PART B

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RECIPROCAL TRANSACTIONS

Summary of the Claimants' claims re 'reciprocal' transactions

2337. The Claimants alleged that another way in which Autonomy created the appearance of increased revenue in its published information was through a number of what they labelled variously as *"Reciprocals", "barter", "quid pro quo", "round-trip" or "circular"* deals.

2338. The Claimants advanced two types of challenge:

(1) The first type of challenge concerned purchase transactions listed in RRAPoC Schedule 5 ("Schedule 5 transactions") which were said to be purchases of products which (a) Autonomy allegedly did not "need", (b) were of "no discernible value", and (c) were "linked" to sale transactions in an accounting sense.

(2) The second type of challenge concerned purchase transactions which were not said to be "reciprocal" with sale transactions, but which were alleged to have put VARs in funds so to enable them to repay their debts on earlier sales identified at RRAPoC Schedule 3. These purchases were also said to have been of products which Autonomy did not "need" and which were of no value to Autonomy. The Claimants relied on these types of transactions detailed in Schedule 3 of the RRAPoC as evidence that the VAR was not on risk in respect of earlier sales giving rise to the debts (the revenue for which sales the Claimants have stripped out for the purpose of their FSMA and misrepresentation claims).

2339. I have already addressed, in the section of this judgment dealing with the impugned VAR transactions, purchase transactions which are said to have put those counterparties in funds to enable them to repay their debts under VAR purchase orders. I shall return later to these 'type 2 reciprocals'. For the present, my focus is on the first type, the Schedule 5 transactions.

2340. The Claimants challenged the Schedule 5 transactions as typically involving:

(1) Autonomy <u>selling</u> a software licence and/or hardware to the relevant counterparty and, at the same time, or shortly thereafter, Autonomy <u>purchasing</u> products or services from that counterparty the sale and the purchase having been negotiated at the same time and concluded in circumstances where (allegedly) the sale would not have happened, either at all, or on the terms it did, but for the purchase; and then

(2) Autonomy preparing and implementing separate contractual documentation for the sale and purchase, and presenting and accounting for the sale and the purchase as if they were independent, arm's length transactions;

(3) Autonomy recognising revenue from the <u>sale</u> immediately, and capitalising and amortising the costs of the <u>purchase</u> over the purported useful life of the product or service in question, thereby deferring the related costs.

2341. The Claimants further alleged that, to ensure that this accounting treatment passed muster with Deloitte, Autonomy devised a false commercial rationale to explain Autonomy's purchase of the counterparty's product or service. The Claimants alleged that, with one exception (a purchase of hardware, software and services ("RT 5") from EMC Corporation ("EMC") which was impugned only on the basis that the purchase was in excess of fair value), the only real purpose of Autonomy's purchase from the counterparty was to incentivise the counterparty's reciprocal purchase of a software licence or hardware from Autonomy from which Autonomy could recognise revenue and, in most cases, to provide the counterparty with the necessary funds for the counterparty's purchase.

2342. The Claimants' case was that this is apparent from, amongst many other things: (i) the absence of evidence that Autonomy's decision to purchase the product or service was made on the basis of a genuine commercial rationale, as opposed to a desire to generate revenue from a reciprocal sale, (ii) the evidence that Autonomy would not have made the purchase had the counterparty not entered into the sale, and (iii) the evidence that the counterparty would not and, in many cases, could not, have purchased the software licence and/or hardware from Autonomy on the terms it did but for Autonomy's purchase.

2343. The Claimants' punchline was that in the case of Schedule 5 transactions Autonomy should not have recognised any revenue from its sale to the counterparty, and should have accounted for the sale and the purchase on a net basis, recording the net amount that Autonomy paid to the counterparty as an expense. The Claimants contended that the total adjustments required in respect of improper recognition of revenue from the reciprocal transactions in the Relevant Period total some $65.2 million. The Claimants' main claim in respect of the Schedule 5 transactions is brought under FSMA and/or for misrepresentation to recover loss in respect of the resulting falsity of statements made in Autonomy's published information.

2344. In addition, with the exception of the EMC transaction (RT 5) and the MicroTech transaction ("RT 6") at Schedule 5/5 and 5/6 respectively, these transactions are also said to have resulted in transactional losses claimed by the relevant Autonomy counterparty (ASL and Zantaz) against each of Mr Hussain and Dr Lynch on the basis of an alleged breach of duty. The Schedule 5 transactions in respect of which transactional losses are claimed were set out in RRAPoC Schedule 12B ("Schedule 12B"). In each case, the Claimants quantified their loss as the excess of the total cash paid by Autonomy group companies for the purchase side of the transaction over the total cash received by Autonomy group companies from the sale side.

Summary of the Defendants' case re 'reciprocal' transactions

2345. The Defendants rejected this characterisation of the Schedule 5 transactions. They submitted that the Claimants' case in relation to the Schedule 5 'reciprocal' transactions was without any foundation: the sets of transactions identified in Schedule 5 were all accounted for properly, and since each transaction was independent, had its own commercial rationale, and was to be regarded and accounted for separately, it was wrong to lump it in with another or other transactions to conjure a 'loss'. The Defendants preferred to refer to the transactions in question as *"purchases from customers"*.

2346. The Defendants emphasised, in particular, that in all the impugned transactions the "reciprocal" transactions concerned sales of dissimilar goods (which, as will be seen is important in the context of IAS 18.12). They submitted that the existence of a commercial rationale for various purchases was confirmed extensively by the Claimants' own witnesses.

2347. More generally, (though the Claimants dismissed these points as *"straw men"*) the Defendants stressed that (a) there is nothing wrong with purchasing something from a customer, (b) there is nothing improper *per se* about linked transactions, (c) there is no requirement to show that Autonomy 'needed' the products or services, and (d) there is no basis for substituting Autonomy's stated rationale for the purchases with another rationale after the event.

2348. The Defendants also noted that for many of the impugned purchase transactions, the Claimants did not even challenge the fair value assessment during the trial. In any event, fair value was assessed at the time, often with objective third party evidence, and Deloitte, who were well aware of the factual connections between the transactions, were satisfied and concluded that revenue on Autonomy's sales transactions should be recognised gross.

Defendants' knowledge and participation

2349. As to the issue of the Defendants' knowledge of improper accounting, the Claimants' case was that:

(1) Mr Hussain's knowledge was *"beyond argument"*: he was

> *"front and centre of the reciprocal transactions. He often came up with the idea for the transactions and he was either directly involved in their negotiation or he oversaw and directed their negotiation by others within Autonomy."*

(2) Dr Lynch was aware of each of the relevant sales by Autonomy and he approved most of Autonomy's related purchases. Even where there is no documentary record of him approving a purchase he must, at the very least, have been aware of it: it is inconceivable that Mr Hussain, who knew of both transactions, would only have told Dr Lynch about the Autonomy sale and not the related multi-million-dollar Autonomy purchase.

2350. In his closing submissions, Mr Hussain attacked the evidence of Mr Egan and Mr Baiocco to the effect that he had planned and directed the sales and purchases with Capax Discovery ("RT 1"), on which the Claimants based their claims, as contrived, co-ordinated and untrue. He contended, as to both this and the other impugned transactions, that there was no reliable evidence suggesting that he conceived the arrangements to be in any way improper. Mr Hussain otherwise adopted the submissions on behalf of Dr Lynch.

2351. Dr Lynch maintained that each of the impugned transactions appeared to him to have a commercial rationale and to be at fair value. He did not think that any of them was improper. His closing submissions noted that for many of the transactions the Claimants did not even challenge him as to his understanding at the time in relation to one or both of the commercial rationale and fair value issues.

The Schedule 5 and Schedule 12B transactions

2352. The impugned 'reciprocals' which were not connected with VAR transactions (see paragraph 2338 above) were described in Schedule 5 of the RRAPoC in groups referred to as "RT 1" through "RT 6". In the Claimants' written closing submissions, the groups were addressed according to the counterparty. "RT 1" (with Capax Discovery), "RT 3" (with FileTek), and "RT 6" (with MicroTech) were transactions with favoured or 'friendly' VARs. The others, "RT 2", "RT 4" and "RT 5", were described as "Miscellaneous Reciprocal Transactions" and were with various software companies: RT 2 was with VMS Inc ("VMS"), RT 4 with Vidient Systems Inc ("Vidient") and RT 5 with EMC. In this judgment, I shall revert to the sequence as set out in Schedule 5 of the RRAPoC, which is chronological by reference to the first transaction in the set.[286]

2353. In addition to their claims under FSMA and/or misrepresentation, the Claimants also claimed transactional losses in respect of some, but not all, of the Schedule 5 transactions impugned as 'reciprocal'. Those transactions in respect of which the Claimants made claims for transactional losses were listed in Schedule 12B of the RRAPoC: the transactions comprised in RT 1, RT 2, RT 3 and RT 4 were all also "Schedule 12B transactions" in respect of which claims for transactional losses were made. No claims for transactional losses were made in respect of RT 5 and RT 6.

General points on accounting issues

2354. The accounting question and the Claimants' allegations must be decided in respect of each of the impugned transactions individually and on its own particular facts. However, it is convenient to consider first the overarching accounting questions raised by the Claimants and the accounting framework by reference to which they arise, and also certain points suggested in Dr Lynch's written closing submissions to be of general application.

The accounting framework

2355. Although the Claimants sometimes described the sets of transactions which they sought to impugn as *"barter"* transactions, those transactions were not suggested to involve an *"exchange"* or swap of goods such as to bring the transaction within IAS 18.12[287]: they were transactions for monetary consideration. However, the Claimants' case was that

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[286] It should be noted, however, that I have already dealt with transactions connected with VAR transactions (and which were the subject of the second type of challenge identified in paragraph 2338(2) above and set out in Schedule 3 of the RRAPoC) in the Schedule of Impugned VAR Transactions. Accordingly, I have addressed the 2011 FileTek/StorHouse transactions, which were, as Schedule 3 transactions, examples of the second type of challenge referred to in paragraph 2338(2) above, together with the impugned VAR transaction to which they relate (VT18).

[287] IAS 18.12 provides in relevant part as follows:

"When goods are sold or services are rendered in exchange for dissimilar goods or services, the exchange is regarded as a transaction which generates revenue. The revenue is measured at the fair value of the goods or services received, adjusted by the amount of any cash or cash equivalents transferred. When the fair value of the goods or services received cannot be measured reliably, the revenue is measured at the fair value of the goods or services given up, adjusted by the amount of any cash or cash equivalents transferred."

they were so inextricably 'linked' that their only fair presentation in the accounts would have been to account for them together.

2356. The Claimants accepted that simultaneous transactions of sale and purchase between the same counterparties are common, and that usually, they are accounted for as separate transactions. The Claimants' point was that in certain circumstances that may not reflect their true substance: although in form separate, their true substance may only be revealed and reflected by treating and accounting for them together. The Claimants contended that this was the position in the case of each of the sets of impugned 'reciprocal' transactions they identified in Schedule 5.

2357. Thus, the Claimants presented the principal accounting question underlying their case on the Schedule 5 transactions as being whether Autonomy should have accounted for the relevant sale and purchase impugned:

(1) as separate transactions, in accordance with the accounting principles applicable to each; or (as the Claimants submitted was correct)

(2) on a net basis, that is, recognising any net payment by Autonomy as an expense and any net receipt by Autonomy as other income.

2358. The Claimants adopted two approaches in support of their submission that (2) (the net basis) was the correct accounting treatment.

2359. The first, and what they presented as the simplest, approach involved a reiteration and application of their fundamental point in the context of the impugned VAR transactions, which is that transactions are to be accounted for in accordance with their substance and not merely their legal form. The Claimants' case is that in each case the overall reciprocal arrangement lacked substance because it lacked any commercial rationale other than to put the counterparty in funds for some other purchase, or to satisfy some other obligation, and that it was wrong to recognise revenue from it accordingly. The Claimants' first approach was not dependent on IAS 18.13, and indeed made it unnecessary to look at that rule. Furthermore, the experts were agreed with that approach: if the transactions lacked independent rationale and substance, that sufficed to disqualify revenue recognition without further regard to the more specific and detailed journey through IAS 18.13.

2360. The Claimants' alternative approach was based on IAS 18.13 itself. IAS 18.13, which is headed *'Identification of the transaction'*, prescribes the test and accounting treatment of 'linked' transactions. In the course of his oral closing submissions, however, Mr Rabinowitz clarified that although the routes offered were different they would always lead to the same conclusion: there would never be a case where one route was satisfied and the other not: as he put it *"you get to exactly the same point"*.

2361. IAS 18.13 confirms that transactions are *"usually"* accounted for separately. However, and in addition to a case where transactions are by way of barter or exchange (for which the test and accounting treatment is prescribed in IAS 18.12) there is a possible exception where two or more transactions, though they may take the form of separate agreements, they:

> *"are linked in such a way that the commercial effect cannot be understood without reference to the series of transactions as a whole."*

2362. IAS 18.13 also stipulates how, in such a case, revenue recognition criteria are to be applied to:

> *"separately identifiable components of a single transaction in order to reflect the substance of the transaction."*

2363. As the Defendants emphasised, and the Claimants accepted, the test under IAS 18.13 is not factual linkage *per se:* it is not sufficient for there to be a factual connection, or even for there to be a situation where one transaction would not have occurred without the other. Mere reciprocity does not lead to net accounting. Moreover, and as was common ground between the accounting experts and the parties, the fact that transactions may be linked does not prevent recognition of the sale transaction at gross fair value. The joint statement of Mr MacGregor and Mr Holgate stated under their "Agreed view":

> *"Even if the alleged reciprocal transactions are determined to be linked, this does not necessarily preclude separate recognition of each limb of any such transaction i.e. the recognition of the gross fair value of the sale and purchase."*

The parties' approaches to the nature of the linkage required and its identification

2364. The Claimants put forward the following approach:

(1) The initial step is to identify the transactions that might be linked in such a way that their commercial effect cannot be understood without reference to the series of transactions as a whole. This may be established by what the Claimants described as a *"prima facie linkage"*. The Claimants stressed that such a *"prima facie linkage"* would not of itself mean that the transactions must be accounted for together, and that it would only mean (as Mr Holgate explained it) that the transactions:

> *"should be considered together but that then may lead to accounting for them separately or on some net basis. That's not the end of the story, in other words"*.

(2) The next step, according to the Claimants' approach, is to consider whether it is possible to understand the commercial effect of each of the transactions without regard to the other. That is a fact-specific enquiry. Relevant considerations would include (a) whether each transaction has a genuine commercial rationale, (b) whether there is any contractual interdependence between the transactions, and (c) whether the transactions are at fair value.

(3) The Claimants stressed, however, that these considerations are (i) not exhaustive, and they instanced a further potentially relevant matter as being whether one transaction would have happened without the other; (ii) not mutually exclusive, and they instanced the payment significantly in excess of fair value such as might call into question the commercial rationale for the purchase; and (iii) not necessarily deserving of equal weight, and they quoted Mr Holgate's view in particular that if there is a lack of commercial rationale for one part of a linked transaction *"you're three-quarters of the way there."*

2365. The Defendants, on the other hand, advocated the three-stage approach in fact adopted by Deloitte:

    (1) First, it is necessary to examine the contracts to determine whether there is a contractual linkage between the purchase and any sale transaction which impacted on the revenue recognition for the sale. The Defendants submitted that there was no such linkage for any of the transactions which are impugned in this case.

    (2) Secondly, it is necessary to ensure that there was a commercial rationale for the purchase.

    (3) Thirdly, it is necessary to determine whether the transactions were at fair value.

2366. In his closing submissions on behalf of Dr Lynch, Mr Hill addressed the Claimants' suggestion that it was relevant to consider whether one transaction would have occurred without the other. Noting that Mr Holgate had accepted in cross-examination that this was not conclusive, Mr Hill submitted that it was no more than *"part of the factual picture"* since it did not answer the question he posed as being at the heart of the matter:

    "…can I understand the commercial effect of these transactions separately?"

2367. Mr Hill suggested that, in the case of each of the Schedule 5 transactions, if there was a commercial rationale other than solely to generate, by means of a purchase, revenue for a sale, that commercial rationale provided the requisite understanding. He stressed that the Claimants' case for impugning the transactions had been pleaded and argued on the basis of <u>the sole</u> purpose of Autonomy's purchase being to incentivise and fund the counterparty to enable Autonomy's sale. It would not suffice if that was only <u>part</u> of the purpose. In this connection, Dr Lynch's written closing submissions quoted Mr Welham's agreement that, having ascertained that the goods were dissimilar items, the essential questions were whether there was a commercial rationale, and whether there was fair value; and provided that was the case then revenue would be recognised gross:

    "Q. ... So one of the questions is whether the goods in question are similar, correct?
    A. It is, yes.
    Q. Once that's out of the way, then essentially the two elements are commercial rationale for the deal and fair value?
    A. Yes."

2368. It was common ground that in each set of Schedule 5 transactions the goods, the subject of Autonomy's purchase transaction and the goods, the subject of Autonomy's sale transaction were not "similar".

2369. The principal focus of the parties' submissions was therefore on the commercial rationale, and in particular, the issue as to whether what the Defendants asserted was the rationale for the Schedule 5 transactions was genuine, or whether it was a pretext to cover what the Claimants submitted was the real purpose, being to incentivise and fund Autonomy's counterparty to purchase software from Autonomy so that Autonomy could recognise revenue on its sale transaction. There were a number of disputed issues in

this connection, some of which melted away as being largely semantic or what the Claimants described as *"strawmen"*.

2370. In that context, the issues can be summarised as:

(1) The relationship between the commercial rationale of the transactions and their commercial effect;

(2) Whether the Claimants had to demonstrate that the only rationale for the transactions was for Autonomy to fund by the purchase transaction the revenue-generating sale transaction and thus in effect purchase its own revenue;

(3) The relevance of whether or not Autonomy needed and used the goods it purchased;

(4) The relevance of the pre-purchase assessment of the goods the subject of Autonomy's purchase transactions;

(5) The relevance of Deloitte's assessment and approval of each of the transactions;

(6) The import of the factual evidence given by those involved in the transactions;

(7) The import and reliability of the expert evidence.

2371. As to (1) in the preceding paragraph 2370, the Claimants sought to apply IAS 18.13 according to whether or not one transaction in a series had any commercial rationale without the other(s). They contended that where one of the transactions in a set of two makes, on its own, no commercial sense, and has no substantial business rationale or commercial purpose at the time of the transaction except to fund the other transaction, then the one is obviously dependent on, and cannot sensibly be understood without regard to the other; and that in such circumstances both must be accounted for according to their net effect together. Mr Rabinowitz summarised this in his oral closing submissions as *"…the inability to understand a commercial rationale for one without having regard to the other as well."*

2372. The Defendants, though they too addressed the issue of the commercial rationale of each transaction, pointed out, correctly, that the test prescribed by IAS 18.13 for applying the recognition criteria for two or more transactions together is not expressed in terms of the *"commercial rationale"* of one transaction in a set of two (or perhaps more) transactions, but rather in terms of whether an understanding of the *"commercial effect"* of the relevant set or series of transactions may only be had by *"reference to the series of transactions as a whole"*.

2373. The paradigm is where the series of transactions all concern the same goods going round in a circle or *"round-trip"*. Hence the example given in IAS 18.13 of a transaction of sale of goods on one date and a transaction for the repurchase of the same goods at a later date: a proper understanding of each transaction is only to be found by reference to their composite result, and it is right that the revenue recognition criteria should be applied, not to the components, but to the composite, as in the case of an exchange or swap of the same goods (see IAS 18.12).

2374. Where, on the other hand, the various transactions in a sequence relate to dissimilar goods, and the analogy with an exchange or swap is lacking, the fact that the transactions are performed in a sequence does not ordinarily deprive each transaction of commercial

effect: neither the sale nor the acquisition of the goods is substantially negated or in commercial terms reversed, and the application of the revenue recognition criteria to each transaction in the sequence is appropriate and indeed required. Perhaps another way of looking at this is that where the effect of one transaction is fundamentally altered by the effect of another the question is whether each can be understood on its own terms without reference to the other, or whether in reality the two (or more) can only properly and rationally be understood by reference to their combined effect.

2375. In each of the allegedly reciprocal transactions impugned in this case, the transactions related to dissimilar goods: they were not (contrary to the terminology sometimes deployed by the Claimants and even by Mr Holgate) exchange, barter or "round-trip" transactions; and where the goods the subject of each of the two transactions are dissimilar, *prima facie* at least each transaction would appear to be independent and the subject-matter of the contracts suggests no reason to depart from the "usual" approach of separate accounting of each.

2376. The question is whether, nevertheless, any of the transactions in an identified sequence was in reality simply a way of funnelling money to the counterparty to fund another transaction in that sequence, having no real substance or independent rationale at all. Mr MacGregor put the point this way in his oral evidence:

> *"…So to make this real, in these situations, I think the suggestion is that Autonomy was buying software which it didn't -- had no point – there was no purpose in it buying it, it was done solely as a way of funnelling money back to the counterparty. So it's that leg of purchase which on its own doesn't make any sense.*
>
> *…if the overall substance of the transaction is solely as a way of Autonomy paying money to – for no other reason, paying money to a counterparty so that it can buy its software, then that commercial – the overall transaction has no commercial substance. And one would deal with the accounting for that on a net basis, i.e. whatever the net payment is…would be simply treated as an expense with no recognition of revenue."*

2377. On that approach, the relevance of assessing the commercial rationale of a transaction in such a sequence is to determine whether that transaction has any independent substance, or whether it is in reality only understandable by reference to the commercial effect of all the transactions in that sequence. In particular, where a purchase transaction has no rationale except to fund a sale transaction, so that the purchase cannot really be understood except by having regard to the sale, it may well be that the two transactions need to be taken as one, and only any surplus of the sale proceeds over the purchase proceeds accounted for and recognised as revenue.

2378. This analysis seems to me to bear on a point I raised with Mr Rabinowitz in the course of his oral closing submissions, intended to be reflected in the question identified in (2) in paragraph 2370 above. This was whether it suffices to justify treating transactions in a sequence compositely when applying revenue recognition criteria that (to take the example as above of a purchase transaction and a sale transaction) the predominant purpose for the purchase was to fund the sale, and the one would not (or probably not) have taken place without the other, but it was not the sole purpose.

2379. Mr Rabinowitz initially submitted that *"predominant reason suffices"*. I do not accept that this is the correct approach. It would, at least potentially, require the court to weigh an entity's competing proper purposes, which (outside possibly the context of unfair prejudice issues) is very rarely appropriate when the judgment has lawfully been left to that entity's management.

2380. Similarly, a related test Mr Rabinowitz proposed, which was to ask whether the one would have taken place but for the other, does not seem to me to be what IAS 18.13 has in mind: thus, the rationale of a purchase by Autonomy may include the fact that thereby the counterparty will have funds which it intends to use to purchase dissimilar goods from Autonomy, and yet also have its own commercial rationale and substance viewed as an independent transaction so that its commercial effect can readily be understood.

2381. Mr Rabinowitz's last iteration of the argument was to pose the question: *"why was this being done?"*. He elaborated this (modifying it a little to suit the particular context of related transactions) as follows: accepting factual linkage is a necessary but not a sufficient characteristic, having identified it:

> *"…you ask yourself a question: can I actually understand this, properly understand the one, genuinely understand the one without having regard to the other? If you can't you have to account for them together. It's only in that way that you get a genuine commercial rationale being reflected in your accounts."*

2382. Although that may seem to restate the issue, it does seem to me to point the way. The question in my view is whether the rationale of the one is only in reality supplied by the other. The answer may not depend exclusively on whether one or the other lacks substance: it may be apparent from other considerations that the real reason for one is the other. If in the case of factually linked transactions, one transaction appears to be so lacking in commercial rationale that it begs the question what the real reason can be, and the reason is apparent from the other, the two must be accounted for together for the purposes of applying the revenue recognition criteria. Here, if it is established that the one cannot realistically be explained except as a funding mechanism for the other, that would, in my view, suffice. The test also seems to me to be close to what Mr MacGregor may have had in mind, though that must be qualified by the gloss that the commercial rationale of a transaction is to be distinguished from its incidental side effects and from pretended objectives which at the time plainly carried no real weight in the decision to undertake it.

2383. The next question is how the fact or lack of any genuine commercial rationale for and substance of the (in this case) purchase transaction is to be determined. The Claimants relied especially on two tests, reflected in (3) in paragraph 2370 above: whether Autonomy had in fact any need for the goods and whether it in fact made any use of the goods when purchased. In this regard, the Claimants had pleaded in each case that Autonomy had *"no independent need"* for the goods purchased; and they contended that this could be demonstrated by evidence as to the use made, or the lack of any use being made, of the goods after the purchase.

2384. This led to the Defendants contending that (a) a test of necessity was too strict and misplaced, and that any genuine commercial rationale should suffice, and (b) to assess the commercial rationale by reference to the subsequent use of the goods purchased was flawed in principle since it relied on hindsight, did not address the commercial rationale

at the time of purchase and was a particularly unsuitable evaluative approach for a fast-moving company in a fast-developing sector, where technologies change and priorities shift with great speed and it is not unusual for products to be unsuccessful or to be moved aside.

2385. I agree with the Claimants that this dispute was largely semantic (a dispute about "need"); and indeed, the Claimants accepted in their oral closing that the test is *"genuine commercial rationale at the time of the purchase"*. A demonstrated lack of any real intention at the time of the purchase to use the goods purchased is obviously relevant. Conversely, evidence of subsequent use might be relevant in testing whether the rationale was genuine or (as Mr Rabinowitz put it) *"one drummed up after the event."* I accept the Claimants' submission that adventitious use after the event is unlikely to provide any commercial rationale, and indeed may suggest that the need for the product has been confected and the rationale contrived.

2386. That said, I accept the Defendants' submission that the Claimants adopted too confined an approach to the assessment of commercial rationale. I agree that:

(1) There could be a number of types of commercial rationale. Immediate need is not a valid test of commercial rationale. Autonomy could have a potential use for the product, or could want it in its inventory, or could be accumulating useful stock (in the case of hardware servers, for example).

(2) Nor, related to that, is the subsequent use of the product purchased a reliable test either; and although it may have some relevance to the intention at the date of the purchase (as acknowledged above) the Claimants' approach of assessing commercial rationale according to the lack of any subsequent use runs the risk of impermissible and misleading hindsight. A product considered worth acquiring may be overtaken, or have been proved unreliable. As head of R&D, Dr Blanchflower was well placed to comment on this industry reality:

> *"Q. It's also right, isn't it, that tech companies quite often work on projects that end up not being successful, yes?*
>
> *A. Correct.*
>
> *Q. It's an industry where one hit can make up for a number of misses, isn't it?*
>
> *A. Yes.*
>
> *Q. And when a project starts, it can be pushed aside by something more important sometimes, yes?*
>
> *A. Yes, yes.*
>
> *Q. Or a better opportunity might come along which is more worth spending the development management time?*

A. Yes, I agree.

Q. Or perhaps sometimes a competitor's product might come along which makes the project no longer so viable or interesting to take forward?

A. Yes, yes.

Q. And it's not that rare, is it, for a company to invest in a project and for it then to get delayed, or sometimes not even get to market?

A. That happens, yes.

Q. And Autonomy had projects like that just like any other tech company, didn't it?

A. I would like to think we had a greater hit rate than most, but that is still the case, yes."

(3) Conversely, however, I accept the Defendants' submission that whilst evidence of non-use may or may not be significant, proven actual use may have what Mr Hill termed *"asymmetrical significance"* as a good indicator of commercial rationale.

2387. As to (4) in paragraph 2370 above, the Claimants placed considerable emphasis on what they depicted as the lack or paucity of evidence of any proper pre-purchase process of assessment by Autonomy of the goods it was to purchase. This is obviously, in my view, potentially a relevant factor to consider in respect of each of the impugned reciprocal transactions in assessing whether Autonomy really wanted to purchase the goods, or whether its driving purpose was to get money into the hands of its counterparty to enable the counterparty to purchase Autonomy products. However, I agree with the Defendants that it is necessary to consider whether Autonomy's approach was uncharacteristic compared to its ordinary process of decision-making, or whether the Claimants' criticisms are in part a manifestation of a different and more bureaucratic management style of a company such as HP. It is also necessary to take into account whether management were already familiar with the product, such that extended assessment and a written record may have been considered pointless or unnecessary.

2388. As will be seen when considering the various impugned reciprocal transactions in turn, the Defendants contended that the Claimants had taken an unrealistic approach to the process that one would expect to see for Autonomy to decide on a purchase which overlooked Autonomy's characteristic entrepreneurial approach to decision-making, and that their criticisms of the written material justifying or recommending the purchase were exaggerated. The Defendants contended that members of management were well abreast of other products in their market and often already had prior knowledge of a product, and knew they were interested in buying it. It was not unusual or sinister for the written document to have no more than a confirmatory role.

2389. As to (5) in paragraph 2370 above, the Defendants contended that the Claimants had ignored or understated the role of Deloitte. The Defendants placed considerable reliance on Deloitte's review and approval of each of the impugned reciprocal transactions, in the course of which Deloitte had full access and spoke to Autonomy personnel, including Dr Menell and others on the technical side (such as Mr Lucini). Deloitte also consulted their own technical specialist, Mr Johnstone, who reviewed the products.

2390. Deloitte's approach was summarised in a summary prepared by Mr Knights, in which Deloitte considered the first VMS purchase and sale, having also discussed the matter with Mr Barden, from Deloitte's NAA department:

> *"I have talked through the "VMS" matter with Phil Barden.*
>
> ***Background Summary***
>
> - *Autonomy have sold $9m of software to 3rd party VMS*
> - *VMS have separately sold to Autonomy $13m of services/license for a 3 year provision of their services to Autonomy*
> - *We have reviewed the commercial substance of both deals*
> - *We are satisfied that these are not similar items of exchange*
> - *We have reviewed the contractual terms of both transactions*
> - *It is clearly demonstratable that what Autonomy has bought from VMS is entirely different from what it has sold to VMS.*
> - *We are satisfied that there are no related party matters.*
>
> ***Accounting principles***
>
> *Phil has agreed that the accounting principles are around revenue recognition and are directly tied into the audit judgements around:*
>
> - *Establishment of fair value of both transactions.*[288]
>
> - *The determination that these transactions are or are not for similar items*
> - *The judgement for business rationale for these transactions - to underline the separate nature of both transactions.*
>
> *On the basis that the audit team can conclude satisfactorily on these areas of judgement then revenue recognition and the separate recording of revenues and costs is appropriate.*
> *Revenue and costs would be recognised at fair value."*

2391. Deloitte's view that a preliminary matter to be addressed was whether the two transactions within the set (one for Autonomy to purchase goods and the other for

[288] In the case of the sale transaction, there was no reason to measure the fair value as distinct from the sale revenue. In the case of a purchase, where the measurement is highly fact-specific, the Defendants' case is that the finance department and Deloitte considered the evidence of fair value of the goods purchased in each case and were satisfied that the amount paid was the fair value. The Claimants contended, however, that Deloitte were misled. The issues as to the measurement of fair value, Deloitte's assessment and the Claimants' case that Deloitte approached the matter on the basis of a number of misunderstandings fed by Mr Hussain and Mr Chamberlain, are elaborated below.

Autonomy to sell goods to the same counterparty) concerned similar goods was explained in an email dated 6 July 2009 from Mr Barden of Deloitte's national accounting and auditing team when considering the VMS deal (see below) to Mr Knights, Mr Knight and Mr Welham (and others in Deloitte), where he stated in response to an email from Mr Knights setting out his report as follows:

> *"Even in a barter transaction, revenue will be recognised at fair value unless the items exchanged are 'similar'. If we are happy that each sale could have taken place without the other, and that the items exchanged are not 'similar', then I would expect revenue to be recognised at fair value."*

2392. Mr Welham agreed and explained that having ascertained that the goods were dissimilar items, the essential questions were whether there was a commercial rationale, and whether there was fair value. Provided that was the case then revenue would be recognised gross:

> *"Q. … So one of the questions is whether the goods in question are similar, correct?*
>
> *A. It is, yes.*
>
> *Q. Once that's out of the way, then essentially the two elements are commercial rationale for the deal and fair value?*
>
> *A. Yes."*

2393. Deloitte also reviewed and approved the assessment of fair value in the case of each of the impugned reciprocal transactions. Mr Welham confirmed that Deloitte in every case scrutinised the evidence available at the time the audit judgement was made, which included evidence which came into existence after the accounts stage but before the audit judgement.

2394. The Defendants suggested that the Claimants paid hardly any attention to the assessments of fair value which were carried out at the time, and that the cross-examination of Dr Lynch was striking for the absence, in general, of any challenge in relation to this material and the fair value assessment that was made. They went on to submit that if (as they suggested the Claimants' own witnesses had confirmed) Autonomy was purchasing a product that was or would be useful, and which was purchased at fair value, the Claimants attempts to impugn the transaction and the accounting cannot get off the ground.

2395. It is to be noted, however, that in the case, for example, of the Vidient transaction (RT4) addressed in greater detail below (see paragraphs 2878ff), where the purchase and sale transactions by Vidient were put into different quarters (see paragraphs 2904 to 2913), Mr Welham's evidence (which is supported by the documentary evidence and which I accept) was that Deloitte did not become aware of the Vidient sale transaction until too late to consider the two together (and see paragraph 2914 below). Similarly in the case of the purchase and sale transactions with MicroTech comprising RT6 in Q1 2011, which were also put into different quarters, Deloitte were unaware of the second

transaction when they reviewed the first (see paragraph 2964(1) below). Mr Welham also confirmed that Deloitte knew that there was factual linkage in the sense that they were transactions between the same parties at about the same time. The question is whether they could each have taken place without the other, not whether they would each have taken place without the other.

2396. As to (6) in paragraph 2370 above, the parties drew rather different conclusions from the "direct" evidence as to the rationale for Autonomy's purchases. The Claimants relied especially on Mr Egan's evidence as to the real rationale for some of Autonomy's purchases in his witness statement (in paragraphs 36 to 38) as follows (the underlining is mine):

> *"36. …One of the ways in which Autonomy met the larger goals was to do round trip transactions with customers who had a product Autonomy could buy. Mr Hussain directed me to find "quid pro quo" deals – deals in which Autonomy could buy goods or services from another company, and in turn, that company would use the funds from the sale to purchase software from Autonomy. The point of these deals was effectively to find revenue for Autonomy that was easier to get than a conventional sale because the buyer was getting something good for its own business in return.*
>
> *37. In the deals that I understand from the Claimants' lawyers are challenged in this case, Mr Hussain or I identified another company's product or service that Autonomy could purchase, even though Autonomy otherwise had no intent or plan to purchase that product or service, which was unwanted, unused or overpriced. I would then approach the other company and propose what I called a "quid pro quo" or "round trip" deal. Autonomy would offer to purchase the other company's product or service if, in return, that company would agree to license identified software from Autonomy. In most cases, the money that Autonomy paid to the other company to buy its product or service gave the other company the funds with which to purchase the license from Autonomy. An incentive for the other company was that Autonomy would pay more for the other company's product or service than the other company was asked to pay Autonomy for the license to use Autonomy's software…*
>
> *38. Mr Hussain principally set the price to be charged for the Autonomy software and directed the negotiation of the spread. Again, he instructed me as to how to ensure that those deals were to be structured so as to be acceptable to Deloitte. To make the case that the revenue from the sale element of these deals could be recognized, I wrote emails explaining how Autonomy would get value from the products that it purchased. But, in reality, I knew that Autonomy would not have purchased the products without the related purchase by the third party."*

2397. When cross-examined Mr Egan confirmed that his evidence in these paragraphs should be read as relating only to the reciprocal transactions with Capax Discovery (RT1) and FileTek (RT3). However, the Claimants submitted that many of the other reciprocal transactions had strikingly similar features to the FileTek and Capax Discovery round-trip deals; that this was unlikely to have been a coincidence, particularly in circumstances where Mr Hussain was involved in all of them; and that the Court should

therefore infer that Mr Egan's general comments in his witness statement about the rationale behind the reciprocal transactions apply across the board.

2398. The Claimants submitted that it is clear from Mr Egan's evidence that:

(1) The reciprocal transactions were conceived of by Mr Hussain or Mr Egan, neither of whom had technical expertise.

(2) The transactions were conceived of as a means of generating revenue to meet market expectations.

(3) The transactions were an expensive means of generating revenue because Autonomy had to purchase a product in order to induce the revenue-generating sale.

(4) Autonomy would not have purchased the products without the related purchase by the counterparty.

Factual evidence as to the real rationale: Claimants' case

2399. The Claimants went on to submit that this evidence and the inferences they invited the court to make were supported by what they described as a *"wealth of material"* from which they submitted it is to be inferred that this was the real rationale for Autonomy's purchases. They described this material in five headline points.

2400. First, they submitted that the purchases were difficult to square with Autonomy's general approach of <u>not</u> purchasing third party software and using Autonomy's own software or open source software where at all possible. That general approach was Autonomy's publicly stated position at the time, and was confirmed by a number of witnesses, including Dr Blanchflower, Mr Lucini, Mr Humphrey, Mr Wang, Mr Kalbag, Mr Greenwood, and Dr Lynch's witness, Mr Avila. Their evidence, in short, was that Autonomy did not generally purchase third party software. There were, of course, exceptions, but this was usually where the software in question was highly specialised and Autonomy had no equivalent offering. A review of Autonomy's financial statements for the years ended 31 December 2009 and 31 December 2010 reveals that over 99% of Autonomy's capitalised software purchases during those years related to transactions that are impugned in these proceedings, which the Claimants relied on as belying any suggestion by the Defendants that it was commonplace for Autonomy to purchase third party software.

2401. Secondly, the Claimants contended that Autonomy did not conduct the sort of due diligence which would be expected from a company purchasing a product for many millions of dollars with the genuine intention of using it in its business. Autonomy's approach was more consistent with what might be expected from a company that did not care what it was purchasing and whether it could use what it purchased but was searching for something to say to justify it. Thus, the Claimants contended that prior to purchasing the products in question:

(1) Autonomy did not obtain any test licence or prepare any proof of concept.

(2) Nor did Autonomy perform a detailed technical evaluation to determine: (i) whether Autonomy could build an equivalent product for less, i.e. a buy versus

build analysis, and (ii) whether the product was capable of being used alongside or integrated with Autonomy's software.

(3) Nor did Autonomy conduct any detailed commercial or cost benefit analysis to determine the likely value of the product to Autonomy in terms of future sales or saved expense.

(4) Nor, contrary to Dr Lynch's assertion, did Autonomy obtain alternative quotes from third-party suppliers "*in most cases*". Autonomy obtained competing quotes in just two instances – RT2(1) and RT3(1) (the first reciprocal transaction with VMS and the first reciprocal transaction with FileTek, respectively) – and even then only after the purchase in question had taken place, suggesting that the quotes did not, therefore, form any part of Autonomy's decision-making process, and instead, were obtained in an attempt to justify to Deloitte the fair value of a purchase that had already happened.

2402. The Claimants rejected the arguments (outlined above) deployed by the Defendants to the effect that Autonomy did not need to conduct any detailed technical analysis because it was already familiar with the product or the product was well known in the industry, and as an agile company in a fast-moving industry that made decisions quickly did not habitually produce long reports on why it did things. The Claimants contended that these points do not withstand scrutiny, because:

(1) There was no evidence that Autonomy had any first-hand experience of the relevant products prior to purchasing them. The material that Autonomy did obtain was marketing information or information obtained from cursory internet searches and was often obtained after Autonomy had already made the decision to purchase the product.

(2) Autonomy did produce reports, certainly for the larger purchases, but these were often misleading and produced after the event, not for the purpose of determining whether Autonomy should purchase the product, but, rather, to generate a paper trail which Autonomy could use to justify the purchase to its auditors.

2403. The Claimants submitted that the only credible explanation for Autonomy's approach is not that Autonomy was acting normally; but rather that the purpose of Autonomy's purchase was not to obtain the benefit of the products or services, but to generate a related revenue-generating sale.

2404. Thirdly, the Claimants submitted that there is clear evidence that the purchases were an exercise not just in generating, but in maximising, Autonomy's revenue, and that this was achieved by Autonomy channelling funds to the counterparties under the guise of the purchases to enable them to enter into sales that would otherwise have been beyond their financial means. In addition to the direct evidence from Mr Egan in re-examination on the FileTek reciprocal transactions (RT3) that Mr Hussain's objectives included making the deal as large as possible, the Claimants pointed to accounting evidence that Autonomy's purchases were out of all proportion to the sales made by the counterparty of the same products in their ordinary course of business. They submitted that this strongly supports the inference that the purpose of Autonomy's purchase was simply to induce the counterparty's purchase at a price that would assist Autonomy in reaching its revenue goals and to channel the necessary funds to the counterparty. For example:

(1) For RT1, the counterparty, Capax Discovery, was, in 2009, a newly-formed entity with no business to speak of. Nevertheless, Autonomy paid in excess of $14 million for services which Capax Discovery was not even in a position to provide and never in fact provided.

(2) For RT2, the counterparty, VMS, had total annual revenues of $50 to $75 million, and yet Autonomy purchased VMS's products for $13 million and $8.4 million.

(3) For RT3, the price that Autonomy paid for its first purchase of FileTek's StorHouse software represented more than 20 times FileTek's total licence revenues for StorHouse in all of 2008, and more than 10 times its total licence revenues for StorHouse in the first three quarters of 2009.

(4) For RT4, the price that Autonomy paid for its first purchase of Vidient's 'SmartCatch' software represented more than 13 times Vidient's total licensing revenue from sales of SmartCatch in 2009 and was the largest transaction in the company's history.

2405. The Claimants also sought to rely on evidence from the counterparties that, without Autonomy's purchase, they would not – and, in many cases, could not – have made their reciprocal purchase from Autonomy on the terms they did. This is addressed in more detail in the transaction-specific parts of this section below.

2406. Fourthly, the Claimants placed reliance on the following common features of the reciprocal transactions:

(1) Autonomy paid the amounts due in respect of Autonomy's purchase <u>before</u> the counterparty paid the amounts due in respect of Autonomy's sale, with the exception of RT4, where the counterparty made a small advance payment to Autonomy in response to concerns expressed by Deloitte as to the counterparty's financial standing, and RT5, where the relevant debts were netted off against each other; and

(2) Autonomy paid significantly <u>more</u> to the counterparty than the counterparty paid to Autonomy, with the exception of RT6, where this would have happened but, in the event, the outstanding balance was cancelled <u>after</u> HP's acquisition of Autonomy was announced and there was no net payment.

2407. The Claimants submitted that these features are consistent with the purpose of Autonomy's purchase being: (i) to incentivise the counterparty to enter into the reciprocal sale, which Autonomy achieved by agreeing to make a net payment to the counterparty, and (ii) in most cases, to fund the reciprocal sale, which Autonomy achieved by paying the counterparty <u>before</u> it was required to make any payments to Autonomy. The Claimants put this as high as being:

> "*not just the inexorable inference to be drawn from these common features of the reciprocal transactions, it is also borne out by the transaction-specific evidence of the negotiations of the reciprocal transactions, many of which involved negotiation of the "spread", i.e. the net amount that Autonomy would pay to the counterparty and/or the timing of Autonomy's payments to the counterparty so that they preceded any payment by the counterparty.*"

2408. Fifth, the Claimants submitted that an examination of whether Autonomy actually received and used the services and products that it purchased from the counterparties reveals that:

(1) For RT1 (Capax Discovery) and RT6 (MicroTech), Autonomy never received any of the services it purportedly purchased for in excess of $17 million and $4.5 million, respectively.

(2) For RT2 (VMS), Autonomy made no material use or sales of the VMS data feed for which it paid a total of $17 million.

(3) For RT3 (FileTek), Autonomy did not achieve any code integration of the 'StorHouse' software on which it spent more than $21 million, nor was the software actually used by or for a single Autonomy customer.

(4) For RT4 (Vidient), there is no evidence that Autonomy ever tried to combine Vidient's 'SmartCatch' with any Autonomy product or otherwise used or sold the 'SmartCatch' software which it purchased from Vidient for more than $5 million.

(5) For RT5 (EMC), EMC did not use the software licensed to it by Autonomy and Autonomy knowingly overpaid for the EMC hardware it purchased.

(6) Four of the reciprocal transactions involved multiple purchases by Autonomy of rights to the same products or services from the same counterparty over a period of time (RT1, RT2, RT3 and RT4). As Mr Holgate put it in re-examination:

> "*Well, it would certainly, as the phrase goes, put one on enquiry because if the first licence to use software hasn't been used, then why is one paying further money to acquire further rights to the same thing? That doesn't make commercial sense. So at the very least one would need to find further facts and circumstances to understand why such a thing had been done*".

Factual evidence as to the real rationale: Defendants' case

2409. The Defendants rejected the Claimants' analysis and contended that much of it was based on unreliable witness statements, and that the principal person on whom they had relied, Mr Egan, had in effect recanted when (as they postulated came as a surprise to him) he was cross-examined. Further, whilst in fact Autonomy had made every one of its purchases because of its perceived utility at the time, they submitted that (i) what happened after the reciprocal transactions is irrelevant to their accounting treatment, (ii) the "*vast majority*" of Autonomy's purchases were used, albeit not always immediately, and (iii) Autonomy sometimes got it wrong or abandoned projects.

2410. The Defendants submitted that insofar as the Claimants' witnesses had first-hand evidence to give in relation to the purchase transactions, when they came to be cross-examined, they generally confirmed that there was indeed a commercial rationale for the purchase.

2411. In their written closing submissions, the Defendants gave two examples from Mr Egan's witness statement:

(1) Mr Egan's witness statement included the general statement that he had identified products for Autonomy to purchase which were unwanted, unused or overpriced. Mr Egan accepted that he only had any real recollection of three deals, VMS, StorHouse and EDD, and agreed that these were the only deals he was really able to give any evidence about. As explained below, Mr Egan was taken to the StorHouse and VMS purchases, and his evidence under cross-examination was very different from his witness statement. He confirmed that, as far as he was concerned, there was a good commercial rationale for each of the purchases, and that though it was not his judgement, he understood them to have been at fair value.

(2) Mr Egan suggested that Dr Lynch was involved in generating pretextual emails about Autonomy's purchases. Although he believed he would have had a better recollection at the date that he made his witness statement, he acknowledged that he retained no memory of any emails from Dr Lynch that were pretextual, and he acknowledged that he had not suggested any such thing in his evidence to the US Grand Jury given some time before his witness statement. He could point to no evidence to support the assertion as regards Dr Lynch; and in the end he accepted that from his own memory he was not able to give any evidence of Dr Lynch's involvement in generating emails to create the appearance that Autonomy had a genuine need for a product or service.

2412. In short, the Defendants depicted the "direct" evidence (and especially Mr Egan's evidence) as undermining rather than supportive of the Claimants' case when tested and then clarified in cross-examination.

2413. The Defendants contended that it was also a recurring feature of the Claimants' witness statements (in particular from the technical witnesses) that they included commentary on various purchase decisions made by Autonomy and the merits of those decisions. The Defendants dismissed this evidence as *"not useful"*:

(1) It became clear from cross-examination that so far as the technical witnesses were concerned, the witnesses in question were not involved in those business decisions and did not have any evidence as to the actual commercial motivation of management at the time. Moreover, those witnesses were generally not involved in <u>any</u> of Autonomy's decision making as to whether and when to make purchases, and on what terms. Nor were they involved in the sales side, in ascertaining the market demand for particular products, or in considering Autonomy's market positioning, and the product portfolio that Autonomy wanted to present. These all involved commercial questions which were not dealt with at the time by these technical staff, and which were handled by other (often more senior) people in management and/or on the commercial side.[289]

[289] The Defendants instanced Mr Lucini's comments on the StorHouse purchase. Mr Lucini was not involved in strategic discussions generally, and not involved in any of the strategic discussions with regard to Autonomy's development in the structured market. Mr Wang agreed in cross-examination that essentially, the pricing decisions, commercial decision, and the ultimate decision-making was made by people on the commercial side, not on the technical side (as he was, and to a large extent, so also Mr Lucini).

(2) Even on the technical aspects, the technical witnesses were frequently asked to comment in their witness statements on products that they had not been involved in at the time, and on the basis of a recent review of limited documentation, rather than the product itself. Unsurprisingly, it emerged that the witnesses had little understanding of the product or its functionalities.

(3) Non-technical witnesses also volunteered comments on technical areas which were not their expertise, and on which they would at the time have deferred to Dr Menell and his technical team.[290]

2414. The Defendants similarly sought to undermine the other evidential material relied on by the Claimants.

2415. As to the first point relied on by the Claimants in support for the proposition that Autonomy could not have had genuine commercial reasons for the various impugned purchase transactions (see paragraph 2400 above), the Defendants noted that a number of the statements of the Claimants' technical witnesses included a section regarding Autonomy's propensity (or otherwise) to buy third party software, which the Defendants described as amounting to a refrain that it was against Autonomy's philosophy to purchase third party software, and it did not do so.

2416. However, according to the Defendants, the Claimants and their witness statements painted an extreme picture, the true position being more nuanced; fully understood, it did not yield any support for the Claimants' case: the reality was that while, all things being equal, Autonomy did have a philosophy of developing its own software and it did use and purchase third party products where this made business sense. Whether, in any particular situation, it was preferable to "buy" or to "build" was, of course, a multi-faceted commercial decision; Autonomy did both.

2417. Despite the terms of some of the witness statements, the Defendants relied on the following examples from cross-examination in support of their point that this was broadly accepted by the Claimants' witnesses:

(1) Dr Blanchflower's evidence, including the following passage:

> *"Q. And the management would need to take a number of factors into account in the buy or build decision, including the opportunity cost of devoting a number of their engineering staff, yes?*
>
> *A. Yes.*
>
> *Q. As well as the time it would take, if you were building rather than buying, to get the product to market, yes?*
>
> *A. Yes.*
>
> *Q. And, depending on the situation, it can be better to buy a product that's already been tested rather than have to go*

[290] The Defendants cited Mr Egan as an example.

through elaborate testing processes?

A. There were certainly situations where that was not the case.

Q. But it all depends, doesn't it?

A. Yes."

(2) Mr Lucini gave evidence to similar effect.

(3) Mr Martin explained in his witness statement that Autonomy did purchase software from third parties.[291] He explained about the documents (which showed examples of such purchases) being:

> "*consistent with my understanding of Autonomy's philosophy of wanting to develop its own products where feasible and commercially reasonable, but making a business judgment to purchase software where it made more sense to acquire it from third parties*".

He was not challenged on that evidence.[292]

2418. The Defendants sought to rebut the Claimants' contention that Autonomy did not conduct the sort of due diligence one would have expected from a company purchasing a product for many millions of dollars with the genuine intention of using it in its business (see paragraph 2401 above) on the basis that (already mentioned previously) having regard to its nature as a nimble and bureaucracy-free entrepreneurial company, speedy management decisions based on personal prior knowledge and experience with little written material recording an assessment were not egregious, and did not suggest anything sinister or any improper purpose.

2419. The Defendants relied also on the wide variety of commercial reasons that might justify a purchase, the fact that the Claimants' technical witnesses had little or no first-hand involvement in the decision-making process nor any knowledge of or insight into the actual commercial motivation of management or of perceived market demand, Autonomy's market positioning, or management's plans for the development of Autonomy's product portfolio. They sought to sweep away witness evidence, particularly from witnesses with technical rather than commercial roles purporting to address the commercial merits of a purchase, as just *"not useful"*.

2420. As to the Claimants' contention that Autonomy in effect tried to maximise the size of its purchases simply as a means of funnelling more funds to its counterparty to enable the counterparty to make purchases well beyond its means, (see paragraphs 2376 and 2404 above), the Defendants relied on the fact that in every case Deloitte had confirmed

[291] A witness called by Dr Lynch.
[292] It was put to Mr Avila in cross-examination that as a general rule or philosophy Autonomy did not purchase third party software. Mr Avila agreed but acknowledged that *"it wasn't entirely the case"* and that there were several exceptions. Mr Avila's evidence was that there were a number of reasons that made it not only possible but likely that Autonomy or any other software company would consider third party software. He also explained that he had a lot of experience with customers which required Autonomy in some cases to go out and explore whether "*we could build them in-house or find the best of breed from outside of Autonomy*".

that fair value was paid, and there was nothing inherently wrong with a purchase from a counterparty, nor in the use by the counterparty of the proceeds to purchase from Autonomy. It is normal practice for software companies to buy and sell each other's products: the ultimate question is whether there was a commercial rationale and fair value for the product on each side.

2421. As regards the Claimants' reliance on seemingly suspicious *"common features"* of the transactions (see paragraph 2406 above) the Defendants depicted the Claimants' submissions as placing excessive weight on the instances where Autonomy paid a customer for a purchase immediately before the customer paid Autonomy for the sale, and/or situations where Autonomy made prompt or early payment to the customer. They contended that there is no significance in this:

(1) If Autonomy was paying its customer it was unsurprising (and good business practice) that it expected its customer to meet its obligations to Autonomy. It was generally in Autonomy's interests to pay its customers promptly and receive prompt payment from the customer, as this would reduce Autonomy's "days sales outstanding" ("DSO"). Autonomy published its DSO figures. Thus, for example:

> *"In Q1 2011 DSOs were 102 days [...] above the top end of the company's target 80-90 day range."*

(2) As Dr Lynch explained, the lower the DSO, the better:

> *"A. They told the reader how quickly our customers were paying us and it would be -- if customers were taking a long, long time to pay, then people might interpret that as meaning there was an issue with the product or that the economic environment was deteriorating, so it was a number that people looked at to try and make inferences."*

My assessment of the witness evidence on 'reciprocals' in general terms

2422. I shall return to address particular aspects of this evidence in addressing each of the impugned reciprocal transactions specifically. However, my overall assessment as to whether, as the Defendants submitted, cross-examination exposed and undermined the Claimants' evidence to the extent of showing the Claimants' characterisation of the purchases from customers as improper 'reciprocal', '*quid pro quo'* or *'round-trip'* transactions to be without remaining foundation can be summarised as follows.

2423. The centre-piece of the Defendants' case that the purchases were properly rationalised transactions for sound commercial purposes at fair value was their assault on Mr Egan's evidence. It did seem to me that Mr Egan's witness statement, which was shown to be narrowly focused on StorHouse and EDD, gave a much more comprehensive and assertive condemnation of the purchases (*"unwanted, unused or overpriced"*) than his much more understated and carefully confined evidence when cross-examined. This was one of the many contexts in which I felt that even if Mr Egan had carefully considered the evidence as he assured me he had, he had subscribed to lawyerly drafting that had more impact and assertiveness than when confronted specifically he was content to defend or convey.

2424. Nevertheless, whilst the message was modified, it seems to me that it was to the same ultimate effect summarised in (1) to (4) of paragraph 2398 above: even if by happenstance some use could be found for what was purchased and the price was not shown to be above fair value, the conception, purpose and effect of the three sets of purchases by Autonomy on which he could give direct evidence was to induce and fund a reciprocal purchase from Autonomy of a software licence so that Autonomy could recognise revenue from the latter.

2425. Thus, for example, after his cross-examination, from a question to Mr Egan (in fact by reference to the second FileTek deal) to explain further an answer he had given in re-examination as to the principal driver of the deals the following exchange developed:

> "*MR JUSTICE HILDYARD: ...Another question arising out of your re-examination today and this time referable to the second quid pro quo deal with FileTek where Mr Rabinowitz asked you what the primary driver for the deal was, was it revenue, and I think your answer was that you did regard the primary driver as being revenue. Was that a matter of concern to you then as to the propriety of what was being proposed?*
>
> *A. No.*
>
> *MR JUSTICE HILDYARD: Why not? Can you answer reasonably shortly?*
>
> *A. Yes, I viewed it that if Sushovan wanted to take out what was very expensive revenue, then that was fine because he was going to take the expense as well as the revenue.*
>
> *MR RABINOWITZ: Can I just ask you, Mr Egan, in answering my Lord's question, you said that if Sushovan wanted to do a deal for expensive revenue, then you were happy to do a deal for expensive revenue. Can you just explain what you meant by "expensive revenue"?*
>
> *A. Meaning that there was a large cost to Autonomy. Autonomy was buying something else, so it was not therefore the same as if I went and sold a similar software deal to a company where there was no expense side of the equation.*
>
> *MR RABINOWITZ: Thank you very much.*
>
> *MR JUSTICE HILDYARD: Yes. Was the expense side, the fact that it was expensive in financial terms to Autonomy, made up in your mind by some other advantage and, if not, how could the transaction in your perception then be a proper one?*
>
> *A. Value -- software revenue was always the priority and it was very highly valued. It was just implicit to me that that had high value."*

2426. Perhaps inevitably, given the constraints under which he had to give his evidence, it was not always clear quite what the overall effect was of Mr Egan's answers. The Defendants sought to take from this evidence that Mr Egan considered the transactions to raise no concern as to their propriety. But I took from it a different message that Mr Egan accepted that the real purpose of the purchase by Autonomy from the counterparty was to fund a purchase by the same counterparty from Autonomy from which Autonomy

could recognise revenue. It was revenue which came at a cost; the outlay was justified only by the value to Autonomy of securing such a software sale. No value other than revenue recognition was suggested. That, of course, chimes with the Claimants' case that the reciprocal transaction was in the nature of a 'round-trip". Further, as will be seen, any other explanation or 'spin' on what Mr Egan meant cannot stand with the contemporaneous documentation explored below.

2427. Further, and in addition to the disputed issue as to whether its purchases were ever really of any utility to Autonomy, which is more conveniently elaborated later in discussing the specific impugned transactions, the point summarised in paragraph 2408(6) above that four of the reciprocal transactions involved multiple purchases by Autonomy of rights to the same products or services from the same counterparty over a period of time (RT1, RT2, RT3 and RT4) was never satisfactorily rebutted.

2428. My last general comment relates to Mr Egan's evidence on the issue of pre-textual documents. The Defendants presented this as in effect amounting to a retreat from the evidence he had given. I did not take that to be the effect of what Mr Egan was saying. I took it that Mr Egan candidly accepted that this was no longer a matter that he could remember; but he believed that at the time of his witness statement what he had stated was something he could recall and truthfully state. He rejected the suggestion put to him that he had included it *"because that's the evidence that HP wanted"* and he had never thought he would be cross-examined on it. He told me that he had taken a *"very careful approach"* to his statement, had edited it significantly and *"removed names very frequently"*. As I have explained previously, I have been wary of Mr Egan's evidence in his witness statement, parts of which seem to me plainly to have been formulated for him by US lawyers with a certain view of the facts, and which he reconciled himself to saying at the time. But his own evidence in cross-examination tended to be more reliable; and I was persuaded in this context by what he told me.

The Expert Evidence relating to the impugned reciprocal transactions

2429. The last of the general issues identified in paragraph 2370 above is the import and reliability of the expert evidence relating to the impugned reciprocal transactions (see paragraph 2370(7)).

2430. Ultimately, there was little substantive dispute between the experts as to the meaning and effect of the relevant provisions of IAS 18; and they were agreed that in the application of the revenue recognition criteria in particular it was necessary to identify clearly (a) the transaction to which the criteria were to be applied (be it a separate transaction or a linked one) and (b) its substance and commercial effect, and not merely its legal form.

2431. Both experts also agreed that a transaction having no real and understandable commercial effect except by reference to another linked transaction should not be accorded accounting recognition. That is so either because the overall reciprocal arrangement lacked substance or because, in terms of IAS 18.13 and/or IAS 18.14 the revenue recognition criteria should be applied to the transactions so linked together and the separate purported effect of each individual but linked transaction should be ignored.

2432. Moreover, the experts did not differ materially on a number of matters relating to the otherwise contentious issue as to the degree and nature of the linkage required to

mandate the application of revenue recognition criteria to the linked transactions as a whole. Thus:

(1) Although certain parts of Mr Holgate's evidence at first blush appeared to suggest otherwise, he did not disagree with Mr MacGregor that mere reciprocity does not lead to net accounting, and nor does factual linkage, such as negotiation at the same time, without more.

(2) Mr Holgate accepted that the fact that one transaction would not have occurred without the other is not conclusive: it is a part of the factual picture.

(3) Mr MacGregor stressed, and Mr Holgate also accepted, that part of the analysis in determining whether two or more transactions should be accounted for separately or together under IAS 18.13 is to look at the relevant contracts and see if there is any linkage provided for or implicit.

(4) Both experts agreed that questions of commercial rationale depended very much on the facts; that a company like Autonomy might have a number of reasons for purchasing goods and services; that it was not the accountant's job to substitute his own views on commercial matters for those of the entity; and that the accountant would discuss things with management.

2433. Where the experts materially differed was in (a) the approach each took to his task and (b) the application of the agreed principles to the facts or assumed facts.

2434. As in his assessment of the impugned VAR transactions, Mr Holgate assessed the accounting treatment of the reciprocal transactions on the basis of the assumptions he had been instructed to adopt. Again as in the case of the impugned VAR transactions, he had not considered the actual facts; and since he had not even been provided with the relevant contracts, he had not considered the contractual documentation governing the legal relationship between the parties in the various transactions concerned.

2435. These matters were heavily criticised by the Defendants, especially since both experts were in agreement that (a) the analysis of transactions thought to be linked, their commercial rationale, and the determination of their proper accounting treatment depended on the particular (often nuanced) facts and (b) in the real world an accountant would always have regard to the terms of the contracts in determining whether the sets of transactions identified fell to be accounted for separately.

2436. Further, according to the Defendants, the assumptions Mr Holgate was given were truncated and extreme, lacking in nuance and presented in a vacuum, and couched in such a way as to suggest the answer to the ultimate question. Although slightly different assumptions were given for each impugned transaction, so that it is necessary for me to rehearse those applicable when discussing the particular impugned transaction, the following examples common across the impugned transactions were instanced by the Defendants to illustrate their point:

(1) In each case, Mr Holgate was instructed to assume that the Autonomy group company directly contracting *"had no independent need"* for the goods and/or services that it purchased from the counterparty, connoting (as the Claimants themselves put it) that there was no *"commercial rationale for buying it"*.

(2) Likewise, the assumptions described the impugned transaction as a *"nominal purchase"*, connoting (as Mr Holgate accepted) contrivance or artificiality (though any suggestion of sham was disavowed by the Claimants).

2437. Mr Holgate also accepted that another potential problem in proceeding on the basis of assumptions was the danger that in an *"assumed facts case"* some assumptions could implicitly rely in whole or in part on matters not yet known at the date of the accounting judgement called for in *"a real case"*. He confirmed in the course of his cross-examination, albeit in the context of the accounting treatment of the impugned VAR transactions, that it is not legitimate to take into account events after the date of drawing up the accounts.

2438. I would add that my understanding of the agreed view of the expert accounting evidence and of IAS 8 is that information coming to light between the reporting date and the signing date (after audit approval and signature) cannot be taken into account except (and the exception is an important one) insofar as it sheds light on circumstances prevailing at the reporting date; and information coming to light in that period must be disregarded insofar as it describes or reveals transactions and other events that arise after the reporting date. Information that comes to light after the signing date can be taken into account only at the next reporting date.

2439. Mr Holgate protested that even if (as he did accept) the assumptions were framed in a way that rather determined the answer, he was *"not going to be led by the nose so easily…"*. However, the Defendants made the point that confirmation bias is by its nature difficult to recognise and thus avoid, and submitted that there were signs that Mr Holgate was (as Dr Lynch put it) *"channelled"* by his assumptions and this resulted in him (a) failing properly to consider the possibility of nuanced variations or qualifications and the differences introduced by hindsight and (b) failing to ask for obviously relevant material (most strikingly, the contractual documentation). I was surprised by the last point; but I have not been persuaded that in the end it skewed his approach.

2440. Mr MacGregor regarded his approach as being *"somewhat different to Mr Holgate's"*. He was not asked to make assumptions, save as to the basic facts. He described his approach as follows:

> *"I have looked at each of the transactions and identified the accounting treatment based on the available evidence including identifying elements of disputed factual evidence which, if so determined (i.e. if the Claimants' allegations are confirmed) would mean the transactions did not have substance."*

2441. Mr MacGregor emphasised that in his opinion:

> *"a key point in considering the alleged reciprocal transactions is that, even if they are considered 'linked' by reference to IAS 18.3, this does not necessarily invalidate the revenue recognised by Autonomy."*

2442. As to the first five of the six impugned transactions, he stated that:

> *"…in my opinion, it appears that the sales and transactions in each case may have been "linked", but not necessarily in such a way that they could not be*

understood without reference to the series of transactions as a whole. I say this because, based on the evidence I have seen, there appears to be a commercial rationale for both the sales and the purchases, and each can be understood on its own terms. It appears that the linkage could have been, in substance, the exchange of dissimilar goods or services that should be accounted for by reference to IAS 18.12, which requires that the revenue is measured at the fair value of the goods or services received, adjusted by the amount of any cash or cash equivalent transferred."

2443. With the obvious but important caveat as to the need in every case for detailed consideration of the facts and contractual documents, I think the overall gist of his evidence in relation to IAS 18.13 is captured by the following exchange in the course of his cross-examination:

> *"Q. …If the facts are that Autonomy was purchasing something for which it had no need and which had no discernible value to Autonomy, and it was entering into that transaction simply as a means to channel funds to the potential purchase of its own software, then because the one transaction at least lacked a commercial rationale, you would look at the transactions together and you wouldn't account for any revenue from that transaction, correct?*
>
> *A. The way it works is if the overall commercial – if the overall substance of the transaction is solely as a way of Autonomy paying money to – for no other reason, paying money to a counterparty so that it can buy its software, then it has no commercial – the overall transaction has no commercial substance. And one would deal with the accounting for that on a net basis, i.e. whatever the net payment is, in this case it's Autonomy paying the counterparty, would be simply treated as an expense with no recognition of revenue."*

2443A. I turn from these general matters to consider the impugned reciprocal transactions individually to assess whether the Claimants' case that each was a means of Autonomy buying recognised and reportable revenue at substantial cost has been established and whether, as they submitted, the linked sale and purchase in each case lacked substance. If so, I agree that each pair of purchase and sale should have been accounted for on a net basis, and no revenue should have been recognised from the sale.

RT 1: Capax Discovery/EDD (Sch 5/1 and Sch 12B)

2444. The Claimants contended that revenue on three sales to Capax Discovery of Electronic Data Discovery ("EDD" or "e-Discovery") software was recognised incorrectly, on the basis that the payments in respect of the sales were "reciprocal" with payments from Autonomy for EDD services that Autonomy did not need and which in any event Capax Discovery could not and did not provide.

2445. These three transactions were referred to compendiously as RT 1 and comprised individually:

(1) A March 2009 sale of a licence for $7.5m and 2 years support and maintenance for $750,000. This is referred to below individually as "the first Capax Discovery/EDD sale".

(2) A December 2009 agreement licensing additional software and extending the term from 5 to 6 years, for a licence fee of $4 million and $200k support and maintenance. This is referred to below individually as "the second Capax Discovery/EDD sale."

(3) A further agreement dated March 2011 providing Capax Discovery with the right to install the software at its UK Data Centre, for a licence fee of $1.6m and $80k support and maintenance. This is referred to below individually as the "third Capax Discovery/EDD sale".

2446. The Claimants' pleaded case in relation to RT 1 in RRAPoC Schedule 5/1 is that Capax Discovery agreed to purchase the EDD licences initially on the understanding that the Autonomy group companies would direct EDD support service business to it; and that when that support business was not provided, Autonomy made payments to Capax Discovery and Capax Global which were intended to be and were, used to fund the instalment payments due under the EDD software licences. These payments were made ostensibly for *"specialized EDD processing"*, *"additional EDD processing"* and *"Supplemental EAS support"*: but in fact, Capax Discovery and Capax Global were never required to provide such services or support (or what was provided was of no discernible value to the Autonomy group).

2447. As was noted in Dr Lynch's written closing submissions, the version of events pleaded in RRAPoC Schedule 5/1 refers only to a promise of future business rather than funding, and does not *ipso facto* call into question revenue recognition. However, the Claimants' factual presentation went further. Mr Baiocco asserted in his witness statement that even before that first sale, Mr Egan had agreed that Autonomy would provide funds to Capax Discovery to meet its instalment payments and indeed make a profit. That sat uneasily with the pleading that initially the only promise was that Autonomy would direct lucrative business to Capax Discovery. However, the cross-examination focused on the alleged side-agreement and tested the proposition that it was made before the first sale; and I consider that notwithstanding the departure from the pleading I must resolve the factual case as presented and cross-examined, not least since undoubtedly the Claimants have always sought to impugn all three of the sales comprising RT 1, and it is important in any event to determine when (if ever) there was an agreement to the effect that Autonomy would funnel funds (as distinct from business) to Capax Discovery to enable it to make the instalment payments as they became due.

2448. Thus, the Claimants' primary case is or became that the recognition of revenue from each of the sales comprising RT 1 was improper because the sales were only achieved by the preceding promise that Autonomy would somehow channel funds to Capax Discovery to put Capax Discovery in funds to pay the instalments due and to enable it also to show a profit. In that way, Autonomy funded and incentivised Capax Discovery to purchase Autonomy software so that Autonomy could recognise revenue from the sales.

2449. Whilst the Defendants contended that any arrangements made for Autonomy to purchase services were reached after the initial purchase and were not pre-agreed, the Claimants

contended that it is clear from the evidence, and that it is a matter of obvious and necessary inference, that the arrangement was reached before the relevant licence sales were entered into, and that it is simply not credible for the Defendants to suggest that this was a "*private arrangement*" between Mr Baiocco and Mr Egan, not least in circumstances where Autonomy paid $17 million pursuant to the arrangement over a period of more than two years, a substantial proportion of which was approved by the Defendants. On that basis, the Claimants submitted, the overall arrangement with Capax Discovery lacked economic substance, there was no net revenue realised and no revenue should have been recognised on the sales.

2450. The Claimants submitted that the Defendants both knew this. They contended further that Deloitte were misled by the form in ignorance of the substance, and did not appreciate that in substance and reality, Autonomy was buying revenue through a reciprocal transaction of illusory substance.

2451. Further, and more generally, the Claimants submitted that the means Autonomy adopted of funding Capax Discovery, by the issue of a series of purchase orders followed by payments for e-Discovery services which Capax Discovery could not and did not provide and for supplemental EAS support which Capax Global was never required to provide, plainly demonstrate fraud.

2452. The amounts involved were considerable. The revenue recognised by Autonomy in the Relevant Period in respect of the three transactions comprising RT 1 amounted to some $14,130,000. The Claimants' case is that Autonomy should not have recognised any of that as revenue but should instead have recorded the difference between the cost of the purchases and the amounts that it invoiced in respect of those sales, amounting to $1,507,281, as an expense. Under Schedule 12B of the RRAPoC, the Claimants also sought recovery of transaction losses in respect of RT 1 in the net amount of $3,215,000.

2453. As to the Defendants' position, Dr Lynch himself came to have concerns about RT 1. At the outset of his cross-examination, Mr Rabinowitz asked Dr Lynch whether, having listened to the evidence given in the case for the Claimants, it was really his position that not a single example of wrongdoing at Autonomy had been shown. Dr Lynch said that this was not his position; and he identified the evidence of Mr Egan and Mr Baiocco in respect of the transactions comprising RT 1 as having convinced him that Autonomy had been paying for EDD services that Capax Discovery was not in a position to provide, and that Mr Egan knew this and yet was reporting that the services were being provided. Later in the course of his cross-examination, Dr Lynch confirmed his acceptance that:

> *"What I know of the matter is that Capax was not able to deliver the services it said it was able to deliver."*

2454. When then asked whether in such circumstances it was inappropriate for Autonomy to have recognised revenue from the sale of software to Capax Discovery, Dr Lynch was more guarded; but he did accept that revenue recognition would indeed have been inappropriate *"if that arrangement was made at the time of the sale of software to Capax."*

2455. In other words, Dr Lynch distinguished between (a) the general impropriety inherent in paying for non-existent or fictional services (which he accepted) and (b) the different question whether that affected revenue recognition in respect of the transaction

preceding the payments (which he contended depended on whether any arrangement for payment for such services was made before or after the transaction). As to the latter, the Defendants' case was that if there was any agreement to pay for non-existent or fictional services, it was put in place after and not before the transaction, and only to make up for the failure to funnel business Capax Discovery's way. That, after all, was consistent with the Claimants' pleading. Thus, notwithstanding Dr Lynch's acceptance, on the basis of the evidence given by Mr Egan and Mr Baiocco, of the apparent impropriety of the arrangements as between them, the Defendants did not accept that the recognition of revenue from the sale of the three licences was improper.

2456. The Claimants sought to dismiss the timing issue as a *"red herring"*. They argued that had Deloitte been told at any point that payments had been made on fictitious invoices and then used to pay instalments under the original sales transactions, Deloitte's whole approach would have been unsettled and it would have revisited very sceptically indeed all related revenue recognition; and management's credibility would be shot. However, it seems to me that though relevant to any reliance sought to be placed by the Defendants on the approval of Deloitte, and also of course to my overall assessment of the Defendants' intentions, knowledge and honest belief, for present purposes the point cannot be dismissed as a red herring, even if in the event sums were paid for fictional services. From the point of view of the accountancy rules, the relevant time for assessment is the date of the transaction from which revenue is said to have been derived. A dishonest expedient adopted afterwards as the means of funding it would not necessarily affect revenue recognition of a precedent transaction at the transaction date[293]. Accordingly, Dr Lynch's caveat as to the timing of whatever arrangement was made must be assessed.

2457. Further, both of the Defendants maintained that they were not aware of any improper arrangement at the time, and were certainly not aware that there was anything wrong in recognising revenue from Autonomy's EDD licence sales. Dr Lynch's position was that he had very little involvement in any of the three transactions; and generally, that he was not involved in any software sales. He signed off some of the purchases for services, but he did so on the basis of the proper approvals of others, without any reason to think that the purchases were not genuine. For his part, in his written closing submissions, Mr Hussain described the attempt to implicate him in whatever arrangements that may have been agreed between Mr Egan and Mr Baiocco as *"ex post facto reconstructions which bear no relation to reality"*.

2458. Accordingly, and as the Claimants had themselves highlighted, the principal factual issues for determination in respect of RT 1 are:

(1) Whether there was an understanding between Mr Egan and Mr Baiocco and/or in the case of the March 2011 agreement between Mr Hussain and Mr Baiocco prior to the sales from which revenue was recognised that Autonomy would ensure that Capax Discovery would be provided by Autonomy with the means

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[293] Mr Welham was asked whether he considered this would have affected the original revenue recognition. His response was a little under-stated:
"A. I think when you use the word "fictitious" auditors' ears start to prick up. So anything where we're assuming there is something fictitious going on, I feel slightly uncomfortable to be honest. So I can't comment on that because I think you're saying if something happened to do with fictitious invoices after the event, would that impact revenue recognition? And I just can't speculate at all because we're in the world of fictitious invoices which as I say, would trouble me."

of paying instalments due under the sales agreement, and if so what was its nature and timing?

(2) Whether, having regard to its nature and timing, the effect of any such arrangement and what was known of it rendered Autonomy's decision to recognise revenue on its software sales improper; and if so

(3) Whether the Defendants knew that the recognition of revenue from Autonomy's sales of EDD licences was improper.

The first Capax Discovery/EDD sale in Q1 2009

2459. The software licensed to Capax Discovery by Autonomy under the first Capax Discovery/EDD sale (dated 31 March 2009) included Autonomy's e-Discovery software, called "Introspect" and a product called Enterprise Archive Solution ("EAS"):

(1) E-Discovery or EDD is, in summary, the process through which electronic data is ingested and maintained, searched and analysed, typically in the context of litigation or investigations. The provision of e-Discovery/EDD business requires a platform of e-Discovery software and appropriately trained personnel. Autonomy's e-Discovery/EDD software was called 'Introspect'.

(2) EAS was a digital archiving product that had been developed and sold by Zantaz to a significant number of smaller customers. After Autonomy acquired Zantaz in 2007, Autonomy made the decision not to continue to develop EAS; but it still had to provide support services for customers to whom the product had been sold. In this respect, EAS differed significantly from e-Discovery/EDD, the software for which Autonomy continued to develop and sell, together with related e-Discovery services.

2460. It is common ground that EDD was a lucrative line of business which Mr Baiocco (and, in particular, Mr Stephen Williams who had been recruited by Capax Global in late 2008 and who had been an Autonomy e-Discovery consultant at his previous employers) was particularly keen to develop. Mr Baiocco explained that his goal was to offer a hosted e-Discovery solution to customers: that is to say, that eventually Capax Discovery[294] would host the relevant e-Discovery software and the customer's data in its own data centres. For that purpose, Capax Discovery would eventually need to acquire a data centre and the necessary hardware, and suitably trained personnel; but it needed also a licence to the relevant e-Discovery software.

2461. The license granted to Capax Discovery by Autonomy by the first Capax Discovery/EDD license agreement was to (a) use this software for the benefit of customers, either in connection with Capax Discovery's distribution of services provided by Autonomy, or in connection with Capax Discovery's own provision of services, and (b) install, operate and host the software, solely for the purposes of making the software available to customers as a Software as a Service ("SaaS") subscription-based offering, provided such hosted offering was housed on, managed by, and offered through access to servers owned and/or leased and controlled solely by Capax

[294] Capax Discovery was not incorporated until mid-March 2009, after the meeting at the London Hotel discussed below (see paragraph [2468(2)]). References to 'Capax Discovery' for the purpose of this section denote the Capax entity to carry on e-Discovery business.

Discovery. The agreement also granted Capax Discovery a licence to market, sell and distribute Autonomy's services to customers. No source code license was granted.

2462. The amounts payable under the first Capax Discovery/EDD sale were to be paid in instalments over 2 years in accordance with the Schedule to the licence, with the first instalment of $500,000 falling due on 30 April 2009. There were then eight instalments of $968,750 which were due at three-monthly intervals thereafter, until 31 March 2011. Autonomy was entitled to a royalty of 20% on all "Net Revenues" (as defined) over a threshold of $25 million.

2463. Capax Discovery assumed unequivocal obligations to pay the fees under the agreement (see Article 6). At Article 13, the agreement contained an entire agreement clause, which Mr Egan agreed was completely standard in software licences at that time, and which provided, amongst other things:

> *"This Agreement together with all Order Forms, contains the full and complete understanding of the parties as to the subject matter hereof and may not be altered or modified, except by written amendment which expressly refers to this Agreement and which is executed by both Autonomy and Capax. The parties expressly agree that this Agreement supersedes all prior or contemporaneous proposals and all other oral or written understandings, representations, conditions, and other communications between the parties relating to such subject matter, as well as the terms of all contemporaneous or future purchase orders. Unless the parties expressly agree otherwise in writing, in the event of a conflict or ambiguity between or among the provisions of this Agreement and an Order Form, the following shall be the order of precedence: first this Agreement: second, the Order Form. Any terms and conditions contained in any purchase order or other ancillary purchase documents issued by Capax and/or Customer shall be of no force or effect."*

2464. Autonomy recognised the $7,500,000 license fee as revenue in Q1 2009. The Claimants have stressed that the first Capax Discovery/EDD sale was important to Autonomy in enabling it to hit its quarterly revenue targets. On the day it was struck, Mr Sass sent an email to Mr Hussain and Mr Egan (among others) marked 'high importance' and announcing in capital letters: *"CAPAX IS IN (SIGNED COPY IN HAND)"*. A few hours later, Mr Hussain replied, copying Dr Lynch, saying *"Very well done both of you – I like $7.5m deals"*. There is no dispute that Dr Lynch was also thus aware of the sale.

2465. More contentious, however, is the detail of what was said in the lead-up to the agreement. The Claimants' case was that a *"handshake"* agreement was made, and deliberately not reduced to writing, which in substance obliged Autonomy to provide funds to Capax Discovery in order to enable it to fund its obligations under the Capax Discovery/EDD agreement. The Claimants supported their case on the basis that Capax Discovery was newly incorporated and such funding was absolutely necessary: and in any event Capax Discovery was not in a position itself to provide EDD services until much later, and was reliant on Autonomy to fund it.

2466. The Defendants, on the other hand, contended that even if an arrangement was at some time made between Mr Egan and Mr Baiocco for Autonomy to assist Capax Discovery

by paying it for services before it could actually provide them, it was after and not before the first Capax Discovery/EDD sale agreement. Further, if and when made, the agreement was informal and personal to Mr Egan and Mr Baiocco, and did not bind Autonomy or alter or remove the unconditional obligations entered into by Capax Discovery under that agreement. They dismissed the version of events put forward by the Claimants as not credible, nor realistically supported by the evidence.

2467. Dr Lynch relied in his closing submissions on four key points in addressing the alleged understanding between Mr Egan and Mr Baiocco. He submitted:

(1) First, the version of events put forward by the Claimants through their witness statements was manifestly incorrect.

(2) Secondly, the timing of any arrangement (whether by handshake or otherwise) was not as suggested, and post-dated the Capax Discovery/EDD agreement.

(3) Thirdly, the only party to any such discussions or understanding from the Autonomy side was Mr Egan, and any agreement he made with Mr Baiocco in defiance of standing instructions and the terms of the first Capax Discovery/EDD license agreement was personal to them and not binding upon Autonomy as a legal entity.

(4) Fourthly, any understanding or arrangement reached was informal, did not amount to an enforceable arrangement, did not alter the fact that Capax Discovery was on risk, and did not affect revenue recognition under the first Capax Discovery/EDD sale agreement.

The Claimants' evidence of a handshake deal and the Defendants' criticisms of it

2468. The Claimants' evidence was directed towards establishing not only the content of the alleged *"handshake"* agreement (see paragraph 2465 above) but also its timing, it being crucial to their case (as it had developed) on revenue recognition in respect of the first Capax Discovery/EDD sale agreement that it should be shown to have preceded 31 March 2009. There were three strands:

(1) The background to the alleged agreement, which the Claimants depicted as demonstrating that the initiative came from Autonomy (or at least, Mr Egan) which was desperate to make up a revenue shortfall, that Capax Discovery (or at least, Mr Baiocco) was equivocal, and that Capax Discovery's agreement had in effect to be bought;

(2) The events relating to the only actual meeting firmly identified as having taken place in the relevant time period between Mr Egan and Mr Baiocco, at a hotel in New York, on 11 March 2009;

(3) The exchanges after that meeting, which were predominantly between Mr Baiocco and Mr Sass, but which the Claimants maintained were directed by Mr Egan.

2469. Each of these strands was disputed by the Defendants. They maintained that:

(1) The initiative was welcomed by Autonomy but initially came from Mr Baiocco, who had identified e-Discovery as a lucrative area and incorporated Capax

Discovery to pursue it, but who needed not only an EDD licence but (in effect) some sort of collaboration with Autonomy to build this new area of business.

(2) At the meeting between Mr Egan and Mr Baiocco at the London Hotel in New York on 11 March 2009, the discussion was general and involved nothing which could have been described or thought to amount to a handshake agreement.

(3) No such agreement was reached in the period after that meeting: the exchanges and finalisation of the details which culminated in the first Capax Discovery/EDD sales agreement were dealt with by Mr Sass without substantial involvement on the part of Mr Egan.

2470. As to (1) in these opposing positions, an important detail of the Claimants' evidence is that Mr Baiocco stated in his witness statement that in early 2009, after Capax Discovery had decided to explore licencing EDD from Autonomy with a view to then offering e-Discovery services to its own clients, Capax Discovery requested quotes from Autonomy, but *"the amount Autonomy was asking for ($4 - $4.5 million) was more than we were willing to pay"* and Capax Discovery told Autonomy that it *"would not be able to proceed at a price in that range"*. Mr Baiocco had given the same evidence when examined in chief in the US criminal trial. The point is important because it was deployed by the Claimants as part of their overall case that Mr Baiocco's agreement to a very considerably higher quote a month or two later can only realistically be explained on the basis of Autonomy having agreed some sweetener or other.

2471. Another detail not mentioned in the witness evidence, but which is important for the same reason, is an email dated 13 March 2009 from an Autonomy salesperson called Jeff Cornelius ("Mr Cornelius") which he sent after hearing that Capax Discovery had *"reached out"* to Autonomy, advising Mr Egan and Mr Sass that he had already made a proposal to licence EDD software to Capax Global for as little as $1.6 million. Although Mr Sass quickly replied to the effect that the offer was nonsense *("This is bs. Must tell you guys")* the discrepancy is arresting, and was cited by the Claimants in closing as reinforcing the Claimants' position that later discussions:

> *"were driven by Autonomy's desire to recognise as much revenue as possible in Q1 2009, and were not constrained by the value of the software or what Capax was willing to pay, because Autonomy was itself going to fund the licence purchase in full."*

2472. Thus, the Claimants relied on the antecedent history as an important indication that Autonomy engineered the transaction to plug a gap in its software revenues, and then in effect talked Mr Baiocco into a larger deal than otherwise Capax Discovery could have reasonably been expected to undertake by the promise of funding.

2473. In my view, the documentary evidence points to the original enquiry having come from Mr Baiocco, and that it met with an enthusiastic response. That was my impression of the email exchanges and the oral evidence did not cause me to alter it. Thus:

(1) An email from Mr TJ Lepore (an Autonomy sales person covering the New York area) to Mr Robert Sass (Vice-President of US Sales) dated 4 March 2009 records (as an update on "new opportunities") that *"Capax Global wants to build an eDiscovery practice – EDD, Review, maybe ECA. John can talk to you*

whenever", and Mr Sass's reply (within 10 minutes) encouraged immediate discussion, asking also *"do you have a feel for dollars – what do you think we can get this q?"*

(2) After Mr Lepore had spoken with Mr Baiocco that day to discuss Mr Baiocco's plans for this new venture, and what assistance Autonomy could provide, a later email from Mr Lepore to Mr Sass also dated 4 March 2009 recorded the fact of the discussion and the following:

> *"I did speak with John @4.30 as planned.*
> *I told him…that this is in the 7-figures range, depending on how much of a platform he wants to build. He didn't flinch; he's just looking for help on the best deal possible.*
> *Actually, in addition to ECA etc., they'd want to be able to show up to Company X with a portable system and collect from specific repositories. So they want to do the on-site ingestion/collection ala EnCase.*
> *With regard to timing, he has to sell it to his partners but he recognises this is huge business, the direction they want to go, AND he has all the idle servers released by Voxant. He wishes he had a deal to tie this to, but I explained that eDiscovery hosting is "here's the data – I need it processed and ready in two days" kinda thing, and if you've made the law firm happy it's more of an annuity than a huge up-front deal. He's hearing that from his new guy Steve Williams as well (Steve is from the eDiscovery space)."*

2474. In my view, the emails above attest also to the preliminary nature of the enquiry: it is a prospective project rather than a present proposal, and at that stage, Mr Baiocco had no settled or certain idea quite what he wanted in terms of software in order to achieve its new objective. But the impetus came from him.

2475. Turning to (2) in paragraphs 2468 and 2469 above and the dispute as to what transpired at the only documented meeting between Mr Egan and Mr Baiocco on the matter, on 6 March 2009 Mr Sass emailed Mr Baiocco, saying that Mr Egan and Mr Mooney were keen to put something together that worked for all parties. He *"reiterated the fact that we can be creative to ensure flexibility"* but emphasised that March was a key driver for Autonomy. Mr Baiocco was very enthusiastic about doing the e-Discovery project,[295] but at this stage it was still up in the air, and Capax Discovery had not even sorted out what the software might be. Mr Sass's email encouraged further discussion *"to get more clarity on what is needed"* and suggested a further meeting thereafter with Mr Egan who was in New York at the time (his email of 6 March 2009 proposed that they *"see if we can get together when Stouffer is in town to kick around ideas."*)

2476. It is common ground that a breakfast meeting was then arranged to be held at The London Hotel in New York City ("the London Hotel"). This was to be attended inter alios by Mr Egan, Mr Sass and Mr Baiocco on 11 March 2009. The evidence of that

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[295] Mr Baiocco: "*We really want to do this. Just need to make sure we have everything in order.*"

meeting, and who in the event attended it, is disputed and equivocal and the Claimants' case was modified over time. No consistent version was provided by the witnesses.

2477. In his evidence in the US criminal proceedings, Mr Baiocco had (in examination in chief) given a detailed account of proposals put forward by Mr Egan at the London Hotel meeting. He described this in answer to Mr Frentzen (US prosecuting counsel, with whom Mr Baiocco had had many previous meetings) as follows:

> *"Q. What did Mr Egan propose to you?*
>
> *A. He proposed that they would give us the software and – well, give us the software for a price and that then they would make sure on the back end that we got taken care of to pay it until we were up and running and able to do the actual work ourselves.*
>
> *Q. So what was the price that you were – that Capax was supposed to pay?*
>
> *A. Seven and a half million plus support and maintenance.*
>
> *Q. So it was more than the original quote?*
>
> *A. Yes.*
>
> *Q. All right. And so in what way was it that Mr Egan was proposing that you could now do this deal for more money than you were – that you had already not been able to do?*
>
> *A. Well, he was proposing it because we weren't going to have to write a check for it. They were going to actually, you know, give us the EDD sort of processing money to give us the ability to make the payments to them for the software.*
>
> *Q. So was the proposed deal that Autonomy would give you the money to pay to them for the licencing of the software?*
>
> *A. Yes.*
>
> *Q. What were you going to do with the software once you received it at Capax?*
>
> *A. Well, we were going to set it up and build the business that we wanted to build around it.*
>
> *Q. Was there an understanding of – or was there an agreement about it if you were able to do the eDiscovery work, how that would proceed in terms of the relationship between Capax and Autonomy?*
>
> *A. Yeah. Well, once we were going to be up and running, they were going to feed us overflow and then there was like a royalty on the back end…after we hit a certain threshold, that they would collect X amount of any eDiscovery that we would do going forward for the term of that license.*
>
> *Q. Was part of this discussion or did part of this discussion involve the potential that Capax would actually get EDD work sent their way by Autonomy?*
>
> *A. Yes. When we were ready.*

Q. And that was my question. At this time in early 2009, was Capax prepared to do any EDD work?

A. No. We couldn't have been until we had the software. We didn't even own the software prior to that, so, no.

…

Q. What was it that gave you reassurances that you could enter into this agreement even if you couldn't make that payment schedule?

A. I had a handshake agreement from Stouffer that they were going to make sure that we got the money to us to be able to make the payments to them.

Q. To be clear, the money for these payments was going to come from who?

A. From Autonomy.

Q. With that understanding, did you agree to this?

A. Yes."

2478. This evidence was largely repeated, but with less detail, in Mr Baiocco's witness statement in the present proceedings. Mr Baiocco gave an account of the meeting, and of a deal, which Mr Egan stipulated must be made and signed by the quarter end (31 March 2009), for Capax Discovery to licence an EDD software package from Autonomy for an initial fee of $7.5 million. The assertion that a specific fee was mentioned acquired some importance and was disputed. It became clear in evidence that a fee of $7.5 million had not in fact been mentioned: the most initially floated was a fee of $5 million. However, even at that lower level, such a fee was, according to Mr Baiocco, significantly higher than a fee quoted previously by Autonomy (in January or early February) of some $4 to 4.5 million which he had rejected; but this time, Mr Baiocco said, the proposal was for *"a more robust EDD software package"* and came with a collateral assurance that Autonomy would:

> *"get money to [Capax] so that we could make the licence fee payments as they became due and in return Autonomy would receive the royalty on EDD fees earned by Capax. In addition, Mr Egan said that Autonomy would make sure that Capax would make a profit on the relationship".*

2479. In addition, Mr Baiocco stated:

> *"…once we acquired a data center and all of the necessary hardware, installed the EDD software on it, and trained the necessary EDD personnel, we would provide EDD services to our own customers and Autonomy would send any overflow EDD business from its customers to us. We would pay a 20% royalty to Autonomy on EDD fees earned in excess of $25 million."*

2480. According to Mr Baiocco, he was only willing to contemplate an even higher fee (of $7.5 million) and:

> *"willing to go forward with these terms because the software would effectively cost Capax nothing, we would be able to build an e-Discovery business, and we were promised a profit."*

2481. It was this rather detailed and specific set of arrangements that Mr Baiocco described as a *"'handshake' agreement with Mr Egan on behalf of Autonomy."* His description of its terms varied; and Mr Baiocco accepted that his recollection was imperfect. However, the gist of what Mr Baiocco said Mr Egan proposed remained the same: Autonomy would take care of Capax Discovery, or as Mr Baiocco put it:

> *"the concept was clearly on the table that they [Autonomy] were going to somehow give me the money to pay the thing".*

2482. Whereas, initially at least[296], Mr Baiocco placed all this as having been agreed at the London Hotel meeting, Mr Egan's witness statement did not expressly mention the London Hotel, nor did he specify when else the proposal was made. However, he gave a similar account in his witness statement of the proposals some time exchanged, emphasising the nature of the arrangements made as a *quid pro quo*. He stated their content in a conspicuously legalistic way, with a confessional flavour, as follows:

> *"I proposed that Capax license EDD software for a term of five years for $7.5 million (plus $750,000 for two years of support and maintenance). In return, and with Mr Hussain's approval, I told Mr Baiocco that Autonomy would agree to underwrite Capax's purchase by paying Capax a monthly fee that would fund its license purchase in full. I told Mr Baiocco that the license to use EDD software and Capax's corresponding payment obligations would be recorded in a contract that would state that Capax would be obligated to pay the full amount. I described the payments from Autonomy as monthly and at will, but said that it was Autonomy's intention to pay them until the license was fully underwritten or Capax was generating sufficient revenue from use of the licenses to pay the license off early. This was an oral side agreement. At Mr Hussain's direction, this oral agreement was not to be documented. I also told Mr Baiocco that Autonomy would do everything in its power to help Capax ultimately earn a profit on the transaction. Mr Baiocco agreed to proceed on that basis."*

2483. One of the difficulties with over-lawyered evidence, as was this passage (and others) in Mr Egan's witness statement, is that the impression is given of focus on details of legal significance and the orderly exchange of information and mutual promises, whereas any conversation or series of conversations (particularly perhaps one in the lobby area of a busy hotel apparently taken over at that time by a trade show[297]) is likely to have been more amorphous, fragmented and (often) legally incomplete. Mr Egan's detailed and orderly presentation of the alleged agreement in his witness statement did not survive cross-examination; and the time and place of the agreement became increasingly vague

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[296] In cross-examination, he acknowledged that he did not in fact remember the meeting at the London Hotel at all though he could recall Mr Egan being there, and on the basis of an email referring to Mr Sass having been there, probably Mr Sass also

[297] According to Mr Egan in his cross-examination.

and unclear from the answers given by Mr Baiocco and Mr Egan when required to depart from their carefully polished scripts.

2484. Another difficulty of using witness statements as a vehicle for a statement of events crafted to achieve a legal result is that even if not untrue, the words placed in the mouth of the witness may reflect matters thought to complete the legal depiction of which he or she has or retains no direct knowledge. In this case, it seemed clear to me that neither Mr Baiocco nor Mr Egan could any longer accurately distinguish between what they actually could remember and what had become their perceived recollection, though to be fair to both, when cross-examined and left to their own devices, they did each do their best in that regard.

2485. Varnish stripped away by the process of cross-examination, the uncertainty even as to who was there revealed the frailty of the recollection of the principal witnesses, Mr Egan and Mr Baiocco. Mr Baiocco expressed himself *"1,000%"* confident that he had walked with Mr Lepore to the London Hotel and was originally insistent that Mr Lepore was at the meeting. However, this is not supported by the email evidence put to Mr Baiocco; Mr Lepore was not on the email convening the meeting and is not named as a "required attendee". There is no reason to suppose that Mr Lepore is likely to have attended the meeting; and eventually Mr Baiocco accepted that his recollection may have been faulty[298]. Mr Egan thought Mr Lepore was there too; but by his own admission his memory was hazy. The unreliability of their recollection is emphasised by the fact that Mr Baiocco could not remember Mr Sass being there, and nor could Mr Egan; but the email evidence clearly suggests that he was. I accept and find that the meeting at the London Hotel was attended by Mr Baiocco, Mr Egan and Mr Sass, but not Mr Lepore.

2486. Mr Baiocco accepted when cross-examined that he had no real recollection of the details of the discussion at the breakfast meeting in the London Hotel. Under cross-examination, he portrayed it instead as a discussion about *"e-discovery software in general"*, possibly with some discussion of Autonomy investing a little in Capax Discovery as an EDD partner, but with no specific discussion about "a dollar value on the deal" or any side agreement. He no longer could support his previous stance of the London Hotel meeting having been the occasion of the alleged *"handshake"* agreement. He could no longer remember *"exactly when the money piece came in…"* He added:

> *"I remember Stouffer talking about having 8 or $9 million of free money somewhere above or below – I'm not an accountant – the line they could use to invest in a partner, that's what I remember but not specifically talking about a dollar value on the deal at that meeting, I don't recall that."*

2487. Mr Egan, having first told me in the course of his cross-examination that he could remember a meeting with Mr Baiocco at the London Hotel at which he *"started talking to him about his interest in buying EDD software"* but little else of detail, and certainly no specific discussion about the *"7.5 million"*, then clarified that actually he had no recollection of discussing EDD at that meeting at all, and that what he had said about having had such a meeting at the London Hotel where they had discussed EDD was *"wrong"*; he added:

[298]Mr Baiocco suggested that Mr Lepore might not have been at the meeting, but that he had met him before the meeting for coffee. But in his earlier evidence, he had been unequivocal that Mr Lepore was at the meeting with Mr Egan. Mr Baiocco plainly had no real recollection; his evidence was entirely reconstructed.

"I've corrected it, I do not recall that we discussed EDD."

2488. In light of the answers given under cross-examination, I consider it clear that whatever discussions there were at the London Hotel on 11th March 2009 they were more general and informal than the impression created in the witness statements. However, I think it likely (and this is borne out by later correspondence referred to in paragraph 2492 below) that, recognising the delay likely before it could be ready and able to do serving work, the possibility of Capax Discovery licencing e-Discovery software with the assistance of funding from Autonomy was floated, reflecting in this context the same general pattern which came to be established in the impugned VAR deals.

Evidence of an agreement after the London Hotel meeting but before 31 March?

2489. Mr Baiocco's evidence was that the meeting at the London Hotel was the only occasion on which he met Mr Egan prior to the deal; and though in re-examination Mr Egan was prompted by various emails (referred to at greater length in paragraph 2492 below) to state his belief that he *"did have discussions with Mr Baiocco after the London Hotel"* he had earlier stated when cross-examined that he had no reason to disagree with Mr Baiocco's evidence that the London Hotel meeting was their only meeting.

2490. In this curious position, of an alleged agreement on which the representatives of both of those said to have been parties to it insisted but neither of whom was ever able to date or place, the Claimants' case to the effect that the surrounding documentary and circumstantial evidence is such that it must have taken place ranged over a long time period and many events, as did (inevitably) the Defendants' response. The Claimants' written submissions well exceeded 100 pages in seeking to establish the inference, and the Defendants were almost as detailed in their rebuttal.

2491. I propose to consider the matters and events relied on by the Claimants as follows:

(1) the email exchanges immediately after the first Capax Discovery/EDD sale agreement;

(2) whether those involved were aware that Capax Discovery could not itself provide EDD servicing;

(3) other evidence of arrangements after 31 March 2009 suggesting prior agreement;

(4) any documentary evidence of arrangements thereafter made for Autonomy to support Capax Discovery;

(5) payments actually made by Autonomy to Capax Discovery under purchase orders issued by Capax Discovery for EDD services.

2492. The email exchanges following the London Hotel meeting seem to me to support my conclusion that the discussions there were preliminary, and did not focus on price or any settled *quid pro quo,* but did float the idea of a deal for Capax Discovery to purchase the EDD licence with money to pay for it being provided by Autonomy in some form:

(1) Mr Egan must have reported back to Mr Hussain after the breakfast meeting because on 12 March 2009 (the day following) Mr Hussain emailed Dr Lynch with the subject *"Capex [sic] deal"* and informing him that Mr Egan *"had a*

bite at a $5m deal". The day following that, in the context of updating Mr Hussain on a number of prospective deals, Mr Egan confirmed to Mr Hussain that *"John [Baiocco] called Rob [Sass] and said he was very interested in the pitch we presented at breakfast. Time to start to let him know it could be possible"*. Mr Hussain forwarded the email to Dr Lynch and Dr Menell.

(2) On the same day, Mr Lepore reported on a meeting with Mr Williams of Capax Discovery. Capax Discovery was evidently still exploring what kind of EDD project it wanted to do, and decided it would be necessary to produce a demo for Mr Jerry Hawk (Mr Baiocco's partner in Capax Discovery). Mr Lepore noted excitement on the part of Capax Discovery; and also that they had *"ideas about also not only developing eDiscovery software for those we sell to, but running it for them as well. I bet Wilmer would have interest in that kind of arrangement"*.

(3) Later on 13 March 2009 Mr Sass reported to Mr Egan on a call with Mr Baiocco. He wanted to move forward for a deal in Q1. He was proposing a meeting in Parsippany, New Jersey on 23 March 2009, and was still considering a broad range of possible deals (described as *"flavors on a proposal"*) of $5m, $10m, or possibly a lower entry point.

(4) On 18 March 2009, Mr Hussain sent Dr Lynch one of his many spreadsheets: on it was listed a $5 million deal with Capax Global, with a comment by the entry *"Indicated would like to do"*.

(5) No deal fee had been settled on even by 24 March 2009, as is evident from the documents below.

(6) The negotiations appear from the email evidence to have been carried on between Mr Baiocco and Mr Sass, though (contrary to what the Defendants suggested) with substantial background involvement on the part of Mr Egan.

(7) The parties' revenue expectations could be seen from the spreadsheet sent from Mr Sass to Mr Williams on 24 March 2009, in the revenue generation models. At that stage, a straight $5m fee was being proposed by Autonomy (see the "E-discovery proposal" tab).

(8) On 26 March 2009 Mr Sass sent a deal model with two options, one being a $7.5m option and the other a $5m option. This was the first evidence of a $7.5m option being suggested. There was evidence that a deal at that higher amount was promoted by Mr Egan to cover a gap in expected revenue for the quarter opened up by the collapse of a deal with Morgan Stanley which had been expected to close in the quarter. Mr Hussain's instant reaction as recorded in an email to Mr Egan responding to the news of the collapse of the Morgan Stanley deal was *"s**t – another piece of revenue gone. You definitely need $7.5m from capax."*

(9) The *quid pro quo* offered for the larger commitment of $7.5m on the part of Capax Discovery was a lower rate of royalty payable to Autonomy, suggesting (according to a 5-year model) a greater long-term return to Capax Discovery under the $7.5m option. Mr Baiocco had set his sights on revenues of the order

of a net $44m over 5 years, and naturally considered it an exciting prospect.[299] However, despite this, Mr Baiocco seems to have remained cautious, and it should be remembered that this was before the first of the VAR deals when the understanding that Capax Discovery would not be left exposed became part of the pattern.

(10) By 27 March 2009 no deal had yet been completed; and it is clear from email evidence that Mr Egan remained concerned that Mr Baiocco had or would develop *"cold feet again"*. Mr Sass confirmed by email in response that:

> *"...he is looking for some sweetners [Sic]. he mentioned meeting with the partners and wanting to lay it all out. essentially he sent tom[300]on a mission and tom came back empty handed. He sounded a bit concerned, so I want to nip asap. You may want to call him or reply all to my emails and assuage concerns."*

2493. No specific occasion when the idea floated at the London Hotel meeting was discussed is identifiable in that chronology, and it is a fair point against the Claimants and the credibility of Mr Baiocco's evidence that he never did pinpoint any place or time when that idea became an understanding on which he was prepared to rely. Mr Hussain's closing submissions sought to quash any notion that "Tom's mission" had anything to do with any handshake agreement, on the grounds that (a) on the Claimants' case any agreement had already been made some time earlier and (b) as head of sales Mr Leonard ("Tom") would not have been engaged in that sort of thing, but in *"sweetners [sic]"* which got the EDD operations up and running and securing new business. There is something in the latter point, reinforced by the likelihood that Mr Baiocco would have wanted to seek any confirmation of a handshake agreement himself, rather than through a messenger.

2494. Mr Baiocco's inconsistencies, and his failure to identify when the understanding eventually crystallised, were understandably much relied on by the Defendants in support of their case that (a) no settled formulation had ever been provided of what the alleged understanding was, even to the point that the Claimants' pleaded case varied from the case eventually put at trial; and (b) if there was any workable understanding reached between Mr Egan and Mr Baiocco in respect of the EDD transaction it was, at most, an *ad hoc*, reactive arrangement reached after the event in light of unexpected difficulties, and not such as in any event to affect revenue recognition at the (relevant) point of sale.

2495. As to (a) in the preceding paragraph 2494, I have had especially in mind that initially Mr Baiocco described the arrangement as being that Mr Egan would provide Capax Discovery with business that would provide it with the means to make its instalment payments (and see paragraphs 2446 to 2448 above). However, and although the Defendants dismissed Mr Baiocco's attempt to explain this as *"incoherent"*, I consider that the explanation he gave is understandable. His central point was that by 'business' he meant and understood 'provision of funds'; and I consider that the explanation probably lies in the fact that even at an early stage the mechanism for funds being passed

[299] As he confirmed in cross-examination.
[300] Mr Tom Leonard, who (according to Mr Hussain's closing submissions) acted as Capax Discovery's head of sales.

by Autonomy to Capax Discovery involved the placing of purchase orders for 'business'. That is how I understood the following exchange in Mr Baiocco's cross-examination, when he was asked to confirm whether his account that the handshake agreement was that *"Autonomy would provide enough EDD business to Capax to cover Capax's quarterly payments on the purchase of software…"* was true:

> *" Q. Is that what you told your lawyers at the time? I mean, it's a very different story from the one you're now giving to this court.*
>
> *A. It's one word difference. There's no chance they could have given me business in the beginning because we weren't set up or able to do the business.*[301]
>
> *Q. This is a completely different story. What this is talking about is the level of business that Autonomy would provide to give you enough to cover the payments plus a profit. That is a completely different story from the one you're now telling this court, isn't it?*
>
> *A. No, then the word "business" is wrong in there*
>
> *Q. Well did you-*
>
> *A. I don't know if I said "business"*
>
> *Q. Were you misleading the lawyers when you told them this?*
>
> *A. No, I was not trying to mislead anybody, I was there of my own volition so, no, I was not trying to mislead anybody. Ever."*

2496. In support of their alternative argument as to the timing of any understanding, and in addition to there being no identified time or place for when it was crystallised, the Defendants placed much reliance on what they depicted as a sudden dawning on Mr Baiocco that his enthusiasm had overlooked the extent of the task that confronted Capax Discovery in building an EDD business, followed by a rather desperate lunge for some support from Autonomy. This was presented as inconsistent with there having been, prior to then, any settled understanding. Dr Lynch highlighted the following in particular:

(1) A few days after the agreement, Capax Discovery received a proposal for a lucrative proposed deal with a company called Iovate Health Sciences Inc ("Iovate") for the provision of litigation search facilities in pending Canadian litigation with an estimated data corpus of 2.5TB and a contract price of around $400,000 to $450,000. That would have covered the first instalment due under the agreement with Autonomy. Preliminary assessment of the viability of the possibility of Capax Discovery becoming involved, perhaps using Autonomy's facilities, revealed quite how far Capax Discovery really was from being able

[301] I considered at one point that the explanation might be that at the time, Mr Baiocco was not distinguishing between Capax Global (which was already undertaking profitable business) and Capax Discovery (which was not), and that his main point that the word "business" was misplaced because Capax Discovery was incapable of undertaking any was an afterthought. But the fact that the understanding was for the provision of EDD business disposed of that to my mind.

to assist, and brought home to Mr Baiocco quite how long it would take to get his new project up and running.

(2) Dr Lynch suggested that it was this dawning which drove Mr Baiocco to enlist, after the deal, Autonomy's financial help via a rather frantic email from Mr Baiocco to Mr Sass very early (03:14 hours) in the morning of 6 April 2009 in the following terms:

> *"I really need to speak to you in the morning. As I said from the beginning of this deal, there are things we didn't know we didn't know. We rushed the process to get this done for you in Q1. We are feeling the pain of all that now. My understanding of the Keys to the kingdom was that we would have everything we needed to do e discovery etal. Steven [Williams] is saying that the contract is missing key elements. Can we please talk in the AM as early as possible? I pushed this thru against all the partners wishes to push it into q2 so we didn't make mistakes. I need help. Sorry to sound so dire, however my reputation is on the line here."*

(3) Dr Lynch pointed out that Mr Baiocco's email of 6 April does not mention or even hint at any prior agreement that Autonomy would be passing money to Capax Discovery in some way. Mr Baiocco sought to explain the omission on the basis that this had nothing to do with financial support and that what he was pressing for was software which had not been provided; but this did not carry conviction.

(4) Furthermore, when Autonomy responded, its answer came, (by email also dated 6 April 2009) not from Mr Sass (though he and Mr Sullivan were copied) but from Mr Egan, and it made no mention whatever of software but simply stated:

> *"Sushovan, Mike Sullivan and I identified $250k of business we would like Capax to handle for us last week. That would be a first job. Mike Sullivan should be in touch tomorrow."*

(5) Also consistent with the 6 April email having been intended by Mr Baiocco, and understood by Mr Egan, to be a cry for financial help rather than for software or a software fix is the activity which the email prompted. The focus is not on the provision of fixes for software, but on what was ostensibly a "first job" which was intended in reality as the promise of initial funding.

2497. Nevertheless, despite my scepticism and concerns about the lawyer-varnished witness evidence, the inconsistencies in Mr Baiocco's evidence (exacerbated no doubt by the push and pull of multiple meetings with lawyers) and the Claimants' inability to pin-point any particular occasion when any agreement was made, I am satisfied that at some point prior to the end of Q1 2009 and the signing of the deal, the parties became *ad idem*.

2498. In particular, I have concluded and find:

(1) Mr Baiocco and Mr Egan agreed to proceed on the basis that Autonomy would find a way or ways of getting money to Capax Discovery to enable it to pay instalments under the licence proposed and earn a profit as well and (as Mr Baiocco put it in his evidence in the US criminal proceedings) *"make sure on*

the back end that we got taken care of to pay it until we were up and running and able to do the work ourselves".

(2) That understanding crystallised at some time prior to the agreement on 31 March 2009. I do not accept the argument that the risk belatedly dawned on Mr Baiocco. I do not accept the Defendants' argument that Mr Baiocco was simply carried away by enthusiasm, and may also have underestimated the length of time required to get an EDD platform up and running. Mr Baiocco was undoubtedly exuberantly entrepreneurial; but in the particular context he was markedly more hesitant and deliberate, and needed to carry his partners with him; and he is not a fool. I reject the defence that if there was any such understanding, it post-dated the first Capax Discovery/EDD sale and (as Dr Lynch's closing submissions put it) *"amounted to no more than an ad hoc solution with a salesman to assist Capax with its instalment payments, by putting business Capax's way, as a stop-gap, until Capax were up and running."*

2499. In the end, it is a point that comes down to whether or not to believe Mr Baiocco. For all the doubts I had and have retained about his witness statement, his rejection in the course of cross-examination of the suggestion that he left it until after he had signed a $7.5 million deal to make arrangements to cover his exposure was authentic and convincing:

> *"Q. Can I suggest that if you reached any kind of arrangement with Mr Egan, it was after the licence agreement and all that he was doing was saying, "look, I'll find a way of getting you the money until you get set up and running"?*
>
> *A. Let me just be clear. Are you suggesting that I signed the $7.5 million deal and <u>then</u> made a deal to get paid on the backside of that <u>after</u> I signed the 7.5 million, is that what you're saying?*
>
> *Q. Well, I'll ask the question again. What I suggest is that, if you reached any kind of arrangement with Egan, it was after the licence agreement had been entered into?*
>
> *A. That would be <u>false</u>. I knew <u>flat out</u> when I signed it that we were going to get the money on the handshake deal."* [Emphasis intended to reflect inflection in Mr Baiocco's answers]

2500. I accept that evidence. It had the ring of truth and logic. It seems to me to be also consistent with the circumstantial evidence, and in particular the following:

(1) Mr Baiocco's consistent evidence was that there was no prospect of Capax Discovery being ready to do e-Discovery business for, at the very least, 6 months; and I consider it unlikely that Mr Baiocco and his partners would have committed to paying instalments in June without some reassurance such as is alleged. As Mr Baiocco himself put it in an email dated 4 March 2010 (see paragraph 2544(6) above), without some such assurance, *"we were nowhere near ready to do a deal like this."*

(2) Autonomy needed the deal; and for that it needed to provide a *"sweetener"* and reassurance. I have been persuaded that something, beyond optimism and greed, must have encouraged Mr Baiocco at this early stage in the Autonomy/Capax Discovery collaboration to go, at Autonomy's request, for the considerably larger deal.

(3) At some point in the last week of March, the decision was made and implemented by Mr Baiocco and his partners to form the new LLC, Capax Discovery. Whilst of course Mr Baiocco's ultimate purpose was for Capax Discovery to be the vehicle for what was a new venture distinct from Capax Global's business, he made it quite clear that it also was *"a way to mitigate risk. It was a way to say: if you don't pay, then we're going to mitigate how we may have to pay if you don't live up to your bargain."* What has struck me is not so much the suggestion that Capax Discovery's formation was a means of holding Autonomy to an understanding already established, but that Autonomy accepted both the introduction of this new, untested vehicle with no trade or financial history, and the blaring message it sent. Dr Lynch accepted that even if he did not personally know, it was well known within Autonomy that Capax Discovery was a new entity set up for the purpose, as contemporaneous emails made clear.

2501. Autonomy's pressing need to overcome Mr Baiocco's hesitancy about so large a commitment in order to fulfil its revenue forecast for Q1 2009, and its acceptance of the last-minute introduction of a newly formed entity without any financial ability to meet its obligations under the deal, seem to me to add considerable support to the Claimants' case. Mr Baiocco could not proceed without support; Autonomy could not achieve forecast if his reluctance was not overcome; Mr Egan could not legally bind Autonomy, but the agreed introduction of Capax Discovery meant that as a matter of fact Autonomy would have to abide by the understanding to preserve the credibility of the arrangement. These realities must have been recognised and accepted by both parties: in a sense, the assurances and the incentive to abide by them were inherent.

2502. I am also satisfied that but for these assurances, and the additional comfort provided that they would be honoured because Autonomy agreed to contract with the newly-formed Capax Discovery without right or legitimate expectation of recourse to Capax Global, Mr Baiocco would not have proceeded. On 31 March 2009 (the last day of Q1 2009), Autonomy Inc entered into a licence and distribution agreement with the newly-formed Capax Discovery, signed by Mr Egan on behalf of Autonomy Inc and Mr Baiocco on behalf of Capax Discovery.

Further defences if there was a pre-contract understanding

2503. In case of such a conclusion, the Defendants contended that, even if there was a collateral understanding between Mr Egan and Mr Baiocco, it was personal to them and did not bind Autonomy or implicate the Defendants.

2504. Dr Lynch maintained that he had very little involvement in any of these transactions and that he certainly had no knowledge of any such understanding. Mr Baiocco only met Dr Lynch briefly once at a conference and did not discuss with him any of the transactions referred to in his witness statement. Mr Egan did not suggest that he had any discussions with Dr Lynch in relation to the EDD arrangements and he accepted in cross-

examination that there was no interaction with Dr Lynch of which he could give evidence.

2505. He did not accept that other members of Autonomy's management knew of it either:

(1) He pointed out that neither Mr Baiocco nor Mr Egan had suggested that any other Autonomy staff member was party to the relevant conversations.

(2) He contended that individuals far closer to the underlying business than he was did not know; and he relied especially on the evidence of Mr Sullivan, who was the Claimants' witness, the CEO of Zantaz (which was the umbrella company for e-Discovery business) and the person subsequently involved in giving and requesting approval on a number of purchase orders for services from Capax Discovery (which became the vehicle for payments to Capax Discovery used to fund instalments, as explained below) that he was not aware of it. He stressed that the Claimants had expressly disavowed any allegation that Mr Sullivan was implicated in any wrongdoing.

(3) As to Mr Egan's evidence that Mr Hussain did know and approved the arrangements, Dr Lynch drew my attention to the fact that this was a story told in the statement of facts attached to Mr Egan's deferred prosecution agreement with the US prosecuting authorities, and his own liberty depended on sticking to that script. Dr Lynch submitted that the evidence as a whole is far more consistent with Mr Hussain not being aware of the arrangements.

(4) He submitted that there was no basis for thinking that Mr Scott, Mr Smolek, or Ms Watkins knew of the arrangements at the time, or that any of them appreciated that no e-Discovery work was, or was capable of being, done by Capax Discovery.

2506. This defence gives rise to a number of questions, not least how the reality that Capax Discovery was incapable of providing EDD servicing can possibly have been kept so secret for so long, from so many who were undoubtedly involved in the process of Autonomy placing orders for it and paying accordingly. I shall return to the question of the Defendants' personal knowledge later. For the present I focus on three aspects of the issue as to the state of awareness within Autonomy of (a) the purchase orders for EDD servicing and the pattern of payments by Autonomy to Capax Discovery in the period Q2 2009 to Q4 2009; (b) the capacity of Capax Discovery to undertake EDD servicing and other work; and (c) the omission of Mr Kanter from Dr Lynch's roll-call.

Autonomy's purchase orders and payments to Capax Discovery Q2 2009 to Q4 2009

2507. In the months that followed the first Capax Discovery/EDD sale, Capax Discovery's largest, perhaps exclusive, source of funds was payments made to it by Autonomy under purchase orders for *"outsourced specialised EDD services"* which I am satisfied and find Capax Discovery was not able to provide. The process was elaborated by Mr Egan as follows:

> *"Autonomy submitted a series of purchase orders to Capax Discovery for EDD services to be rendered; Capax then billed, and Autonomy paid, for services that were not actually performed and that, for a substantial period of time,*

Capax Discovery was not capable of performing…Mr Hussain and Dr Lynch approved these payments…

…

I generated emails that created the appearance that Capax was actually providing overflow EDD services for Autonomy. In those emails I referenced Autonomy's true bandwidth constraints with respect to its EDD processing and used those constraints as a stated reason for paying Capax for EDD services that were not performed…I knew that Mr Kanter and Mr Hussain had made similar pre-textual statements. Mr Kanter confirmed: "I'm OK with the subcontracting on the EDD side as we have volume issues" and Mr Hussain stated: "We have been subcontracting EDD services to Capax". In fact, the payments to Capax Discovery were designed to allow Capax Discovery to pay for the license that we sold to it so that Autonomy could recognise $7.5 million of revenue in Q1 2009."

2508. This needs a little unbundling. The first point to explain is my finding that Capax Discovery was simply unable to and never did provide the services for which it was paid by Autonomy pursuant to the series of purchase orders.

2509. In making that finding, I have considered Dr Lynch's evidence, which was not challenged, that *"Capax could have performed the service work anywhere it could access Introspect software, whether at its own facilities, at the customer's facility if the customer had Introspect or at Autonomy's Boston office where Introspect was run."* I also note that from the time that the deal was signed Capax Discovery was sending employees to Autonomy's Boston EDD centre for training and by July 2009 Capax Discovery was being held out in promotional material as providing EDD services and hosted archive services, which may have influenced some Autonomy personnel (see below). The Defendants also sought to contend, both (in the case of Mr Hussain) in the US criminal proceedings and in these proceedings, that although it was some time before it could establish its own data centre, Capax Discovery did almost immediately develop an EDD service capability which it did make available to Autonomy and for which it was properly paid.

2510. However, it is important to note the limit of Dr Lynch's evidence on the point. Dr Lynch did not say that Capax Discovery actually did provide such services; just as it never did provide the services referred to in the promotional material. Nor was Mr Baiocco's evidence challenged that Capax Discovery was unable itself to provide e-Discovery services to customers until 2011, and probably did not actually start doing so until December 2011. In particular, the evidence was, and I find, that Capax Discovery could not and did not provide the services ordered from it by Autonomy in a sequence of purchase orders over the course of two years which nevertheless Autonomy paid in full. The pattern which emerges is clear: Autonomy was repeatedly paying for non-existent services. Not only does that support the Claimants' case that there was an understanding, and the conclusion I have reached, since it is difficult to posit such a pattern unless there was some such understanding[302], it also invites the question how it can be that only Mr Egan knew about this extraordinary state of affairs, notwithstanding the involvement of

[302] Its timing is a different matter, I accept.

a number of Autonomy personnel in the implementation and approval of the purchase orders.

2511. The Claimants relied on the following train of events:

(1) The pretence commenced, almost immediately after the first Capax Discovery/EDD deal was signed, with Mr Egan's email of 6 April 2009 which I have already cited in paragraph 2496(4) above, in which Mr Egan, in response to a cry for help from Mr Baiocco, wrote that Mr Hussain, Mr Sullivan and he had:

> *"…identified $250k of business we would like Capax to handle for us last week. That would be a first job. Mike Sullivan should be in touch tomorrow."*

(2) It is apparent from email exchanges that the request came from Mr Hussain and that Mr Smolek consulted Mr Scott (COO and General Counsel of Autonomy Inc) and Ms Cynthia Watkins (Autonomy's Corporate Controller) about Mr Hussain's "*request in correctly quantifying the $250k PO requests service for Capax & MicroLink LLC with Joel [Scott] & Cynthia [Watkins]*". Mr Smolek then reported to Mr Hussain that Mr Scott had:

> "*resolved that Stouffer [Egan] would be best to establish that mechanism, as he determined that it wouldn't fall under existing contract terms*".

(3) In his response the same day (16 April), Mr Hussain expressed impatience with the fact that a purchase order had not yet been given to Capax Discovery, saying that he had:

> "*…no idea why this is so complex Create a PO for outsourcing edd processing as we did last year. Send details of PO (gb [gigabytes], price) to stouff Egan], pete [Menell], Sullivan and me. We'll approve*".

(4) Later that day, Mr Smolek sought authorisation from Mr Hussain and Dr Menell to issue a purchase order to Capax Global for "*Outsourced Services"* described as *"Specialized EDD Services*" in the amount of $250,000. Mr Hussain provided his approval. Dr Menell indicated that Mr Sullivan should be *"second approval for these".* In Mr Sullivan's witness statement he said he was *"puzzled by this since I was not aware that Capax was doing any EDD processing work for Autonomy".* He said that he raised the matter with both Mr Hussain and Mr Kanter who referred him to Mr Egan. His recollection was that Mr Egan's explanation had *"a certain vagueness"* but the gist was that:

> *"there was a commercial arrangement between Autonomy and Capax for Capax to undertake e-Discovery projects for which it would be paid by Autonomy. Mr Egan assured me that the work was being performed and I should therefore sign-off on the purchase order."*

(5) Mr Sullivan then emailed simply *"ok"* that afternoon. Autonomy sent the purchase order to Mr Baiocco the next day (17 April). Initially, the purchase

order was incorrectly issued to Capax Global, and it was reissued by Autonomy on 22 April 2009 to Capax Discovery. The following day, 23 April 2009, Capax Discovery invoiced Autonomy in the amount of $250,000 for "*Specialized EDD Processing*", corresponding to the purchase order.

(6) In the meantime, Mr Baiocco was pressing for more help in view of the impending payment instalment date at the end of the month, when Capax Discovery would owe $500,000. Mr Baiocco emailed Mr Sass on 21 April 2009 asking if there was "*Any movement*".

(7) When Mr Sass replied that Mr Egan was tied up in a meeting, Mr Baiocco replied immediately:

> "*Im running out of time for today. I have a MS thing I need to be at from 4pm on. Can you talk to him? The deal is that Autonomy will stay ahead of us (champagne smacking)! We have 500k due in ten days and a PO for 250k. we also talked about front loading the PO's. We have no ability to help ourselves yet. We should be getting enough po [purchase order] monies to get us ahead by the end of April. I am sure I didn't misunderstand the deal? Correct? Don't mean to sound like a whiner, but I guess I am at this point.*
>
> *PLEASE HELP !"*

(8) The message appears to have reached Mr Egan because, on 23 April 2009, Mr Sullivan emailed Mr Smolek saying that Mr Egan had "*asked that we issue another PO to Capax. $270k is the amount. Could you get this in process?*". Together with the earlier purchase order for $250,000, this would bring the total amount that Autonomy was proposing to pay to Capax Discovery for non-existent "*Outsourced Specialized EDD services*" to $520,000.

(9) Mr Smolek sought authorisation from Mr Hussain and Mr Sullivan to issue this second purchase order on 24 April 2009, and Mr Egan asked Mr Sass to let Mr Baiocco know to expect another purchase order within 24 hours. As before, the purchase order was for "*Outsourced Services*" described as "*Specialized EDD Processing*". Mr Sullivan and Mr Hussain gave their approvals. The next day, 28 April 2009, Capax Discovery invoiced Autonomy for $270,000.

(10) Notwithstanding that the purchase orders had been approved by Mr Hussain and Mr Sullivan, by May 2009, Autonomy had not paid anything to Capax Discovery. Capax Discovery had also not paid Autonomy, which the Claimants suggested was consistent with the arrangement that Autonomy would put Capax Discovery in funds before it paid Autonomy.

(11) In the meantime, on 15 April 2009, and again on 11 May 2009, Mr Baiocco sent Mr Egan a list of the hardware that he needed to set up Capax Discovery's e-Discovery platform. Mr Egan then forwarded the list to Dr Menell and Mr Hussain, saying "*This is the HW [hardware] that Capax is looking at for starting their EDD processing facility. Can you have someone comment on whether the specs look right?*". From Mr Egan's email, it was clear that Capax Discovery did not yet have a facility for e-Discovery processing. This did not apparently prompt any questions from Mr Hussain or Dr Menell as to why

Autonomy had issued purchase orders in purportedly outsourcing e-Discovery processing services. The Claimants submitted that this is consistent with Mr Egan's evidence that Mr Hussain and Dr Menell were aware that this was the case: by analogy with the Sherlock Holmes story, they were the dogs that did not bark.

(12) The delay in receiving funds from Autonomy and assistance with the hardware order led to Mr Baiocco emailing Mr Sass again for help. His first email of 11 May 2009 simply said "*HELP !!!!!!!*". Mr Sass asked Mr Baiocco to send an email as he was travelling. In response, Mr Baiocco wrote:

> *"Getting nowhere with a bunch of promises that were made. I just need to have a schedule of what's going to happen when. Don't want to come off as a complainer, but things are [not] happening in the timeframes that were promised.*
>
> *I.E*
>
> *Champagne smacking profit (edd invoicing) FRONT LOADED*
>
> *Hardware order (crippled without it)*
>
> *Buyout datacenter hardware (promised EASY to do)*
>
> *EU business*
>
> *Please don't share this email. I know how this might sound outside of you and I, but there wasn't a second that anyone wasn't available when they needed me to sign the deal. Now I need to stalk to get the bare minimum.*
>
> *I want this to be perfect for a million reasons, first and foremost, so we can do this AGAIN when you really need it!*
>
> *Let me know your thoughts."*

(13) Mr Sass asked Mr Baiocco to leave it with him for 48 hours and noted that Mr Egan was "*getting you some stuff as I write this (meaning he is paying attention)*".

(14) At the end of May 2009, Mr Chamberlain emailed Ms Watkins, copying Mr Hussain, in relation to the e-Discovery purchase orders. Mr Chamberlain noted that they should have been approved by both Mr Hussain and Dr Lynch given the amounts involved.

(15) The following week, on 8 June 2009, Mr Smolek sought Dr Lynch's approval:

> *"Hi Mike,*
>
> *Steve Chamberlain has directed that we obtain (ex post) your authorization to the following four PO Requests (in addition to the below listed standard authorizations previously granted per Corp Policy). If similar such requests arise in the future, per Steve C., we will seek to obtain your authorization within the standard process framework, by obtaining an AND [sic] authorization for both yourself*

& Sushovan at the highest listed level policy prior to issuing a PO (vs. the OR currently dictated per policy under which these were processed).]

Please at your earliest convenience - review & reply with your authorization to the following below listed four purchase requests.

All below listed individual approvals are also attached.

#1 [Tracking #04072009-7] PO Request

REQUESTOR: Stouffer Egan

VENDOR: Capax Discovery LLC

PO LINE DESCRIPTION: Outsourced Specialized EDD Services [1,250 GB @ $200.00/GB] TOTAL COST: $250,000.00

APPROVED BY: Sushovan Hussain Apr 17, 2009; Mike sullivan Apr 17, 2009

…

#3 [Tracking #04242009-1] PO Request

REQUESTOR: Stouffer Egan

VENDOR: Capax Discovery LLC

PO LINE DESCRIPTION: Outsourced Specialized EDD Services [1,350 GB@ $200.00/GB]

TOTAL COST: $270,000.00

APPROVED BY: Sushovan Hussain Apr 27, 2009; Mike sullivan Apr 27, 2009"

Dr Lynch wrote: *"ok"*. He did not ask any questions.

(16) On 8 June 2009 Ms Watkins asked Mr Sullivan (by email) to sign off and inform her that work had been completed on EDD invoices from Capax Discovery in order that Autonomy could process them. Mr Sullivan signed off: "*Yes – work has been completed."* Again, Mr Sullivan's conduct is not impugned and Mr Egan does not suggest that he was aware of any arrangement. Mr Sullivan must have been given that impression by Mr Egan, whose evidence was that he "*wrote emails that gave the impression that work was being done*".

(17) On 22 June 2009, a few weeks after Dr Lynch's approval of the purchase orders, Autonomy paid Capax Discovery $520,000.

(18) The following day, 23 June 2009, Capax Discovery paid Autonomy $500,000 in respect of the first instalment under the first Capax Discovery/EDD sale. This was almost two months after the instalment had fallen due. Mr Baiocco's unchallenged evidence was that Capax Discovery had not paid earlier because it had not been given the funds by Autonomy to do so.

(19) At around this time, Mr Egan had agreed to purchase hardware to the value of approximately $800,000 for Capax Discovery to use with its EDD system, half of which was sent to Dr Lynch for approval by Mr Smolek in July 2009 and half of which was sent to Dr Lynch for approval in October 2009. Capax Discovery had first asked for this in April 2009, and repeated the request in May 2009. There was no criticism by the Claimants of the hardware purchase as such; but the Claimants cited an email from Mr Egan to Dr Menell and Mr Hussain (dated 11 May 2009) describing the hardware order as what *"Capax is looking at for starting their EDD processing facility"* as making clear that by that time Capax Discovery did not yet have a facility of its own for e-Discovery processing. The hardware request sent by Mr Smolek to Dr Lynch on 8 June 2009 identified Mr Egan as the requestor and confirmed Mr Sullivan and Mr Hussain as having already given their approval. Mr Sullivan was first approver. Dr Lynch wrote simply, *"ok"*.

2512. The next instalment under the first Capax Discovery/EDD sale was $968,750 and was due on 31 July 2009. That brought forward once more the urgent need to find funds to enable Capax Discovery to pay.

(1) On 7 July 2009, when Mr Smolek contacted Mr Egan saying that he had sent the hardware purchase order to Dr Menell for approval, he also explained that he had spoken with Mr Baiocco, who was expecting "*multiple more POs to be issued in the very near term*" and wanted early commitments on dates/amounts so he did not need to "*keep hounding Autonomy to meet his expectations*". Mr Egan responded:

> "*We have a large volume of EDD processing at the moment and will be sub-ing quite a bit to them. I am with Mike Sullivan and Pete [Menell] this evening and we will get you details quickly*".

Mr Egan told me in cross-examination that this email too was pretextual, and was intended to provide a record consistent with what he and Mr Hussain had agreed would be the stated reason for the payments to Capax Discovery. When it was put to him by Mr Miles that *"this was something cooked up with Mr Baiocco"* Mr Egan responded that this was not so; rather, he and Mr Hussain had "*cooked it up*" together and then *"proposed it to Mr Baiocco"*. In light of the antecedent history described above, I accept that evidence.

(2) On 9 July 2009, Mr Sullivan asked Mr Smolek to prepare another $250,000 purchase order for eDiscovery work for Mr Sullivan's approval. Mr Sullivan approved the purchase order on the same day (9 July 2009), following which Mr Smolek sought Mr Hussain's approval. Mr Hussain provided his "*ok*" the same day. Mr Hussain also approved the first part of the hardware purchase he had asked Mr Egan to split in two a few weeks earlier, as did Dr Menell.

(3) Next in the approval chain was Dr Lynch. Mr Smolek emailed him on 10 July 2009, saying:

> *"Hi Mike,*

Please at your earliest convenience - review & reply with your authorization to the below listed two purchase requests (requiring CEO authorization per Steve Chamberlain).

All below listed individual approvals are attached.

#1 [Tracking# 07092009-1] PO Req

REQUESTOR: Stouffer Egan

VENDOR: Capax Discovery LLC

WHAT: Outsourced Specialized EDD Services 1,250 GB@ $200.00/GB

COST: $250,000.00

APPROVED BY: Mike Sullivan July 9, 2009, Sushovan Hussain July 10, 2009 [attached]

#2 [Tracking # 07092009-2] PO Req

REQUESTOR: Stouffer Egan

VENDOR: Capax Discovery LLC

WHAT: Reimbursement of Hardware & Software (procured from vendor Dell) needed to drive partnership acceleration efforts. Full Dell quote support attached approval on partial listing as detailed here: Sub-Total Cost Part# Description

$30,562.32 493005440 Software Licensing

$682.75 493007331 VMWare Workstation

$25,197.89 493024437 (VMWare Server Vl3) Latest Version vSphere 4 Enterprise

$179,290.97 493052754 CX4 Storage

$75,240.77 493053552 Brocade Switches

$105,396.17 483285873 M1 OOOe/Biade M600 Chassis 1

COST: $416,370.87

APPROVED BY: Pete Menell & Sushovan Hussain July 9, 2009 [attached]"

(4) Dr Lynch provided his usual "*ok*" later that day. Dr Lynch's evidence when cross examined, was that the payment was in respect of "*capacity which could be called on at short notice in order to deal with peak processing*". Dr Lynch told me that his understanding that *"that's what I thought we were buying"* came from information *"that would have come up, presumably ultimately, from Mr Egan… since he was the person that told that into the system"*, but that he had not spoken specifically to anyone within the management team. He added:

> *"What I didn't know was whether it was being used or not, but I would have expected the person requesting the POs to have made sure that there was a reasonable level of usage."*

(5) A few weeks later, on the morning of 31 July 2009, Mr Baiocco emailed Mr Egan, noting "*Today's the 31st. can you please update me on the PO's*". That morning, Mr Baiocco also called Mr Sass. Mr Sass relayed this:

> "*I received a call from John Biaocco [sic]. He indicated that he is waiting for 4 po's [purchase orders] at 250k each and asked that I reach out for status as he has an invoice due. Please advise*".

It is clear that Mr Baiocco was expecting purchase orders totalling $1 million from Autonomy because Capax Discovery's second instalment (in the amount of $968,750) fell due that day. Mr Sass made no attempt to disguise that fact in his email. Mr Sass forwarded his email to a wider group, including Mr Hussain and Mr Chamberlain, saying that he was re-sending it because Mr Smolek and Mr Hussain had limited access to email.

(6) Later on 31 July 2009, Mr Egan forwarded this exchange to Mr Kanter, Mr Sass and Mr Smolek, copying Mr Sullivan, saying:

> *"Andy,*
>
> *I think we discussed in UK. Can your group pick this up? Mike Sullivan can provide the what, but it needs you to then get the approvals done and manage the pos out on time."*

(7) Mr Egan and Mr Kanter appear to have had a discussion in the UK about the e-Discovery purchase orders. Shortly after Mr Egan sent this email, he replied to Mr Baiocco's email earlier that day, apologising for the delay and saying "*Sushovan is on vacation so we've routed through Andy Kanter our COO. Should be forthcoming*". Mr Kanter eventually took over the purchase order process, which the Claimants relied on as further undermining the suggestion that the arrangement between Autonomy and Capax Discovery was a secret confined to Mr Baiocco and Mr Egan.

(8) Mr Smolek prepared a purchase order for $1,000,000 for "*Outsourced Specialized EDD Services*", which was approved by Mr Sullivan on 3 August 2009 and by Dr Lynch and Mr Hussain on 6 August 2009. Dr Lynch told me that he did not feel the need to question anyone about it, and did not do so, in light of the prior approval of it by numerous people and the fact that it was a repeat purchase.

(9) The Claimants noted that by this point, Dr Lynch had approved payments to Capax Discovery totalling $1.77 million ($520,000 + $250,000 + $1,000,000) without questioning anyone specifically about the payments. They submitted that either Dr Lynch questioned the outsourcing arrangement and was informed of the true position, it being no part of Dr Lynch's pleaded case that he was

misled by, for example, Mr Hussain and Dr Menell – who, in addition to Mr Egan, knew the true position – or he did not ask any questions because he was already aware of the arrangement.

(10) Although the purchase orders had been approved, it took Autonomy until 30 September 2009 to pay Capax Discovery. During this time, Capax Discovery made no payment to Autonomy, even though payment was nominally due at the end of July 2009. However, Capax Discovery then paid the second instalment due under the first Capax Discovery/EDD sale the very same day that it received $1 million from Autonomy.

2513. In my judgment, the sequence of these events, the correlation between the imminence of Capax Discovery's need to meet payment obligations under the first Capax Discovery/EDD sale agreement with purchase orders in amounts sufficient to enable that, and the apparent automaticity of the approval process for each of the purchase orders raised, all support the case that there was some sort of arrangement for Autonomy to subsidise Capax Discovery irrespective of whether at the date of payment Capax Discovery had any capability of providing the services purchased, and indeed notwithstanding that it did not.

2514. In addition to the points already noted, of particular significance to my mind are:

(1) Mr Egan's email to Mr Baiocco dated 6 April 2009, which I have concluded was pre-textual, was circulated to both Mr Sass and Mr Sullivan: neither contradicted its account that it was Mr Hussain, Mr Sullivan and Mr Egan who had identified "$250k of business" which none of them had any grounds to suppose Capax Discovery could handle as the basis for a purchase order.

(2) It is clear that Mr Hussain was at the centre of the purchase order process, and the procurement and payment for services which he had no reason to think could be provided so shortly after the first deal and Capax Discovery's formation. Further, Mr Hussain knew that Capax Discovery was a fledgling company, that it had no business of its own and that Mr Baiocco had made plain that it could not rely for help from Capax Global.

(3) The subsequent emails referred to in (2), (3) and (4) in paragraph 2511 above confirm that Mr Smolek, Mr Scott, and Ms Watkins were involved as well as Mr Hussain.

(4) Mr Baiocco did not confine to Mr Egan his references to the arrangement between them. He was open about Capax Discovery's inability, initially at the least, to pay out of its own resources; his email stating *"We have no ability to help ourselves yet"* and its obvious further reference to a funding plus profit arrangement to get Capax Discovery *"ahead"* by the time the first instalment became due at the end of April was, it will have been seen, written to Mr Sass when Mr Egan was not available; see (7) in paragraph 2511 above.

(5) Mr Kanter was also involved from the outset: see (4) in paragraph 2511 above.

(6) Mr Sullivan appears to have known at the time, or at least suspected, that Capax Discovery was not yet capable of doing processing work (see (4) in paragraph 2511 above).

(7) It would have been obvious to them all that Mr Baiocco's pressure on Autonomy was tied to impending instalment dates, and payments by Autonomy depended upon and correlated with payments by Capax Discovery.

(8) Autonomy's and Capax Discovery's need and appetite for mutual assistance is apparent: for example, and as the Claimants submitted, the references to Autonomy's need to sign the deal and to doing this *"AGAIN when you really need it"* (see (12) of paragraph 2511 above) reinforce their case that the arrangement was driven by Autonomy's revenue recognition requirement, which might well recur.

(9) Mr Kanter became central to the operation, and the fact that he took over the e-Discovery purchase orders seems to me to confirm the direction of the process by the core management.

(10) The automatic unenquiring approvals sought from and provided by both Dr Lynch and Dr Menell are difficult to explain unless they too were complicit.

No documentary support for purported outsourcing of eDiscovery services

2515. The Claimants' case was that the notion that e-Discovery services were being provided to Autonomy by Capax Discovery was a pretence. I do not think that is entirely justified:

(1) There is evidence, for example, that by August 2009, Capax Discovery employees, who had been sent to Autonomy's Boston data centre for training, were also providing *ad hoc* consultancy services. An email from Mr Scott to Mr Smolek dated 3 August 2009 noted this and recorded also that Mr Sullivan was expecting *"that they would be billing us for their services and wanted to be sure that we track any amounts we are paying them for those services and include them in tally of payments made out to Capax."* Mr Smolek's reply stated *"Yes – makes sense. Accordingly, going forward I will amend PO Requests to reflect tally of payments made to Capax."*

(2) Further, by October 2009, Capax Discovery was apparently confident that it had trained human resources for EDD processing. Thus, for example, on 20 October 2009, Mr Cox of Capax Discovery emailed Mr Loughran of Autonomy asking whether they might be deployed:

> *"Have resources on the bench for I6,* [a reference to Introspect EDD projects] *and would very much like to get them on a I6 project. Do you have anything in the works that we could jump on?"*

2516. That said, however, there is nothing to suggest that there was any basis at all for the initial pre-August purchase orders. Further, there is nothing to quantify the work done in August and later, or the charge for it; nor is there any evidence to suggest that in the event any charges were included in any EDD purchase orders, which were invariably in round figure amounts, and certainly did not give any appearance of incorporating labour charges.[303] There is a conspicuous lack of any documentation of the kind which would be expected in such a context. There was no statement of work, no order form, no

[303] Conceivably, such charges may have been swept up into what was described as a *"catch-all"* category described in paragraph 2541 below.

procurement or ordering document, no agreement to evidence the outsourcing except the purchase order and nothing to record the place, time and value of the outsourcing said to be taking place. Dr Lynch accepted in cross-examination that he would have expected there to be *"more paperwork than that"*.

2517. This contrasted starkly with the position relating to the EAS support services that (it is common ground) were actually being provided by Capax Global. In that context, the documentary record was substantially complete, undermining also any suggestion of some systemic aberration or neglect.

2518. A similar contrast was provided by a comparison between the approval process for EAS support services properly provided by Capax Global and the EDD purchase orders which were simply the machinery for payments for non-existent services. Thus, for example, in an email dated 12 November 2009 from Mr Hussain to Mr Egan and Mr Smolek (copying Dr Menell and Mr Kanter) Mr Hussain carefully adumbrated six questions to be answered before approval of *"the EAS part"* (including as to whether Capax Global had enough capacity to provide support) whereas all Mr Hussain noted in relation to the second part was: *"Regarding the EDD – I would like Andy to approve."* In an email later in the same thread, Mr Crumbacher noted that he had *"NO INSIGHT into the EDD."*

2519. That, and a request from Mr Scott asking for a table showing the amount of revenue Autonomy received from Capax (both entities) and the amount Autonomy paid to Capax Discovery in respect of the e-Discovery and EAS then prompted Mr Crumbacher to ask Mr Smolek for some *"help with the EDD numbers…"*. When Mr Crumbacher reported back to Mr Scott (the same day) he stated:

> *"I talked to Phil [Smolek] about the EDD subcontracting "process". Long story short, there really isn't one. Sullivan and Stouffer approve sending EDD processing work to Capax at a processing rate of $200/GB. There is no statement of work, order form, contract, or other ordering document or agreement to evidence the outsourcing of these services, other than a PO. Further, there is no specific outsourcing agreement under which we would outsource the EDD processing work in this manner; the EDD License Agreement contemplates them paying us for EDD processing work, not the other way around.*
>
> *So far, we've paid $1,770,000 for these outsourced EDD services. An additional PO is open (not finally approved/issued) for an additional $250,000.00, making the grand total of our EDD processing services $2,020,000.00 to date. Going forward, Andy Kanter is to be involved in approving the EDD outsourcing POs…"*

2520. Moreover, in his witness statement in these proceedings, Mr Sullivan (whose honesty was not impugned) stated that, though as CEO of Zantaz he *"had detailed oversight of its EDD business"*, he did *"not believe that Autonomy needed standby EDD support services"*. He added that he:

> *"knew of no instance of EDD work being outsourced to Capax or any other third party. When capacity constraints did arise, as in the case of our extremely large EDD contract with BP, Autonomy scaled up its operations by adding hardware and hiring additional staff to handle the extra workload."*

2521. Whilst I have harboured some reservations about this evidence (which, of course, could not be tested by cross examination), and its consistency with the evidence Mr Sullivan had given in the US criminal proceedings (which was so tested) in this regard its central point chimes with what Mr Crumbacher and Mr Smolek had observed: that there was no support beyond the purchase order and their approval for what by December 2009 amounted to payments by Autonomy to Capax Discovery of a total of $2,520,000 (all of which was used by Capax Discovery to pay instalments due under the first Capax Discovery/EDD agreement by that time totalling $2,437,500).

2522. I have concluded and find that, in addition to Mr Hussain, Dr Menell and Mr Kanter knew that:

(1) Capax Discovery had not the means to undertake substantial (if any) e-Discovery processing work as envisaged by the series of purchase orders.

(2) The purchase orders had been devised principally by Mr Egan and Mr Hussain, as a means of getting funds to Capax Discovery to enable it to pay instalments due under the first Capax Discovery/EDD sale, as was necessary to maintain the presentation of the sale to auditors and in the accounts as one from which revenue should be recognised.

(3) The way the purchase orders were (a) commandeered by Mr Hussain and/or in anticipation of instalment dates under the first Capax Discovery/EDD sale then (b) processed on demand for the round figure required to pay such instalments without demur, further consideration or request for background supporting documentation, and lastly, (c) followed by invoices which were automatically approved without enquiry or any actual evidence, and simply on the basis that another person in the rung of approvers had given their approval,[304] seems to me consistent only with them being the pretence asserted by the Claimants. They were in reality payment orders made out to Capax Discovery.

(4) The various emails suggesting that Autonomy actually needed and expected the work to be done by Capax Discovery because of excess demand for which it required overflow capacity were contrived.

(5) None of this could, of course, be revealed to Deloitte.

2523. I need make no finding about what Mr Sass and/or Mr Sullivan knew. I shall return to Dr Lynch's involvement and knowledge in paragraphs 2575 to 2588 below. I turn to considering the reliance placed by the Defendants on Deloitte's approval of revenue recognition.

Deloitte's consideration of the first Capax Discovery/EDD sale

2524. The Defendants placed reliance on Deloitte's review and approval of the revenue recognition on the sale agreement. It seems to me to be clear that this purported reliance was unjustified. It is worth exploring briefly the principal reasons why that is so, because

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[304] The exchange of emails between Mr Sullivan and Ms Watkins on 8 June and 10 June 2009 illustrates this. Ms Watkins stated: *"I spoke with Stouffer on Thursday last week in regards to the EDD invoices from Microlink and CAPAX and he believes that you will be able to sign off and confirm work has been completed in order for us to process. Please review the attached invoices and provided [sic] your approval and confirmation…"* All Mr Sullivan was prepared to state in response was: *"Yes – approved as I understand MRL has already approved as well."*

as well as showing that if they had known the true position, Deloitte would never have approved revenue recognition, it provides a broader insight into how Autonomy dealt with Deloitte to secure its revenue aims.

2525. First, Deloitte was not told about a letter from Mr Baiocco dated 31 March 2009 stating in terms that Capax Global LLC was *"a separate and distinct entity from Capax Discovery LLC. All contractual obligations will be between Capax Discovery LLC and Autonomy only"*. Secondly, Deloitte were never informed that there was a *"handshake"* agreement between Mr Egan, acting on behalf of Autonomy and with Mr Hussain's authority, and Mr Baiocco, acting on behalf of Capax Discovery, pursuant to which Autonomy had agreed to fund Capax Discovery's payments to Autonomy by channelling funds to Capax Discovery for fictitious services. Both provided clear grounds for refusing revenue recognition.

2526. Mr Baiocco's letter was no doubt intended to negate any expectation that Capax Global would stand behind its fledgling subsidiary, and drove home the point that a reason (the Claimants suggested the principal reason) for forming the new entity and making it the sole contracting party with Autonomy was to insulate Capax Global. As it happened it also left Autonomy in effect committed to funding Capax Discovery's commitments until it developed the EDD business (since otherwise artificiality would be revealed anyway). Mr Sass forwarded Mr Baiocco's letter to Mr Egan, Ms Watkins and Mr Crumbacher. It seems to me to be most unlikely that Mr Hussain was not told about it: and I infer that he was. Yet Deloitte were not told. At the very least the letter would have raised serious, probably unanswerable, questions about collectability, which I infer was the reason that it was not shown.

2527. As it was, Deloitte's working papers make clear that Deloitte approved revenue recognition on the assumption that parent would stand behind subsidiary, and Capax Global had proved reliable and was financially strong. Both experts were agreed that if recourse was only against Capax Discovery it would not have been appropriate to recognise revenue; and that, as it seems to me, was the significance of Mr Baiocco's letter, which plainly should have been disclosed to Deloitte.

2528. Secondly, even on the Defendants' case that any agreement or understanding post-dated the first Capax Discovery/EDD deal, it was in place before Deloitte approved the quarterly statements. Mr Egan's evidence was that Mr Hussain knew and approved of the handshake agreement and yet Mr Hussain did not disclose its existence to Deloitte. The Claimants invited me to find that this was because Mr Hussain knew that it would have precluded Autonomy from recognising revenue from the first Capax Discovery/EDD sale. Mr Welham explained in his witness statement at Welham 1 §120:

> *"If Autonomy had indeed agreed to make payments to Capax Discovery for fictitious EDD services in order to fund the EDD licence fee instalment payments due to Autonomy, I do not believe that we would have concluded that the revenue on the 31 March 2009 sale could be recognised. A side agreement of this kind would have been inconsistent with our understanding that the risks of ownership had truly passed to Capax Discovery or that economic benefits would flow to Autonomy from the transaction, and would have been contrary to the audit confirmation received from Capax Discovery."*

2529. The obvious problem with that passage of evidence is that it appears to be premised on Deloitte being told that the payments were for fictitious EDD services and does not in terms address the position if there had simply been (before or after the deal) a side agreement for Autonomy to fund Capax Discovery's instalment obligations in whatever way was available. It should go without saying that an auditor would not approve revenue from a contract for purported services known to be a fiction. However, it seems to me that Deloitte could not reasonably have approved revenue recognition had they known that Autonomy was somehow to fund Capax Discovery's instalment payments either, for the reason given by Mr Welham: it would have been inconsistent with risks of ownership truly passing to Capax Discovery, and the economic benefits associated with the transaction would have been funded by the purported recipient (Autonomy).

2530. In any event, it is clear that Deloitte's approval of revenue recognition was on the basis of an incomplete, and in fact fundamentally erroneous, understanding. Had Deloitte been properly informed, revenue recognition would not have been approved. I infer that that was the reason why Deloitte was kept in the dark.

Conclusion on first Capax Discovery/EDD sale

2531. In short, in my judgment, the reason for the first Capax Discovery/EDD sale was that it was needed in order to generate recognised revenue to cover an unexpected shortfall; Capax Discovery had no ability to pay the first year's instalments, and Autonomy agreed to fund them. Autonomy was paying for its own revenue. No revenue should have been recognised.

The second Capax Discovery/EDD sale (Q4 2009)

2532. By the end of 2009, and even though its advertising material in July had (prematurely) held out its capability of undertaking EDD business, Mr Baiocco was still trying to get Capax Discovery's e-Discovery platform up and running.

2533. At the end of December 2009, Autonomy and Capax Discovery entered into the second Capax Discovery/EDD sale which extended the term of the first Capax Discovery EDD sale by one year, and also enlarged the licence to include additional software, including ControlPoint, additional EDD software and IDOL SPE.

2534. The licence fee of $4,000,000, plus an annual support fee equal to 5% of the licence fee, was payable in four equal instalments of $1,050,000, with the first instalment due on 31 March 2010, and the remaining instalments at three-month intervals. Autonomy recognised the $4,000,000 licence fee in full as revenue in Q4 2009.

2535. The evidence of both Mr Baiocco and Mr Egan was that Mr Egan had promised, again on a handshake basis, that the fee instalments due from Capax Discovery would be covered one way or another by Autonomy, as under the first Capax Discovery/EDD sale. That meant that, in addition to ensuring that Capax Discovery was able to meet its quarterly payments of $968,750 under the first Capax Discovery/ EDD sale, Autonomy now had to ensure that Capax Discovery was able to pay the additional quarterly payments of $1,050,000 due under the second Capax Discovery/EDD sale.

2536. It is plain that Mr Egan both appreciated this and understood that something more had to be done to help Capax Discovery. In January 2010, Mr Egan emailed Mr Kanter, copying Mr Hussain, saying:

> *"Sushovan [Hussain] has approved Capax Jan support, can you be sure it has gone out? Capax has not received.*
>
> *Also, can you update on the process of outsourcing more EDD and the greater sum on support per month given higher client load than we had accounted for originally? If you could raise that paperwork for approvals it would be great."* [Emphasis supplied]

2537. The Claimants contended that Mr Egan's requests in the second paragraph of his email were designed to implement the handshake agreement that Autonomy would fund the instalments due under the second Capax Discovery/EDD sale by increasing the monthly amounts Autonomy was paying to Capax Discovery. This was partly achieved by an increase of $225,000 per month in the payments to Capax Discovery purportedly for e-Discovery services, from $250,000 to $475,000. This increase was attributed to so-called "*Additional EDD Processing*". As explained above, Capax Discovery simply was not yet in a position to provide such services, and the invoicing process was a fiction.

2538. However, even this substantial increase fell short of the quarterly payments that were due from Capax Discovery at this stage, which totalled $2,018,750 ($968,750 + $1,050,000). As Mr Egan suggested in his email to Mr Kanter, on top of the increase in payments for supposed e-Discovery services, Autonomy was going to increase the sum paid to Capax Discovery in respect of EAS support, making additional monthly payments of $125,000 under the guise of *"Supplemental EAS Support"*.

2539. Although the Claimants accepted that Capax Global was providing EAS support to Autonomy's customers, they did not accept that the payments in respect of *"Supplemental EAS Support"* were for any genuine services. On the contrary, they contended that, as reflected in Mr Egan's email above, the *"Supplemental EAS Support"* payments were simply another means of getting funds to Capax Discovery to enable Capax Discovery to pay for the first and second Capax Discovery/EDD sales.

2540. The Defendants sought to counter this by presenting *"Supplemental EAS Support"* as part of the provision of EAS support services which was *"work that Autonomy did not want to do and Capax was happy to do it"* (as Mr Baiocco confirmed in cross-examination). However, this was not accurate: although the Defendants deployed the description "Capax", it was not Capax Discovery which did EAS work: it was Capax Global.

2541. It was suggested to Mr Baiocco in cross-examination that these supplemental EAS payments were supposed to compensate Capax Global for professional services it had provided but was unable to bill for. It was put to him that according to the notes of an interview he had with Morgan Lewis in February 2013, his version of events then was that *"truth be told"* the description *"Supplemental EAS Services"* was used as a *"catch-all"*, and payments made under or by reference to the Capax EAS agreement included an element of uplift to compensate Capax Global[305] for *"thousands of unbillable hours and write-offs related to the product implementation services Capax performed for Autonomy"*. Mr Baiocco had not mentioned this in his witness statement; and in his

[305] Although in the note "Capax" was the definition used for Capax Discovery, it is clear from the context that it was used to describe both Capax companies. It struck me that the unbilled hours were more likely to be referable to work done by employees of Capax Global than of Capax Discovery.

answers in cross-examination he seemed to me to be trying to marginalise what he had said to Morgan Lewis, though accepting that it was *"partially true"*.

2542. My impression was, and I find, that what Mr Baiocco really meant by the category being a "catch-all" was that it was a useful and sufficiently amorphous description to cover payments which were not referable to any documented or identified service, and which could be and was used as the vehicle for the additional payments that became necessary to enable Capax Discovery to cover its increased commitments. That was both the catalyst for and the principal purpose of the payments made by reference to the category, as the close relationship between payments made in and payments made out by Capax Discovery illustrates. It may well be that Capax Global had a justified claim to be compensated for unbilled hours; but that was not the purpose of the payments.

2543. Put shortly, it seems to me clear that the increased payments to Capax Discovery and Capax Global, whether described as for *"Additional EDD Processing"* or as *"Supplemental EAS Support"*, were driven by the need to find more money for Capax Discovery in light of the increased instalment payments due under the second Capax Discovery/EDD sale and continuing obligations under the first Capax Discovery/EDD sale and were made for that reason.

2544. I have been fortified in that conclusion by the following evidential matters:

(1) Apart from those directly involved in the Purchase Order process, no-one within Autonomy appears to have had any experience of Capax Discovery ever providing any services: if any question arose it was invariably referred on to "Cambridge", connoting the finance department.

(2) There was never any documentary evidence provided to support the suggestion that Capax Discovery did any EDD processing or EAS work: unsurprisingly, since it was incapable of doing the first, and EAS work was usually done by Capax Global.

(3) It is clear that in early 2010 Mr Kanter took over supervision and control of all the purchase order process in relation to Capax and Autonomy's purported EDD and EAS activities, confirming its direction from "Cambridge" without regard to what, if anything, was happening where Capax Discovery was based and operated, and without any evidence of work done or required. As the Claimants submitted, Mr Hussain's decision (and his decision it was) to put Mr Kanter in charge of the e-Discovery and supplemental EAS purchase orders only made sense if they both knew that this was simply a financial exercise that involved getting sufficient funds to Mr Baiocco.

(4) The pattern of the issue of a purchase order by Autonomy to cover instalments due from Capax Discovery is to my mind further confirmed, and the correlation between payments made by Autonomy pursuant to purchase orders purportedly for e-Discovery processing or Supplemental EAS support is, as before, revealingly exact. Purchase orders were churned out according to funding need, and enhanced immediately when additional amounts became due in consequence of the second Capax Discovery/EDD sale.

(5) In this regard, the Claimants cited various spreadsheets prepared at the time by Mr Baiocco which clearly show him attributing payments received from Autonomy in respect of purported e-Discovery services and supplemental EAS

support to instalments due under the first and second Capax Discovery/EDD sales, and only paying those instalments once he had received sufficient funds from Autonomy to do so. Notably, no deductions were made for the costs of providing the purported services: for none were being provided. Any excess of the monies paid to Capax Discovery over the amounts paid out represented the agreed profit. Although in cross-examination Dr Lynch suggested that each spreadsheet was *"more like a standard balance of trade journal which you see quite regularly where people keep track of the cash and the trade between two parties"* the spreadsheets did not allow for any of the usual deductions or variations that would be expected in a record of a trading relationship; and the correlation mentioned above was a clear sign also of the purchase orders simply being the mechanism for payment of funds as and when required for payment of instalments.

(6) Further, after sending the first of these spreadsheets to Mr Kanter in March 2010, Mr Baiocco sent Mr Kanter a follow-up email which, as well as confirming Mr Kanter's direct involvement, makes even plainer that the payments manifest, not a trading relationship, but the subsidy arrangements provided for in the handshake agreement:

> *"…sorry to hit you again here. Just wanted to reiterate. That we were promised more than a dollar for this. We were promised a profit as well. Trying not to sound ungrateful in any way, just that we were nowhere near ready to do a deal like this."*

(7) Another illustration is provided by an e-mail exchange between Mr Baiocco and Mr Kanter on 6 December 2010. In the first Mr Baiocco asked: "*anything today?*" Mr Kanter asked what the number was on "*DD1*", i.e. direct deal 1. This was a reference to the first Capax Discovery/EDD sale. Mr Baiocco later responded that the number was "*750 k for dd1 in turn. I pay 968,500 asap for oct 31 due that will get me thru dec for heat*". Mr Kanter must have been aware of the arrangement with Capax Discovery. Even Dr Lynch accepted that Mr Baiocco was saying that he needed another $750,000 from Autonomy in order to pay the instalment under the first Capax Discovery/EDD sale which had fallen due on 31 October 2010. (Dr Lynch subsequently approved this payment without making any enquiry; and see paragraph 2578 below in my discussion of the Defendants' knowledge).

Deloitte's consideration of the second Capax Discovery/EDD sale

2545. Deloitte's working paper setting out its consideration of the second Capax Discovery/EDD sale included the following:

> *"…The Capax Discovery arm of the group specialises in eDiscovery solutions for businesses and in order to do that they need the Autonomy software listed above…*
>
> *…given the success Capax has had with its previous Autonomy purchases, we conclude that there is clear commercial rationale for this purchase...*

> *In considering the ability of Capax Discovery LLC to meet their contractual commitments to Autonomy, we have reviewed their payments made in Q4 2009 and their overall payment history…*
>
> *Given that Capax are up to date with their significant payment obligations (i.e. more than $1.0m paid in each of the last two quarters) and given the information obtained with regards to their status with Microsoft, we conclude that this deal is recoverable…"*

2546. As is apparent from this working paper, and from Mr Welham's unchallenged evidence, Deloitte was not aware that the only reason Capax Discovery was up to date with its payment obligations under the first Capax Discovery/EDD sale was because, pursuant to the handshake agreement, Autonomy had funnelled money to Capax Discovery for non-existent e-Discovery services. Mr Welham's evidence was that, if Deloitte had known that Autonomy needed to put Capax Discovery in funds to pay for the Autonomy e-Discovery software by making payments for services that Autonomy knew to be fictitious, Deloitte would not have regarded Capax Discovery's payment history as supporting the recognition of revenue on this or other Capax Discovery deals, which was not challenged and is obvious if its premise is correct. There can, therefore, be no dispute that the information which was withheld from Deloitte was highly relevant to Deloitte's conclusion on revenue recognition.

2547. Equally obvious and *a fortiori* would be the position if Deloitte had also been aware that what lay behind Mr Baiocco's call for and expectation of help, and Autonomy's urgent reaction to assist, was the same understanding as had underpinned the first transaction (and indeed all of the impugned transactions with Capax). As before, Mr Egan's evidence was that Mr Hussain knew and approved of the understanding and the expectation which was its corollary. As before, Mr Hussain did not disclose its existence to Deloitte because he knew that it would have precluded Autonomy from recognising revenue from the second Capax Discovery/EDD sale.

2548. Deloitte was not aware either that Capax Discovery had in fact had no success with its previous Autonomy purchases, i.e. with the software licensed pursuant to the first Capax Discovery/EDD sale, because (as explained above) Capax Discovery was not even in a position to provide e-Discovery services to customers by 31 December 2009.

2549. I find that Deloitte were misled; their approval cannot avail the Defendants, and the Defendants' purported reliance on it tends further to endorse the dishonest nature of their (the Defendants') approach and of the transactions concerned.

Conclusion on second Capax Discovery/EDD sale

2550. For similar reasons as in the case of the first Capax Discovery/EDD sale I have concluded that no revenue should have been recognised from the second Capax Discovery/EDD sale.

The third Capax Discovery/EDD sale (Q1 2011)

2551. By the end of March 2011, Capax Discovery was ready and looking to undertake e-Discovery processing work in the UK. To that end, it had rented premises in London and set up a data centre at a considerable cost. The team at Capax Discovery was

working closely with individuals from Autonomy, including Mr Lucini and Dr Menell, to ensure that everything was in place to provide actual services, and, in particular, a prospective part in providing services in the context of BP Deepwater Horizon oil-spill litigation then at the disclosure stage.

2552. As part of the process, and also to discuss with Autonomy a structured service contract which a Capax Discovery-related entity called Autonomix had won from the US government and in which it hoped to enlist Autonomy, Capax Discovery's Mr Baiocco, Mr Steve Williams and a Mr Allen Gurney, travelled to the UK for a meeting in Cambridge, which in the event was followed by two short meetings between Mr Baiocco and Mr Hussain.

2553. The Claimants presented the meetings between Mr Baiocco and Mr Hussain (the first occasions on which they had met in person) as curious affairs, at which:

(1) First, Mr Hussain seemed principally concerned initially to try to persuade Mr Baiocco to take in another VAR deal which he explained Mr Egan had forgotten to mention, and of which Mr Baiocco had been given no notice at all. That was odd in itself; but more remarkable still was that according to Mr Baiocco's evidence, Mr Hussain wanted the new VAR deal booked as a Q1 2011 deal, even though by this point it was late in the first week of Q2 2011.

(2) When Mr Baiocco declined, not (it appears) so much because of the backdating proposed, but because he had just entered into a VAR transaction for end-user UBS and did not want so soon to take another one, Mr Hussain almost immediately followed this up by telling Mr Baiocco that Capax Discovery's existing licence did not enable use in Europe and that in order to provide e-Discovery services from its London data centre it would have to extend its licence for a fee.

(3) There was a dispute as to whether this came as a surprise to Mr Baiocco, as he had claimed in his witness statement. There was contrary evidence relied on by the Defendants that the possibility of this had earlier been raised internally within Capax Discovery by Mr Williams. Even so, the impression I got from Mr Baiocco was that he was taken aback: both because Autonomy itself had not previously raised it despite exchanges of emails as to the setting up of and prospective work for the London office, and because of the apparent correlation between his refusal of the VAR deal and what was effectively a demand for a further licence fee. The correlation is added colour by the fact that the VAR deal and the fee sought by Autonomy were almost the same: $1.6 million, payable in two equal instalments on 30 May and 29 June 2011.

(4) According to Mr Baiocco, who had made clear in emails that he had over-spent on the London office to prepare for licensing work he had understood to be imminent, the feeling of being, in effect, confronted with little option was compounded by the fact that within hours after his first meeting with Mr Hussain at which this had been mentioned, and before any further discussion of the terms, he was sent documentation for a licence extension. This was already complete with the relevant terms of licence extension, first in draft and then almost immediately after that, in execution form with the date entered in as 31 March 2011 (nearly a week earlier than the draft, echoing the VAR proposal which Mr Hussain had initially proposed).

(5) At the second meeting (on 7 April 2011) between Mr Hussain and Mr Baiocco there was discussion about the Autonomix proposal, and a very short exchange, so short as barely to amount to a discussion, also about the licence extension (what became the third Capax Discovery/EDD sale). There was no substantial dispute about the words comprising the exchange; but much debate as to its true content and significance. Mr Baiocco's evidence was that he asked Mr Hussain *"straight up, 'We're good on this no matter what?' and he [Mr Hussain] said 'Yes'"*. Mr Baiocco read a lot into this, however; in cross-examination he said that this was:

> "*the gist of it. I don't know if there were more words but the answer was I needed assurance that, if I was buying this, even if --- we were assuming we were going to get the BP data which would make anything else moot, but if for some reason they didn't give us the BP data that I wasn't going to be left holding the bag for $1.6 million*".

2554. Mr Baiocco accepted in cross-examination that he had never discussed the so-called *"handshake arrangement"* with Mr Hussain ever before. Mr Hussain's closing submissions described the idea that this exchange of some five words in about two seconds amounted to a confirmation of a supposed handshake deal made years before as *"unreal"*. Viewed in a vacuum that is plainly right. But the discussion did not stand alone. In particular:

(1) Mr Baiocco set the short exchange in the context of *"all the payments that came my way over the course of time leading up to that"* and his *"assumption that [Mr Hussain] was fully aware of the handshake deal at that point"*.

(2) Before the meeting Mr Baiocco had repeatedly sought assurances from Mr Lucini that substantial work would be provided by Autonomy to Capax Discovery, and emphasised that Mr Baiocco had scaled up in London on that basis. Mr Lucini had been variable in his responses and it was natural for Mr Baiocco to seek reassurance. He supposed that Mr Hussain would be aware of that.

(3) Both Mr Baiocco and Mr Hussain must also have known full well that the licence extension was backdated. That did not benefit Mr Baiocco but it did benefit Autonomy, which on the basis of the false date recognised revenue from the sale in Q1 2011. That backdating was not explained or denied. In complicity there was mutual need and understanding.

2555. I have reached the conclusion that, notwithstanding how short and apparently perfunctory the exchange, each man knew what the other was meant to understand. I accept and find that Mr Hussain was well aware of and had approved the previous agreements with Mr Egan. The exchanges signified that nothing would change: the same understandings as before remained in place. If for some reason Autonomy did not give Capax Discovery the BP Deepwater Horizon work, then it would be provided with funds in another way and *"no matter what"* it would not be left *"holding the bag"*.

2556. That this is what was intended by the two of them is reinforced by subsequent events. When Autonomy did not pass on to Capax Discovery any of the processing work related to the BP Deepwater Horizon case and instead up-scaled its own operations by adding

hardware and hiring additional staff, Capax Discovery was not left holding the bag. Autonomy subsequently made additional payments, purportedly for EDD processing services which Mr Baiocco said in his witness statement Capax Discovery *"did not actually provide"* but which enabled Capax Discovery to discharge its indebtedness under the third Capax Discovery/EDD sale, as well as the payments previously promised in respect of the two earlier EDD agreements.

2557. Reflecting the previous arrangements:

(1) Mr Baiocco's main point of contact continued to be Mr Kanter, whom he continued to email regarding payment of the purchase orders.

(2) Towards the middle of June 2011, Mr Kanter suggested that he, Mr Baiocco and Mr Hussain should speak, and he proposed a call on 14 June 2011. Ahead of the call the following day, Mr Baiocco replied to Mr Kanter, "*Hey, if you get me the July 475k for edd today, I will pay off the entire 968,750 today as well, I already wired half to Helen Ku. That way we have that off the table for tomorrow?*".

(3) Mr Kanter could not have understood anything other than that Mr Baiocco intended to use the payment of $475,000, purportedly in respect of e-Discovery services, to pay the final part of the instalment due under the first Capax Discovery/EDD sale.

(4) By the end of June 2011, Capax Discovery – entirely with money provided to it by Autonomy – had paid Autonomy the instalments under the first and second Capax Discovery/EDD sales. All that remained were the instalments due under the third Capax Discovery/EDD sale. Although these had fallen due in May and June 2011, respectively, they remained unpaid when HP's bid for Autonomy was announced on 18 August 2011 because Capax Discovery had not yet been put in funds by Autonomy.

(5) On 20 September 2011, Mr Richard Eads emailed Mr Chamberlain with the subject "*Capax*", noting that there had been a "*Tremendous amount of clean up recently. We have 2 invoices remaining as shown below. These appear to be for internal Capax systems since no end-user is specified…I'm going to start calling on these unless instructed otherwise*". Mr Eads must have been instructed otherwise, because the two invoices for the instalments due under the third Capax Discovery/EDD sale were not paid until more than two months later, in December 2011.

(6) The last purchase order in respect of supplemental EAS support was issued on 13 September 2011, and the last e-Discovery purchase order was issued on 3 October 2011, the day that HP's acquisition of Autonomy completed. Since Mr Hussain was the person who discussed the third Capax Discovery/EDD sale with Mr Baiocco, the funds required to pay the instalments under this deal could not plausibly have made their way to Capax Discovery unless, as Mr Baiocco said, Mr Hussain was aware of the handshake agreement and agreed that a

similar arrangement would apply to the third Capax Discovery/EDD sale – as in fact it did. [306]

2558. Mr Baiocco's evidence was that these payments were made using funds Capax Discovery received from Autonomy in respect of eDiscovery and/or supplemental EAS support services that Capax Discovery never actually provided. His position was that Capax Discovery was simply unable to do the work for which purchase orders were drawn and honoured. This is inconsistent with its promotional material asserting the contrary, which he first explained at the US trial on the brusque basis that this material *"wasn't true"*, *"selling ahead of capability, so – we do it all the time"*, but softened by elaborating to say, in answer to a question from his cross-examiner querying whether he did routinely tell people that they had capability that they did not have:

> *"No. But it takes sometimes six months to a year to close a deal like that, so we felt like we were close enough that we could advertise and get a deal, and we always have the back up of Autonomy doing the work for us if we weren't ready."*

2559. Mr Baiocco's evidence was supported by Mr Sullivan, whose evidence in his witness statement was that he *"knew of no instance of EDD work being outsourced to Capax or any other party"* and that he did not believe that Autonomy needed standby EDD support services, explaining that *"when capacity constraints did arise, as in the case of our extremely large EDD contract with BP, Autonomy scaled up its operations by adding hardware and hiring additional staff to handle the extra workload."*

2560. Mr Sullivan sought to explain the fact that he had approved a sequence of purchase orders without demur, and in at least one he not only approved but certified that *"Yes – work has been completed"* on the basis that though he had been *"puzzled"* initially (in April 2009), he had thereafter relied on Mr Egan's assurance and the apparent assent of Mr Hussain and Dr Lynch that the work was being performed.

2561. I have mentioned previously my wariness of relying on witness statements clearly honed by US lawyers, and though Mr Baiocco and Mr Sullivan both also testified in the US proceedings and relevant parts of the transcript were in the evidence in these proceedings, of course Dr Lynch had no opportunity to cross-examine them (nor, of course, did I have any opportunity to see that done).

2562. Dr Lynch, who (the Claimants did not dispute) had no involvement in any of the above discussions or events, and who denied any knowledge of them (see further below), did not accept either Mr Baiocco's or Mr Sullivan's evidence as above summarised. By this time, he suggested, Capax Discovery was on any view performing EDD work for Autonomy. They had personnel who had been trained for eDiscovery work and were operating in Boston on Autonomy's platform: and those staff could also have performed EDD services at the customer centre, or on Capax Discovery's platform to the extent it

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[306] The table in RRAPoC Schedule 5, Transaction 1 showed: (i) the payments by Autonomy group companies to Capax Discovery and Capax Global which the Claimants contend were made in respect of non-existent eDiscovery services and supplemental EAS support in the period June 2009 to December 2011, and (ii) the payments received by Autonomy Inc from Capax Discovery in the same period, which the Claimants contend were made using the payments in sub-paragraph (i). To support this further, the Claimants compared the table in RRAPoC Schedule 5, Transaction 1 with the last known version of Mr Baiocco's Capax Aging Report. As shown in Annex B of the Claimants' Closing Submissions, the payments and receipts in the RRAPoC table tallied with Mr Baiocco's Capax Aging Report, save in the minor respects outlined in Annex B.

was up and running. As he had stated in his witness statement, his understanding was that Capax Discovery could perform the work wherever it could access Introspect software, whether at its own facilities, at the customer's facility, or at Autonomy's Boston office.

2563. This is one of many contexts in which it would have been helpful to hear from Mr Sullivan; and for that matter to have more reason to have confidence in the witness statements as evidence. However, there was no evidence either that Capax Discovery was in fact called on to provide or in fact providing any EDD outsourced services of any materiality, nor that Autonomy ever in fact had need of them. Furthermore, the circumstantial evidence is against Dr Lynch's efforts to sanitise this transaction. Its timing (in response to Mr Baiocco's need for help); its genesis; its amount; its backdating demonstrating clearly that revenue recognition was the imperative that drove it; and the simple fact that the amounts remitted by Autonomy were needed and (albeit after some unusual delay) used to pay Autonomy: all support generally the evidence given that Capax Discovery had no capacity and that the invoices from Autonomy were fictitious: and that is my finding.

2564. Dr Lynch repeated his case that this was not how it appeared at the time. Sitting in the UK and busy as a CEO with his many and various functions, and with evidence by this time of Capax Discovery's EDD capabilities, he had no reason to suppose that Capax Discovery was not doing anything for the payments it received. For reasons given later in discussing the issue of knowledge, I cannot accept this.

Deloitte's consideration of the third Capax Discovery/EDD sale

2565. When Deloitte reviewed the third Capax Discovery/EDD sale, it did so as part of its Q1 2011 review, given that it had been backdated to 31 March 2011. The rationale for the deal was explained to Deloitte by Mr Chamberlain as allowing Capax Discovery's UK data centre to connect to the software licensed under the previous sales. Deloitte concluded that "*it represents additional rights to Capex [sic] and therefore can be recognised as revenue*".

2566. As before, Deloitte was unaware that Autonomy was channelling funds to Capax Discovery under the guise of purchase orders for e-Discovery processing and supplemental EAS support which Capax Discovery was not providing.

2567. Although Dr Lynch suggested that Deloitte was *"sampling the payments, they were able to look at them, nothing was hidden from them"*, it is clear that Deloitte was in the dark about the scale and nature of the payments being made in respect of e-Discovery processing. Mr Murray of Deloitte emailed Mr Welham on 18 April 2011 with the subject *"Capax – payments going back to them for services performed"*, saying:

> *"Pete is still waiting on information about the level of Capax purchases during Q1 2011, but I note that in our post Q-end unrecorded liabilities work we have picked up on $1.5 million of invoices alone paid to Capax.*
>
> *Going to be too late to comment on in the audit committee but we should consider putting further 'context' around the relationship with this reseller for Q2. Might not look so rosy if revenue from Capax to date is (for example) $50*

million, cash received is $30 million, balance outstanding is $20 million, services purchased from Capax by Autonomy are $60 million..."

2568. Mr Welham initially put the amounts paid to Capax Discovery down to Capax Discovery doing *"all of the legacy eas [Enterprise Archive Solution] maintenance"*. He suggested that Deloitte should find out what the figure was for the previous year, noting that he would expect it to fall given EAS was no longer a product being sold by Autonomy. But, as Mr Murray pointed out in his response, *"The one invoice details I have seen to date is for EDD processing – that doesn't sound like maintenance – sounds more like data analysis/input type services"*.

2569. This was less than a year after Mr Hogenson and Mr Tejeda had raised concerns about the payments to Capax Discovery in respect of e-Discovery processing and supplemental EAS support. Had Deloitte conducted a full investigation into these payments at the time of the Hogenson episode, or otherwise been informed of them on a regular basis, as Dr Lynch wrongly suggested was the case, this is not the sort of exchange one would expect to see between Mr Murray and Mr Welham. The exchange makes plain that Deloitte had little idea of the scale of these payments or what these payments were supposedly for. Still less did Deloitte appreciate that no e-Discovery processing had actually been outsourced to or performed by Capax Discovery or that Capax Discovery was just using the funds it received from Autonomy to pay the instalments under the first, second and third Capax Discovery/EDD sales in a circular flow of funds, and keeping the excess as profit. Dr Lynch accepted that these were matters Deloitte would have needed to know about in order to assess whether it was appropriate to recognise revenue on the three Capax Discovery sales. Deloitte was not aware of them.

2570. Deloitte was similarly unaware that the third Capax Discovery/EDD sale had been backdated. Mr Welham's unchallenged evidence was that, had Deloitte known of the backdating, it would not have approved recognition of the revenue in Q1 2011 and, had it known of the arrangement between Capax Discovery and Autonomy, it would not have approved of any revenue recognition.

2571. Again, given Mr Hussain's involvement in the third Capax Discovery/EDD sale, and his awareness of the true nature of the arrangement with Capax Discovery, the withholding of this highly relevant information from Deloitte cannot have happened without his knowledge.

Did the Defendants have guilty knowledge of false accounting in respect of RT 1?

2572. Dr Lynch accepted in his oral evidence that if the nature of the arrangements in relation to the first, second and third Capax Discovery/EDD sales was as the Claimants contended, and Autonomy was in effect channelling money to Capax Discovery for fictitious services, then *"absolutely"* it would have been improper for Autonomy to recognise revenue on the sales. As the Claimants put it, the position is *a fortiori* as regards Mr Hussain's knowledge and position. That leaves as the only question whether the Defendants were aware of the fictitious nature of the arrangement.

Mr Hussain's knowledge

2573. I have already made and reconfirm my central finding that Mr Hussain was well aware of and approved the assurances and intentions which underpinned all Capax Discovery's

VAR and reciprocal dealings with Autonomy. I have found more particularly that Mr Hussain understood what Mr Baiocco was signalling in the short exchange at their second meeting discussed above, and conveyed the confirmatory signal that the same arrangements would continue as before.

2574. I find that Mr Hussain also knew that (a) Capax Discovery did not have any capability to undertake e-Discovery processing until 2011 and (b) payments made by Autonomy for EDD services and supplemental EAS support were fictitious.

Dr Lynch's knowledge

2575. As I have noted to the same effect previously, Dr Lynch was not the sort of person, and Autonomy was not the sort of company, where the CFO acted autonomously. Mr Hussain reported to Dr Lynch routinely and regularly, and there would have been no question, and there was as far as I am aware no example, of Mr Hussain acting otherwise than in implementation of a course discussed with, and ultimately determined by, Dr Lynch. In idiomatic language, Dr Lynch was a control freak, and he regarded Autonomy very much as both his creation and his creature.

2576. I have already concluded that Mr Hussain was well aware of, and had indeed fashioned, the use of purchase orders for services which he knew that Capax Discovery would not and could not yet provide as a covert means of funding Capax Discovery to enable it to pay instalments under the first Capax Discovery/EDD sale in accordance with an arrangement with Mr Baiocco of which he was also well aware. It would have been entirely out of character, and contrary to Dr Lynch's expectations of those he regarded as serving him, for Mr Hussain to have kept this from Dr Lynch. That is particularly so given that this was a new venture with a new company. Furthermore, there is no dispute that the recognition of the revenue concerned had become a focus of both Mr Hussain and Dr Lynch as Q1 2009 drew to a close.

2577. At the operational level, it is clear that:

(1) An email dated 12 March 2009 from Mr Hussain to Dr Lynch and headed *"capex deal" [sic]* evidenced that Mr Hussain told him of Capax Discovery's possible interest in what was then a $5 million deal the day after the London Hotel meeting, albeit in brief terms (*"Stouff's had a bite at a $5m deal"*).

(2) Also, (and illustrating how Mr Hussain kept Dr Lynch in almost constant touch) Mr Hussain forwarded to Dr Lynch an email from Mr Egan dated 13 March 2009 noting (amongst other deals) that *"John called Rob and said he was very interested in the pitch we presented at breakfast. Time to let him know it could be possible"* (see paragraph 2492(1) above).

(3) Five days later, on 18 March 2009, Mr Hussain emailed Dr Lynch, Dr Menell and Mr Kanter identifying *"capexglobal"* as one of the *"Big deals"* prospective but outstanding.

(4) The fact of this prospective deal was listed in the very regular update spreadsheets schedules provided by Mr Hussain to Dr Lynch in this as in every quarter.

(5) Dr Lynch knew about the formation of Capax Discovery and its introduction as a counterparty. There is no documentary record that he was shown Mr

Baiocco's letters stressing that it was *"brand new"* and separate legally and contractually from Capax Global; but I think it more likely than not that Mr Hussain would have told him.

(6) On the last day of the quarter, Mr Hussain emailed Mr Sass and Mr Egan, copying Dr Lynch and Dr Menell, noting from their earlier email to him that (as summarised in the subject line) *"capax is in (signed copy in hand)"* and to send congratulations: *"Very well done to the both of you – I like $7.5m deals!"*

(7) Thereafter, Dr Lynch was asked to and did approve a first purchase order of $250,000 for *"outsourced specialised ED services"* which on 8 June 2009 Dr Lynch approved unquestioningly *"ok"*. This was the pattern of future purchase orders likewise.

2578. In the round, it seems clear that Dr Lynch knew of the first transaction in broad terms, knew its value and knew that it had become a vital constituent element of Mr Hussain's plans for the quarter in terms of revenue recognition. I have explained that I think it likely that Mr Hussain discussed and agreed with him the use of the purchase order mechanism I have described to fund the fledgling Capax Discovery in accordance with the understandings that had enabled Mr Baiocco to commit it to the transaction. That knowledge informed his understanding of the second and third transactions also.

2579. In the end, Dr Lynch relied on the vital gap in his knowledge as having been that he did not appreciate, and had no reason to suppose, that Autonomy was paying something for nothing. There were three strings to his argument:

(1) First, *"Since Mr Hussain was not aware of anything improper, there is no basis for suggesting that Dr Lynch would be"*. Dr Lynch maintained the position that Mr Hussain had never suggested to him, and (contrary to Mr Egan's evidence) he did not think Mr Hussain or Dr Menell knew at that time, that in fact no services were being or could be provided. Dr Lynch added to this that he was in a more distant position than was Mr Sullivan, who as CEO of Zantaz was in a position to know; and he was entitled to and did rely on the fact that Mr Sullivan had given his approval.

(2) Secondly, Dr Lynch appeared to suggest that his own understanding, even at that time, was that (a) though it had not yet got facilities or requisite hardware to do its own processing, Capax Discovery had the services of Mr Williams and what he described as *"experienced EDD people"* well able to assist using someone like Autonomy's own systems, and it was doing e-Discovery work at Autonomy's premises, and (b) any payments presumably related to this work.

(3) Third, his understanding at the time, according to his first witness statement, was that what Autonomy was paying did not depend upon the actual provision of services, but on the guarantee of their availability. He explained this in his first witness statement as *"akin to an insurance policy"* to ensure availability of overflow services to meet exceptional demand, and elaborated on this as follows:

> *"Whilst I was not involved in the specific case with Capax, the general rationale behind partnering with an EDD service provider…was that [it] would be able to provide back-up services, that could be used when Autonomy alone was unable to meet customers' EDD needs.*

> *Essentially, Autonomy purchased overflow capacity from Capax on a monthly basis, akin to an insurance policy.*
>
> …
>
> *If I had known at the time that an EDD provider did not perform any overflow work in a particular month, I still would have been happy paying the provider for EDD overflow capacity because the nature of an insurance policy is that you are not going to call upon it every month…*
>
> …
>
> *My understanding was that [Capax] was capable of processing that content and was on standby to do so…"*

2580. This three-string defence was repeated by him in respect not only of this, but also the second and third Capax Discovery/EDD sales addressed below.

2581. As to the first string, and as will already be apparent, I do not accept the lynchpin of Dr Lynch's argument that Mr Hussain did not know that no services were being or could be provided. I have held that Mr Hussain not only knew but had orchestrated a chorus of pretextual emails to give colour to the pretence (see above). Mr Kanter also was well aware, and his positioning to be in charge of the purchase order process is significant: an insider in the core management team needed to be in charge, even if this was not ordinarily part of his role. Of course, Mr Kanter might have persuaded me otherwise had he given live evidence: but he did not. It seems to me very unlikely that either of them would have kept this from Dr Lynch. Dr Lynch's retort that they did so because they knew they had no alternative but to keep quiet since he would have sacked them is circular.

2582. In relation to the second string, as I have indicated in paragraph 2515 above, there is some evidence that in the later part of 2009, Capax Discovery was building the expertise and employee base to offer EDD service capability. Dr Lynch was quick to seize on this in cross-examination as giving some substance to his alleged belief that work was being done by Capax Discovery under the various purchase orders. For example, when it was put to him that *"it would have been obvious to anyone within the company that Capax was not actually providing Autonomy with these services",* Dr Lynch enveloped his responses with a recourse to what had become a stock reference to *"Capax staff working on EDD"*, telling me that:

> *"…there's a big complication in all this, which is there are significant numbers of Capax staff working on EDD on projects for Autonomy, but they're doing it on Autonomy's own system, not on the Capax system, and although it's very difficult to unpick the jigsaw puzzle at this stage, the question is how were those people paid for?"*

2583. I do not accept that this was any part of Dr Lynch's thinking at the time. This struck me as an opportunistic recourse to matters that, as I read his evidence, he did not suggest he was aware of, and which for reasons I have previously explained are unlikely to have been the basis of the purchase orders in any event.

2584. What really stands out is the lack of any supporting evidence such as Dr Lynch himself accepted he would have expected (see paragraph 2516 above) but which he never called for. What also stands out is that in his witness statement, he was quite clear what he considered the purchase orders to relate to, and it does not suggest that any part of the justification was occasional services by Capax Discovery employees training at Autonomy's Boston data-centre:

> *"The process of purchasing EDD overflow capacity was handled primarily by Mr Egan and Mr Scott in Autonomy's US subsidiary. They would request a purchase order for a certain amount of data overflow capacity, priced by volume on a monthly basis, and would seek approval before issuing the purchase order. The payments to Capax for the EDD overflow capacity were approved at times by Messrs Sullivan, Kanter, Hussain and others. I also approved some of these payments. I did so on the basis that the US management team considered that the overflow capacity was a necessary insurance policy. I was also informed that Capax were performing the work. It did not seem unreasonable at the time."* [My underlining for emphasis]

2585. That brings me to the third part of Dr Lynch's argument – that even if no actual work could be demonstrated, the purchase orders were akin to payments for insurance cover. I have reached the conclusion that Dr Lynch was simply casting about for some justification to cover the reality that he knew that no EDD processing work was being done. In my judgment, he knew also that Capax Discovery was a new company, new into the field, which (to quote Dr Lynch himself) *"wanted to break into the EDD business"*; he knew it was lacking infrastructure, and that it was experiencing software problems and further delays; he knew the product and the business and he knew accordingly that it was entirely unrealistic to suppose that Capax Discovery was immediately ready to provide the cover he suggested was needed. He cannot really have believed that Capax Discovery was in a position to provide, still less had actually provided, e-Discovery services with an invoiced value of $520,000 by June 2009 when he approved the purchase orders in June 2009.

2586. In my judgment, none of these lines of defence is persuasive. I have concluded that the most likely rational explanation is that Dr Lynch and his core management knew that the purchase orders and following invoices were indeed a funding mechanism, in accordance with the need to enable Capax Discovery to pay the instalments in accordance with the handshake agreement and to maintain the appearance of a real sale.

2587. In short: even if he was not involved in and did not know the details of individual transactions, I consider it more likely than not, and I also find, that Dr Lynch was aware from Mr Hussain and Mr Kanter and Mr Egan of (a) the handshake agreement and (b) the purchase order scheme.

2588. In my judgment, Dr Lynch, like Mr Hussain, had *"guilty knowledge"* of the false accounting of each of the transactions comprised in RT 1.

RT 2: the VMS transactions

2589. I next address two sets of transactions between Autonomy and Video Monitoring Services of America, Inc ("VMS") in Q2 2009 and Q4 2010. VMS provided a data

service, together with analytics of the data. The data included television, radio and podcast content, internet content for the top 200 print publications and video commercials. VMS was a longstanding Autonomy customer and used Autonomy software extensively in their products. Its CIO, Mr Gerry Louw, had built a close working relationship with Mr Egan.

2590. The transactions comprised (a) the purchase by Autonomy of rights (under licence) to use and display VMS's data feed and (b) the sale by Autonomy of software licences and hardware to VMS.

2591. It is the Claimants' case that there was no genuine commercial rationale for either of Autonomy's purchases of the VMS data feed, that neither was an independent arm's length transaction and that both were linked to, and in truth the reason for them was to incentivise and fund, the sales by Autonomy to VMS of Autonomy software on terms VMS would not otherwise have agreed so that Autonomy could recognise additional revenue in Q2 2009 and Q4 2010. Mr Egan negotiated both the sale and the purchase elements of both transactions.

2592. The Claimants contended, with the support of expert evidence from Mr Holgate, that Autonomy's purchases, and the linked sales to VMS, therefore lacked economic substance and further, that IAS 18.14(d) was not satisfied because in substance no economic benefits flowed to Autonomy.

2593. Accordingly, the Claimants submitted that Autonomy should not have recorded revenue on the sales to VMS. Autonomy should instead have: (i) recorded the net cost in relation to the first VMS sale and purchase, totalling $4,000,000, as an expense in Q2 2009, and (ii) recorded the net cost in relation to the second VMS purchase and the VMS hardware and software sale, totalling $261,633, as an expense in Q4 2010.

2594. The Defendants rejected these allegations as having no merit. In Mr Hussain's closing submissions, they were described as *"utterly misconceived"*. The Defendants contended that:

(1) The purchases were for fair value, and the Claimants had not challenged the fair value assessment during this trial. The purchases involved valuable data rights which could be, and were, compared to offerings of other third party providers at the time.

(2) There was a commercial rationale for the purchase. VMS provided data that Autonomy could and did offer to its customers and embed in its products.

(3) Mr Egan considered that both the sale and purchase transactions were well-rationalised, sensible, logical and proper transactions, with a good commercial rationale.

(4) Dr Lynch approved the purchases but had limited involvement in them: so far as he was aware, they had an acceptable commercial rationale, were at fair value, and had been or would be scrutinized by Deloitte.

(5) The accounting of the purchase transactions and the sales to VMS was handled by the finance department, was scrutinised by Deloitte and was correct. Such factual "linkage" as there was did not undermine the revenue recognition for the sales.

(6) Dr Lynch was not involved at all in the accounting, he was entitled to rely on the finance team and Deloitte, and there was no basis on which he should have concluded that the accounting was incorrect, let alone fraudulent.

The first VMS transaction (Q2 2009)

2595. In deciding between these two opposing positions it is convenient to address the following issues:

(1) The background to the transactions and the genesis of the sale by Autonomy to VMS;

(2) The genesis and suggested commercial purpose of Autonomy's purchase by Autonomy of the VMS data feed licence;

(3) Whether there was any analysis of the utility to Autonomy of the VMS data feed;

(4) The terms of (a) the purchase by Autonomy and (b) the sale by Autonomy;

(5) What use was made by Autonomy of the VMS data feed;

(6) Whether the price paid by VMS for Autonomy software was fair;

(7) On what basis Deloitte and the Audit Committee considered the sales and purchases.

Background

2596. The first mention of any deal with VMS in Q2 2009 was in Mr Hussain's email to Mr Egan on 10 June 2009, in which Mr Hussain asked "*how about VMS for extra revenue? They are private.*" Mr Hussain's email did not suggest that there was any reason for approaching VMS, apart from generating extra revenue. The email did not identify what Autonomy was looking to sell to VMS; it simply identified VMS as a potential source of additional revenue. Nor is it clear what the relevance of VMS being private was, though the Claimants surmised that it would likely be subject to less scrutiny than a public company. Dr Lynch accepted that the idea of a sale came from Mr Hussain, not Mr Egan.

2597. Mr Hussain emailed Mr Egan again on 15 June 2009, saying *"call to vms for a deal?"*. Again, there was no mention of any particular reason for approaching VMS.

2598. A few days later, on 19 June 2009, Mr Hussain emailed Dr Lynch, telling him that *"US commercial call was poor…I believe we need emc and vms…"*. This suggests that Dr Lynch was already aware of a potential deal with VMS. Dr Lynch accepted that Mr Hussain might have mentioned it to him before this email. He was, however, reluctant to accept that Mr Hussain was saying that Autonomy needed revenue from EMC and VMS to make up for the poor commercial deals in the US, suggesting that *"there was always stuff on the left and right"* and that deals *"come and go within a quarter"*. But this was, in Dr Lynch's words, *"very late in the quarter"*, and Mr Hussain was not sending Dr Lynch a spreadsheet with deals on the left and deals on the right; he was sending him an email specifically about needing deals with VMS and EMC, for no apparent reason other than because the *"US commercial call was poor"*. The Claimants suggested that Dr Lynch could not have been in any doubt that Autonomy needed extra

revenue from deals with VMS and EMC in order to hit Autonomy's Q2 2009 revenue target.

2599. That was also the message Mr Hussain was communicating to Mr Egan. On 22 June 2009, he told Mr Egan *"we need big VMS – more commercial just disappeared"*. So urgent did Mr Hussain apparently regard the possible deal that he even offered to fly to New York to meet VMS's CEO, Mr Peter Wengryn, in order to close out a deal that was *"favourable to both parties"*.

2600. At around the same time, also on 22 June 2009, an unconnected event occurred[307]. Up until then, a company called Moreover Technologies, Inc ("Moreover"), a news and social media aggregator, had supplied Autonomy a data feed of news articles, free of charge. Out of the blue, Mr Ian Black, Autonomy's Head of Global Operations, informed Dr Lynch, Mr Hussain, Mr Kanter and Dr Menell by email that he had just learned that Moreover had switched off the data feed. Apparently, its new owners had decided to use a rival provider's software, rather than Autonomy's. This was the first time that anyone at Autonomy, including Dr Lynch, learned that the feed had been switched off. Mr Black informed the recipients of his email that he had persuaded Moreover to switch the feed on pending discussions after the end of Q2 2009, and that he would seek a replacement in the event he was unable to keep the feed free of charge.

2601. Dr Lynch's witness statement sought to present the approach to and purchase of a data feed from VMS as prompted and made necessary by the requirement for Autonomy to replace Moreover's services. Although Autonomy sought in the meantime to "work-around" the resulting loss of data feed by *"spidering"* a small selection of news sites to continue demonstrating Autonomy's software to customers, Dr Lynch said this was a necessarily temporary, inadequate and expensive expedient.

2602. The Claimants, however, insisted that the rationale and impetus for the deal with VMS <u>cannot</u>, have been the temporary cessation of the Moreover data feed. Nor can it have been the fact that Moreover subsequently indicated that it wanted to charge Autonomy £50,000 per annum to continue using the data feed in its demonstrations, because this offer was not made until <u>after</u> Autonomy had entered into the deal with VMS. They submitted that Dr Lynch's witness statement was misleading in suggesting that either of these factors formed part of the background to the VMS deal, and that it is clear from the terms and the timing of Mr Hussain's emails that the rationale for the deal with VMS on Autonomy's side was the need to generate extra revenue in Q2 2009.

Negotiations for sale and purchase

2603. In late June 2009, Autonomy entered into negotiations with VMS to buy their data feed, in parallel with the negotiations for the sale to VMS of Autonomy software. These continued in tandem between 23 June 2009 (when Mr Egan sent VMS a draft set of terms for both sale and purchase) and 29 June 2009, when Mr Egan forwarded the terms to Mr Hussain and Mr Chamberlain on 25 June 2009, asking them how they wanted to structure the deals. Mr Chamberlain's response noted:

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[307] By this point, Mr Hussain had <u>already</u> emailed Dr Lynch and Mr Egan about a deal with VMS and offered to fly to New York to close out a deal that was favourable to both parties. Dr Lynch accepted that none of Mr Hussain's emails had anything to do with the Moreover data feed being switched off.

> *"The tricky bit on this from a rev rec perspective will be demonstrating fair value.*
>
> *e.g. this is currently priced as us paying them $9m and them paying us $7m for the licence – i.e. net flow $2m. We need to prove that this is fair value and that the net $2m is not appropriate at $3m to licence to them and $1m to us. All the support we can get on that will be helpful."*

2604. Mr Chamberlain's focus on revenue recognition is notable. His further commentary also implicitly recognised the importance to Autonomy of the headline figures, as distinct from the net position. Autonomy needed the headline sale price to be high to maximise recognised revenue, even though of course that would entail greater outlay.

2605. The Claimants also called my attention to the timing of the email setting out proposed terms, which was just hours after Autonomy found out about the Moreover data feed having been switched off, suggesting that the proposal to purchase VMS data feed was independent, and not prompted by the position with Moreover. The Defendants, on the other hand, tended to depict the need for replacement as the catalyst. I return to this later.

2606. However, it is apparent from the draft terms, and from Mr Chamberlain's response, that <u>both</u> sides of the round-trip arrangement were already in play by this point: a $9 million purchase by Autonomy and a $7 million purchase by VMS. Mr Egan sent these proposed terms to VMS on the morning of 23 June 2009, a matter of hours <u>after</u> Autonomy first found out that the Moreover data feed had been switched off. That suggests that what appeared then to be the temporary interruption to the Moreover data feed formed no part of Autonomy's decision to purchase the VMS data feed.

2607. In the meantime, the need for the VMS transaction to make up a revenue shortfall became even more definite and so did the quantum of the amount needed for that purpose. The day after Mr Egan sent the draft terms to VMS for the sale and purchase transactions, Mr Hussain informed Dr Lynch that VMS was *"in process at between 7-9m"*. Later that day, Mr Hussain told Mr Egan *"Hitachi – unlikely and JPMC $1m lower so I am $2m short – therefore need VMS at $8m or $9m"*.

2608. This suggests that Mr Hussain was dictating the size of Autonomy's sale to VMS by reference to Autonomy's revenue needs for the quarter. Dr Lynch initially resisted this suggestion, referring to a *"whole series of variables: what can be offered, what discounts can be offered, how much you throw in for a particular amount"*, but none of those considerations was even hinted at in Mr Hussain's email. Dr Lynch was willing to accept, however, that Mr Hussain "*would certainly like to have a VMS deal of 8-9 million, so I guess what he's telling Mr Egan is to try and aim for that, whatever package is put together"*.[308] He also had to accept that he may well have been aware that Autonomy was planning to purchase something from VMS for $9 million.

2609. This is most likely to have been the case. He would not have been able to provide any meaningful input or make any informed decision if he only knew of the proposed sale to VMS. Furthermore, that sum made this a large deal: around 10% of VMS's entire projected revenues for 2007. Yet there was no evidence of VMS's ability to afford such

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[308] At that amount, the size of the purchase contemplated by Mr Hussain was around 10% of VMS's entire projected revenues for 2007, as shown in an Information Memorandum which Autonomy had received when Dr Lynch was considering acquiring VMS in that year.

a commitment, which in itself seems to me to suggest that Autonomy never intended that the purchase price of what VMS was to get from Autonomy would be self-funded.

2610. Mr Egan emailed Dr Lynch and Mr Hussain on 25 June 2009 with updates on a number of deals, asking for *"a decision/input from you first thing in my AM (6AM-ish)"*. The last deal in Mr Egan's email was VMS, in relation to which he said:

> *"We [Autonomy and VMS] meet at 9.30 am to go over products etc. Then I meet Peter [Wengryn] on Friday at 11:00 AM to finalize numbers. He has cancelled 2 of 3 customer meetings on Friday to do this with me. He also confirmed that he can do the deal if it is a good one for VMS without additional board input."*

2611. According to Dr Lynch, whether it was a good deal for VMS depended on what VMS was getting from Autonomy and what it was having to give to Autonomy. Mr Hussain was involved in deciding this too. When Mr Egan sent him a copy of the draft agreement licensing certain Autonomy software to VMS on 28 June 2009, he suggested reducing the software licenced to Autonomy, Virage and Softsound and to *"give future pricing for the rest"*.

2612. The same day, Mr Hussain emailed Dr Lynch, copying Mr Egan, Dr Menell and Mr Kanter, with the subject *"VMS sale",* saying:

> *"Mike*
>
> *As you know VMS have bought IDOL multiple times and are an excellent reference for us. Gerry Louwe and Pete Wengryn of VMS have often expressed a desire to extend the relationship and we have come close in the past in selling more software to them.*
>
> *We have been in discussions to extend the relationship and it appears there is significant interest in our rich media software and the Interwoven products. Stouffer has the detail but it looks like we could have a large sale of $5m to $9m based on the amount of software they want to buy. I have talked to Pete Wengryn over the weekend and he is v interested in buying this quarter.*
>
> *Following the Iwov acquisition we also been considering integrating the VMS services (news and ads) as part of our wcm [web content management] offering. I believe this could be a significant advantage in future sales. We will draft up a business plan for the wcm offering featuring vms for your approval."*

2613. As the Claimants noted, Mr Hussain's email read as though it was the first contact he had made with Dr Lynch about a potential deal with VMS in Q2 2009 even though, by this point, Mr Hussain had already informed Dr Lynch of a potential deal with VMS on two separate occasions (explaining that it was *"in process at between 7-9m"*), and Mr Egan had asked for Dr Lynch and Mr Hussain's decision/input on a number of deals, including VMS. Dr Lynch suggested that the email was laying out *"the fact that we're going to be doing a purchase, which I may or may not have heard of before this point"*. But I agree with the Claimants that it is improbable that Dr Lynch had been told that Autonomy was attempting to make a large sale to VMS but not that Autonomy was also proposing to make a $9 million purchase from VMS.

2614. That said, the focus of Mr Hussain's email was on Autonomy's sale to VMS. Mr Hussain said *"it looks like we could have a large sale of $5m to $9m based on the amount of software to buy…Pete Wengryn…is v interested in buying this quarter"*. This, the Claimants suggested, was a considerable understatement of the size of the deal, and an odd turn of phrase for Mr Hussain to use in circumstances where, four days earlier, he had told Dr Lynch that a deal was in process between $7 and $9 million, and where he had seen Mr Egan tell Dr Lynch that Mr Wengryn was willing to do the deal that quarter if it was a good one for VMS.

2615. The Claimants submitted that Mr Hussain's email only makes sense as a pre-textual document setting out the party line on the VMS deal to Autonomy's senior management. Likewise, Dr Lynch's response that this made "*sense especially given the moreover issues*" depicted the purchase side (Autonomy's purchase of data feed) as a response to the Moreover issue, which the Claimants submitted was likewise pre-textual. That is of course a serious allegation. However, given the clear evidence that Mr Hussain had been keeping Dr Lynch informed of the intention to use revenue from the VMS deal to cover shortfalls (see above), my assessment that it is likely that Dr Lynch knew of the direct link between the purchase and sale transactions, and the likelihood (as I find it to be) that Dr Lynch was well aware of the two transactions and their inter-dependence I have concluded that it is more likely than not that both emails were indeed pre-textual.

VMS and Autonomy reach agreement in principle (29 June 2009)

2616. Over the next few days, Mr Hussain and Mr Egan finalised the terms of the sale to VMS. On 29 June 2009, Mr Hussain told Mr Egan to take out certain software (Introspect EDD, ECA and Digital Safe) from the proposed list of software to be licensed to VMS *"since these are hosted and would be subject to a hosting fee"*. The same day, Mr Egan instructed the Autonomy lawyer who had put the agreement together to make the changes Mr Hussain had directed and to increase the licence fee from $7 million to $9 million. Mr Hussain was also copied to this email.

2617. Thus, Mr Hussain was instructing software to be removed from the draft agreement and yet the price was going up from $7 million to $9 million, the range that Mr Hussain had previously given to Dr Lynch on 24 June 2009. It is hard to see why Mr Hussain had told Dr Lynch the day before that Autonomy's sale to VMS would be between $5 and $9 million depending on the amount of software VMS bought when that was clearly not the case.

2618. Meanwhile, Mr Scott and Mr Crumbacher were tasked with reviewing Autonomy's proposed purchase of VMS's data feed. Mr Crumbacher asked Mr Scott on 29 June 2009: "*What do we intend to do with this data? Not being flippant…more for ensuring scope of license*". Mr Scott responded: "*Push it through our software to show end-users how the software works and/or to make available as a value added service. Need to confirm though as have not been given any detail*".

2619. By the end of the day on 29 June 2009, Autonomy and VMS had reached agreement on the terms of the deal. Mr Hussain emailed Mr Egan and Mr Wengryn, copying Mr Scott, saying:[309]

[309] Emphasis added.

"Stouffer and peter

My understanding of where we have ended up:

- *<u>$9m software purchase</u>*
- *$0 maintenance in year 1*
- *5% maintenance in year 2 onwards*
- *Existing maintenance (assumed at around $400k but tbc) superceded [sic] by the new deal*
- *<u>$13m valuation on the VMS services – 3 year term</u>*

I'll leave it to you to finalise the documentation."

2620. Both agreements were executed on 30 June 2009, the last day of Q2 2009:

(1) Autonomy's purchase took the form of a data licensing agreement, pursuant to which VMS granted Autonomy Inc a licence to use and display the licensed data and agreed to provide Autonomy with access to the data so that its end-users could access and view the data in connection with their use of Autonomy's software products (the "first VMS purchase"). Autonomy was not entitled to sell or transfer the licensed data in any manner to any other party. The term of the licence was three years commencing on 30 June 2009, to renew automatically unless terminated by either party. The licensed data included broadcast content, i.e. television, radio and podcast content, internet content of approximately 30,000 websites, web print content and advertising content, i.e. all the video commercials and associated metadata captured by VMS. The fee for the provision of the licensed data during the term of the agreement was $4,333,333.33 per year, payable in one lump sum of $13 million within 30 days of the effective date of the agreement.

(2) VMS's purchase from Autonomy took the form of a fifth product schedule to a software licence agreement that Autonomy and VMS had entered into in December 2002 (the "first VMS sale"). Subject to the terms and conditions of that prior agreement, Autonomy Inc granted VMS a licence to use an extensive suite of Autonomy software for the purpose of indexing audio and video content from various news feeds and other audio/video sources. The licence fee of $9 million, which included a support and maintenance fee of $428,571 for the first year, was to be invoiced immediately and was payable within 30 days from the date of invoice.

2621. Mr Egan emailed Mr Hussain and Dr Lynch at the close of Q2 2009, telling them that the "*Big ones* are *done*", including VMS. Autonomy recognised $8,571,429 as revenue in Q2 2009 and recognised the support and maintenance fee of $428,571 as revenue over the following year.

Justification of the transactions

2622. Autonomy had not conducted any technical analysis of VMS's data feed before agreeing to purchase rights to it for $13 million. When cross-examined about this, Dr Lynch said

that he did not see why there was any need for a technical analysis of a data feed, and did not know *"quite what that would be for a data feed"*.

2623. Similarly, it was suggested to Mr Lucini that he would not have expected Autonomy to carry out a technical analysis because Autonomy was purchasing information rather than technology. Mr Lucini explained that he would have expected a different type of analysis in those circumstances, aimed at whether the content of the information met the requisite specification: *"…what is this data? Is it what we want it to be or is it purported to be --- so there would be some checking"*.

2624. The lack of any effort, before spending $13 million on a data feed, to assess its suitability, quality and content, and overall utility in terms of whether it could be integrated or used with Autonomy's products, is certainly noteworthy. So is the lack of any sign that any consideration was given to whether Autonomy could produce its own data feed for itself, particularly in light of Autonomy's general philosophy not to license third party products.

2625. No assessment of the commercial utility of the licence to Autonomy had been undertaken either. In his contrived email dated 28 June 2009 (already very late in the day) Mr Hussain had told Dr Lynch that a business plan setting out the rationale for purchasing the VMS data feed would be drafted for his approval; but none had been prior to the purchase.

2626. Dr Lynch sought in cross-examination to wave this away, telling me (I felt somewhat glibly) that the commercial analysis *"would be down to, after everyone else has approved it, whether it makes sense to me and it did"*, and adding simply that he was "*very happy with the commercial terms because of what we were getting for that money"*. When pressed whether any comparative evaluation had been undertaken to see what other suppliers could provide in terms of a data feed and on what price, he told me that *"…we did have good knowledge of that and…then we got competitive quotes from multiple players that all came in at the same level"*; but these were obtained after the event and cannot have formed part of the decision-making process.

2627. It was only on 1 July 2009, after the transaction had been agreed, that a business plan and other supporting documentation, including a revenue recognition memorandum, was hastily commissioned by Mr Hussain. The Claimants characterised this suite of documents as a paper trail contrived to give the false impression of careful assessment of the VMS transaction after a survey of alternative solutions prior to the VMS transaction.

"Project Shockwave" business plan

2628. The business plan which emerged, which was produced initially by Mr Egan and Dr Menell, but then substantially amended by Mr Hussain, was entitled *"Project Shockwave: Autonomy Integration of VMS Data Q1 – Q2 2009"*. It was plainly intended to present this as a proposal which had been under consideration for some time and for which a business case appeared clear; and in its final form as handed to Deloitte the document was drafted as if the VMS transaction were a prospective opportunity, rather than already executed. In its conclusion it stated *"We are asking for approval to engage in negotiations with VMS to buy a 3 year exclusive unlimited access to its data set for a price of up to $13m…."*

2629. The Claimants pointed out, however, that the document (which was passed on to Deloitte), though clearly dated 21 March 2009 on its front page is shown by its metadata to have been created on 3 July 2009. I was told that the earliest version which the Claimants' researches unearthed was created on 30 June 2009.[310] By the time the document was first circulated by Mr Hussain, Autonomy had already entered into the first VMS purchase transaction with VMS. Dr Lynch suggested that there *"may have been an earlier version"* but accepted that *"…if you're telling me that this is edited in July, then no, this is after the purchase was done"*.

2630. I accept the Claimants' case that the business plan was misleading in other ways too:

(1) It stated that Autonomy had approached both VMS and another company in the same business called Newsedge (renamed Acquire Media) for quotes and described the differences (including that the Newsedge proposal though cheaper was for news and text only). It referred in addition to other indications of interest (including from a company called PRN Newswire). It stated that it had *"considered all indications of interest and…decide to recommend VMS…"*. But Autonomy had not obtained quotes from other potential suppliers; it had entered into the VMS transaction at Mr Hussain's direction without any such process and it was only on 3 July 2009 that the first approaches were made by Mr Hussain and Mr Black. Any competitive quotes were elicited only after the transaction had been agreed, and Mr Hussain was still somewhat haphazardly updating the draft with indications of interest later received on 3 July 2009.

(2) The document represented that compared to continuing use of the Moreover data feed, a cost saving of approximately $1 million over three years could be expected if the VMS data feed were used instead. But Moreover had previously provided the data feed for free; and they had not yet had any discussions with Moreover about whether that would continue and, if not, what charge it would make. As noted previously, in his evidence Dr Lynch had suggested a likely cost of about £50,000 pa and told me that this was his expectation because *"a news feed costs that sort of money"*.

(3) Dr Lynch had no explanation for the suggestion (in the business plan) that Moreover would charge in the region of $300,000 pa saying only in cross-examination that he assumed that Mr Black had given the estimate and that there were *"many emails that you're not showing us around this whole process."* None was identified in re-examination or at all.

2631. The version of the business plan that was sent to Deloitte was materially identical to the version sent by Mr Hussain to Dr Lynch on 3 July 2009 and contained all these misleading passages.

2632. However, as elaborated later, Deloitte was aware that one of the competitive quotes referred to (that from Newsedge) post-dated the transaction, but in its own memorandum accepted it anyway as *"still persuasive evidence that the purchase price from VMS of*

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[310] The Defendants contended, however, that the dating of the document was automated, and *"was clearly a hangover of some kind resulting from the inclusion of material from various sources in the document. The content of the document referred clearly to the cancellation of the feed in June…It was obvious to the reader that the document post-dated the cancellation of the Moreover feed and was not a March 2009 document"*. I should record that the Claimants, having previously pleaded the document was backdated, then deleted that allegation, and I have proceeded on the basis that the document was wrongly dated, but not intentionally back-dated.

$13 million is not unreasonable". Further, the Defendants contended, the description of the transactions as prospective had not misled Deloitte: it was obvious to Deloitte that the transactions had already been entered into when the document was provided to them.

The revenue recognition memorandum

2633. As well as the business plan, Autonomy's finance department also produced a revenue recognition memorandum dealing with various accounting issues, including collectability and fair value in relation to the purchase by Autonomy. Mr Chamberlain had noted in his notebook that the $9 million VMS sale by Autonomy was *one* of the key revenue items for Q2 2009 and a memo was needed *"to support fair value"* for the transactions. The same notes stressed the importance of a number of other considerations, including the need to show that (though he described them as *"swap transactions"* in his notes and as *"circular"* in discussions with Dr Lynch) there was (a) *"clear water between the two…payment of $13 m & timing"* and (b) *"evidence of negotiation - $13m"*.

2634. Mr Chamberlain prepared and sent to Mr Hussain what he described as a *"very draft…skeleton for me to work with tomorrow"* of the revenue recognition memorandum on 29 June 2009.

2635. On 3 July 2009, Mr Hussain sent a substantially revised draft of the memorandum to Mr Chamberlain and Dr Lynch. Dr Lynch understood that this document was going to be provided to Deloitte, and he accepted that it is likely that he read it.

2636. The Claimants' criticism that the revenue recognition memo, like the 'Project Shockwave' business plan, was written as if the VMS transactions were in contemplation rather than already entered into seemed to me, of itself, overblown: but the Claimants' more substantial point, which I accept, was that the impression that was conveyed was that Autonomy had satisfied itself as to 'fair value' and had proceeded with a purchase from VMS only after having (a) considered and obtained quotes from other news aggregators and (b) conducted *"detailed market research",* neither of which was true. There had been no detailed market research, and Mr Hussain and Mr Black had sought quotes from a handful of other news aggregators after Autonomy entered into the first VMS purchase.

2637. In relation to the first VMS purchase, Mr Hussain's amended revenue recognition memo carefully portrayed the acquisition of the data feed by Autonomy as complementary to the purchase of Interwoven in March 2009. This was on the basis that since Interwoven products *"manage the data repositories for publishing to websites and allow companies to automatically tune their marketing campaigns"* the addition of the data feed would give a further competitive advantage.

2638. The purchase price payable by Autonomy of $13 million was said to be justified not only by *"detailed market research",* but also by reference to an offer which (Mr Hussain's memo recorded) VMS had received from a company called Neilson in 2006, for the purchase of lesser rights for $7.5 million for three years, with an option to extend for three further years for $12 million. The memo stated also that:

> *"Value in use calculations based on a combination of the revenue opportunities and the costs savings that will result from the acquisition of the licence show a value of $23m. This represents a margin of 43% which is consistent with the margins within the Autonomy business."*

2639. The memo did not bring out the exceptionality of the sale from VMS's point of view. A schedule of VMS representative sales prepared by VMS's CFO, Ms Sayad, showed that VMS had not entered into any sales in excess of $1 million.

2640. As regards the first VMS sale the memo acknowledged that HP had acquired from Autonomy a similar internal use licence in 2006 for the considerably smaller sum of $3.7 million, but stated that the VMS licence *"includes much more technology due to the inclusion of the Interwoven product suite."* Further, it was said that VMS anticipated it would save some $2.7 million annually by substituting the technology in place of manual functions, and at the same time get better and more accurate content *"as well as getting new customers attracted to the superior offering."* The memo acknowledged also that VMS's *"Annual capex spend in 2006 was some $4.5m so this purchase is higher than normal but represents a significant business opportunity for VMS…".* Like the sale side, the deal was exceptional from VMS's point of view.

2641. As to affordability and collectability, it was stated in the memo that collectability was not an issue:

> *"<u>Collectability</u>*
>
> *We need to consider the collectability of the $9m licence fee due to Autonomy independently of the purchase of Autonomy software.*
>
> *Autonomy considered acquiring VMS in early 2007. The information gathered at that time showed that <u>VMS was generating revenues of $75m</u> and producing EBITDA margins of 20% and above. Whilst we have not been able to obtain more recent information from management they have confirmed that the company has shown over 5% growth per annum since then.*
>
> *The company has annual revenues in excess of $75m and over 900 employees. Annual capex spend in 2006 was some $4.5m so this purchase of $9.0m is higher than normal but represents a significant business opportunity for <u>VMS and they have represented that they could finance this transaction without the need for external finance even if Autonomy paid nil for the VMS licence.</u>"*
>
> [My emphasis]

2642. However, the actual hard detail about VMS's financial position was sparse. VMS was a private company and produced only short-form accounts, and its CFO, Ms Sayad, explained in an email of 2 July 2009 that:

> *"VMS is a private company therefore we do not disclose any such information. I can share with you that our revenue falls within the $50M to $75M range."*

2643. The Claimants submitted that having regard to the available financial information:

> *"it is hard to see how VMS could have purchased Autonomy software for $9 million, still less why it would have wanted to do so. Taking the figures at their highest, a transaction of this size was more than 10% of VMS's entire annual revenues and it was not something that VMS could finance from its available cash reserves. The only explanation for why VMS was able and willing to pay*

> *$9 million was because Autonomy had agreed to pay more for the VMS data feed."*

2644. Albeit some time later, VMS's CEO Mr Wengryn later acknowledged (in an article in the *Wall Street Journal* in 2012) that VMS could not have contemplated a purchase of that magnitude but for the sale.

2645. Further, this was clear at the time to all concerned at Autonomy. In an email exchange on 6 July 2009 between Mr Hussain, Dr Lynch, Dr Menell and Mr Scott it was decided (at Mr Hussain's suggestion, but with the immediate approval of Dr Lynch) to pay VMS's sales invoice early *"to ensure their goodwill".*

2646. It is difficult to see how goodwill would have been ensured from payment a day early, as in effect was proposed. Autonomy already had the right to use the VMS data feed; and, as Dr Lynch accepted, if the transactions between VMS and Autonomy were looked at together Autonomy was making a net payment of a 'delta' of some $4 million. As Dr Lynch also accepted, VMS had already had quite a lot of "goodwill". Dr Lynch eventually said he did not know what Mr Hussain had meant.

2647. It was suggested, however, that it would have been obvious to him what the reason for the rush to early payment was: it was to assist VMS by providing the funds it needed to meet the first instalment (which was due imminently) of the purchase price for the software licence it had purchased from Autonomy.

2648. Dr Lynch resisted this suggestion when put to him in cross-examination on the basis that Mr Hussain could simply have netted the debts and paid the difference. But it is of some note that this was not the approach that Autonomy took. As Dr Lynch himself explained, *"for cash transparency reasons to make our accounting more straightforward"*, Autonomy preferred not to net the payments. To avoid doing so in this case, Autonomy needed to put VMS in funds, which is what it did. Autonomy paid VMS $13 million on 29 July 2009, a day before the payment was due. The next day, VMS paid the $9 million due to Autonomy under the first VMS sale.

2649. That Dr Lynch was well aware of the nature of the transaction, seems to me to be supported by the fact that he asked for no details; and I infer that is because he already knew of the transactions. I agree with the Claimants that that is the most obvious explanation for why Dr Lynch would approve making an early payment on the basis of an email that he professed not to understand.

2650. Dr Lynch contented himself with:

> *"ok and lets put moreover on the to be destroyed list"*

Deloitte's consideration of the first VMS transaction

2651. Autonomy provided Deloitte with the business plan and the revenue recognition memorandum as part of its review of the first VMS sale and purchase at the beginning of July 2009.

2652. Additionally:

> (a) Ms Sayad of VMS signed an auditor debtor confirmation letter confirming that the first VMS sale was a "*separate transaction completed on an arms-length basis*"; and

(b) Mr Hussain and Mr Egan spoke with Deloitte about "*the commercials*".

2653. On 6 July 2009, Mr Hussain briefed Mr Egan in advance of a planned evening call with Mr Knights (of Deloitte) as follows:

> *"Last piece of the jigsaw, they want to talk what were the commercials*
>
> *YOU Should only talk about the sale of autonomy software as I ran the purchase side*
>
> *VMS have sent us a written confrmation about the independence of the 2 transactions so that's fine".*

2654. Dr Lynch disagreed when it was put to him that the reason why Mr Hussain was telling Mr Egan only to talk about the sale is because he wanted it to appear to Deloitte that the sale and purchase were negotiated separately. He suggested that the reason was that Mr Hussain *"would understand the strategic rationale for the purchase. Mr Egan is just a sales guy."*

2655. However, the Claimants submitted that Mr Hussain plainly ran both the sale and the purchase. They put to Dr Lynch that Mr Hussain had told Mr Egan to reach out to VMS for a deal to generate extra revenue which he needed for the purpose of achieving forecast; he had told Mr Egan what size the sale needed to be to satisfy Autonomy's revenue targets; he had told Mr Egan how to structure the deal; and he had told Mr Egan what software to sell to VMS. Dr Lynch sought to deny each element, and queried what each proposition put meant; but beyond repeating his point that Mr Egan would have little knowledge of the purchase side and was simply involved in sales, and emphasising that *"if you were trying to create a distance, you wouldn't be putting a document to them that mentions that we've done both together at the same time"*, he eventually resorted to saying that he *"wasn't involved in this deal, so I don't know the ins and outs of who did what, when and detail"*.

2656. The working paper that Mr Welham produced, dated 6 July 2009, provides an indication of what Deloitte had been given to understand about these transactions by Autonomy. I accept the Claimants' submission that the paper reveals a number of misunderstandings on Deloitte's part:

(1) Deloitte's understanding was that the purchase by Autonomy was prompted in March 2009 as part of Autonomy management's programme of developing the Interwoven content management products following its acquisition of Interwoven.[311] The paper recorded that:

> *"it became clear that the revised IWOV web content management products could be used to provide other services to the customer through the use of software supplied by VMS, who have been a customer of Autonomy since 2002."*

[311] Dr Lynch told me the same when he was cross-examined: *"The reason that it was investing in this way was that it had just spent three-quarters of a billion dollars on Interwoven which is a company where half of its business is aimed at marketers and what it wanted to do was give them products that would be able to combine the power of real time news analysis."*

In fact, though Deloitte were unaware of this, the first mention of any deal with VMS in Q2 2009 was Mr Hussain's email to Mr Egan on 10 June 2009 (see also paragraph 2596 above) in which Mr Hussain asked *"how about VMS for extra revenue? They are private".*

(2) Secondly, and relatedly, Deloitte understood from Mr Hussain that there "*has been ongoing negotiations since the development of the Project Shockwave plan in March 2009*". This was untrue for reasons set out above. It was suggested to Mr Welham in cross-examination that the date was an obvious error and that Mr Welham understood that at the time. But it is clear from Mr Welham's working paper that this was not the case. Further, Mr Welham confirmed in re-examination that, per this document, his understanding was that the Project Shockwave plan had been developed in March 2009.

(3) Thirdly, and again relatedly, Deloitte was led to believe from discussions with Mr Egan that the negotiations on the price of the first VMS sale had been ongoing for "*several months*". Dr Lynch tried to defend this statement in cross-examination by vague references to Autonomy having had dealings with VMS since 2002 and there being ongoing interactions between the parties. That is not what the working paper recorded Mr Egan as having told Deloitte. Dr Lynch was eventually forced to accept that "*the deal only became a firm option in June*".

(4) Deloitte were not aware that (a) Moreover was prepared to continue its data feed for a relatively modest annual fee (£50,000 per annum) nor that (b) Autonomy's Dr Blanchflower had started work on improvements to its own data feed immediately after the interruption to the Moreover feed in June 2009 and was expecting to 'go live' by the end of July 2009 (see paragraph 2665(6) below); so that (c) Autonomy's need for the VMS data feed was very uncertain.

(5) Deloitte were not aware either that Autonomy had not conducted any technical analysis or assessment of VMS's data feed before agreeing to purchase rights to it.

2657. Autonomy provided Deloitte with further documentation intended to support its accounting treatment of the transactions with VMS, including: (i) a management representation letter, dated 15 July 2009 and signed by Mr Hussain, stating that the first VMS purchase was an arm's length commercial transaction and that the cost should be amortised over the useful economic life of the data feed, which was estimated to be three years, and (ii) the financial information on VMS that Mr Chamberlain had collated. Mr Hussain instructed Mr Chamberlain to send this financial information to Deloitte together with some further points Mr Hussain had drafted in an attempt to support recoverability of revenue from VMS. Mr Chamberlain did so, emailing Mr Murray of Deloitte on 7 July 2009 as follows:

"Tom – this is the latest financial information I have and was generated when we were looking at acquiring VMS.

Couple of additional points:

- *Old company, been around for 25 years, run like a partnership with cash taken out by the shareholders. They run a revolver with the bank which we assume they will use. They are a conservatively run company who have always paid us on time - $1m licence plus $250k maintenance*
- *$85m retained earnings so a good strong company, but like a partnership like deloitte they take money out of the business and run an overdraft. They also have an $11m revolver. So I am comfortable that for such a strategic deal as the purchase of Autn software they will use the revolver to allocate the cash."*

2658. The Claimants dismissed the suggestion that VMS was going to use more than 80% of its revolver to pay for the Autonomy software as just a ruse to satisfy Deloitte that collectability was probable. In particular, they provided evidence that Mr Hussain had already suggested paying VMS the $13 million in respect of the first VMS purchase before it was contractually due. The funds to pay for the Autonomy software were therefore going to come from Autonomy, and not from any revolver.

2659. As it was, and despite the fact that as Mr Murray of Deloitte noted in an email to Mr Welham the "*financial info for the year ended March 2007 is mildly useful but nowhere near enough to support our audit work…*", Deloitte ultimately appears to have received sufficient comfort on collectability to concur with Autonomy's accounting treatment.

2660. Deloitte's Q2 2009 Report to the Audit Committee simply stated that:

> *"This is a $9 million deal to supply VMS with a perpetual licence for a suite of Autonomy software products including TeamSite, LiveSite, Qfiniti and IDOL. Also in the quarter, Autonomy has separately purchased $13 million of software and associated services from VMS. Given that there is clear commercial rationale for the separate transactions, separate contractual arrangements and evidence that both transactions have been made at fair value, management has confirmed and concluded that there are no links between the contracts that would impact the accounting. Licence revenue of $8.5 million has been recognised with $0.5 million being deferred as fair value on support and maintenance. The cost of the software purchased by Autonomy has been capitalised on the balance sheet as an intangible asset and is to be amortised to the income statement over its useful economic life of 3 years."*

2661. What Deloitte did not know, and what the Audit Committee were thus not told, was that the transactions had been conceived by Mr Hussain as a means of generating extra revenue in Q2 2009, had been negotiated together, and would not have happened independently of the other.

Autonomy's use of the VMS data feed Q3 2009 to Q3 2010

2662. The Claimants relied finally in this context on evidence that (a) Autonomy did not use the VMS data feed for some 8 months after its acquisition and (b) Autonomy developed its own enhanced data feed which left little room for or appetite to adopt the VMS version. The Claimants prayed this in aid first, on the ground that lack of subsequent use was relevant in assessing what was the real rationale in purchasing the product in the first place, and secondly, in assessing the substance of a subsequent purchase by

Autonomy of further rights in respect of the VMS data feed. (I elaborate on the second of these points in the context of the second VMS transaction, see paragraphs 2680 to 2714 below).

2663. The Defendants responded to this that (i) contrary to the Claimants' case, Autonomy did use the VMS feed for demonstration purposes and furthermore (ii) in any event, the Claimants had misunderstood and overlooked Autonomy's use and sale of the VMS feed as an integrated element in its product portfolio (and especially Autonomy's "Explore" offering) which they submitted was the central purpose for which it was purchased. The Defendants also submitted that the crucial question which the line of argument tended to obscure was not whether the data feed was in fact used but was whether there was a commercial rationale at the time of the sale.

2664. The dispute engendered a detailed exegesis in the parties' respective written closing submissions. I consider that the most salient points can be summarised under three headings as follows:

(a) Autonomy's immediate response to the cessation of the Moreover feed;

(b) Autonomy's efforts to find a use for the VMS data feed after it was provided with sample data from it 6 months later;

(c) Autonomy's attempt to integrate the VMS data feed and sell it as part of Autonomy's software product.

2665. As to (a) in the preceding paragraph:

(1) In the Business Plan produced by Mr Hussain it was stated that as Moreover had cancelled its feed and restored it only temporarily, *"a replacement news feed is required urgently"*.

(2) Nevertheless, although the Defendants sought to present the purchase of the VMS feed as the solution adopted in light of this urgent need, contemporaneous documents make clear, and it did not seem to be disputed, that after the purchase of the relevant rights to that feed its evaluation was not a priority for Autonomy, and still less was its deployment. The contemporaneous documentation barely referred to it, the focus being almost exclusively on assisting VMS in relation to its purchase and adoption of Autonomy software.

(3) Instead, when on 20 July 2009 Mr Hussain asked Dr Menell *"what to do"* when Mr Black advised that Moreover would be switching off its feed on 31 July 2009 Dr Menell suggested that Autonomy should create its own feed:

> *"Moreover is a good clean and reliable feed. However, like the rest of the world (remember Bloomberg) technology wise its built on our stuff and other simple 3rd party bit and pieces that we have our own and frankly superior version off…So renewing Moreover would be something we would do if a) we were lazy and have been lazy and b) we ever listened to humans calling themselves "product managers". Thus*

> *time to bite that bullet and package our own that given our technology will utterly obliterate the likes of Moreover…"*

(4) Then, on 20 July 2009, Dr Menell instructed Dr Blanchflower, Mr Goodfellow and Mr Lucini to create an alternative news feed by 31 July 2009, when the Moreover feed was due to be switched off:

> *"You know what to do – it is time to eat our own dog food. We have until 31st and I want something we can use AND sell to our customer as a clean pre classified plug and play tagged feed package. Fern [Lucini] lead the charge."*

(5) There was no mention in any of these emails of the VMS data feed that Autonomy had licensed a few weeks earlier for $13 million.

(6) As it happened, Dr Blanchflower had been working on an alternative feed since the interruption to the Moreover feed in June 2009. Dr Blanchflower told Dr Menell, Mr Lucini and Mr Goodfellow that there was an "*rss fetch on 200 news sites*" and that it would be ready to go live before 31 July 2009. Dr Blanchflower's unchallenged evidence was that it was a relatively straightforward task: it took him a morning to find as many news sites as possible, an afternoon to connect them using a rich site summary (RSS) connector, and a further two weeks for the feed to fill up with news items. Similarly unchallenged was Dr Blanchflower's evidence that the news feed was able to pick up breaking news stories quickly and effectively, and worked well in Autonomy's demonstration environment.

(7) The only challenge to Dr Blanchflower's evidence on this issue was the suggestion that he could not have gone out and replicated the content of the VMS data feed, at least not without negotiating and paying for rights to access and sublicense content. As Dr Blanchflower explained, he had, to some extent, replicated the VMS data feed, because "*we had a demonstration on the sales environment and products that we shipped to customers that were able to obtain the transcriptions of broadcast news feed and social media posts and obviously web content as well*". To the extent that further rights were required, he considered that they could be obtained without great expense, either by the customer or by Autonomy.

(8) Dr Lynch sought to discredit the data feed that Dr Blanchflower created on two fronts: technical and legal.

(a) Dr Lynch suggested that the feed was a "*temporary workaround*", which was expensive, slow, required a large amount of bandwidth and was often blocked by websites. But the Autonomy news feed used a RSS connector to extract news from as many websites as possible. RSS is a format specifically used for delivering regularly changing web content, such as news headlines. The RSS connector only extracted the text from news articles, which required very little bandwidth, and it did so quickly and inexpensively. Dr Blanchflower, who created the news feed, did not recall any issue with the speed at which it operated. Nor, since RSS is how news sites expect their

articles to be consumed, did he recall any websites blocking Autonomy's news feed. This evidence was not challenged.

(b) Dr Lynch also suggested at various points in his oral evidence that Autonomy would not be able to create its own data feed without infringing copyright. However he accepted that though a *"grey area"* this should not affect use for demonstration.

(9) The news feed that Dr Blanchflower created is <u>still</u> used to this day by MicroFocus in the same form as it was in 2009, which appears be contrary to any suggestion that it contravened copyright laws or had any deficiencies of note.

The 'Blanchflower' data feed must also have been used within Autonomy because, as explained below, Autonomy was not even using the VMS data feed some six months after purchasing it.

2666. As to (b) in paragraph 2664 above:

(1) It seems clear, though Dr Lynch did not accept this, that it was not until the beginning of December 2009, some 6 months after the first VMS purchase, that VMS provided Autonomy with some sample data from the VMS data feed. Mr Avila had no knowledge of any sample data having been provided prior to this point. There is no other evidence of VMS delivering the data feed to Autonomy, save to enable VMS to recognise revenue from the first VMS purchase.

(2) Perhaps both because it had not been scoped before purchase, nor its details and sample data provided until so long after it, Autonomy still seems to have been unclear what use they could make of the data feed. On 3 December 2009, Mr Avila sent a link to the sample of the VMS data to Mr Lucini, Mr Gallagher and Dr Blanchflower, noting that Autonomy needed to "*provide some specification/requirements document for the data feed. Beyond putting this into our demos, if we intend to pair it with our WCM [Web Content Management]/Optimost stack we need some doc that outlines what we want*".

(3) That *"doc that outlines what we want"* was necessary in order to provide VMS with some information to enable it to determine what application programming interfaces ("APIs") Autonomy needed to enable the VMS data feed to communicate and interact with Autonomy's software, as Mr Avila accepted.

(4) VMS had been asking for this specification since July 2009, but, as at December 2009, none had been provided by Autonomy's technical team. Mr Avila could not remember when work on the technical specification had started, nor even whether it had done so prior to his email of 3 December 2009. There is no evidence, and it is not likely in those circumstances, that any use could have been made of the data feed in the meantime. This is difficult to reconcile with the claims made in the Project Shockwave business plan.

(5) When the sample of data was provided, Mr Avila asked his colleagues to look at it or let him know who to work with. The email exchanges that ensued show that there was still no clear idea as to whether and, if so, how, the VMS data feed was going to be used by Autonomy. The email exchanges suggested also

that some of the content was unsuitable for use in Autonomy's demonstration environment, and that there was a considerable degree of overlap between the VMS data feed and the Moreover data feed that Autonomy could have licensed for demonstration purposes for £50,000 per annum.

(6) The response of Mr Gallagher, Head of Development at Autonomy, appears to confirm that the provision of the data sample was Autonomy's first practical engagement with the application of the VMS feed. In an email dated 7 December 2009 he asked: "*What is this feed? What sort of content does it contain? Why did we licence it?*". As far as Mr Avila was aware, and as is plain from the terms of Mr Gallagher's email, Mr Gallagher was not familiar with the VMS data feed before Mr Avila's email. In response:

(a) Mr Avila replied with a summary of the VMS data feed and explained that "*It was part of the last deal we did with them as far as I know, we can integrate this "feed" within our demos or products and upsell customers into full VMS features…*".

(b) Mr Gallagher appears to have reviewed the data feed and then asked Mr Avila: "*Have you looked at the demo data?...From what I've seen the quality and content is pretty poor…not at all sure how it could be used in our demo network*". Mr Gallagher copied and pasted an example from the data feed in his email to Mr Avila.

(c) Mr Avila responded that he had "*not looked at it closely*" but "*for most of them the quality seemed ok*".

(d) But, for Dr Blanchflower at least,

> "*the "okay" was never what we were aiming for. The demo system was our showcase and designed to be as high quality as we could obtain. If there was anything that wasn't okay, we would remove it and try to do better. This was to replace our own iteration of the Moreover feed and unless it was tangibly better, there would be no reason to*".

(7) In further exchanges, Mr Avila went on to say: "*We don't have to use all of it, or any of it. If we do want to use it somehow we need to give them a spec [specification] of what we want though*". Mr Avila confirmed in his oral evidence that (a) if a specification was to be provided he needed someone to work with him to determine how to filter the data, which he accepted Autonomy needed to produce and provide to VMS if it wanted to use the data; but (b) he could not remember what he knew about it at the time, but he accepted that Autonomy probably did not need the data feed, because the data feed Dr Blanchflower had devised was satisfactory.

(8) Sometime later, Mr Lucini participated in the discussion, expressing uncertainty as to whether Autonomy got much value from "*a raw feed of unprocessed info*". Mr Lucini thought "*it would be funny if we end up getting moreover again but coming from vms! but this is a numbers game. Eloy, how much data do they process? How much would come our way? If it's meaningful we can put it through maindemo beta [sic] and see if it plays well…*". Mr Lucini was

essentially saying that, if Autonomy took the print and internet content, then it would be getting the Moreover data feed, but via VMS.[312] His suggestion that the VMS data feed be run in the main demo environment to see how it played out, indicates that the feed had not been tested in this environment, still less used. Mr Avila told Mr Lucini that he would get the numbers. Noting that Autonomy had *"seemingly paid for this*", he expressed hope that Autonomy could "*use it somehow, even if just moreover*". But $13 million was a lot to pay to continue to receive Moreover's data feed via VMS and other unprocessed, low quality news feeds that Autonomy did not want to use for its product demonstrations.

(9) Mr Gallagher's further investigations were not positive. As regards the only additional content that VMS offered over and above Moreover, namely, the broadcast content, Mr Gallagher advised Mr Avila that he should "*take a look*", because Mr Gallagher's random sampling of the files that VMS had transferred showed them "*all to be crappy local news broadcasts…we don't want these in the demo*". The Defendants took issue with this, on the basis that Mr Lucini, for one, appeared to consider the local data feeds *"a good thing"*. Mr Avila considered that *"for most of them the quality seemed ok"* and thought that Mr Gallagher, in comparing the feed to Moreover and viewing it solely in terms of its use in demonstrations had rather missed the point that the use of the VMS feed was not so confined. Indeed, the Defendants pointed out that Mr Avila had stressed that the ability to use VMS data for demonstrations was simply an ancillary benefit; its main purpose was to permit Autonomy to embed the feed into its WCM (Web Content Management) product line and Mr Avila had asked for thoughts about use in any other products also.

(10) That point had its dangers for the Defendants: Mr Avila's requests in finding and defining for VMS a use specification other than demonstration strengthened the impression that some use had had to be identified because none had been the reason for the purchase. As the Claimants noted, had the reason for the purchase been to integrate with Autonomy's product sets (as Autonomy represented to Deloitte in the Project Shockwave business plan) that exercise would have been unnecessary: Autonomy's engineers would have been told to start work on integrating it.

2667. As to (c) in paragraph 2664 above:

(1) Even by January 2010, Autonomy had still not provided VMS with the specification for the data feed without which VMS could not tailor it to Autonomy's requirements. It was not provided until 11 February 2010.

(2) Towards the end of March 2010, some nine months after Autonomy had acquired the VMS data feed, Autonomy incorporated it into its media aggregation service ("MAS") which in turn fed into a product known as Autonomy Explore. As Dr Blanchflower explained, and Mr Avila agreed, Autonomy Explore was an interface that formed part of Autonomy's Promote

[312] This was also the view of Mr Andrew Joiner, CEO of Autonomy eTalk, who told his colleagues in May 2010: "*VMS doesn't care about the feed. It's basically forked to us without being cleansed. They get it through a subscription to Moreover etc. What they want is for us to sell their data"*.

business unit, which included the Web Content Management suite of products. At a high level, Autonomy Explore indexed documents of use to people interested in media and marketing and performed analytics on that data.

(3) On 23 March 2010, Mr Joiner notified Dr Lynch and Dr Menell of the integration, saying:

> *"Good news is that we are receiving and ingesting the daily feeds from VMS into explore.*
>
> *Eloy [Avila] and Nathan [Anderson] have spearheaded the effort and produced a sizing. The issue is that we fill up the current demo idol server in a few days*
>
> *Would you be okay with adding a few servers per their recommendation? It is key element of deals and demos."*

(4) Dr Lynch recalled seeing this integration at the time, and acknowledged that it took place nine months after the first VMS purchase. Attempts were made during the cross-examination of the Claimants' witnesses to establish that the VMS data feed was incorporated into Autonomy Explore and sold to customers. Mr Goodfellow was unable to comment on whether Autonomy Explore incorporating VMS was sold to customers. Mr Lucini recalled that Autonomy tried to use the VMS data feed in Autonomy Explore, but that it did not work and was stopped. He also recalled a number of proofs of concept and demonstrations, but he did not recall any sales. Nor was he taken to any signed sales contracts in his cross-examination.

(5) Mr Avila referred in his witness statement to a number of documents shown to him by Dr Lynch's legal team and suggested that the VMS feed was "*incorporated into many of our Promote products, such as Optimost and Autonomy Explore, and sold to various key customers*". Mr Avila amended this paragraph before giving evidence so that it read "*VMS's feed was incorporated into and made compatible with many of our Promote products, such as Optimost and Autonomy Explore, which were sold or proposed to various key customers*" (emphasis added). The examples given were explored in detail in cross-examination. It emerged that Mr Avila had no personal involvement in four of the five examples he referred to in his witness statement. None of the documents he referred to were a signed sales contract showing the sale of the VMS data feed to a customer. Nor did any of the documents involve a sale or a proposed sale of Optimost incorporating the VMS feed. The most that Mr Avila was able to point to was an email chain relating to a customer called Herbalife, which started with Mr Anderson noting that Autonomy had sold a media aggregation service to Herbalife which it had not yet built. Mr Avila was not taken to any others in re-examination, nor was Dr Lynch.[313]

[313] After the close of evidence, the Defendants uploaded a number of additional documents to the trial bundle on this issue. Many of the documents post-date the second VMS reciprocal transaction and most of them are to the same effect as the documents exhibited to Mr Avila's witness statement, i.e. proofs of concept, statements of work, draft agreements, emails and the like, as opposed to evidence of material sales of Autonomy Explore / MAS incorporating the VMS data feed.

(6) In November 2010, Mr Avila asked Mr Joiner: "*how we are packaging the VMS data feed into Explore nowadays and if we are selling it?*". Mr Avila also asked whether it would make sense for VMS to host the data and provide access to Autonomy. Mr Joiner responded that this was not really practical and that:

> *"…For a variety of reasons, it doesn't make much sense for VMS to host the data. Firstly, we have already paid for the data and we are better with IDOL. Secondly, they don't add much value. They aren't collecting data themselves just forwarding the feeds. If they were to index the data, they don't have an automated way to extract and export data like we do with Automation Server. I could go on and on obviously (we would be totally dependent on them for support, they would know our customers etc etc). Happy to discuss further."*

(7) Mr Avila confirmed in cross-examination that this reflected his understanding at the time and explained that he handed over evolution of the data specification to Mr Anderson, who worked closely with Mr Andrew Joiner and Mr David Joiner, heads of the business unit for Autonomy Explore and Optimost.

(8) Mr Avila then asked Mr Joiner, who was involved with the VMS data feed and its potential use within Autonomy's Explore and Optimost products, about the possibility of upselling or reselling the VMS data feed, suggesting that part of a new offering to VMS "*may be a more collaborative reseller agreement of their feed/service*". Mr Joiner's response was again negative, ending:

> *"…there just isn't a ton of value in their feed, especially if there are royalties. It's a commodity market — though putting it into IDOL isn't…".*

2668. As at Q4 2010, therefore, Autonomy had not done what it represented to Deloitte it would do with the feed in its Project Shockwave business plan. There is no evidence that the feed had been integrated with Autonomy's Interwoven or Optimost product sets, still less sold to customers as part of these products.[314] As elaborated in the context of the second VMS transaction, it appears that Autonomy had not even acquired the rights to use the VMS data feed as part of its Optimost products, despite representing to Deloitte that this was part of the rationale for acquiring the data feed in Q2 2009.

2669. Mr Hill sought in his oral closing to maintain the line that the VMS data feed *"was used and was used for the purposes for which it was bought."* He submitted that it was successfully incorporated into the 'Explore' product, which was part of the WCM product line, which in turn was part of the 'Promote' part of Autonomy's business. He added that even if this was not the Optimost product mentioned in the Project Shockwave Business plan, it was another Interwoven product and thus *"very much in line with the commercial rationale that was explained to Deloitte"* so that *"the product was used and was used for the purpose for which it was bought".*

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[314] After the close of evidence, the Defendants uploaded two documents on this issue. These do not advance their case. The first in time shows that the Managing Director of Optimost, Mark Wachen, asked in August 2009 whether the terms of the first VMS purchase entitled Autonomy to use the data feed in new Optimost products. As will be seen, it did not. The second in time shows that, by Q1 2011, there had not been any VMS-Optimost integration.

2670. However, Mr Rabinowitz countered in his oral reply that this overlooked how long it had taken even for Autonomy to start work on the specification for the data feed, having as a matter of some urgency paid $13 million for it; it overlooked the fact that what Deloitte had been told to justify the purchase was that it would be integrated for demonstration use immediately, and into TeamSite, LiveSite and Optimost in Q3 2009, none of which was done; and that even overlooking the fact that it was the Optimost product, and not the Explore product, which Autonomy had identified, there was (as stated above) no evidence of actual integration with Interwoven or Optimost products, and the evidence of any sales was *"very thin indeed"*. There were in evidence no signed sales documents nor any documents of the kind that would be expected if there had been material sales. Mr Rabinowitz also reminded me that attempts were made during the cross-examination of the Claimants' witnesses to establish that the VMS data feed was both incorporated and sold to customers: but all these attempts failed. I accept the Claimants' case and find that any sales were negligible.

Conclusions on the first VMS transaction

2671. In summary, in my judgment:

(1) Mr Hussain proposed a sale of software by Autonomy to VMS as the means of generating extra revenue in a quarter when the *"US commercial call was poor"* and Autonomy needed some $9 million in extra revenue in order to hit Autonomy's Q2 2009 revenue target. It was Autonomy which approached VMS and prompted and promoted the sale.

(2) VMS was undoubtedly interested and became keen to purchase software which it considered offered it a potential for positive change: but a purchase of that magnitude was disproportionately large having regard to its available resources and was not one it could have contemplated but for Autonomy's offer to purchase from it a licence to its data feed.

(3) Autonomy's purchase of a licence to VMS's data feed was thus the means of enabling VMS to effect its proposed large ($9 million) purchase of Autonomy software.

(4) Mr Hussain was in direct control of both Autonomy's sale and its purchase. He dictated the price and the amount of software sold, as well as the price to be paid by Autonomy to VMS for the data feed licence. The presentation of the transactions to Deloitte and the Audit Committee as separate was false.

(5) Autonomy did not conduct any technical analysis of VMS's data feed before agreeing to purchase rights to it for $13 million. The commercial assessment presented to Deloitte was prepared after the deal had been agreed and did not in reality guide or indicate the reasons for the decision either to sell or to purchase.

(6) The further memorandum on revenue recognition prepared to persuade Deloitte of the desired revenue recognition was also contrived and misleading.

(7) Autonomy did not need the data feed licence it acquired and did not seek to assess, still less deploy, it for many months after its purchase of it on the last day of Q2 2009. Instead, Autonomy pursued two alternative options of either

(a) striking a deal for its previous data feed provider, Moreover, to continue providing such a data feed at a cost negotiated at £50,000 per year or (b) developing its own data feed.

(8) Given its past disappointment with Moreover, the fact that its data feed was limited to demonstration and did not permit sale, and Autonomy's corporate preference to develop its own software, Autonomy favoured and adopted the course of developing its own data feed.

(9) Although there were or might have been copyright problems for Autonomy in developing its own data feed for sale, those problems did not, or were not thought to, affect the development and deployment of its own data feed for demonstration purposes. Dr Blanchflower, Mr Lucini and their teams quickly developed such a data feed which is still in use by MicroFocus in substantially the same form as it was in 2009.

2672. I have concluded in these circumstances that the reason for Autonomy's purchase of the VMS feed was to fund a purchase from it by VMS in order to generate recognised revenue in order to seek to cover a shortfall on quarterly revenue targets; and that, since that was the reason for both transactions, they should have been accounted for together, and no revenue should have been recognised in respect of the sale to VMS.

The accounting treatment of the VMS reciprocal transactions

2673. It is convenient to set out the accounting consequences in respect of both the first and the second VMS transactions. There is no real dispute as to the application of the accounting principles on the basis of my conclusions that in each set of transactions the reason for the purchases by Autonomy was to fund the purchases from it in order for Autonomy to generate recognised revenue and in each set the purchase by Autonomy and the purchase by VMS from Autonomy must be taken together:

(1) There is no dispute that Autonomy's purchases of the VMS data feed were linked to Autonomy's software and hardware sales to VMS. The linked sale and purchase transactions ought, therefore, to have been considered together in order to determine their substance and appropriate accounting treatment.

(2) From the matters set out above, it is clear that, in each case, the linked sale and purchase were not independent, arm's length transactions, and it was not possible to understand the substance and commercial effect of one agreement without regard to the other. That is because there was no genuine commercial rationale for either of Autonomy's purchases of the VMS data feed. Rather, the real purpose of Autonomy's purchases was to incentivise VMS and to fund VMS to purchase Autonomy software on terms VMS would not otherwise have agreed so that Autonomy could recognise additional revenue in Q2 2009 and Q4 2010. Autonomy's purchases, and the linked sales to VMS, therefore lacked economic substance.

(3) Further, IAS 18 §14(d) was not satisfied because no economic benefits flowed to Autonomy.

2674. It follows that Autonomy should not have recorded revenue on the sales to VMS. Autonomy should instead have: (i) recorded the net cost in relation to the first VMS sale and purchase, totalling $4,000,000, as an expense in Q2 2009, and (ii) recorded the net cost in relation to the second VMS purchase and the VMS hardware and software sale, totalling $261,633, as an expense in Q4 2010.

Defendants' knowledge

2675. There is no doubt about Mr Hussain's involvement and knowledge. I accept the Claimants' submissions that:

(1) Mr Hussain conceived of the first VMS reciprocal transaction as a means of generating extra revenue in Q4 2009 and he dictated the size of the deal to Mr Egan by reference to Autonomy's revenue needs.

(2) Based on the financial information he had relating to VMS and the size of VMS's business, he must have appreciated that VMS would not have entered into the first VMS sale on the terms it did unless Autonomy had incentivised it and funded it to do so through the first VMS purchase.

(3) He contributed to the misleading Project Shockwave business plan and was content for the equally misleading revenue recognition memorandum to be provided to Deloitte. He can only have understood that it was necessary to mislead Deloitte because there was no genuine commercial rationale for the first VMS purchase and that Deloitte would not have concurred with Autonomy's accounting treatment of the first VMS sale had it known that was the case.

2676. As ever, the position against Dr Lynch is less clear. His general position, as he asserted in his witness statement, and resorted to in cross-examination occasionally (see above) was that he had little involvement in the VMS reciprocal transactions.

2677. However:

(1) Dr Lynch was aware (as he had been informed by Mr Hussain by email of 19 June 2009) that the context in which Mr Hussain was pursuing a deal with VMS was that the *"US commercial call was poor"* and he needed extra revenue (naming VMS in that regard): see paragraph 2598 above. The inference from the way the email was drafted was that Dr Lynch was already aware of the proposed deal by then.

(2) Dr Lynch was kept updated of the progress of the transaction, including the proposed sale price *"at between 7-9m"* (see paragraphs 2607 and 2615 above), and accepted that he may well have been aware of the proposal for Autonomy to purchase something from VMS for a like price. He was also party to what I have determined were pre-textual exchanges setting out the line to be adopted on the purchase side.

(3) He was provided with a copy of the Project Shockwave Business Plan and the Revenue Recognition memo. He suggested that he might not have read the Business Plan: but I would doubt that. I think it more likely than not that he would have read it, even if only rapidly.

(4) He discussed the twin transactions with Mr Chamberlain, including a discussion about the first VMS reciprocal transaction being one of a number of "*circular transactions*".

(5) He eventually had to accept in cross-examination that the proposed deal only became a firm option in June 2009, and I infer that he was aware accordingly that the statements made to Deloitte that the purchase proposals had been commenced in March 2009 were false.

(6) He was kept informed of Mr Chamberlain's concerns about persuading Deloitte about the values paid.

(7) He was aware at the time that the purchase by VMS and the sale by VMS were being discussed at the same time.

(8) Mr Hussain sought his approval to pay VMS early. Dr Lynch asked no questions and I infer he knew, as did Mr Hussain, that this was needed to enable VMS to fund the instalment for its own purchase the next day.

(9) Dr Lynch was aware of the efforts to find some use for the VMS feed, and of the work being done to create Autonomy's own data feed. He was aware that the VMS data feed was not incorporated with any Autonomy product until the end of Q1 2010, almost a year after Autonomy had bought it for $13 million.

(10) Over the course of his cross-examination, I formed the impression that Dr Lynch did know that the pressing and preponderant reason for the purchase by Autonomy from VMS was to fund a corresponding purchase by VMS of software. I agree with the Claimants, and find that Dr Lynch cannot have believed that it was appropriate to recognise revenue from the sale to VMS in those circumstances.

2678. That is consistent with my overall view that Mr Hussain always kept Dr Lynch informed of the purpose and progress of the various transactions to bolster revenue to reach target.

2679. In my judgment, in all the circumstances, Mr Hussain plainly had 'guilty knowledge' of the improper recognition of revenue from the sale side. I have concluded on a balance of probabilities that so also did Dr Lynch.

The second VMS transaction - Q4 2010 (RT 2)

2680. As in Q2 2009, in Q4 2010 Mr Hussain was looking for ways to generate revenue to achieve revenue targets. As was his habit for every quarter, Mr Hussain had prepared a revenue forecast spreadsheet divided into closed deals, large deals and *"deals on the right"*. In Dr Lynch's words, there was a sort of route map, with *"his deals on the left, and then as things come out of the left, you put things in from the right"*. In other words, the deals on the right were brought in to cover any revenue shortfall in the event that any of the deals on the left fell away.

2681. At the beginning of November 2010, Mr Hussain circulated to Mr Egan, Ms Eagan and Dr Lynch, among others a table setting out the status of various large deals. The table included a $5 million deal with VMS 'on the right'. Mr Hussain, who had by then taken

up Mr Egan's suggestion of the possibility of striking new arrangements with VMS through its new CEO (Mr David Stephens), told Ms Eagan in his covering email that the VMS ideas needed to be put into a proposal as soon as possible.

2682. A few days later, on 14 November 2010, Mr Hussain updated Dr Lynch on various deals that quarter and told him to *"Add VMS at say $5m – Nicole running, meeting wed"*. Each of Mr Hussain's updates to Dr Lynch over the following week identified VMS as key to the quarter. Over the course of the next few weeks, Mr Hussain, Ms Eagan and Mr Egan's focus was on what Autonomy could buy from VMS and sell to it, and how Autonomy could maximise revenue from the deal.

2683. It is clear that Dr Lynch was aware of a possible deal with VMS and that Mr Hussain was counting on it in his revenue forecasts. Dr Lynch was also kept informed of the progress of the discussions with VMS. Mr Hussain forwarded him Ms Eagan's summary of a meeting with VMS, in which Ms Eagan said that it *was "looking very good but still not sure on the new CEO's spend level. Beth Ladd has lunch with Gerry [Louw] today and I'll ask her to try to get a feel for how large we can go"*. Obviously, and as Dr Lynch accepted, the larger the deal, the more revenue for Autonomy.

2684. As is also clear from Ms Eagan's email, this was not a case of Autonomy having identified further rights from VMS that it needed or wanted and then entering into negotiations with VMS to acquire those further rights, as one would expect to see if there was a genuine commercial rationale for the purchase.

2685. Mr Hussain's primary concern, unsurprisingly, was how much revenue Autonomy could generate from a deal with VMS.

2686. At the beginning of December 2010, Mr Hussain told Dr Lynch that VMS needed some connectors and that a deal could be done, but probably for no more than $1 million. Mr Hussain suggested to Dr Lynch that a meeting needed to take place with the CEO of VMS, Mr Stephens. Mr Hussain later offered to Ms Eagan to meet with Mr Stephens when he was in New York.

2687. The first exercise was conducted primarily by Ms Eagan, not by reference to any apparent need or want on the part of Autonomy for further rights to VMS's products, but simply by reference to what was outside the scope of the first VMS reciprocal transaction:

(a) Ms Eagan asked Mr Scott and Mr Egan on 15 November 2010 for the terms of the first VMS reciprocal transaction, that is, what Autonomy licensed to VMS and what VMS licensed from Autonomy, saying that she needed them "*in order to think through the new deals structure*". Having considered the agreements, she then emailed Mr Scott and Mr Egan with some queries.

(b) On 19 November 2010, Mr Scott set out his answers underneath Ms Eagan's queries (his answers being identified in bold):

> *"Products such as Explore, Social Media Governance, Concept Stream (a new News Monitoring function) as well as the Twitter hash tag analysis we are just developing now did not exist. I assume these would therefore not be covered under the agreement as they did not exist at the time of the agreement. Is that correct?*

Anything new that was not in existence at the time would not be covered.

What were the limitations on our license of VMS data? Apparently, Andrew Joiner said we are using the feeds but not the other information. We need Gerry@ VMS to wrap it in a web API. I'm trying to find out more about that aspect but may need to know if that would be covered under the agreement. VMS new CEO would also like us to display the VMS brand in our demonstration with VMS data. Was that contemplated in the original agreement?

We are authorized to use and display the Data to End-Users by embedding an API designed to access the Data into Autonomy software. We have no right to sell or distribute the Data, itself, in any manner or via any method to end-users. Autonomy is restricted from providing functionality to the End-User to download or reproduce Data for its own use, for sale or distribution. I did not see anything that authorizes, requires or prohibits us from displaying their logo in our demos.

Were there any resell/upsell terms? For example, does our salesforce have the right to resell or upsell VMS services to our clients? If so, what are the terms? Or are we to refer clients to VMS sales organization?

I don't see a right to sell/upsell VMS products (presumable the data in question) to customers. In fact, the contract states "All sales of Data or media to Autonomy End-Users, whether in tape, DVD, or other digital format, shall be made by VMS at prices to be established by VMS. VMS shall bill each End-User directly for such sales. VMS shall pay Autonomy a commission of 10% of all such sales exclusive of taxes, shipping, and handling charges, and/or royalty charges, if any." Commissions are paid quarterly in arrears."

2688. Dr Lynch asserted that Ms Eagan's email was the "*sales part of an interaction with VMS, not the purchase part*", and that Ms Eagan was trying to find out what VMS already owned so that she could "*work out what she can go and pitch to sell them*". The Claimants contended, and I accept, that that was not the case. Only the first paragraph of Ms Eagan's email related to the software that Autonomy had already licensed to VMS and what further software Autonomy might be able to pitch. The remainder of Ms Eagan's email related to the scope of the first VMS purchase.

2689. On 19 November 2010, Ms Eagan sent Mr Hussain a proposal, which envisaged VMS licensing Autonomy software outside the scope of the first VMS sale and Autonomy reselling / upselling the VMS data feed.

2690. Initially, it seemed unlikely that a deal in excess of about $1 million was realistic. By 7 December 2010, Mr Stephens had had several meetings with Ms Eagan. He summarised the outcome of those meetings in an email to Ms Eagan and Mr Egan, noting that:

"VMS is not yet fully utilizing the software it already has under license – I guess like Autonomy is not yet fully utilizing the content it has licensed from VMS"

2691. The following week, Ms Eagan met with Mr Hussain to discuss the deal structure. The goal, by this point, was *"$2m revenue VMS pays Autonomy"*. Mr Hussain told Mr Egan, Ms Eagan, Dr Menell and Mr Scott on 14 December 2010 that he had spoken with Dr Lynch and *"he was fine"*. Mr Hussain summarised the deal structure as follows:

"We sell $2m of software (connectors that Pete [Menell] has to deliver please)

We buy: $0.5m services provided, $0.5m for the VMS service plus for non cash (but valuable to VMS) – we put their logo on our AVRO product and also we give them PR via our PR of the product"

2692. Dr Lynch accepted in cross-examination that it was obvious the two deals with Autonomy buying and selling software were being discussed at the same time, and that he had had a discussion with Mr Hussain about the proposed deal reflecting the terms of Mr Hussain's email.

2693. The next day, 15 December 2010, Mr Hussain told Dr Lynch and Dr Menell that the CEO of VMS wanted to do a deal, that the terms were yet to be agreed and that he and Mr Egan would negotiate the deal. Mr Hussain later told Dr Lynch that the VMS deal was *"a replacement for kpmg"*, another potential Q4 2010 deal, which Mr Hussain had flagged earlier as being at risk. Dr Lynch accepted in cross-examination that Mr Hussain meant a replacement from a revenue point of view; in other words, the revenue from the VMS deal was going to replace the revenue that Autonomy was looking to earn from a deal with KPMG.

2694. Mr Hussain then attempted to identify ways of increasing the size of the deal and hence the revenue that Autonomy could recognise. The same day, he emailed Mr Egan and Ms Eagan with the subject *"about buying vms",* saying:

"*Thought I'd throw that in to make it bigger*

We could take shares as part consideration to help them

The problem is of course time but at these levels we could do it without much dd."

2695. Dr Lynch acknowledged that Mr Hussain was trying to make the deal bigger in order to increase the revenue Autonomy could recognise, and that he was suggesting Autonomy consider taking shares in VMS as payment to facilitate that.

2696. Mr Hussain sent Mr Egan and Ms Eagan further ideas for increasing the size of the deal later that day:

"Ideas: We sell hardware for $5m. We provide financing – say 1 year to pay. This has value

We sell the connectors, extensions etc for $5m inc 5% maintenance

We prebuy their servies [sic] at list etc for $4m

There has to be a strong branding of vms and cross selling opportunities".

2697. *[Paragraph intentionally left blank]*

2698. Dr Lynch suggested that Mr Hussain was simply trying to sell more to VMS, and that there was nothing wrong with that; but Mr Hussain was plainly aware that VMS was not in a position to finance a larger deal from its own resources and was trying to find ways of overcoming this by providing financing or accepting alternative consideration so as to increase the revenue that Autonomy could look to recognise.

2699. Mr Hussain's idea of adding a sale of hardware enabled a considerable increase in the size of the proposed transaction. After negotiations between Mr Egan and Ms Eagan with VMS on 16 December 2010 Mr Egan reported that "*There is a $10M deal here"*, assuming that Autonomy could supply *"approx. $5 to $6M in HW through bonded warehouse"* and software to a value of between $2m to $4m, and would purchase from VMS *"enhanced and increased rights for current period"* and also an extension of aggregate rights for a term of 5 years, which Mr Egan wrote in his email reporting on the meeting was *"vital for Nicole [Eagan]"* Mr Egan noted further that VMS *"also requested longer than 2 year payment on the HW"*.

2700. The following day, 17 December 2010, Mr Hussain updated Dr Lynch and Dr Menell on Autonomy's progress towards its revenue targets, saying *"Currently tracking between 250 and 258 depending on kpmg"*. That figure included *"Vms agreed at 9.5m"*.

2701. By 22 December 2010, the discussions between VMS and Autonomy had come down to the delta, that is, the net cash VMS was going to receive from the deal. The Claimants contended that this reflected the reality that the deal for Autonomy was about how much it had to pay to VMS to secure the revenue it needed for the quarter.

2702. This reality, and the fact that all concerned in Autonomy understood that the sale values for which Autonomy would seek to achieve would depend on revenue needs, was further emphasised in the email exchanges in evidence. Thus on 22 December 2010, Mr Egan received an email from Mr Stephens with the subject "*best effort*", which Mr Egan forwarded to Mr Hussain.[315] Rather than having protracted negotiations, Mr Stephens indicated he wanted to "*cut to the chase and put a deal on the table that works for all*".

2703. Mr Stephens summarised the deal as follows:

"...Please see attached. It achieves

- *A $13m sale for AU in 2010*
- *The net payment is in the range you discussed*
- *VMS gets the HW and SW it needs*

[315] The suggestion was made that Mr Stephens' email might not be the email referred to, but it is clear that the attachments to the email were sent to Mr Hussain by Mr Egan.

- *AU has access to data to help build your business*

- *I believe I can get our shareholders to agree in time*

- *Most importantly it builds an even stronger relationship between our 2 companies*

- *We have discussions underway for further relationship enhancement in 2011"*

2704. A spreadsheet which (though at one time this was queried) appears to have been attached to Mr Stephen's email set out in tabular form a series of linked transactions between Autonomy and VMS, comprising a sale by VMS of further rights to the VMS data feed for $8.1 million, and sales by Autonomy of (a) hardware (acquired by Autonomy from a third party supplier) for $8 million and (b) further Autonomy software for $5 million.

2705. On 23 December 2010, Mr Egan sought Mr Hussain's advice on how to proceed, suggesting that they "*counter slightly more softly at like 3.25 delta or at least put language in that opens the door for David to be in touch with you today to discuss/make a case etc.*". Mr Egan summarised the position for Mr Hussain in more detail later that day in response to an earlier email from Mr Hussain:

> *"Not sure when you are getting out of your meeting. I'm not sure I follow this. Our offer to them was:*
>
> *They buy approx 8-10M in HW, amount doesn't matter really as it nets out of analysis. (however, it does actually matter a bit as I'm sure we will source it for at least 10% less than we sell it for.)*
>
> *They pay $5M for the SW*
>
> *We buy $7.5 M in VMS Information Services*
>
> *That would leave a real delta of $2.5M. One way to think about it is that $1M of that is against the AU staffing services obligation both past and future. The remaining 1.5 is either: a pure delta or recovered in HW sourcing prowess.*
>
> *With that said. They countered moving that $2.5 to $4.6. and penciling 8M in HW so it would be 13M in rev to AU.*
>
> *A few thoughts:*
>
> - *I think we can counter again*
>
> - *I don't think they have the ability to do too much better than that. (they aren't actually going to buy the HW in the absence of help like this , they just have to go on and run their business and hope they can self fund those aspirations over 4 years. So it's not like we are relieving them of planned expense.*
>
> - *What we do next depends heavily on what you need. It would be best to know more on BofA.*

- *We could just work to optimize and keep the option to do this deal. If we break out of the range of economics they can even consider we will not be able to reconvene them if we regret it upon collapse of other stuff.*

- *Thoughts???"*

2706. The Claimants highlighted a number of points of note in Mr Egan's email:

    (1) The hardware purchase netted out of the calculation of the delta because, as Dr Lynch put it, it was a zero-margin transaction. The relevant delta was therefore between the proposed sale by Autonomy of software and the proposed purchase by Autonomy of further rights to the VMS data feed. In other words, the delta was the cost to Autonomy of selling its software.

    (2) Autonomy's response to the terms proposed by Mr Stephens expressly depended on what Mr Hussain said he *"needed"*; and given the subsequent reference to the status of the proposed deal with BofA, that can only have meant what Mr Hussain needed from a revenue perspective.

    (3) Mr Egan regarded the deal as otherwise optional: he appeared to think that in reality, Autonomy only needed to make the purchase to generate the sale.

2707. In the result, the parties compromised on what Mr Stephens described as *"the $3.3m net cash payment"*. Only after that was attention turned to ironing out exactly what would be the software rights to be sold by Autonomy to VMS and the data feed licence rights it was to purchase from VMS, as well as to providing a recorded justification for Autonomy's purchase of such rights for $8.4 million.

2708. In the latter context, no effort was made by either Mr Hussain or Dr Lynch, both of whom ultimately approved the transactions, to establish whether the first VMS purchase had been a success, financially or otherwise, before investing further substantial sums (including a very handsome 'delta') in another VMS data feed licence. Mr Crumbacher simply prepared a table setting out the main features of Autonomy's further purchase from VMS and asked Ms Eagan and Mr Egan to add the reasoning behind the purchase and the amount allocated to each component of it. Mr Hussain put in an additional request that Ms Eagan and Mr Egan *"add colour"* and Mr Chamberlain *"work on valuations"*. Mr Hussain indicated that he was *"ok"* with the purchase *"given the commercial success of the previous acquisition of data"*, any such success being negligible, if measurable at all.

2709. The three components of the second VMS reciprocal transaction were executed on 31 December 2010:

    (1) Autonomy's purchase from VMS took the form of an amendment to the first VMS purchase (the "second VMS purchase"). The second VMS purchase extended the term of the first VMS purchase from three years to five years and expanded the scope of the data licensed under the first VMS purchase so as to include social media content and vertical market content. The agreement also licensed additional rights to Autonomy, including: (i) the right to sublicense and

distribute the licensed VMS data to Autonomy customers, end-users, prospects, resellers and partners, and (ii) the right to use, manipulate, access, review, compile and automatically act on the VMS data solely through operation of and in conjunction with Autonomy's hosted, web-based, online marketing optimisation and analytics product currently marketed under the trademark "Optimost" for itself and for the benefit of customers and users of the Optimost service. The fee payable by Autonomy under the second VMS purchase was $8.4 million, which was due in five (unequal) instalments. The first three instalments were for $2 million each and were due in February, April and July 2011.

(2) Autonomy's sale of further software licences to VMS took the form of a further product schedule to the existing software licence agreement (the "VMS software sale"). Under the VMS software sale, Autonomy licensed certain software to VMS for the uses authorised therein. The agreement provided for a licence fee of $5 million, which included a fee in respect of the first year of support services in the amount of $250,000. The licence fee and the support fee were payable in three instalments. The first two instalments were for $1,500,000 and were due within 90 and 120 days of invoice, respectively.

(3) Autonomy also sold hardware and other equipment to VMS pursuant to a second amendment to an earlier software licence agreement between the parties (the "VMS hardware sale"). Under the VMS hardware sale, VMS agreed to purchase from Autonomy the hardware and equipment specified in the schedule to the agreement for a purchase price of $6,004,066.90. This amount was payable in four instalments of $1,501,016 or thereabouts. The first instalment was not payable for almost an entire year, and the final instalment was not due until almost two years after the effective date of the agreement. Dr Lynch acknowledged that these were unusually generous payment terms.

2710. Autonomy recognised the licence fee from the VMS software sale and the amount payable under the VMS hardware sale, totalling $10,754,067, in Q4 2010, and the support fee as revenue over the following year.

2711. Three further points were stressed by the Claimants:

(1) First, much was made by the Defendants in the cross-examination of the Claimants' witnesses and in Mr Avila's witness statement of the second VMS purchase giving Autonomy the right to resell the VMS data feed; indeed, Mr Avila's witness statement rehearsed that Dr Lynch's legal team had told him that this right was a "*fundamental factor*" in Autonomy entering into that agreement. The basis for those instructions is entirely unclear. As noted above, when Mr Avila asked Mr Andrew Joiner in November 2010 about the possibility of reselling or upselling the VMS data feed, Mr Joiner was less than enthused and said that there "*isn't a ton of value*" in the feed.

(2) Secondly, as outlined above, the second VMS purchase granted Autonomy the right to use the VMS data feed in Autonomy's Optimost product set. Yet Autonomy had represented in the Project Shockwave business plan that part of the reason for the first VMS purchase was to incorporate the VMS data feed

with its Optimost suite of products. The fact that Autonomy had to license additional rights in order to be able to use the VMS data feed in this way indicates that: (i) this cannot have been part of the rationale for the first VMS purchase, contrary to what was stated in the Project Shockwave business plan, and (ii) Autonomy cannot, at least lawfully, have incorporated the VMS data into its Optimost product set by Q4 2010. This would explain why there is no evidence of Autonomy having done so prior to the second VMS purchase.[316]

(3) Thirdly, the payment terms were structured so that: (i) VMS did not have to pay anything in respect of the hardware for almost a year after the sale, an unusually long period of time, and (ii) with one exception which, as will be seen, VMS regarded as an oversight, VMS did not have to pay anything to Autonomy under the VMS software sale until Autonomy had provided VMS with the funds by making payments under the second VMS purchase. These payment terms reinforce the suggestion that the second VMS purchase was simply a means of channelling funds to VMS.

2712. As in the case of the first VMS purchase, the Claimants' case is that the purpose of the second VMS purchase was to incentivise and fund VMS to make a reciprocal purchase from Autonomy from which Autonomy could recognise revenue in Q4 2010, not because Autonomy had any genuine need or want for further rights to the VMS data feed.

2713. Dr Lynch's written closing submissions complained that much of the material put to him was comprised of documents to which he was not a party. It was noted, however, that none suggested that the purchase from Autonomy was not going to be at fair value or that it would not involve purchasing rights that Autonomy genuinely wanted.

2714. However, the VMS data feed was no more useful than it had been previously; and the reason for the linked transactions was, as before, revenue recognition with the transactions fixed at a price to ensure the achievement of the revenue required by Mr Hussain to meet the quarterly target.

Deloitte's consideration of the second VMS transaction

2715. On 18 January 2011, a few weeks after Autonomy entered into the second VMS reciprocal transaction, Mr Chamberlain asked Ms Eagan to "*pull together a memo that shows what we have purchased and why. This memo should give some consideration to why we have paid $8.4m for it. May be linked to price lists, quotes etc or may be cheaper than costs for us to replicate etc etc*". No such consideration had taken place within Autonomy prior to it entering into the second VMS purchase, as one would expect if the purchase had a genuine commercial rationale.

2716. Mr Chamberlain repeated his request the following day, saying he was *"going to need something over the next few days on this to provide to the auditors"*. He said that the summary Ms Eagan had produced a few days earlier was very useful and *"should be repeated in the paper with a little bit more meat on the bones highlighting why we would pay $8.4m for this i.e. some evidence of possible future sales/markets that this will help us get into"*. Ms Eagan responded, noting that she was *"not at all involved with pricing"*.

[316] As noted above (footnote 314), from a document uploaded to the trial bundle by the Defendants after the close of evidence, it is clear that there had not been any VMS-Optimost integration by Q1 2011.

As set out above, that is because the pricing was negotiated by Mr Egan and Mr Hussain by reference to the delta between the second VMS purchase and the VMS software sale.

2717. No paper appears to have been produced because, the same day, 19 January 2011, Mr Chamberlain forwarded an inconclusive earlier summary by Ms Eagan of the second VMS purchase to Mr Welham. Mr Chamberlain subsequently emailed Mr Welham on 25 January 2011 asking what he needed, saying that he had *"provided the commercial rationale from Nicole"* and that the pricing was *"consistent with the previous deal we did with them at which time we obtained many third party quotes etc."*. Subject to the next paragraph, these emails appear to have been the only documented rationale put forward to Deloitte to justify the second VMS purchase.

2718. From Deloitte's working paper, it appears that Deloitte was given to understand that the second VMS purchase provided Autonomy with access to VMS's main data feed and permitted Autonomy to include the VMS analysis tools in its own products. Deloitte also appears to have spoken with Dr Menell about the supposed rationale for the deal, and been provided with a short demonstration to prove that *"the VMS feed [Autonomy] claimed [it] had was real"*. Presumably because the information was insufficient, Deloitte had to consult its own in house IT specialist. Deloitte's working paper records that:

> *"Per our conversation with…our in house IT specialist, the value gained from this purchase is considerable and has a defined market opportunity. As a result, the amount to be paid of approximately $8.4 million is deemed to be reasonable and at fair value for the purposes of our assessment of the two transactions made with VMS during the quarter."*

2719. As regards the VMS software and hardware sales, Deloitte was provided with: (i) an auditor debtor confirmation letter signed by the CFO of VMS confirming that the instalments under the VMS software and hardware sales were proper and unpaid as of 31 December 2010, (ii) confirmation that the hardware supposedly being supplied from Autonomy's existing stock was bonded, and (iii) documents indicating that the hardware Autonomy purchased from the hardware reseller, Insight, had been approved by Dr Lynch and was bonded and ready for shipment.

2720. None of the material provided to Deloitte by Autonomy disclosed that:

(1) Moreover had offered to continue to provide its data feed to Autonomy for use in its demonstration environment for £50,000 per annum in mid-July 2009;

(2) Autonomy had created its own data feed, which it started to build in June 2009, and which it used for demonstration purposes in place of Moreover;

(3) Autonomy had not achieved any real commercial success from the VMS data feed it purchased for $13 million under the first VMS purchase and did not have any real reason for purchasing additional data streams and rights in Q4 2010;

(4) The second VMS purchase and the VMS software sale were linked and their negotiation was conducted by reference to the 'delta' payable to VMS; and

(5) Contrary to what Deloitte were told, Autonomy had to buy in hardware for resale and did not deliver $4 million of hardware from its own stock under the VMS hardware sale.

2721. Mr Welham's unchallenged evidence was that, had Deloitte been aware of these matters, this would have prevented revenue recognition in respect of the sum relating to the hardware supposed to be supplied from Autonomy stock, and would have caused Deloitte to give further consideration to whether it was appropriate to recognise any revenue from the VMS software sale.

Payments made in respect of the second VMS transaction and VMS's bankruptcy

2722. The payments made in respect of the second VMS transaction were as follows:

(1) Autonomy paid VMS $2 million on 17 February 2011 for the first instalment under the second VMS purchase.

(2) A few weeks later, on 31 March 2011, VMS paid Autonomy the first instalment of $1.5 million under the VMS software sale.

(3) The next day, 1 April 2011, Autonomy paid VMS a further $2 million under the second VMS purchase.

(4) On 29 April 2011, Autonomy received $1.5 million from VMS in respect of the VMS software sale.

2723. At the beginning of June 2011, Mr Stephens asked Mr Egan for help regarding the next payments. As Mr Stephens explained, "*we have $2m to go in either direction 2 days apart. Our intent in the December deal was to have dates that were exactly synchronous. In the rush to get revisions done the gap arose. We want & need to avoid sending you $2m to only get it back 2 days later…Unless I hear otherwise I will assume you are ok for the amounts to net out on 6/30*". Mr Chamberlain raised Mr Stephens' request with Mr Hussain. Although Mr Hussain asked Mr Chamberlain to try to get the cash in, in the event, Autonomy agreed to net off the final instalment payable by VMS under the VMS software sale against the $2 million instalment payable by Autonomy under the second VMS purchase, leaving Autonomy owing $2.4 million in respect of the second VMS purchase.

2724. At around this time, June 2011, Mr Louw of VMS contacted Mr Goodfellow to see if Autonomy would consider buying back some of the hardware that VMS had purchased under the VMS hardware sale. Mr Louw told Mr Goodfellow that VMS had a *"very nice overhang of servers that I need to get rid of quickly to fund another immediate opportunity here at VMS. We are estimating that we can reduce the HP DL360 count by 40, and the HP ML150 count by 600. The above has not been shipped yet / received yet, so guaranteed brand new and in box"*. Mr Louw offered to sell this hardware to Autonomy or one of its clients at a lower price than VMS had paid for it.

2725. This proposal appears to have been discussed within Autonomy. Before Autonomy had made a decision, VMS filed for bankruptcy at the end of August 2011. The imminence of VMS's bankruptcy must have been apparent to Mr Hussain because an instruction was given in mid-August 2011, two weeks before VMS filed for bankruptcy, to put a

payment hold on so that no payments were made to VMS without Mr Hussain's approval.

2726. Autonomy did not pay the final instalments under the second VMS purchase, which were not due until October 2011 and July 2012.

2727. Nor did Autonomy receive any cash in respect of the VMS hardware sale. The full amount was ultimately written off in September 2012. Mr Goodfellow's unchallenged evidence was that no repurposed Autonomy hardware was ever delivered to VMS. It is unclear if Autonomy ever sought to recover the HP hardware that had been supplied to VMS for which it was never paid.

2728. As a result of VMS's bankruptcy, Autonomy had to find another source for ingesting social media content into its media aggregation service.

2729. The reactions within Autonomy varied from suggesting that Autonomy should consider acquiring the material assets of VMS to suggesting that VMS's bankruptcy was not a surprise and that Autonomy had better alternatives. Dr Lynch seemed to think that the reference to Autonomy acquiring VMS's assets showed that the VMS data feed was valuable to Autonomy, in fact, it showed the opposite. Had the data feed been as significant as the Defendants had sought to make it out to be, one would have expected Autonomy to have explored that option. But it did not do so. That supports the inference that it did not do so because Autonomy purchased the data feed not for its intrinsic value to Autonomy but to fund reciprocal purchases by VMS of Autonomy software, from which Autonomy could recognise revenue.

Conclusions on second VMS transaction

2730. In summary, I have concluded in respect of the second VMS transaction, as in the case of the first VMS transaction, that:

(1) Mr Hussain proposed a further sale of software by Autonomy to VMS because he needed additional recognised revenue to make up for deals *"on the left"* which had not materialised (and in particular a proposed deal with KPMG).

(2) His need was such that a sale of software alone was insufficient. A sale of hardware was added to bring up the total apparent recognised revenue.

(3) VMS wanted both the software and the hardware (though later it offered some of the latter for sale back to Autonomy because its financial position became so weak). But to fund its purchases it needed Autonomy to make further purchases to cover the outlay.

(4) Mr Hussain was in direct control of both Autonomy's sale and its purchase. He dictated the price and the amount of software sold, as well as the price to be paid by Autonomy to VMS for the data feed licence. The presentation of the transactions to Deloitte and the Audit Committee as separate was false.

(5) Autonomy did not conduct any technical analysis of the commercial and more general success of the VMS data feed which it had purchased in the first VMS transaction before committing to purchase extended rights for $8.4 million.

(6) No memorandum to explain the justification for the further purchase was ever drafted: one could not even be put together. The information provided to Deloitte and reflected in their working paper was misleading. The commercial assessment presented to Deloitte was prepared after the deal had been agreed and did not in reality guide or indicate the reasons for the decision either to sell or to purchase.

(7) Autonomy purchased the data feed not for its intrinsic value to Autonomy but to fund reciprocal purchases by VMS of Autonomy software, from which Autonomy could recognise revenue.

(8) Even so, Autonomy had to pay a considerable ‘delta’ to VMS for its participation.

(9) When VMS went into liquidation, as the final demonstration of its financial precariousness, Autonomy made no effort to acquire any further rights. They were not of any real utility or commercial value to it.

2731. As in the first VMS transaction, it follows that Autonomy should not have recorded revenue on the sales to VMS. Autonomy should instead have: (i) recorded the net cost in relation to the first VMS sale and purchase, totalling $4,000,000, as an expense in Q2 2009, and (ii) recorded the net cost in relation to the second VMS purchase and the VMS hardware and software sale, totalling $261,633, as an expense in Q4 2010.

Knowledge of the Defendants

Mr Hussain’s knowledge

2732. Mr Hussain orchestrated both sides of the second VMS transaction. His knowledge is clear. I accept the Claimants’ submission that as an experienced CFO it is more likely than not that he did not honestly believe that the requirements for revenue recognition were satisfied.

Dr Lynch’s knowledge

2733. I accept the Claimants’ contentions and find that:

(1) It is more likely than not that Dr Lynch was aware that the VMS data feed was not incorporated into any Autonomy product until the end of Q1 2010, almost a year after Autonomy had bought a licence to it in the first VMS transaction for $13 million.

(2) He cannot genuinely have believed that Autonomy had made sufficient commercial use of the data feed to warrant spending another $8.4 million on it in Q4 2010 without any further assessment.

(3) The most likely explanation why he proceeded without any assessment was that he appreciated that the real rationale for the second VMS purchase was to fund another purchase by VMS of Autonomy software and in addition hardware from

which Autonomy could, at a price, recognise revenue. It is of note, and confirmatory of this explanation, that when subsequently he was told that VMS looked at the deal as a financial transaction, only he expressed no surprise.

2734. For similar reasons as in the context of the first VMS transaction, I have concluded that Dr Lynch, like Mr Hussain, had 'guilty knowledge'.

RT 3: purchases of StorHouse from FileTek (Q4 2009/Q2 2010)

2735. Two further sets of transactions between Autonomy and FileTek were alleged by the Claimants to be (in each case) a means of enabling Autonomy to obtain recognisable revenue from FileTek by making purchases from FileTek to put it in funds to purchase Autonomy software. The allegedly reciprocal transactions occurred in Q4 2009 and again in Q1 2010/Q2 2010.[317] The Claimants' case is that no revenue should have been recognised on Autonomy's sales of IDOL licences to FileTek, since these transactions lacked any genuine commercial rationale and thus lacked economic substance, and that the Defendants knew this.

2736. The Claimants contended that the central facts in relation to the FileTek reciprocal and VAR transactions were largely established by the unchallenged evidence of Mr Egan and concessions made in cross-examination by Mr Szukalski.

2737. The Defendants, on the other hand, maintained that the purchases by Autonomy in each case had a commercial rationale, on the basis that the 'StorHouse' software acquired offered valuable functionality of utility to Autonomy and its customers and was at fair value.

2738. I address first the principal dispute, which was as to whether the commercial rationale for the 'StorHouse' purchases which was asserted at the time, and presented to Deloitte and the Audit Committee, was genuine (as asserted by the Defendants) or contrived (as alleged by the Claimants). This requires an assessment of:

(a) FileTek's business in broad overview;

(b) the genesis of the first pair of transactions, and in particular how the decision to buy the StorHouse product came to be made;

(c) the extent of the technical analysis conducted by Autonomy prior to the purchase;

[317] See also footnote 286 above as to the reciprocal VAR transaction with FileTek: FileTek was used by Autonomy as a VAR for a large ($10.5 million) one-off transaction in respect of the end-user US Department of Veterans Affairs ("USDVA") (VT18). Subsequently, in March, June and August 2011, Autonomy entered into a succession of further purchases of StorHouse licences from FileTek. The Claimants' case is that these were intended to, and did, put FileTek in funds to pay down its debt on the USDVA VAR transaction. The last and by far the largest of the purchases took place the day before the announcement of HP's acquisition of Autonomy and was alleged to be part of an attempt by Autonomy management to clean up the books before the new owners took over. The Claimants' case is that no revenue should have been recognised on the VAR transaction and that the Defendants knew this.

(d) the coincidence in timing between each of the StorHouse purchases and FileTek's need for funds;

(e) FileTek's own internal accounting analysis regarding the true value of the software being bought and sold.

FileTek's business

2739. FileTek had two main products:

(1) Trusted Edge was a classification and e-Discovery tool that dealt with unstructured data and was aimed at the e-Discovery market. Mr Szukalski described it in cross-examination as a product that:

> *"was able to classify and index content that was at the edge, the trusted edge, of companies' networks, so it would go on to laptops and desktops and see what was on those desktops and laptops, to be able to index them, categorise them, classify those so that if there was a legal hold or anything, the company would be sure that they got all the materials in terms of being able to identify those materials underneath."*

(2) StorHouse was, as Mr Szukalski accepted, a different product altogether. It was not at all directed at the e-Discovery market. Rather, it was directed at the IT industry and at data storage vendors. At its simplest, StorHouse was a database archiving product that allowed customers to archive databases and conduct searches across them. It had two main components: (i) StorHouse Relational File System ("RFS"), which was essentially a file system that was hosted in the cloud; and (ii) StorHouse Relational Manager ("RM"), which was a means by which a customer could offload its database to the cloud and conduct searches across the database.

2740. Filetek's CEO and CFO during the Relevant Period was Mr William ("Bill") Loomis. He testified at Mr Hussain's criminal trial that, in 2008, FileTek had revenues of about $15 million. This is reflected in FileTek's profit and loss statement for 2008. Mr Loomis further testified that part of the company was then spun out, as a result of which revenues fell to between $7 to 8 million per annum. FileTek's profit and loss account for 2008 attributes about $6.6 million of revenue to a segment of the business known as Healthcare Information Systems. Mr Szukalski confirmed that he believed that this was the segment of the business that had been spun out before he re-joined FileTek in January 2009.

2741. As at the end of 2008, FileTek's sales were not flourishing. FileTek made licence sales of StorHouse of only $331,000 in 2008. Mr Szukalski agreed that, at the time he re-joined FileTek "*there was very little sales going on*". Instead of making new sales of StorHouse licences, FileTek was "*living off the maintenance revenues*" of sales of StorHouse that had been made in the mid-to-late-1990s.

2742. Similarly, as regards Trusted Edge, FileTek made licence sales of only $81,000 in 2008. Mr Szukalski explained that Trusted Edge was "*the start-up component of FileTek*" and was "*just pretty much being launched as a new product*" at the time he re-joined FileTek

(on 1 January 2009). Mr Szukalski readily agreed that sales of Trusted Edge were "*low*" and that Trusted Edge was a "*small player in the e-discovery market at best*".

2743. Overall, therefore, FileTek was incurring a loss on its operations.

2744. As at the end of 2008, FileTek had cash and cash equivalents of just under $5 million. There was no significant improvement in FileTek's business during the first half of 2009. On the contrary, sales of StorHouse declined year-on-year from $283,000 in the first six months of 2008 to $162,000 in the first six months of 2009. As regards Trusted Edge, during the same six month period there was a slight increase in licence sales from $27,000 to $93,000. But Mr Szukalski accepted that Trusted Edge remained a "*very small*" player nonetheless. FileTek incurred a loss on its operations of slightly over $1 million in the first half of 2009.

2745. Realistically, therefore, Mr Szukalski accepted that FileTek was very much a business in need of a turn-around. Although Mr Szukalski pointed to the company's history in the late 1990s and early 2000s as a basis for thinking that the company's turn-around could succeed, he accepted that the technology industry was one where things could change very quickly.

2746. FileTek had an OEM agreement with Autonomy in respect of its Trusted Edge product. By an agreement dated 21 February 2008, FileTek had taken a licence of certain "*Development Software*" and "*Run-Time Software*" from Autonomy in relation to FileTek's Trusted Edge product (defined as the "*Application*"). This had not proved a success either: as at the third quarter of 2009, it appears that FileTek had yet to incorporate IDOL Server into Trusted Edge so as to make use of the Run-Time licence.

2747. Mr Szukalski's evidence was that there had been no sales of Trusted Edge that incorporated the IDOL Server software as at 30 October 2009. In an email dated 17 November 2009, Mr Loomis estimated that FileTek was likely to make only 15 sales of Trusted Edge, incorporating IDOL Server, between then and 30 June 2010. Mr Szukalski accepted that this was Mr Loomis' best estimate of the likely sales.

2748. Under its OEM arrangements with Autonomy, FileTek had negotiated that most of its payments should be as commission on sales. But it also was required to make a prepayment of $150,000. Not long before the disputed transactions, FileTek had determined that it would have to write down the value of FileTek's $150,000 prepayment. Mr Loomis had calculated that the value to FileTek of its prepayment was only $37,500[318], resulting in an impairment of $112,500. This amount was written down in FileTek's accounts.

2749. In short, by the third quarter of 2009, FileTek was in some considerable financial difficulty.

Genesis of the proposal for the allegedly reciprocal transactions

2750. Mr Egan's evidence was that it was he who conceived of what the Claimants presented as a round trip transaction: the purchase by Autonomy of StorHouse software in order

[318] $2,500 multiplied by 15.

to fund the purchase by FileTek of Autonomy software. This was not challenged in cross-examination.

2751. Mr Egan's evidence, which was in effect what the Claimants principally relied on, was as follows in respect of the first FileTek reciprocal transaction:

> *"In late December 2009, I conceived of, and Mr. Hussain approved, a round trip deal that would generate immediate and substantial ($8 million) recognizable revenue. The entire transaction was arranged over the course of two or three days. FileTek's Chief Operating Officer was Gary Szukalski, a former Autonomy employee. I knew from prior conversations with Mr. Szukalski that FileTek was interested in licensing IDOL but did not have the means to pay for a substantial license. My idea was that, in return for FileTek agreeing to pay a large sum to license IDOL, Autonomy would agree to license FileTek's StorHouse software for integration with Autonomy's Digital Safe software. Digital Safe software is primarily used to store and manage unstructured data -- for example, emails. My idea was that it might be possible for StorHouse to be used with Digital Safe to enhance Autonomy's structured data capabilities.*
>
> *85. Autonomy's technical staff had not, to my knowledge, previously evaluated FileTek's StorHouse software or determined whether it was practical to combine it with our existing Digital Safe software. However, I now had a reason for a purchase from FileTek that would give FileTek both the money to purchase a license from Autonomy and, as I explain below, the incentive to license software from Autonomy. I presented my idea to Mr. Hussain. He approved it, but he made it clear that, if the deal were made, the documentation for each deal had to be entirely independent of each other."*

2752. Mr Egan's evidence regarding Mr Hussain's approval was not challenged. Dr Lynch confirmed in cross-examination that he had no basis for disputing the fact of Mr Hussain's approval. When Counsel for Mr Hussain cross-examined Mr Egan, he invited Mr Egan to agree with the narrow point that Mr Hussain "*did not meet anyone from FileTek*" but did not challenge Mr Egan's evidence about Mr Hussain's approval of the transaction.

2753. On Monday, 28 December 2009, Mr Egan emailed Mr Szukalski, subject "*Hello and idea*", asking Mr Szukalski to ring because "*I have an idea I want to run by you*". When Mr Szukalski received the email, he did not know what Mr Egan wanted to speak about, as he confirmed in cross-examination and as also appears from his message in an email under which, on the same day, he forwarded the email to Mr Mark Seamans, FileTek's CTO, asking "*Hmmm ... what do you think this is all about?*". Mr Seamans speculated that Mr Egan might seek to "*pitch you on an extension*", that is, an extension to FileTek's existing OEM agreement which was due to expire on 30 June 2010.

2754. It is now common ground that the telephone call took place at 10.30am on the morning of Tuesday, 29 December 2009. Mr Egan's evidence about the telephone call in his witness statement, which Mr Szukalski considered to be accurate, was:

> *"I proposed a deal to FileTek. I said that Autonomy had money in its budget to make a purchase from FileTek and suggested that Autonomy would buy a*

license to use FileTek's StorHouse software if FileTek were willing to buy a license to use Autonomy's IDOL software. I told Mr. Szukalski that my proposal would do two things for FileTek: it would give FileTek the money it needed to license IDOL and the deal would be profitable for FileTek because Autonomy would pay FileTek more than FileTek would have to pay Autonomy. FileTek would keep the difference. Mr Szukalski expressed interest and agreed to talk to his colleagues at FileTek. I told him that any deal had to be completed in the next two days, i.e. by December 31."

2755. In cross-examination, Mr Szukalski volunteered that Mr Egan asked "*more questions about what StorHouse was and what it did and could it benefit Autonomy in some way*". This reinforced the conclusion that, when Mr Egan spoke to Mr Szukalski, Mr Egan was unaware of any technical analysis within Autonomy as to how StorHouse might be said to benefit Autonomy.

2756. Mr Szukalski also explained that, during his initial call with Mr Egan, Mr Szukalski had questions for Mr Egan about Autonomy's storage requirements for StorHouse, such as "*how many clients, how many instances, what the storage requirement was*". Mr Egan did not have answers to what Autonomy actually needed, but Mr Szukalski thought he recalled that Mr Egan had said that he would go and speak to the technical people at Autonomy, find out what those requirements were, and revert to Mr Szukalski.

2757. Mr Egan did revert to Mr Szukalski by email later that day, setting out what Autonomy's *"needs would look like"*. The email asked also whether that was enough to enable Mr Szukalski to *"get…going on a price and fair value support?"* signifying (as Mr Szukalski confirmed) that there had been some prior discussion about price:

> *"Q. Now, so far as the price is concerned, that had already been discussed on the call that you had had with him in the morning, hadn't it?*
>
> *A. He had discussed a range, that is correct. Without knowing any details he had discussed a range. So I was kind of reverse engineering, if you will, leveraging our existing price book, how to get to those numbers that he was suggesting.*
>
> *Q. So he'd given you the range for the price, both for the Autonomy sale and the FileTek purchase?*
>
> *A. In ranges, yes.*
>
> *Q. And he'd indicated the range of the delta between those two?*
>
> *A. That is correct.*
>
> *Q. And now he was giving you the technical information so that you could reverse engineer justifying a price for StorHouse within that range?*
>
> *A. Yes, correct."*

2758. Quite what Mr Szukalski meant by *"kind of reverse engineering"* was much disputed. I elaborate on that later. But to return to the sequence of events, Mr Egan's proposal was "*exciting*" for Mr Szukalski and his colleagues. Mr Szukalski described it as a "*no brainer*". Mr Egan's witness statement continued:

> *"Mr. Szukalski responded promptly. He said that FileTek was prepared to discuss my proposal further. We talked numbers. After some back and forth, I proposed that Autonomy would license StorHouse software and support for $10,367,280 and that FileTek would license IDOL for $8,480,000 (of which $480,000 was for one year of support and maintenance). The difference, $1,887,280, would be FileTek's profit on the deal. I told Mr. Szukalski that the documentation of the two deals would have to be separate. I said that the documentation would say that each company was to pay for its licence 30 days after signing, but that Autonomy would pay a few days early."*

2759. Again, Mr Szukalski in cross-examination endorsed this account, subject to two qualifications. First, he said that the discussion concerned a spread of around $2 million, Mr Szukalski having initially proposed a spread of $2.5 million, which eventually came down to $1.89 million "*which again we were very happy with*". Secondly, he did not *"necessarily recall"* Mr Egan saying that the documentation for the two deals would have to be separate.

2760. Mr Szukalski was reluctant to accept that the two transactions – the sale to FileTek and the purchase from FileTek – were linked. He presented the main driver as *"the ticking time bomb of renegotiating the Trusted Edge KeyView/IDOL software that we had to renegotiate".* He told me in cross-examination that the proposed transaction, and the delta it offered, was *"the one way we could figure it out pretty quickly".* However, he accepted that the numbers agreed for the two transactions were linked, because the price for one was dictated by the spread over the price for the other.

2761. The timing indicated by Mr Egan meant that there were only two calendar days for the deal to be done. Mr Szukalski, a former Autonomy employee, assumed (and thought it obvious) that the urgency and the year-end deadline imposed by Mr Egan meant that it was driven by Autonomy's need to recognise revenue within the quarter, though he also stated that *"Most software companies are always looking for opportunities to find new transactions if they can at the last end of the quarter…".*

2762. As regards the final sentence of the passage from Mr Egan's evidence quoted in paragraph 2758 above, (that Autonomy would pay early), Mr Szukalski said that Mr Egan's offer was a "*great offer because part of the negotiation was they paid us early, we had the cash to pay them on time*". Mr Szukalski agreed that the written contracts would not say anything about Mr Egan's agreement to pay early, and said that to that extent FileTek was taking a risk. However, Mr Szukalski went on to say:

> *"Q. But when Mr Egan told you that Autonomy would pay early, you relied on what he said as being true?*
>
> *A. Yes, absolutely we did. We said we'll trust you on that for sure.*
>
> *Q. So although it wasn't going to be put down in writing, you proceeded on the basis that Mr Egan would be as good as his word?*

A. Trust, yes.

Q. And that Autonomy would perform in accordance with what he had said?

A. That is correct."

Negotiation of the price to be paid for StorHouse

2763. Mr Egan's evidence was that he and Mr Szukalski reached agreement in principle on either Tuesday 29 December 2009 or Wednesday 30 December 2009. Mr Szukalski accepted this in cross-examination.

2764. Also on 29 December 2009 (and thus on the same day as the initial call between Mr Egan and Mr Szukalski) Mr Egan informed Mr Szukalski that "*Steve Chamberlain our comptroller will call Bill [Loomis] shortly*".

2765. Mr Chamberlain's subsequent email identified two things he needed for revenue recognition purposes:

(1) On pricing of the StorHouse software to be purchased by Autonomy from FileTek, Mr Chamberlain needed *"a copy of your price list together with confirmation that discounting on this deal is consistent with your other discount levels for your larger transactions"*. Mr Szukalski understood that this was relevant to justifying the price Autonomy paid FileTek as being at fair value.

(2) On the price to be paid by FileTek for its purchase of software from Autonomy, Mr Chamberlain's immediate concern was collectability: Mr Chamberlain needed to *"demonstrate that FileTek have the ability to pay Autonomy in the absence of the cash receipt from Autonomy from the sale of your software."* Mr Szukalski understood that Autonomy's auditors would need to see evidence that FileTek could pay Autonomy even if FileTek was not paid by Autonomy.

2766. Thus, although (on the Claimants' case) Autonomy's objective was to maximise recognised revenue and to that end, extract as high a price as possible for the purchase by FileTek of Autonomy software without exceeding 'fair value', the purchase price of the Autonomy software to be purchased by FileTek could not exceed what could be presented, even then at a 'stretch', as being collectable from FileTek. Equally, what Autonomy could pay for StorHouse to provide the actual cash for FileTek's purchase had not to exceed what could be presented as the fair value of the StorHouse software.

2767. On the afternoon of 29 December 2009, Mr Chamberlain wrote to Mr Hussain, copying Mr Egan, saying that he (Mr Chamberlain) had spoken to Mr Loomis. Mr Loomis told Mr Chamberlain that FileTek was waiting on information from Mr Egan to be able to price and show how this was consistent with FileTek's pricing. Mr Chamberlain noted that "*Current models are based on volumes for licence and our volumes and multiple customers should enable us to construct an argument*".

2768. On collectability, Mr Chamberlain referred to FileTek as having $5.3 million of cash and a $1.1 million net receivable loan which could be converted. He suggested that "*$6.5m is ok, $8m is a stretch*".

2769. Dr Lynch initially told me in cross-examination that he did not think that he knew at this time about Mr Chamberlain's view that $8 million was a stretch in relation to collectability. However, having been shown an email which Mr Hussain had sent to him, subject "*End of day*", which stated, "*FileTek – collectability will be issue for $8m but getting more info*", he had to accept that the collectability issue in relation to FileTek plainly was brought to his attention.

2770. The same day (29 December 2009) Mr Egan sent an email, to Mr Szukalski and Mr Loomis, in which Mr Egan said, "*Our needs would look like the following*" and set out the technical parameters for StorHouse that had been given by Dr Menell. Mr Egan asked Mr Szukalski, "*Gary can that get you going on a price and fair value support?*"

2771. Dr Lynch accepted that Mr Egan's list of the technical parameters would *"ultimately"* have come from Dr Menell or someone in Autonomy's technical department. There were, however, no documents or other evidence to suggest that Autonomy's technical department had given a moment's thought to the technical parameters for a StorHouse licence prior to the evening of 29 December 2009.

2772. Although Mr Egan's email requested that FileTek provide a price based on the technical requirements that had been provided, Mr Szukalski candidly accepted in cross-examination that a price range had already been discussed on the initial Szukalski/Egan call that morning, without knowing any of the technical details. Mr Szukalski confirmed in cross-examination that he understood that Autonomy wanted him to demonstrate that the price Autonomy was paying for StorHouse was consistent with FileTek's general pricing.

2773. On Wednesday 30 December 2009, Mr Crumbacher sent FileTek draft documentation for the transaction. In an internal FileTek email later that day, Mr Loomis set out a number of comments on the draft documentation, including the following:

> *"1. Deal is for $8.8M (vs. $8M). As I understand the initial conversation Gary had with Stouffer, the spread was to be $2M. Therefore, the STHS [StorHouse] deal s/b [should be] $10.8m?*
>
> *2. Payment terms are 50% net 30 + 50% net 90. We'll need their cash to pay any portion, and I understand that our payment terms for the STHS s/w is net 30. ... Perhaps it should be net 20? Also, an item for the final exec call."*

2774. The Claimants made the following points in this context:

(1) As regards item 1, they submitted that Mr Loomis' comment meant that, in order to derive the price that Autonomy would pay FileTek for a StorHouse licence, it was necessary to add the spread of $2 million to the licence fee that FileTek would pay Autonomy. They submitted that this demonstrated that the purchase price was reverse engineered, as Mr Szukalski had acknowledged. Dr Lynch, though emphasising his position that he had not seen this at the time, attempted to sever the apparent link and suggested that it was *"the other way round"* and that the purchase price had already been fixed and all this signified was that *"Stouffer is trying to drum up an 8.8 million sale"*. I do not accept Dr Lynch's

suggested gloss; in any event, Mr Szukalski (the recipient of the email) agreed that the Claimants had correctly identified what Mr Loomis had meant.

(2) As regards item 2, Mr Szukalski confirmed that his understanding was that FileTek needed Autonomy's payment for the StorHouse licence, in order for FileTek to pay any portion of the price on FileTek's licence of IDOL Server. That was the reality, as further demonstrated when, later that day, Mr Loomis sent Mr Chamberlain FileTek's financial statements as at Q3 2009. Licence sales of StorHouse for the first three quarters of 2009 were \$546,000 and of Trusted Edge were \$105,000. Mr Szukalski accepted that FileTek was still "*burning cash*" and making an operating loss.

(3) As regards Mr Loomis' suggestion that the payment terms for the StorHouse licence should be "*net 20*", Mr Szukalski confirmed that Mr Loomis was suggesting that the written contract should reflect what Mr Egan had already said Autonomy would do, namely pay FileTek before FileTek had to pay Autonomy.

2775. Further, as at the end of Q3 2009, FileTek had yet to make any sales of Trusted Edge that incorporated within it the IDOL Server software. Accordingly, the low sales of Trusted Edge did not, at that stage, have anything to do with the Sublicense Fee payable under FileTek's 2008 OEM agreement with Autonomy, as Mr Szukalski rightly accepted.

2776. In the early hours of 30 December 2009, Mr Szukalski sent Messrs Egan and Scott a proposed price for StorHouse. The proposed licence fee of \$7,405,200 and maintenance fee of \$2,962,080 came to a total payment in the first year of \$10,367,280. Mr Szukalski confirmed in cross-examination that, in arriving at this figure, he made sure that it achieved the agreed spread of about \$2 million over the price that FileTek was to pay Autonomy for the IDOL Server licence.

2777. As already noted, the scale of the price to be paid by Autonomy for StorHouse is striking. It represented more than <u>20 times</u> the total licence revenues for StorHouse in the whole of 2008. It also represented more than <u>10 times</u> the total licence revenues for StorHouse in the first three quarters of 2009. Mr Szukalski accepted both these points. He claimed that he and Mr Loomis had not felt *"uncomfortable with this dollar figure because we had…done transactions of this size previously…in the late 1990s…"* This was not persuasive: whatever may have been the position in the 1990s, the disproportionality of the transaction relative to FileTek's sales in 2009 was obvious. The explanation lay in the assurances given and the prospect of the delta offered.

2778. The price that Autonomy was willing to pay for StorHouse is all the more remarkable given Mr Szukalski's evidence that, having regard to the flagging nature of FileTek's business at the time he re-joined FileTek, "*it was all about just find customers, transact, kind of turn the crank back up by not giving software away by any stretch of the imagination, but being a little more, you know, conducive to the needs of the budgets of the customers that we're selling to*". As Mr Szukalski acknowledged in cross-examination, there was therefore the potential for deep discounts to be offered against the list price, all the more so for a very large transaction.

2779. On the morning of 31 December 2009, Mr Howard Patrick, FileTek's General Counsel, wrote to Mr Szukalski, stating, "*You were going to forward revised pricing to Autonomy*

and copy me?". Mr Patrick then wrote to all recipients stating, "*I have just been told by Gary, that there are to be no changes to FileTek's pricing*".

2780. Mr Szukalski did not have a good recollection of these exchanges; but he accepted the possibility that Autonomy simply did not want FileTek to offer a lower price. If FileTek offered a lower price, the price to be paid by FileTek for the IDOL licence would also need to come down, if the agreed spread was to be maintained; Autonomy did not, however, want the price for the IDOL licence to come down, because that would reduce the revenue that Autonomy would recognise in Q4 2009.

2781. Still on 31 December 2009, Mr Szukalski emailed Mr Egan FileTek's proposal. Although the proposal was dated 29 December 2009, Mr Szukalski explained that he produced it on 31 December 2009, having had to type it at the reception for his father-in-law's funeral. Mr Szukalski accepted that it was a "*rushed*" piece of work and that some of it would have come from boilerplate marketing materials. The reason why it had to be rushed was because to satisfy Autonomy's objectives, it needed to be provided to, and accepted by, Autonomy by the end of the day, being the last day of the quarter.

2782. That afternoon a call took place between Mr Egan, Mr Loomis and Mr Szukalski. In advance of the call, Mr Loomis circulated internally within FileTek a checklist of points to cover on the call, including:

> "*2. Timing of payments*
>
> *3. Confirm that there's no way of being burned. No contemplated change in control or management prior to transfer of money."*

2783. Mr Szukalski confirmed in cross-examination that item 2 was a reference to the fact that FileTek was going to get paid by Autonomy, before FileTek had to pay Autonomy. He agreed that this was a point that was important to FileTek. It was important because FileTek would not have bought IDOL at the price that it did, but for the fact that Autonomy was going to buy StorHouse and thereby channel funds to FileTek to pay for IDOL.

2784. Mr Szukalski explained that item 3 was a reference to a concern that, were there to be a change of management or an acquisition of Autonomy, after the execution of the deal but prior to the transfer of money from Autonomy to FileTek, any new management of Autonomy might fail to honour the assurances that Mr Egan had given. Mr Loomis was going to seek confirmation that there was no way of FileTek being burned in that way and thus, as Mr Szukalski put it, "*establish trust*".

2785. Mr Loomis' testimony in the US criminal proceedings was to similar effect:

> "*Q. Are you familiar with this email, Mr. Loomis? Do you remember it?*
>
> *A. Yes, generally.*
>
> *Q. Okay. Point No. 3 here says, "Confirm there's no way of being burned." Do you see that?*
>
> *A. Yes.*
>
> *Q. What did you mean by that?*

> *A. Well, my concern, given this was a barter transaction, I was viewing it as a barter transaction, that we would not have a situation where we were obligated to pay 8 or $9 million and all of a sudden there was a cancellation of the StorHouse side of the barter transaction.*
>
> *Q. Okay. How dependent were you on the StorHouse side of the transaction to go forward with the purchase of the Autonomy software?*
>
> *A. We were dependent on it."*

2786. Following the call, Mr Loomis sent an email to himself and Mr Szukalski entitled "*Autonomy Memo to File*" summarising the key outcomes from the call. Mr Szukalski confirmed that he regarded the email as an accurate record of the discussion. It included the following items:

> *"1. We should be paid 4-5 days before net 30 due date.*
>
> *2. ...*
>
> *3. No change in control or change in leadership is contemplated prior to exchange of money.*
>
> *4. No one to be burned on this deal."*

2787. I accept that these points were a reflection of the assurance that had been provided, and which was the basis of the deal, that (a) Autonomy would pay FileTek 4-5 days before the date when Autonomy was contractually required to pay (namely 30 days after invoice) (item 1); (b) that FileTek was not going to be left having to pay for the IDOL licence without getting paid by Autonomy for the StorHouse licence (Item 4); and (c) that no change of control of Autonomy was in the offing which might result in new management not observing these extra-contractual assurances (item 3).

2788. Also on 31 December 2009, Mr Loomis wrote to FileTek's Chairman, Bill Thompson, regarding "*a year end transaction*". Mr Loomis said (item 1), that "*Driven by Autonomy's need to make certain numbers ...*[319] *they approached Gary*". Mr Loomis went on to summarise the key terms of the transaction, including the net profit to FileTek of around $1.88 million (item 4). Mr Szukalski confirmed in cross-examination that this figure reflected the spread that he had agreed with Mr Egan. Mr Loomis also noted (item 5), "*Must be signed today*".

2789. That assessment – that the deal was driven by Autonomy's *"need to make up the numbers"* seems to me to have been correct. The conclusion is further supported by the fact that although it was put to Mr Egan that Dr Menell or other members of Autonomy's technical team may have known about the technical properties of StorHouse, Mr Egan was not challenged on his evidence that <u>he himself</u> was unaware of any such evaluation.

2790. The Claimants submitted, and I accept and find, that it follows that (i) the idea of selling an IDOL licence to FileTek originated with Mr Egan, (ii) so too did the idea of purchasing StorHouse, (iii) Mr Egan's reason for suggesting a purchase of StorHouse was to bring about the sale of the IDOL licence by providing FileTek with the

[319] Points of ellipsis appear in the original.

wherewithal, (iv) Mr Hussain knew and approved of this proposal, and (v) Mr Egan conceived of this idea in circumstances where he did not know of any technical evaluation by Autonomy of StorHouse or the practicality of combining it with Digital Safe, and as a means of generating recognisable revenue from the sale of Autonomy software to FileTek. Mr Hussain knew that.

Had Autonomy (coincidentally) any identified need for StorHouse?

2791. There were two strands to the Defendants' argument that even if revenue generation was a desirable product of the purchase by FileTek of Autonomy software, and even if that purchase was facilitated by Autonomy's purchase of StorHouse from FileTek, the primary purpose of Autonomy's purchase was that it considered StorHouse to be (a) a useful adjunct for incorporation into its (Autonomy's) product offering and (b) part of what Dr Lynch stated in his witness statement to be a *"strategy to move aggressively into the structured data market…".* The Defendants also contended that both the purchase from FileTek of StorHouse and the purchase by FileTek of Autonomy software were at fair value.

2792. The Claimants accepted that Mr Egan did not have the final say on whether Autonomy should buy StorHouse; approvals from his superiors, including Dr Lynch, would be needed. But they submitted that it would be a remarkable coincidence if, Mr Egan having come up with the idea of the purchase for one reason (a reason known to Mr Hussain), others within Autonomy's senior management nevertheless ended up approving the purchase for an entirely different reason.

2793. Dr Lynch, in his witness statement, presented the decision to make "*an investment in StorHouse, in the tens of millions of dollars range*" as part of a "*strategy to move aggressively into the structured data market* ...". He claimed that Autonomy *"had familiarity with the product by virtue of our experience in the market, File Tek's OEM and our negotiations with Informatica."* He maintained that:

> *"Autonomy decided to buy StorHouse rather than try to develop the software itself to save time, money and engineering resources. The software needed to be tested with live customer databases, which was a tedious and very time intensive process that had a tendency to irritate the customers whose databases were being used. Autonomy had prospects lined up that needed the software and had been asked to provide a solution for a highly classified intelligence application, which involved handling structured data. For these reasons, it was necessary to acquire the software reasonably quickly. Purchasing StorHouse had the added advantage of signalling to Informatica that Autonomy was not desperate to acquire their company and had other options, which might encourage Informatica to accept Autonomy's prior offer. For Autonomy, buying StorHouse was the equivalent of parking a tank on Informatica's lawn."*

2794. In cross-examination, Dr Lynch also stated that, in the context of the potential acquisition of Informatica, Dr Menell had compared Informatica's technology to third-party offerings on the market, including FileTek's, and so Autonomy was familiar with the StorHouse product and had assessed its technology.

2795. However, when pressed to identify any documentation to support his depiction of the strategy, and the assessment of StorHouse which he claimed in cross-examination had been undertaken by Dr Menell (which was not mentioned in his witness statement), Dr

Lynch initially told me that he did not know whether there was documentation or not, but revised this later to justify its apparent absence on the basis that Autonomy was *"a very different company to a Hewlett-Packard. We move very fast. We understand our products, we understand the market and we make decisions and we don't spend a lot of time producing long reports."* He thought there might have been a short 5 or 6 page document recording *"basic technical checks"* but qualified that by saying that *"to be blunt, the decision had been made before that document was done usually."* He could offer no explanation why the strategy alleged had not been explained to Deloitte: he said he did not deal with Deloitte and did not know what they had been told.

2796. Dr Lynch also suggested in cross-examination that Mr Egan was aware, when approaching Mr Szukalski, of the Informatica strategy. This had not been put to Mr Egan, whose evidence was not consistent with the suggestion. But, more importantly, the suggestion was also inconsistent with Dr Lynch's own earlier evidence in his second witness statement that "*Mr Egan was wholly unaware*" of the potential Informatica transaction.

2797. In the circumstances, I cannot accept Dr Lynch's depiction of the genesis and rationale of the purchase of StorHouse from FileTek as being part of some overall strategy for Autonomy's entry into the structured data market and persuading Informatica to accept its overtures. Dr Menell did not give evidence; there was no documentary support for Dr Lynch's presentation; and the suggestion that Mr Egan was aware of such a strategy seemed to me implausible and contradicted by Dr Lynch's own evidence, as well as Mr Egan's unchallenged evidence to the contrary.

2798. Nor can I accept the second strand of the Defendants' response, to the effect that Autonomy had undertaken a technical analysis of StorHouse prior to late December 2009 which had prompted its interest. It seems to me clear from the pattern of events described above, and from the unchallenged evidence of both Mr Egan and Mr Szukalski in that regard, that when Mr Egan approached Mr Szukalski, he had next to no knowledge of StorHouse as a product. I am satisfied and hold that identified need for the product did not prompt Mr Egan's approach or inform the negotiations which followed.

2799. I am fortified in that conclusion by the efforts subsequently made, including by Mr Egan, to develop a technical justification for the acquisition after the event.

2800. On 29 December 2009, and after his initial call with Mr Szukalski, Mr Egan wrote to Dr Menell as follows:

> *"Pete,*
>
> *In response to all your investigations into tech to support the right way to deliver on the Kraft style RDBS archiving demand a company called Filetek has come forward with a pitch about their Storhouse product as well as a module called "Relational Manager".*
>
> *It sounds like they may have a very good solution to the things you have been looking at build/buy on.*
>
> *I may recall that you had already shortlisted them but their president called me this AM to pitch as they are quite keen and he knows Autonomy …"*

2801. Mr Egan's email was a contrivance:

(1) There is no evidence that, as at 29 December 2009, Dr Menell had been conducting the "*investigations*" mentioned in Mr Egan's email. Certainly, as already noted, Mr Szukalski's evidence was that neither Dr Menell nor anyone else in Autonomy's technical department had previously contacted him about the potential use of StorHouse by Autonomy.

(2) Mr Egan's own evidence in cross-examination was that his email was pretextual and misleading because it did not accurately express the fact "*that this was my idea to pitch this quid pro quo relationship*" and he (Mr Egan) was not aware of Dr Menell looking to "*build/buy*" as stated in the email.

(3) It was not true that FileTek had "*come forward with a pitch*" or that Mr Szukalski "*called me this AM to pitch*". As the documents make clear, and Mr Szukalski and Mr Egan readily confirmed in cross-examination, it was the other way round: Mr Egan had contacted Mr Szukalski.

2802. Dr Lynch had to accept in cross-examination that it did appear that Mr Egan's email was pretextual in giving the impression that FileTek had come forward with a pitch.

2803. Mr Egan was asked whether he was "*trying to mislead Dr Menell*" by this email, to which he answered "*No*". But that was because Dr Menell already knew that the email was pretextual.

2804. Dr Menell responded to Mr Egan 30 minutes later stating, "*Come across this lot before. Very strong on lifecycle and trans[p]arent back off to teirsh [sic] storage. Will have sean et al pull more of the White papers to validate the assumptions*". As the Claimants noted, this email exchange is hardly indicative of Dr Menell having come up with the decision to invest tens of millions of dollars into StorHouse.

2805. On 30 December 2009, Mr Chamberlain asked Mr Egan and Dr Menell, in an email copied to Mr Hussain, for a "*technical paper explaining why both bits of technology are needed*":

> *"1) why does Autonomy need the Filetek solution and what benefits will that bring. Need to try and justify the $10m cost and show that benefits of at least that amount will be generated. E.g cost savings of $2m per annum for 7 years discounted to give a NPV of greater than $10m*
>
> *2) why does FileTek need Autonomy and how will the technology be used?"*

Price Autonomy agreed to pay FileTek for purchase of StorHouse

2806. As to 1) in the preceding paragraph and the purchase by Autonomy of *"the Filetek solution"* (StorHouse), the Defendants sought to counter the notion that the price was "reverse-engineered" according to the price that Autonomy was wishing to achieve from

its sale to FileTek of software on the basis that in fact the price was "fair value" and in fact represented a 45% discount on FileTek's list price. They relied also on (a) Mr Szukalski's assertion in his witness statement that *"The contract pricing was not inflated; it was set at a level that FileTek considered to be appropriate"* and (b) Mr Egan's somewhat reluctant evidence in cross-examination, after stating that he *"didn't care too much about that"* that *"it was at fair value effectively"*.

2807. The issue relating to the quantum of the purchase price which Autonomy agreed to pay FileTek was much disputed and the evidence in respect of it was confusing. In particular, the evidence given in the US criminal proceedings by Mr Loomis of the way FileTek internally analysed and accounted for the value of the software it sold contradicted its depiction as representing a fair price, and, in accounting terms, "fair value".

2808. Mr Loomis' accounting memorandum, which addressed the question whether it was proper for FileTek to recognise revenue in respect of its receipt is a telling document. Amongst its observations in explaining the conclusions that under US GAAP, and in particular, its requirement for VSOE[320], immediate revenue recognition of the sales revenue from the purchase of FileTek software to Autonomy would not be proper were the following:

(1) *"This transaction was completely unique to [sic: for] FileTek and was an outlier transaction for our normal business strategy and projections and there were no very similar transactions that would provide a good faith comparison for the pricing and fair values.*"

(2) *"This was our first customer who had plans to use our software in a hosted environment with large hosted customers, so it doesn't fit into our Reseller model or the End-User model for pricing."*

(3) *"The 5-year term for the StorHouse maintenance with prepaid maintenance collected is also highly unusual for our customer base and therefore assigning appropriate fair value to maintenance for a 5-year duration would be very subjective."*

(4) *"without any similar transactions in past (nor any expected in near future) there is no context in which to determine the VSOE of Fair value of the maintenance contract."*

(5) *"Due to the unusual nature of the two contracts being executed at close duration and the fact that FileTek might not have entered into the contract to purchase the Autonomy licences without the StorHouse licence being executed, the contract prices are clearly not fair value and therefore, accounting treatment "a"… without any fair value adjustments would be inconsistent with GAAP."*

2809. Mr Szukalski, when cross-examined, was not asked to comment on the GAAP accounting issues but he was invited to and did confirm that:

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[320] Vendor-Specific Objective Evidence is required under US GAAP: this requires evidence of the fair value of a contract's components if any part of the value of and revenue from individual items is to be recognized before the last element in the contract is delivered

(1) It is unlikely that FileTek would have contracted to purchase Autonomy software *"at that price point"* without the StorHouse sale contract.

(2) The StorHouse contract was highly unusual, as in particular was its provision for pre-payment of 5-years maintenance.

(3) If the StorHouse sale contract had been self-standing (that is, but for the contract for FileTek's purchase of Autonomy software at the same time) the price that Mr Szukalski and Mr Loomis would have expected to get in an arm's length transaction for the sale of the StorHouse software was much closer to $2 million than $10 million. A figure of $2 million for a transaction of this size, had it been the only thing under negotiation, and *"where there wasn't a barter deal",* would have been, according to Mr Szukalski's evidence, a:

> *"Good deal. We would have taken that deal for sure, yes."*

(4) In stating, in his witness statement, that the *"contract pricing was not inflated: it was set at a level that FileTek considered to be appropriate"* he had intended to convey no more than that the sale was at a discount on the list price in the *"standard price book".*

(5) He told me that he *"reverse-engineered to get in Mr Egan's range of the differential [the range that Mr Egan had given in their first call] but I still used the standard price list to come up with the pricing how it was. So I didn't pull it out of thin air. I came up with the pricing based on something that had already been around for a while."*

(6) He could not opine on *"fair value",* which he regarded as an accounting concept and *"a Bill Loomis issue."*

2810. Furthermore, Mr Szukalski's evidence was that in the absence of the IDOL licence, he would have been prepared to offer Autonomy a discount as high as 74% on its StorHouse licence, if that meant transacting the business. Mr Szukalski, who was responsible for sales of StorHouse, said he would still have regarded a much lower price of only $2 million for a StorHouse licence of this size as a "*Good deal. We would have taken that deal for sure.*"

2811. Further, Mr Egan's evidence in cross-examination was more equivocal than its description in Dr Lynch's written closing submissions. When it was put to Mr Egan that the price paid to FileTek by Autonomy was a "*fair and proper price*". Mr Egan answered as follows:

> *"I didn't care too much about that, I was more going through what Sushovan's objectives were for the financials of the deal. It could have been significantly smaller, it could have been significantly larger; it was the three factors I mentioned."*

2812. The "*three factors*" were identified by Mr Egan in a previous answer as, "*the absolute dollar amounts, fair value, and that the volumes going in each direction were acceptable and relevant to each party*".

2813. Mr Egan expanded in re-examination on what he meant by "*Sushovan's objectives*":

> *"Pretty much exactly what I was just referring to, in other words he had a set of objectives and a bit of a puzzle to solve. He had to consider wanting the deal to be as large as it could be properly rationalised to be on fair value; it had to have enough delta to incentivise FileTek for doing this very rushed transaction; it had to involve software that both parties valued and got in the volumes that were meaningful."*

2814. The Claimants contended that Mr Egan's reference to the price being "*rationalised to be on fair value*" echoed Mr Szukalski's evidence about "*reverse-engineering*", i.e. starting with the price for StorHouse that he and Mr Egan had discussed and then creating a proposal that would be said to justify that price. Mr Egan also explained that his understanding was that:

> *"Fair value provides for a very large range. It was my understanding at the time that both prices from each company to the other met fair value criteria."*

2815. In my view, what both Mr Egan and Mr Szukalski were trying to do was explain that they had not consciously broken any rules or adopted a pricing structure which, having regard to both transactions in the round, they felt could not be rationalised by reference to some objective criteria; but the objective was for both FileTek and Autonomy to achieve as high a price as could plausibly be presented as being within the "very large range" of fair value and not wholly disconnected in terms of percentage variation from FileTek's list price.

Price FileTek agreed to pay Autonomy for Autonomy software

2816. Turning to 2) in paragraph 2805 above, Mr Chamberlain's question *"why does FileTek need Autonomy and how will the technology be used?"* reflected his concern about the dramatic increase in the price to be paid by FileTek for its IDOL licence, which he would have anticipated would have to be explained to Deloitte. The figures were startling: in 2008, FileTek was required to make a $150,000 license prepayment and had paid nothing else since then. Now it was going to pay a licence fee of $8 million. On 30 December 2009, Mr Chamberlain followed up his initial query with a further email to Mr Egan and Dr Menell, again copying Mr Hussain (who recognised the issue as *"vv important"*):

> *"The technical paper should also address the different economics of their previous deal compared to this one. In Q1 2008 they signed an OEM agreement with term until 30 June 2010. They got similar software for the Trusted Edge Application. The cost was $150,000 plus 10% S&M, giving a total of $165,000. This agreement adds SPE but otherwise looks same from software perspective and allows them to also use on their Storhouse application. Now the fee is $8,000,000.*
>
> *Pete- need a compelling technical argument to support the pricing differential.*
>
> *Stouff- need to add a compelling commercial argument as to why pricing is like this. Needs significant additional revenues to justify their expense."*

2817. Again, I prefer the insight provided by Mr Loomis's accounting memorandum to the self-justifying and ultimately circular evidence provided by Mr Egan and Mr Szukalski. The memorandum explained what truly was the proposed use of the Autonomy software envisaged by FileTek and what its anticipated value to FileTek would be. It attributed a fair value to FileTek of the Autonomy IDOL licence of $455,000. That was about 5% of the price actually agreed to be paid. The reason for that very low value to FileTek in comparison to the price being paid was that FileTek only had plans to sell the software with Trusted Edge licences and Trusted Edge's sales projections were very low (40 sales a year).

2818. In this context:

(1) Although an amendment to the agreement for the purchase of Autonomy software gave FileTek the right to incorporate IDOL into StorHouse (whereas the 2008 OEM agreement was limited to Trusted Edge), the truth was that FileTek's intention at the time, as Mr Szukalski confirmed, was to bundle IDOL only with Trusted Edge software licences.

(2) The accounting memorandum recorded that FileTek "*does not have on its development road map to incorporate Autonomy licences into StorHouse software*", a fact which Mr Szukalski confirmed was correct.

(3) The estimate of 40 Trusted Edge sales incorporating IDOL yearly was Mr Loomis's estimate taking into account that (as the memorandum recorded) FileTek had a "*poor track record*" of hitting its projected figures for sales of Trusted Edge, as Mr Szukalski confirmed. Mr Loomis therefore did not feel comfortable relying on FileTek's sales projections for Trusted Edge when calculating the value to FileTek of the extension of its IDOL licence. The assumption which Mr Loomis regarded as reasonable was a sale of an average of 40 units of Trusted Edge per year over 5 years. Mr Szukalski did not regard the estimate of just 40 unit sales per year as an unrealistic estimate at the time. Indeed, even that estimate turned out to be optimistic, since in the event "*Trusted Edge failed as a business*".

2819. In the circumstances it is clear that the price for one transaction was dictated by the other, and it was calculated not by reference to the value of what was being sold but by reference to the generation of as much recognised revenue for Autonomy as it was thought possible to present to Deloitte, with a large reward for FileTek for its assistance. I accept the Claimants' submission and find that the reason why FileTek was willing to pay such a vastly higher price for IDOL was because Autonomy was going to give FileTek the funds to pay for it.

Autonomy's technical analyses of StorHouse

2820. Mr Chamberlain's email of 30 December 2009 referred to in paragraph 2805 above had also asked for some assessment of *"why…Autonomy need[ed] the Filetek solution and what benefits will that bring."* When it was put to Dr Lynch that this looked as if Dr Menell was being asked by Mr Chamberlain to come up with an *ex post facto* technical argument to support a price that Mr Egan had already agreed, he acknowledged this, and

queried also how a technical argument would support the price agreed. But, as the Claimants submitted and I accept, Mr Chamberlain would have understood, as I consider Dr Lynch did also, that Autonomy needed something to give credence to the case for there being a genuine commercial rationale for acquiring StorHouse.

2821. The requests from Mr Hussain and Mr Chamberlain prompted a cursory and superficial technical assessment by Autonomy of the StorHouse software. Mr Egan acknowledged in his witness statement that, as the chronology also demonstrates, the purpose of this technical analysis was not to decide whether Autonomy should purchase the software or what it should pay, but *"to justify the value of the deal to Deloitte"*.

2822. Dr Blanchflower's unchallenged evidence was that, on 30 December 2009, Dr Menell, without explaining the reason for his request, asked Dr Blanchflower and Mr Gallagher (neither of whom were part of the Digital Safe team) to provide a description of FileTek's software, along with examples of how it could be used in conjunction with Autonomy's products. Dr Blanchflower gave the following unchallenged evidence:

> "*To the best of my recollection, the only thing we had to go on when conducting our analysis was the name "FileTek". Our starting point, therefore, was to conduct an internet search to find information on the company and its software. We looked at FileTek's own website, and may also have run additional Google searches to look for relevant news stories or other information about FileTek and its technology. We did not have a copy of FileTek's software or any detailed installation guides or user manuals. Our report took us no more than a few hours to produce."*

2823. Based on those internet searches, Dr Blanchflower and Mr Gallagher prepared an email which Mr Gallagher sent to Dr Menell later on 30 December 2009. The first half of the email, which was drafted by Dr Blanchflower, set out "*Initial thoughts*" on how FileTek's software might overlap with or complement Autonomy's software. At a high level, Dr Blanchflower could see that FileTek's software could be valuable to Autonomy, but he said that he had to "*fish for possible uses*" and included anything that was potentially plausible: he made clear that he was "*stretching some of the use cases, but I was asked to think of as many as I could*". The second half of the email, which was drafted by Mr Gallagher, was evidently based on a review of FileTek's own website, as the links to the website made clear.

2824. It was the unchallenged evidence of Dr Blanchflower that Dr Menell did not follow up with Dr Blanchflower and Mr Gallagher in relation to the email. All that Dr Menell did was to send a hyperbolic summary in praise of StorHouse stating that its capabilities "*represent a game changing play when combined with Autonomy's SPE powered DigitalSafe*". This was untrue and there was no basis for it: no prior work had been done to explore the possible integration of StorHouse with SPE, nor had any work been done to determine the feasibility of combining StorHouse with Digital Safe.

2825. I accept the Claimants' submission, supported also by the evidence of Mr Wang and Mr Goodfellow, that this is hardly the sort of technical evaluation one would expect Autonomy to conduct if it was seriously considering licensing StorHouse for in excess

of $10 million in order to integrate it with Autonomy's products[321]; and that the technical analysis was just an *ex post facto* justification in order to provide a paper trail for Deloitte.

Execution of the two agreements

2826. Less than half an hour after receiving Dr Menell's paper, Dr Lynch replied "*ok*", signifying his approval for the StorHouse purchase. Shortly thereafter, Mr Hussain also replied, "*This is good – I am fine*".

2827. On the evening of 31 December 2009, Mr Loomis wrote to Mr Thompson, subject "*autonomy agreements have been mutually signed*". Mr Szukalski accepted that, on that day, FileTek would not have signed the IDOL licence, unless Autonomy had mutually signed the agreement for a StorHouse licence. Mr Loomis' email again recorded that "*CEO [Mr Egan] said that we should be paid 4-5 days early via wire*", a reference to Mr Egan's assurance on the call earlier that afternoon. Also that evening, Mr Szukalski sent a note to his FileTek colleagues expressing appreciation for their help and hard work. He said, "*I would have never guessed one week ago that we would be closing a financial transaction of this size to close out 2009. It has been quite a challenging and remarkable 48+ hours ...*". Mr Szukalski accepted that his email reflects the fact that the transaction only came onto the horizon at all when Mr Szukalski heard from Mr Egan on 28 December 2009. Mr Seamans' one-word reply to Mr Szukalski's email, "*Unbelievable*", was a fair reflection of Mr Szukalski's own reaction to getting the deal done within only three days and to the scale of the deal.

2828. The two agreements mutually executed on 31 December 2009 were:

(1) A software licensing and maintenance services agreement under which FileTek granted Autonomy Inc a licence to install, implement, access, use and copy StorHouse for a period of five years for its internal business purposes and/or for the benefit of its hosted customers. The total fee for the software licence and maintenance support was $10,367,280, based on 60 users and specific data limits (including 1 petabyte of primary relational data, i.e. structured data), which was payable by Autonomy Inc within 30 days from receipt of invoice.

(2) An amendment of the 2008 OEM agreement under which Autonomy Inc licensed certain software, including Autonomy IDOL with SPE Basic, to FileTek for use with FileTek's StorHouse application. The agreement provided for the payment by FileTek of a licence fee of $8,000,000 and a fee of $480,000 for the first year of support. The licence fee and support fee were to be invoiced immediately and payable in two equal instalments of $4,240,000 within 30 and 90 days, respectively, from the date of invoice.

[321] Mr Wang's evidence was that a proper product evaluation would have involved speaking to the technical team (including himself) and having engineers run a proof of concept to ensure there were no significant integration issues, which in this case would have involved trying to integrate StorHouse with Digital Safe. This never happened. Indeed, on the evidence, no attempt was made to check, for example, whether StorHouse was capable of searching structured data on the scale required by large customers, such as banks. Mr Wang's evidence was that repeated stress tests using large volumes of structured data should have been run, and that this would have taken weeks.

2829. Autonomy recognised the $8,000,000 licence fee under the first FileTek sale as revenue as at 31 December 2009 and the support fee as revenue over the following year.

How the first StorHouse purchase was presented to Deloitte

2830. The Defendants placed reliance in this context also, as in almost all others, on Deloitte's approval of the transactions. They emphasised that Deloitte's review involved a demonstration of the StorHouse product attended by Deloitte's technical expert Mr Johnstone. Mr Gallagher presented the demonstration and Mr Goodfellow had worked on it. Deloitte were seeking to *"ensure from an audit perspective that the two transactions are appropriately valued and can be separated and that they make commercial sense."*

2831. Deloitte focused on the two key questions of whether there was a commercial rationale, and whether the transactions were at fair value. With regard to the technical evaluation Mr Welham confirmed in cross-examination that Mr Johnstone was able to ask all the questions he wanted about the software. Mr Johnstone produced his own technical evaluation.

2832. Then, on 11 January 2010, Deloitte produced their working paper with a view to assessing whether the two deals could be recognised separately. This involved ascertaining whether there was a linkage such as to impact the accounting treatment. Deloitte's view was that these were dissimilar goods, and the transactions could be recognised independently. Deloitte concluded that:

(1) There was a clear commercial rationale behind the purchase; and

(2) The purchase was at fair value. In this context Deloitte took into account that competitive quotations had been obtained by management from a number of companies with regard to potential software applications for use with SPE for structured data analysis, including HP, Informatica and CommVault. Mr Welham confirmed that Deloitte had no problem with a quotation being obtained after the year end.

2833. Mr Welham agreed that reaching these conclusions involved the process previously described of confirming the transactions did not relate to similar goods, and then identifying both commercial rationale and fair value for the transactions:

> *"Q. So you decide they're not similar, then you ask yourself the question, is there a commercial rationale for both limbs?*
>
> *A. Yes.*
>
> *Q. Then you ask yourself, has fair value of the two transactions been established?*
>
> *A. Yes, correct."*

2834. In addition to the demonstration and a management paper provided to them by Autonomy on 12 January 2010, Deloitte was also provided with: (i) a management representation letter dated 22 February 2010, signed by Mr Hussain, confirming that Autonomy's purchase of StorHouse was on an arm's length basis, (ii) a confirmation

letter signed by Mr Loomis in respect of the first FileTek sale confirming the outstanding debt owed to Autonomy and that there were no side agreements, (iii) evidence of Dr Lynch's approval of the first FileTek purchase and internal correspondence between Autonomy management outlining the supposed commercial rationale for the purchase, and (iv) a copy of an email from Mr Szukalski to Mr Egan on 21 January 2010, in which Mr Szukalski purported to set out FileTek's commercial rationale for licensing additional Autonomy software as follows:

> *"…the FileTek Trusted Edge platform utilizes the Autonomy Keyview filters and IDOL platform. Our current contract with Autonomy was set to expire in June 2010…we projected that a royalty arrangement with the same terms would have cost us an annual average of approximately $3-5 million in royalties due to Autonomy and possibly even more. Further, the prior royalty formula caused less than optimal pricing structures for FileTek in order to minimize the per copy royalty. These conditions drove the commercial desire to negotiate a license with a fixed up front cost (and no royalties.) Otherwise, we would have been forced to find alternatives to the Autonomy products. This new arrangement not only allows us to renew our commitment to Autonomy but allows us to further expand our use of Keyview and IDOL within Trusted Edge and allows us to integrate the Autonomy IDOL SPE software in support of our STH storage virtualization platform offering."*

2835. Deloitte concluded, on the basis of this material, that the first FileTek sale and purchase were separate transactions conducted at arm's length. This process appeared to be careful and comprehensive and reliable accordingly.

2836. However, the Claimants' case was that Deloitte was misled. The Claimants relied particularly on the evidence of Mr Welham. According to his evidence in his witness statement, Deloitte were unaware that:

(1) Autonomy had not undertaken any detailed technical analysis or due diligence in relation to the StorHouse software but, the day before the first FileTek purchase, had only briefly reviewed FileTek's website and the information about its software on the internet.

(2) FileTek would not have bought the IDOL licence at the price it did had it not been for Autonomy's purchase of StorHouse, and FileTek was dependent on receipt of funds from Autonomy under the StorHouse purchase to make payments under the IDOL licence.

(3) The negotiations had been conducted by reference to the "*spread*", i.e. the delta or net payment that would fall to be made after setting the two payments off against each other.

(4) FileTek had been assured by Autonomy that it would not be "*burned*" on the transaction.

(5) Had Deloitte been aware of these matters, they would have been of "*concern*" as they would have called into question whether the transactions were independent, arm's length and commercially reasonable transactions, all of

which were essential planks of Deloitte's analysis of the appropriate accounting treatment.

2837. According to the Claimants, the true position was also withheld from the Audit Committee. On 28 January 2010, Mr Hussain sent Dr Lynch and Mr Kanter the final version of his management note for the Audit Committee. Mr Hussain's covering email noted that he had included "*More on filetek*" and requested "*Any final comments before we send?*". Dr Lynch accepted that he had at least reviewed the draft "*at the level of the non-financial stuff*". The version of the note sent to the Audit Committee, which included what was described in Dr Lynch's written closing submissions as having *"added positioning",* was seriously misleading:

(1) The note described the purchase of the StorHouse licence as a "*completely separate transaction*" from the IDOL sale to FileTek. This was an untenable description in light of the chronology set out above. In fact, as already noted, the two transactions had been conceived by Mr Egan, and approved by Mr Hussain, as a package, and negotiated with FileTek by reference to the spread between the two prices.

(2) The note also misrepresented the commercial rationale and background to the purchase of StorHouse:

> *"We carried out a detailed evaluation process over several months to identify technology that would allow us to do this "out-of-the box" and evaluated products from HP, Informatica and CommVault. The evaluation process was carried out independently by our CTO and technical team. We eventually selected the Filetek product because the technology was judged to be the most appropriate and best of breed …"*

(3) But there had been no "*detailed evaluation process over several months*" nor is the adverb "*eventually*" apt to describe the decision to buy StorHouse; and there was no evaluation at any time of HP's or CommVault's products as an alternative to purchasing StorHouse. As explained previously, Autonomy's technical department spent a few hours browsing material about FileTek on the internet, only a couple of days before the StorHouse licence was purchased.

(4) The suggestion that the evaluation of StorHouse was carried out "*independently*" by Dr Menell, was also false: Dr Menell was only asked to consider the StorHouse purchase after Mr Egan had already approached Mr Szukalski about a round-trip transaction.

2838. The note also went on, as part of supporting the existence of a genuine commercial rationale, to assert that StorHouse had been "*fully integrated and is available for commercial sale*". Dr Lynch asserted in cross-examination that this was "*a perfectly reasonable statement*" on the basis that because FileTek "*was an NAS,*[322] *once it was set up in a network environment, then it was integrated and available for sale*". Dr Lynch's position therefore appeared to be that the statement was true if StorHouse had merely been installed in a network environment. However:

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[322] This appears to stand for Network Attached Storage.

(1) Although there was a dispute about what *"fully integrated"* meant, the Claimants submitted, and I accept, that the phrase *"fully integrated"* of itself was intended to convey more than the installation of the software on the network. That is reinforced by the claim that it was *"available for commercial sale"*.

(2) The Claimants also submitted that in any event, there was no evidence that StorHouse had even been installed in a network environment within Autonomy as at late January 2010. Against this, the Defendants relied on (a) exchanges with Mr Gallagher which appeared to demonstrate that the StorHouse software had been downloaded in January 2010 and (b) the fact that there had been a demonstration in January to explain to Deloitte the purpose of the StorHouse software and a use case for combining it with IDOL, which suggested that the StorHouse software would have been installed for that purpose and to show off its functionalities. However, when cross-examined about this, Mr Goodfellow explained that the demonstration material had been compiled by him and two others in his team, and he was adamant that they had not installed StorHouse by then or for that purpose. There was nothing to contradict this.

2839. Despite Mr Goodfellow's adamant insistence, I remained puzzled by why or how a use case would have been sought to be presented without installation of the software concerned. Nevertheless, even if a prototype was installed by then (12 January 2010) I consider and find that the note, especially with the additions made by Dr Lynch, was materially misleading: I accept that the depiction of a fully integrated "oven-ready" product was greatly exaggerated with a view to justifying to Deloitte (and, in turn, the Audit Committee) the purchase of StorHouse as a self-standing transaction which was justified on its own merits notwithstanding its very considerable purchase price.

2840. In short, I am satisfied that the way the transaction was presented to Deloitte was distorted to the point of falsity. In my judgment, Deloitte's conclusion that the first FileTek sale and purchase were separate transactions conducted at arm's length was based on a false presentation to them.

Mutual payments in respect of the first FileTek transaction

2841. The inter-dependence of the transactions, and the side arrangements to ensure that FileTek would be put in funds before ever being required to pay was again illustrated by the payment process:

(1) On 26 January 2010, a number of days before Autonomy's payment for the StorHouse licence fell due, Mr Egan wrote to Mr Scott asking him to "*raise the payment*" to FileTek that day. Mr Egan explained that, "*Sushovan is aware and is expecting a request for approval as early as this evening or at latest tomorrow AM. He will then approve and can you be sure we either wire or send check overnight?*"

(2) The same day, Cynthia Watkins, in Autonomy's finance department, sought Mr Hussain's approval for the payment, noting that payment was due on 30 January 2010. In the early hours of 27 January 2010, Mr Hussain gave his "*ok*", and so did Dr Lynch.

(3) Autonomy paid FileTek $10.367 million on 27 January 2010, in advance of the contractual due date for payment, in accordance with the assurance given by Mr Egan to Mr Szukalski.

(4) Two days later, on 29 January 2010, FileTek paid the first instalment of $4.24 million to Autonomy. Mr Szukalski confirmed that FileTek used the cash it had received from Autonomy to pay Autonomy.

2842. In cross-examination, Dr Lynch did not seek to argue that the timing of these payments was a mere coincidence; but he sought to explain and justify the sequence on the basis that, before the payment was made by Autonomy, he would have expected someone to have had a phone call with FileTek saying, "*If I send you what I owe you, you'd better send it back straightaway*". Dr Lynch said that getting prompt cash payment from FileTek was helpful for Autonomy's Days Sales Outstanding ("DSO") metrics, which he explained in re-examination was a measure of how quickly debts owed to Autonomy were paid. This did not, however, address the real issue: as the Claimants put it,

> *"the issue here is not one of the timing of cash flow: the Claimants' case does not involve a complaint that Autonomy made a legitimate purchase but paid for it sooner than it could have done; the Claimants' case is that Autonomy's reason for purchasing the StorHouse licence and paying in advance of the due date was to put FileTek in funds first to enable it to purchase Autonomy software at a high price and then to pay down its debt to Autonomy."*

2843. On 31 March 2010, FileTek paid the remaining instalment of $4.24 million to Autonomy. Again, Mr Szukalski's evidence was that FileTek used the money it had received from Autonomy to pay Autonomy.

2844. I accept the Claimants' case in relation to the first of the transactions comprising RT 3.

Defendants' knowledge

2845. The knowledge of both Defendants of the reciprocal nature of the first of the RT 3 transactions, and the consequent impropriety of accounting for them as if they were independent, seems to me to be apparent from the description above. I give further reasons for this conclusion after my consideration of the second of the RT 3 transactions which follows.

The second of the FileTek transactions comprised in RT 3: Q1 to Q2 2010

2846. Whereas the Claimants described the second FileTek purchase transaction as once again driven by Autonomy's need for more recognised revenue, the Defendants described it as being for proper commercial purposes and to meet a genuine desire on Autonomy's part to extend the data limits of the first purchase (including a 1 PB limit for relational data) so as to enhance its capacity to deploy StorHouse and enable it to meet identified customer demand. Both sides relied on the evidence of Mr Egan in this context; and there was a dispute as to whether a number of emails were genuine or pre-textual.

2847. The Claimants relied on the following description in Mr Egan's witness statement of what promoted the transaction, and its salient features:

> *"In Q1 2010 Mr Hussain told me that we were short on revenue again. I therefore looked to do another quid pro quo deal. Mr Hussain and I agreed that I would present a second round trip deal to FileTek. The rationale for the deal, which I laid out in an email to Mr Hussain dated March 30, 2010, was that Autonomy expected an increase in its data hosting business because of its recent (separate) agreement to host Merrill Lynch data, and that as a result, Autonomy could license additional rights relating to the volume of data that could be hosted by Autonomy using FileTek's StorHouse software. The rationale was a pretext, as both Mr Hussain and I knew. Autonomy did not "need" the right to use StorHouse.*
>
> *On March 29, 2010, I spoke with FileTek's Mr Szukalski, with whom I had made the quid pro quo deal at the end of 2009. I proposed that FileTek licence additional Autonomy software before March 31. In return, I said that Autonomy would purchase additional rights to use FileTek's StorHouse software in the following quarter for a purchase price that would substantially exceed the amount of FileTek's purchase from Autonomy. The separation in time was a requirement established by Mr Hussain. Its purpose was to introduce two separate time periods as another fact establishing the deals as independent transactions. Most of my discussion with Mr Szukalski and FileTek's CEO, Bill Loomis, was about the spread - the dollar amount by which Autonomy's purchase from FileTek would exceed the amount of FileTek's purchase from Autonomy. The spread was a principal incentive to FileTek to do this quid pro quo deal.*
>
> *I agreed with Mr Szukalski and Mr Loomis that FileTek would license software from Autonomy in Q1 2010 for $8.5 million, plus one year of maintenance for $510,000, a total obligation of $9,010,000. In return, I agreed that Autonomy would purchase additional rights to use FileTek's StorHouse software and related support for about $11.5 million in Q2 2010. We agreed that the spread would be approximately $2.5 million. Mr Hussain established the amount of the licence fee for the Autonomy software and directed the negotiation of the amount of the spread; I conducted that negotiation. Both halves of the agreement were reached orally at the end of March 2010. FileTek's purchase from Autonomy was documented on March 31, 2010. Autonomy's agreement to purchase additional rights to use StorHouse remained entirely oral at that point. Mr Hussain told me that it should not be in writing."*

2848. The Claimants relied also on internal Autonomy email exchanges with Dr Lynch which appeared to support the presentation of the transaction as a device to raise recognised revenue to cover shortfalls, and thereby also Dr Lynch's involvement and knowledge;

(1) On 29 March 2010, Dr Lynch sent an email to Mr Hussain and Mr Egan, attaching a revenue route map which included $12 million of revenue referable to "*gary/clutch/bluearc/safenet/cronin*". Dr Lynch accepted that "*gary*" might have been a reference to Gary Szukalski.

(2) The next day, 30 March 2010, Dr Lynch sent Mr Hussain an update, which now included $10 million of revenue referable to "*gary*". Again, Dr Lynch accepted

it was possible that this was a reference to Mr Szukalski. No alternative explanation has been advanced.

(3) Later on 30 March 2010, Dr Lynch sent an email to Mr Hussain, attaching what Dr Lynch called "*my list*". The list again included $10 million of revenue in relation to "*Gary*", which Dr Lynch accepted might, at the very least, be a reference to a deal with Mr Szukalski.

(4) On 31 March 2010, Dr Lynch sent Mr Hussain a further revenue routemap, which now included $8 million of revenue for "FILETEK". Dr Lynch confirmed in cross-examination that it was he who had added the reference to FileTek. This strongly supports the conclusion that the references to "*Gary*" in Dr Lynch's earlier route maps had also been to FileTek.

2849. The Claimants contended that it is perfectly clear, therefore, that late in Q1 2010, Dr Lynch knew that a revenue transaction with FileTek was part of Autonomy's plan to achieve its revenue target for Q1 2010; and further, that it is very unlikely that whoever told Dr Lynch about this (either Mr Hussain or, since Dr Lynch was on the west coast of the United States at the time, Mr Egan) failed to tell Dr Lynch about the intended quid-pro-quo purchase of StorHouse.

2850. On 30 March 2010, Mr Egan sent Mr Hussain an email, subject "*filetek*", in which he said, "*BofA has granted us the Merrill business. We will have to buy more FileTek to satisfy that contract at lower HW costs. We may wish to pitch a deal at FileTek on last day of Q to get best pricing*". Mr Hussain responded enthusiastically, copying Mr Kanter and Dr Menell.

2851. Mr Egan's evidence was that both he (Mr Egan) and Mr Hussain knew that the commercial rationale set out in this email was a pretext. Although it was suggested to Mr Egan in cross-examination that his email was an "*honest email*", Mr Egan maintained that it was:

> "*a bit misleading because I wanted to buy more FileTek to enable another quid pro quo deal. It also happened to be that we had great increases in volume and therefore had perfect rationale and business case for buying more.*"

2852. The Claimants contended also that the pretextual nature of the rationale is apparent from the fact that, as at 30 March 2010, Autonomy had <u>not yet installed</u>, let alone <u>used</u> StorHouse and, therefore, had not used any of the data capacity made available under the first StorHouse licence. They added that until an email from Mr Chamberlain to Mr Hussain dated 30 March 2010 referred in a single phrase to a limit on what Autonomy had acquired under the first transaction there was no document in which anyone in Autonomy's senior management had ever referred to the capacity limitation in the first transaction, or to any need to revise it.

2853. The Defendants, on the other hand, relied on Mr Egan's evidence to support their case that the need for extra capacity was not contrived but real, and that the rationale for the purchase was genuine. They instanced especially the following:

(1) On 30 April 2010 Mr Egan emailed Mr Goodfellow and Dr Menell stating:

> *"This is FileTek's first proposal for the additional volume we asked about as a result of our winning the Merrill Lynch, Met Life and Newedge deals. They don't know about Lily volume, BNPP, The new larger JPMC volumes and the rate at which volumes are growing."*

(2) Mr Egan confirmed that the rationale for this purchase was genuine:[323]

> *"Q. Right. The business about needing extra capacity, that was true, wasn't it, as you saw it at the time?*
>
> *A. I believe so, yes.*
>
> *…*
>
> *Q. But in relation to the rationale for this further deal, what you say there represents what you honestly believed at the time?*
>
> *A. Yes, I believed that the additional -- I knew that we had one capacity and that we had growing volumes and additional customers that rationalised making additional purchases."*

2854. They relied also on Mr Szukalski's evidence in cross-examination that there was a genuine negotiation for something that Autonomy genuinely wanted in the course of which he wanted to "fence" the deal to limit the amount of software that Autonomy received for the $10 million that Autonomy had proposed, but that Dr Menell had negotiated *"very cleverly"* by introducing the idea that Autonomy would require in return that the StorHouse licence should be extended to grant unlimited capacity. This was Mr Szukalski's answer also to the fact that it was Mr Egan's evidence in his witness statement that the price had in fact been agreed in March 2010 at $11.5 million (see above), and indeed to his own evidence that Mr Egan had "coached" FileTek to put forward a price that could be beaten down by procurement. The following exchange in the course of Mr Szukalski's cross-examination illustrates the point:

> *"Q. So this negotiation was a bit of a show really, wasn't it?*
>
> *A. No, continue on, there should be more negotiation that happens –*
>
> *Q. Yes. There are a number of further emails between you and Mr Scott. Those are emails you've seen recently, are they?*
>
> *A. No, not at all. But there's further, I think, negotiation as well relative to the capacity licences of the software that we sold.*

[323]In this passage of his cross-examination Mr Egan did say that he had more of a "symbiotic agreement" with Mr Szukalski than the email reflected. Although the Defendants submitted that this went only to the negotiation process and did not affect the substance, which was that Autonomy did want the extra capacity (and paid fair value for it), I consider that Mr Egan was making the broader point about his business relationship and understandings with Mr Szukalski

Q. Insofar as the price is concerned, where you land up is that the figure precisely of $11.5 million that you had agreed with Mr Egan at the end of March?

A. Correct, but the value that we provide to Autonomy becomes significantly higher based on a negotiation of the software that we're licensing to them which changes dramatically during this negotiation phase."

2855. Mr Szukalski presented the licence for unlimited capacity as a *"big deal"*:

*"Q***.** *And Autonomy didn't seek to negotiate you to a lower price than that?*

A. No, but higher value.

Q. Removing the constraints on capacity?

A. Big deal. It's a big deal in terms of what we're offering here in terms of unlimited capacity. The technology was completely based on per terabyte pricing. When you remove that, you've removed all limitations. So in essence what we were offering to Autonomy was -- a Zantaz Digital Safe was a complete enterprise licence for the technology. It's a big deal. It's high value."

2856. Mr Szukalski expanded on this in the course of his re-examination as follows:

"Q. ... again, can you just expand a little on that answer when you talk about the negotiation of the software that you were licencing to him, what are you talking about there?

A. Again, there is two components here. There is the price negotiation and then the software negotiation. In this case it was very interesting. So the price negotiation ended up about $11.5 million which was kind of the target value that we, in terms of price or budget that Autonomy was willing to spend. But what Autonomy negotiated very cleverly, and this is the involvement of Dr Pete Menell, the CTO of Autonomy at the time, was, you know, the original proposal included our standard structure of so many terabytes of licensed storage for storing this and Dr Pete came back and basically said, "We'd like to negotiate a little harder and get an unlimited capacity for Digital Safe" which was pretty clever and that's the improved value that Autonomy got as a result of that negotiation. They got an unlimited capacity."

2857. However, although it does seem likely that there was growing demand for archiving and searching database records, and in that context there was a theoretical or potential use case for StorHouse which (in Mr Wang's words) Autonomy *"definitely tried to push and offer"*, the fact which was never contradicted was that at the time of the second StorHouse purchase, (a) Autonomy had not yet started using StorHouse for any customers (b) in the case of neither BofA/Merill Lynch nor Kraft, nor any other Autonomy customer was StorHouse ever actually used, as Mr Wang confirmed in his re-examination. There was no evidence to support the Defendants' line of argument that Autonomy needed to extend the first StorHouse licence because it had exceeded its 1 PB limit.

2858. So far as concerns FileTek's purchase from Autonomy, Mr Szukalski told me (again in re-examination) that FileTek came to the negotiation with its own "wants list" of software that it wanted to acquire in the purchase – a list a Mr Seamans of FileTek was said to have compiled as a *"running list"* before Mr Egan made an approach to FileTek. However, as the Claimants emphasised, Mr Szukalski had earlier accepted in cross-examination that FileTek had not approached Autonomy about wanting to licence any new IDOL functionality before Mr Egan's approach to him.

2859. Further, Mr Loomis' evidence in the US criminal trial was that FileTek would not have paid anywhere close to $9,010,000 if Autonomy had not agreed to license additional StorHouse software for the same amount or more:

> *"Q. ...Now, would you, on behalf of FileTek, have bought the $8.5 million license from Autonomy in March 2010 if Autonomy had not agreed to a barter transaction in which it bought even more StorHouse from FileTek, you know, eventually in the period that was discussed -- would you have bought that license from Autonomy if there had not been the other side of the equation?*
>
> *A. We would have bought the license, but not at that dollar amount. We needed the extra capability. And we would have bought the license if the StorHouse sale was the same exact dollar amount [as FileTek's purchase from Autonomy] also. We didn't need that extra dollar amount to do it, but it was, of course, attractive.*
>
> *...*
>
> *Q. What amount of money do you think you would have been comfortable with if there had been no reciprocal barter transaction? How much are we talking about?*
>
> *A. I don't know. It would be significantly less.*
>
> *Q. How much significantly less?*
>
> *A. Well, it would be less than a million, put it that way, and could be substantially less than that. I don't -- I would have to review all my sales forecasts back in those days."*

2860. That was, of course, less than one-tenth of the price FileTek in fact agreed to pay. For his part, Mr Szukalski sought to quibble about what FileTek would have agreed to pay; but he said he "*absolutely*" agreed that, if Autonomy had not been offering to buy more StorHouse licences, FileTek would not have been prepared to pay anything like $8 or

$9 million for this further IDOL licence. He later confirmed that he had no reason to disagree with Mr Loomis' testimony about what FileTek might have been prepared to pay, as set out above.

My conclusion in relation to the second set of RT 3 transactions

2861. In my judgment, the second FileTek purchase and sale transactions comprised in RT 3, like the first, were plainly "reciprocal" or "barter" transactions; they should have been accounted for accordingly. That is so whether or not Autonomy found some use for the StorHouse software and customer demand for the structured data analyses it facilitated.

2862. In particular:

(1) The evidence that Mr Egan's overture to Mr Szukalski was driven by a need to generate recognised revenue was clear; and the suggestion that the impetus really came from a need for greater capacity was very thin and undermined by the fact that even if later demand increased, at the time Autonomy had done little to use up the initial capacity it had purchased under the first agreement.

(2) Mr Szukalski's evidence of a real negotiation was unpersuasive; and the notion of Dr Menell having *"very cleverly"* pulled off an unexpectedly *"big deal"* of *"high value"* was not in the least bit credible. Even Dr Lynch had to accept that the whole negotiation appeared to be, as it was, a charade.

(3) The division of the two transactions across two quarters was artificial, as confirmed by Mr Egan's evidence that Mr Hussain directed that Autonomy's commitment in March 2010 to purchase additional rights to use StorHouse in the following quarter *"should not be in writing"*, which was not challenged.

(4) The purchase price for Autonomy's software was out of all proportion to its real value to Filetek.

Deloitte's approval was given on a false basis

2863. As usual, the Defendants sought to rely on the fact that Deloitte approved the accounting treatment of both sides of the second RT 3 transaction, after a review of the purchase transaction to ascertain whether it had any impact on the revenue recognition for the licence deal in the previous quarter. Mr Welham confirmed that essentially the same tests were applied as if both transactions had taken place in the same quarter.

2864. It appears that Deloitte discussed the commercial rationale for the transaction with Mr Gallagher and Dr Menell. There was a further demonstration attended by Mr Johnstone, Mr Welham and Mr Murray and Deloitte were able to test the rationale and make any enquiries they wanted to. Deloitte's conclusion was:

> *"Given the above demonstration (and the input from Ben Johnstone) and the discussion with Pete Menell, there appears to be a clear commercial rationale behind this purchase."*

2865. Deloitte also concluded that the transaction was at fair value. Their memorandum on the "Purchase of additional StorHouse tech from FileTek Q2" (prepared by Mr Murray) dated 18 July 2010 noted that the:

> *"extension to make this an unlimited licence would add significant value. Note that Mike Lynch talks about the potential for a £35m licence deal alone that could come out of this purchase…*
>
> *Per Pete Menell we note that management considers this to be a worthwhile purchase and the fact that it was approved by the CEO, CTO and CFO adds weight behind it being an arms length transaction made at fair value."*

2866. It is apparent that Deloitte were unaware that the 'use case' for StorHouse within DigitalSafe was purely theoretical, and that the talk about potential deals was simply that: talk.

2867. It is also clear that Dr Menell provided Deloitte with information designed to justify the licence extension which was misleading. Thus:

   (1) Dr Menell told Deloitte that the second StorHouse purchase was necessary because the 1 PB limit for structured data under the existing StorHouse licence "*was reached by Kraft alone*". This was false. In fact, as at the time of the second StorHouse purchase, Autonomy's technical team had not even attempted to use StorHouse for Kraft, still less used up the 1 PB limit. Indeed, it was the unchallenged evidence of Mr Wang that the total volume of data (structured and unstructured) held by Kraft in its Digital Safe as late as September, October, November and December 2010 was considerably less than 1 PB. The position was no different in July 2010, when Deloitte came to review the second StorHouse purchase. Dr Lynch suggested in his cross-examination that Dr Menell had meant that "*Kraft had the legal right to turn on that tap and to do that we had to have capacity of 1 petabyte in order to take whatever they sent us and that had to be up and running there and then*". But, as the Claimants pointed out, this is not what Dr Menell told Deloitte, and it was not suggested to Mr Welham in cross-examination that it was what Deloitte understood. In any event, I accept the Claimants' submission that, even if there were any basis for Dr Lynch's attempt to rationalise what Dr Menell told Deloitte, it fails to meet the point that StorHouse was not in fact being used for Kraft as at the time of the second StorHouse purchase and, indeed, was never used for Kraft.

   (2) Dr Menell told Deloitte that the capacity constraint in the first StorHouse licence required Autonomy to monitor the volumes of data being archived and that "*customers had expressed concern over that fact*". This was also misleading: Autonomy had not yet started using StorHouse for any customers. No contemporaneous documentation supports the suggestion that customers had expressed concern over monitoring of their data volumes.

   (3) Dr Menell told Deloitte that "*any sale of SPE contains an element of this FileTek software*". This was untrue. As Dr Blanchflower explained, SPE never contained any element of StorHouse software. Dr Menell, as CTO, must have known this.

2868. In the round, I am satisfied, and find, that Deloitte were not aware of the true nature of the transaction. Mr Welham confirmed in his witness statement that he and his team were not aware, in particular, that Autonomy had orally agreed with FileTek at the time

of the sale of Autonomy software in Q1 2010 that in the subsequent quarter (and after the Q1 2010 earnings announcement had been made), Autonomy would make a further purchase of FileTek's StorHouse software product in order to put FileTek in funds to pay the amount due to Autonomy in respect of the Q1 2010 sale. Nor were they aware of the disparity in the values paid on each side of the transaction compared to the price that would, but for the reciprocal transactions, have been a realistically achievable price. Whether more sceptical review might have led to a line of inquiry which would have put the transaction into a more realistic perspective is not in issue in these proceedings.

2869. In my judgment, Deloitte approved the transaction on a false basis, and so did the Audit Committee.

The FRRP were also misled

2870. As discussed in the course of my assessment more generally of Mr Hogenson's concerns and the questions which followed from the FRRP (see paragraph *2232ff* above) Mr Hogenson had questioned the purchases from FileTek, on the basis that they appeared to be barter transactions where the economic benefit on both sides of the transaction appeared to be materially overstated, and the FRRP in due course also queried the transactions.

2871. The responses provided by Autonomy in a letter to the FRRP dated 3 March 2011 included misleading statements about the transactions now under consideration:

(1) Autonomy presented the purchase/sales in the two sets of transactions as unconnected, which plainly they were not.

(2) Autonomy told the FRRP that *"FileTek was selected by Autonomy following receipt of multiple quotations as part of Autonomy's due diligence process"*: but quotations from competing suppliers were sought and obtained only after the purchase of the first StorHouse licence.

(3) The letter went on to claim that "*FileTek products are incorporated into Autonomy software, for which sales have been strong*". This was not correct: as already explained, StorHouse was not incorporated into any Autonomy software. Sales of Autonomy software incorporating StorHouse were not "*strong*"; they were non-existent.

2872. Autonomy's perceived need to mislead has further confirmed me in my conclusion that the transactions were not properly accounted for.

Defendants' knowledge

2873. I am satisfied that both Defendants knew and conceived the real driving purpose of the transactions comprising RT 3 to be the generation of recognised revenue by funding FileTek to make a purchase of Autonomy software that otherwise it would not have made, and that their accounting treatment was not proper having regard to their true nature as reciprocal transactions.

Mr Hussain

2874. Furthermore, Mr Egan's evidence in his witness statement was that it was Mr Hussain who:

(1) authorised both sets of *quid pro quo* transactions.

(2) devised the idea adopted in the second set of FileTek transactions of the purchase from Autonomy and the sale by FileTek being artificially split to take place in sequential quarters and directed Mr Egan that the sales and purchases should never be linked in any paperwork;

(3) encouraged Dr Menell and the technical departments to come up with bogus technical reasons to justify them; and

(4) acquiesced in, and may have sanctioned, the provision by Dr Menell of false information to Deloitte; and contributed to the drafting of the misleading memoranda to Deloitte.

2875. I accept that evidence: Mr Hussain had guilty knowledge of the true nature of the RT 3 transactions and that they were improperly accounted for accordingly.

Dr Lynch

2876. Dr Lynch had such 'guilty knowledge' also. I consider and find that:

(1) It is unlikely that Dr Lynch was asked to approve the transactions without an explanation of their true nature. That was not how Mr Hussain and the cabal operated.

(2) That is further supported by the fact that in an email dated 29 December 2009 Mr Hussain undoubtedly did raise collectability as an issue in the context of the first RT 3 transaction, and (as the Claimants submitted) it is inherently likely that Mr Hussain would have explained to Dr Lynch how the issue was resolved through the StorHouse purchase as a means of funding FileTek.

(3) The technical evaluation was an exercise in trying to find *ex post facto* justification for the purchase and some use case. Especially given that it involved the acquisition of third party software, contrary to Dr Lynch's preference and policy, for Autonomy to develop its own solutions, it is inherently unlikely that Dr Menell, Mr Hussain and the cabal would have kept back from Dr Lynch the bogus nature of the exercise.

(4) Dr Lynch was personally involved in adding *"positioning"* to the memorandum for Deloitte and also to the letter to the FRRP which was misleading, as he must have known.

(5) Dr Lynch's depiction of the StorHouse transactions being part of a broader strategy to acquire Informatica (putting *"tanks on Informatica's lawn")* lacked any supporting documentation and any real credibility, and the creation of a false story is further evidence of his knowledge of the truth.

Overall conclusion in respect of RT 3

2877. In my judgment, both sets of transactions comprising RT 3 are plainly illustrative and confirmatory of Autonomy's use of reciprocal transactions as a further means of making

good shortfalls in quarterly revenue; and both Defendants knew that, and that the objective required false accounting. The linked sales and purchases were not independent, arm's length transactions, and it was not possible to understand the substance and commercial effect of one agreement without regard to the other: they should have been considered together in order to determine their substance and appropriate accounting treatment. I agree with the Claimants that Autonomy should not, therefore, have recorded revenue from the FileTek sales, but instead should have recorded the net cost, totalling $4,395,494, as an expense.

RT 4: Vidient Systems Inc (Q4 2009/Q3 2010)

2878. The Claimants impugned as "reciprocal" and improperly accounted for two transactions with Vidient Systems Inc ("Vidient"). Each involved a purchase by Autonomy from Vidient of a product for which it was alleged Autonomy had no need in order to fund a purchase by Vidient of Autonomy software which enabled Autonomy purportedly to recognise revenue from its sale.

2879. Autonomy's <u>purchases from Vidient</u> were:

(1) A purchase in Q1 2010 of a 3-year software licence for video analytics software manufactured by Vidient and called *"SmartCatch"* for $3 million plus $150k in respect of support and maintenance for one year.

(2) A purchase in Q4 2010 of further rights under a distribution and system integration agreement in respect of SmartCatch software for a total consideration of $2.31 million.

2880. Autonomy's <u>sales to Vidient</u> were of:

(1) A licence to certain Autonomy software for use as an embedded component of SmartCatch under an OEM agreement in Q4 2009 for which the consideration was $2.5 million plus $125,000 for one year of second-line support. Payment was due 15 days after payment was due from Autonomy under its agreement to purchase a licence for SmartCatch.

(2) An extension in Q3 2010 of the term of the Autonomy OEM agreement of Q4 2009 by one year, and the licensing of additional software and IDOL functionalities for a fee of $2 million, plus $100,000 for one year of second-line support.

2884. I address each in turn. However, I do not think it necessary to do so in the same detail as my discussion of the VMS transactions, since it seems to me that the pattern is similar, and the use of 'reciprocals' as another lever to generate revenue when needed to cover shortfalls on forecast revenue was already established both by the VMS transactions and by the FileTek transactions. Instead, I highlight the points emerging which seem to me to be of greatest significance in confirming that the Vidient transactions fell into the same pattern.

The first Vidient transaction Q4 2009/Q1 2010

2885. Autonomy's first transaction with Vidient was pursued by Autonomy at the same time as the FileTek transaction. The sale side (the sale by Autonomy of a licence to embed Autonomy software under an OEM agreement) was entered into at the end of Q4 2009, the purchase side (the purchase by Autonomy of the SmartCatch licence) was entered into in Q1 2010.

2886. SmartCatch was Vidient's only substantial product. Put in simple terms, SmartCatch monitored video feeds from closed circuit television systems ("CCTV") and identified suspicious activity, such as a person loitering in a particular area or walking the wrong way at an airport. SmartCatch was predominantly marketed and sold to transportation entities in the US, such as railways, airports and metros.

2887. Vidient was a heavily loss-making business. During the first nine months of 2009, it incurred a loss of $2.7 million. Vidient's total revenues in the same period were just $456,902, of which $228,569 was from sales of SmartCatch. As at 30 September 2009, it had cash and cash equivalents of just over $3 million. Mr Frank Pao ("Mr Pao"), who had worked at Autonomy for four years before then (including as COO) was Vidient's fourth CEO in a 12-month period, described 2009 as a "*horrible*" year and acknowledged that the numbers for the first three quarters were "*ridiculously low*". Vidient's status as a struggling restart is worth underlining, if only to set in context the statements by Dr Lynch and Mr Frank Pao (who gave evidence on behalf of Dr Lynch) regarding the supposed success of, and market demand for, SmartCatch, and to put into context the scale of the transactions, from Vidient's perspective, that Vidient entered into with Autonomy.

2888. Mr Pao agreed when cross-examined that prior to his discussions with Mr Egan, he had no firm intention to purchase Autonomy software in Q4 2009. In view of Vidient's financial position and the rapid rate of spend, he had no money to license Autonomy software on a large scale.

2889. Although Mr Pao kept in touch with a number of his colleagues after leaving Autonomy, he most commonly contacted Mr Kanter, with whom he had worked closely at Autonomy. Mr Pao therefore had no reason to approach Mr Egan at the end of Q4 2009. Mr Egan, however, was looking for ways to generate more immediately recognisable revenue for Autonomy in Q4 2009. This is plain from the first FileTek reciprocal transaction which Mr Egan was pursuing at the same time. It was thus Mr Egan who approached Mr Pao.

2890. Mr Pao undoubtedly welcomed the opportunity to sell a licence to Autonomy for Autonomy to embed SmartCatch in its own products for sale, and for Vidient to embed Autonomy in its products likewise. On the Vidient sale side, the upside was obvious and substantial from Vidient's point of view. First, the sale price was full, and profitable for Vidient as a major sale on its own. The price being paid by Autonomy was more than 13 times the total licensing revenue that Vidient had received from sales of SmartCatch in 2009 to that point, and it was the largest transaction in Vidient's history. Secondly, Vidient's own sales had been badly affected by the 2008/2009 market crash: and it had little market penetration, having for example only two salespeople in the USA. Partnership through an OEM agreement with a large company with a successful product and a large customer base was plainly an enticing prospect to Vidient. As Mr Pao put it:

> *"This is for a partner to embed our software within their product and then to sell that product out to hopefully hundreds of customers because Autonomy had a tonne of customers."*

Mr Pao told me in cross-examination that he was expecting to make *"maybe $30 million out of this deal"* by way of royalty payments on Autonomy's sales.

2891. Furthermore, the sale by Vidient was to be coupled with a purchase by it of Autonomy software for Vidient to 'OEM' it (embed it in its own product) which was to be funded by the purchase price payable by Autonomy. The net effect of both transactions together would leave Vidient with a profit or 'delta' of some $525,000. The purchase by Vidient was in effect to be funded by the sale to Autonomy. Although Mr Pao equivocated (to the point of confused bluster) when asked whether Vidient could have afforded to make the purchase out of its own resources, and settled on the formulation that he *"would have found ways to still buy the software but at a much cheaper price that's in line with my cash reserves and what I'm expecting to get in Q4"*, this was either mere puff or (which seems to me more likely) demonstrative that the price to be paid to Autonomy was considerably higher than what Mr Pao would ordinarily have been expected to pay for it. It was plain that with cash reserves of $3.1 million which were being eroded by difficult trading conditions a purchase of anything like the magnitude discussed was otherwise out of the question. Mr Pao was more candid in accepting that he:

> *"fully expected to be paid by Autonomy on one transaction first and then I would pay them this amount."*

2892. Furthermore, after further circumlocution, Mr Pao eventually had to admit in cross-examination that in fact Vidient never did 'OEM' Autonomy software into SmartCatch. He told me that he:

> *"ended up having deals that did not necessarily require Autonomy technology, so there was no need for me to dedicate engineering resources to do that over dedicating engineering resources to sell my own product which had much higher margins."*

2893. This too was difficult to accept given Vidient's lamentable trading history[324] and the opportunities Mr Pao had earlier told me about; but I think it reveals the truth: that from Vidient's point of view the real benefit of the deal, in addition to the benefit of association with Autonomy in general terms, was the cash 'delta'.

2894. Looking then at the matter from the point of view of Autonomy, Autonomy's management cannot realistically have expected much from the sale of Autonomy software to Vidient, except, of course, the revenue it generated, which could be and was booked in its quarterly accounts. The prospect of large OEM sales through Vidient was small. What then of Autonomy's purchase of SmartCatch?

2895. The Defendants maintained that Autonomy wished to partner with Vidient because SmartCatch had (to quote Mr Hussain's written closing submissions) *"a good*

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[324] Though in fairness I should note that Mr Pao told me that it improved considerably in 2010 and thereafter

reputation and market penetration in the critical US markets"[325] whereas Autonomy's own similar product in the video analytics segment of the market, Virage, *"had failed to penetrate US markets, and its products had been poorly received"*. They also cited positive industry press support to the effect that the deal made sense since (in the words of one commentator) *"while there's no doubt, Autonomy is a global leader in the broader search market, their approach never translated to meaningful success in the video surveillance market"* whereas *"Vidient can provide them a solid solution"*. The Defendants' case was thus that SmartCatch was a superior product to Virage, recognised to be so in the market, and Vidient had thereby achieved success in the US market despite its small size which would be of considerable benefit to Autonomy if in an OEM partnership with it.

2896. The Claimants disputed this, and emphasised especially that:

(1) As in respect of VMS, Autonomy undertook no analysis of SmartCatch, technical or otherwise, prior to 30 December 2009, the point when the deal was agreed.

(2) Dr Blanchflower and Mr Gallagher (then Autonomy's Head of Development) were asked by Dr Menell to analyse the SmartCatch software on 30 December 2009 only after the deal had been struck, and their analysis was constricted by the fact that Autonomy did not have a licence to test SmartCatch and they simply had to review Vidient's website. That of itself is noteworthy: as Mr David Humphrey ("Mr Humphrey", who was Chief Technology Officer ("CTO") of Micro Focus International plc at the time of his witness statement, but at the time CTO of Virage, Inc ("Virage", the Autonomy group company that developed and sold Autonomy's video analytics products) stated in his witness statement on behalf of the Claimants:

> *"…it does not make any sense to me to purchase a licence to a third party product based only on the information available on the company's website"*.

(3) Dr Blanchflower provided his thoughts and comments to Mr Gallagher, who then wrote an email to Dr Menell the same day. Mr Gallagher's email noted that Vidient's website was "*very low on technical detail, so no detail at all on how they do it*" and that Vidient seemed to have "*one product called SmartCatch which has 2 main applications: Security and Surveillance or (Video Intrusion Detection) as they call it [and] Business Intelligence*".

(4) With regard to Video Intrusion Detection, Mr Gallagher told Dr Menell that there was "*Lots of overlap with existing Virage products lines here*",[326] but that SmartCatch had two additional features which "*Virage has never claimed much in that they do*", namely, "*…Remote control of surveillance cameras – auto control and zoom – automatic following of suspect*". Mr Gallagher's email is

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[325] In particular, Vidient had won a $500,000 contract from the US Department of Homeland Security for San Francisco Airport and had a number of high profile users in the transport sector, including Montreal Metro.

[326] Virage was an Autonomy group company that, amongst other things, developed and sold Autonomy's video analytics products.

the <u>only</u> written record of any analysis of SmartCatch by Autonomy in, or prior to, December 2009.

(5) Dr Blanchflower confirmed in cross-examination that the exercise with which he and Mr Gallagher were tasked: (i) did not involve any assessment of the relative performance of SmartCatch and Autonomy's existing offerings, because that would have required access to the SmartCatch software, which they did not have, (ii) did not involve any consideration of the respective market penetration of the products, (iii) did not involve any consideration of which product was better perceived in the market, and (iv) did not involve any assessment of the value to Autonomy of purchasing a product with better market penetration and/or perception.

2897. There remained considerable disagreement as to the relative advantages of the two systems. However, I do not think it necessary to say more than that it seemed to me that the balance of the evidence, which was limited as to its substantive content as distinct from the disagreement it encouraged, was that SmartCatch probably was a superior and more complete system, and it had a more positive reputation in the relevant market segment and some track record of exploiting it, though Vidient itself was struggling to convert this into durable success.

2898. But such an exercise in comparing the two products, to my mind, misses the point. What did not come out of the evidence, in my judgment, was that this perception was the real reason that Autonomy entered into the twin arrangements. Neither the results of the limited *ex post facto* assessment undertaken, nor the way Autonomy approached the decision whether or not to enter into the arrangements, suggests that the advantages of the product were the reason for Autonomy's purchase.

2899. Moreover, not only did Vidient not deploy the Autonomy software it had licensed (see above) but there is no evidence that Autonomy made any effort to pursue a 'strategic partnership' with Vidient after it executed the OEM agreements, or that it integrated SmartCatch into its Command and Control application (a security infrastructure platform which assisted with the retrieval of relevant intelligence in real time), despite paying $3.15 million for the right to do so.

2900. Mr Pao confirmed in cross-examination that he could not recollect ever being told of any sales by Autonomy of Vidient's software; and that he never received any royalties from sales, still less the $30 million he had hoped for.

2901. Indeed, Mr Humphrey and his security and surveillance division did not even download SmartCatch until some 18 months after the Vidient OEM agreement was executed and then only because Dr Menell asked Mr Humphrey to take a look at the software. This evidence was not challenged. Rather, it was put to Mr Humphrey that he was not open to the supposed commercial opportunity presented by the partnership with Vidient and took no steps to develop it. As Mr Humphrey pointed out in his oral evidence, he "*had no clue what was going on [with Vidient] other than what was in the press release, which didn't make sense*" to him. Mr Humphrey's evidence was consistent with his reaction at the time. The Claimants relied on the following in particular:

(1) The Vidient press release referred to by Mr Humprey announced a 'strategic partnership' between Autonomy and Vidient and was issued in January 2010. The day after it was issued, Marc Geall (then Head of Corporate Strategy and Investor Relations at Autonomy) asked Mr Humphrey "…*what is the story with the vidient announcement?*". Mr Humphrey responded: "*Thought you could tell me!*". Mr Humphrey was clearly confused by the announcement and, as he made clear in cross-examination, "*didn't know what was going on at this point*". As Mr Humphrey explained in his first witness statement, he only became aware of the OEM agreements after they had been entered into.

(2) On 2 February 2010, Mr Humphrey emailed Mr Egan, copying Mr Murray (the CEO of Virage), asking Mr Egan to:

> *"…explain…our positioning with regards to Vidient and that press release last week? I fully understand them wanting IDOL, having spoken a few times to Frank [Pao] about this at shows…What I do not understand is the statement referring to redistributing their product. They have a very similar product set to Virage S&S so there is a direct conflict of interest. Also even if there are potential areas of collaboration, policy has always been to remove third party product. We have therefore placed confusion in the market with regards to our product capabilities and also generated conflict against our statement that we own all our own technology?"*

(3) A few days later, on 4 February 2010, Mr Humphrey emailed Mr Egan and Ms Eagan, again copying Mr Murray, setting out the quote attributed to Mr Egan in the press release and adding:

> "*Another colleague has sent links to their website ask [sic] what is going on. As I said below the following quote really makes it difficult, what should I be saying?*".

(4) Having received no reply from Mr Egan or Ms Eagan, Mr Humphrey asked Mr Murray to "*try and chase this*". Mr Murray said "*Absolutely – nothing from either party suggest [they are] not proud of this deal*".

(5) Mr Humphrey never received a response from Mr Egan or Ms Eagan. The inference suggested is that there was no coherent story to tell.

2902. Put shortly, in all the circumstances, I have concluded and find that the real reason for Autonomy's purchase of SmartCatch was to incentivise and fund Vidient's purchase of Autonomy software and enable Autonomy to recognise the revenue thus (apparently) generated.

2903. This conclusion is fortified by the fact that no coherent explanation was ever provided to me for why Autonomy suddenly needed to acquire OEM rights to SmartCatch in the dying days and hours of Q4 2009. The best that Dr Lynch could offer, apart from emphasising that he did not really know the reason since he was not involved in the negotiation at the time, was to suggest that the hypothesis that it was all done in a rush to ensure recognition of revenue was fundamentally flawed because if that had been the aim it would have been far more straightforward to sell to a VAR. A discount would be

necessary, but (on his view of IFRS) the sale to the VAR would trigger the revenue recognition and

> *"that would be perfectly fine. And then you would have that revenue, they would then sell the stock later, you'd have taken a discount hit to get them to do it, but there would be nothing improper about that. You don't need to go to these elaborate levels of buying things unless you actually want the thing."*

In my judgment, however, that does not reveal a flaw, but simply another lever; and as I have found in the context of the impugned VAR transactions a flawed lever likewise.

Separation of the OEM agreements by quarter

2904. The focus on the requirement to generate recognised revenue within Q4 2009 to meet Autonomy's revenue target was the context of, and I have concluded the reason for, a particular feature of the first Vidient transaction. This feature is that, although both agreements were negotiated and then signed together on the evening of 31 December 2009, and were in similar terms, it was agreed between the parties to treat the sale by Autonomy (from which revenue was needed in Q4 2009) as completed on that day, but the effective date of Vidient's sale of a licence was (on 31 December 2009) moved into the next quarter (Q1 2010).

2905. After Mr Hussain had asked him, by email dated 30 December 2009, to spend time with him on the paperwork, the next day (31 December 2009) Mr Chamberlain emailed Mr Mooney, Mr Guiao, Mr Scott, Mr Egan, Mr Kanter, Dr Menell and Mr Hussain expressing his concerns about the agreements that were to be signed later that day with Vidient:

> *"…General – don't like the fact that we have prepared both of these. They are two separate transactions and they should look and feel like that. Need to work with Frank [Pao] to get the license of their software on their paper. Also, the licensed software needs to reflect the quote we have received (attached)."*

2906. Mr Scott replied at 6.46am PT time (2.46pm UTC time):

> *"We've already received comments back on both docs (attached). We can look to move to a different [sic] for Vidient's license to Autonomy but my concern is that this will extend the process with limited time left. Is it truly necessary?*
>
> *Separately they have asked us to commit to issuance of a press release issued through "standard" channels and would like the draft attached to both contracts. I received from MDM [Mr Mooney] a copy of UK-approved press release yesterday. OK to agree to commitment below with UK-approved press release attached?"*

2907. The second sentence of Mr Scott's email appears to have been missing a word. It is likely that it was intended to read "*We can look to move to a different [quarter] for Vidient's license to Autonomy*" or similar because: (i) that is, in fact, what happened, (ii)

that would be consistent with Mr Chamberlain's prior email referencing a need for the transactions to appear to be separate, and (iii) that would make sense in the context of Mr Scott's own email, in which he expressed concern about the shortness of time before the end of the quarter.

2908. Mr Chamberlain then responded at 4.38pm UTC time, saying:

> "*...Priority 1 – make deal recognizable [i.e. for revenue purposes] ...Priority 2 – get deal in.... To help one [i.e. Priority 1] the more different these look the better. Just spoke to Livius [Guiao] on this point*".

2909. At 11.46am PT (7.46pm UTC time), Mr Pao sent Mr Guiao an email, copied to Mr Scott, attaching a revised draft of the Vidient OEM agreement. Mr Pao's covering email said:

> *"Here are David's changes, plus two that I discussed separately with you [Mr Guiao] and Joel [Scott] today, specifically for the agreement where we sell to you: (a) the date changed to 1/1/10; and (b) change internal fee waiver to inclusion as part of second-line support fee..."*

2910. From this email, it is clear that Mr Pao spoke with Mr Guiao and Mr Scott that day and agreed to change the effective date of the Vidient OEM agreement to Autonomy from 28 December 2009 to 1 January 2010 and to make a change in relation to the second-line support fee.

2911. When cross-examined on the point, Mr Pao said he could not recall who had proposed the change to the effective date, and whether it was his suggestion or whether it had been suggested by Mr Scott and Mr Guiao. He said that it was possible, *"maybe even likely"* that the change came from him, because the other change "*almost certainly*" came from his accountant, Katerina Jeanneau. Mr Pao suggested that he might have wanted to roll the deal into 2010 because 2009 had been *"a horrible year for the company"* and, as he was *"not going to hit my number so I don't want to waste any revenue that I can recognise...I would rather take it in 2010 and make 2010 look fantastic"*. But he acknowledged that this was *"kind of my guess at what happened here"*. In re-examination, when he was again asked about the point, he told me that *"...Again I don't have a specific recollection but that's probably the case, that I would have asked for it*". I was not persuaded that Mr Pao could remember the sequence, and his evidence smacked to me of him looking back and recreating what would, as he thought, be the canny thing to have done. Given the sequence I have described, I think it unlikely that the idea came from Vidient, even though I would accept that his rationalisation may explain why he was prepared to go along with it. Mr Pao struck me as commercially obliging even when he might have been unsure of the reasons for what he was being asked to do.

2912. For his part, Dr Lynch (who was not copied on Mr Chamberlain's email of 31 December 2009 which I consider was the catalyst of the change) attempted to explain the change as being down to Autonomy wanting to maximise its various financial metrics for that quarter. He disagreed with the suggestion that the OEM agreements were put into different quarters by Autonomy in an attempt to make them look like separate transactions, thereby facilitating revenue recognition on the Autonomy OEM agreement. He suggested that:

> *"…in terms of the reality of the situation, one day is not going to make any difference in terms of what the process was. So I suspect it's to do with that we wanted the cost of this to come into this quarter rather than the previous quarter."*

2913. But that ignores the context, and in particular the fact that Mr Chamberlain had in effect spelt out why the change was necessary. I accept the Claimants' submission that I should find (as I do) that the sequence and substance of the exchanges was as follows:

    (1) Mr Chamberlain expressed concern that the agreements should look like separate transactions.

    (2) Mr Scott suggested that they could move the Vidient OEM agreement to a different quarter but was worried that this might delay the process.

    (3) Mr Chamberlain advised that making the transactions look more different would help make revenue from the deal recognisable, and spoke with Mr Guiao about this point.

    (4) Mr Scott and Mr Guiao then spoke with Mr Pao and suggested changing the effective date of the Vidient OEM agreement to 1 January 2010.

    (5) Mr Pao obliged and circulated a revised draft of the Vidient OEM agreement which changed the effective date of the agreement to 1 January 2010 and showed the other changes that they had discussed on their call.

Deloitte's consideration of the first Vidient transaction

2914. There was another important facet or consequence of the artificial separation of the two sides of the first Vidient transaction. This is that, despite Dr Lynch's suggestion that it would in reality make no difference (see above), Mr Welham's unchallenged evidence was that, because the Vidient OEM agreement was in a subsequent quarter, it was <u>not</u> considered as part of Deloitte's analysis of Autonomy's sale of its licence to Vidient. Deloitte therefore reviewed Autonomy's accounting treatment of the Autonomy (sale) OEM agreement without regard to the Vidient (sale) OEM agreement. They did not review the Vidient OEM Agreement until April 2010, as part of their Q1 2010 review.

2915. The Claimants described the Vidient OEM agreement as having been withheld from Deloitte and submitted that this cannot have been inadvertent. In support of this the Claimants submitted that it is inconceivable that it would have escaped Autonomy's finance department, and Mr Hussain and Mr Chamberlain in particular, to bring to Deloitte's attention an agreement that was executed by the same party on the same day. They also relied on the fact that when Deloitte reviewed the Autonomy OEM agreement in January 2010, they immediately identified an issue with Vidient's financial condition, causing Mr Murray of Deloitte to email Mr Chamberlain on 12 January 2010 to say that Deloitte needed evidence to support recoverability in the context of various revenue deals. Amongst the list of revenue deals was the transaction with Vidient, in relation to which Mr Murray noted:

> *"…although we have been provided with a balance sheet – they are a loss-making company, albeit with $3m of cash at 30 September 2009, with a net asset position that is only supported by that cash balance. Based on their cash burn I am not sure they would have enough to pay this deal as at 31/12/09. Certainly not without using all cash reserves, which I would expect they would be reluctant to do. Unless they obtain further funding I cannot see how they can pay within the 45 days. Can you please provide the rationale for the recoverability of this deal."*

2916. Mr Pao agreed that Deloitte's summary was fair. As noted previously, he also agreed that the answer to Deloitte's question regarding how Vidient was going to pay within the 45 days was that Vidient was going to use the funds it received from Autonomy under the Vidient OEM agreement and from any other sales it made (although he did not identify any such 'other sales'). Yet even then Autonomy said nothing, and the Autonomy OEM agreement was included in Deloitte's schedule of proposed misstatements, pending evidence that the revenue from Vidient was recoverable.

2917. Mr Welham informed Mr Chamberlain that Deloitte would "*need some cash on Vidient given heavily loss making business which we have evidence is burning cash quickly in order to remove this from misstatements schedule*". By 26 January 2010, someone from Autonomy had spoken with Mr Pao about making an early payment in respect of the Autonomy software. Mr Pao could not recall with whom he spoke, but he accepted that he agreed to make an early payment as a favour to Autonomy so as to strengthen the business relationship. Mr Chamberlain relayed the message to the Deloitte team, telling them that Vidient would pay "*all or a large proportion over the next day or so,*" without mentioning that Autonomy was to pay Vidient a far larger sum within days.

2918. The Claimants contended that had Autonomy considered that the OEM agreements were genuine arms' length transactions, the finance department would surely have disclosed the Vidient OEM agreement as an answer to Deloitte's concerns about collectability, and ensured that the transaction was removed from what was called *"the misstatement list"*. Dr Lynch could provide no answer, stressing that he thought it unlikely that he knew of the misstatement list, still less Vidient's appearance on it. Mr Hussain, Mr Kanter, Mr Chamberlain and/or Dr Menell might have dispelled the suggestion: but not one of them gave evidence before me.

2919. Mr Rabinowitz submitted in his oral reply the obvious inference is that Autonomy withheld the information deliberately. With some hesitation, since disclosure was inevitable sooner or later (and was indeed made for the Q1 2010 review, as has been mentioned) I have concluded that that is the only explanation. The alternative that there was a complete failure within the finance department to grapple with Deloitte's enquiry seems to me to be too unlikely.

2920. Thus, I agree with the Claimants that, far from providing comfort and endorsement from the Defendants' point of view, the evidence relating to Deloitte's consideration of the first Vidient transaction further supports the Claimants' case.

Conclusions on first Vidient transaction

2921. In my judgment, the first Vidient transaction reinforces, and indeed highlights, the pattern of the reciprocal transactions by now set, with the refinement of splitting the two agreements over two quarters. In particular:

(1) The sale and purchase were reciprocal transactions for which the principal driver was revenue recognition to cover a shortfall in revenue compared to forecast.

(2) They were orchestrated by Autonomy, and in particular by Mr Hussain and Mr Egan.

(3) No assessment of SmartCatch was made before Autonomy agreed to purchase rights under the Vidient OEM Agreement. The only assessment made was after the event and was equivocal. In reality, Autonomy had no pressing need to acquire SmartCatch on the last day of Q4 2009.

(4) There was no evidence that Autonomy ever did integrate SmartCatch into its Command and Control application, despite paying $3.15 million for the right to do so. The Defendants disparaged the evidence of Mr Humphrey that he would have expected to have been aware of any sales of the SmartCatch software and was not so. They stated that *"this was an exaggeration of his role"* and (as he acknowledged) *"although he was part of the Virage business in Cambridge, there were other parts of the business in the US in which he was not involved."* But it seems to me more likely than not that had there been sales, he would, at (in effect) headquarters have come to hear at least something about it; and he did not.[327]

(5) Nor was there any evidence that Vidient ever deployed the Autonomy software it licensed under the Autonomy OEM agreement. The reality was that what was in the transaction for Vidient was the $525,000 'delta', and what was in it for Autonomy on its sale was revenue recognition.

(6) The separation of the two agreements constituting the first Vidient transaction was at the suggestion of Autonomy, and its purpose was to give the appearance of separate transactions to protect revenue recognition and Deloitte's approval.

(7) The decision not to tell Deloitte about the Vidient OEM agreement during Deloitte's review of Q4 2009 was in order to safeguard revenue recognition, even at the cost of the transaction appearing on the *"misstatements list"*. The evidence relating to the involvement of Deloitte in this regard further undermines the Defendants' case.

2922. The accounting treatment of the first Vidient transaction was improper. As in the case of the first and second VMS transactions, it follows, in my judgment, that Autonomy should not have recorded revenue on the sales to Vidient. Autonomy should instead

[327] Mr Humphrey was obviously proud of Virage's own product, and his evidence was that SmartCatch offered no more and was no better than Virage's existing product, though in cross-examination Dr Lynch branded the latter *"useless"*. Dr Blanchflower agreed that SmartCatch was better. I have taken into account Mr Humphrey's antagonism to the purchase and to being undermined but nevertheless regard his evidence as reliable confirmation, in the absence of contrary evidence, that in the event no sales were effected.

have: recorded the net cost in relation to the first Vidient sale and purchase, totalling $525,000, as an expense in Q1 2010.

2923. I deal with the issue as to the Defendants' knowledge of both Vidient transactions after briefly addressing the second Vidient transaction.

The second Vidient transaction – Q3 2010/Q4 2010

2924. The second Vidient transaction took place in Q3 2010/Q4 2010 and was, similarly to the first, comprised of:

(1) a sale by Autonomy to Vidient of additional Autonomy software and IDOL functionalities, and also a one-year extension of the term of the existing Autonomy OEM agreement, for which the licence fee was $2 million plus $100,000 for one year of second-line support; and

(2) the purchase by Autonomy from Vidient of further rights in respect of SmartCatch under a software distributor agreement, for which Autonomy agreed to pay a non-refundable prepayment of $2.31 million.

2925. Thus, again much as in the first Vidient transaction, Vidient was to be paid by Autonomy more than it was to pay Autonomy, the 'delta' this time being $210,000; and, again as in the first Vidient transaction, Autonomy's payment to Vidient was due before Vidient's payment to Autonomy was due.

2926. I need not spend as long on this second Vidient agreement. Suffice it to say that I am satisfied that:

(1) The sale by Autonomy was driven by Autonomy's imperative to generate further revenue for Q3 2010 to meet targets. On the last day of the quarter, Mr Hussain directed Mr Egan and Mr Mooney to:

> "*...pull out all the stops on vidient and the other 2 deals we talked about. If you can hit $5m it would be great but $4m is fine*".

(2) Mr Pao was not planning to purchase further software from Autonomy until he was approached by Mr Mooney of Autonomy close to the end of Q3 2010, and as far as Mr Pao could recall, no one from Autonomy had contacted him about purchasing further rights to SmartCatch.

(3) As of mid-2010, Vidient was still a loss-making business and its cash reserves had dwindled to a little over $1 million. Mr Pao explained in re-examination that he knew he would eventually run out of money and had to try to line up potential buyers of Vidient.

(4) The fees of $2.1 million payable under the OEM amendment were twice Vidient's available cash as at June 2010. Mr Pao admitted in cross-examination that he "*really needed their [Autonomy's] money to be able to finance this*" and that he would not have entered into the amendment if he did not know that Autonomy was going to purchase further rights to SmartCatch. It goes beyond that, in my view, because such an agreement would not have been proportionate or realistic otherwise, as well as it being inconceivable that Mr Pao would have

entered into an agreement to pay more than twice Vidient's available cash reserves without a sufficient assurance – whether (in Mr Pao's words) in the nature of "*a handshake and a discussion with Mike (Mooney)*" or otherwise – that Autonomy was going to put it in funds in time to pay the instalments. Mr Pao repeatedly asserted that Autonomy did not know he was dependent on Autonomy purchasing further rights to SmartCatch to enter into the OEM amendment. I do not accept this. It is plain that the reason Mr Mooney and Mr Pao did not agree equal payment terms, as recorded in the exchanges of 30 September 2010, was to ensure that Vidient was paid first.

(5) The two sales agreements were reciprocal. As in the case of the first Vidient agreement, the coupled agreements were deliberately put into different quarters by Autonomy to give the appearance that they were independent, arm's length transactions in order to assist with revenue recognition.

(6) Save for Autonomy's desire to generate further revenue in Q3 2010, neither party therefore had any apparent reason to enter into a further deal.

(7) The second Vidient transaction was improperly accounted for. Deloitte's approval was on a false basis and in ignorance of the true reciprocal nature of the agreements and Vidient's inability to fund its purchase without the sale proceeds from Autonomy.

Accounting treatment of the Vidient transactions

2927. I agree with the Claimants that:

(1) The linked sale and purchase transactions ought to have been considered together in order to determine their substance and appropriate accounting treatment.

(2) From the matters set out above, it is clear that, in each case, the linked sale and purchase were not independent, arm's length transactions, and it was not possible to understand the substance and commercial effect of one agreement without regard to the other.

(3) Further, IAS 18 §14(d) was not satisfied because no economic benefits flowed to Autonomy.

2928. It follows that Autonomy should not have recognised any revenue on its sales to Vidient and should instead have recorded the net cost in relation to the second Vidient sale and purchase, a total of $237,909, as an expense in Q4 2010.

The Defendants' knowledge of improper accounting of the Vidient transactions

2929. In the circumstances described above, I am satisfied that Mr Hussain had "guilty knowledge" in respect of both Vidient transactions. The position in respect of Dr Lynch requires more analysis. Dr Lynch maintained that his involvement in both Vidient transactions was peripheral, and that he was not involved in negotiating or accounting for the purchase or sales. He drew particular support from an email dated 22 October

2010 which he sent to Mr Ganesh Vaidyanathan of Autonomy in response to a request for his approval of payments to Vidient, in which he had stated:

> *"I know nothing about this and so can't comment let me find out from the relevant people. I'm sure it's fine I have just been out of the loop."*

2930. He was adamant, however, that there was nothing wrong with the transactions. His evidence in his witness statement was:

> *"To my knowledge, the purchase made good commercial sense.*
>
> ...
>
> *At the time, I would have expected Deloitte to review the purchases and sales as part of their quarterly audit review, and to agree an appropriate accounting treatment with the Finance Department. I had no reason to suspect that there were any material issues with the accounting. I now know that Deloitte were satisfied with the accounting treatment for both purchases and sales."*

2931. Further, Mr Hill submitted in his oral closing submissions on behalf of Dr Lynch that the Claimants had not challenged Dr Lynch's evidence that this was his understanding at the time and had instead focused on what the relevance to the decision making process of his commercial understanding can have been if he had not been involved at all in that process. This point was developed into the submission on his behalf that having cross-examined Dr Lynch on the premise that since he had not been involved his commercial view was irrelevant, they could not now turn back and rest their case on an allegation that in fact he was involved. It was submitted for him that it was *"impossible to understand"* how in such circumstances a fraud case could be pursued against him in respect of these transactions.

2932. This was bold but, in my judgment, not accurate. Although sometimes perhaps too apt to ask Dr Lynch about his views on emails to which he was not party, Mr Rabinowitz did cross-examine Dr Lynch on his involvement, and the fact that he also asked questions on the alternative hypothesis that he was not involved does not detract from that.

2933. Amongst the points that emerged from that cross-examination were that:

(1) The email of 22 October 2010 referred to in paragraph 2929 above can only have referred to the second Vidient transaction, and not the first.

(2) Dr Lynch accepted that he may have been aware from one of Mr Hussain's *"prospect lists"* that Autonomy was looking to recognise revenue from a sale to Vidient at the end of Q4 2009, and probably also from an email and schedule sent to him by Mr Hussain on 29 December 2009 stating *"Frank Pao's [company] said yes $1.5m"*.

(3) On 29 December 2009 Mr Pao requested assistance from Mr Mooney and Mr Egan (in the absence of the *"PR person"*) on a press release to be issued concurrently with the OEM agreement, and Mr Mooney sent a *"first stab"* to

Dr Lynch, who responded with some changes (pruning the draft considerably) on 31 December 2009 stating:

> *"something like this would be acceptable…pls do not forward directly from me".*

(4) Dr Lynch explained that the reason he did not want to have drafts forwarded directly from him was simply because he did not want Mr Pao to know that he was *"the one that's nobbling his press release"*.

(5) When it was put to him that he was thus aware of the simultaneous negotiation and agreement of the sale of Autonomy software and the purchase of SmartCatch, and that he had been able to and did review the press release (twice) in the light of that and his knowledge of their basic content, he resorted to repetition that, except for the press release, he had *"very little to do with the deal"*. I formed the impression that he baulked at a denial because what was put to him was true.

(6) Dr Lynch said he would not *"explicitly"* have known that Autonomy was paying Vidient a 'delta', but it may be that he could have worked it out from email exchanges he saw. Again, I formed the impression that he was aware of the broad structure, including the payment of some form of 'delta', even if not of the precise details.

(7) He felt able to tell me categorically that *"the contracts were not dependent on each other…they were independently executed contracts"*. He was also content, after the usual introduction that he *"wasn't particularly involved at this level"*, that the reason for the purchase was that *"we wanted to have some technology that the market respected that worked"*. He also told me that he was able to judge this because he *"had significant knowledge of this market and the technology",* having himself written the original video analytics code for the system. I accept that; but his certainty as to the reasons for the separation was based on his reading of the contracts, and his conclusion that as *"there was no clause that says, "I'm buying this because you're buying that", they were independently executed contracts"* was neither within his expertise nor correct; and the evidence was plainly self-serving.

(8) When pressed to accept that he must have known, at least when he made his first witness statement, that Deloitte had not been provided with and did not consider the Autonomy purchase agreement as part of their Q4 2009 review, Dr Lynch told me that his understanding was (it was not clear when this was formed) *"that they reviewed it – anything that was within two quarters",* and that non-disclosure would have been *"a futile approach"*. But he had to accept that there was nothing to suggest that they had done.

(9) He told me that it was *"highly unlikely"* that he knew that Deloitte had put the first Vidient transaction on the list of potential misstatements, and doubted he even knew what such a list was at the time; but when shown that Mr Hussain had sent an email on 28 January 2010 (attaching the Q4 2009 Audit Committee pack) to Dr Lynch and Mr Kanter expressly alerting them to the fact that Vidient was in a list of *"judgemental errors"* and that *"we can get it down to $1m or so*

from the current $4m – Vidient cash plus the Italian deal is being worked on to remove" his response was to the effect that all he had been asked about was a list of misstatements not judgemental errors and that he was not very familiar with these things. (This lacked conviction and credibility. Mr Hussain would not have been emailing Dr Lynch in these terms unless Dr Lynch was familiar with, and involved in, these sorts of matters.)

(10) A few days later, Dr Lynch approved the payment of $3.15 million to Vidient; he must have understood that the payment was going to fund Vidient's multi-million-dollar linked purchase of Autonomy software.

(11) When it was put to him that there was no evidence that Autonomy had either used or sold SmartCatch by September 2010 he said his understanding, based on Dr Menell having (apparently) told him was that it had been used *"in some covert surveillance applications",*[328] was that it had been.

2934. My strong impression overall was that, although he was not involved in the day to day details, Dr Lynch was well aware of the salient aspects of and true reason for both sets of Vidient transactions. Knowledge on his part of the fact and purpose of the transactions was taken as read by Mr Hussain. He knew they were proposed as part of the route to meeting revenue forecasts; that they had been negotiated and concluded together; that they had then been presented to Deloitte as separate transactions; that their presentation as separate transactions was fundamental to revenue recognition; that Deloitte had expressed concern in that regard; that the proposed solution was to ensure payment by Vidient; that Vidient was a small company and that Deloitte considered collectability an issue; that the payments by Autonomy to Vidient he approved was the means of funding repayment; that insofar as there was any evidence at all of sale or use before the second Vidient transaction it was limited to a reference by Dr Menell about a single classified sale. He had no explanation why none of this was set out in his witness statements, except to suggest that the Claimants had been critical of the length of his witness statement as it was.

2935. The question then is whether, with that knowledge, he also knew that revenue recognition was not justified. In my judgment, he did, despite his insistence in cross-examination that if the contract did not contain express language of direct linkage they were not so in accounting terms. He knew the transactions were linked in the sense that they were not independent but inter-dependent; and that this was fatal to revenue recognition. In my judgment, he had 'guilty knowledge.'

RT 5: EMC Corporation - Q3 2010

2936. Towards the middle of August 2010, Mr Hussain provided Dr Lynch with a revenue update indicating that, in order to reach its revenue targets for Q3 2010, Autonomy needed to close another large deal "*plus one at $5m and we should be ok*".

[328] Dr Lynch referred in his first witness statement to a sale *"as part of a classified solution for use in Afghanistan"*.

2937. The Claimants contended that Autonomy entered into reciprocal transactions with EMC to generate the required recognised revenue. In bare outline:

(1) In Q3 2010, Autonomy purchased computer software and hardware from EMC under an order letter dated 29 September 2010 which provided for the shipment of hardware and software to Las Vegas, Sacramento, Boston and London. The London order was subsequently cancelled, and the claim relates only to the US hardware purchase which totalled $8,947,386 plus sales tax ($9,627,894 in total). Payment was due on 30 October 2010.

(2) At the same time (on 30 September 2010) there were two sales by Autonomy of software to EMC. One such sale was pursuant to a fifth amendment of an agreement dated 26 February 2004 between an Autonomy group company, Verity Inc ("Verity") and a subsidiary of EMC called RSA Security LLC. This was referred to as the RSA amendment. The RSA amendment was not impugned. The impugned transaction comprised a sale of OEM rights made by Autonomy's subsidiary, Verity, to EMC. The agreement was comprised in a Sixth Amendment to a Verity OEM agreement entered into on 14 February 2002[329], and was referred to as "the Sixth Amendment". The effect of the Sixth Amendment was to extend licences EMC had acquired from Autonomy from June 2012 to June 2015. The fee was $5,007,000 plus a support fee of $250,350.

(3) The net effect of the US hardware purchase and the Sixth Amendment was that Autonomy was to pay EMC $8,947,386 (before tax) and EMC was to pay Autonomy $5,257,350. Autonomy netted off the amounts due to Verity Inc (in respect of the Sixth Amendment and the separate RSA amendment) against the amounts due to Autonomy Inc for the US hardware purchase. Autonomy paid EMC the difference of $3,627,954 in November 2010.

2938. The Claimants' case is that:

(1) As regards the sale to EMC: the only reason EMC agreed to purchase more software and extend the term of its licence at that time was because Autonomy agreed to overpay for its purchase of hardware (and related software and services) from EMC. No extension of the term of its licence was yet necessary in circumstances where (a) under the Fifth Amendment to the OEM Agreement (in June 2009) its existing licence still had two years of the term remaining and in any event, (b) in June 2010 Mr Di Silvestro of EMC had told Autonomy that EMC had *"not used or distributed the software covered under"* the Fifth Amendment. This was confirmed in summer 2011 when Autonomy's maintenance renewal department asked EMC to renew the support services under the Sixth Amendment. Mr Di Silvestro of EMC responded by email dated 9 August 2011 that EMC had no plans to do so because the Sixth Amendment *"was a component of the swap transaction last year, and we do not use the software."* The sale pursuant to the Sixth Amendment lacked a genuine commercial rationale and therefore lacked economic substance.

[329] The Verity OEM agreement granted EMC rights to use certain Verity software for the development of EMC's software application programmes and to distribute the software as an embedded component of those programmes. As implicit, the OEM agreement had been subject to a number of successive amendments.

(2) As regards the purchase from EMC: although RT5 differed from the other impugned reciprocal transactions in that the Claimants did not contend that Autonomy's purchase from EMC was of goods that Autonomy did not need and accepted that the hardware and related software was for use in its data centre, that purchase was at significantly more than fair value. The Claimants submitted that this is obvious from the contemporaneous material:

(a) Mr Sullivan expressed concern about the price EMC was proposing to charge Autonomy in an email to Mr Hussain on 28 September 2010. He told Mr Hussain that EMC was "*trying to charge a very heavy premium to our normal prices. Still the overall price is 20% below list but much higher than what we would normally pay. Will fill you in in the AM*".

(b) Dr Lynch suggested that this was just part of a negotiation, but the price of $10 million that Mr Hussain had mentioned on 24 September 2010 to EMC's Mr Harry You was more or less the price set out in Mr Sullivan's email to Dr Menell and Mr Hussain seeking their approval to place the order.

(c) Dr Lynch then suggested that Autonomy had still managed a "*good reduction on the list price*". That was clearly not the case in circumstances where, as Mr Sullivan noted in his email, the price was <u>much</u> higher than Autonomy would normally pay. There is no obvious explanation for why Autonomy would pay so much more than normal, other than to incentivise a reciprocal purchase by EMC.

(3) Further, in view of the fact that Autonomy received no cash (on a net basis) from the round-trip transaction with EMC, no economic benefits flowed to Autonomy, thus precluding the satisfaction of the revenue recognition criteria under IAS 18 §14(d).

(4) It follows that Autonomy should not have recognised the revenue on the Sixth Amendment.

2939. The Defendants' case is that there was a commercial rationale for both EMC's purchase from Autonomy and its sale to Autonomy, they were genuine sales at fair value, and they were not 'reciprocal' at all:

(1) As regards the sale to EMC: EMC was a sophisticated and reputable purchaser. The Claimants did not suggest any impropriety on EMC's part. The Claimants had provided no reason or evidence at all why EMC would have been prepared to be involved in doubtful and uncommercial dealings, as was the unstated but inevitable implication of the Claimants' case. As Dr Lynch put it in the course of his cross-examination:

> *"Let's just work this through. So your theory – so remember hardware isn't profitable at the same level as software. So in order – so the margin that EMC would have made on the hardware would have been perhaps $1 million of profit, so it's not – it doesn't make any sense.*

> *They would have sold us the hardware but only made $1 million, and then they'd have to send 5 million on software. So, again, when you actually think about it, putting aside the fact that EMC is a large, perfectly respectable company, it just doesn't make any sense."*

(2) A demonstration that the purchase was genuine was provided by the fact that on 31 July 2012 EMC opted to renew the licence for a further 6 years until 30 September 2018. There are no proper grounds for impugning the sale of software licences by Autonomy to EMC.

(3) As regards Autonomy's purchase from EMC: the computer equipment purchased by Autonomy was for equipment it needed for use in its own data centres (and indeed the Claimants did not suggest otherwise, see below) and the price Autonomy negotiated to pay was at a 22% discount to list price, and thus (*per* Dr Lynch) at *"better than fair value because it's at a discount to the list price"*.

My assessment

2940. I accept that the Claimants' case implicitly implicates EMC. No one who had worked for EMC gave evidence. I do not think it appropriate, and it is not necessary, to make final findings in such circumstances.

2941. Nevertheless:

(1) It is by no means easy to understand what reason EMC had to purchase an extension of a licence which it did not need for software it twice confirmed it did not use.

(2) It does seem clear that the price paid by Autonomy for hardware, even though at a discount to list price, was much higher than Autonomy, as a valued repeat customer, would normally have expected to pay.

2942. Further, it seems clear that the impetus for the transactions at the time they were made was Mr Hussain's need at the end of Q3 2010 for recognised revenue to achieve forecast, and that was the reason for the twin transactions. In that regard:

(1) On 26 September 2010, Mr Hussain circulated a revenue summary to Dr Lynch, Mr Kanter and a number of others. The spreadsheet included a tab entitled "*forecast mrl*", which was a revenue forecast spreadsheet that Mr Hussain had prepared for Dr Lynch. The spreadsheet was divided into closed deals, large deals and deals on the right. Dr Lynch explained that Mr Hussain put together a "*sort of route which is his deals on the left, and then as things come out of the left, you put things in from the right*"; in other words, the deals on the right were brought in to cover any revenue shortfall in the event that any of the deals on the left fell away. Mr Hussain had included in the list of deals on the right a $10 million deal with EMC.

(2) The next day, 27 September 2010, Mr Hussain told Mr Egan that he "*really need[ed] db, bofa, va and one other (emc)!!*". Mr Hussain then asked Mr Sullivan and Mr Mooney if they had "*sent the sales contracts to emc*", to which

Mr Sullivan replied "*Already discussed with Joel [Scott] and Mike [Mooney] separately. Contracts are being prepared but depend on what we sell etc…*".

(3) As is clear from these emails: (i) Autonomy needed a deal with EMC, among others, in order to meet its Q3 2010 revenue target, and (ii) as late as 27 September 2010, Autonomy had no clear understanding of what it was going to sell to EMC.

(4) Dr Lynch seemed reluctant to accept this in his oral evidence. He suggested that Mr Hussain was just 'overshooting' with Mr Egan and probably did not need all the deals he had listed. But Mr Hussain's email was only 4 days from the end of the quarter. By that point, it is likely that Mr Hussain would have known how much revenue was needed in order to meet Autonomy's targets; in any event, Mr Hussain reiterated to Mr Sullivan the next day, 28 September 2010, that he "*need[ed] EMC please And probably $2m more low margin*".

(5) Also on 28 September 2010, Mr Hussain emailed Mr Mooney, Mr Sullivan and Mr Scott setting out five different purchases that EMC was apparently looking at. There was no mention in the list of what became the Sixth Amendment. Mr Hussain asked Mr Mooney and Mr Scott to send Mr Sullivan the purchase orders that they had already sent to EMC and said "*…MS [Mike Sullivan] – <u>as agreed</u> Billy's [Bill Scannell of EMC] team picks those that make up $6m but I want to identify deals that I can take to Harry [You]. Need that information tonight please*" (emphasis added). From Mr Hussain's email, it appears that an agreement had been reached whereby EMC would pick deals totalling $6 million, and that Mr Hussain was looking to pitch further deals to Mr You. That, at least, is what happened.

(6) The email from Mr Di Silvestro in the summer of 2011 stating that the Sixth Amendment was a component of the swap transaction and that EMC did not use the software is not easy to explain away and appears to confirm the Claimants' case.

(7) The Claimants' contention that it is further confirmed by last-minute efforts made by Mr Hussain to expand the deal that had already been agreed by adding three further purchases from EMC in return for EMC purchasing something from Autonomy, and Mr You of EMC's initial response that *"At this late stage, I think the only thing we can do is expand both sides of the current, basic deal"*[330] also seemed to me at least to invite serious questions of Mr You, and probably Mr Di Silvestro.

2943. As I say, these are not questions on which I consider it is necessary, appropriate or fair to provide a final answer on less than complete evidence and in the absence of a non-party from which no evidence has been provided. However, it does seem to me, on the evidence before me, that:

[330] Though it is to be noted that later that day Mr Harry You appears to have had misgivings, saying *"I think we are fine with the current deal"* after Mr Hussain spelt out what he had in mind (*"Harry – I was thinking that I can find need for hardware for data centres at list price (expand the current purchase) if you were to find the need for the web content management software for your websites"*)

(1) The EMC transaction had attributes echoing, and followed the pattern which emerged from, the other reciprocal transactions I have addressed above.

(2) At the least, the high price paid by Autonomy, well in excess of what it would ordinarily have expected to pay, seems likely to have been what EMC required as an incentive to effect a transaction in such a rush simply to assist Autonomy to book revenue from it in Q3 2010 so as to meet its forecast. That, rather than any proper commercial rationale, is what appears to have driven the transaction.

(3) On the view expressed by Mr Di Silvestre that the Sixth Amendment was a component of a *"swap transaction"*, the Sixth Amendment and the US hardware purchase were linked and should have been assessed together to determine their substance and proper accounting treatment, with the result that no revenue would have been recognised.

2944. I do not think the fact that Deloitte approved the revenue recognition assists the Defendants. As the Claimants submitted, Autonomy did not inform Deloitte that the Sixth Amendment was a component of a reciprocal transaction and that EMC did not use the software to which it related. Nor did Autonomy tell Deloitte that the US hardware purchase was significantly overpriced in comparison to the price it would ordinarily expect to pay. Mr Welham's unchallenged evidence was that these matters would have been highly relevant to Deloitte's assessment of revenue recognition criteria in relation to the Sixth Amendment. Dr Lynch had no explanation for why "*highly relevant*" matters were withheld from Deloitte. The inference is that Mr Hussain's finance department deliberately withheld these matters because Mr Hussain appreciated that, if they were disclosed, Deloitte would not have concurred with Autonomy's accounting treatment of the Sixth Amendment.

The Defendants' knowledge of improper accounting of the EMC reciprocal transaction

Mr Hussain's knowledge

2945. Mr Hussain was at the centre of the EMC reciprocal transaction. He closely monitored Autonomy's revenues in Q3 2010. He identified the need for another revenue-generating transaction at $5 million in the middle of August 2010 and, as the end of the quarter approached, he stressed the need for the deal with EMC in order to meet Autonomy's revenue targets.

2946. He knew that the price Autonomy was paying for the EMC hardware (and related software and services) was a *"very heavy premium to our normal prices…much higher than we would normally pay"* (see paragraph 2938(2)(a) above). He nevertheless approved the US Purchases as described in an email to him and Dr Menell of 29 September 2010. It appears from an email from Mr Chamberlain to Mr Stephan circulated to both Mr Hussain and Dr Lynch that they gave their approval orally with 13 minutes to spare before the deadline.

2947. Mr Hussain then led a further effort to encourage EMC to enter into deals to buy <u>further</u> software from Autonomy in exchange for Autonomy making an <u>additional</u> purchase of hardware that Autonomy did not then need at a price that he knew to be significantly higher than the price Autonomy ordinarily paid EMC for comparable hardware.

2948. Mr Hussain must have appreciated in those circumstances that EMC entered into the Sixth Amendment, not because it had any genuine reason for extending the Fifth Amendment, but because Autonomy had agreed to pay over the odds for the US hardware purchase, and that the Sixth Amendment could not, therefore, give rise to any recognisable revenue because it lacked economic substance. I find that he did have 'guilty knowledge'.

Dr Lynch's knowledge

2949. Dr Lynch veered in his evidence between his desire to put forward observations which would rehabilitate the transaction and its approval by Deloitte and his main defence that he was not involved and any comment was conjecture or the product of analysis long after the event. Also, and this is a point of more general application, the diligence of his review of the documentation and his ability to recollect its content made it even more than usually difficult to determine what he had come to know and believe from what he knew and believed at the time. Not infrequently, his observations offered a glimpse of more contemporaneous knowledge than he was prepared to admit he had.

2950. As was often, indeed almost invariably, the case in my experience, Dr Lynch delivered his evidence in a calm, unruffled and articulate way which was impressive, and when set apart from the documentary evidence, convincingly delivered. For example, in this context, he was able to dismiss the suggestion that the fact that the transaction was done at the very end of the quarter was not in the least unusual: he assured me that nearly all Autonomy purchases were at the end of the quarter, because, so he told me, *"it's a negotiating point"* and further, *"the only time you know how much fire power you've got in the quarter is when you see whether the quarter is coming in…so…you'll have your spare capacity to buy things….".* But that was an attempt to extrapolate from a normal transaction and its timing as justification for a very different sort of transaction. It does not, in my view, explain the coincidence of the need for revenue and the urgency of the two transactions. I do not accept Dr Lynch' s suggested explanation.

2951. My overall assessment is:

    (1) I would accept that Dr Lynch was not involved in the transaction day to day.

    (2) He seemed to me reasonably clearly to be underplaying the extent of his involvement. For instance, he seemed reluctant to accept that he was aware of Autonomy's purchase from EMC, notwithstanding that Mr Hussain had forwarded him an email referring to an offer by EMC "*to sell $10m of hardware for our data centres for q3*", and that he approved the purchase by telephone on the last day of the quarter. He also questioned whether an email from Mr Hussain saying "*Need to talk to you about q3 emc deal and db*" referred to the deal with EMC in Q3 2010, suggesting that it might have been about Project Dynamo, even though Dr Lynch knew the parties were aiming for a Q4 close for Project Dynamo because that is what he had discussed with the CEO of EMC and told Mr Hussain.

    (3) The contemporaneous documents show that Dr Lynch was aware of <u>both</u> sides of the reciprocal arrangement with EMC and that he was aware Mr Hussain was trying to find ways of incentivising EMC to enter into deals from which Autonomy could recognise revenue in Q3 2010.

(4) Moreover, it is improbable that Mr Hussain kept Dr Lynch informed of the Q3 2010 deal with EMC and his efforts to expand both sides of the existing deal, but concealed from Dr Lynch the fact that the Sixth Amendment – which formed part of the existing deal – had only come about because Mr Hussain had agreed to make overpriced purchases from EMC that Dr Lynch was going to be asked to approve, and did approve.

(5) Overall, I had the impression that Dr Lynch knew the general shape and purpose of the transactions at the time, and when giving his approval: and that he appreciated that the reason for both and their linkage was in reality the urgent need to show revenue.

2952. According to Dr Lynch's own evidence about the sorts of transactions he would have considered problematic, he cannot have regarded such an arrangement as in any way proper. Nor, as an intelligent CEO with more than a basic grasp of accounting, can he genuinely have believed that it was appropriate for Autonomy to recognise in full revenue on a sale of Autonomy software which was induced by, and would not otherwise have taken place but for, an overpriced purchase by Autonomy.

Purchase and sale transactions with MicroTech comprising RT 6 in Q1 2011

2953. Another set of transactions which the Claimants alleged to have been reciprocal and driven by the need, late in the quarter, for recognised revenue to cover a shortfall on market forecast, took place some time later, in Q1 2011. Autonomy's counterparty was MicroTech, which Autonomy had by then used as a 'friendly VAR' in a number of impugned VAR transactions.

2954. The allegedly reciprocal transactions with MicroTech involved:

(1) Autonomy granting MicroTech the right to collect 98% of Autonomy's maintenance and support fees from Autonomy's end-user customer, Bank of America, in return for MicroTech purportedly providing 'backline' maintenance and support services[331] directly to, or for the benefit of, Bank of America (the "MicroTech Services Agreement"); and

(2) Autonomy selling MicroTech a licence to use the Autonomy software that ostensibly would allow MicroTech to provide these services (the "Autonomy Software Licence Agreement").

2955. The Claimants contended that there was no genuine intention on Autonomy's part to outsource the 'backline' maintenance and support services for Bank of America to MicroTech, and that this was a reciprocal transaction conceived by Mr Hussain, and implemented with the knowledge and approval of Dr Lynch, as a means of improperly generating revenue to ensure that Autonomy met its Q1 2011 revenue targets.

2956. As it was, Autonomy recognised the licence fee of $3,860,468 as revenue in Q1 2011. MicroTech was rewarded with a 'delta' of $450,389, representing the difference

[331] 'Backline support services' were defined in the *"Maintenance & Support Services Agreement"* between Autonomy Inc and MicroTech as including *"troubleshooting in conjunction with Bank of America in order to assist Bank of America with its support requests, coordinating with Autonomy to respond thereto, and timely responding to Bank of America's requests for telephone, email, or web-based support Services."*

between what MicroTech was to receive under the MicroTech Services Agreement ($4,503,880) and what, in aggregate, MicroTech was to pay for the licence under the Autonomy Software Licence Agreement ($4,053,491, comprising the licence fee of $3,860,468 and an annual support fee of $193,023).

2957. The Claimants identified and relied on the following features in support of their claim:

(1) the absence of any contemporaneous documents demonstrating a bona fide reason for, or plan by, Autonomy to outsource 'backline' maintenance and support services to MicroTech;

(2) the absence of any explanation as to why, if Autonomy genuinely intended to outsource these services to MicroTech, the relevant paperwork was only produced and sent to MicroTech within the last 24 hours of Q1 2011;

(3) the fact that Autonomy never asked MicroTech to provide, and MicroTech never provided, any 'backline' maintenance and support services for Bank of America; and

(4) the fact that the reciprocal transaction was unwound shortly after the announcement of HP's acquisition of Autonomy.

2958. Dr Lynch claimed to have had *"no material involvement in this transaction."* His written closing submissions noted that the Claimants' pleadings and Further Information did not include any specific allegation of knowledge or involvement on the part of Dr Lynch; and that no basis for the allegation of knowledge was identified in his cross-examination either.

2959. However, Dr Lynch also asserted that he could see nothing in the arrangements on their face which would have alerted him to any impropriety: he would have considered it to be a straightforward commercial transaction in line with Autonomy's practice of delegating services work to its partners. In his view, the sale to MicroTech of the licence was to enable it to perform the support services; and there was nothing wrong in assigning to MicroTech the right to invoice customers directly for such services. He relied also on the evidence of Mr Steve Truitt adduced as hearsay evidence by the Claimants themselves as confirming that both the assignment agreement and the purchase of software from Autonomy were genuine commercial transactions.

2960. Dr Lynch dismissed the pattern of events after the transaction as simply showing that *"the arrangements did not operate as they were intended. Dr Lynch was not involved in this aspect."* Likewise, he depicted the arrangements made in September 2011, under which Autonomy and MicroTech executed agreements effectively cancelling the parties' obligations to each other, as *"not surprising where the arrangements had not worked out as originally intended, and BoA were continuing to pay Autonomy directly."* He noted that the Claimants made no claim for any transactional loss in respect of the transaction: it is relevant only to the FSMA and misrepresentation claims.

2961. Mr Hussain adopted Dr Lynch's position, noting in addition only that *"RT 6 is a peripheral claim, being modest in amount and it was unwound with no material impact on [Autonomy's] financial position."*

2962. In the circumstances, I consider it is sufficient for me to state my conclusions on the first limb (the allegedly reciprocal nature of the transactions) in summary form.

2963. As to the genesis and main driver of the transactions:

(1) I am satisfied that the sequence of schedules provided by Mr Hussain to Dr Lynch from 26 March 2011 demonstrated that (a) the revenue-generating side of the overall transaction was first referenced in a spreadsheet dated 25 March 2011 sent to Dr Lynch on 26 March 2011; (b) the deal was initially posted on the right of the schedule, signifying it was held in reserve and was not immediately envisaged for completion if deals on the left hand-side of the schedule proceeded as hoped; (c) the deal was only moved to the left of the schedule when deals on the left failed to eventuate; (d) only when moved to the left of the spreadsheet did the deal move (quoting the Claimants) *"from being a contingency plan to a necessity for Autonomy to satisfy its Q1 2011 revenue goals";* (e) the deal was conceived a few days before the end of the quarter.

(2) On 30 March 2011, Mr Hussain emailed Mr Scott, copying Mr Chamberlain, with the subject "*bofa*" saying "*MT [MicroTech] assignment. Let's chat when you're up, need to get the MT obligation to support sorted*".

(3) Mr Scott testified at Mr Hussain's criminal trial that either Mr Hussain or Mr Chamberlain had asked him to prepare two agreements with MicroTech: (i) an agreement appointing MicroTech to provide 'backline' maintenance and support services for the benefit of Bank of America (the MicroTech Services Agreement), and (ii) an agreement licensing to MicroTech the software that was ostensibly needed to provide those services (the Autonomy Software Licence Agreement).[332] Although I have reservations about Mr Scott's evidence generally, I see no reason not to accept this part of it.

(4) Not until 30 March 2011 did Autonomy propose the arrangements to MicroTech: it seems that Mr Scott talked to Mr Steve Truitt sometime on the same day before sending him a draft of the proposed MicroTech Services Agreement as an attachment to an email timed at 20:44 on 30 March 2011. Even allowing for timing differences (it was some 8 hours earlier in California, which is where I take it that Mr Steve Truitt received the email) that gave MicroTech only hours to consider the agreement and the proposed purchase of the licence.

(5) The circumstances in which and the haste with which the agreement was concluded casts real doubt on its substance. Further, the MicroTech Services Agreement obliged MicroTech to have sufficient personnel trained in the features and functions of the relevant Autonomy software and to have procured office space and facilities for such personnel, ostensibly to allow MicroTech to be in a position to provide 'backline' maintenance and support services from the moment it entered into the agreement. I agree with the Claimants that it is difficult to see how MicroTech could have been in such a position in circumstances where it received the agreement stating these obligations a matter

[332] From Mr Hussain's email to Mr Scott on 30 March 2011, copied to Mr Chamberlain, in which Mr Hussain asked to speak with Mr Scott, the Claimants submitted, and I accept and find, that it is more likely that the direction came from Mr Hussain.

of hours before the agreement was due to be signed and MicroTech's supposed service obligation was theoretically to be fully functioning. MicroTech did not even have access to the relevant Autonomy software until 31 March 2011.

2964. I also agree with the Claimants that the conclusion that the real rationale for the transactions was not for Autonomy to outsource 'backline' maintenance and support services, but to enable an apparent purchase by MicroTech of Autonomy software in respect of which Autonomy could (as it did) recognise revenue on Q1 2011, is reinforced by events after the agreements were concluded. In particular:

(1) Autonomy did not disclose the MicroTech Services Agreement to Deloitte. Mr Welham's unchallenged evidence, which I accept, was that Deloitte were not aware of the MicroTech Services Agreement when they reviewed Autonomy's revenue recognition of the Autonomy Software Licence Agreement.

(2) MicroTech never provided any 'backline' maintenance and support services for the benefit of, or directly to, Bank of America. There is also no evidence that Autonomy ever asked MicroTech to provide such services; and no evidence that MicroTech even set up the infrastructure needed to provide those services. Even so, Autonomy paid MicroTech $714,082 on 10 June 2011, notwithstanding that MicroTech had provided no 'backline' maintenance and support services to that point, and never provided such services thereafter.

(3) Shortly after HP's acquisition of Autonomy was announced on 18 August 2011, Autonomy and MicroTech unwound the reciprocal transaction. Thus:

(a) On 1 September 2011, MicroTech paid Autonomy, not the amount due under the Autonomy Software Licence Agreement ($642,674.59), the amount it had received from Autonomy in June 2011 ($714,082) in a circular flow of funds.

(b) Then, on 7 September 2011, Mr Scott sent letter agreements to Mr Steve Truitt terminating the entire arrangement and relieving MicroTech of any obligation to pay the outstanding fees under the Autonomy Software Licence Agreement. MicroTech was also relieved of any obligation to provide 'backline' maintenance and support services under the MicroTech Services Agreement and its right thereunder to invoice and/or collect fees was revoked.

(c) Autonomy then raised credit notes to MicroTech totalling $3,339,410, the amount of the fees MicroTech was due to collect from Bank of America pursuant to the MicroTech Services Agreement ($4,053,492) less the amount paid by MicroTech in September 2011 ($714,082).

2965. I have concluded that the MicroTech Services Agreement was the means of funding the Autonomy Software Licence Agreement: the two transactions comprising RT 6 were reciprocal and the objective of both was in the last hours of Q1 2011 to enable Autonomy to recognise revenue to cover a shortfall on forecast revenues that had become apparent at the end of 25 March 2011.

2966. It follows that Autonomy should not have recognised any revenue from the Autonomy Software Licence Agreement.

Defendants' knowledge

2967. As to the second limb, and the knowledge of the Defendants:

Mr Hussain

2968. Mr Hussain maintained the revenue spreadsheets I have referred to above. I am satisfied that he conceived and managed the process by which the MicroTech reciprocal transaction was put in place and directed Mr Scott to draft the two agreements.

2969. I accept the Claimants' submission that as an accountant, Mr Hussain cannot have been in any doubt that these agreements should have been considered together to understand their substance and to determine their appropriate accounting treatment. The fact that nevertheless, he signed a representation letter to Deloitte confirming Autonomy's accounting treatment of the Autonomy Software Licence Agreement without making any mention of the MicroTech Services Agreement supports my conclusion that he knew the two, if properly considered together, would be revealed to be linked in such a way as to cause Deloitte to characterise them as reciprocal. That would have undermined their real purpose.

Dr Lynch

2970. Dr Lynch, for his part, attempted to distance himself from the MicroTech reciprocal transaction in his witness statement and his oral evidence. However:

(1) Although initially during cross-examination he appeared reluctant to acknowledge that he was aware of a possible deal in Q1 2011 with MicroTech involving Bank of America, Dr Lynch eventually accepted that he was "*aware that something with Bank of America was happening with MicroTech*" and that Autonomy was proposing to sell something to MicroTech for around $3 million and to recognise revenue on that sale.

(2) It must have been obvious to Dr Lynch from the sequence of spreadsheets he received from Mr Hussain as briefly described above that the transactions were conceived and came to be relied on by Mr Hussain as the means of making good a shortfall on revenue forecasts.

(3) The Autonomy Software Licence Agreement and the MicroTech Services Agreement were, in Dr Lynch's words, "*obviously linked*" even if (as he maintained) *"not in the accounting sense"*. Dr Lynch offered no credible explanation for why Mr Hussain would have informed him about only one side of the arrangement with MicroTech and concealed the other.

(4) I accept the Claimants' submission that it is also unlikely that Mr Hussain would have agreed to Autonomy relinquishing some $4.5 million in fees from Bank of America without alerting Dr Lynch. Dr Lynch cannot maintain he was unaware of the MicroTech Services Agreement without insinuating that he was misled by Mr Hussain, but it is no part of Dr Lynch's case that Mr Hussain actually did mislead him.

2971. I have concluded on a balance of probabilities that Dr Lynch would have been informed by Mr Hussain or by Mr Chamberlain of the linked agreement with MicroTech, and its objective of funding MicroTech so that it could pay for the Autonomy software and earn a profit.

2972. I am satisfied that Dr Lynch would have appreciated that it was improper to recognise revenue on such an artificial reciprocal arrangement.

2972A. Accordingly, I have concluded that Dr Lynch, like Mr Hussain, had "guilty knowledge" of the improper accounting treatment of RT 6.

Overall Conclusion on Reciprocal transactions

2972B. My overall conclusion is that the Claimants have established their claims in respect of each of the impugned Reciprocal Transactions.

<u>IDOL OEM</u>

Summary of the Claimants' claims in relation to OEM

2973. The Claimants have brought claims against both Defendants under FSMA, under the Misrepresentation Act 1967 and in deceit, in relation to allegedly untrue or misleading statements in Autonomy's published information and representations made to HP in respect of a line of Autonomy's business called its *"Original Equipment Manufacturer"* or *"OEM"* business. Revenues from that business were variously described in Autonomy's published information, and it is the meaning perceived by the market and intended by Autonomy to be conveyed by the various descriptions which is at the nub of this aspect of the dispute.

2974. The classic characteristics of this line of business were that Autonomy sold licenses to Original Equipment Manufacturers or "OEMs", who then on-sold their products with Autonomy software embedded to third-party customers. Under the licences sold, OEMs were obliged to make payments to Autonomy in the nature of commission or royalty payments on each sale of equipment embedded with licensed Autonomy software. This generated a growing, reliable and recurrent revenue stream, which was in addition an especially high margin business because after the sale of the licence it required no further input from Autonomy.

2975. During the Relevant Period, Autonomy reported revenue arising from its OEM business using various terms: "*IDOL OEM*", "*OEM derived revenues*" and "*IDOL OEM derived revenues*" (collectively "IDOL OEM revenue"). In total, reported IDOL OEM revenue in this period amounted to $316.5 million.

2976. In cross-examination, Mr Apotheker told me that he:

> *"really liked this notion of the OEMs because much more than the resellers themselves, this was a highly scalable model. In particular, the way it was explained to me and the way I think it worked was that it was a multi-year, layered effort where you could generate more and more income from a given*

OEM over time with hardly any additional cost of sale. So I thought it was a very, very important part of the business model and a very smart one."

2977. The Claimants submitted that:

(1) A reasonable reader of Autonomy's published information would have understood an OEM to be a software company, which then embedded IDOL into its own software products, and licensed those combined products to the OEMs' third party customers. A reader would not have supposed that a hardware supplier would be considered to be an OEM.

(2) Autonomy's presentation of OEM derived revenue in its published information gave the impression that it comprised (a) upfront development fees paid by OEMs for the right to embed Autonomy's IDOL technology into their own software products for subsequent licensing of those combined products to third parties or (b) ongoing royalty or other recurring payments from OEM partners to Autonomy in respect of the OEM's sales of their own software products, with IDOL embedded under licence, to their own customers[333].

(3) Accordingly, the understanding conveyed by the OEM metric was of (a) a (normally) recurring and predictable high-margin revenue stream which would grow over time as other software companies licensed their own software containing IDOL; and (b) broad acceptance of IDOL across the software industry.

(4) Dr Lynch's own comments about IDOL OEM revenue in Autonomy's published information reinforced the impression that IDOL OEM sales were sales of IDOL to be embedded in other software companies' products.

2978. According to the Claimants, the truth was very different, in that:

(1) a large proportion of revenues represented as OEM revenues arose from sales to *"companies which could not embed Autonomy software in their own software products"* and were thus generated from sales to persons not properly characterised as OEMs[334].

(2) The constituents of what was reported within what I shall refer to as "the OEM Metric" comprising IDOL OEM revenue as variously described[335] comprised, in addition to royalties (i) revenue from one-off sales of Autonomy software licences to customers that did not sell software and were not OEMs, (ii) revenue from one-off license sales for the purchaser's internal use only; and/or (iii)

[333] The usual royalty rate was presented as amounting to about 3% of the revenue from OEM partners' sales of their own product with embedded IDOL.

[334] The Claimants pleaded that *"In theory, OEMs were software companies (i.e. companies that licence software to third parties) that embedded Autonomy's IDOL software in their own software products"* and thus sales to "non-software companies" could not fall within the OEM metric

[335] As explained above, I use this expression to cover the various expressions used over time to denote the same revenue stream (*"OEM derived revenues", "IDOL OEM derived revenues"* and later simply (and revealingly) *"IDOL OEM"*).

revenue from VAR sales, none of which therefore had any of the classic characteristics of OEM business.

(3) Such sales did not generate royalties or produce a reliable and recurring revenue stream, and they did not signify broad acceptance of IDOL across the software industry.

(4) Of the total of $316.5 million included within the OEM metric over the Relevant Period, around 80% of it (over $250 million) did not conform to Autonomy's description of it as OEM business because it lacked an essential quality of that business. The revenue was not generated by commission or royalty payment and thus lacked its reliable recurring nature, generated without any further effort required of Autonomy, which made it especially attractive to investors in assessing Autonomy's business. Furthermore, the amount of revenues truly of that nature and properly classifiable as *"OEM"* business were in decline.

2979. The Claimants accepted, and it is common ground, that neither *"OEM"* nor *"OEM derived revenues"* (or cognate expressions) is a term of art; each is an expression that, in isolation, is capable of bearing different meanings. It was also common ground that Autonomy's reporting of the OEM metric was not covered by IFRS. However, the Claimants contended that by the same token, the market's understanding of the precise nature and scope of a given company's "OEM" business and revenue derived from it must be gained, not from a dictionary or financial lexicon, but from the way that the company chose to describe this aspect of its business in its published information.

2980. The Claimants relied in this regard on various express statements in Autonomy's published information which, contrary to the Defendants' case now, appeared invariably to describe OEMs as software companies. Thus, in its 2010 Annual Report, and Quarterly Reports for Q4 2010, Q1 2011 and Q2 2011 Autonomy described IDOL OEM as follows:

> *"IDOL OEM. IDOL OEM is where Autonomy's IDOL is embedded inside other software companies' products. IDOL is now embedded in most major software companies' products addressing most software vertical markets. This is a particularly important revenue stream as it generates ongoing business across the broadest product set possible, in addition to up-front development licences."*

2981. In Schedule 8 to the RRAPoC, the Claimants provided details relating to 68 transactions which they contended generated revenues wrongly included within the OEM metric. They did not ultimately pursue their case in respect of one of these[336]; and in an Appendix (Appendix 3) to their written closing submissions they provided short summaries of the 67 such transactions in respect of which they maintained their claims. They had provided a broadly similar appendix as part of their written opening submissions.

2982. They identified three broad categories or aspects of revenue which did not conform to the understanding (as described above) of the OEM metric which the Claimants

[336] A transaction in Q2 2011 with Bloomberg.

contended was conveyed by Autonomy's published information, and which accounted for some $250 million out of total revenues of some $316.5 million described as "*IDOL OEM", "OEM derived revenues"* or "*IDOL OEM derived revenues"*:

(1) Sales to non-software companies, including (a) a sale to Tottenham Hotspur of a solution to provide own-use functionality, and in particular *"functions at the level found in a Premiership football club's ordinary operations: CRM, ticketing, player analysis, retail, internet and web design"* and (b) government agencies who *"by definition"* would *"not sell anything to anyone"*;

(2) Sales that limited the purchaser's right to use Autonomy's software to internal use by the purchaser only, so that the purchaser would have neither the apparent intention nor the capability of embedding IDOL software for resale in their own products;

(3) Sales which could not properly be classified as giving rise to IDOL OEM revenue, because (a) the licence sale was associated with hosting transactions; or constituted (b) VAR sales where neither the VAR nor the end-user was a software company intending and licensed to embed IDOL technology into its own for onward sale, or (c) reciprocal transactions (for the same reasons) or (d) hardware sales, in each case being instances where (on the Claimants' case) the purchaser was not a software company with the ability and intention of embedding IDOL technology into its own technology for onward licensing to third parties.

2983. The Claimants contended that the Defendants were well aware of what the Claimants described as the *"striking mismatch between Autonomy's presentation and the truth".* They contended that it must have been obvious to them both that the inclusion in the *"OEM metric"* of revenue which did not conform to the description, and did not have the valuable characteristics of 'true' OEM revenue, resulted in the metric being untrue and misleading and made this aspect of Autonomy's business (and since it was a significant business line, Autonomy as a whole) seem more valuable than it was.

2984. Further, although their FSMA claim in this context was based on untrue or misleading statements, rather than omissions and deliberate concealment, the Claimants relied on what they presented as Autonomy's repeated concealment from HP of details relating to the largest transactions allocated to the OEM business as confirming the Defendants' guilty knowledge of the misleading or untrue presentation of IDOL OEM revenue.

2985. According to the Claimants, Autonomy's Quarterly Reports throughout the Relevant Period would cite only transactions with software companies as giving rise to OEM derived revenues, and (conversely) did not identify any transactions as giving rise to such revenue which did not conform to the Claimants' narrow definitions of the disputed expressions, even where such transactions were of substantially greater value or prestige

than the transactions that Autonomy did choose to highlight.[337] The Claimants provided the following illustrative examples:[338]

(1) In Q1 2009, Autonomy allocated to IDOL OEM revenue $3,251,000 from a deal with the Ministry of Defence (OEM2). This was a much larger deal than two of the three named deals: Symantec (no revenue allocated to IDOL OEM revenue) and Proof Point ($230,000).

(2) In Q1 2010, Autonomy allocated to IDOL OEM revenue $8,915,000 from a deal with Bank of America (OEM21). This was a far larger deal than all of the named deals combined: Adobe ($750,000), McAfee ($500,000 and $248,000) and Siemens ($72,000).

(3) In Q1 2011, Autonomy allocated to IDOL OEM revenue $6,448,000 from a deal with Tottenham Hotspur Football Club (OEM48). This deal was almost four times larger than one of the named deals: Symantec[339] ($1,400,000).

2986. The Claimants acknowledged that Deloitte had reviewed these passages and indeed the constitution of the OEM metric in every quarter (though, as elaborated in paragraphs 3168 to 3170 below, the Claimants did not accept that Deloitte's advice on the classification of that revenue as IDOL OEM revenue was sought or given). However, they were keen to stress that in both their FSMA and their misrepresentations claims the *"fraud that has been alleged is not at its heart an accounting fraud".* They presented each as a claim *"where the fraud involved was straightforward"*, and not one which involved the assessment of accounting standards or matters of accounting judgement. The Claimants submitted that the Defendants could not, therefore, *"hide behind anything said or done by Deloitte."*

Summary of the Defendants' defence in relation to OEM

2987. The Defendants disputed the Claimants' claims root and branch. They submitted that there was no basis for the Claimants' *"artificially narrow definition"* of what constituted an OEM, nor for their *"unsustainably restrictive"* limitation of the scope of revenues which could properly be included within the description in Autonomy's published information of the *"OEM Metric"*.

2988. In particular their position was that:

(1) The Claimants had adopted an unduly restrictive approach to what constituted an *"OEM"*. According to the Defendants, there was no basis for confining the expression *'OEM'* to a company whose business included licensing software to third parties and which has the intention and capability of embedding IDOL

[337] The Claimants also contended that the Defendants were involved directly in the choices: and see as to their involvement and knowledge paragraphs 3208 to 3219 below.
[338] Revenue figures are taken from Mr Hussain's spreadsheets. The size of the transactions was not reported in the Quarterly Reports – just the customer names.
[339] This is an impugned OEM transaction (OEM55). The Claimants contended that its mention in the relevant Quarterly Report, along with the mentions of the Q2 2009 deal with VMS (OEM4) and the Q2 2011 deals with Rand (OEM60), McAfee (OEM58) and OpenText (OEM59) in the relevant Quarterly Reports, would not have given rise to suspicion in the same way as mention of the concealed transactions mentioned in the main text above as the relevant named customers were very obviously software companies.

software into its own software products for licensing to those third parties, as the Claimants have sought to do.

(2) Nor was there any basis for restricting the revenues properly included within the OEM metric to upfront fees and royalties paid to Autonomy by the OEM itself, as the Claimants have also sought to do.

2989. According to the Defendants, such restrictions were not justified by anything said in published information by Autonomy, and the market to which such published information was addressed would not have perceived the OEM metric to be so restricted. In particular:

(1) Dr Lynch's view was that any organisation that develops a software solution for its industry and then sells it on to others in the industry could reasonably be considered an OEM, and the Claimants' attempts to restrict OEMs to software companies was *"an artificial exercise"*. Dr Lynch accepted that *"obviously the vast majority of software in the world is done by software companies"*, and agreed that OEMs in the sector of interest to Autonomy would predominantly be software companies: but the Defendants' position[340] was thus that the category was not exclusive. The essential quality as he presented it, was the "*right to reprint*": the OEM is being given the right to produce or sell multiple copies of the software it acquires from Autonomy. In the context of Autonomy's business, Dr Lynch described an OEM as being:

> "*one that takes Autonomy's technology and builds it into something that it sells or gives to its customers, as opposed to a one-off sale*".

(2) As to the requisite quality required for revenues to be included within the OEM metric, Dr Lynch contended that commission/royalty payments from an OEM, albeit the paradigm, were not the only qualifying revenues: revenues from direct sales[341] to customers of Autonomy's OEMs for which the opportunity arose in consequence of the initial licence sales to the OEMs concerned (or to put it another way, for which the original OEM transaction was the springboard) were also properly classified as indirectly derived from the OEM relationship and could be and was properly described as *"OEM derived"* revenue within the 'OEM metric'.

2990. Dr Lynch, whose submissions were (as ever) adopted by Mr Hussain, did not shy away from the consequence that (as he put it in his first witness statement):

> *"Working out whether a sale was OEM-derived or not involved a qualitative judgment."*

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[340] In his closing submissions, Mr Hussain fully endorsed Dr Lynch's position and did not address the matter further, save for summarising his overall case in consequence as being that: *"'OEM' is not an accounting term and the approach taken by AU to categorising revenue as 'OEM' revenue was reasonable. Deloitte vetted the revenue that AU categorised as OEM to ensure that it was not presented misleadingly, and there is no basis for alleging fraud against Mr Hussain."*

[341] Especially *"upsells"* and *"PODS"* as to which see footnote 343 below.

2991. Further, the Defendants stressed that just as the meaning accorded to "OEM" was not unnatural and indeed fell within the ordinary usage of the term[342], so too the more extensive scope of their interpretation of *"OEM derived revenues"* was not contrary to any accountancy rule, and gave content and their ordinary meaning to the words used: and there was no basis for restricting the meaning of *"OEM derived revenue"* so as, in effect, to give no meaningful content to the word *"derived"*.

2992. They contended that the very purpose of the introduction of the word was to ensure inclusion of revenue *"derived"* from OEM business (including sales to a third-party customer of an OEM) as well as revenue from a direct sale to an OEM: the inclusion of the word "derived", which remained in the published information until Q3 2010, and (according to the Defendants) continued to inform market understanding after that date, necessarily connoted a wider category of revenues than merely those received from the OEM itself as an upfront licence payment or ongoing royalty stream and captured further sales made possible (*"driven"*) by the initial OEM sale. Dr Lynch explained this in cross-examination as follows:

> "*The metric that we give as a management metric which is OEM-derived includes that revenue but also includes revenue which has been made possible by our OEM programme, but that may – well, it does include sales where the purchaser is not an OEM. So, for example, an upsell*."[343]

2993. The Defendants also drew attention to the fact that types of OEM described by Dr Lynch were similar to the types of OEM included in HP's own OEM business, and suggested that this reflected the ordinary usage of the expression. Thus HP's "*OEM Partnership*" brochure from March 2014 identified:

> *"…three types of OEM branding options to align with your go-to-market (GTM) requirements:*
> • ***Embedded*** *– Encapsulate HP-branded hardware components within your own branded product.*
> • ***Integrated*** *– Use HP hardware systems as the platform for an appliance or a vertically integrated solution loaded with your intellectual property, and you can brand the turnkey solution with your brand or ours.*
> • ***Private label*** *– Simply rebrand and sell an HP component "as-is" to your own customers."*

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[342] The OED defines OEM as an *"organisation that makes devices from component parts bought from other organisations"*. By contrast, Investopedia states that an OEM is *"traditionally defined as a company whose goods are used as components in the products of another company which then sells the finished item to users"*. In their Re-Amended Reply, the Claimants accepted the OED definition to be the usual one; but then also conceded that *"as a matter of general usage, the expression "OEM" is capable of referring to a transaction where a company makes a component or part-system that is used in another's product"*.

[343] In this context, an *"upsell"* is a sale of additional functionality or capacity, either to the OEM itself to sell on to its customers or a direct sale of additional functionality or capacity to the OEM's customers (an "end-user" in the Claimants' terminology, which I shall adopt). Another type of sale direct to the OEM's customers were *"PODS"* (short for product oriented drop-in solutions): these were sales of additional software direct to an OEM's customer.

2994. Thus, in the Defendants' terminology at trial (though it is to be noted it was not deployed in the published information itself) *"Core"* or *"straight"* OEM business involved sales to an OEM with the "*right to reprint*": the OEM is being given the right to produce or sell multiple copies of the software it acquires from Autonomy. *"Derived"* OEM business extended to sales of Autonomy software generated or which were judged to have been made possible by that original OEM sale. The latter, so the Defendants contended, included both *"upsells"* and *"PODS"*. These comprised most of the so-called *"derived"* business.

2995. In Dr Lynch's Re-Amended Defence (at paragraph 160.3) it was pleaded that:

> *"Autonomy provided information as to its OEM derived revenues in its quarterly accounts. The relevant revenues included both transactions directly with OEMs, sales of additional functionality to the end- user ("upsell") either directly or through the OEM as a reseller, and (in particular where BEA, IBM or SAP[344] were the relevant OEM) sales of drop in solutions ("PODS") which end-users would buy to function with the Autonomy /OEM product."*

2996. In practical and numerical terms, the dispute between the parties in respect of all the various claims brought by the Claimants in respect of the presentation of Autonomy's OEM business focused on whether those categories could or could not properly be classified as falling within the OEM metric as generating OEM derived revenues; and then on whether the Defendants believed in the accuracy of the published information about the OEM revenues.

2997. As to the latter point, Dr Lynch emphasised that, in any event, he had not personally been involved in the classification or calculation of OEM revenues and had relied on the finance department and Deloitte. His avowed understanding was that the OEM metrics were fair and accurate and the revenues included within them were understood by the market; and he was reassured in that belief and in his approach by Deloitte's careful review, and the fact that at no time had they ever suggested that the descriptions or figures were wrong or misleading. Dr Lynch submitted that Deloitte's close involvement and their approval of the categorisation of the transactions confirmed him in his belief that the OEM metric and the figures given in Autonomy's published information were not misleading in any way.

2998. Further as to this:

(1) Deloitte were familiar with the transactions themselves, having tested all of Autonomy's large revenue deals as part of their quarterly audit review. This involved testing all transactions over $1m, and a sample of smaller ones. According to the Claimants, most of the impugned OEM transactions (51 out of 67) fell into the $1m plus category; thus, the vast majority were tested by Deloitte.[345]

[344] BEA Systems, SAP and IBM were/are all large software companies.
[345] An example of a working paper testing one of the impugned OEM transactions, with Tottenham Hotspur Plc, though it does not address the classification as OEM (that was the subject of a separate exercise), was relied on to demonstrate Deloitte's awareness of the terms of the relevant transaction.

(2) Deloitte reviewed and approved each quarterly press release and Annual Report. Similarly, Mr Welham explained that somebody from Deloitte (usually Mr Welham himself) listened in to each of the earnings calls in the Relevant Period. Thus, Deloitte was aware of all of the material from which the Claimants contended their restrictive definition of OEM derived revenues had been taken.

(3) There was a quarterly testing process to agree the metrics used in the earnings release. Deloitte took the spreadsheets classifying revenue prepared by Autonomy's finance department, and incorporated them into one of its own working papers.[346] Illustrating Deloitte's approval of the classifications, in one such paper, a Deloitte tick-mark appears against the heading for the column "OEM upsell", directing the reader to a note drafted by Deloitte stating that:

> "*The OEM Upsell category includes hosted license deals that are hosted on OEM customer data-centers. This is considered reasonable for including as OEM driven revenues.*"

(4) Deloitte understood that the IDOL OEM category published by Autonomy included upsells and PODS, as Mr Welham confirmed. Mr Welham gave the following evidence on this point:

> *"Q. ... So someone within Deloitte has specifically considered this particular category, the "OEM upsell" category in relation to hosted licence deals, hosted on OEM customer data centres and concluded that this is considered reasonable, correct?*
>
> *A. Well, the preparer of this spreadsheet has, yes."*

He went on to explain that the preparer of the spreadsheet, including the tickmarks, was Deloitte.

(5) On a related note, Mr Welham said that if he had heard anything he thought was misleading on an earnings call, he would have raised the matter, in the first instance with the audit partner. Mr Welham did not raise any such issue for any of the calls he listened to; nor, as far as he was aware, did anyone else at Deloitte.

2999. In any event, the Defendants concluded, the Claimants' case *"has the whiff of hindsight"*. Although now keen to stress the importance of the OEM metric, the Claimants had not attached such importance at the time:

(1) It was not an IFRS figure, and did not form part of the financial statements. As Autonomy's published information made clear, it was a voluntary supplemental metric provided for background information, to assist in understanding the company's business. Autonomy explicitly stated that the categorisation involved qualitative estimates.

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[346] Mr Welham confirmed that the whole of the document was a Deloitte working paper.

(2) The effect of any misclassification, if established, would be hard to gauge, since any reduction in the OEM metric would be offset by an increase in some other metric that might be equally attractive for investors. As Dr Lynch put it,

> "*there's no dispute that these are actual sales. So if you take them out of OEM revenues and you put them into cloud, then investors would get excited that cloud was growing even faster*."

(3) It was attractive to HP to know that Autonomy's technology had been adopted in some large OEMs, but Mr Apotheker agreed that "*the absolute number wasn't of big interest.*"

3000. In further support of their position that the Claimants' approach was manufactured, the Defendants also pointed out that the transactions the Claimants now complain were misdescribed as "OEM" include contracts that were in the data room during due diligence. They contended that HP's advisers analysed these contracts, knew that they were categorised as OEM, but raised no complaint about misclassification. Further, this gave rise to the question whether the Claimants could show that they had reasonably relied on the OEM business having a narrow scope such as to exclude from it transactions of the sort that were actually made available to them as being within it.

3001. The Defendants dismissed the misrepresentation claims as similarly contrived, and in answer to the Claimants' central claim stressed especially that Autonomy's OEM derived revenues were indeed *"highly likely"* to be recurring and no false depiction had been given at any stage.

The Claimants' various causes of action in respect of OEM business

Summary of FSMA claim in relation to statements made about the OEM business

3002. The Claimants' FSMA claim is based necessarily on statements made in Autonomy's published information. In its published information, Autonomy described revenues from this line of business initially as *"OEM derived revenues"*[347], later as *"IDOL OEM derived revenues"*[348] and lastly as *"IDOL OEM"*. (I shall refer to them uniformly as *"OEM derived revenues"*).

3003. The Claimants' FSMA case in this regard is that HP (and through it, Bidco) (a) reasonably relied on the presentation of OEM derived revenues in its published information when purchasing Autonomy[349] (b) was thereby misled and (c) has suffered loss as a result.

3004. Mr Rabinowitz summarised the essential elements of the OEM claim under FSMA in his oral closing submissions as follows:

[347] In four Quarterly Reports from Q3 2009 to Q2 2010.
[348] In the Q3 2010 Quarterly Report.
[349] This claim has, as in the case of all the FSMA claims, a dog-leg nature: to establish liability the Claimants must first show that Autonomy was liable to Bidco and was right to accept liability in full, and then secondly, that the Defendants are liable to Autonomy for their respective breaches of duty in thus exposing Autonomy. See also paragraphs 17 to 18 and 432 to 434 above.

> *"So what matters is to identify what it was that Autonomy told the market about its IDOL OEM revenue, to consider whether that reflected the reality about what was being included by Autonomy in that category and to consider also, if this is the case, whether the Defendants knew that what was being said by Autonomy in its published information did not reflect the reality of what Autonomy was in fact including in this category."*

3005. I address these FSMA claims in respect of Autonomy's presentation of its OEM business in more detail in paragraphs 3030 to 3247 below.

Summary of the Claimants' direct misrepresentation claims in relation to OEM

3006. In addition to their FSMA claim, the Claimants also brought claims in deceit and/or under s. 2(1) of the Misrepresentation Act 1967. However, the Claimants only claimed losses under these claims in respect of the shares and share options which each of the Defendants sold to Bidco. In connection with Autonomy's OEM business, the Claimants alleged that direct misrepresentations about the OEM derived revenue category had been made by Dr Lynch and Mr Hussain to HP in the run up to the acquisition, on which HP and through it, Bidco, had also relied.

3007. The Claimants grouped eight sets of misrepresentations they alleged in respect of Autonomy's OEM business and divided them chronologically according to certain presentations made during the course of the acquisition process:

(1) The initial approach to HP by Qatalyst and introductory meetings in January to March 2011, at which HP was shown two slide decks ("the January and February Slides") depicting Autonomy's *"Attractive Revenue Mix"* of which some 15% was shown in a pie-chart to be comprised of *"OEM Ongoing"* (some 13%) and *"OEM Dev"* (some 2%), and later, in March 2011 some further slides ("the March Slides") to the same effect;

(2) The more detailed discussions in London in June and July 2011, in the course of which (according to the Claimants) Dr Lynch (in addition to describing Autonomy as a *"pure software"* company) stated that (i) the costs of Autonomy's IDOL OEM revenues were very low, being royalty based, with gross margins approaching 100% and (ii) the sales channel to OEMs gave rise to a *"network effect"*; and

(3) The due diligence process in August 2011, in the course of which HP asked specific questions of Autonomy and also asked for Autonomy's *"Top 10 OEM customers by revenue for FY 2010"*, and received (allegedly) misleading responses.

3008. I address these claims in deceit and/or misrepresentation claims, which are direct claims by HP against the Defendants, in paragraphs 3248 to 3252 below.

Two points of clarification with respect to the ambit of the dispute in respect of OEM claim

3009. Before addressing the issues in respect of the OEM claim at greater length, it is convenient to address two points which serve to define and confine the ambit of the dispute.

3010. The first, raised by the Defendants, has two facets. One is as to the sufficiency and status of the details provided by the Claimants in respect of the 67 transactions they relied on as generating revenue which could not properly have been classified as "OEM derived revenue".

3011. The other is as to the consequences of the fact that the Claimants sought to advance their OEM case on the general basis that none fell within what the Defendants described as the Claimants' own *"self-chosen, inaccurate definition"*, and apparently on that basis did not go through the details of the transactions referred to in Schedule 8 of their RRAPoC with Dr Lynch or any other witness or ask about their classification as giving rise to OEM revenues.

3012. Dr Lynch contended that the Claimants' approach, and especially their suggested conclusion that the three categories they had identified (see paragraph 2982 above) comprised some 80% of the OEM derived category, was so insufficient and unsatisfactory that the claim should simply be regarded as not open to them to pursue as against him. Mr Hussain could not complain that the case had not been put to him; but he could and did complain that the case was inadequately supported by the evidence that the Claimants had chosen to put forward.

3013. The Defendants relied especially on the following:

(1) The Claimants did not go through the 67 transactions (otherwise than in submissions) even on a sample basis; they did not ask Dr Lynch (or any other witness) about any specific positive features which on their case had apparently justified a judgement that revenue from it qualified for inclusion within the OEM metric. Instead, the case on misclassification was put to Dr Lynch "*at a very high level of generality"*. Dr Lynch was simply asked about the Claimants' general theory, and then confronted with certain conclusions based on that theory with which he inevitably disagreed.

(2) The cross-examination of him thus proceeded on the basis of the Claimants' narrow definition, which he considered wrong, but did not condescend to the detail of why each impugned OEM transaction was, on the basis of that narrow definition, said to be lacking qualifying characteristics. The complaint was that he was never given the chance to explain how, by reference to the characteristics of each transaction, the broader definition he advanced would have justified the classification of revenue within the OEM metric in each particular case or why the characterisation suggested by the Claimants was wrong in the context of each specific transaction.

(3) Having not been given the opportunity to justify the classification of each individual transaction by reference to his own understanding of the scope of the metric, Dr Lynch was also not given the opportunity to explain the (avowedly very limited) extent of his knowledge in respect of each of them, nor what part (if any) he played in assigning them to the OEM metric as being OEM-derived.

(4) Further, the summary descriptions of the nature of the transactions provided by the Claimants were (according to the Defendants) not adequate for the purpose of testing the Claimants' complaints as to classification. In a number of cases, the Claimants' reasons for saying that transactions were wrongly classified as

OEM was that the same transactions were challenged in some other part of the Claimants' case, whether as alleged 'reciprocal transactions', or impugned VAR or Hosting transactions[350]. The Defendants' more general point was that this was not a proper or sufficient basis on which to challenge the classification: a separate analysis was needed to sustain a case that the revenues were wrongly categorised as OEM.

(5) In particular, the Defendants submitted that the 80% figure asserted by the Claimants to represent the proportion of revenue included in the OEM metric which (according to their 'narrow' definition) did not match Autonomy's own description of OEM derived revenue was *"not anchored to anything, not even kinds of deals, never mind actual deals"*.

3014. Mr Rabinowitz submitted in his oral closing that, having set out in his pleading and in his written opening what characteristics of the 67 impugned transactions the Claimants relied on as disqualifying them from inclusion within the OEM metric, (a) it would have been disproportionate and would have *"got very short shrift"* from me had Dr Lynch been cross-examined on such features in each or even a sample of those transactions; (b) Dr Lynch had had every opportunity to raise, and should have raised, any points he had if he disagreed; and (c) the suggestion that the impugned transactions were properly included within the OEM metric because the market understood a broader category to be indicated by the introduction of the prefix "derived" in Q1, Q2 and Q3 2010 was the case relied on by the Defendants and for them to demonstrate.[351]

3015. The Claimants' decision is forensically understandable, especially given constraints of time, but raises a difficult issue. As to whether a trawl through the 67 impugned OEM transactions with Dr Lynch (who denied any detailed involvement but was the only person giving evidence for the Defendants who was suggested to have been involved) might have got short shrift from me, there was no need for such reticence, even if mercifully meant. But I agree that it is unlikely that I would have been persuaded that a trawl in cross-examination through 67 listed transactions, with a witness who professed not to know anything about the details of them and could only, if anything, offer a commentary which he might have provided more efficiently in submissions would have been necessary or proportionate. Some process of illustration by example might have been fashioned, but none was suggested.

3016. In any event, the question is whether having made the choice and taken that course, it was sufficient for the Claimants to base their OEM case on their general theory, and an explanation in submissions (but not evidence) why none of the features of the 67 transactions identified (but not proved) conformed with it.

3017. It is obviously important to consider what the Defendants pleaded. Neither of them admitted the contents of Schedule 8. However, the point that each made was that they were not knowingly improperly accounted for because they were considered to be "OEM-derived revenues". Dr Lynch also pleaded that if their inclusion as such was in

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[350] The examples given by Dr Lynch were OEM13, 15, 16, 23, 34 and 35.

[351] As Mr Rabinowitz put it: *"It's the defendants who say – it's not us who say this – it's the defendants who say the expression "*OEM *derived"…everyone knew….meant something wider than development fee and ongoing royalty…They're relying on OEM derived as producing some wider category but that's their case, not our case."*

error it was not an error of which he was aware of or involved in. I set out Dr Lynch's pleading in this regard below:

> *"It is further denied that the transactions identified in Schedule 8 were incorrectly characterised. The characterization of those transactions involved a qualitative assessment by members of the Finance Department (and not by Dr Lynch), which was reviewed and concurred in by Deloitte and was fair. If, which is denied, any of those transactions could not fairly have been characterised as OEM-derived revenues, this was not an error that Dr Lynch was aware of or involved in."*

3018. In that latter context, and as recorded in his written closing submissions, Dr Lynch's evidence on the general point was that he knew and regarded it as entirely appropriate, and consistent with the broad scope of OEM revenues that he understood was conveyed (especially by the use of the prefix *"derived"*), that during the Relevant Period, the revenues classified as *OEM-derived* revenues were not limited to those generated by sales to customers who purchased the right to embed IDOL software into their own software for onward licensing to third parties; and that he knew that Autonomy was including within the OEM metric other revenues, including one-off upsells and PODS directly to service providers which had purchased the IDOL software content from an OEM, and sales to a VAR merely for resale. The justification he avowed for the inclusion of revenue from the 67 impugned transactions in the "OEM metric" was that OEM business was not limited to sales to an OEM and sales such as upsells and PODS to service providers to update and upgrade Autonomy software on equipment supplied to them by an OEM was "OEM derived".

3019. At times during the dispute it seemed to me that the issues were being obscured, and their determination made more difficult, by treating the disagreement as being whether the semantic description "OEM derived" offered a safe haven (as Dr Lynch insisted it did). As it seems to me, the issue cannot be determined by labels.

3020. The issue is whether the Defendants genuinely thought that transactions with the characteristics of the 67 transactions impugned (and described as OEM derived) would have been considered in the market to be such as to justify regarding them as having special value by reference to the nature of the revenue they generated such as to justify their special description.

3021. I am not persuaded that anything more was needed than to determine (a) why special value was generally accorded in the market to OEM business (b) what were the salient characteristics of the 67 transactions relied on by the Defendants as justifying their implicit invitation to the market (by their special description in Autonomy's published information) to treat them as having special value; and (c) whether the Defendants had any honest belief in that justification or were simply deploying the special description as a false excuse for according special treatment and value to a cohort of transactions having in fact (and to their knowledge) no special qualities or characteristics.

3022. The Claimants' case was set out clearly in their Opening Submissions, identifying the characteristics of the 67 impugned OEM transactions which they submitted were not such as would be perceived to have the especially valuable characteristics associated

with OEM business. If Dr Lynch wanted to argue that they contained other characteristics or that the characteristics had been misdescribed he had the opportunity to do so. I am not persuaded that this required him to be cross-examined to elicit his comments in that respect.

3023. As to the honesty of his belief in the characteristics it seems to me that enough was put forward and Dr Lynch was, in all the circumstances, sufficiently cross-examined.

3024. I return later to consider the Claimants' submissions on the *"general theory"* and the basis on which they submitted it excluded each of the 67 impugned OEM transactions.

3025. A second point of detail concerns whether the Claimants' "general theory" dictates that only a recurring revenue stream was properly included within the OEM metric: if so, that would have excluded single licence or upfront payments and revenue from the sale of PODS.

3026. There was some confusion in this regard, introduced by the contention in Dr Lynch's Re-Amended Defence that the Claimants' clarification (in paragraph 185.1 of their Reply) that they were not contending that revenue was "*precluded from being classified as IDOL OEM revenue merely on the ground that it did not, in a given case, result in an ongoing revenue stream"* carried with it acceptance that such single licence or upfront payments were not improperly included within the metric.

3027. I do not think that the Claimants' clarification went further than to accept that it was not a necessary quality of all revenue allocated to the OEM metric that it should be recurring in nature provided it was generated by further sales to the OEM made almost inevitable by the original sale to that OEM. The Claimants maintained their position that revenue from a sale to an end-user and PODS would not be perceived as either sufficiently certain or as having the other qualities associated with OEM business.

3028. The upshot is that it remained the Claimants' case that (a) it was misleading of Autonomy to have included within the OEM metric in its published information sales to an end-user simply on the basis that the end-user had originally acquired the IDOL software to which it wished to add functionality from an OEM; and (b) it was misleading to include in the OEM metric revenue a type of revenue that might be expected to be but was not a sale to an OEM and was not an incidental but almost inevitable product of and within the original OEM relationship. I consider later whether the admitted extension to incremental sales nevertheless introduces an element of subjective judgement in any event.

3029. I turn to identify and then address the issues to which the disputes concerning Autonomy's OEM business give rise by reference to the Claimants' pleaded causes of action.

FSMA claim in more detail

3030. The following issues arise in the context of the FSMA claim in respect of the OEM metric:

   (1) What did the Claimants have to prove to establish their FSMA claim in relation to the OEM metric?

(2) What was the "published information" on which the Claimants claim to have been entitled to rely in this context? Are they right that it included transcripts of earnings calls at least from Q4 2010 onwards?

(3) What were the statements made of OEM derived revenue in that published information, and what, in the round, was the depiction of the scope of IDOL OEM revenue in that published information?

(4) Should the depiction of the scope of IDOL OEM revenues in the published information be taken as exhaustive and exclusive? Or is that depiction to be read subject to an established market understanding that revenues described as IDOL OEM would include also revenues which did not arise directly from, but could be said to have been made possible by, sales to OEMs?

(5) Did revenue streams in fact included in the OEM metric fall outside a reader's likely understanding of the OEM metric so as to make the published information false and misleading?

(6) What involvement did the Defendants each have in the presentation of that published information? If the statements were false and misleading, did they know that?

(7) How did HP/Bidco understand the published information? What is the test of reliance in a FSMA claim and can HP demonstrate such reliance?

The legal ingredients of the FSMA Claim in relation to OEM

3031. In the Introduction to this judgment, I have sought to explain the requisite conditions of liability applicable in any FSMA claim, whether under s. 90A or its replacement, Schedule 10A (as and from 1 October 2010): see paragraphs 432 to 544 above. Certain particular legal issues arise in the context of the OEM claim which require further elaboration. These relate to:

(1) Whether the statements made in earnings calls and transcripts of earnings calls after 1 October 2010, on which the Claimants placed reliance, fell within the scope of the definition of *"published information"* in Schedule 10A, paragraph 2(1) FSMA (which came into force on 1 October 2010);

(2) The test for determining whether a statement is *"untrue or misleading"*; and

(3) The test of whether a PDMR within the Issuer knew it to be so, or was *"reckless whether it was untrue or misleading"* (what I have termed "guilty knowledge" in paragraph 448 above).

The statements on which the Claimants claim to have been entitled to rely in this context

3032. In the context of the OEM claim, the Claimants referred to and contended they relied on Autonomy's Annual and Quarterly Reports for the Relevant Period (that is to say, the Quarterly Reports for Q1 2009 to Q2 2011 and the Annual Reports for FY 2009 and

2010). It is common ground that these constituted *"publications"* or *"published information"* within the meaning of those expressions in s. 90A and its replacement (with effect from 1 October 2010) in Schedule 10A of FSMA respectively.

3033. However, the Claimants also referred extensively to calls and transcriptions of earnings calls in the same period, including the Q4 2010 earnings call, the Q1 2011 earnings call and the Q2 2011 earnings call, and appeared to rely on statements made in that context as also constituting *"published information*" to which Schedule 10A FSMA applied.

3034. I have explained, in the Introduction, my reasons for concluding that the calls and the transcripts of them did not constitute published information. It follows that, in my judgment, statements made in the earnings calls cannot found a claim under Schedule 10A of FSMA. However, as also noted in the Introduction, that does not mean that they are inadmissible or irrelevant: they may well be relevant to other conditions of liability, such as the state of mind of relevant PDMRs in making the statements now impugned, and the actual state of market knowledge.

3035. In the context of the OEM claim in particular, they may be of direct relevance to the fundamental questions of (a) whether the scope of OEM-derived revenues was explained to the market so as to become, in effect, market knowledge and (b) the Defendants' own understanding of the meaning of IDOL OEM and their perception of what the market would take the category to comprise and understand from the metrics given. Some may also be relevant to the question of what analysts and the investment community actually knew, or were told, though of course individual conversations should not be taken to import knowledge across a broader constituency.

Determining whether a statement is (a) untrue or misleading and (b) known to be so

3036. Obviously, whether a statement is knowingly false or recklessly made depends upon what its maker understood it to state about the matters to which it refers, and whether according to that understanding, what was stated was in fact true. In a case based on alleged deceit, the test is whether the statement was untrue, tested according to what the defendant considered to be, or envisaged would be understood to be, its meaning, though it will suffice also if the defendant was reckless in the sense of knowing that a statement might well be understood in a way which would render it (on that understanding of it) untrue or misleading.

3037. In many cases, there is no dispute as to the meaning of a given statement, and the questions then are whether it was untrue or misleading in its description of the matters to which it refers, and if so, whether the PDMR deemed responsible for the published information in which it appears knew it to be untrue or misleading, or was reckless as to whether it was or not.

3038. In such a case, the clear objective meaning of the statement, though not determinative, may itself be a relevant factor in determining whether the maker had any real belief in the meaning he now asserts. Thus:

(1) If the objective meaning of a statement is clear, and by reference to that meaning would be false, a defendant's claim to having thought and intended it to have some other meaning may be difficult to sustain. In such circumstances, the defendant will be forced to resort to some personal definition, or some

eccentric meaning, which may strain credulity. As the Privy Council said in *Akerhielm v de Mare* [1959] AC 789:

> *"For instance, the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true."*

(2) By contrast, as Males J (as he then was) noted in *Leni Gas & Oil Investments Limited and another v Malta Oil Pty and another* [2014] EHC 893 (Comm) at [7] to [9]:

> *"if a reasonable person in the claimant's position would not have understood that the statement in question was being made, that may make it unlikely that the defendant intended his words to be understood as making such a statement. As Mr Kitchener acknowledged, if the court is of the view that no reasonable representee could have inferred the representation contended for, it is highly unlikely that it will find either that this is what Dr Higgs intended or that this is what Mr Ritson in fact understood."*

3039. In other cases, however, what a reasonable person would have taken the statement to mean is not clear, and is disputed. The potential for such dispute is obviously far greater in a case such as the present, in the context of statements which (a) have no standardised or defined meaning, (b) have been given none by the maker, (c) have been the subject of a variety of explanations to different audiences at different times, and (d) in the case of the voluntarily provided OEM metrics, were expressly stated to be subject to *"qualitative"* assessment. Any search for what the posited reasonable person would have understood the statement to mean is further complicated in a case such as this (and possibly in any case where information is published generally), where the audience is disparate and comprised of persons in very different circumstances, with varying degrees of background knowledge and expertise, a few of whom may also be aware of other published information issued by the same issuer at about the same time though most others may not.

3040. The search for a single objective meaning in such circumstances is in reality something of a conceit; and it may be unnecessary and even unwise. Unnecessary, because, as Mr Miles submitted, the search in the context of a deceit claim is not for the single 'best' objective interpretation, as it would be in the context of disputed contractual interpretation: for the PDMR cannot be guilty of deceit simply because the court considers that on its interpretation of it, the statement was untrue: his knowledge of its falsity is ultimately the only test of dishonesty. Unwise, because the selected preferred meaning may skew the assessment of subjectively intended meaning, at least unless it is kept firmly in mind that at most it is relevant as a test of the credibility of the defendant's own interpretation or of the likelihood that the defendant fell upon the phrase precisely because of its ambiguity (and see paragraph 3047 below).

3041. Mr Miles went on to submit that if the court is persuaded that a statement alleged to be false or misleading is genuinely open to various meanings, and that asserted by the defendant is one of them (even if not the most likely or obvious one), the determination of the matter is, in effect, removed to the second stage of enquiry, and to an assessment of the defendant's actual state of mind. As Mr Miles put it:

> *"If there is a range of possible meanings, then in order to say someone has acted fraudulently, it is necessary to show that they either understood the term in the narrow sense contended for by the claimants or deliberately used the ambiguity for the purpose of deception."*

3042. That accords with the following extract from *Clerk & Lindsell on Torts* (22nd ed) at 18-25:

> *"Where a statement is capable of being understood in more than one sense, it is essential to liability in deceit that the party making the statement should have intended it to be understood in its untrue sense, or at the very least that he should have deliberately used the ambiguity for the purpose of deceiving the claimant."*

3043. Thus, for example, in the *Akerhielm* case itself, a buyer of shares who had relied on an ambiguous statement in a company prospectus (that shares had been "subscribed", begging a question whether the shares were paid up in cash or in some other way, or unpaid) failed in his action in deceit once it was shown that the defendants had honestly believed the statement to be true in the sense in which they had intended it to be read.

3044. Mr Miles submitted that there was just such ambiguity in the present case. The meaning the Defendants maintain they had intended was an available one, and (so they said) shared by many in the market, so that at worst the statements were unintentionally ambiguous: and according to that intended meaning, or one of two or more legitimate meanings resulting in ambiguity, the statement was neither untrue nor misleading.

3045. However, that submission, and Mr Miles's invitation to move straight to limb two, is premised on an initial conclusion that true ambiguity has been revealed by the dispute. The Claimants did not accept that. They contended that on proper analysis, the meaning conveyed by the OEM metric and the disputed expressions (OEM and OEM derived revenues) was clear, and as conveyed, was untrue. Although the expressions might, shorn of context, be open to different interpretations, the description of the OEM metric and the meaning attributed to the disputed expressions in the published information, resolved any ambiguity otherwise inherent in the expressions 'OEM' and 'OEM derived revenue' and left no room for any alternative interpretation. The Defendants had, in effect, supplied their own definition of the expressions in the published information.

3046. On this view, the Defendants were seeking to rely, not on ambiguity in the statements made, but on a private dictionary which the Defendants claimed to have built up in the market, in which the impugned expressions had or had acquired, on the basis of a special dictionary thus created, a broader meaning than the meaning apparently ascribed to them in the document taken as a whole. In other words, any ambiguity was introduced by some special meaning vouchsafed to the market, or more likely, a section of the market, which was not apparent from a process of interpreting the published information itself.

3047. It followed, on the Claimants' argument, that Mr Miles's approach of going straight to the question of what the Defendant intended assumed ambiguity where in fact there was none, and could result in an important factor being left out of consideration. Resort to an eccentric 'private dictionary' meaning would be difficult to sustain and itself cast dispositive doubt on the defendant's honesty in making statements in a form which relied on it; and indeed the question of guilty knowledge might also be determined by plain inconsistency between an arguable interpretation asserted by the defendant, and the other words the defendant has used in the presentation taken as a whole.

3048. I have concluded that, in this case, I am required to adopt the two-stage approach by the Claimants' assertion that any ambiguity in the meaning of the expressions used has been resolved by definitive language in the published information taken as a whole. In any event, I have concluded that the ambiguity is not so evident that I can safely take the shortcut to the question of the Defendants' subjective intention.

3049. In the circumstances it seems to me that there is no available shortcut such as Mr Miles in effect suggested; and to determine the OEM claim, I must assess:

(1) whether the market would have understood the expression *"OEM Derived"* materially to extend the nature of the business included in the OEM metric.

(2) What, at that time, the Defendants honestly intended readers of Autonomy's published information to understand to be conveyed by the OEM metrics they provided, the expressions *OEM* and *OEM derived revenue* they deployed, and the statements they made as to the scope and nature of Autonomy's OEM business;

(3) Whether, in the light of the answers to (1) and (2) above, the statements made and the metrics provided were true or untrue, or misleading, to the knowledge of the Defendants.[352]

3050. Incidental to these principal questions are the following further sub-issues:

(a) What, if any, account should be taken of the evidence of Analysts relied on by the Defendants in support of their position that there was an established market understanding that Autonomy's OEM business was broader in scope than the Claimants have depicted it to be and extended, for example, to upsells and PODS;

(b) Whether the Defendants were aware that those expressions would be likely to be interpreted by many as the Claimants maintain they did interpret them and deployed them (i) knowing that, so interpreted, they were untrue or misleading, or (ii) lacking any honest belief in their truth (so as to be reckless according to the meaning of recklessness laid down in *Derry v Peek* (1889) 14 App. Cas 337)) if so interpreted; and/or (iii) because they knew the expressions were ambiguous and consciously deployed the ambiguity to deceive the Claimants.

[352] It would suffice for the Claimants if, although the Defendants did not actually know the statements to be untrue or misleading, they were reckless as to whether they were untrue or misleading.

3051. I turn first to the way the OEM metric was put forward in Autonomy's published information.

What was stated in Autonomy's published information about the OEM metric?

3052. What was said about the OEM metric and OEM derived revenues in Autonomy's Quarterly Reports and Annual Reports can be summarised as follows:

(1) Initially, in the Q1 2009 and Q2 2009 Quarterly Reports, little more was conveyed about this category of business than that Autonomy was developing an *"OEM Program"* which involved sales of Autonomy software to key companies which would each *"OEM Autonomy technology",* that is to say, embed Autonomy software in their own products for onward sale.

The OEM Program was said to be growing, but little more information was provided, and nothing was said about the content or form of the OEM agreements.

(2) The Q3 2009 Quarterly Report was the first to provide *"Supplemental Metrics"* which referred to and measured *"OEM derived revenues"*. It cautioned that these metrics were *"provided for background information"* and *"may include qualitative estimates"*.

It was stated that *"More than 400 companies OEM Autonomy technology, including Symantec, Citrix, HP, Novell, Oracle, Sybase and TIBCO";* but no definition was provided of OEM derived business, nor was the form or content of the deals described.

(3) The 2009 Annual Report described OEM relationships (as well as cloud computing) as one of *"the new models of the software industry"* and as the vehicle to enable Autonomy's technology (especially in unstructured data analysis) to be applied to every area of IT, even areas in which Autonomy did not itself compete.

There was no discrete definition of OEM business; and the rubric *"OEM derived"* was not used.

However, it was stated that Autonomy had over 400 *"OEM relationships with other major software vendors that build our technology into their products*"; and that Autonomy was relied on by OEMs *"from virtually every major software sector"* to *"address the problem of unstructured information, provide unique next-generation functionality and deliver unparalleled performance"* by *"[embedding] Autonomy's award-winning technology into their software solutions"*.

It was stated also that:

"Autonomy's OEM customers bring Autonomy technology to vertical markets by embedding it in their own solutions. Autonomy benefits from the expertise of

a community of systems integrators and consultants who engage with customers to expand and sustain use of Autonomy products in a wide variety of industries".

For the first time, there was mention of the fee structure, which was said *"typically"* to provide for royalty fees based on the amount of sales by the OEM: it was stated that *"OEM and reseller arrangements…typically provide for fees payable to the group based on licensing of the group's software to third party customers"*. These royalties or royalty-type payments were said to be around three percent of the value of product sales.

Supplemental Metrics were provided, with a warning about qualitative estimates; but though these gave figures for key parameters, and in particular organic growth and cash conversion rates, they did not identify or distinguish OEM or any other business lines.

(4) The Q1 2010 Quarterly Report referred to and quantified *"OEM derived revenues"* and introduced more detailed *"supplemental metrics"* which separated out two constituent parts of OEM derived revenue, *"OEM Dev"* and *"OEM Ongoing"* and portrayed the OEM Program as growing strongly.

Still there was no overall definition of the types of revenue comprising OEM derived business nor any description of the form or content of OEM deals. The Supplemental Metrics were given as before, with the same warning about qualitative estimates.

(5) The Q2 2010 Quarterly Report expressly stated the OEM business to be Autonomy's *"fastest growing revenue stream"*, with a quote from Dr Lynch referring to *"a powerful networking effect underway as IDOL further penetrates the entire spectrum of enterprise software applications"*.

Supplemental Metrics were provided in a form which distinguished various business lines, including *"OEM derived revenues"* (which was sub-divided into *"OEM Dev"* and *"OEM Ongoing"*). There was no further definition of OEM derived business or the form or content of OEM deals. Again a warning was given about the supplemental metrics only being provided *"for background information and may include qualitative estimates."*

(6) The Q3 2010 Quarterly Report described strong (30% year on year) growth in "IDOL OEM revenues" as *"both a further endorsement of the unique capabilities of IDOL and reflects a growing network effect as more software companies choose to design their products with Autonomy inside."*

Supplemental Metrics were again provided, substantially in the same (revised) format, but prefacing the word "*IDOL"* before *"OEM derived revenues"* and quantifying each of the sub-components identified (*"IDOL OEM Dev"* and *"IDOL OEM Ongoing"*). As before, there was no definition of IDOL OEM or IDOL OEM derived, and no description of the form or content of OEM deals. The same warning about qualitative estimates was given.

(7) The Q4 2010 Quarterly Report described IDOL OEM as *"where Autonomy's IDOL is embedded inside other software companies' products…addressing most software vertical markets."* It added that:

"This is a particularly important revenue stream as it generates ongoing business across the broadest product set possible, in addition to up-front development licences."

Autonomy continued to depict IDOL OEM, with IDOL Cloud, as fast growing, high margin, highly attractive *"as they turn one-off sales into multi-year committed annuity streams",* replacing *"one off sales"*, and one of the *"key drivers of our business"*.

The Report drew attention to there being a short-term effect of this as appearing to depress growth, since one-off sales were recognised in full and immediately, but emphasised the advantage over the longer term of *"more valuable annuity streams"*. The impression conveyed was of the OEM business promoting the wide use and acceptance of Autonomy's software within the software industry.

Supplemental Metrics were provided in a slightly altered and truncated format but to the same effect: these indicated that in Q4 2010 IDOL OEM revenues totalled some 14% of all revenues. The previously invariable warning of "qualitative estimates" was no longer expressly stated.

(8) The 2010 Annual Report elaborated on the presentation in the Q4 2010 Quarterly Report, adopting the same description of IDOL OEM. Again, OEMs were described as software companies wishing to embed IDOL, and a warning was included in Dr Lynch's report as CEO of *"some seasonality in IDOL OEM sales as they are predicated on the rest of the software industry sales, and the period over which those vendors report their sales to us"*.

IDOL OEM growth was stated to have been 32%, and broadly similar statements as in the immediately preceding Quarterly Reports were deployed to expand on the value of turning *"one-off sales into multi-year committed annuity streams"*, and to emphasise that *"numerous world-leading software companies embed Autonomy's award-winning technology into their software solutions"*.

The fee structure was described as generating royalties, giving rise to higher margins than IDOL Cloud business. However, no breakdown between *"OEM Dev"* and *"OEM Ongoing"* was provided, and no mention was made of *"OEM derived"*: those terms appear to have dropped out of the description of the metric.

(9) The Q1 2011 Quarterly Report conveyed basically the same message, emphasising again IDOL OEM's importance as a revenue stream *"as it generates ongoing business across the broadest product set possible, in addition to up-front development licences"*.

However, this report did not include the information provided in the Q4 2010 Quarterly Report and the 2010 Annual Report which expressly depicted the

IDOL OEM category as comprising, in addition to up-front licence payments (which were mentioned), ongoing royalty payments paid by software companies which had chosen to embed IDOL in their own software for onward sale. No split between *"Dev"* and *"Ongoing"* was provided.

(10) The Q2 2011 Quarterly Report was in similar form to the Q1 2011 Quarterly Report, again emphasising the importance of IDOL OEM as a driver of Autonomy's business, providing strong growth and (like Cloud) a recurring and particularly important revenue stream *"as it generates ongoing business across the broadest product set possible"*.

The description of IDOL OEM as being *"where Autonomy's IDOL is embedded inside other software companies' products"* was repeated.

Again, no split between "*Dev"* and *"Ongoing"* was provided: again, those sub-categories were not mentioned, though reference was made to revenue from sales by OEM *"in addition to up-front development licences"*. OEM business was (like Cloud business) presented as a *"recurring model"*, deriving *"recurring revenues with long-term contracts."*

3053. In none of these Reports was there any express mention of either *"upsell"* or *"PODS"* revenue. Nor was there any other express reference to sales of functionality to end-users (as distinct from to the OEMs). The Defendants' contention was, as it had to be, that the reference to *"ongoing business across the broadest product set possible in addition to up-front development licences"* was easily broad enough to extend to such sales, and certainly did not exclude them.

3054. The Claimants relied strongly on breakdowns of OEM derived revenue provided in certain quarters (Q1 2010, Q2 2010 and Q3 2010). These divided *"OEM derived revenues"* into two sub-categories (*"OEM Dev"* and *"OEM Ongoing"*). The Claimants pointed out that according to those breakdowns, the lion's share of IDOL OEM revenue consisted of ongoing royalty revenue (see paragraph 3056(4) to (5) below). Thus, in each of the three quarters (Q1 2010, Q2 2010 and Q3 2010) in which this breakdown was provided, the sum of *"OEM Dev"* and *"OEM Ongoing"* was equal to total reported *"OEM derived revenues"*, with the vast majority (at least 90%) being attributed to *"OEM Ongoing"* revenue.

3055. The Claimants' latter point was simple but important: in addition to emphasising the preponderance of royalty revenues, the two stated categories left no arithmetical or other room for any other sources of OEM revenue. Thus, if, as the Defendants contended, the expression "*OEM derived revenues*" communicated the inclusion of upsell and PODS revenue within IDOL OEM revenue, this could only be because upsell and PODS revenue could properly be regarded as coming within one or both of the sub-categories: "*OEM Dev*" and "*OEM Ongoing*".

3056. The Claimants' case is, as I would summarise it, that taken together, a reasonable reader of all these various Reports would have understood them to be demonstrating the rapid growth of what in early 2009 was a relatively new line of business and as representing that:

(1) Autonomy's OEM business was based on sales to (or at least predominantly to) some 400 of the largest software companies, each with a very large customer base and considerable market presence and penetration: this was a means of introducing IDOL software to a very broad market.

(2) Those software companies (a) produced their own software (b) embedded IDOL software into their own software products under a licence purchased from Autonomy and (c) licenced or sold their products with IDOL embedded on to their own customers.

(3) Sales of software embedded with IDOL through the OEM channel (a) endorsed the unique capabilities of IDOL and reflected its penetration of the software market, and its wide acceptance and use in the software industry, and (b) promoted wider acceptance and use of Autonomy's software in the software industry, furthering the objective of IDOL OEM becoming the software of choice for anyone with unstructured data analysis needs.

(4) Revenue from IDOL OEM business (whether described as *"IDOL OEM"*, *"IDOL OEM derived revenues"* or *"OEM derived revenue")* came from two sources, that is (a) upfront fees for the purchase of a development licence (sub-categorised in the Reports for Q1 2010, Q2 2010 and Q3 2010 as *"OEM Dev")* giving the right to embed the software into an OEM's own products and (b) royalties which normally became payable on the licensing by the OEM's own customer of the combined product (sub-categorised by way of further information in the Reports for Q1 2010, Q2 2010 and Q3 2010 as "*OEM Ongoing"* and referred to as *"OEM royalties"* in Q4 2010, the 2010 Annual Report and as *"ongoing business"* in Q1 2010 and Q2 2010).

(5) The predominant component of OEM derived revenue in every quarter was the ongoing element. Breakdowns of these revenues, provided in Q1 2010, Q2 2010 and Q3 2010, allocating total OEM Derived revenues between each of those two categories, appeared to show that (a) some 90% or more of the total revenue came from *"OEM Ongoing"* payments and (b) the two categories accounted for all revenues, and there was no room for any other source of revenue.

(6) *"OEM Ongoing"* revenues were presented (in Q1, Q2 and Q3 2010) as derived from payments by OEMs to Autonomy calculated as a percentage (usually about 3%) of revenues received by the OEM from the sale of its own products with embedded IDOL, and as likely to expand over time as OEM partners embedded more IDOL software functionality in product releases.

(7) Such payments represented a rapidly growing, committed (by contractual obligation imposed on the OEM) and multi-year, recurring revenue stream of greater value than one-off payments, notwithstanding some adverse impact on short-term growth because revenues classified as "royalties" for accounting purposes could only be recognised in the accounts over time.

(8) Another hallmark of the ongoing revenue stream was that it was generated without any ongoing effort by and at no additional cost to Autonomy, resulting in nearly 100% gross margin.

(9) The strong organic growth of IDOL OEM revenue had by 2010 (when such growth was stated to be 32%) become a driving force, with IDOL Cloud, of Autonomy's business and could be regarded as an important measure both of Autonomy's current success and its future prospects.

3057. HP did not read all the published information. Mr Sarin read the most: but he considered only the 2010 Annual Report and the quarterly reports for Q1 2011 and Q2 2011. The Defendants pointed out that most of the OEM transactions sought to be impugned were from Q3 2010 or earlier. I accept the Defendants' point that it was not until Q4 2010 that anything was given resembling a definitive description of IDOL OEM in terms of being *"where Autonomy's IDOL is embedded inside other software companies' products…addressing most software vertical markets"*. However, it being common ground that the scope of IDOL OEM was intended to be constant over the entire Relevant Period, it seems to me that the Claimants were entitled to rely on the description as applicable across the Relevant Period; and, in any event, HP was entitled to rely on the way IDOL OEM was described in Autonomy's published information in the Annual Report for 2010.

3058. In summary, the Claimants' case was that the reasonable reader of Autonomy's published information (including the reasonable reader who had only read the annual report for 2010 and the quarterly reports for Q1 2011 and Q2 2011) would have expected and the market would have understood:

(1) Most, if not all, of Autonomy's OEM business to be generated through transactions with large software companies.

(2) The revenues of that OEM business to come exclusively from development licences sold to such OEM partners and recurring payments due from those OEM partners to Autonomy by way of royalties in respect of their onward sales to third parties of software products with IDOL embedded under licence.

They would not have expected any material part of the revenue included in the OEM metric to be derived from sales to third parties, and would not have regarded the prospect of multiple sales to third parties involving sales effort and cost on the part of Autonomy as being the same as recurring revenue from an OEM partnership at no further cost to Autonomy and thus near 100% margin.

The Defendants' response on the scope of IDOL OEM conveyed by the published information

3059. As indicated in my summary of their case, the Defendants contended that (a) in standard parlance and in the market, it was not only companies in the business of developing their own software which could properly be regarded as OEMs: the category was not generally understood to be so limited and hardware companies could be OEMs as well; (b) the Claimants' approach rendered redundant the word "derived" and had given no or no sufficient content to the description of the OEM metric as expressly including all revenue derived from the OEM relationships, as well as revenues generated from an OEM directly.

3060. As to (a), the Defendants drew support from the evidence of Mr Daud Khan ("Mr Khan"): when cross-examined, he accepted that OEMs are not limited to software

companies. They contended that there was no reason why OEM relationships with customers in hardware or other sectors would have been less attractive than software OEMs, and that the same rationale which commended OEM partnerships with other software companies would also apply to a partnership with large hardware companies. They reasoned that the important issue was the market penetration and low costs upsells that an initial sale of a licence to an OEM could achieve; and it mattered not in terms of that objective whether the OEM developed its own software, or was a manufacturer of hardware which embedded IDOL onto its hardware.

3061. Dr Lynch suggested that market penetration across a broad range of industries is in itself desirable. Dr Lynch said that he would be keen to publicise an OEM where "*someone was OEM-ing our software on to a piece of hardware*", or an OEM in the healthcare sector, since it would be a very positive thing to show Autonomy's involvement in broader sectors.

3062. The breadth of the expression "OEM" contended for by Dr Lynch is well illustrated by the example of the transaction with Tottenham Hotspur Football Club in March 2011 (OEM48). Tottenham Hotspur is obviously neither a software nor a hardware company. In cross-examination, it was put to Dr Lynch (in effect) that a football club could surely not reasonably be considered to be an OEM, with an expectation of embedding the Autonomy software it acquired and then onward licencing the product to its own customers. Dr Lynch responded that, on the contrary, Tottenham Hotspur might well decide to sell its website solution on to another football club and it would thereby be an OEM, and the revenues would be OEM derived revenue (see below).

3063. As to (b), the Defendants maintained that they had themselves coined the description of the revenues from the OEM business as *"OEM derived"* to make clear that the category was not confined to a transaction with an OEM yielding revenue from the OEM itself by way of upfront licence fee or royalty payments. This was a lynch-pin of their case. Accepting (as the Defendants did accept) that none of the phrases in contention was or is a term of art or has any established accountancy definition, in ordinary English usage the word *"derived"* connotes something received or obtained from a source or origin and it was apt to cover a wider category of revenues than merely those received from the OEM itself as an upfront payment or royalty: it could include revenue arising from sales of IDOL transactions made possible by, or for which the need arose in consequence of, the embedding and licensing of IDOL software further to the original OEM sale.

3064. According to the Defendants, that would obviously include sales of enhanced functionality (an *"upsell"*) to the OEM itself (which the Claimants accepted to be the case only if the OEM would embed that additional functionality into its software product for on-sale to its own customers); but it would include also the sale of enhanced functionality to an end-user which had come to use IDOL software and need or want that functionality as a result of purchasing from an OEM software with IDOL embedded in it (which the Claimants did not accept).

3065. Both the Defendants positively asserted this. Mr Hussain's pleaded case was to that effect. Dr Lynch's Re-Amended Defence and Counterclaim pleaded as follows in this regard:

> *"160.1. Given the nature of Autonomy's core IDOL software, third party OEMs frequently sought to embed Autonomy's technology in their own*

products through a variety of contractual arrangements. OEM customers would typically license a small subset of the many functions in IDOL – perhaps four or five of the 500 available – which could be further restricted by the permissible amount of data that could be used with the software.

160.2. Following these sales, Autonomy would have the opportunity to "up-sell" additional functionality or capacity either to the original OEM purchaser or directly to an entity that had purchased the product from an Autonomy OEM customer. Autonomy considered and accounted for any follow-on license-sale – whether to the original OEM customer or to an OEM customer's customer – as OEM-derived revenue, because the follow-on sale occurred as a consequence of the initial OEM sale.

…

161.4 When referring to transaction types falling within OEM-derived revenues, Autonomy's published information also made it clear that contracts and situations varied and did not purport to describe all transactions as holding identical characteristics. The OEM model and its characteristic of having derived revenues from follow-on licence sales or upsell transactions had been discussed extensively in analysts' reports since the earliest days of the OEM business and it was clear that the market knew and understood Autonomy's OEM model."

3066. Dr Lynch himself described it in cross-examination as follows:

"*The metric that we give as a management metric which is OEM-derived includes that revenue but also includes revenue which has been made possible by our OEM programme, but that may – well, it does include sales where the purchaser is not an OEM. So, for example, an upsell.*"

3067. Thus, sales to OEMs with a view to IDOL software being embedded into and re-sold by that OEM as part of its own software of that type could, he suggested, conveniently be described as *"core"* OEM transactions, and the revenue derived from them as *"core OEM revenue"* to distinguish it from the wider category of OEM derived revenues discussed above. The wider category would extend to sales of further functionality to persons which had acquired the original IDOL software embedded in a bundle of software sold by an OEM: though not "core" sales generating core revenue in that sense, these were nevertheless sales parasitic on, made possible and in that sense "derived" from, the original core sale, and generated OEM-derived revenue accordingly.

3068. To my mind the clearest explanation of the distinction between OEM and OEM-derived, and what the Defendants said they intended to be the considerably wider scope of the latter, was provided by Dr Lynch in the course of his cross-examination about a list of the ten largest OEMs which Autonomy provided to HP at Mr Sarin's request in the late stages of HP's due diligence exercise in August 2011. I must return later to the dispute about the *Top 10 list*, but I quote now and at some length from that cross-examination for the illumination it offers of Dr Lynch's case on OEM and OEM derived:

"Q. We've been through this before. Mr Sarin asked you for total – the ten largest OEM.

> *A. OEMs, yes.*
>
> *Q. No, I think what he asked you for was the top ten OEM customers by revenue?*
>
> *A. That's right. So an OEM-derived contributor might not be an OEM customer.*
>
> *Q. Well, with respect, it's still an OEM customer –*
>
> *A. No, it's not. An OEM customer is someone who takes our software and builds it into their product, and there is – and then they sell that to other people, and that is an OEM. Okay? And our OEM business is about those OEMs. The metric that we give as a management metric which is OEM-derived includes that revenue but also includes revenue which has been made possible by our OEM programme, but that may – well, it does include sales where the purchaser is not an OEM. So, for example, an upsell. So, just to go through this, for the sake of argument, Oracle sells something to Ford, we'll get revenue from Oracle because they are an OEM, and then, if Ford buys something to clip on to that piece of Oracle which uses…the connection to Oracle* [*quaere* Autonomy]*, then that is a sale that has been enabled and driven by that network effect that we were talking about and that is an OEM-derived sale. But the sale to Oracle is a core OEM deal, the sale to Ford contributed to derived, but Ford is not an OEM.*
>
> *…*
>
> *I don't think there's any dispute between us that, if you sell an upsell to Ford, then Ford is not an OEM, yet that still goes into OEM-derived."*

3069. The Defendants contended that there was nothing in the published information sufficient to displace the broader meaning which they said was intended by the word *"derived"*. They submitted that the Claimants had based their narrow definition of the term from a selective reading of certain parts of the published information, whereas in fact no such definition could fairly be spelt out of the metric as described in the published information.

3070. They added that the express warning that the figures were provided as background information and might include *"qualitative estimates"* reflected the fact and connoted that the category was descriptive and not definitive, and that the inclusion of particular amounts within the category was a matter of judgment and estimation, rather than a rigid rule. Thus, for example, a judgement might be required and made as to whether the link between source and sale was sufficient to warrant the sale being categorised as derived from (and made possible or driven by) the original sale to an OEM.

3071. The Defendants relied especially on the following:

(1) Throughout the Relevant Period up to and including Q3 2010, there was nothing in Autonomy's published information that stated in terms either (a) that Autonomy's OEMs were all software companies or (b) that the revenues within the OEM metric were restricted to payments direct from the OEM.

(2) The Business Review section in the 2009 Annual Report stated that "*As part of our comprehensive OEM Program, numerous world-leading software companies embed Autonomy's award-winning technology into their software solutions*" (emphasis added). It did not purport to give an exclusive definition and nor did it say that the programme was restricted to such arrangements: on the contrary, it indicated that was only a part of the programme.

(3) The Claimants' suggestion that a comment in the Q2 2010 press release that "*IDOL further penetrates the entire spectrum of enterprise software applications*", and in the Q3 2010 press release that the growth in IDOL OEM revenues "*reflects a growing network effect as more software companies choose to design their products with Autonomy inside*" demonstrated that it was made clear that the idea that all the OEMs were software companies was an incorrect gloss. While these comments (correctly) highlighted the success of the OEM programme in the software sector, there was no suggestion that the only OEMs were software companies.

(4) The 2010 Annual Report retained the statement from the 2009 Annual Report that "*As part of our comprehensive OEM Program, numerous world-leading software companies embed Autonomy's award-winning technology into their software solutions*." It also contained the following words, on which the Claimants placed particular reliance:

> *"IDOL OEM. IDOL OEM is where Autonomy's IDOL is embedded inside other software companies' products. IDOL is now embedded in most major software companies' products addressing most software vertical markets. This is a particularly important revenue stream as it generates ongoing business across the broadest product set possible, in addition to up-front development licences. In 2010 IDOL OEM revenue totalled $132 million, up 32% from 2009. 42 new agreements were signed during 2010 with 10 new agreements signed during Q4 2010, including deals with Nuance, HP and Vericept."*

(5) But there was no suggestion in that extract that OEM revenues were limited to revenues received directly from the OEM. On the contrary, this passage stressed the breadth of the business generated by the OEM programme: "*it generates ongoing business across the broadest product set possible*". Nor did it purport to give a comprehensive definition of what is categorised as IDOL OEM revenue; at most, it is a general description, qualified by the words appearing above the passage quoted, that "*the trends are provided for background information and may include qualitative estimates*." In any event, these words should not be read in isolation: given what was said five pages earlier ("*As part of our comprehensive OEM program…*"), the reader would

understand that the embedding of IDOL in software companies' products did not represent the totality of Autonomy's OEM business.

(6) The Q1 and Q2 2011 press releases contained the passage saying that "*IDOL OEM is where Autonomy's IDOL is embedded inside other software companies' products*", but without the indication given in the Annual Reports that this was only a part of Autonomy's OEM business. However, readers interested in Autonomy would not have read the quarterly press releases alone: they would read them together with the fuller account in the Annual Reports. In this case, HP read the 2010 Annual Report, and it would not have been led by the Q1 and Q2 2011 press releases into thinking that IDOL OEM revenues were more narrowly drawn than in the Annual Report.

3072. The Defendants contended also that the warnings about *"qualitative estimates"* would not have been necessary if the category was confined to "straight" OEM transactions: whereas there was obviously some measure of qualitative assessment or estimate in determining whether to include a later transaction as derived from the original transaction.

3073. The Defendants brought their points on the scope of OEM derived revenues and OEM Ongoing together in the submission that once it is understood that OEM derived revenues included sales direct to customers of OEMs, it is unsurprising that they included revenues from companies other than software companies: even if the OEM itself was in the software sector, its customers could well be operating in different fields.

3074. The Defendants relied on the same point in relation to sales where there was a restriction requiring the customer to use Autonomy software for internal purposes only: where a sale is made direct to an OEM's customer, that customer would be using the software for its own purposes, rather than acting as an OEM itself, so an "internal use" restriction would cause no problems.

3075. As to the Claimants' point that (a) the further breakdown of *OEM derived revenues* into the two sub-categories of *"OEM dev"* and *"OEM Ongoing"* which Autonomy provided in Q1 2010, Q2 2010 and Q3 2010 appeared to allow no room for the inclusion of revenue from any other source (see paragraphs 3054 to 3055 above) and (b) Mr Hussain had adopted the same sub-categories as representing all such revenues, the Defendants' answer was to the effect that this depended on rigidly confining the description *"OEM Ongoing"* to royalties, and (for example) altogether excluding upsells and PODS, for which there was no warrant. Again in the context of questions related to the *Top 10 List*, Dr Lynch put the Defendants' position forcefully and clearly in cross-examination (the underlining is mine):

> *"…what we did with our OEM business was we created a definition which was well communicated to the market over a very long period, at least ten years, on multiple occasions, and our numbers were done on that basis. Yes, there are some judgements in those numbers, and it was made clear that situations varied and that there were qualitative estimates. That was actually the wording in the annual report.*
> *You [the Claimants] have come up with a different definition of these terms and you've recalculated things on your own basis which bears*

no relation to our terms, and also, I would venture, bears no relation to the commercial reality of what was going on."

3076. The Defendants also submitted that the words *"OEM Ongoing"*, according to their definition, included not only royalties, but also revenues (a) made possible by the original OEM sale and (b) which could be expected to be ongoing from reliable repeat business. Their rationale was that OEM customers, having embedded Autonomy's software in their own products, were in practical terms tied in: they would be almost bound to renew their contracts and purchase updates and add-ons from Autonomy on a regular basis. Phrases such as *"multi-year committed annuity streams"* (as used in Autonomy's published information, see paragraph 3052(7) above) and Mr Hussain's references to *"ongoing royalties"* should be interpreted similarly, as extending to what Dr Lynch described in his first witness statement as *"follow-on sales…made possible by the initial OEM sale"*. Dr Lynch explained in cross-examination that even if not legally committed to renew, an OEM would in practical terms have to do so if its product had succeeded, because:

> "*people don't make and launch software products that are going to be sold for a year. They're generally the lifetime of a software product, probably 10/15 years. So once an OEM puts our technology in, remember you have to re-engineer the thing to take technology out usually, so it's a big job. So once you're in, you're in a situation that you're going to make money out of that situation for multiple years.*"

3077. Dr Lynch went on:

> *"Autonomy's OEM business generated substantial ongoing revenue. Once the technology was incorporated in a product, the product was likely to continue being shipped and a renewal was likely to be generated at the end of the original licence. It was not uncommon for an OEM customer to enter into six renewal contracts with Autonomy. For example, EMC entered into a sixth amendment to its OEM Agreement with Autonomy in 2010."*

3078. The Defendants concluding in their written closing submissions that:

> *"Far from limiting the scope of the revenues derived from the OEM set, this phrase emphasised the breadth of those revenues. The OEM business model was a way of generating on-going revenues as it tied in OEMs and required them to continue doing business with Autonomy. Ongoing business need not necessarily be recurrent royalties. As well as royalties, periodic renewals and ad hoc upsells derived from the original OEM relationship provide a revenue stream from ongoing business."*

3079. In summary, the Defendants' case was that:

(1) There was nothing in the wording of the published information denoting that Autonomy's OEM business and its OEM partnerships were exclusively with software companies.

(2) Nor was there anything in that wording sufficient to displace the meaning of "OEM derived": on the contrary, the introduction of the prefix "derived" was intended to denote the inclusion of any revenue judged to have been made possible by an initial OEM sale: they had cultivated that meaning in the market, and by Q4 2010 it had become notorious that OEM business included "OEM derived".

(3) The rationale of OEM derived revenue applied whether the OEM was a software or a hardware company.

(4) Repeat sales to third parties who had been sold a product embedded with IDOL and thus became not only aware of Autonomy and its software offering but often dependent on Autonomy for any enhancements or functionality needs were both referable to the original sale of a licence to the OEM in question and likely to lead to repeat or recurring sales;

(5) The revenue stream from upsells and PODS to end-users could be expected to endure and increase, as could repeat purchases by OEMs who, having embedded IDOL would almost inevitably require upgrades, add-ons and renewal or extension of licences; and prospective revenue from all that business was properly regarded as offering similar added commercial value as repeat revenue even if it was not automatically recurring like a royalty.

3080. Dr Lynch had to accept, however, that in not a single one of the Quarterly Reports, Annual Reports or even Earnings Calls in the Relevant Period was there anything expressed which either (a) distinguished between "straight" or "core" OEM (or just OEM) and "OEM-derived" sales or (b) referred to the word *"upsell"* or the expression *"PODS"*. Although Dr Lynch insisted nevertheless that by that time the extended scope of the transactions and revenues categorised as OEM sales and revenues had become common knowledge in the investment community and the market, he had to resort to the evidence from analysts reports and explanations said to have been given to a section of the market[353] which I have determined do not establish any market understanding to be taken into account in determining the meaning which reasonable readers would have attributed to the published information.

3081. I turn to my assessment of the competing arguments as to that meaning.

My assessment of what was conveyed by the published information itself

3082. I have already noted that the Claimants acknowledged (and I think this was accepted by the Defendants) that neither *"OEM"* nor *"OEM derived revenue"* were expressions with any settled or standard meaning: both were capable of different meanings, and the latter was, of course, self-coined. Subject to the issue as to some cultivated general understanding in the market (which I address further later), an understanding as to the

[353] *"Upsells and PODS were discussed frequently between 2002 and 2009, multiple times, and not only was it done on earnings calls, but it was in analysts reports, communications with fund managers and analysts and their writings as well."*

scope of Autonomy's OEM business and the nature of the revenues it generated had to be formed from what Autonomy said about them in its published information.

3083. The Defendants' contention that the introduction of the prefix *"derived"* clearly signalled a widening of the scope of business allocated to the OEM metric beyond the ordinary scope of OEM business, and that transactions and revenues which might not have constituted "core" OEM business and revenue nevertheless were counted as being part of that OEM metric, supposed that the market would have recognised some extension from a usual meaning: but there was no usual meaning, and readers were left to cull the meaning from Autonomy's published information read carefully in context. Put another way, the notion of an "expanded" meaning going beyond the ordinary assumes an established ordinary meaning; here there was none and a reader would not have been alerted to a broader than usual scope of business, because there was no "usual" scope of business.

3084. I consider that what must be assessed at this first stage is what impression was given in the published information of the nature and scope of Autonomy's OEM business and revenues in the relevant statements, taking into account that the statements usually included warnings about qualitative estimates. It is in a sense in the nature of a jury question rather than one of legal definition.[354]

3085. In my view, the reasonable reader would have read the published information starting from the premise (expressly stated in the annual and each quarterly report in 2010 and in Q1 and Q2 2011) that OEM business generated *"a particularly important revenue stream"* and had special characteristics which materially distinguished it from other lines of Autonomy's business. In identifying those special characteristics, the careful reader would have particularly noted:

   (1) The references to the OEMs as *"other major software vendors"* or as being within *"the software sector",* the emphasis placed on the number and standing of the 400 software companies with whom Autonomy had established software partnerships, and the references to OEM partners *"leveraging Autonomy's award-winning technology into their software solutions"* and to IDOL being embedded in *"other software companies' products"*;

   (2) Dr Lynch's own special commendation of the OEM business in his review in the 2010 Annual Report as being based on partnerships with *"numerous world-leading software companies [which] embed Autonomy's award-winning technology into their software solutions"* which were *"highly attractive to us as they turn one-off sales into multi-year committed annuity streams"*;

   (3) There was no mention of revenue from OEM business other than from development licence fees and royalty payments, no room allowed in the Supplemental metrics for any different source of revenue, and no mention either

[354] However, it would be permissible to answer that the impression given is equivocal, or to use the more familiar word, ambiguous: so that if the statement were true by reference to any of the meanings, that would conclude the matter against the Claimants, unless in fact the Defendants intended a meaning which would make the statement untrue.

of what the Defendants now present as having been a major source of revenue, namely upsells and PODS.

3086. I cannot accept the Defendants' submissions that the published information, without reference to what they insisted was general market understanding, depicted OEM business in terms which allowed for a broader category of revenues than from development licence fees and royalty payments by OEMs to Autonomy. I do not accept that what the Defendants referred to as *"the narrow categories"* put forward by the Claimants were simply pulled together from *"various snippets from the Annual Reports and the quarterly press releases and earnings calls to come up with an unsustainably restrictive definition"* (as the Defendants suggested they were).

3087. I do not accept the Defendants' alternative submission that the presentation was ambiguous. The attraction offered was clearly depicted: a growing line of business generating, at little or no expense to Autonomy and thus a near 100% margin, recurring royalties from large 'captive' partners using their size, reputation and market presence to sell products with IDOL embedded under licence, as the Claimants submitted.

3088. In any event, I cannot accept that a reasonable reader would have understood from Autonomy's published information that a substantial proportion of revenue categorised as OEM derived revenue included (a) revenues from one-off licences sales for the purchaser's internal use only or (b) revenue from VAR sales.

3089. In my judgment, taking the published information as a whole, but without regard to anything said at Earnings Calls or any views expressed by Analysts, the impression conveyed by Autonomy's published information was that:

(1) Substantially all Autonomy's OEM relationships were with software companies, and in value terms most were with the 400 or so software companies expressly referred to.

(2) Substantially all revenue was derived from OEMs in the form of (a) development licence sales proceeds and (b) royalties paid by the OEM to Autonomy.

3090. Further, in my judgment, the same impression would have been given to a reader who read only the 2010 quarterly reports and the 2010 annual report and the quarterly reports for Q1 2011 and Q2 2011.

Should regard be had to evidence that various Analysts considered the market understood OEM Metric to be broad in scope?

3091. In further or alternative support of their submission that the expression was known to have extended the scope of OEM business, however, the Defendants contended that the OEM metric and the disputed expressions ("*OEM"* and *"OEM derived revenues"*) were (as the Defendants submitted) to be understood by reference to what the Defendants described as *"the understandings that had built up in the market over time as a result of explanations given by Autonomy".* They sought to rely in this regard on evidence of the views of various Analysts who covered Autonomy and wrote advisory notes on its business and prospects for the benefit of their clients.

3092. This evidence was disputed, both as to its relevance and as to its message. The principal focus was on (a) the evidence of two analysts, Mr Khan (two of whose analyst notes, one in 2002 and the other in 2004 were relied on also), and Mr Morland; (b) the evidence of one of Autonomy's corporate brokers, Mr Shelley, and the evidence of the manager of a hedge fund that invested in Autonomy, Mr Pearson; and on (c) what the Defendants sought to dismiss as *"a small selection of analyst notes"* especially identified by the Claimants.

3093. The Claimants also objected to Dr Lynch's attempt to rely upon what he argued was the market understanding concerning IDOL OEM on the broader basis that (a) it resembled expert evidence of some general market approach and understanding; but it was not adduced and could not be relied on as such; (b) such evidence could in any event lead nowhere, since *"the possibility that an analyst or investor might have been privy to additional information, not found in the published information, is neither here nor there".* On that basis, the Claimants dismissed Dr Lynch's recourse to what he argued was the market understanding as a *"red herring".*

3094. I accept the Claimants' broader objection in substantial part. I would add by way of both explanation and gloss that in my view:

(1) As emphasised previously, the question in this case is not one of contractual interpretation: nevertheless, at this first stage of identifying what the disputed statements would have been taken to mean by the reasonable reader, the principles established in the context of contractual interpretation provide a guide more generally in any context of linguistic analysis. The fact that the statement is unilateral does not alter that: see *Kyle Bay Limited t/a Astons Nightclub v Underwriters subscribing under Policy No. [019057/08/01]* [2007] EWCA Civ 57 at [31] citing *Mannai Investment Co Ltd v Eagle Star Assurance Ltd* [1997] AC 749 as putting to rest any doubt in that regard.

(2) It is well established that (even in the absence of apparent ambiguity) words must always be read in context to ascertain their intended meaning, and their context includes (in the oft-quoted words of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896):

> *"absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man"*

However, this is subject to the requirement that it should have been *"reasonably available to the parties"* and to the exclusion for the purpose of establishing objective intention of evidence of negotiations and declarations or other evidence of subjective intentions.

(3) That said, the concept of what is *"reasonably available to the parties"* must be kept within sensible limits, especially where the words spoken are addressed not as between the parties, but are published generally to a mixed audience, as in the context of published information. In such a context, if words are to be given a special "private dictionary" meaning the special private dictionary must be shown to have been available to all those to whom the words were addressed.

(4) In the context of words published generally, as by (inexact) analogy with words in a standard form contract, resort to background information or knowledge should be sparing, and probably only used where it is clearly established that it was shared generally within the market or audience to which it was addressed. At this first stage, the search is for a meaning that would have been generally ascribed to the disputed statement(s), if one can be identified.

(5) Proof of a generally accepted market dictionary or understanding is difficult. It will ordinarily require expert evidence. Such proof is not supplied by evidence that the Defendants vouchsafed to particular persons a key to understanding not provided to the market as a whole: for example, in Earnings Calls which I have determined do not constitute published information.

(6) Similarly, evidence (such as was relied on by the Defendants in this case, as elaborated later) from particular analysts of what they themselves understood, or considered to be understood in the market more generally, will only carry weight if it is accepted as a reliable proxy for the market as a whole. I agree with the Claimants that the evidence of what analysts thought is not expert evidence and was not adduced as such. Unless I were to accept the evidence of what the analysts told me as a reliable proxy for the views of the market, I do not think it would rise above evidence of a particular point of view, possibly informed by essentially non-public information. Analysts' notes and views may inform, but they do not demonstrate or represent, a general investor outlook.

(7) Proof that a significant body of analysts or others in the market or audience held a different view of the meaning of the statements made will obviously tell against any assertion of general market understanding; and especially strongly so where (as arguably again in this case) market understanding is being used to establish a private dictionary meaning inconsistent with what the words otherwise appear to connote.

3095. I do not accept that the evidence of the views of various analysts relied on by the Defendants provides a reliable proxy, not least because of the contrary evidence (analyst notes) which the Claimants also sought to rely on. I am not persuaded that there was reliable evidence on which the Defendants could rely to establish an understanding shared by those to whom the published information was addressed of a different or modified meaning of the disputed expressions in that published information relating to the OEM metric.

3096. It follows from this conclusion that, in my view, I should assess what the published information conveyed to its audience about the OEM business and the OEM metric without regard, at the first 'objective' stage, to evidence of the market understanding alleged by the Defendants (though that does not exclude the possibility of a mixed or ambiguous message and does not mean that the evidence of market analysts is irrelevant, since it may be relevant at the second stage of assessing what, subjectively, the Defendants themselves intended to convey).

3097. However, lest I am wrong in my conclusion that there was no reliable evidence of a general accepted market understanding, I turn to address in more detail the Analyst

evidence and any further evidence in relation to the Defendants' case that (a) the Claimants had adopted an excessively restricted and self-serving approach and had failed to take into account that (b) Autonomy had cultivated over the course of time an appreciation and understanding in the market of the phrase "OEM derived" (and cognate expressions) and that (c) it had become accepted and notorious that the OEM metric extended to business generated by reference to an original OEM sale.

Analyst/other evidence and market understanding

3098. The Defendants' case that the Claimants' restrictive definition of IDOL OEM revenues (limiting them to revenues from sales of software to companies (i) whose businesses included licensing that software to third parties and (ii) who had the intention and capability of embedding IDOL software into their own software products for onward licensing to those third parties) was inconsistent with the evidence of two of the Claimants' own witnesses, Mr Daud Khan ("Mr Khan") and Mr Paul Morland ("Mr Morland"), who had covered the company on-and-off for many years, and with *"the understanding that had built up in the market over time as a result of explanations given by Autonomy."* The Defendants relied also on the evidence of their own witnesses, Mr Pearson and Mr Shelley.

3099. The Claimants' submissions engaged at some length with the content of analyst reports, including in a detailed Appendix devoted to "*Evidence concerning market understanding",* in support of their case that, if relevant, what in fact the analyst notes showed was a widespread understanding that the analyst community in general understood the OEMs involved to be software companies embedding IDOL technology in their own software products and IDOL OEM revenues to consist entirely of development fees and ongoing royalties.

3100. To determine this aspect of the dispute I address the evidence of Messrs Khan, Morland, Pearson and Shelley in turn, before turning to the evidence of other analysts relied on by the Claimants.

Mr Khan

3101. Mr Khan said that he understood the term "OEM" as used by Autonomy in its published information by reference to:

> *"the standard use of the word and the commentary they provided around their use of the word."*

3102. Mr Khan had covered Autonomy intermittently since 2001 (first for Merrill Lynch and then, after 2006, for Cazenove) and had become a "negative analyst" in the sense that (a) as he accepted, from January 2008 onwards, he consistently recommended selling Autonomy stock and (b) many, if not most, of his clients had short positions in Autonomy stock.

3103. In his witness statement, he stated that it was not his *"understanding of the substance of IDOL OEM revenue"* that it included revenues derived from direct sales to customers of OEM customers. However, he accepted that he recollected having been told:

"by someone from Autonomy management mentioning, I believe off-line, after an earnings call, that OEM revenues included direct sales to customers that had purchased software from an Autonomy customer" and

"assumed that such a sale would be related to the original OEM purchase, allowing the customer to increase the functionality of the embedded software."

3104. He reconciled what otherwise might appear to be inconsistent positions by explaining that:

(a) *"given the focus of the published disclosure on sales to software companies, a royalty model and recurring revenue, making no mention of the inclusion of sales to the customers of OEM customers, I assumed that this was a minor part of Autonomy's overall revenues"*; and further that he

(b) *"did not believe that the inclusion of such revenues was common knowledge amongst analysts. It was not a standard interpretation of OEM"*; and he added that

(c) *"If such sales had been material, this would have been significant from a valuation perspective as they would have involved costs that would not arise in a royalty model, and hence would not command as high a valuation in the same way as OEM revenue…"*[355]

3105. When cross-examined, he largely reiterated this evidence but introduced the refinement that he thought there were *"probably two definitions of upsell"*, one an upsell to the OEM customer and the other an upsell directly from Autonomy to the OEM customer's customer to add functionality to IDOL acquired as part of software purchased from an OEM. He explained that the latter was the species of upsell he had not understood before the "off-line" conversation and had considered not to be a material part of the OEM business. The former was the sense he may have had in mind when describing upsell fees as one of three types of revenue from OEMs in a note dated 26 April 2002 which he had written on Autonomy when at Merrill Lynch (though he did not mention it in his witness statement).

3106. It was not clear whether he had this in mind also in a second analyst note he had written for Clear Capital Markets[356] in January 2004, which he had not mentioned in his witness statement either, and which included the following passage suggestive that whatever upsells were:

"What we have seen is that up-sell OEM revenues have started to be a significant contributor albeit as volatile as royalties or up-front payments."

3107. This was, again, a little at odds with his witness statement, in which he stated that he had:

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[355] Mr Khan and Mr Morland agreed that IDOL OEM revenue commanded a higher market valuation than other revenue streams by virtue of its predominantly recurring nature. Mr Shelley and Mr Pearson concurred.
[356] A UK based stockbroker and wealth manager

> *"… assumed that this was a minor part of Autonomy's overall OEM revenues…If such sales had been material, this would have been significant from a valuation perspective as they would have involved costs which would not arise in a royalty model, and hence would not command as high a valuation in the same way as OEM revenue…"*

3108. He also stated that he did not believe that *"the inclusion of such revenues was common knowledge amongst analysts. It was not a standard interpretation of OEM."* Mr Khan agreed, however, that deciding whether or not a particular contract should be categorised as upsell would be a matter of judgment.

3109. When cross-examined, Mr Khan sought to explain inconsistencies between what he had written in his notes for Merrill Lynch and Clear Capital (and also a note for Cazenove) and his evidence in his witness statement as lapses in memory; but in a passage of his cross-examination which seemed to me to cast some doubt on the status of his evidence in his witness statement, and some concern as to the way it had been assembled, he also accepted that:

> *"My witness statement was drafted by the claimants' lawyers using my testimony from the US and then we had dialogue around the various paragraphs which I then authored and asked for changes."*

3110. Mr Khan could not recall whether he knew that PODS were also included in OEM revenue ("*I honestly can't remember. Maybe they were*"). He was referred to an earnings call in Q4 2002 in the course of which, in response to a question about the contribution of the *"PODS technology"* to sales, Dr Lynch had estimated that it was then running at around $2 million a quarter, noting also that it was a *"different route to market"* and a useful way of getting IDOL into the relevant organisation, and Mr Hussain had added that *"…in terms of the POD sales in Q4, it's included within the $1.5m of up sells for the OEMs"*. These references did not trigger any recollection: and Mr Khan made the point that this was more than 17 years ago.

Mr Morland

3111. Mr Morland's evidence in cross-examination was that the market understood that both PODS and upsells were included in Autonomy's OEM revenues:

> "Q. *Let's quickly deal with OEM. Autonomy reported its OEM revenues using a number of different terms over the years: OEM, OEM-derived, IDOL OEM-derived, IDOL OEM. You understood them to mean the same thing, didn't you?*
>
> *A. Yes.*
>
> *Q. And the market understood that OEM-derived included pods and upsells didn't it?*
>
> *A. Yes."*

3112. However, in re-examination, Mr Morland qualified this by saying that:

> *"at the time I was unfamiliar with the term 'pod' but I understood it was to do with connectors and so I understood an upsell to be a sale of an additional connector to the OEM partner at the time. I never really understood it…I wasn't familiar with the term 'pod' at the time."*

3113. The Claimants pointed out that the difficulty with the question to Mr Morland in cross-examination was that the expression "upsell" is ambiguous: some take it to include only sales of additional licence or functionality to an OEM, some take it to extend to sales to an end-user. I agree with the Claimants that Mr Morland appears to have assumed the limited meaning; and he was simply unclear what PODS were.

3114. More generally, Mr Morland's evidence was rather unclear. The impression I formed overall was that he regarded the OEM metric in much the same way as Mr Khan, and would have expected it to be substantially comprised of revenue derived from sales to OEMs for embedding and onward sale.

Mr Pearson

3115. Mr Pearson was one of the witnesses called by Dr Lynch. His evidence was that the category was understood differently by different investors. In his witness statement he stated that:

> *"To my knowledge, there was no 'standard interpretation' of OEM-derived revenue at the time…The definition varied company to company. Therefore, I knew that a company's OEM-derived revenue figure could have a range of revenue streams included in it, such as licences, royalties, and upsells. Quite clearly, Autonomy's OEM revenue included both recurring and non-recurring revenue streams, as was stated by Autonomy in multiple conference calls from 2002 – 2004…"*

3116. The results presentation for Q1 2008 similarly noted that *"OEM breakdown includes some licence and is almost all IDOL".* The Defendants appeared to latch on to this as denoting that the scope and nature of OEM derived revenues was as they had suggested, and thus included non-recurring revenue; and they emphasised Mr Pearson's evidence in cross-examination that this was a point that had been well understood in the market for some time. But this was, to my mind, a misunderstanding or mistaken assertion: all that the presentation seems to me to have signified was that OEM business generated revenue from the sale of development licences to OEMs (*"OEM Dev"*) as well as recurring payments from OEMs for onward sales of products with IDOL embedded (*"OEM Ongoing"*). That was of course well known and plainly stated to the market: but that is of no assistance in the present context of considering how *"OEM Ongoing"* and thus *"OEM derived"* were constituted.

3117. Mr Pearson's own assertion that he *"knew"* from the fact that the term was not defined and had different meanings *"company to company"* that therefore the *"OEM-derived revenue figure"* could include upsells was either a *non-sequitur,* or simply a general statement as to the potential, but not necessarily the actual, meaning of the term. Either way, it was of little assistance; and Mr Pearson also had difficulty in pointing to any support for including upsells in any published information or recorded commentary after 2004.

3118. The only post-2004 analyst research note which Mr Pearson was able to pray in aid (when drawn to his attention in re-examination) was one dated 6 January 2010 and written by Mr Briest at UBS. That note did, in a table highlighting that implied growth in *"royalty/upsell sales" "might be more like 50-60%"* and a chart tracking the acceleration in sign-up rates against an acceleration in what were described as *"OEM upsell/royalties",* thus contain a reference to *"upsell"* in the context of IDOL OEM revenue. The same Note, in its analysis of *"The OEM opportunity"*, also spoke of *"a high pedigree of software relationships within its OEM list"* and identified the significance and value of OEM relationships as being *"perhaps the best visible evidence of IDOL's differentiation and competitive advantage"* and the high operating margin on all such sales "*given the related R&D costs are absorbed in the core business and the costs of sales will be relatively modest for incremental royalty streams."*

3119. However, nothing in the Note, as I read it, demonstrated an understanding that upsells to customers of the OEM partner were also included and I agree with the Claimants that the references to upsells were to sales of additional software or functionality to the OEM partner itself: the presentation being of upsell revenues having a similar nature and the same source as royalties. On that reading, Mr Briest's Note does not take the matter further for the Defendants, and tended rather to support the Claimants' case both as to OEMs typically, perhaps invariably, being software companies and as to there not being included in OEM derived revenues revenue from dealings with a third-party customer.

3120. The Claimants also noted that the 6 January Note was the last report written by Mr Briest that mentioned upsells. In subsequent notes, Mr Briest only mentioned development fees and ongoing royalties.

3121. In any event, I accept the Claimants' contention that the value of Mr Pearson's evidence was diminished by (a) his claim, which he had to draw back from in cross-examination, that by 2009 the OEM category had become relatively less valuable because IDOL was by then so well known to and well regarded in the market that the market penetration offered by OEM sales was no longer of the value it had previously had; (b) his difficulty in pointing to any specific examples of explanations by Autonomy, after 2004, that justified the conclusion that the category included revenue from direct sales to end-users; as well as (c) his continuing close connection with Mr Hussain and his continuing investment in Dr Lynch's business interests, which may explain a somewhat partisan approach considered that the market also understood that OEM included some licence revenues.

Mr Shelley

3122. Mr Shelley (who, like Mr Pearson, was called as a witness by Dr Lynch, but who is not relied on or even referred to at all in the Defendants' closing submissions, as the Claimants noted with some glee) gave evidence in his witness statement that he did:

> *"not recall there being a discussion between Autonomy and the analyst community regarding the composition of reported OEM sales. If this had been an area of interest for analysts and investors, I would have raised the issue with Autonomy."*

3123. This was difficult to square with his own requests, of which he was reminded in cross-examination, for a breakdown of the composition of reported IDOL OEM, and in

particular, what the split was between new deals and royalties from previous deals. Autonomy's response further indicated a perception that it was understood that those were indeed (substantially at least) the constituent revenue sources. Mr Kanter responded to Mr Shelley as follows:

> *"A very small proportion of OEM revenue relates to upfront development fees for new transactions, typically $200k per transaction. Royalties for OEM contracts vary, depending on what IDOL functionality is being used by the OEM. Four percent is an example of a typical OEM, and are reported on gross sales of the OEM's product. Royalties are normally paid quarterly in arrears."*

3124. The same emerged from further exploration with Mr Shelley in the course of his cross-examination, of various documents, including a variety of analysts' notes with a view to showing that in fact analysts were clear as to the substantial composition of OEM revenue, and there was no sign in any of them of it being contemplated that it might include a substantial proportion of non-royalty one-off sales to end-users.

3125. He was taken to a draft of the Q4 2010 Quarterly Report containing his comments as well as those of a colleague of his at Goldman Sachs (just after Mr Shelley had moved there in late 2010). The draft Report noted that IDOL OEM revenues:

> *"comprise two elements: up-front development licences as third party software vendors develop new products built on IDOL; royalty payments earned from sales of those products when they come to market…".*

3126. He was then also taken to a note published by Credit Suisse on 18 March 2010 entitled *"The Autonomy OEM Opportunity"*. In addition to describing the OEM partnerships as being with *"software vendors"*, the Credit Suisse Note explained OEM derived revenues as being comprised of development licence fees and *"royalties paid to Autonomy for ongoing sales made by OEMs once they are up and running"* as Mr Shelley had to accept (and see further as to this note, paragraph 3129(1) below).

3127. The following exchange during Mr Shelley's cross-examination seemed to me to confirm his acceptance that, more generally, the high margins attributed to OEM revenues, were characteristic of, and only really explained if OEM ongoing was largely, even if not exclusively, comprised of, royalty payments rather than one-off direct sales:

> *"Q. So when Credit Suisse is talking about gross margins of over 95% and operating margins of around 75%, they're talking about margins on royalty payments, not direct sales by Autonomy, aren't they?*
>
> *A. It would appear so, yes.*
>
> *Q. So the understanding that Autonomy's reported ongoing OEM payments are royalty payments, which we've seen is an understanding they had, rather than revenues on direct sales, that is critical to Credit Suisse's valuation of the OEM business in this note isn't it?*
>
> *A. It would appear so, yes.*

…

Q. The exercise here is based on the understanding that the OEM ongoing revenues are royalty revenues, isn't it?

A. Yes, that's right."

Assessment of that evidence and comparison with analysts notes relied on by the Claimants

3128. Looked at in the round, I consider that this evidence suggests that it was recognised by some analysts that Autonomy might have some leeway in terms of including revenue generated by sales to an end-user even if (as would be usual) they were one-off sales for which the opportunity was provided by the embedding of IDOL in software licensed to that end-user by an OEM: but it does not signify any appreciation in the market that revenue of that sort would represent any material part of the total IDOL OEM revenue. Nor, to my mind, does it establish any general market understanding that the prefix 'derived' materially increased the scope of the OEM classification.

3129. The impression that the market continued to regard the OEM metric as substantially confined to licence and royalty-type payments is confirmed by evidence of the understanding of other analysts relied on by the Claimants. The Claimants relied on the following:

(1) A detailed 17-page note about Autonomy's OEM business issued by Credit Suisse on 18 March 2010, entitled "*The Autonomy OEM Opportunity*", and authored by Mr Frederick Grieb ("Mr Grieb")[357]. The note recorded Mr Grieb's understanding of the meaning of "*OEM Dev*" and "*OEM Ongoing*":

> ***"OEM Development****: OEM Development fees are the upfront fees of $200k that are paid to Autonomy, upfront, upon the signing of an OEM agreement.*
>
> ***OEM Ongoing****: These are the royalties paid to Autonomy for ongoing sales made by OEMs once they are up and running."*

There was no mention of upsell or PODS sales anywhere in this note. The entirety of Autonomy's "*OEM derived revenues*" appears to have been understood by Credit Suisse, a sophisticated evaluator of Autonomy's published information, to be made up of development fees and ongoing royalties from licence sales by an OEM of products in which Autonomy software was embedded under licence from Autonomy.[358]

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[357] As well as Chandramouli Sriraman.

[358] Indeed, when analysing why IDOL OEM revenues were a "*high-growth, high margin opportunity*", Credit Suisse referred only to the "*initial $200,000 fee to begin work with Autonomy*", and the "*~3% of OEM license revenues as a royalty payment on average*". Credit Suisse's analysis of Autonomy's historic IDOL OEM revenues, and its projection of Autonomy's future OEM revenues, was broken down entirely into these "*OEM Development*" and "*OEM Ongoing*" categories.

(2) A Morgan Stanley analyst note dated 30 June 2008 describing Autonomy's OEM business as essentially comprising *"an upfront fee and then a 3% royalty on its product sales that embed IDOL on a going forward basis"*;

(3) A Nataxis analyst note dated 11 March 2011 describing OEM revenues as comprised of (a) a non-refundable upfront fee and (b) royalties on the sale of the software;

(4) A Nomura analyst note dated 22 April 2010 (by an analyst also regarded by Autonomy as "sound" according to the assessment referred to in paragraph 3130(1) below) breaking down all reported IDOL OEM revenue into *"OEM Dev"* and *"OEM Ongoing"* and describing the latter as *"royalties"*;

(5) An initiating note[359] by Standard & Poor's ("S&P") dated 27 August 2010 to the same effect;

(6) A Societe Generale ("Soc Gen") initiating note dated 23 March 2010 (by an analyst described by Autonomy as a "drifter") stating that *"OEM sales are extremely profitable as they carry a 100% gross margin"* which Mr Shelley accepted suggests that Soc Gen shared Credit Suisse's understanding since such high gross margins are consistent with royalty payments, and not direct sales by Autonomy.

3130. In short, these analyst notes suggest that a number of influential market analysts understood from what they were being told that Autonomy's OEM business was confined to what Dr Lynch described later as "Core" OEM. Dr Lynch was notably discomfited by the Credit Suisse note[360], and offered uncharacteristic bluster when confronted with it:

(1) It was first suggested to Dr Lynch that Credit Suisse did not understand that upsells were included in reported OEM revenue, and he responded that he would be "*very surprised*" if Credit Suisse had got this wrong. Having then been shown that Credit Suisse's understanding did not support his case, Dr Lynch then said that he did not know who Mr Grieb was: "*obviously Credit Suisse didn't understand it, whoever this person is*" and queried whether he (Mr Grieb) had actually been *"present in the calls where this was all explained".* Yet Mr Grieb was an analyst who was both known to, and well regarded by, Autonomy's executive management and investor relations team. Indeed, Mr Grieb was an analyst considered by Autonomy or its advisers to be "*Sound*" (as opposed to "*Corrupt*", or "*Feeble-minded*" or a "*Drifter*").[361]

(2) Dr Lynch then sought to paint Credit Suisse as an exception in not knowing about the inclusion of upsell and PODS revenue. He went so far as to tell me

[359] That is to say, that firm's first note on Autonomy.
[360] In which it may be noted that Mr Grieb described OEM business as being where *"Autonomy allows software vendors to use the company's IDOL technology via OEM agreements"*
[361] This was the view expressed in the slide-deck sent by Mr Brown to Dr Lynch and Mr Hussain on 3 December 2010. Furthermore, the Claimants contended that contrary to the impression given by Dr Lynch in cross-examination, Dr Lynch knew *"perfectly well"* who Mr Grieb was, having met him in September 2010 at a meeting in Autonomy's Piccadilly offices.

that *"everyone knew, with the possible exception of the one analyst"* (Mr Grieb).

3131. The Defendants broadened this to submit that this evidence of other views suggested only that the primary focus of a *"a small number of analysts"* was on core OEM revenue: it did not establish that those analysts perceived the OEM metric to include no other revenues at all; and if they did, and if they took to be excluded from the OEM metric any revenue which was not recurring, and all upsells (even of additional functionality to an OEM customer) it was altogether more restrictive than even the Claimants had put forward. As mentioned above, even the Claimants came to accept that "upsells" did at least include sales of:

> *"additional functionality to the original OEM purchaser…provided the revenues arose from licences that permitted the licensee to embed additional IDOL software in the OEM's own software product for onward licensing to the OEM's customers."*

3132. However, I do not think it ultimately assists the Defendants on this aspect of the case. What these notes suggest to me is that the focus of a not insignificant number of analysts from well-regarded firms, and (I take it) of their readership and addressees as a whole, was on the particular value to be ascribed to (a) the typically recurring nature of IDOL OEM revenues (b) the especially low cost and high margins of sales effected through an OEM and (c) the prospect of ever greater penetration into the unstructured data market, bringing the potential for IDOL increasingly to become the solution of choice embedded within a broader software package sold by large OEMs with a corresponding presence and reputation in the market. Revenue which did not have any of those characteristics or qualities, and could only be distinguished from IDOL Product revenue by reference to some antecedent sale to an OEM, would not have been anticipated to form any substantial part of the revenues included in the OEM metric.

3133. It seems to me to be clear from the analyst notes collated by the Claimants that many analysts, and it is to be inferred, many addressees, would not have expected revenues from one-off sales, or sales direct to an end-user rather than an OEM, which generated no ongoing and recurring revenue stream, to represent any material proportion of the revenue comprised in the OEM metric. If they expected any such revenues at all, they would not have expected the amounts to be such as to upset the description of the OEM metric as predominantly, even if not exclusively, made up of a recurring royalty revenue stream derived from OEMs producing software themselves which embedded IDOL in that software and licensed the combined product to end-users.

3134. Indeed, on that basis, I am not persuaded that there was such a division of understanding between the analysts relied on by the Defendants and those relied on by the Claimants.

3135. In any event, I consider that it is possible to identify revenue which, having none of the qualities associated with OEM revenue, addressees of Autonomy's published information and market analysts would not have expected to form any material part of the amounts included in the OEM metric. As to that:

(1) It seems to me that the touchstone for analysts and investors was that the revenue included in the (straight or core) OEM metric was derived from either

development licences sold to an OEM (whether or not a software company) for the OEM to embed IDOL into its products for sale to an end-user, in which case they fell within the description *"OEM Dev"* or from royalty payments on revenues earned by the OEM on onward sale to an end-user, in which case they fell within the description *"OEM Ongoing"*.

(2) Revenue from sales which, but for an antecedent transaction between the purchaser and an OEM, was not in any other sense "OEM-derived", and which had none of the characteristics that made OEM revenues particularly valuable (their recurring nature, especially low costs and high margins and the market penetration amongst (to use a phrase which will place this judgment in its historical context in the time of Covid-19) "super-spreaders" of the software (as were the large OEMs)), would not have been considered by addressees to be any material part of the OEM/OEM-derived metric.

(3) In my view, these included upsells and PODS directly to end-users which cannot comfortably be described as "upsells" because (a) they were not sales to the same person as had originally purchased the goods for which additional functionality was required; (b) they were not sales of OEM products; (c) they did not give the purchaser any right to embed IDOL into products for onward sale; (d) they did not enhance the royalty rate or generate any new multi-year royalty stream (or in some cases an upfront payment in lieu of it); and (e) the costs of the sales were not absorbed by an OEM, so that the marginal profit was unlikely to be either recurring or different from ordinary IDOL Product sales.

(4) Likewise, revenue from sales of IDOL to OEMs which were not calculated to result in IDOL being embedded because the OEM was not a software company and/or because the license granted was restricted to the internal use of the IDOL software, and sales which were not structured and/or intended to generate a recurring royalty revenue stream (or in some cases, a lump sum in advance in lieu if it), also fell outside what I have found Autonomy presented in its published information and addressees of that information understood the scope of the OEM metric to be.

(5) Sales of hardware, and other sales which were not of IDOL software, would not have been understood to be included in the IDOL OEM metric either: the fact that the purchaser had in some anterior transaction acquired an Autonomy product from an OEM, or was purchasing non-IDOL goods to supplement or add to the functionality of a previous purchase of IDOL software embedded in an OEM product, would not, in my view, have been understood to fall within that metric.

(6) Another debated category was revenue from repeat renewals of development licenses. Dr Lynch insisted (quoting from his second witness statement) that *"Even OEMs that did not include ongoing royalties provided ongoing revenue streams, as it was extremely common for OEMs to be renewed."* He gave as an example that EMC renewed its OEM six times prior to HP's acquisition, and again even thereafter. I accept the commercial sense of this, which Dr Lynch explained clearly when cross-examined as follows:

> *"... people don't make and launch software products that are going to be sold for a year. They're generally the lifetime of a software product, probably 10/15 years. So once an OEM puts our technology in, remember you have to re-engineer the thing to take technology out usually, so it's a big job. So once you're in, you're in a situation that you're going to make money out of that situation for multiple years."*

(7) But whilst I accept the commercial logic, I am not persuaded that it is of much assistance to Dr Lynch. The renewal posited is with an OEM for continued embedding of Autonomy software yielding a royalty-like payment (or sometimes a payment in advance to cover the term, which Dr Lynch explained would be called an *"upfront royalty")*. In that event, the revenue upon renewal would either be recurrent or its equivalent upfront; but whilst any renewal might be likely it could not be said to be recurrent. Dr Lynch sought to rely in this context on the evidence of Mr Collet when it was put to him that the renewal would *"lead to recurrent revenues",* to which Mr Collet replied *"It might lead to renewal upon the end of the agreement. If that is what you call recurring revenues."* But I did not understand Mr Collet to be indicating that that is what he would have called recurrent revenues; and I have concluded that there is nothing to support the suggestion that either analysts or the market more generally would have considered revenue from repeat business to be like or analogous to a *"multi-year committed annuity stream"* (as Dr Lynch described the characteristic which made the OEM business so *"highly attractive to us"* in his statement in the 2010 Annual Report).

3136. In the result, I have concluded (and see paragraphs 3086 to 3089 above) that the narrow "objective" view of the meaning of the metrics provided was that which probably prevailed amongst both the analysts and in the market, with some leeway for the occasional borderline case permitted by the warnings Autonomy expressly stated (to the effect that the metric was for background information and that the decision to include revenues within it would involve some *"qualitative estimates"*) which I consider would have been taken to connote some flexibility and room for subjective judgement.[362]

3137. In any event, I consider that a more detailed review of the views expressed by analysts at the time confirms me in my view that there is not any sufficient evidence of there having been any general market understanding that the OEM metric extended to business judged by Autonomy to have been made possible (IDOL OEM *"derived"*) by some earlier sale to an OEM as well as the OEM sale itself.

(e) Was the published information false and misleading?

3138. In the RRAPoC, the Claimants identified a total number of (initially) 68 (but subsequently amended to 67) transactions of over $1 million in the period Q1 2009 to Q2 2011 which they alleged were incorrectly characterised as giving rise to IDOL OEM revenue during the Relevant Period. Their total value was $254,964,000. This compared

[362] Even though that express warning was not included in the reports for Q1 2011 and Q2 2011 (where the figures appeared in the *"Financial Review"* section which was described as representing a *"a commentary on key trends in the quarter"*) I am prepared to assume that a reader of the run of financial statements would have had the warning in mind.

to a total value of all such deals worth $1million or more during the Relevant Period of $293,500,000.

3139. Thus, the Claimants pleaded that approximately 87% by value of the OEM transactions they had analysed had characteristics which did not match the description of IDOL OEM revenue in the published information so as to render the statements in it false.[363]

3140. As previously explained, the Claimants did not at trial pursue a case in relation to a transaction with Bloomberg in Q2 2011 (the last one listed in the above Schedule 8), so that the Claimants ultimately identified and relied on 67 OEM transactions not having characteristics which were necessary for revenue from the transaction to be allocated to the IDOL OEM metric. The Claimants calculated that these transactions in total accounted for some 80% of the revenue included in the OEM metric, though the Defendants disputed this figure and did not accept that there was any demonstrated basis for it.

3141. The Claimants divided the revenues (allegedly comprising about 80% of the whole) which they submitted were wrongly included in the metric into three principal (but sometimes overlapping) categories:

(1) Revenues from sales of IDOL to non-software companies, which did not license software to their own customers, and so had neither the intention nor the capability to embed Autonomy's software into their own software products. In most, if not all, cases of this type, the reality was that the purchaser simply intended to deploy the software acquired from Autonomy for its own internal use. The principal examples given by the Claimants were:

(a) various sales to government agencies[364], which by definition are not in the business of selling anything to anyone, let alone their own software products with embedded IDOL software;

(b) a sale to Tottenham Hotspur football club of a solution *"intended to enable a system to provide the following functions at the level found in a Premiership football club's ordinary operations: CRM, ticketing, player analysis, retail, internet and web design".*

This category included sales to companies which plainly intended to deploy the software on hardware supplied to them for internal use: these companies included Bloomberg (OEM10), MetLife (OEM27), JP Morgan (OEM28), as well as revenue from non-software companies who could not embed the software in their own product;

(2) Revenues from sales of software licences that expressly limited the purchaser's right to use the Autonomy software, and prevented the purchaser from

[363] See the Notes at Schedule 8 to the RRAPoC, which explained that *"The analysed transactions represent approximately $293.5 million (93%) of the $315.9 million of revenue categorised as IDOL OEM in the Relevant Period. Of the transactions analysed, approximately 87% were found not to be IDOL OEM ($255.0 million of $293.5 million)…If all of the non-analysed transactions are assumed to have been properly characterized as IDOL OEM, approximately 81% of the value categorised as IDOL OEM…(or 86% in the period from Q3 2009 to Q2 2011) did not arise from IDOL OEM transactions."*

[364] As end-user, whether through a direct purchase or purchase from a VAR.

embedding the software into its own products for onward sale or licensing to third parties.

(3) Revenues from transactions that by virtue of the nature of the contract, or because the revenue was not properly recognisable under IAS, could not properly be classified as a sale giving rise to IDOL OEM revenue. These included:[365]

(a) Licence sales associated with hosting contracts which enabled those customers to archive digital information in an environment hosted by Autonomy but were not sales to software companies which embedded IDOL technology into their own software products for onward licensing to third parties, and where in any event restrictions on the use of the licenced software for such purposes was prohibited (including six impugned hosting transactions, worth a total of $31.1 million, where the Claimants alleged that the data continued to be hosted by Autonomy on Autonomy's facilities using Autonomy software and (according to the Claimants) the revenue should not have been recognised at all);

(b) Hardware sales, including (i) a transaction under which Autonomy agreed to sell to Bloomberg *"hardware, software and services"* for a total sum (all classified as OEM revenue) of $7,129,000 of which the hardware element was $5,718,010 and (ii) a transaction with Rand covering hardware which involved a sale of Arcpliance and a licence to use DS Mail (but not IDOL software), under a contract which limited use of the licensed software, prohibited the making of any copies, sublicensing and distribution, and made clear that its use was to be to provide a hosted email archiving service to end-users;

(c) Ten impugned VAR transactions, totalling $59.9 million of revenue, under which neither the VAR nor the end-user was permitted or intended to embed IDOL into its own products, and where the revenue should not have been recognised, and seven of which (involving $40.1 million of revenue) were not followed by any sale to an end-user during the Relevant Period;

(d) Ten components of impugned reciprocal transactions involving $55.9 million of revenue; and

(e) Five transactions totalling $11.6 million of revenue from the sale of consultancy services by MicroLink, a subsidiary of Autonomy.

[365] It may be noted that the Claimants contended that *"Where an impugned OEM transaction…is also impugned elsewhere in the case, such that the revenue should not have been recognised at all, the fact that this revenue was classified as IDOL OEM revenue served to exacerbate the misleading nature of reported IDOL OEM revenue. That follows from the fact that IDOL OEM revenue, a particularly valuable revenue stream, was also fraudulently inflated. Further, VAR, hosting or hardware transactions are, by definition, incompatible with Autonomy's description or definition of IDOL OEM revenue."*

3142. The Claimants' analysis was that from Q3 2009 to Q2 2011 inclusive, that estimate of 80% of the revenue included in the OEM metric had one or more characteristics of (a)-(e) below:[366]

(a) Revenue from licences sold by Autonomy where the terms of the licence restricted the licensee to internal use of the software only;

(b) Revenue derived from hardware;
(c) Revenue derived from contrived VAR, reciprocal or hosting transactions;

(d) Revenue derived from transactions generating only a single up-front payment and no royalties (the Claimants' case being that none of the 67 in fact gave rise to royalties, even if provision was made in the contract for them)[367];

(e) Revenue derived from sales which were not IDOL sales by Autonomy.

3143. The Claimants submitted that in none of the 67 transactions above described, which they estimated to represent 80% of the revenues classified as OEM derived, were any of the revenues derived from royalty or other payments of a recurring nature.

3144. Furthermore, the Claimants contended that even in relation to the remaining 20% or so of revenues allocated to the IDOL OEM metric which they accepted was such as to generate high margin royalty income from OEMs, most were restructured in favour of accelerated upfront one-off payments, which (because discounted for early payment) yielded in aggregate less in total revenue over the course of the transaction. Many OEMs accepted this since the lump sum was smaller and relatively good value for them (the only advantage to Autonomy being immediate receipt of revenue which could immediately be recognised in its accounts).

3145. The effect of the one-off prepayments, according to the Claimants, was to reduce still further the amount of revenue in the IDOL OEM metric which consisted of ongoing royalties, and still more to reduce the amount representing royalty payments at a level of 3%, thus aggravating the untrue and misleading nature of the statements made by Autonomy in its published information.

The Defendants' response

3146. The Defendants' response on this aspect of the dispute concerning these analyses and numbers had four primary limbs:

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[366] The OEMs are numbered according to their position in the table provided at Schedule 8 to the RRAPoC. The same name and value are ascribed to them as in Mr Hussain's quarterly revenue spreadsheets that were provided to Deloitte, with footnotes provided in the Claimants' further tables in their written submissions suggesting explanations of any discrepancies.

[367] In respect of some there was a royalty clause [OEM1,6,11,15,18,31,34,35,44,52,60] but either none resulted (sometimes because of a commutation to a single up-front payment) or none should have been recognised because it was a reciprocal or other impugned transaction [OEM1,11,13,15,18,23,31,34,35,44,52] or there is no sufficient evidence to warrant treating revenue as royalty [OEM20,29,30,39,47,57,67]

(1) The Defendants rejected as being artificially and incorrectly restrictive the basis on which the Claimants alleged the 67 OEM transactions in question to have been wrongly classified. They denied that the characterisation of the impugned transactions was untrue or misleading. In accordance with the Defendants' more flexible and broader interpretation, their case was that revenues classified as IDOL OEM reflected a qualitative estimate of all IDOL business in the period in question generated through the OEM channel/network which Autonomy would not otherwise have been able to generate. In his Defence, Dr Lynch had pleaded, for example, that a non-software company could be an OEM and revenue from sales to an OEM would be classed as OEM derived[368], as also should sales to end-users of added functionality or PODs. According to the Defendants, these transactions had not been shown to be incorrectly classified.

(2) The numbers had been compiled by Autonomy's Finance Department in close consultation with Deloitte and listed on spreadsheets provided to and carefully ticked-off by Deloitte: Deloitte had thereby reviewed and verified Autonomy's classification of transactions as OEM transactions for the purpose of testing the OEM revenue figures.

(3) The summary reasons given in the Claimants' written closing were not adequate for the purpose of testing the Claimants' complaints as to classification, and these had not been put to Dr Lynch.

(4) The Claimants' assertion that 80% of the revenue characterised as IDOL OEM was misallocated was just that, an assertion, and it had not been supported by evidence.

(5) Further, in a number of cases, the Claimants' reasons for saying that revenues were wrongly classified within OEM was that the transaction from which the revenue was generated was challenged in some other part of the case, as an alleged reciprocal transaction, or impugned VAR transaction or (in at least one case) a hardware transaction, and that was not a proper basis of challenge without a separate analysis as to why they were not properly characterised as OEM-derived.

3147. As to (1) in the preceding paragraph, it follows that on the Defendants' own case, considerable amounts of revenue were allocated as OEM-derived which did not have what I have concluded would have been taken by addressees of the published information to be the special characteristics of that metric. It further follows from that conclusion that whilst I consider that such addressees would have expected there to be scope for *"qualitative estimate"* or subjective judgement as to whether in particular instances the link between the transaction to which revenue was referable and a prior OEM transaction was sufficient to warrant differentiating it from, for example, income referable to IDOL Product transactions, they would not have expected the inclusion of substantial amounts of revenue from categories of transaction which had not the special characteristics associated with the metric to be within that scope. Both Defendants knew

[368] In his Defence, and in his witness statement, the example given was that *"a delivery company may develop a smartphone application for tracking parcels which they sell to other parcel delivery companies. If, in developing that app, they use Autonomy and then they sell the app to others, they will be acting as an OEM."*

that, on the contrary, there were substantial amounts included in the OEM metric which were neither licence fees paid by an OEM nor ongoing payments payable by an OEM in respect of onward sales under licence of products embedded with IDOL. (That does not necessarily mean that the Defendants were dishonest: it is a matter for consideration at the next stage of the analysis whether at the time (a) they honestly intended the broader meaning they now assert and (b) whether they honestly considered the revenue to have been entirely properly allocated in accordance with their own understanding of the metric; but it does mean (if the amounts of revenue in question were substantial) that the published information was misleading.)

3148. Similarly as to (2) in paragraph 3146 above, although the involvement of Deloitte is a matter to which I must return (see paragraphs 3166 to 3185 below), the fact (if shown) that Deloitte did accept Autonomy's finance department's categorisation of revenue as IDOL OEM which had not the characteristics which I have concluded an addressee of the published information would have associated with the metric, can only go ultimately to the issue whether the Defendants were acting dishonestly. Any comfort or confirmation they may have obtained from Deloitte's approval would not alter the fact that the published information was, on the basis of my conclusions, misleading.

3149. The question raised by (3) in paragraph 3146 above relates back to the first of the two issues that I addressed in the introduction to this chapter as to whether what the Claimants had done was sufficient for the purpose of identifying the characteristics of the 67 impugned transactions without further evidence of their own or cross-examination of Dr Lynch. My judgment is that it was: see paragraphs 3010 to 3023 above.

3150. More specifically as to (4) above, in his oral reply, Mr Rabinowitz relied on (i) the *"underlying contracts"* alleged to have generated revenues which could not properly be classified as OEM derived revenue (which were in the trial bundles and were identified in the Schedules provided as part of the Claimants' Opening Submissions, and, as slightly modified, as part of the Claimants' Closing Submissions also) , and (ii) Mr Bezant's Fourth Report, which Mr Rabinowitz submitted verified the content of Schedules 8 and 9 of the RRAPoC and the 80% figure as having been *"correctly quantified from Mr Hussain's revenue spreadsheets."* Mr Bezant (who was not, of course, a witness of fact but an expert) only checked and confirmed the consistency between the Schedules and what was stated in Mr Hussain's spreadsheets: he expressly stated that he was not instructed to consider *"the Claimants' assessment of whether transactions were or were not IDOL OEM…"* But he could calculate the sum assuming that none of the transactions went beyond the scope of the market view of OEM business.

3151. I have taken into account in that context, and with regard to (5) in paragraph 3146 above, the Defendants' argument that some of the 67 transactions revenues were alleged to have been wrongly classified as OEM derived on the ground that the transactions in question were impugned on some other basis (VARs and reciprocal arrangements in particular), and that this did not suffice to establish a case that the revenues had been wrongly categorised as OEM derived. Of course, I accept that there could arise an obvious element of double-counting; and, for example, the mere fact that revenues have been recognised too early would not of itself entail that they had been wrongly categorised as OEM derived.

3152. However, in the case of almost every one of the VAR transactions and Reciprocal transactions, there was at least one further material basis alleged for the Claimants' case that the revenues generated were not properly classified as OEM, rather than (as in fact they were classified by Autonomy) 'OEM-derived'. Thus:

(1) Of the 10 VAR transactions identified as giving rise to revenue which was not properly categorised:

(a) OEM7 (with a VAR for end-user IBM/Ameriprise) involved the licencing of software for use of 20,000 Mailboxes only with Ameriprise and was part of a hosting services arrangement, so that no OEM was involved and no ongoing royalty arrangement could or did result;

(b) OEM12 (with MicroTech for end-user DiscoverTech) did not involve an OEM embedding IDOL into its own software and no ongoing royalty payment could or did result;

(c) OEM16 (with MicroLink for end-user DiscoverTech) did not involve an OEM embedding IDOL into its own software and no ongoing royalty payment could or did result;

(d) OEM36 (with Capax Discovery for end-user Amgen) was a licence sale for internal use (hosting), and that use was restricted accordingly;

(e) OEM45 (with DiscoverTech as VAR for end-user BofA) was a licence sale for use only for internal purposes, and no ongoing royalty payment could or did result;

(f) OEM50 (with Capax Discovery for end-user McAfee Inc) was a licence sale for McAfee's sole internal use, no OEM which wished to embed IDOL software in its own products was involved, and no ongoing royalty payment could or did result;

(g) OEM53 (with DiscoverTech for end-user Prisa) was a licence sale for use only for internal purposes, no OEM which wished to embed IDOL software in its own products was involved, and no ongoing royalty payment could or did result;

(h) OEM62 (with DiscoverTech on-licensing to Dell for end-user Hyatt) was a licence solely for the purpose of a sub-licence to Hyatt for its internal use, and no ongoing royalty payment could or did result;

(i) OEM64 (for JP Morgan) was a licence for its internal use only, no OEM was involved and no ongoing royalty payment could or did result;

(j) OEM65 (with Capax Discovery for end-user UBS) was a licence for UBS's internal use only, no OEM was involved and no ongoing royalty payment could or did result.

(2) Of the 10 reciprocal transactions identified as giving rise to revenue which was not properly categorised:

(a) OEM1 (with Capax Discovery) was a licence which did not permit Capax Discovery (which was not an OEM) to embed Autonomy software in its own software for onward licensing to third parties and even though the contract contained a royalty clause this related only to the provision of services;

(b) OEM4 (with VMS) was a sale of a licence which prohibited VMS embedding Autonomy software into its own, and resulted in no ongoing royalties;

(c) OEM11 (with Capax Discovery for Eli Lilly) gave rise to no royalty payments or obligations;

(d) OEM13 (with FileTek) gave rise to no royalty payments or obligations;

(e) OEM15 (with Vidient) was one of three exceptions in that the contract did contain a royalty clause and Vidient might be classified as an OEM;

(f) OEM23 (with Filetek) gave rise to no royalty payments or obligations;

(g) OEM34 (with Vidient) was another of three exceptions in that the contract did contain a royalty clause and Vidient might be classified as an OEM;

(h) OEM35 (EMC) was the third such exception;

(i) OEM46 (with VMS) the transaction was not with an OEM nor did it give rise to any royalty payments;

(j) OEM52 (with Capax Discovery) was a licence for restricted internal use and though the contract contained a royalty clause it was never triggered.

3153. As to the substance of those complaints, I find that (with the possible exception of OEM15, 34 and 35, where the Claimants specified no reason other than that the transactions were "impugned reciprocal transactions" and which involved an aggregate of some $9,507,000) revenues from the 67 transactions identified were misclassified, amounting to nearly 80% of the revenues in the OEM metric. This misclassification of what I accept was regarded in the market as an important metric rendered untrue or

misleading (i) Autonomy's definition or description of IDOL OEM/OEM derived revenue in its published information, (ii) each amount of IDOL OEM/OEM derived revenue stated during the Relevant Period, and thereby (iii) Autonomy's published information, including its Quarterly, Half-Yearly and Yearly Reports in 2010 and 2011.

Did the Defendants know of the inclusion within the OEM metric of revenue outside what investors were likely to understand to be within its scope?

3154. Nevertheless, and as the Claimants appreciated, it is not enough for them to establish (as in my judgment they have established) that Autonomy included within the OEM metric revenues that reasonable readers would not have expected to be categorised as such (in the sense that readers would not have expected the OEM metric to comprise such revenues). They must also prove that the Defendants (to quote the test in FSMA, but interpolating my own words to make clear its application in the present case) each *"knew the statement* [of OEM and OEM-derived revenues] *to be untrue or misleading or was reckless as to whether it was untrue or misleading"*.

3155. Put another way it is not sufficient to show that the Defendants knew that the metric included revenue which falls outside what I have determined, looking after the event at the language in the published information, its context and evidence of the way it was in fact understood in the market, readers would have expected to be included within the metric. What they had to show was that the Defendants knew at the time that revenue was being misclassified, and thus of a mismatch between reality and expectation, so as to displace the Defendants' case that they knew no such thing.

3156. It is the Defendants' subjective understandings and intentions which are in issue at this second stage, and which are not revealed as fraudulent simply because of a mismatch between what they thought at the time was proper to include and what, years later, the court has determined the readership expected to be included.

3157. As earlier foreshadowed, Dr Lynch submitted that (a) so far as he was aware, all revenues allocated to the OEM metric fell within its scope as he understood and intended the scope of the OEM metric to be; and (b) he was not involved in the process of characterisation of revenues nor in the allocation of revenues to the OEM metric, and he relied on the finance department and Deloitte in that regard. The first point (that is, (a) above) was available to and adopted by Mr Hussain as applicable to him also, *mutatis mutandis*. The second point was not available to him.

3158. Before turning to the facts especially relevant to this second stage, however, I must return (see also paragraph 3013 above) to Mr Miles's objection on behalf of Dr Lynch that this part of the Claimants' case was never properly put to him (despite indications that it would be in his long cross-examination), nor was he ever challenged on material parts of his witness statement in this regard. Mr Miles submitted that Dr Lynch was "*not given the opportunity either to justify the classification of the individual transactions, or to explain the extent of his knowledge in respect of each of them"* and that in combination the result should be to preclude the Claimants from pursuing the allegation of fraudulent knowledge against Dr Lynch. (Of course, although in all other respects Mr Hussain adopted all that Dr Lynch said, no such objection was open to or pursued by Mr Hussain.)

3159. I cannot accept this submission. In my judgment, Dr Lynch made clear his understanding at the time that Autonomy was including revenues within the OEM metric on the basis of an alleged market understanding that its scope extended not only to revenue from the OEM transaction but to revenue generated from transactions with end-users *"made possible by the initial OEM sale"* (as he put it in his first witness statement). He knew that included within the OEM metric was licence revenue from sales to service providers who were using IDOL to provide services; licence revenue from sales to a reseller for resale; sales to non-software companies; direct sales to customers of OEM partners; sales involving licences limited to internal use; and revenues from upsells and PODS. It was his case that he believed that the scope was understood to be so extended[369]; the Claimants challenged him on that case and put their opposing and primary contention that it was not, and he did not have any honest belief that it was. If Dr Lynch considered that any of the 67 impugned transactions individually fell within the narrower scope, he could and should have said so. In short, I consider that the Claimants did sufficiently challenge Dr Lynch on the salient points in his evidence, and in particular on his fundamental point that it was made plain to the market, and should have been obvious from the use in 2010 of the phrase "OEM-derived", that the IDOL OEM/OEM derived metric extended to all sales of IDOL software generated or facilitated by what he called the *"OEM route to market"* (including direct sales to the end-user).

3160. I cannot accept either that any different understanding would have resulted from a more detailed exegesis of the contracts nor that any material unfairness was caused to Dr Lynch by the course adopted by the Claimants of challenging Dr Lynch on his understanding of the phrase, its use in the relevant published material, and how he understood it would be interpreted by the market, rather than on the details of the 67 individual transactions impugned as falling outside the metric.

3161. In summary, what was necessary was for the Claimants to challenge and undermine Dr Lynch's evidence as to his own understanding and put to him their case that he was aware of and involved in the mischaracterisation of revenue which resulted in a mismatch between the description of OEM-derived revenue and what in fact was included under that category or metric. In my judgment, they did put to Dr Lynch their case, and the basis on which they sought to challenge his.

3162. The Claimants focused especially in this context on what Mr Hussain and Dr Lynch had said at the time, especially in the course of Earnings Calls and in the Q3 2010 Investor Bulletin. Although I have determined that the transcripts of these Earnings Calls did not constitute "published information" within the FSMA test, and (as the Defendants emphasised) there is no evidence that anyone at HP looked at or listened to any of them at the time, they are nevertheless relevant at this second stage to an assessment of the Defendants' true understanding and intentions.

3163. The Claimants relied, for example, on the fact that:

(1) On the Q3 2009 earnings call, when asked to comment on the *"slight deceleration"* that had occurred in that quarter in the *"OEM situation"*, Dr Lynch had replied that *"The simple reason is that we get the returns from what*

[369] For example, he told me in cross-examination that although not involved in the transactional detail, *"…everyone understood that the definition of "OEM-derived" included business that was being generated by our OEM programme even if it was not revenue directly from the OEMs."*

400 of the world's software companies have sold, and there's very little ability to work out exactly where that number's going". The Claimants contended that this suggested that OEM derived revenue was, in the main at least, revenue *"from what…software companies have sold"* and that this equated to royalty revenue.

(2) On the Q1 2010 earnings call, Dr Lynch explicitly stated :

> *"On the OEM side of the business, <u>we sell to virtually all of the major names in the software industry through a royalty based model</u>. As we've mentioned before, that business acts like a tracker fund of the software industry. So as wider software sales increase and the number of products coming to market increase, so you would expect OEM revenues to increase."* [Emphasis supplied]

(3) In the course of the earnings call for Q1 2010,[370] Mr Hussain explained the breakdown of that quarter's reported $29 million of "*OEM derived revenues*" in terms which characterised "*OEM derived revenues*" as being comprised entirely of development licence fees, and ongoing royalties received in that quarter, leaving no scope for the inclusion of upsell or PODS revenue. He said this:

> *"OEM development licenses of $3m give us some visibility about future royalty streams into the OEM business. OEM ongoing royalties in the quarter amounted to some $26m."*

3164. When, in cross-examination, Dr Lynch was confronted with this apparently exclusive characterisation of "*OEM Ongoing*" as "OEM *ongoing royalties*" both in statements he himself made, and in statements made by Mr Hussain, he offered the following explanations, which the Claimants answered, and which I assess, as summarised below:

(1) First, as to his own statements, Dr Lynch contended that the phrase *"royalty based model"* does not necessarily mean, and he did not intend it to mean, that the only OEM business conducted by Autonomy was done on such a model, nor that each relevant transaction had an ongoing royalty stream. He gave as an example a buyout deal or bulk royalty deal that could fairly be described as *"royalty based"* where the amount the customer was required to pay was calculated by reference to a notional royalty rate. Mr Pearson (who, it will be remembered, was called by the Defendants) also sought to emphasise in re-examination that *"there were generalisations about description…generalisations were commonly used by analysts and investors throughout this period to describe the general trend of what's going on"* by which I took him to mean that words would often be deployed in a generic but not exclusive sense to signify a broad general category but not to denote an exclusive meaning. However, even Mr Pearson volunteered (in the same

[370] The first of the three quarters in which this breakdown was reported.

passage of his re-examination) that *"People understood that in general they were royalty driven in some form or another…"*

This did not carry the Defendants very far. The typical characteristic of OEM revenue (after payment of the original licence fee) was a payment by the OEM to Autonomy calculated by reference to the value of its onward sales of product including Autonomy software: in other words, a royalty-type basis of calculation.

(2) Secondly, Dr Lynch told the Court that Mr Hussain simply made a mistake in his choice of words – "*there's an occasion when talking in realtime on a call, he has used a word he shouldn't*".

However, Mr Hussain was reading from a script. He said exactly what he was scripted to say:

- *"<u>OEM development licenses</u> of $3m give us some visibility about future royalty streams from the OEM business.*
- *<u>OEM ongoing royalties</u> in the quarter amounted to some $26m."*

Further, the script: (i) contained edits by Dr Lynch to the management presentation part of the script; and (ii) contained no edits to the 'question and answer' section. While Dr Lynch made changes to other parts of the management scripts, he made no changes to Mr Hussain's description of "*OEM Ongoing*" as "*OEM ongoing royalties*".

In any event, even if Dr Lynch's review had been limited to the questions as he suggested it was, the same representation of the contents of IDOL OEM revenue was contained in the 'question and answer' section. Question 59 was "*New revenues classification*" and the answer, so far as it concerned IDOL OEM revenue, said "*OEM Dev 3.0*" and "*OEM Royalty 26*" – entirely in accordance with Mr Hussain's representation that $26 million of OEM Ongoing comprised only royalty revenue. Dr Lynch could not identify any steps taken by anyone at Autonomy, including Dr Lynch himself, to correct Mr Hussain's characterisation of "*OEM Ongoing*" as "*OEM ongoing royalties*", whether on this call or at all.

(3) Thirdly, Dr Lynch asserted during cross-examination that an explanation of the sub-categories "*OEM Dev*" and "*OEM Ongoing*" had been given to the market two quarters before the Q1 2010 earnings call, in the context of the Q3 2009 results, and that the actual definition of these metrics would be found there.

However, there appeared to be nothing to support this, either in the transcript of the Q3 2009 Earnings Call, or in the Results presentation for that quarter: on the contrary, both appeared to convey that Autonomy's IDOL OEM revenue comprised (i) a development fee and, (ii) payments when <u>OEMs' products</u> are sold i.e. ongoing royalties, and there was no mention of upsells or PODS in the

Q3 2009 earnings call materials, let alone a description or explanation of such revenue sources.

Indeed, the way Dr Lynch explained to the market what OEM business Autonomy was doing is perhaps the most striking demonstration that he (and Mr Hussain) knew what the market perceived OEM business to comprise. Thus, for example:

(a) On Autonomy's Q1 2008 earnings call Dr Lynch said:

> "*we license our technology to other software players who then use the technology to enable their own products to understand structured information … They do this on a model where they will sign up a deal with us. There may be an upfront payment which would typically be around $200,000, and then they … write … their product … The back period is now, on average, two years between for them to write whatever their product is … Then that product ships and we would receive a royalty stream … What we see in Q1 is 12 OEM deals signed, so we would expect to see revenue from them on average in two years' time.*"

(b) Autonomy's 2009 Annual Report stated:

> "*An OEM pays an upfront non-refundable fee and then writes its new product which can take up to two years depending on its product roadmap and release cycle. Once the product is launched they make license payments of around three percent of product sales to Autonomy*".

(c) Autonomy's 2010 Annual Report stated:

> *"Contracts and situations vary, but by way of example an OEM could pay an upfront non-refundable fee and then take two years to launch its product. Once that product is launched they may make license payments of around three percent of product sales to Autonomy."*

(d) An "Introduction to Autonomy" prepared for investors in 2010 read:

> "*An OEM pays an upfront development fee and then writes its new product which can take up to two years depending on its product roadmap and release cycle. Once the product is launched OEMs pay a royalty stream of around 3 per cent of product sales to Autonomy.*"

(4) Fourthly, Dr Lynch referred to what he presented as being the universal understanding in the market (except for an errant Credit Suisse or *"unless they had arrived from another planet"*). But as explained previously, (see paragraphs 3098 to 3137 above) I do not accept that that was so; and certainly no general market understanding such as the Defendants asserted was proven: the evidence showed that many analysts had the same or a similar understanding as Mr Grieb and Credit Suisse.

(5) Fifthly, Dr Lynch also relied on his understanding that both Deloitte and Autonomy's Audit Committee, as well as its finance department, were closely involved, had reviewed Autonomy's policies for disclosure of and accounting for the OEM revenues, and had satisfied themselves that they were appropriate. He assumed that Deloitte understood the nature of the transactions and the identity of the counterparty in each case. He knew that Deloitte checked Autonomy's earnings releases and ensured that the figures reported were accurate. As Mr Miles put it in his oral closing argument, *"they understood more about the detail than Dr Lynch"* and appeared content with both *"the numbers and the way the language was used"*. Dr Lynch's case was that he felt entitled to and did assume that if Deloitte had had any concerns that the information provided about OEMs was misleading, they would have made that clear: but nothing of that kind ever happened.

3165. The last of these points, and the dispute which resulted as to the significance of the fact that Deloitte never objected to either the enumeration and presentation of the OEM metric, was a principal focus of the defence and needs elaboration.

Deloitte and OEM revenues

3166. I turn to consider, therefore, (1) the nature and extent of Deloitte's involvement and of its responsibilities in respect of the OEM metrics, and (2) what relevance Deloitte's involvement has to the assessment of whether the Defendants believed the OEM metric to be properly described and constituted (or whether, instead, they knew it be untrue or misleading, or took a reckless risk of it being misunderstood).

Nature and extent of Deloitte's involvement

3167. The Defendants' case was that although the initial preparation and presentation was for the finance department of Autonomy, Deloitte (a) reviewed the way in which the OEM metric was presented in the Quarterly and Annual Reports and in what was termed *"the front end of the accounts",* (b) checked the constituent elements of the deals going into the OEM metric, and (c) "*ticked off"* the numbers. Deloitte was thus closely involved in considering the categorisation of the transactions and the amount of revenue which could be included in the metric as OEM derived revenue. Dr Lynch had no role in the process.

3168. The Claimants, on the other hand, submitted that *"the misclassification of transactions within the IDOL OEM revenue was not an accounting matter"* and Deloitte's involvement was *"of very limited relevance indeed"* to the determination of the OEM issue. Deloitte's advice, they stated, *"was neither sought nor given"*. They added that *"in circumstances where the Defendants knew that the definition or description of IDOL*

OEM revenue in the published information was misleading, it is simply irrelevant that Deloitte failed to detect the Defendants' wrongdoing." They submitted that the Defendants could not *"hide behind Deloitte in relation to their fraud."*

3169. The Claimants accepted that, as appeared from their working papers, Deloitte had undertaken a process of going through the final draft of the relevant Reports and had ticked off every number, next to the relevant label or description of the metric. However, they contended that it was no part of Deloitte's remit to check the composition and presentation of the IDOL OEM metrics and figures in the "front-end" or narrative part of the reports, which the Defendants themselves accepted were not IFRS figures subject to audit and were provided voluntarily by Autonomy. The Claimants cited in this regard Accounting Standard *ISA 720A (2004)*, which states that *"...the auditor has no specific responsibility for determining whether or not other information is properly stated"*, and "*ISA 720B (2009)"*, which requires the auditor only to *"read the other information to identify material inconsistencies with the audited financial statements"*.

3170. As to the actual process in this case, they relied on Mr Welham's evidence as confirming that this ticking off process simply involved checking the totals presented in the *"front end"* against the audited figures in the *"back end"* (as put to Dr Lynch) and that Deloitte never had to consider, and did not consider, the reasonableness of the categorisation of revenue within IDOL OEM revenue. It was, as it were, a merely mechanical process of ensuring consistency of numerical quantification between the two parts of the Reports.

3171. They relied particularly on the following passage of Mr Welham's evidence when he was cross-examined by Mr Miles on a spreadsheet which Deloitte had marked up with tickmarks, the objective of which was stated to be *"To agree the metrics used in the quarterly press release to supporting schedules and to test the validity of these schedules"*:

> *"So the tickmarks will just be what the person who prepares the spreadsheet writes. So just to clarify what we're doing here, because this relates to what we call front end information, then we have no - - our responsibilities around that are to read it and ensure consistency with the financial statements... So when the team have gone through this, they're essentially looking at what's included to make sure we can tie back - - so that the totals tie back to the financial statements and what makes up those totals ties back to what we have audited or reviewed. So while someone may have written "Appears reasonable", we're not really considering the reasonableness of where things are categorised because that's not within our remit.[371]"*

3172. In addition, and although not stressed by the Claimants, the following further passage seemed to me to illuminate that evidence:

> *"So we're not opining on the categorisation here, we're essentially making sure that revenue deals included here are ones that we've tested and therefore that essentially there aren't incorrect deals or bogus deals included in these metrics which are not part of the reviewed revenue or the audited revenue."*

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[371] Mr Welham made a similar point in relation to IDOL Cloud revenue, which, like IDOL OEM revenue, was not an IFRS metric.

3173. However, that is difficult to reconcile with what the evidence demonstrates as to what Deloitte actually did, as revealed by extracts from one of Deloitte's working papers showing their comments on spreadsheets provided by Autonomy's finance department classifying revenue. The example relied on by the Defendants was a spreadsheet with various schedules, of which the stated objective was *"To agree the metrics used in the quarterly press release to supporting schedules and to test the validity of these schedules"*. Its conclusion was *"Satisfactory."*

3174. It does seem from the paper itself that as part of the audit testing process, Deloitte would have reviewed at least some of the underlying contracts, if their value was over $1 million, as part of the sampling process. Mr Welham was taken to the Q2 2011 tab within the document. It was clear that he could not remember much about it. His answers were really simply acknowledgements of what was stated: thus, he agreed that columns AB to AE were headed "OEM Royalty", "OEM upsell", "OEM POD", and "OEM Prepay", and that it looked as if the "IDOL OEM" category which was published by Autonomy had included upsells and PODS.

3175. He was then taken to columns S and Y headed "Deloitte Added Columns" with column S containing deals over 1 million which had a reference to a testing sheet and on to column AC row 4, which contained a reference to "tick mark e", and then on again to the "Tickmarks tab" where a note stated:

> *"The OEM upsell category includes hosted licence deals that are hosted on OEM customer data-centres. This is considered reasonable for including as OEM driven revenues."*

3176. It was put to Mr Welham that someone within Deloitte had specifically considered the OEM upsell category in respect of hosted licence deals hosted on OEM customer data centres and concluded it was reasonable: he agreed that the preparer of the spreadsheet had, and confirmed that this was someone in Deloitte.

3177. Further, in cross-examination, Mr Welham was taken to guidance issued by the Auditing Practices Board (the predecessor in this context of the FRC) as to an auditor's responsibility in respect of *"Other information in documents containing audited financial statements"* (which essentially covered the 'front-end' or narrative part of the Annual Report). That guidance provided, for example, that:

> *"The auditor should read the other information to identify material inconsistencies with the audited financial statements. If as a result of reading the other information, the auditor becomes aware of any apparent misstatements therein, or identifies any material inconsistencies with the audited financial statements, the auditor should seek to resolve them."*

3178. Mr Welham acknowledged[372] that, in the light of this guidance, Deloitte did check for material inconsistencies and misleading statements in the 'front-end', as the Schedule exemplified, and they had identified none.

What reliance can the Defendants place on Deloitte in this context?

3179. In his written closing submissions, Dr Lynch placed considerable emphasis and reliance on Deloitte's review and apparent acceptance of the accuracy of the schedule in this context, as in effect, endorsing and even justifying both his avowed belief in the accuracy of the published information about the OEM derived revenues and the reasonableness of that belief. Mr Miles added in his oral closing that:

> *"Deloitte read the description…in the front end of the accounts and they read the descriptions in the quarterly reports, did the same thing every quarter and never identified anything misleading. As I say, they had a fuller and closer understanding than Dr Lynch did of the deals that actually went into the numbers given for the metric. We say that's very important because, if they didn't think there was a problem, it makes it very improbable to suggest that Dr Lynch should have done."*

3180. The Claimants, on the other hand, dismissed any reliance on Deloitte's checks as unfounded: even if Deloitte's remit extended to opining on the reasonableness and consistency of the information provided in the front-end of the various Reports (whether as a matter of obligation or simply as a matter of what in fact they chose to do), which the Claimants did not accept, they submitted that:

> *"In circumstances where <u>the Defendants knew</u> that the definition or description of IDOL OEM revenue in the published information was misleading, it is simply irrelevant that Deloitte failed to detect the Defendants' wrongdoing."* [Claimants' emphasis]

3181. That submission is premised on knowledge (or at least recklessness) on the part of the Defendants. Ultimately, as will be seen, I agree with its conclusion, but there is a prior question, as it seems to me, whether the Defendants' case that they relied on Deloitte as support for treating OEM business as being broad enough in scope to cover the scheduled transactions. That requires brief analysis of what Deloitte's role was and what their approval signified.

3182. As to that, in my view, all that really Deloitte's process of checking and approval signified was that they were satisfied that the transactions were accurately described and that transactions as so described fell within what the Defendants told Deloitte was a broader category of OEM business. In other words, Deloitte saw no basis to contradict what they were given to understand by Autonomy was the scope of the OEM metric as extending to any revenue which, according to a subjective judgment, could be said to have been driven or made possible by an original licence sale to an OEM. They read the metric and interpreted the disputed phrases using the criteria that the Defendants

[372] As he had also agreed in his evidence in the US criminal proceedings.

supplied them. Deloitte did no more than check that the transactions conformed to the description of the metric that Autonomy had supplied.

3183. Deloitte might have probed further; but they were not required, as regards this narrative description voluntarily provided, to assess separately or second-guess the directors whether a transaction fell fairly within the scope of what the market understood to be OEM business. They had to do little more than satisfy themselves that the approach and figures were consistent. Having, for whatever reason, accepted management's interpretation, approval followed, but that provides little or no validation of the Defendants' avowed belief. Autonomy and its management were in a far better position to assess what the market considered to be comprised in OEM business.

3184. I have concluded that the fact that Deloitte accepted, or at least did not raise any objection to, the inclusion of the 67 impugned transactions within the OEM metric is of little, if indeed any, relevance or assistance in determining whether the Defendants knew that the inclusion of revenues from *"follow-on sales"* gave an untrue or misleading depiction of the extent and success of the OEM line of business. I do not accept that Deloitte were or can be regarded as a litmus test either of market perception of the scope of the OEM metric or of the Defendants' honesty.

3185. In my judgment, Deloitte did not know what the Defendants, in my judgment, did know, or at least knew to be a real risk: that the category they had devised extended to transactions which the market would not have regarded as having the characteristics associated with OEM business.

3186. As to the Defendants' individual positions, I do not accept that Dr Lynch was ignorant of this. As previously noted, Dr Lynch emphasised that he personally had no involvement in or knowledge of individual OEM transactions, and was not involved in determining how deals should be classified. He could not recall ever reviewing the spreadsheets in any detail, if he saw them at all. But he did know, as he has acknowledged, that there were many transactions that did not constitute "core" OEM transactions: and I have concluded that the metric was misleading, and he knew it. Mr Hussain was in no better position. He offered nothing to absolve himself except the "definitional issue".

3187. On the basis of the matters referred to above, (and I should acknowledge, fortified also by my findings summarised in paragraphs 3207 and 3235 below),[373] it is reasonably clear, and I find, that:

(1) Both Defendants knew or recklessly took the risk that readers in the market of Autonomy's published information were not aware that such a preponderance of the revenues included in the OEM metric were not "core" OEM revenues;

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[373] Relating to my findings in respect of the *"Lone Pine episode"* and the *"Top 10 List"* provided to HP in the course of the due diligence process

(2) Both Defendants well understood the enhanced value attributed to OEM business and wanted to take advantage of it, including (if necessary) by 'pumping up' the OEM metric and including within it revenues which had only a vestigial subjective basis (if any) for classifying as especially valuable.

(3) The fact that Deloitte undertook the checking exercise described above does not affect the conclusion.

3188. The evidence has satisfied me, and I find, that a substantial (likely to be almost 80%, though I shall confirm the figure in my judgment on quantum) of the revenues allocated to the OEM metric was outside what the market perceived to be its scope, as the Defendants knew or understood to be a real risk.

A further issue as to upfront prepaid licensing deals or "buy-outs"

3189. A further aspect of the dispute concerns the evidence of Mr Harald Collet ("Mr Collet")[374], Autonomy's head of OEM sales in North America from Q3 2008 to Q1 2010 and as such the *"real head of OEM"*, to the effect that even in the case of "core" OEM transactions which might have generated ongoing royalty revenue, in the *"great majority"* Autonomy had agreed instead to smaller, accelerated, upfront non-royalty payments. This, the Claimants submitted, made matters even worse.

3190. Mr Collet's evidence made two principal points:

(1) the upfront prepaid licensing deals or "buy outs" were presented as giving rise to recurring revenue in the form of royalty, and that was untrue or misleading;

(2) the discount for prepayment or buyout reduced the likely aggregate payment obligation: contrary to the impression given by Autonomy's published information, Autonomy was sacrificing ongoing royalty income in order to accelerate future revenue into current reporting periods to be recognised immediately.

3191. The Claimants invited me to find that:

> *"…even as regards OEM deals with OEM partners that were legitimately included within IDOL OEM revenue and might otherwise have generated royalty payments…this in the main did not happen"*, and that this
>
> *"…further reinforces the untrue and misleading nature of the statements made by Autonomy in its published information to the effect that IDOL OEM revenue consisted mainly of ongoing royalties, still less that royalty payments at a level of 3% of the OEM's sales to end-users were typical. Few, if any, IDOL OEM transactions generated, or could reasonably be expected to generate, a recurring royalty stream of around 3% of license sales."*

[374] Mr Collet also co-authored the "Joe Bloggs" communications: see paragraphs 312 to 313 in the Introduction and 3235A and 3235C below.

3192. Dr Lynch accepted in the course of his cross-examination that *"there would be a significant number of upfront royalties on that sort of structure, yes"*, and that he knew at the time that this was happening.

3193. I have not been persuaded that this materially would have affected the market, or that it was wrongful, even if it was (as the Claimants contended) with a view to accelerating recognition of revenue, and despite a loss thereby to Autonomy in terms of total ultimate revenue. It seems to me that a prepaid royalty is a capitalised payment in lieu of a recurring royalty. I decline to make the finding sought.

3194. However, Mr Collet's evidence also referred to an incident in relation to upfront royalties which I should mention since it was relied on as revealing Dr Lynch's *"willingness to lie to the Court, in order to cover up lies he had told to investors during the Relevant Period",* and in this case to maintain the depiction of the OEM business he wished to present. This was referred to at trial as *"The Lone Pine episode".*

The Lone Pine episode

3195. Lone Pine Capital (HK) Limited ("Lone Pine") was a hedge fund (based in Hong Kong) at which a Ms Leonie Foong ("Ms Foong") worked. According to Dr Lynch's evidence in cross-examination, Lone Pine, through Ms Foong, had been probing for material in support of a negative story in the market that Autonomy had a balance of pre-paid royalties that had been improperly recognised up-front, although the royalties would need to be paid back if the sales on which they were based did not occur. When Ms Foong approached Autonomy with regard to the story, Dr Lynch sent an email dated 21 July 2009 referring her to Mr Collet whom he described to her as *"the real head of OEM for Autonomy".*

3196. A call was set up with Mr Collet on 21 July 2009. Mr Collet was not trained in investor relations, and was not permitted, save in limited circumstances, to speak to analysts or investors, but Autonomy was happy for him to have a one-off, general conversation about the market. In an email Dr Lynch encouraged him to keep the call short.

3197. Mr Collet claimed that in advance of the call, "*Dr Lynch emailed me a script setting out what I should say to Lone Pine*." He said that the script contained a number of assertions that he was uncomfortable with, because (he said) they mischaracterised Autonomy's OEM business *"as principally involving deals for ongoing royalty revenue streams when, in my experience… the great majority of my team's OEM sales were being structured as up-front, pre-paid licensing deals"*; however, because of the "*culture of fear*" at Autonomy, he followed the script as best he could.

3198. The Defendants objected that none of this was true, and the Court should find that the notion of a script – and the instruction to say anything misleading – was an invention by Mr Collet. Dr Lynch was adamant that there had been no script. His written closing submissions elaborated on this as follows:

    (1) The script was, according to Mr Collet, sent by email (as it must have been since Mr Collet was located in the US and Dr Lynch in the UK). No trace or copy of any such script has been found, despite extensive searches.

(2) When this was pointed out to him in cross-examination, he said – for the first time – that he had deleted it, claiming that he did so as "*it felt like it was best for [him] not to have a copy of that*", because he "*was concerned that [he] got direct instructions on how to speak to the investor and what to say to the investor and it was emailed direct from Mike Lynch to [him]*." This was inconsistent with his witness statement, which simply stated that he did not have a copy of the script and that he understood from the Claimants' lawyers that they had been unable to locate it on Autonomy's systems. In any event, the Defendants contended that a copy would have existed in Dr Lynch's email account and no such email exists.

(3) Mr Collet maintained that the script was a narrative document, setting out in some detail what he was meant to say. However, the call took 45 minutes, and he remembered the "script" to be only half a page long.

(4) Mr Collet said that he was uncomfortable with what he had to say on the call, but he did not raise that either with his boss, Mr Mooney, or with Dr Lynch.

(5) The suggestion that there was a script was inconsistent with the other emails that were sent at around the time of the conversation, for the reasons explored in cross-examination with Mr Collet.

3199. Following the call, on 23 July 2009 Ms Foong sent some follow up questions to Mr Collet, focussing on prepaid royalty fees, and Mr Collet passed them on to Dr Lynch. Dr Lynch replied with a proposed response for him, copying Mr Mooney and Mr Bettencourt. Dr Lynch then provided Mr Collet with a Word document containing the text of proposed responses to each of Ms Foong's questions, which focused especially on whether there was any *"hosted component to some OEM deals which requires either pre-payment of licences or ongoing licence fees"*. Dr Lynch instructed Mr Collet (who it will be remembered was head of OEM in North America) to *"Pls take attached doc, read it and CUT AND PASTE JUST the text into a text email reply to them."* In cross-examination, Dr Lynch sought to explain this peremptory instruction on the basis that (a) Mr Collet was not trained in investor relations and (b) *"under the DTR regulations[375], only certain people…are allowed…to have correspondence in anything other than general terms with investment managers."* In any event, Mr Collet followed the instruction to the letter.

3200. Lone Pine's questions and Dr Lynch's answers were as follows:

(1) *"Is there any "hosted" component to some OEM deals which requires either pre-payment of licences or ongoing licence fees?*

No this would not be normal (can't think of one), there may be deals like this in the EDD and hosted archiving group but not the OEM business…..but I guess we would consider it if it arose.

(2) *What are pre-paid royalty fees if such a thing exists?*

[375] The FCA's *"Disclosure Guidance and Transparency Rules sourcebook"* issued in compliance with the FCA's obligations under the *Market Abuse Regulation.*

The 200k upfront payment that customers make covers the first quarter of royalties when they start shipping (typically 2 years later). It is not normal for customers to pay upfront royalties. I believe Verity did this kind of thing before the acquisition by Autonomy but it is not our model. (I think insistence on this old verity model was one of the reasons Chad was let go) We aim to maximize the royalty stream not the upfront. [My emphasis]

(3) *Using an example, could a customer choose to prepay upfront a portion of his future expected royalty payments, and subsequently pay less royalty payments in the future (when his products get shipped). You mentioned some royalty rates go as high as 30%; I'm wondering whether there is any structuring a customer might do to lower that royalty rate, but pre pay a portion upfront*

Prepaying would not reduce the royalty rate even if we did it, although I guess we are always open to considering any deal (not my call that would be the CEO) this is not how we work, as I said our goal is maximum ongoing royalty not upfront.

There is one area that might cause confusion. An OEM customer enters a deal with us for specific of the 500 functions we sell (typically 4 or 5 of them) ships them inside each time their software is sold and pays the royalty on each one sold. Sometimes although their product has these 4 or 5 functions one specific of their end customers might need another function not in the OEM agreement in which case for this one end-user the OEM can resell the extra function as a one off licence solely for that end-user (i.e. for this one sale the OEM is acting as a reseller as well as an OEM). There can also be deals where the OEM is only licensed to a certain amount of data/speed per end-user and in the event of them selling to an end-user with bigger needs they can pay a one off royalty kicker for that end-user.

Remember a company like Sybase may be an:

1 OEM paying a royalty to us on their shipping product;

2 may also be a reseller of licences for other functions to augment the OEM product in specific end customers;

3 resell Autonomy non OEM licences, and

4 may also be doing systems integration work using Autonomy software.

The OEM group would only see the first 2 cases, the rest is non OEM but to the same company."

3201. There is a dispute between the parties both as to what question Ms Foong was really asking in question 2, and whether the answers proposed by Dr Lynch were accurate and reasonable:

(1) Dr Lynch maintained in cross-examination that the question was "*about whether we have a balance of pre-paid royalties that have to be given back if the sales don't occur, which was the hedge fund story at the time*". He submitted that his answer on that basis was correct: particularly in the context of the questions regarding returnable up-front royalties that Lone Pine had been asking, and bearing in mind the need to avoid making improper selective disclosures to a hedge fund. Autonomy did not engage in transactions involving the pre-payment of royalties which were returnable, and which could only properly be recognised on sell-through.

(2) The Claimants dismissed this as a tactical gloss on a straightforward question about what prepaid royalties were, and whether Autonomy used them, and that Dr Lynch had to gloss the question because he knew that, if the question bore its obvious meaning, then his draft answer to that question was a lie.

3202. There was also a dispute in relation to Dr Lynch's scripted response to Ms Foong's third question. The Claimants submitted it to be obvious that the statement that *"Prepaying would not reduce the royalty rate, even if we did it"* was intended to reinforce the answer to question 2, and to reiterate the false assertion that Autonomy had not received (or bargained to receive) pre-paid royalties, that being no part of its model. Dr Lynch suggested in cross-examination that all the response meant was that the royalty rate would not be lowered, and that this was true: *"We did take pre-paid royalties, yes, but we didn't reduce the royalty rate."*

3203. On the basis of their interpretation of the questions and answers, the Claimants submitted that:

(1) Dr Lynch's *"lies to Lone Pine were glaring"*. He had instructed Mr Collet to tell Lone Pine that prepaying royalties did not take place, when he knew it was entirely ordinary for Autonomy to receive prepaid royalty payments from OEM partners.

(2) To cover these lies *"Dr Lynch gave blatantly dishonest evidence to the Court."* The Claimants elaborated this as follows:

> "*His tactics included: (i) attributing a false meaning to what Lone Pine had asked and the answers he drafted; (ii) inventing a justification – the risk of inside information- that was irreconcilable with is written evidence about the market's understanding; and (iii) providing evasive answers when faced with these difficulties".*

3204. Against this, the Defendants insisted that:

(1) Mr Collet was an unreliable witness who had concocted a story about a script which never existed to cover up his own misdescription of the OEM business to Ms Foong at their first meeting which led to the further questions.

(2) Restrictions under the DTR regulations made it imperative for Dr Lynch to dictate the response to Ms Foong to avoid inadvertent release of inside information by Mr Collet who had no relevant training in investor relations, and

especially so since Ms Foong had (according to Dr Lynch) been fishing before, and he was concerned that Lone Pine was attempting to solicit inside information. His concerns are apparent from an email he felt he had to write to Ms Foong on 23 July 2009 (after her discussion with Mr Collet) warning her off such soliciting.

(3) Both the questions and the prescribed responses had to be interpreted in the context of earlier questions regarding returnable up-front royalties that Lone Pine had been asking, and bearing in mind the need to avoid making improper selective disclosures to a hedge fund. The questions were properly regarded as attempts to establish whether market gossip that Autonomy was engaged in transactions for prepaid royalties which would be recognised as revenue immediately but then returned was true: and the answers were intended to provide a firm refutation of that, and make clear (as was the fact) that Autonomy did not engage in transactions involving the pre-payment of royalties which were returnable, and which could only properly be recognised on sell-through.

(4) Thus, the interactions with Lone Pine give no grounds to criticise Dr Lynch, and provide no support for the allegation that he was involved in or knew of any false reporting of OEM revenues. Mr Collet's evidence should be rejected as unreliable.

3205. Although in a sense something of a side-show, the Lone Pine episode does cast light on a central issue of Dr Lynch's reliability and in particular his true intentions in relation to the depiction to the market of Autonomy's OEM business.

3206. In my judgment:

(1) Mr Collet's antipathy to the Defendants was obvious. His reliability was also shaken by:

(a) The discrepancies between his witness evidence and his evidence when cross-examined, especially those arising from his sudden mention in cross-examination of matters entirely absent from his written evidence (for example, that he had destroyed the script he said Dr Lynch had sent him);

(b) The lack of any documentary support for certain of his factual assertions (in addition to the obvious example of the lack of any trace of the script he said had been provided by Dr Lynch);

(c) His apparent willingness to fling accusations without a shred of support (so that the Claimants had to withdraw a paragraph of his witness statement containing a serious accusation that the Defendants had manipulated the number of OEM deals reported)[376];

(d) His acceptance in cross-examination, contrary to the impression given in his written evidence, that (i) he had never been specifically directed to do a buy-out (ii) there was no policy on the part of the Defendants

[376] Mr Collet himself sought to persist with this allegation even after accepting he could not substantiate it

that buy-outs should be preferred[377] and (iii) the point of the exercise was to try to do the best deal possible for Autonomy;

(e) The overall impression I had was that he was no longer able to distinguish between the case theory and his actual recollection.

(2) However, Dr Lynch's evidence on the Lone Pine episode did not appear to me to be reliable either. In particular:

(a) His effort to recharacterize the questions put by Ms Foong in order to explain his answers was ingenious but unconvincing;

(b) His answer to the second of Lone Pine's questions (quoted in paragraph 3200(2) above) was almost the reverse of the truth and was in any event misleading; and

(c) His evidence in relation to his answer to Lone Pine's third question was not convincing either. Dr Lynch is prone to careless spelling but seldom to careless language. I find that in stating *"Prepaying would not reduce the royalty rate, even if we did it"* (and see paragraph 3202 above) he was stating and intended to confirm that Autonomy did not "do" prepayment deals.

3207. Overall, the Lone Pine episode does seem to me to provide an example, and confirm my more general impression, of Dr Lynch using language by which he intended to convey or support the depiction of a business line generating a reliable recurring revenue stream (or, to use a phrase from Dr Lynch's statement in the 2010 Annual Report, *"multi-year committed annuity streams"*), knowing that the depiction given was at best inaccurate.

Allegation of concealment of transactions in published information

3208. The Claimants submitted that further support for the conclusion that the Defendants were aware that an untrue or misleading presentation was being given of IDOL OEM revenues was also to be derived from what they described in their written closing submissions as *"the manner in which Autonomy repeatedly concealed the identities of the counterparties to the largest transactions that had been allocated to IDOL OEM revenue."*

3209. In particular, they submitted that it cannot have been a coincidence, especially given the prolonged period over which the contrast is apparent, that:

(1) Throughout the Relevant Period, Autonomy's Quarterly Reports would cite only a handful of deals giving rise to IDOL OEM revenue, all with counterparties who were software companies fulfilling the restrictive view of a standard OEM; whereas

[377] Though Autonomy's sales commission system did provide salesmen (including Mr Collet) with a financial incentive to strike deals with a larger 'headline' figure, as Mr Collet himself explained in his first witness statement.

(2) By contrast, Autonomy never identified counterparties to transactions included within the OEM metric which were not software companies even where (as they put it) *"such transactions were of substantially greater value or prestige than the transactions that Autonomy did choose to highlight."*

3210. The Claimants offered the following suggested examples:

(1) In Q1 2009, Autonomy allocated to IDOL OEM revenue $3,251,000 from a deal with the UK Ministry of Defence ("the MoD") (OEM2). This deal (which was not mentioned in the Q1 2009 Quarterly Report) was a much larger deal than two of the three named deals: Symantec (a software company) which raised no allocated OEM revenue, and ProofPoint (another software company) from which the revenues were just $230,000.

(2) In Q1 2010, Autonomy allocated to IDOL OEM revenue $8,915,000 from a deal with BofA (OEM21). This was a far larger deal than all of the named deals combined: Adobe ($750,000), McAfee ($500,000 and $248,000) and Siemens ($72,000).

(3) In Q1 2011, Autonomy allocated to IDOL OEM revenue $6,448,000 from a deal with Tottenham Hotspur Football Club (OEM48), which was almost four times larger than one of the named deals (with Symantec, from which the revenues were $1,400,000).

3211. The Claimants' point was if the Defendants honestly believed that there was nothing wrong with the inclusion in IDOL OEM revenue of revenue from large-value deals with such well-known counterparties as, for example, the Ministry of Defence, Bank of America, and Tottenham Hotspur, then it is difficult to understand why they were omitted from the published information. The Claimants suggested that the reason was that had such counterparties been mentioned, this would have invited questions as to how some of the counterparties could possibly have been embedding IDOL into their software products for on-sale to end-users.

3212. They went on to submit that had Mr Hussain attended for cross-examination he would have been asked about his involvement in the process and what led to some transactions being selected for inclusion in the published information when other much larger transactions with high profile counterparties were omitted. He would not, answering truthfully, have disputed that he and Dr Lynch were both involved in the selection process and, further, that it was no coincidence that transactions which would have alerted the market to an inconsistency between what Autonomy's published information represented as IDOL OEM revenue and what was in fact included were deliberately omitted.

3213. In the same context, Dr Lynch was taken in cross-examination to the passage in his first witness statement where he had stated that Autonomy "*commonly reported selected new OEM relationships to the market*" (emphasis added). The Claimants portrayed that as an acknowledgement that a deliberate choice was made as to which deals were references in Autonomy's published information. Dr Lynch did not dispute this, but he said that he, personally, "*would not have been involved in that level*".

3214. Against this, the Defendants contended that it is wrong to say that the transactions that were highlighted systematically referred only to customers operating in the software sector. Dr Lynch made four principal points in this regard:

(1) First, that the whole argument was predicated upon an artificially narrow view of what could properly be categorised as an OEM and OEM revenue. On the broader interpretation which the Defendants say they intended there was no reason to select only software companies: the choice of which deals to mention was not informed or influenced by the narrow view at all.

(2) Secondly, unless perhaps it was something *"strategically important"*, the selection would have been done by the Investor Relations or Marketing department, and Dr Lynch would only be minimally and exceptionally involved.

(3) Thirdly, there was no suggestion in Autonomy's quarterly reports that it was the largest examples that were chosen. He explained that the selection was not based on size, and the selected deals were not described as the largest OEM-related transactions. He stated in his witness statement that:

> *"Autonomy highlighted those transactions that were innovative, to show the calibre and breadth of OEMs, to reference up-and-coming companies or those whose reputation would enhance Autonomy's reputation."*

(4) Fourthly, it is wrong to say that the transactions that were highlighted systematically referred only to customers operating in the software sector. He also specifically disagreed that there was any intention to present only software companies. Dr Lynch told me in cross-examination that he had *"gone through the press releases of Autonomy"* and in fact, Autonomy's published information in the Relevant Period included companies that would fairly be regarded as operating both outside and inside the software sector; he named companies such as GE, Siemens, Xerox and HP. He added that the boundary between a software company and a non-software company is a vague one. Dr Lynch explained in cross-examination that *"every so often companies whose primary business is something else still do something with software."*
Although he accepted that since Autonomy dealt most with software companies those highlighted would *"obviously…more likely…be software companies"* he did not understand that they were selected for that reason. He added that, on the contrary:

> *"If we'd had the chance to announce that someone was OEM-ing our software onto a piece of hardware, we would have been extremely keen to publicise that. You know, being able to show, for example, that Autonomy is being used in health care was a very positive thing, given that we didn't do a lot of health care business ourselves…"*

3215. The first of the points raises in a modified form the question at the heart of this aspect of the case as to the meaning of the disputed phrases in fact intended by the Defendants. My determination that the Defendants knew that they were allocating to the OEM Metric transactions which would not have fallen within the market perception of OEM business (with permissible but small exceptions as I have explained above) largely disposes of the point, though of course my determination would further be supported if the Claimants establish that the selection of OEM deals was for the reasons they suggested.

3216. As to the second point, Dr Lynch's position as regards his knowledge of the process of selection was somewhat inconsistent. As the Claimants pointed out, in his first witness statement, Dr Lynch gave detailed evidence explaining the thought process behind the selection of which OEM deals to highlight and the basis on which Autonomy *"commonly reported selected new OEM relationships to the market."* There was no suggestion or acknowledgment in that witness statement that this was not a matter within Dr Lynch's direct knowledge. The Claimants submitted that if it were true that Dr Lynch had no involvement in, or direct knowledge of, the selection process, one might have expected him to have said precisely that, not least because Autonomy's reporting of selected OEM partners to the market is specifically pleaded by the Claimants as a basis for inferring Dr Lynch's knowledge of Autonomy's wrongdoing. No such statement appears in either of Dr Lynch's witness statements either. I consider that Dr Lynch and Mr Hussain would have been involved: I hold that they were so.

3217. As to the third point, I accept that the selection was not by reference to the size of the transaction, though I should have thought it might also have some bearing. But that is not, as I see it, a point entirely in Dr Lynch's favour. For example, if selection was made (as Dr Lynch contended) to enhance Autonomy's reputation, I accept that it is striking that no mention was made of the Ministry of Defence or the SFO or Tottenham Hotspur.

3218. As to the fourth point, the fact is that the selections made were of entities unlikely to cause surprise or excite enquiry as to the basis of their inclusion does support the Claimants' position. Again, the 'dual' status of some companies as both hardware and software companies is a point which is in some ways against Dr Lynch: the choice of such an ambivalent entity is consistent with the Claimants' position.

3219. In light of my earlier conclusions effectively accepting the Claimants' case that Autonomy's published information contained untrue or misleading statements in respect of its OEM line of business, I do not think I need make a determination whether in addition the selection of OEM counterparties in the published information actually concealed the identities of the counterparties to the largest transactions that had been allocated to the OEM metric. I make no finding of deliberate concealment, which in any event would only be a basis of claim under FSMA if the concealment resulted in *"the omission from…published information of any matter required to be included in it"* within the meaning of FSMA. However, I consider that the selection of OEM transactions for presentation in the Quarterly Reports is consistent with and supportive of the findings I have earlier made.

Alleged pre-announcement concealment: Top 10 List

3220. I am further fortified in my conclusions by the efforts made in the course of HP's pre-acquisition due diligence to avoid disclosing the existence of transactions included within the IDOL OEM category when providing a list of 'top 10' OEM customers by

revenue which Mr Sarin requested. The Claimants relied on this in the context of the FSMA claim as providing a further demonstration of what they presented as the Defendants' willingness to mislead HP regarding the true nature of its IDOL OEM revenue and business. In brief, the facts relating to the *Top 10 List* were as follows.

3221. On 9 August 2011, Mr Sarin sent Mr Kanter a list of information requests, which sought amongst other things "*Top 10 OEM customers by revenue for FY10 (and IBM, Oracle, EMC, [Computer Associates] and [Symantec] if not in top 10 list)*". A list was provided by Mr Kanter in an email on 10 August 2011. The email described what was being provided: "*The top ten* <u>*core OEM licence customers*</u> *in FY 2010 break down as follows*". Mr Kanter then proceeded to list three companies *"[b]etween $3m and $12m"* and seven companies *"[b]etween $1m and $3m"*.

3222. Mr Kanter thus did not describe what was being provided as a list of the top contributors to Autonomy's OEM metric: it simply listed the largest "core" OEMs. The Defendants contended, in essence, that Mr Sarin got what they understood him to have asked for, and that Mr Kanter had made clear what they were providing by describing the list as being of the top 10 *"core customers"*. Dr Lynch's Defence clearly summarised their position:

> *"The customers listed were Autonomy's top 10 customers who were OEMs, which corresponded to HP's request for the top 10 OEM customers. HP's request also made it clear from the reference to IBM, Oracle, EMC, CA and SYMC that HP were looking for information as to actual OEMs, rather than transaction counterparties to other OEM derived revenue…"*

3223. Mr Sarin stated in his witness statement, however, that he *"understood this to mean that the 10 customers listed were the 10 largest sources of IDOL OEM revenue in the year ended 31 December 2010."* Dr Lynch, who was involved with Mr Hussain in the process of compiling the list, and had been consulted by Mr Hussain in drawing up the list sent by Mr Kanter, explained the difference:[378]

> *"A.… the simple fact is you can go through our contracts, you can find the top OEM customers and that will give you a list, but that's not the same as the top contributors to OEM-derived, because those are not OEMs and we're being asked for OEMs."*

3224. Dr Lynch's evidence in his witness statement was that at no stage did he believe that HP was being provided with anything different from what Mr Sarin had requested; he was adamant when cross-examined that what he took Mr Sarin to be asking for was a list of the largest OEMs, and not the largest OEM-derived customers. His rationale was explained in an exchange in cross-examination which I have already quoted at length in paragraph 3068 above. I would refer again to that passage and add the following further extract:

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[378] It was also Dr Lynch who had suggested that it was better to give bands of values, rather than the exact revenue from each OEM.

> *"Q. What I suggest has happened, Dr Lynch, is you get a request from Mr Sarin for top ten customers. You and Mr Hussain work through a list of OEM customers that…Mr Hussain has put together on a schedule, and what you send him includes only those customers, only the OEM customers or transactions which fall within a narrow ambit of the definition of OEM, rather than you identifying –*
>
> *A. Because they're OEMs*
>
> *Q. Well –*
>
> *A. The others aren't OEMs. I don't think there's any dispute between us that, if you sell an upsell to Ford, then Ford is not an OEM, yet that still goes to OEM-derived.*
>
> *Q. I suggest that what you did was to exclude transactions from the list that you knew didn't accord with Autonomy's description to the market of OEM revenue?*
>
> *A. I completely disagree. What they're wanting is to see the contracts – it's not even a list they want, it's the contracts – relating to OEM customers so they can see the terms of those contracts…"*

3225. In the result, the list that Mr Kanter provided omitted many of the entities that were the counterparties to the 10 largest transactions by revenue that had been included in IDOL OEM revenue in FY 2010. For example, there was no reference to the deals with JP Morgan (worth $8,700,000 (OEM28)), MetLife (worth $7,025,000 (OEM27)), Bank of America (worth $8,915,000, $2,726,000 and $7,000,000 - OEM21, OEM37 and OEM45[379] respectively) or Amgen (worth $4,467,000 and $9,000,000 - OEM24 and OEM36[380] respectively). Each of these transactions was included within the $132 million of IDOL OEM revenue stated in Autonomy's published information for FY 2010. Taken together, they accounted for 36.2% of reported IDOL OEM revenue in that year.

3226. The Claimants contended that it is no coincidence that none of the excluded entities is a software company; and that, furthermore, the spreadsheet prepared by Mr Hussain which formed the basis of the list ultimately provided to Mr Sarin did not identify customers to HP where the relevant contract (a) was restricted to the purchaser's internal use; (b) constituted an upsell transaction or (c) was a hosting transaction. The Claimants submitted that it was plain that, before sending the list to Mr Sarin, the Defendants had carefully selected only those customer names where they believed that the related transactions accorded by nature with the narrower interpretation of the OEM metric, inviting or supporting the inference that the Defendants knew that the market would perceive the metric to have that narrower scope.

3227. They added that Dr Lynch's responses in cross-examination were *"not at all to his credit. He made a series of assertions that lacked any credibility."* They instanced his

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[379] As end-user in an impugned VAR transaction.
[380] As end-user in an impugned VAR transaction.

suggestion, quoted in paragraph 3224 above, that Mr Sarin was really asking for the relevant contracts not the names of customers, which was plainly not the case. More generally, they dismissed Dr Lynch's main point that there was a distinction between *"core"* and *"derived"* as a *"tactic"*, and his claim to the effect that this distinction had previously been explained to HP as *"completely untrue"*. They added that the explanation of the distinction to HP was not mentioned in his Defence, nor in his written evidence (including in his response in his second witness statement to Mr Sarin's witness statement): nor was it to be found in any quarterly report, earnings call or annual report during the Relevant Period. They stated that *"There was no such mention because Dr Lynch's live evidence was simply made up."*

3228. Dr Lynch sought to rely on a Power Point display at a meeting in which (he said) the distinction was made and asserted that in any event it was also *"well understood in the market and covered in many analysts reports and market conference calls before that period"*. There was little or no evidence for either.

3229. However, the Defendants referred me to a document which was provided to Mr Sarin by Autonomy a little later in the due diligence process. This was a further list of top OEM customers, headed *"OEM analysis. Top customers by name and revenue category 2006-2010"*, which Mr Sarin accepted when cross-examined, that he had probably seen. Immediately below that description there appeared a note in the following form:

> *"Note: Excludes…upsells, maintenance, pros serve etc, and excludes companies which were formerly OEMs but subsequently acquired by Arsenal (eg IWOV, Meridio, etc). Estimates of contributions below."*

3230. The further list then set out the customers in question under two categories (Over $10m and Under $10m) as follows:

> *"Over $10m category*
> - *EMC*
> - *HP*
> - *IBM*
> - *Iron Mountain*
> - *Video Monitoring Services*
>
> *Under $10m category*
> - *Adobe*
> - *Bloomberg*
> - *Computer Associates*
> - *Dassault Systems*
> - *Deloitte*
> - *Energy Solutions*
> - *Huron*
> - *Hyland*
> - *KPMG*
> - *Rand*
> - *Opentext*
> - *Oracle*
> - *Symantec*

- *Verdasys*
- *Xerox"*

3231. The Defendants submitted that this list made clear to HP both that Autonomy's OEM business included upsells, and also that upsell revenue was being excluded in drawing up the list. If still uncertain, for example about the scope of the expression "upsells" (which when cross-examined he told me he had understood to be restricted to *"selling more functionality to the OEM itself"*) Mr Sarin had the opportunity to ask further questions, but had chosen not to do so.

3232. Further, on 10 August 2011, various OEM contracts were uploaded to the data room. Mr Gersh confirmed that he read all of them. Those contracts include contracts which HP now impugn, saying that they cannot properly be classified as OEM. But the Defendants contended that HP would have known that Autonomy was treating those contracts as OEM contracts from their inclusion amongst the OEM contracts in the data room; and as explained below, those reviewing the contracts for HP during the due diligence process identified the very clauses about which the Claimants now complain in a document headed "*Project Tesla OEM Contract Reviews*" prepared on 11 August 2011. However, that is a matter going, as I see it, to inducement and reliance rather than the intentions behind the provision of the *Top 10 List.*

3233. Despite some equivocation on the part of Dr Lynch when he was cross-examined on the matter, there was no real dispute about the Defendants' involvement in the preparation of the *Top 10 List.* Dr Lynch accepted that he had been consulted by Mr Hussain in drawing up the list sent by Mr Kanter, and had, for example, suggested that it was better to give bands of value rather than the exact revenue from each OEM. He accepted also (and there are emails demonstrating) that he had thereafter been kept up-to-date by Messrs Hussain and Kanter as the response to Mr Sarin was finalised. Mr Hussain was aware and involved likewise.

3234. The question whether the *Top 10 List* was contrived to perpetuate a false impression is a facet of the more general question as to whether the IDOL metric was intentionally misleading. My conclusion that it was accordingly not only informs but to some extent dictates my assessment.

3235. I have concluded on a balance of probabilities that:

(1) Although it may well be that, over time, Dr Lynch has convinced himself, such that he now does believe, that the distinction between OEM and OEM derived on which his position is based was current in the market's understanding at the time, it was not.

(2) At the time, the Defendants did wish and intend to ensure that the fact that they had included in the OEM metric a very substantial amount of revenue from sources other than what the market understood to be comprised in it was not exposed.

(3) The Defendants (and Mr Kanter) well appreciated that Mr Sarin's request for a list of *"Top 10 OEM customers"* required an answer which did not expose that fact.

(4) Like the self-coined expression "OEM derived", the notion of "core" OEM customers was the means they devised of providing a list which was apparently responsive, but which confined the listed customers to software companies engaged in business which plainly did properly fall within the metric, and did not expose the "derived" element which by now comprised by far the greater part.

(5) There was no evidence that the expression "core OEM" had been used before, or that the Defendants had some substantial basis for thinking that it would be understood by Mr Sarin as differentiating "derived" business. I have seen no evidence that either he or the market understood, or had even been introduced to, the notion of "core" OEM as denoting a small sub-set of business included in the OEM metric.

(6) The notable absence of any attempt at an explanation, and the deletion of words in an early draft list which did at least explain that upsells and maintenance had been excluded, further support the impression I have formed that the *Top 10 List* was carefully contrived to continue the pretence that the OEM metric was substantially comprised of revenue from (a) development licences and (b) royalty-type payments by the OEM concerned on its onward sales of product embedded with Autonomy software.

(7) In this, as in general, the due diligence undertaken was feeble: its aim in reality was to find support for Mr Apotheker's project and the sale price, rather than to ferret out inconsistencies: but that is matter going to the issue of inducement and reliance, to which I turn in paragraph 3236 below, after brief consideration of one further episode which the Claimants submitted, and I agree, reinforces the conclusion that Dr Lynch was at the time intent on concealing from HP the true variety of revenues included in what Autonomy presented as its OEM business. The episode in question relates to the *"Joe Bloggs"* correspondence, which I mentioned in paragraphs 312 to 313 of the Introduction to this judgment.

The "Joe Bloggs" correspondence and post-announcement concealment

3235A. It may be recalled that in late August 2011, and some 14 months after he had left Autonomy, Mr Collet co-authored (with a former Autonomy colleague of his called Mr Marshall) an anonymous communication (of which there were several iterations) to industry and financial analysts suggesting a number of questions that HP should be asking about Autonomy's OEM business. The Defendants portrayed this (in Dr Lynch's written closing submissions) as *"[r]ather than being a disinterested attempt by him to pass on his concerns, this was a sustained campaign to generate negative market sentiment, apparently for the benefit of investors holding short positions in Autonomy stock…"* More pertinent in this context than Mr Collet's motives, however, is the insight that Dr Lynch's responses provides into how he intended HP to understand Autonomy's OEM business.

3235B. Of particular relevance in that context is a document dated 13 September 2011 entitled *"Autonomy – examining the intentional misinformation"* sent by Dr Lynch to Mr Robison under cover of an email of the same date, and described by Dr Lynch as *"a simple rebuttal to the 4 main attacks from the short hedgies over the years"* which had been prepared by *"Our IR people"*. One of the four areas addressed was *"IDOL OEM, how it works and the revenue profile"*. What stands out from the description given of the *"IDOL OEM"* business is that no inkling was given of any revenue source other than development fees and (predominantly) recurring royalty revenue: thus there was no mention or suggestion at all of other sources of revenue, such as upsells and PODS revenue, and no mention of some subset of *"OEM- derived revenue"* though the totals given in the document were the same in the document as in Autonomy's published information.

3235C. Dr Lynch sought, especially in his second witness statement, to distance himself from the preparation of the 13 September 2011 document. But it is clear from background documentation, and I find, that he was personally involved in its preparation and aware of its contents before it was sent to HP. He must have been aware, and I find that he intended, to perpetuate the impression given in the published information of the *"IDOL OEM"* business being entirely comprised of upfront development fees and (predominantly) recurring royalty revenues because of the special value given in the market to revenues of that sort. I would not base my conclusion as to what the category was intended to convey on this document: but it does seem to me to be supportive of the conclusion that I have reached.

The issue of reasonable reliance: did Bidco acquire Autonomy in reasonable reliance on the information given about Autonomy's OEM business in the published information?

3236. The Claimants' case that HP's understanding of the IDOL OEM revenue stream as particularly valuable was based on Autonomy's published information (and in the context of its deceit and Misrepresentation Act claims, on the pre-acquisition representations made to it) and their case that HP reasonably relied on what was said in that published information accordingly was based on the evidence of Mr Sarin and Mr Apotheker, little of which was challenged on the point, and also of Mr Robison and Mr Gersh (whose description of OEM revenues as comprising *"an upfront licensing fee, PCS [post contract support] and royalties that are paid on a quarterly basis…"* in KPMG's due diligence report was plainly based on that information).

3237. Mr Sarin's evidence was that:

(1) He reviewed the 2010 Annual Report, and "*relied on the accuracy of the 2010 Annual Report when forming a view as to whether Autonomy could be a good acquisition target for HP*".

(2) He also reviewed Autonomy's Q1 2011 Quarterly Report, which "*indicated that all of [Autonomy's] product lines were achieving double digit growth*", and that "*Autonomy's OEM business was said to be growing at 28% annually*".

(3) He read Autonomy's Q2 2011 Quarterly Report "*and was impressed by Autonomy's apparent performance*", which included 27% growth in the IDOL OEM business.

(4) When building the Deal Model, HP used the five categories of reported revenue identified in Autonomy's published information. One of these was IDOL OEM, which Mr Sarin understood to be "*licensing Autonomy software to other software companies who embedded it in their own products*".

(5) In the Deal Model, a high gross margin (98%) was projected for OEM:

> *"because we understood OEM revenue to consist of royalties paid to Autonomy by other software companies, with very little attendant cost to Autonomy, and it seemed that Autonomy had few competitors in the space*".

(6) At the time of the Q2 2011 results, the published information appeared to convey, and HP understood it to convey, that:

> *"Cloud and OEM now represented more than half of Autonomy's core software business was significant from HP's perspective. We considered the Cloud and OEM revenue streams to be particularly valuable because of their (apparent) recurring nature... once an OEM customer embedded Autonomy software in its own software product, that product would usually (we understood) be sold for a period of years. We viewed the OEM business as very valuable because we believed the revenues were recurring in nature, increasing rapidly, and highly profitable to Autonomy because all selling was done by the third party software companies*".[381]

(7) The following excerpt, from a document headed "*Autonomy – calculating organic growth*" sent to Mr Sarin by Derek Brown (Autonomy Investor Relations), copied to Dr Lynch and Mr Hussain[382], on 23 August 2011, shortly after the offer was announced, accorded with Mr Sarin's understanding of the attractiveness of Autonomy's IDOL OEM business:[383]

> *"Autonomy has consistently signed 10 to 15 OEM agreements per quarter for many years. These lead to royalty revenues which begin to flow around 2 years later as 3rd party products with IDOL embedded come to market. Thus there is a* ***layering effect*** *as more and more products begin paying royalties each quarter.*
>
> *Another key driver for OEM is the* ***royalty rate****, which averages around 4% but is ticking up as more functionality is licensed. IDOL OEM revenues grew by 27% in Q2'11 which is pure organic expansion. IDOL OEM is currently 26% of core IDOL sales."*

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381 Emphasis added.
382 The Defendants saw the document in draft form before it was sent to Mr Sarin.
383 Emphasis in the original.

3238. The Claimants also relied on the following unchallenged parts of Mr Apotheker's evidence:

(1) His statement in his witness statement that he reviewed the 2010 Annual Report "*very carefully*" in May 2011. (He confirmed this when cross-examined.)

(2) His understanding that the manner in which IDOL OEM revenue was described or defined in that report:

> "*indicated that Autonomy's IDOL software had been widely accepted by other software companies and was becoming the industry standard for managing and analyzing unstructured data. This aspect of Autonomy's business also appeared to be very profitable because other software companies were selling Autonomy's software in the course of selling their own software (at no cost to Autonomy). OEM revenues were attractive for the further reason that they are typically recurring in nature. Once software is embedded in another software company's product, sales of that company's product tend to be made over a period of several years*". [384]

(3) Dr Lynch's remark in the 2010 Annual Report that the "*IDOL OEM and IDOL Cloud routes*" were "*highly attractive*" as they "*turn one-off sales into multi-year committed annuity streams*" was consistent with Mr Apotheker's understanding of the value of the IDOL OEM revenue stream.

(4) Mr Apotheker stated that:

> *"Similarly, if Autonomy had fully disclosed that its IDOL OEM revenues were far lower than had been shown in the Annual Report I reviewed... it would have made a significant difference to my thinking about the company. Lower IDOL OEM growth would have meant that Autonomy's software was not as successful in the marketplace as I had otherwise thought...lower IDOL OEM revenues and slower growth would have made Autonomy, as a whole, less attractive to HP, because Autonomy would not have as readily helped HP to achieve its strategic goals of becoming a higher margin, higher growth company."*

3239. When cross-examined, Mr Apotheker told me that he:

> *"really liked this notion of OEMs because much more than the resellers themselves this was a highly scalable model. In particular, the way it was explained to me and the way I think it worked was that it was a multi-year, layered effort where you would generate more and more income from a given OEM over time with hardly any additional cost of sales. So I thought that was a very, very important part of the business model and a very smart one."*

[384] Emphasis added.

3240. He confirmed that it was this which made the OEM line such an attractive part of Autonomy's business model: *"the absolute number wasn't of big interest"*.

3241. Mr Robison, who did not attend to give evidence (citing medical reasons) also stated in his witness statement that his understanding was that:

> *"Strong IDOL OEM revenues and revenue growth were important to HP. The stated growth of Autonomy's IDOL OEM sales was an indicator that other companies valued Autonomy's technology. We therefore considered IDOL OEM to be a highly profitable, growing revenue stream that was recurring in nature and an indicator of the quality of the business."*

3242. I agree with the Claimants' summary in their closing submissions that:

(a) HP based its understanding of Autonomy's IDOL OEM business, in substantial part, on the 2010 Annual Report, and the Q1 and Q2 2011 Quarterly Reports.[385]

(b) HP's understanding of IDOL OEM revenue accorded with Autonomy's description or definition of this revenue as arising where Autonomy licensed its software to other software companies who embedded it in their own products.

(c) HP understood the business to be fast-growing.

(d) HP forecast future IDOL OEM revenue by reference to the size and growth of the IDOL OEM revenue amounts reported by Autonomy.

(e) HP understood this business to be particularly valuable, because it consisted of a stream of recurring, high-margin, royalty income, paid by OEM partners over many years.

3243. Further to my analysis of the instances given by the Defendants where reliance might not be reasonable (see the Introduction to this judgment at paragraph 521) I have considered the following in the particular context of the question whether HP's reliance on the above was reasonable:

(1) Whether the fact that there was a general warning in the 2010 Annual Report that *"delivery of Autonomy's core technology is via a number of methods, depending on the demands of the customers, trends within these delivery methods are not segments and are provided for background information and may include qualitative estimates"* was a sufficient warning to make any reliance without further investigation and verification unreasonable;

(2) Whether the fact that Mr Apotheker accepted when cross-examined that he did not read any more up to date quarterly reports and the 2010 Annual Report which he did read was by then some seven months' out of date (though he told me he was told by others within HP that the quarterly reports *"were in line with*

[385] As noted above, its understanding was also formed by the misrepresentations made to HP directly, upon which HP also relied. These misrepresentations are addressed more fully below.

expectations more or less") made any reliance unreasonable in the context of such a large transaction;

(3) Whether in the course of due diligence HP reviewed documents which made plain the true position, and if so whether (as was submitted in Dr Lynch's written closing) the Claimants *"cannot say that they were misled about the content of Autonomy's OEM business, when these things were clear from documents provided to them and reviewed at the time."*

3244. Suffice it to say that none of the matters in (1) and (2) above persuaded me that reliance was not reasonable.

3245. As to (3), the Defendants relied on the following as demonstrating that the Claimants' claim is artificial and *"founded on matters that they (or their advisers) knew about at the time, and were not concerned about"*:

(1) that a number of the OEM contracts that the Claimants sought to complain about were included in the data room during due diligence and HP's advisers (Freshfields), working with an HP in-house lawyer (Ms Walton) had analysed these contracts, and collated a document headed "*OEM Contracts Reviews*";

(2) the "*OEM Contracts Reviews"* document identified key features of contracts in the data room inconsistent with what the Claimants have alleged to be their understanding of the scope of the metric; yet

(3) neither HP nor its advisers raised any complaint or suggested that any contracts had been improperly categorised as OEM;

(4) one example given by the Defendants was the transaction OEM 61 in the list of OEM transactions impugned by the Claimants. This covered two contracts with Iron Mountain, both of which were uploaded to the data room on 10 August 2011. Although the documents were redacted, the redactions did not cover the text which the Claimants relied on as showing these contracts could not properly be classified as OEM. The basis which the Claimants give for the complaint that the agreements were wrongly classified is that "*The transaction related to a reseller agreement and a second agreement restricted to internal use*". Dealing with the two contracts in turn:

(a) The contract the Claimants challenged as a reseller agreement was the very first contract described in the "*OEM Contract Reviews*" document.[386] In the "*Type of Document/Contract*" box the reviewer wrote "*Value added reseller agreement*"; so there was no secret about that. The Claimants' written opening quotes one clause to allege that the contract was wrongly classified. The

[386] The Defendants identified the document being discussed as "*Iron Mountain - IM partnership (redacted)*", a redacted version of the VAR Agreement dated May 2011.

same clause is quoted in the "*OEM Contract Reviews*" document.[387]

(b) The Claimants alleged that the second contract described in "*OEM Contract Reviews*" contained an internal use restriction such that its categorisation as OEM was improper. But the Defendants suggested that the reviewers must have read it, since it is the first clause on the first page, and they have quoted from other parts of the contract.

(5) It was also clear from those contracts in the data room that Autonomy's OEM business covered some VAR agreements: the example of OEM 61 (relating to two contracts with Iron Mountain) appears above; and OEM 55 covered a contract with Symantec also relied on by the Claimants as wrongly classified on two bases clear from the wording of the contract itself, both noted in the *OEM Contract Reviews."*.

(6) The contracts in the data room also included contracts which would not generate royalties (such as an agreement with Verity for lump sum payments and no royalty, OEM54).

3246. However, although the Defendants contended in their closing submissions (both written and oral) that the Claimants *"cannot say that they were misled about the content of Autonomy's OEM business, when these things were clear from documents provided to them and reviewed at the time"*, I do not accept this apparent assertion of actual knowledge and understanding. It may be that the Claimants should have appreciated that the OEM business was broader in scope, and/or their advisers should have so advised them; but I am far from convinced that they did so. As discussed previously, it was not open to the Defendants to contend that HP should somehow have worked out the truth for itself. Further, none of this was put to Mr Sarin or Mr Apotheker (or Mr Gersh); it was not suggested to any of them that HP had in fact ascertained the true composition of IDOL OEM revenue from its due diligence exercise.

3247. In short, I consider that HP (and thus Bidco) reasonably relied on and was induced by what was stated in the published information as to the particularly valuable nature of the OEM revenue stream.

The misrepresentation of Autonomy's OEM business in other materials

3248. I address in a separate chapter of this judgment the various claims made by the Claimants in respect of pre-acquisition representations, which the Claimants allege they relied on as having induced them to purchase the Defendants' own shares in Autonomy at the price they agreed to pay: see the chapter headed Deceit and Misrepresentation Claims. Although I also address various representations made about Autonomy's OEM business in that chapter, it is convenient to deal here with a sub-set of those representations now, because in my view they cast further light on the dispute as to what the Defendants intended to convey about that business, and in my view reinforce my conclusion as to

[387] In the box headed "*Product*": "*Tesla, Inc. grants Iron Mountain, during the term of this agreement, a limited non-exclusive, non-transferable right and license to distribute copies of the Products to Iron Mountain's customers, and to resell the Service Products and Support to End-users.*"

what the Defendants intended the published information to convey about Autonomy's OEM business.

3249. The material I have in mind, all of which I return to later, can for present purposes be summarised as follows:

(1) In initial meetings in January and February 2011, Mr Quattrone of Qatalyst took HP through two slide decks. There is an issue whether he did so as agent of Autonomy, but for the present that is not of importance since the focus presently is on what HP were told. The Slides included representations concerning (i) the level of IDOL OEM revenue; (ii) the growth of IDOL OEM revenue; and (iii) the nature of the business as "*Royalty-based ~3%*".

(2) On 4 March 2011, a further slide deck ("the March Slides") was used which included what the Claimants alleged were misrepresentations as to (i) the level of IDOL OEM revenue; (ii) the growth of IDOL OEM revenue; (iii) the royalty-based nature of IDOL OEM revenue; (iv) that IDOL OEM revenue was revenue from transactions with software companies; and (v) that reported IDOL OEM revenue related to deals signed two years ago.

(3) The Defendants contended that the slides shown in March should not be considered in isolation; and Dr Lynch told me in cross-examination that although not mentioned in the Slides themselves, the inclusion of revenues from upsells and PODs was expressly mentioned; but there was no other evidence of this, and Dr Lynch made no mention of any such broader discussion in his witness statements, nor in his pleadings.

(4) On 29 June 2011, Dr Lynch made misrepresentations at a meeting held between HP and Autonomy representatives in London. These included that Autonomy's OEM business was fast-growing and involved many other software companies incorporating IDOL into their own software products.

(5) Further representations about IDOL OEM revenue were made to HP on due diligence calls in August 2011, including on calls held on 1, 2 and 4 August 2011. These reinforced the depiction of Autonomy's OEM business as being rapidly and exponentially growing, very high margin and generating recurring revenue, as in Autonomy's published information.

3250. The Defendants addressed the statements made in the March slides in relation to OEM as follows:

(1) First, they said that the Claimants' argument that the Slides represented that IDOL OEM revenue constituted 15% of Autonomy's reported revenue in 2010, when the true figure was only 3.2%, was founded on the Claimants' narrow and erroneous definition of the relevant revenues. The Defendants' case was that Autonomy's IDOL OEM revenues for 2010 were not, and were never represented to be, confined to core OEM revenue received directly from OEMs, rather than the broader OEM derived revenues described above.

(2) Secondly, they rejected the Claimants' allegation that by selection of companies whose logos were shown on slide 19, Dr Lynch represented that Autonomy's OEM revenue "*was exclusively derived from transactions with companies operating in the software industry or with a large software business*." They contended that no such representation was made: the relevant slide, which appeared in a section describing Autonomy's business models rather than defining the scope of its different revenue categories, merely identified a selection of Autonomy's core OEM customers.[388] The Defendants contended, therefore, that the selection was not misleading: as already discussed, Autonomy's core OEM customers are primarily software companies, even if its OEM derived revenues come from a wider range of counterparties.

(3) Thirdly, as to Dr Lynch's alleged representation through the Slides that the business operated mainly or typically on a royalty model, with annual royalties of 3 or 4%, the Defendants' case was that no such representation was made, and that, at most, an example was given with an indication of a 4% royalty, which HP would have known from reading Autonomy's 2010 Annual Report was only an example, and that "*contracts and situations vary.*"[389] Further, they submitted that HP was aware from its own OEM arrangements with Autonomy that some of Autonomy's contracts provided for prepaid fees.

(4) Fourthly, the Defendants insisted that they had not given a false impression of OEM revenues in respect of recurrent revenues and that there was no misrepresentation, since Autonomy's core OEM revenues were highly likely to recur since, even where the OEM paid a bulk or prepaid royalty, there was a strong incentive to renew at the expiry of the contracts with Autonomy. In any event, the Defendants contended that many of Autonomy's OEM contracts were royalty bearing and that the Claimants had not established otherwise.

(5) Finally, they maintained that the Claimants' argument that the growth rate for Autonomy's OEM revenues were misstated, showing that the business was growing at the rate of 35% from 2009 to 2010, rather than (as the Claimants argued) shrinking at 28.5%, was again predicated on the Claimants' misconception about the true scope of the OEM metric: see above.

3251. Given that I have found in favour of the Claimants on their case that a significant proportion of the revenues included in the OEM metric were not structured to generate recurring revenue and on their case that only revenue from development licences and royalty revenues should have been included in the OEM metric. I accept the Claimants' case that the March Slides were misleading in relation to Autonomy's OEM business.

3252. I consider the extent of the Defendants' involvement in and responsibility for them in paragraphs 3866 to 3867 below in a separate chapter in which I address the Claimants' deceit and misrepresentation claims. Suffice it to say for the present that I think both must accept responsibility for the representations made from March 2011 onwards.

Conclusion on OEM

[388] Not all of the companies whose logos were shown were "software companies", though Dr Lynch accepted that they had software businesses.
[389]See paragraph 3164(3)(c) above.

3253. In my judgment:

(1) the Defendants gave a false and misleading picture of Autonomy's OEM business.

(2) They knew they were doing so. They did so because they also knew that it would be, and had been, regarded as generating a particularly valuable revenue stream.

(3) HP relied on that picture, and it was reasonable for it to have done so.

(4) The direct representations made to HP confirmed the depiction given in Autonomy's published information.

(5) HP was the controlling mind of Bidco; and its reliance is to be attributed to Bidco.

(6) The Claimants' case in respect of the OEM business has been established.

HOSTING

General overview of the Claimants' hosting case

3254. An important part of the Autonomy group's business was the provision of data hosting services to customers which enabled them to archive and preserve, access and navigate their data and digital information in an environment that was hosted and managed by the Autonomy group at its own data centres using Autonomy software.

3255. Hosting business customers tended to be 'sticky' in the sense that once having settled on a provider, they rarely switched to another, because of the effort and substantial expense of doing so. Further, since the standard model was that customers would pay a subscription for the services provided, hosting businesses tended to generate recurring and predictable revenue. This made its hosting business (sometimes called *"IDOL Cloud"*), which Autonomy primarily carried on through Zantaz, a part of the group's business which analysts and other investors valued especially highly. Dr Lynch was well aware of this: he noted in the Q2 2011 earnings call that:

> *"Obviously we'd be very happy if everything went to the Cloud because it's a much nicer model in terms of valuation."*

3256. The particular importance ascribed by analysts and investors to Autonomy's hosting business as an important source of reliable and growing revenue seems to have encouraged Autonomy to provide metrics to show its success. From 2010 onwards, Autonomy's published information referred to the hosting business as *"IDOL Cloud"* and included an IDOL Cloud metric in the "front-end" of its quarterly and annual accounts. Revenue included within that IDOL Cloud metric was an indicator of the growth and success of the hosting business. It was an especially valued revenue stream.

3257. The Claimants' case in relation to Autonomy's hosting business ("the hosting case") is, in a nutshell, that Autonomy resorted to stratagems intended artificially to accelerate the rate at which Autonomy recognised revenue from hosting customers to boost the appearance of substantial growth of this revenue stream whilst at the same time failing to disclose the true nature of the arrangements and the fact that this inevitably reduced future recurring revenues.

3258. The alleged stratagem was Autonomy's introduction of what was called a "hybrid model" for its two main hosted offerings in the Relevant Period, which were Digital Safe and e-Discovery. The Claimants' complaints relate both to the model and to its presentation.

Autonomy's hosting business and the introduction of the Hybrid Model in more detail

3259. Both these products (Digital Safe and e-Discovery) had originally been developed by Zantaz, a specialist in cloud archiving. Zantaz also had another archiving solution called Enterprise Archive Solution ("EAS"), which was typically the solution sold to smaller

customers who wanted to manage their own archive on-premises (that is to say in their own office or site).[390]

3260. Autonomy had acquired Zantaz in July 2007, and Zantaz continued to be the operating company for Autonomy's hosting business thereafter[391]. Both before and after the acquisition the CEO of Zantaz was Mr Sullivan. He remained as CEO of Zantaz throughout the Relevant Period.

3261. Prior to its acquisition, Zantaz had generally charged its customers fees for hosting services (priced as an agreed sum per megabyte of storage) usually on a pay-as-you-go basis. This was an industry standard way of charging and was known as "Software-as-a-Service" ("the SaaS model"). In its own financial statements prior to its acquisition, Zantaz recognised revenue from its SaaS business over the course of the hosting contract as and when the services were provided. That was the accounting treatment prescribed by US GAAP.

3262. Following its acquisition, and at Autonomy's instigation, Zantaz began to promote, both to new and existing customers, an alternative contract model, known as the *"hybrid model"* or *"hybrid structure"*. This involved structuring or restructuring its hosting arrangements so that customers paid (i) a significant upfront sum for a licence to use Autonomy's software, (ii) fees for standard maintenance and support services of the kind typically provided with software licences, and (iii) considerably reduced fees for hosting and related ongoing services. Typically, around one-third of the overall revenue from a hybrid deal was recognised upfront[392]. References in this part of this judgment to "licence fee" or "licence fee element" are to that proportion of the revenue from a hybrid deal which was recognised upfront.

3263. In cases where the hybrid model was agreed, Autonomy treated the sale of such a licence like the sale of goods and would recognise the sizeable licence fee element as revenue immediately upon delivery of the software. The remaining revenue was recognised over the period of the arrangement.

3264. The Claimants' overall "Hosting case" is that the licence issued in the hybrid model had no real substance and was not in any real sense a separate and severable component of the overall transaction for the provision of hosting, monitoring and maintenance services, so that it was wrong to account for it as if its sale was analogous to the sale of goods. The rights apparently conferred on a grantee under the licence had no practical utility and were of no material benefit to the grantee except as the means of obtaining discounted hosting fees. It was a device used to justify accounting for part of the hosting

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[390] After acquiring Zantaz, Autonomy made the decision not to continue to develop EAS, though it still had to provide support services for EAS customers which Autonomy largely outsourced to Capax Global. Autonomy/Zantaz focused development efforts on e-Discovery and Digital Safe.

[391] However, and in line with my general impression that little heed was taken to separate corporate identity within the Autonomy group and all group business was in reality directed by Autonomy's management, Dr Lynch, when asked in cross-examination to confirm that hosting business was *"mostly carried on by or through Zantaz"*, said *"We didn't really operate as companies in that way…so, for example, the employees in Zantaz would have been Autonomy employees…"*.

[392] As Dr Lynch explained, in the hybrid model, there was a licence element or component, for which a fee was charged, as well as hosting and service elements. The licence fee element would typically comprise about one-third of the whole. After carving out somewhere between 5% and 15% for the invariable maintenance part of the licence fee the remaining part of the licence fee would be recognised 'upfront' (i.e. immediately), provided that the auditors (Deloitte) were satisfied that the split between licence fee and maintenance fee was at *"fair value"*.

fees as realised revenue at the point of the licence sale, whereas in reality the issue of a licence did not alter the fact that all that was to be provided was hosting and related services[393]. Further, the Claimants argued that such were the discounts offered in return for payment of the upfront licence fee that the hybrid model resulted in Autonomy receiving a considerably diminished overall return.

3265. In the particular context of eDiscovery, the Claimants also advanced an alternative case, that it was not possible to ascribe a "fair value" to the licence component of the hybrid deal and therefore recognise the licence revenue upfront.

3266. The Claimants' hosting case had five strands:

(1) Their principal claim was a FSMA Claim which related to 51 of the hosting transactions identified in Schedule 6 of the RRAPoC each involving the sale by Autonomy of a licence to use Digital Safe and/or related software as part of a hosted Digital Safe arrangement which in many cases could only be used with Digital Safe ("Related Software"). These Digital Safe transactions were referred to as "Schedule 6DS (D(igital) S(afe)) transactions". The Claimants' complaint in relation to the Schedule 6DS transactions is that Autonomy ought to have recognised the licence fee as revenue over the term of the contract and not upfront, and that the recognition in its accounts of all revenue from the licence fee at the time of the sale caused Autonomy's published information to be misleading.

(2) The Claimants also claimed under FSMA in respect of seven more of the transactions listed in Schedule 6, which related to Hybrid Model e-Discovery arrangements ("the Schedule 6 e-Discovery transactions"). As with the Schedule 6DS transactions, the Claimants contended that Autonomy ought to have recognised the revenue rateably over the term of the contracts, rather than upfront, and the recognition in its accounts of all revenue from the licence fee at the time of the sale caused Autonomy's published information to be misleading.

(3) A further complaint raised by the Claimants related to the inclusion of the licence fee revenue within the IDOL Cloud metric in Autonomy's published information[394]. The principal issue is whether Autonomy's descriptions of the IDOL Cloud category of revenue were untrue and/or misleading to the knowledge of the Defendants. According to the Claimants, Autonomy represented the IDOL Cloud metric as comprising revenue which was recurring in nature, and the allocation of licence fee revenue (which was a one-off fee and thus not recurring) was never disclosed, and (the Claimants noted) the Defendants did not contend that they were ignorant of the allocation of licence

[393] For Digital Safe, this comprised (a) hosting the software and the data on Autonomy's own hardware or the Autonomy cloud, and (b) monitoring and managing the performance of the system. For e-Discovery, this comprised the same plus related e-Discovery services, and the use of the term 'hosting' or 'storage' in a context where it applies to e-Discovery should be understood to include both.

[394] From 2010 onwards, Autonomy's accounts (at their "front-end") and published information referred to the hosting business as *"IDOL Cloud"* and all or nearly all hosted transactions and the revenue arising were allocated to IDOL Cloud. IDOL Cloud revenues grew considerably during the Relevant Period, increasing from \$45 million in Q1 2010 to \$64.3 million in Q2 2011. The Schedule 6 transactions comprised some 10% in Q1 2010, 44.4% in Q2 2010, 10% in Q3 2010, 13% in Q4 2010, 29.2% in Q1 2011 and 24.7% in Q2 2011.

fees to IDOL Cloud. The Claimants contended that the purpose and effect of this was to give the market the false impression that Autonomy's recurring revenue from its hosting business was higher and of a different quality than actually it was. However, Mr Rabinowitz clarified that the Claimants did not assert any free-standing claim in this regard, but relied on it as evidence of (a) general dishonesty on the part of both Defendants and (b) their willingness to present Autonomy's hosting business to the market (and HP) in a misleading manner.

(4) The fourth strand of the Claimants' hosting case was a direct personal claim for breach of duty against both Defendants to recover transactional losses in relation to a numerically small, but in money terms substantial, subgroup of the 51 Schedule 6DS transactions. Originally, the Claimants sought to claim damages against the Defendants in respect of all the Schedule 6DS transactions. However, by the time of trial (and further to amendments at a contested hearing in 2017 and at the PTR in February 2019) the Claimants confined their claim for damages against the Defendants to just four of the 51 DS transactions ("Schedule 12D transactions"). Though residually maintaining that all 51 identified DS transactions were improperly accounted for, the Claimants adduced no evidence relating to any specific hosting transactions other than in respect of those four Schedule 12D transactions. The four Schedule 12D transactions all involved what were claimed to have been contrived re-structuring (and in one case, re-re-structuring) of hosting contracts which had already been restructured, which were of no benefit to either of the parties to them, except in enabling Autonomy to claim further revenue recognition and the customer to achieve cost savings. The four Schedule 12D transactions accounted collectively for almost 25% of the total licence fees from the Schedule 6DS transactions. They were made between Zantaz and Morgan Stanley (two transactions, one in Q4 2009 and the other in Q1 2011), Zantaz and Deutsche Bank (in Q1 2011), and Autonomy Inc (though Zantaz continued to be the entity recording revenue)[395] and MetLife (in Q2 2011). The issue is whether the Schedule 12D transactions were entered into for the improper purpose of artificially accelerating revenue, without regard for and contrary to the commercial interests of Zantaz and/or ASL.

(5) The fifth strand of the Claimants' case was defensive: they refuted any suggestion that HP was aware that the upfront recognition of licence revenue from Autonomy's hybrid hosting deals contravened the applicable accounting principles, or that the hybrid model was implemented in such a way as to result in the reduction of overall hosting revenues and profits, or that licence revenue was included in IDOL Cloud, or (more generally) any suggestion that HP was not deceived.

3267. Part A of this chapter of this judgment addresses both limbs of the FSMA/Schedule 6 claims and also the Claimants' contentions in respect of the IDOL Cloud metric. Part B addresses the Schedule 12D personal claims for transactional losses.

PART A: FSMA Claims

[395] According to Schedule 12D.

3268. The crux of the Claimants' Hosting claim under FSMA is a dispute whether it was proper for Autonomy to recognise revenue from the sale of the licence as at the date of that sale as if the licence was separate from the hosting services element for which customers continued to be obliged to pay, or whether the licence fee was properly to be treated as a prepayment of the hosting services to be provided by Autonomy and thus recognised over the period during which those services were provided.

3269. The characterisation of the sale of the licence as a separate component of a composite sale giving rise immediately to recognised revenue depended on the licence being treated and regarded as conferring a real and realisable right in respect of the software to which it related and thus as having a real and independent value to the grantee separate from the services also to be provided.

3270. At heart, the issue is as to the application of accounting principles; but the dispute as to the substance of the licence engendered a detailed analysis of what in practice the grant of a licence meant in terms of the use the grantee could in practice make of the licenced software. The Claimants argued that in all of the Schedule 6 hosting transactions the licence lacked any practical utility. The Defendants argued that, on the contrary, its utility was to enable the customer to use the software separately from any hosting services, and in its own premises if it so wished; and that whilst not all customers who subscribed into the restructured package would use the right, the right was nonetheless in the nature of a separate asset available for use and good against its issuer.

3271. In that regard, the analysis of utility was slightly different according to whether the licence related to the 51 Schedule 6DS transactions or to the seven e-Discovery transactions. In both cases the Claimants contended that (a) the customer continued to receive substantially the same service regardless of whether it had acquired a licence (that is, the same service as a customer who contracted on a SaaS basis) and (b) only the legal/payment structure changed, which did not justify the accounting treatment accorded. However, whereas the e-Discovery software was capable of being used independently of an Autonomy hosted arrangement, the Claimants contended that Digital Safe was too big and too complex for it to be used by the customer independently from the hosting and related service components of a Digital Safe arrangement.

3272. In the context of the e-Discovery claims, the Claimants argued that even though a customer could take e-Discovery in-house and operate it itself, it would not have been practicable for customers to do so. The argument was primarily based on the difficulty and expense of seeking to use e-Discovery "on-premises".

3273. Subject to those differences, however, it can be seen that the broader issues as to the practical effect of the purchase and grant of a licence, and as to viability and utility of the options said to be available to the licenced customer, were common to both.[396]

3274. Although the competing cases can thus fairly shortly be summarised, their elaboration by the parties both in submission and in the evidence was considerable. The Claimants' written submissions devoted over 320 pages and some 650 footnotes to their Hosting Case, after days of evidence. The Defendants also dealt with the matter at length though

[396] Mr Holgate put the essential point differently as being whether the services (of capturing, indexing and archiving) were, as he was asked to assume they were, unaffected by the sale of a licence to the customer, and *"the sale of a licence to Digital Safe had no commercial effect in practice and therefore no substance"*.

they managed to confine themselves to less than 200 pages in their written closing submissions, with only 400 footnotes.

3275. I turn to address the following matters:

(1) Brief description of Digital Safe;
(2) Brief description of Autonomy's e-Discovery offering;
(3) A detailed analysis of the Digital Safe claim;
(4) A detailed analysis of the e-Discovery claim;
(5) Defendants' knowledge; and
(6) IDOL Cloud metric.

(1) Brief description of Digital Safe

3276. Digital Safe was Autonomy's leading archiving product. It performed a "capture and index" function, which enabled customers to store, search and retrieve their data. The software, together with the hardware (servers) onto which it was loaded, formed the Digital Safe system or (as a combined software and hardware offering was often referred to in the parlance of the sector) "solution".

3277. Mr Samuel Yan ("Mr Yan") who had been Systems Architect and Director of Development for Digital Safe at Zantaz, and continued in a similar role at Autonomy after its acquisition of Zantaz[397] described its *"most recognisable attribute"* as being *"its ability to scale"* which (in broad terms) meant that it could keep accommodating increasing demand for data for archiving with the addition of more storage cells.[398]

3278. Digital Safe was originally developed by Zantaz, which Autonomy acquired in July 2007. Zantaz had a number of archiving and related offerings, increasingly cloud-based, which it had either developed itself internally or acquired from other entities. These included, as well as Digital Safe and e-Discovery, Enterprise Archive Solution ("EAS") which was typically sold to customers who wanted to manage their own archive at their own customer site ("on-premise"), and Digital Supervisor, a surveillance product.

3279. Reflecting its Zantaz history and its acquisition by Autonomy, there were two types of Digital Safe: the original type was a Lucene-powered Digital Safe (sometimes referred to as a "Lucene Safe") developed by Zantaz and an IDOL-powered Digital Safe (sometimes referred to as an "IDOL Safe").

3280. Broadly speaking, the IDOL Safe consumed more storage and memory than a Lucene Safe, but it had other compensating advantages. Autonomy's drive was to get IDOL, its proprietary product, into everything. Nevertheless, whilst new Digital Safe customers would be provided with IDOL safes, large legacy customers of Zantaz generally remained on Lucene Safes because, though possible, there were difficulties in moving between the variants.

[397] On its acquisition of Zantaz, Autonomy appointed Mr Yan Chief Architect in the Product Development team for Digital Safe. After the spin-off of Hewlett Packard Enterprise's software business, he became a senior member of the Digital Safe Product Development team at MicroFocus, the buyer.
[398] Digital Safe operated by having identical storage cells. Additional storage could be obtained with additional identical cells.

3281. To bridge the gap, in a few cases an additional, smaller IDOL index, known as *"IDOL Cache"*, was added to a Lucene Safe, which enabled new IDOL-based applications (such as DS Mail, which is like Gmail for DS users, and Supervisor S6) to be used on a Lucene safe. (It may be noted that even IDOL Safes needed an IDOL Cache to use DS Mail.)

3282. As Mr Sullivan explained in his witness statement, in the case of both variants, multiple services were wrapped around a Digital Safe ("DS") archive, including data migration into the archive, data returns and destruction, monitoring, technical support, systems administration and security. The solution could store, search and retrieve from multiple petabytes of data to accommodate the vast exponential growth in data in recent history. In a hosted environment it was often used in conjunction with other pieces of related Autonomy software, including Supervisor S6 and DS Mail.

3283. Of particular utility, Digital Safe offered regulated entities (such as banks) the ability to store their data in accordance with Rule 17a-4 issued by the US Securities and Exchange Commission ("SEC") regarding electronic data storage, which has specific requirements relating to length, format, quality, accessibility etc. of record retention. As mentioned before, a particular characteristic and strength was its scalability.

3284. Digital Safe was, however, a complex and sophisticated product, with what Mr Sullivan described as *"a huge footprint."* The indexing and archiving functions were performed automatically by the software, but the complexity of the solution was such that it needed close monitoring, and problems frequently arose, which (especially given the nature of the customer base and their reliance on the solution) had to be fixed very quickly.

3285. Autonomy needed teams of specialized technicians (who, according to Mr Yan, typically received around 6 months of intensive training to even understand its operation) to monitor its hosted customers' DS archives on a 24/7 basis. Mr Sullivan's evidence was that at any one time, there would be at least five network and software operations people on duty simply monitoring the software.

3286. Digital Safe was thus not designed for use by an unassisted customer: it was designed to be (primarily at least) a hosted solution to be run at scale by Autonomy from its own or third-party data centres. Its designers did not expect it to be used "on-premises" except perhaps by very large entities with their own data centres and trained personnel.

3287. Accordingly, the vast majority of Digital Safe customers (Mr Yan estimated 90%) were hosted by Autonomy, storing their data in a Digital Safe at an Autonomy data centre. Mr Yan said (and he was not contradicted) that only a handful of customers had an on-premises Digital Safe solution. Even the small number of "on-premises" customers almost invariably needed a remote management system so that their Digital Safe and data could be monitored and managed by personnel with the requisite Autonomy expertise.

3288. Mr Yan could remember only two attempts by companies (CDC and Rand) to use Digital Safe and make its capabilities available to their own customers without Autonomy's assistance; and in those two situations, CDC was supplied with a more self-sufficient variant which did enable it to carry on, but Rand was forced to stop.

3289. Mr Sullivan's evidence in his witness statement was that even with a good remote management link, on-premises Digital Safe was more burdensome for Autonomy than hosted Digital Safe since it was dependent on the customer for a number of things in an on-premise context. It was better and easier for Autonomy to have the control of everything in its own data centres. Because of this, Mr Sullivan said, Autonomy *"always tried to sell DS on the hosted basis…"*.

(2) Brief description of Autonomy's e-Discovery offering

3290. Often as part of its hosted business Autonomy also offered e-Discovery services to assist customers with the review and disclosure of material in litigation. The software at the heart of this process was called 'Introspect' and 'Early Case Assessment' ("ECA").

3291. Like Digital Safe, Introspect had been developed by Zantaz before its acquisition by Autonomy. ECA was developed by Autonomy before that acquisition. Introspect was used in connection with the processing of data; ECA was effectively a data-culling tool, allowing customers to reduce the population of material to be loaded into Introspect for review by identifying a subset of data falling within specified parameters.

3292. As indicated earlier, e-Discovery software could form part of a hosted arrangement or an on-premises solution. In a hosted arrangement, the software was used in connection with the ingestion, processing, storage, analysis and production of data by Autonomy in Autonomy-run data centres. In an on-premises arrangement, the software was sold on a standalone basis to the customer to be used in-house (or at a third-party centre), where the required services would be performed by the customer (or a third party).

(3) A detailed analysis of the Digital Safe claim

3293. Under the SaaS model, Zantaz/Autonomy stored the customer's data on the Digital Safe system as a service to the customer. The Digital Safe system and the customer data loaded onto it were hosted and managed by Zantaz in data centres controlled by Zantaz or, in some cases, by third parties such as IBM.[399] The hardware and software that made up the Digital Safe system were owned by Zantaz/Autonomy and maintained by its employees, according to the unchallenged evidence of Mr Egan and Mr Yan, and the evidence of Mr Sullivan.

3294. Before its acquisition and the introduction by Autonomy of the hybrid model, Zantaz usually provided its data hosting service under a multi-year contract, with customers paying for the service on a per megabyte basis and uploading data to the Digital Safe system over the duration of the contract. Zantaz was paid by customers either in

[399] Some of the so-called "on-premise" Digital Safe customers used a third party's data centre. The distinction between these customers and the hosted customers who nevertheless used an IBM data centre was as follows. In the hosted scenario, the customer would contract with a third party, for example IBM, for the provision of a hosted archiving solution. The third party would then subcontract Zantaz to provide the solution; there would be no contractual relationship between Zantaz and the customer, and the customer was fundamentally purchasing a hosted service provided through an intermediary. It would not own the hardware or the software on which it was installed. By contrast, in the on-premise scenario, the customer would purchase Digital Safe in the form of an appliance from Zantaz, and then Zantaz would be engaged to run and monitor the appliance, which would be located at the third party's data centre. In this scenario, there was a contractual relationship between Zantaz and the customer, and the customer was fundamentally purchasing an appliance, such that it would own the hardware and the software installed on it.

advance[400] or, increasingly from 2008, on a 'pay-as-you-go' basis. In both cases, Zantaz recognised revenue in the quarter in which the service was provided.

3295. Regardless of whether the customer was on a pre-paid or a pay-as-you-go contract, neither the Defendants nor Mr MacGregor, Dr Lynch's accounting expert, dispute that the substance of the SaaS arrangements was a data hosting service, or that Zantaz appropriately accounted for those arrangements by recognising the revenue derived from them over the term of the arrangements as the service was provided.

3296. Under the hybrid Digital Safe arrangements, Autonomy provided the same data hosting service, but the customer also purchased a licence to use either Digital Safe software or Related Software.

3297. The way that Autonomy structured the hybrid arrangement involved the customer paying: (i) a substantial fee in respect of the software licence, which was usually paid upfront; (ii) a fee in respect of software maintenance and support services; and (iii) significantly reduced hosting / storage fees on a per megabyte basis. The key differences between these arrangements and the SaaS arrangements were thus: (i) the change in payment structure, and (ii) the introduction of a software licence.

3298. The Claimants emphasised, however, that the payment structure does not determine the pattern, or timing, of revenue recognition. IAS 18 §24 provides that "*[p]rogress payments and advances received from customers often do not reflect the services performed*". The fact that the customer pays in full upfront, in full in arrears, or in instalments on a monthly basis, does not alter the fact that if or to the extent that the contract is, in substance, for the provision of services, then, whatever the cash position the revenue should, in accordance with IAS 18 §20, be recognised over the period as the services are provided.

3299. For so long as the hosting arrangement continued, the introduction into the structure of a licence enabling the customer to move on-premises did not materially alter the nature of the services provided by Autonomy, which continued to provide the same data hosting service under the hybrid arrangement as it would have done or, in the case of existing customers, did under a SaaS arrangement. In particular, regardless of the fact that the customer had purchased a software licence:

(1) Autonomy still hosted the customer's data and the Digital Safe system – including the Digital Safe software licensed to the customer – on hardware owned by Autonomy and located in Autonomy's data centres.

(2) Autonomy still used the Digital Safe software to perform the capture and index processes mentioned above on the customer's data, which the customer provided to Autonomy over the duration of the arrangement and which Autonomy uploaded to the system.

(3) Autonomy still monitored the customer's Digital Safe system round the clock, detecting and fixing problems as they arose.

[400] Dr Lynch disputed the extent to which this took place.

3300. From the customer's perspective, the position was also the same. In particular, the customer was contracting for a hosted Digital Safe arrangement; it intended for Autonomy to host its data, it paid Autonomy to host its data, and that is what Autonomy did. The customer received substantially the same service as it would have received had it contracted, or re-contracted, on a SaaS basis with Autonomy.

3301. The Claimants emphasised that Autonomy repeatedly assured customers – particularly those who found the concept of a licence in a hosted arrangement confusing – that everything would remain exactly the same and that the licence was just a formality. Thus, for example, in an email dated 23 December 2009 to Mr Christian Lucas of Morgan Stanley (which had apparently thought the new structure *"problematic"* and queried *"what would be the upfront payment that you're looking for before y/end in order for the savings programme to kick in?"*) Mr Hussain wrote:

> *"Hi Christian – to clarify, we require no payment at all. The savings start the moment MS signs an amendment to the existing agreement that simply puts lower rates into effect coupled with a software licence fee. In this sense it is not even an offer that requires a legal review as it is purely financial and causes savings. It's quite simply "sign and save"..."* [My emphasis]

Outline of the dispute as to the purpose and effect of the restructurings

3302. In those circumstances, according to the Claimants, it is clear that the reason, and the vice, of Autonomy's introduction of a hybrid model for hosted business, and the sale of a licence to the hosted software in exchange for an upfront payment, was to enable Autonomy successfully to avoid the usual revenue recognition treatment of a prepayment for services and to accelerate the recognition of revenue in respect of the licence element improperly, and to present a false impression of its business. They described it as little more than a *"naked attempt to find a way to produce an accounting effect...namely the acceleration of recognised revenue*".

3303. The Claimants' case was that the net effect of the introduction and adoption of the hybrid model was substantially to reduce the total contract value to Autonomy and to accelerate the rate at which Autonomy recognised revenue from hosting customers at the expense of recurring revenue. They claimed that over $125m of revenue was "accelerated" in this manner.

3304. The Claimants depicted the adoption of the 'hybrid' model as part of Autonomy's relentless search for ways of giving the impression of meeting ambitious revenue targets and market expectations. According to this depiction, though in the case of the impugned hardware, VAR and reciprocal transactions Autonomy in effect purchased its own revenue, whereas hybrid hosting deals involved Autonomy foregoing some part of its future revenue stream in favour of an upfront payment which they treated as immediately recognisable revenue, the same objective of meeting and beating market revenue forecasts was common to all.

3305. The Defendants, on the other hand, insisted there was nothing intrinsically wrong, let alone improper, about the hybrid hosting model, or the issue of licences in order to secure for Autonomy immediate revenue and tie in its customer at a time of sharply declining storage rates and considerable customer volatility. That being the case,

accounting for the sale of a licence was a matter of fine judgement, and the decision to treat the sale of the bundle of legal rights which a licence comprised as analogous to sale of goods revenue stream was well within the ambit of propriety. Enquiry about what use of the rights was made thereafter by individual licensees was (since it was the application of hindsight) illegitimate on ordinary accounting principles.

3306. The Defendants pointed out that after the Acquisition, HP itself had accepted the propriety, and explored how it could continue the practice, of the hybrid hosting model and the sale of licences linked to lower storage and service charges even though the requirement under US GAAP to undertake a VSOE assessment[401] was expensive. They suggested that HP had only abandoned the model because of a strong market movement back towards the SaaS model and a concern that establishing VSOE under US GAAP would constrain Autonomy's ability to be flexible with pricing. Those were matters of business judgement, not indicative of any doubt as to propriety.

3307. In that regard, the Defendants contended that the 'hybrid' model was beneficial both to Autonomy (in ensuring longer term customer commitment) and the customer (which acquired a legal right to software it could deploy outside the hosted environment and a beneficial aggregate subscription rate). They defended it as a commercially driven business decision well within the range of the proper exercise of directors' business discretion. They stressed especially that hosting was a profitable and valuable business line but highly competitive. The commercial effect of selling a licence deal was to lock in the customer which had made an upfront investment that it would not wish to lose.

3308. Ultimately, the Claimants did not go as far as to suggest that the restructurings had no commercial benefits for Autonomy. Zantaz's CEO, Mr Sullivan, who was in charge of its hosting business, and who gave evidence for the Claimants both in the US and in these proceedings, did subscribe to the Claimants' line that the *"main commercial reason for the restructurings, from Autonomy's perspective, was to generate large upfront licence fee revenues"*. But he did not suggest that he considered the sales or restructurings to have been improper. In his witness statement, he explained the advantages as follows:

> *"There were, however, other incidental commercial benefits flowing from the license model, principally enhanced customer lock-in and upsell opportunities.*
>
> *...*
>
> *30. Customers did, though, sometimes threaten to switch to a new provider for new data, often by issuing RFPs in an effort to get lower prices from Zantaz/Autonomy. Although we occasionally lost customers, these customers were generally smaller customers. We could afford to lose smaller customers because they did not significantly affect our revenues. We had to be careful with larger customers and, where data center costs had fallen, we passed some of our cost savings to them to make sure we did not lose them. The relationship was sticky, but retention was not guaranteed and concessions on rates were often offered.*

[401] Vendor-specific objective evidence, a requirement under US GAAP for the recognition of revenue.

31. One effect of restructuring to a license model was to remove this tension dynamic from the relationship with customers. They paid a great deal upfront and, in exchange, secured very low ongoing storage rates. This meant that there were, for the term of the service arrangement, no discussions around reductions in storage rates (save where instigated by Autonomy) or threats from customers to go elsewhere. Customer retention was virtually guaranteed.

32. The license model also had the theoretical benefit for the customer that it now owned a license to the DS software. A few customers did express some interest in having the ability to bring their DS archives in-house in the future, if, for example, Autonomy were to go bankrupt – and may have believed that the purchase of a license gave them that ability."

3309. Mr Sullivan also made clear that Autonomy had to remain competitive in light of the falling rates in the market. Customers did threaten to leave. Autonomy did have to pass on some of the costs savings of falling storage costs to customers, to ensure they did not lose them. Customer retention was not guaranteed. (This was said by the Defendants to undermine the Claimants' counterfactual assumption that in the absence of the restructured deals Autonomy could have continued to store the same amount of data at higher historical rates.[402])

3310. Mr Egan also thought there was nothing wrong with the restructuring of the hosted deals. He considered that the hybrid arrangements incentivised customers both to stay and to store additional amounts of data:

"My view was that it gave them incentive to stay longer and it gave them incentive to give us more of their overall volumes and change their policies to retain and collect more."

3311. Other witnesses called by the Claimants, including Mr Goodfellow, also confirmed the business common sense in the hybrid deals when they were cross-examined about them, especially at a time (which it was not disputed it was) of precipitously falling storage prices.

3312. It should also be noted that the practice of selling the hybrid model continued after the acquisition, until at least the end of May 2012. HP had a project to establish VSOE under US GAAP for the hybrid deals. In May 2012 the model was abandoned for

[402]In a nutshell: the Defendants submitted that the Claimants' arguments as to the financial implications of the hybrid model were unrealistic. They assumed that, absent a restructuring, customers would have continued to pay historic rates for the duration of the restructured contract, when in reality customers would have responded to the changing commercial environment by demanding competitive rates. The Claimants also ignore the fact that, by offering competitive storage rates, Autonomy was encouraging customers to store more data. The Defendants contended that the assumption that, in a counterfactual world, the same amount of data would have been stored under uncompetitive rates as was stored under lower, competitive rates, is a false one. However, that might be a reason for offering a discount for the "bird in the hand"; but not for artificial devices to enable accounting for it as recognised revenue.

business reasons (including the fact that the market was moving away from a licence model to a SaaS model).

3313. However, the Defendants' answers on the issue as to the commercial rationale of a licence and the financial advantages it offered (which I shall come on to assess later) must be distinguished from the accountancy issue to be addressed in respect of the 51 Schedule 6DS transactions in the context of the FSMA claims. This is whether the accounting treatment of the sale of a licence separately from the provision of services for an upfront fee was justified (in the sense of being a not unreasonable application of the relevant accounting standards).[403]

3314. That question, which is the principal focus of this section of this judgment, is whether or not the sale of a licence to an Autonomy customer, as part of a hybrid contract under which it was also entitled to receive and bound to pay for hosting and related services, could properly be treated and accounted for as a separate component of the hybrid transaction, and the licence fee booked as recognised revenue at the point of sale.

Applicable accounting principles

3315. There is no dispute that in accruals accounting, unlike cash accounting, a prepayment for goods or services falls to be recognised over the period in which the goods and services are provided, and not upfront.

3316. The dispute, in a nutshell, is whether the licence fee was merely a disguise for, and in substance no different from, the prepayment for hosting services; or whether the licence conferred rights of substance and real practical utility to the customer in respect of the use of Digital Safe, such as to justify the licence and the fee for it being treated as a separate component of the hybrid contract analogous to an immediate payment on the sale of goods.

3317. As foreshadowed above, the Claimants, though not alleging that the licence was a sham, nor disputing that it comprised and conferred a bundle of legal rights, contended that it had no real utility to the customer or effect on the hosting services and its substance and value were illusory: the hybrid model (as they put their case to Dr Lynch) *"made no difference to the substance of the arrangement and the service the customer received"* and was *"simply a pretext devised by Autonomy to accelerate revenue"*. In other words, the Claimants sought to depict the licence simply as a construct, the only value of which was that it provided a passport to discounted service costs, at the expense to Autonomy of a reduced aggregate revenue stream.

3318. The Defendants submitted that it was sufficient that the licence granted under the hybrid model conferred enforceable legal rights which gave the customer the option to continue using Autonomy's hosting services, or to use the hosting services of a third-party for the licensed Autonomy software, or to operate the software themselves by moving Digital Safe and their data on premise.

[403] The Claimants confirmed, with emphasis, in their closing submissions that their complaints in their Hosting case were ranged exclusively at Autonomy's sales of a licence to Digital Safe and/or related software in a hosted Digital Safe arrangement and not an on-premise arrangement so that none of their Schedule 6DS transactions involved an on-premise Digital Safe.

3319. They contended also that the Claimants' case that the rights were illusory was false, and that it was entirely possible to deploy Digital Safe on premise and quite practicable to move from a hosted solution to an on-premise solution, lifting and shifting Digital Safe and the Customer's data from Autonomy's data centre to its own (or another) data centre. According to the Defendants, that was a real and separate right of practical utility, justifying treating the sale of the licence as analogous to a sale of goods and to be accounted for accordingly.

3320. Except as noted below, the two experts (Mr Holgate for the Claimants, and Mr MacGregor for the Defendants[404]) agreed on the relevant accounting principles, which can be summarised as follows:

(1) The IASB[405] *'Conceptual Framework for Financial Reporting'* makes clear that a transaction must be accounted for in accordance with its substance and economic reality and not merely its legal form.

(2) The revenue recognition criteria in IAS 18 are usually applied to each transaction as a whole. However, as IAS 18 §13 provides, where a single transaction consists of multiple components, consideration should be given as to whether they are separately identifiable components to which it is necessary to apply the revenue recognition criteria separately in order to reflect the substance of the transaction, or, alternatively, whether the revenue recognition criteria should be applied to the transaction as a whole in accordance with its overall substance.

(3) Where the substance of the transaction, or a separately identifiable component thereof, is the rendering of services, the criteria governing both if and when revenue can be recognised are set out in IAS 18 §§20 and 25. These provide, inter alia, that:

> *"When the outcome of a transaction involving the rendering of services can be estimated reliably, revenue associated with the transaction shall be recognised by reference to the stage of completion of the transaction at the end of the reporting period… [IAS 18 §20]*[406]
>
> *For practical purposes, when services are performed by an indeterminate number of acts over a specified period of time, revenue is recognised on a straight-line basis over the specified period unless there is evidence that some other method better represents the stage of completion…" [IAS 18 §25]*

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[404] Mr MacGregor was instructed by Dr Lynch; but Mr Hussain "*fully endorsed*" Dr Lynch's position and adopted that evidence.
[405] The International Accounting Standards Board.
[406] The rest of IAS 18 §20 provides that the outcome of a transaction can be estimated reliably when all the following conditions are satisfied: (a) the amount of revenue can be measured reliably; (b) it is probable that the economic benefits associated with the transaction will flow to the entity; (c) the stage of completion of the transaction at the end of the reporting period can be measured reliably; and (d) the costs incurred for the transaction and the costs to complete the transaction can be measured reliably.

(4) Where the substance of the transaction, or a separately identifiable component thereof, is the sale of a good, the relevant revenue recognition criteria are those set out in IAS 18 §14. These criteria include that the amount of revenue can be measured reliably.

(5) Mr Holgate accepted that it was *"entirely possible"* for there to be a hybrid contract with a licence element and then a service element *"if the facts point to that"* and in particular, if on the facts the licence was *"validly a separate good or service"* separable from the service provision as a whole; and that a software licence is in general treated as a sale of goods.

(6) However, Mr Holgate did not consider this was or could be answered by reference to what legal rights the licence conferred; he considered that in order to establish the correct accounting treatment for the hybrid transaction, it is necessary to identify the genuine economic substance of the transaction and to consider whether the components of the transaction should be accounted for separately, so as to reflect the substance of the transaction.

3321. In cross-examination Mr Holgate put the test as follows:

> *"…we have to ask if the licence is indeed validly a separate good or service…If it is separate from the provision of subsequent services, then fine, you recognise the licence upfront on day one as revenue and the services gradually over the period.*
>
> *On the other hand, if it's not separable from the service provision as a whole, then the whole thing falls to be accounted for as service provision over a period."*

3322. I did not understand Mr MacGregor to dispute the test. As he expressed his position in this regard in his and Mr Holgate's Joint Statement:

> *"If there were separately identifiable components, providing the criteria of IAS 18.14 and/or IAS 18.20 were applicable, Autonomy was entitled to recognise the IAS 18.14 revenue generated on the licence component of the hosting arrangements at the date of the sale agreement, and the separate IAS 18.20 storage services revenue over the term of the agreement (by reference further to IAS 18.25)."*

3323. The differences in approach between him and Mr Holgate were as to (a) the relevance of the definition of the attributes of the licence in the contract defining it and (b) if the contract was not conclusive, whether in fact the licence did confer rights of substance and utility.

The differences between the experts in their approach to applying these Standards

3324. The differences between the experts as to their ultimate conclusions were in consequence of:

(1) Mr Holgate's more expansive view of the principle that accountants look to the substance and not the form (which Mr MacGregor readily accepted as a

principle but considered was not to be stretched as far as Mr Holgate suggested); and

(2) Eight assumptions which the Claimants instructed Mr Holgate to make. One of these assumptions foreclosed the issue, in that Mr Holgate was instructed to assume that the licence had *"no independent value"*. Others were conclusory and it was suggested that they "*dragooned*" the answer. Subject to that, which was objected to and on any view objectionable, the assumptions were factual matters, which were in every case disputed.

3325. As to (1) in the preceding paragraph, Mr Holgate gave the accountancy principle (which I have discussed earlier when addressing the VAR transactions) that a transaction must be accounted for in accordance with its substance rather than in accordance with its form such pre-eminence that he did not see or call for the licence agreements themselves and consequently did not consider the terms of the licences.

3326. When cross-examined on the legal differences between a SaaS contract and a hybrid contract, and challenged as to whether he was *"unduly dismissive of the legal differences between a SaaS contract and a hybrid one",* Mr Holgate (who had not read any of the underlying contracts) answered:

> *"No. My Lord, it's inevitable that accountants and lawyers see this issue of substance over form differently. Substance over form is very much an accounting principle that essentially overrides contractual and legal form of arrangements. It's not surprising that lawyers have difficulty with that…"*

3327. Consistently with this approach, Mr Holgate seemed to consider that he was entitled to ignore the fact that the licence agreements conferred legal rights, which would (by way of illustration) be enforceable in bankruptcy; and then, having dismissed their form, to assess their substance according to whether there was any difference between the services a customer received (a) before and (b) after the sale and purchase of the licence.

3328. His conclusion, without regard to any of the licence agreements, that because the service provided was essentially the same, the rights provided to the customer had no practical substance (or, as he put it, were *"trumped by the fact that the service continues as before"*), was the main plank of his case that recognition of revenue was wrong.

3329. Mr MacGregor agreed, of course, that the accounting principles require accountants to identify and assess the commercial, or *"genuine economic"* substance of the transaction over the form. However, he ascribed importance to the contractual option and rights conferred by the licence to *"take the storage system in-house to archive data itself at any time during the licence term."*

3330. Like Mr Holgate, Mr MacGregor wished to be satisfied, in light of the Claimants' claims to the contrary, that the legal option and rights conferred were not illusory. In that context, he recognised the need to be satisfied that the rights were capable of being exercised by the customer, and that from the customer's perspective, there was an independent value to owning a Digital Safe licence separate to the value of the data storage service provide by Autonomy: or, in other words, that the licence agreement was not all form and no substance. Mr MacGregor appeared to accept that if a customer had

in fact no intention of moving Digital Safe on premise or otherwise away from Autonomy then in that particular case the licence could not be considered to have separate value; but he appeared to suggest that then revenue recognition would be denied by reference to the individual case, and he became convoluted and indeed confused when pressed on whether that provided the basis of extrapolating any more generic test, sometimes suggesting that each individual case had to be assessed but then at other times suggesting that the matter had to be looked at generically. I think the following exchange is illustrative:

> *"Q. …You say in a number of places in your report that, when considering whether the licence to Digital Safe or eDiscovery software should be treated separately from the service and indeed whether it has value, what is most important to consider is the view of the customer, correct?*
>
> *A. Well, one looks at it from the perspective of the customer, ie what is the customer getting?*
>
> *Q. So what is most important is to consider it from the point of view of the customer, yes?*
>
> *A. In this respect, yes.*
>
> *Q. And it would follow…in relation to customers that did not consider the licence to be important or of value, indeed customers who didn't even want to download the licence, that you would not consider any revenue from those licences could be recognised…?*
>
> *A. Well, I think where – I don't think that's correct. Because if you have a whole series of licences being sold, you're looking at the position of customers generically in terms of what it is they're getting.*
>
> *Q. What if more customers take the view that they don't really want the software and they're only doing this for reducing the costs, in other words you say you're looking at it generically, what if the bulk of customers do not consider the licence to be important or of value? Do you extrapolate from that and say I shouldn't therefore recognise it for anyone?*
>
> *A. I suppose it depends on the negotiations and what the customers think they're getting when they're going through the negotiations and what their future intentions are…*
>
> *…*
>
> *If the situation is – and we clearly have the situation where some customers are taking this stuff on premise, other customers are having it at the Autonomy data centre, if there is a position between those customers and some of those customers are in the position I just said and others are not like that, then you probably do two different things.*
>
> *Q. Two different things, what in relation to customers who are like that you don't recognise the revenue?*

> A. *Possibly but I think you've got to – you know, looking at the generic, what is it that the customer is getting? Well, it's getting a licence and then it's getting some services afterwards. If when you actually drill down to that you're going to a particular customer who says, well, no, I was never interested in any of that, what I wanted was just – I was offered something cheaper, then that would be a different situation…*
>
> …
>
> *You've got to look at these things on a detailed [contract] by contract basis…"*

3331. Ultimately, it seemed to me that Mr MacGregor built in an implicit assumption that the bulk of customers did genuinely want to have at least the possibility of moving on premise, but accepted that a different accounting treatment might be necessary in the case of what he took to be, or persuaded himself was, the exception. He assumed, in other words, that the exemplar was a customer which had in mind the possibility of making use of the legal right.

3332. On that basis, and unlike Mr Holgate, Mr MacGregor's view that "*the Digital Safe licences were capable of being separated from the hosting services provided by Autonomy"* was based on his review of the evidence as to the nature of the legal rights and obligations conferred and imposed, and the use that was or could be made of the licence by exemplar customers, and on Deloitte's working papers. Mr MacGregor especially stressed that (a) the licence conferred ownership of the software; (b) even if none of the hosted customers had brought Digital Safe and their data on premise, their entitlement to do so was valuable and sufficient, and not illusory since it appeared that there was a number of customers which had started off and run Digital Safe on premise (albeit with the assistance of Autonomy).

3333. Neither expert provided me with what I regard as a settled and satisfactory test:

(1) In my judgment, Mr Holgate went too far in suggesting that the "*accounting principle essentially overrides contractual and legal form of arrangements."* The accounting principle reflects that what must be determined is what in substance is the effect of the transaction; but that will be informed by its legal form. A valid legal contract confers enforceable legal rights and imposes enforceable obligations. As Mr MacGregor pointed out, Mr Holgate's arguments missed the point that under the licencing agreement part of the hybrid arrangements, the customer became (for the term of the licence) the owner of the software, which it could 'mine' using another hosting provider or at home, and had an option as to its use enforceable against Autonomy, including in the event of its bankruptcy.

(2) But whilst I agree with Mr MacGregor that those contractual rights and obligations cannot be ignored, or said to be "*trumped*", the assessment of them for accounting purposes required is of their intended commercial effect on the relationship between the parties. The rights and obligations may be commercially illusory (as I have held them to have been in the impugned VAR transactions); or the rights and obligations, even if given full effect, do not conform with their overall description: the classic example is a lease dressed as

a licence. Here, if in reality the customer either had no intention or no practical prospect or capability of utilising and enjoying any benefit from the licence and the reality was that it entered the arrangement to secure the discount, that may determine what the true commercial effect was to be. The problem of the question of revenue recognition being so fact-specific and requiring individual assessment of the intentions and capabilities of the specific customer is a difficult one to deal with, and is liable to pose immense problems for any auditor.

3334. As to the factual assessment, and as regards (2) in paragraph 3324 above, Mr Holgate was required by his instructions to make eight far-reaching Assumptions of fact. His conclusions were necessarily entirely and exclusively by reference to the constructed universe to which he was confined by his instructions.

3335. The eight Assumptions which thus defined and confined Mr Holgate's task require more detailed assessment. They were stated as follows:

(1) Once a customer had purchased a licence to Digital Safe software, it received substantively the same service that it would have done had it contracted on a SaaS basis. The Digital Safe system (comprising the Digital Safe software-which performed the capture and index function-and the hardware) was at all times installed only at Autonomy's data centres.

(2) A Digital Safe licence was of no independent value to a hosted customer because a hosted customer could not customise, configure or implement the Digital Safe system (including the software) for use in its own premises as it could only be performed by Autonomy using Autonomy's proprietary knowledge and resources. The implementation process for use on a customer's own premises was complex and took several weeks minimum to complete. Unless and until that process was undertaken, it was incapable of operation. Provision of the necessary Autonomy customisation, configuration and implementation services for Digital Safe on a customer's premises did not generally form part of the contracts with hosted customers.[407]

(3) Digital Safe required ongoing managed services without which it would malfunction and ultimately stop working. In practice, only Autonomy could provide such services and the provision of them for use of Digital Safe on a customer's premises did not form part of the contracts with hosted customers.

(4) There were no user-manuals regarding either the implementation or ongoing support and management of Digital Safe, and no third parties (let alone customers) who could provide such services.

(5) Where hosted Digital Safe involved the sale of software other than Digital Safe software then such software could only be used, or was sold for use, with Digital Safe.

[407] RRAPoC §110.1 additional support did not form part of the licensing or hosting arrangements that Autonomy provided to the customer.

(6) Negotiations between Autonomy and existing hosted customers were largely instigated by Autonomy and not the customer. For both new and existing customers the hybrid model was proposed by Autonomy and negotiations largely centred on the customer's savings over the lifetime of the contract. Autonomy's primary purpose in hybrid deals was so as to generate upfront recognition of revenue through the licence.

(7) The intention and understanding of both Autonomy and the customer was that after the sale of the licence, the Digital Safe system and the customers' data would remain hosted, and all associated services would be performed by Autonomy at its data centres.

(8) None of the hosted customers brought the Digital Safe system (comprising the Digital Safe software and accompanying hardware) in house.

3336. Mr Holgate opined that these eight factors relating to the hybrid Digital Safe contracts compelled the conclusion that (to quote his report) *"the substance of the arrangement was…the services of capturing, indexing and archiving data"* and that the *"sale of a licence to Digital Safe had no commercial effect in practice and therefore no substance"*.

3337. In other words, Mr Holgate considered that, taking the assumptions together, there was, in substance, no sale of a good since on the basis of the assumptions collectively, the licence had no independent value separate from the data storage services: the sale was of services and had to be accounted for as such. On that basis, the approach taken of recognising revenue from the licence sale immediately at the point of sale was improper.

3338. On Mr Holgate's approach, there was no room for the application of the criteria prescribed by IAS18.14: that had no application to, what on that approach, was simply in what he termed *"overall substance"* a structured sale of services over time for which the relevant IAS 18 paragraphs are IAS18.20 (and 18.25 in the case of storage or other services).

3339. Furthermore, Mr Holgate did not look at the work Deloitte undertook concerning the hybrid licences. All he knew about the licences was what was said about them in the Assumptions he was given, all of which (in accordance with his instructions) he took to be the basis on which he was required to report.

3340. Mr Holgate had not been invited, and had not attempted, to try to assess what the effect of stripping out one or more of the assumptions might be: indeed, perhaps a little too easily, he accepted when cross-examined that it was *"all or nothing."* Nor did he assess other possibilities which might ensure the value to the customer of the licence (such as the possibility of purchasing implementation and monitoring services, or the possibility of the customer favouring a hybrid structure because it might enable it to allocate the cost against its capital budget, or obtain some tax advantage). He accepted that this was an important point; when asked to explain why, then, it was not mentioned in his reports he explained that this was because he had proceeded *"on the basis of the assumptions in front of us."*

3341. In his first report, Mr Holgate placed special reliance on Assumptions (2), (3) and (4) as numbered in paragraph 3335 above. All these related to the implementation and

management of Digital Safe on premise, which he assumed, and the Claimants insisted, could not be achieved successfully without Autonomy's assistance on premise.

3342. He agreed when cross-examined in that connection that the fact (as it was put to him to be) that customers could buy implementation and monitoring services from Autonomy for a separate fee was important. He was a little evasive as to the effect of that in terms of Assumptions (2), (3) and (4). Instead, he moved swiftly on to say that even more important was the first part of the first Assumption (see paragraph 3335(1) above), that a hybrid customer received substantially the same service that it would have done had it continued to contract on a SaaS basis. He confirmed that he considered that point, and its elaboration in Assumptions (6), (7) and (8), to be the most important: in effect, a trump card (and see paragraph 3328 above). In his first report he explained why:

> *"The substance of the arrangements was (for new customers) and continued to be (for existing customers) the service of capturing, indexing and archiving data throughout the contract period. These services were unaffected by the sale of a licence to the customer. The licence fee, when properly considered, was therefore payment towards these services."*

3343. Consistently with that, Mr Holgate confirmed that the Claimants:

> *"do not take issue for the purpose of these proceedings with the accounting treatment for 'on premise' deals, i.e. where Digital Safe was implemented at the customer's own site."*

3344. Mr MacGregor rehearsed these assumptions in his supplemental report. In his conclusions, Mr MacGregor summarised in his own words in more compressed form his understanding of the assumptions that Mr Holgate had been instructed to make as being that (a) a Digital Safe licence was of no independent value to a customer (b) the software could not work on a customer's premises without Autonomy (and no one else's) ongoing support, (c) there were no user manuals, (d) the intention and understanding was that the customer data would be hosted by Autonomy and (e) all associated services would be performed by Autonomy at Autonomy's own data centres. He dealt, however, with all eight.

3345. Mr MacGregor accepted that the eight assumptions taken collectively, including the conclusory introductory sentence to the (second) "assumption" that the licence had *"no independent value to a hosted customer"*, led inexorably to the accounting treatment outcome or conclusion reached by Mr Holgate. However, noting that all the assumptions were matters of fact disputed by the Defendants, he made clear that, as regards Digital Safe, only the *"no independent value"* assumption was of itself conclusive.[408] "

3346. In Mr MacGregor's opinion, unless it was factually impossible (as distinct from expensive or difficult) to use the rights whether at that time or in the future, the licence would be a thing having some value independently and separately from the supply of

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[408] As regards e-Discovery he went further, stating in his Supplemental Report that *"if for example, it was possible for customers to perform the services themselves, contrary to just the single assumption that it was not practicable for a customer to perform the service itself, then [he] would not agree in the same way."*

services. He suggested that, at least, it would offer *"a protection element…which you get when you purchase something which isn't there when you're just renting something"*. He considered also that the eighth assumption impermissibly introduced hindsight to an accounting assessment.

3347. When questioned further whether he would accept that on the basis of the first, sixth, seventh and eighth assumptions (which in effect elaborated on the "trump" point Mr Holgate had described as of particular importance in reaching his conclusion) it would follow that the licence had no substance, he declined:

(1) As to the first assumption (same service with or without and before or after sale and purchase of a licence) he opined that what was missed out, not even mentioned, was the fact that the licence conferred a proprietary right of significance;

(2) He did not consider the sixth assumption (as to the licence purchase being instigated by Autonomy) *"matters one bit"*;

(3) In his opinion, the seventh assumption (the intention and understanding that after the sale the hosting would continue) did not *"deal with the optionality that the customer has"*;

(4) He considered the eighth assumption (none of the customers brought Digital Safe in house) to be both a *"hindsight point"* and one which missed the point that a number of customers had started with and retained Digital Safe on premise without undue difficulty.

3348. After that, Mr Rabinowitz returned to cross-examine Mr MacGregor further on the second, third and fourth assumptions, on which Mr Holgate had relied particularly in reaching the conclusion that the licence could not be used by a customer *"independently from the hosting and related service components of a Digital Safe arrangement"* nor was it *"feasible, from a commercial or technical perspective, for the licence to be sold as a separable good"*.

3349. Again, Mr MacGregor's opinion was that none of the factual assumptions compelled or even justified the conclusion that the licence had no independent value; and the conclusory first sentence in assumption (2) (which he considered, correctly) to be in reality a self-standing judgment, not a matter of fact, of itself took the matter no further for that very reason: all it signified was that *"if that's the assumption, then that's the conclusion you reach"*.

3350. In my judgment, Mr MacGregor was correct to this limited extent: the assumptions took no account of the basic legal fact that the licence gave contractual rights to the customer and imposed contractual obligations on Autonomy which introduced, potentially, a new and separate facet of the relationship between them beyond the provision of services.

3351. But none of this answered the real question in the case, on which Mr MacGregor floundered: how it was that those contractual rights could be said to have any real substance if (a) in most or many cases those rights were commercially illusory and/or never likely to be useful or used, and/or (b) the real intention of a hybrid customer was

to continue using hosted services, without regard or recourse to the licence rights, with the sole real benefit of the licence being as a passport to lower data storage rates.

3352. Again and again, the only answer provided by Mr MacGregor and the Defendants was (to quote from a passage in Dr Lynch's written closing submissions which seems to me eloquently and neatly to summarise the nub of his argument and of Mr MacGregor's response to Mr Holgate) that Mr Holgate's and the Claimants' approach gave:

> *"negligible, if any, weight to the contractual rights and obligations of the parties. It sets at nought the option given to the customer, in law, to take the software in-house (at which point it would be in the same position as the on-site licensee) and discounts the fact that the buyer owns an asset which would, for example, be effective in any bankruptcy of Autonomy. There may also be other good commercial reasons why the buyer would wish to have those rights, such as an ability to allocate them against a capital budget in its own business.*
>
> …
>
> *As Mr MacGregor pointed out, Mr Holgate's emphasis on the practical position of the customer misses the point that under the hybrid agreement, it <u>owns</u> the software and that the customer has an <u>option.</u>"*
>
> [Emphasis as in original]

3353. Dr Lynch also submitted that Mr Holgate's approach entirely ignored the fact that the licence conferred a bundle of legal rights; and it led to the proposition, which Dr Lynch labelled *"bizarre"* in his closing submissions, that when selling the licence to one customer (the on-site customer), Autonomy could recognise the revenue, but when selling the same asset to another customer (the hosted customer) Autonomy could not.

3354. Pausing there, in a sense the Defendants' position was, by implication at least, that if the hybrid hosting agreements were valid in accordance with their terms (which was not disputed), and the rights were capable of having some economic value for example in the event of the bankruptcy of Autonomy, or in the licensee's accounts, or (as Dr Lynch also posited, simply as an option which the licensees could flourish when the time came for renegotiation of hosting terms) that was definitive. Before considering whether (or to what extent) a factual exegesis is necessary or whether there is, as it were, such an overall or generic answer, I would summarise my view as to the relevant test or tests as follows:

(1) As already indicated, I consider the fact that the licence comprised legally enforceable contractual rights to be highly important but, in the application of accounting principles, far from definitive in the determination of the substance of the transaction.

(2) I agree also with the observation in the written closing submissions on behalf of Dr Lynch that Mr Holgate tended to talk about the use of the software, rather than the acquisition of it (or a right to it) by the customer, and that this led to the flawed assumption that if *"in practice"* the customer remained on Autonomy's hosting system it necessarily followed that the licence had no separate value.

(3) I do not think it is realistic to require of the company and its auditors to enquire of and determine the motives of an individual customer in purchasing a licence[409], or whether that customer actually intends and/or has or is likely to have the capability to utilise the rights it confers.

(4) However, I do not think it unrealistic, and I do think it necessary (as indeed must follow from my conclusion at (1) above) that an overall or generic assessment be made as to (a) whether across the cohort of customers there was ever any practical likelihood that the contractual rights would be utilised, (b) whether in reality the use of the licence ever played any substantial part in the promotion and negotiation of a hybrid deal or a further re-restructuring of its terms, and (c) whether there was ever any real expectation on the part of Autonomy or intention on the part of the customer, in any but the most exceptional case, to move the customer's software and data away from Autonomy's data centres onto its own premises (or even a third party provider's) during the currency of its hybrid hosting arrangement.

(5) If that assessment reveals no such practical likelihood; or no such usual intention; or that the difficulties and expense of moving and/or running Digital Safe on premise would in all but an exceptional case or cases be prohibitive or at least disproportionate to the likely benefit and/or that the process of promotion and negotiation of a licence or a restructuring placed no real focus on the benefit of moving on premise (as distinct from the financial benefit of reduced ongoing data storage charges or, a less obvious but potentially equally important financial advantage such as amortisation of the costs over the licence term) then the licence should be accounted for as in effect a prepayment, rather than a sale of goods.

3355. I turn therefore to that factual question whether the licence for which the licence fee was charged had any real substance and utility (whether actual or prospective) to the customer separate and apart from the hosting services which the customer also contracted to have and pay for as part of the 'hybrid' transaction looked at as a whole, and which in fact all customers continued with after acquiring a hybrid hosting licence.

The practicalities of (a) installation and (b) monitoring

3356. The evidence in this regard was very detailed. In my judgment, it established that:

(1) Digital Safe was designed to be primarily a hosted solution, and the majority of Autonomy's Digital Safe customers were hosted (as Mr Yan put it, *"located at an Autonomy data center and managed by Autonomy personnel")*.

(2) On-premise installation and implementation was not impossible. Digital Safe was available and actively offered as an on-premise solution. However, it involved considerable infrastructure costs. There were *"not many"* (to quote Mr

[409] Which Ms Gustafsson emphasised she did not in any event regard as relevant. In cross-examination she told me: *"…their motivation for undertaking that transaction is irrelevant to me as an accountant when looking at that deal…Their motivation was not part of an accounting standard that would have changed the accounting treatment"*.

Yan) existing hosted customers who moved Digital Safe on-premise. The Claimants acknowledged that some 17 customers were said to have had Digital Safe on-premise.

(3) Most Digital Safe customers were banks and large financial institutions with considerable resources, often running (and having employees with suitable training and experience to run) complex IT systems. Smaller entities would be unlikely to want or need to run the full Digital Safe solution; Arcpliance, a simpler product with a more limited capacity known among Autonomy's software developers as "Safe in a Box", could possibly provide a more suitable solution as it was simpler and much more easily installed, implemented and managed, though for smaller customers other simpler alternatives were available such as CAMM.

(4) Installation, configuration and customisation or implementation of Digital Safe on-premise were complex tasks, almost inevitably requiring Autonomy's assistance. The evidence (which I accept) was that no customer ever carried out this process by itself successfully (or at all).

(5) The complexity and duration of the implementation process for an on premise Digital Safe established from inception (and thus not involving the further complexities of data segregation and "lift and shift" involved in a move from an existing hosted service) depended on the size and resources of the customer, its data requirements and its particular needs. A minimum of at least three weeks would have been required: and Dr Lynch accepted in cross-examination that in many cases it would have taken *"at least months."*

(6) Autonomy never encouraged on-premise deployment of Digital Safe without Autonomy managed services. The Defendants' reliance on the fact that Autonomy produced instruction manuals as signifying encouragement to move on-premise was mistaken: and I accept that such manuals as were produced were far from being sufficiently detailed to enable a customer to do without managed services.

(7) Some customers that moved Digital Safe on-premise initially did not want ongoing services (which were usually provided by remote access through a VPN link) because they did not want anyone to have access to or visibility of their data (Apple, Axa and BNP Paribas were examples). Not all customers initially opted for full management services. However, after initial difficulties all Digital Safe customers who were sold a system without managed services (except Apple which never completed implementation) resorted to Autonomy to provide management services, or moved into another less complex solution (such as Arcpliance, and latterly, a new umbrella product called Autonomy Consolidated Archive or ACA, as in the case of Rand and a company called Air Liquide). Autonomy encouraged this. Dr Lynch's suggestion that Digital Safe could be managed without assistance was not borne out by their experience; it was (as described by Mr Young in an email to Dr Lynch dated 16 April 2010) *"a complicated beast with a lot of delicate moving parts"*.

(8) In some cases, customers chose to instal Digital Safe from inception in a third party data centre. For example, ManuLife had its Digital Safe on-premise in an IBM or IBM-controlled data centre in Canada because Canadian law required data to be hosted within its jurisdiction and Autonomy had no data centre there at the time.

(9) A customer with a licence also had the option to keep its existing data in a data centre hosted by Autonomy, whilst using that licence to have any new data on-site or at a third-party data centre: and that was a feasible and practicable alternative to full migration (which, for example, was adopted by Morgan Stanley which used hosted services for most of its Digital Safe data but had an on-premise Digital Safe in Switzerland for Swiss secrecy law reasons).

(10) Migration of hosted data on premise was not completely impossible, at least if the migration was to another Digital Safe (or as Mr Yan put it more technically, *"if the solution source and the solution destination were Digital Safe"*). However, the process was, as described by Mr Yan, *"laborious"*, time-consuming and expensive. The only example in the evidence of a company which initially had its data stored under a hosting contract with Autonomy but which, after purchasing a licence, successfully migrated its data and *"lifted and shifted"* its hardware from Autonomy's data centres on to its own premises was Citibank.[410] (In fact, there is no evidence that Citibank ever purchased a hybrid deal: it appears that Citibank's transition was agreed in December 2007, pre-dating the adoption of the hybrid model in mid-2008). That was, it seems, the exception that proved the rule. Citigroup's move on-premise was very complex (involving over 2 petabytes), and took about a year, even with Autonomy's help. The actual costs of the migration of data and any *"lift and shift"* were not explored in detail. It seems likely they were a very considerable disincentive for others contemplating the same thing. Mr Yan was cross-examined as to the practical difficulties of data migration. He told me that some 30 people were involved and that though he did not have the exact figures, it was:

> *"safe to say that it would have costed them a lot of money, a lot of materials and lot of staff and certainly a lot more time…"*

(11) During the period of a transition from hosted to on-premise a customer would still need to adhere to any applicable regulations on data storage: this was put forward by the Claimants as another reason why a move was impractical. But Dr Lynch explained, and I accept, that during the transition period the obvious solution would have been (at least in theory) for the customer to carry on its hosted service arrangements until its on-premise Digital Safe was built.

(12) Schedule 6DS licence contracts did not include any provision for Autonomy to provide managed services if a customer decided to move its archive on premise. The Claimants initially suggested that the requirement for Autonomy's assistance rendered the process unviable in the absence of any contractual

[410] Mr Yan explained that *"lift and shift"* involved powering down the hosted Safe, loading it up onto trucks for transportation, reassembling it at the customer site, and re-powering it up. As Digital Safe was compatible with most hardware, installing new hardware and programming Digital Safe onto it was likely to be the easier option.

provision for such assistance in the licence. That was an exaggeration. There was no impediment to Autonomy pricing and charging separately for its assistance and managed services, and that is indeed how customers (such as Merck) which did not initially contract for managed service but did subsequently require it, were charged. Autonomy's charges for such services, whether as part of the original purchase price or as a separate and subsequent addition, were modest. Thus, for example, BNP Paribas paid $80,000 per annum for remote monitoring and administration services (though this was in addition to $160,000 per annum for support and maintenance); Manulife paid $123,500 for implementation at its third-party on-premise centre and $14,583.33 per month for the entire suite of managed services; and AXA paid $60,000 for implementation.

(13) There was nothing to suggest that the same options would not have been available where Digital Safe had been moved on-premise from a hosted environment. However, Mr Goodfellow felt sure, when cross-examined, that *"Autonomy would have been willing to sell them those services as an additional service from Autonomy"*. Citibank's purchase of maintenance and monitoring services when it bought a licence demonstrates, as I find, that they were available. It appears from the lack of any evidence to the contrary, Mr Yan's evidence in cross-examination, and the inherent likelihood, that such services would have been provided by Autonomy at fair value and without differentiation according to whether the customer had always had Digital Safe on-premise or had moved on-premise. In all cases, according to Mr Goodfellow, monitoring and management charges, like implementation charges, were historically comparatively small.

(14) In all cases, however, the customer was dependent on Autonomy. No VAR or third party provider was in a position, either legally (since only Autonomy had the requisite proprietary rights) or practically (since none was trained or had experience on Digital Safe) to provide the assistance that any on-site Digital Safe customer would inevitably and routinely require.

3357. As it seems to me this evidence also confirms, and I find, that:

(1) Although (as was not disputed) Digital Safe was capable of being and was operated on premise, it realistically only ever was so by large institutions, multinational companies or large organisations with quasi-governmental roles such as the SFO and VA Vaco with commensurate resources.[411]

(2) Even the largest institutions with considerable resources either never attempted, or having attempted, found it impossible[412], to instal and/or manage Digital Safe without Autonomy's assistance and for example, all on-premise customers found they needed to establish VPN access for Autonomy to monitor and

[411] Thus, only one of the 17 on-premise Digital Safe users identified by the Defendants was not either a financial institution (BNP Paribas, AXA, Manufacturers Life, Morgan Stanley, UBS) or a large multinational

[412] For example, Air Liquide (a large French multinational corporation) had to be moved to EAS/CAMM which were designed for on premise use because it was as a practical matter impossible to run Digital Safe unmanaged or by "self-service".

manage the system and provide the near constant support required for Digital Safe.

(3) In short, it was not a practical proposition to implement or keep Digital Safe going without considerable and consistent support from Autonomy. I accept the Claimants' submission and find that a customer who had bought a licence had no real chance of implementing and thereafter using the Digital Safe on a standalone basis, because of its intrinsic complexity, the lack of customer-facing manuals, and the lack of third parties in a position to assist them.

The manner in which hybrid deals were sold

3358. The Claimants also relied on the pattern of Autonomy's approaches to existing hosted customers and the subsequent negotiations if and when they ensued as demonstrating that (a) Autonomy presented the hybrid model licence simply as a means to obtain the data storage savings it offered, and never expected any hybrid customer actually to exercise its contractual rights or "option" and (b) very rarely, if ever, did any customer manifest any intention of using the licence independently of its hosting arrangements with Autonomy.

3359. The Claimants took as an exemplar Autonomy's approach (through Mr Krakoski, a Digital Safe sales executive at Zantaz)[413] to Charles Schwab Corporation (a US multinational financial services company, "Charles Schwab"), and the latter's reaction and the ensuing course of negotiations. They illustrated these matters by reference to contemporaneous emails as follows:

(1) On 19 October 2009, Mr Krakoski emailed Mr Andy Uffelman (of Charles Schwab) encouraging a restructure:

> *"Great thing about the license structure for Schwab is long term it reduces storage [i.e. storage rates] dramatically… It will absolutely be imperative that we are both on the same page for making this happen in the quarter. Autonomy exec's are hyper-focused on quarterly results…"*

(2) The focus of Mr Krakoski's sales pitch was thus on the potential savings that Charles Schwab stood to make, not on the licence.

(3) Although at one point, Charles Schwab's legal group expressed "*…concerns with the licensing language*", the subsequent exchanges make clear that the real focus was not on the extent of the licence rights (in which there was no apparent interest) but on the balance of the real underlying deal as between (a) what Charles Schwab would be prepared to pay for the licence and (b) what level of reduction or discount Autonomy would be prepared to accept in return on (i) storage rates (ii) maintenance and service charges.

[413] Mr Krakoski had been slated as a witness for the Claimants, but he was withdrawn

(4) The true focus of the negotiation and Charles Schwab's lack of interest in the licence is plain from the contemporaneous documents. For example:

(1) On 18 November 2009 Mr Krakoski proposed revised terms for a licence fee of $3.8 million, in return for a very low management and services charge of *"M/S: 5% annually!"* with *"all services currently being provided"* and in addition a licence of both ControlPoint and a Digital Safe Connector, as well as an option to increase ControlPoint capacity *"in the form of a perpetual licence"*. Mr Krakoski calculated this resulted in 26% savings over the current method of charging, $2.8 million in savings over the term, reduced maintenance and services fees, as well as allowing Charles Schwab *"to leverage ControlPoint",* which he summarised as *"Overall increases savings and allows for more upside archival"*.

(2) On 7 December 2009, Mr Uffelman emailed Mr Krakoski saying that (a) Charles Schwab had *"no appetite"* for so large a licence fee; (b) but they would be prepared to pay $2.25 million; provided that (c) since they *"did not intend to take the software",* Autonomy agreed to the 5% maintenance fee and the same reduced storage rates continued as part of the arrangement.

(3) After the deal closed on 28 December 2009, Autonomy sent Charles Schwab a software delivery email letting it know that the licensed software was ready for download.

(4) When Charles Schwab received this email, Mr Uffelman contacted Mr Krakoski saying:

> "*Jim, let's talk about what this means. We don't want to download the software, nor do we want the risk of any of our technical partners doing so in error. What controls can we have in place to ensure this doesn't happen?*" [414]

(5) Eventually, Charles Schwab agreed to restructure its arrangement and to contract on the hybrid model. But, as the Claimants contended, it appears clear from the email exchanges that the reason Charles Schwab agreed to the new model was simply because it made considerable savings; it had no interest at all in owning the licence or moving on-premise.[415]

3360. More generally, it does not appear that any of the hybrid Digital Safe customers were expected by Autonomy or themselves intended even to download the licensed software. The Claimants relied in support of this on the evidence of Mr Avila who had noted in an email to Autonomy's Mr Mohit Mutreja in relation to a hybrid e-Discovery deal (subject headed *"Papering JPMC"*):

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[414] Emphasis added.

[415] In his first witness statement, Dr Lynch suggested that Charles Schwab ran Digital Safe on premise. This was not so: Charles Schwab was always a hosted Digital Safe customer, as Mr Avila confirmed in cross-examination, and as also appeared from an internal Autonomy email from Mr Rizwan Khan of 15 September 2011

> *"since we are selling a license, we will have to deliver [it to the customer] – even if we host it. Similar in concept to deals where we sell the DS software but host it in any case. The customer is never expected to install it themselves.*"

3361. When Mr Avila was shown this document in cross-examination, he initially tried to pass it off as an "*exaggeration*", but ultimately he accepted that it was fundamentally correct:

> *"Q. ... That was true, in cases where Autonomy sold Digital Safe licences to customers, it was true that the customer was never expected to install the software themselves, yes?*
>
> *A. That was perhaps an exaggeration on my part, but I think we all assumed that in any hosted deal where there was a licence component, it was unlikely that the customer would go off and try to install it themselves while they had the service being hosted for them.*
>
> *Q. You didn't expect them to do that?*
>
> *A. Right.*
>
> *Q. And so far as you know, no customer did go and install Digital Safe software themselves?*
>
> *A. Or any hosted licence software as far as I know."*

3362. The Claimants gave other examples from which this appears to have been a widespread understanding amongst Autonomy staff at the time. Thus:

    (1) In the context of a Schedule 6 transaction in Q2 2009 during which Morgan Stanley purchased a licence to Digital Safe Universal Access, Mr Goodfellow sent an email to Mr Wang and Mr Loren Wheale (an Autonomy technician) asking them to "*build ... a package we can put on Automater for delivery to MS*". Mr Wheale asked Mr Wang what the point of the exercise was, with Mr Wang explaining in reply: "*Revenue recognition, we need to ship something to Morgan. We shipped them Digital Safe software before even though they probably won't do anything with it*".[416] The Claimants noted that Mr Wang was not challenged on this evidence.

    (2) In the context of another Schedule 6 transaction with Energy Solutions LLC in Q1 2010, Ms Cynthia Watkins noted that the deal was "*hosted but we still need to ship the software in order to recognize the license*". The Claimants' point was that this suggested that shipment was irrelevant to the customer, and only needed for Autonomy's own purpose of revenue recognition.

3363. Of course, these are simply examples; but the fact that, in the Relevant Period, not one hosted customer successfully used the hybrid licence to move on premise strongly supports the suggestion that the licence element was simply regarded on both sides of

[416] As Mr Wang explained, he was referring to a Schedule 6 transaction with Morgan Stanley in Q2 2008.

the transaction as something that would never be used by the licensee, except as the required fee to access the lowest data storage charges.

Defendants' reliance on Deloitte and Audit Committee

3364. A principal plank of the Defendants' defence, in this context as similarly (as has been seen) in others was that, whatever may now be the case, years later and with the potentially insidious overlay of hindsight, at the time they drew comfort from the approval of the accounting treatment of the hybrid hosting transactions throughout the Relevant Period by a well-trained and experienced finance department, and by respected auditors Deloitte, and also the Audit Committee headed (from 2010) by Mr Bloomer, himself a respected Chartered Accountant with a wealth of financial and commercial experience.

3365. The Defendants pointed out that Deloitte had access to a wide group of personnel at Autonomy and Zantaz to assist in their understanding of Digital Safe, and hosting and hybrid deals.[417] Deloitte also had access to their own technical expert, Mr Johnstone. The Audit Committee had its own fund of expertise.

3366. In summary, the Defendants' case was (in respect of both Digital Safe and also e-Discovery which I shall deal with later) that:

(1) Deloitte audited and the Audit Committee approved a considerable number of these deals over the course of the Relevant Period. They carefully scrutinised the hybrid model and its accounting treatment proposed by the finance department; and they considered it sound and approved it. In every audit, Deloitte concluded that the licence revenue was correctly recognised.

(2) More specifically, Deloitte understood the salient features of the hybrid deals and approved Autonomy's approach in:

(1) treating the sale of the software licence and the provision of hosting and related services as separately identifiable components of a single transaction;

(2) accounting for the licence revenue upon sale to the customer and recognising revenue on that date and thus upfront; whilst

(3) accounting for hosting, support and maintenance and other services rateably over the period in which they were provided;

[417] Both Zantaz and Autonomy made available a number of people, including from its technical staff, to assist Deloitte in its process of review and auditing. They included Mr Lucini, Mr Goodfellow and Mr Smolek (who were not suggested to have been in any way dishonest), as well as Ms Gustafsson (whom the Claimants depicted as having *"personal interests…closely aligned with the Defendants"* and as occasionally unreliable or implausible in her evidence but not dishonest) and Dr Menell and Mr Chamberlain (both of whom the Claimants did allege were implicated).

(4) following a "residual method" of valuing other services in order to determine the appropriate amount of revenue for the licence (which Mr Holgate also accepted was reasonable and normal).

(3) Deloitte reviewed the accounting to ensure it complied with the provisions of IAS 18. Mr Welham confirmed in his oral evidence that on the basis of the information provided to them Deloitte considered that the sale of a licence was a sale of goods, that IAS 18.14 fell therefore to be applied to that element, and that its criteria were satisfied.

3367. The Defendants submitted that they were entitled to and did rely on this as corroboration of the appropriateness of their approach; and Mr Rabinowitz accepted that if Deloitte understood the factual position and were not misled then:

> *"…it's very hard to say that Dr Lynch and Mr Hussain should not have thought it was okay."*

3368. The question on that basis is whether the finance department were compromised, or Deloitte and the Audit Committee were misled, as to their assessment of the true nature of the hybrid arrangements and the expectations of the parties in respect of them. In particular, it is necessary to consider what they knew or were told as to the viability of installing and running Digital Safe and its software on premise without specialist assistance from Autonomy; and as to the practicality of a hosted customer moving on premise its data and software to which it was entitled under the terms of the licence.

3369. The Claimants' case was that the finance department was headed by, and ultimately its assessments reflected the views and requirements of, Mr Hussain and Mr Chamberlain; and that Deloitte, and in consequence the Audit Committee, were fundamentally misled. According to Mr Welham's witness statement, they were given to understand by Autonomy's core management that:

(1) There was no reason why hybrid model customers should not exercise their contractual right under the licence, just as Citigroup had done, to bring the Digital Safe system, including the software, onto their own premises, that this was a developing market trend[418], and that, at least in some cases, customers intended to do so in short order.

(2) There was no reason why customers could not (a) instal the Digital Safe system, their data and the software, onto their own servers, either themselves or with the assistance of third party service providers and then (b) implement and use the Digital Safe system and software themselves or with the support of third parties, without the need for material input from Autonomy.

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[418] According to Mr Welham, Deloitte was told in 2008 that there was a *"current trend in the market place*" of customers "*bringing services in house*". There was no relevant evidence of such a trend: whilst Deutsche Bank and Morgan Stanley did express an interest in (and Morgan Stanley did implement in Switzerland) on premise solutions in jurisdictions that imposed restrictions on data exports (such as Switzerland and Japan) that was a specific response to a specific difficulty and was exceptional. The real trend was towards the cloud, and in particular cloud-based hosting, which was a particular Autonomy strength and which made hosting cheaper and even more attractive.

3370. According to Mr Welham's witness statement, Deloitte were not told, and did not understand, that customers were motivated by the substantial savings offered by Autonomy, rather than by a desire to own a licence to the Digital Safe software. Nor, according to Mr Welham, did Deloitte understand that the hybrid model was generally proposed by Autonomy to the customer, and that the negotiations with hybrid customers were mainly about price.

3371. In an echo of the assumptions which Mr Holgate was instructed to make, the Claimants also asked Mr Welham to make six assumptions of fact, which he confirmed were directly contrary to Deloitte's understanding at the time. This served to (a) emphasise how different Deloitte's understanding was from what was said by the Claimants to be the reality and (b) to enable Mr Welham to state his view as to Deloitte's likely approach had they been aware of that reality. Those six assumptions were in substance[419]:

(1) Hybrid customers received substantially the same service as SaaS customers, the only substantive difference being the payment structure.

(2) A Digital Safe system could only be customised, configured and implemented for use on premises by Autonomy as part of a complex and lengthy process using Autonomy's proprietary knowledge and resources unavailable to third parties: a Digital Safe licence was thus of no independent value to a hosted customer.

(3) The Digital Safe system required continuously available managed services, which only Autonomy (and no third party) could provide, to keep it going.

(4) Negotiations to restructure a hosting contract were largely instigated by Autonomy, and not the customer, and such negotiations largely centred on price and the amount that the customer would save over the lifetime of the contract.

(5) The intention and understanding of both Autonomy and the customers was that, after the licence sale, the customer's data would be hosted, and all associated services would be performed, by Autonomy at its data centres.

(6) None of the hosted customers referred to in Schedule 6 to the RRAPoC ever did bring a Digital Safe system (including the software) on premise.

3372. Mr Welham's expressed view was that:

(1) Each of these assumptions was contrary to Deloitte's understanding at the time, and would have been relevant to Deloitte's overall consideration of the issue whether the licence was analogous to a product sale or should be treated as a prepayment, which was the nub of the decision about revenue recognition.

(2) The matters he was asked to assume suggested that there was no standalone value in the Digital Safe licence.

(3) The likely conclusion would have been against revenue recognition; further, Deloitte (and presumably also the Audit Committee whose understandings were

[419] I have slightly altered their expression, but not materially so.

based on Deloitte's reports to them) would have drawn serious adverse conclusions from management's provision of what, on that basis, would have been false or misleading information.

3373. Neither this forensic approach nor the responses it elicited was accepted by the Defendants. They depicted the Claimants as having *"used hindsight to construct an argument against revenue recognition which is contentious and highly technical (and indeed wrong)",* and stressed that *"the people who were operating diligently and in good faith at the time thought that the licences could be recognised as separate components and that the accounting was correct."* The Defendants sought to challenge the six assumptions and Mr Welham's evidence as to how Deloitte would have accounted for the hybrid deals on the basis of them.

3374. The Defendants were adamant that Deloitte had not been misled, and that the Claimants had overlooked the fact that Deloitte were involved in a detailed consideration of the hosting arrangements such that they cannot have approached the matter in such a simplistic way. They were supported in this by the following aspects of Mr Welham's evidence in cross-examination:

(1) Mr Welham accepted when cross-examined that Deloitte were aware that the expectation for many customers who had purchased a licence as part of a hybrid deal was that they *"might well"* not migrate but continue to remain with Autonomy and continue to enjoy essentially the same services as any hosted customer.

(2) Mr Welham also accepted that what mattered for accounting purposes was that the customer could take their licence elsewhere and not whether they did take their licence elsewhere (which did not quite address whether they ever would do so).

(3) Although the Claimants presented his evidence as having been that Deloitte were misled into thinking that there was a customer trend towards an on-premise solution, Mr Welham was more circumspect in his witness statement, claiming no more than he had *"derived"* an understanding from Autonomy management that *"consistent with the then current trend in the market, customers wanted to be able to archive their data in-house and to reduce the cost of storage"*. He also clarified when cross-examined that their understanding was that there was a move amongst customers to *"cloud services or hosted services in-house"* (which was not inaccurate).

(4) Mr Welham accepted that Deloitte had understood that running a data centre on the customer's own premises *"required specialist expertise"*, though he reiterated that he did not think they had understood it would require *"very specialist implementation"*. He also accepted that a customer would always be able to buy separate implementation and support services from Autonomy: but he emphasised that Deloitte had understood that these might be purchased also from "*another provider"*.

(5) Further, he accepted that Deloitte knew that when Citi had taken Digital Safe in-house the *"lift and shift"* of its servers from Autonomy's data centres to its

own had proved a serious undertaking, but had been achieved; and they took from this also that other customers would have the ability to do the same if they chose.

(6) Mr Welham confirmed also that if it was assumed that customers could migrate their data to their own data centre or a third-party data centre with specialist assistance separately charged, that could impact on the question whether the licence had standalone value and possibly lead to a conclusion *"the other way"* (that is, that it did have standalone value).

(7) Similarly, Mr Welham confirmed that Deloitte understood that Digital Safe would be likely to need monitoring and management by specialists, and as long as the services were provided to the customer at fair value that would not tell against revenue recognition and indeed would tend to support the licence having separate value.

(8) He accepted that it really did not matter whether it was Autonomy which approached the customer to initiate negotiations about restructuring, or *vice-versa.* What mattered was the final contract which they agreed. However, Mr Welham suggested that he considered the issue as to who had initiated the contract had influenced Deloitte's *"slightly different"* understanding as to whether there was *"a move to move cloud services or hosted services in-house"* though he again confirmed that in isolation the point did not impact revenue recognition.

(9) When asked about the fifth assumption he had been told to make (which mirrored Mr Holgate's seventh assumption), that the intention of both Autonomy and the customers was in fact that notwithstanding their acquisition of a licence entitling them to *"lift and shift"* they would stay put as hosted customers, he agreed that this was really a repeat of the first assumption; and it was likewise answered by the point, which Mr Welham had accepted (albeit with a barely audible but potentially important reservation *"to an extent, yes"*), that what mattered for accountancy revenue recognition purposes was the rights and obligations of the parties, and not whether they were in fact exercised (unless practically incapable of being so): he made clear, however, that what he meant by this was that what mattered was having *"the ability to do it."*

(10) Similarly, when asked whether, if it were assumed that a customer which chose to move Digital Safe on-premise could only obtain the maintenance and other services required in order to run the system from Autonomy, but also that Autonomy would have been willing to provide such services at fair value, he intimated that then that too *"might well"* militate in favour of the accounting treatment adopted.[420]

3375. Mr Welham correctly cautioned, however, that he was not, in giving this evidence, intending either to verify or disprove these assumptions: they were prescribed assumptions, not verified assertions. Before turning to assess whether Deloitte were

[420] Mr Welham was notably reluctant to concede this, and prevaricated what effect this would have before ultimately all but conceding that it would support and not undermine the accounting treatment which Autonomy had adopted and Deloitte had approved.

misled it is necessary to address the underlying questions of fact as to the viability of on premise Digital Safe and as to what truly were the objectives of the contracting parties in respectively agreeing to sell and purchase hybrid licences.

3376. As detailed in paragraph 3356 above, with one notable outlier, the witness evidence broadly confirmed that:

(1) Digital Safe was a highly sophisticated product (it may be remembered that Mr Young had described it in an email to Dr Lynch dated 16 April 2010 as *"a complicated beast with a lot of delicate moving parts"*), and it could not be moved on premise or managed and kept in working order there without continuous expert assistance. All efforts to make do without such assistance, and without a VPN connection, failed. That was so even in such cases as Merck (one the world's largest pharmaceutical companies), Citibank and AXA (both amongst the world's largest financial institutions): as the Claimants noted in their written closing submissions if those three companies did not have the technical expertise and resources to operate Digital Safe without Autonomy's managed services, it is difficult to imagine that any could. According to Mr Yan's unchallenged evidence, Autonomy even had to second an employee to Citibank's New Jersey offices to supervise the system.

(2) Mr Wang, Mr Yan and Mr Goodfellow all confirmed in their witness statement evidence that Digital Safe required near constant support, for which a VPN link on a dedicated network line was essential. Mr Avila was constrained to accept that he could not disagree.

(3) That was no criticism of the product: it was simply not designed or suitable for on premise deployment without such assistance. Mr Sullivan, as the CEO of Zantaz which had devised it, described it (see also paragraph 3284 above) as *"a massive product with a huge footprint"*, and the systems required to run it as being *"complex and proprietary"*. His evidence was that it *"was not designed to operate at a customers' premises, or without the Autonomy services necessary, first to implement it and thereafter to maintain it."* There was a raft of contemporaneous documentation to that effect, in which Dr Lynch's witness, Mr Avila, repeatedly expressed his agreement. Mr Young agreed entirely with Mr Robert Desroches[421] that it should not be put onsite at all except perhaps in *"extraordinary circumstances",* and then only with full monitoring and maintenance. Indeed, Mr Desroches considered it should not be offered at all: EAS or CAMM[422], or sometimes perhaps Arcpliance, should be offered instead.

(4) The option offered by a hybrid licence to move and run Digital Safe on premise was more theoretical than real: the logistical support required, even if put in place, was a clear disincentive against any move from a hosted solution.

(5) Further, assistance was only available from Autonomy. Mr Sullivan's evidence was that the relevant information to enable assistance was not provided to non-Autonomy personnel, and he was not aware of any VAR that could or did

[421] Who, according to Mr Yan, was in charge of Digital Safe operations at the time.
[422] Enterprise Archive Solution and CA Message Manager ("CAMM") were software solutions which could *readily* be installed onto a computer and easily managed.

implement or maintain Digital Safe in the Relevant Period. Even Mr Martin, a witness for Dr Lynch who tended to be an enthusiastic advocate for him (though, to my mind, too enthusiastic to be a reliable one), appeared to accept that Autonomy had not trained partners like Capax Discovery and MicroTech to assist, and no other third party providers, who would not in any event be given the requisite proprietary evidence, were in a position to provide assistance either.

3377. The notable outlier was Dr Lynch. He was to some extent committed to confirming its viability because he accepted that he was involved in the decision to offer the hybrid hosting model and thought it a *"sensible business decision",* thought he emphasised he was *"not…involved in the execution of this strategy".* If anything, he went further in seeking to support its viability and deny impracticability when cross-examined (after the evidence of Mr Wang and Mr Yan to the contrary). He told me:

(1) When asked to agree that Digital Safe was designed to be a hosted system, not an on-premise system, he replied *"not at all".* He sought to recharacterize Mr Yan's evidence to the contrary as limited to the case of a *"very large Digital Safe"* with thousands of cells. That was more difficult but would only be likely to be required by large institutions with the resource to handle the most complex IT systems.

(2) In that context, he asserted that in fact *"Digital Safe was not particularly advanced".* It was written in industry-standard language and protocol. There was *"no problem using Digital Safe unhosted."* He reasoned that it shared a code with Arcpliance and, he said, *"they both ran on premise".*

(3) He accepted that there were no specific manuals to assist migration or management of Digital Safe. He did not agree this posed any problem; again he referred to Arcpliance as if it were much the same thing: *"Arcpliance is Digital Safe in a box and that had its manuals."*

(4) He contradicted the evidence of Mr Yan and Mr Goodfellow that only the most skilled staff at Autonomy dealt with Digital Safe pre-configuration and other similarly complex tasks: he told me that they *"just dealt with their little area"* and *"actually the Digital Safe group were actually not particularly highly skilled".*

(5) He sought also to contradict the evidence of his own witness, Mr Martin, that Autonomy did not train partners to assist with Digital Safe; he told me that Capax Discovery and MicroTech *"did for ACA*[423] *and may have done for Arcpliance as well"* and that since *"ACA is Digital Safe but under a different brand"* he *"would totally have believed Capax was capable of implementing Digital Safe for a customer."*

3378. Dr Lynch's expertise in the software field is undoubted; for a man who had devised IDOL, its adaptation for and incorporation into Digital Safe (which was a Zantaz product) no doubt appeared relatively simple. But the balance of the contemporaneous evidence seems to me to be very firmly against his rear guard attempt, alone, to depict

[423] Autonomy Consolidated Archive.

Digital Safe as a common or garden variety bit of software which could be implemented and managed with ease. His efforts to confuse and equate Digital Safe with other products which could more easily be deployed on premise were fairly obvious, and discreditable. His suggestion that Digital Safe could be managed without assistance was not borne out by the experience of anyone involved. I have no real hesitation in rejecting his evidence in this regard.

3379. Furthermore, the regrettable inference which I make is that Dr Lynch devised this line to try to bolster both (a) the semblance of the licence offering a viable option and (b) Deloitte's approach and acceptance of that. That obviously is of relevance more generally, and more specifically see also paragraphs 3383 and 3384 below as to what he supposed Deloitte to understand. I next deal with my assessment whether Deloitte were misled.

3380. In my judgment:

(1) As his cross-examination confirmed, Mr Welham's witness statement over-egged the extent of Deloitte's misunderstanding;

(2) I do not accept that Deloitte understood Digital Safe to be *"standard software that customers were capable of installing onto their own servers themselves or with the assistance of third party service providers";* nor that Deloitte ever had any basis for an understanding that Digital Safe could be supported *"without the need for material input from Autonomy"* (as Mr Welham had rather extraordinarily claimed in his witness statement, from which he had to retreat in cross-examination).

(3) Similarly, I do not accept either that Deloitte, which also audited Citibank, did not appreciate that the process of bringing Digital Safe and related software and its data on premise had been complex and expensive for Citibank. By the same token, Deloitte knew that a move on premise, though expensive and difficult, was an option and could be achieved: and that therefore the licence did appear to grant some optionality.

(4) Deloitte also understood that notwithstanding that optionality, many customers might not exercise their rights under the licence, and would continue with Autonomy so as to benefit from the cheap hosting services for which they had also contracted.

(5) Nevertheless, cross-examination also confirmed that there were fundamental gaps in Deloitte's understanding. They were not provided with and did not have anything like a full understanding of what a move in-house would involve. Perhaps the most important was that they do not appear to have understood quite how much continuing and constant support was needed for Digital Safe, or quite how highly specialist was the support required, or that an on premise customer would in consequence be wholly dependent on Autonomy. In that regard, Mr Welham emphasised that Deloitte understood, and indeed Mr Miles in questioning him confirmed that he should assume, that implementation and support services could be provided by *"another provider"* (see also paragraph 3374(4) above). But the evidence was that no third party provider could assist: it was a proprietary product as well as being hugely complex and only

Autonomy could assist. The fact that the evidence also was that Autonomy charged fair value did not undo the point that Deloitte had not understood that the optionality depended on continued and extensive co-operation from Autonomy.

(6) Further, and in consequence, Deloitte had not understood the degree of even the most sophisticated on-site customer's likely dependence on Autonomy, and the almost inevitable disincentive to any move on premise that this presented.

(7) In addition to the gaps in their understanding of the product and its viability in practical and commercial terms of its on premise use, Deloitte did not have a full or accurate understanding of the market. Mr Welham repeated (see paragraph 3374(8) above) that Deloitte had what he described as a *"slightly different"* understanding as to whether there was *"a move to move cloud services or hosted services in-house"*: Deloitte do seem to have been under the impression that the optionality which the licence was said to provide was a response to a perceived market desire for flexibility, rather than simply a restructuring of pricing. This clouded their view as to the true objectives of the contracting parties and whether any had any real expectation (on the part of Autonomy) or intention (on the part of the customer) that the optionality apparently granted should ever be exercised. That in turn encouraged a flawed perspective as to the separate utility and purpose of the licence.

(8) It was a noticeable feature of the cross-examination that, despite its thoroughness otherwise, Mr Welham was never asked whether Deloitte had any, and if so what, understanding of the negotiations leading to the transactions and/or of the objectives of the customers concerned. Although Mr Welham was cross-examined about whether the assumption he was asked to make that Autonomy had instigated the negotiations was significant (see above) he was not asked about the evidence linked to it which Mr Welham had given in his witness statement: he was not questioned about the linked assumption that the ensuing negotiations *"largely centred on price."* I infer that this was not explored because, as the Claimants illustrated by reference to the transaction with Charles Schwab described in paragraph 3359 above, that was indeed (often, perhaps usually) the only focus of negotiations.

(9) In short, Deloitte did not have a proper understanding of the product, or the viability of on premise deployment of Digital Safe, or the true objectives of the contracting parties, or, therefore, of the real purpose of the licence.

(10) With a fuller understanding, it is more likely than not that Deloitte would not have been persuaded that the licence had substantive stand-alone value, and would not have approved revenue recognition; and neither would the Audit Committee.

The Defendants' knowledge in relation to Digital Safe

3381. The question then is whether Autonomy's management, and more particularly, the Defendants, actively misled Deloitte, or alternatively knew that there were those fundamental gaps in Deloitte's understanding so that their audit opinion could not properly be relied on.

3382. Dr Lynch emphasised that the task of accounting for the hybrid deals was in the province of the finance department and Deloitte and he had not been involved in the audit process; but he insisted he had no reason to believe that they had been misled or had misunderstood the circumstances to which their accounting judgments were to be applied. He made clear that his understanding was that *"this is all seen completely transparently by Deloitte who go through it in great detail";* and that he had assumed that they had the information they required, that they were doing their job properly and that he could rely on their view and approval, and that of the Audit Committee.

3383. However, I take it from his own evidence that the understanding he asserted he had, and must be taken to have assumed that Deloitte would form or share, was that Digital Safe was easily implemented, managed and maintained. He would have assumed that that was the basis on which Deloitte provided their audit opinion; and on which the Audit Committee gave their approval. However, I have found that he knew that this presentation of Digital Safe as a straightforward, easily managed product was contrived: in fact, he knew it to be false. In such circumstances, he knew likewise that Deloitte were proceeding on a false basis; and in any event, he cannot have relied on their approval.

3384. Furthermore, he would have known, as an experienced CEO that the judgement as to the viability of the optionality said to be conferred by the hybrid licence depended on matters unlikely to be, and in fact not, in their experience or knowledge. The judgement was ultimately dependent on facts, not fine assessment of audit principles. It may be that Deloitte were naive; or led by the nose; it is unnecessary and inappropriate for me to say more than that Dr Lynch cannot legitimately maintain that he relied on their approval.

3385. Mr Hussain, a trained accountant, CFO and head of the finance department, had direct involvement in a number of the deals, including in reviewing the savings models[424]. Quite how many is uncertain. In her witness statement, Ms Gustafsson suggested that she could *"only remember [Mr Hussain] looking at the models once or twice."* In cross-examination she was taken to four such examples, and referred to three more; and she revised her evidence to say that he would only have seen a *"single digit [percentage]"* of the *"hundreds of models"* she produced. But it was not the numbers that mattered: he saw quite enough for him to know what the purpose was and that the licences were sold simply on the basis of the savings they would yield to the customer and the revenue they would realise for Autonomy.

3386. This is clear also from one of his own contemporaneous emails (dated 23 December 2009) recording that he himself sold the hybrid model by reference to the savings that it would yield for customers, noting in relation to a deal with Morgan Stanley that the deal was "*purely financial and causes savings. It's quite simply sign and save*".

3387. Both his involvement and the objective was confirmed by other email exchanges urging Autonomy staff to complete hybrid deals and emphasising how important they were. The extent to which he expected to be involved is apparent from an email he sent when it emerged, in relation to a restructuring of a Digital Safe hosting deal with Pioneer

[424] These were detailed spreadsheets produced by Autonomy's sales representatives/Finance team which were designed to illustrate to the customer the savings that could be achieved if they chose to contract on a hybrid, rather than a SaaS, basis.

Investments in Q3 2010 that there would be a lower licence fee than he had been expecting or been told about:

> *"on Pioneer we gave away licence value without my knowledge or approval. I was expecting $1.2m but now it's a lot lot less. Do not let that happen again*"[425]

In point of fact, this seems to have been rather unfair on the part of Mr Hussain, betraying perhaps a desperation for revenue in the quarter. Again illustrating Mr Hussain's close involvement, Mr Stephan and Mr Sullivan had kept him well informed and warned him of the particular difficulties in the transaction which Mr Stephan described to Mr Sullivan made *"recognising licence revenue upfront very problematic."*

3388. There can be no real doubt, in my judgment, that Mr Hussain was well aware that a Digital Safe hybrid hosting licence was a device to provide a basis for recognising revenue at the point of sale. In my judgment, he cannot legitimately assert that he relied on Deloitte in this respect either.

Conclusion as to accountancy treatment of hybrid hosting licence as separable

3389. In my judgment, the accounting treatment of revenue from the sale of hybrid hosting licences was improper.

3390. Customers agreed to purchase such licences and pay the considerable fee in exchange for deep discounted storage rates and service charges, and without any or any real intention of downloading software, moving their data, or otherwise exercising the rights conferred by such licences.

3391. Autonomy expected and customers who purchased such a licence (in every instance save one (Citi, whose transaction pre-dated the hybrid model) intended to continue as hosted customers. The economic and factual reality was that the licence fee was not paid as the purchase price for the acquisition of valuable rights but as the negotiated prepayment for future services to be provided at discounted rates. It was not analogous to a sale of goods.

3392. The suggestion of its utility in giving customers an option to move their data and software was a pretence. The option was legally defined and no doubt enforceable: but what it enabled was, in all but theory or in such an exceptional case as to be unrepresentative, in practical terms unusable. The licence was a device to obtain accelerated recognition of revenue, for which the customer paid a fee but for which it was Autonomy which ultimately paid the price by so heavily discounting future revenue streams.

3393. Both Dr Lynch and Mr Hussain were aware that the licence was an accounting contrivance: both were aware of its purpose.

3394. The finance department were not independent; and Deloitte and the Audit Committee were misled.

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[425] Emphasis added.

3395. The Claimants have established their case.

IAS 18.14 (a) and (b)

3396. In light of that conclusion, and for two further reasons, I do not think it is necessary or appropriate for me to consider in this context the Claimants' argument, put forward in their written closing submissions (as they had in their written opening) that in relation to software licences sold as part of hybrid contracts, the condition of neither IAS 18.14(a) nor IAS 18.14(b) were met.

3397. One of the further reasons is that the Defendants correctly pointed out that this had not been pleaded: in the context of their case in respect of the Digital Safe licences (Schedule 6DS) the Claimants' pleaded case in the RRAPoC relied only on IAS 18.13 as the basis for their claim that recognition of revenue was improper. Especially in a case alleging fraud, it is imperative that the case sought to be advanced should properly be pleaded. In the context of the Digital Safe hybrid hosting arrangements, the Claimants should not be permitted to rely on IAS18.14 to upset revenue recognition.

3398. The second reason is that in the context of e-Discovery the Claimants did plead reliance on IAS 18.14 as a further basis for their contention that revenue recognition was improper in the context of the e-Discovery hosting arrangements. It is pleaded there as an alternative case. It seems to me that it only arises in that context, as in this, if it is necessary to deal with the alternative case. I return to that when addressing the e-Discovery position.

3399. It is to the e-Discovery aspect of the Claimants' hosting claim that I next turn.

(4) A detailed analysis of the e-Discovery claim

3400. Autonomy's e-Discovery offering provided customers with the software, and usually the services, necessary to collate, review and disclose material in the context of litigation.

3401. Autonomy's e-Discovery software included: (i) Introspect, which was used in connection with the processing and hosting of data, and enabled data to be searched and reviewed before being disclosed, and (ii) ECA[426], which allowed customers to limit the material to be uploaded to the review platform by identifying data falling within specific parameters.

3402. This e-Discovery software usually formed part of a hosted arrangement, where Autonomy used the software in its data centres in connection with its performance of ongoing e-Discovery services. These services were multiple and varied, ranging far beyond simply storing customer data to, amongst other things, ingestion, processing (and resolving data processing issues), data culling, analysis and producing reports, performing quality control checks, and production of documents in disclosure.[427]

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[426] Early Case Assessment: see paragraph 3290 above.

[427] In the *context* of e-Discovery, the term "hosting" should be understood to include not just storage services, but also related e-Discovery services.

3403. According to the unchallenged evidence of Mr Kalbag, Autonomy personnel were heavily involved in providing these services, which were not automatically performed by the software, but required action or intervention at each stage of the e-Discovery process. The combination and extent of these services was difficult to predict in advance, and differed from customer to customer.

3404. As with the hosted Digital Safe arrangements, prior to its acquisition by Autonomy Zantaz sold e-Discovery to hosted customers on a SaaS basis. Zantaz offered customers a menu of different services, including data ingestion, processing, storage and production, and charged customers a unit price for each of the various services provided. Zantaz accounted for these hosted arrangements as a service, recognising the revenue as the service was provided.

3405. Following Autonomy's acquisition of Zantaz, Autonomy structured and, occasionally, restructured, hosted e-Discovery arrangements so that customers purchased a licence to use the e-Discovery software as well as storage and other e-Discovery services. These hybrid arrangements were offered as an alternative to a SaaS basis, and offered the customer lower overall cost: the upfront fee for the licence being less than the saving achieved by reduced ongoing charges for related e-Discovery services.

3406. As in relation to the Schedule 6 Digital Safe transactions, the Claimants' overall case in relation to the seven Schedule 6 e-Discovery transactions was that the only real benefit from the customer's point of view was the heavy discount on storage and service charges thus obtained, and the only real purpose of the e-Discovery licences from Autonomy's point of view was the acceleration of revenue recognition to assist or enable it to meet revenue targets. The Claimants cited an email dated 20 June 2011 from Mr Mark Daoust (VP e-Discovery) to Mr David Wilner (who had just joined after the Iron Mountain acquisition) explaining the purpose of the licence:

> *"I would be sure to look at existing revenue for existing clients. If we are getting great rates, then I wouldn't try to convert to licence. I would only use on net new clients or new cases with existing clients.*
>
> *For instance, we had a J&J case that was going approaching contract expiration so we converted them to license. However, if they had a long time before contract expiration we would have left them as is.*
>
> *Of course, if we need revenue for the quarter we may chose [sic] to sacrifice some recurring revenue for a license deal to hit our numbers."*

3407. The Claimants pointed out also that the conclusion that Autonomy was motivated by a desire to accelerate revenue recognition is reinforced by a consideration of the targets and generous commissions that Autonomy set for its sales representatives for concluding hybrid deals. Whereas SaaS deals attracted commission of around 2% to 6% of the revenue recognised during the first 12 months of the arrangement, hybrid deals, at least to begin with, attracted commission ranging from 5% to as much as 18% of the upfront licence fee. Unsurprisingly, this had a substantial effect on the behaviour of Autonomy's sales representatives. As Mr Bock explained in an email to Mr Hussain in March 2009 (which in point of fact related to a DS transaction, to which the same applied), he had "*negotiated with [Deutsche Bank] for months to structure [a] deal in a way that allowed us to front-load the revenue*", and therefore expected to

be paid commission on the licence immediately, at the higher rate applicable to licence fee revenue.

3408. The seven e-Discovery transactions impugned by the Claimants were entered into with five customers and can briefly be summarised as follows:

(1) two of the transactions were with Johnson & Johnson (one in Q2 2009 granting for a fee of $1,446,104 a two-year licence for Introspect software, with user limitations, and (for a further $695,000) storage and eDiscovery services or a term of two years, the other in Q1 2011 granting for a single fee of $2,659,176 a two-year licence, again with user limitations, for Introspect software and storage and other eDiscovery services, together with support and maintenance);

(2) two were with BP (one in Q2 2010 granting for a fee of $13,534,000 a perpetual licence, with user limitations, to Introspect and ECA software together with a three-year application services term with a separate charge , the other in Q2 2010 granting for a fee of $1,350,000 a perpetual licence, limited to 200 named users and 10TB of customer data, for Introspect software including EDD (but with only limited functionality) together with separately charged application and support and maintenance services for a three-year service term);

(3) one was with Philip Morris International AG ("PMI") in Q4 2010 granting for a fee of $964,176 a three-year licence , with use and user limitations,for Introspect EDD, I6 and ECA software, together with separately charged hosting and support and maintenance services);

(4) one was with United States Postal Service ("USPS") in Q2 2011 granting for an upfront fee of $5,531,553 a two-year licence, with use and user limitations, for Introspect and ECA software and for a further spread fee, storage (hosted) eDiscovery services and support and maintenance;

(5) one was with JPMC in Q2 2011 granting for a fee of $3,237,600 a two and a half-year licence, with use and user limitations, for SLD software and (for a further deferred and spread fee) hosting services and support and maintenance.

3409. The Claimants' case on the Schedule 6 e-Discovery deals has two aspects:

(1) First, as with Digital Safe, they complained that the transactions in question were hosted deals structured as hybrid arrangements comprising (a) the sale of a licence to use the e-Discovery software and (b) the sale of storage and other e-Discovery services simply so that Autonomy could present the licence sale as a sale of goods justifying the application of IAS 18.14 and the recognition of revenue at the time of that sale, whilst recognising revenue from the sale of services rateably over the term of the arrangement. The purpose of this, according to the Claimants was to accelerate revenue recognition improperly. The claim was that the licence was not a separately identifiable component of the impugned transactions, and that it should have been treated as a prepayment for services, with the revenue being deferred and recognised rateably over the terms of the arrangements as in the case of other payments for services.

(2) Secondly, the Claimants claimed that no reliable fair value could be attributed to the e-Discovery software licence, and thus even if IAS 18.14 applied to the licence element separately, its criteria for revenue recognition (and sub-paragraphs 14(a) to (c) in particular) could not be satisfied. The Claimants contended that in approving Autonomy's determination that fair value could be attributed to the software licence, Deloitte were misled about and/or failed to understand certain facts about the provision of e-Discovery services.

Accounting principles

3410. As to (1) in the preceding paragraph, the relevant accounting principles were agreed to be broadly the same as applied in the context of the Digital Safe claim. In both contexts, the question is whether the value attributed to the licence should have been recognised upfront as revenue generated by the sale of goods, or whether it should have been treated as a prepayment for services and spread rateably over the term of the relevant contract.

3411. In determining the propriety of their accounting treatment, the most important difference between Digital Safe and e-Discovery transactions is that in the case of e-Discovery, it was not in dispute, and indeed one of six bespoke Assumptions[428] numbered (4) which Mr Holgate was instructed to make in relation to the substance of e-Discovery licences was, that the software was capable of operating independently of Autonomy.

3412. However, the Claimants maintained, and Mr Holgate was (as part of the same Assumption (4) referred to in the preceding sentence) instructed that:

> *"Generally, it would not have been practicable for the hosted customers to take the software and the data in-house to perform the services themselves."*

3413. The other Assumptions Mr Holgate was instructed to make in respect of the question whether the e-Discovery licences had any real substance mirrored those in respect of the same question in respect of the Digital Safe transactions. Adopting the same numbering as in Mr Holgate's report, they were as follows:

(1) *"Autonomy performed a variety of services as part of its hosted e-Discovery offering, many of which (e.g. performing quality control checks, resolution of data imaging/ processing issues, e.g. from password protected, encrypted or corrupted documents, data culling, batching, report production, format conversion and load file creation) were not performed automatically by the software, but rather required action or intervention by Autonomy personnel. This process was akin to a production line requiring a significant level of involvement from Autonomy staff at each stage of the e-Discovery process."*

(2) *"With the exception of the deals with BP, the term of each of the hosted e-Discovery licences was relatively short (two to three years) and Autonomy was contracted to provide services for the duration of the term. BP had a perpetual licence with a limited capacity and Autonomy was contracted to provide*

[428] The Claimants instructed him to make 12 Assumptions in all in respect of the Claimants' case on eDiscovery. The first six (referred to above) related to the issue as to the substance of the licence and whether it was a separately identifiable component of the hosting arrangement (which they contended it was not); the other six (see later) related to the Claimants' argument that even if it was, the licence fee should still not have been recognised upfront, because none of IAS 18.14(a), (b) or (c) was satisfied.

services for an initial term of three years. During the initial three year period BP was to pay a monthly Application Service Fee of $4/ GB/ month, following which the Application Service Fee increased to $10/ GB/ month."

(3) *"Each hosted e-Discovery customer received substantially the same service regardless of whether it had acquired a licence, i.e. the same service as a customer who contracted on a SaaS basis; only the legal/payment structure varied. Existing hosted customers who had originally contracted on a SaaS basis received substantially the same service as they had previously."*

(4) As summarised or quoted in paragraphs 3411 and 3412 above, but also adding:

> *"Unlike the Digital Safe software, the e-Discovery software was capable of being used independently of an Autonomy hosted arrangement, but was either sold as standalone software (which the customer would use itself, without Autonomy providing e-Discovery services) or as part of a hosted arrangement. If a hosted customer decided to take the e-Discovery software on premise during the term of the licence, Autonomy would not have provided the services that the customer expected to receive and for which it had effectively prepaid through payment of the upfront licence fee."*

(5) *"The intention and understanding of both Autonomy and the customers was that the software and data would be hosted and maintained by Autonomy in its data centres, and the associated e-Discovery services would be performed by Autonomy, for at least the contractually agreed period. This is what happened in practice."*

(6) *"The negotiations between Autonomy and the customers were focused on price. Autonomy typically introduced the option of an upfront licence fee and highlighted the significant discounts it offered the customer as compared to the price on a SaaS basis. From the perspective of the customers, the transactions involved the purchase of hosted e-Discovery services with an upfront prepayment in the form of a licence fee. Autonomy's primary purpose in structuring the deals to include a licence was the upfront recognition of revenue."*

3414. On the basis of this set of six Assumptions, Mr Holgate considered that (a) *"it was not generally practicable for customers to take the software and their data in-house to perform the e-Discovery services themselves"*; (b) in any event*, "it did not happen in practice in the transactions under consideration"*; and so (c)*"there was no substance to the grant of the licence"*.

3415. He concluded that:

> *"the revenue recognition criteria should therefore be applied to the transaction as a whole in order to reflect the combined substance of the two*

> *elements of the transaction taken together, which was….the provision of eDiscovery services over a period of time.*"

3416. Mr Holgate considered Assumptions (3) and (5) as set out in paragraph 3413 above to be the most important in reaching his conclusion that the e-Discovery hybrid hosting licences had no real substance.

3417. As to the second aspect of the Claimants e-Discovery case (see (2) in paragraph 3409 above), Mr Holgate considered that even if he was wrong about the e-Discovery licences lacking substance, on the basis of the same Assumptions, none of the first three criteria in IAS 18.14 was met.

3418. This was because (a) it was impracticable for hosted customers to take the software and data in-house and so in substance they never had transferred to them the risks and rewards of ownership, (b) for the same reason, Autonomy and not the customers retained managerial involvement and control usually associated with ownership, and (c) the prices charged for the e-Discovery software and related services were so variable, and there was such a lack of what he called *"sufficiently disaggregated and relevant management information relating to costs",* that it was not possible to measure reliably the revenue attributable to the software licence, whether by the "residual method" (explained later) or at all.

3419. Mr MacGregor considered, as to the first aspect of the Claimants' e-Discovery case (see (1) in paragraph 3409 above), that on the basis of the specific Assumptions dictated to Mr Holgate, the conclusions he reached dictated the result (as had his assumptions in respect of the Claimants' Digital Safe case). He stated: *"there is again not another credible way to analyse the Schedule 6 transactions for the sale of e-Discovery licences."* In other words, as with the Digital Safe case, Mr MacGregor accepted that if all the Assumptions which Mr Holgate was instructed to make were established on the evidence as matters of fact, the e-Discovery licences lacked substance and the accounting treatment adopted was incorrect and improper.

3420. However, he did not accept that it sufficed for the Claimants to establish in fact the Assumptions that Mr Holgate identified as appearing to him to be the most important. He declined to accept Mr Holgate's view that Assumptions (3) and (5) were the most important to the analysis and might of themselves invalidate the accounting treatment adopted by Autonomy. He maintained that in his view *"all of them together are part of his overall picture"* and that they all stood or fell together; he said that if even just one of the Assumptions was incorrect (he instanced Assumption (4) in particular: if it was practicable for a customer to perform the service itself, contrary to Assumption (4)) then he *"would not agree in the same way."* When cross-examined he clarified that by this he meant that *"I think if you just vary that one, then you will be taking into account revenue at the point of sale."*

3421. Overall, his refrain was that the licence did have separate substance because:

> *"…there is a right there, you own the software, it's your data on it and that of itself has value."*

3422. As to the second aspect of this part of the case (see (2) in paragraph 3409 above), Mr MacGregor's view, contrary to that of Mr Holgate, was that the rights conferred by the

licence were plainly transferred to, and enjoyed, managed and controlled by the customer (so that (a) and (b) of IAS 18.14 were satisfied); and that as to IAS 18.14(c), it appeared to be confirmed by Deloitte's review that it had been possible and practicable to capture the costs of the hosting portion of the transaction (often using standard rates for data storage) and on that basis there was no reason for not establishing the fair value of the licence calculated based on the residual value of the complete contract. Mr MacGregor also emphasised that *"the assessment of fair value does not require precision and IFRS confirms this"*. He found it:

> *"difficult to believe that the range of possible costs for these services was so wide that a reasonable estimate of the cost, and therefore of the value (on a cost plus margin basis), could not be determined or that Autonomy had no idea of the costs associated with the various parts of the business."*

Did the EDD licences have or lack substance?

3423. Although the experts appeared at first blush to be divided by this battery of assumptions, there was no real dispute as to the factual position as regards Assumptions (1), (2), (3) and (5). It seems to me that Mr MacGregor's focus on Assumption (4) reflected this; and that the real question to be decided in relation to the Claimants' e-Discovery claim is whether the Claimants showed, on the evidence, and as a matter of fact, that even accepting that, unlike the Digital Safe software, the e-Discovery software was capable of being used independently of an Autonomy hosted arrangement, that was not something any hosted e-Discovery customer would ever in fact have intended to do. The Claimants maintained that this was so because once a customer had elected for a hosted solution, if subsequently during the term of the licence a hosted customer decided to take the e-Discovery software on premise, Autonomy would not have provided the services that the customer expected to receive and for which it had effectively prepaid through payment of the upfront licence fee.

3424. The Claimants insisted that in such circumstances, the admitted right given to a hybrid e-Discovery customer to move on premise during the currency of a hosted e-Discovery arrangement was no more than theoretical and it was highly unlikely that any customer would ever actually exercise it. In reality, they contended, the licences simply offered financial advantages to both parties to the arrangement but otherwise were never expected or intended to alter in any way the hosting arrangements between the parties to such licences, or the use made of them. The Claimants especially noted in that regard that the term of the licence was usually coterminous with the term of the services, and/or the relevant agreement provided for Autonomy to host the licence, supporting their case that the customer had no desire to host the e-Discovery software and its data, or to perform the e-Discovery itself, and intended to rely on hosted services throughout the term.

3425. Furthermore, the Claimants contended that in each of those transactions:

(1) The hybrid e-Discovery deal was sold on the basis of the savings that the customer would make, and not on the basis of the rights a licence would confer. This was perhaps most clearly illustrated in Autonomy's detailed licence proposal for JPMC stating:

> *"Licence Deal: JPMC gets significant discount in exchange for revenue commitment and immediate payment"*

The discounts proposed were between 20% and 30% depending on the projected volumes of data, and were set out in a table of *"Proposed Discounts in exchange for License Commitments"*.

(2) What each of the customers was interested in purchasing and retaining was a hosted arrangement; and some of them demonstrated confusion (and in one case concern) as to why a software licence was being introduced into the arrangements. Thus, for example, PMI could not really understand, and therefore queried, the purpose of a licence when all it wanted was *"pure hosting"*; and USPS's comments on a draft hybrid e-Discovery arrangement circulated to it included that *"it is strongly suggested that [USPS] removes/deletes any license for which it has no interests/needs"*.

3426. As proof of the real expectations and intentions of the contracting parties, the Claimants relied also on the fact that in the case of the seven impugned e-Discovery transactions, none of the five hybrid e-Discovery customers involved did in fact operate the software independently of Autonomy.

3427. The Defendants, on the other hand, rejected the Claimants' suggestion that the licence was merely a mechanism for Autonomy to offer savings, and contended that the Claimants' case is flawed as a matter of accounting principle and baseless in fact. Autonomy marketed its e-Discovery offering on the basis that it was able to "*seamlessly provide both hosted/licensed products*" and this set it apart from its competitors. It was accepted by Mr Kalbag that Autonomy faced competition from other e-Discovery offerings, some of which offered licences that permitted a customer to use the software on-site. Not only was on premise deployment of e-Discovery entirely possible: but offering the option of it was a commercially motivated response to other products in the market, attract new customers and keep existing hosted customers happy.

3428. The Defendants emphasised both the advertised and actual commercial practicability of on premise deployment, and of a move from a hosted to an on premise environment:

(1) Autonomy made e-Discovery software available to licensees because they legally owned the software, and it did so by putting it on Automater, as Mr Lucini accepted. It was available for customers to download it if they wished to bring it on site. Customers who did not own the licence did not have access to the software.

(2) Downloading of the material was straightforward and no different than for other licenced software products. The software was made available on Automater to customers in the usual way.

(3) The evidence also was that the cost of transitioning to on-premise was close to being, by comparison to the other costs, insignificant: for example, Mr Kalbag accepted that in the case of USPS the estimate was $30,000.

3429. The Defendants also contended that, contrary to the Claimants' case, the evidence demonstrated that customers were interested in having the option of bringing the software on-site:

(1) The example the Defendants most relied on was BP which (as Dr Lynch correctly recalled) had been especially concerned about owning a licence, one of Autonomy's in-house lawyers (Ms Dolan) having noted following a meeting with BP, that:

> *"One commercial issue came up on Friday regarding their longer term plans. They will use the hosted software for their immediate need but they want to bring it in house. They do not want any limitations on the software. They want an unlimited BP license key and then they wanted to true up (number of instances, users, data amount, etc) after an agreed period."*

(2) Another client, USPS, far from indicating a wish not to have a licence, confirmed that they too were interested in the option of bringing e-Discovery on-site (which was not their immediate intention but which gave them flexibility to do so in due course). Thus, USPS requested pricing for four different e-Discovery options as part of its RFP[429] in September 2010, three of which involved USPS taking the software in-house. Two of the four options involved USPS starting out as a hosted customer, and then bringing the software in-house at a later date; and the option of bringing the software in-house continued to feature in discussions with USPS throughout much of the negotiations. Mr Kalbag confirmed that the option of taking the software in-house was never "*taken off the table*".

My assessment and conclusion

3430. It does seem clear, and I accept, that e-Discovery could be deployed on premise with considerably greater ease and far less expense than could Digital Safe, though (as I have found) it was not impossible to run Digital Safe on premise either. Although the evidence as to the particular point was sparse, it did not appear that e-Discovery needed the constant availability of Autonomy back-up and expertise that I have accepted Digital Safe did. Furthermore, it was not suggested by the Claimants that there were no third party providers with the ability to assist a customer to use and maintain e-Discovery in-house. Dr Lynch was adamant that use of e-Discovery in-house was common place (he told me in cross-examination that his *"understanding was that there were more on-premise e-Discovery implementations than those that were hosted"*).

3431. The real issue is whether a customer which had selected and entered into a hosted e-Discovery arrangement with Autonomy would ever have seriously wanted the option of moving on premise.

3432. Dr Lynch also maintained, though with less conviction, that moving e-Discovery software and data from a hosted Autonomy data centre on premise/in-house was not at all difficult or expensive:

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[429] Request for Proposal.

> *"Q.…I suggest to you not a lot of the customers who were using eDiscovery hosted services could or wanted to take on the burden of performing the eDiscovery services themselves?*
>
> *A. I disagree. I don't know about people moving but, you know, without looking it up, my understand was there were more on-premise eDiscovery implementations than there were those that were hosted.*
>
> *Q. But the point I'm trying to make to you, Dr Lynch, is that where you have a hosted customer, they are unlikely to want to move to do themselves?*
>
> *A. I disagree. Unlike Digital Safe, where you could have very large amounts of data to be moved, it was relatively, then all these things are relative – relatively easy to set up an eDiscovery system, and so if a customer wanted to move, it actually wasn't very difficult at all. In fact you even had – it was even easier than you might think because you often had hybrid situations, and I don't mean that in terms of the deal, but the customer is processing their own eDiscovery system, and then they have overflow and they send it to a hosted eDiscovery system or vice-versa, so there really wasn't very much - it's a very different situation to Digital Safe.*
>
> *Q. The reality is that customers were interested in relation to eDiscovery as well in the savings offered on the hybrid deals, not on moving on premise, correct?*
>
> *A. No, I disagree with that completely. EDiscovery was a slightly different business model in that it was generally to deal with litigations. So if someone is getting sued and processed, so what would happen, for example, if they had a high volume of processing, so I think Morgan Stanley used to do this, so if they're in the middle of a big case, then they would like hosted stuff, but for the general run of the mill , they would be happy to have it run on premise, so it was basically about load balancing."*

3433. As I have outlined above, Dr Lynch offered two examples of customers who did want that flexibility and the legal rights conferred by the licence which secured it for them: BP and USPS. However, the evidence is far less clear than the Defendants suggested.

3434. As to USPS, although the Defendants relied on Mr Kalbag's evidence, it does not seem to me that it supported the proposition that USPS wanted to have and for that reason contracted for flexibility to move on premise during the currency of their hosting contract. Mr Kalbag, though tenaciously cross-examined, doggedly maintained the general thrust of his evidence that in the case of USPS (at least) their real requirement was for hosted services: although they had started off by exploring all options including on-premise software deployment (as was clear from the RFP), by the end they regarded the licence as something that Autonomy wanted more than they did, and they regarded the licence in reality simply as a sort of *"insurance policy"* affording them some *"price protections."*

3435. Mr Kalbag, who enhanced his credibility by acknowledging that his objective was to get as much commission as soon as possible[430] summarised his position as continuing to be, notwithstanding 40 pages of cross-examination on the point, that all USPS really wanted was to continue the hosting arrangements with some protection against price increases but never intended to move on premise. The protections could have been (and it seems in fact were) obtained by provisions within the hosting arrangement; and as Mr Kalbag continued to insist notwithstanding 40 pages of cross-examination on the point:

> *"…Yes, I think I've said this several times: … The licence was a mechanism to protect them from cost overruns and predictability of price. Once we gave them options that didn't require it, it was clear that bringing it in-house was not their preference or what they desired, it was just their way of protecting themselves from cost overruns. And if you look at the final licence that they signed, we inserted the licensing not because that was the best way to give them the licences [sic, but must have meant to say protections], it was because it would allow us to recognise the revenue upfront. So it was definitely an insertion from our part, it wasn't something they specifically said, that "Hey, while you're hosting it, give me licences at the same time.""*

3436. BP was an exceptional case at least in one particular and important respect: BP was the only one of the five customers identified above which negotiated for and agreed a perpetual licence[431], suggesting that it did want to reserve some ability and right to move on premise after the end of the hosting services term. But as in the case of USPS there is nothing to suggest that BP ever intended to move on premise during the currency of the agreed hosting term. Mr Sullivan recorded in a contemporaneous email (dated 16 May 2010) to Mr Hussain and Dr Lynch (and others) that, in looking for a platform for the vast documentation in the well-known Horizon well oil-spill litigation, BP explained that they would "*not even think about trying to do this themselves*". It is clear from the context, in my view, that this signified that for the term of the hosting deal (three years) they wanted a hosted and not an on premise arrangement, and the issue for them at the time was to choose a suitable hosting provider (being concerned about their then provider's *"weaknesses including throughput rates, and ability to reuse content in multi matter cases"*).

3437. More generally, Dr Lynch's own witness, Mr Avila, confirmed that Autonomy did not expect customers to install the e-Discovery software whilst it was being hosted for them. As he had explained in an email to Mr Mutreja in June 2011 in response to a query whether in hosted e-Discovery contracts the software had to be uploaded on Automater:

> "*since we are selling a license, we will have to deliver [it to the customer] – even if we host it. Similar in concept to deals where we sell the DS software but host it in any case. The customer is never expected to install it themselves.*"

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[430] Due to the terms of their compensation plans, sales representatives could make significantly more in commission by structuring new or restructuring existing hosting arrangements to include an upfront licence fee than they could from SaaS deals.

[431] The others negotiated licences coterminous with their hosting arrangements, usually 2 or 3 years.

3438. None of the five e-Discovery customers in Schedule 6 did in fact ever bring the e-Discovery solution in-house during the term of the hosting transaction (or at all, so far as disclosed in the evidence before me).

3439. In my judgment:

(1) It is clear from the evidence that in the context of e-Discovery the licence was perceived by customers as something that Autonomy were keen, indeed anxious, to persuade them to agree, and which put them in a good position to negotiate sharply reduced storage and service rates.

(2) Some may have perceived the licence as also conferring protection against price rises; but there is no evidence that any placed any real value or practical utility on the option conferred under the licence to move on premise, at least during the hosting term which in all cases except BP was coterminous with the licence granted.

(3) Hybrid hosting was devised and deployed by Autonomy as the means of introducing a thing (technically, and in legal terminology, a chose in action) which could be sold apparently as something separate and apart from the storage and services which the customer really wanted and intended to use.

(4) The reality of the matter was that in most cases the licence had no real commercial purpose otherwise.

(5) Certainly in those cases, the licence was thus not a separable part of the hosted arrangements. The sale of a licence was not analogous to a sale of goods. It should have been accounted for as a prepayment for services.

(6) I must admit to more uncertainty in the case of the perpetual licence granted to BP. When Deloitte themselves expressed some concern about the licence being in the nature of a prepayment, the fact of the licence being perpetual was certainly emphasised by Mr Hussain to Deloitte, as recorded in Deloitte's working paper. But even in that case, Mr Hussain was clear, in contemporaneous emails not apparently shown to Deloitte, that BP had no intention of moving on premise: when a question from Mr Tim Young of Autonomy asking whether that might be BP's aim was forwarded to him, he responded unequivocally *"Nope – this is all hosted"*. Further, it seems clear from that contemporaneous record that BP's objective was the usual one of securing the price reductions Autonomy was offering for licensed customers.

3440. In reaching my overall assessment I have been mindful, of course, that Deloitte took a different view: they accepted that the licence component was separate, and approved the way Autonomy did account for licence sales. I accept that Deloitte considered the arrangements in considerable detail and in doing so had access to Autonomy's finance department and its own internal technical expertise.

3441. However, it is clear to me that, whether because they were misled or because they overlooked the realities, Deloitte swallowed the line they were given that the *"key feature"* in every transaction was that the customer wanted to own, and by the licence

acquired ownership, of the licence. I have concluded that, save possibly in the case of BP, the evidence simply does not bear out that this was any real part of the customer's objective; and even in the case of BP, it seems that Deloitte's doubts were assuaged by Mr Hussain telling them (as recorded in Deloitte's working papers) that:

> *"if BP thought that the licence fee was in any way paying for future services to be performed by Autonomy, then they would have requested deferred payment terms over the life of the agreement. Instead, they have paid the full amount upfront within several days of signing the agreement."*

3442. That disguised the point that what the payment obtained was the deeply discounted storage and service rates. It is not for me to determine whether Deloitte should have seen through this: the fact appears to be that they did not.

3443. In any event, I do not accept that Deloitte's approval was in fact relied on by the Defendants. For reasons that I elaborate later in addressing the issue of the Defendants' 'guilty knowledge' (see paragraphs 3449 and 3475 below) I have concluded that both the Defendants knew that the licence was a contrivance and that it was not properly accounted for, negating their pleas of reliance on Deloitte.

3444. I consider briefly later their approach to the more detailed tests prescribed by IAS 18 in assessing the e-Discovery hybrid hosting transactions and the question whether, even if the licence could be regarded as a separate component or element, it was possible to ascribe that component *"fair value"* (which was another precondition for revenue recognition).

3445. As foreshadowed in the context of my discussion of the Digital Safe hybrid transactions in paragraphs 3396 to 3398 above, the Claimants submitted that even if the Schedule 6 e-Discovery transactions were in substance transactions with separable components, such that it was *prima facie* necessary to recognise the revenue from the licence fee upfront, the criteria in IAS 18.14 also needed to be satisfied before Autonomy could do so: and that IAS 18.14(a) to (c) were not met. As I have accepted their primary argument, this alternative is (on the view I have formed) redundant in this context as I found it to be in the context of the Digital Safe transactions.

3446. In paragraph 3398 above I indicated that in this context, in which it was expressly pleaded (it was not in the context of Digital Safe), I would consider further the basis for the Claimants' alternative reliance on IAS 18.14 as an alternative if it was appropriate.

3447. In the event, having concluded in both contexts that, in line with the principle that a transaction must be accounted for in accordance with its true substance, a conclusion that in commercial reality the licence had none except as a ticket to cheaper storage rates appears to mandate its treatment in that same way for the purpose of the specific accountancy standards. In that event it would be very odd if some different conclusion were reached by applying the specific provisions of IAS 18.14.

3448. On the other hand, if the hypothesis to be adopted is that the licence was genuinely a valuable thing apart and conferred real rights the problem remains, albeit in a slightly different form: the problem being how the tests prescribed by IAS 18.14 are to be applied where the rights, even if real, cannot as a practical matter be exercised and there is in

truth no wish or intention to exercise them. In short, I have concluded that ultimately this leads to a *cul de sac* because whatever the analysis, the question always has to be asked what the substance of the "real rights" was: and in substantive terms there was none. Accordingly I do not think it useful to consider further the alternative case.

(5) Defendants' knowledge

3449. Lastly in this section, I return to the case on accountancy impropriety, and the second limb of the case, as to whether the Defendants had "guilty knowledge". I do so in relation to both the Digital Safe and the e-Discovery Schedule 6 claims.

Mr Hussain's knowledge of true purpose of the licences and accounting impropriety

3450. In my judgment, the evidence confirmed, as was inherently probable, that Mr Hussain, Autonomy's CFO and a chartered accountant, was involved in a number of hybrid hosting arrangements (both Digital Safe and e-Discovery) and aware of the true purpose and objective of the licence as a device to enable the acceleration of revenue and its improper early recognition.

3451. With Dr Lynch (as to whose involvement and knowledge see below), he was responsible for developing and overseeing the implementation of the strategy of selling software licences as part of hosted arrangements, knowing that the licence was a pretext for accelerating revenue recognition. (That is particularly clear from their involvement in the Schedule 12D re-restructuring transactions as to which see further below.)

3452. The evidence showed that Mr Hussain was often the most senior direct point of contact between Autonomy and Deloitte during the process of explaining to Deloitte the nature of the individual hosting transactions. There was never any question that he had direct engagement in and knowledge of the basis of the hybrid hosting programme.

3453. I have concluded that Mr Hussain was aware of:

(1) Autonomy's true motivations for selling hybrid deals;

(2) The nature of the negotiations with hybrid customers;

(3) The fact that there was no change in the substance of the services provided to customers before and after the relevant transactions;

(4) The fact that Digital Safe was as a practical matter incapable of being used on-premise without Autonomy's assistance in implementation and the ongoing operation of the system;

(5) The fact that (save the transactions with BP) each of the Schedule 6 e-Discovery transactions involved the sale of a licence that was coterminous with the provision of e-Discovery services, and that there was no real likelihood of a customer which had elected to acquire a hosting licence and paid a large sum in advance for the benefit of obtaining reduced hosting rates and services moving on premise within the term.

3454. The Claimants drew my attention to a particular example of Mr Hussain's direct involvement in misrepresenting the true nature of the hybrid hosting transactions. In

relation to one of the two BP e-Discovery transactions, he stated in an email dated 14 July 2010 to Mr Welham (copied to Mr Mercer of Deloitte and also Mr Chamberlain) that he would prefer that (a) they should *"clear"* with him *"the technical person you speak to since otherwise you will get incomplete information"* and (b) in the particular BP transaction at least that the *"future obligation is covered by the fee per gb per month."* As Mr Hussain knew, that presentation of the (future) hosting data storage fees and services as wholly separate and funded by the charges was materially misleading: the licence fee secured the reduced rates and was in reality a prepayment.

3455. In my judgment, Mr Hussain had "guilty knowledge" that the accountancy treatment of the hybrid hosting transactions was (as to the immediate recognition of revenue from licence sales) improper and Autonomy's published information contained untrue and misleading statements in this respect accordingly.

Dr Lynch's knowledge of Autonomy's improper accounting

3456. As regards Dr Lynch, it is inherently improbable, given the nature of the relationship between him and Mr Hussain, that Mr Hussain would have been aware of the impropriety of Autonomy's accounting, but not Dr Lynch. It is difficult to see what motivation Mr Hussain would have had to keep these matters from Dr Lynch, given that relationship. Notably, it was no part of Dr Lynch's case that he was misled by Mr Hussain.

3457. In any event, Dr Lynch acknowledged that he was *"involved with Autonomy management about developing creative solutions to offer our hosted customers, including the hybrid hosting model."* He implicitly acknowledged also that, as CEO, he was required to assess the commercial sense of the hybrid hosting arrangements, his evidence in that context being that they *"provided numerous benefits to Autonomy"*. He identified the following in particular:

(1) allowing Autonomy to remain competitive in the hosting market and to avoid a feared *"exodus of clients"*;

(2) committing the customer "*to longer terms for hosting services and greater data volumes than they had under prior agreements"* because customers *"were incurring a large "sunk cost" upfront in the form of the licence payment, with much lower costs occurring over the term of the licence"*;

(3) increasing the prospect of upsells of a *"whole host of IDOL-compatible products, which generated new business"* to customers (who would then own hosting software integrated with IDOL and (he said) thus be "*far more likely to buy other licences from Autonomy, rather than competitors, to perform related tasks"* than would SaaS customers);

(4) providing cash immediately, which was in itself beneficial to Autonomy and lastly;

(5) encouraging customers to move to newer versions of the hosting software, enabling Autonomy *"to free up space and power in its data centre, which saved on internal costs"*.

3458. I return to his commercial assessment later when discussing the Claimants' claims to recover transactional losses in respect of Schedule 12D transactions (see paragraphs 3482 to 3723 below). It is relevant for present purposes in (a) demonstrating that, even if not at the implementation level, Dr Lynch was closely involved in the development, assessment and justification of the model; and in (b) revealing inconsistencies which in my view support the conclusion that Dr Lynch was quite aware that the licence rights were never intended or expected to be exercised.

3459. As to (b) above, it seems to me that the premise of Dr Lynch's assessment was not that customers would be likely to exercise their apparent legal right to move on premise, but that they would be tied closer to remaining as hosted customers and using more data storage, because of low hosting rates in consequence of, and as a reward for, upfront subscription and because, in his own words, of the large upfront "sunk cost" in the form of the licence payment. In my judgment, it is obvious from the basic premise that he assumed that the licence rights were never in fact to be exercised: and the commerciality of the model from the point of view of both Autonomy and the customer was premised on them not being exercised. That, in my view, undermined, to the point of substantially disposing of, his central theme that the licence was valuable in itself. He was well aware that it was not.

3460. Dr Lynch submitted that the Claimants' cross-examination on the issue of IAS 18.13 and e-Discovery "*fell far short of what was necessary to maintain an allegation of fraud against him*". He emphasised that very few documents relating to e-Discovery were put to him, none directly involving him, and that his cross-examination was limited to two main points:

(1) First, a suggestion that customers were told by Autonomy they would get the "*same thing*", whether it was a licence or SaaS. Dr Lynch stated this was based on a single document, which, as Dr Lynch explained it, was making the point that customers who bought a licence but still paid for hosting services received the same service from Autonomy as a SaaS customer. Dr Lynch accepted that this is what it stated; but he submitted that this did not upset his case: the fact that customers also paid for and received hosted services simply reflected the nature of the hybrid model and did not alter the fact that they paid for and received an asset – a valuable software licence.

(2) Secondly, a suggestion that customers were "*unlikely*" to want to move from a hosted service to on-premise. He rejected this and maintained that the suggestion was undermined by documents which he maintained demonstrated that customers were interested in the option of bringing the software on site.

3461. He added to this that the Claimants accepted that there were on-premise customers and that it followed (he maintained) that however "*complex*" the process of implementation, the licence in those cases had independent value; there is no justification for why a different approach should be adopted for hosted customers.

3462. However, as it seems to me, the cross-examination focused sufficiently and put to Dr Lynch the fundamental points in issue; and it also seems to me that it demonstrated that he had no satisfactory answer on either. His resort to the twin assertion that the legal rights conferred by the software licence were valuable was (I agree with the Claimants) trite; and his claim that customers were interested in the options it conferred was undone

by the premise described above, and by the fact that it was implicit in his approach that he knew that:

(1) a customer with a hosted arrangement had no need for a software licence, particularly where: (i) the customer had no intention of using the licence on-premise independently of Autonomy's hosting services, (ii) the term of the licence was coterminous with the term of the hosting services, as was almost invariably the case in the Schedule 6 e-Discovery transactions, or (iii) the licence was to software that did not exist or was not asked for nor needed by the customer, as was often the case in the Schedule 12D transactions, or could not be used without Autonomy's assistance, as was the case for all the Schedule 6 Digital Safe transactions; and that

(2) there was no material difference between the SaaS offering and the hybrid offering; both were, in essence, service offerings under which customers received substantially the same services, regardless of whether they owned a licence to the software or not.

3463. I have concluded, and find, that Dr Lynch can only have understood and intended that the purpose of introducing a licence sale in a hosted arrangement was to provide a pretext for the improper acceleration of revenue, and that there was, in truth, no justification for adopting a wholly different revenue recognition approach to the hybrid deals than the approach that had been adopted in relation to the SaaS arrangements.

3464. My conclusion is also reinforced by Dr Lynch's explanation of the hybrid model in exchanges with analysts. Two examples of such exchanges were explored with Dr Lynch in cross-examination.

3465. At the end of May 2009, Ed Meier of Schroder Investment Management emailed Mr Hussain saying "*It's come to my attention from a couple of your customers recently that there may have been some change to contract structures (both in Zantaz). We have been told that on some occasions rather than pro-rating a 5-year contract equally over quarters as used to be done, a large proportion of it has been paid up front with the remainder (maybe 20-25%) pro-rated*". Mr Meier asked if this was prevalent in more than a few contracts. Mr Hussain forwarded Mr Meier's email to Dr Lynch. Dr Lynch responded to Mr Hussain with a draft email (replete with typographical errors) to be sent to Mr Meier saying:[432]

> *"the number amount and sources exploded so this model no longer worked, so it was necessary to terminate the old approaches and move to the new hybrid model with software on site to do the gathering and apply meaning based policies for what to then send tot he [sic] digital safe…*
>
> *…on once [sic] sense what you write is true, ratably recognized solutions for 3 suppliers were rolled into one with a 1/3 upfront. However the points to bear in mind is that the new contracts were much larger (~10 times) and for different functionality that subsumed the need for the old ones. Only a 1/3 of the new larger contracts moved up front. So in fact the effect of the change was still a massive increase eint he [sic] ongoing…ie the argument Autonomy some how swapped up front licence for ratably when the whole thing is viewed is the*

[432] Emphasis added.

> *opposite of the total outcome…THe [sic] outcome is actually much more longeterm [sic] revenue, not a short term boost at the expense of the future (unless you only consider a small fraction of the roll up rather than the total size).”*

3466. The Claimants branded Dr Lynch’s response as a complete fiction: and I must agree, for the reason they gave, which was simply that the position he was attempting to disavow was precisely what had happened and what the Defendants had intended from restructuring the hosted arrangements. I agree also with the Claimants that Dr Lynch’s defence of this email in cross-examination was unimpressive. He stood by his suggestion that hybrid customers would pay “*a lot, lot more*” as a result of the restructuring, a suggestion that was patently incorrect, as explained in more detail in the context of the Schedule 12D transactions below. For present purposes, it suffices to note that the evidence of Mr Sullivan, Zantaz’s CEO, is that the hybrid model led “*to reductions in longer term revenue and, thus, to a reduction in the total revenue which would be earned on those customers’ accounts over the lifetime of the relationship*”.

3467. Moreover, the Claimants observed (again to my mind, correctly) that having accepted that he was intending thereby to give Mr Meier the impression that the licensed software was used by the customer onsite to ingest and index the data that needed to be archived, Dr Lynch steadfastly refused to accept that this was false, maintaining that “*the licence is also used on site for part of the system as well*”, even when it was pointed out to him that Mr Yan had given contrary evidence. The Claimants’ witnesses, Mr Goodfellow and Mr Yan, gave unchallenged evidence that, when Digital Safe was hosted, regardless of whether the customer had a licence or not, the entirety of the Digital Safe system resided on Autonomy’s systems, and not the customer’s. None of Dr Lynch’s witnesses gave evidence to the contrary. Dr Lynch sought to defend the accuracy of his statements to Mr Meier in May 2009 by suggesting that Autonomy did not start selling licences to the Digital Safe software itself until the end of 2009. But that was belied by the documentary record, as set out in Annex C of the Claimants’ written closing submissions and Schedule 6 of the Particulars of Claim, that Autonomy had entered five hybrid deals before May 2009 that involved the sale of a Digital Safe licence (numbered in Annex C as 1, 2, 3, 4, 9).[433]

3468. The second example put to Dr Lynch related to similar suggestions in an email that he sent to Mr Goodman on 20 September 2009 for passing on to Mr Michael Briest, an analyst at UBS. The email appears to have been intended as a response to a note written by Mr Morland.[434] Dr Lynch wrote:

> *“2/ [Mr Morland’s] statement that: Autonomy has changed the revenue recognition policy at Zantaz and now recognizes a third of hosted deals up front … The statement that Autonomy recognizes a 1/3 of hosted deals up front is completely untrue, all hosted operations are recognized ratably as the service is delivered. A typical mega deal is made up of 2 parts, a set of software that is bought by the banks and installed inside it and on this*

[433] There were many more Schedule 6 transactions in this period, which either concerned Related Software or eDiscovery.

[434] Two days earlier, Mr Morland had published a note in which he wrote: “*Autonomy has changed the revenue recognition policy at Zantaz which used to recognise its hosted revenues evenly over the period of the contract. Autonomy has changed this such that one third of hosted revenues are now taken up front (as if they were a license) with the rest spread as before*”. This statement was addressed by Dr Lynch in the quoted text above.

> *hardware to sort data by policy (ie it is not hosted), this is in the example case given as a third of the total size. This is recognized as a normal software licence sale. 2/3 is the service of hosting a different set of software on our servers, eg archiving and discovery. [This] is recognized ratably as the service is delivered. ON NO account is a third of hosted sales recognized up front. This has been covered in earnings calls ... This error is key to the note as it is the central tenant of the hypothesis by which revenues were aggressively recognized ..... [it's] just not correct and arises solely from forgetting that mega deals are only part hosted and part licence software the customer runs un hosted by us..."*[435]

3469. When it was suggested to Dr Lynch that he was proposing to tell Mr Briest that the software licensed in hybrid deals was not hosted and was run on the customer's system, he echoed his remarks regarding his draft email to Mr Meier: "*Again, we're early in this process, in September 20 2009. More of the licences -- the licences tend to move -- become hosted by us more for the larger deals later*". The Claimants submitted, and again I agree, that when it was pointed out to Dr Lynch that there were sales of Digital Safe in 2008, he was unable to offer any meaningful explanation of his remarks:

> *"Q. Wasn't Morgan Stanley first licensed Digital Safe in 2008?*
>
> *A. Yes.*
>
> *Q. Well, I suggest to you from the very beginning, the way in which your hybrid system worked, was intended to work, was that Autonomy continued to host both the software and the customer's data and that what you were saying here was false?*
>
> *A. No, I think this is a reasonable explanation of what is going on. And by the way, it has to be taken in the context of everything else that's been said at the time.*
>
> *Q. You say everything else that's being said at the time, Dr Lynch, but if what you were saying here was untrue, then it was untrue?*
>
> *A. It's not untrue. It's absolutely correct, what it's saying."*

It was not clear what the relevant "*context*" to which Dr Lynch referred was. The point was not explored in re-examination.

3470. Dr Lynch then sought to rely on the fact that customers were occasionally licensed some software that ran onsite in hybrid deals:

> *"A. Just on the last point, just to be clear, there's a series of things that can be licensed that are part of this cloud system which run on premise as well as the licence itself being hosted off premise. Just so we've got that clear. My apologies for interrupting you.*
>
> *Q. Well, let's just be very clear. I understand there are a series of things that can be licensed and hosted, and there's no dispute, for example, that a*

[435] Emphasis added.

connector could have been put in the customer's premises, but what we're talking about here is that for which you're being paid one-third of the fee, which is the whole Digital Safe licence –

A. No, the one-third would include those licence elements because those are going in -- all of that is going into the cloud part of the business.

...

Q. ... that's the scenario you paint: that the customer is using the software that you've licensed, let's say Digital Safe on premise.

A. It is using some of the software it's licensed on premise –

Q. Some of the software?

A. -- and some of the software, <u>its licence is hosted by us at their discretion rather than being on premise or somewhere else</u>."

3471. But Dr Lynch's draft email to Mr Briest did not make this clear at all. In stating that a hybrid deal was "*part hosted and part licence software the customer runs un hosted by us*", it suggested that <u>all</u> the software that was sold by way of a licence would be run by the customer onsite. It did not suggest that Autonomy was licensing software that was <u>not</u> installed on the customer's systems and was instead hosted by Autonomy; but this is precisely what Autonomy did when it licensed Digital Safe and e-Discovery software (and indeed much of the Related Software that was sold as part of Schedule 6DS transactions).

3472. When later pressed on this, Dr Lynch returned to the suggestion that hybrid customers ran Digital Safe on-premise:

"Q. What parts of the software do you say that they were hosting themselves?

A. Things like parts of the Supervisor software, parts of the ControlPoint-type software, parts of the gathering software so things that were actually getting the data, sucking it up. IDOL caches would be run on site, so where there were IDOL caches being run, those would be run on site. There would quite often be quite a small satellite Digital Safe system on site depending on what the bank needed as well, where that was a short-term archive. So under the regulatory requirements, some data had to be kept for seven years, some data had to be kept for three years, but some of it had to be kept for seven days, and that was better done on site."

3473. This gave the misleading impression of some usage of licence rights by hosted customers; and it was inconsistent with the unchallenged evidence of Mr Yan that in a hosted Digital Safe arrangement, the Supervisor software would sit with the Digital Safe software in Autonomy's data centres. The Claimants submitted and I agree that it is also difficult to square Dr Lynch's comments about a "*small satellite Digital Safe system on site*" for short-term archiving with the fact that there was no evidence to suggest that any of the hybrid Digital Safe customers with existing hosting agreements ever ran

Digital Safe on-premise (save for Morgan Stanley which ran an on-premise Digital Safe in Switzerland, which appears to have been for regulatory reasons and not for short-term archiving)[436].

3474. The Claimants concluded that the obvious inference from Dr Lynch's recourse to misleading statements, or at best partial truths, as to the nature and use of the hybrid hosting model is that he was aware that, if the market realised the true nature of these transactions, Autonomy's improper revenue acceleration scheme would be discovered. I accept that.

3475. I have concluded that Dr Lynch was well aware that:

(1) The hybrid hosting structure was a response, not to customer interest, but to his and Mr Hussain's obsession with ensuring that Autonomy achieved, or came as close as possible to meeting, revenue forecast;

(2) The licence was a device calculated to justify revenue recognition which conferred legal rights which neither side intended or expected would ever be deployed and which in the context of Digital Safe were in reality of no practical utility, and in the context of e-Discovery would have nullified the original choice made by the customer in favour of hosting and caused the upfront payment to be wasted;

(3) The introduction of a formal legal right of no intended commercial consequence would not in any material way alter the hosting arrangements between the contracting parties, which both parties intended and expected to carry on as before.

(6) IDOL Cloud metric

3476. I should mention, but not dwell long, on the Claimants' contentions in respect of the use of the IDOL Cloud metric in Autonomy's published quarterly and annual accounts from 2010 onwards.

3477. The gist of these complaints was that in what were described as *"supplemental metrics"* provided in the narrative or *"front end"* of Autonomy's accounts from 2010 onwards a false impression was given by the inclusion of revenue from the sale of licences that Autonomy's recurring revenue from its hosting business was higher than it was. In particular, it was said, the market was given to understand that the metric was comprised (or at least largely comprised) of recurring revenues and thus a reliable and valuable revenue stream whereas in fact it included a substantial proportion (of around 20%) of revenue from one-off licence sales which was not recurring in nature (and see paragraph 3266(3) above).

3478. The Claimants made clear in their closing submissions that these allegedly misleading presentations did not give rise to any standalone claim. The Claimants relied on them as constituting *"powerful evidence"* of the Defendants' (i) *"general dishonesty"* and (ii) *"willingness to present Autonomy's hosting business to the market (and HP) in a misleading manner."* In his oral submissions, Mr Rabinowitz confirmed that the Claimants' complaint in relation to the IDOL Cloud metric was *"not part of the reason why we say the published information was wrong"* and did not *"feed into the loss*

[436] See Annex D of the Claimants' written closing submissions for further detail.

claim". After I had queried this, Mr Rabinowitz explained that this was because *"of the way the model works, the DCF model worked here"*.

3479. The length of the Claimants' submissions on this issue of credit suggests to me that at one point this was intended as a substantive plea but was never in the event advanced. The Defendants objected to the deployment of such matters at such length on an issue of credit. In objecting to its elaboration, Dr Lynch summarised this objection as follows in his written closing submissions:

> *"In summary, the complaint appeared to have morphed from one in the pleading where it was said that it was false accounting to allocate cloud licence revenue to IDOL Cloud to one where it was said to have been a fraudulent misrepresentation on the market to include any licences in IDOL Cloud because the latter was a category of "recurring revenue". The morphed complaint is contingent on an unstated (and unpleaded) but implied assumption that IDOL Cloud was exclusively a category of "recurring revenue".*

3480. I consider that the matter was pleaded. In their RRAPoC, the Claimants had alleged that an untrue and/or misleading impression had been given that:

> *"IDOL Cloud revenue was increasing rapidly and was a source of recurring revenue at the level suggested by the then-current reported IDOL Cloud revenue when, in fact, a significant component of IDOL Cloud revenue was attributable to purported licence fees which were non-recurring in nature. The aforementioned practice meant that the revenues were not representative of the actual performance of IDOL Cloud or its future prospects."*

3481. But it was not pursued as a claim. I do not propose to delve further into it; and I have not taken account of it in my assessment of the Defendants accordingly.

PART B

The Schedule 12D Transactions

The nature of the claims and how they differ from the Schedule 6 claims

3482. In addition to their claims pursuant to FSMA that the transactions listed in Schedule 6 of the RRAPoC were falsely accounted for, the Claimants identified a sub-set of those transactions as commercially entirely unjustifiable, and as having been entered into only for the improper purpose of accelerating revenue, at considerable cost, and thereby loss, to the Autonomy group company concerned[437].

3483. The Claimants referred to this sub-set of Schedule 6 transactions as Schedule 12D transactions, the latter being the Schedule to the RRAPoC where the relevant transactions were listed. The Schedule 12D claims made were direct claims against the Defendants for breach of duty.

3484. Although both sets of claims related to Autonomy's hybrid hosting business, it is important to distinguish the different ingredients of the two types of claim:

(1) As previously explained, but as I repeat to accentuate the differences, the Schedule 6 claims pursuant to FSMA required proof that it was wrong to treat the licence sold in a hybrid hosting transaction as a separate component of real substance justifying an accounting treatment analogous to a sale of goods, and that the Defendants knew it was wrong and that Autonomy's published information was false accordingly.

(2) The Schedule 12D claims were not dependent on proof of accounting impropriety; nor was proof required of knowledge of the impropriety of the recognition of revenue. The proof required was that, viewed as a whole, the impugned transaction lacked any commercial rationale, and that no reasonable director could have approved and/or directed it, so as to be in breach of duty as a director and/or employee or by virtue of exercise of fiduciary discretion and power.

3485. Accordingly, the Claimants' position was that their Schedule 12D claims could be made good even if their larger Schedule 6 accounting claims failed. Conversely, and as was implicit in the limitation of their direct claims to only a small sub-set of the Schedule 6 transactions, the Claimants appeared to accept that to make good their Schedule 12D claims it was not sufficient to establish their case that the accounting for these transactions was improper; they had also to establish that the transactions themselves were not commercially justifiable. I have some doubt about that implicit concession. The basis of their Schedule 6 claims was the contrived nature of the licence; and it is difficult to justify the sale of a contrivance, and the impropriety of the objective and intended accounting treatment may infect the whole and outweigh any other claimed commercial benefit. I return to that below.

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[437] As I elaborate below, the Schedule 12D claims also give rise to difficult, but (in the case of the claims against Dr Lynch) potentially dispositive, issues as to which Autonomy entity was the legal person to which the duty alleged was broken and which such entity had suffered the alleged loss and damage.

Overview of the Schedule 12D transactions and claims

3486. Originally, the Claimants had asserted that all the hosting transactions which are the subject of the false accounting claims (that is all the Schedule 6 transactions) were improper and caused transactional losses which they sought to recover as damages in personal claims against each of the Defendants.

3487. However, by amendments made in early 2017, the Claimants confined their claims to losses resulting to ASL and Zantaz from only four such transactions. Those four transactions (all of which are also the subject of Schedule 6 claims) were entered into with three leading financial institutions, namely, Morgan Stanley, Deutsche Bank and MetLife by Zantaz (in the case of the Morgan Stanley and Deutsche Bank transactions) and Autonomy Inc (in the case of the MetLife transaction).

3488. The distinguishing feature of these transactions ("the Schedule 12D transactions"), and the basis of their selection, was that they were restructurings of hosting contracts which had already been restructured from the SaaS model into hybrid contracts with a licence fee; except that in the case of Morgan Stanley, the impugned transaction was a re-re-restructuring which included a further licence fee (by then the third such payment).

3489. The Claimants contended that, therefore, if there were any benefits to be gained from bringing a customer onto the hybrid model, they had already been realised.

3490. Further, the Claimants contended that the customers concerned were offered substantial reductions to their ongoing data storage rates in circumstances where they had not approached Autonomy seeking any price reductions, and where there was no discernible risk of them leaving Autonomy in favour of another archiving provider.

3491. The Claimants also maintained that in each case, Autonomy licensed software that did not exist, was of no use to the customer, had been added into the description of software to be licenced under the agreement at the last minute without any request for it by the customer and/or had already previously been promised to the customer separately from the re-restructuring. The Claimants contended that the addition in the description of the software to be licensed was contrived to give the impression (especially to Deloitte who would be scrutinising the transactions) of some further commercial basis for the transaction which was in truth illusory.

3492. The Claimants' case in such circumstances was that it was not only the accounting for these transactions which was improper: the transactions themselves were not commercially justifiable and they resulted in overall loss. Their purpose was to establish a further licence sale from which Autonomy could immediately recognise all the revenue except for the fair value of the maintenance element. Their price was the discount which had to be offered to customers, and the resulting loss was the reduction in the overall fees paid over the course of the relevant transaction.

3493. The total losses allegedly sustained were stated in the Claimants' written closing submissions to amount to $24,835,156. The entity which actually booked the reduced revenue was Zantaz. Of this the Claimants claimed $6,912,011 had been suffered by

Zantaz and the remainder, $17,923,145 was loss claimed by ASL as transferee of losses under intra-group transfer pricing arrangements (see further below)[438].

Problems of standing and loss outlined

3494. The cause of action indicated would be a claim by the corporate entity alleged to have suffered loss against the directors responsible for that alleged loss for breach of a duty owed to that company in causing it to enter the loss-making transaction(s) and/or compensation for the abuse of their powers. I make that statement of what may seem obvious because it gives rise to two fundamental difficulties for the Claimants. Both difficulties emanate from the fact that the only Autonomy entities which were parties to the four impugned transactions were Zantaz and Autonomy Inc, and Zantaz was the only entity which booked revenue from those transactions.

3495. The first difficulty is that though Zantaz was the party which booked the allegedly reduced revenue within the Autonomy group[439] and is thus the entity which the Claimants contend "*forewent revenue as a result of the improper restructuring of four hosting arrangements*", the claim is primarily advanced by ASL. ASL claims losses of some $17,923,145 compared to a claim advanced by Zantaz of $6,912,011 (the total losses claimed in respect of the Schedule 12D transactions being just under $25 million[440]).

3496. The Claimants have put forward this as their primary case on the basis that most of Zantaz's profits and losses were, transferred to ASL under transfer pricing agreements between (inter alios) ASL and Zantaz which provided for the allocation of profits and losses from group companies to ASL.[441] However, in recognition of the potential difficulty in relying on the transfer pricing agreements as the basis of loss claims and also given the complex calculations necessary in that context, the Claimants put forward an alternative case which they presented as reflecting the position before the transfer pricing arrangements are taken into account. On that alternative case the entirety of the alleged loss is claimed by Zantaz.

3497. That, however, accentuates the second difficulty. Dr Lynch was never *de jure* a director of Zantaz. Nor was he a *de jure* director of ASL, though Mr Hussain was a *de jure* director of both.

3498. The Claimants sought to overcome this impediment by establishing that though not *de jure*, Dr Lynch was a *de facto* or (by virtue of being President of Autonomy Inc and/or what the Claimants described in their RRAPoC as *"the chief decision-maker within the Autonomy group"*) a shadow director of ASL, and that ASL was entitled to recover from

[438] The Claimants advanced an alternative case, reflecting the position before the transfer pricing arrangements, under which all loss is allocated to Zantaz as the entity that recorded the revenues.

[439] More precisely, the entity which contracted with the customer, raised the invoice and originally recorded the licence revenue in its general ledger, except in the case of the MetLife transaction where the contracting and invoicing party was Autonomy Inc but the revenue was recorded in Zantaz's books.

[440] More exactly (as calculated by Mr Bezant) $24,835,156.

[441] The transfer pricing arrangements and the transfer pricing calculations carried out for the year ended 31 December 2010, and which in summary amongst other things involved amounts equal to 96.5% of revenues recorded in Autonomy Inc and Zantaz, with arrangements for a percentage to be paid back to Zantaz in respect of profit-sharing arrangements between Zantaz and ASL, were of some complexity. However, Mr Bezant checked the allocation of the Schedule 12 losses by reference to these arrangements and calculations and did not identify any inaccuracies. Mr Bezant was not challenged on this in cross-examination.

him by way of damages or equitable compensation losses passed to it in consequence of the transfer pricing arrangements referred to in paragraph 3496 above.

3499. These are, as against Dr Lynch at least, convoluted claims. For the present, suffice it to say that:

(1) The Claimants abandoned their original allegation that Dr Lynch was a *de facto* director of Zantaz when it became clear that since Zantaz was incorporated in California the question whether he would be treated as a *de facto* director of it would be governed by the laws of California;

(2) The Claimants have ultimately not pursued any claims on behalf of Zantaz against Dr Lynch and thus, Zantaz's claims are now brought only against Mr Hussain;

(3) It follows that, on the basis of the Claimants' alternative case, reflecting a mathematical model of the position before the transfer pricing arrangements, no monetary claim is left against Dr Lynch;

(4) The Claimants' claims against Dr Lynch on behalf of ASL depend on establishing either (a) that Dr Lynch was a *de facto* or alternatively a shadow director of ASL or (b) that the transfer pricing arrangements somehow gave rise (now quoting from the RRAPoC) *"to a relationship of trust and confidence such that Lynch assumed the obligations of a fiduciary towards ASL…"* and that (c) he acted in breach of duty to ASL even though the impugned transactions were entered into, not by ASL, but by Zantaz and Autonomy Inc; and

(5) There is also an issue as to whether ASL suffered any loss, given that it was not the party that entered into the allegedly loss-making transactions, and that any losses were allocated to it pursuant to the transfer pricing arrangements.

I shall return to deal at greater length later with (4) and (5) above: they are, of course, fundamental to the Hosting 'improper transactions' claims against Dr Lynch, as they are to the other claims for transactional losses.

The Defences in outline

3500. In addition to these 'gateway' issues, the Defendants also accused the Claimants of having in effect presented a new case in closing which (as Mr Hill who dealt with this aspect of the case on behalf of the Defendants submitted) was *"not visible in their pleading"*. Put shortly, the Defendants' point was that in opening the Claimants had presented the claim as based on alleged false accounting and its adverse effects, whereas in closing they impugned the Schedule 12D claims as commercially improper irrespective of the accounting because a re-restructuring (and *a fortiori*) a re-re-restructuring, could not be proper because the customer was already locked in: the bird was already in the hand.

3501. Dr Lynch, in particular, submitted that this change of tack, albeit relating to a more restricted cohort of transactions, went back on a concession made by the Claimants in opening as to the scope of the improper transactions claim, was not pleaded, and was unfair. Mr Hill submitted that the Defendants would have wanted to know, and were entitled to know, that the Claimants were seeking to run this new case before cross-

examination; and that had they known, they might well have *"wanted to put more focus in our cross-examination specifically on the issue of whether, from a commercial perspective, a re-restructuring was distinct from a restructuring and whether a re-restructuring was considered to be commercially sound."* He submitted that the Claimants should be held to the position they set out in opening and be restricted to the accounting issues they had raised.

3502. I accept that the Claimants did refine and recast their case, as is obvious from the whittling down of the Schedule 12D transactions to re-restructuring transactions; but I do not accept that they ever made the concession asserted that they would restrict their complaints to the accountancy issues, nor do I accept that the Defendants were truly taken by surprise or caught unprepared. Seeking to strait-jacket the Claimants' claims in this way was always part of the Defendants' strategy; and I agree with Mr Rabinowitz's observation in his oral reply that this was a forensic point on their part. I do not consider that the Defendants' cross-examination of the Claimants' witnesses was unfairly affected or would have been substantially different. In my judgment, the Claimants were entitled to pursue the claim, and there is no unfairness to the Defendants thereby.

3503. Turning to the Defendants' substantive positions, in addition to those 'gateway' matters, their case was that the transactions impugned all had a sound business rationale. They promoted customer loyalty. They encouraged increased use of hosting facilities. They locked in new revenue streams which were otherwise uncertain in a falling market. They also secured an immediate payment of cash. Mr Hill referred to this in his oral closing submissions as *"the bird in the hand approach"*. The greater customer retention they secured increased the prospect of upsales, and by demonstrating customer loyalty, enhanced Autonomy's profile and credibility in the market-place.

3504. Furthermore, the Defendants presented the transactions as profitable and not loss-making. According to the Defendants, the rates payable under the re-restructured deals remained competitive without excessively squeezing margin. There was no basis on which any of this fell outside the proper exercise by the directors of their business judgement or constituted any improper exercise of their powers.

3505. The Defendants also relied on the fact that a number of people at Autonomy were involved in selling hybrid deals, including restructured hybrid deals, and none had apparently thought any of the transactions to involve impropriety: these included Mr Sullivan, Mr Collet, Mr Yan, Mr Wang and Mr Goodfellow (none of whom is suspected of dishonesty) as well as Mr Egan.

3506. The Defendants rejected the suggestion that in the case of each of the Schedule 12D transactions, Autonomy inserted into the description of the software licensed items which did not exist, which the customer had not asked for and did not need in order to mislead Deloitte into treating the newly licensed software package as different and more extensive than that previously licenced. They insisted that additional software was included in every case; and in every case it existed, was capable of being used, and was of practical use and value to the customer.

3507. The Defendants made the further point that it was not disputed that the software was put onto the delivery mechanism by Autonomy's technical team, none of whom was implicated in any wrongdoing, and none of whom considered that he/she was doing

anything improper. They dismissed as unsubstantiated, unsupported and implausible the Claimants' case that (as Mr Hussain portrayed it) "*AU's technical team decided to upload fake software*".

Structure of this Part

3508. Once again, these allegations and their rebuttal led to considerable cross-examination and occupied the parties in a very substantial exegesis: in their respective written closing submissions, the Claimants devoted some 110 pages, the First Defendant, just over 100 pages and the Second Defendant added a further 50 pages, all with copious footnotes with references to passages in the transcript.[442]

3509. Although my treatment must be more condensed, bearing in mind that the losses claimed are, in the circumstances of this case relatively small (totalling a maximum of some $25 million spread in each case over several years), it is nevertheless necessary to travel into some of the details of each of the four transactions to do justice to the parties' rival contentions. That is especially so since the Claimants relied on the details as further illustration of their case that all the Schedule 6 transactions were accounted for improperly.

3510. I address first the question whether, and if so on what basis and to what extent, Dr Lynch owed duties to ASL in respect of the Schedule 12D claims.

3511. I then turn to consider each of the four transactions in turn, and especially in each case

(1) Whether the Schedule 12D transactions had any proper commercial rationale;

(2) Whether Autonomy included as part of the transactions (and purported to supply) software which did not in fact exist but which gave (false) support to Autonomy's justification of the transactions to Deloitte.

Did Dr Lynch owe any duties to ASL?

3512. The primary basis on which the Claimants sought to establish that, though not *de jure* a director of ASL, Dr Lynch owed fiduciary and statutory duties to ASL, was their contention that he was a *de facto*, alternatively a shadow, director of ASL.

3513. The Claimants relied in this context on the recent decision of Morgan J in *Instant Access Properties Ltd v Rosser & others* [2018] BCC 751, especially at paragraphs 213 to 228. Morgan J explained in that case that:

(1) "…the question whether a person is a de facto director or a shadow director depends upon the specific facts of each case" (see para. 217)

(2) "There does not appear to be a clear legal test to help one decide whether a person is or is not a de facto or shadow director. For the purpose of deciding that question, it is necessary to focus on what the person actually did in relation to the company." (ibid.)

[442] Some 261 footnotes in the case of the Claimants in this part alone.

3514. Morgan J also drew on and quoted extensively from the decision of the Supreme Court in *Revenue and Customs Comrs v Holland* [2010] 1 WLR 2793, where the earlier authorities were reviewed and by a majority (3-2) it was decided (dismissing the appeal) that the director of a corporate director of a company was not a *de facto* director of that company, even though he was the guiding mind behind the sole corporate director and was the natural person who decided that the underlying company should pay the dividends which were impugned. That was because (according to the majority) he never assumed the duties of a director, and all that he did was *"in the course of directing the corporate director, not by acting or purporting to act as a director of the [underlying company]"*.

3515. As confirmed by Lord Hope JSC in *Holland* (at [26]):

> *"if it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity such as shareholder or, as here, consultant, the person in question must be entitled to the benefit of the doubt"*.

3516. Further, as Lord Collins (also, with Lord Hope and Lord Saville, one of the majority) made clear:

(1) It is not sufficient, if it is sought to establish that a person was a *de facto* director for the purpose of making that person liable for some act or omission of the company, to show that that person was *"the guiding mind"* in making that company's decision.

(2) In such a context, it must be shown that the person assumed the responsibility for a directorial decision; and that decision must be one reserved under the company's governance structure (that is, the system by which companies are directed and controlled) to a director or board of directors, and not one capable of being performed by a manager or other employee, or actually being performed by the person in question by virtue of some other role or authority.

(3) Thus, the question is whether the person in question (a) was as a fact *"part of the governing structure"* [93] and (b) had been demonstrated to have *"assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets"*.

(4) Now that the concept of a *de facto* director has been extended to cover not only (as originally) a person whose appointment was defective or who without lawful authority claimed to hold office, there can be no hard and fast distinction between the concept of a *de facto* director and that of a shadow director (see [91]) though, as noted by Morgan J in *Instant Access* [at 216]:

> *"If they were de facto directors, they owed the same duties to the company as would a de jure director. If they were shadow directors, there is a separate question as to whether they owed fiduciary duties to the company, and, if so, which duties."*

3517. Morgan J also referred to cases on *de facto* directors after the *Holland* case, and especially *Smithton Ltd v Naggar* [2015] 1 WLR 189 in the Court of Appeal, where

Arden LJ said that *"The question is whether he has assumed responsibility to act as a director"* and added (*inter alia*) that:

(1) That *"is to be determined objectively and irrespective of the defendant's motivation or belief";*

(2) *"The court is required to look at what the [defendant] actually did and not any job title actually given to him";*

(3) *"The court must look at the cumulative effect of the activities relied on"* and all the circumstances in the round; but

(4) *"It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case"*;

(5) *"Relevant factors include*: (*i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director"*;

(6) *"The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision*."

3518. Lastly in his analysis of the law in *Instant Access*, on the question of what makes a person a shadow director Morgan J referred to *Secretary of State for Trade v Deverell* [2001] Ch 340 and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) where it was clarified that:

(1) *per* Morritt LJ (as he then was) in *Deverell*, *"Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence"*;

(2) again *per* Morritt LJ in *Deverell, "such directions or instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them",* and nor furthermore is it *"necessary to the recognition of a shadow director that he should lurk in the shadows";*

(3) *per* Lewison J in *Ultraframe, " a position of influence (even a position of strong influence) is not necessarily a fiduciary position"*: the test is effective control since *"the policy underlying the definition is that a person who effectively controls the activities of a company is to be subject to the same statutory liabilities and disabilities as a person who is a de jure director"*; and

(4) also *per* Lewison J in *Ultraframe*, and by the same logic, it is not necessary that the person in question should be able to influence every member of a board: *"a person at whose direction a governing majority of the board is accustomed to act is capable of being a shadow director".*

3519. In the present case, the Claimants relied on the following facts as demonstrating that Dr Lynch was a *de facto* director of ASL (ASL being a company incorporated in England, the *de jure* directors of which were Mr Hussain and Mr Kanter):

(1) The Claimants' general case about Dr Lynch's role in relation to the Autonomy group companies, including (a) Deloitte's conclusion in its memo of January 2011 that Dr Lynch exercised *"a very unusual level of control for a FTSE 100 CEO"*; (b) the evidence of corporate decisions in all operating companies being made by a "core management team" comprising Dr Lynch (at its head), Mr Hussain, Mr Chamberlain and Mr Kanter, and also (though less consistently) Dr Menell and Ms Eagan; (c) Deloitte's further conclusion that all *"purchases over $30,000 must be approved by the CEO"* such that *"very few transactions are processed within the group without direct authorisation from Mike Lynch being required";*

(2) The lack of any evidence that ASL acted on the basis of resolutions passed by its board of directors, and the appearance that instead, important decisions regarding its affairs were taken by executives at the Autonomy group level, including Dr Lynch. The Claimants gave as an example ASL's $9.6 million purchase of a three-year licence of the ATIC in Q4 2010 in connection with the MicroTech/Vatican VAR transaction (VT13) which Dr Lynch approved, as he accepted. The invoice was initially issued to Autonomy Inc, following which it had to be re-issued to ASL. Nevertheless, Dr Lynch refused to accept in cross-examination that he had given his approval on behalf of ASL. He said that he was "*able to do the approval as part of my role, but I don't know how that relates to the legal entities*". The Claimants contended that it is obvious that, in point of fact, Dr Lynch was acting as though he were a director of ASL. Dr Lynch had no knowledge of an ASL board resolution approving the purchase, and there is no evidence that one exists.

(3) Dr Lynch's approval was required for purchases made by ASL. Thus, for example, in the allegedly reciprocal transaction with Vidient Systems in Q3 2010 (being the second Vidient transaction in RT4), which included ASL making purchases from Vidient totalling $2.31 million, Mr Chamberlain sought Dr Lynch's approval for this "*given size of amount*". In cross-examination, Dr Lynch accepted he gave the required approvals. When it was put to Dr Lynch that these approvals were given on behalf of ASL, Dr Lynch said "*I wouldn't necessarily have known who it was getting contracted through*". This reflected Dr Lynch's earlier evidence that: "*I wouldn't know which contracting company was being used, unless I went and looked at the paperwork, which I didn't usually*".[443] The practice was clearly for Dr Lynch to provide purchase approvals where ASL was the Autonomy company that entered into substantial transactions.

(4) Dr Lynch also approved MAF payments on behalf of ASL. He accepted that he approved the payment of a $1.1 million MAF by ASL to DiscoverTech in Q1 2011.

3520. Alternatively, the Claimants asserted that Dr Lynch was a shadow director of ASL, on the alleged basis that Mr Hussain and Mr Kanter, ASL's directors, were accustomed to act in relation to the transactions entered into by ASL in accordance with Dr Lynch's instructions. Very little additional evidence in support was provided by the Claimants, save as relevant to their contention that he was a *de facto* director. I think the reality is

[443] In the context of his cross-examination concerning RT3, where the relevant Autonomy subsidiary was Autonomy Inc.

that if they fail to establish that he was a *de facto* director, they cannot succeed in the alternative plea that he was a shadow director.

3521. In the further alternative, the Claimants contended that Dr Lynch owed a fiduciary duty of loyalty to ASL on the basis that he undertook to act for it or on its behalf in relation to the transactions which had a financial impact on it by virtue of the transfer pricing arrangements discussed above. The Claimants relied on *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 and submitted that that undertaking is implicit in the fact that:

> *"all significant transactions and decisions, including those affecting ASL, took place at his direction or with his knowledge, consent and/or involvement. These circumstances gave rise to a legitimate expectation on the part of ASL, which equity will recognise, that Dr Lynch would not utilise his position in a manner adverse to the interests of ASL and, accordingly, gave rise to the relationship of trust and confidence between him and ASL."*

3522. On the issue whether he was a *de facto* or shadow director of ASL, Dr Lynch raised little dispute on the law, not least because (as explained above) the law is clear that ultimately the issue in every case is one of fact. The facts, however, were much disputed.

3523. Dr Lynch's position on the facts was:

(1) He was adamant in his oral evidence that he was never a *de facto* director of ASL;

(2) The Claimants did not identify any instance of him being held out as a director of ASL;

(3) The main focus of his cross-examination in relation to this issue was on the fact that it was thought necessary for transactions by ASL to be approved by him, and he did, on various occasions, approve transactions that were, in the event, entered into by ASL. However, although he did not deny the fact that he was asked for and gave approval, Dr Lynch contended that (a) he would not *"have known which subsidiary the purchase was going through at the time"* and (b) his approval of transactions undertaken by subsidiaries of Autonomy Corporation Plc does not mean that he was acting on behalf of, let alone acting as a director of, those subsidiaries: he was acting as CEO of Autonomy, or as "Group CEO" (as he was described, for example, in Autonomy's Trading Update for Q1 2011).

3524. Dr Lynch contended that the Claimants' further alternative contention that if he was not a *de facto* or shadow director of ASL, then he owed a fiduciary duty to ASL because he implicitly undertook, under or by virtue of the transfer pricing arrangements, that he would consider its interests and not utilise any power or position (whether as CEO or otherwise) in a manner adverse to ASL (in accordance with the *Mothew* case cited above), failed on the facts. Dr Lynch contended that the fundamental premise of this basis of claim was that he knew that ASL would end up bearing the consequences of the transactions he approved because of the transfer pricing arrangements: but there was no evidence, and he denied, that he knew of those arrangements and that losses would be transferred to ASL.

3525. In my judgment, Dr Lynch plainly did act as a *de facto* or shadow director of ASL and owed duties in acting as such:

(1) His own denials in that regard are not legally dispositive: the question is to be *"determined objectively and irrespective of the defendant's motivation or belief"*: see paragraph 3517(1) above;

(2) The governance structure of the Autonomy Group as a whole was such that (a) decisions at subsidiary level were taken without the perceived need for formal board consideration by the senior management group comprised of Dr Lynch, Mr Hussain, Mr Chamberlain and/or Mr Kanter, (b) Dr Lynch was in a position to and did influence the others to the extent that his was the decisive decision on all material matters referred to him. As explained in paragraph 3518(2) above,

> *"such directions or instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them".*

(3) Dr Lynch's answer in the course of his cross-examination that *"I wouldn't know which contracting company was being used, unless I went and looked at the paperwork which I didn't normally"* illustrates how subsidiaries within the Autonomy Group were "used" as contracting parties without regard to their separate interests and at the direction of senior management with Dr Lynch at its apex.

(4) Although the mere fact that his approval was sought for large transactions by subsidiary companies would not of itself support the conclusion that he was a *de facto* or shadow director of the transacting subsidiary, the reality was that (a) the absence of any evidence that any of the subsidiaries had a functioning board of directors which actually made any decision confirms that the power of management in fact resided elsewhere than the board; (b) Dr Lynch was at least on a par with the *de jure* directors, and (c) the need for his final approval connoted that Dr Lynch had the ultimate decision-making power and was in fact first among them.

3526. That makes it unnecessary to consider the alternative case based on *Mothew*, though I should say that I was not convinced by it, and would accept the arguments against its application which Dr Lynch put forward.

The extent of Dr Lynch's duties acting as a de facto or shadow director of ASL

3527. However, establishing that Dr Lynch acted as a *de facto* director of ASL does not entail that he owed a duty to take steps in other capacities to protect it from harm: and in this case, the sources of alleged harm to ASL were (a) transactions entered into, not by ASL but by Zantaz/Autonomy Inc and (b) the transfer pricing arrangements.

3528. Dr Lynch submitted that even if he was a *de facto* director of ASL (as I have found he was) and if he did owe such a duty, there was no basis in law for any claim for its breach in the context of the four Schedule 12D transactions, because:

(1) ASL was not a party to any of them and nothing Dr Lynch did in relation to them was done on its behalf;

(2) If ASL suffered any loss, that loss was caused, not by the transactions or their effect, but by the transfer pricing arrangements: Dr Lynch was not aware of or involved in those arrangements and had not exercised *de facto* or shadow directorial power in respect of them; and in any event

(3) The Claimants have not alleged that the decision by ASL to enter into those arrangements involved any breach of duty.

3529. The Claimants accepted that if only Zantaz (as the contracting party, or in the case of the MetLife transaction, the entity which recorded the revenues) was the proper claimant in respect of all the relevant losses, then only Mr Hussain could be liable, and not Dr Lynch. The basis on which the Claimants asserted that Dr Lynch as a *de facto* or shadow director of ASL could be liable for transactions entered into not by ASL was never made clear or even broadly explained:

(1) In the RRAPoC, the Claimants pleaded the duties that Dr Lynch owed to ASL, but there was no satisfactory explanation as to how those duties were engaged or breached in the case of a transaction entered into by another entity. The pleaded duties were alleged to include *"to act for and on behalf of ASL in relation to transactions which had a financial impact on ASL pursuant to the transfer pricing and profit sharing arrangements…".* But the basis of this broad (and, in my view, novel) duty was not explained.

(2) In their written closing submissions, the Claimants variously asserted that Dr Lynch and Mr Hussain owed duties either as a director of ASL or in equity *"not to utilise his position in a manner adverse to the interests of ASL"* and were in breach of duty:

(a) *"in procuring Zantaz's entry into them [the Schedule 12D transactions]"*

(b) *"in causing the relevant subsidiary to act to its detriment…"*

in circumstances where (the Claimant submitted) *"all significant transactions and decisions, including those affecting ASL, took place at his direction or with his knowledge, consent and/or involvement."* But again there was no explanation of the basis of these broad formulations which cut across ordinary principles of separate corporate personality.

3530. In Dr Lynch's closing submissions the Defendants took it to be the Claimants' case in this regard that Dr Lynch owed a duty to ASL in respect of transactions carried out by other companies likely to cause it loss and was in breach of that duty by causing Zantaz/Autonomy Inc to enter into the Schedule 12D transactions knowing that they would cause loss which ASL would eventually bear because of the transfer pricing arrangements. It was not for Dr Lynch to postulate the basis of such a duty and he did not do so; but he submitted that even if such a duty was assumed for the sake of argument, the claim failed on the facts anyway, since Dr Lynch had not known the details of the transfer pricing arrangements and he was not aware losses would be transferred from Zantaz to ASL.

3531. Addressing first the legal basis of the claims, in my judgment:

(1) The Schedule 12D transactions involved no decision by ASL at the time they were made: they were entered into by Zantaz (or, in the case of the MetLife transaction, by Autonomy Inc), not by ASL: no duties were owed to ASL in respect of transactions undertaken (as they were) by different entities, namely, Autonomy Inc and Zantaz;

(2) The decision of ASL which has allegedly been causative of ASL's own loss (the decision to enter into the transfer pricing arrangements) has not been impugned and cannot be the basis of loss;

(3) No basis of claim against Dr Lynch for ASL's loss has been explained, still less established;

(4) If as public filings suggested but Dr Lynch denied, he was President of Autonomy Inc, he might have been liable for loss in respect of the MetLife transaction to which Autonomy Inc was a party: but the Claimants' case is that *"Autonomy Inc…typically transferred 100% of the costs it incurred and 96.5% of the revenues, to ASL",* leaving Autonomy Inc no worse off for having entered into the transactions and thus having sustained no loss.

3532. My findings set out in the previous paragraph address the primary case advanced by the Claimants, as I understand it (and there were convolutions in it), in respect of the four hosting contracts.

3533. As my fourth finding indicates I consider that whilst any claim for breach of duty arising from transfer pricing arrangements must fail for the reasons given, it does not follow that the company suffering the original loss which it might have sustained from a breach of duty cannot bring a claim. Thus, the claim which Zantaz has brought against Mr Hussain (brought in the name of the 4th claimant to whom it has been validly assigned) can be validly brought because it involves a breach of duty by him owed to Zantaz. Whether it succeeds depends on the facts which I discuss below.

3534. No question arises in respect of Zantaz of the losses having been transferred to ASL. But in principle I do not consider that the transfer pricing arrangements with ASL affect the potential claims which a subsidiary which in fact has suffered the original loss could make. Those transfer pricing arrangements, as explained in the Claimants' submissions, do not purport to assign the claims.

3535. In my view, the fact that the subsidiary has chosen to transfer its loss to another company in the group does not mean that subsidiary has not suffered the loss. It does not put the Defendants at risk of double recovery because there has been no assignment and therefore no claim can be brought by ASL (unless as is the case in other direct claims under different heads (in particular, in respect of (a) reciprocal transactions (both VAR and non-VAR) on which it incurred losses as set out in Schedule 12B and (b) MAF and similar payments or foregone receipts on improper transactions identified in Schedule 12C) ASL has suffered the original loss). The company which suffered the loss can enter into an arrangement to transfer the loss to someone else. As long as it does not assign the claim it does not lose the right to sue, and the fact it has by an inter-company arrangement agreed the loss shall sit on another subsidiary's books does not mean it has suffered no loss. The Claimants have put their claim in the alternative on the basis of

claims by the subsidiaries (or their assignee) for the loss they sustained as a result of a relevant breach of duty. Those are the companies which appear to me to have the claim.

3536. However, in my view, what has to be established is that the company which has the claim for the breach of duty has in fact suffered a loss as a result of that breach of duty. The original hosting arrangements of the Schedule 12D customers, prior to any restructurings, were with Zantaz. Further, Zantaz was the contracting party in three out of four of the amending contracts which reduced the amount of payments it received in the future. Autonomy Inc was the party to the fourth amending contract (the MetLife contract) which reduced the amounts to be received by Zantaz.

3537. Autonomy Inc suffered no loss as a result of this fourth contract, because it was never going to receive the income stream which has now been reduced. It was Zantaz which suffered the loss, and Dr Lynch, for the reasons advanced, owed Zantaz no duty. It follows, in my judgment, that, not because of the transfer pricing arrangements but because it has suffered no loss, Autonomy Inc has no claim.

3538. Thus, though there is nothing sufficient to displace the public filings showing him to have been President of Autonomy Inc, and I find that he was, for the reason given above Autonomy Inc suffered no loss. No claim lies by Autonomy Inc, the 4th claimant, against Dr Lynch in respect of the MetLife contract.

3539. As to what Dr Lynch knew of the transfer pricing arrangements and their effect, when the Claimants put to him in cross-examination that he was aware of the transfer pricing arrangements, his initial answer was *"Not really. I wouldn't be surprised to hear there were…but, no, I wouldn't have had any detailed* knowledge *of it"*. Later he clarified that he *"understood they existed"* but he did not *"know the details"*. However, I do not understand the transfer pricing arrangements themselves to have been impugned. Accordingly, I am not persuaded that Dr Lynch's knowledge or the lack of it affects the position in respect of the Schedule 12D hosting direct claims, or in respect of the other Schedule 12 direct claims (in respect of hardware, VAR, and reciprocal transactions).

3540. In my judgment, as to the Schedule 12D hosting contracts:

(1) Notwithstanding his overall strategic control of the Autonomy group and the broad remit of his role and activities in that respect, as a matter of law Dr Lynch, though a *de facto* director of ASL, did not breach any duty to ASL.

(2) The only claim there might be for breach of duty owed to ASL would be if ASL suffered the original loss in respect of the breach of duty arising out of making the four impugned hosting contracts; and that is not alleged. No claim, therefore, lies by ASL against Dr Lynch for breach of duty in respect of these four hosting contracts.

3541. In relation to direct claims made in Schedule 12 by ASL in respect of the payment of commission to friendly VARs and entering into unfavourable reciprocal arrangements to boost revenue, a claim does lie by ASL against Dr Lynch because ASL was the original contracting or paying party who sustained some of those losses claimed, not because of the transfer pricing arrangements. I deal with this in the section of my judgment dealing with the other direct loss claims.

3542. However, I must turn to consider the substance of the Schedule 12D transactions, both in case I am wrong, and also because in any event, although he did not admit this in his pleading, it is clear from public filings and I find that Mr Hussain was a director of all three implicated companies (Zantaz, ASL and Autonomy Inc) and thus claims do theoretically lie against him in respect of the Schedule 12D transactions.

General observations on the factual circumstances of the Schedule 12D Transactions

3543. Turning to the facts relating to the Schedule 12D transactions, the following points of general application were stressed, particularly by Mr Hussain, and do seem to me to be either common ground or to have been established:

(1) According to Dr Lynch's undisputed evidence, the cost to the hosting industry of storing data fell from $1 million for 1 GB in the 1980s to around $10 in the early 2000s and to $0.10 by 2010; the amount that a hosting provider could charge per unit of data consequentially dropped substantially over the Relevant Period, inevitably prompting customers to expect and often demand savings.

(2) Zantaz SaaS contracts were typically terminable at short notice and prescribed no commitment by the customer to store a minimum level of data.

(3) The hybrid model gave Autonomy an immediate injection of cash.

(4) From the customer's perspective, the hybrid model delivered a more competitive rate, greater certainty as to future rates, and any benefits of owning the software licence (albeit the Claimants disputed there were any at all).

3544. Both Defendants also stressed that none of the number of people at Autonomy who was involved in selling hybrid deals, including the restructured deals in Schedule 12D, thought there was any impropriety involved in them. The Claimants' own witnesses such as Mr Sullivan, Mr Goodfellow and Mr Egan considered that there was a commercial rationale for them, in particular in enhanced customer retention and upsell opportunities.

3545. In addition, and as Mr Hussain again stressed, the hybrid model was known to the market, and known to HP from the diligence process. Further, HP studied the hybrid model in detail as part of the "re-basing" project to restate Autonomy's accounting applying US GAAP. There is nothing in the evidence to suggest that HP's decision to discontinue the model was anything other than a business and/or US GAAP accounting judgement, nor that the internal HP accountants involved in the project considered the model or its accounting treatment was inappropriate.

3546. The problem with these general points is that although they do appear to provide commercial justification for hybrid deals sold to existing SaaS customers, that justification is much more thin and tenuous in the context of the Schedule 12D transactions themselves which involved a re-restructuring or in one case, re-re-restructuring of existing hybrid arrangements.

3547. That focuses attention on the commercial justification of the individual Schedule 12D transactions, to which I now turn in chronological sequence.

The Q4 2009 Morgan Stanley Schedule 12D transaction

3548. Morgan Stanley had originally contracted with Zantaz on a SaaS basis pursuant to an agreement dated 21 June 2001 ("the Original MS Agreement"). Zantaz first sold a hybrid deal (using the Claimants' terminology, "the First MS Amendment Agreement") to Morgan Stanley in Q2 2008. The First MS Amendment Agreement moved Morgan Stanley off the SaaS model and secured substantial savings for Morgan Stanley. The Claimants' complaints relate to two subsequent re-restructurings of that hybrid deal in Q4 2009 (in the Claimants' terminology "the Second MS Amendment Agreement" but which I shall call "the Q4 2009 MS Agreement") and then again in Q1 2011 ("the Q1 2011 MS Agreement").

3549. To understand the purpose and effect of the Q4 2009 MS Agreement, which the Claimants preferred to regard as a re-restructuring, it is necessary to set it in the context of the First MS Amendment Agreement in Q2 2008.

3550. Under the First MS Amendment Agreement in Q2 2008:

(1) Morgan Stanley agreed to pay a fee of US$18.5 million for a licence of a package of software including Digital Safe version 7.1 (a Lucene version) and Digital Safe version 8 (an IDOL version);[444]

(2) The agreement was for a term of two years from 1 July 2008 subject to Morgan Stanley having an option to extend for up to six consecutive one-year term;

(3) The storage rate for year one was $0.00798 per MB, reducing to $0.00312 per MB for year five.

3551. The Claimants contended that the First MS Amendment Agreement was an example of the use of the hybrid hosting model improperly to accelerate revenue recognition, at a substantial cost in terms of the deep discount that had to be provided to the customer to persuade it to pay an upfront licence fee.

3552. The Q4 2009 MS Agreement followed less than two years later. By the time it was concluded on 31 December 2009, there were still at least[445] six months left to run before the initial term of the First MS Amendment Agreement expired.

3553. The revisions introduced by the Q4 2009 MS Agreement included the following:

(1) Morgan Stanley agreed to pay a fee of $12 million to licence the same software (albeit with updates), but with the addition of a product called *"SPE Basic"*;

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[444] In an argument which presaged a more substantial dispute as to the existence of IDOL Digital Safe version 9 when purportedly supplied as part of the Q1 2011 MS Agreement (see paragraph 3618 below), Mr Yan and others of the Claimants' witnesses suggested that Digital Safe version 8 did not exist at the time it was sold to Morgan Stanley. It was asserted in the RRAPoC that it was not released until December 2010. Mr Yan also suggested that version 8 could not have been used by Morgan Stanley, which had a Lucene safe and not an IDOL safe. However, it became clear that there was confusion about the appellation/designation "version 8": it sometimes being referred to internally as *"DS Onsite"*. I did not understand the Claimants to have sought ultimately to pursue the point. In any event, I was persuaded that it was not well-founded. I was persuaded, and find, that Autonomy was in a position to sell IDOL Digital Safe version 8 to Morgan Stanley as at the date of the First MS Amendment Agreement.

[445] Although the term commenced on 1 July 2008 (*"the SOW Effective Date"*) the initial term was to continue for 24 months from the *"Livestream Activation Date"* which appears to be uncertain but to have occurred at some point between 1 July 2008 and 3 March 2009.

(2) The storage rate was amended so that Morgan Stanley would pay $0.00312 per MB from year two rather than year five, with a view to projected savings for Morgan Stanley of some $13 million over seven years.

3554. The Defendants presented the immediate commercial context of the Q4 2009 MS Agreement as follows:

(1) Morgan Stanley had pointedly made clear to Dr Lynch, at a meeting between him and the bank's head of enterprise infrastructure in November 2009 and in a presentation the bank thereafter provided to Dr Lynch that the bank was looking to cut costs across the board.

(2) The same presentation stated another of Morgan Stanley's objectives to be to manage its costs by working with strategic suppliers: Autonomy/Zantaz had ambitions to fulfil that role, and Morgan Stanley seemed eager to explore possibilities to broaden its use of Autonomy/Zantaz products.

(3) Thus, whereas until 2009 Morgan Stanley had very largely used its Digital Safe simply to store emails, in an email to Mr Lepore of Autonomy dated 16 October 2009, Mr David Bhola of Morgan Stanley stated that the bank was interested in both SharePoint and a document-tracking dashboard proposal, and, more generally, *"would be interested in hearing from Autonomy what is going on in the search space, new product offerings, new functionality etc. Areas of interest include rich media, spe, new functionality to be introduced into the IDOL product set."*

(4) Another, separate, deal concluded in November 2009, under which Zantaz was to supply, and Morgan Stanley's Digital Safe system would be accepting, data from MS Office, SharePoint and Documentum, seemed to offer the prospect of likely increased demand on the part of Morgan Stanley for additional data archiving in Digital Safe from 2010 onwards.

(5) Autonomy had in the circumstances seen encouraging signs of there being a substantial opportunity to increase Morgan Stanley's data needs and usage, but with the implicit costs that Morgan Stanley would be looking for lower data storage costs.

(6) Further, Autonomy/Zantaz was promoting the use of newly developed "*Ironman cells"* which allowed more data to be stored per cell than traditional IDOL cells. This new development was also thought likely to facilitate the conversion of a Lucene Digital Safe to an IDOL Digital Safe. This was a further factor suggesting enhanced prospects of Morgan Stanley increasing its data storage requirement. As Mr Egan stated in a briefing note to Mr Hussain dated 23 December 2009 if Morgan Stanley could be persuaded to upgrade to Ironman cells *"Autonomy gets a showcase account on the latest safe cells and that is good for Autonomy"*. Moreover, as Mr Egan also noted:

> *"The economics work out better for Morgan Stanley over time and in the case where MS wishes to send any additional volumes to the safe.*
>
> *The last point is important in that Autonomy wishes to constantly provide MS with incentive to store more volume in the safe. By capping software expense and lowering the rates MS is incentivized to migrate*

> *other types of data to the safe. An example would be the legacy migration project that is going on right now. Or for instance, Autonomy can take retired application data into the safe etc.*
>
> *Overall, this license proposition and rate reduction commercially underpins constant innovation to lower costs to Morgan Stanley on a per unit basis so that the Autonomy Digital Safe becomes an increasingly attractive and cost efficient archive platform for greater volumes and breadth of data."*

(7) Mr Egan added to this, when cross-examined about the reference to *"retired application data"*, that this would be likely to include data from financial applications, which would in turn include relational structured data which would be a use case for SPE.

(8) In the meantime, Autonomy's costs of storage had fallen since the First MS Amendment Agreement, and Autonomy could afford to offer a reduced hosting rate whilst still making the same margin.

(9) Thus, Autonomy saw its opportunity to obtain more data and data storage fees from Morgan Stanley, as well as a potential shopfront for both Ironman cells and SPE, and at the same time to lock the bank in for a new upfront commitment. In return, it was offering a package which it could present as attractive to Morgan Stanley whilst not eroding its previous margins.

(10) When it was suggested to Mr Goodfellow in cross-examination that the end of 2009 was a good time to lock Morgan Stanley in with a new upfront commitment, the gist of Mr Goodfellow's answer was:

(a) first, that it was <u>always</u> a good idea to try to renegotiate and secure a further upfront commitment and revenue; any time was a good time to improve lock-in with customers; and

(b) secondly, that all customers would be seeking to get the best deal they could. This was true also in the case of Morgan Stanley.

3555. Against that commercial background, the Defendants submitted that the Q4 2009 MS Agreement achieved a number of objectives for both parties, made obvious business sense, and was a good commercial deal. Not least, as the Defendants emphasised, it locked in $12 million of licence revenue, which, whether or not relied on to meet quarterly targets was a valuable accretion to funds.

3556. The Claimants presented the position very differently. Their case is that the deal entirely lacked *"any legitimate rationale…"* and was driven (with the active involvement and encouragement, it was contended, of both Mr Hussain and Dr Lynch) by the need on Autonomy's side for any deal that provided apparently recognisable revenue in a large amount.

3557. The Claimants contended that this was demonstrated by the negotiations leading up to the deal. According to the Claimants:

(1) Autonomy's opening pitch for this restructure was made by reference to the savings that Morgan Stanley stood to gain from it; only later was anyone concerned to identify what software might be licensed to Morgan Stanley to give the transaction some semblance of a rationale. Had the purpose of this transaction been to license Morgan Stanley new software that it genuinely wanted or needed, one would have expected the discussions about the software to precede negotiations over price. That was not the case.

(2) According to Mr Egan's unchallenged evidence, the deal was a point of "*focus of Dr Lynch and Mr. Hussain's attention*". In cross-examination, Dr Lynch appeared to accept it was an important deal for the quarter. Mr Egan informed both of them on 21 December 2009 that the numbers supported "*doing a large deal*", and Mr Hussain responded saying *"good luck! Need it!"*.

(3) When on 22 December 2009, Mr Egan opened the negotiations over the deal, he sent Mr Frank Cooke and Mr Troy Huber of Morgan Stanley a spreadsheet demonstrating the potential savings, noting:

> *"-Proposed lowering of overall cost structure for Digital Safe to Morgan Stanley to create savings of $6.3M over next 5 years or $13m over 7 years…*
>
> *-This deal can be accomplished with no changes to contracts other than to amend existing agreements with new software table and new rate table…*
>
> *Mike [Lynch] and Sushovan [Hussain] asked that I keep the offer very simple and show Morgan Stanley a pure savings option based upon a restructure that yields license revenue for savings. I know they described this in broad strokes to people like Christian in the UK which you and I discussed."*[446]

(4) That encapsulated the deal in the eyes of Mr Egan: it was to make a further licence sale to serve as a pretext for upfront revenue recognition, in return for which Morgan Stanley would receive further substantial savings. Mr Egan forwarded this email to Mr Hussain, saying "*FYI in case you talk to [Christian Lucas of Morgan Stanley] in am*".

(a) When Mr Hussain chased Mr Lucas again the next day, 23 December 2009, Mr Lucas replied, asking:

> "*what would be the upfront payment that you're looking for before y/end in order for the savings programme to kick in?*".

(b) In response Mr Hussain clarified that:

> *"The savings start the moment MS signs an amendment to the existing agreement that simply puts lower rates into effect coupled with a software licence fee. In this sense it is not even*

[446] Emphasis added.

an offer that requires a legal review as it is purely financial and causes savings. It's quite simply "sign and save"."

3558. The Claimants contended that whilst it is clear that the purpose of the deal from Morgan Stanley's perspective was to achieve savings, it is equally clear that the real driver for Autonomy was revenue that it could (albeit improperly) recognise immediately. They referred in this regard both (a) to Mr Hussain's determined efforts to get a deal before the end of the quarter, and (b) also to his re-jigging of the transaction to maximise recognised revenue return.

3559. As to (a) in paragraph 3558 above:

(1) Mr Hussain pushed for the deal to be completed before the end of the quarter, emailing Morgan Stanley on 23 December 2009 to say: "*Realize this is a big ask but anything you can do would be highly appreciated*".

(2) Likewise, Dr Lynch was keen to ensure that the Morgan Stanley deal closed in Q4 2009 given its importance to Autonomy's revenue targets. On 26 December 2009, he told Mr Hussain and Mr Egan, among others, that:

> *"Given the criticality to the quarter and the short amount of time left should: [Mr Egan] and [Mr Joel Scott] be in NY for 9am Monday for MS? what do we think?"*

(3) To push the matter forward, Mr Hussain approached an employee of Morgan Stanley called Mr Lucas (an investment banker who advised Autonomy from time to time but who was not part of Morgan Stanley's IT procurement function) in an attempt, as Dr Lynch acknowledged, (in his words) *"to leverage the relationship with the investment bank"*. Mr Hussain suggested to Mr Lucas in an email dated 22 December 2009 that, *"if we have a deal with MS that gets us there on the q[uarter]"* it was *"very likely"* that he would be minded to pursue a convertible bond issue with Morgan Stanley acting as Autonomy's advisors.[447]

3560. As to (b) (in paragraph 3558 above):

(1) The problem arose because the rates Autonomy had offered and contracted for with Morgan Stanley in the First MS Amendment Agreement were already so low that under VSOE rules[448] if any lower rates were offered Autonomy would have had to carve out an amount from the licence fee and attribute it to storage, so as not to undervalue the storage component of the transaction.

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[447] This is apparent from: Mr Hussain's earlier requests for advice about the effect of a convertible bond issue; his later reference to organising a call with "*John and Mark… re converts*"; a later email from Mr Lucas referring to a "*convertible financing*"; and the fact that Autonomy issued convertible bonds worth around £497 million in early 2010, with Morgan Stanley acting as "*Global Coordinator and Sole Bookrunner*".

[448] VSOE is technically a US GAAP concept, but the term was also used by Autonomy during the Relevant Period to refer to its IFRS estimates of fair value for software and services. In essence, VSOE refers to the evidence required in order to attribute a reliable fair value to individual components of a transaction.

(2) The consequence of carving out an amount from the licence fee would, of course, have been a reduction in the immediately recognised licence fee revenue.

(3) To avoid this, Mr Hussain was content to reduce Autonomy's fair value for Digital Safe storage to the new, lower rate proposed in the further amendment, as recorded in Mr Philip Smolek's email of 23 December 2009:

> *"I did discuss w/ Stouffer [i.e. Mr Egan] – this Morgan restructure if successful will likely [mean] we'd need to establish a new VSOE rate on storage in order to not require a carve on this license… Stouffer indicated to me that Sushovan is 100% in support of this deal & assured him that he'd handle any Accounting/VSOE adjustment that need to happen to make this Q4 license deal stick. Quick background (in case your minds are getting old like mine)… We re-pegged Dig Safe Storage VSOE to $0.00672/MB/yr (equiv) in Q2'09 [which equated to Morgan Stanley's then current second contract year contracted rate] (the lowest client rates in existence). Stouffer's proposal today proposes to peg Morgan's new storage rate effective with this deal to become $0.00312/MB/yr (equiv)…"*

3561. The Claimants rejected any suggestion that Autonomy's motive for entering the deal related to any real concerns about customer retention. As Mr Hussain noted in an email to Dr Lynch in November 2009, Morgan Stanley were Autonomy's "*best client, v happy*"; which is perhaps unsurprising, since they were on the "*the lowest client rates in existence*".

3562. Likewise, the Claimants dismissed Dr Lynch's suggestion that Morgan Stanley were exerting pressure for a new deal. They accepted that it was true that Morgan Stanley had issued a generic document that showed they were attempting to cut the costs of their enterprise infrastructure software in 2009. However, this document was a nonspecific strategy presentation, which did not even mention Autonomy. The Claimants submitted that it:

> *"would be a stretch to conclude, on the basis of that presentation, that Morgan Stanley would have moved to a competitor if Autonomy was unwilling to cut prices."*

The dispute whether the inclusion of SPE was a contrivance

3563. Last but not least, the Claimants contended that the last-minute[449] addition of SPE Basic to the definition of the software to be provided to Morgan Stanley under the Q4 2009 MS Agreement was a fiction devised to persuade Deloitte that there was substance in the sale of a new licence as well as a broader commercial justification for the transaction as a whole.

[449] According to Mr Egan's evidence in his witness statement, a draft version of what became the Q4 2009 MS Agreement which was sent to Mr Crumbacher by Morgan Stanley's external lawyers on 30 December 2009, just one day before the transaction was concluded, contained no reference to SPE; SPE was only added to the draft in the early hours of 31 December 2009.

3564. The position with respect to SPE, which the Claimants emphasised was (apart from updates) the only new or additional software included in the Q4 2009 MS Agreement, is factually convoluted and disputed. The dispute engendered a considerable amount of evidence as to the nature of SPE, its utility generally and in particular to a Lucene safe operator such as Morgan Stanley, what Deloitte had been told and whether they were misled, and the veracity of Dr Lynch's claim during the Q4 earnings call on 3 February 2010, that *"although the deal was many other things, [SPE] was one of the key differentiators"* and his evidence to me when cross-examined that the addition of SPE was *"the basis on which Morgan Stanley were happy to commit to us for a long time"*. These issues are relevant not only to the matters under discussion in this section of this judgment, but also as a test of my conclusions about the accounting treatment accorded to the hybrid hosting model which I addressed in the preceding section.

3565. In broad summary, the Claimants contended that SPE Basic[450]:

(1) was in its infancy at that time, and in the event was never integrated with Digital Safe;

(2) according to Dr Blanchflower, would need to have changed considerably to enable it to be harnessed with Digital Safe to access and search structured data;

(3) in any event would not have been capable of use on a Lucene safe without further work by Autonomy which, according to the Claimants, was never done; and in any event;

(4) was not asked for, discussed or required by Morgan Stanley: its inclusion in the Q4 2009 MS Agreement was in consequence of a directive from Mr Hussain at the end of December 2009 that it should be included (whether or not requested, and for free) in all IDOL deals worth more than $250,000;

(5) Morgan Stanley itself did not focus on, or even appreciate, the addition: thus, for example, Morgan Stanley's Mr Furman, who was head of archiving at Morgan Stanley at the time, sent two chasing emails in January 2010, after the Q4 2009 MS Agreement had been concluded, asking for information about SPE after reading about it in the Financial Times, and apparently unaware that it had been supplied to Morgan Stanley already.

3566. The Claimants submitted in the round that in the particular context of the Q4 2009 MS Agreement, SPE was included to give the semblance of a more extensive licence and as the means of persuading Deloitte that the new licence had independent value.

3567. The Claimants relied especially on the evidence in the witness statement of Mr Egan, who was directly involved in the negotiations with Morgan Stanley. He stated:

> *"SPE was included in the deal at a very late stage. The reason for this was that, for the revenue to be recognized, it was necessary to distinguish the software package under the restructured deal from that under the prior arrangement. I discussed this issue with Mr. Hussain, including what would satisfy the appropriate level of distinction in order to enable revenue recognition. I understood that we either had to add software or include a different version of the software to that previously provided. Therefore, I understood that if we had not included SPE in the deal, and the deal had been restructured as it had*

[450] Structured Probabilistic Engine.

originally been negotiated (without SPE), it would have threatened revenue recognition. To my knowledge, based on my involvement in the negotiation with Morgan Stanley, SPE was not part of the commercial justification for Morgan Stanley's decision to restructure their existing arrangement. Indeed, I believe that Morgan Stanley would have done the deal without SPE."

3568. The Claimants observed, and I accept, that much of this evidence was not challenged in cross-examination:

(1) Mr Egan's evidence that he and Mr Hussain discussed the need to differentiate the software licensed to Morgan Stanley from that which had already been licensed to them under the First MS Amendment Agreement, and that Mr Egan was left with the understanding that some software needed to be added to the agreement in order to enable revenue recognition was not challenged.

(2) Nor was there any challenge to Mr Egan's evidence that he did not discuss SPE with Morgan Stanley and that he believed that Morgan Stanley would have done the deal without SPE.

3569. The Claimants also pointed out, and I also accept, that Mr Egan's explanation was supported by the contemporaneous documents:

(1) When Autonomy pitched the restructuring to Morgan Stanley, it never made any mention of SPE. This was true of the pitches made by Mr Hussain and Mr Egan to Mr Lucas, Mr Cooke, and Mr Huber.

(2) Dr Lynch attempted to explain away Mr Hussain and Mr Egan's exchanges with Morgan Stanley on the basis that Mr Lucas was an investment banker with little understanding of the bank's IT functions, and that Mr Cooke and Mr Huber were "*just interested in getting a good deal*" and "*making sure the system runs*", respectively. They were later dismissed as "*low-level operational people*". However, Mr Cooke was head of procurement at Morgan Stanley, and Mr Huber was an executive Director who appears to have been Mr Furman's boss, in charge there of Archiving and Digital Safe, and of sufficient corporate weight to have been suggested as a contact for Dr Lynch. In other words, Mr Huber and Mr Cooke were senior and important individuals within Morgan Stanley's IT function; and the contemporaneous documents show that they knew nothing at all of SPE.

(3) It is also consistent with Mr Egan's evidence that the draft restructuring agreement sent to Mr Crumbacher by Morgan Stanley's external lawyers, Sidley Austin, on 30 December 2009, just one day before the transaction was concluded, contained no reference to SPE and that SPE was only added to the draft agreement in the early hours of 31 December 2009, after Mr Hussain and Dr Menell had issued their directive to include it (for no charge) in all IDOL deals worth more than $250,000.

3570. Further in relation to paragraph 3566 above and the suggestion that the inclusion of SPE was a means of persuading Deloitte to accept that the new licence was materially different, the Claimants supported their case by reference to Deloitte's working paper, which stated that:

"SPE is a new Autonomy product, launched in Q3 2009. SPE gives additional functionality to IDOL, which allows it to search structured information, such as databases. Combining this software with DS allows customers to sort and archive data directly from their third party databases.

In order to understand the commercial rationale for this purchase by MS and to establish how significant the addition of SPE is (in order to justify the $12m price tag) we have held discussions with Pete Menell (CTO). Pete noted that under the original DS deal, MS was only able to sort and archive its undstructured [sic] data, such as e-mails and other documents produced by standard desktop applications (Microsoft Office etc.). What the addition of SPE allows MS to do is to sort and archive all of their structured data from their transactional databases i.e. the databases that the bank uses to manage its customer accounts, value its numerous financial products and manage its finances. Given the volume of structured data held by MS globally, by purchasing DS with SPE, MS has significantly increased the amount of its data that can be archived in accordance with regulatory requirements. In Pete's opinion, from MS's point of view, when compared to other options for archiving all of their global structured data, a price of $12m is tiny.

…

Now that we have identified the commercial rationale and the technical reasons for the transaction, we must consider whether the licence fee of $12.0m represents fair value or whether an element of the upfront fee relates to the provision of future services. To do this, we must consider the exact nature of the additional software provided to MS and the other elements in the deal, such as the future support and maintenance fees and the ongoing storage rates. These are considered in turn below…

…

Note from the above that the storage rates have now been reduced significantly, so that the ongoing storage charge from year two onwards is at the rate previously reserved for year five onwards under the original agreement. Per discussion with the CFO we noted that the reason why the storage rates have now been reduced is due to the commercial pressure to keep MS as a customer."

3571. The Claimants contended that the information provided to Deloitte by Dr Menell was misleading, because (a) SPE could not be used with Digital Safe because it was never successfully integrated into it; (b) even if it had been integrated, Morgan Stanley would not have been able to use it unless Autonomy created a new IDOL cache specifically to enable SPE to work with a Lucene Digital Safe, or Morgan Stanley converted to an IDOL Digital Safe, neither of which happened. Indeed, the Claimants suggested that even on the Defendants' evidence, further configuration of Morgan Stanley's Safe would have been needed before it could use SPE, and there is no credible evidence that this ever occurred. Dr Menell's explanation was also, according to the Claimants, misleading by omission. He neglected to mention that he and Mr Hussain had issued a directive that SPE should be included in all IDOL deals with a licence fee greater than $250,000 "*at no additional cost*". In those circumstances, they suggested that it is *"surprising"* that he was willing to tell Deloitte that the $12 million that Morgan Stanley paid for its licence to SPE was "*tiny*".

3572. The Defendants sought to rebut each of these contentions, insisting that SPE was:

(1) Compatible with Morgan Stanley's Lucene safe and usable through an IDOL 'cache': according to the Defendants, the Claimants' submissions failed to take into account that by at latest November 2009[451], Morgan Stanley had commenced (and were some way in the process of) *"IDOL-ising"* its safe by (in Morgan Stanley's case, given its huge structured data archive) installing extensive parallel IDOL architecture in the form of an IDOL cache;

(2) From, at latest, November 2009, part of what Dr Lynch called the *"roadmap"* for the development of Morgan Stanley's use of IDOL for both unstructured and structured data: the Defendants maintained that structured databases of customers such as Morgan Stanley could be searched using a combination of IDOL, Digital Safe and SPE. Indeed, as both Dr Blanchflower and Mr Wang (though with some caveats) accepted when cross-examined, such a use of SPE was being considered for another institution, BofA, at around this time;

(3) Of considerable value to Morgan Stanley, given its vast structured data archives: the Defendants emphasised that Morgan Stanley certainly had a use for SPE, as Mr Goodfellow eventually conceded, and Dr Lynch referenced in that context both correspondence in October 2009 mentioning Morgan Stanley's interest in SPE (amongst other products and functionalities) and also meetings which he told me he had personally had with senior executives of Morgan Stanley (including Mr David Riley, Morgan Stanley's CIO of enterprise infrastructure) in Q4 2009, as well as a breakfast and town hall meeting at the Morgan Stanley Investor Conference on 10 November 2009[452]. Dr Lynch also told me in the course of his cross examination that he recalled discussing SPE further with Mr Rosenthal, Morgan Stanley's CTO and Mr Traverso, and that these discussions had concerned Morgan Stanley's interest in Autonomy's roadmap of its technology and the extent to which Autonomy would be able to handle other types of data (which would increasingly become available for archiving following the November 2009 deal).

3573. In the latter context, Dr Lynch insisted, when pressed to explain why SPE was only included at the last minute, that this was a misunderstanding: according to his evidence, in fact SPE capability was already included in IDOL 7.5, and the decision to *"break out"* SPE was *"so that we could actually use that from a marketing point of view"*, that is to say, *"for branding purposes"*.

3574. He insisted also that, contrary to the Claimants' suggestion, SPE was an important factor in persuading Morgan Stanley at the highest approval level to commit to a five-year engagement: Dr Lynch told me that he had met with Mr David Riley, Morgan Stanley's CIO of enterprise infrastructure, amongst others. It seems clear from the documents (and

[451] In paragraph 8 of his third witness statement, Mr Yan suggested that Morgan Stanley *"only had an IDOL cache installed in its production safe in the first half of 2011"*. However, that was contradicted by the documentation, from which it is clear that (as the Defendants submitted) the process was well underway by November 2009.

[452] The evidence of his diary extracts also supports Dr Lynch's recollection of meetings with Morgan Stanley's CTO and other senior IT employees on 28 September 2009, and his attendance at a breakfast and town hall meeting at the Morgan Stanley Investor Conference on 10 November 2009.

especially an email from Mr Scott Coleman of Morgan Stanley to Dr Lynch dated 2 November 2009) that this discussion included email archiving.

3575. The Defendants denied that Deloitte had been misled by them or Dr Menell or anyone else. Dr Lynch repeated once again that *"No one was trying to mislead Deloitte and Deloitte could easily check anything they needed to know."* When it was put to him that he would surely have appreciated that "*the acceleration of revenue was improper given that the so-called licence contained in this agreement was artificial"* he added further:

> *"I disagree that it was improper to do that structure and it's one that Deloitte and the market knew and understood. The market was well aware that we were doing that and it's one that HP well understood and there was nothing improper about it. The commercial strategy here was actually a highly successful one for the business which led to us being one of the largest cloud providers, if not the largest, at the time."*

3576. As to Dr Menell's failure to mention that no separate charge was made for SPE, Dr Lynch gave the following answer in cross-examination:

> *"Q. Do you see that Dr Menell told Deloitte that from Morgan Stanley's perspective $12 million would be a tiny price for SPE?*
>
> *A. Yes.*
>
> *Q. He doesn't mention that he had instructed Mr Crumbacher to include it in all licence deals over $250,000 for free, does he?*
>
> *A. Yes, but this is tied into the archiving pricing of the per megabyte. So what's happening is they take in SPE, they take in unstructured data -- sorry, structured data, they then still have to pay on the per megabyte basis, so we're going to make a lot of money out of it.*
>
> *Q. Dr Lynch, Dr Menell tells Deloitte that, from Morgan Stanley's perspective, $12 million would be a tiny price for SPE in circumstances where, as he knew and you knew, an instruction had been given to include it in all licence deals over $250,000 for free?*
>
> *A. On the basis of the licence deal. So, remember, it's part of IDOL so that IDOL transaction that's being added to will have a limit on it. So here the limit is very large because this is a large deal. So the equate you're making is not apples to apples. So if I license IDOL to a customer they then get SPE Basic, you're calling it for free, but the point is they're only getting that for what they've licensed IDOL for. So if they've licensed IDOL for a certain amount of data or a certain amount of users -- remember we talked about instances and users and things like that -- that's all they're getting SPE for. The reason why this is so much more expensive is this is a massive system.*
>
> *Q. They already had a licence for IDOL, correct?*
>
> *A. They already had a licence for one level of IDOL, yes.*
>
> *Q. And they were restructuring in a way where the only additional software was SPE, correct?*

> *A. SPE for a large amount of data, yes.*
>
> *Q. I suggest Dr Menell was misleading Deloitte, correct?*
>
> *A. Completely disagree."*

3577. In the round, Dr Lynch remained adamant that (a) for the reasons explained above, the size of the fee was justified by the size of Morgan Stanley's structured data and the value to it of using the software in such circumstances, adding *"what you are buying is the rights for the size of what you are doing. Morgan Stanley here is buying a very big version of IDOL, if you like to think of it that way"*; (b) there was no reason why Morgan Stanley couldn't use SPE to process new structured data; and (c) there was nothing misleading about telling Deloitte that there was a risk that Morgan Stanley would leave: as Dr Lynch put it, *"obviously, if something is 10 times more expensive than the competition, you're going to move."*

My assessment of the commerciality of the transaction and Deloitte's apparent approval

3578. There is no doubt that Mr Hussain came to place reliance on the deal as a source of revenue to enable Autonomy to meet its quarterly target. That was the obvious driver for Autonomy's need to strike the deal before the end of the quarter. The rush betrayed the purpose. In assessing the commerciality of the transaction, the question is whether there was any other purpose; and, if so, whether that is sufficient to justify the transaction as the product of a reasonable commercial decision, rather than a costly expedient to ramp up revenue in a hurry in respect of which any side benefit was just that and not the driver.

3579. The Defendants asserted that the deal was commercially a good one for Autonomy. Dr Lynch's written closing submissions emphasised that:

    (1) Autonomy locked in $12m of licence revenue.

    (2) From a commercial perspective this was a good moment to renegotiate with Morgan Stanley and lock in a new commitment. They were coming towards the end of the contractual period anyway, and had the right to terminate at will. There were also very substantial amounts of new data in prospect.

    (3) Locking in Morgan Stanley was a justified objective; they were known to be cost-sensitive and an internal document showed that their "*top priority*" was in controlling and reducing costs, including by strategic sourcing.

3580. Mr Egan's briefing note to Mr Hussain explained the commercial proposition (in the second paragraph, starting "*Regarding the Digital Safe rate reduction deal*"):

    (1) It referred to the value proposition of the migration to Ironman IDOL cells offered by the new arrangements. It also made the following point:

    > *"Autonomy wishes to constantly provide MS with incentive to store more volume in the safe. By capping software expense and lowering the rates MS is incentivized to migrate other types of data to the safe. An example would be the legacy migration project that is going on right now. Or for instance, Autonomy can take retired application data into the safe etc."*

(2) This showed that Autonomy was envisaging Morgan Stanley migrating other types of data into the Digital Safe. This included "*retired application data*", which would be structured data: a use case for SPE. Mr Goodfellow accepted this:

> *"Q. And this is dealing with incentivising them to deal with other types of data including a legacy migration project, yes?*
>
> *A. That's correct, yes.*
>
> *Q. There's also a reference to Autonomy taking retired application data into the safe, do you see that?*
>
> *A. There is there, yes, correct.*
>
> *Q. And retired application data is likely to include data from financial applications, isn't it?*
>
> *A. That is correct.*
>
> *Q. Which is likely to include relational structured data, yes?*
>
> *A. That is correct.*
>
> *Q. And that is a use case for SPE, isn't it?*
>
> *A. It's a potential use case for SPE as we've already covered."*

(3) The final paragraph of Mr Egan's email stated:

> *"Overall, this license proposition and rate reduction commercially underpins constant innovation to lower costs to Morgan Stanley on a per unit basis so that the Autonomy Digital Safe becomes an increasingly attractive and cost efficient archive platform for greater volumes and breadth of data."*

(4) The Claimants' witness, Mr Goodfellow, who had stated in his witness statement that he could not see *"any commercial justification beyond revenue recognition for re-restructuring",* was unable to adhere to that when cross-examined, as the following extract shows:

> *"Q. ... So overall the message to Morgan Stanley is it's being offered incentives to put greater amounts of data into archiving, yes?*

A. That's correct, yes.

Q. And that fits with Morgan Stanley's commercial programme which it's told Autonomy about of trying to lower its costs and achieve economies of scale, yes?

A. That seems a perfectly -- reducing costs seems a perfectly reasonable goal for Morgan Stanley.

Q. And at the same time Autonomy stands to benefit from getting more data?

A. Potentially, yes."

3581. When cross-examined, Dr Lynch, with characteristic fluency, elaborated his case as to the commercial rationale of the transaction as follows:

"Q. …You appreciated that this transaction was not in the commercial interests of Zantaz, correct?

A. I think it was an extremely commercial deal for Zantaz in that you managed to tie in one of the marked customers for another five years, you managed to set rates in a market where they were falling, you managed to get them to become a reference for your new technology, you got the possibility of opening up much more data than you already had because you now had the argument of going into Morgan Stanley and saying, "You've already got the SPE licence, turn on structured archiving for us". So, no, I think it was a very, very good deal. And of course because we lowered the rates, they sent us more data.

Q. I suggest that substantial savings were being offered to Morgan Stanley in circumstances where there was in fact no risk of them leaving and as a result of that, Zantaz actually received substantially less revenue as a result of the restructuring; correct?

A. That's wrong on so many levels. So, first of all, your assumption is that although their contract ended in six months' time, they would continue for the next five years at the rate at that point despite the fact that storage costs were falling and had continued to fall very, very aggressively. So that's the assumption that you've made there. Secondly, you haven't included any concept of pricing having an effect on demand so the fact that the rate was lower meant that they put more data in. And, in terms of moving, Morgan Stanley could have decided to completely change their archive over, I agree that

> *that would have been a very large amount of work and probably not necessary, but all they had to do to switch to a competitor was take the pipe that was bringing new data and switch it over to their competitor. And in fact the other possibility was when there were banking transactions. So one of the things that happens here; because of this deal, we win a deal for a joint venture that Morgan Stanley does and we wouldn't have been able to win that if we hadn't got this new basis for doing the business. So the reality is it was an extremely good commercial situation where we got more data and we got more types of data, we got a long-term commitment, we fixed a price in a falling market, we kept out competition who couldn't match us and we became Morgan Stanley's choice where they did have completely green field situations such as their joint venture with Citigroup."*

3582. The additional commercial factors referred to by Dr Lynch illustrate that commercial decisions may have many strands. Where there are competing commercial arguments, the Court is most reluctant to second-guess the balance between them struck by directors; nor even, in most cases, which was the predominant consideration; that is a matter for their business judgment. The question is whether that is the situation in this case.

3583. In my judgment, this is not really a case of competing commercial arguments as to how best to serve and advance the interests of the company: it is a case where the operative reason for what was done could not be relied on as being in the interests of the company at all.

3584. Even accepting that the transaction offered the various benefits identified and emphasised by Dr Lynch, what drove the transaction was Mr Hussain's requirement for recognised revenue to try to achieve the target for Q4 2009. Whilst I suspect that Morgan Stanley would have proceeded with the transaction even had it not been supplied with the structured data functionality, and on balance could in any event have made use of that functionality on its Lucene safe with further work by Autonomy, in my judgment (and I find) Autonomy would not have proceeded but for its management's need for, and perception that the transaction could be structured so as to generate, revenue which could immediately be recognised in its quarterly accounts and presented to auditors (and by them to the Audit Committee) in such a way as to secure their approval.

3585. It seems to me likely, and I find, that part of the reason for Autonomy's adoption of this strategy was that the hosted hybrid transactions, and in particular the issue of a licence, could be presented as having commercial benefits for both contracting parties. The fact that the licence could reasonably plausibly be presented as the means of securing continuing loyalty and the "bird in the hand", and the appearance of there being commercial benefits for both contracting parties from the transaction, were essential if the payment for the licence was not to appear too obviously to be what it really was: a prepayment of hosting costs and charges.

3586. That is not to say that those other benefits were all illusory; but I do not consider that any was the real reason for Autonomy's adoption and espousal of the model. In particular (but without elevating it into some sort of litmus test, since I have considered all the alleged benefits both individually and cumulatively) I cannot accept that the late

addition of SPE (in the early hours of 31 December 2009) was anything more than cosmetic: it was made for the reasons given by Mr Egan as recorded in paragraph 3567 above. I cannot accept Dr Lynch's evidence in this regard. His claim in cross-examination that the reason that SPE was added was *"because that was the basis on which Morgan Stanley were happy to commit to us for a long time"* (and see paragraph 3564 above) was not credible; and his attempt to justify what he had said in the earnings call for Q4 2009 that SPE was *"the key winning differentiator"* in securing that commitment was likewise unconvincing: what he had said in the earnings call was false, and its falsity has confirmed in my view that the addition of SPE was a device. The other benefits were potentially real; but they were ancillary.

3587. In such circumstances, in my judgment, what ultimately drove the transaction was not a commercial assessment of the interests of the company, but the perceived imperative of generating revenue which could be presented as recognised revenue in its accounts to seek to meet revenue targets. That may have sustained the share price; but it is well established that the proper business of the company does not extend to pursuing such an objective.

3588. I consider that the Q4 2009 Morgan Stanley transaction provides a further illustration and confirmation that treating the sale of a licence as a separate component of a hybrid hosting restructuring was without foundation and led to improper accounting and misstatement of recognised revenue. There was barely more than a residual recourse to the licence as making any real difference, let alone an identified and separate difference. The arguments highlighted that even on the Defendants' case, save only for the extension of the licence to SPE which I have determined was contrived at the last minute and was provided to others free of charge, the real commercial rationale was the *quid pro quo* offer of reduced data storage rates and service and maintenance charges in return for an upfront prepayment. As briefly mentioned in paragraph 3583 above, I doubt whether in such circumstances the pursuit of that objective could ever be justified as a proper exercise of business judgment or management powers.

3589. I have concluded that the driver for the transaction was the need for recognised revenue, that this was not a commercial decision weighing the interests of the company but one borne of the Defendants' objective of maintaining Autonomy's reputation of meeting revenue forecasts which underpinned its share price, and that it was a breach of duty giving rise to loss.

3590. I confirm that I do not consider that the fact that Deloitte considered and approved the transaction provides any defence. On the contrary, it seems to me that Deloitte were materially misled, that what they were told to address concerns they expressed about SPE was false and that the perceived need to dress the transaction up for them is further proof of its impropriety. The position is particularly stark because Deloitte were misled so directly in response to a concern they had specifically raised.

3591. Deloitte were plainly concerned about the transaction, and in particular that SPE was the only additional software to that which had been licensed to Morgan Stanley under the First MS Amendment Agreement. In January 2010, Mr Welham had asked Mr Chamberlain whether Autonomy was *"saying that Morgan Stanley have paid $12 million for SPE Basic?"*

3592. More generally, Deloitte was dubious as to "*what caused the agreement to be renegotiated*", noting that, "*from Autonomy's point of view, they had MS tied in to a*

lucrative S&M and storage contract…" prior to the restructuring. Unsurprisingly, given that the storage rates under the agreement were lower than Autonomy's previous estimates of fair value,[453] Deloitte wanted to consider the "*substance of the [Q4 2009 MS Agreement] to establish if the relevant elements have been determined at fair value*".

3593. In paragraph 3570 above, I have already quoted Deloitte's working paper recording Autonomy's explanation of the transaction, and the inclusion of SPE. I have previously also addressed the dispute whether SPE could be used on Morgan Stanley's Lucene safe (and concluded that it could, but only with further work by Autonomy). Even leaving those aside, the reply recorded in the working paper as having been given by Dr Menell to Deloitte on the specific concern and resulting question they had raised is, in my view, sufficient to undermine any purported reliance on their approval. Deloitte were not in a position to know what SPE comprised or what its true value was. Dr Menell's statement, as recorded in the working paper, that the price of $12 million *"when compared to other options for archiving all of their global structured data"* was *"tiny"* was thoroughly misleading without being in the context of the undisputed fact that (as previously mentioned in paragraph 3571 above) he and Mr Hussain had issued a directive that SPE should be included for free. In my judgment, this was more than *"surprising"* (again see paragraph 3571 above): it was false. I do not consider that Dr Lynch's attempt to explain it away in the passage of his cross-examination I have quoted in paragraphs 3576 and 3577 above, though characteristically ingenious, was credible.

3594. Further, it appears from the final paragraph of the quoted text from Deloitte's working paper above, that Mr Hussain himself misled Mr Welham into believing that Morgan Stanley had applied commercial pressure to reduce storage rates, and that Autonomy had been concerned that, if it did not reduce the storage rates, Morgan Stanley might terminate the First MS Amendment Agreement. There is nothing to suggest that this was in fact true. This depiction of Morgan Stanley as a flighty customer contemplating a move was at odds with Mr Hussain's own evidence earlier that Morgan Stanley were Autonomy's *"best client, v happy"* (see paragraph 3561 above) and with Dr Lynch's description of them as *"reasonably happy"* (see paragraph 3600 above). Further, the Claimants pointed out that:

   (1) Mr Hussain did not merely suggest that Morgan Stanley might use a new provider for new data; he suggested to Mr Welham that Morgan Stanley might terminate the existing arrangement, which would require it to move its existing data to a new provider. Dr Lynch himself accepted that a customer would be very unlikely to do that.

   (2) In fact, as explained above, Autonomy could not have had any cause for concern regarding Morgan Stanley's continuing use of Digital Safe, given the extremely low rates that Morgan Stanley was already benefiting from, and the difficulties, mentioned above, with any customer switching hosting provider.

[453] Mr Smolek had remarked that if the transaction went ahead, Autonomy would "*need to establish a new VSOE rate* on *storage in order to not require a carve on this license*" but that "*Sushovan is 100% in support of this deal & assured [Mr Egan] that he'd handle any Accounting/VSOE adjustment that need to happen to make this Q4 license deal stick*".

3595. In the round, therefore, in my judgment, the Claimants' factual case in relation to the Q4 2009 MS Agreement is well-founded and a breach of duty and improper use of power has been established. I shall consider later what loss was thereby caused.

The second Morgan Stanley Schedule 12D transaction: Q1 2011

Outline of the Claimants' case

3596. The Claimants' case with respect to the third amendment to the original agreement in Q1 2011 (which I shall refer to as "the Q1 2011 MS Agreement", and which was a re-re-restructuring in the Claimants' parlance), echoed their case in respect of the re-restructuring in Q4 2009 discussed above.

3597. At the time of the Q1 2011 MS Agreement, Morgan Stanley's existing arrangements entitled them to renew for up to six years on consecutive one-year terms. Morgan Stanley had already exercised its option to extend its existing arrangements.

3598. The licence fee under the Q1 2011 MS Agreement was $5 million. The new licence covered (a) the software already licenced under the hosting agreement, with the addition of (amongst other things) Digital Safe version 9, StorHouse/RFS and StorHouse/RM, Autonomy Investigator and Early Case Assessment, and (b) a separate package of software to be supplied by Autonomy pursuant to an 11th Amendment to the Software License Agreement dated 31 March 2011.

3599. Under the Q1 2011 MS Agreement, which was concluded on the last day of the quarter, 31 March 2011:

(1) Morgan Stanley agreed to pay a licence fee of $5 million;

(2) Autonomy agreed to reduce the data storage charge from an already extremely low rate of $0.00312 MB per annum to a rate of $0.0023 per MB per annum for the year beginning April 2011, and then to reduce yet further at various intervals thereafter to $0.0016767 per MB per annum;[454]

(3) Otherwise, the terms of the agreement and the options to extend remained substantially unchanged.

3600. The Claimants sought to impugn the Q1 2011 MS Agreement as a contrived and commercially indefensible deal. They dismissed as unsustainable the Defendants' presentation of the rationale of the deal, on the basis that (put shortly):

(1) Dr Lynch's claim that *"the old hosting rates were no longer competitive"* and that a further reduction was needed to ensure Morgan Stanley's continued loyalty ignored (a) the fact that by virtue of the Q4 2009 MS Agreement, Morgan Stanley already enjoyed extremely (and artificially) low storage rates, (b) his own evidence in cross-examination that Morgan Stanley was already *"reasonably happy"* and also (c) the fact that at the time that what became the Q1 2011 MS Agreement was being negotiated, Morgan Stanley had already shown its satisfaction in exercising its option to extend the existing agreement;

(2) Dr Lynch's argument that under the Q1 2011 MS Agreement Autonomy supplied additional software which was both a benefit to Morgan Stanley and a

[454] The Agreement itself reads "*$0016767/MB*". This appears to be a typographical error.

prospective source of further profit for Autonomy from its use and maintenance was contrived: Morgan Stanley had not requested the additional software and the principal addition as put forward by Dr Lynch (Digital Safe version 9) did not even exist.

3601. The Claimants invited me to reach the conclusion that the only real purpose of the transaction from Autonomy's point of view was revealed to be accelerated revenue recognition, for which it paid the price of having to agree even more deeply discounted storage rates. Once more, according to the Claimants, Autonomy was, in effect, purchasing its own revenue and swallowing the cost.

3602. The Claimants sought to elaborate and fortify these points by reference, in particular, to:

(1) the difficulties which Autonomy apparently had in finding any plausible justification for a re-re-restructuring;

(2) what on the Claimants' case was Autonomy's contrived resort to the inclusion of what was described as Digital Safe version 9 (which the Claimants claimed simply and starkly, did not exist) and the reference to structured data load capabilities as provided by FileTek Storhouse RFS and StorHouse RM software simply as expedients to differentiate the Q1 2011 deal from the Q4 2009 deal;

(3) Mr Welham's evidence that Deloitte was not made aware of fundamental aspects of the transaction and would not have considered revenue recognition appropriate had they known about them.

3603. I address these points in turn, with some additional elaboration of the convoluted and confused issue relating to whether or not Digital Safe version 9 was in existence, which is relevant also to another transaction which the Claimants impugned as improper and loss-making between Zantaz and Deutsche Bank.

Instigation of the transaction

3604. Dealing first with the instigation of the transaction by Mr Hussain and his team, it seems that in around the middle of February 2011, Mr Hussain identified Morgan Stanley as one of a number of *"deals possible this [quarter]"* and encouraged his team to set about trying to identify what else they could offer to Morgan Stanley to justify another transaction and another upfront licence fee which would generate recognised revenue.

3605. The twin problems which emerged were that (a) Mr Crumbacher's hurried review of the existing contractual arrangements did not suggest any restrictions or deficiencies in Morgan Stanley's existing contractual entitlements which might have offered an easy opening for a further sale, and (b) when Mr Hussain tasked Ms Gustafsson with checking *"the model, [updating] it and [sending] it to [Mr Egan] and me with any possibility of restructure. Urgent"* Ms Gustafsson replied the same day, highlighting that Morgan Stanley storage rates were already at what Autonomy had set as "fair value": *"we are already at VSOE…"*.

3606. Notwithstanding these difficulties, on 15 March 2011, Ms Gustafsson sent a draft proposal to Mr Egan, copying Mr Hussain, presenting Morgan Stanley with *"an opportunity to save your company in excess of $9m in five years"* in return for an upfront licence fee of $5m for software that was yet to be identified. The suggested savings were later revised down to approximately $5.9 million over five years assuming a flat storage

rate of $0.00312 per MB per annum, thus not taking into account further decreases in the storage rate at various intervals that featured in the final version of the contract.

3607. On 16 March 2011, Mr Egan explained to Mr Furman and Mr Cooke of Morgan Stanley that *"through a restructure of your license the Digital Safe we can reduce for storage cost per MB by 26.2%, saving Morgan Stanley a total of $5.9m (37%) over a five-year period… In exchange for a $5m Digital Safe license, we would be able to reduce the storage rate…"*. Again, there was no mention of the software that Autonomy was proposing to licence to Morgan Stanley. The Claimants contended that this demonstrated that:

> *"the approach appears to have been to identify how much of the ongoing storage fees could be moved into the upfront licence fee in order to create substantial revenue for Autonomy for the quarter, and the savings that Autonomy would need to offer to Morgan Stanley to persuade it to pay the license fee, and then to work out what software Autonomy could licence to Morgan Stanley to justify the licence fee."*

3608. The Claimants referred to two emails from Mr Hussain to Mr Egan as illustrating the pressures he felt he was under and the pressures he put on those below him in the hierarchy: on 16 March 2011, he emailed Mr Egan saying *"2 weeks for MS is an eternity!! We definitely need the deal"* and on 21 March 2011 his email subject line read *"no pressure but need MS!"*.

3609. Meanwhile, the software to be licensed to Morgan Stanley had still not been identified. Mr Egan emailed Dr Menell, Mr Hussain, Mr Crumbacher and Mr Scott on 24 March 2011, saying:

> *"As discussed with Sush, I need a list of new software that would be additive to Morgan Contract but related to IDOL, DS, audit center and S6 that can be added to the contract to support their accounting position for keeping old and new package amortizing simultaneously. Need urgently."*

3610. Mr Hussain forwarded this email to Mr Chamberlain, who responded: *"Just met with Pete [Menell] and Poppy [Gustafsson]. She is drafting an email. Plenty of extra we can give them"*. Around 15 minutes later, Ms Gustafsson sent Mr Egan a *"PROPOSED SOFTWARE OFFERING"* which included *"Digital Safe v9.0 Digital Archive System with FileTek structured data-load capabilities"*. Mr Egan then asked her to "*line item the idol functions*". Ms Gustafsson duly did so by lifting a list from another customer's Digital Safe contract. Mr Chamberlain forwarded this list to Mr Crumbacher, copying Mr Egan, saying:

> *"THIS NEEDS TO BE VERIFIED BY THE TECHNICAL TEAM AS BEING RELEVANT AND DELIVERABLE"*.

3611. When cross-examined, Ms Gustafsson acknowledged that she had little idea of what the software set out in her emails actually was. She told me:

> *"…I was very rarely, if ever, involved in what was actually licensing, I was agnostic to it, It certainly didn't change the metrics that I was putting in…*

What I can see here is that there's a long list of technical things that then I would have had no idea what any of those are, now I have no idea what any of them is - - what's a kick-start metadata? I have literally no idea. What this looks like to me is a copy and paste from a similar or equivalent agreement…"

3612. The Claimants submitted that this demonstrated that she had simply put together a description of varieties of software offering, culled from previous agreements without discrimination in terms of customer suitability, from which others could select what would be appropriate, not for the customer's needs, but to ensure that the revenue from the licence fee could be recognised upfront.

3613. When it was put to her that it was clear that she had been called upon to put together the software offering to ensure that the revenue from the licence fee could be recognised upfront she told me:

> *"Q. You would have been concerned from a revenue recognition perspective to ensure that the software that was licensed was something new from that which had previously been licensed, correct?*
>
> *A. It would have been important, yes, to be able to demonstrate it was separable.*
>
> *Q. That's why you're involved in the discussion as to what software is going to be licensed, to make sure there's something new in there which can justify recognising the revenue, correct?*
>
> *A. I don't think that's correct."*

3614. Ms Gustafsson's explanation for the fact that she was tasked with putting together the first formulation of the software licence was that she had:

> "*a lot of visibility of the other contracts readily at my disposal and [she could] copy and paste them from another legal agreement, if that's possibly helpful*" and she was "*bringing up things that could be used as a frame of reference … to sort of start drafting the legal agreements*".

3615. The Claimants submitted that this was not credible evidence: it was improbable that Mr Crumbacher, one of Autonomy's lawyers, would have needed Ms Gustafsson's help in sourcing a suitable precedent for a Digital Safe licence. Moreover, if the software licence were being put together with Morgan Stanley's commercial and technical needs in mind, one would expect to see the person negotiating with Morgan Stanley passing information back to Autonomy's technical department, which would identify the products that met the customer's technical needs, and would in turn pass the list of products to Autonomy's Legal and Finance departments to ensure that the proposal was documented correctly. But Ms Gustafsson, on her own admission, was "*not involved in conversations that are happening there with the customer*". The Claimants invited me to conclude that the only rational explanation for Ms Gustafsson being tasked with putting together the software offering was that it was primarily driven by accounting considerations.

3616. I have concluded that this is indeed the most rational explanation. Ms Gustafsson struck me as uncomfortable in telling me *"I don't think that's correct"* and her attempt to explain her role was not convincing. Her evidence revealed clearly that though she had little, if any, idea what the software comprised, she knew what she was tasked to do and the target she was required to hit:

> *"...from my perspective, and I stand by my statement, that what we are licensing is not really relevant. What's important here is that the licence is a separable element to that bundle of contracts that we are doing. Whether it's IDOL licence 7.0 or 6.0, whatever it is, it could be anything. What matters to me is that this is a separable component of the bundled agreement."*

3617. The second limb of the Claimants' contentions was the claim that some of the software included in order to appear to differentiate the Q1 2011 MS Agreement from the previous agreements did not even exist in March 2011, and was only made available to customers some three and a half years later, in November 2014.

3618. A considerable body of evidence was put forward on the dispute as to the existence or not at the time of version 9 of Digital Safe (an issue which, as will be seen is relevant also to another of the impugned Schedule 12D transactions, that between Zantaz and Deutsche Bank). By way of overall summary:

(1) The Claimants relied primarily on (i) Mr Langford's searches of the records of Autonomy software releases, (ii) Mr Langford's evidence that the listing of Digital Safe software on Automater with a suffix *"WIN"* demonstrated that Automater was not an accurate guide, still less proof of 'version 9', because Digital Safe was a 'Linux' system which was not compatible with Windows, and (iii) the recollections of Messrs Yan, Wang, Langford and Goodfellow as to when Digital Safe version 9 was released.

(2) Dr Lynch's position was that this was no more than a "*dispute over semantics*": and that there was a version of Digital Safe called 'version 9' prior to 2014 and "*it is irrelevant that a 2016 version of Digital Safe may also been called Digital Safe version 9*". Further, Mr Langford's evidence as to the incompatibility of Digital Safe and Windows was wrong: Digital Safe could be adapted to be compatible with Windows, as shown by a number of documentary references to Windows compatible versions of Digital Safe and, for example, the supply of a Windows compatible version to Manulife.

(3) Mr Hussain's case was that he understood that version 9 was placed on Automater in March 2011.

3619. It is clear that there was some uncertainty within Autonomy at the time as to the availability of version 9, and considerable confusion as to what was in the event placed on Automater for downloading. After receiving Ms Gustafsson's list on 24 March 2011, Mr Crumbacher asked Dr Menell and Mr Avila to confirm that the additional software could be delivered by the end of Q1 2011:

(1) Dr Menell and Mr Avila replied in the affirmative the following day, but Mr Crumbacher was clearly not satisfied with their answers, because he asked Mr McCarthy to confirm that the products were deliverable a few days later.

(2) Mr McCarthy explained in an email to Mr Crumbacher dated 28 March 2011 that he did not have a version 9 of Digital Safe as a "deliverable": but he noted that he had *"heard rumours that Roger may have a copy but it isn't on Automater"*.

(3) Mr Crumbacher relayed to Mr Goodfellow and Mr Lucini:

> *"Chris, Fer, is there a version 9 of the Safe? Need it for Morgan Stanley (8.0 won't work), and Michael's telling me there's no v.9 on Automater. If Ver 9.0 exists, can we get it up on Automater for delivery?"*

(4) Mr Lucini responded saying "*...we will put [version 9] up there*" but he stated in his witness statement that he could not recall what was uploaded; "*It may have been a copy of an earlier version of Digital Safe, or possibly just an empty zip file*". Indeed, Mr Lucini's evidence, which he confirmed in cross-examination, was that somebody – he thought possibly Dr Menell – told him that it didn't matter what software was uploaded.

(5) The software that was eventually uploaded was sent by Mr Wang to Mr Goodfellow, who passed it to Mr Booth for uploading onto Automater. Mr Wang could not be sure what he sent to Mr Goodfellow, but suggested that it was most likely to have been Digital Safe version 8.

(6) Mr Goodfellow too believed that it was most likely to have been a predecessor to Digital Safe version 9, albeit he thought it was more likely to have been Digital Safe 7.4.

3620. This evidence on the part of the Claimants' witnesses was at best confused. But the Defendants' evidence, largely provided by Dr Lynch himself despite his position that he was barely involved, did not clarify the matter either. It was less than convincing, partly because it was based on supposition, but also because it turned on the assertion that the evidence of Mr Wang, Mr Yan, Mr Goodfellow and Mr Langford could be disregarded on the simple basis that *"It's not for the engineers to name the products"* and that "engineers" would not be either involved in or (apparently) even aware of the name allocated by marketing.

3621. In greater detail, what Dr Lynch asserted in his evidence was that the marketing department had taken the decision to brand the combination of Digital Safe version 8, StorHouse, and dense cells as "Digital safe version 9" sometime around the time of the conclusion of the First MS Amendment Agreement. Dr Lynch went on to suggest that the software engineers would have continued to refer to this combination as a *"dot release"* on version 8 (viz. as Digital Safe version 8.1 or version 8.2 or similar), while the rest of the company, particularly customer-facing departments and the lawyers, referred to it as Digital Safe version 9.

3622. The Claimants neatly pointed out a number of difficulties with this explanation, and in particular, that:

(1) Mr Goodfellow did interact occasionally with customers, as also (less often) did Mr Wang and Mr Yan; and it is hard to imagine how they were meant to talk to customers about the products for which they were responsible without the

naming conventions that the sales and marketing departments, and therefore the customers, were using;

(2) It is hard to see how Autonomy could have run an effective business if its legal and sales departments were using different naming conventions from the engineers, with neither of them aware of the different terminology being used by the other;

(3) There is no evidence beyond the fact of the entries on Automater of any decision to rebrand Digital Safe version 8 with StorHouse and dense cells as Digital Safe version 9;

(4) Dr Lynch's suggestion that Autonomy's marketing function would have renamed the relevant iteration of Digital Safe as version 9 *"some time…around the Morgan Stanley first deal"* cannot be right: the First MS Amendment Agreement was signed in June 2008, some 18 months before Autonomy purchased the StorHouse software that Dr Lynch claimed was a critical feature of version 9.

3623. Dr Lynch's explanation, though characteristically ingenious and delivered with assurance, is not credible. The Defendants' other witness on the issue was Mr Martin. His evidence on version 9 was speculative and no more persuasive than Dr Lynch's.

3624. The Defendants' stronger point was that the records in evidence showed that by May 2011 at least Automater did list a product called version 9 as a shippable/deliverable. Furthermore:

(1) On 31 March 2011 Mr Adam Booth (who oversaw the Automater system) wrote to Ms Dolan (an in-house lawyer) and Mr Martin in relation to the version of Digital Safe software to be provided to Philip Morris, which had just signed a Digital Safe software purchase contract. Mr Booth wrote: "*We put "Zantaz Digital Safe v9" on Automater earlier this week. I can't see a list of products as such, shall I just ship that?*"

(2) In May 2011, Mr McCarthy was providing Mr Young with a list of "*Automater shippable*". This included Digital Safe version 9.

(3) On 16 June 2011, Mr Booth provided Mr Goodfellow with a list of Digital Safe software potentially shippable to a customer (Compliant Phones), asking which software was to be shipped. The list included Digital Safe version 9.

(4) An email from Mr Nick Ng to Mr Avila dated 7 December 2011 attached a list of "*shippables from michael*". The document lists all the products which were put up on Automater and shippable to customers as at 28 October 2011. Digital Safe version 9 was included on the list.

3625. However, to my mind, this shows nothing more than that software named Digital Safe version 9 appeared on Automater, in line with what Morgan Stanley were told they were being provided with.

3626. I have concluded that in a sense Digital Safe version 9 did exist, and the issue was a semantic one, as Dr Lynch insisted: but it was a new name for an old lamp, or more accurately a collection of old products, bestowed in order to give the impression of something new and novel because that was what was needed to distinguish the new

licence from the old one. It was obviously necessary to ensure that the software as described should appear as a deliverable on Automater; but as Mr Langford explained, that presented no real difficulty, at least in part because Automater was simply a delivery platform. I accept:

(1) Mr Wang's evidence in cross-examination that:

> *"...we sometimes put up just a binary and name it something that matches the name of the contract. That's why when we went through the list that you had pulled up for Automater, the files may be there by name but essentially you could put any file and name it, which we have done for previous contract fulfilments of software delivery."*[455]

(2) Mr Langford's similar evidence in cross-examination that: one "*could put something in Automater that purported to be a version of the software*" even though "*it wouldn't be the version you could actually deploy*" and that "*there was never any check or balance on Automater to ensure that actually what was being uploaded would have resulted in something that actually worked*" the effect of which was that "*you could list anything you want in Automater and it wouldn't matter*". He added that all the emails that he was shown by the Defendants could prove was that:

> *"... there was an entry in Automater that said Digital Safe version 9. That doesn't mean there was an actual functioning installation media under that."*[456]

3627. My conclusion that "Digital Safe version 9" was simply a name chosen to convey novelty does not mean, however, that the new licence contained no more software than the old. Although the Claimants did also challenge the inclusion of 'StorHouse' in the definition of software to be provided, the Defendants pointed out also that none of the other new or additional or upgraded software to be supplied pursuant to the Q1 2011 MS Agreement (which included Autonomy Investigator and Early Case Assessment, Autonomy Consolidated Archive ("ACA") Server, Autonomy Social Media Connect DS Mail and Supervisor S6) was alleged to be superfluous, unusable or otherwise not of value and benefit to Morgan Stanley, and in terms of charges for additional ongoing support and maintenance fees and prospective add-ons to Autonomy as well.

3628. The dispute about the value of StorHouse[457] centred on whether it could be successfully integrated with Digital Safe. The Claimants contended that it never had been: certainly,

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[455] Indeed Mr Wang suggested that this happened once in relation to Digital Safe version 8.

[456] Mr Langford also said that he had conducted his own checks through SIDCAP, which according to his evidence was a significantly more robust record of when software was released than Automater, to establish when various versions of the Digital Safe software were released. Those searches apparently showed that Digital Safe version 9 was not certified as being fit for installation in customer safes until November 2014.

[457] StorHouse, it may be recalled from the section of this judgment in which I addressed the transaction between Autonomy and FileTek in Q4 2009 which was impugned as reciprocal (RT 3), was one of FileTek's two main products (the other being "Trusted Edge"). StorHouse was a database archiving product that allowed customers to archive databases and conduct searches across them. It had two main components: (i) StorHouse Relational File System ("RFS"), which essentially was a file system hosted in the cloud and (ii) StorHouse Relational

they said, not at the level of code-integration. The Defendants contended that, on the contrary, StorHouse was substantial and valuable software even if not properly integrated at the code-level, as Mr Goodfellow explained. Ultimately, the Claimants' other witnesses did not gainsay this:

(1) Mr Yan, whose evidence in his witness statement was that StorHouse had never been successfully integrated into Digital Safe because *"it did not make sense to integrate"* the two (since Digital Safe *"does not interrogate structured data"*), conceded in cross-examination that he *"would not know"* whether nevertheless it would have been useful to Morgan Stanley in non-integrated form and that Mr Wang would know more.

(2) Mr Wang had suggested in his witness statement that Morgan Stanley "*would not have been able to make any use of StorHouse's capabilities in a Digital Safe context*". However, when cross-examined, he eventually accepted that StorHouse was a useful product for customers without a deep code integration; and when asked more specifically about its utility to Morgan Stanley he stated:

> *"If Morgan Stanley's requirement was directly what StorHouse provided for nearline database offloading, then that would have been useful. I just don't know what Morgan Stanley's requirements were."*

3629. The issue whether what was provided did justify both the further substantial fee and its treatment as a separate component for the purpose of revenue recognition ultimately became reduced, as regards these other software additions, to whether the addition was to meet the customer's requirement or need, or simply contrived to achieve that purpose.

3630. When it was suggested to Dr Lynch that this software was not being included at the request of the customer and was added for revenue recognition purposes, he demurred, insisting that Morgan Stanley's needs would have played a role in the selection of the software, and that "*the customer won't be requesting a carburettor, but they will expect a system that actually works like a car*".

3631. The Claimants contended that the reality was that Morgan Stanley had not requested version 9 of Digital Safe, or StorHouse; nor had they requested the functionality provided by either piece of software.[458] Dr Lynch's analogy with a carburettor provided no answer: on the Defendants' case, the addition was not simply of a part necessary to make the car already provided work: it was a new piece of equipment. I have concluded that the inclusion was directed without regard to the customer's need: it was included to support the accountancy case.

Were Deloitte misled?

3632. As in the case of the Q4 2009 MS Agreement, the Defendants relied on Deloitte's approval of the Q1 2011 MS Agreement, although it is fair to note that in both contexts

Manager ("RM"), which was a means by which a customer could offload its database to the cloud and conduct searches across the database.

[458] Not only is there no evidence of this in the contemporaneous documents, it is also unlikely to have been true given the *nature* of Morgan Stanley's archived data. Mr Yan's unchallenged evidence was that Morgan Stanley never put meaningful amounts of structured data (the type of data that StorHouse was designed to handle) into its Safe.

Deloitte's focus was on revenue recognition, rather than on testing commercial purpose and propriety (which in the ordinary course would be matters for management). Neither Deloitte (according to Mr Welham) nor the Audit Committee (according to Mr Bloomer) were provided with detailed material which would have enabled them to test how the transaction had arisen and its objectives and purposes.

3633. The Claimants elaborated on what they presented as deficiencies in what Deloitte and the Audit Committee were told and the information provided to them, relying especially on Mr Welham's evidence (which was not directly challenged and was confirmed by Mr Bloomer from the point of view of the Audit Committee) premised on the assumptions he was asked to make that:

(1) Deloitte was not told that Morgan Stanley had not requested Digital Safe version 9 or StorHouse. Similarly, the Audit Committee did not know whether Morgan Stanley had requested this software or could use it.

(2) Nor was Deloitte told that version 9 of Digital Safe did not exist at the time and that StorHouse had not been successfully integrated with Digital Safe.

(3) Further, neither was provided with Autonomy's internal exchanges, or its communications with Morgan Stanley.

3634. Subject to the modified approach I have taken, and the qualified answer I have given on the question whether or not Digital Safe version 9 existed at the time, and whether the inclusion of StorHouse differentiated the new licence from the old, I accept that the approval of Deloitte and the Audit Committee was based on a misappreciation of the facts. That in turn was based on what Deloitte was told by Autonomy. I think it unlikely that the Defendants were unaware of what Deloitte were being told. Mr Welham confirmed in cross-examination that obviously any audit view would depend on the actual facts. The fact that it is surprising that Deloitte, who must have appreciated that it was a re-re-restructuring inviting especially sceptical review, asked no more questions does not avail the Defendants.

Conclusions

3635. In my judgment:

(1) Autonomy did conceive and press for the Q1 2011 MS Agreement as a means of generating recognised revenue to enable it to achieve revenue forecasts. It is more likely than not that it was that perceived advantage which prompted Mr Hussain to suggest the re-re-restructuring to Morgan Stanley; and it is clear that it was the need to achieve forecast for the quarter which explained its urgency. Revenue recognition was the objective which drove the transaction.

(2) There were ancillary benefits, including the value Mr Hill repeatedly emphasised of the *"bird in the hand"* especially at a time (and it was accepted that this was a time) of swiftly softening rates. But that did not alter the reality that the transaction was promoted, structured and eventually concluded for the overriding purpose of securing immediately recognised revenue from the sale of a licence which in reality conferred no new rights or benefits of any utility.

(3) The real essence of the transaction was that Autonomy had to offer and agree a deep discount on future storage charges as the price of an immediate licence fee of $5 million.

(4) In my judgment, therefore, the Claimants have established the factual premises of their case in respect of both of the two MS Amendment Agreements and a breach of duty and improper use of power has thereby been established.

Deutsche Bank Q1 2011 re-restructuring

3636. The third of the four Schedule 12D transactions impugned by the Claimants took place in the same quarter as the Q1 2011 MS Agreement and was made between Zantaz and Deutsche Bank.

3637. Deutsche Bank was a long-standing customer of Zantaz. On 4 October 2005, the New York branch of Deutsche Bank had entered into a three-year contract with Zantaz for email restoration services ("the Original DB Agreement"). Pursuant to the Original DB Agreement, Zantaz had agreed to provide digital archiving services on an SaaS basis for an initial storage rate of $0.105 to $0.10 per MB per annum subject to a clause which obliged Zantaz to share with Deutsche Bank the benefit of any savings resulting from a decrease in the cost of providing the services.

3638. In May 2008, shortly before the Original DB Agreement was due for renewal, the parties entered into a 17th amendment, which restructured the arrangements into a hybrid hosting contract. The Claimants referred to this as "the First DB Amendment Agreement".

3639. The core terms of the First DB Amendment Agreement, which was dated 21 May 2008, were as follows:

(1) Deutsche Bank agreed to purchase a Digital Safe licence with certain functionalities for a fee of $5.227 million;

(2) The term of the amended contract and the software license was from 1 June 2008 to 31 May 2013, subject to Deutsche Bank's rights (a) to terminate the agreement on six months' notice; and (b) to extend the arrangements for a maximum of three years from 31 May 2013, a fee of $1,045,000 being payable for each consecutive annual extension;

(3) Deutsche Bank agreed to pay storage fees of $0.0092 per MB per annum.

3640. The Claimants impugned the First DB Amendment Agreement as a Schedule 6 transaction, alleging that the immediate recognition of revenue from the sale of the Digital Safe licence was improper on the basis that the licence had no separable substance or value, did not confer any usable right or benefit on Deutsche Bank which had no intention of taking its data on-premise and its treatment as a separate component of the overall transaction was a pretence: their case was that it was merely a device to seek to justify accelerated revenue recognition.

3641. The Claimants emphasised in their written closing submissions that Dr Lynch and Mr Hussain were aware of the restructuring from the outset and appear from the contemporaneous documents to have been in no doubt as to its importance to Autonomy's quarterly revenue targets. The Claimants pointed out that:

(1) On 7 February 2008, Mr Hussain told Mr Egan, among others, that "*DB are "hot" right now – so which ones are Q1 opps (and which can be made into licence)?*".

(2) The same day, Mr Jim Still, VP for North American Field Sales, informed Mr Hussain and Dr Lynch that Zantaz was looking to see if the arrangement with Deutsche Bank could "*be turned into a licence*".

(3) At the beginning of April 2008, Mr Hussain emailed Dr Lynch letting him know that Autonomy should hit its revenue target of $117m by the end of Q2 2008 if three "*large deals*" were concluded, including the deal with Deutsche Bank.

(4) In an email copied to Dr Lynch, Mr Hussain later stressed the importance of doing the "*Digital Safe restructuring*" for Deutsche Bank "*asap*"; he explained that "*they want to buy and I am telling them they have to buy now*".

3642. The Claimants also brought to my attention documentation which they submitted appeared to suggest that, in the Defendants' own perception and from Deutsche Bank's perspective, the purpose of the deal was to achieve cost savings. Thus:

(1) In an email to Mr Hussain on 7 April 2008, an Autonomy sales representative categorised the restructure as "*cost savings / license revenue*".

(2) Later in April 2008, Mr Egan emailed Mr Hussain, copying in Dr Lynch, saying that they could now "*push Dan Marovitz much more directly on the cost savings proposition*".

(3) A few weeks later, on 8 May 2008, Mr Egan provided Deutsche Bank with an overview of the proposed restructure, referring to "*$8.2M nominal savings figure over 5 years*" and "*$5.3M real savings over 5 years or an 18% savings as compared to the current structure*" without any mention of the licence element at all.

(4) Mr Egan also attached an illustrative table of the savings that could be achieved, saying that this helped to "*communicate the kind of savings that can be realised through restructure*".

(5) Mr Hussain forwarded Mr Egan's email to Dr Lynch the same day. Mr Egan sent another email the same day to Deutsche Bank, copying in Mr Hussain, telling them that "*in the case of the Digital Safe restructure the software is currently live and yielding significant value. The restructure would create savings vs expense for Deutsche Bank*", which Mr Hussain forwarded to Dr Lynch shortly after. This, the Claimants contended, demonstrated, and was evidently Autonomy's attempt to reassure Deutsche Bank, that the restructure was only about finances and that, in substance, everything would stay the same.

(6) As with the Morgan Stanley restructures above, the software appears to have been an afterthought. On 14 May 2008, only a week before the restructure, and many weeks after negotiations began, Mr Scott emailed Dr Menell, copying in Mr Egan, asking for "*…a clear list of software to be licensed to DB as part of the current deal which contemplates a licensed Digital Safe. Please give me a call asap as we are trying to get an amendment out to DB very quickly…*".

(7) The effect of the First DB Amendment Agreement was that Deutsche Bank obtained a significant reduction in storage rates in return for paying an upfront

fee to license Digital Safe, a result which was described by Mr Egan to Deutsche Bank as a "*win/win*".

3643. In addition, the Claimants identified features, said to be indicative of Deutsche Bank having no intention to take Digital Safe on-premise, so that the licence was of no utility to it. These included the fact that the term of the Digital Safe licence was coterminous with the term of the First DB Amendment Agreement, so that if it had wished to move on-premise, Deutsche Bank would have had to terminate the First DB Amendment Agreement and forfeit the sums it had paid thereunder.

3644. For reasons I have sought to set out in the preceding section of this judgment, I have accepted the Claimants' case that Autonomy, to the knowledge of the Defendants, improperly accounted for the Schedule 6 transactions. For comprehensiveness, I confirm that the features of the First DB Amendment Agreement which the Claimants brought to my attention to indicate particular grounds for considering immediate revenue recognition in respect of the licence sale to have been improper, appear to me to be consistent with, and to confirm, the general conclusion I reached in that part of this judgment.

3645. In particular, I consider of particular significance that (a) the terms of the licence and the hosting agreement were coterminous, (b) Autonomy's clear objective was immediate revenue recognition, and (c) the evidence indicated that Deutsche Bank had no intention of moving on-premise and would have forfeited sums it had paid under the First DB Amendment Agreement if it did so. These facts support the conclusion that the licence was a contrivance, and could not realistically be characterised as a separate component of the hybrid model so as to justify immediate recognition of the sale revenue in Autonomy's accounts.

3646. The Claimants did not, however, seek to impugn or claim any loss in respect of the First DB Amendment Agreement as an improper loss-making Schedule 12D transaction, though they noted that it secured for Deutsche Bank savings (and thus in a sense a concomitant reduction in overall revenue for Autonomy) of some $8.1 million (representing a saving compared to what it had to pay under the Original DB Agreement of approximately 37%). The Claimants did not claim any direct loss in respect of the First DB Amendment Agreement: it was not one of the Schedule 12D transactions. I need say no more about it and now revert to the further restructuring in respect of Autonomy's hosting agreement with Deutsche Bank which was the subject matter of the Schedule 12D claim. I refer to this as the Second DB Amendment Agreement which as mentioned in paragraph 3636 above, was, after long negotiation, finally executed in Q1 2011.

The Second DB Amendment Agreement: the restructuring negotiations

3647. The re-restructuring negotiations commenced some time earlier, in April 2010. The Claimants spent some time in chronicling what they presented as Autonomy's *"multiple (failed) attempts to push the deal through each quarter, until it was finally executed in Q1 2011"*.

3648. Much time was spent in the parties' respective closing submissions on the exchanges of correspondence, both internal within Autonomy and between Autonomy and Deutsche Bank:

(1) The Claimants' aim was to show that the process was initiated by Autonomy and that substantially the whole focus was on Autonomy trying to get Deutsche Bank to enter into a new licence and pay a fee in return for offering Deutsche Bank considerable data storage savings, and on Autonomy trying to find ways of justifying a new licence as conferring substantive rights different from those that Deutsche Bank already had under the First DB Amendment Agreement.

(2) The Defendants' aim, on the other hand, was to show that (a) it was Deutsche Bank which approached Autonomy to try to negotiate downward its storage charges on the basis (as it stated in an email from Mr Dan Manners of Deutsche Bank to Mr Sullivan of 12 April 2010) that it was *"looking to dramatically increase [its] data volumes in the UK as [it was] moving to a capture all scenario"* and wished to discuss how pricing might be *"extrapolate[d] to the larger scope"*; (b) Deutsche Bank needed and wanted further software and software rights and that there was real substance therefore in its corresponding need for a new and more extensive licence, and (c) what Autonomy might theoretically stand to lose in consequence of reducing its data storage charges it would in reality gain from retaining Deutsche Bank as a customer and storing considerably increased amounts of data for it.

3649. In my view, all these strands are evident from the documentary evidence. I can summarise the position as having been that Deutsche Bank, appreciating that Autonomy was certainly keen, and indeed in something of a hurry, to strike a further agreement, deployed both carrot and stick. Deutsche Bank made clear that its corporate plans included a substantial migration of its data, but (hinting at moving to a competitor) that it was not going to increase the usage of its UK Digital Safe unless it negotiated a substantial overall fee reduction, and obtained also a discount on an IDOL-isation project for its Lucene Safe which it considered it required to enable full migration into Digital Safe. It pressed, in particular, for free installation of an IDOL index and full IDOL functionality.

3650. When the Second DB Amendment Agreement was eventually concluded on 31 March 2011 its provisions included the following:

(1) Deutsche Bank agreed a fee of $7.1 million to license a package as before, but now including Digital Safe version 9 together with IDOL dense-cell (sometimes known as "Ironman") implementation;

(2) The term of the agreement was extended to 31 March 2016, (and thus a three-year extension on the First DB Amendment Agreement);

(3) Storage rates were reduced to $0.00445 per MB per annum;

(4) Deutsche Bank would be given a credit if it increased the data in its UK Digital Safe from 0.34 TB to 2.37 TB.

3651. It should be noted that Deutsche Bank was previously a Lucene user and had not licensed an IDOL version of Digital Safe (e.g. version 8).

Claimants' case

3652. The Claimants alleged that:

(1) Deutsche Bank had no need or use for and had not requested IDOL dense-cell implementation, because it operated a Lucene–powered safe which used only Lucene dense-cells; and

(2) Digital Safe version 9 did not exist as of 31 March 2011, and Deutsche Bank had never requested a licence for it. This was substantially the same allegation (*mutatis mutandis*) as was made in respect of the Q1 2011 MS Agreement (see above).

3653. In paragraph 106Y of its RRAPoC, the Claimants invited the conclusion that:

> *"It is to be inferred… that Autonomy included these licences in the software definition in the Second DB Amendment Agreement in order, in part, to deliberately mislead Deloitte into believing that the licence fee of US$7.1 million had been paid in return for new software that DB had requested, and intended to use, and thus to support the case for recognising the revenue from the licence fee upfront, when in reality no new software had been requested by, or was (in the case of Digital Safe version 9) to be made available, or (in the case of IDOL dense cell capability) of any use, to DB."*

3654. As to (1) in paragraph 3652 above, according to the Claimants:

(1) IDOL dense cells were not a licensable piece of software at all; they were part of the architecture for the Digital Safe system, and it therefore made no sense at all to include them in a software license that was apparently to be delivered electronically;[459] and

(2) In any event, IDOL dense-cells were of no use to Deutsche Bank since Deutsche Bank had a Lucene Safe and such dense cells were incompatible with Lucene-powered safes, for which there were Lucene-dedicated dense cells.

3655. Further, and in anticipation of the argument that it was a substantive thing of value provided under the agreement which would also facilitate the conversion of Deutsche Bank to an IDOL safe with greater data usage, the Claimants also ran an argument in their closing oral submissions that the provision in the agreement for dense cell installation and implementation (described as merely *"included within the software"*) simply confirmed a commitment made by Autonomy (through Mr Egan) for a free upgrade under the First DB Amendment Agreement. They argued that this could not itself substantiate the licence arrangements under the Second DB Amendment Agreement.

3656. On the basis of those propositions, the Claimants contended that the only real substance of the Second DB Amendment Agreement, and the true *quid pro quo* for the licence fee, lay in its provisions for data storage fee reductions, resulting in losses to Zantaz/Autonomy. They accordingly denounced the licence element as a dishonest contrivance, which purported to give rights which were illusory to software which DB

[459] Mr Goodfellow stated in his witness statement that *"[b]uying and implementing dense cells was an Autonomy overhead – the benefits derived from dense cells were only felt by Autonomy (through a reduction of its internal costs). It was not a piece of software that was licensed to clients."* Mr Yan said a dense cell was a piece of *"storage architecture"*. Mr Sullivan stated in an internal Autonomy email in August 2012 that *"Cells can be considered appliances because they are hardware with software pre-installed."*

did not want and could not use, and in the case of Digital Safe version 9 did not exist, simply in order to enable Autonomy to present it as sale of goods generating revenue which could be recognised "upfront" but which should have been spread over the term of the Second DB Amendment Agreement.

3657. That argument primarily goes to the accountancy issue of revenue recognition. But the Claimants relied on it to show that the transaction lacked any proper commercial purpose, and caused loss. As to loss, they submitted that the savings to Deutsche Bank from lower data storage fees (estimated internally at $8.6 million over five years) were considerably in excess of the licence fee ($7.1 million); and that any suggestion that the lower rate would be balanced or exceeded by greater ingested volume (as Dr Lynch did quite strenuously suggest in cross-examination) was false. They submitted that in fact, modelling at the time suggested that ingested volumes were expected to decrease, not increase, following the transaction.

3658. The Claimants concluded that not only was the licence a contrivance, and the transaction was simply an example of Autonomy resorting to the purchase of its own revenue at considerable cost. They submitted that the Defendants cannot have believed that the Second DB Amendment Agreement, which resulted in reduced revenues and profits, was in the commercial interests of ASL, nor can Mr Hussain have believed that it was in the commercial interests of Zantaz. On that basis, the transaction was improper, and the Defendants were in breach of their duties to ASL and, in the case of Mr Hussain, to Zantaz, in bringing about the transaction. The company which had suffered the loss should be compensated accordingly.

3659. The Claimants calculated that the loss arising from the Second DB Amendment Agreement was $6,368,357.[460] The loss has been calculated in the same way as the Q4 2009 and Q1 2011 MS Agreements. This was set out at length by Mr Bezant in his Supplemental Report.

Defendants' answers to Claimants' case

3660. The Defendants refuted this case in its entirety. They mounted a sustained attack on the evidence of each of the Claimants' witnesses, both as to its apparent but suspicious consistency and as to its revealed and revealing inconsistency. As indicated above, the witnesses marshalled a great deal of detail, but it can fairly be summarised by reference to the principal propositions in the Claimants' case as I have summarised those above.

3661. The nub of the Defendants' answer to the Claimants' proposition that Deutsche Bank had no need for IDOL dense cell implementation, supposedly because it operated a Lucene–powered safe which used only Lucene dense cells, was that the documentary evidence contradicts this. The Defendants contended that it shows that, on the contrary, Deutsche Bank (a) had, for some time before the re-restructure, wanted to IDOL-ise its Lucene Safe, and to utilise IDOL functionality and search on its archived data; (b)

[460] In the RRAPoC, Schedule 12D, the loss is stated to be $6,724,420. This difference is the result of three errors, which are summarised in Table A13-12-2 of Mr Bezant's Fourth Report. The first is explained in Mr Bezant's instructions, and arose from an error in calculating the application of various volume-based archiving credits, which results in an adjustment of $381,816 in the Defendants' favour. Mr Bezant has confirmed that this adjustment is correct. The second arises from a failure to include certain actual data volumes, and results in an adjustment of $14,363 in the Claimants' favour. The third arises from a formula inconsistency, and results in an adjustment of $11,390 in the Claimants' favour.

initially sought to brow-beat Autonomy into providing it for free (which Mr Sullivan dismissed in an internal email dated 9 December 2009 as *"an absurd position"* for them to take *"without a deal"*) but (c) eventually negotiated the provision of IDOL Digital Safe and IDOL dense cell implementation as part of the Second DB Amendment Agreement, as the final wording of that agreement confirmed.

3662. The Defendants pointed to a number of what they depicted as unsatisfactory features of the evidence given by the Claimants' witnesses, and in particular:

    (1) Mr Yan had said in his witness statement that he did not even understand what was meant by *"IDOL dense cell implementation"*; but he was reminded in the course of his cross-examination that he was personally involved from 2011 in the project to convert Deutsche Bank's Lucene-powered Digital Safe into an IDOL-powered safe. Once taken through some contemporaneous email exchanges (and especially an email dated 31 May 2011 from Mr Goodfellow) he accepted that this phrase probably referred to the use of ironman/dense cells for the project to IDOL-ise Deutsche Bank's safe.

    (2) Mr Wang said in his witness statement that he had not heard of *"IDOL dense cell implementation"* before. He too omitted to mention the project to IDOL-ise Deutsche Bank's Digital Safe, notwithstanding his own involvement in it. With some initial reluctance, he eventually conceded in cross-examination that active steps were indeed taken to move all of Deutsche Bank's data to an IDOL-powered Digital Safe and that he *"would not disagree with Mr Yan…if that is what Mr Yan had attested to"* that the phrase from the contract most likely referred to the use of ironman/dense cells for this purpose.

    (3) Mr Goodfellow did remember the project to IDOL-ise the Deutsche Bank safes but he could offer no explanation to explain the omission from his witness statement of any mention of it other than to say that he did not intend to give a misleading impression.

3663. The Defendants relied on the above also to counter what Mr Hussain described in his written closing submissions as the Claimants' *"fall-back position"*, which was advanced via the evidence of Mr Goodfellow. This was to the effect that even if Deutsche Bank did require the ironman/dense cells, that could only be to enable the IDOL-isation of its Digital Safe, and Mr Egan had already given Deutsche Bank a separate undertaking, outside the contract, to IDOL-ise the Digital Safes for free. That was suggested by the Claimants to provide another reason for doubting the commerciality of the Second DB Amendment Agreement and for presenting it as in substance simply an agreement to pre-pay data storage charges as the means of obtaining an unusually deep discount.

3664. The Defendants objected to this *"fall-back position"* on the basis that it was a new line of argument that had not been pleaded[461]. They also dismissed it as *"another bad point"* They stressed that it was quite plain that the discussions for IDOL-isation took place within the context of the discussions for the restructuring, and the obligation to provide Deutsche Bank with IDOL dense cell implementation was contained in the Second DB

[461] As succinctly summarised by Mr Hill QC in his oral closing, *"… It's a new case. It is contrary to the pleadings and their own witness statement. The pleaded case is that Deutsche Bank couldn't use this software, not that it could."*

Amendment Agreement itself and not elsewhere, and was in terms stipulated by Deutsche Bank by amendment to the travelling draft.

3665. The Defendants further emphasised that:

(1) Although (as Mr Hussain put it) *"Cs may not like it, the legal position is that [Autonomy] and Deutsche Bank contractually agreed that the licence would include Digital safe version 9 with IDOL dense cell implementation."*

(2) There was no suggestion that the contract was some sort of a sham; and furthermore, Deutsche Bank took the trouble of amending the draft of the Second DB Amendment Agreement (by email dated 11 March 2011) to tighten Autonomy's obligations from the provision of *"IDOL dense cell capability"* to *"IDOL dense cell implementation"*.

(3) The contract is the only place where the agreement to provide the dense cell implementation is formally recorded;

(4) Mr Goodfellow ultimately accepted in cross-examination that Deutsche Bank did need to establish a contractual entitlement to the IDOL Digital Safe software, and that could only be found in the Second DB Amendment Agreement.

(5) He also eventually agreed that, contrary to the message given in his witness statement, Deutsche Bank did have a use for IDOL dense cell implementation, specifically wanted it and had contracted for it.

3666. As regards the Claimants' second proposition (that Digital Safe version 9 simply did not exist as of 31 March 2011, see paragraph 3656 above), the Defendants' case was that (a) version 9 was put up on Automater, (b) it was an IDOL version of Digital Safe; (c) it was put up with the active involvement of Mr Wang, Mr Lucini and Mr Goodfellow, (d) it was available for delivery, and was delivered, to Deutsche Bank, and (e) none of the witnesses suggested that he thought he was involved in anything improper. Furthermore, and as I return to below, Dr Lynch contends that he was not involved in any way.

3667. I have addressed this issue as to whether Digital Safe version 9 was in existence at the time in the context of the Q1 2011 MS Agreement. I add only that in the context of the Second DB Amendment Agreement the Defendants submitted that the Claimants' witness statements were once again seriously misleading and unaccountably failed to disclose the witnesses' role in providing version 9 of Digital Safe to Deutsche Bank via Automater. In particular:

(1) Although Mr Wang had stated in his witness statement that *"a customer bought version 9 of Digital Safe at a time it did not exist"*, he neglected to mention that he had been the person responsible for providing Mr Goodfellow, and indirectly Mr Booth, with the version of Digital Safe that was put on Automater as version 9 for delivery to customers. Under cross-examination, Mr Wang (a little equivocally) accepted that the file that he provided to Mr Goodfellow to put on Automater was *"eventually put on Automater as version 9"*. He accepted that the file that he provided would have been likely to be Digital Safe software. He also accepted that, if it was going to satisfy Deutsche Bank's requirements, it needed to be an IDOL version of the software. Mr Wang could give no reason

why his own involvement in getting version 9 onto Automater was not dealt with in his witness statement.

(2) Similarly, Mr Lucini had stated in his witness statement that he could not recall what was uploaded: *"it may have been a copy of an earlier version of Digital Safe, or possibly just an empty zip file."* Mr Lucini had added in the same paragraph of his witness statement that he recalled *"someone, possibly Dr Menell, telling me that it did not matter"* what was uploaded. As also mentioned in the context of the Q1 2011 MS Agreement, the Defendants submitted that both were fabrications. They dismissed Mr Lucini's evidence as an incoherent invention, falsified by Mr Wang's evidence, and demonstrating that he was an untruthful witness. It was, they said, obviously inconsistent with the sequence of events apparent from the documents which do not suggest any involvement on the part of Dr Menell or anyone other than Mr Lucini, Mr Goodfellow, Mr Wang and Mr Booth;

(3) Mr Goodfellow's witness statement also grossly understated his role in the event, referring only to an email from Mr Lucini stating *"okay, we will put it up there"* and not to his own actions in implementing that. Under cross examination, Mr Goodfellow had to accept that he was the person who actually uploaded version 9 onto Automater, that although he was now trying to suggest that he thought version 9 and version 7.4 were the same, he did not say so or suggest that at the time, that that would have been unlikely since version 7.4 was a Lucene version, and that he knew that the fact that version 9 was for IDOL-isation purposes and was being supplied was important for revenue recognition purposes. The Defendants characterised Mr Goodfellow's evidence as contrived and dishonest with a constant but irrelevant refrain, which appeared to be a peddled script and was little more than a distraction, that IDOL-isation was not provided under the Second DB Amendment Agreement but by a prior commitment made by Mr Egan (see above).

3668. The Defendants also relied on the further evidence showing the inclusion of Digital Safe version 9 in the Automater record of shippables/deliverables, and its compatibility with Windows, which I have previously addressed in the context of the Claimants' like contentions in respect of the Q1 2011 MS Agreement: see paragraphs 3624 to 3631 above.

3669. More generally, the Defendants stressed the overall commerciality of the transaction:

(1) Contrary to some parts of the Claimants' submission, Deutsche Bank did need a licence: as noted above, it had not previously had any licence to operate IDOL-based software[462] on its Lucene Safe.

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[462] The Claimants were inconsistent in this regard. They appeared in parts of their written closing submission to persist with an argument that Deutsche Bank did not need a licence because none was needed for initial installation of an IDOL Digital Safe. However, on page 1956 of their written closing submissions, the Claimants did concede that *"Admittedly, if Deutsche Bank's hosted Safe was being converted to IDOL, and it wanted a licence to the Digital Safe software deployed on that Safe, it would need a licence to the IDOL version of the Digital Safe software, as Mr Wang accepted in cross-examination…"* That is what was provided for: what Deutsche Bank wanted and was getting was (a) Ironman/dense cells and implementation and (b) version 8 or 9 of IDOL Digital Safe software to use IDOL functionality paired with its Lucene safe.

(2) It is true that both parties had an agenda in wishing to include software in the new licence which would clearly differentiate the new licence from the old: it was important to Deutsche Bank that the new licence should be in addition to, and not terminate, the old licence, because it wished to amortise the old licence in its accounts, which required its continuation; and it was important to Autonomy that the new licence should be a substantive sale of goods, for all the reasons discussed previously.

(3) It is true also that both parties recognised that the differentiation was in part driven by accountancy objectives. But what was eventually agreed to be licenced was materially different, and was useful to Deutsche Bank, as well as to Autonomy (not least in terms of the value of market penetration).

(4) Further, the Defendants contended that from Autonomy's point of view, the Second DB Amendment Agreement:

(a) turned the speculative prospect of Deutsche Bank extending (at its option) the remaining term of the First DB Amendment Agreement beyond 2013 into a contractually certain term until 2016, in circumstances where rapidly falling data storage rates (and costs) meant that customers were naturally looking to improve their 'deal' rather than simply roll over;

(b) locked in revenue and greatly increased the likelihood of retaining Deutsche Bank as a customer both in this context and in other business contexts then being pursued: that was a positive in itself, and was the means of avoiding the very considerable negative in the market place of a large multinational bank leaving Autonomy;

(c) brought Deutsche Bank into the IDOL ecosystem and that would have provided perceived upsell opportunities, as envisaged in Mr Egan's email of 20 December 2010 where he explicitly stated (in respect of the IDOL-isation) that:

> "*this would ready the safe for additional use of Autonomy software that uses advanced IDOL function like DSMail or ECA or other but those products would still need to be licensed by DB for usage and hardware expense can scale depending upon the scale of the DB usage*"

(d) generated an incentive for Deutsche Bank to store more data in due course with Autonomy in circumstances where the migration of its data was on the cards; and

(e) strengthened the ties between Autonomy and Deutsche Bank and the prospect of future collaboration, it being recorded in an email from Mr Hussain to Dr Lynch dated 30 November 2011 written to brief Dr Lynch before a lunch engagement with Mr Dan Marovitz of Deutsche Bank that, in addition to Digital Safe UK and US there were existing relationships between the Bank and Autonomy in Supervision US and UK, ECA in the UK, Search Global Internet and an "Electronic commerce project in London"; and Mr Hussain

wrote that Deutsche *"want to use us in more areas: IDOLise the DS, Supervision in Asia and DS in Japan"*.

My assessment

3670. I turn first in my assessment to the dispute as to whether Deutsche Bank had any use for ironman/dense cells, and whether the inclusion of ironman/dense cells in the software covered by the licence granted as part of the Second DB Amendment Agreement was (as the Claimants in effect seemed to me to be contending) window-dressing to give credence to the presentation of the new licence as more extensive than the first.

3671. It seems to me that the key to the dispute in this regard is to determine quite what ironman/dense cells actually were, and what their use actually was.

3672. A premise of the Defendants' case was that ironman/dense cells comprised software, properly included as such in the Second DB Amendment Agreement and appropriately treated as valuable software items. This, on that case, demonstrated that the licence relating to the Second DB Amendment Agreement was materially more extensive than that relating to the first.

3673. As mentioned previously (see paragraph 3654 above)[463], the Claimants depicted the dense cells differently, as hardware, and not a licensable piece of software at all so that the licence to *"IDOL dense cell implementation"* was a *"mirage"*. As Mr Goodfellow explained in his witness statement:

> *"Over time, as technology improved, Autonomy updated its hardware and storage cells. When this happened, cells usually became "denser" and this reduced the cost to Autonomy of storing data. Buying and implementing dense cells was an Autonomy overhead – the benefits derived from dense cells were only felt by Autonomy (through a reduction of its internal costs). It was not a piece of software that was licensed to clients…"*

3674. This explanation, and its designation of dense cells as part of the hardware architecture, was echoed and supported by both Mr Yan and by Mr Sullivan. Although the Defendants criticised Mr Goodfellow sharply for not acknowledging, and as they saw it, seeking to obscure, both (a) his knowledge of and involvement in the project for IDOL-isation of Deutsche Bank's Lucene safe in his witness statement, and (b) that ironman/dense cells were proposed to be deployed to enable it, neither his evidence nor that of Mr Yan and Mr Sullivan that such dense cells were hardware and not a piece of software that was licenced to clients was challenged. I accept that evidence: ironman/dense cells were hardware and not software and were not licensable as software.

3675. Two points made by Mr Goodfellow then fall into place. First, the omission from his witness statement of any reference to the fact that dense cells were proposed to be

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[463] And the footnote to the paragraph which I repeat here for convenience: Mr Goodfellow stated in his witness statement that *"[b]uying and implementing dense cells was an Autonomy overhead – the benefits derived from dense cells were only felt by Autonomy (through a reduction of its internal costs). It was not a piece of software that was licensed to clients."* Mr Yan said a dense cell was a piece of *"storage architecture"*. Mr Sullivan stated in an internal Autonomy email in August 2012 that *"Cells can be considered appliances because they are hardware with software pre-installed."*

deployed in the project to IDOL-ise Deutsche Bank's Lucene safe was by no means as open to criticism as the Defendants suggested it was. Once it is understood that the dense cells were only to be deployed by Autonomy, the Defendants' contention that Mr Goodfellow, Mr Yan and Mr Sullivan were all disguising their utility to Deutsche Bank carries little force. Secondly, his point that another reason why the inclusion of the dense cells in the licence was window dressing, was that Autonomy had already agreed to provide them as part of its project to IDOL-ise Deutsche Bank's safe also is clarified and compelling. It was his evidence, elicited in cross-examination, that Autonomy had indeed committed to the project and more particularly, had agreed to do it, and thus incidentally provided the means of doing so including the ironman cells, for free.

3676. The pleading point then seems to me to fall away also. None of this was new. It was not a *"fall back position"* as it was described in Mr Hussain's written closing submissions, nor a *"rear guard response"* as described in Dr Lynch's. It was all part of the Claimants' original case that the extension of the licence purportedly to cover dense cells was window dressing, as indeed I find it to have been.

3677. The only other respect in which the licence granted in the context of the Second DB Amendment Agreement was said to give more extensive rights to software than did the earlier licence was the purported provision of "Version 9".

3678. I have set out in my discussion of the same point in the context of the Morgan Stanley Q1 2011 transaction the reasons for my conclusion that this too was window dressing, and I need not repeat them.

3679. In my judgment, and in agreement with the submission to that effect made by the Claimants, the Defendants' reliance on the "software" that was licensed to Deutsche Bank as the mainstay of their argument that the licence had true substance is misconceived. I endorse and adopt the Claimants' conclusion that the true position is that Deutsche Bank paid the $7.1 million licence fee in exchange for savings; the addition of what purported to be software was an afterthought. In the case of what was described as "version 9" it was not new; in the case of the dense cells it was not software at all; and in neither case did the licence provide anything of utility which Deutsche Bank had not been provided with or already promised or available for free.

3680. As in the case of the Morgan Stanley transactions I would accept that the transaction did offer some benefits. Dr Lynch described the deal as *"a very elegant solution to protect the value in Zantaz's future relationship with Deutsche Bank".* I would not discount the value in customer retention, especially since (as I have already noted in paragraph 3649 above) Deutsche Bank's wont was to strike a hard bargain using carrot and stick, and it had (for example) already expressly threatened *"to move our email platform…to a hosted Microsoft solution".*

3681. But none of this was what drove the transaction. The essential characteristic of the deal was (as described in the Claimants' written closing submissions) *"savings for Deutsche Bank in return for upfront revenue for Autonomy".* What drove the transaction, and its timing, was Mr Hussain's desperate need for more revenue: in the words of an email dated 3 December 2010 from Mr Hussain to Mr Sullivan subject- headed *"what i need"*, the transaction was an *"absolute must".*

3682. That imperative, and the objective of the transaction, were well known to Dr Lynch, and I infer from all the circumstances, shared and approved by him. He could have been in

no doubt about the driver. On 10 December 2010, Mr Hussain had sent him an email containing the following:

> "*Really don't know what to do mike. As I guessed revenue fell away completely yet SMS report shows massive activity. But I speak with the vp's who are far more accurate. Also stouff, Joel and mike I think keep separate sheets and unless I am v wrong don't discuss the sheets hence plane crashes and they don't know. We've covered up with bofa and hopefully db and Doi but if latter 2 don't happen it's totally bad.*"[464]

3683. I can deal much more briefly with the Claimants' allegation that Deloitte were misled.

The Claimants' allegations that Deloitte and the Audit Committee were misled

3684. I accept the Claimants' case that Deloitte were misled about the true nature of the transaction with Deutsche Bank, and in particular, were not told that the new software licensed to Deutsche Bank was inserted only at the last minute or that version 9 only existed in the sense explained in paragraphs 3626 and 3627 above.

3685. I see no reason to doubt Mr Welham's evidence in his witness statement that if:

> *"the inclusion of additional software in the contractual documentation was made only at the last minute…simply to support an argument that the licence was of new software, then that would undermine the supposed commercial rationale for the deal and call into question the recognition of the revenue, as well as suggesting that the documentation had been drafted in a manner to mislead Deloitte. It would also be a matter of real concern if, as I am asked to assume, the additional software that was purportedly being sold included software that did not in fact exist or which could not have been used by Deutsche Bank."*

3686. The Claimants supplemented this with an allegation that Autonomy's Audit Committee had not been provided with Autonomy's internal exchanges, or its communications with Deutsche Bank, and did not know whether Deutsche Bank had requested the licensed software, whether they could use it, or whether it had already been promised to Deutsche Bank separately to the restructure. More particularly, it was said, the Audit Committee did not know that Deutsche Bank was motivated to enter the transaction on the basis of the savings that it was offered, rather than any interest in the software that was ultimately licensed; nor that Autonomy entered into the transaction so as to accelerate revenue recognition.

3687. The fact that, as it was, both Deloitte and the Audit Committee approved the transaction is, in my judgment, of no assistance to the Defendants. In my judgment, the Claimants' allegation that the Q1 2011 Deutsche Bank re-restructuring was commercially unjustified and a breach of duty and improper use of power has been established. I shall consider later what loss was thereby caused.

Metropolitan Life

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[464] Emphasis added.

3688. Chronologically the last of the impugned Schedule 12D transactions was a further restructuring in Q2 2011 of a hybrid hosting contract between Autonomy Inc and Metropolitan Life Insurance Company ("MetLife") which had been concluded in June 2010.

3689. Like Deutsche Bank, MetLife had been a long-standing customer of Zantaz. Until the end of Q2 2010 it had contracted with Zantaz on a SaaS basis, on the terms of an agreement dated as of 15 March 2002. At the end of Q2 2010, MetLife and Autonomy Inc agreed an amendment and restructuring of their existing SaaS arrangement to a hybrid arrangement ("the First MLIC Amendment Agreement"), made as of 30 June 2010.

3690. Under the First MLIC Amendment Agreement:

(1) MetLife agreed to license Digital Safe and Related Software for a licence fee of $7.025 million; and

(2) MetLife agreed to pay storage rates starting at $0.001313 per MB per month ($0.015756 per MB per annum) and reducing to $0.001125 per MB per month ($0.0135 per MB per annum) in the fourth year of the contract;

(3) The agreement was for a five-year term ending on 30 June 2015, and MetLife had options to extend for additional one-year periods.

3691. In conformity with the usual pattern, (a) Mr Hussain had needed and pressed for the deal to achieve quarterly forecasts (he described it in an email to Mr Chamberlain and Ms Gustafsson as *"a key deal for the quarter")* and (b) in its negotiations, Autonomy's sales pitch focused on the potential savings from the restructure over time, while ensuring that Autonomy secured an upfront licence fee on which it could rely for revenue recognition. Autonomy made no secret of this: and in an email to Mr Hussain, Mr Sass said "*I shared that rev rec will guide what we can do".*

3692. According to a spreadsheet prepared by Autonomy for MetLife, MetLife stood to save $10.6 million over five years from entering into the First MLIC Amendment Agreement. Even so, MetLife initially balked at the licence fee, and Autonomy eventually agreed slightly extended payment terms, which became terms of the deal.

3693. Barely a year later, in May 2011, Autonomy approached MetLife about the possibility of a further restructuring with the inducement that it would lower storage rates again. Dr Lynch did not dispute that it was Autonomy that made the first approach.

3694. The initial term of the First MLIC Amendment Agreement then still had around four years left to run. Mr Hussain's written closing submissions noted, however, that under the First MLIC Amendment Agreement MetLife was paying more ($0.015756 per MB per annum) than Morgan Stanley had paid in 2008 ($0.0092 per MB per annum) and that MetLife's rates were plainly uncompetitive in light of the rapid fall in the costs of hosting.

3695. Nevertheless, Autonomy initially proposed only a reduction in maintenance and support fees. On 2 June 2011, Mr Sass sent Mr Egan a draft of his proposal to MetLife, setting out three different options, each involving the abolition of the maintenance fee. Mr Sass noted that Autonomy was "*proposing a licence "refresh" of the Digital Safe/Audit Center/Supervisor/Investigator Software (aka 2010 License software). This refreshed*

licence grant will include all the software licensed under the June 2010 agreement"; in respect of two options, it would also extend the expiration date of the licence.

3696. The Claimants drew my attention to Mr Egan's response and its aftermath: "*I would change word "refresh" to "increase" for both reve rec purposes and so that they can continue to amortize the license they have*". Mr Sass proposed "*update*" instead of "*refresh*" or "*increase*", noting a concern, at least with one scenario, "*that we are not adding anything per se*". Mr Egan agreed, indicating that Mr Sass would have to "*figure out how to [add] something*" to the agreement. Mr Sass sent the proposal to Mr Kelly the same day (2 June 2011).

3697. MetLife were not interested in paying upfront simply for a reduction in maintenance. When that became clear, Mr Sass proposed a generous reduction of 60% in storage rates in return for an upfront licence fee of $5.8 million. Having made the offer, Mr Sass reported to Ms Gustafsson that he had what he called *"sellers remorse"* that it was too generous to MetLife. Ms Gustafsson reassured him:

> "*Don't worry! It is a five year deal, and they are only getting 25% discount on NPV – I have seen many higher than that! We are close to Q end so if we want a deal then we have to get them focussed straight away*".

3698. MetLife again balked at the licence fee, prolonging the negotiation. Mr Sass sent an email to Ms Gustafsson on 16 June 2011 requesting *"immediate help"* and reporting that though MetLife *"like the deal"* they were *"fishing for a better deal"* and were asking (a) to extend by a further year from five to six year to enable them to amortise the cost of the licence over that longer period, (b) to reduce the licence fee and (c) to reduce the storage cost. He asked Ms Gustafsson to *"do some analysis (and magic)."* The upshot was a re-engineering of the proposal to (i) reduce the licence fee to $5.5 million, (ii) increase the term to 63 months and (iii) further reduce storage charges to $0.0004888 per MB per month.

3699. As that summary of the exchanges demonstrates, there was no focus or even mention in the negotiating process on what software was to be licensed to MetLife to attempt to justify the sizeable upfront licence fee. As at 13 June 2011, nothing had been *"figure[d] out"* (see paragraph 3696 above). Mr Crumbacher reminded Mr Sass on that date that he needed to identify some software to license: "*you didn't state what software your licensing [sic]. Is this a termination of the old license (Digital Safe) and then a relicense of the same/most recent version of the Digital Safe software with a lower maintenance rate?*". Mr Sass told him that it was a "*relicense with lower maintenance and lower reduced storage*". Not until 17 June 2011 was any alteration made to the software to be provided; even then, according to the Claimants, it was only because Mr Hussain decided that a DiscoverEngine SharePoint connector should be included. There is nothing in the evidence to suggest that the addition was requested by MetLife, or that the additional functionality was actually required. I elaborate on this in paragraph 3711 to 3714 below.

3700. A deal was agreed just before the end of the quarter. Mr Hussain was plainly involved in the negotiations and the ultimate transaction; and he was, for example, fully aware of and involved in the unilateral addition of software to the solution provided.

3701. Dr Lynch denied having had anything more than an awareness *"at a high level, very high level"* that a deal was being negotiated. However, he acknowledged in cross-examination that he had been informed that Autonomy was negotiating a further deal with MetLife, and he did not dispute that he would have known from one of Mr Hussain's many revenue target lists that the deal would be important in terms of meeting Autonomy's quarterly revenue targets. Further, he implied that he knew enough about it to try to justify the transaction (in fact, incorrectly) on the basis that MetLife was *"an unhappy customer"* (as further elaborated in paragraph 3704 below). This evidence was typical of Dr Lynch's attempts to offer explanations of a transaction which were to his advantage whilst protesting he had next to no knowledge of the transactions themselves. The Claimants submitted that *"it is to be inferred"* that Mr Hussain *"kept [Dr Lynch] informed"* of the matters complained of. In all the circumstances and in light of the instances and pattern of Dr Lynch's involvement and the way Dr Lynch and Mr Hussain worked together as chronicled in this judgment, the inference is justified. I have been left in little doubt that he knew what was going on, at least sufficiently to know what was Autonomy's true objective (revenue acceleration to help plug gaps in achieving forecast).

3702. Under the Q2 2011 deal ("the Q2 2011 MetLife restructuring"):

(1) MetLife agreed to licence Digital Safe and Related Software, and the five year term under the Q2 2010 hybrid hosting agreement was extended for 15 months to September 2016, for an aggregate fee of $5.5 million;

(2) DiscoverEngine was added to MetLife's licensed software package;

(3) MetLife's monthly storage fees were substantially reduced.

Claimants' case

3703. The essential factual elements of the Claimants' claim in respect of the Q2 2011 MetLife restructuring were the Claimants' propositions that:

(1) The Q2 2011 MetLife restructuring was conceived and instigated by Autonomy as a pretext to enable Autonomy to generate immediately recognised revenue from a licence sale at the cost to Autonomy of discounted data storage rates and thus a reduced future revenue stream;

(2) Its true substance was simply a payment by MetLife of the licence fee in return for a considerable reduction in data storage charges (under which MetLife stood to save in excess of $10 million over the term, almost double the licence fee);

(3) The only difference in terms of the software licensed to MetLife under the Q2 2011 restructure compared to its previous agreement was a licence to a connector called DiscoverEngine that enabled the extraction of data from a Microsoft Office document management and storage system, known as SharePoint;

(4) DiscoverEngine was introduced into the Q2 2011 MetLife restructuring by Autonomy at the very last minute, without any demonstration to, or discussion with, MetLife or any assessment of its suitability for MetLife;

(5) Initially, Autonomy proposed to provide DiscoverEngine for free; the true reasons why DiscoverEngine was included in the Q2 2011 MetLife

restructuring had nothing to do with any requirement of MetLife and everything to do with (a) seeking to mislead Deloitte into believing that MetLife wanted and intended to use DiscoverEngine and the licence fee had been paid for this new software, and so as to justify to Deloitte another licence and another upfront licence fee and (b) assisting Autonomy in persuading Deloitte that there was a genuine demand for DiscoverEngine from Autonomy's customers;

(6) In terms of the interests of Autonomy as a corporate entity, there was no justification or commercial rationale for the Q2 2011 MetLife restructuring, especially during the currency of the earlier hybrid deal and so soon after it: there was no basis for any suggestion that the restructuring was prompted by any real concern about customer retention; and

(7) Both the Defendants knew all this.

I address these points, and the Defendants' responses to them, in greater detail below.

3704. Dr Lynch suggested when he was cross-examined about this deal that his memory of the background of the Q2 2011 restructuring was that MetLife were *"an unhappy customer…it had been a bit of a bumpy relationship with MetLife."* He suggested this was another matter that could be clarified from the *"corpus"* of documents. He also said that he did not think they were thinking of leaving, but *"had had issues with us"*; and that he did not know who had approached whom. He accepted that he had not mentioned this in either of his witness statements.

3705. No documents were found by the Claimants in the *"corpus"* supporting Dr Lynch's memory; and none was suggested to Dr Lynch when he was re-examined. The Claimants instead relied on and put to Dr Lynch an email dated 16 June 2011 from Mr Sass to Ms Prentis (now Ms Gustafsson) stating (as they put to Dr Lynch) *"We are in good shape…they like working with us";* but that was after the proposal for restructuring had been floated: the missing words after *"We are in good shape"* were *"(meaning they like the deal)…"*; so the email does not support either side.

3706. Points of general application in the context of hosted restructurings made in Mr Casey's oral closing submissions on behalf of Mr Hussain were that (a) hosted customers were well aware that storage rates were going down fast, could transfer or reduce data storage needs at any time, were *"hard-nosed"* and could be expected to be on constant watch for a better deal; (b) although the Claimants had emphasised that once committed to data storage with one host, there were difficulties in moving and customers tended to "stick", that was *"overstated"* and there were at least two documented examples of very large movements of data during the Relevant Period and a number of threats by other customers to do the same; (c) it was *"far-fetched to suggest that what Zantaz/Autonomy should have done was to sit back and expect customers to pay whatever happened to be the current rate for hosting"*; and (d) a post-acquisition email referred to MetLife as being *"very sensitive to pricing"*.

3707. I would, of course, accept that pro-active engagement with a customer to retain its goodwill would be understandable and indeed expected in what Mr Casey described as a business *"which was far more dynamic than the Claimants acknowledge, the customers were more hard-nosed"* and *"it's far-fetched to suggest that what Zantaz should have done was to sit back and expect customers to pay whatever happened to be the current rate for hosting"*. He added that the Claimants' suggestion of customer reluctance to move was overstated: *"We know that there were two very large movements*

of data during the relevant period: Citi's from hosted archive to on-premises and JPMC's move to IBM. Other customers…threatened to do the same."

3708. However, it was in this case a very short time since the previous substantial restructuring. There was no real evidence, beyond the say-so of Dr Lynch for which he claimed support which never materialised, of customer dissatisfaction or restlessness. It seems reasonably clear, and I find, that the impetus for the transaction came from Autonomy, and that but for Mr Hussain's need to find more revenue, no restructuring would have been proposed.

3709. The Claimants' characterisation of the true substance of the restructuring as being the payment of an upfront licence fee in return for deeply discounted data storage rates seems to me to be accurate. That does not exclude the likelihood that as in other contexts, such as the Deutsche Bank restructurings, there were other potential commercial benefits; but it encourages sceptical review of them.

3710. The real issue, to my mind, is whether, notwithstanding the rational commercial justifications advanced for the Q2 2011 MetLife restructuring, the imperative of somehow finding revenue which could be recognised in its accounts to *"cover up"* what Mr Hussain had described in his email to Dr Lynch of 10 December 2010 as the complete falling away of US IDOL revenue at the end of 2010 (see also paragraph 3682 above) was in reality the only, or at least plainly the predominant, driving force, and if so whether that invalidates the decision or renders it or Mr Hussain's conduct improper. The adventitious addition of DiscoverEngine as the sole extra software licensed is of particular interest in this context.

3711. As to the commercial features of the transaction, the extension of the term was always part of the package. It is clear, however, that the addition of DiscoverEngine software came late in the day, after the contours of the deal for Autonomy to reduce data storage charges in return for MetLife committing to a licence fee for an extended term: although there is email correspondence suggesting that Autonomy had identified in May 2011 a sales opportunity for *"Connectors for the capture and archive of documents (SharePoint, JIVE collaboration)"* the addition of DiscoverEngine was made on the initiative of Autonomy, rather than of MetLife.

3712. As submitted by the Claimants, the process leading up to that decision is revealing:

(1) When on 13 June 2011, Mr Crumbacher pointed out to Mr Sass that he needed to identify some software to license: "*you didn't state what software your licensing [sic]. Is this a termination of the old license (Digital Safe) and then a relicense of the same/most recent version of the Digital Safe software with a lower maintenance rate?*", Mr Sass told him that it was a "*relicense with lower maintenance and lower reduced storage*". There was no suggestion of including a SharePoint connector.

(2) A few days later, on 15 June 2011, Mr Scott emailed Mr Hussain identifying "*several customer opportunities where we may want to offer the Sharepoint connector as part of our overall solution*", including MetLife. Mr Scott had been asked to compile the list by Mr Hussain.

(3) The message about offering DiscoverEngine to customers including MetLife had reached Mr Rothman, an Autonomy lawyer, who was involved in

documenting the MetLife deal. On 17 June 2011, Mr Rothman emailed Mr Sass to say that he understood "*we now need to add Share Point Connector to … this document … correct?*".

(4) But the message had not reached Mr Sass, who had been leading the negotiations with MetLife. He was entirely unaware of a reason for adding a SharePoint connector to MetLife's contract. He replied: "*sorry. no clue what you are talking about*". Mr Rothman explained: "*My understanding is that Sush has decided we should give this connector to MetLife … (for free) as a way to promote this product. Hence, I was asked by [Mr Crumbacher] to include a reference in both documents. Do you have any objection …?*"[465]. Mr Sass responded "*Let me call Sush*". A few hours later, Mr Sass reverted to Mr Rothman indicating that he was content to include DiscoverEngine in the agreement.

(5) When on the evening of 17 June 2011, Mr Sass forwarded the draft produced by Mr Rothman to Mr Kelly, he made no mention of the fact that DiscoverEngine had been newly inserted into the agreement,[466] as shown by the "*redline*" he attached. Mr Sass's failure to mention the new software belies any suggestion that MetLife had requested it or the functionality it provided.

(6) The reality, to my mind, and I find, was that DiscoverEngine, though intended to be a promotional offer to others for free, was added in this case as if it justified a considerable fee as the available means of satisfying what Mr Egan had described as the need to *"figure out how to [add] something".*

(7) MetLife itself barely noticed the addition. The Claimants drew my attention to an email dated 1 September 2011 from MetLife to Ms Beth Ladd at Autonomy expressing interest in *"the strategy for SharePoint and capturing data that is traditionally maintained in an application or structured environment as opposed to just documents and emails"*, suggesting (so they contended) that MetLife was not even aware that it had purchased a SharePoint connector as part of that agreement.

3713. Even though it is worth remembering that (as I have determined in the chapter of this judgment dealing with "VARs") Autonomy had purchased DiscoverEngine to put DiscoverTech in funds, I am prepared to accept in this context Dr Lynch's evidence that DiscoverEngine was superior to Autonomy's own product and did offer real benefits to MetLife; and that this was in turn of benefit to Autonomy. I accept also that it was in Autonomy's interests to improve its relationship with MetLife, address its complaints (which especially concerned cumbersome processes and service deficiencies), and pave the way for more business (including building an IDOL Index on its entire safe with 120 TB data requirements). This is apparent from the notes of a QBR (Quarterly Business Review) meeting between Autonomy and MetLife at operational level in May 2011. There were commercial considerations which also supported the transaction.

3714. But that was not the rationale of its addition of DiscoverEngine or more generally of the sale of a new licence. I accept the Claimants' contention that the operative reason for

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[465] Emphasis added.
[466] A previous draft of the agreement that was sent to MetLife did not include DiscoverEngine.

the late addition of DiscoverEngine, reminiscently of the late addition of IDOL dense cells in the Deutsche Bank deal, was to support the misleading impression that MetLife was getting something for its $5.5 million which could be seen to be separate and apart from the benefit of reduced storage charges.

3715. Reverting to the transaction itself, the negotiations around the upfront licence fee for Autonomy and the overall savings for MetLife continued. After some last minute re-negotiation which resulted in a reduction in the licence fee to $5.5 million, coupled with reduced storage rates, which created an additional saving to MetLife of over $1 million, on 29 June 2011, Mr Sass informed Mr Hussain that the deal with MetLife should complete that quarter, which it did. The following day, 30 June 2011, Mr Sass told Mr Hussain "*MetLife ($5.5M) IN*". Mr Hussain's response again reveals Autonomy's true motivation for entering into the transaction: "*Any possibility of recognising $5.8m?*". First and last, that was, in my view, Autonomy's and the Defendants' real focus.

Relevance of Deloitte's review and approval?

3716. In this context, as in all others where an accounting treatment was questioned, the Defendants sought to draw support from the approval of Deloitte. But in this context, as in all others, Deloitte saw only what was presented to them. Whether those involved in Deloitte should have adopted and pursued a more sceptical approach is not for me to determine: Deloitte's conduct is not on trial, and they are not parties. What is relevant for present purposes is whether their approval was given on a basis which reflected reality.

3717. The basis of their decision is evident from their internal working papers detailing their approach to the accounting treatment of the Q2 2011 MetLife restructuring. In particular:

(1) Although the overall description of the deal is stated as involving *"an extension of term, a renegotiation of fees for both storage and go-forward maintenance, and the addition of the 'DiscoverEngine' connector for Digital Safe"* that is the only mention of DiscoverEngine in the assessment;

(2) The key terms are described as follows: –

> *"The licence term is extended out to 30/09/16*
>
> *Monthly storage fee reduced to $0.00048888 per MB per month for remainder of terms (reduced from $0.001313) -62.8%*
>
> *Annual S&M fee reduced to $275,000 for remainder of term (reduced from $351,250)"*

(3) Immediately after that, Deloitte recorded:

> *"we note that such deals are reasonably common with large customers – as the cost of storage for Autonomy falls, large customers are able to renegotiate their storage fees lower in exchange for a non-refundable upfront licence payment…*

> *We have reviewed the original agreement and the amendment and noted no terms that would restrict the upfront recognition of revenue. As such recognition of revenue upfront is deemed appropriate."*

(4) Having reviewed the maintenance element, and Autonomy's management assessment concluding that it complied with the VSOE, Deloitte concurred that the established rates were reasonable.

(5) After noting that MetLife were one of the largest listed insurers in the US so that collectability should not be an issue, in formally approving revenue recognition, Deloitte recorded that:

> *"(a) The risks and rewards of ownership passed to the customer when the items were delivered. As all of Autonomy's obligations have been fulfilled the risks and rewards have been transferred.*
>
> (1) *Autonomy has not retained any managerial control.*
>
> (2) *The revenue can be measured effectively as it is stated on both invoice and in the contract*
>
> (3) *it is probable that economic benefits will flow to autonomy*
>
> (4) *there are no costs incurred in this transaction."*

3718. There was no consideration given to what any broader objectives of the transaction might be; there was no focus or sceptical review of the by now fairly evident pattern of transactions of many varieties late in the quarter which as a fact bolstered revenue otherwise than by what might be termed plain vanilla sales.

3719. I do not see any sufficient reason not to accept:

(1) Mr Welham's evidence that, had Deloitte known that DiscoverEngine had not been requested by MetLife, and was included in the deal to give the impression that MetLife was getting something for its $5.5 million licence fee, Deloitte would not have considered it appropriate for Autonomy to have recognised the licence fee as revenue in Q2 2011; and

(2) Mr Bloomer's evidence that, if it were the case that DiscoverEngine had been inserted into the agreement without any suggestion that the customer wanted it, it would have been "*contrary to [his] understanding at the time*" and he would have wanted to understand the "*conflict between*" what Deloitte was told and the true state of affairs.

Defendants' knowledge of impropriety

3720. I have already found that both Defendants knew what was the driving purpose of the transaction. For comprehensiveness I confirm that, in my judgment, they appreciated that all the other claimed benefits were peripheral, even if necessary in presentational terms, and that the transaction would not have been pursued but for the objective of accelerated revenue recognition, which would come at a substantial net cost and loss.

3721. In my judgment, the decision made was not one simply of commercial judgement in which the Court should not usually intervene. Its driver was a transaction based on a contrivance. That infected the decision and rendered it, to their knowledge (since they were aware of the contrivance), improper.

Overall conclusion

3722. In my judgment, the Claimants' allegation that the Q2 2011 MetLife restructuring was commercially unjustified and a breach of duty and improper use of power has been established.

3723. I shall consider later what loss was thereby caused.

OTHER TRANSACTIONS

3724. The Claimants sought to impugn a sixth (and final) category of transactions, described in both the RRAPoC Schedule 7 ("Schedule 7") and in its closing submissions as *"Other Transactions"*[467]. This amorphous collection related to another set or sets of transactions that allegedly had, and were designed to have, the effect of enabling Autonomy to recognise or accelerate the recognition of revenue for the purpose of achieving revenue forecasts in a given quarter.

3725. The four individual sets of transactions which were the subject of Schedule 7 are:

(1) A series of agreements with Tottenham Hotspur plc ("Tottenham Hotspur"): (a) a software licence agreement between ASL and Tottenham Hotspur pursuant to a purchase order dated 30 June 2010 ("the 2010 Tottenham Sale") but not actually signed until 5 July 2010, (b) a Shirt Sponsorship Agreement dated 5 July 2010 ("the 2010 Tottenham Purchase") between the same parties and also Tottenham Hotspur Football & Athletic Co Limited (together with Tottenham Hotspur "the Club") under which Autonomy committed to pay shirt sponsorship fees of an aggregate of £63 million payable over five seasons, and also a MAF calculated as 30% of "Total Net Qualifying Revenues" being revenues from customers referred by the Club to ASL as sponsor; (c) a further agreement between ASL and Tottenham Hotspur dated 31 March 2011 for the sale to Tottenham Hotspur of additional software licences and "managed services"; and (d) an amendment to the Short Sponsorship Agreement also dated 31 March 2011 altering the amounts payable in the subsequent seasons and also changing the definition of "Qualifying Revenues" with the effect of a further MAF being payable to the Club;

(2) An amendment dated 10 December 2010 ("the Prisa First Amendment") to a software licence agreement dated 31 March 2010 between ASL and a Spanish company in the Prisa group called Ediciones El Pais SL ("EEP"), (Q4 2010);

(3) A Hosting Services and Licence Addendum ("the Hosting Addendum") entered into between Autonomy Inc and Amgen Inc ("Amgen") on 21 December 2010, which was part of a wider project for the provision by Autonomy of hosting and related e-Discovery services (Q4 2010); and

(4) An agreement dated 3 June 2011 under which Autonomy Inc sold Iron Mountain Information Management Inc ("Iron Mountain") a perpetual licence and associated maintenance and support services, which was concluded on the same day that Autonomy Inc acquired the Iron Mountain digital business from Iron Mountain Inc (Q2 2011).

3726. The Claimants did not, apparently *"due to time constraints",* cross-examine Dr Lynch in relation to any of these four transactions. Therefore, the Claimants accepted that they cannot allege that Dr Lynch had knowledge of their false accounting.

3727. However, they submitted that the Other Transactions remain relevant given that:

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[467] Each described in Schedule 7 of the RRAPoC.

(1) the Claimants maintained that there was false accounting in relation to each of the transactions and they continued to allege that Mr Hussain knew of that false accounting; and

(2) if (as the Claimants alleged) there was false reporting in relation to the Other Transactions, they fell to be taken into account when assessing loss.

3728. The Claimants addressed the Other Transactions at considerable length in their written opening, and again in their closing submissions. They impugned the Other Transactions on various grounds, including the apparent linkage between ASL's sales to and purchases from Tottenham Hotspur, and the alleged failure in the case of all the transactions to satisfy the revenue recognition criteria in IAS 18.14. However, the focus of this aspect of the Claimants' case as regards the first three transactions (Tottenham Hotspur, Prisa and Amgen) was their allegation that the sale of licences in each case involved (as a substantial part of the overall sale) the provision of services after the sale to initiate and enable the use of the software supplied.

3729. The Claimants' case in respect of those three transactions is that what was sold was not simply a piece of software purchased together with separately charged additional services, but a composite 'solution' of which the provision of services was an integral part[468]. Since nothing of immediate value was transferred until the integral services were provided, it was wrong to recognise revenue at the point of sale (as Autonomy had done) and revenue recognition was required to be deferred until the delivery of a fully functioning product had been concluded, or at least until some subsequent stage in the installation of the software for the customer had occurred enabling its use as a working solution.

3730. The Claimants' case in respect of the fourth 'other' transaction (Iron Mountain) was of a different nature. It raised a separate and different issue about whether the revenue from an IDOL licence sold to Iron Mountain after its acquisition by Autonomy was booked at fair value; and in particular, whether there was any proper basis for Autonomy having increased the revenue recognised in respect of a software licence sold to Iron Mountain in Q2 2011 by way of what purported to be a 'fair value adjustment' of $5.5 million.

3731. The Claimants also contended that in the case of all four Other Transactions, the true position in respect of the relevant transaction was concealed from Deloitte.

3732. The Defendants rejected all these claims. Dr Lynch, in addition to the point agreed that having not been examined, it could not be suggested that he had dishonest knowledge of false accounting, dealt with the claims in relation to Other Transactions inside three pages. He dismissed each, at least as against him, as never having made any sense at all, and more generally, as based on *"nuanced matters of detailed accounting, and accounting judgement"* in respect of which Autonomy had taken, and Deloitte had approved, a perfectly permissible view.

3733. Mr Hussain's closing submissions dealt with the Other Transactions in more detail than in his opening submissions; but he too sought to dismiss the claims as turning on matters

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[468] "Solution" is not a term of art, nor even a well-defined accountancy or business term. It was used by the Claimants to connote an agreement for the provision of both software (in this case invariably under licence) and implementation services where the provision of both is, as a matter of substance, so intertwined that it would be unrealistic and inappropriate to recognise separately the two elements of the sale.

of nuance and accountancy judgement, maintaining that the approach taken by Autonomy when accounting for them had been entirely legitimate, and Deloitte had concurred with it.

3734. The competing accounting views were argued out by the parties' respective experts. Each adopted the approach typical of his report. Mr Holgate relied on a series of assumptions of fact ("the Assumptions") given to him in his instructions. The Defendants criticised the Assumptions as framed in a way which funnelled him to a conclusion favourable to the Claimants. As noted in all other contexts in which he provided his expert opinion, Mr Holgate did not see, or call for, the relevant contracts. Nor did he consider Deloitte's working papers or any of the work Deloitte had undertaken in reaching their views about the accounting for these transactions. Mr Holgate agreed (as did Mr MacGregor) that in the real world an accountant would have had to be familiar with the contractual terms and all other available evidence about each individual transaction and reach a decision on revenue recognition case by case.

3735. On the basis of the Assumptions he was instructed to make, Mr Holgate's conclusions in respect of the first three transactions, put summarily, were that (a) Autonomy was in each case providing not simply a piece of software but also services as an integral part of the whole 'solution' sold, so that (b) revenue from the whole 'solution' could not be recognised unless and until it had been provided in full and (c) on the basis of the second of the Assumptions (in respect of Tottenham Hotspur and Prisa), as there was no clear statement of work for the project, nor were the deliverables or acceptance criteria defined, it was not possible to measure the costs reliably, as was required by IAS 18.20 before revenue from services could be recognised.

3736. Mr MacGregor's report was more open-textured. He concurred with the applicable tests but took a different view of the shape of the overall transaction in each case. In his first report, he identified as the main claim, and thus the main area of disagreement, in respect of the first three transactions as being whether the economic substance of the transactions was the provision of a "solution" to which the provision of services was integral, or (in the words of his report) "*whether or not the transaction could be split into separately identifiable components by reference to IAS 18.13, and whether the costs to complete the project or the outcome of the transaction could be estimated reliably by reference to IAS 18.26.*"

3737. With reference to the relevant agreements, and to Autonomy's general policy as set out in Autonomy's Consolidated Financial Statements for revenue associated with professional services, Mr MacGregor concluded that it was a legitimate approach, and in line with that general policy, to regard each of the first three transactions as comprised of separate components in accordance with IAS 18.13, and the costs of completing the project or the outcome of the project as susceptible to reliable estimation by reference to IAS 18.26.

3738. Although they reached different conclusions, Mr Holgate agreed in cross-examination that:

(1) the essential question for these deals was whether the sales in question were to be regarded as a sale of a licence or an agreement to provide a solution;

(2) that is a matter of judgement to be determined on the basis of the facts known to the accountant;

(3) it is possible for one agreement to include a licence and other services as long as they are separately identifiable;

(4) the question whether the costs of any service element can be measured is a matter of accounting judgement to be assessed against the factual evidence available at the time.

3739. A brief factual analysis of the first three transactions is necessary to understand the application of these questions to the facts.

Tottenham Hotspur: the two sets of transactions

First set: Q2 2010

3740. The transaction with Tottenham Hotspur was one of the "*big deals*" of Q2 2010, as described by Mr Hussain in the revenue summary spreadsheet he provided to Dr Lynch on 30 June 2010.

3741. Autonomy's sale of a software licence to Tottenham Hotspur ("the 2010 Tottenham Sale") was established pursuant to a purchase order dated 30 June 2010 ("the 2010 Tottenham Purchase Order"). The licence fee under the 2010 Tottenham Sale was a total of £3.9 million plus VAT, and professional services were contracted to be provided in order to provide Tottenham Hotspur with "*a fully implemented system*" with a view to the football club becoming "*the most technically advanced club amongst its peers*". The 2010 Purchase Order was signed by Mr Kanter on behalf of ASL following its approval by Mr Hussain.

3742. Although the 2010 Tottenham Purchase Order was dated 30 June 2010, i.e. right at the end of Q2 2010, the contemporaneous documents show that the 2010 Purchase Order was backdated; it was not signed by the parties until 5 July 2010. Given it appears that Mr Hussain gave his approval for the 2010 Purchase Order on 1 July 2010 (the final draft only having been produced that day), he must have been aware that it was going to be executed after the quarter end, even though it was dated 30 June 2010.

3743. The Shirt Sponsorship Agreement was established at the same time as the 2010 Tottenham Sale following discussions between Dr Lynch and Mr Daniel Levy (the Chairman of Tottenham Hotspur). The Shirt Sponsorship Agreement between ASL and Autonomy and Tottenham Hotspur was correctly dated 5 July 2010. The Shirt Sponsorship Agreement, which was signed by Mr Hussain on behalf of each of ASL and Autonomy, was for five seasons with fees totalling £63 million. The sponsorship fee payable to Tottenham Hotspur for the first season (2010/11) was £9 million, which rose to £12 million for the 2011/12 season (save that the fee would be reduced to £9 million if Tottenham Hotspur failed to generate 'Qualifying Revenues' of £4 million). Qualifying Revenues were revenues from sales by Autonomy to third party customers introduced by Tottenham Hotspur, with Tottenham Hotspur being entitled to a marketing assistance fee (MAF) equal to 30% of the Qualifying Revenues.

3744. The following points are to be noted in relation to this first Tottenham transaction:

(1) The 2010 Tottenham Purchase Order and Sale and the Shirt Sponsorship Agreement were negotiated alongside each other and (though dated differently) were entered into at or around the same time. The 2010 Purchase Order recorded – in language expressly approved by Mr Hussain – that there would be no annual

support fee payable by Tottenham Hotspur provided that it continued "*to maintain a strategic relationship with Autonomy*", which was plainly a reference to the Shirt Sponsorship Agreement.

(2) It was recited in the 2010 Tottenham Purchase Order, at the request of Mr Levy that the goal be identified, that the licence was intended *"to enable a system to provide the following functions at the level found in a Premiership football club's ordinary operations: CRM, ticketing, player analysis, retail, internet and web design. It is the goal of the parties for Licensee to represent the most technically advanced club amongst its peers".* The Claimants submitted that thereby Tottenham Hotspur contracted to receive a 'solution' to which the provision of services was integral: it required a bespoke solution to its website needs, a project involving not just the provision of software and support, but also services to conclude the delivery of a fully functioning website that would meet Tottenham Hotspur's requirements. They added that the software purchased under the 2010 Tottenham Sale was not of any use to Tottenham Hotspur until that solution had been delivered. The only witness who gave evidence in relation to the deal was Alastair Martin, but he accepted that he was not involved in its negotiation and, thus, had no knowledge of the discussions that had taken place between the parties prior to them entering into the 2010 Purchase Order.

(3) The 2010 Purchase Order provided no defined scope of work for the project; it did not define the deliverables or key milestones against which delivery could be measured, nor did it contain any defined acceptance criteria.

(4) The documents show that the project stalled and delays resulted, as Mr Martin accepted. As at 18 October 2010, nothing had happened on the project. At the end of October 2010, the parties had another "*Project Kick Off*" meeting, at which a further presentation was given by Autonomy, from which the embryonic nature of the project is clear: see, for example, the "*Work package summary*", including the "*Solution design*" workstream. Matters continued to stall thereafter and no professional services were provided following that meeting. Thus;

(a) By late April 2011, i.e., more than six months later, the solution design had still not been agreed between Autonomy and Tottenham Hotspur.

(b) Indeed, as late as early June 2011, Mr Martin raised with Dr Lynch and Mr Kanter the fact that Tottenham Hotspur was "*not overly happy with our responsiveness and attention*" to their website "*refresh project*", due to Autonomy's failure to apply adequate resources to it. Mr Martin acknowledged that the "*project is still in the design phases*". Dr Lynch replied on 6 June 2011 that the account was "*another one for a remedial plan*" and should be fixed, and asked that Mr Martin report back in a week.

The second transaction

3745. On 31 March 2011, ASL entered into a further agreement with Tottenham Hotspur to provide additional software licences and "*managed services*" for a period of three years. The agreement was recorded in a purchase order dated 31 March 2011, which was signed by Mr Kanter on behalf of ASL ("the 2011 Tottenham Purchase Order"). The licence fee was £4 million (plus VAT), with a 5% support fee for the first year (£200,000 plus VAT). On the same date, the Shirt Sponsorship Agreement was also amended, (i) increasing the sponsorship fee payable for the 2011/12 season from £9 million to £11 million, and (ii) altering the definition of 'Qualifying Revenues' so as to include licence revenues paid not just by third party customers, but also by Tottenham Hotspur to ASL, such that the £3.9 million payable under the 2010 Purchase Order and the £4 million due under the 2011 Purchase Order qualified ("the Amendment Agreement"). Mr Hussain signed the Amendment Agreement on behalf of ASL and Autonomy.

3746. A number of points should be noted in relation to this set of transactions:

(1) The 2011 Purchase Order and the Amendment Agreement were plainly linked transactions: they were negotiated together and the parties operated on the basis that the two agreements would "*complete*" at the same time.

(2) Indeed, it is notable that the 2011 Purchase Order and the Amendment Agreement were broadly for the same value: £4.2 million was payable by Tottenham Hotspur under the former; with £4.37 million payable to it under the latter, being the total of (i) the £2 million increase in the sponsorship fee for the 2011/12 season, and (ii) a MAF of £2.37 million, resulting from the combined total of £7.9 million payable under the 2010 Purchase Order and the 2011 Purchase Order now constituting 'Qualifying Revenues' (the MAF amounting to 30% thereof).

(3) The 2011 Purchase Order did not deliver any significant incremental value to Tottenham Hotspur. It stated that the licensed software was for use in relation to Tottenham Hotspur's web services and social media, indicating that it formed part of the overall project to provide the club with its website requirements under the 2010 Purchase Order. In other words, this sale formed part of the wider commitment by ASL to deliver to Tottenham Hotspur a functioning website. Thus, the software licensed under the 2011 Purchase Order was of no use to Tottenham Hotspur until the solution contemplated by the 2010 Purchase Order had been delivered.

(4) Again, as with the 2010 Purchase Order, the 2011 Purchase Order contained no defined statement of work for the project, key delivery milestones, defined deliverables, or defined acceptance criteria.

3747. Autonomy accounted for the Autonomy licence sale side of the first two transactions as follows:

(1) Licence revenue of £3.9 million less £30,000 under the 2010 Purchase Order was recognised immediately by Autonomy on 30 June 2010, that £30,000 representing a total of 6 months' services at £5,000 per month which Autonomy

carved out of the upfront licence fee as the value of future services to be provided over time[469];

(2) Licence revenue of £4 million under the 2011 Purchase Order was recognised immediately by Autonomy on 31 March 2011.

3748. As I explain below, the focus of the submissions on all sides was on the first set of transactions, which Deloitte considered were not reciprocal and so the 2010 sale and the 2010 purchase should be accounted for separately. I did not understand that to be challenged. In particular my focus is on Autonomy's accounting treatment of the 2010 sale, in which Deloitte concurred, as comprising separately identifiable components. The Claimants submitted that this accounting was wrong.

3749. Addressing the fundamental question and applying the criteria agreed between the experts as adumbrated in paragraph 3738 above, what is to be determined is whether the sales were of a licence, with separate arrangements at a separate price for servicing, or whether in reality the agreement should be characterised as providing for the sale of a 'solution'.

3750. There is no dispute of principle between the experts on this point. The issue that requires resolution is one of fact, not accounting principle, and turns on whether the substance of the deliverable to be provided to Tottenham Hotspur was a working solution.

3751. The Claimants submitted that plainly, it was. The terms of the 2010 Tottenham Purchase Order itself, which provided that the software licences that were the subject of the contract were "*intended to enable a system to provide the following functions at the level found in a Premiership football club's ordinary operations: CRM, ticketing, player analysis, retail, internet and web design*" (see paragraph 3744(2) above) reflected that Tottenham Hotspur were contracting to receive "*a fully implemented system*". According to the Claimants' characterisation:

(1) The objective that Tottenham Hotspur sought to achieve by entering into the 2010 Tottenham Purchase Order is plain on its face: they wanted a "*system*" which would provide the various specified "*functions at the level found in a Premiership football club's ordinary operations*", but the detail of what that involved was left to be discussed and agreed between the parties subsequently;

(2) The software licences the subject of the 2010 Tottenham Purchase Order were of no use to Tottenham Hotspur in and of themselves: they required Autonomy to provide the professional services in order to put in place the yet to be defined "*fully implemented system*" and the 2010 Tottenham Purchase Order simply included an exhaustive list of the software "*required in relation to management of a typical peer website*".

3752. Accordingly, the Claimants' case is that the substance of the deliverable to be provided to Tottenham Hotspur was a working solution (i.e. "*a fully implemented system*"), not simply a piece of software, and the provision of services was integral to that solution. Thus, nothing of immediate value was transferred to Tottenham Hotspur at the time of entry into the 2010 Purchase Order and, therefore, no revenue should have been

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[469] Deloitte's working papers show that Deloitte considered that the carve-out should have been $90,000 but that no adjustment was proposed because the difference was *"clearly trivial"*

recognised by Autonomy in relation to the 2010 Purchase Order at 30 June 2010. It was not suggested to Mr Holgate in cross-examination that his conclusion was wrong if the substance of the deliverable was a working solution.

3753. For the Defendants, Mr MacGregor agrees that, if the contract – when assessed from the perspective of the customer – was for the provision of a working solution, then revenue should not have been recognised when it was. He put it as follows:

> *"A. ... Look, at the end of the day, on each of these things, again this is going to come down to a reading of what the contract information says about whether there was a sale of a licence or whether it's not as simple as that and what was being provided was the sale of a licence only in the context of something which was then had to have substantial amounts of work done on it so that it could be operated by the purchaser –*
>
> *Q. Again –*
>
> *A. – in the manner it wanted.*
>
> *...*
>
> *...as I say, it's at paragraph 20, goods and services were integral to the delivery of the project and that that project was for Autonomy to deliver. If that's not the case, then you're going to recognise the revenue upfront. If it is the case, you're not. That is the – I think in many respects there's probably not a disagreement between Mr Holgate and myself. It's more a disagreement as far as the facts are concerned which, as I've said, is not for me to opine on."*

3754. However, subject to that caveat, Mr MacGregor expressed the view in his first written report that:

(1) He had seen nothing on the 2010 Tottenham Purchase Order to suggest that the goods were sold subject to installation, or (whether expressly or implicitly) that payment was subject to the services being provided.

(2) Based on the email confirmation of delivery and the revenue confirmation letter he had seen, he agreed with the view taken by Deloitte that the contemporaneous evidence supported the conclusion that revenue could be recognised from the sale of the licence before the services were delivered.

(3) He agreed with Deloitte that the 2010 Tottenham Sale could fairly be regarded as comprising separately identifiable components of a single sale to which the revenue recognition criteria could properly be applied separately.

Were Deloitte misled?

3755. The Claimants submitted that, as between the experts, the view of Mr Holgate on the characterisation of the 2010 Tottenham Sale as a 'solution' was to be preferred, and that the Defendants' reliance on Deloitte was misplaced because the true position in relation to the Tottenham Hotspur transactions was concealed from Deloitte.

3756. They relied in this respect on Mr Welham's evidence in his witness statement that:

(1) Contrary to the assumptions the Claimants asked him to make, he had not understood that (a) *"the parties understood at the date of the agreement that what was required was the delivery of a solution, namely a fully-functioning and much enhanced website"*, (b) *"delivery of the solution required the provision of significant services, but in the absence of a defined scope of work or key delivery milestones, there was no means reliably to measure the outcome of the transaction or the costs to complete the project"*.

(2) While he could not determine now how precisely the revenue would have been recognised over the lifetime of the contract, had Deloitte appreciated that *"the agreement was intended to deliver a solution"*, then *"it is likely that it would not have been appropriate to recognise software licence revenue at the outset of the transaction."*

3757. They relied also on the fact that Mr Bloomer confirmed in cross-examination that the Audit Committee was not told the full picture. The Audit Committee was informed of the 2011 Tottenham Purchase Order, but not the (linked) Amendment Agreement. He stated that if the two transactions were linked, that would have been an important point for him to consider in relation to revenue recognition. The Audit Committee understood that the deal was the sale of a software licence, rather than the sale of a solution which required the provision of significant but unquantifiable services.

3758. Dr Lynch did not address these further points, but Mr Hussain's written closing submissions did, and the allegation that Deloitte were misled was there described as *"utterly spurious"*. Those submissions emphasised that *"the parties made the contract they made, Deloitte reviewed a copy of it, and came to the view that AU's approach was acceptable."*

My assessment whether Tottenham 2010 Sale should have been accounted for as a 'solution'

3759. I accept and would agree with the view of the experts that the essential question can be characterised as whether the sale should be characterised as a sale of a licence or an agreement to provide a 'solution'.

3760. I do not, however, agree with the Claimants that the factual position was clear and necessarily demanded characterisation of the 2010 Tottenham Sale as a 'solution' and could not be treated as comprised of two elements (the sale of a licence and the provision of services at a price). I do not consider that in reaching their view Deloitte were misled. Deloitte's working papers confirm that Deloitte were well aware of the recital on which the Claimants placed such reliance and the provisions of the contract in relation to the provision of future services. They concluded that the provision of future services was a separate element for which an appropriate deduction could and should be made. In fact they considered to be inadequate the amount that Autonomy carved out of the upfront licence fee and had agreed should be deferred over the period: they would have required a carve-out of $90,000 equalling almost double the amount of £5,000 per month adopted

by Autonomy. However, they concluded the difference to be *"clearly trivial and as such, no adjustment has been proposed."* Mr Welham was simply stating what Deloitte's view might have been on the basis of Assumptions he was required to make. Likewise, Mr Holgate's opinion was the product of Assumptions which did mandate an answer, and he had never considered the contract.

3761. I do not therefore accept the Claimants' conclusion that the 2010 Tottenham Sale was on the face of the 2010 Tottenham Purchase Order and in fact a contract under which the deliverable was a 'solution', namely a fully implemented system for which Autonomy had contracted to provide 200 hours of service, and from which it was wrong to recognise revenue before the implementation process had been completed. It seems to me that it is an available and respectable view that in form and substance the 2010 Tottenham Purchase Order established a contract for a licence and the separate provision of services, with the licence and the services to be paid for separately. It does not seem to me that Tottenham Hotspur's obligation to pay was contingent on either the provision of the services or the outcome of implementation. I do not accept that Deloitte were relevantly misled in this context; and I do not consider the facts clear enough to overturn the contemporaneous judgement call made of the contract and the facts.

The second Tottenham Hotspur transaction

3762. As mentioned briefly above, there was no dispute between the experts that in the case of the second set of purchases and sales, the Tottenham Hotspur 2011 Purchase Order and the Amendment Agreement were linked transactions which needed to be considered together to understand their substance and to determine the appropriate revenue recognition under IAS 18.13. Nor was there any dispute between the experts that looking at the two agreements together, revenue under the 2011 Purchase Order should have been net accounted with the cost of the Amendment Agreement. As Mr MacGregor put it, the *"net effect of [the sale] is nil, when considered with the MAF and additional sponsorship payment that became due as a result of [the Amendment Agreement]"*.

3762A. The second Tottenham Hotspur transaction was largely subsumed in point of analysis into the first by all parties. Noting that the experts had agreed that the 2011 Tottenham Hotspur transaction had been incorrectly accounted for, Mr Hussain did not address the position any further in his written closing submissions, and nor did Mr Casey in his closing speech (although he did address the first of the Tottenham transactions). Mr Hussain's pleaded defence was to the effect that the accounting judgment made at the time was not unreasonable, and had been approved by Deloitte. Mr Welham acknowledged this in his witness statement, but made clear that this was on the basis that *"Autonomy management told us that the new software included in the second deal provided significantly enhanced functionality for Tottenham Hotspur."* Any defence to the claim relating to the second transactions on the part of Mr Hussain amounted to piggy-backing on the defence to the first of the transactions. With some considerable hesitation, I have concluded that though the defence in the context of the 2011 transaction is (at best) stretched, I have not the degree of conviction, even on a balance of probabilities, required to make a finding of "guilty knowledge" and fraud. In any event, I doubt that the single transaction will make any material difference to the computation of damages.

Prisa (Q4 2010)

3763. The second transaction gives rise to broadly the same issues as the Tottenham Hotspur transactions.

3764. On 31 March 2010, ASL entered into an End-User Software Licence Agreement with a Spanish company called Ediciones El Pais SL ("EEP"). EEP was part of the Prisa group of companies, which, at the time ASL entered into the agreement, was "*a global media conglomerate that had four main business units: newspaper and editorial content (El Páis was its largest newspaper); television and satellite (the largest pay TV operation in Spain); an education-based unit (the largest publisher of textbooks in Spanish and Portuguese-speaking markets); and radio (with between 13,000 and 14,000 radio stations globally)*".

3765. Following negotiations involving Mr Hussain, a First Amendment to that Agreement ("the Prisa First Amendment") was entered into on 10 December 2010 between Autonomy Spain SL ("Autonomy SL") and EEP acting for itself and on behalf of its subsidiary company, Prisa Digital SL ("Prisa"). The Prisa First Amendment involved the provision by Autonomy SL of software licences, three years support and maintenance, 2,640 days of professional services and training for use on EEP and Prisa's website, audio, video and other digital products. The Claimants relied on the 2,640 days of services and training as demonstrating the importance of the services aspect of the contract, suggesting that the licensed software was of no use without these services and the two were indivisible.

3766. The agreement provided for fees totalling about €9.6 million (plus VAT), including €6.8 million in respect of software licences. It is clear from an email dated 15 October 2010 from Mr Hussain to Dr Lynch subject *"getting to 236"* that the entry into the Prisa First Amendment was recognised by the Defendants as forming a critical part of Autonomy meeting the market consensus for Q4 2010. The documentary evidence shows that Mr Hussain provided regular updates to Dr Lynch in relation to its progress.

3767. The background to the Prisa First Amendment was described in the Claimants' closing submissions as follows:

(1) At the time it was concluded, Mr Rahul Puri ("Mr Puri") was Managing Director of Innovation and Chief Software Architect at Prisa. Mr Puri joined Prisa in May 2010 with the remit to transform the company's technology, moving it from a traditional analogue media organisation to a digital centric organisation. In his witness statement, Mr Puri elaborated as follows:

> *"To do that, we had to change Prisa's entire technology platform. As part of the exercise, we wanted to build Prisa's online brand and maximize the revenue streams from our website. We therefore needed to implement web content management systems, data management systems and recommendation systems to enable the use of our apps that we also were building. It was a full top-down technology transformation."*

(2) In its pitch in the tender process that took place, Autonomy made clear that it could provide all the technology, tools and services that Prisa needed to transition into a digital media organisation within a three-year transformation process. Autonomy made a number of presentations to Prisa prior to contracting:

(a) The first was in Madrid in August 2010. The presentation given by Autonomy on that occasion recorded Prisa's objectives, and the "*solution*" that Autonomy was able to provide. Mr Puri was challenged during his cross-examination that Prisa "*hadn't defined your objectives and goals*", but this presentation shows that is wrong. As Mr Puri noted, Autonomy's solution, as referenced in the presentation, was "*its organisation bringing their technology, their people to bear to help us realise our strategy and our vision*".

(b) There was a follow up presentation in October 2010, which again reflected the custom built "*solution*" that Autonomy could provide to meet Prisa's objectives.

(3) As a result, Prisa decided to retain Autonomy. It is clear that the ability of Autonomy to tailor its core products to Prisa's needs was the key reason why Prisa elected to contract with Autonomy.

(4) That resulted in the parties entering into the Prisa First Amendment, pursuant to which Prisa purchased the software which was required in order for the digitalization project to be implemented.

(5) However, as Mr Puri explained, (i) successful implementation of the project required Autonomy's software to be tailored in order for the solution sought by Prisa to be delivered, and (ii) Prisa had no use for the software it had purchased beyond the scope of the project, and it could not use any of the software for the project without the involvement and support of Autonomy personnel. As Mr Puri explained in cross-examination:

(a) "*the intent was to have a comprehensive solution. So we could not execute on the technology without executing on the professional services, so they went hand in hand rather than just splitting up into two different components*"; and

(b) as a standalone product, the Autonomy software was of no use to Prisa: "*As a stand-alone we would not have been able to use that software; we required Autonomy's expertise to implement that software*".

(6) It can be seen from the contemporaneous documentation that Prisa made clear to Autonomy that the contract would need to include "*every product and functionality for the project*" as Autonomy understood the requirements at that time.[470] As Mr Puri put it in cross-examination, "*We were looking for an entire solution that we could implement to realise our strategy and vision for Grupo Prisa. ... when we looked at the contract, we looked at it as a full comprehensive*

[470] See also Alvaro Etcheverry of Autonomy's email to Mr Hussain dated 18 August 2010, in which he referred to the fact that "*we had a very successful POC meeting with the some of the top directors of Prisa in Madrid. Not only did we fully cover all their expectations and objectives we also demonstrated the added value of the Autonomy solution*".

solution to meet our objectives and goals as an organisation”.[471] He noted that “*the reason we had Autonomy do the services, they knew their technology best and would be able to provide an integrated solution for us to meet our overall objectives and goals from a strategy and vision perspective*”.

(7) In his witness statement, Mr Avant suggested that “*the license component of the deal was more significant than the services component*” and that “*the agreement was primarily for the purchase of software*”. However, Mr Avant accepted in cross-examination that he was not involved in the negotiation of the deal (which took place before he joined Autonomy), and as he accepted, the statements in his witness statement were based simply upon a review of the agreement after the event. In any event, he is wrong: the agreement was for Autonomy’s software licences and services together because the two elements were indivisible. Similarly, Mr Martin purported to give evidence about the nature of the deal with Prisa, but he was not present at the pre-contract presentations, nor was he involved in negotiating the contract with Prisa.

(8) Although the Prisa First Amendment was entered into on 10 December 2010, no statement of work had been agreed by that time; indeed, it could not be agreed until further discussions about Prisa’s requirements and testing on its systems had taken place. As a result, as is not disputed by Dr Lynch’s witnesses, the scope of the project was not agreed as at 31 December 2010 and work on the project had not begun by that date. Indeed, on 31 December 2010, Dr Lynch and Mr Hussain received a status update which indicated that there was no project plan in place at that time.

(9) In fact, the scope of the project in relation to the flagship phase (Prisa Radio), which required the bulk of Autonomy’s services and software, was not agreed until about a year later, in a statement of work dated 19 December 2011,[472] which was signed by Autonomy on 26 December 2011 and Prisa on 27 December 2011. It outlined a project schedule that indicated the project initiation had started in February 2011 and set a “*target go live date*” for the new website of February 2012. In the event, however, the project was never completed, according to the Claimants because Autonomy could not get its technology to work, and was cancelled.

3768. Thus, as with the Tottenham Hotspur transactions, the Prisa First Amendment did not provide any defined scope of work for the project, nor did it define the deliverables or key milestones against which delivery could be measured, nor did it contain any defined acceptance criteria. The Claimants made the point that this is unsurprising in

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[471] “*The reason we had Autonomy do the services, they knew their technology best and would be able to provide an integrated solution for us to meet our overall objectives and goals from a strategy and vision perspective*”.

[472] In his witness statement, Mr Martin said that the 19 December 2011 statement of work only concerned Prisa Radio, which was one of many projects with Prisa. It is right that statements of work for other parts of the overall project were envisaged and negotiated, but only one other was signed by Prisa. However, that was dated 12 July 2011, so it cannot account for revenue having been recognised by Autonomy on 31 December 2010; indeed, it expressly related to services to be performed between 18 July and 30 September 2011. In any event, due to the problems that arose in relation to the flagship phase (Prisa Radio), all other initiatives were put on hold.

circumstances where the parties recognised at the time of contracting that a statement of work addressing these issues would need to be agreed subsequently.

Appropriate accounting treatment

3769. On 31 December 2010, licence revenue totalling about €6.8 million[473] (out of a total consideration of €9.6 million) was recognised in full in respect of Prisa in Autonomy's accounts.

3770. For the same reasons as in relation to the Tottenham Hotspur transactions, the Claimants submitted that this accounting was wrong. In particular, they contended that:

(1) The substance of the deliverable to be provided to Prisa – when assessed from their perspective, which Mr MacGregor accepted is the correct approach[474] – was a solution, to which the provision of services by Autonomy was integral.

(2) Nothing of immediate value was transferred to Prisa at the time of entry into the Prisa First Amendment (31 December 2010), and therefore, no revenue should have been recognised by Autonomy in relation to the Prisa First Amendment at 31 December 2010.

(3) The deliverable under the Prisa First Amendment was not well defined, and in the absence of an agreed statement of work it was not possible to measure with any reliability important measures such as the stage of completion or costs to complete the transaction as was required in order to recognise revenue from services under IAS 18 §20.[475]

(4) In any event, as at 31 December 2010, no services had been provided to Prisa, and thus no costs had been incurred, so there was no revenue and no costs to account for in the FY 2010 accounts.

3771. In his expert reports, Mr MacGregor asserted that the Prisa First Amendment was not a 'solution'. The Claimants objected that it is unclear how he is able to opine on that issue as he accepted it is a question of fact. They noted that in cross-examination, Mr

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[473] The licence revenue recognised was €6,820,208, being (i) the €6,745,000 licence fee appearing in the Prisa First Amendment, and (ii) a further amount of €75,208 carved out from the "*One Off Fee*" in the Prisa First Amendment (of €243,208) for a one month extension and support.

[474] PwC's guidance stated in this regard as follows: "*The substance will not only be based on the transactions' visible effect; it will also have to be analysed based on all the transactions' contractual terms, or the combination of the contractual terms of linked transactions….in assessing the transactions' substance, the transaction should be viewed from the perspective of the customer and not the seller; that is, what does the customer believe they are purchasing? If the customer views the purchase as one product, then it is likely that the recognition criteria should be applied to the transaction as a whole. Conversely, if the customer perceives there to be a number of elements to the transaction, then the revenue recognition should be applied to each element separately.*"

[475] Indeed, this appears to have been recognised within Autonomy. On 19 May 2011, Mr Lucini sent an email to Mr Hussain in which he stated: "*As I get the facts it becomes clear that we are about to embark on a complicated project without the appropriate measures to actually positively deliver and get acceptance from the customer. what's more I think that in the present conditions we can never succeed as the customers perception and reality of what they are going to receive is simple that…a perception …There is no objective acceptance criteria…we are hoping the client likes it at this point*".

MacGregor accepted that, as with the Tottenham Hotspur transaction, if the transaction is properly characterised as the provision of a solution, the revenue should not have been recognised in full as at 31 December 2010.

3772. However, what I consider Mr MacGregor meant was that the determination of the substance of the transaction depends on the facts and is ultimately a matter of accountancy judgement. In any event, the matters he put forward to explain his conclusion that on the basis of his understanding of the position are of relevance, though the Claimants did not trouble to address them.

3773. In particular, he drew attention to Mr Puri's own description in his witness statement of the scope and nature of the Prisa transactions, as suggesting that the customer perceived it was purchasing the underlying technology and, separately, additionally priced services for the implementation of the software products. The passage read as follows (emphasis as supplied by Mr MacGregor):

> *"[PRISA] entered into an agreement with [Autonomy] involving the purchase by Prisa of certain <u>Autonomy software licences, three year's support and maintenance and 2,640 days of professional services and training</u>, for use on El Pais and Prisa's website, audio, video and other digital products. The agreement provided for fess totalling approximately €9.6m, <u>including €6.8m in respect of software licences. Autonomy was to provide the underlying technology for many of the components required for the project, as well as provide services for the implementation of those products for Prisa.</u>"*

3774. Mr MacGregor also emphasised that the contract itself expressly stipulated a separate and defined rate for the services to be provided, and provided as well for further incremental increases in the service rates after the exhaustion of the contractual number of man day services contractually agreed.

3775. Furthermore, he made the point that the Claimants had *"not explained how they believe the professional services revenue should be accounted for if the components of the transaction were not considered separable, given that these services were invoiced as and when such services were performed, and are therefore (it must be assumed) matched to the cost of the service being performed."*

3776. Mr MacGregor's conclusion was that on the facts as he understood them, as reflected in the above discussion, it was within a range of proper accounting judgement to account for the Prisa transactions as Autonomy had accounted for them; and if his understanding of the facts was wrong, he did not believe that the professional services under the contract should have been accounted for other than in line with the called for provision of those services, leading in effect to the same conclusion that the accounting treatment in fact according to the transactions was probably correct and at least was proper.

Were Deloitte misled?

3777. As in the case of the Tottenham Hotspur transactions, Deloitte's working papers confirm that Deloitte were well aware of the terms of the agreement, and thus of the provisions for a licence fee, a support fee and professional services and managed services thereafter. They were satisfied with the "carve-out rate" of 7% and concluded that the accounting treatment proposed was satisfactory.

3778. As in the context of the Tottenham Hotspur transactions, the Claimants relied on the evidence of Mr Welham in his witness statement that the true position was withheld from Deloitte, in respect of the Prisa First Amendment. But his evidence was premised upon the conclusory assumption he was instructed to make that the *"parties understood at the date of the contract that what was required was the delivery of a solution (to transform Prisa from a traditional media group to a predominantly digital media group…)"* and that there was *"no way to reliably measure the outcome of the transaction or the costs to complete the project".* The assumptions commanded the conclusion sought by the Claimants.

My assessment whether the Prisa Sale should have been accounted for as a 'solution'

3779. Again (as in the context of the Tottenham Hotspur transactions) I accept and would agree with the view of the experts that the essential question can be characterised as whether the sale should be characterised as a sale of a licence or an agreement to provide a 'solution'.

3780. I do not, however, agree with the Claimants that the factual position was clear and necessarily demanded characterisation of the Prisa First Amendment as a 'solution' and could not be treated as comprised of two elements (the sale of a licence and the provision of services at a price).

3781. I accept the points made by Mr MacGregor as described above. I particularly agree with his analysis, as articulated also on behalf of Mr Hussain, that at least in its form, the Prisa First Amendment was, unequivocally, an agreement for the licencing of software and separately for the provision of services. Mr Puri agreed in cross-examination that this was indeed *"the way the contract is structured".* The question then is whether what Mr Puri told me, in a following passage of his cross-examination, that *"the intent was to have a comprehensive solution"* and *"we could not execute on the technology without executing on the professional services, so they went hand in hand rather than just splitting up into two different components"* is sufficient to require a different reading of its effect as a matter of substance.

3782. In my view, it is not. Although in other contexts (especially in the context of the numerous impugned VAR transactions) I have accepted that it is substance rather than form which controls the accounting treatment of transaction, I have also made clear that the contractual form is usually the best guide to intention. The position is no different in this context. The following summary of the effect of the contractual provisions was put forward in the closing submissions on behalf of Mr Hussain, and I adopt it:

(1) It was for Prisa to determine on an as needed basis whether and in what quantity to deploy the (defined) Software (by putting it into operational use for access by its users) during the defined Deployment Period (Clause 4).

(2) Even if Prisa decided not to deploy the Software during the Deployment Period, it was nonetheless liable to pay the annual Support Service Fee (as defined) in full.

(3) At the end of the Deployment Period, it was for Prisa to provide an inventory of its use of the Software during the deployment Period. At that stage, the parties would consider the quantities of licences that Prisa would need in the future.

(4) The licence fee for the Software was payable up front and was non-refundable. The parties could have agreed, but did not agree, that the fee would be staggered or that Prisa's obligation to pay would be contingent upon the deployment/implementation of the Software or upon the Software achieving a particular outcome.

(5) If the parties mutually agreed a statement of works ("SOW"), Prisa would be entitled to call upon Autonomy to provide 2,640 man days professional services at the agreed bulk rate and thereafter at a rate of €900 per day.

3783. Mr Puri did agree that the arrangement was (as it was put to him in cross-examination):

> *"to have the software which gives you the building blocks and to have professional services and for you mutually to agree on the statement of works."*

3784. I also agree that the totality of what the parties agreed and promised each other can be understood from the written agreement itself. Unlike the position as I have found it to be in the case of the impugned VAR transactions, no assurances were given that the contractual agreement would in practice not be enforced. It was not suggested that there was any side understanding. What Prisa apparently hoped might be the benefits of collaboration and their confidence that Autonomy shared and would help it achieve its rather vaguely expressed objectives cannot subvert their stated and agreed understanding. In short, and again adopting Mr Casey's closing submissions on behalf of Mr Hussain:

(1) Prisa's obligation to pay the licence fee and software support services in full was unconditional and the fees were non-refundable. Its liability was not contingent upon its use of the Software for its intended or any other purpose.

(2) At the date of the Prisa Agreement, Prisa had no concrete ideas of what it wanted to do with the Software, other than a generalised aspiration to achieve the digital transformation of its business. Furthermore, the professional services work could only begin once the SOW had been mutually agreed with Autonomy.

(3) At its highest, Autonomy had agreed that Prisa could call upon it to provide professional services (subject to the terms of the agreement) but it had not agreed to perform any specific services (that being a matter for consensus in the SOW) nor had it agreed that it would achieve any specific outcome or result. It is common in business for contractors to be paid in phased stages of time or on the achievement of performance milestones. Autonomy and Prisa could have agreed that the licence fee would be paid in either of these ways, but did not do so.

(4) Thus, Prisa assumed the risks, among others, that on analysis the project would be far smaller in scale than anticipated in December 2010; that in the event it would choose not to pursue the project at all; that the SOW that it wanted could not be agreed with Autonomy in full; and that some or even the majority of the Software would prove to be superfluous to the project once Prisa properly defined it. Even if these circumstances materialised, Prisa had no right to, or expectation of, a refund of any part of the Software licence fee.

(5) In short, there is no warrant for the suggestion that the economic substance of the Prisa First Amendment was any different to its form.

3785. In all the circumstances, I do not accept that Deloitte were relevantly misled in this context; and I do not consider the facts clear enough to overturn the contemporaneous judgement call made of the contract and the facts they made.

Amgen (Q4 2010)

3786. Autonomy Inc entered into a Hosting Services and License Addendum (the "Hosting Addendum") with Amgen Inc ("Amgen") on 21 December 2010. This enabled Amgen to archive and access electronic communications in a hosted online electronic communications archiving and management system. It formed part of a wider project for the provision by Autonomy of hosting and related e-Discovery services, in relation to which there had been three prior agreements. The software and services to be provided under the Hosting Addendum related to Digital Safe technology[476].

3787. The Claimants made three points in respect of the Hosting Addendum in support of their case of improper accounting.

3788. First, they submitted that what, in substance, Amgen purchased was a 'solution', namely the "*Digital Safe System*". This comprised: (i) Digital Safe and related software (namely, DS Mail and Anywhere Archive), which was to be "*hosted and used for archiving*"; and (ii) hardware. The Digital Safe System was to be implemented for the provision of "*Hosted Services*", which consisted of "*DS Mail and Digital Safe Archiving services, which are a hosted online electronic communications archiving and management solution that enables [Amgen] to archive its electronic communications and enables Users to access such communications*". The services also included the purchase of a "*Dedicated Digital Safe*", which meant that all required servers (i.e. hardware) and software components were isolated for exclusive use by Amgen.

3789. Secondly, the Claimants invited me to note that the fees charged to Amgen by Autonomy, which were in two categories, were for a license and services (including infrastructure) which were not separately identifiable components of the overall 'solution' but rather were an integral part of the provision of the Digital Safe hosting services that Amgen had purchased. The Service fees of $11,382,076 which were charged comprised (i) an *"Infrastructure and Support Fee"* of $6,379,363 and (ii) an *"Archiving Fee"* of $5,002,713 (for volumes of data to be *"ingested into the Digital Safe"*). The Claimants submitted that these elements, along with the license to Anywhere Archive Software, were an integral part of the hosting product and neither was a separately identifiable component of the overall solution.

3790. Thirdly, the Claimants submitted that the licence element was artificially structured into the Hosting Addendum so that Autonomy could recognise as much revenue upfront as possible. It will be recalled (and see my consideration of the "Hosting claim") that such was the complexity of Digital Safe that generally (as here) it was provided as part of a hosted arrangement, whereby the Digital Safe system (on which the customer's data was stored) was: (i) located in Autonomy's data centres; and (ii) run by Autonomy on the customer's behalf. Part of the Claimants' complaint relating to the Amgen Hosting

[476] By way of brief reminder, Digital Safe was an archiving solution that allowed customers to store, search and retrieve their data.

Addendum was that it provided for the restructuring of Amgen's hosting arrangements so that as the *quid pro quo* of greatly reduced hosting fees in the future, Amgen would pay a licence fee for an "Anywhere Archive" software licence entitling it (it was said merely notionally) to bring Digital Safe in-house.

3791. The Claimants' case impugning the Hosting Addendum appears to have two aspects.

3792. One aspect of the Claimants' case, which may not be advanced separately from the second (see below), is the Claimants' contention that the restructuring and the "Anywhere Archive" licence comprised a device. The burden of the complaint in this respect was it is clear that Amgen did not desire an "Anywhere Archive" software licence: it had no commercial effect in practice since as a practical matter, moving in-house was not feasible, Amgen had no wish to attempt it, and the services provided to Amgen were wholly unaffected by the sale of the licence. The purpose of the "Anywhere Archive" licence, it was said, was simply to enable Autonomy to accelerate and recognise revenue from its sale. This part of the Claimants' case reflects or expounds the same arguments as its "Hosting Case", though the Claimants had by trial limited their Schedule 12D "Hosting Case" (asserting direct claims for transactional losses for breaches of duty) to re-restructurings of existing hosting arrangements. However, although not confirmed by the Claimants in their submissions, my understanding of their case as pleaded in their RRAPoC, is that the alleged artificiality of the licence is not separately relied on to establish the claim. The claim as pleaded is that no revenue should have been recognised, not because of any alleged artificiality, but because the 'solution' had not yet been provided. The pleading was:

> *"The Digital Safe system had not been successfully implemented as at 31 December 2010 or by the end of the Relevant Period (30 June 2011), and no hosting services had been provided to Amgen prior to this date. Accordingly, no revenue should have been recognised in relation to this transaction at 30 June 2011."*

3793. In the circumstances, I have assumed that the Hosting Addendum was not intended to be an unexplained and unpleaded extension of the Claimants' Hosting Case; and in accordance with the pleadings, I take it that the claim must stand or fall according to the second part of it.[477]

3794. The second, and on the basis of that approach the gist, of the Claimants' case impugning the Hosting Addendum is that the Claimants' contention that the licence to "Anywhere Archive" software was not a separately identifiable component of the overall arrangement (under IAS 18 §13) and that the artificiality of the licence serves to underline that the intention and understanding of Autonomy and Amgen was that both the Digital Safe System and Amgen's data would be hosted, and all associated services would be performed, by Autonomy at its data centres. That was the substance of the transaction. Nothing was transferred to Amgen that was of independent value as the Anywhere Archive software could not be used separately from the Digital Safe System,

[477] That is so even though I note that in Mr Hussain's written closing submissions it was accepted that the first part would *"clearly follow"* the outcome of the "Hosting Case" and (as will be seen) the Claimants' expert dealt with what I shall call the 'artificiality point' substantively.

which itself could not be used independently of Autonomy's support services. As events transpired, the purchased Digital Safe System was not implemented by the conclusion of the Relevant Period. The Hosting Addendum contained agreed milestones for the completion of the project with an expected completion date of 30 June 2011. This expected completion date was not met and formed part of a complaint by Amgen against Autonomy on 5 November 2012. In short, until all the constituent elements of the 'solution' were provided no revenue should have been recognised.

How Hosting Addendum (a) was and (b) should have been accounted for on pleaded case

3795. Before the agreement of the Hosting Addendum on 21 December 2010, there was internal discussion within Autonomy about the amount of revenue that could be recognised. On 10 December 2010, in an email from Mr Mooney to Mr Chamberlain, copying in Mr Hussain, the view was expressed that Autonomy would be able to recognise the licence element (of $3.5 million) and the first two years of fees. When the deal eventually closed, Mr Mooney sent Mr Hussain an email stating "*Should be able to recognize very close to what's been committed. ($7.4M)*".

3796. Ultimately, Autonomy recognised revenue for Q4 2010 of: (i) $3.5 million in respect of the "Anywhere Archive" licence on 29 December 2010; and (ii) $2,201,745 in respect of accrued infrastructure fees on 31 December 2010.[478]

3797. The Claimants' case is that this was improper: by reference to all these considerations, no revenue should have been recognised in relation to the Hosting Addendum when it was or indeed at any time before the end of the Relevant Period (30 June 2011).

(1) Nothing was transferred to Amgen that was of independent value as the Anywhere Archive software could not be used separately from the Digital Safe System, which itself could not be used independently of Autonomy's support services. Thus, the software licence should not have been accounted for separately from the overall Digital Safe hosting arrangement.

(2) In the case of the infrastructure fees, again, the lack of separability of the infrastructure element from the overall Digital Safe hosting arrangement (see above) meant that it was not appropriate to account for it separately.

(3) Accordingly, in both cases, the revenue recognition criteria should have been applied to the transaction as a whole in accordance with its overall substance, namely the provision of a service over time. Revenue should, therefore, have been recognised over the period that any hosting services were actually provided, in accordance with the recognition criteria for the provision of services under IAS 18 §20. These include the requirement that "*the stage of completion of the transaction at the end of the reporting period can be measured reliably*".

(4) The Digital Safe System was not implemented, and the provision of hosting services did not commence, by the end of the Relevant Period, as explained above. Therefore, no infrastructure or licence revenue should have been recognised (even rateably) at all. Indeed, it was inherently unlikely that the Digital Safe project would even have commenced, let alone completed, at the

[478] Mr Hussain was involved in discussions about the appropriate accounting treatment of this transaction.

time revenue was recognised within just 10 days of the Hosting Addendum being signed.[479] It was, therefore, inappropriate to recognise any revenue by the end of Q4 2010.[480]

3798. Mr MacGregor cautioned that the evidential record was sparse. But on the available evidence, and especially having regard to the terms and provisions of the Hosting Addendum, (which Mr Holgate had not read) he took a different view from Mr Holgate. In particular:

(1) He did not agree that it was necessarily the case that the "infrastructure" and support fees could not be separately identified. He did not accept Mr Holgate's conclusion, based on the Assumptions he was told to make, that the "infrastructure" could not be regarded as in any way independent or operate independently from the Digital Safe services.

(2) Whilst accepting that it would not have been possible for Autonomy to provide the archiving services prior to Amgen putting any data into the Digital Safe, it appeared to him, based on his review of Deloitte's working papers (which Mr Holgate did not consider) that it was possible for Autonomy to set up the systems and infrastructure to hold such data at the outset of the contract. Also, it made sense to him that, if (as appeared) Autonomy was designating servers for Autonomy's use of a term of five years, Autonomy should be entitled to charge Amgen for these dedicated servers from the beginning of the contractual use term (of five years) regardless of whether Amgen made use of the servers or not.

(3) Further, in the absence of any evidence from Amgen as to its expectation and intentions, those could only be ascertained from the contractual documentation. The Hosting Addendum itself undoubtedly treated them separately, and provided for payment in any event on or before 12 February 2011. Mr MacGregor made the point that if, as suggested by Mr Holgate, the licence was in substance part of the provision of an overall service and was considered to be so, it was open to Amgen, and he would have expected it, to have protected its interests by specifying that it would only be obliged to pay once the services had been provided, or would be entitled to a refund if in the event they were not. As it was, Autonomy contracted for and received payment from Amgen of the licence fee and the infrastructure and support fee on 11 February 2011.

(4) Generally, he concluded that there was *"insufficient information to impugn the accounting treatment as recorded by Autonomy and detailed on Deloitte's files."*

Were Deloitte misled?

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[479] The milestones for the project envisaged a draft of the project plan being produced at a later point in time, namely 10 January 2011. Thus, revenue was recognised before the project had been planned, let alone implemented.

[480] Mr Holgate also expressed the view that, even if the criteria for sale of goods applied to the transaction (which they do not), the fact that the Digital Safe System had not been implemented shows that criteria (a) and (b) of IAS §14 had not been met.

3799. The Claimants contended that had Deloitte been aware of the true facts in relation to the Amgen transaction, it would not have considered it appropriate to recognise revenue up-front.

3800. As to this, according to the Claimants:

(1) The Deloitte report for Q4 2010 shows that Deloitte considered the transaction based on a false understanding. It stated that the deal "*had been structured to split the licence fee into a licence fee payable upfront and an infrastructure fee payable over the term of the licence*" and that "*Both elements have been recognised in revenue as there are no further obligations on Autonomy's part now that the software has been delivered*". However, as shown above, in substance the transaction was for the delivery of a solution and that solution was, in fact, not delivered at all during the Relevant Period. Autonomy had many further obligations at the time the software was delivered.

(2) In cross-examination, Mr Welham explained that Deloitte's view of the Amgen transaction was "*based on what we knew at the time*", in response to which the cross-examiner said, "*I'm not going to debate the assumptions you've been asked to make*". It was not suggested to Mr Welham that Deloitte would still have considered it appropriate to recognise revenue if those assumptions were, in fact, true - as indeed they are.

3801. The Claimants also relied on Mr Bloomer's confirmation in cross-examination that the Audit Committee was not told the full picture. As to this, it was led to understand that: (i) the Amgen sale was the sale of a Digital Safe software licence and storage – rather than, according to the Claimants, the sale of a solution absent the implementation of which the software could not be used; and (ii) there were no further obligations on Autonomy's part as the software had been delivered – even though the solution had not been implemented at the time revenue was recognised. The Claimants contended that the Audit Committee were thus deprived of relevant considerations. As Mr Bloomer confirmed, it would "*certainly have been relevant for Deloitte at the time to ensure that the revenue split was right between whatever had been delivered by the end of this quarter <u>and whatever remained to be delivered as ongoing services</u>*" (emphasis added).

3802. However, and although the Claimants in their oral closing argument submitted that there had been no challenge to this evidence (Mr Miles having stated he did not intend to *"debate the assumptions"* and Mr Casey not having cross-examined on the issue at all) as I read the evidence of Mr Welham he was simply expressing the conclusions already implicit (and even sometimes explicit) in the Assumptions he was required to make. As in other contexts, the evidence did not seem to me to carry the analysis any further.

My assessment

3803. On the basis that the Claimants have not pleaded or advanced this claim as an extension of their "Hosting Case" (see above), the gist and basis of the claim is the recognition of revenue before delivery of the 'solution'. Although there appear to me to be a number of unanswered questions as to the basis for splitting off part of what in the round appears may well have been acquired as an indivisible whole, the evidence in this context was relatively sparse.

3804. Against that, the terms and provisions of the Hosting Addendum did separate out the various elements of what Autonomy engaged to provide and the amounts payable at each contractually agreed stage.

3805. I have concluded that in the particular context, and taking into account the nature of the claim as part of a fraud case where, as to this part of it, I have heard from neither of the two Defendants, there is insufficient factual basis to overturn the express provisions of the contract and the contemporaneous judgement call made of the contract and the facts made by Autonomy and approved by Deloitte.

Iron Mountain (Q2 2011)

3806. The fourth and last of the "Other Transactions" impugned by the Claimants was a sale of a perpetual licence to IDOL and associated maintenance and support services by Autonomy to Iron Mountain Information Management Inc ("Iron Mountain") for a licence fee of $1.5 million, with an additional $75,000 support and maintenance fee. As mentioned earlier, the transaction was concluded on the same day that Autonomy acquired the Iron Mountain Digital business from Iron Mountain Inc (a related group company). It is also worth noting that this is one of the impugned OEM transactions (OEM61).

3807. In the written closing submissions on behalf of Mr Hussain, the Iron Mountain transaction is described as *"a one-off in the case"*; and it is correct that the transaction is unlike any of the three "Other Transactions" addressed above, and the basis of impugning the transaction is specific and particular.

3808. The Claimants' essential complaint can be summarised as follows:

(1) As was common ground between the parties' respective experts was the correct approach, Deloitte determined that the perpetual licence sale to Iron Mountain and Autonomy's acquisition of the Iron Mountain Digital business were linked transactions and that in consequence it was necessary, in determining how much revenue from the sale could be recognised, to establish the *"fair value"* of the licence sold under IAS 18. That was more difficult than might appear since (as previously noted) IDOL had no standard price or value, with much turning on the particularities of different customers.

(2) Autonomy calculated the fair value of the licence by identifying what it considered to be eleven comparable sales with seven different customers. Details of these were set out in a table which Autonomy sent to Deloitte. Autonomy then calculated the average price (adjusting to the same 5-year term as the Iron Mountain licence[481] if the allegedly comparable licence term was

[481] Management took a 5-year term to be what in reality is equivalent to a 'perpetual' licence in the software industry as after that point it is likely that the technology will be outdated. Deloitte's working paper noted this as follows: *"As the Iron Mountain licence is a perpetual licence, management has assumed that in reality perpetual in the software industry only means around 5 years, as after that point the technology is largely redundant and a new licence would need to be purchased – on that basis, management has extrapolated the value of any licence with a term <5 years up to 5 years, to represent the value of the licence if it had been sold as a perpetual licence"*.

different) before excluding three of the comparables on grounds of a material difference undermining comparability[482].

(3) The comparables left gave rise to an average value of just over $11 million. In an email dated 20 July 2011 to Messrs Murray and Welham and copied to Mr Hussain, Mr Chamberlain stated that:

> *"This supports a fair value of $10-11m. Given the subjectivity we have gone for a slightly lower value - $7m – as we believe this to be a prudent and strongly supportable position."*

3809. The Claimants contended that the way that Autonomy assessed and determined the *"fair value"* was unjustifiable for two main reasons:

(1) First, the notion of determining "*fair value*" by comparison to other deals was misconceived because there was no standard pricing for Autonomy software, including IDOL:

(a) On 12 April 2011, Mr Welham sent an email to Mr Mercer (copying in Mr Hussain) expressing concern with the revenue treatment for two deals signed with Discover Tech. One was for end-user FINRA, and the other was for end-user Prisa. Both concerned e-Discovery software, into which IDOL was incorporated.[483] Mr Welham said: "*These are identical, i.e. products sold, number of users etc but the purchase price is $1.1m vs. $3.8m. We need help understanding how this works from a fair value and arms' length perspective*".

(b) The next day, Mr Chamberlain sent the following explanation to Mr Welham (again, copying in Mr Hussain): "*it is not uncommon for the same software to be sold to different customers for very different prices. The buying decision is all around ROI and different organisations can achieve different returns with the same software. The negotiations are complex and lead to very different answers from time to time*".[484]

(c) Accordingly, the same piece of Autonomy software could be sold on identical terms to two different customers at two very different prices from a fair value perspective. Prices were determined by the

[482] Three were excluded on the ground that *"Autonomy is a fundamental part of the customer offering"* which, based on Deloitte's working paper, the Claimants took to mean that it was not possible *"to split out the IDOL search related value"*

[483] Mr Welham's email concerns impugned VT30. As is apparent from the relevant letter agreement dated 31 March 2011, the software licensed to Prisa was e-Discovery software. IDOL was incorporated into such software by the time of this deal. Given that the deal with FINRA was "*identical*", the same must have been true for the software licensed to FINRA too.

[484] Dr Lynch confirmed in cross-examination that what Mr Chamberlain told Mr Welham was true. When it was put to him that there was no standard market price for Autonomy software, Dr Lynch said this would depend on the software – but he did not specify particular software that did have a standard market price. Nor was Dr Lynch's qualification expanded upon in re-examination.

idiosyncrasies of the particular customer and the complex process of contractual negotiation.

(2) Secondly, even if it were possible to compare prices, the particular transactions selected for comparison in Autonomy's spreadsheet were inappropriate. In their written closing submissions, the Claimants included a detailed table explaining their contentions in this regard by reference to each "comparable", concluding that none of the selected transactions was an appropriate comparable, for reasons which included variously (a) the licence covered different software and/or a different number of functionalities covered by the licence (b) the licence restricted the number or type of permitted users or the nature of permitted use (whereas the Iron Mountain licence was for an unlimited number and type of users and did not restrict use) (c) the licence was restricted to English, whereas the Iron Mountain licence included all languages supported by Autonomy (d) in four cases (a licence sold to Capax Discovery (RT 1), a licence sold to VMS (RT 2), a licence sold to Filetek (RT 3) and a licence sold to EMC (RT 5)) the sale was part of a transaction alleged (and which I have found) to be reciprocal.

3810. These criticisms were well put together and persuasive in demonstrating that the exercise was imperfect. But the difficulty is in fashioning any less imperfect alternatives.

3811. Mr Holgate suggested none, and acknowledged that it was not possible to be definitive about an alternative figure. In plumping (as he did) for the transaction price of $1.5 million, on the residual approach that he considered that *"no other number suggests itself as being preferable to $1.5 million"* Mr Holgate undermined the whole rationale for requiring (as IAS 18 did and does) the assessment of fair value in the first place (that is, that in a linked transaction the purchase price paid might well not be the 'right' price).

3812. Mr MacGregor made the point that *"Simply because arriving at a fair value is difficult does not mean that it should not be done; in fact international accounting standards require it must be done in certain circumstances."* Even accepting that *"views may (and…often do) differ as to what constitutes a "comparable" transaction, as there are so many different characteristics to be considered as well as the relative weight given to each"* there may be little alternative. Mr MacGregor considered that:

(1) Absent any indication of "standard price" or price list, such an approach, i.e. by reference to comparable transactions, was reasonable.

(2) Deloitte had carefully considered Autonomy management's fair value exercise (as recorded in its working paper, which show that Deloitte undertook a full review) and reached the conclusion that *"management has used a representative sample of deals and that the average used (excluding the one outlier) provides a prudent estimate of fair value"*. He noted that Deloitte had also brought the matter to the attention of the Audit Committee (though it is to be noted that Mr Bloomer confirmed that they were not provided with details of the 'comparable' transactions). Overall, Mr MacGregor saw no reason to second-guess that assessment.

3813. The Claimants were critical of Mr MacGregor's answers about these matters in cross-examination. In particular, and although more circuitously expressed, I took the effect of their criticism to be that he had (a) appeared to downplay the extent to which

transactions even needed to be comparable and (b) done nothing to defend the management's assessment of fair value and appeared to accept that the comparators relied on by Autonomy did not establish anything more than that the default figure of $1.5 million might not be correct and (at most) that a higher figure might be justified. There was some substance in this: and I was left wondering whether he had himself lost confidence in the comparability of the transactions identified, though he refrained from any such admission.

3814. The Claimants submitted that the description of the fair value adjustment exercise to the Audit Committee was highly misleading. The Deloitte report dated 30 June 2011 stated that management had "*determined fair value with reference to seven similar sized licence deals*" although that sample did include "*one significant outlier*".[485] Mr Bloomer confirmed that the Audit Committee was not provided with any details of the comparator deals. Thus, the Audit Committee's understanding was that the fair value exercise was undertaken by reference to seven other deals, and that the deals used were "*relatively similar*". The Claimants submitted that neither of these factors was true: the sample of transactions actually utilised in the calculation consisted of just four transactions from three customers, and the deals used were not similar at all.

3815. They suggested further that the comparables had been specially selected by Autonomy to justify a figure Autonomy already had in mind and needed to achieve. They relied in that respect both on what they described as the inappropriateness of the transactions they considered and on an email exchange between Mr Chamberlain and Mr Hussain on 15 July 2011 (and thus before the analysis was undertaken) in which Mr Chamberlain first requested from Mr Hussain *" a summary of comparable transactions so we can justify the fair value adjustment"*.

My assessment

3816. I was left with a feeling of unease about the exercise adopted and the choice of comparables. Nevertheless, the fact remains that, as emphasised in Mr Hussain's closing submissions, the exercise was fully examined by Deloitte and Mr Welham did not suggest in his witness statement that Deloitte was in any way misled about this transaction: and they could assess the comparables for themselves.

3817. The Claimants made much of Mr Bloomer's evidence that the Audit Committee was not provided with any details of the "comparator deals" (see paragraph 3814 above). But it was for Deloitte to determine what detail to provide in their report and the balance of Mr Bloomer's evidence was that the approach which had been taken *"seemed a reasonable approach"*, and he and the Audit Committee well understood that "similarity" was a relative concept. The following exchange in his cross-examination seems to me to illustrate this:

> *Q. And you would have understood that the comparator deals used for the fair value exercise were similar to the Iron Mountain transaction, yes?*
>
> *A. As I say, relatively similar given the variability in the licence and the deals that Autonomy did, it – you know, there's an element of art rather than*

[485] The outlier referred to is Eli Lilly. As recorded by Deloitte, this transaction was excluded because: (i) of the different sizes of Eli Lilly and Iron Mountain; and (ii) because the value of IDOL had declined since 2008 (see Deloitte workbook tickmark (a)).

science in trying to do this exercise but they would have been similar enough to do it in this way." [My emphasis]

3818. In the round, and again having heard from neither of the Defendants, I have concluded that I was not shown a sufficient evidential basis for disturbing the assessment made by Autonomy and approved by Deloitte.

Overall conclusion on the "Other Transactions"

3819. Accordingly, I do not consider that the Claimants' case for impugning the Other Transactions was made good in any of them. I consider them, for a number of reasons, to be distinguishable from the other claims in this case, which may explain their bundling together, and possibly even why Dr Lynch was not cross-examined on them.

3820. As a general observation, the question, which I would have found difficult, as to the effect on the calculation of loss when a claim has been made good against one Defendant but not the other, does not arise in the context of the Other Transactions, or in relation to any of the claims in this case.

DECEIT AND MISREPRESENTATION CLAIMS

The pre-acquisition misrepresentations alleged

3821. The Claimants have also pleaded claims against the Defendants in common law deceit and/or under the Misrepresentation Act 1967 ("the 1967 Act" or "s.2(1)"). The Claimants' case is that in the course of the acquisition process the Defendants made a series of misrepresentations to HP on which HP/Bidco[486] relied in deciding to purchase Autonomy, and the price it was willing to pay. Subject to the 'wrinkle' that the claims are brought by Bidco, these claims are 'direct' claims: that is to say, they rely on what was allegedly represented to HP itself by Dr Lynch and/or Mr Hussain, rather than on what Autonomy represented to the market in its published information.

3822. In paragraph 207 of its RRAPoC, Bidco limited its direct claims against the Defendants in deceit and/or misrepresentation to loss attributable to the acquisition from them of the shares and share options that they each sold to Bidco in aggregate amounting to some US$420 million (being the dollar equivalent on the date these claims were issued (30 March 2015) of £284 million, the shares having been denominated in sterling)[487].

3823. Its claim (through Bidco) in deceit required HP to establish that:

(a) the Defendants made representations of fact that were untrue;

(b) they made those representations, directly or indirectly, to HP;

(c) they did so knowingly, without belief in their truth, or reckless as to their truth;

(d) they intended HP to rely on those representations; and

(e) HP did so rely, and thereby suffered loss.

3824. Bidco's alternative claims in misrepresentation under s.2(1) do not require proof of the third element (that the false representations were made fraudulently, that is, without belief in their truth or reckless as to their truth). Rather, if the other elements adumbrated above are established, the claims are made out unless the Defendants prove that they had reasonable grounds to believe, and did believe up to the time they sold their shares and share options to Bidco, that the facts represented were true.

Summary of the representations and the claims made in respect of them

3825. The eight sets of pre-acquisition representations which the Claimants alleged were made to HP were grouped by the Claimants into three stages of the acquisition process:

[486] Again, the *Bidco point* arises: see paragraphs 484 to 500 above. References in this part of this judgment to HP should be taken to it as the controlling mind of Bidco and/or on the basis that representations to HP were intended to be relied on by HP and any acquisition vehicle that HP might use to acquire Autonomy.

[487] Bidco's case is that HP generally operated in US dollars at all relevant times, that it had to purchase sterling to effect the acquisition, and that Bidco, as the corporate vehicle that HP used to purchase Autonomy, foreseeably bore loss in US dollars: see paragraph 196C of the RRAPoC. I will address further in a judgment on quantum issues as to the currency of account and the currency of calculation of loss.

(1) the initial approach to HP by Qatalyst and introductory meetings in January to March 2011;

(2) the more detailed discussions in London in June and July 2011; and

(3) the due diligence process in August 2011.

3826. In summary, the Claimants based their claims on:

(a) Representations made in January and February 2011 in slide decks ("the January and February Slides") sent by Mr Quattrone of Qatalyst ;

(b) A further slide deck presented at a meeting in March 2011 ("the March Slides");

(c) Representations allegedly made by Dr Lynch at a meeting attended by representatives of HP and Autonomy in London on 29 June 2011 ("the June meeting");

(d) Further representations allegedly made at another meeting on 29 July 2011 ("the July meeting");

(e) Representations allegedly made in the course of due diligence calls in August 2011, on 1, 2 and 4 August 2011.

3827. The representations on which HP based its case in general reflected Autonomy's published information. The Claimants acknowledged that their case on the falsity of the representations, and on the Defendants' knowledge of (or recklessness as to) that falsity, generally followed from their case on the alleged false accounting. If the Defendants succeeded in defending the allegations about false accounting, many of the misrepresentation claims would have fallen away: but they have not done so.

3828. The Defendants denied fraud and deceit. Their over-arching defences were that:

(1) Qatalyst was not acting as their or even as Autonomy's agent, and the Defendants cannot be liable for any misrepresentation made by Qatalyst, but not by them or on their behalf.

(2) The Claimants relied on some representations made by Dr Lynch and on others allegedly made by Mr Hussain, and (for example) in their counterfactual submissions as to loss, they did not distinguish in respect of each alleged misrepresentation which, if either, was responsible; but each Defendant had to be considered separately, and in considering a claim against one, only those misrepresentations found to have been made by him, or on his behalf, can be taken into account. Neither was alleged to have nor had any liability in respect of statements made by the other (save insofar as the Claimants allege that Dr Lynch, by his silence, acquiesced in a misrepresentation made by Mr Hussain; I deal with this below in the context of the 29 July 2011 meeting).

(3) Neither had conscious knowledge at the time that they had made any representation which was false.

(4) The Claimants had not proved inducement/reliance.

(5) The Claimants had not proved loss.

3829. In addition, Mr Hussain contended in his Defence that even if, contrary to his primary case, he knew that statements made in Autonomy's reported financial results and its other public statements were false (or had no honest belief that they were true):

(a) Mr Hussain always made it clear to HP, and it was understood by all parties to the negotiations, that it was for HP to carry out its own due diligence in relation to the Autonomy acquisition.

(b) In repeating those statements to HP, or referring HP to Autonomy's published information, he was "*at its highest*" representing that those sources contained the statements in issue, and was neither making such statements himself, nor representing that they were accurate, or even that he reasonably believed them to be accurate.

3830. In his closing submissions this contention, which was not advanced by Dr Lynch and which the Claimants dismissed as unrealistic, was not repeated in the context of the January and February Slides[488] but it was in relation to the 1 August 2011 due diligence call, and I take it to have remained part of his case in both contexts. [489]

The January and February Slides

3831. The first two sets of misrepresentations relied on by the Claimants were made in the January and February Slides.

3832. The Defendants' position was that:

(1) Neither of these slide stacks or presentations was prepared by either Dr Lynch nor Mr Hussain, nor were they sent by them to HP, or used by either of them on a call or meeting. According to the Defendants, these were not representations by either Dr Lynch or Mr Hussain, nor were they made to Bidco. Instead:

(a) The January Slides were emailed by Mr Quattrone to Mr Lane of HP on 26 January 2011.

(b) The February Slides were emailed by Mr Quattrone to Mr Robison on 3 February 2011.

[488] *"At its highest, any representation by Mr Hussain would have been to the effect that he believed that AU's financial information was accurate and not misleading. Any such representation would have been true"*
[489] In that context, Mr Hussain's pleaded defence was that *"Mr Hussain was simply repeating information from the Q2 2011 Quarterly Financial Report and investor presentation…As a matter of English law, Mr Hussain's repetition of such information amounted, at most, to a representation that those sources contained the relevant figures, but not that those figures were accurate."*

(c) Both sets of Slides were prepared by Qatalyst on its own accord, as an investment bank's tool to drum up a transaction from which it could profit: neither set was prepared by either of the Defendants.

(d) Like the Slides sent by Qatalyst to Oracle at around the same time, they were sent "*for the purpose of our* [i.e. Qatalyst's] *independently pitching Autonomy as an idea*".[490]

(e) Neither of the Defendants was even aware that the slide stacks were being prepared.

(2) The January and February Slides preceded the acquisition by more than six months, at a time when no transaction was in prospect, and when HP and Autonomy were at an early stage of getting to know each other.[491] They played no part in HP's decision in August to proceed with the acquisition of Autonomy.

(3) The January and February Slides were prepared on the basis of and reflected Autonomy's published information, which was accurate.

(4) Even if (contrary to the Defendants' case) the published information was in some respect not accurate, Dr Lynch's case in particular was that he believed it was, and reasonably so: accordingly, even if these documents are treated as containing misrepresentations by Dr Lynch, there would be no fraud, and Dr Lynch would have a defence to a claim under s.2(1).

(5) In any case, at that stage, neither of the Defendants was intending to promote or bring about a sale. At that stage, according to the Defendants, Qatalyst was simply (quoting Dr Lynch's written closing), *"arranging meetings with several companies on a low-key basis, preparing for the possibility of an unsolicited bid defence."*

3833. The Claimants did not accept any of this. Their position was that Dr Lynch and/or Mr Hussain made these representations, or caused them to be made, as part of the strategy of enticing a bidder and inducing a sale:

(1) Mr Quattrone was shopping Autonomy to a set of potential purchasers that he had discussed with Dr Lynch. This "*potential acquiror universe*" included HP. Qatalyst produced and provided the January and February Slides to HP as part of that process and on behalf of Autonomy.

(2) The January and February Slides included information taken from a slide deck with the file name "*corpoverview2010*" sent by Dr Lynch to Mr Quattrone by two emails in advance of their video conference on 6 December 2010, and shortly before Mr Quattrone began approaching potential purchasers. The Claimants contended (and put to Dr Lynch) that the material was provided to

[490] Email from Mr Quattrone of Qatalyst to Dr Lynch, 29 September 2011.
[491] See Mr Johnson's evidence in the US criminal proceedings that the video-conference on 3 February was a "*typical first meeting with the company to learn a little bit more about what they do, a little bit about their products, but fairly high level, from what I remember*", and that "*you start at a very high level because we're talking to a lot of companies all the time*".

Qatalyst with the intention that Qatalyst should use the material to pitch Autonomy to potential buyers. As to this:

(a) I was told that the attachments to these two emails have been lost; and the Claimants had therefore referred to the slides sent by Dr Lynch to Mr Quattrone as the *"Lost Slides"*.

(b) However, two other Autonomy presentations from around this time – one with the file name "*Corporate overview November 2010*" (the "November 2010 Slides"); and another with the file name "*Company Overview – December 2010*" (the "December 2010 Slides") have been located. Dr Lynch accepted that Autonomy used standard slides, which it updated as needed, and that he along with others would work on them: "*one deck is used as the starting point for another*".

(c) A comparison of the November 2010 and December 2010 Slides with the January and February Slides (and indeed the March Slides, discussed below) shows significant overlaps, as was shown in detail in cross-examination. Materially:

(i) The representations as to overall revenue, gross margin and net profit in the January and February Slides were contained in the "*Autonomy Overview*" slide in each deck. Those Slides extensively reproduced material (including but not limited to materially identical representations) contained in four separate slides in the November 2010 Slides: "*Introduction to Autonomy*"; "*Autonomy's Power of Three"*; "*Financial Overview*"; and a slide containing bar charts. Those slides from the November 2010 Slides were later reproduced and updated in the March Slides.

(ii) The representations as to organic IDOL growth in the January and February Slides were contained in bar charts in the "*Key Financial Metrics*" slide in each deck, which reproduced and updated an otherwise substantively identical bar chart labelled "*Quarterly Organic Growth*" in the November 2010 Slides.

(iii) The representations as to revenues by category in the January and February Slides were contained in the pie charts reproduced at paragraph 3842(4) below, which substantively reproduced and updated a table of the same data in the November 2010 Slides. The same table was itself reproduced and updated in the March Slides.

(iv) The representations as to IDOL OEM in the January and February Slides were contained in the "*IDOL Software Business Model*" slide in the January and February Slides. Those slides extensively reproduced material (including but not limited to materially identical representations) from the December 2010 Slides.

(d) The Claimants submitted that it is clear that the January and February Slides were heavily based on the Lost Slides (updated appropriately), including the representations in issue.

3834. In cross-examination, Dr Lynch (in answers that struck me as having been thought about in anticipation of this line of questioning) admitted that the January and February Slides "*may*" have been based on the Lost Slides, but (i) initially claimed that the Lost Slides were publicly available on Autonomy's website; and (ii) pointed out that many of the representations concerned publicly reported figures. He also insisted that none of this was done, nor was Qatalyst's involvement with a view, to pitch Autonomy to potential purchasers. He told me:

> *"We were interested in the idea of having the ability to, if we got an irresistible bid, to have more than one bidder and the possibility of having a better home for the company that we could carry on with our vision and also we were very happy to take up these introductions to the most senior people in the technology sector in the world".*

3835. I am not persuaded that the derivation of the content of the January and February Slides has as much significance in determining whether the Slides amounted to representations by the Defendants as the Claimants suggested it did. It seems to me to be obvious that Qatalyst would have asked for information, and that Autonomy would have wished to, and in the event did, supply it. As the Claimants pointed out, if the compilation in the Lost Slides was available on and easily mined from Autonomy's website, there would have been no need to go to the effort of dividing the deck up into two parts and sending them to Mr Quattrone by email, as Dr Lynch did; he could simply have sent a link for Mr Quattrone to download. The coincidence of timing between the sending of the January and February Slides, and Mr Quattrone's approaches also suggests some connection between the two.

3836. All in all, it seems to me plain that the derivation or source of the information was the slides prepared by Autonomy: and there would have been no point in Qatalyst re-inventing the wheel from publicly available information. However, in my view, the form and content of the January and February Slides, and the fact that both were presented on their face as being Qatalyst documents, suggests (and I find) that, whatever their derivation, they were put forward by Qatalyst as its own documents.

3837. The more pertinent and difficult question is whether the documents were put forward at the meeting with HP on 3 February 2011 in the presence of the Defendants and without objection or correction from either of them. The Claimants contended that the February Slides were indeed shared with HP <u>during</u> the 3 February 2011 video-conference with HP that both Defendants attended (and there is no suggestion that they demurred from the representations made in them). They relied in this regard on Dr Lynch's own evidence in his first witness statement, where he said <u>(emphasis added)</u>:

> *"HP claims that there were misrepresentations about the amount of revenue recognisable from OEM relationships, the growth of Autonomy's OEM business and the existence of royalties from OEMs in three PowerPoint slides shared or shown to HP in January, February and March 2011. <u>The February and March slides were shared with HP during video-conferences that I attended</u>.*

The January and February slides were prepared by Mr Frank Quattrone and Qatalyst…"

3838. However, in the course of cross-examination, Dr Lynch claimed for the first time that the February Slides had <u>not</u> been shared during the video-conference, and rather that some <u>other</u>, previously unidentified and (he seemed to suggest) no longer extant, presentation deck was shared instead. The Claimants urged that this evidence should be rejected, given that:

(1) The passage cited from Dr Lynch's first witness statement is unambiguous and cannot sensibly be construed in the context of what immediately precedes and follows it as referring to some slide deck other than the February Slides.

(2) No correction was made to that paragraph between 14 September 2018, when that evidence was served, and the moment when Dr Lynch made his new claim in the course of cross-examination.

(3) Dr Lynch has not identified an alternative set of slides, nor have the Claimants been able to locate one.

3839. In the circumstances, I do not feel able to accept Dr Lynch's evidence in cross-examination contradicting what he had said in his witness statement. He himself retreated to saying that *"Yes, there's been a lot of confusion about these slides"* and he oscillated between denial that the slides had been put forward at all and general assertion that *"…these would not be slides that I would do for a presentation because they're all about things that I don't know about"*. In short, the best that can be said about his evidence in this regard was that it was confused.

3840. I find that the February Slides were based on material provided for the purpose of such a presentation and were put forward under the name of Qatalyst at the 3 February 2011 meeting in the presence of Dr Lynch and Mr Hussain, neither of whom dissociated himself in any way from their content.

3841. Furthermore, even if Dr Lynch's claim that the February Slides were not shared with HP during the video-conference were correct, there is no dispute that they were provided to HP around the same time. I agree with the Claimants that the points made above in respect of both the January and February Slides would still apply, and that Dr Lynch and Mr Hussain both in effect adopted their presentation, and implicitly vouched for their accuracy.

Substance of representations in the January and February Slides and their alleged falsity

3842. The Claimants' case (the elaboration of which I have taken very largely from their written closing submissions) is that the January and February Slides included the following false representations (set out here following the order of the slide decks, which is identical in each case)[492]:

[492]The analysis which follows reflects an exercise undertaken by the Claimants and their valuation expert to contrast certain financial metrics reported to the market by Autonomy with what, on the Claimants' case, it should have reported. In accordance with the shorthand used by the Claimants' valuation expert, Mr Bezant: "**Represented**" denotes figures actually reported by Autonomy, while "**True**" refers to the restated figures

(1) The Autonomy group's total revenues were said to be $740 million in 2009. The Claimants' case is that True total revenues were $646.8 million; or $593.8 million excluding the undisclosed pure hardware sales; and $870 million in 2010, when True total revenues were $722.3 million; or $623.3 million excluding the undisclosed pure hardware sales.[493]

(2) The Autonomy group's adjusted gross margin was said to be 88% in 2009, when in fact the True adjusted gross margin (correcting only for the treatment of hardware costs) was 83.3%. Its adjusted gross margin was held out as 87% in 2010; the True adjusted gross margin (on the same basis) was 83.6%.[494]

(3) The Autonomy group's net income (corresponding to "net profit (adjusted)" in the Quarterly Reports) was said to be $233 million in 2009, when in fact the True net income of the software business (excluding hardware costs and revenues) was $179.2 million; and $292 million in 2010, when in fact the True net income (on the same basis) was $199.8 million. As the hardware sales were loss-making, True figures including the hardware business were lower still.[495]

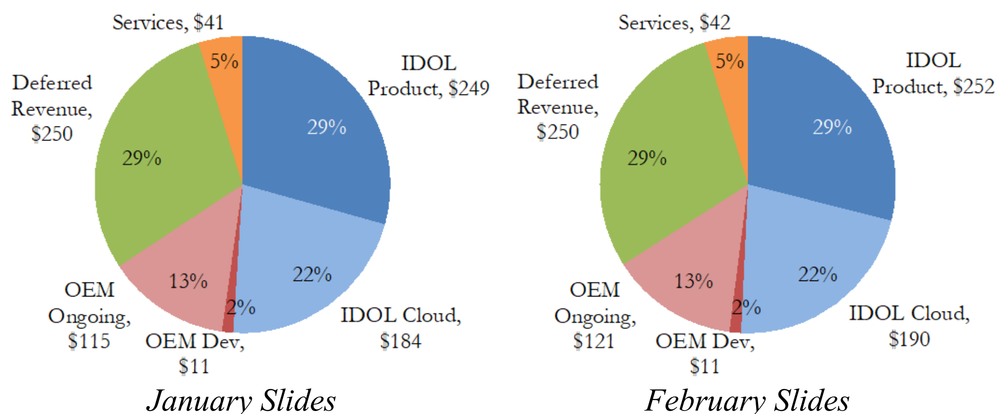
(4) Autonomy's purportedly "*Attractive Revenue Mix*" was represented as follows:

advanced by the Claimants as "corrected" (only) for the effects of the false accounting of which they complain. Mr Bezant and the Claimants accepted that, given the disconnect between Autonomy's underlying accounting records on the one hand, and Autonomy's reported revenues by product category on the other, there is no perfect way of correcting the latter to reflect the Claimants' case. The Claimants used two approaches: (a) they prepared what they called the **Restated Revenue Schedule** (which was built up from the underlying accounting records); and (b) they also undertook what they called the **Cross-check** (based on manually identifying transactions in the Hussain Revenue Spreadsheets from which the reported revenue figures by category were taken). In the former, "True total revenues" denoted what the Claimants contended were Autonomy's actual revenues excluding "pure" hardware sales, and "True adjusted gross margin" similarly was a calculation of gross margin with a "correction" for hardware costs. Mr Giles criticised the Restated Revenue Schedule but agreed with the Cross-check, and accepted that "*the two methodologies come up with something quite close*". In this part of this judgment, for ease of reference, True figures are taken from the Restated Revenue Schedule, in line with Mr Bezant's main analysis (in the slightly updated form exhibited to Mr Bezant's 4th Report to accurately reflect the Claimants' case). Figures based on the Cross-check are provided in footnotes for completeness.

[493] 2009 figures in January Slides, 2009 and 2010 figures in February Slides.

[494] 2009 figures in January Slides. 2009 and 2010 figures in February Slides. True figures *per* Schedule 2 PoC were confirmed by Mr Bezant, which was not challenged.

[495] 2009 figures in January Slides, 2009 and 2010 figures in February Slides. True figures calculated as follows: (i) Effective tax rate on adjusted basis calculated by dividing reported provision for tax by reported profit before tax (adj), in each case as set out in the 2010 Annual Report. Thus 2009 effective tax rate = 90,268 ÷ 323,066 = 27.9%; 2010 effective tax rate = 86,705 ÷ 378,921 = 22.9%. (ii) Tax at calculated effective tax rate deducted from True cash pre-tax income, as set out in Adjusted Deal Model: "Target IS" tab (cells S31:T31), with scenarios set to "Original" ("MB assumptions" tab) and "True Position" ("Accounting assumptions" tab). Thus 2009 True adjusted net income = $248.6 million × (1 – 27.9%) = $179.2 million; 2010 True adjusted net income = $259.1 million × (1 – 22.9%) = $199.8 million.



(5) The slides did not specify the periods to which these pie charts were said to relate, but the January Slides appear to correspond to the reported figures for the 12 months ending in Q3 2010, and the February Slides appear to correspond to the reported figures for FY 2010. The Claimants contended that these pie charts made the following false representations:

(a) They portrayed Autonomy's revenues as being made up entirely of the categories shown: software licensing, and related services (including software as a service).[496] In fact, for the 12 months ending in Q3 2010, True hardware revenues were $83.6 million (12% of the True total), while for 2010 that figure was $100.7 million (13.9% of the True total).[497]

(b) As the total revenues shown in the pie charts included substantial hardware revenues, it follows that the revenue figures shown for one or more of the categories were significantly overstated.

(c) IDOL OEM revenues were substantially overstated. In the 12 months ending in Q3 2010, True IDOL OEM revenues were only $21.7 million (3.1% of the True total), rather than the $126 million or 15% as stated.[498] In FY 2010, True IDOL OEM revenues were only $22.8 million (3.2% of the True total), rather than the $132 million or 15% stated.[499]

(d) IDOL Cloud revenues were also significantly overstated. In the 12 months ending in Q3 2010, True IDOL Cloud revenues (i.e., in particular, absent the wrongful acceleration of revenue recognition) were $119.3 million (17.1% of the True total), rather than $184 million or 22%. In FY 2010, True IDOL Cloud revenues were

[496] Autonomy said that the "deferred revenue release" category "*[stemmed] principally from support and maintenance contracts recognized in arrears*".
[497] True figures: see footnote 499 above. Cross-check hardware revenues – 12 months to Q3 2010: $82.1 million, representing 11.7% of the total. FY 2010: $99.8 million, representing 13.8% of the total.
[498] These numbers are arrived at by adding "OEM Ongoing" and "OEM Dev" together. The same applies to the stated IDOL OEM revenues for FY 2010 in the February Slides.
[499] True figures: see footnote 499 above. Cross-check IDOL OEM revenues – 12 months to Q3 2010: $22.7 million, representing 3.2% of the total. FY 2010: $23.8 million, representing 3.3% of the total.

$119.2 million (16.5% of the True total), rather than $190 million or 22%.[500]

(6) The slides also included charts that purported to show year-on-year organic IDOL revenue growth consistently between 10% and 20% per quarter for 2009 and 2010.[501] In fact, True organic IDOL revenue (as defined, excluding loss-making pure hardware sales and improperly recognised revenue) declined by 5% from 2008 to 2009, and was flat from 2009 to 2010.[502]

(7) IDOL OEM revenue was said to be:

(a) growing significantly year-on-year (35% in the January Slides and 32% in the February Slides) when in fact True IDOL OEM revenue <u>declined</u> year-on-year at comparable rates (between 20.9% and 59.3% for each of the first three quarters of 2010, and 29.5% for FY 2010);[503] and

(b) "*Royalty-based ~3%*", when in fact, few if any true IDOL OEM transactions generated, or could reasonably be expected to generate, a recurring royalty stream of around 3% of licence sales.

3843. Dr Lynch accepted in cross-examination that he knew that Autonomy's reported revenue figures included hardware revenues, revenues from VAR transactions and revenues from what on the Claimants' case were improper reciprocal transactions.[504] Dr Lynch also accepted in cross examination that he knew that the IDOL OEM revenue figures included revenue from transactions that, on the Claimants' case, did not come within Autonomy's own description or definition of its IDOL OEM revenue. Further, he accepted that he was aware that the IDOL Cloud revenue figures included some non-recurring licence fee revenue (which, on the Claimants' case, did not come within Autonomy's own description of its IDOL Cloud business or revenue). Mr Hussain accepted that he knew all this too. What the Defendants did not accept was that the representations were false, or that they knew they were false.

3844. In my judgment:

(1) The Defendants were content for Qatalyst to make the representations conveyed by the January and February Slides as detailed in the preceding paragraphs. I accept and find that Qatalyst was, as the Claimants put it in their written closing submissions:

> *"shopping Autonomy to a set of potential purchasers that he [Mr Quattrone] had discussed with Dr Lynch. This 'potential acquiror universe' included HP. Qatalyst produced and provided the January and February Slides to HP as part of that process."*

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[500] True figures: see §0. Cross-check IDOL Cloud revenues – 12 months to Q3 2010: $126.9 million, representing 18.1% of the total. FY 2010: $129.1 million, representing 17.9% of the total.
[501] February Slides; the January Slides included an identical graph, save that it did not include Q4 2010
[502] True figures *per* the Claimants' Restated Organic Growth Schedule.
[503] True figures: see footnote 499 above.
[504] Dr Lynch also accepted that the (adjusted) gross margin figures stated in the slides would have been lower if all of the hardware costs had been accounted for in COGS.

(2) Strictly, the company (Autonomy) as a legal entity had no corporate interest in any auction which might be in contemplation or developing for its shares. The persons interested are the company's shareholders (the shares being their personal property), and the directors act in respect of inviting, promoting and developing any bid in effect as (a) potential and then actual auctioneers and (b) communicators of matters relevant for the shareholders to know in making their decision on any eventuating bid. It seems to me that representations made by Qatalyst on the basis of what they were told, or information supplied by the Defendants, were in effect made on their behalf.

(3) Although the Defendants maintained that they did not know that any of those representations was false, in light of my conclusions and findings in relation to the Claimants' cases on Hardware, VARs, Reciprocal Transactions, Hosting and OEM, that is not sustainable.

(4) It follows that the representations were in material ways false; and

(5) both Defendants knew the representations were false, or were at least, reckless as to their truth or falsity.

3845. For the avoidance of doubt, in the light of my previous findings, I do not accept that it avails the Defendants that Autonomy's published information had been prepared by Autonomy's finance department and scrutinised and approved by Deloitte. The finance department was controlled by the clique; and Deloitte were repeatedly misled. Neither Defendant can rely on assumptions as to the accuracy of their work or avoid liability by reference to what Deloitte did or did not know or do.

Did HP rely on the January and February Slides? What effect had the Disclaimer?

3846. The Defendants' final answer was to deny reliance.

3847. As to reliance, HP maintained that the January and February Slides prompted HP's interest and led to the March meeting (see below) so that there was a continuum of reliance which concluded with HP deciding to offer, and offering, £25.50 per share for Autonomy, including the shares owned by the Defendants. They presented the misrepresentations in issue as *"fundamental parts of"* (i) the initial approach to HP concerning the possible sale of Autonomy (of which the January and February Slides were part); (ii) the Defendants pitching Autonomy to HP directly (including by the February Slides); and (iii) the Defendants' responses to HP's due diligence requests.

3848. With particular reference to the January and February Slides they contended that:

(1) The January Slides, sent as part of Mr Quattrone's initial approach to HP, led to the 3 February 2011 video conference, which with the related February Slides, led in turn to the 4 March 2011 meeting at which the March Slides were presented; and

(2) The representations in the February Slides were of "*particular interest*" to Mr Robison (who was HP's Chief Strategy Officer and Head of SCD) and his

colleagues in the SCD group, and they relied on them when considering whether Autonomy would be a suitable fit for HP.

3849. The Defendants, on the other hand, contended that the January and February Slides had no material impact on HP in deciding to make the bid:

(1) They were not the cause of HP's interest, since HP was already aware of Autonomy as a potential target from late 2010.

(2) In January and February 2010, HP was not thinking of acquiring Autonomy: its focus was instead on Tibco.

(3) Mr Apotheker did not remember reading and/or looking at the Slides, still less focusing on them; and though Mr Robison's witness statement made claims about features in the slides that were interesting to him, and posited questions he would have wished to ask if gross margins had been presented as lower, he did not attend at trial, and since it was not possible to test his evidence they submitted that little weight should be placed on his account.

(4) There was no evidence provided that any of these Slides were shown to HP's board. The documents did not feature at all in the subsequent documentation showing HP's consideration of the acquisition (for which HP relied on analysis by its own corporate analysts, and third party advice from Perella Weinberg and BarCap).

(5) In any case, it was unrealistic to suppose that these Slides had any operative effect at all at the time of the bid many months later.

3850. The Defendants also relied in their defence on a boilerplate disclaimer at the end of the two slide decks in support of an argument that HP did not rely on the representations contained in them, or that any such reliance was unreasonable. They suggested that the disclaimer estops Bidco from contending that it relied on the representations. These contentions were not, however, elaborated or even put forward in their submissions, and I have not been persuaded that, of themselves, the warnings in small print provide a defence or found an estoppel.

3851. As to reliance, the Defendants concluded that it was not realistic to think (and the Claimants had not sought to argue) that either set of slides had any impact on their thinking by the time Bidco came to make an offer for Autonomy. They contended, in effect, that it is unrealistic to think that the January and February Slides still operated on the minds of those concerned on behalf of the Claimants months later and after so much other information had been provided.

Summary of my assessment re the alleged falsity January and February Slides

3852. I agree with the Defendants that it is unlikely that HP called to mind the January and February slides when it came to determining to bid, nor were the slides any real influence by then in their determination of the price.

3853. Further, in my view, even if retained in the mind, the facts and impression so retained would be subject to further information provided and especially the due diligence exercise. The representations made would not independently be actionable as such.

3854. However, I accept HP's argument that the January and February Slides whetted HP's appetite. In a vacuum, I would not accept that this, nor the fact that the slides encouraged their further interest, would be sufficient. But the slides do need to be seen as part of a continuum, over the course of which the information provided and the representations made by Autonomy gave HP a picture of a company capable of enabling HP to achieve Mr Apotheker's target of moving HP into the mainstream of the advanced software sector, and thereby transformational change.

3855. In particular they need to be taken into account in conjunction with the March slides, to which I now turn.

The March Slides

3856. On 3 March 2011, HP and Autonomy entered into a Mutual Non-Disclosure Agreement. On 4 March 2011, Autonomy and HP spoke again via video conference. HP participants included Mr Robison, Mr Johnson, Mr Levadoux and Ms Marge Breya. The meeting took place in HP's offices in Palo Alto, California. Mr Hussain attended in person, with Mr Quattrone; and Dr Lynch joined by videolink. The third set of misrepresentations as alleged by the Claimants was made in a further stack of slides presented at that meeting ("the March Slides").

3857. Dr Lynch maintained that the March Slides were prepared by Autonomy using publicly available information. Dr Lynch said that he believed that he had delegated the preparation of the slides to various team members, and that he instructed Mr Kanter to include some additional background information about Autonomy to respond to particular questions that HP had raised (via Mr Quattrone) in advance of that meeting; but that otherwise he had little involvement.

3858. In cross-examination, Dr Lynch claimed that he had, in fact, refused to address many of HP's requested topics:

> *"All I'm prepared to do is give them an introduction to the company which is a public document and then some slides on other information that's already public, which is functions, geographies, head count and org explanation. What that doesn't say is: please prepare slides with the P&L for the next three years, with cloud Saas business model, with balance sheet overview, with market share over time, with historical revenue growth. So there's lots and lots of things here which are not going to be given in this meeting but you can't blame them for asking."*

3859. This was not entirely accurate. It is right to say the final deck did not include P&L projections for the next three years. Mr Quattrone had recognised that Autonomy would not want to "*give them precise forecasts at this stage*", and suggested instead "*giv[ing] them orally some directional input*"; and in any event, Autonomy always maintained it did not <u>have</u> such projections, hence the 4 August 2011 due diligence call (addressed below) to discuss the reasonableness of the assumptions and projections contained in parts of HP's Deal Model. But all of the other items referred to by Dr Lynch were covered in the final version of the March Slides: the IDOL Cloud business model; an overview of the balance sheet; market share over time (OEM market share was said to be "*almost total*" in any event); and historical revenue growth.

3860. The Claimants submitted that Dr Lynch's claim that he had not been prepared to give HP such information, when in fact the slides included it, was a misguided attempt to obfuscate his evident enthusiasm for interesting HP in a potential purchase of Autonomy. When pressed, Dr Lynch accepted that he saw HP as a potential purchaser but insisted that a purchase by HP

> *"would not be a probability at this stage. This is a first meeting. There has been no discussion of anything to do with financials or price or anything like that. Remember, this is one of the largest technology businesses in the world. It's a big customer of Autonomy's and we're getting to meet the CTO and we' re getting to explain the way our business is wonderful. Yes, that could end up in an acquisition, yes, they're probably interested in learning as much as they can; but from our point of view it would be a very gentle process, and…you'll see in the emails that's very much how we view it.* "

3861. I accept that although these were early days, nevertheless by this time, Dr Lynch did have in mind HP as a potential suitor, and the information provided, which was impressively packaged, was no doubt designed further to whet the appetite. But the Claimants' suggestion to the effect that Dr Lynch's efforts to downplay its content was an effort to camouflage an established determination to achieve a sale is, to my mind, exaggerated.

3862. Three hours were allocated to the video presentation; but according to Dr Lynch's account, at the meeting on 4 March 2011, he presented the technology and positioning slides; other people dealt with the other slides. Dr Lynch attended throughout. Mr Johnson explained in his evidence in the US criminal proceedings that the meeting was primarily about the technology, but with a "*little bit of financial information"* at the very end of the meeting, presented by Mr Hussain rather than Dr Lynch. I accept that Dr Lynch may largely have left matters of general presentation to others, though that would have been atypical of him, judging from his contributions in Earnings Calls. But that does not serve to disassociate him from the content: see further in paragraphs 3866 to 3867 below.

Representations in the March Slides

3863. The Claimants' case was that the March Slides contained material misrepresentations which they sought both to summarise and quantify as follows:

(1) The slides made a series of claims about financial metrics, which were untrue because they reflected the false accounting addressed in earlier parts of this judgment. They included those set out, with what the Claimants presented to be the corresponding True metrics, in the following table (which with the underlying derivations I have taken from the Claimants' written closing submissions with very little alteration, but which it should be remembered will require amendment in assessing loss and damage since it includes adjustments which I do not consider to be justified in respect of amounts reflecting (a) the Claimants' claims in respect of the Realise/Credit Suisse VAR transaction (VT15) and the Schedule 7 "Other Transactions" which, in the event, I have rejected, and (b) overstatements of Autonomy's revenues for Q2 2011 in

consequence of what the Claimants asserted (but never pleaded) was misaccounting for a Q2 2011 Schedule 6 Iron Mountain transaction[505]):

Metric	**Stated figure**	**True figure**
2010 total revenue	$870 million *slides 4, 58, 59*	$722 million ($623 million excl pure hardware)
2009 total revenue	$740 million *slide 58*	$646.8 million ($593.8 million excl pure hardware)
2010 IDOL Product revenue	$251 million *slide 59*	$222.7 million[506]
2010 IDOL Cloud revenue	$190 million *slide 59*	$119.2 million[507]
2010 IDOL OEM revenue	$132 million *slide 59*	$22.8 million[508]
2010 IDOL OEM revenue as % of total	15% *slides 18, 20*	3.2%[509]
IDOL OEM growth year-on-year	30–35% *slides 17, 18, 19*	(56.1%) (i.e. decline) in 2009[510] (29.5%) (i.e. decline) in 2010[511]
2010 operating profit (adjusted)	$377 million *slide 58*	$246.3 million[512]

505 For the avoidance of doubt, I confirm that I have accepted the Defendants' submission that this allegation, which the Claimants did not assert to be based on fraud, and which was not mentioned in their RRAPoC except as a footnote to Annex 6, nor ever properly pleaded nor put to Dr Lynch, should be ignored.
506 FY 2010 Cross-check IDOL Product revenue of $204.4 million.
507 FY 2010 Cross-check IDOL Cloud revenue of $129.1 million.
508 FY 2010 Cross-check IDOL OEM revenue of $23.8 million.
509 FY 2010 Cross-check IDOL OEM revenue represents 3.3% of the total.
510 This represents the decline in IDOL OEM revenue between 2008 Represented revenue and 2009 True revenue.
511 Cross-check IDOL OEM growth – 2010: (26.4%) i.e. decline. 2009 not calculated because the 2008 revenues are not adjusted.
512 Restated Profit Schedule: "Restated profit measures" tab (cell R39). Includes hardware.

Metric	**Stated figure**	**True figure**
2009 operating profit (adjusted)	$329 million *slide 58*	$239.2 million[513]

(2) Slide 17 described Autonomy as having a "*Pure Software Model*". The same slide repeated the representations made in each of the January and February Slides as to the alleged "*Royalty-based ~ 3%*" nature of Autonomy's IDOL OEM revenue. On the Claimants' case and interpretation of the phrase, that was false, for the reasons previously discussed.

(3) Slide 18 repeated the misrepresentation made in each of the January and February Slides as to the alleged "royalty"-based nature of Autonomy's IDOL OEM revenue, save that the percentage "royalty" was now said to be "*~4%*". That was, again, false for the reasons previously discussed.

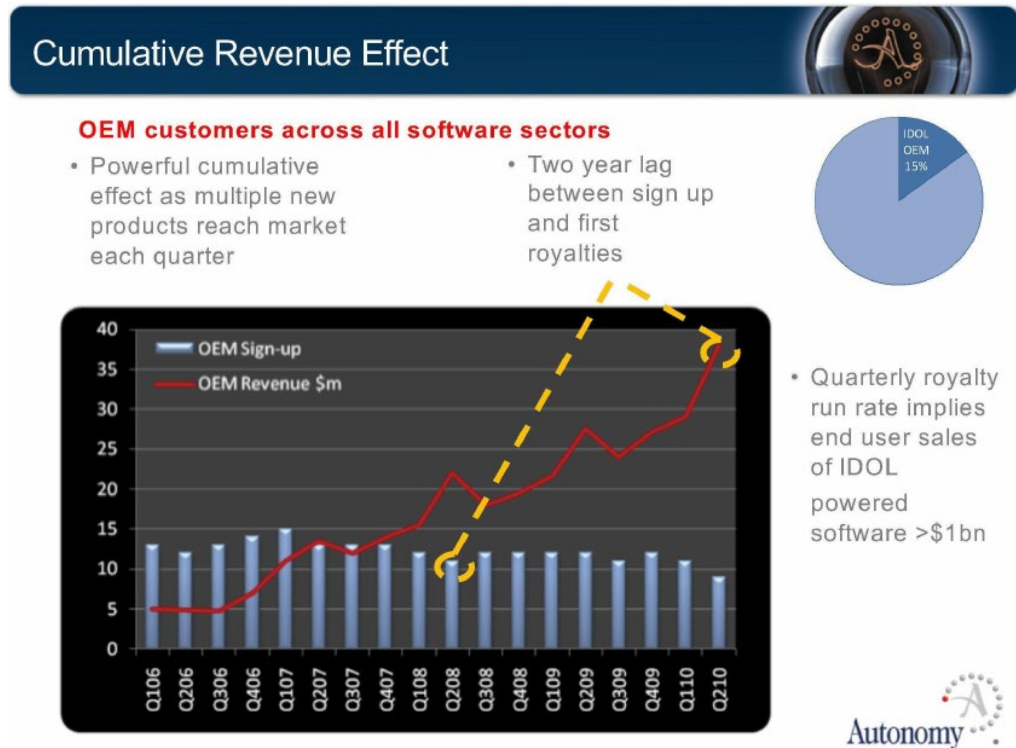
(4) Slide 19, headed "*IDOL OEM*":

(a) included the logos of 17 purported OEM customers. All of those companies were in the business of licensing software.[514] The obvious implication was that Autonomy's IDOL OEM revenue was obtained from those (and similar) companies. In fact, much of the revenue reported as "IDOL OEM" arose from transactions with companies or entities that did not license software, and so could not embed Autonomy software in any software product of their own; and

(b) claimed that "*Revenues today relate to deals signed two years ago*". This was a reference to (and so impliedly repeated) the Defendants' regular claim that IDOL OEM revenues consisted substantially of royalty payments on OEM partners' products, with such products typically released around two years after the OEMs' contracts with Autonomy were signed. The Claimants alleged that this was false, on the basis that much reported IDOL OEM revenue (around 80%) was neither (i) an upfront fee paid to an OEM partner; nor (ii) an ongoing royalty payment.

[513] Restated Profit Schedule: "Restated profit measures" tab (cell M39). Includes hardware.
[514] This does not appear to be in dispute.

(5) Slide 20 purported to show that Autonomy's OEM business had a "*[p]owerful cumulative effect*" on revenues "*as multiple new products reach market each quarter*", via the following graph, which compared, on a quarterly basis, the number of new OEM customers (blue bars) and "*OEM Revenue*" (red line).



(6) This slide was said to merit attention in light of and by way of rebuttal of the Defendants' case that, in Dr Lynch's words, the reference to "*~4% royalties*" (like that to "*~3% royalties*" in the February slides) was "*an example*", and "*did not represent that all of Autonomy's OEM sales generated annual royalties of 4%*":

(a) The red line showed the total quarterly IDOL OEM revenue reported by Autonomy, which had risen to $38 million in Q2 2010, the last quarter shown.

(b) The dotted yellow line was said to illustrate a "*two year lag between sign up and first royalties*" (emphasis added). It drew a link from the number of new OEM customers (shown by a blue bar) in Q2 2008 to the red line in Q2 2010. The Claimants contended that the reasonable reader would thereby understand that the red line – and hence Autonomy's total reported IDOL OEM revenue – consisted materially of royalty revenues.

(c) Further, the slide claimed that "*Quarterly royalty run rate implies end-user sales of IDOL powered software > $1bn.*" This was alleged by the Claimants to be false given that: (i) the only revenue figures shown on the slide were those plotted by the red line; and (ii) if the 3–4% figures cited by Autonomy and Dr Lynch were remotely accurate indications of the level of IDOL OEM royalty payments, then $38 million of IDOL OEM revenue could only imply more than

$1 billion in quarterly end-user sales by Autonomy's OEM customers if the great majority of the former indeed consisted of royalty payments, the clear implication was thus that the "*quarterly royalty run rate*" approximated total reported IDOL OEM revenue.[515]

(d) The slide thus represented that IDOL had been widely adopted by other software companies in their own products (as Dr Lynch accepted it did), and that ongoing, recurring revenues from those companies' sales would be substantial. However, on the Claimants' case, those representations were false: ongoing royalty payments from OEM customers in fact made up only a small part of reported IDOL OEM revenue.

(e) In cross-examination, Dr Lynch claimed for the first time that when the slides were presented to HP, Autonomy would have explained that IDOL OEM revenue in fact included revenue from upsells and PODs. However, there was never any public explanation of that point by Autonomy in the Relevant Period.[516]

(f) Dr Lynch also claimed that the slide was "*not discussing revenues*", on the basis that it was in a section of the deck entitled "*Business Models*". That appeared to be contradicted by a slide entitled "*Cumulative Revenue Effect*", which includes a graph of "*OEM Revenue*".

(7) Slides 55 and 58 repeated what the Claimants contended were the false claims about Autonomy's gross margin made in the January and February Slides, described earlier.

(8) Slide 59 set out a table of 2010 reported revenues by category, with year-on-year growth rates for Q4 revenues. This table:

(a) made no reference to hardware sales, but included revenue from such sales in some or all of the five categories of revenue listed, so

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[515] In cross-examination Dr Lynch disputed this interpretation, claiming: "*there's a bit more information given away here than really should be because, if you take 3% – if you take 1 billion and you apply 3% and you gross down, it's in effect giving you the non-derived part of the OEM. Because if it was – if what you were saying was true, that number would be about 6 billion*". However, $1 billion of quarterly IDOL OEM sales, at a 3–4% royalty rate, would imply $30–40 million ($1 billion × 3–4%) in royalty revenues per quarter – so the claim of "*>$1 billion*" in IDOL OEM sales is exactly in line with the most recent quarterly IDOL OEM revenues ($38 million in Q2 2010) shown on the slide. By contrast, $6 billion of quarterly IDOL OEM sales at the same royalty rate would imply <u>$180–240 million</u> in royalty payments per quarter – several times the IDOL OEM revenue that Autonomy reported. It may be that Dr Lynch was trying to suggest that "*end-user sales … of >$1 billion*" should be construed as referring to <u>annual</u> sales, but: (i) that is not what the slide says on its face; (ii) the reasonable reader would not read a sentence that refers in terms to a quarterly metric and understand that the other metric cited is intended to apply to a quite different time period; and (iii) even the highest quarterly IDOL OEM revenue shown ($38 million in Q2 2010), using the 3% rate cited by Dr Lynch, does not imply $6 billion in IDOL OEM sales annually in any event.

[516] The Claimants suggested that the implausibility of the suggestion is reinforced by the fact that the "intentional misinformation" document that Dr Lynch sent to HP's Mr Robison on 13 September 2011 (addressed in more detail in the OEM section of the judgment), which purported to provide (among other things) an explanation of the "revenue profile" of IDOL OEM, made no mention of the fact that IDOL OEM revenue included revenue from upsells and PODs.

making the same misrepresentation described in paragraph 3842(5)(a) above; and

(b) claimed that these figures "*implied*" IDOL OEM revenue for 2011 of $167 million, which claim the Claimants contended was neither honest nor reasonable as it would have represented more than 600% growth over the True 2010 IDOL OEM revenue of $22.8 million.

(9) The slide also claimed that Autonomy had the "*advantage of growth in annuity streams*". This too was said by the Claimants to be false: True IDOL OEM revenue was declining (see paragraph 3842(7)(a) above).

3864. The Defendants' answer to these claims was in summary as follows:

(1) Overall, the claims that the various statements as to Autonomy's revenues (overall and by category), profit and revenue growth, which according to the Claimants were "*untrue because they reflected the false accounting*" were groundless because there was no false accounting, for reasons already given.

(2) The slide headed "*Pure Software Model*" was not a representation that Autonomy sold only software: indeed, the same slide made reference to Autonomy's appliance sales. More generally, these slides would not have been considered in isolation from Autonomy's accounts, and those accounts made clear that the reference to "*Pure Software Model*" was intended to distinguish Autonomy from companies deriving significant revenues from services (and see paragraphs 654 to 657 in the part of this judgment dealing with the Claimants' "hardware" claims).

(3) The slide setting out revenue and growth by category, together with implied figures for 2011, accurately stated revenue and growth rates. As discussed in the "OEM" part of this judgment, the Defendants contended that the reference to "*advantage of growth in annuity streams*" was a fair comment.

(4) The remainder of the alleged misrepresentations related to Autonomy's OEM business. These representations have already been dealt with in the OEM section above.

(5) Further, Dr Lynch claimed for the first time in cross-examination that Autonomy's hardware sales were discussed at the 4 March 2011 meeting, relying on a slide in the March Slides that described "*Drag Along Third Party Revenues*". Although, as Mr Rabinowitz put to him in cross-examination, it had been part of the Claimants' case since April 2015 that the March presentation contained misrepresentations because nothing was said to HP about or to explain the hardware sales, this suggestion that there had been discussion about hardware sales as an example of *"drag along revenues"* was not pleaded in Dr Lynch's defence and was not mentioned in his witness statements. Dr Lynch suggested that it had been mentioned before, but without going through all the documents he could not be more specific; and when challenged again, he responded with studied calm and said he *"would have to disagree"* with the suggestion made to him that this was *"just another one of your opportunistic inventions"*. No mention was made of the point in Dr Lynch's closing submissions. I have attached no weight to it.

Summary of my assessment re alleged falsity of the March Slides

3865. My assessment of the Claimants' allegations in respect of the falsity of the March Slides and the Defendants' answers to those claims can be summarised as follows:

(1) In light of my conclusions and findings in relation to the Claimants' cases on Hardware, VARs, Reciprocal Transactions, Hosting and OEM, I have concluded that it follows, and I find accordingly, that (a) the March Slides reflected false accounting in respect of those important aspects of Autonomy's business, so that (b) the representations in the March Slides based on that false accounting were in material ways false.

(2) I also consider that the representation made that Autonomy was a *"pure software company"* or *"pure software model"* was intended to convey a special selling point, the success and self-sufficiency of its software business without the need for other revenue streams, whilst in fact disguising volume third-party hardware sales.

The Defendants' involvement in and responsibility for the representations in the March Slides

3866. There is no real dispute that the representations in the March Slides were made by the Defendants to HP:

(1) Dr Lynch and Mr Hussain were both involved in preparing the slides. Mr Hussain admitted as much and Dr Lynch did not deny it. The evidence of his involvement is summarised above.

(2) Dr Lynch's name appears on the front of the deck.

(3) The Defendants admit that they presented the slides to HP.

(4) In cross-examination, Dr Lynch admitted to presenting the "*technology and positioning slides*". He claimed that "*other people did the other slides*", which was not consistent with his pleaded admission that there were two presenters - himself and Mr Hussain. In any event, he admitted that he listened to the whole presentation, and there is no suggestion that he disavowed any of the representations made in the deck under his name.

(5) Likewise, through presenting part of the deck, and his acquiescence during the rest, Mr Hussain adopted those representations he did not directly make.

3867. In my judgment, both Defendants had "guilty knowledge" of the false accounting and therefore knew the representations were false, especially in giving no inkling of substantial sales of *"pure hardware"*; or they were, at least, reckless as to their truth or falsity.

Did the Claimants rely on the March Slides?

3868. The Claimants dismissed as *"fanciful"* the Defendants' argument that these representations did not induce Bidco to acquire their share and share options in Autonomy.

3869. They contended that:

(1) Mr Robison "*relied on*" the March Slides, which gave an "*impressive picture of Autonomy's financial performance and business*".

(2) The "*pure software model*" they described was, according to Mr Robison:

> "*a very attractive model for HP, a predominantly hardware company that was looking to acquire an asset that would enable it to expand in the software market. The fact that Autonomy's business model was focused almost exclusively on software, with only a small amount of services as disclosed in its public filings and presentations to HP, was important to HP and affected the price that HP was ultimately willing to pay, and did pay, for Autonomy."*

(3) According to Mr Robison's witness statement, the size and growth of IDOL Cloud as described in the March Slides was "*important to HP because of the relative predictability and recurring nature of the revenue stream*".

(4) The presentation of "*strong*" IDOL OEM revenues and revenue growth was also "*important to HP*", indicating "*that other companies valued Autonomy's technology*". HP therefore considered IDOL OEM to be "*a highly profitable, growing revenue stream that was recurring in nature and an indicator of the quality of the technology"*.

(5) Mr Robison described the overall "*message conveyed during the March 4 meeting was that Autonomy was a high-growth, pure software company*". Mr Robison described the presentation Dr Lynch gave of the March Slides as "*pretty compelling stuff*".

(6) Mr Sarin, who did not attend the 4 March meeting but who reviewed the March Slides shortly thereafter, also thought that the March Slides described "*a very compelling business*", given its apparent scale and growth.

3870. However, the Claimants did not mention Mr Apotheker in this connection. The Defendants presented him as the lynch-pin, and as the only one of the witnesses relied on by the Claimants in this context who could be cross-examined. Their argument was that:

(1) In March 2011, Mr Apotheker was not yet focussed on Autonomy as a possible acquisition target and the March Slides (which he did not refer to either in his witness statement or in cross-examination) played no part in his decision-making.

(2) On 19 March 2011 Mr Robison sent Mr Apotheker some slides showing a comparison between Tibco and Autonomy. Even by this stage Mr Apotheker was not personally considering Autonomy as a possible acquisition target. In his witness statement Mr Apotheker said that the first time he recalled

Autonomy appearing on the list of companies that were part of HP's Finance and Investment Committee's "M&A Pipeline" was at a meeting some time later, on 25 May 2011.

(3) Mr Robison's account of his reliance on the slides was general and could not be tested in cross-examination. The Defendants acknowledged that Mr Robison's witness statement made various very specific claims about what he thought in relation to particular slides, and how he relied on them; but it is hard to believe that these were genuine recollections when his witness statement said that "*I do not recall now whether I received a copy of the presentation at the time.*" The Defendants submitted that this has all the hallmarks of forensic reconstruction; a concern heightened by the fact that so many of the witness statements for the Claimants were palpably over-lawyered. This is a matter that Dr Lynch would have wished to test in cross-examination; and given that Mr Robison did not attend to give evidence, they submitted that no weight should be placed on what he says on this topic.

(4) In any event, none of the Claimants' witnesses suggested that the March Slides continued to have any impact on their, or HP's thinking by the time that HP's board decided to proceed with the acquisition in August. It is implausible that the March Slides played any real part in that decision, so long later, and after further investigation and negotiations must in all likelihood have relegated the March Slides far to the background, if ever they had any real prominence at all.

3871. As in the context of the January and February Slides (see paragraphs 3852 and 3853 above), I have concluded on the issue of reliance that:

(1) Subject to (3) below and to paragraph 3872, it is unlikely that HP specifically focused on or called to mind any of the January and February and March Slides when it came to determining to bid;

(2) The representations made would not independently be actionable as such;

(3) The March Slides, and what Mr Robison described as the *"impressive picture of Autonomy's financial performance and business"* conveyed by them and Dr Lynch's *"compelling"* presentation of them, were nevertheless intended to influence and were in fact influential in reinforcing HP's overall impression of Autonomy as (a) a *"pure software model"* which, as such, was particularly attractive to HP and ultimately (to quote Mr Robison's evidence, which I accept in this regard) *"was important to HP and affected the price that HP was ultimately willing to pay, and did pay, for Autonomy"*; and (b) having two sizeable and growing revenue streams, IDOL Cloud and IDOL OEM, which were relatively predictable and recurring in nature and (especially in the case of IDOL OEM, a good indicator of the quality of Autonomy's technology).

3872. I accept HP's argument that the March Slides, like the January and February Slides, whetted HP's appetite and informed its approach (including the development of its Deal Model): they need to be seen as part of a continuum, over the course of which the information provided and the representations made by Autonomy gave HP a picture of a company and business with strong revenue streams and quality technology capable of

enabling HP to achieve Mr Apotheker's target of moving HP into the mainstream of the advanced software sector, and thereby transformational change.

29 June 2011 meeting: the fourth set of alleged misrepresentations

3873. A meeting on 29 June 2011 between HP and Autonomy representatives was held in London. This followed two earlier meetings, one between Dr Lynch and Mr Robison at the beginning of June and another a lunch meeting between Dr Lynch and Mr Apotheker in Paris in mid-June.

3874. At the earlier meeting on 2 June 2011, the focus had been largely on HP and in particular Mr Apotheker's and Mr Robison's vision of making what Dr Lynch stated in his first witness statement he was given to understand was *"a key strategic shift away from its existing low-margin, commoditised hardware business, towards high-margin software"*. Dr Lynch described that he left the 2 June meeting *"excited about* [Mr Robison's] *ideas"* and went on that this was:

> *"the first meeting where I believed it was possible that HP would make an offer for Autonomy. After the meeting, I reported to Mr Quattrone that the meeting had been productive, but I expected it would be a slow partnership."*

3875. Dr Lynch described his lunch meeting with Mr Apotheker in Paris on 16 June 2011 notably briefly in his first witness statement:

> *"We discussed at a high level whether there might be any possibility of combining the two companies. While it was a serious discussion, it was brief."*

3876. According to Dr Lynch in his first witness statement, the purpose of the meeting on 29 June 2011 was to meet with HP's corporate development, software and cloud services team to discuss how HP and Autonomy might be able to work together. HP's participants included Mr Robison, Mr Sarin, Mr Levadoux and Ms Breya, while Autonomy was represented by Dr Lynch, Mr Hussain, Mr Kanter and Dr Menell.

3877. Mr Robison sent lists of discussion topics and detailed questions to Dr Lynch in advance of the meeting. Mr Sarin and Mr Levadoux both made notes of the meeting, which Mr Sarin stated in his witness statement was characterised as a "partnership discussion" to minimise the chances of rumour or speculation about a purchase transaction.

3878. The Claimants contended that Dr Lynch made the following misrepresentations at the 29 June 2011 meeting:

(1) According to Mr Sarin's evidence in his witness statement, Dr Lynch again described Autonomy as a "*pure software*" company. This was challenged in cross-examination, but Mr Sarin maintained that he distinctly recalled the phrase being used multiple times. It does not appear to have struck him at the time that this was of significance though: his notes made no mention of the phrase; and although in their written closing the Claimants suggested that Dr Lynch *"ultimately accepted that he had used the term"*, I understood his evidence rather to be that he explained Autonomy's model as a software business which was unusual in doing no material services.

(2) Dr Lynch said that Autonomy's OEM business was growing, and that it involved many other software companies incorporating IDOL into their own products, which made the IDOL platform ubiquitous. Mr Sarin's evidence to this end was not challenged, and Dr Lynch accepted that it was possible that he might have made the statements that Mr Sarin says he made. The Claimants reiterated their contention that what was stated about Autonomy's OEM business was false, because True IDOL OEM revenue was a fraction of that reported, and in decline.

(3) According to Mr Sarin's witness statement evidence, Dr Lynch also represented that:

(a) Being royalty-based, the costs of Autonomy's IDOL OEM revenues were very low, so that the gross margins of Autonomy's IDOL OEM business were close to 100%; and

(b) IDOL OEM produced a "*reliable income stream*", because the use of IDOL in other companies' software gave rise to a "*network effect*", which Mr Sarin explained in his witness statement:

> "*refers to the increased value that a good or service has as its user base increases – the telephone, for example (like, say, PayPal or Facebook) became much more valuable to its users as the number of those users increased.*"

(c) Mr Sarin added:

> *"Autonomy described their OEM business as the glue in many companies' products; it was very 'sticky', in the sense that once a company started to use IDOL as a component of its own products, it became very difficult for the company to cease doing so*."

3879. Mr Levadoux's notes (which he summarised in an email dated 1 July 2011 to Mr Robison and others, copying (amongst others) Mr Andy Johnson) echoed this:

(1) They suggested that Dr Lynch had represented that Autonomy's technology was

> *"very sticky, and even if many competitors OEM their technology, it would be very difficult for them (i.e. IBM/Lotus/Oracle, Adobe) to switch vendor"*; and

(2) They noted that the impression given was that:

> "*A core element of [Autonomy's] strategy is to scale by allowing others to build vertical apps on this platform (i.e. through OEMs). Focusing on being a platform business is also what allows them to be so profitable*".

3880. The Defendants suggested that Mr Sarin's witness statement *"was affected by the forensic process, rather than reliable recall"*, that Mr Sarin's reference to Dr Lynch

having described Autonomy as a *"pure software company"* looked like a *"forensic afterthought"* and that he was especially *"muddled"* as to what truly had been discussed about the OEM line of business, and had perhaps forgotten that in reality there had only been discussions about the broad pattern of OEM business and not about gross margins or other detailed facets of it.

3881. It was put to Mr Sarin that his contemporaneous notes of the meeting showed that the discussion at the meeting was "*all in the context of barriers to entry. It wasn't a general discussion about OEM or the OEM business model*" and "*when you suggest there was specific discussion about OEMs, gross margins and that sort of thing*", it was "*a muddle on your part.*" This part of the cross-examination of Mr Sarin was uncharacteristically convoluted; and I was not persuaded that it achieved what I took to be its purpose of suggesting and showing that nothing of any materiality or specificity had been said about the OEM business. I agree with the Claimants that the Defendants' suggestion that the discussion centred only on *"barriers to entry"* was a distraction, because the (alleged) fact that competitors could not easily enter the market was precisely one of the things that was said to make IDOL OEM a "*reliable income stream*".

3882. Further, the suggestion that a discussion about barriers to entry was not also a discussion about the reliability or profitability of IDOL OEM revenue is belied by the way Dr Lynch explained the concept in other contexts. For example, Dr Lynch explained on the Q1 2008 earnings call that:

> "*The OEMs market is very important for us because it allows penetration of the IDOL technology into many different areas without us having to write those applications, and it produces a very strong network effect*";

and in the Q3 2010 Quarterly Report, Dr Lynch said:

> "*The continued strong growth in our IDOL OEM revenues is both a further endorsement of the unique capabilities of IDOL and reflects a growing network effect as more software companies choose to design their products with Autonomy inside*".

3883. Moreover, the specific point about high gross margins recalled by Mr Sarin is also echoed in Mr Levadoux's notes:

> "*A core element of [Autonomy's] strategy is to scale <u>by allowing others to build</u> vertical apps on this platform (i.e. through OEMs). <u>Focusing on being a platform business is also what allows them to be so profitable</u>*" (emphasis added).

3884. In any event, as Mr Sarin pointed out in cross-examination, what he described Dr Lynch as saying about Autonomy's OEM business during the 29 June meeting was consistent with how Autonomy described its OEM business in the Q1 Quarterly Report, "*which we had read by this time*", and later in the Q2 2011 Quarterly Report. Indeed, the claim about near-100% gross margins on royalties was in the March Slides.

3885. Bringing this together:

(1) I consider it more likely than not, and therefore find, that Dr Lynch did refer to Autonomy as a *"pure software company",* that the meaning that Mr Apotheker and others at HP (including Mr Robison) took from the phrase was the meaning adumbrated in paragraph 3865(2) above, and that this did encourage HP because it was through acquisition of a strong specialised *"pure software company"* having no need for or dependence on other revenue streams that Mr Apotheker planned to effect "transformational change" for HP.

(2) The main focus of the meeting appears to have been on the special value and attraction of Autonomy's (a) IDOL technology and (b) OEM business as a reliable income stream with incremental prospects because of a *"network effect".*

(3) The overall effect was to reinforce the message that Autonomy was a strong software-focused business with ground-breaking technology, as indeed Mr Sarin stated in his witness statement. There is no dispute about the enthusiasm it engendered in HP: Mr Robison wrote that evening to Mr Apotheker referring to a *"REALLY good meeting today"* and Mr Apotheker confirmed his and Mr Robison's considerable enthusiasm for the potential deal by that stage.

3886. The Claimants did not allege that the ground-breaking potential of Autonomy's IDOL technology was exaggerated; however, I have concluded in the context of the OEM Claim that the nature of Autonomy's OEM business was misrepresented and its success and growth was inflated in its accounts, to the knowledge of both Defendants.

3887. Once again, I doubt that anything said at the 29 June 2011 meeting can plausibly be said to have induced the acquisition, other than in the general sense of encouraging HP's continuing interest and enthusiasm. The influence the meeting had was more general than specific: a purchase was not by then yet a real prospect and I doubt that the representations made were specifically called to the mind of those who eventually directed HP/Bidco to make a bid. However, (and like the January, February and (most especially) the March Slides), they were intended to and did encourage and inform HP as it worked towards the decision to bid, and in its work in developing and refining the Deal Model which eventually provided the parameters for agreement of a bid price.

3888. In other words, like the earlier slides, the representations made at the 29 June 2011 meeting were an important element of the continuum which eventually informed the bid and ultimately induced HP to purchase Autonomy at a considerable premium.

3889. I return to the issue of reliance in the context of these deceit/misrepresentation claims in paragraphs 3979 to 3988 below.

29 July 2011 meeting and its background: the fifth set of alleged misrepresentations

3890. On Friday, 29 July 2011, what HP described as the second set-piece meeting between HP and Autonomy took place at the Berkeley Hotel in London. No NDA was yet in place. HP was represented by Mr Robison, Mr Sarin, Ms Breya and Mr Levadoux. Autonomy was again represented by Dr Lynch, Mr Hussain, Mr Kanter and Dr Menell. The primary purpose of the meeting was to discuss the approach to and intended process

of due diligence. In cross-examination Mr Sarin accepted that it was agreed at the meeting that Autonomy would not be providing substantive information: it would be about process, the process by which information would be provided.

3891. The immediate background to the 29 July 2011 meeting was a meeting the previous day between Mr Apotheker, Mr Robison and Dr Lynch in Deauville. It was at that meeting on 28 July 2011 that a bid price was discussed for the first time although the Claimants had begun developing an early version of a discounted cash flow ("DCF") model (which became "the Deal Model") to try to determine the standalone value of Autonomy some time earlier (in early February 2011).

3892. Dr Lynch told me in cross-examination that until then he had thought a bid possible but not probable; but as from 29 July 2011 Autonomy was clearly *"in play"*. HP had even pencilled in and was targeting an announcement of acquisition on 18 August 2011 (leaving a short time for due diligence)[517].

3893. Dr Lynch had been pressing for £27 per share. He, Mr Apotheker and Mr Robison had agreed that if HP was to acquire Autonomy, HP would need to offer a price in an agreed range. Dr Lynch's initial recollection was that this range was between £25.50 and £26.50 per share, but it now appears to be common ground that the range in fact agreed was between £24.94 (which was precisely a 45% premium over the previous end-day closing price of £17.20) and £26.94 per share (representing a premium of 57% over the previous evening's closing price). Those latter figures were as stated in a draft indicative offer letter sent by HP to Autonomy the next day (29 July 2011). Having reached agreement on range of price, HP and Autonomy agreed to proceed to due diligence.

3894. The 29 July 2011 meeting was thus a new stage: a bid was by then on the cards, and it is plausible to assume (and intend) that the final decision and negotiations to fix on a final bid price would be influenced by subsequent details provided, and the due diligence process which had been agreed.

3895. The Claimants alleged that two representations were made at or arose from the 29 July 2011 meeting: one in the course of the meeting itself, and the other in a table that the Defendants agreed at the meeting to provide:

(1) Mr Sarin's evidence was that at the meeting, Mr Hussain *"told us that HP should rely on Autonomy's publicly available financial information"*. Both what was actually said and what was intended to be and understood to be conveyed by this was disputed.

(2) Second, it is common ground that following discussions at the meeting, Mr Hussain, with the assistance of Mr Kanter, prepared a table in response to item III(A)(3) on the Tesla Question List, which was uploaded to the Data Room. The table set out quarterly revenue figures by product category for the period Q1 2009 to Q2 2011. Those figures matched, and were expressly said to derive from, Autonomy's quarterly earnings releases.

[517] Dr Lynch told me in cross-examination that he did not think *"anyone in their right mind expected to do the deal on 18 August."* He added: *"I now know why they had to do it on the 18th, but I didn't at the time…I've never seen a deal done at this speed."*

3896. As to (1) above, the Claimants alleged that what Mr Hussain said *"constituted an implied representation by Lynch and Hussain that Autonomy's published information was accurate and not misleading."*

3897. The Claimants' case is that by telling HP to rely on Autonomy's publicly available financial information, and by uploading the table to the data room in response to HP's due diligence question, Mr Hussain – and Dr Lynch, through his acquiescence – represented that in each case that information was complete, accurate, and not misleading.

3898. The Defendants did not accept this, and contended that this was not what was said or intended:

(1) Mr Sarin had a list of due diligence questions, and there was a discussion about how the answers would be provided, or where they could be found. In relation to some of those questions, he wrote "Doc" on his list. He explained what that meant in cross-examination:

> *"Q. It was being explained to you, wasn't it, by -- it was Mr Hussain who was talking at that point and he was explaining to you, wasn't he, that much of the information about these things was in the published material?*
>
> *A. Much of the basic financial information was in the published material, yes."*

The Defendants submitted that in this passage, "*these things*" is a reference to the points where he had written "Doc" on his list and that it was not some general statement by Mr Hussain that HP should rely on Autonomy's published information, nor would it have been taken as such by any reasonable person hearing what Mr Hussain said.[518]

(2) Secondly, Mr Hussain submitted that all that he had said, and was understood to have said, and certainly all he had meant, was that much of the information that HP had requested was available from the published material. In other words, he was not doing, or not intending to do, more than directing HP to where information would be available, without confirming its accuracy, still less warranting it. In any event, if (contrary to this) any representation was to be implied, his alternative position was that it would have been limited to Mr Hussain's belief that Autonomy's published information was accurate and not misleading: and, he maintained, any such representation would have been true.

(3) Thirdly, for his part, Dr Lynch emphasised that he made no such statement, nor should such a statement be attributed to him., and that Mr Hussain was not acting as his agent. HP argued that Dr Lynch through his silence demonstrated acquiescence and adopted Mr Hussain's statement. But Dr Lynch countered that

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[518] See *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] 1 WLR 329 (CA) citing Toulson J (as he then was) in *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264 , para 50, (quoted in paragraph 3907 below).

silence does not ordinarily give rise to liability in deceit or misrepresentation;[519] that HP did not identify any legal obligation on Dr Lynch to correct or qualify anything said by Mr Hussain; and that Dr Lynch was not subject to any duty of disclosure.

(4) Fourthly, Dr Lynch contended that the Claimants did not in fact rely on the fact that he said nothing at this point. If they had wanted any assurance from Dr Lynch about the content of Autonomy's published information, they could have asked him directly: indeed, they could have requested a warranty from him as to the accuracy of Autonomy's accounts (something they never did). While Mr Sarin stated in his witness statement that Dr Lynch did not disagree with Mr Hussain's comment about the published information, he did not say that he paid any attention to – let alone relied on – Dr Lynch's silence. And as already noted, Mr Sarin played no part in the decision making process.

(5) Fifthly, Dr Lynch submitted that there was no actionable representation by him (and there was certainly no representation made to Bidco or its agent), but that even if there had been, the representation could have been no more than that he believed the published information to be accurate, which he did. He also had reasonable grounds to do so. Accordingly, the alleged representation would not give rise to liability, either in deceit or under s. 2(1).

3899. Although an issue of law may arise, which I discuss below, the primary question is one of fact, as to what was actually said and what was meant. Neither HP nor the Defendants were very clear on important details: for example, although Mr Sarin's evidence was that *"Dr Lynch did not disagree"* with Mr Hussain's statement, he did not actually state that Dr Lynch was there, or what the context was from which it was said to be apparent that Dr Lynch *"did not disagree"*. Further, the statement which Mr Sarin attributed to Mr Hussain that *"HP should rely on Autonomy's publicly available information"* was imprecise, as the present dispute as to its meaning shows: a direct quotation might have given more of an insight as to whether Mr Hussain was simply informing HP about a useful source, or indicating that what was stated was true and correct and need not further be assessed. Mr Sarin did not even in his witness statement confirm exactly what he understood Mr Hussain to mean, nor did he give any explanation as to why he had concluded that Dr Lynch understood what was said to have meant that Mr Hussain was verifying the published information (rather than identifying a source of information to be verified by HP).

3900. Indeed, although the Claimants' written closing submissions stated that Mr Hussain had made the relevant statement to HP *"in Dr Lynch's presence"* and cited Mr Sarin's witness statement in support, Mr Sarin did not actually say that, although there is some basis for an inference that Dr Lynch was present from Mr Sarin's evidence that the statement was made when going through with Dr Lynch and Messrs Hussain and Kanter and Dr Menell for that purpose what was called the *"Tesla Question List"*.

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[519] Clerk & Lindsell on Torts (22nd Ed, 2017), §18-06. And bearing in mind that this is alleged to have been an *implied* representation, see *Marme Inversiones v NatWest* at §123: "*a number of principles can be distilled from these authorities: (1) First, it is possible for a representation to be made expressly or impliedly through words or conduct. For a representation to be implied, silence or mere assumption is not usually enough as there is no general duty of disclosure.*"

3901. As so often in this hugely detailed case, the finer details are nevertheless lacking or elusive. Once again, the difficulty in determining what was said, and more especially its nuances, is made very difficult by the absence of Mr Hussain, who therefore could not be tested on either. Mr Kanter might have assisted me: but he withdrew and was not cross-examined: and the same applies in respect of Dr Menell.

3902. Dr Lynch himself did not expressly deny that the statement had been made. He did not assert that he did not hear it being made. He was, as it struck me, uncharacteristically wary when he was cross-examined. The following passages serves to illustrate this:

> *"Q. So where information could be found in publicly available documents, you wanted HP to rely on that information, correct?*
>
> *A. As I recall, Mr Robison was the person who first decided that a lot of the work could be done off of public documents, but we were happy for that to be a starting point.*
>
> ...
>
> *Q. Now, Mr Sarin's evidence is that in the meeting Mr Hussain said that HP should rely on Autonomy's published information. You don't deny that in your pleadings. Is that because you don't remember it or you have no recollection of it?*
>
> *A. I think it was a generally accepted term, but, as I say, I remember Mr Robison bringing it up and I wasn't in all the meetings anyway.*
>
> *Q. You didn't disagree with what Mr Hussain said when he said that HP should rely on Autonomy's published information?*
>
> *A. I don't know about the technicalities of "rely" from a legal sense but obviously I would expect HP to read all the public information.*
>
> *Q. But you didn't disagree with what Mr Hussain said when he said to you...*
>
> *A. I wouldn't disagree that it was a good idea to go and read all the public information, along with all the analyst reports, everything you could get your hands on.*
>
> *Q. It would have been obvious to you, Dr Lynch, that when HP was told to rely on that information, HP would understand that it was being told that that information was accurate and not misleading?*
>
> *A. A couple of things here. So first of all, I do believe that information was accurate, not misleading, but secondly, it's not for us to tell HP how to do its due diligence. Under the UK system they can request whatever information they want to request. We then decide whether to give that*

information. We can't tell HP how it needs to arrive at its decision or what process it needs to do, it must make those decisions itself.

Q. When you tell them or when Mr Hussain says to them "You should rely on Autonomy's published information", you would have understood that HP would have understood from that that they were also being told that the published information was accurate and not misleading?

A. I believe that the public information was accurate."

3903. In addition to the questions of fact raised, it is necessary to consider certain authorities referred to by the Claimants as to the effect of a person making reference in this way to public information as the answer to enquiries. These can conveniently be dealt with now.

3904. The Claimants cited *Webster v Liddington* [2015] 1 All ER (Comm) 427 in the Court of Appeal at [46][520], where Jackson LJ (with whom Briggs LJ and Christopher Clarke LJ both agreed) gave examples of possible "scenarios" in which, absent a contractual warranty, a person had passed on information produced by someone else, and how these might variously be regarded as him having (i) adopted the information as his own; (ii) represented that he has reasonable grounds to believe the information; or (iii) simply passed on information about which he has no personal knowledge or belief. The Claimants submitted that this is not a case that can plausibly fall into the third category: Dr Lynch and Mr Hussain were, respectively, the CEO and CFO of Autonomy, and had personally approved Autonomy's published financial results. Indeed, this was not information produced by someone else at all: it was their information and in passing it on they endorsed its truth and accuracy.

3905. The Claimants argued further that implicit in any representations Mr Hussain made about figures or statements made in the accounts was that so far as he was aware those figures and statements could be relied on as giving a true and fair view: and see *MAN v Freightliner* [2005] EWHC 2347 (Comm).

3906. Mr Hussain's case was that all he said, and was understood to have said, was that much of the information that HP had requested was available from the published material; in his RRAD he pleaded that he merely "passed on" information and that his references to information being in Autonomy's financial reports *"amounted, at most, to a representation that those sources contained the relevant figures* [or statement]*, but not that those figures* [or statement] *were accurate".* His statement was in the nature of giving directions as to whereabouts, and not any warranty of the accuracy of what was then found. In any event, Mr Hussain contended that any representation would have been limited to his belief that Autonomy's published financial information was accurate and not misleading: and that each was true.

[520] In *Webster v Liddington* [2015] 1 All ER (Comm) 427 the defendants/appellants were qualified clinicians who handed a lay patient a brochure prepared by another which described the treatment which the clinician was offering to carry out. It was held at trial and confirmed by the Court of Appeal that the defendant clinicians, in handing over the brochure, adopted its contents and impliedly represented them to be accurate, even though the brochure was not, as it were, his document.

3907. As Jackson LJ acknowledged in *Webster v Liddington,* those scenarios are not a complete statement of the range of possibilities and there are other intermediate positions. They are simply illustrations of the more general proposition explained by Toulson J (as he then was) in *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep 264[521] at [50] and approved by Jackson LJ in *Webster v Liddington* that:

> *"In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation has been made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."*[522]

3908. What is required, therefore, at the first stage is not an assessment of which of the scenarios identified in *Webster v Liddington* most nearly equates to the position (as the Claimants appeared to suggest) but what in all the circumstances a reasonable person would have been likely to infer from Mr Hussain's references to the information sought by HP being available in Autonomy's published information, which it may be added, so far as it concerned financial information about Autonomy, was prepared by or under the aegis of Mr Hussain himself. I say "the first stage" because it seems to me that, having determined what the statement was taken to mean by the addressee, it is then necessary to determine whether that is the meaning which was intended by the addressor (and see *Arkwright v Newbold* and paragraph 466 of the Introduction).

3909. I turn to my assessment of the factual issue as to the received and intended meaning and effect of Mr Hussain's disputed statement referring HP to Autonomy's published information.

3910. I accept that a major part of the meeting was simply an exercise in assisting HP to understand where information might be found; and I note that Mr Sarin himself accepted in cross-examination that:

(1) As mentioned in paragraph 3890 above, the 29 July meeting was about the process by which information would be provided, and Autonomy would not be providing any substantive information (not least because no Non-Disclosure Agreement was yet in place).

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[521] An appeal from that decision was dismissed by the Court of Appeal [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449

[522] In *IFE Fund SA v Goldman Sachs International*, Goldman Sachs had sent on a Syndicate Information Memorandum ("SIM") to IFE which IFE stated it had relied on in proceeding with an acquisition and which turned out to be false. The SIM was not prepared by Goldman Sachs but by a third party, and it contained express written disclaimers including that Goldman Sachs had not independently verified the information in the SIM. Toulson J did not accept IFE's case that Goldman Sachs was making an implied representation that it was unaware of any facts showing that the information was or might be materially incorrect (even though in fact Goldman Sachs had been advised by Arthur Andersen of some inaccuracies).

(2) At the meeting, those concerned simply went through the *"Tesla Question List"*[523] together and annotated the list to identify where the information requested might be found and/or its source.

(3) The answer in many cases was "the published information"; but all that was expressly said was to the effect that *"much of the information about these things was in the published information."*

3911. It is unsatisfactory to have to determine the first factual question, as to what Mr Hussain actually said, without having the benefit of any evidence from him. I take it that he would have denied having said, or having intended to be understood as saying, anything more than that for many of the questions which would arise in the course of the due diligence process HP should look first for the answer in the published information. I shall proceed on the factual premise that this was all that he did say or intended to say. I doubt that Mr Hussain would have intentionally expressed himself in such a way as to appear to be confirming, still less warranting, the accuracy of what was set out in the material. After all, the published information carried its own warranty of truth and accuracy, to the best of the issuer's knowledge and belief.

3912. The next question is what was conveyed by what I have determined he said. I consider that HP would have assumed that he was not aware at that time of anything material that he knew was not in that material and undermined its reliability.

3913. Then the question is whether Mr Hussain would have intended that to be what was conveyed. In my judgment, Mr Hussain, with what he knew of the quick time table and the constraints it imposed on the due diligence process, must have expected and intended that in referring HP to the published information as its first source (see above) he was conveying to them that he did not himself know of financial and other information which was material and undermined the reliability of that primary source.

3914. I have concluded, despite the lack of direct evidence, that Dr Lynch was present and aware of whatever it was that Mr Hussain said. He did not say he was not, despite being given every opportunity to do so when cross-examined: it seemed to me that in his cross-examination he deliberately stepped away from suggesting that he was not. Having the same appreciation as Mr Hussain of the constraints on the due diligence process, and with the knowledge he had, Dr Lynch would have expected HP to take what was being conveyed as being that Mr Hussain was not aware at that time of anything material that he knew was not in that material and undermined its reliability; and that he would have shared Mr Hussain's intention that HP should do so (as I find he did).

3915. On the basis of my previous conclusions that Mr Hussain and Dr Lynch had "guilty knowledge" that (a) the accounting treatment of important aspects of Autonomy's business was improper and gave a false impression of the true position and performance of Autonomy and (b) the nature and amount of an important part of the revenue attributed to the software sales had been generated over the course of the Relevant Period by hardware reselling, and that this and a significant proportion of the costs of it had been concealed or disguised, both would have known that HP were being directed to an unreliable source.

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[523] Tesla being the code name for Autonomy at that time

3916. Whilst of course I accept that ordinarily there is no duty to speak, in the particular circumstances, Dr Lynch was there to represent Autonomy as its CEO in assisting HP in proceeding with the process of due diligence, and Mr Hussain was there as CFO to assist HP; Dr Lynch shares responsibility with Mr Hussain for the latter having led them to what I have determined he knew was a misleading source and implicitly encouraged them to rely on it.

3917. At least in the case of Mr Hussain, I consider that I am reinforced in this assessment by the table which, after the discussions at the 29 July 2011 meeting, Mr Hussain prepared with the assistance of Mr Kanter (and see paragraph 3895(2) above). This table, which was in response to part of the *"Tesla Question List"*, set out quarterly revenue figures by product category for the period Q1 2009 to Q2 2011 (and was uploaded to the Data Room). Those figures matched, and were expressly stated to derive from, Autonomy's quarterly earnings releases. Of particular note is that no mention was made of hardware sales. Neither of the Defendants addressed this point.

3918. In my view, and I find, Mr Hussain, in presenting this material and causing it to be uploaded to the Data Room for the purpose of the due diligence exercise, would have been taken to and did represent that he believed, as CFO, that the information given was complete, accurate and not misleading; and the table gave a misleading impression by omitting any reference to hardware sales.

3919. I have also concluded that Mr Hussain knew that he was representing that the information to which he directed HP, and that which he provided in the table he produced after the meeting with the assistance of Mr Kanter, was true and accurate to the best of his belief.

3920. However, no evidence was provided sufficient to establish that Dr Lynch was involved in either the compilation or presentation of the table: and I find that he was not involved in either. That does not, however, cause me to change my overall conclusion that he knew and intended that what was represented by Mr Hussain was done so with his endorsement.

Alleged misrepresentations in the course of due diligence 1 August 2011 to 18 August 2011

Overview

3921. I have described in the Introduction to this judgment the process of due diligence which took place between 1 August 2011 and 18 August 2011. It may be recalled that Dr Lynch, for his part, sought to impugn HP's conduct of due diligence as rushed, and suggested that HP cut corners, failing to obtain information – most strikingly, Deloitte's work papers – that would have been provided had HP not gone ahead and announced the acquisition on 18 August 2011, and revealed some of the matters that the Claimants complain about. By contrast, the Claimants submitted that those claims were not only factually wrong but also irrelevant as a matter of law, since it is trite law that it is no defence to a fraud claim that the victim should have discovered the truth, or even that he was careless in not doing so.

3922. I return to the process of due diligence now to address the Claimants' separate contention that Mr Hussain made a number of misrepresentations in the course of certain due

diligence calls on which HP also relied in proceeding with the Acquisition, in particular, in the course of telephone calls as part of the process on 1, 2 and 4 August 2011.

3923. In addressing the three sets of misrepresentations (the sixth, seventh and eighth sets) alleged to have been made in the course of due diligence calls on 1, 2 and 4 August 2011, I focus first on whether there was any misrepresentation in each case. I address the issue of reliance compositely at the end of this section since it seems to me to be artificial not to look at them together and in the round.

1 August 2011 due diligence call: the sixth set of alleged misrepresentations

3924. On a "finance overview" due diligence call held on 1 August 2011, Mr Hussain gave an overview of the business and presented Autonomy's Q2 2011 results. The Claimants alleged that in doing so he made a series of misrepresentations, all of which were recorded in a contemporaneous note of the meeting made by Rob Binns ("Mr Binns") of HP, and were also described by Mr Sarin to the same effect in his witness statement (which was not challenged in this regard).

3925. Mr Binns noted that Mr Hussain made the following representations in his overview of Autonomy's business:

(1) Autonomy's gross margin range was 87%–90%, and its operating margin range was 42%-50%.

(2) Although Autonomy's accounts were drawn up in compliance with *"IFRS not US GAAP"*, revenue-recognition policy was *"closely aligned to US GAAP"* (though I note that this may refer only to Interwoven since it was explained as being *"due to prior US listing"*).

(3) Autonomy's COGS included support costs, managed service data centre hosting costs, and *"very little 3P [third-party] royalty costs"*.

(4) The market consensus forecast for Autonomy's 2011 revenue was $1.06 billion.

3926. The Claimants alleged that each of these representations was false. According to the Claimants:

(1) If all hardware costs were allocated to COGS as the Claimants contended they should have been, and none to sales and marketing, Autonomy's reported gross margin (on the adjusted basis reported by Autonomy) would have been 83.3% in 2009, 83.6% in 2010 and 86.7% in H1 2011. (The unadjusted IFRS measures were substantially lower.)

(2) According to the Claimants, Autonomy's revenue recognition policy and practice did not meet even the less prescriptive IFRS standards.

(3) Mr Hussain's statement as to COGS made no mention of hardware costs, which even after Autonomy's wrongful inclusion of large parts of those costs in sales and marketing expenses still represented very large proportions of Autonomy's reported COGS: 37.7% of COGS in 2009 ($33.1 million of $87.7 million reported); 73.2% in 2010 ($81.7 million of $111.5 million reported); and 69% in H1 2011 ($40.4 million out of $58.6 million reported).

(4) Mr Hussain's statement as to the market consensus forecast for 2011 of revenues of $1.06 billion amounted to an implied representation that there were reasonable grounds for that consensus, which was false because that consensus was based on false and misleading historical financial statements.

3927. The Claimants also alleged that in presenting Autonomy's Q2 2011 results, Mr Hussain further impliedly represented that they were complete, accurate and not misleading, but that he well knew that they were not. According to the Claimants:

(1) As a result of false accounting, the Q2 2011 Quarterly Report included numerous incorrect and misleading metrics. They included those set out, with what the Claimants presented as the corresponding True metrics, in the following table (though it is to be noted that when I assess quantum the figures will have to be further adjusted to strip out claims in which the Claimants have not succeeded as identified for like purposes in paragraph 3863(1) above).

Metric	**Stated figure**	**True figure**
Q2 2011 total revenue	$256.3 million *pages 1, 3, 9, 16*	$211.3 million ($190.5 million excl. pure hardware) [524]
Q2 2011 IDOL Cloud revenue	$64.3 million *page 3*	$49.1 million[525]
Q2 2011 IDOL OEM revenue	$47.2 million *page 3*	$3.8 million[526]
Q2 2011 IDOL OEM year-on-year growth	26% *page 3*	(60%) from $9.6 million to $3.8 million[527]
H1 2011 total revenue	$476 million *pages 2, 3, 9, 16*	$388.9 million ($348 million excl pure hardware)[528]
H1 2011 IDOL Cloud revenue	$117 million *page 3*	$78.2 million[529]
H1 2011 IDOL OEM revenue	$84.3 million *page 3*	$7.5 million[530]

[524] Cross-check Q2 2011 revenue is the same as the True Position revenue to the nearest $0.1 million.
[525] Cross-check Q2 2011 IDOL Cloud revenue is $43.6 million.
[526] Cross-check Q2 2011 IDOL OEM revenue is the same as the True Position revenue.
[527] Cross-check Q2 2011 IDOL OEM year-on-year growth of (64%) i.e. a 64% decline ($10.6 million to $3.8 million).
[528] Cross-check H1 2011 total revenue of the same.
[529] Cross-check H1 2011 IDOL Cloud revenue of $75.6 million.
[530] Cross-check H1 2011 IDOL Cloud revenue of $75.6 million.

Metric	**Stated figure**	**True figure**
H1 2011 IDOL OEM year-on-year growth	27% *page 3*	(44%) from $13.5 million to $7.5 million[531]

(2) The Autonomy group's adjusted gross margin was said to be 88% in H1 2011 and 87% in Q2 2011. The True figures (correcting only for the treatment of hardware costs) were 86.7% and 86.2% respectively.

(3) The Q2 2011 Quarterly Report also repeated, on pages 3 and 4, the claim that Autonomy operated a "*pure software*" model, which the Claimants alleged was false as previously explained and addressed above.

3928. As previously mentioned, Mr Hussain pleaded and contended as a general matter that all that he was doing in "presenting" the Q2 2011 Quarterly Report and results was telling HP that there was information available in the public domain, on which HP could take its own view: his presentation added nothing, and no-one on the call could have thought that he was making any kind of personal representation. I have not accepted that general defence in the context of the 29 July 2011 meeting, and the position is in my view clearer in the present context, after due diligence had started, and matters had progressed from the preparatory stage to the substantive stage.

3929. In my view, and I find, when making statements in the course of the due diligence exercise about Autonomy's financial information, or in repeating or paraphrasing what was said about Autonomy's financial position and performance in published information for which he had, or shared, responsibility, he was not only passing on information: I consider it would have been naturally supposed by his audience, as he must have been aware and intended, that, as CFO with responsibility in that context, he believed and was satisfied that the information thus conveyed was accurate, and not untrue or misleading.

3930. I also agree with the Claimants that implicit in any representations he made about figures or statements made in the accounts was that he believed that those figures and statements could be relied on as giving a true and fair view: and see *MAN v Freightliner.*

3931. As to the particular misrepresentations alleged, Mr Hussain responded:

(1) The gross margin percentage range he had referred to accurately reflected Autonomy's published information, which he believed had been prepared in accordance with IFRS and vetted by Deloitte (including in relation to the allocation of part of the costs of hardware reselling to sales and marketing rather than COGS). Furthermore, it was the evidence of Mr Bloomer, as the chairman of the Audit Committee, that fluctuations in Autonomy's margins within a handful of percentage points would not have had a significant effect on

[531] Cross-check H1 2011 IDOL OEM year-on-year growth of (48%) i.e. a 48% decline ($14.5 million to $7.5 million).

investors' perception of Autonomy or its market valuation.[532] In the quarter in question (Q2 2011), even on the Claimants' case the adjustment required to correct the alleged misallocation of hardware costs in the quarter was immaterial (Autonomy reported adjusted gross margin of 88% in H1 2011 and 87% in Q2 2011, whereas the Claimants' 'correction' resulted in figures of 87.6% and 86.2% respectively).

(2) Anything that Mr Hussain had said about Autonomy's revenue recognition being closely aligned to US GAAP was (at most) a comment on Autonomy's accounting policies. It was not on its face any kind of representation about the accounting treatment of individual transactions.

(3) As to the impression alleged to have been created by the omission from the description of COGS of any significant hardware costs that there were none, Mr Hussain contended that:

(a) The description given was not, on its face, concerned with the proportionate monetary contribution of the various types of costs included in COGS;

(b) HP knew of at least Autonomy's sales of appliances and therefore that its COGS did include some hardware costs;

(c) It was open to Mr Sarin to ask questions to explore the costs of appliance sales or other sales but he did not do so because he had not taken what was said as a representation as alleged.

(4) Mr Hussain's reference to the market consensus forecast for Autonomy's 2011 revenue of $1.06 billion was not a representation that there were reasonable grounds for such consensus, nor any additional warranty of the accuracy of the published information: he was simply pointing out the availability of the public information and he believed that Autonomy's published information was accurate.

(5) In any event, no reliance had been demonstrated, in particular because:

(a) No evidence had been led to show that Mr Sarin, who was not a decision-maker, had reported this alleged representation to anyone who was; and

(b) Mr Sarin accepted without equivocation in his cross-examination that no buyer would ever rely on the target's evaluations.

3932. As to (1) above, even if (as I would accept is likely) the gross margin percentage range Mr Hussain gave did accurately reflect Autonomy's published information, and even if (as I would accept) Mr Hussain was aware that Deloitte had vetted the accounts, Mr Hussain knew there to be material information which falsified the figures given and nullified the fact of apparent approval by Deloitte.

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[532] Mr Bloomer explained: *"If you compare Autonomy to a company that operates on very tight margins, such as a supermarket, the impact of reported margins is very different. A supermarket…might have margins of 2-3%. In a business like that, a 1-2% fall is very significant. For a company with margins around 80% or 90% that fluctuated by a few percentage points up and down every quarter, movements in margin are less relevant"*

3933. As to (2), Mr Hussain's reference to Autonomy's revenue recognition being closely aligned to US GAAP, even if ostensibly only a comment on Autonomy's accounting policies, would have been known by him to be untrue, in that the way Autonomy accounted for VAR sales was radically different than that required under US GAAP: and indeed it was only the difference which enabled the use of VAR sales as an improper means of accelerated revenue recognition. That strategy would have been impossible under US GAAP.

3934. As to (3) in paragraph 3931 above, I consider and find, that Mr Hussain's continued adoption by reference of Autonomy's treatment of COGS in its financial statements and published information, was or amounted to a misrepresentation as to there being no material hardware sales, which was false.

3935. I cannot accept Mr Hussain's point in 3931(4) above either. On the basis of my previous findings, Mr Hussain knew that market consensus figures were derived from incorrect figures in Autonomy's financial statements.

3936. As explained above, I address paragraph 3931(5) above later, taking together all the allegations in respect of alleged misrepresentations in the course of due diligence. I also address later the dispute as to the extent of any involvement by and knowledge of Dr Lynch in the due diligence process as a whole, after considering the seventh and eight set of alleged misrepresentations and the due diligence calls on 2 August 2011 and 4 August 2011 during the course of which the Claimants contended they were made.

3937. Thus, in my judgment, Mr Hussain misled HP during the 1 August 2011 due diligence call in each of the respects alleged.

2 August 2011 due diligence call

3938. The seventh set of alleged misrepresentations was made during the second financial due diligence call, held on 2 August 2011. This call addressed Autonomy's business model, revenue streams, revenue recognition practices and tax policies.

3939. HP had sent questions to Autonomy in advance. Mr Johnson, Mr Sarin and others attended for HP, together with representatives of BarCap, Perella and KPMG (including Mr Gersh). Notes were taken by Mr Sarin (on his copy of HP's questions) and by Mr Murali of BarCap. Mr Sarin's unchallenged evidence was that it was Mr Hussain who addressed most of HP's questions. The Claimants alleged that Mr Hussain made two misrepresentations in the course of the call.

3940. The first alleged misrepresentation arose from Mr Hussain's response to the first of the questions provided in advance by HP:

> *"1. Describe your sales model by product or vertical (i.e., hosted vs. SaaS vs. on-premise license vs. OEM vs. appliance). For each, describe the standard elements in each arrangement by sales model and how revenue is recognized with each.*

a. Do all or only certain arrangements include license, maintenance, professional services or hosting/subscription?

b. Include discussion of how each element in the agreement is priced (i.e., % of license, users, cost per seat/node etc.)"

3941. Mr Sarin explained his thinking and objective in asking this question as follows:

"In short, we were asking Mr Hussain to describe Autonomy's business by product, so that we could understand the revenue streams associated with each of these products. The request was intended to be broad. We were looking to elicit information from Autonomy, and Mr Hussain in particular, about everything that Autonomy sold (whether referred to in Autonomy's public filings or not) and wanted to know how revenue was recognized in relation to each revenue stream. We wanted to understand the full picture around Autonomy's revenues."

3942. Mr Gersh (who had been involved with KPMG in putting the question list together) explained his thinking behind the questions as follows:

"The question [list] was intentionally broad ... [It] did not exclude (and was not intended to exclude) any particular product or type of sale or any element of Autonomy's business. We wanted to gain a broad understanding of Autonomy's sales model and how different types of revenue were recognized because revenue recognition differences between IFRS (which Autonomy used) and US GAAP (which HP used) might impact the business after an acquisition."

3943. Both Mr Sarin and Mr Gersh gave evidence that Mr Hussain's answer to HP's question made no reference to the pure hardware sales that had made up more than 10% of all Autonomy's reported revenues (and a larger percentage of what the Claimants recalculated and presented as being its "True revenues") over the preceding eight quarters. Thus:

(1) Mr Sarin stated:

"We knew about Autonomy's appliance sales, which Autonomy described as a small part of its business, where customers had an urgent need to deploy IDOL, involving a pre-installed license on appropriate hardware, and which was said to be conducted at a margin not widely dissimilar to Autonomy's license business. However, we knew, and were told, nothing about any sales by Autonomy of third-party hardware without any Autonomy software …"

(2) Mr Gersh's evidence on this aspect was as follows:

"*I recall that Question 1 was asked on the August 2 call. As I explained to the jury in Mr. Hussain's criminal trial, if Autonomy was reselling any significant amount of hardware as an element of its contracts (with pre-loaded software or as standalone hardware), I would have expected Mr. Hussain or others in*

> *Autonomy management on the call to disclose and discuss any such arrangements in response to Question 1. They did not."*

3944. During the US criminal trial Mr Gersh was asked whether he recalled that "*as a part of the response to Question 1 … Mr Hussain said that Autonomy sold hardware as a matter of convenience <u>when Autonomy software was needed to work with hardware</u>*" (emphasis added). Mr Gersh said that he did recall this, later making clear (as the original question put to him by Mr Hussain's US attorney did) that he thought Mr Hussain was talking about appliances. Mr Gersh then further emphasised this in his witness statement in these proceedings by way of response (and in rebuttal) to Dr Lynch's suggestion that Mr Hussain had in fact described Autonomy's pure hardware sales on the call.

3945. Both Mr Sarin and Mr Gersh were cross-examined on behalf of Dr Lynch about Mr Hussain's comments; but their evidence that Mr Hussain made no reference to Autonomy's pure hardware sales on the 2 August call was not itself challenged. Indeed, in his pleading, Mr Hussain did not deny that his answer to Question 1 omitted any reference to Autonomy's pure hardware sales.

3946. The Claimants contended that by omitting any reference to Autonomy's pure hardware sales from his answer to Question 1, Mr Hussain gave the false impression on the 2 August call that Autonomy's revenues were derived entirely from software, and related services (including software as a service), except only for the "*very small*" appliance business conducted at returns comparable to the rest of its pure software business that Autonomy had disclosed and represented as effectively software sales.

3947. Mr Hussain denied making any misrepresentation, and counter-attacked that Mr Gersh, in particular, was well aware that Autonomy sold hardware otherwise than as an appliance. More specifically, Mr Hussain contended that although the notes taken by Mr Sarin and Mr Murali both seem to make clear that all of those other revenue streams were discussed in terms on the call and only hardware went unmentioned, his defence pleaded that no false impression was given by Mr Hussain's answer because:

> *"Mr Hussain's notes exclude references to a number of revenue streams, including support and maintenance, professional services and eDiscovery services … HP would have been aware that any response by Mr Hussain based on such notes would not have been an exhaustive description of Autonomy's revenue."*[533]

3948. In addition to his contention that he expressly mentioned hardware sales for the convenience of customers, Mr Hussain contended in his written closing submissions that Mr Gersh's knowledge of substantial hardware sales should be inferred from:

 (1) Mr Gersh's evidence in cross-examination that he had read all the contracts that Autonomy placed in the due diligence data room: these included at least two contracts for the sale of hardware;

[533] This point was not pursued in Mr Hussain's Closing Submissions.

(2) The lack of any apparent foundation for Mr Gersh's explanation, which appeared to confirm that he had read the contracts, but assumed that they were all part of a *"solution involving Autonomy's product"* or an appliance;

(3) An internal KPMG email from Mr Gersh dated 7 August 2011 which expressly stated that he was not sure that the 40 contracts in the data room *"captured everything…since as far as I can tell they have not captured free software or hardware pass-through"*;

(4) The (alleged) falsity of Mr Gersh's suggestion in cross-examination that *"that's a reference to the hardware component of appliances and where they're selling a solution"*, it being submitted that such falsity was shown by Mr Gersh's use of the expression pass-through sales to denote hardware and distinguish hardware sales from appliance sales: the context being Mr Gersh's discovery (post-acquisition) of a $41 million purchase from Dell which he considered too large to relate to an appliance sale and Mr Gersh's approach then in distinguishing appliance sales from pass-through hardware sales; and

(5) The frailty (as Mr Hussain presented it) of Mr Gersh's explanation that:

> *"We use the term generally, sort of "pass-through hardware" in a software sense because software companies aren't making hardware, they're purchasing it from somebody, they're putting their software on it and they're selling the product with the hardware delivery mechanism, so as it's described as an appliance…"*

(6) Other evidence suggesting that (contrary to what Mr Gersh maintained he had understood) "pass-through hardware" was not used in "a software sense" included both (i) KPMG in their post-acquisition report and (ii) E&Y in their memorandum of December 2012 (addressing HP's write-down of $8.8 billion) used the term *"hardware pass-through"* to denote what they described as *"standalone hardware sales"*.

3949. It is necessary to separate out three strands in these competing presentations:

(1) Whether what Mr Hussain said on the 2 August 2011 telephone call gave the false impression that Autonomy's revenues were derived entirely from software;

(2) Whether Mr Sarin and/or Mr Gersh became aware that Autonomy sold hardware, and more particularly, hardware otherwise than as an appliance ('standalone' hardware);

(3) Whether the issue of hardware sales was, or if properly understood, would have been, a matter of importance to KPMG, Messrs Sarin and/or Gersh, and HP.

3950. I have addressed the last two points, which, as it seems to me, go to the issue of reliance, rather than whether or not there was any misrepresentation, in the context of the Hardware claim. I have concluded that neither Mr Gersh (or KPMG) nor Mr Sarin appreciated, prior to the Acquisition, that Autonomy had been reselling, in substantial

quantities, hardware other than with Autonomy software built into or embedded in it, or as part and parcel of an identified software sale.

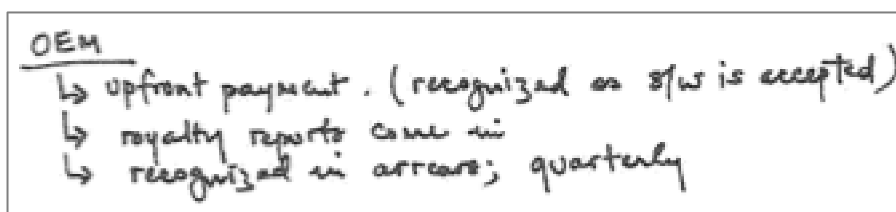
3951. Focusing for present purposes on point (1) above:

(a) Whether or not evident from other sources read or available to HP that Autonomy had engaged in substantial "pure" or "standalone" hardware sales, the fact remains that Autonomy's published information did not contain any reference to such sales;

(b) In those circumstances, in my judgment, in directing HP to that published information without any warning, Mr Hussain perpetuated and reinforced the impression that Autonomy did not sell material amounts of non-appliance (i.e. standalone) hardware;

(c) Further, in my judgment, this was intentional in that Mr Hussain did not wish HP to know that Autonomy had (a) undertaken hardware sales as an expedient to make good any shortfall in software sales and to ensure that Autonomy either did meet or came close to meeting quarterly revenue forecasts, and (b) disguised its use of that expedient by accounting for costs and losses of sales as sales and marketing expenses: and see my assessment of and conclusion on the Hardware claims.

3952. The <u>second</u> misrepresentation concerned Autonomy's IDOL OEM revenue. As Mr Sarin's notes recorded, HP was told that such revenue generally consisted of an upfront payment by the OEM partner followed by royalty payments based on the OEM partner's sales, as the following excerpt from Mr Sarin's notes showed:


OEM
↳ upfront payment. (recognized as s/w is accepted)
↳ royalty reports come in
↳ recognized in arrears; quarterly

3953. Mr Murali (of BarCap) also made notes which recorded in relevant part:

"Rev rec around OEMs – Upfront fee + royalty (from a licence perspective),"

though he did also note after that: *"did not understand 100% Need to clarify"*.

3954. The Claimants alleged that this representation was false, because as discussed in the part of this judgment dealing with the OEM claims, only a small fraction of the IDOL OEM revenue reported by Autonomy was derived from ongoing royalties.

3955. For reasons set out in some detail in the part of this judgment in which I consider the OEM claims, I have concluded that the depiction of Autonomy's OEM business as

generating from OEMs an especially valuable royalty revenue stream was incomplete, inaccurate and false, to the knowledge of both Defendants; and that Mr Hussain's representation was likewise false, and known by him to be so.

4 August 2011 due diligence call

3956. The eighth set of alleged misrepresentations were made on a due diligence call held on 4 August 2011. The call was attended for HP by Mr Johnson, Mr Sarin, Ms Hsiao and others, as well as representatives of BarCap. Mr Hussain, Mr Kanter and Mr Chamberlain participated for Autonomy, as (it appears) did Brian Cayne of Qatalyst: none of them gave evidence.

3957. During the 29 July 2011 meeting, HP had asked (not for the first time) for internal three-year financial projections. Dr Lynch and Mr Hussain had said that no such projections existed. It had therefore been agreed that HP would show Mr Hussain parts of its Deal Model, and that Mr Hussain would comment on the reasonableness of the assumptions and projections it contained. The Claimants relied on the fact that this agreement was recorded in Mr Sarin's notes of the 29 July 2011 meeting, where against HP's questions concerning Autonomy's three year projections Mr Sarin noted: "*walk thru HP model*"; and on Mr Sarin's email to his team following the meeting:

> "*They do not have a 3 year financial plan … As such, I have offered to Sushovan (CFO) that we can walk him through our stand-alone model (just the income statement and associated assumptions) to get his perspective*".

3958. In cross-examination Mr Sarin told me:

> *"The purpose of the August 4 call was really because we didn't have access to management's own long-term forecast. The idea was for us to really run at a high level some of the assumptions that were driving our projections for the valuation of Autonomy and so, as we have discussed before, looking at growth rates and margins was particularly important. So we were showing a subset of the model that was only looking at Autonomy, to Autonomy CFO and we were walking through that just to make sure we got comfort that some of those numbers were indeed correct, and we weren't really missing anything in the process …*
>
> *So the idea of talking to executive management really is they are more involved in running the business, they have more insight on their own business than anybody sitting from the outside would glean over a two to three-week period. So the idea was to elicit from management: here is how we're looking at the business, here is how we're evaluating the business, here is how we're looking at the projections of the business; looking at your historical numbers, do you believe this makes sense?"*

3959. Mr Sarin made contemporaneous handwritten notes of the call and gave evidence by reference to them. The notes were a few lines long; but Mr Sarin told me that the meeting lasted about an hour.

3960. During the call, Ms Hsiao (a member of Mr Sarin's team) shared her computer screen with the other attendees and Mr Sarin *"walked them through"* parts of the Deal Model. As Mr Sarin explained, "*it was limited to inputs*[534] *that would be needed to figure out top line and other elements of P&L until 2016, but no assumptions that would be relevant for a valuation*", because "*I wouldn't want to share with the target if the valuation that I'm coming up with is higher than the market value, because at this time the deal hasn't really been, you know, signed and so you don't want to tip your hand in terms of value.*" Mr Chamberlain took screenshots, which he emailed to Mr Hussain. There was a dispute, which I need not decide, whether those screenshots provide a complete or partial record of what was shown. Revenue projections were shown by product line, but only up until 2016.

3961. According to the Claimants, Mr Hussain *"largely confirmed the assumptions and projections that he was shown, but suggested some tweaks, which HP largely adopted."* The *"tweaks"* which the Claimants suggested were made at Mr Hussain's suggestion related to two aspects of the Deal Model which the Claimants said were adjusted in the course of the conversation: (a) the forecast growth of IDOL Product revenues (as to which, according to Mr Sarin's contemporaneous notes, Mr Hussain stated that the original 5% annual growth projection was "*very low*" and his suggestion was to use 10% instead), and (b) the formula used to project maintenance fees (which according to the same notes suggest that Mr Hussain placed the renewal rate at 90%). The result, as can be seen by comparing the first and second of Mr Chamberlain's screenshots, was slightly to reduce total projected revenue for 2011 (from $1.08 billion to $1.06 billion) and 2012 (from $1.27 billion to $1.25 billion).

3962. The Defendants gave a rather different depiction, and in particular, submitted that any changes that were made to HP's model following the call were not made in reliance on any comment of Mr Hussain, but rather on HP's own assumptions, and that in any case, Mr Hussain was not seeking to push up the numbers: on the contrary, he suggested that some of HP's proposed figures be reduced. Further, substantial changes were made to the model at a later stage between 4 and 18 August 2011, as Mr Sarin accepted. The Defendants relied on Mr Sarin's own evidence in cross-examination:

> *"Q ... Now, you, of course, understood that you were here looking at your own projections, and that projections like this are always a matter of opinion, aren't they?*
>
> *A. Yes, there is an element of subjectivity involved.*
>
> *Q. No buyer would ever rely on the target's own evaluation of these things; these were your own projections, correct?*
>
> *A. Correct."*

3963. The dispute in this regard is relevant to, and in assessing, the Claimants' allegation that, Mr Hussain made the following misrepresentations in the course of the call:[535]

[534] The transcript says "imports", which is an obvious error.

[535] Mr Sarin also explained that during the call Mr Hussain said that HP's assumptions about the various gross margins that applied to Autonomy's different product categories were "*right*". It was suggested to Mr Sarin in cross-examination that he had only asked about Autonomy's overall gross margin, rather than the margins on individual components; however, he explained later in his oral evidence that that was, and indeed he told Ms

(1) That the consensus analyst estimate for Autonomy's 2011 revenues was $1.05 billion, but that UBS's forecast of $1.06 billion was more accurate. The Claimants cited Mr Sarin's notes recording a statement there attributed to Mr Hussain that the consensus was "*a little behind*", so that actual revenue "*could be a little higher*", before he cited the UBS figure. The Claimants contended that this statement was false because, like the consensus figure, UBS's forecast reflected the false accounting underpinning Autonomy's published financial results.

(2) That the projections in the Deal Model for licence (i.e., IDOL Product), IDOL Cloud and IDOL OEM revenue were "*reasonable*". Again, the Claimants contended that this was false because Autonomy's 'True' revenues in those categories were inconsistent with such projections.

(3) That the consensus forecast for Autonomy's 2012 revenues was $1.25 billion. As described above, this corresponded to the revised projection in the Deal Model that resulted from the adjustments which the Claimants contended were made during the call. The Claimants submitted that this amounted to an implied representation that there were reasonable grounds for the market consensus, but that in fact the consensus simply reflected the false accounting. Mr Sarin told me:

> *"when somebody is looking at the revenue elements that comprise the full Autonomy revenue, he's looking at the disaggregated gross margins by those five elements. To the extent there is a significant piece of information that is missing, which would have a material impact on the valuation and our understanding of the business, that would have been an appropriate time to flag it."*

3964. Mr Hussain dismissed the call as *"wholly insignificant"*. He submitted:

(1) In fact, he had pointed Mr Sarin to lower projected revenue figures (of $1.05 billion) and the effect of his suggestions, as Mr Sarin had accepted in his evidence and confirmed in cross-examination, was to reduce projected revenues compared to those in HP's suggested model (which had projected revenues for 2011 of $1.076 billion).

(2) All that he was doing was referring to analyst estimates which were publicly and easily available to HP. He denied having said that HP's figures were "reasonable" and although the Claimants again cited Mr Sarin's contemporaneous notes as recording just such a comment, he said that all he was doing was explaining the assumptions and the comment was Mr Sarin's own gloss.

Harvey of HP in an email dated 10 November 2011 that "*The gross margin split was not officially provided by Autonomy. We had made assumptions based on our understanding, public comparables etc. During one of the diligence sessions we vetted the assumptions, at a high level, with their CFO*". The suggestion put to Mr Sarin is inconsistent with the comment recorded in Mr Sarin's contemporaneous note: "*gross margins right*" (emphasis added). Further, if all HP were asking were whether the weighted average of its individual gross margin assumptions was in line with Autonomy's reported overall gross margins, it could have done the necessary, simple sums itself.

(3) In any event, as Mr Sarin confirmed in cross-examination the further and substantial changes later made to the model between 4 and 18 August 2011 were made unilaterally by HP without any reliance on any statement made or allegedly made by him.

3965. Insofar as the Claimants were seeking to rely on the exchanges during the 4 August 2011 call as amounting to Mr Hussain confirming the validity of HP's Deal Model and its assumptions, and as going beyond or providing a basis for a claim independent of their allegations as to the falsity of Autonomy's accounting information I do not accept that. Nor do I accept that HP would have been entitled to or did treat what was said as validating their Deal Model, or as the basis on which they made alterations to it. At most, in my judgment, Mr Hussain was refining representations already made, and by inferential repetition, reinforcing them. If relevant at all, that is really relevant principally to reliance. Whilst the call was not wholly insignificant, what happened was not such as to found any separate claim for misrepresentation.

3966. That leaves for consideration two matters that I reserved until after dealing with the representations made during the process of due diligence: (a) the involvement of Dr Lynch in the due diligence process and (b) the issue of reliance.

Dr Lynch's involvement in the due diligence process

3967. Dr Lynch has sought to portray himself as having played very little part in the due diligence process. He says that he did not attend any of the calls between the senior leaders on both sides to which he was invited. But Mr Sarin's evidence was that he did, noting that Mr Robison for HP "*sat through every call*", and would not have joined if "*his counterpart*" (Dr Lynch) did not. Indeed, Dr Lynch claimed not to remember speaking to Mr Sarin at all after 1 August 2011, but the evidence shows that he did.

3968. More generally, although it is true that Dr Lynch's name is on very few due diligence emails or documents, that does not mean he was not involved in drafting them. Rather, consistently with his general practice, Dr Lynch repeatedly commented on other people's emails in draft, and indeed himself drafted or redrafted emails for other people to send.

3969. Dr Lynch claimed in cross-examination that he did so because "*there was an explicit request from Andy [Kanter] that all emails should go through him for purposes of the recording for the UK takeover process*", but plainly Dr Lynch could simply have copied Mr Kanter on any emails sent by him. Indeed, Dr Lynch was happy to email HP directly about due diligence issues when it suited him. (Dr Lynch's claim is certainly not supported by Mr Kanter's email of 1 August 2011 asking him and others to avoid emailing documents on the basis that they had to go through the data room.)

3970. What is more, his involvement went beyond drafting or commenting on emails. He had conversations with Mr Hussain about how best to respond to HP requests. As described in the OEM section of the judgment, Dr Lynch was involved in putting together a list for HP of Autonomy's "*Top 10 OEM customers by revenue for FY 2010*". Despite attempting in his first witness statement to distance himself from this episode, it is clear

from the contemporaneous materials that he discussed the list with Mr Hussain on at least two calls.

3971. Dr Lynch continued to deny these allegations generally. He claimed that he did not participate in any of the financial or legal due diligence calls, though he did join a few technical calls to discuss Autonomy's products. He sought to maintain this in cross-examination:

> *"So if you look at the calls I'm on, they're all about product, technology and positioning. I don't attend the finance and legal calls."*

3972. His written closing submissions suggested also that this was broadly confirmed by Mr Sarin when he was cross-examined, relying on the following passage:

> *"Q.… if we just consider the due diligence process from 1 August onwards, okay, and just define it as that for a moment, during the period after 1 August, you can't recall Dr Lynch providing any information to you, can you?*
>
> *A. So just to make sure I understand the question, when confirmatory diligence begins with the first call on August 1, your question is do I recall Dr Lynch providing me specifically any information?*
>
> *Q. Yes. During any call that you were involved with or any email that you received?*
>
> *A. My calls were largely with Mr Hussain, Mr Kanter. I probably did speak with Dr Lynch occasionally about some things, for example the call with Deloitte that happened in -- later on down the road. I don't believe he and I were spending time going through diligence materials.*
>
> *Q. Right. Just on that call involving Deloitte, you're not suggesting that he was actually part of the Deloitte call? Are you talking about process again?*
>
> *A. Process again.*
>
> *Q. Right, and he again says that he wasn't actually part of that conversation and that's something you've just misremembered?*
>
> *A. I think there is an email to that effect, which says, "This is what Dr Lynch and I have agreed in a prior conversation and therefore we will -- instead of getting the auditor work papers, we will go ahead and have a call with Deloitte".*
>
> *Q. We can look at that in due course –*

> *A. Sure.*
>
> *Q. -- but he cannot recall any discussion with you during the period after 1 August?*
>
> *A. I don't recall any substantive diligence-related call. There might have been process-related calls."*

3973. Dr Lynch's closing submissions acknowledged that later in his cross-examination, Mr Sarin suggested that he had a conversation with Dr Lynch in relation to OEMs, sometime between 16 and 18 August 2011; but it was pointed out that this was not something which Mr Sarin dealt with in his witness statement, and when cross-examined he sought to justify the omission on the basis that this was because "*it wasn't really any diligence-related item per se*", and that "*There wasn't anything material that I ought to have then written out in the witness statement*". In the circumstances, Dr Lynch submitted that no weight should be placed on this supposed incident.

3974. Dr Lynch also said that he did not attend any of the calls between the senior leaders on both sides that he was invited to; and he pointed out that his name is on very few financial due diligence emails.

3975. However, with reference to that last point, the Claimants marshalled examples which they submitted demonstrated that, although not apparently involved, Dr Lynch was actually (as Mr Rabinowitz put it to him in cross-examination) *"directing what HP is and is not told in the background…"*. In particular:

    (1) They referred to a response, apparently from Mr Kanter, to an email from Mr Levadoux listing certain key things which HP wanted to be dealt with as due diligence entered its second week (including *"Top Tesla OEM arrangements")*, and relied on an email chain to show that in fact it was Dr Lynch who had drafted the response and simply told Mr Kanter to send it to Mr Levadoux.

    (2) They put forward another example, of an email from Dr Lynch directly instructing the addressee, Mr Kanter, as to the content of a response to an email from Mr Sarin.

    (3) Another email, dated 12 August 2011, from Mr Kanter to Dr Lynch concerning information sought by Mr Sarin, including relating to OEM business, received the response "*Could you draft answers for us to review*", suggesting a supervisory role on the part of Dr Lynch.

    (4) A fourth example was an email dated 10 August 2011 from Dr Lynch to Mr Kanter with Dr Lynch's editorial changes of a draft email to Mr Sarin which Mr Kanter had prepared or caused to be prepared and obviously sent to Dr Lynch for comments. Dr Lynch stated that he had *"edited a lot"*. Mr Sarin had asked various questions, focusing especially on Autonomy's hosting business, and had requested *"…off the shelf/regularly produced management reports (monthly/quarterly) that you use to manage the $300 million business…"*

3976. Dr Lynch sought to dismiss the suggestion that he was directing what HP was told and not told *"in the background"* as a *"bit of kite-flying"* forming no part of the Claimants' pleaded case and which, in any event, was not true. However, as it seemed to me:

   (1) His explanation of the examples above of his involvement behind the scenes in responses to Mr Sarin, which was that "*there was an explicit request from Andy [Kanter] that all emails should go through him for purposes of the recording for the UK takeover process*", and *"emails are supposed to go through Mr Kanter…"*, seemed to confirm rather than disprove the fact of his involvement.[536]

   (2) There were also instances suggesting that Dr Lynch was happy to email HP directly about due diligence issues when it suited him.

   (3) There are indications also that his involvement went beyond drafting or commenting on emails. He had conversations with Mr Hussain about how best to respond to HP requests. For example, he was involved in putting together a list for HP of Autonomy's "*Top 10 OEM customers by revenue for FY 2010*", and it is clear from the contemporaneous materials that he discussed the list with Mr Hussain on at least two calls.

3977. The impression which I formed generally was that Dr Lynch was simply indisposed towards permitting an important part of Autonomy's business being run by others, indeed perhaps personally incapable of doing that. As in other contexts, which I have addressed, even if he was not involved routinely, or in day-to-day details, Dr Lynch never relinquished a general supervisory role in any sphere of importance to Autonomy's business. Where not ostensibly involved, he was in any matter of importance involved behind the scenes. He would almost invariably involve himself at a more micro-level, sometimes sporadically but often more routinely, according to his concern and interest. In my view, this is illustrated in the present context of the due diligence.

3978. In my judgment, Dr Lynch shared with Mr Hussain knowledge of the impropriety of the way aspects of Autonomy's actual business activities had been accounted for and disclosed (or rather disguised, concealed, or misleadingly presented). For the proposed Acquisition to proceed at the price agreed, both knew that the false presentation had to be maintained. I consider it much more likely than not that Mr Hussain would have kept him informed of the progress of the process on a regular basis. Dr Lynch was involved in this, as in all other important matters relating to the company. He did not need to know and I doubt he did know the details of every stage; but I am satisfied that in the due diligence process overall he was, as I have described him elsewhere, the éminence grise and well aware of what the message to HP had to be, and intended that it should be, and knew that it was being, delivered in the form of the information provided in answer to HP's questions and in the representations made. He knew that thereby HP were being deceived. In my judgment, Dr Lynch was responsible accordingly and liable with Mr Hussain as if he also had been the actual representor.

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[536] Dr Lynch's claim is also difficult to reconcile with Mr Kanter's email of 1 August 2011 asking him and others to avoid emailing documents on the basis that they had to go through the data room.

Whether HP relied on the Defendants' misrepresentations

3979. It is common ground that in order to make good their claims in deceit HP had to show not only that the Defendants made representations of fact to HP which they knew to be untrue, and did so knowingly, without belief in, or reckless as to, their truth[537], but also that they intended HP (or, where the representations were made indirectly, recipients in a class including HP) to rely on those representations and HP did so rely.

3980. The Defendants contended that even if found to be such, none of the misrepresentations set out above were intended to or did induce Bidco to buy the Autonomy shares and share options they agreed to sell.

3981. The Claimants dismissed this as *"fanciful"*. They submitted that the misrepresentations in issue were fundamental parts of: (i) the initial approach to HP concerning the possible sale of Autonomy; (ii) the Defendants pitching Autonomy to HP directly; and (iii) the Defendants' responses to HP's due diligence requests. That process concluded with HP deciding to offer, and offering, £25.50 per share for Autonomy, including the shares owned by the Defendants. They contended *"non-exhaustively"* that the evidence shows that HP was induced by the representations in the following ways.

3982. The Claimants' case as to the January, February and March Slides is as follows:

(1) The January Slides, sent as part of Mr Quattrone's initial approach to HP, led to the 3 February 2011 video conference which, with the related February Slides, led in turn to the 4 March 2011 meeting at which the March Slides were presented.

(2) The representations in the February Slides were of "*particular interest*" to Mr Robison and his colleagues in the SCD group. Mr Robison, who was HP's Chief Strategy Officer and Head of SCD, relied on them when considering whether Autonomy would be a suitable fit for HP.

(3) Mr Robison "*relied on*" the March Slides, which gave an "*impressive picture of Autonomy's financial performance and business*". The "*pure software model*" they described was, as Mr Robison explained in his witness statement:

> *"a very attractive model for HP, a predominantly hardware company that was looking to acquire an asset that would enable it to expand in the software market. The fact that Autonomy's business model was focused almost exclusively on software, with only a small amount of services as disclosed in its public filings and presentations to HP, was important to HP and affected the price that HP was ultimately willing to pay, and did pay, for Autonomy."*

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[537] Bidco's alternative claims under s.2(1) Misrepresentation Act 1967 do not require proof of the third element – that the false representations were made fraudulently, i.e. without belief in their truth or reckless as to their truth. If the other elements are established, the claims will be made out unless the Defendants prove that they had reasonable grounds to believe, and did believe up to the time they sold their shares and share options to Bidco, that the facts represented were true.

(4) The size and growth of IDOL Cloud as described in the March Slides was "*important to HP because of the relative predictability and recurring nature of the revenue stream*".

(5) The presentation of "*strong*" IDOL OEM revenues and revenue growth was also "*important to HP*", indicating "*that other companies valued Autonomy's technology*". HP therefore considered IDOL OEM to be "*a highly profitable, growing revenue stream that was recurring in nature and an indicator of the quality of the technology"*.

(6) The overall "*message conveyed during the March 4 meeting was that Autonomy was a high-growth, pure software company*". The presentation Dr Lynch gave of the March Slides was "*pretty compelling stuff*".

(7) Mr Sarin, who did not attend the 4 March meeting but who reviewed the March Slides shortly thereafter, also thought that the March Slides described "*a very compelling business*", given its apparent scale and growth.

3983. As to the representations made in June and July 2011 the Claimants submitted that:

(1) The representations made at the 29 June 2011 meeting, including in respect of IDOL OEM, led Mr Sarin to conclude that Autonomy was "*a strong business*".

(2) HP also relied on the Defendants' repeated representations that Autonomy was a "*pure software*" business. Had HP known about Autonomy's hardware sales, and their contribution to Autonomy's reported rate of revenue growth, it would have viewed them as a significant negative, which would have affected how much (if anything) HP was willing to pay for Autonomy. Likewise, had Mr Sarin's team been aware of the hardware sales it would have asked detailed questions for the purpose of valuing Autonomy.

(3) HP relied, as the Defendants told it to rely at the 29 July 2011 meeting, on Autonomy's publicly available financial information, including the H1/Q2 2011 results presented to them directly by Mr Hussain.

(4) Most importantly, HP relied on that information also when building the Deal Model, the bedrock of which was Autonomy's reported historic revenues and costs.

(5) BarCap, acting for HP, also checked the historic revenue numbers in the model against the table provided by Mr Hussain described in paragraph 3895(2) above. Had the table been accurate, there would have been major discrepancies, and the falsity of the published numbers would have been discovered.

3984. As to the representations made during due diligence:

(1) Mr Sarin's evidence was that he and his team relied, in developing the Deal Model, on the information provided in due diligence. That included the comments on the Deal Model provided by Mr Hussain on 4 August 2011. According to Mr Sarin's witness statement:

> *"Confirmation from Autonomy's CFO that the key assumptions and projections in our valuation analysis were consistent with his knowledge*

of Autonomy's business was very important to us. I recall after that call feeling very comfortable that the projections in the model were reasonable. Of course, I recognized that Mr Hussain would probably be motivated to be upbeat about the projections so as [to] get a good price, and I weighed his feedback to reflect this potential bias, as well as the fact that people's views can differ. Thus, when he said that he thought our 5% year-on-year IDOL Product growth rates were too low and could be doubled to 10%, I took account of his views but did not fully adopt them. Ultimately, however, I believed that as the CFO of a large, publicly-listed company, Mr Hussain would be truthful in his statements to me and the public market."

(2) Likewise, on 8 August 2011, Mr Johnson told Mr Robison that there were three areas in which HP hoped to "dig deeper" on due diligence: Deloitte's work papers, an open-source code scan, and:

(3) "*One click deeper on financial projections – While they do not have a 3-year plan, they probably have a financial model that they will use with Qatalyst for fairness purposes. <u>Our financial diligence to date has been predominantly Q&A with Sushovan</u>*" (emphasis added). HP never obtained Qatalyst's model, and Mr Hussain's answers on the 4 August 2011 call were what it principally relied on for confidence that its key forecasts and assumptions for Autonomy were in line with Autonomy management's views.

(4) Mr Apotheker and the SCD group in turn focused on the analysis in the Deal Model when considering the value that Autonomy presented to HP, which, in turn, informed the price that HP was willing to pay for it.

(5) It was suggested to Mr Sarin that HP did not rely on what Mr Hussain said in the 4 August 2011 meeting; Mr Sarin strongly disagreed. The Claimants dismissed this suggestion as *"hopeless"* and submitted that the whole purpose of the call was for Mr Hussain, the CFO of Autonomy, to provide HP with guidance on its forecasts and assumptions in the absence of any internal projections by Autonomy (which HP had repeatedly sought). They emphasised their point that there would have been no point in HP asking Mr Hussain to comment on its forecasts and assumptions if HP did not intend to rely on what he said.

3985. More generally, as set out above, the Claimants insisted that most of the representations in issue were responding to specific questions from HP. Thus:

(1) in the case of the March Slides, HP's questions covered topics including Autonomy's historical revenue growth and the size of the OEM and Cloud businesses;

(2) in the case of the 29 June 2011 meeting, HP asked about Autonomy's product categories and historical and projected sales; in the case of the 29 July meeting, HP's detailed questions gave rise to both the representation that it should rely on Autonomy's published information for many answers, and the specific table of revenues by product category complained of; and

(3) in all of the due diligence calls (1 August 2011: overview of Autonomy's financials requested by Mr Sarin; 2 August 2011: HP sent detailed lists of questions; 4 August 2011: Mr Hussain was asked to comment on specific forecasts and assumptions in the Deal Model), Mr Hussain was likewise responding to specific questions.

3986. The Claimants suggested that if, rather than either misrepresenting the truth or staying silent, the Defendants had told the truth, then the discrepancy between that truth, and the claims in Autonomy's published financial information, would have become apparent. In such circumstances, as Mr Apotheker described:[538]

> *"I would have been highly suspicious and demanded answers ... The facts that I have been asked to assume would have raised material and serious questions about the accuracy of Autonomy's public description of its business and its success, and perhaps more importantly, raise[d] significant doubts about the integrity of Autonomy's management, whose names and signatures appeared in descriptions of the business contained in the Annual Report. Matters such as substantial sales of third-party hardware by a software company, round-trip transactions, overstatement of IDOL OEM revenues, inflated revenue growth figures, and other inaccuracies or misstatements would have suggested that Autonomy's management was engaged in a systematic effort to portray Autonomy's business as stronger, better-managed, more vibrant and more successful than was truly the case ...*
>
> *If such information had come to my attention prior to announcing the deal, I nevertheless think it possible that I would have given Autonomy and its leadership an opportunity to explain the discrepancies. If, as seems most likely, the explanation I heard was not satisfactory, I have no doubt that I would have recommended to HP's Board that it should abandon the deal, because I would have had no interest in bringing into HP a team that I could not trust and whose judgement I doubted, and a company significantly less relevant to HP's strategy and successful than initially thought. I am confident the Board would have shared my concerns."*

My overall assessment of the due diligence process and its relevance

3987. In summary, in my judgment, the cumulative effect of the Slides and the representations made were to depict Autonomy as having a special selling point as a pure software company with especially valuable and dependable revenue streams (especially from its IDOL Cloud and IDOL OEM) accurately and reliably described and quantified in its published information. Due diligence on a tight timetable was undertaken on that premise, and the answers to the questions raised by HP in the course of the due diligence process reinforced the representations made and further encouraged and induced HP to rely on Autonomy's financial reports and the public statements therein of its business,

[538] Mr Apotheker was asked in various ways whether he would have been reassured to learn that Deloitte knew some of the underlying facts and had approved the accounts. He made clear that he would still have asked questions. But those questions, as premised, are not relevant here. If the Defendants had told Mr Apotheker that Deloitte was satisfied, that would obviously have amounted to an implied representation that Deloitte was correctly satisfied – and if the alleged fraud took place at all, that implied representation would have been equally false.

the sources and nature of its revenue streams, its software revenue growth, and its overall financial position and performance.

3988. HP/Bidco relied on these representations in the round, together with the published information they appeared to refresh and validate, in pursuing a potential bid, negotiating the price and ultimately entering into the Acquisition (including the purchase of the Defendants' respective shares and share options) at the price finally agreed. The suggestion that HP/Bidco did not rely on the representations as well as the published information is incorrect: they were complementary and reliance was placed on both in that all these matters impacted the mind and affected the judgement of HP/Bidco in determining to proceed and eventually conclude the Acquisition, including the purchase of the Defendants' respective shares and share options, at the agreed bid price.

The Non-Disclosure Agreement

3989. Finally, Dr Lynch (but not Mr Hussain, despite a passing mention in his Defence) sought in his RADC to invoke the provisions of the Non-Disclosure Agreement ("the NDA") entered into by HP and Autonomy on 3 March 2011 in an attempt to defeat the Claimants' misrepresentation claims. The plea relied on the effect of the NDA as a matter of Delaware law: but no evidence of Delaware law was provided. Dr Lynch did not mention the NDA in his closing submissions, and I take him to have abandoned the point.

3990. Further, if I am wrong and the point is sought to be maintained, I do not consider that, taking Delaware law to be the same as English law, as I must in default of any evidence of Delaware law, the NDA would avail Dr Lynch as a defence to a claim for fraud. Dr Lynch cannot rely on a contractual term to exclude his own liability for fraud, as a matter of public policy: *HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349, *per* Lord Bingham at §16 and Lord Hoffmann at §76.

3991. As to Bidco's claims under s.2(1) Misrepresentation Act 1967, pursuant to s.3 of that Act, contractual terms cannot exclude or restrict liability save insofar as they satisfy the requirement of reasonableness under s.11(1) Unfair Contract Terms Act 1977. That was for Dr Lynch to prove, and he has not even alleged that the terms of the NDA satisfy the statutory requirement. It is in any event doubtful that a contractual term that purports to exclude or restrict liability for fraud can be regarded as reasonable, especially in the circumstances of the present dispute.

3992. Further, and in any event, I agree with HP that the provisions invoked by Dr Lynch have no such effect even on their own terms:

(1) First, Dr Lynch sought to rely on clause 5 of the NDA as estopping Bidco from "*advancing any claim by reference to confidential information defined therein*". As to this:

(a) "*Confidential Information*" was defined in clause 1. The definition excluded, among other things, information that "*prior to or after the time of disclosure becomes part of the public knowledge or literature*", save by the fault of the receiving party.

(b) It was unclear which, if any, of the misrepresentations set out above were being said by Dr Lynch to relate to "*Confidential Information*"

within the meaning of the NDA – particularly given his case that the representations in issue "*generally reflected Autonomy's [public] financial statements*". The burden was on Dr Lynch to plead and prove those matters: and he did not do either.

(2) Second, Dr Lynch relied in his pleading on clause 13, which provided:

> *"This Agreement constitutes the entire agreement among the parties hereto and supersedes all other prior agreements and understandings, both written and oral, among or between any of the parties with respect to the subject matter hereof and thereof. All modifications of, waivers of and amendments to this letter agreement [sic] must be in writing and signed by both parties hereto."*

(3) However,

(a) That is, in terms, an entire-agreement clause, providing that the Non-Disclosure Agreement supersedes "*prior agreements and understandings*". Entire-agreement clauses do not ordinarily exclude liability for (non-negligent) misrepresentations; if that is what is intended, then it must be expressly stated: *Mears Ltd v Shoreline Housing Partnership Ltd* [2013] CP Rep 39 §16.

(b) The clause is only concerned with agreements and understandings "*with respect to the subject matter*" of the NDA– that is to say, the use of Confidential Information. Even if "*understandings*" did mean "*representations*", the clause would have no effect on representations that did not concern the use of Confidential Information.

(c) Clause 13 defines the agreement "*among the parties hereto*", i.e., HP and Autonomy. Neither Bidco nor Dr Lynch is a party to the Non-Disclosure Agreement, and neither is mentioned in clause 13 (whether directly or by any reference to "*Associates*"). Dr Lynch had no right to enforce clause 13 against Bidco, nor is Bidco bound by it.

(4) In any event, even on Dr Lynch's case, he could only have invoked clause 13 in respect of representations made before the date of the Non-Disclosure Agreement, i.e. 3 March 2011: i.e., those in the January and February Slides.

Conclusion on the claims in deceit and misrepresentation

3993. In my judgment, the Claimants have established their claims in deceit and misrepresentation against each of the Defendants in respect of each of the misrepresentations addressed above.

RELIANCE AND LOSS REVISITED

Ambit of this Chapter

3994. Before turning to the Direct Loss claimed, I return to address in more fact-related detail, and as regards all the various FSMA claims, the issues of "reasonable reliance" and loss. I also address some associated issues in respect of the Deceit and Misrepresentation Claims.

3995. I have dealt in the Introduction with the law applicable in this context as I perceive it. I have also identified the persons within HP/Bidco primarily engaged in the process which ultimately led to the Acquisition (see paragraphs 158 to 178); and I have chronicled (a) how HP came to identify Autonomy as a target (see paragraphs 153 to 157); (b) the development of HP's interest and the preparation and refinement of HP's detailed analysis; (c) the exploratory and then more detailed negotiations about price (see paragraphs 222 to 233); (d) the process of due diligence (see paragraphs 234 to 278); and (e) the negotiations and their final conclusion with agreement on price, the approval and announcement of the bid on 18 August 2011 and the declaration of it becoming unconditional as to acceptances on 3 October 2011 (see paragraphs 279 to 304 and 321).

3996. Further, in paragraphs 3236 to 3247 I have addressed in some detail the question as to whether Autonomy's published information induced a false understanding of Autonomy's OEM business (and concluded that it did, and that HP/Bidco reasonably relied on a depiction of the extent and nature of that business which was false). I have focused especially on the presentation of OEM in Autonomy's published information for a number of reasons. First, in that context (OEM) there was a more pronounced issue in light of the dispute as to the meaning and extent of the OEM metrics voluntarily provided. Secondly, there was especially focused dispute between the parties as to whether any reliance had been placed by HP/Bidco on any particular understanding of what Autonomy's OEM business comprised. Thirdly, it is clear that HP/Bidco regarded the OEM business as (quoting from Mr Apotheker's cross-examination) a *"very, very important part of the business model, and a very smart one"* for which in its DCF analysis (see below) it projected gross margins of 98%: it is clear, and I find, that HP/Bidco placed particular reliance on their understanding derived from Autonomy's published information about the nature of IDOL OEM revenue, its rapid growth (for example, 27% growth was recorded in Autonomy's Q2 2011 Quarterly Report) and its high gross margins on what appeared to be recurring revenue.

3997. However, the matters I referred to in paragraph 3242 in reaching my conclusion that HP/Bidco reasonably relied on the depiction of the nature and scope of OEM's business in proceeding with the Acquisition at the bid price also exemplify the false and misleading exaggeration of key elements of Autonomy's business which led HP/Bidco to conclude that its revenue streams were more reliable and valuable than was in truth the case.

3998. My purpose now is to gather together strands already apparent as regards Autonomy's other business lines, and to confirm and clarify my conclusions as to the fact, extent and reasonableness of HP/Bidco's reliance on Autonomy's published information. This is necessary both for comprehensiveness and so as to enable determination of the related but separate issue of compensable loss in respect of the FSMA claims and the relevant counterfactual by reference to which to assess it. In doing so, I also consider the interplay between the FSMA claims and the personal claims in deceit and misrepresentation.

Summary of Claimants' case on reasonable reliance

3999. The Claimants submitted that in the context of their FSMA claims, as in the context of deceit, they had established that the Defendants were each responsible for untrue and misleading statements or omissions made dishonestly, and that the "presumption of inducement" applied and had not been rebutted. However, they also described at some length the process leading up to the negotiations which eventually culminated in the agreed bid, the construction of a DCF analysis[539] ("the Deal Model"), the formulation and agreement of a bid price, and the eventual Acquisition.

4000. The Claimants' overall factual case on reliance was that HP/Bidco's decision to proceed with and conclude the Acquisition at the bid price was materially informed and influenced by the untrue and misleading depiction of Autonomy as a *"pure software"* model achieving high margin sales with consistent organic software revenue growth based on the sale of IDOL (what Autonomy regularly referred to as *"IDOL organic growth"*) and an attractive mix of business in the amounts and having the characteristics described in Autonomy's accounts, including "annuity-like" flows of business and profits from rapidly growing OEM business.

4001. According to the Claimants, HP's approach and its Deal Model used to establish standalone and 'with synergies' valuations of Autonomy were falsified by the undisclosed reality that in what the Claimants' valuation expert, Mr Bezant, took to be the 'True Position',[540] Autonomy was (a) a much smaller business (at both revenue and profit levels); (b) not a pure software business but one that had a material and increasing proportion of sales of third-party hardware; (c) growing less rapidly than represented; and (d) based on a less attractive mix of business.

4002. As to the requirement of showing that their reliance was reasonable, the Claimants' position was that:

> *"there is no sensible basis on which it could be argued that it was unreasonable of HP and Bidco to rely on the accuracy of Autonomy's published information."*

Summary of the Defendants' contrary case

4003. The Defendants, in addition to denying reliance on the basis of their *"Bidco point"*, also did not accept that the "presumption of inducement" has any application in the context of a claim under s. 90A/Schedule 10A of FSMA, and submitted further that even where the presumption is applicable the burden lies on the investor (here, HP/Bidco) to identify precisely what misrepresentations they relied on, to establish that but for those misrepresentations they would have acted differently (it being insufficient to show that they might have acted differently) and that in all the circumstances any such reliance was reasonable.

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[539] As described by Mr Apotheker in his witness statement, *"A DCF model estimates the future performance of a business, and assesses the present value of the cashflows that it is expected to generate."*

[540] The 'True Position' represented the position had accurate information been published historically. Mr Bezant recorded in this regard that the basis on which he had been instructed was that, in assessing the FSMA Loss, he was instructed *"to assume that, but for the breaches of duty alleged by the Claimants: (1) Autonomy's published financial information would not have been subject to the false accounting of which the Claimants complain; but (2) the impugned transactions would still have been entered into."*

4004. The Defendants appeared to accept that the misrepresentation need not be the sole inducement, and that it is sufficient in a claim under FSMA to show that the claimant's *"mind was disturbed by the misstatement of the Defendants, and such disturbance was in part the cause of what he did"*; but they emphasised that the misrepresentation must play a *"real and substantial part in inducing the representee to act"* and that it must be shown to have been *"actively present to* [the claimant's] *mind"*. In this regard, on the facts, they contended that HP/Bidco (a) had relied on a variety of sources, and especially its own corporate analysts and third party advice from Perella Weinberg (on broad strategy issues) and Barclays Capital ("BarCap"), (on the specifics of the Acquisition) in determining whether to bid for Autonomy and at what price; (b) did not have in mind the published information or the Slides when it made the formal bid, even if those matters had encouraged and influenced its initial approaches; and (c) would have proceeded with the Acquisition on the same terms even in the absence of the alleged fraud, and so could not prove either the relevant degree of reliance or loss.

4005. In the latter context, the Defendants contended that in reality, Mr Apotheker drove the bid forward and his focus was at all times not on the published information or the financial state of Autonomy as there portrayed, but rather on the synergies that could be created by the Acquisition. They relied especially on an email from Mr Apotheker to Mr Lane dated 5 September 2011, in which, in seeking to defend the bid, he emphasised the importance of the envisaged synergies that the combined companies could generate, more than the stand-alone value of Autonomy (and see the footnote to paragraph 201 and paragraph 311).

The issues requiring analysis

4006. It seems to me that, in the light of those competing contentions, the following principal issues require analysis:

(1) What were the principal metrics and factors by reference to which HP/Bidco pitched its bid price and eventually concluded the Acquisition?

(2) More particularly, what were the principal metrics and factors underpinning the Deal Model?

(3) How ultimately did HP/Bidco make its decision at board level?

(4) Does the fact that HP/Bidco took into account the views of analysts and specialist advisers, especially in assessing Autonomy's likely future performance, suggest that it did not rely sufficiently on Autonomy's published information to establish its claims and substantial loss?

(5) Was anyone whose knowledge is to be attributed to HP/Bidco aware, before the Acquisition, of any material matters which falsified the depiction of Autonomy in its published information?

(1) *What were the principal factors and metrics by reference to which HP/Bidco pitched its bid price and eventually concluded the Acquisition?*

4007. With Mr Apotheker (as CEO) the persons primarily charged with the identification of suitable targets to enable HP to realise Mr Apotheker's vision of *"evolve[ing] the Enterprise Business from low-margin products and services to become a full services*

and solutions partner for businesses, providing the essential/strategic parts of the technology 'stack'[541]*"* were the members of the SCD Group and its Corporate Development sub-team particularly aligned with software business.[542] In the case of Autonomy, they were, principally, Mr Apotheker, Mr Robison (head of the SCD Group), Mr Sarin, and (though less engaged because diverted by a serious family illness) Mr Johnson. It was ultimately their assessments, together with the Deal Model and the assessments of HP/Bidco's advisers (Perella Weinberg and BarCap) that went to the Board of HP and informed the final decision.

Mr Apotheker

4008. Mr Apotheker accepted that the only financial report he personally read relating to Autonomy was its 2010 Annual Report and Accounts. He did not read anything earlier, nor the Q1 or Q2 2011 Quarterly Reports. But he told me, and I accept and find, that he read the 2010 Report and Accounts *"very carefully"*. As well as the formal status, Responsibility Statement and the fact that the accounts were audited by Deloitte, Mr Apotheker's evidence (which I accept) was that he noted in particular that the Annual Report stated that:

(1) Autonomy's revenues in 2010 were $870 million, and that this was an increase of 18% from 2009;

(2) IDOL organic growth (revenue growth not attributable to acquisitions) was 17%;

(3) Autonomy's IDOL OEM business generated $132 million in 2010, up 32% from 2009; and

(4) IDOL Cloud growth was *"strong"*, with 2010 Cloud revenues of $190 million.

4009. Mr Apotheker noticed also that the Annual Report referred in various places to Autonomy as being a rare example of a *"pure software model"*. Subject to the caveat that he accepted in cross-examination (as I have noted in paragraph 1626(1) above) that he took this to mean also that Autonomy *"was in the business of providing excellent software with as little services as possible"*, his evidence was that he *"understood this to mean that Autonomy made virtually all of its revenues and profits from the development, use, marketing and sales of software"* and that this was very important to him.

4010. In my judgment, the more general impressions he formed, on the basis of his reading, that Autonomy appeared to be "*a very successful, high-growth, high margin"* enterprise encouraged his interest in pursuing negotiations, and encouraged him also to anticipate having to pay a significant premium over its then share trading price, which he took into account during the negotiations which followed, but such generalised impressions were not such as Mr Apotheker did rely or could reasonably have relied on without much more detailed analysis and support. However, I am satisfied, and find, that the untrue representation that Autonomy was a *"pure software model"* generating substantially all its revenue and growth from high margin software sales, and the concealment

[541] See paragraph 144 above as to what this meant and comprised.
[542] See footnote 24 in paragraph 141 above.

accordingly of the substantial pure hardware sales undertaken to disguise shortfalls in software revenues and the true performance of Autonomy's software business, impacted on his mind and informed his judgement (and that of the SCD Group) at every stage of the process, including the final decision to make a bid at the price eventually agreed, and ultimately to conclude the Acquisition.

4011. Further, Mr Apotheker and the SCD Group also placed reliance on the fact that the 2010 Annual Report (as in fact did subsequent Reports) (a) segmented Autonomy's revenues into five categories of (i) IDOL Product, (ii) IDOL Cloud, (iii) IDOL OEM, (iv) Deferred Revenue Release (broadly signifying maintenance) and (v) Services, (b) did not suggest that there was any other revenue category and (c) stated that Services accounted for only about 5% of total revenues. That apparently exclusive description of the sources of Autonomy's revenues made no mention of sales of third-party hardware. Mr Apotheker took all of this to be consistent with and confirmatory of Autonomy's representation as a *"pure software model"*, with the exception he noted of a small amount of "appliance" sales, which was presented and he read as a sensible strategy, being (as he understood it) confined to sales of hardware with Autonomy software preloaded into it, and thus to what he called *"a delivery channel for software sales"* generating (as the Annual Report expressly stated) a *"margin profile…not widely dissimilar to our traditional licence business."*

4012. In the mind of Mr Apotheker (as also in the minds of others in the SCD group, see below) that (false) depiction of Autonomy as a company deriving substantially all its revenues and meeting its forecasts from software sales in the apparently exclusive five categories of revenues listed in paragraph 4011 above was an important distinguishing characteristic of Autonomy; and it provided a litmus test of the success of its signature product (IDOL). That depiction was an important factor in assessing Autonomy and in the construction of the Deal Model (especially in projecting likely revenue forward) and reliance on it was, in my judgment, plainly reasonable.

4013. Mr Apotheker also focused on, and was especially attracted by, Autonomy's Cloud business, which was presented as largely comprised of delivery of IDOL on a 'Software-as-a-Service' (SaaS) model. As this business line was represented, he considered it would be of particular value in meeting HP's *"specific need to develop and grow its cloud business"*, as well as providing immediately, and apparently into the future, a source of recurring revenue, complementing Autonomy's fast growing IDOL OEM business (which was especially attractive for all the reasons previously explained). As with the representation of Autonomy as a *"pure software model"*, these were characteristics and qualities of Autonomy's business as depicted which I have been persuaded impacted on his mind and influenced his judgement, and that of the SCD Group, throughout the process, including the eventual Acquisition.

4014. However, Mr Apotheker made clear, both in his witness statement and when cross-examined, that HP obviously did not rely simply on his reading of the 2010 Annual Report, and more generally, would not have made a formal bid or proceeded with the Acquisition without having undertaken a full and careful financial analysis of its own, nor without a process of due diligence. The centrepiece of HP's assessment was its DCF analysis and Deal Model.

4015. The following evidence in Mr Apotheker's witness statement was not substantially or effectively challenged:

"When considering the value that Autonomy actually presented to HP, however, the SCD Group and I focused on HP's DCF analysis. That analysis, based on Autonomy's public financial statements, analyst reports, etc., sought to estimate Autonomy's standalone value by estimating the cash it could produce in the future, and also to take account of the synergies we hoped that HP could achieve from the deal. In considering a price that would be appropriate to pay for Autonomy and to recommend to the HP Board, I focused on ensuring that the price paid by HP was justified by the value we believed it would receive (including Autonomy's cash), that HP would pay as little as possible above Autonomy's share price, and on retaining for HP's shareholders as much as possible of the value of the synergies that we hoped to achieve from the transaction. I also recognized that Dr. Lynch would seek to obtain as much value as possible for his shareholders."

4016. As to the suggestion that Mr Apotheker and HP had in reality proceeded on the basis of the synergies and *"transformational opportunity"* to be realised by the Acquisition, rather than on the basis of Autonomy's stand-alone value, I accept the explanation and answers provided by Mr Apotheker himself in his second witness statement and then in the course of his cross-examination as to the relative importance of stand-alone value and prospective synergy values:

(1) As he explained in cross-examination:

"there is a sequence here that is very important. It had to be a sound asset…The acquisition was based on the intrinsic value, stand-alone value of Autonomy plus the synergies…the actual value of the company was the foundation".

(2) When asked to confirm that nevertheless he was *"looking at the time at the long-term benefits of owning Autonomy"*, he said:

"A. Well, I'm looking at two things essentially to form an idea. I'm first of all looking at the present value of Autonomy as a stand-alone business, because that's where you start, that's what you pay for essentially. Anything else, the synergies, if you take an objective look, objective view of this, clearly the risk on the synergies is on the HP shareholders, not on the Autonomy shareholders. So when you negotiate these things you want to be in a position where it's the HP shareholders who get the maximum benefit out of these synergies, so the price point has to take that into account."[543]

(3) This corresponded with his evidence in his second witness statement:

"in evaluating whether a software company's product is effective and successful, it is essential also to evaluate its financial performance, because that performance reflects whether customers who use the technology perceive it as valuable and worth the associated costs. The fact that Autonomy's reported financial results gave the impression that it had achieved significant

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[543] On HP's analysis, at the price it paid for Autonomy, it retained 90% of the synergy value that it hoped to create through the Acquisition, and yielded 10% to Autonomy's shareholders, which Mr Apotheker thought *"a fair compromise".*

> *and fast-growing shares of the markets in which it operated was an important part of our assessment that its technology would be valuable to those markets in the future. It would have made no sense to look only at the technology without also putting significant focus on Autonomy's financial information."*

4017. When cross-examined, Mr Apotheker reiterated the importance of the underlying finances of a target company, and just as much so where the proposed acquisition was a *"strategic"* one with anticipated synergies: as he put it, *"the actual value of the company was the foundation."* It was put to him that (a) he *"[wasn't] particularly interested in the metrics* [because he was really] *interested in buying a transformative business"* ; (b) he *"never looked in any detail at the DCF valuation produced by HP…"*; and (c) what really prompted him was that Autonomy offered *"essentially a unique opportunity"* hinging on the synergies anticipated. His answers in summary were:

(1) He wanted a transformative business; but *"good financials"* were essential:

> *"I wanted both…I wanted to buy a good company with good financials and for me the financials were actually a proof point of the success of the business."*

(2) He did not study the spreadsheet nor did he look at every number, but he was adamant that he looked at the DCF valuations in detail, and *"of course"* he considered the assumptions used to satisfy himself of their reliability.

(3) Although he accepted both that Autonomy was unique in offering IDOL and the route into the unstructured data space and that the anticipated synergies were also very important in differentiating Autonomy and justifying a substantial premium on the then market price of its shares, he insisted that the underlying financial position of the company as it appeared in its Reports was the bedrock, as was apparent from the following exchanges:

> *"Q. What you say is that you presented to the board your business case hinging more on the synergies than on the stand-alone capabilities and that's what actually happened, isn't it?*
>
> *…*
>
> *A. It is impossible to achieve the synergies without the actual company and therefore one needs to pay for the company and then add to it the synergies. The price of the company was determined by the actual value of the business and some of the synergies. We came to the conclusion in the conversation of this trial that it was about 10/11% of the synergies. That's how the maths works.*
>
> *Q. You never did that maths, the board never said, "I'll tell you what, you can go up to 10% of the synergies", that's just where you ended up, isn't it?*
>
> *A. But the board had all the information. These are smart people, they can do a simple arithmetic calculation.*
>
> *Q. The truth is that what this deal was driven by was your vision about the synergies that HP could make out of acquiring the software, wasn't it?*

A. *But it is clear that HP wasn't going to buy the company and not integrate it and therefore not extract synergies. The whole idea of this deal was to extract these synergies. That is absolutely right and that's the only reason that they really wanted to do any acquisition, be it Software AG or any other company. So in this case as well, the real reason of course that any company would want to acquire another company, we are not - as we said yesterday, we are not a private equity investor or a stand-alone investor, this is an industrial IT company who wants to buy a company in order to extract the value and the synergies out of it, obviously. <u>But the price calculation and therefore what it is that you end up paying for this business is based on the value of the business first of all.</u>"* [My emphasis]

4018. Mr Apotheker was unequivocal in his evidence in his witness statement not only that he had no knowledge or awareness prior to the Acquisition of third party hardware sales except appliances sold as *"a delivery channel for software sales"*, but also that he had no knowledge or awareness of *"the round-trip transactions that created the false appearance of revenue and profit"*; or that *"Autonomy converted a significant portion of its Cloud revenue into license revenues…enhancing current reported revenue and reported revenue growth and reducing the long-term value of this part of the business"*; or that *"Autonomy greatly overstated the amount of its IDOL OEM revenues, and revenue growth"*; or (though he did *"of course"* understand the widespread use of resellers by software companies) that in this case, VARs were being *"used to enable Autonomy to recognize revenue or to accelerate the recognition of revenue in a manner inconsistent with relevant standards."* These matters resulted in a difference between what was reported and what properly should have been recorded of some $145 million: a roughly 17% reduction. He considered that these inaccuracies and misstatements suggested to him *"a systematic effort to portray Autonomy's business as stronger, better-managed, more vibrant and more successful than was truly the case"* and he found it *"hard for me to conceive of an innocent explanation for the fact that no such information was apparent from my careful study of the Annual Report."* The discrepancy between the represented position and what was *"truly the case"* was plainly such as in his view to alter materially and substantially the attractions and value of Autonomy to HP.

4019. I accept Mr Apotheker's evidence as above summarised.

Mr Robison

4020. Although in places over-lawyered, and also untested since he did not attend at Trial (see paragraph 166 above), Mr Robison's witness statement appeared to me to be credible and convincing as regards:

(1) his specific consideration of both Autonomy's IDOL OEM revenues (which he understood to be derived from sales *"when Autonomy software was embedded in other companies' products"* and which he especially identified as *"important to HP"* because their stated growth *"was an indicator that other companies valued Autonomy's technology"*) and its IDOL Cloud revenues as reported in Autonomy's published information and confirmed in the Slides (showing nearly 20% growth year-on-year and representing some 22% of total revenue recognised), and the perception encouraged that

these were particularly attractive and high-margin sources of recurring revenue;

(2) his perception that the emphasis in both Autonomy's published information and in its management's repeated presentations that Autonomy was a *"pure software model/company"* with *"a compelling software product in IDOL"* demonstrated that its reported revenue growth was based almost exclusively on high-margin software sales (with a very small amount of appliance sales which were also high-margin); and that this powerfully endorsed the market success of Autonomy's software and its signature product, IDOL;

(3) his perception also that Autonomy's pure software model (as it was represented to be) was highly complementary to HP's plan to develop its business in high-growth, high-margin software markets and not in lower-margin hardware sales (HP already being one of the world's largest hardware manufacturers);

(4) his focus on the particular attraction and value of Autonomy's IDOL OEM business as represented in Autonomy's published information and purportedly confirmed in other presentations;

(5) his emphasis on the importance of the historic performance as presented in Autonomy's published information in assembling the DCF/Deal Model and in particular in forecasting future cashflows and growth, and his confirmation that both would have been markedly lower but for the material overstatement and false depictions of Autonomy's historic revenue streams; and

(6) the continuation of his understanding of and reliance on those matters up to and including the Acquisition.

4021. In my judgment, that evidence further supports the Claimants' case that Autonomy's published information, and in particular the statements of its revenues and their growth and its assertions that Autonomy was a *"pure software company",* continued to have an impact on the mind and influence on the judgement of those within HP involved in the analysis of the merits of the proposed Acquisition and its eventual conclusion.

Mr Sarin

4022. As previously explained, Mr Sarin was a key member of the Corporate Development sub-team of the SCD Group, and reported to Mr Johnson (HP's Head of Corporate Development, who in turn reported to Mr Robison who reported to Mr Apotheker). He and his team had line responsibility both for the preparation of HP's Deal Model and (with KPMG) for the due diligence undertaken by HP. In the process leading up to the Acquisition, Mr Johnson relied unusually heavily on Mr Sarin especially in relation to the due diligence exercise since he himself was having to deal with serious illness in his close family and (as he told the US court in the criminal proceedings there) he was unable to travel.

4023. Mr Sarin stated in his witness statement that:

> *"We were heavily reliant on Autonomy's published information and on analysts' projections for Autonomy, which were, in turn, reliant on Autonomy's published information."*

4024. It was common ground that Mr Sarin carefully read Autonomy's 2010 Annual Report and its Q1 and Q2 2011 Quarterly Reports (but not the 2009 Annual Report nor the 2009 Quarterly Reports). He also appears to have read some (unspecified parts) of the 2010 Quarterly Reports, and the transcripts of the Q1 and Q2 2011 Earnings Calls.

4025. Amongst the matters which according to his evidence (which I accept in this regard) Mr Sarin derived from those reports and documents were:

(1) The accounting information, and in particular, Autonomy's historic revenue figures split amongst the five categories (see paragraph [] above) which (as I elaborate later) were fed into and provided the bedrock of the Deal Model;

(2) The statements and explanations in the 2010 Annual Report as to Autonomy's strategy, products and the size and performance of its five revenue streams;

(3) The statements in the Q1 2011 Quarterly Report, in particular those indicating that (a) all of Autonomy's product lines were achieving double-digit growth, (b) organic growth of Autonomy's IDOL Product and IDOL Cloud businesses purportedly at an annual rate of 17%, (c) 28% annual growth in Autonomy's OEM business, and (d) gross margins (which in its 2010 Annual Report Autonomy identified as a *"key performance measure"* and an *"[i]ndicator of success of the company's business model"*)[544] of 88% and operating margins of 43%;

(4) The results reported in Autonomy's Q2 2011 Report, in particular showing (a) consistency with Autonomy's previously-reported financial performance, (b) consistency with HP's own estimates (reported revenues of $256.3 million compared to HP's estimate of $245.7 million), (c) continuing strong organic growth of IDOL business year on year in H1 2011, with represented organic growth figures for H1 2011 in IDOL OEM, IDOL Cloud and IDOL Product of 27%, 17% and 13% respectively leading to the summary that (d) *"Cloud and OEM, both recurring models, account for 62% of IDOL software sales, reaching an inflection point"* (all such figures in fact being materially false for all the reasons addressed in this judgment)[545].

4026. Mr Sarin made clear that neither he nor (so far as he was aware anyone else at) HP was aware pre-Acquisition that Autonomy was improperly accelerating hosting revenues and profit and including non-recurring revenue in IDOL Cloud and IDOL OEM. This was not substantively or successfully challenged in cross-examination. He was likewise

[544] Autonomy reported gross margin on an *"adjusted basis"* which excluded certain specific, non-recurring and non-cash charges, thereby enabling investors, and Autonomy management, to assess the performance of Autonomy's operations.

[545] The 'True Position' (being the financial position which would have been presented to the market on the assumptions which the Claimants' valuation expert, Mr Bezant, was instructed to make and in effect were intended to enable the correction of the false accounting and descriptions of Autonomy's business as alleged by the Claimants), will be re-examined and tested as part of my quantum judgment: but, according to Mr Bezant's analysis, *"In the True Position, Autonomy's historical revenue growth over the period 2009 to H1 2011 was less than half that in the Represented Position"* with true organic growth even worse, and a materially less attractive product mix (with True IDOL Cloud effectively flat from Q2 2009 through Q1 2011, but with an uptick in Q2 2011) and True IDOL OEM revenues having in truth diminished over the Relevant Period, so as to represent only 2.5% of 'True software revenues' in the final twelve months.

adamant that he was not aware that a significant part of Autonomy's reported revenues in the period before the Acquisition resulted from the sale of hardware that included no Autonomy software; and he added that he *"would certainly have expected any such hardware resales to be described"* when, in the course of the due diligence exercise and in order *"to better understand each of Autonomy's existing and foreseeable revenue streams"*, he asked Autonomy's management to describe all of the products sold by Autonomy and *"major product categories and new products under development"*.

4027. Mr Sarin's evidence was for the most part supported by contemporaneous evidence. His cross-examination focused on an attempt to get him to accept that HP's forecasts of Autonomy's financial results had little to do with its reported financial results, and that HP did not rely on those results, or on what it was told in the process of due diligence. Mr Sarin rejected this and I consider that this attempt failed. I accept his evidence in his witness statement quoted above as to their reliance on Autonomy's published information and on analysts' projections for Autonomy *"which were, in turn, reliant on Autonomy's published information."*

Mr Johnson

4028. Mr Johnson, to whom Mr Sarin reported, was principally engaged in planning and overseeing the process of due diligence. Although not a member, he also attended (with Mr Apotheker, Ms Lesjak and Mr Robison) some meetings of HP's Finance and Investment Committee of HP's Board (including those on 25 May 2011 and 18 August 2011), which was also involved in the continued financial assessment of potential acquisitions. However, and as previously mentioned, because of a family illness he arranged for Mr Sarin to take a larger role in that. Mr Johnson did not provide a witness statement in these proceedings; but he did give evidence in the US criminal trial against Mr Hussain, which was admitted into these proceedings by a hearsay notice on behalf of the Claimants.

4029. Mr Johnson's evidence in the US criminal proceedings very largely related to the process of due diligence, the public announcement of the bid, and the post-Acquisition denouement and especially a dispute as to whether Mr Johnson had told Ms Lesjak that more than $5 billion of the eventual write-down was attributable to accounting improprieties. When asked in re-examination in those proceedings whether he had relied on Autonomy's financial statements, he answered *"very much so."* But he was not invited to condescend to more detail and did not do so.

4030. Mr Johnson confirmed, however, that the warranties as to the truth and accuracy of Autonomy's financial reports given by the Defendants to Bidco when irrevocably undertaking to assent their respective shares in Autonomy into HP/Bidco's offer had further encouraged and resulted in such reliance on Autonomy's public statements as to its financial position.

4031. As I elaborate later, the decisions at board level were predominantly based on the reports made by Mr Apotheker and Mr Robison, the reports of the SCD and of the Finance and Investment Committee, and the Deal Model (as to which see below), as well as the perceived absence of any "red flags".

4032. In my judgment, the statements and figures in the published information identified above undoubtedly influenced, through Mr Apotheker, Mr Robison, Mr Johnson and Mr Sarin not only HP's initial approach, but also its Board's decision to proceed with a bid for Autonomy in preference to any other, and more particularly, in preference to a bid it had

contemplated for another software company, Software AG (code-named "Singapore" within HP). Most important of all, however, was that the historical revenue figures underpinned the DCF analysis and Deal Model, to which I next turn.

(2) *The Deal Model and its bases*

4033. There is no real doubt, and I also find, that HP's Deal Model that produced HP's standalone valuation of Autonomy, which was revised and updated throughout the acquisition process, was predominantly based on Autonomy's published information.

4034. That is so notwithstanding the Defendants' energetically pursued point that Mr Apotheker only read the 2010 Annual Report, and Mr Sarin read the 2010 Annual Report and the Q1 and Q2 2011 Quarterly Reports but not the 2008 or 2009 Annual Reports, nor the Q1 and Q2 2009 Quarterly Reports. The main 2009 results were reproduced in the 2010 Annual Report, and the main Q1 and Q2 2010 results were reproduced in the Q1 and Q2 2011 Quarterly Reports; and in any event, the fact remains that (subject to caveats mentioned by Mr Sarin and addressed below) the historical results in the Deal Model were taken from the published information.

4035. It is apparent from the various iterations of the Deal Model, and Mr Sarin's evidence was, that he and his team used the historic revenue and costs figures for 2008, 2009, 2010 and the first half of 2011 in Autonomy's published information in constructing their DCF analysis and Deal Model. Even in exercising judgements about other inputs, including assumptions underpinning future revenue growth and margins, those historic revenue and costs continued to provide the bedrock. Mr Sarin's evidence in his witness statement, which I accept in this respect, unequivocally supported this. Thus:

(1) The Deal Model was based on a DCF analysis, using an analysis of the historic performance of the target to estimate its future performance and the present value of the cashflows that it could be expected to generate as the means of establishing standalone value (that is, value of the target in its own right without regard to potential synergies to be obtained from the combination of businesses and resources pursuant to the acquisition). That analysis was necessarily based on historic figures provided by Autonomy in published information.

(2) The DCF analysis set out within the Deal Model focused on (a) *"Rev Buildup"*, which set out historical and forecast revenues and gross profits; (b) *"Target IS"*, which set out historical and forecast operating costs, profits and cash flows; and (c) *"Stdaln DCF"* which set out the calculation of the net present value ("NPV") of forecast cash flows during the explicit forecast period of H2 2011 to 2021, and the terminal value of Autonomy (being the value of Autonomy into perpetuity as at the end of a forecast period of ten years, assuming continuation forever having reached a steady state).

(3) The calculations set out in the *"Rev Buildup"* tab of the Deal Model were based on HP's analysis and forecasts of future revenues in five revenue categories, being (a) *"IDOL Product Licence"*, corresponding to the IDOL Product revenue category in Autonomy's financial reports; (b) *"IDOL Cloud"*, corresponding to the IDOL Cloud revenue category in Autonomy's financial reports; (c) *"OEM"*, corresponding to the IDOL OEM revenue category in Autonomy's financial reports; (d) *"Maintenance"*, corresponding to the Deferred Revenue Release revenue category in Autonomy's financial reports

(which was said to stem *"principally from support and maintenance contracts recognized in arrears"*); and (e) *"Services"*, corresponding to the Services revenue category in Autonomy's financial reports.

(4) The *"Rev Buildup"* tab set out historical revenues between 2008 and H1 2011 adjacent to HP's projections of Autonomy's future revenues over the explicit forecast period (H2 2011 to 2021). Mr Sarin explained in his witness statement that *"the historic revenue and costs were derived from Autonomy's annual audited accounts, its quarterly reports, and quarterly earnings calls that Autonomy had with analysts."* He added that *"we considered, and relied on, Autonomy's historic revenue figures for 2008, 2009, 2010 and the first half of 2011, as Autonomy had provided them to the market."*

(5) I accept that evidence, though with two caveats that Mr Sarin accepted in cross-examination. One caveat was that Autonomy did not report IDOL Cloud separately until Q4 2009, but rather provided one combined figure for what was later split into IDOL Product and IDOL Cloud, so the split between Product and Cloud revenues applied in the Deal Model for 2008 and 2009 reflected estimates provided by Goldman Sachs. The second caveat was that the historic revenue figures could only provide a starting point and future growth could not simply be extrapolated from past growth[546], though Mr Sarin also made clear that *"Where we used our own projections (in particular for later years), we paid particular regard to Autonomy's publicly reported organic growth to date…"*

(6) Mr Sarin's evidence, which I also accept, was that while HP obviously did not unthinkingly "carry forward" prior years' growth, historical revenue growth, and particularly historical organic growth, played a central part in HP's forecasts for the period through 2021: it was put to Mr Sarin in cross-examination, and he was asked to agree, that HP did not base its 2014-2021 revenue growth forecasts on historical organic growth rates up to 2011, and had in reality relied more on market growth projections than on Autonomy's reported results; but he did not agree and reiterated that whilst the projection of growth rates naturally took account of various sources and market projections, it remained *"based on what was prior growth and prior revenue."* He emphasised: *"Where we used our own projections (in particular for later years), we paid particular regard to Autonomy's publicly reported organic growth to date…"* When asked in re-examination whether reported historic revenues had any effect on the DCF analysis, he answered:

> *"They do…the model is very sensitive to margins, growth rates and a whole host of other factors. If the reported numbers are different or historic numbers are different, then the model would be very different."*

(7) Similarly, the three categories of operating expenses (research and development, sales and marketing, and general administrative costs) which were also reflected in the Deal Model to build up a projection of gross margins

[546] Mr Sarin explained in cross-examination that he thought a simple extrapolation would be inaccurate because *"…given a business like Autonomy with various revenue segments, there are different growth rates, different capital investment assumptions, all of that factors into a much more thoughtful free cash flow number than just trying to take history and grow it at a certain rate."*

were also grounded in the historical reported numbers. The three categories were projected as a percentage of revenue, based on their reported historical relationships, though for the purpose of the Deal Model HP held the relevant percentages constant from 2013 to the end of the forecast period because (as Mr Sarin explained) that was a conservative assumption to make given the significant revenue growth projected. Forecast costs were then deducted from the forecast revenues to produce forecast operating profits.

(8) In turn, and demonstrating once again the continuing bedrock influence of Autonomy's published historical figures, (a) HP's forecast of free cash flows through 2021 in the *"Target IS"* tab of the Deal Model was based on adjustments to those forecast operating profits to account for taxes, capital expenditures and working capital needs[547] and (b) the calculation of standalone value was based on the sum of (i) the free cash flow forecast through 2021, and (ii) the *"terminal value"* of Autonomy, that is to say, the value of its free cash flows after 2021 calculated on the assumption that the free cash flows projected for 2021 would grow at a *"terminal growth rate"* for which HP's central estimate was 4% *per annum.*

(9) Then, to establish enterprise value[548], each of the above components was discounted to present value by reference to HP's estimate of Autonomy's weighted average cost of capital ("WACC"), which was 10%. This resulted in an estimate of Autonomy's enterprise value of some \$9.5 billion. Adding Autonomy's net cash reserve of \$705 million produced an equity value of \$10.207 billion.

(10) The Deal Model then also included an estimate of the synergies that HP hoped to realise by combining its resources with those of Autonomy, which (after deducting certain "dis-synergies" in respect of the likely discontinuance of some of Autonomy's OEM relationships where the OEM was a competitor with HP), amounted to \$7.6 billion, leading to a combined standalone and synergistic value of \$17.1 billion. Mr Sarin explained that the quantification of likely synergies was a rather different exercise, which relied principally on a *"thorough understanding of HP's own business"* and was undertaken principally by Ms Breya and Mr Levadoux (leaving Mr Sarin and his team to focus on constructing the financial model). Mr Sarin explained, and I accept and find, that *"Standalone value is given more weight in pricing decisions than any estimated synergy value because standalone value is based on an existing*

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[547] As Mr Bezant explained in his expert's report, HP calculated future free cash flows as it forecasts:

(1) Operating profits (as above derived), plus
(2) Amortisation expenses (assumed to be nil from 2011 onwards), less
(3) Tax (assumed at a rate of 28%), plus
(4) Depreciation (calculated as the product of forecast revenues and its expectations of depreciation as a percentage of total revenue), less
(5) Increase in working capital (calculated as trade receivables less trade payables informed by their historical values) plus
(6) Increase in deferred revenue (on assumptions informed by the historical relationship between deferred revenue and revenues in 2008, 2009 and 2010) less
(7) Capital expenditures (calculated as a percentage of forecast revenues).

[548] *"Enterprise value"* represents the standalone value of Autonomy as calculated in accordance with the discounted cash flow analysis in the Deal Model; Mr Sarin explained in his witness statement that *"Enterprise value ignores cash and debt, and adjusting for these items produces the equity value of Autonomy. The focus of our valuation exercise was on enterprise value."*

performance history"; once more underlining the importance and impact of the historic figures derived from Autonomy's published information.

4036. In short, although (inevitably) HP had regard to other sources of information and other analyses in building the Deal Model, the fundamental importance and influence in the building of the Deal Model of the historical figures in Autonomy's published information is obvious. For the avoidance of any doubt, it was in my judgment clearly established.

(3) *How ultimately did HP's Board make its decision?*

4037. The Deal Model could not and did not dictate the price: that was inevitably the product of negotiation and then consideration and approval (or not) by HP's Board. However, the Deal Model did provide, in effect, the lower and upper boundaries of a suitable bid price, in the form (respectively) of its figures for the standalone value of Autonomy and the valuation incorporating synergies. It was ultimately common ground, and in any event it seems to me to be clear, that the standalone value generally formed a lower bound to the price, above which the buyer will seek to pay over as little as possible of what it might obtain from potential synergies. A bid price within that range then had to be fixed by reference (principally) to (a) the standalone value (b) Autonomy's then current share price and (c) what premium HP was persuaded would be necessary (and thus what proportion of the synergy value which HP hoped would result would have to be surrendered to Autonomy's shareholders) to achieve the objective of an agreed bid.

4038. The Deal Model was not, of course, the only analysis put before the HP Board. Before finally agreeing the bid price and approving the Acquisition, HP's board was also presented with what the SCD Group called the *"IRB Shell"* in the form of a deck of slides and information built up over the course of the bid process. An important function of the *IRB Shell* was to show and explain the SCD's working valuation of the target. Mr Sarin explained that the *"...purpose of the IRB Shell was to deliver all the key information in relation to an acquisition to HP's senior executives and the relevant Board committees in a format that was familiar to, and could easily be followed by, those executives and committees."* Perella Weinberg and BarCap supplemented this with presentations of their own (including valuation analyses).

4039. The *IRB Shell* produced to HP's Board on 5 August 2011 incorporated a valuation section that included most of the key types of analysis that would typically inform a board's deliberations in determining whether to proceed with a large acquisition, most importantly, DCF valuations on both standalone and synergistic bases, but also trading and transaction multiples, together with analyses of earnings accretion/dilution and a range of potential bid premia. In this case, the deck included a chart summarising the key analyses graphically in a format referred to as a *"football field"* chart.

4040. In parallel with the continuing process of due diligence in the following two weeks after 5 August 2011, HP's board and relevant committees continued detailed assessment of the proposed deal. The Deal Model continued to be fine-tuned. Negotiations also continued to agree finally the bid price, taking into account a more than 10% decline in Autonomy's share price since the original range (of £24.94 to £26.94 per share) had been agreed between Dr Lynch and Mr Apotheker and Mr Robison in Deauville on 28 July 2011. The bid price of £25.50 per share (which was thus further toward the bottom of the range agreed at Deauville) was finally agreed (subject to Board approval by both

HP and Autonomy) on 15 August 2011. That was then considered by the SCD, Perella Weinberg and BarCap, and then also the Finance and Investment Committee, and the matter then went forward to the Board of HP with their recommendations and supporting material.

4041. When the question whether finally to approve the Acquisition at the bid price agreed came before HP's board for the final time on 18 August 2011, the deck and the presentations by the SCD and by Perella Weinberg and BarCap also included investment appraisal metrics, by way in effect of cross-checking the DCF-based valuations, and comprising:

(1) historical bid premia: the range of premia over the share price paid in comparable transactions can be used both to sense-check a proposed bid and to gauge the likelihood that it will be accepted by shareholders. These were provided by Perella Weinberg and BarCap;

(2) internal rate of return ("IRR"): the discount rate that, when applied to forecast cash flows, results in a net present value of zero. This can be compared to a predetermined "hurdle rate" that defines the minimum rate of return required by the investor. BarCap calculated the internal rate of return implied by SCD's DCF estimate of total synergistic value at the offer price; and

(3) earnings accretion/dilution: analysis of whether, and when, a proposed transaction will increase the return to shareholders of the acquiring company. Such analysis was provided by SCD, Perella Weinberg and BarCap.

4042. Perella Weinberg and BarCap's presentations included materially similar standalone DCF valuations to those presented by SCD, both of which were based on HP's forecasts.

4043. All the various presentations and the *"football fields"* showed that HP's board considered and approved the bid price by reference to (a) a standalone valuation of Autonomy and (b) a valuation including both standalone value and synergies. All the assessments were underpinned by the historical figures and metrics in Autonomy's published information. The bid price was at a premium to the standalone valuation, but significantly less than the valuation combining standalone value and synergy value: the bid price did not require HP to cede more than about 10% of its anticipated synergy benefits, which the Board was satisfied was reasonable, and by reference to analyses of historical acquisition premia paid for UK listed technology companies was so. The Board unanimously resolved to authorise HP to proceed with the transaction, and the bid proceeded through its subsidiary, Bidco.

(4) *What is the relevance of HP/Bidco's reliance on other sources of information and advice?*

4044. It will already be apparent and it was not in dispute that HP/Bidco took into account the views of analysts and specialist advisers, especially in assessing Autonomy's likely future performance (including, for example and as already noted above, relying on Goldman Sachs estimates in splitting annual IDOL Product and IDOL Cloud revenue figures for 2008 and 2009 which Autonomy had not provided).

4045. Also, HP used other valuation techniques, including trading and transactions multiples analyses, historical bid premia comparisons, calculations of Internal Rate of Return and earnings accretion/dilution analyses produced by BarCap and Perella Weinberg, as well

as Perella Weinberg and BarCap's own materially similar standalone valuations, to inform its deliberations.

4046. It seems to me unlikely that in any large transaction of this nature a bidder would proceed exclusively by reference to the target's published information even if tested by rigorous due diligence.

4047. However, in my judgment, none of this undermines my conclusion that the foundation of HP's assessment and ultimate decision was the description of historical revenue performance, organic software revenue growth, gross margins and the description of its business and five revenue streams put forward in Autonomy's published information and providing the bedrock for the Deal Model.

4048. Autonomy's published information also, of course, influenced the market, the share price, the anticipation of a bid premium and the expectations of shareholders in gauging the sufficiency of any bid offer price. That in turn had to be taken into account by HP in determining what bid price to agree and offer; and as already mentioned, one of HP's cross-checks was an analysis of bid premia in similar acquisitions. However, in my judgment, that does not militate against HP/Bidco having relied on the published information: on the contrary, it is a further manifestation of the fact that Autonomy's published information inevitably informed not only its analysis but its eventual decision.

(5) *Was HP/Bidco actually aware of any matters falsifying the published information?*

4049. I have concluded in earlier parts of this judgment that no one involved in due diligence on the part of HP, or in the negotiation and ultimately approval of the bid and Acquisition, whose knowledge would be attributed to HP/Bidco, was aware, before the Acquisition, of any material matters which falsified the depiction of Autonomy in its published information.

4050. As also previously explained, a defendant found guilty of deceit cannot establish a defence based on contributory negligence or the principle of *"caveat emptor"* (and see paragraph 519 above).

Conclusion on reliance (FSMA Claims)

4051. I am entirely satisfied that the Claimants have established reliance on Autonomy's published information and that such reliance was reasonable.

4052. If, as I consider to be the case, the presumption of inducement applies, it has not been rebutted; but even if I am wrong and it does not apply in the context of FSMA claims, as Mr Miles rather tentatively argued, inducement is established in any event in the case of each one of the claims that HP/Bidco based their assessment, constructed their Deal Model and proceeded on the basis of representations and statements in Autonomy's published information which have been demonstrated by the Claimants to have been untrue and/or misleading.

4053. As summarised in paragraph 522 above:

(1) HP/Bidco have established reasonable reliance on what was stated in the published information in respect of all the aspects of Autonomy's business now said to have been misrepresented; and more particularly, HP/Bidco reasonably relied on that published information as having conveyed that:

(a) Autonomy was a *"pure software company"* having no need to rely on any sources of revenue other than those from its software licence sales;

(b) All revenue recognized in its accounts was generated by substantive transactions which had been properly accounted for;

(c) Autonomy's OEM business revenue was a particularly valuable source of recurring revenue derived at least predominantly from development licence sales and recurring revenue from royalties;

(d) Autonomy's hosting business, which was accounted for as part of its IDOL Cloud business, was growing as a result of increased hosting revenue streams which by their nature were recurrent;

(e) Sales by Autonomy from which revenue was recognized were genuine transactions of commercial substance, and properly accounted for accordingly.

4054. In the circumstances it was reasonable for HP/Bidco to rely on Autonomy's published information and they did so; but in the respects I have sought to set out, that published information was untrue or misleading to the knowledge of both of the Defendants; and there were matters omitted from Autonomy's published information which were required to be included in it, both Defendants knowing that the omissions constituted dishonest concealment of material facts.

4055. In reality, Autonomy was a smaller company with a materially less attractive revenue mix, with lower growth and less success in the market and (overall) lower profit margins than it was represented and appeared from its published information to be.

Introduction to issues of quantum

4056. In my judgment, absent the fraud, HP would not have proceeded with the transaction at the bid price. The question then is whether HP would have proceeded with the transaction at all, and if so, at what price. However, I have reached the provisional view, in the context of the FSMA Claims, that even if accurate information had been given and Autonomy's financial position and performance had been properly and accurately disclosed, HP/Bidco would nevertheless have wished to proceed to a bid and to conclude the Acquisition, but at a significantly reduced bid price.

4057. Although serious, in my judgment the misrepresentations did not negate the value of the core product IDOL nor the potential for the Acquisition of Autonomy's software business to provide the platform and catalyst for the transformational change in HP's focus away from its low-margin hardware business towards enterprise software, and the better use of its vast resources and market presence in that area and in the developing field of unstructured data analysis.

4058. The question then is whether Autonomy's shareholders would have accepted a lower bid price. The Claimants pleaded that they would have done so (or at least would have been likely to do so): see the quotation from the RRAPoC in paragraph 530 above.

4059. The premise of this is that Autonomy's published information should be assumed to have been corrected and that the shareholders would have been properly informed by accurate information, but would not have known of the fraud. As noted in paragraph

529, and expressly stated in Dr Lynch's closing submissions, it was common ground that in assessing the FSMA Loss, the relevant counterfactual is that accurate information would have been published historically, since loss falls to be calculated on the assumption that Defendants did not cause Autonomy to breach its obligations under FSMA, so that Autonomy's published information would have reflected the correct accounting in respect of the impugned transactions. I have taken it also thereby to be common ground that this accurate information would have informed the market, and thus Autonomy's share price and its shareholders' expectations. Accordingly, my understanding is that, on the case as argued I need not be troubled by a question that had at one time concerned me about whether the transaction would inevitably have been abandoned because whilst the position would have been corrected as between HP and Autonomy, the shareholders (whose agreement to sell was necessary) would still have had the perception of value and expectations of premium informed by the (inaccurate) published information.

4060. On the assumptions explained above, my provisional view is that it is more likely than not that shareholders would have accepted a lower bid price, even a considerably lower bid price.

4061. The assessment of what bid price, on that basis, would have been recommended and agreeable is a difficult one. As Mr Bezant acknowledged, it is not possible to provide a scientific determination and there is inevitably subjective judgement involved. The reality, as it seems to me, is that though valuation techniques provide a floor and ceiling, ultimately the price to be paid depends upon what is to be taken to be the then current share price and what premium is necessary to win the likely support of a strong majority (probably 90% of the shareholders). Autonomy's share price would have been lower, and shareholders' expectation of premium moderated; and HP's DCF modelling and other valuation cross-checks would only have justified a lower price and lesser premium to ensure an agreed bid. As Dr Lynch himself recognised, a bid becomes irresistible if at a premium which most shareholders are likely to find irresistible; and the Defendants could not have resisted or vetoed such a bid.

4062. What that price would have been remains to be assessed in a later judgment on quantum, which will need to take into account the recalibration of the Deal Model and other cross-checks in light of my findings as part of an overall enquiry to assess what in Autonomy's 'True Position' its share price would be likely to have been, what premium would reasonably have been required to be paid, and whether a bid at the resulting price would have been within acceptable parameters having regard to HP's (properly recalibrated) Deal Model (including its revised assessment of synergy value) and other cross-checks.

4063. In doing so I shall also wish to consider further the Defendants' expert, Mr Giles's, central themes that Mr Bezant had adopted a flawed approach both to the assessment of remaining synergy value and to the effect of the required adjustments on a DCF valuation, it being Mr Giles's view that *"Overall the Accounting Adjustments [would] very likely have no impact or very little impact on cash"* and that in consequence a DCF valuation would *"not be materially affected by the Allegations"*.

4064. I am also likely to need further guidance on (if it becomes relevant) the *"No-Transaction scenario"* (the quantification of which would depend, amongst other things on whether synergy value of Autonomy in the hands of HP is to be included) and the differences in the *"FSMA Counterfactual"* and the *"Misrepresentation Counterfactual"* (as to which see further below).

4065. For the present, I do not feel it appropriate or possible to express any final view; but I presently and provisionally consider that the Claimants' FSMA loss will be established to be, though substantial, substantially less than the amounts claimed.

Issues relating to the Deceit/Misrepresentation Claims

4066. As previously explained, the FSMA claims did not seek to recover loss relating to the acquisition of shares and share options held by Dr Lynch and Mr Hussain. Conversely, the claims for common law deceit and under the Misrepresentation Act 1967 against the Defendants were confined to loss attributable to the purchase of their shares and share options (the amount claimed being approximately $420 million). A further complexity relates to the different considerations which the parties agreed were applicable in relation to the counterfactual to be assumed for the Deceit and Misrepresentation Act claims.

4067. Whilst I have taken the claims to be complementary, and to have been established in both cases, it is of course important to keep in mind that whereas the basis of the FSMA claims against the Defendants is the recovery from the Defendants (by way of breach of duty claims) of Autonomy's loss in consequence of it having accepted liability to HP/Bidco for the untrue or misleading statements and omissions dishonestly concealing material facts in published information for which the Defendants were responsible as PDMRs, what the Claimants described as the *"conceptually simpler"* claims in deceit/misrepresentation were direct claims against the Defendants, based on their personal deceit/misrepresentation. I have had to be (and have been) satisfied in the one (the FSMA claims) that HP/Bidco reasonably relied on Autonomy's published information in proceeding with the Acquisition at the bid price; and in the other (deceit and misrepresentation) that HP relied on the representations in purchasing the Defendants' respective shares and share options.

4068. The Claimants also stressed an important difference between the two sets of claims in respect of the measure and calculation of loss they asserted. As explained above, in the FSMA claim, and for the purpose of assessing the FSMA Loss, the counterfactual (*"the FSMA Counterfactual"*) presented is one in which the Defendants did not cause Autonomy to breach its obligations under FSMA, so that Autonomy's published information would have been compliant with FSMA and reflected the correct accounting in respect of the impugned transactions throughout. In the FSMA Counterfactual, therefore, HP would never have been aware that the published information was inaccurate or misleading, still less that the misrepresentations were the product of dishonesty. In the deceit/misrepresentation claims, however, the counterfactual is different. Unlike the FSMA Counterfactual, the *"Misrepresentation Counterfactual*" which the Claimants presented does not assume any correction to Autonomy's published information until the negotiation stage, and so HP would have at some stage become aware that the published information had been materially inaccurate or misleading, although it would after that disclosure or discovery then have proceeded on the corrected information.

4069. Quite when and in what terms it is to be assumed that the disclosure or discovery would have been made is likely materially, perhaps determinatively, to affect whether, in the context of the direct misrepresentation claims, the transaction would have proceeded at all.

4070. Thus, the Claimants contended (though Mr Bezant was not entirely consistent in this regard) that the correction would have revealed or required the revelation of dishonesty; and that in those circumstances it may then seem implausible that HP would have pursued an acquisition of Autonomy at all. In that context, Mr Bezant was instructed by HP to assume, in constructing the Misrepresentation Counterfactual that:

(1) but for the breaches of duty alleged by the Claimants, the misrepresentations alleged to have been made by the Defendants directly to HP would not have been made; but the impugned transactions would still have been entered into, and Autonomy's published financial information would have been the same as it was in fact; and

(2) insofar as HP continued to pursue an acquisition at all, price negotiations on both sides, and the decisions of the selling shareholders, would have been informed by the same information about Autonomy's "True" historical performance that would have been available to the market in the FSMA Counterfactual.

4071. Mr Bezant stated in his first report that he read this as in effect requiring him to

> *"assume that, during the course of negotiations, Autonomy would have informed HP of the True Position and thereby that its published information was false and misleading. In that scenario, I anticipate that, HP may well have terminated negotiations. If HP did not do so, I would not expect HP to have proceeded with negotiations until Autonomy had fulfilled its obligation to disclose the True Position to the market. In any event, consistent with my instructions, disclosure by Autonomy would be required in order for negotiations to proceed with the selling shareholders and Convertible Bond holders aware of the True Position."*

4072. The Defendants, on the other hand, contended that no such revelation of dishonesty would have been necessary and in the construction of the Misrepresentation Counterfactual none should be assumed. According to the Defendants, it would have been (as it was stated in their written closing submissions) sufficient for Autonomy to *"say that it had learned that the accounting ought to be different and then provided HP with the correct accounting treatment"* and accordingly the Misrepresentation Counterfactual should simply be based on the assumption that *"HP would have had a full view of the transactions in question."* In short, and as Dr Lynch's valuation expert Mr Giles approached the matter, neither the issue whether the transaction would have proceeded nor the counterfactual value of Autonomy should be discounted by reference to the *"stain"* of accounting issues.

4073. Further, if it is assumed for the purpose of the Misrepresentation Counterfactual that the transaction would have proceeded, the question arises as to what information revealing the need for correction would have been known when, and by whom, and what, even if no disclosure of dishonesty is to be assumed, what (if any) other repercussions of revelation should be assumed.

4074. In that context, Mr Bezant's approach was that:

> *"... disclosure of the True Position would cause the market to reassess the value of Autonomy for:*
>
> (1) *the business' prospects in the True Position; and*

> (2) *additional uncertainty arising from knowledge that Autonomy had misrepresented its operations and results in public filings and its communications with the market.*
>
> …
>
> *This uncertainty a buyer would have faced would adversely affect both the Actual Value of Autonomy and the Revised Price. I am unable to quantify with certainty the discount to value that would result from taking such matters into account."*

4075. The Defendants again disagreed. Consistently with their position that the Misrepresentation Counterfactual should not involve any assumption that Autonomy's historical conduct was in any way improper (but also they contended, in any event), they and Mr Giles rejected any suggestion that any correction required would have any lasting effect on *"the long-term expectations for revenues, profits and cash flow that determine value"*. They contended further that *"by the time that HP was provided with the information about the transactions, it would also know that the matter had been looked into and this is what had been identified. Any further discount for the stain would be double-counting."*

4076. I consider that these points, which I have only sought briefly to introduce, raise challenging difficulties both in terms of legal principle and in their effect on the ultimate decision whether the transaction would have proceeded, and according to that, the construction of the appropriate Counterfactual and the quantification of loss. For these reasons, and also because the figures so far produced seem likely to be affected by my findings, I have considered it appropriate both to express only a provisional view as to whether (a) in the FSMA context and (b) in the deceit/misrepresentation context HP would have proceeded with the transaction, and more generally to defer my determination of quantum to enable further submissions. I shall need particular assistance in seeking to resolve, and if possible, reconcile the two different approaches: I would find it difficult to accept that it would be a satisfactory result for there to be a material difference in the quantification of loss according to whether the context and counterfactual relates to (a) the acquisition of shares and share options from Dr Lynch and Mr Hussain and (b) the acquisition of shares from all other shareholders.

DIRECT LOSSES

4077. This Chapter addresses the Claimants' claims against each of the Defendants for breaching their duties as directors and/or employees of three companies within the Autonomy Group, namely, Zantaz, Autonomy Inc (the 4th Claimant), and ASL (the 3rd Claimant) (and/or in the case of ASL, for breach of Dr Lynch's fiduciary duty of loyalty, see paragraph 3521 above).

4078. The claims are for direct losses[549] suffered by particular Autonomy subsidiaries (including the 3rd Claimant and 4th Claimant, which bring the claims) as a result of the Defendants' breach of duty in causing the relevant subsidiary to act to its detriment, essentially by spending, or foregoing, money which it was not in the subsidiary's best interests to spend or forego, and which the Defendants did not believe to be in the subsidiary's best interests.

4079. In these further claims, the 4th Claimant (Autonomy Inc) sues (a) in its own right, but also (b) as the legal assignee of Zantaz's direct claims under this head, there having been a valid assignment to it of all of Zantaz's claims.

4080. I have already addressed such of the direct loss claims as relate to Autonomy's "Hosting" business. In relation to the direct claims made in respect of the four hosting transactions, I have set out in detail in the hosting section, my conclusion is that all four of the impugned contracts were not commercially in the relevant company's best interests, and the Defendants both knew that, because the contracts were entered for the purpose of falsely inflating Autonomy's apparent revenue.

4081. In the course of my analysis in that context, I have reached a number of conclusions of relevance to the matters addressed in this Chapter, which for convenience I summarise below.

4082. As to the dispute whether Dr Lynch had any directorial role in the three companies concerned, I have found that:

(1) both Defendants owed duties as *de jure* directors to Autonomy Inc;

(2) Mr Hussain was *de jure* a director of ASL and Zantaz;

(3) Dr Lynch was not *de jure* or *de facto* a director of Zantaz, but he was a *de facto* or shadow director of ASL.

4083. I have concluded that the only proper claimant for any of these direct claims is (a) the company to which either of the Defendants owed and breached a duty as director or employee (or, in the case of ASL, fiduciary in the sense described in (paragraph 3521 above) or (b) a valid legal assignee of such a claim. More particularly, I have determined that the existence of the transfer pricing arrangements where losses are transferred from one subsidiary to another within the group does not give a right to the transferee to sue for those losses.

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[549] Described in the RRAPoC as "transaction-based losses".

4084. I have also found (again when dealing with the direct claims in respect of the hosting transactions) that no relevant duties were broken by either of the Defendants in their roles as directors of ASL in relation to the transfer pricing arrangements whereby losses incurred by Autonomy Inc, Verity Inc and Zantaz were transferred (but not assigned) to ASL. In my view, on the evidence put forward, those transfer pricing arrangements did not affect the right of the Autonomy company to which a duty was owed and broken by one or both of the Defendants in respect of the impugned transactions to make a claim. An agreement to transfer losses (as distinct from an assignment of the underlying rights) does not carry with it the conclusion that no loss has been sustained by the original claimant, nor that the right to claim has been lost or transferred. How the claimant which has suffered the loss has sought in the past or in the future seeks to deal with the loss which has been sustained has no bearing on its right to sue, or the quantum it may claim.

4085. I concluded in respect of the Hosting claims that because Dr Lynch was not a director of any sort or employee of Zantaz, he owed no duty in respect of the three Zantaz contracts impugned in these direct claims under hosting, and the claim against him in respect of those contracts fails accordingly. It succeeds against Mr Hussain. In relation to the fourth contract, namely between Autonomy Inc and MetLife, the loser was Zantaz, because it was Zantaz which was the original contracting party with MetLife, whose payments were reduced by the later contract with Autonomy Inc. Although Dr Lynch was a director of Autonomy Inc, because Autonomy Inc suffered no loss there is no valid claim against Dr Lynch in respect of this fourth impugned hosting contract. I emphasise that the reason the claim fails against Dr Lynch in relation to this fourth contract is not because of the transfer pricing arrangements, but because Autonomy Inc suffered no loss in the first place.

4086. In my judgment, the same approach as regards the status of Dr Lynch and the identification of the proper claimant and what if any loss was sustained applies to the remaining transaction-based/direct loss claims under the three remaining heads (Hardware, MAF payments to VARs, and reciprocal transactions (VAR and non-VAR)). The breach of a duty owed by the Defendants to the company which sustains the loss, must be established. Such a claim is not affected by loss transfers which fall short of assignment, nor do such matters result in the company suffering no loss. Further, the transfer pricing arrangements made by ASL cannot form the basis of a claim because the entering into of the transfer pricing arrangements cannot successfully be impugned as a breach of duty.

4087. Turning to the factual basis of the claims under these remaining heads, the parties dealt with these three heads of claim relatively shortly in their submissions. So will I.

Hardware

4088. The only difference on the threshold issues in respect of the hardware transactions is that unlike the hosting contracts Autonomy Inc did suffer the losses because they were the buyer and seller of the relevant hardware.

4089. The Third and Fourth Claimants put their case as follows:

(1) The relevant purchases and sales were made for the improper purpose of inflating Autonomy's reported revenue rather than for any genuine commercial purpose.

(2) Both Defendants (a) were directors of Autonomy Inc and (b) actively, albeit in different ways, promoted these hardware sales.

(3) The losses on the hardware sales related to and resulted from a breach by the Defendants of their duties to Autonomy Inc as the relevant company that sustained them.

4090. The Defendants' principal defence of course was that the hardware transactions were legitimate. Otherwise, they were left with arguments as to the effect of the transfer pricing arrangements and questions as to the extent of Dr Lynch's duty and knowledge. I have already dealt with these, as explained above.

4091. I have concluded that the Claimants must succeed on this aspect of their claims. That includes their claim for recovery of $250,000 paid as bonuses in respect of the hardware transactions.

4092. The Defendants have points on the quantum of these claims, which I will deal with in my quantum judgment.

MAF Payments to VARs

4093. The Claimants put their claim under this head as follows:

(1) All three subsidiaries paid so-called marketing assistance fees (MAFs) to VARs. The VARs did not assist in any marketing efforts, notwithstanding the paper trail in relation to various of the MAFs suggesting the contrary.

(2) These were inducements for the relevant VAR to participate, and a reward for having participated, in a transaction that would enable Autonomy to report revenue improperly, and were thus paid in breach of the Defendants' duty to the relevant subsidiary. That would in principle include foregone receipts on certain transactions, including in respect of Verity Inc, where amounts were paid to a VAR by an end user, as a designated payee on a transaction between Autonomy and the end user, which exceeded the amounts paid by Autonomy to the VAR, being in effect another mechanism for payment of a MAF.

4094. Again in principle, I have found the factual basis alleged by the Claimants made out in my detailed consideration of the VAR claims. I also find that procuring the companies to make MAF payments or forego receipts was a breach of duty as a director.

4095. It was not altogether easy or even possible to unravel from the schedules the extent to which ASL or Autonomy Inc was the original payer (and not simply a party to which a cost was subsequently transferred under transfer pricing arrangements). If either was the original payer, a claim lies against both Defendants. To the extent the original MAF payer was Zantaz the claim will only be against Mr Hussain.

4096. The schedules of MAF payments identify all three companies as payers depending on the relevant MAF payment. In principle I find both Defendants are liable for the

Autonomy Inc payments or foregone receipts. I find only Mr Hussain is liable for the Zantaz payments (or foregone receipts).

4097. In relation to the ASL payments, although the evidence is unclear, it appears in respect of a limited number of the MAF payments that ASL was the original payer. Both Defendants were responsible for those payments being made, and in those circumstances both Defendants are liable for the ASL MAF payments.

4098. Again, I will consider precise quantum in my quantum judgement. However, I note that the Defendants did not raise any positive points against the quantification of this head of loss advanced by the Claimants (and amounting to $8,883,221), and did not challenge at trial Mr Bezant's verification work in respect of those figures as set out in Schedule 12C of the RRAPoC.

Reciprocal Transactions

4099. The Claimants put their claim under this head as follows:

(1) All three subsidiaries were involved in either: (i) the impugned reciprocal transactions; and/or (ii) improper reciprocal transactions used to unravel VAR transactions (i.e. where the relevant subsidiary bought something it did not need in order to put the VAR in funds to settle its proposed debt).

(2) The losses incurred similarly represent damages for the Defendants breaches of duty.

4100. For the reasons I have set out at length in my consideration of the VAR Claims, and Reciprocal Claims made under FSMA I find the premise of this head of claim made out, namely there was no commercial justification for these reciprocal transactions and this was known to both Defendants because their purpose was falsely to inflate Autonomy's apparent income. In my judgment, both Defendants authorised these transactions.

4101. As with each of the four separate claims for breach of duty owed by the Defendants to Autonomy companies, against which Defendant the claim can be made depends on which subsidiary entered the impugned transaction. In their closing submissions the Claimants identify which entity has suffered the loss in respect of the reciprocal transactions as follows:

> *"Of this total amount, [around $20m] $739,450 was suffered by Zantaz and the remainder resulted in a loss to ASL by virtue of the aforementioned transfer pricing arrangements."*

4102. They added in a footnote:

> *"The Claimants advance an alternative case, which reflects the position before the transfer pricing arrangements. Under this case, the net loss is recorded in the entity that recorded the purchase transaction. This approach results in losses of $2,980,444 to ASL, losses of $14,469,910 to Autonomy Inc and losses of $3,215,000 to Zantaz: PoC Schedule 12, Table 12B."*

4103. They also asserted that Mr Bezant had confirmed that he had not identified any inaccuracies in PoC Schedule 12, Table 12B. Mr Bezant's evidence on this point was not challenged in cross-examination.

4104. I did not understand the Defendants to take any points on quantum on this head of claim if liability were to be established. However, although no points were raised, I will leave the assessment of these losses to my quantum judgment.

4105. In those circumstances I find that the subsidiary which suffered the losses were as identified in the alternative claim, set out in the footnote. The amounts of that claim have not been challenged but will finally be determined in my separate judgment on quantum.

COUNTERCLAIM

4106. Lastly, I should briefly address Dr Lynch's Counterclaim against the First Claimant (Autonomy), though ultimately only to confirm that it seems to me to follow from my findings in the main claim that it falls to be dismissed.

4107. In summary, the gist of the Counterclaim was that HP's public announcement on 20 November 2012 of the $8.8 billion write-down of Autonomy, and the various briefings on that day, contained statements seriously impugning the conduct and damaging the reputation of Dr Lynch which (according to the Counterclaim) were untrue, that Autonomy authorised the false statements made, and that in doing so it was in breach of a duty of trust and confidence, alternatively duties in tort and under the Data Protection Act 1998 ("the DPA"), which it owed to Dr Lynch.

4108. The Counterclaim identified a series of eleven specific statements made in the course of the announcements and calls referred to above, including serious allegations against *"former members of Autonomy's management team"* accusing them of a *"wilful effort to mislead investors and potential buyers",* and alleged each to be false. Most of the eleven statements impugned the way the business of Autonomy had been conducted and accounted for on broadly the same grounds as have been put forward by the Claimants in the main proceedings and alleged that those *"former members of Autonomy's management team"* had *"used accounting improprieties, misrepresentations and disclosure failures to inflate the underlying financial metrics of the company, prior to Autonomy's acquisition by HP"*. Three of the statements referred, misleadingly it was claimed, to the circumstances in which the alleged improprieties came to light, one to the impact of the alleged improprieties and misrepresentations in causing HP to pay too much for the acquisition of Autonomy. A further statement related to the role of Deloitte and HP's alleged reliance on them.

4109. The claims were not brought in defamation: it does not seem to have been disputed that any defamation claims were statute-barred. Nor did Dr Lynch seek to recover damages for reputational damage. Rather, the claims asserted that the allegedly false statements caused such reputational damage to him that it caused two very substantial prospective investors in his company, Invoke Capital, to withdraw. The sums claimed in the Counterclaim were considerable: Dr Lynch claimed that if the investments had been made, he would have earned considerable equity gains and fees through Invoke Capital of at least $160 million.

4110. The claims depended upon Dr Lynch demonstrating (on the usual balance of probabilities) that (a) the identified statements were false, (b) Autonomy authorised the making of the statements and thereby assumed responsibility for them, and (c) Autonomy owed Dr Lynch duties of which it was in breach. There was also a dispute about causation, and about quantum.

4111. As may be apparent from my description in the Introduction to this judgment, and especially in paragraphs 384 to 414, I have never been convinced that at the time of the Announcement of Impairment in November 2012 HP had yet established the facts necessary to justify the very serious allegations which the Announcement contained. The references in the Announcement to *"intense internal investigation"*, which were relied on as underpinning and justifying the representations and allegations made, had

not been completed and, so far as the evidence went, were largely undocumented (though the Claimants suggested that a claim made to privilege might in part at least explain that).

4112. Still less had there been any exercise to correlate the irregularities alleged to the amount of the write-down sought to be explained and justified, as internal emails make clear (see paragraph 396(2) above). Indeed (as may also be relevant to the question of quantum), any correlation between the amount of the write-down and the improprieties alleged to have justified is difficult to discern, and appears to be belied by the way it was calculated at the time. Of the total write-down of $8.8 billion, $3.6 billion was the result of increasing the discount rate from the 9.5% used in August 2012 (when no impairment was thought necessary) to 16% (an extra percentage point having been added at the very last minute). According to an HP infographic circulated on 19 November 2012, the remaining $5.2 billion was attributable to (a) $2.9 billion for lower margins, (b) £1.8 billion for lower growth rates and (c) $1.3 billion for the effect of re-baselining revenue to reconcile the accounts. No mention was made of the alleged accounting improprieties (though they may be compendiously taken into account in those calculations without express identification).

4113. There are grounds for supposing (and see paragraphs 409 to 413 above) that HP had hurried to inform the market before it had completed the necessary investigations because it urgently needed to revalue the component parts of its business following a reduction in its market capitalisation in 2012 and to satisfy the requirement of US accounting rules that the sum of the parts of a business plus 30% control premium could not exceed its market capitalisation. The huge write-off neatly resolved this problem. Writing down the value of Autonomy ensured that no write-down was required of HP's own Software division (which, as explained in paragraph 411) HP wanted to avoid. The signs are that HP proceeded before it was really ready in light of market and accounting exigencies, and the write-down was in an amount which satisfied both. That may also explain why the allegations were not even put to Dr Lynch before they were vigorously publicised.

4114. However, whilst these matters did encourage in me original scepticism about the claims and their quantum, I do not consider it necessary to consider them in any greater detail. Nor do I need to explore and determine the various and considerable difficulties in Dr Lynch's way (including the difficulty of demonstrating that Autonomy assumed an obligation in respect of HP's Announcement), which would have confronted him even had he succeeded in the main claim. For the fact is, as pleaded by the Claimants, and whether or not sufficiently underpinned and documented at the time that they were made, the statements as to the conduct of the business and its accounts which Dr Lynch identified were, in my judgment, true. The fundamental premise of the Counterclaim was that the statements were untrue, and the premise having been falsified, the claim must fall away. That is so even if the representations as to the basis of the statements were untrue, incomplete or inaccurate: there would be no realistic prospect of establishing loss.

4115. Accordingly, as I indicated would be the result in my Summary of Conclusions (in Appendix 6), I dismiss the Counterclaim.

CONCLUSION

4116. I approached the Claimants' case with considerable scepticism. This was not a case like Theranos, which raised more than $700 million to develop and support a product which never had any substance. Autonomy was a successful cash-generating enterprise, audited by Deloitte, with substantial cash reserves at the close of 2010, and a world-beating software product, which had opened up for analysis the then uncharted but vast area of unstructured data (IDOL) and which Ms Whitman herself had apparently described as *"almost magical technology"*.

4117. However, I have been satisfied and concluded that the evidence reveals a clear pattern of Autonomy's central management resorting, under the direction of the Defendants, to a variety of what the Claimants had termed *"levers"*, which (quoting from the Claimants' written closing submissions) *"the Defendants could pull, as and when desired, to achieve their overall goal of misrepresenting Autonomy's financial condition so as to make it appear that the business was operating in line with market expectations"*.

4118. Although the Defendants advanced the semblance of commercial justification for hardware sales, VAR transactions, reciprocal sales, "hybrid hosting" and the inclusion within the "OEM" category of subsequent sales said to have been generated by OEM transactions, those justifications lacked substance.

4119. Further, the extent to which the Defendants had consistently and successfully sought to conceal the true substance and purpose of material parts of Autonomy's business and to disguise their adverse effect has become clear. No good or sufficient reason was ever provided, for example, for the failure properly to disclose the hardware sales and the treatment of their associated costs which made them loss-making.

4120. Both individually and together the effect of the deployment of these "levers" was to portray Autonomy as a much larger and more successful company than it really was, with a history of meeting and beating market expectations which was sustained only by resort to undisclosed or incorrectly described sources other than proper software licence sales.

4121. I have determined that the Defendants were responsible for a strategy of sales of third-party hardware which were not appliances or in any meaningful way a *"delivery channel for software sales"*, and the purpose of which was to plug shortfalls in software licence sales and thus to disguise the true performance of Autonomy's software business.

4122. I have accepted the Claimants' case that the series of VAR sales which I have described lacked any real substance and the apparent revenue they purportedly generated should not have been recognised: in every case (with one exception where the allegation was not established) the sale to the VAR was put in place to make good revenue lost when a sale to a genuine end-user failed: the reseller was never intended to, nor ever did, play any part in the resale of the software purportedly sold to it; nor was it intended to pay Autonomy from its own resources if an end-user sale eventuated; nor did it have any part to play in any sale to the proposed or a substitute end-user, which Autonomy alone would seek to negotiate and conclude, without regard to or any participation by the reseller.

4123. I have accepted also the Claimants' case that by a variety of reciprocal transactions Autonomy put its customers in funds to buy Autonomy products, by buying products from the customer despite having no or no real commercial rationale for doing so.

4124. Both the pure hardware sales (which Autonomy subsidised by buying the hardware and then reselling it at a loss) and the reciprocal transactions (where in effect Autonomy was paying a customer to buy Autonomy products) amounted to Autonomy buying its own revenue.

4125. Moreover, I have accepted that the Defendants well knew that Autonomy had repeatedly misrepresented the nature and scale of its IDOL OEM revenues, which they knew would be and were especially highly regarded by HP, and had materially exaggerated its hosting revenues.

4126. In reaching these conclusions, I have borne in mind throughout that Autonomy had well-known and reputable auditors, and through much of the Relevant Period, an Audit Committee chaired by a well-regarded and very experienced accountant, and an equally well regarded and experienced non-executive Chairman, all of whom had access to the accounting records without restraint. For reasons I have sought to explain, the Defendants' reliance on them as denoting that the accounting treatment of the impugned transactions may sometimes have 'pushed the envelope', but was within the parameters of reasonable judgements and propriety, justifies or provides a conclusive litmus test. The fact is, as I have concluded, that the evidence (including, especially, emails of which Deloitte, Mr Bloomer and Mr Webb QC were not aware) shows that the Defendants knew that the true purpose of the various 'levers' they deployed was dishonest, as further demonstrated by the efforts the Defendants made to conceal or misdescribe the true nature and scope of the business undertaken.

4127. In the result, I have determined that the Claimants have succeeded in substantially all their claims, except in respect of one impugned VAR transaction and in their claims relating to the *"Other Transactions."* They have established, on the civil standard of the balance of probabilities, that the Defendants dishonestly misrepresented the financial position and performance of Autonomy during the Relevant Period. I consider that HP/Bidco bought a smaller and less successful company than it was represented to be and that HP was led to and did believe that it was acquiring.

4128. One of the tragedies of the case is clear: an innovative and ground-breaking product, its architect and the company will probably always be associated with fraud.

4129. The length of this judgment may well be unparalleled. I have sought to set out the detail I have thought appropriate having regard to the gravity of the claims and the enormity of the consequences for the parties (and especially the Defendants). If there is excuse for its length it is that this has been a most unusual case.

4130. Ordinarily, even the most complex cases tend to be resolved ultimately by reference to a small collection of documents which become dog-eared with repeated citation during the course of the trial, and discrete passages of oral evidence likewise cited so often as to verge upon becoming leitmotifs. In this case, however, the allegations travelled over all the major aspects of the way Autonomy generated revenue, over (in all) more than 100 transactions each with supporting documents. The pattern which I have concluded emerges in the round had to be tested against each one, not least in case some differences

emerged which falsified the general description. The number and variety of transactions, documents and extracts from witness evidence referred to in this judgment may demonstrate the unusual nature of the case, as may also the volume of transcripts which exceed some 18,000 pages and the hundreds of pages of evidence from the US criminal proceedings admitted into evidence in these proceedings as hearsay.

4131. Another unusual facet of the case which necessitated particularly detailed focus on the extensive documentary record has been, conversely, the absence of not only, and most obviously, one of the only two Defendants (Mr Hussain) but also (as already recorded) of a number of key individuals who might have assisted me, and in particular, Mr Knights and Mr Mercer (the lead partners for Deloitte over the course of the Relevant Period), Mr Sullivan, Mr Johnson and Mr Scott (who gave evidence in the US criminal proceedings but not before me) and (on the Defendants' side) Mr Chamberlain, Ms Eagan, Mr Kanter, Dr Menell (all of whom I have concluded were part of a clique responsible with the Defendants for the operation of the impugned 'levers').

4132. The length and complexity of the judgment, my delay in completing my assessment, the need for an extended period to enable the parties' legal representatives to consider, correct and comment upon the draft and my concern about the difficulty of maintaining strict confidentiality pending final formal handing down of the finalised version, caused me to follow an unorthodox course in delivering my conclusions and reasoning. First, I took the unusual step of setting out a Summary of my conclusions and their basis at a public hearing on 28 January 2022[550] (see Appendix 6). Shortly thereafter I provided my draft judgment (first circulated on 31 January 2022, and supplemented in stages thereafter) to nominated individuals for correction and appropriate comment under conditions of the strictest confidence.

4133. As it transpired, rather longer was required for the process of correction and comments, and their consideration, than originally estimated; but the corrections and comments provided by all parties have been extremely useful, and I am grateful to all concerned. I am grateful too for the confirmation provided by all to whom any previous drafts were provided to enable the process of correction and comment, which remain embargoed that any such drafts, will (to ensure confidentiality) be delivered up and destroyed.

4134. More generally, I reiterate my thanks to the parties and their representatives for their patience and unstinting assistance throughout the long process of pre-trial hearings, the Trial itself and the regrettably long period of this judgment's gestation. The advocacy on all sides was of the highest quality, and the support on which it rested was equally exemplary.

4135. I shall need the same assistance in respect of the issues of quantum, which (as I have indicated) will be the subject of a separate judgment in due course after further submissions (in respect of which I shall give directions at a subsequent hearing which is to be arranged).

Postscript

[550] The Summary I provided on 28 January 2022 is, for convenience, attached as Appendix 6 to this judgment. Where there is any inconsistency with this judgment, this judgment prevails.

4136. This postscript addresses three points which have arisen in the process of providing corrections of and comments on the embargoed original draft of this judgment.

The position of Mr Chamberlain

4137. First, on 6 April 2022, Clifford Chance sought my permission "*to notify Mr Chamberlain's US and UK counsel that the judgment includes findings of wrongdoing against Mr Chamberlain, so that he can (if so advised) apply to come inside the embargo or take whatever other steps he is advised to take."* In that regard, they noted that *"the draft judgment contains a number of findings against Mr Chamberlain, who is facing prosecution in the United States alongside our client. The judgment makes findings against a number of other individuals, but Mr Chamberlain is the only one of these individuals facing prosecution. Mr Chamberlain is, of course, not aware of the fact that the judgment will include findings against him and will not have any opportunity to take legal advice on the implications of the civil judgment before it becomes public."*

4138. When I declined to give permission, but invited further explanation of the basis of the request, Clifford Chance by further email dated 20 April 2022 helpfully referred me to the decision in *MRH Solicitors v Manchester County Court* [2015] EWHC 1795 at [24], [32] to [39] as being what they had had in mind, though they stated also that it was *"not an issue that affects our client directly."*

4139. *MRH Solicitors v Manchester County Court* concerned findings made in an *ex tempore* judgment by a Recorder, after a four-day trial, dismissing a claim for personal injury and consequential losses on the basis that the underlying motor accident was staged and the claims were fraudulent. In the course of his judgment, the Recorder found that the solicitors for the claimant driver in that action (MRH Solicitors) were party to the fraud, as also (he held) were two companies which had provided and charged for hire cars provided to the claimant. A passenger was separately represented: but neither the solicitors nor either of the two car hire companies were party to the proceedings. The Recorder subsequently approved a transcript of his judgment which included those findings. MRH Solicitors and the two car hire companies brought proceedings for judicial review to seek to undo what they submitted was a breach of natural justice which had resulted in their integrity being impugned unfairly. They sought and obtained interim relief to prevent the circulation of the approved judgment and as their substantive relief they sought an order quashing parts of the approved judgment.

4140. It was submitted on the applicants' behalf in the judicial review proceedings in the Administrative Court that:

(1) The Recorder had behaved unfairly in expressing final conclusions that the Solicitors and car hire firms had behaved fraudulently, especially since (i) none of the three had been heard or had an opportunity to be heard; (i) no claim of fraud had been pleaded, (iii) there was no evidence for the findings of fraud made.

(2) Judicial review was the appropriate route and remedy since there was no route of appeal by non-parties.

4141. The Divisional Court declined to grant the order sought, since *"no more than on appeal can we re-write the judgment of [the] Recorder…"* They also declined to make

declaratory relief; but that was because they considered that it was unnecessary in light of the unequivocal determination in their judgment, where they stated that:

> *"…the Recorder was not entitled to make a conclusive finding of dishonesty or fraud against MRH [or the two hire companies] and they should be treated as not having such a finding made against them."*

4142. The Divisional Court also provided general guidance, stating that in

"the unlikely event that something similar to this should happen in the future, in our view the right course would be for the third party who believes they have been unfairly criticised in a judgment to apply to be joined as a party."

The person concerned could then appeal (or seek permission to do so). At the same time, however, the Court stressed that the decision was a discretionary one, and emphasised that:

> *"… we are not saying that a third party who is criticised will necessarily be entitled to be joined as a party. There are many cases heard in the civil courts (and also family and criminal courts) where the conduct of an absent person falls to be considered. For example, in a conspiracy case not all the alleged conspirators may be before the court as parties or witnesses. In complex commercial frauds it may well be part of the case there's an absent personal institution was party to dishonest conduct somewhere in the chain. Everything will depend on the facts of the individual case."*

4143. It seems to me that two questions thus need to be considered: (a) whether, prior to public circulation of the judgment, the court should pre-circulate any person(s) in respect of whom it has made serious findings to enable them to make representations for the judgment in some way to be anonymised or even altered; and (b) whether at that stage or thereafter the court should, on application by the person concerned (or indeed on its own motion), order their joinder as a party to enable an appeal.

4144. In determining not to give the permission requested by Clifford Chance to make available this judgment to Mr Chamberlain and his advisers before its final handing-down, I have had in mind particularly the following considerations:

(1) Although Mr Chamberlain's decision not to provide evidence or attend is understandable in light of his indictment in the US, and his right of silence in the criminal proceedings there, that was his decision: he nevertheless had the opportunity to give evidence in these proceedings and declined it.

(2) As mentioned previously, he was not alone in declining that opportunity; and even if his reasons may be stronger than theirs, there would be a variety of persons in the same position as he, the common denominator being that in each case I considered it essential to consider his or her role in what was done as part of the process of determining the claims against the two Defendants. Mr Chamberlain must have appreciated, as must all the others, that their conduct would be reviewed; and it was on the cards that it might be criticised.

(3) This is, in my judgment, just the sort of case which the Divisional Court had in mind in emphasising that such findings might be necessary.

Furthermore, I do not consider that there was any means of successfully anonymising some part(s) of the judgment; nor that any good would come of any process which enabled Mr Chamberlain or others in a similar position to, as it were, offer their commentary and evidence on the findings I have made, without being bound by evidence or exposed to the scrutiny of cross-examination. I have been acutely aware throughout of the obvious imperative that judges should be extremely cautious before impugning the honesty of persons who have not had an opportunity to defend themselves, and I have taken every care accordingly, even though in this case, they did have an opportunity but declined it.

(4) I emphasise nevertheless that nothing in this judgment constitutes a finding of liability or formal finding of guilt against anyone other than the two Defendants. My findings against others are ancillary to my findings against the Defendants.

4145. In those circumstances, and given that (as the Court noted in *MRH Solicitors v Manchester County Court*) *"it is axiomatic that appeals are brought against orders, not the reasons for orders"*, I would not of my own motion consider it appropriate to join Mr Chamberlain or any other of the persons I have found to have been involved in the frauds on the basis of which I have held both Defendants to be liable.

4146. I very much doubt that an application to be joined would be appropriate or serve any purpose, since I have not been asked, do not intend to and could not properly make any order against Mr Chamberlain or any non-party I have criticised. However, since no application has been made, and theoretically, I suppose, could be so, I do not finally decide that now, but certainly do not encourage any such step.

Extant copies of embargoed draft judgment and related documents

4147. The content and copies of all drafts of my judgment circulated to the parties after I had delivered a summary of my conclusions on 28 January 2022 in open court were strictly embargoed. In the unusual circumstances of this case, I attached express conditions, including that all copies should be returned and destroyed once the process of finalising and handing down final judgment had been completed. The purpose of the embargo and of these conditions was to assist, safeguard the confidentiality of, the necessary process of enlisting the assistance of the parties in identifying and correcting suggested errors and omissions (including any parts of the draft(s) which might require clarification or amplification) before finalising the judgment and (by hand-down) putting it in the public domain. I had understood that the conditions I stipulated in relation to drafts of earlier and superseded versions of this judgment and associated documents proposing corrections were accepted, and certainly nothing to the contrary was intimated until 10 May 2022.

4148. However, Clifford Chance on behalf of Dr Lynch have now asked to be permitted to retain copies and the parties' proposed corrections for the purposes of pursuing any application for permission to appeal, and if permission is granted, any appeal itself. After I had indicated that I was not persuaded that this was appropriate, and very shortly before this judgment was finalised for publication, they have indicated that they may wish to put forward further arguments in support of this. I shall consider this further and make

directions to the parties accordingly. In the meantime, I should explain briefly why (subject to consideration of any further arguments and (possibly) interim arrangements for safe custody) I consider that earlier drafts should remain strictly embargoed and be returned or destroyed.

4149. I fully recognise that the process has been more extended and complex than usual, and the corrections proposed considerably more numerous. The parties have all assisted me greatly in identifying typographical errors and in reconstructing paragraph references. They have also, especially in the case of the Claimants, identified other errors both of expression or detailed fact, including some where I had overlooked documents or submissions which I was invited to (and did) revisit with a view to their correction. Dr Lynch, in particular, objected to various of the corrections suggested by the Claimants on the basis that the *"Claimants' comments cross[ed] the line from corrections to submissions on findings in the draft judgment"*.

4150. I have considered every such objection carefully by reference to any source material or submissions cited or repeated. Where I have made corrections, I have done so because it seemed to me necessary either to clarify the language I had used or to reflect my own review of some particular aspect of the record or submissions to which I had been directed and which I felt, with the perspective offered by a little distance from the original drafting process, I had not sufficiently accurately recorded or taken into account. In light of the same process of review, I have also included additional sections to address matters which I considered required further explanation of my conclusions. (These include, in particular, an additional chapter on Reliance which I considered both clarificatory and a necessary introduction to the issue of quantum, on which I shall require further submissions.)

4151. In no case were any corrections suggested or made by reference to evidence or submissions which had not been before me. In no case was any correction suggested or made which altered my overall approach or substantive conclusions as summarised in my Summary (subject only to the caveat below). I am satisfied that the corrections made were appropriate and necessary to ensure both clarity of expression and detailed accuracy in explaining those conclusions in this my final judgment .

4152. As should perhaps go without saying, this version of my judgment, as handed down, is the only version and record to be made public of my final conclusions and reasoning in this case.

Differences between the Summary of Conclusions and this judgment

4153. As to the caveat mentioned above, Simmons & Simmons have suggested to me that in certain instances there are differences between the wording in this judgment and the wording of my Summary of Conclusions. Of the differences to which they drew attention the following remain:

(1) Paragraph 42 of the Summary should be taken to be replaced by paragraph 524 of this judgment which is more nuanced.

(2) Paragraph 48 of the Summary does not reflect that ASL as well as Autonomy Inc have claimed for direct losses.

(3) Paragraph 50.1 of the Summary states that the quantity of pure hardware sales was $100 million whereas in this judgment the total aggregate over the Relevant Period has been corrected to $200 million.

(4) Paragraph 50.4 of the Summary describes the Claimants' case as the foregoing of future recurring revenue in exchange for a "one off and heavily discounted capital sum for a licence", which has been amended to remove the words "and heavily discounted" in paragraph 16(4) of this judgment, though in fact the capital sum provided a discount compared to licence fees otherwise payable over time.

(5) Paragraphs 50.5 and 80 of the Summary describe OEM as Autonomy software being embedded in an OEM's hardware: the judgment has corrected this to an OEM's software at paragraph 16(5), consistently with other parts of the judgment.

4154. Simmons & Simmons have accepted that these corrections are minor. But they have suggested that in light of them, the Summary should now be removed from the Courts and Tribunals website, and not included as an Appendix to this judgment. I do not consider that either course is required. It seems to me that such minor differences are inevitable and had been anticipated in my Summary, where I expressly anticipated differences and stated that in the event of any conflict my judgment would prevail.

4155. Nevertheless, I shall give instructions for the version of the Summary publicised at the end of January to be re-issued with an endorsement in bold, referring readers to this judgment (which will by then have been handed down) and reiterating that in the event of any differences between the Summary of Conclusions and this judgment, this judgment prevails. It may also be possible to include in the Summary an electronic link to this judgment.

APPENDIX 1

DRAMATIS PERSONAE

[Names in **BOLD CAPITALS** are parties. Names in CAPITALS were principal witnesses who gave oral evidence; names in *italics* were other witnesses, including in parenthesis those whose evidence in the US was admitted into these proceedings under hearsay notice; names in capitalised *ITALICS* were individuals of principal importance who did not give evidence]

Name	**Description of role** ***The roles of Autonomy individuals (and associated third parties) relate to the Relevant Period (Q1 2009 to Q2 2011) unless otherwise specified*** ***The roles of HP individuals relate to the date of HP's acquisition of Autonomy unless otherwise specified***
Anderson, Antonia	Autonomy Group Financial Accountant and Revenue Director (from 2011; previously Manager at Deloitte).
APOTHEKER, LÉO	HP President and CEO (November 2010 to September 2011). *Witness for the Claimants*.
Araujo, Neil	CEO Protect, Professional Markets at Autonomy (from August 2009).
Ariko, Barry	Member of Autonomy's Audit Committee.
Avant, Donald "Don"	Group Head of Operations at Autonomy (from July 2011). At the time of trial, VP, Customer Experience at Darktrace, an investee company of Invoke Capital (founded by Dr Lynch and Mr Hussain). *Witness for Dr Lynch.*
Avila, Eloy	Held various technical roles at Autonomy, including Chief Technology Officer (from November 2010). At the time of trial, Chief Technology Officer, Americas at Darktrace. *Witness for Dr Lynch.*

BAIOCCO, JOHN	Managing Partner at Capax Discovery. *Witness for the Claimants.*
Barris, Bob	Vice President of Sales, Dell.
Bettencourt, Michele (formerly Anthony)	CEO of Verity Inc (acquired by Autonomy in December 2005). Thereafter headed up Autonomy's integration of Zantaz and Interwoven (left Autonomy in December 2009). *Witness for Dr Lynch (but not cross-examined).*
Bhagat, Varoon	Member of the Corporate Development sub-team within HP's Strategy and Corporate Development group ("**SCD**").
Binns, Robert	Member of the worldwide Field Operations team, who worked within HP's Software & Solutions team.
Black, Ian	Autonomy Head of Global Operations.
BLANCHFLOWER, SEAN	Autonomy Head of R&D. *Witness for the Claimants.*
Blank, John	Member of HP's Enterprise Financial Reporting ("**EFR**") group, focused on M&A Technical Accounting.
BLOOMER, JONATHAN	Chairman of Autonomy's Audit Committee (from 2010). *Witness for Dr Lynch.*
Bordeaux, Dean	Account Executive, Dell.
Broli, Corrado	Autonomy sales executive (covering Italy). At the time of trial, Country Manager, Italy at Darktrace.
Brossard, Gerard	Vice President for Planning, Strategy and Operations (HP Software); led the Project Management office focused on the Autonomy integration.

Brown, Derek	Investor Relations, Autonomy.
Breya, Marge	Senior member of HP's software marketing team.
Brunnick, Michael	Autonomy Vice President of Federal Sales.
(Camden, Dominic)	Responsible for sales at Zones Inc, an IT solutions provider and hardware reseller. *Evidence in the US admitted as hearsay (Claimants and Defendants).*
CHAMBERLAIN, STEPHEN	VP, Finance at Autonomy (until March 2012). Chief Operations Officer at Darktrace (until 2018). Part of the 'Clique' or 'Cabal'.
Chan, Otto	Managing Director, Global Technology Operations, Citibank.
Chang, Hung	Lawyer at Autonomy.
(Channing, Roger)	Chief Technology Officer and Senior Vice President at MicroTech. *Evidence in US admitted as hearsay (Claimants and Defendants).*
COLLET, HARALD	Autonomy Vice President of Business Development (October 2007 to May 2008); Autonomy Head of OEM Sales in North America (May 2008 to June 2010). Co-author of Joe Bloggs correspondence. *Witness for the Claimants.*
Colomar, Vanessa	Autonomy Head of Communications (August 2011 to September 2012). At the time of trial, Head of Communications and Investor Relations at Invoke Capital. *Witness for Dr Lynch*.
Cooke, Stephen	Partner at Slaughter and May (Mergers and Acquisitions practice). *Witness for Dr Lynch (but not cross-examined).*
Corado, Ray	Financial Analyst, Autonomy.

Corley, Tom	Sales Account Manager, Zones Inc.
Crumbacher, James "Jim"	Associate General Counsel of Autonomy Inc.
Daoust, Mark	Vice-President of e-Discovery, Autonomy.
Debban, Vince	Senior Vice President, End User Computing / Desktop and Electronic Communications, Bank of America.
Desroches, Robert	Vice-President of Digital Safe Operations, Autonomy.
Dolan, Julie	Autonomy Senior Corporate Counsel. At the time of trial, Senior Legal Counsel at Darktrace.
Duckworth, David	HP's Mergers, Acquisitions, Divestitures and Outsourcing Finance Integration Project Manager (until March 2012). *Witness for the Claimants.*
Eads, Richard	Global Procurement Officer and Director of Credit and Collections, Autonomy.
EAGAN, NICOLE	Autonomy Chief Marketing Officer. At the time of trial, co-CEO of Darktrace. *Withdrawn as witness for Dr Lynch.*
EGAN, CHRISTOPHER "STOUFFER"	CEO of Autonomy Inc. *Witness for the Claimants.*
(Esterrich, Tomas)	CFO at MicroTech. *Evidence in the US admitted as hearsay (Claimants and Defendants).*
Faughnan, Michael	Global Account Manager, Dell.
Fitzgerald, Lisanne	Senior Manager and Professional Standards Reviewer, audit, Deloitte.

Flanagan, Tom	Chief Information Officer, Amgen.
Frischknecht, Dominic	Member of the Supply Management team, Credit Suisse.
Furman, Al	Chief Technology Officer, Morgan Stanley.
Gallagher, Darren	Autonomy Head of Development.
Geall, Marc	Autonomy Head of Corporate Strategy and Investor Relations (until May 2010).
Gersh, Andrew	Managing Director at KPMG. Led the KPMG financial due diligence team retained by HP in respect of the Autonomy acquisition and the KPMG team engaged by HP in October 2011 to assist HP in understanding Autonomy's closing balance sheet. *Witness for the Claimants.*
Goldfarb, Neil	Latin America Sales, Autonomy.
GOODFELLOW, CHRISTOPHER	Chief Technology Officer of Infrastructure at Autonomy. *Witness for the Claimants.*
Goodman, Peter	Investor Relations, Autonomy.
GREENWOOD, PHILIP	Autonomy Head of Connectors. *Witness for the Claimants.*
Guiao, Livius	Autonomy Associate General Counsel.
GUSTAFSSON (NÉE PRENTIS), POPPY	Autonomy European Financial Controller (from June 2009) and later Autonomy Corporate Controller. At the time of trial, co-CEO of Darktrace. *Witness for Dr Lynch.*
Harris, Elizabeth "Lisa"	Autonomy's Financial Controller. Joined an Invoke Capital company as a Finance Manager in 2013. At the time of trial, a Director of Darktrace. *Witness for Dr Lynch.*

Haverfield, Rachel	Senior legal counsel at Autonomy. Joined Invoke Capital as General Counsel in December 2013.
HOGENSON, BRENT	CFO for Autonomy in the Americas (whistleblower whose employment was terminated in late July 2010).
Humphrey, David	Chief Technology Officer of Virage Inc. *Witness for the Claimants.*
Humphries, Brian	Head of HP's Corporate Development sub-team within the SCD group (until March 2011).
HUSSAIN, SUSHOVAN	Second Defendant and Autonomy's CFO (who did not give evidence).
Hyson, Malcolm	Chief Technology Officer, DiscoverTech.
Hsiao, Emily	Member of HP's Corporate Development sub-team within the SCD group.
Jackson, Alex	Member of the Deloitte audit team.
Jimenez, Antony	CEO of MicroTech.
(Johnson, Andrew)	Head of HP's Corporate Development sub-team within the SCD group. *Evidence in the US admitted as hearsay (Claimants and First Defendant)*.
Johnstone, Ben	IT specialist, Deloitte.
KALBAG, SAMEER	Chief Technology Officer of Autonomy's Federal group. *Witness for the Claimants.*
KANTER, ANDREW	Autonomy Chief Operating Officer and General Counsel. At the time of trial, non-executive Partner at Invoke Capital. Part of the

	‘Clique’ or ‘Cabal’. *Withdrawn as witness for Dr Lynch.*
Kelly, Brian	Director, Global Procurement, MetLife.
Kelly, Frank	Member of Autonomy's Audit Committee.
Khan, Hafeez "Daud"	Financial analyst who covered Autonomy for Merrill Lynch (2001 to 2003) and for Cazenove (2006 onwards). *Witness for the Claimants.*
King, Martina	Head of Aurasma UK (May 2011 to May 2012). At the time of trial, was working at Featurespace, an Invoke Capital investee company. *Witness for Dr Lynch.*
KNIGHT, ROB	Member of the Deloitte audit team.
KNIGHTS, RICHARD	Deloitte audit engagement partner for Autonomy (2005 to 2010).
Krakoski, James (or Jim)	Autonomy sales executive selling Digital Safe.
Ku, Helen	Autonomy Revenue Manager.
Ladd, Beth	VP, Customer Marketing at Autonomy.
Lafreniere, Joanne	Planning & Strategy Manager, Bank of Montreal.
Lamond, Andy	Director, Realise.
Lane, Raymond	HP's Chairman.
LANGFORD, JONATHAN	Autonomy Development Support Engineer (from July 2010). At the time of trial, Service Management Director at Micro Focus. *Witness for the Claimants.*
Lee, Mickie	Autonomy Senior Counsel.

Lenschow, Raimo	Analyst, Merrill Lynch.
LESJAK, CATHERINE "CATHIE"	Executive Vice President and CFO of HP. *Witness for the Claimants.*
Letelier, Sergio	Director of HP's Corporate, Securities and M&A Operations team and in-house lawyer.
Levadoux, Jerome	Vice President in HP's Products, Information Management and Analytics group; involved in the Autonomy integration.
Levine, Marc	HP's Corporate Controller (from May 2012).
Livermore, Ann	Member of HP's Board of Directors.
(Loomis, William "Bill")	CEO and CFO of FileTek. *Evidence in the US admitted as hearsay (Claimants and Defendants).*
Louw, Gerry	Chief Information Officer, VMS.
Lucas, Christian	Managing Director, Morgan Stanley.
LUCINI, FERNANDO	Autonomy Head of Pre-sales and Chief Architect. *Witness for the Claimants.*
Lynch, Christopher	CEO of Vertica.
LYNCH, MICHAEL	First Defendant and CEO and Managing Director of Autonomy.
Lytle, Charles	Managing Director, Citibank.
Mackenzie-Smith, Simon	Chairman of Bank of America Merrill Lynch, UK.
Manners, Daniel	Director, Global PMO Manager, Deutsche Bank.

Mark, Robert	Autonomy Global Accounts Director.
Marovitz, Daniel	Managing Director, Deutsche Bank.
Martin, Alastair "Al"	Group Head of Autonomy's Technical and Customer Operations, EMEA & APAC. At the time of trial, VP, Technical Operations at Darktrace. *Witness for Dr Lynch.*
McCarthy, Michael	Autonomy Contracts Manager.
McMonigall, John	Senior member of Autonomy's Audit Committee.
Meier, Ed	Equity Analyst, Schroder Investment Management.
Meiers, John	Sourcing Leader in H&R Block's procurement department. *Witness for the Claimants (but not cross-examined).*
MENELL, PETER	Autonomy Chief Technology Officer. Currently head of R&D Technology at Invoke Capital. Member of the 'Clique' or 'Cabal'.
MERCER, NIGEL	Deloitte audit engagement partner for Autonomy (from May 2010).
Mohammadi, Rafiq	Chief Technology Officer of Interwoven; Group Chief Technology Officer of Autonomy following its acquisition of Interwoven.
Mooney, Michael	Senior Vice President, Field Sales Operations at Autonomy.
Morland, Paul	Financial analyst at brokerage firm Astaire Securities (July 2008 to June 2010) and at Peel Hunt (from June 2010). *Witness for the Claimants.*
Murali, Shailesh	Vice President, Technology Mergers & Acquisitions, Barclays Capital.

Murphy, Tony	CEO, Realise.
Murray, Tom	Assistant Manager, audit, Deloitte.
Niemier, John	Business Development Manager, Zones Inc.
Orton, Emily	Member of Autonomy's marketing department (2009 to 2010); Assistant to Dr Lynch (2010 to 2011). At the time of trial, Chief Marketing Officer at Darktrace. *Witness for Dr Lynch.*
Pao, Frank	CEO & President of Vidient Systems, Inc (and previously an Autonomy employee). *Witness for Dr Lynch.*
Pasini, Cesare	Prefect of the Vatican Library.
Patel, Dipan	Autonomy sales executive.
Pearson, Philip	Fund Manager at GLG Partners who invested in and traded Autonomy stock. At the time of trial, a Partner at Invoke Capital. *Witness for Dr Lynch.*
Perachio, Glenn	Senior Vice President of Protect, EMEA Autonomy.
Pereira, Mariana	Held roles in the marketing, R&D and sales teams at Autonomy; Director of Rich Media at Autonomy (until August 2011). At the time of trial, in the marketing department at Darktrace. *Witness for Dr Lynch.*
Perle, Richard	Member of Autonomy's Audit Committee.
Prasad, Reena	Autonomy Director, Americas Credit & Collections.
Puri, Rahul	Managing Director of Innovation and Chief Software Architect, Prisa. *Witness for the Claimants.*

Quattrone, Frank	CEO of Qatalyst Partners.
Robertson, Chris	Deloitte audit partner who oversaw the Autonomy Q1 2010 review.
Robins, Harry	Partner at Morgan, Lewis & Bockius LLP who advised Autonomy on merger control filing requirements in relation to its acquisition by HP. *Witness for the Claimants (but not cross-examined).*
Robison, Shane	Chief Strategy & Technology Officer of HP and Head of HP's SCD group. *Witness statement on behalf of the Claimants admitted as hearsay.*
Rothman, Ivan	Autonomy Senior Corporate Counsel.
Ryan, Patrick	Autonomy AVP Sales.
SARIN, MANISH	Senior Director in the Corporate Development sub-team of HP's SCD group. *Witness for the Claimants.*
Sass, Robert	Senior Vice President, North America Sales at Autonomy. At the time of trial, Managing Director, North America at Darktrace.
Sayad, Laila	CFO, VMS.
Scannell, Bill	Global Sales and Customer Operations, EMC.
Schultz, John	HP General Counsel (from 2012).
(Scott, Joel)	Chief Operating Officer and General Counsel, Autonomy US. *Evidence in US admitted as hearsay (Claimants and Defendants).*
Shelley, Philip	Co-head of Corporate Broking and UK ECM team at Goldman Sachs. *Witness for Dr Lynch.*

(Smith, Reagan)	Head of Bank of America's procurement team for software purchases. *Evidence in the US admitted as hearsay (Claimants).*
Smolek, Phil	Autonomy Senior Financial Analyst (until December 2009).
(Stephan, Matthew)	Autonomy Senior Finance Manager (2009 until early 2011). *Evidence in the US admitted as hearsay (Claimants and Defendants).*
Sullivan, Michael	CEO of Zantaz (July 2007 to 2009); CEO of Autonomy Protect (the archiving and litigation discovery division of Autonomy) (from 2009). *Witness Statement on behalf of the Claimants and evidence in the US admitted as hearsay (Claimants and Defendants). He gave oral evidence in the US criminal trial but not in these proceedings.*
Sunderwala, Meeta	Senior Director, Accounting Policies and M&A Reporting, in HP's EFR team.
SZUKALSKI, GARY	COO and Chief Marketing Officer of FileTek. At the time of trial, Chief Channel Management Officer at Darktrace. *Witness for Dr Lynch.*
Tejeda, Percy	Autonomy Director of Revenue in the Americas.
Truitt, Dan (brother of David and Steve Truitt)	Federal District Sales Manager, Autonomy.
(Truitt, David) (brother of Dan and Steve Truitt)	Founder and CEO of Microlink. Co-founder of MicroTech. Co-founder of DiscoverTech. *Evidence in the US admitted as hearsay (Claimants and First Defendant).*
(Truitt, Steve) (brother of Dan and David Truitt)	Chief Operating Officer of MicroTech. *Evidence in US admitted as hearsay (Claimants and Defendants).*

Uffelman, Andy	Managing Director, Operational Services Control, Charles Schwab.
Veghte, Bill	Executive Vice President, HP Software; temporarily oversaw the management of Autonomy from May to September 2012.
Walton, Charles "Woody"	Vice President of Technology, Federal at Autonomy.
WANG, ROGER	Vice President of Product Development for Digital Safe at Autonomy. *Witness for the Claimants.*
Watkins, Cynthia	Autonomy's Corporate Controller.
Webb QC, Robert	Non-Executive Chairman of Autonomy. At the time of trial, Chair of Luminance (another Invoke Capital investee company) and Darktrace. *Witness for Dr Lynch (but not cross-examined).*
WELHAM, LEE	Member of the Deloitte audit team for Autonomy (2005 to 2008); Deloitte Senior Manager on the Autonomy audit team (2008 to August 2011). *Witness for the Claimants: the only one from Deloitte.*
Wengryn, Peter	CEO, VMS.
Wharton, Tim	Co-founder of MicroTech. Co-founder of DiscoverTech (and owned a 20% stake in Microlink, out of which DiscoverTech was spun).
WHITMAN, MARGARET "MEG"	Member of HP's Board of Directors (January 2011 to September 2011); President and CEO of HP (September 2011 to November 2015); CEO of Hewlett Packard Enterprise (November 2015 to January 2018). *Witness for the Claimants.*
YELLAND, CHRISTOPHER	Autonomy CFO (April 2012 to February 2013). Autonomy Financial Controller (February 2013 to September 2017). *Witness for the Claimants.*

YAN, SAMUEL	Chief Architect in the Product Development team for Digital Safe at Autonomy. *Witness for the Claimants.*
You, Harry	EMC Executive.
Youngjohns, Robert	Senior Vice President and General Manager of HP's Autonomy / Information Management business unit (from September 2012). *Witness for the Claimants.*
Zanchini, Marco	Systems engineer in Autonomy's Milan office. At the time of trial, Cyber Defence Education Specialist at Darktrace.

APPENDIX 2

SCHEDULE OF BRIEF BIOGRAPHICAL DETAILS OF FACTUAL WITNESSES (OTHER THAN PARTIES) AND OF VARIOUS OTHER KEY PERSONS WHO DID NOT GIVE EVIDENCE

The Claimants' witnesses (listed alphabetically)

Mr Léo Apotheker

1. Mr Apotheker started working in the software business not long after he graduated from university in 1976. In 1988 he joined SAP, which has become one of the largest software companies in the world. He started as the managing director of a small SAP subsidiary, and worked his way up, eventually becoming sole CEO of SAP in May 2009.

2. Mr Apotheker was approached by HP in August 2010. At that stage HP had recently fired its CEO, Mr Hurd, in connection with allegations about expenses. Ms Lesjak, a longstanding HP executive, had been appointed as interim CEO.

3. After he was head-hunted, Mr Apotheker wrote a paper for the Search Committee (an HP committee charged with selecting the next HP CEO) to support the hypothesis that HP needed to transform its business towards enterprise software; and it was not disputed that he was selected with that in mind. He was not a Silicon Valley insider, but SAP had a substantial presence in Silicon Valley and so he was not a stranger to it.

4. He was appointed President and CEO of HP on 30 September 2010 (to take effect from 1 November 2010). He had initially been offered the position of Chairman as well as CEO, but turned down the chairmanship. In conformity with European norms and best practice, he considered it was preferable to segregate the positions.

5. At the time of Mr Apotheker's appointment, HP was a low margin traditional hardware company employing some 300,000 people with an annual turnover of about $125 billion. His view was that it needed to evolve to provide a full technology "stack" which he described as comprising *"the hardware, software and network layers that stand between the basic infrastructure of data creation, storage and distribution and the end user of information."*

6. Mr Apotheker perceived there to be special potential value in the integration of structured and unstructured data. He recognised Autonomy as one of the market leaders in unstructured data analysis. He led HP's acquisition of Autonomy.

7. His appointment was terminated by the Board on 22 September 2011, just over a month after the acquisition had been announced.

8. Mr Apotheker was the first witness called by HP and he was cross-examined for two days. His evidence primarily concerned his perception and perspective in relation to the acquisition of Autonomy.

Mr John Francis Baiocco

9. Mr Baiocco was during the Relevant Period, and remains, the Managing Partner of Capax Discovery LLC, perhaps Autonomy's most favoured of its stable of 'friendly' VARs. Capax Discovery was a subsidiary of Capax Global LLC, of which Mr Baiocco was (and remains) also effective CEO.

10. Mr Baiocco gave evidence to the Grand Jury and in the US criminal proceedings against Mr Hussain. He had his own lawyer, paid for by HP.

11. Mr Baiocco retained close links with HP after the Acquisition: for example, he was appointed to the partner advisory board of HP in 2013 and Capax Discovery became a "preferred partner" of HP at about the same time. When Mr Baiocco was first interviewed by HP's lawyers in 2013 Capax Discovery was making about $15 million a year from contracts with HP.

12. He was cross-examined in these proceedings for one day. His evidence addressed the impugned VAR and reciprocal transactions to which Capax Discovery was a counterparty, including VT2, VT3, VT4, VT10, VT16, VT20, VT21, VT27, VT28 and VT34.

Dr Sean Mark Blanchflower

13. Dr Blanchflower joined Autonomy in 2000 as a Research and Development Engineer in Cambridge after a PhD in applied mathematics and then a year of research at Trinity College, Cambridge. From the end of 2004, his job title was Head of Research and Development. He was the leader of IDOL development, though not everyone in R&D reported to him (for example, the R&D teams in the US and in the web content management division did not report to him). He reported to Dr Menell.

14. After the Acquisition he continued working first for Autonomy and then for HP. At the time of giving evidence, he was Vice President of Engineering for IDOL at Micro Focus (which had acquired the software business of Hewlett Packard Enterprise ("HPE") in 2017).

15. Dr Blanchflower attended the trial pursuant to a witness summons. His evidence predominantly addressed technical issues, and especially (a) the development of SPE; (b) Autonomy's approach to purchasing third-party software; (c) the purchase of SAT from MicroLink (though he was not aware of the purchase at the time); (d) the purchase of StorHouse from FileTek and its use thereafter; (e) the VMS transaction; and (f) the Vidient transaction. He was cross-examined for one and a half days.

Mr Harald Peter Ferdinand Collet

16. After a brief interlude at a marketing and media services company, Mr Collet (who graduated from Yale University in 2000) joined Oracle. He was there for seven years, holding the positions of Director of Global Sales Support from October 2005 to July 2006, and Senior Director of Governance Risk and Compliance from July 2006 to October 2007.

17. In October 2007, he joined Autonomy in its New York office, as Vice President of Business Development. In around May 2008, he became Head of OEM Sales in North America.

18. In June 2010, Mr Collett left Autonomy and joined Bloomberg LP and held the position of Global Business Manager for Governance and Compliance Products from July 2010 to August 2016 at which point he left Bloomberg and began a consulting practice. In January 2017, he founded a start-up company in the financial tech sector called Alkymi of which he was CEO at the time of giving evidence.

19. Mr Collet was the author of the 'Joe Bloggs' communications (see paragraphs 312 to 313 and 3235A to 3235C in the main body of my judgment) sent to various industry and financial analysts at the end of August 2011 in which he (and a colleague when at Autonomy, an engineer called Mr Alex Marshall who left Autonomy shortly after Mr Collet to join him at Bloomberg) sought to express concerns about the way in which Autonomy's OEM business was reported to the market, raising a number of questions that they felt HP should ask about its OEM revenues.

20. Mr Collet was cross-examined for a full day. His evidence primarily concerned (a) his assessment of the true nature of Autonomy's "OEM" business; (b) the basis of his concerns as communicated in the 'Joe Bloggs' communications; and (c) his account of Dr Lynch's involvement in providing misleading information to a company called Lone Pine (see paragraphs 3195 to 3207 in the main body of my judgment).

Mr David John Duckworth

21. Mr Duckworth worked for HP for more than 22 years. His job title in 2011 was Mergers, Acquisitions, Divestitures and Outsourcing ("MADO") Finance Integration Project Manager.

22. He had responsibility for the integration of Autonomy's financial systems and processes into HP's financial accounting structure following the Acquisition. That involved the "mapping" of Autonomy's financial information on a spreadsheet showing key parameters such as (a) Autonomy's various legal entities to HP's company codes, (b) Autonomy's organisational structure compared to HP's, (c) Autonomy's product lines to HP's business areas and (d) Autonomy's various general ledger accounts to HP's general ledger accounts.

23. His evidence addressed whether in that process he came to know of Autonomy's *"pure hardware"* sales, and he was cross-examined on that for about two hours: he denied any such knowledge.

Mr Christopher "Stouffer" Bradley Egan

24. After graduating with a BA in Economics from Trinity College in Hartford Connecticut in 1991, Mr Egan worked in a sales capacity for Glaxo Pharmaceuticals. In 1995 he joined Dataware Technologies, again in a sales capacity, before moving to Autonomy.

25. Mr Egan initially joined Autonomy Inc in March 2001 as a salesperson based in Boston and was given responsibility for managing sales on the U.S. east coast within

approximately six months. He was promoted to the position of Head of Sales for the entire USA within a year.

26. In 2003, he moved to San Francisco in California and from 2004 until 2012, Mr Egan was the CEO of Autonomy Inc responsible for Autonomy's sales activities in North and South America.

27. Mr Egan was principally involved in almost all of the impugned VAR transactions. Towards the end of November 2017, Mr Egan entered into a Deferred Prosecution Agreement ("DPA") with the US DoJ, in which he admitted that he was part of a fraudulent scheme to deceive purchasers and sellers of Autonomy's securities about the true performance of Autonomy's business, and that this scheme involved artificially inflating Autonomy's revenues using many of the means complained about by the Claimants. The DPA obliged Mr Egan to pay $923,391 in disgorgement and interest to resolve an action brought against him by the Securities and Exchange Commission. Under the DPA Mr Egan also admitted all facts as set out in a Statement of Facts attached to it, and promised full co-operation with the US DoJ. Any departure from the Statement of Facts or other breach of the DPA would expose him to being charged for all the conduct the subject of the DPA and any other conduct. Mr Egan testified in Mr Hussain's criminal trial as part of his agreement in the DPA to co-operate with the DoJ.

28. Mr Egan gave evidence in these proceedings via video-link from New York pursuant to a 28 U.S.C. §1782 order directing him to do so. His evidence addressed the general sales management process at Autonomy, as well as four categories of impugned transactions, namely, the VAR transactions, the reciprocal transactions, the pure hardware sales and the hybrid hosting arrangements. Mr Egan spoke to these transactions in general terms; he also spoke to a number of the specific transactions in which he had direct involvement. He was cross-examined over a video-link for three shortened days.

Mr Andrew Keir Markham Gersh

29. At the time of the Acquisition, Mr Gersh was a Managing Director at KPMG LLP, the US member firm of the KPMG network. He had been working for KPMG since 1992, first in the UK and, since 1999, in the United States. He is a qualified Scottish chartered accountant, a US Certified Public Accountant, and a licensed accountant in Massachusetts and California. As already stated, at the time of the Autonomy acquisition he was a Managing Director in KPMG; he became a Partner in October 2012. Between 2004 and 2011, Mr Gersh worked on at least 50 financial due diligence engagements for HP, all of them associated with HP's M&A activity, as well as dozens for other clients. He was familiar with both US GAAP (which was his primary expertise) and IFRS.

30. He was cross-examined for about three-quarters of a day in these proceedings. His evidence primarily related to the allegation that HP knew of Autonomy's pure hardware sales before the Acquisition, which he denied.

Mr Christopher James Robin Goodfellow

31. Mr Goodfellow joined Autonomy in October 2004 as a sales engineer and became the Europe Middle East and Africa pre-sales manager. He subsequently was in the Global

Accounts department: he claimed to be its Director, but this was disputed and unclear. He worked in Global Accounts until 2008.

32. Between 2009 and 2013, he was Chief Technology Officer of Infrastructure at Autonomy. During the Relevant Period, he worked with the Digital Safe Sales Team, Digital Safe Product Development Team, the Digital Safe Operations Team and the post-sales support team for Digital Safe customers. Organisational diagrams showed him as reporting to Mr Alastair Martin (then Group Head of Technical and Customer Operations); but he insisted that in practice he reported to Dr Menell. He was senior on the technical side, but not one of Autonomy's leaders.

33. Following the Acquisition, Mr Goodfellow became the Chief Technology Officer of HP HAVEn OnDemand and moved to Micro Focus when it acquired HPE's software business. He subsequently left Micro Focus on 28 February 2018.

34. A witness summons was issued on behalf of the Claimants to ensure his attendance at trial. He was cross-examined for two days. His evidence related primarily to Autonomy's hosting business, some of the reciprocal transactions and one of the VAR transactions.

Mr Phillip Howard Greenwood

35. Mr Greenwood graduated from the University of St Andrews in 2000 with a degree in physics and joined Autonomy as a software developer in Autonomy's Research and Development team based in Cambridge. While in that team, he initially worked on "fetches" also referred to as connectors which extract data from one system to another.

36. In 2002 he moved to another software development team within Autonomy before returning in 2005 to the connectors team to become the Head of Connectors. His main report was Mr Gallagher, who in turn reported to Dr Menell. At the time of the trial, Mr Greenwood was the Connector Team Lead at Micro Focus.

37. Mr Greenwood attended the trial pursuant to a witness summons and he was cross-examined for part of a morning. His evidence related to (a) the development of Autonomy's own *"SharePoint connector"* which enabled the extraction of data from 'SharePoint' (which is a Microsoft Office document management and storage system) and its input into another system such as IDOL, and (b) the acquisition of another 'SharePoint' connector from MicroLink. He also addressed the merits of DiscoverEngine (another SharePoint connector) which Autonomy acquired from DiscoverTech.

Mr David Humphrey

38. At the time of the trial, Mr Humphrey was CTO of Rich Media at Micro Focus. From 2005 until September 2017 (when HPE sold its software division to Micro Focus) he had been CTO of Virage, Inc ("Virage"), an Autonomy group company. Virage developed and sold Autonomy group video analytics products. Until Dr Lynch left Autonomy, Mr Humphrey in theory reported to him; but in practice he reported to Dr Menell and Mr Hussain.

39. His witness statement addressed a series of allegedly reciprocal transactions in Q4 2009-Q1 2010 (RT4 and OEM15) and Q3 2010-Q4 2010 (RT 4 and OEM 34) which are discussed in my main judgment and which related to the purchase by Vidient from Autonomy of IDOL and Virage software with funds provided by a purchase from Vidient by Autonomy of Vidient's SmartCatch software.

40. He was compelled to attend trial by witness summons and was cross-examined for about one and a half hours.

Mr Sameer Sadanand Kalbag

41. After graduating from Cornell University with a degree in Computer Science, Mr Kalbag worked at Intel Corporation, followed by Convera Corporation, the primary focus of which was on search technology.

42. Mr Kalbag joined Autonomy in August 2007 as the Vice President of Technology of the Federal Group. Towards the end of 2009, he was appointed as Account Executive of the Federal Sales Team within Autonomy, which was responsible for sales to government agencies.

43. In mid-2010, he became Director of Federal Sales, responsible for managing a small team in Federal Sales and then in around January 2011 he became interim Vice President of Federal Sales. In around June 2011, he was appointed Chief Technology Officer within Federal responsible for providing assistance to Federal Sales team members.

44. Following the Acquisition, he continued to work for Autonomy and then for Micro Focus following its acquisition of HPE's software business in September 2017. He left Micro Focus in April 2018 and at the time of giving evidence worked as the President and Chief Executive Officer of Trenzai LLC, a data analytics company.

45. Mr Kalbag was cross-examined in one day. His evidence primarily related to the Claimants' case on hosting (and in particular the aspect of it relating to e-Discovery, see paragraphs 3400 to 3448 in the main body of my judgment) and impugned VAR transactions.

Mr Hafeez Bux Daud Khan

46. Mr Khan graduated from the University of Cambridge and qualified as a chartered accountant with PwC, becoming a technology analyst, initially for Merrill Lynch and then, from 2006 to 2011, Cazenove, which was acquired by JP Morgan in 2010. From September 2011 to December 2015 he worked at Berenberg, and from 2016 to early 2018, Cannacord Genuity. At the time of this trial, Mr Khan was a Vice President of Corporate Development at WANdisco, a technology company specialising in distributed computing.

47. Having initially been bullish about Autonomy he became progressively bearish, having concluded that Autonomy was not able to sustain organic growth and was increasingly dependent on growth by acquisition. He cast doubt on the way Autonomy presented and accounted for its organic growth. His relationship with Dr Lynch and Mr Hussain, originally cordial, deteriorated and he was accused of

regulatory breaches and excluded from Autonomy Earnings Calls. Autonomy sought to portray him as ill-informed and even (when he changed his Autonomy share recommendation to “sell”) “corrupt”.

48. He was cross-examined about this and related matters for nearly a day. It was suggested that he had used *“non-public information”* and had tried to drive Autonomy’s share price down in order to please unspecified clients with short positions by seeking to manipulate consensus, because according to one set of forecasts for Q1 2011 he had the highest revenue forecast and one of the lowest target prices. He denied this.

Mr Jonathan Paul Langford

49. After graduating from the University of Cambridge with an M.A. and an MSci in Biochemistry in 2007, Mr Langford joined Autonomy as a Development Support Engineer in July 2010.

50. After the Acquisition, between November 2011 to June 2013, he became a Technical Support Team Lead and then between June 2013 to September 2015 was Applications Support Manager. From September 2015 to the date of his evidence he held the position of Service Management Director, with a focus on the Digital Safe product set.

51. Mr Langford was cross-examined for part of one day. His evidence related to the Claimants’ case on hosting.

Ms Catherine Anne Lesjak

52. Ms Lesjak worked at HP for over thirty years and at the time of the Acquisition she was Executive Vice President and Chief Financial Officer. Pending Mr Apotheker’s appointment, between August and November 2010 she had served as Interim CEO. She was, as it were, HP born and bred and was very much committed to the company.

53. In November 2015, she became CFO of HP Inc. (when HP split into HPE and HP Inc) and at the time of giving evidence had stepped down from that role to become Interim COO.

54. Ms Lesjak was cross-examined over two days. The primary focus of her evidence was the impairment charge that HP announced in November 2012 after the Acquisition, and when she came to know of Autonomy’s sales of hardware.

Mr Fernando Lucini Gonzalez-Pardo

55. After graduating with a degree in electrical engineering from the University of Kent in 1998, Mr Lucini joined an IT consultancy firm called Dataware Technologies where he held the position of Solutions Center Manager. Dataware changed its name to Leading Side and Mr Lucini remained at Leading Side until around 1999.

56. In 2000, Mr Lucini joined Autonomy working in pre-sales, Autonomy’s technology selling arm whose members were known as Systems/Sales Engineers. His precise title and position within the organisation in the Relevant Period was a point of contention between the parties; but it is not disputed that during the Relevant Period, he worked

in pre-sales at Autonomy and on the technical side. It was common ground that he was of relatively high seniority amongst the technical individuals, though in describing himself as "Chief Architect" the Defendants contended that he inflated his position; he was not one of the leaders of the organisation.

57. Mr Lucini remained with Autonomy following the Acquisition and left HPE in 2016. At the time of his evidence he was the Managing Director of Artificial Intelligence at Accenture, a global professional services company.

58. He was compelled to attend trial by a witness summons and was cross-examined for two and a half days. His evidence covered principally (apart from extended questioning of his own role): (a) SPE, (b) Autonomy's approach to purchasing third party software, (c) the purchase of StorHouse from FileTek and subsequent integration work, (d) the VMS transaction, (e) the DiscoverEngine purchases from DiscoverTech, (f) the MicroTech/Vatican Library VAR transaction, (g) the Prisa "*other*" transaction and the DiscoverTech/Prisa VAR transaction and (h) the Morgan Stanley Q1 2011 hosting transaction.

Mr John Meiers

59. Mr Meiers was employed by H&R Block, a tax preparation services company, between August 2007 and January 2015. He had previously worked for DST Output, a subsidiary of DST Systems, Inc, where his role included managing complex IT and manufacturing systems.

60. When he joined H&R Block he was employed as an IT Contracts Project Manager. In March 2008, he became Sourcing Leader in H&R Block's procurement department, and in that role he was responsible for negotiating all of H&R Block's in-bound software licensing agreements.

61. Mr Meiers provided a witness statement on behalf of the Claimants, but the Defendants decided not to cross-examine him. His evidence, which was thus unchallenged, principally concerned his negotiation of a $2 million software deal with Autonomy, and in particular the fact that when negotiating that deal, he was not told and was unaware that just three months earlier, Autonomy had been involved in the resale of hardware by Zones Inc to H&R Block. This (unchallenged) evidence was relied on by the Claimants as further support for their case that there was no real linkage between Autonomy's hardware reselling and its software sales: see paragraphs 1159 to 1182 in the main body of this judgment.

Mr Paul Gilmer Morland

62. Mr Morland started working as an analyst in 1994, and began focusing on technology stocks when technology emerged as an independent sector from 1998 onwards. He started covering Autonomy in 2005 when working at Société Générale. He covered Autonomy throughout the Relevant Period as an analyst first at Astaire Securities, and then (from June 2010) at Peel Hunt. Thereafter, he was self- employed, before moving to Arden Partners in October 2014. He joined Canaccord Genuity in February 2016 where he remained at the time of the trial.

63. Like Mr Khan he was initially bullish about Autonomy but after mid-2009 he increasingly began to question Autonomy's results and accounts, resulting in Autonomy accusing him of making a *"knowingly false accusation"* that Autonomy was *"misaccounting"*, and (falsely) suggesting he was in possession of inside information. Mr Kanter escalated this into a complaint to the FSA.

64. Mr Morland's evidence in his witness statement was directed to explaining why he came to doubt Autonomy's accounting and especially (a) its *"organic growth"* figures, (b) its change to the way it structured its hosting contracts which *"flattered"* its true performance and accelerated receipts at the expense of longer term revenue and (c) its overly aggressive revenue recognition and its poor cash conversion rate. Mr Morland was fiercely attacked in his cross-examination over the course of a full day and it was alleged (for example) that, in bad faith, he tailored his reports to assist clients holding short positions.

Mr Rahul Puri

65. Between May 2010 and September 2013, Mr Puri was the Managing Director of Innovation and Chief Software Architect at Promotora de Informaciones S.A., a Spanish media conglomerate known in these proceedings as Prisa, which was presented as the proposed end-user in the context of a VAR sale by Autonomy to DiscoverTech (see VT30 and paragraphs 591 to 707 of the Schedule of Impugned VAR Transactions).

66. Mr Puri gave evidence about one of the "other transactions" impugned by the Claimants, a transaction between Prisa and Autonomy in Q4 2010. He also gave evidence in respect of impugned VAR transaction VT30, to the effect that (a) he had not even heard of DiscoverTech and DiscoverTech had not at any time contacted Prisa, until 2018 when he was testifying in the US criminal proceedings and (b) the software which was the subject of the VAR sale (e-Discovery software) would not have been of any interest to Prisa. Mr Puri was cross-examined in these proceedings for about one hour.

Mr Harry T. Robins

67. Mr Robins was at the time of the trial (and I assume still is) a partner in the New York office of Morgan, Lewis & Bockius LLP ("Morgan Lewis"), which has acted in the US for HP in connection with HP's investigation into Autonomy and the subsequent US criminal proceedings, but also advised Autonomy on US merger control filing requirements relating to its acquisition by HP/Bidco.

68. Mr Robins provided a witness statement in which he addressed a suggestion made by Dr Lynch that on 16 and 17 August 2011 (very shortly before the acquisition was announced) Mr Kanter and Mr Chamberlain sent Morgan Lewis spreadsheets detailing Autonomy's revenue breakdown for 2009 and 2010, including hardware revenue, and that the information thus provided to Morgan Lewis is attributable to HP. Mr Robins made clear that Morgan Lewis was at that time and for that purpose acting for Autonomy and not HP, and that the spreadsheets were not forwarded to HP's antitrust advisers, Freshfields. The Defendants did not require Mr Robins to attend to be cross-examined and his evidence was not challenged.

Mr Shane V Robison

69. Mr Apotheker was assisted by Mr Robison, the Chief Strategy & Technology Officer and Head of HP's Strategy and Corporate Development Group ("SCD"). Mr Robison was in favour of the strategy to move further into enterprise software.

70. Mr Robison had worked as a staff engineer at Evans & Sutherland, a computer graphics company before moving to Schlumberger to work on artificial intelligence in 1984. He later worked at the Advanced Technology Group at Apple, where he became the Vice President and General Manager of the Personal Interactive Electronics Division. In 1995 he joined Cadence Design Systems which produces software to design integrated circuits and chips before joining AT&T Labs as President of Internet Technology and Development.

71. In 2000, he joined Compaq as the Chief Technology Officer and Head of Corporate Strategy. In May 2002, Compaq was acquired by Hewlett-Packard Company and he became the Chief Strategy & Technology Officer of Hewlett-Packard Company and Head of HP's SCD from mid 2002 until 20 October 2011.

72. Mr Robison made a witness statement which was adduced into evidence under a hearsay notice. He did not attend at trial for medical reasons.

Mr Manish Sarin

73. Before joining HP, Mr Sarin had been a Director in Merrill Lynch & Co's Technology Investment Banking Group. He has an MBA from Columbia Business School.

74. He joined HP in the SCD team and became a Senior Director in February 2010. He reported to Mr Andy Johnson (HP's Head of Corporate Development) who in turn reported to Mr Robison. (Mr Robison reported to Mr Apotheker.)

75. At the time of giving his evidence, Mr Sarin had left HP and was Vice President of Proofpoint Inc, an enterprise security company in California.

76. Mr Sarin was cross-examined over two days. His evidence principally concerned his role in the due diligence process and in the SCD's assessment of Autonomy's results and in assessing and valuing Autonomy for the purpose of assisting HP's leadership.

Mr Michael Sullivan

77. Mr Sullivan co-founded SteelPoint Technologies Inc ("SteelPoint") which specialised in the management of unstructured information and litigation support services. SteelPoint was founded in 1993 and was acquired by Zantaz Inc in 2004. Mr Sullivan was made Senior Vice President of Operations and Services of Zantaz, responsible for the delivery of all software and services to customers. In 2009, following the acquisition of Zantaz by Autonomy in 2007, he became and remained CEO of Autonomy Protect, the archiving and litigation discovery division of Autonomy.

78. After the acquisition of Autonomy by HP in October 2011, he held the position of Senior Vice President of Information Management and Governance, responsible for Autonomy's SaaS business.

79. From 1 September 2017, upon HPE's software business being spun out and merged with Micro Focus, he oversaw the information management and governance product portfolio at Micro Focus, reporting directly to the CEO. In November 2017, he left Micro Focus to become CEO of a different company.

80. Mr Sullivan gave evidence in the US criminal proceedings but (being resident outside the jurisdiction) he was not willing to, and did not, appear before me. His witness statement was adduced as hearsay evidence. No order was sought for video-link evidence.

Mr Roger Wang

81. Mr Wang began working as a program manager for Verity Inc, a search technology development company, in 2002. In 2008, following the acquisition of Verity Inc by Autonomy in 2005, he was promoted to Vice President of Product Development for Digital Safe, reporting to Dr Menell.

82. He left Autonomy in or around January 2013. At the time of this trial Mr Wang worked as a Senior Product Manager at BitGo Inc.

83. Mr Wang was cross-examined for two days. His evidence related principally to the Claimants' case in relation to hosting and the impugned reciprocal transactions with FileTek.

Mr Lee Peter Welham

84. Mr Welham joined Deloitte in 2002 and qualified as a chartered accountant in 2005. From late 2005 to 2011, he was a member of the Deloitte audit team for Autonomy. Through the period of 2008 to August 2011, he was a Senior Manager on the Autonomy audit team. He was made a Partner at Deloitte in 2016.

85. Mr Welham was the only person from Deloitte who gave evidence in these proceedings. He was cross-examined for a full three days in relation to all Deloitte's audit work in the Relevant Period.

Ms Margaret ('Meg') Cushing Whitman

86. Ms Whitman is a graduate of Princeton and Harvard Business School. She had held executive roles at a number of large companies including Walt Disney and Proctor & Gamble. She also served as CEO of eBay from 1998 to 2008. Between 2009 and 2010 she ran unsuccessfully for Governor of California.

87. In January 2011, she joined the Board of Directors of Hewlett-Packard Company before succeeding Mr Apotheker as President and CEO in September 2011.

88. Following Hewlett-Packard dividing into Hewlett-Packard Enterprise Company and HP Inc in November 2015, she became CEO of HPE, stepping down on 31 January

2018. She also served as Chair of the Board for HP Inc from November 2015 to July 2017.

89. Ms Whitman was cross-examined over two days. Her evidence was directed towards Dr Lynch's criticisms of the way HP handled the integration of Autonomy after the Acquisition and the Defendants' case that when the write-down was announced HP had no basis for its amount, and the exercise was one of the new board abdicating its responsibility and seeking to shift any blame on HP's side to Messrs Apotheker and Robison.

Mr Samuel Hald Yan

90. Mr Yan joined Zantaz Inc in October 1998 as a Systems Architect and Director of Development for Digital Safe. Following Autonomy's acquisition of Zantaz in July 2007, he was appointed Chief Architect of the Product Development Team for Digital Safe. In the Relevant Period, Mr Yan was one of the lead engineers in the Digital Safe Product Development team, reporting to Mr Wang.

91. Following the spin-off of HPE's software business to Micro Focus in September 2017, he remained in the Product Development team.

92. Mr Yan was cross-examined over two days, principally in respect of the Claimants' allegations relating to Autonomy's hosting business, and the theoretical and practical viability of moving Digital Safe on-premise.

Mr Christopher Henry Yelland

93. Mr Yelland was Autonomy's CFO from April 2012 until February 2013. After graduating from the University of Warwick he joined Arthur Andersen and qualified as a Chartered Accountant. He worked there for three and a half years before becoming a tutor at the Financial Training Company training people to become accountants. In 1995, he joined the Rover Group. He moved to Compaq in January 2000. In April 2004, after Compaq's merger with HP, he was appointed Finance Manager of HP's UK software and enterprise[551] storage and servers business. In 2007 he became the Finance Director of HP's Personal Systems group in the UK and Ireland. In September 2010, he was promoted to Finance Director of HP's EMEA Software business, and in April 2012, after the Acquisition, he was promoted to be CFO in Autonomy. From February 2013 to September 2017, he was Autonomy's Financial Controller. After Micro Focus had acquired HPE's software business (effective on 1 September 2017), he became Vice-President of Finance at Micro Focus, with responsibility for group Financial Planning and Analysis.

94. Mr Yelland's witness statement primarily related to his experience as CFO of Autonomy from April 2012, including the "rebasing" exercise conducted in June- July 2012 and its enquiry into Autonomy's historical financial performance, preparing various revised business forecasts, and preparing ASL's 2011 statutory accounts and restated 2010 financial results.

[551] HP's "enterprise" business focused on the provision of hardware (such as servers, network infrastructures and storage devices), software, and services to large commercial businesses.

95. Mr Yelland was cross-examined for more than a day. His cross-examination focused principally on his perceptions of the "rebasing" exercise.

Mr Robert Harold Youngjohns

96. After graduating from the University of Oxford, Mr Youngjohns worked for IBM for 17 years before working at Sun Microsystems Inc as Executive Vice-President of Global Sales and later Executive Vice-President of Strategy. Mr Youngjohns then held the position of President and CEO of Callidus Software before joining Microsoft Corporation in 2007 as President of Microsoft North America.

97. On 17 September 2012, he joined Autonomy as Senior Vice President and General Manager of HP's Autonomy/ Information Management business unit. In May 2014, he was promoted to Executive Vice President and General Manager of HP Software.

98. In December 2016, Mr Youngjohns left HP Software and has since founded his own investment and advisory firm with a focus on software and services industries.

99. Mr Youngjohns' evidence was directed towards Dr Lynch's allegations that HP mismanaged the integration of Autonomy. He was cross-examined for about half a day.

The First Defendant's witnesses (listed alphabetically)[552]

Mr Donald Leonard Avant, Jr

100. Mr Avant only joined Autonomy in mid-July 2011, less than a month before the Acquisition was announced. His title when he joined was Group Head of Operations and his evidence was that, as such, he oversaw a group of 400 to 450 people which had *"responsibility for all Autonomy functions in the post-sales space, including professional services, training, and technical support services."* He continued to work for Autonomy for five years thereafter. Since November 2017, he has been employed by Darktrace, in which he is a shareholder.

101. His witness statement discussed (a) Autonomy's provision of services using third party partners; (b) the utility of a licence to use and run Digital Safe on-premise; (c) what he called *"HP Autonomy Culture",* and what he perceived to be the *"dysfunction [which] grew during the time of HP's ownership"*; and (d) his *"observations"* on Autonomy's agreement with Prisa. However, and unsurprisingly given that he had not been working for Autonomy at the time and had had no active role, his 'evidence' was largely interpretation and surmise.

102. Mr Avant was cross-examined for just over an hour. There was no reference to or reliance placed on Mr Avant's evidence in the Defendants' closing submissions.

[552] Of these, none provided a witness statement in the first round of evidence.

Mr Eloy Avila

103. Mr Avila joined Autonomy in January 2004 as a sales engineer. He became Chief Corporate Architect in September 2009, before being promoted to Chief Technology Officer (Americas) in May 2010, and subsequently became the worldwide CTO in November 2010, a position he held until June 2013, when he became the Vice President of Worldwide Pre-Sales for Big Data, a division within HP software. He held this role until he left HP in September 2015. He is currently employed by Darktrace as its CTO for the Americas, a position he has held since April 2018.

104. After being promoted to worldwide CTO, Mr Avila reported directly (and regularly) to Dr Lynch. Before then he reported to Mr Lucini and Dr Menell (more often, the latter). His witness statement covered (a) Autonomy's general rule or philosophy of preferring to develop its own software rather than buying in third party software; (b) SharePoint connectors; (c) the practical feasibility of moving Digital Safe on-premise; (d) SPE; (e) Filetek Storhouse; (f) VMS; and (g) post-acquisition and corporate culture.

105. Mr Avila was cross-examined on all these issues and gave evidence over the course of two days.

Ms Michele (previously Anthony) Bettencourt

106. Ms Bettencourt (who before and when working for Autonomy was known as Anthony) joined Verity Inc in 1995 as a Vice President in its sales department, was promoted to the position of President and ultimately served as its CEO from 2003 to December 2005 (when Verity Inc was acquired by Autonomy). Ms Bettencourt worked within the Autonomy group from January 2006 until October 2009, focusing first on the integration of Verity Inc and thereafter on various acquisitions and potential acquisitions. Ms Bettencourt headed up the integration process of (a) Zantaz Inc when Autonomy bought Zantaz Inc in July 2007, and (b) Interwoven Inc after its purchase by Autonomy in March 2009, before leaving Autonomy in December 2009.

107. Ms Bettencourt provided a witness statement on behalf of Dr Lynch. Its main object was to address the doubts raised in the witness statements for the Claimants casting doubt on the development costs and substance of SPE: her evidence set out her awareness of and involvement in Autonomy's plans to grow its structured data capability, SPE having been developed for that purpose. However, Ms Bettencourt accepted that she was not personally involved in the development of SPE or the acquisition of other technology to develop Autonomy's move into structured data.

108. Ms Bettencourt also explained that she had been involved in preliminary approaches to two potential targets for Autonomy, namely TIBCO and Informatica, and before she left Autonomy had been *"working to improve relations between the companies with a view towards a possible merger or acquisition."* The Claimants chose not to cross-examine her.

Mr Jonathan William Bloomer

109. Mr Bloomer was formerly CEO and CFO at Prudential Plc, having trained and qualified as an accountant and auditor at Arthur Andersen where he became a partner

in 1987 and remained for 20 years. Whilst at Prudential Plc, he was appointed the Chairman of the Practitioner Panel at the Financial Services Authority. He then became a partner at Cerberus European Capital Advisors and founder and CEO of Lucida Plc from 2006 to 2012. He had served on the audit committee at both RT Group plc and Hargreaves Lansdown plc. He became a non-executive director of Autonomy in August 2010.

110. In September 2010, Mr Bloomer became the first permanent chair of Autonomy's Audit Committee. Prior to Mr Bloomer's appointment: (i) there had not been a permanent chair of the Committee, but its members had instead served as chair on an *ad hoc* basis; and (ii) none of the members of the Committee was an accountant or had any formal accountancy training,[553] which was unusual: Mr Bloomer said that the majority of Audit Committee chairs in listed companies would be qualified chartered accountants.

111. Between his appointment and the acquisition of Autonomy by HP, Mr Bloomer chaired four meetings of the Committee held on the following dates: (i) 18 October 2010, in relation to Q3 2010; (ii) 28 January 2011, in relation to FY/Q4 2010; (iii) 19 April 2011, in relation to Q1 2011; and (iv) 25 July 2011, in relation to Q2 2011. The other members of the Audit Committee over this period were Mr Frank Kelly and Mr John McMonigall.

112. During his tenure as chair, meetings of the Audit Committee were also attended by Mr Hussain, Mr Kanter, Mr Chamberlain, Deloitte and occasionally Mr Webb QC. In his witness statement, Mr Bloomer stated that Mr Mercer "*and occasionally more junior members of the Deloitte team*" attended the Audit Committee meetings but, in fact, the minutes show that Mr Welham attended three of the four meetings chaired by Mr Bloomer.

113. In his evidence about the Audit Committee meetings, Mr Bloomer addressed hardware sales and revenue recognition, VARs, Reciprocals, COGs, account receivables and provisioning. He was cross-examined for three-quarters of a day.

Ms Vanessa E. Colomar

114. Ms Colomar joined Autonomy as Head of Communications in August 2011. She thus had no relevant evidence to give in respect of the pre-Acquisition period. The focus of her evidence was thus on HP's statements to the market in November 2012.

115. Ms Colomar resigned from Autonomy in late May 2012 and shortly thereafter joined Invoke Capital as a Partner and its Head of Communications and Investor Relations. Invoke Capital's website described her as a "founding partner" but she denied that she was, insisting that she *"joined Invoke in September when it was fully formed"* and was not involved in setting it up. She also sits on the boards of Darktrace and Luminance. Throughout the course of the trial, she was responsible, along with the Brunswick Group, for Dr Lynch's PR in relation to these proceedings.

[553] In addition to Mr McMonigall, the previous members of the Committee were Mr Barry Ariko and Mr Richard Perle. Mr Ariko was a former executive of several computer and software companies. Mr Perle was former US Assistant Secretary of Defense.

116. Ms Colomar was cross-examined for one hour. Her evidence concerned Dr Lynch's Counterclaim, and is of very limited relevance since in light of my conclusions on the main claim the Counterclaim has fallen away.

117. Of suggested relevance to the main claim, she was taken to documents to show that, in the lead up to the 20 November 2012 announcement by HP, Dr Lynch was making preparations "*in case we really get blamed*", and he requested that Ms Colomar prepare a "*red secret list*" for that eventuality. Ms Colomar told me that she had no idea what Dr Lynch had meant by "*red secret list*", but nor could she recall whether she had sought clarification from Dr Lynch as to what he was referring. The Claimants submitted that this is implausible: Dr Lynch had instructed her to produce the list and she would have acted on that instruction, either producing the list or, if she had been under any uncertainty, seeking his clarification. That seems to me to be credible: but I need make no finding. Ms Colomar was almost invariably in court during the trial; but she was a peripheral witness.

Mr Stephen John Cooke

118. Mr Cooke joined Slaughter and May in 1982, became a partner in 1991, headed its Merger & Acquisitions practice from 2001 to 2016 and at the time of the Trial was its Senior Partner. Slaughter and May was approached by Autonomy in October 2010 (on the introduction of Mr Webb QC) and Autonomy confirmed its intention to appoint the firm as defence counsel in the event of a potential takeover. Autonomy engaged Slaughter and May to advise on the HP acquisition in July 2011. Mr Cooke led the team.

119. In his witness statement on behalf of Dr Lynch, Mr Cooke confirmed that (a) if Autonomy was seeking a buyer for the company in late 2010 and early 2011, he was not aware of that; (b) he was not aware of Autonomy seeking to prevent specific information going to HP; (c) he was not personally involved in the drafting of either a non-disclosure agreement (dated 3 March 2011) or a draft exclusivity agreement (signed by HP on 29 July 2011), but he was aware that Slaughter and May advised the removal of terms sought by HP to impose a requirement for Autonomy to provide all information requested by HP, so that in the result Autonomy never agreed to grant such unrestricted access (which he confirmed also would *"as well as being completely unacceptable to nearly all sellers, be highly unusual in a UK takeover bid").* He also confirmed that he was not directly involved in the due diligence process.

120. The Claimants did not require Mr Cooke to attend for cross-examination, and so his witness statement was not challenged.

Ms Poppy Gustafsson (whose maiden name was Prentis)

121. Ms Gustafsson began working at Deloitte in September 2004 and was assigned to the Autonomy audit soon after she joined. She left Deloitte in April 2008. She joined Autonomy's finance department in June 2009, working on the costs side of the business, before transitioning to work on the revenue side at the end of 2009. She left Autonomy shortly after its acquisition by HP in 2011, and co-founded Darktrace in June 2013. At the time of her evidence she was co-CEO of Darktrace with Ms Eagan.

She was also a substantial shareholder in Invoke, with shares worth around $15 million.

122. Ms Gustafsson accepted that she remains a "*good friend*" of Mr Hussain's, whom she regards as a "*mentor*". She suggested that she had "*no personal loyalty*" to Dr Lynch; but she accepted that he was "*the founding money behind*" Darktrace, a company she set up and of which she was, at the time of her evidence, co-CEO. Indeed, she maintained that she was motivated to "*come and tell [her] side of the story*" because she did not think that Dr Lynch's "*perspective has always been fairly represented*". She was sometimes too obviously an advocate for the Defendants.

123. She gave evidence in relation to (a) the conduct of Deloitte's audits and relationship with Autonomy; (b) her perception of the purpose and strategic rationale of hardware sales, and the reasons why no separate disclosure was considered necessary; (c) her understanding of Autonomy's transactions with VARs, and the issues raised about revenue recognition; (d) her understanding of SPE (she was not involved in its technical development, but her evidence was that she recalled it being talked about and celebrated) and its shipment to VMS; (e) her involvement in accounting for Autonomy's hosting transactions, Autonomy's purpose in adopting the so-called "hybrid model" and her emails, on which she was cross-examined, suggesting that her view was that Autonomy should *"steer clear of upfront payment"* unless it achieved accelerated revenue recognition; and (f) her experience of processes within Autonomy for the collation and monitoring of time sheets and labour costs.

124. Ms Gustafsson was cross-examined for a little less than one and a half days.

Ms Elizabeth "Lisa" Jane Harris

125. Ms Harris qualified as a chartered accountant with KPMG in 1987. She commenced employment with Autonomy on 1 April 2005, working on costs accounting in the finance team. From August 2005, when Mr Steve Chamberlain joined Autonomy, she reported to him. She was made Group Financial Controller in 2009. She worked for Autonomy in the same role after the Acquisition but left in February 2013. After three months gardening leave she left to work for an Invoke Capital company.

126. Her evidence covered (a) Autonomy's finance department functions and structure; (b) Deloitte's role and the audit process as she perceived it, and her impression of their work; (c) her awareness of Deloitte's investigation of the allocation to 'Sales and Marketing' of the costs of loss-making hardware sales (in which she was not herself involved); (d) her awareness of but separation from VAR sales notwithstanding having to approve payments of MAF; (e) her involvement with the sales team in paying staff expenses, commissions and salaries; (f) her perception of work post-Acquisition and on the various exercises to integrate Autonomy's accounting systems and processes into HP's and (in the case of the *"rebasing exercise"*) to find any errors and (as Ms Harris put it) *"prove things were incorrect"* and (driven by Mr Yelland) *"to look for any, and every, little mistake";* and (g) her view that a number of people within HP (including Mr Yelland and Mr Duckworth) were aware of hardware sales from the ledger codes.

127. She was cross-examined for (in all) about one day. Her cross-examination also covered an allegation against her that after she had determined to leave, but whilst still employed by Autonomy, she copied on to a USB drive/ pen drive copies of Autonomy's and HP's confidential documents. She shared this with Mr Hussain because she considered that the documents held on the pen drive showed that HP knew of the hardware sales. She was also cross-examined on an attendance note of an interview of her by HP's lawyers which she claimed was inaccurate (which she addressed in a second witness statement also).

Ms Martina Ann King

128. Ms Martina King had worked at Yahoo and then pursued a *"plural career"* until she joined Aurasma UK (an Autonomy group company) in May 2011 as its Head. She resigned in May 2012 and subsequently joined Invoke Capital.

129. Her witness statement addressed: (a) her experience of working with Dr Lynch (about whom she spoke very highly) and in the work environment he cultivated and (b) HP's interaction with Aurasma (which she maintained HP did not understand or seek to foster and support, and with which HP struggled).

130. Ms King was cross-examined for a little less than one hour.

Mr Alastair James Martin

131. Mr Martin joined Autonomy in September 2004 as a sales engineer, having graduated from the University of Sheffield with a 1st class degree in Computer Science. His role became increasingly managerial, and by the time of Autonomy's acquisition by HP/Bidco his title was Group Head of Technical and Customer Operations, EMEA & APAC which in practice meant that he oversaw Autonomy's sales engineers in EMEA and Asia. He described this role as *"technical customer facing",* which he intended to mean that he *"worked a lot on the support side, helping customers with their technical issues."* He was not in product development but asserted familiarity with *"the technical language"* such that he *"could liaise between Autonomy's developers and our customers."* After leaving his role at HP in 2015, he joined Darktrace. He gave evidence for Dr Lynch.

132. Mr Martin's witness statement addressed a broad variety of the claims against Autonomy. His evidence was in summary that, contrary to the Claimants' case (a) it was not accurate to say that Autonomy never bought software from third parties (and he provided examples of such purchases to the contrary) (see paragraph 2417(3) of the main body of my judgment); (b) there were good reasons why there was customer demand for a connector made by MicroLink which Autonomy acquired from it, and for a product called DiscoverPoint Engine which Autonomy acquired from DiscoverTech; (c) it was not the case that software sold by Autonomy to Tottenham Hotspur plc was of no use to it until Autonomy provided a full 'solution' (cf paragraph 3744 in the main body of my judgment); (d) Prisa made full and substantive use of software it acquired from Autonomy (see paragraph 3767(7) and footnote 473 in the main body of my judgment); (e) SPE was a real and valuable product for which there was real customer demand and which was incorporated as a module of the IDOL platform (see paragraphs 3623 to 3624 of the main body of my

judgment); and (f) Digital Safe was capable of being used by a customer on-premise and there was no difficulty in training Sales Engineers to assist customers to do so (though see paragraph 3377(5) in the main body of my judgment). He also described the differences in the working ethos of Autonomy compared to that of HP.

133. There was considerable overlap and some repetition between Mr Martin's evidence and that of Mr Avila (to the point that certain passages were identical). The Claimants submitted that in cross-examination (over the course of just over an hour) Mr Martin *"was frequently willing to speculate on matters beyond his ken, but was unwilling to accept the obvious (for example, that either he or Mr Avila had copied the other's witness statement)."*

Ms Emily Orton

134. After graduating from Cambridge University in 2009, Ms Orton started working at Autonomy in September 2009 as a graduate European Marketing Executive in the marketing department in London. From early 2010, for around 18 months, she worked as Dr Lynch's assistant, before returning to the marketing department in various roles. By the time she left Autonomy in the summer of 2012, she had become the European Marketing Manager. She then joined Invoke Capital as a Senior Associate. She later became Head of Marketing at Darktrace, and then Darktrace's Chief Marketing Officer. She has been rewarded by around 1.5% of the equity in Invoke Capital, and shares and options in Darktrace in *"life changing"* amounts.

135. Ms Orton's witness statement addressed (a) her perception of Autonomy's workplace culture and contradicted Mr Youngjohns' witness statement disparaging it; (b) her experience of working for Dr Lynch, and her perception of Mr Hussain (though she did not work directly for him); (c) her understanding more generally of Dr Lynch's role and activities, which she described as involving him spending some 50% on *"public facing matters",* leaving little time to deal with internal operational matters, and his relationship with line managers such as Mr Lucini. She mentioned that *"Operationally, while in the office, Dr Lynch was more inclined to be involved with marketing strategy…particularly ensuring the messaging was correct."* She also offered her evidence that *"After the acquisition, to my knowledge there were no tangible steps to integrate the companies."*

136. She was cross-examined for part of an afternoon predominantly on (a) the extent of Dr Lynch's control of expenses and day to day matters and his way of working, and (b) her perception that HP's senior management barely involved themselves in Autonomy after the Acquisition.

Mr Frank Pao

137. Mr Pao, who had formerly been employed by Autonomy, joined Virage as its CEO (see also the short description of Virage's CTO, Mr Humphrey, above) before it was purchased by Autonomy in 2003, remained there for a little over four years, and then left to become Chief Executive Officer and President of Vidient Systems, Inc ("Vidient"). He held that role for approximately three years. Vidient (which designed and developed search and surveillance products) went out of business in November 2010.

138. Mr Pao's evidence was in response to Mr Humphrey's evidence and addressed a series of transactions which the Claimants impugned as reciprocal and which Mr Pao had made on behalf of Vidient.

139. Mr Pao was cross-examined over the course of one morning. The Claimants accepted his evidence on the negotiations that led to the allegedly reciprocal transactions (where consistent with the contemporaneous documents), whilst rejecting and inviting the Court to disregard what they described as his *"speculation and attempts to insulate the Defendants."*

Mr Philip Michael Pearson

140. Mr Pearson, a good personal friend of Mr Hussain, initially worked at UBS and then managed a technology hedge fund at GLG Partners ("GLG") (one of the largest hedge funds in Europe at the time), where he worked from late 2001 to the summer of 2015. He began following Autonomy in 1999 (while still at UBS) and continued to do so at GLG. GLG invested in Autonomy and made at least £20 million from HP's acquisition. He became a partner at Invoke in May 2017, and at the time of giving evidence sat on the board of two of its investments: Darktrace (a company in which he also has a personal shareholding) and Featurespace.

141. His witness statement addressed: (a) how Autonomy was perceived by analysts and the market; (b) methods of valuation (and EPS v DCF models); (c) the relevance of organic growth and the valuation of Autonomy; (d) how disclosure of hardware sales would have affected the perception and valuation of Autonomy; (e) his understanding of "OEM derived revenues" and the value placed on them (his thesis being, contrary to the rest of the evidence, that OEM revenue was a less valuable stream, though when cross-examined he conceded this was his personal and not a market view); and (f) market perception of the constitution of Autonomy's IDOL Cloud revenue. Some of his evidence appeared to be in the nature of opinion evidence, often without reference to supporting evidence or documents.

142. He was cross-examined over the course of a morning.

Ms Mariana Mato Machado de Paiva Pereira

143. Ms Pereira joined Autonomy in September 2008 as a Marketing Executive, an entry level role in the marketing department. In her short (4-page) witness statement she described her primary role as having been product marketing, including supporting the demo team by producing short marketing videos. She worked with the research and development team and the sales team during the period 2008 to October 2009. She then moved to San Francisco as the director of 'Rich Media'.

144. She resigned from Autonomy in September 2011 and moved to Brazil, freelancing for a time until she was hired by HP Brazil in 2012 for a few months, before she left to study for an MBA. After obtaining her MBA degree she worked at Heinz and then started her own company. She then joined Darktrace's marketing department in September 2017 at the request of Ms Eagan (Autonomy's Chief Marketing Officer), with whom she had worked when at Autonomy.

145. The purpose of her evidence was to respond to the evidence of Dr Blanchflower and Mr Lucini concerning the development of SPE and to explain her role in that respect. This came down to having produced a video to demonstrate the product's capabilities and also having worked (indirectly) on its launch. She felt able to say that IDOL SPE *"was a genuine product which followed the normal path of development…".* She was cross-examined for less than 30 minutes. The cross-examination confirmed that she had little direct involvement (even, for example, in the press releases) in SPE, and none at all before September 2009. She was a peripheral witness; the Claimants submitted that the decision to call her simply highlighted the failure to call Ms Eagan.

Mr Philip John Shelley

146. Mr Shelley was the co-head of Corporate Broking at UBS for several years prior to September 2010, and then joined Goldman Sachs in December 2010 as co-head of their combined Corporate Broking and UK ECM[554] team. Whilst at UBS he covered a range of clients as corporate broker, including Autonomy. UBS continued in its role as Autonomy's corporate broker (sharing that role with Citibank) after Mr Shelley left; but in around May/June 2011, Goldman Sachs was appointed as Autonomy's third corporate broker. Mr Shelley left Goldman Sachs in May 2015 and joined Barclays in June 2015 as Vice Chairman of European Banking. He left Barclays in February 2018 and founded his own company, Arlington Capital Markets, Ltd., which (he explained) *"advises companies on how best to communicate their strategy and proposition to potential investors."* Mr Shelley has no ongoing business connections with Dr Lynch.

147. Mr Shelley's witness statement contained a useful analysis of Autonomy's shareholding constituency (and he noted especially that some 60% of its shares were held by its top 20 shareholders) and addressed (a) his view of how the market regarded Autonomy (largely positive with a belief in the potential of IDOL for sustained market penetration, but with a particularly vocal negative constituency too); (b) his perception of Autonomy's approach to reporting (which he regarded as generally transparent); (c) his views on the 'negative analysts' (especially Mr Morland and Mr Khan); (d) his reaction on learning subsequently of the extent of Autonomy's hardware sales (he said he was not *"shocked or astonished"*); (e) his view that the constitution of Autonomy's OEM sales was not a particular area of interest for analysts and investors; and (f) his lack of any recollection of any market questions or discussions regarding the composition of revenues from hosting deals included in IDOL Cloud.

148. He was cross-examined for just over half a day. I have dealt with points emerging in my judgment. The Claimants pointed out that the Defendants did not refer to Mr Shelley's evidence at all in their closing submissions.

[554] European Capital Markets.

Mr Gary Gerard Szukalski

149. Mr Szukalski worked for FileTek from January 1986 until August 2000, then for Verity (where he continued after its acquisition by Autonomy at the end of 2005) until 1 January 2009 when he re-joined FileTek as its President.

150. His witness statement addressed allegedly reciprocal transactions with Autonomy whereby FileTek purchased Autonomy software and Autonomy purchased FileTek's StorHouse software. He also addressed a reciprocal VAR transaction with Autonomy for end-user USDVA.

151. The Claimants made a number of points in support of their contention that *"Mr Szukalski's witness statement was not entirely satisfactory."* Although Mr Szukalski stated in his witness statement that he had "*read the witness statement of Stouffer Egan*" and purported to comment on certain paragraphs in Mr Egan's statement, it emerged in cross-examination, however, that Mr Szukalski had not been provided with a copy of Mr Egan's witness statement prior to signing his own witness statement, and therefore had not read it. Although Mr Szukalski initially appeared to say that he was given excerpts from Mr Egan's witness statement to comment on, he later clarified that he had not read the witness statement "*until fairly recently*" and so "*didn't read these witness statements prior to putting together my witness statement*". Rather, someone from Dr Lynch's legal team had sought to give Mr Szukalski the gist of what was stated in Mr Egan's witness statement. Mr Szukalski also was not shown the transcript of the testimony of Mr Loomis (FileTek's CEO and CFO) in the US criminal proceedings before signing his witness statement, even though Mr Szukalski's statement was presented as part of Dr Lynch's reply evidence (served in the supplemental round), by which time the Claimants had already put in a hearsay notice in respect of Mr Loomis' testimony. Furthermore, it emerged during cross-examination that, prior to signing his witness statement, Mr Szukalski was not shown any contemporaneous documents to refresh his memory, apart from the single email cited in the statement itself. The Claimants submitted that the unsurprising result was a witness statement that was inaccurate in material respects, and needed to be corrected during examination-in-chief. It failed faithfully to convey the reality of Mr Szukalski's recollection of events, as it emerged during his oral evidence.

152. Mr Szukalski was cross-examined for just short of a day and a half. His depiction in the course of cross-examination of FileTek's role as being that of a *"fulfilment partner"* with no real role or intended participation in any onward sale to an end-user was relied on by the Claimants. Indeed, although Mr Szukalski was called by Dr Lynch, the Claimants invited me to attach *"very significant weight to the oral evidence of Mr Szukalski."*

Mr Robert Stopford Webb QC

153. After a successful career as a barrister, Mr Robert Webb QC was General Counsel at British Airways Plc (1998 to 2009) and Rolls Royce Plc (2012 to 2015). He also held non-executive directorships and chairman positions with various British companies, including The London Stock Exchange (2001 to 2015), the BBC (2007 to 2012) and Argent Ltd (2009 to 2012). He became non-executive Chairman of Autonomy in mid-2009 and continued in that position until the Acquisition. At the time of the trial he was Chairman of Darktrace and Luminance (amongst other roles).

154. Mr Webb's witness statement responded to (and contradicted) Mr Robison's evidence that in 2011 Autonomy's management was trying to find a buyer for the company, and also provided (a) his perception of the culture at Autonomy; (b) his impression of the way Mr Hogenson's concerns were addressed (his impression being that *"Mr Hogenson was being given the opportunity to say everything he had to say…"*); (c) his understanding of the extent and purpose of Autonomy's sales of hardware; and (d) his assessment of the views of analysts and how Autonomy addressed their questions.

155. The Claimants chose not to cross-examine Mr Webb.

The following individuals did not provide any evidence but played key roles

Mr Stephen Chamberlain

156. Mr Chamberlain was an ex-Deloitte Chartered Accountant. He joined Autonomy as the Vice President of Finance in August 2005. He was based in Cambridge, where the main group finance function was based. Ms Anderson (ex-Deloitte), Ms Gustafsson (ex-Deloitte), Ms Harris (ex-KPMG) and Mr Stephan (ex-Deloitte) all worked in the finance department and reported to Mr Chamberlain. All finance teams in group companies elsewhere also reported to him. He reported to Mr Hussain.

157. Mr Chamberlain was described by Mr Welham in his witness statement as his *"main point of contact throughout the audit and review processes"* and the *"first point of contact for many requests from the Deloitte audit team for information."* In his first witness statement, Dr Lynch described the Finance Department as being *"headed by Stephen Chamberlain"*, though when cross-examined Dr Lynch suggested that Mr Hussain (as CFO) headed the department and Mr Chamberlain *"would be the number two."* It seemed to me that Mr Chamberlain had day to day control of the department, whilst Mr Hussain oversaw Autonomy's operations, with Dr Lynch: Mr Chamberlain was the energetic *aide de camp* to the general staff. He was (with Mr Hussain and Mr Kanter) directly and closely involved in the due diligence process.

158. He left Autonomy in March 2012. Following his departure, he was appointed as the COO of Darktrace. Dr Lynch has maintained personal contact with him and is paying his legal fees in the ongoing US criminal proceedings.

159. The Claimants described Mr Chamberlain as being *"all over the documents"*. He was part of the core management team and what I have called the "clique" or "cabal". I would have been interested in and greatly assisted by his evidence. He did not provide any.

160. The explanation offered was that he had been indicted by the US DoJ and also charged by the FRC in this country with acting dishonestly and/or recklessly (as well as failing to act with competence and due care). Neither had happened in September 2018 when the first round of witness evidence was served. Dr Lynch told me he did not know whether there was any reason why Mr Chamberlain could not have given a statement.

Ms Nicole Eagan

161. Ms Eagan was Chief Marketing Officer at Autonomy and (as Dr Lynch acknowledged) a member of Autonomy's core management team. She was one of the individuals from Autonomy who helped Dr Lynch set up Invoke Capital. She was, at the time of her witness statement, co-CEO (with Ms Gustafsson) of Darktrace and on its board.

162. She had direct knowledge concerning the sales and marketing of SPE whereas the individual called to speak to that (Ms Pereira) did not.

163. I would have expected her to be called as a witness; and, as in the case of Mr Kanter, she provided a witness statement and was included as a witness in every version of the trial timetable prior to late August 2019, slated to be cross-examined for one day. Not until a letter from Clifford Chance dated 22 August 2019 was it indicated that Ms Eagan (again like Mr Kanter) would not be giving evidence at trial. Dr Lynch suggested that (like Mr Kanter) Ms Eagan declined to appear in light of the continuing investigations being made of them by the US DoJ.

Mr Brent Hogenson

164. At the time of Autonomy's acquisition of a company called Interwoven in 2009, Mr Hogenson was its Vice-President of Finance. Following that acquisition, Mr Hogenson became CFO for Autonomy in the Americas and was based in Autonomy's office in San Jose.

165. Mr Hogenson did not give evidence in these proceedings. However, his contemporaneous expressions of concern especially about the way Autonomy accounted for its sales to VARs (and in particular, Capax Discovery) were well documented, as was how Dr Lynch dealt with them. The *'Hogenson Episode'*, as the Claimants referred to this aspect of the matter (see paragraphs 2232 to 2289 in the main body of this judgment, also led to revealing exchanges with the FRRP/FSA (see paragraphs 2290 to 2336 *ibid.*).

166. Autonomy and Mr Hogenson concluded a settlement agreement (executed on 19 November 2010) pursuant to which Mr Hogenson was paid $750,000. One of the terms of the settlement required Mr Hogenson to deliver an affidavit, which he did. The affidavit was calculated to give the impression that Mr Hogenson had recanted.

167. Read closely, however, Mr Hogenson preserved his position: the most he stated was that he did not consider himself an "*expert*" in IFRS, as distinct from US GAAP, that he "*would not have had access to the complete books and records of the company*" and that, as a result, he "*would not have been in a position to reach conclusions on all of the matters that I raised*" and understood that "*some of the matters I raised <u>may have</u> been wrong <u>or</u> immaterial*" (emphasis added).

Mr Andrew Kanter

168. Mr Kanter is admitted to practice law in California and in his early career was an associate at US law firms in California and London.

169. He was employed by Autonomy Systems Limited a wholly owned subsidiary of Autonomy Corporation Plc from July 2000 to May 2012. From 2001, he served as Autonomy's Chief Operating Officer and General Counsel and in 2012 as Chief Operating Officer only. He was closely involved in many of the impugned transactions. I have described him as one of the members of the 'clique' or 'cabal' through whom Dr Lynch and Mr Hussain effectively ran the Autonomy group.

170. Mr Kanter formally resigned from Autonomy in May 2012 and helped to form Invoke Capital as a founding partner in July 2012. He remains employed by Invoke Capital.

171. Mr Kanter provided a witness statement on behalf of Dr Lynch and it was envisaged that his cross-examination might take four days. I would have been assisted by his evidence. As it was, following Dr Lynch's evidence, Dr Lynch's solicitors gave notice that Mr Kanter's lawyers had informed them that he would not be testifying and they had decided not to seek to compel his attendance (though his address was given as being a residential address in London in his witness statement).

172. Reports in the press suggested that Dr Lynch's team had made the decision not to call Mr Kanter (or Ms Eagan). On the other hand, Dr Lynch suggested that Mr Kanter (like Ms Eagan) declined to appear in light of the continuing investigations being made of them by the US DoJ. In any event, he was not called and his witness statement was withdrawn without further explanation.

Mr Richard Knights

173. Mr Richard Knights was the Deloitte audit engagement partner in respect of the 2008 and 2009 financial statements for Autonomy as well as for the quarterly review work during that period. He shared partner responsibility for the first quarter 2010 work with Chris Robertson. He was involved in all the auditing decisions and discussions in that period.

174. However, Mr Knights gave no evidence in these proceedings, even though a Settlement Agreement the Claimants entered with Deloitte in April 2016 gave the Claimants unusual control over him as a potential witness: cl.6 gave them the right (inter alia) to require Mr Knights to prepare for and attend interviews, sign statements and attend voluntarily as a witness at this trial. I would have been assisted by his evidence. The Claimants' explanation for not calling him is that he was involved in the disciplinary proceedings brought against him by the FRC, which included allegations that Mr Knights breached the fundamental principle of integrity.

Dr Peter Menell

175. Dr Menell worked as Autonomy's Chief Technology Officer from 2004 to 2010. He became Autonomy's Chief Research Officer ("CRO") in November 2010. He was based in Cambridge.

176. Dr Menell was one of the members of what I have called "the clique" or "the cabal". He signed off technological justifications for a number of Autonomy's reciprocal purchases (which I have determined were largely spurious).

177. At the time of trial Dr Menell worked for Invoke Capital. He was one of those involved in the setting up of Invoke Capital.

178. Dr Menell did not give evidence during the trial. I would have been assisted by his evidence. When Dr Lynch was asked if there was a good reason for the failure to call Dr Menell as a witness, he alluded to a "*personal*" matter which should not be referred to in open Court and then said, "*I guess you would call it a medical issue*". This was never further explained or substantiated.

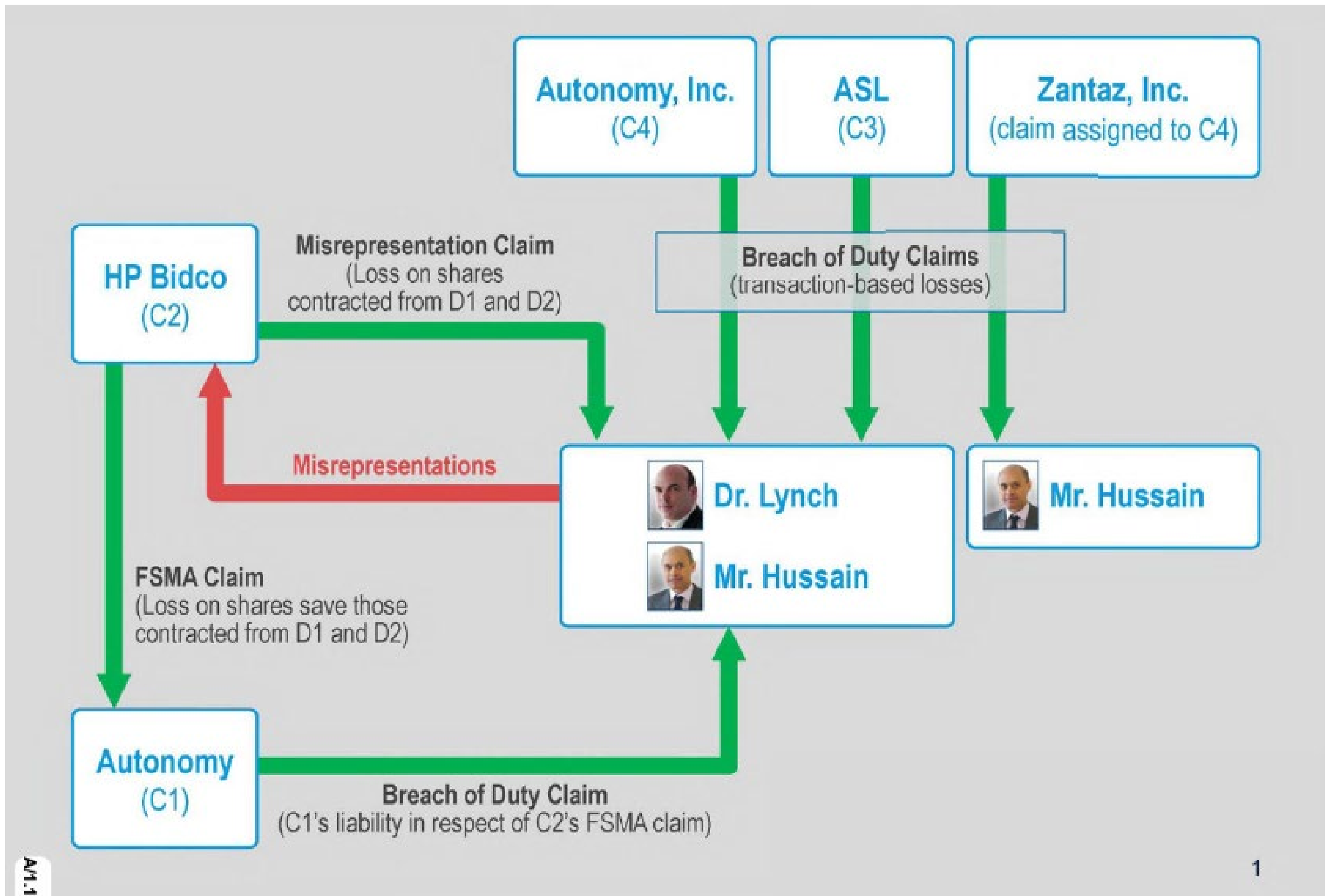
Mr Nigel Mercer

179. Mr Mercer worked for Deloitte and took over responsibility as audit engagement partner on the Autonomy account in around May 2010 and was responsible for Q2 2010 through to Q2 2011.

180. Mr Mercer was as such involved in the audit decisions in that period. His name again appeared on many documents and he was referred to repeatedly in the course of the evidence; and he was involved in all the important accounting decisions at the time. Mr Bloomer gave evidence about his discussions with Mr Mercer before and at Audit Committee meetings. Mr Mercer too was required by the Settlement Agreement to co-operate with the Claimants and, if they wished, to provide them with a statement and appear voluntarily at the trial.

181. However, he gave no evidence in these proceedings: the Claimants cited the same reason that the FRC had brought disciplinary proceedings against him, though the allegations against him did not include any breach of the fundamental principle of integrity.

APPENDIX 3



APPENDIX 4

Chart 1: Reported Revenue in each Quarter of the Relevant Period

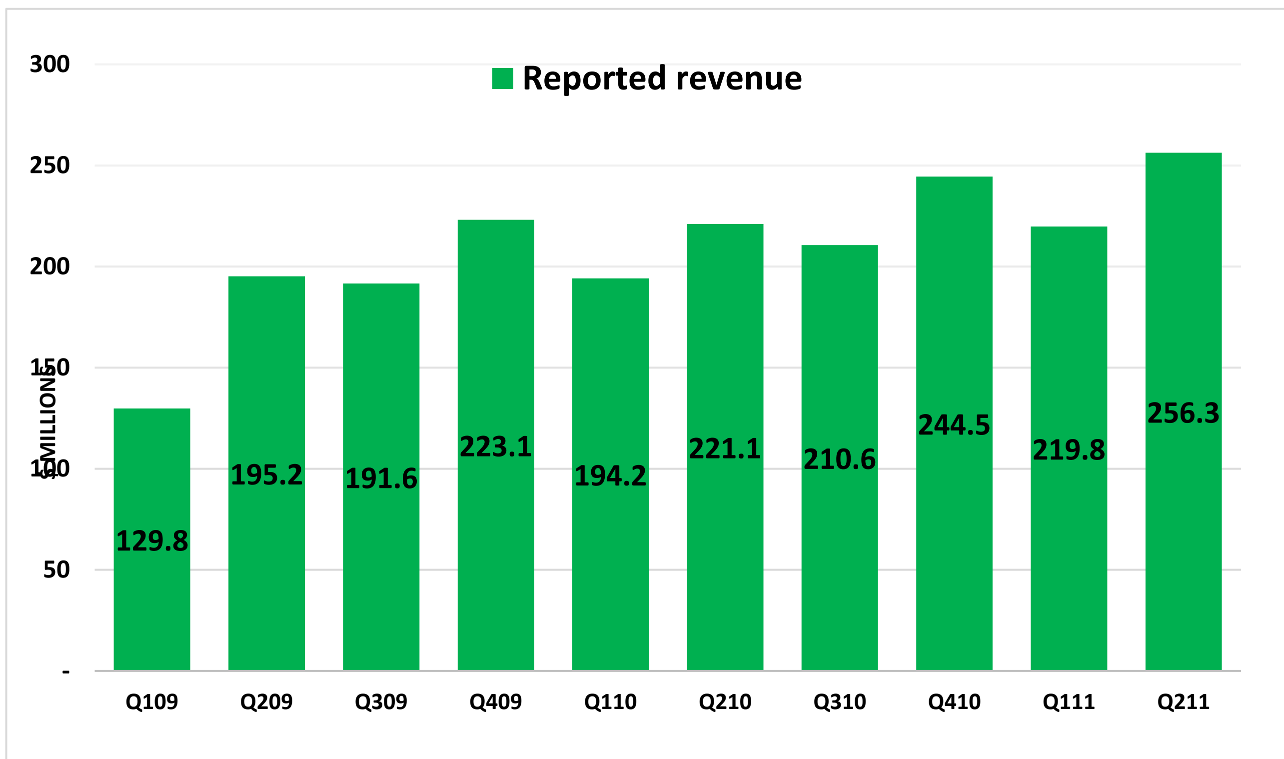


Chart 2: Impact of undisclosed pure hardware revenue and revenue claimed to have been recognised improperly

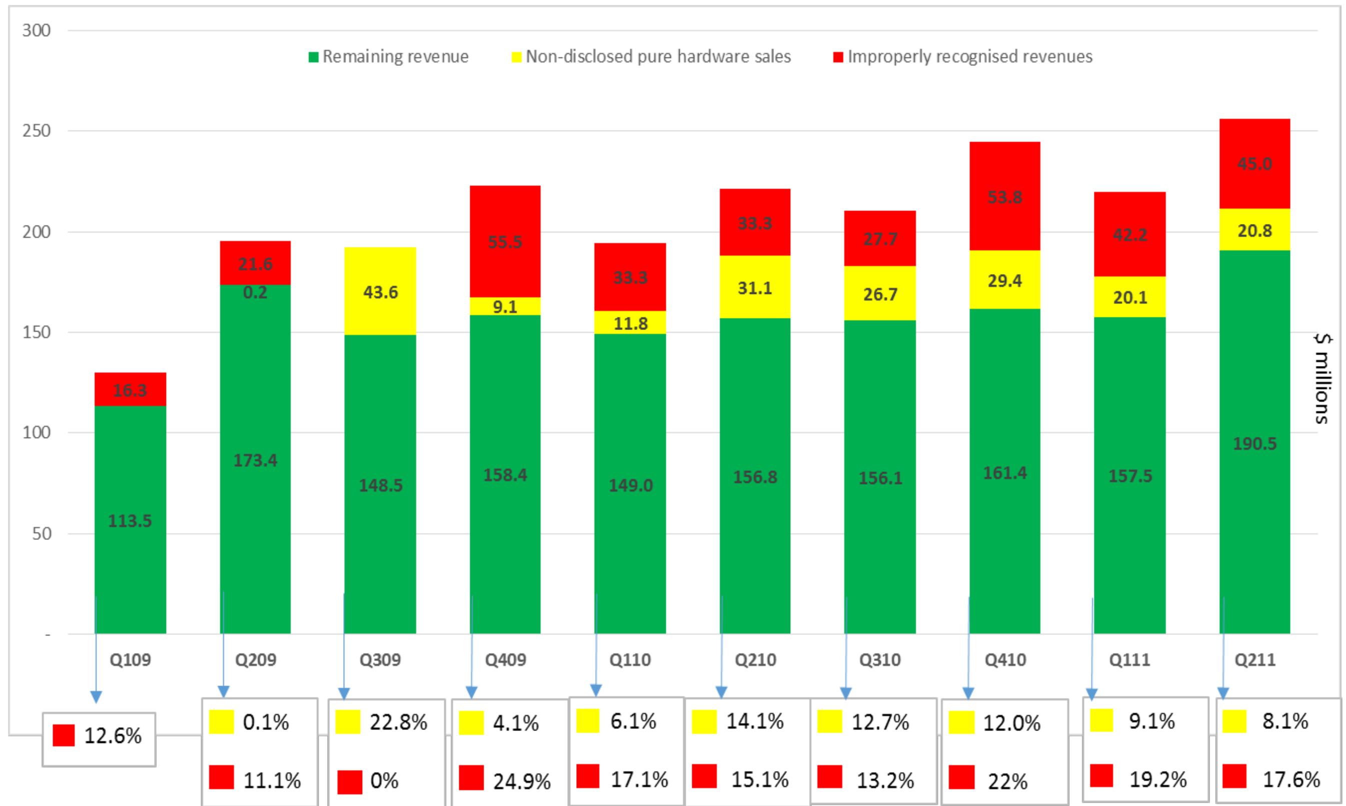


Chart 3: Revenue performance relative to market expectations

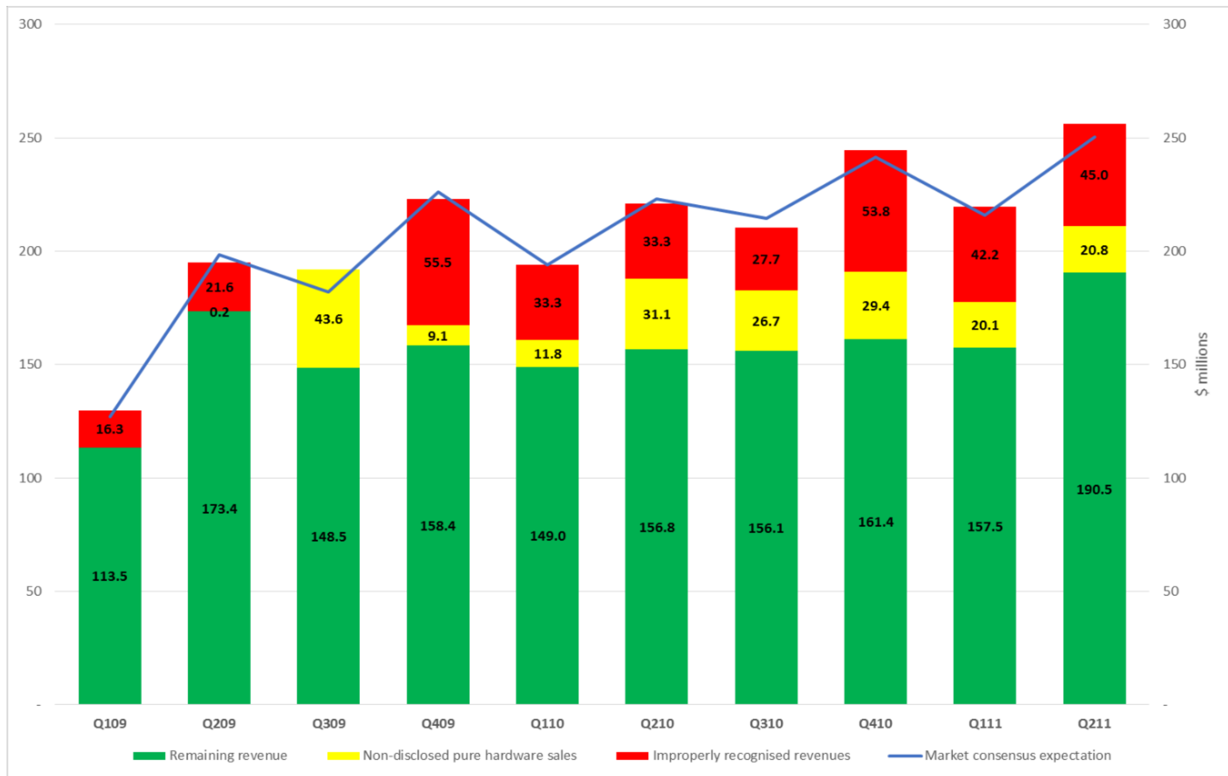
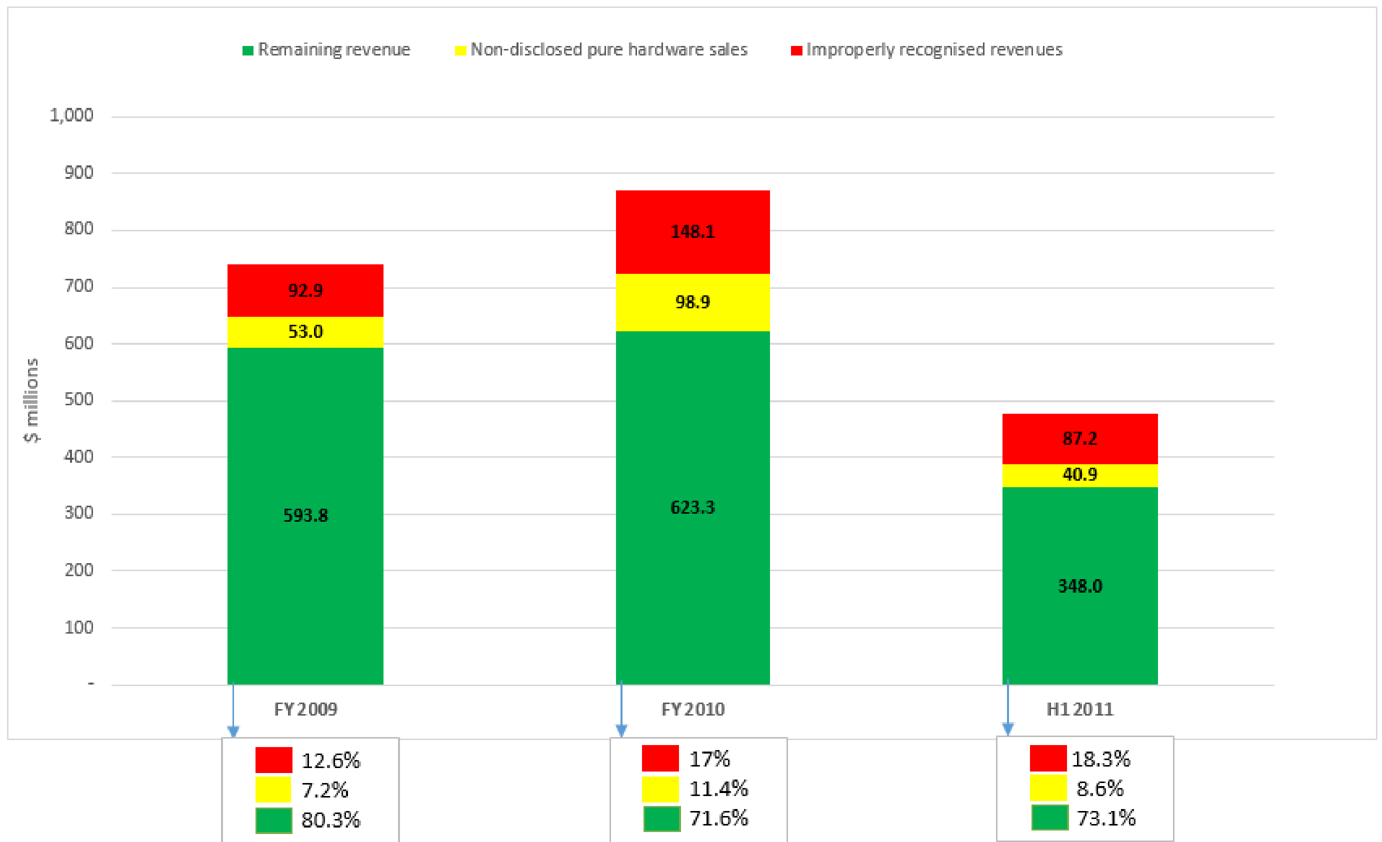
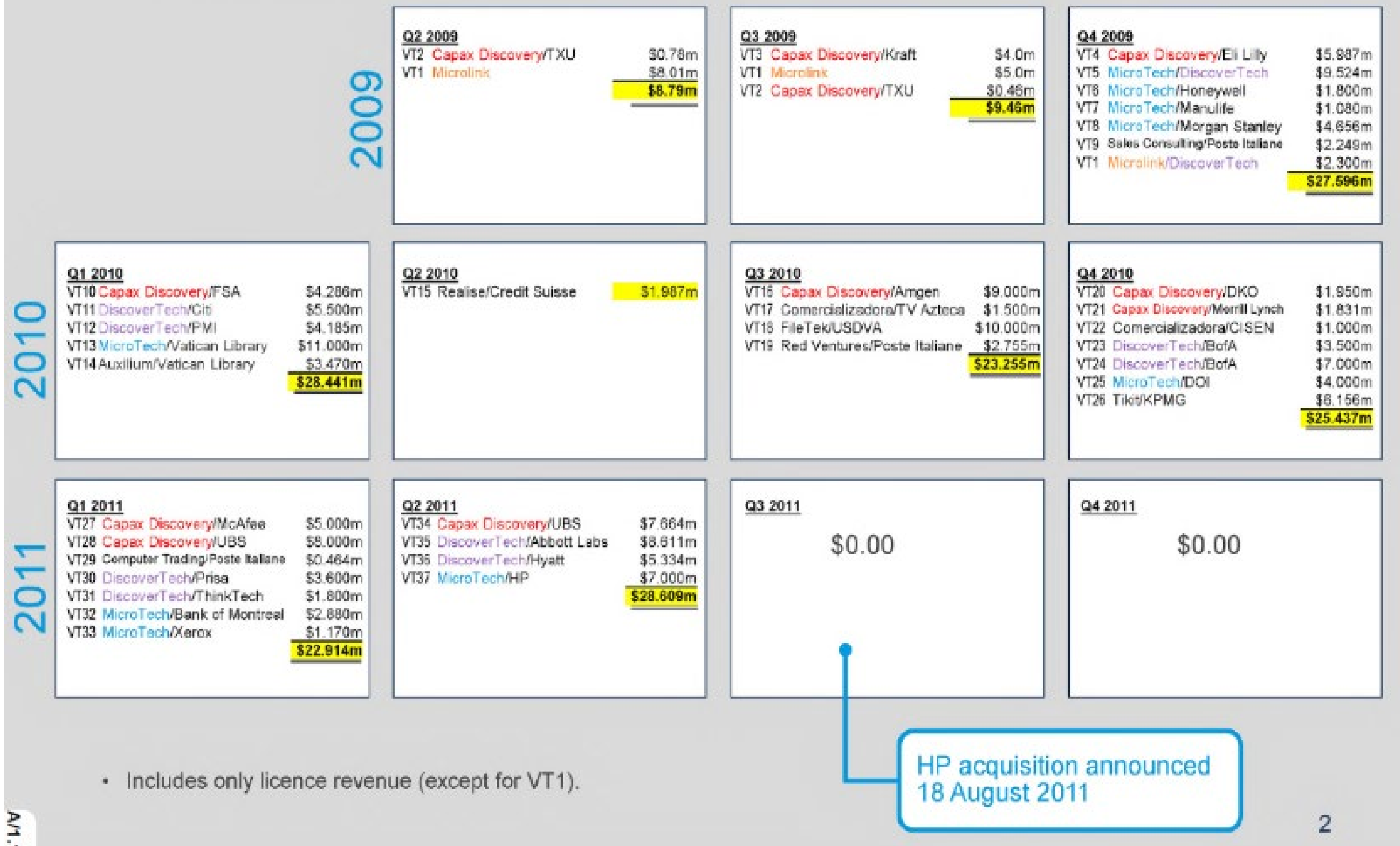


Chart 4: Overview of yearly revenues in the Relevant Period



APPENDIX 5



APPENDIX 6

THE APPROVED FINAL JUDGMENT [2022] EWHC 1178 (Ch) WAS HANDED DOWN ON 17 MAY 2022 . IN THE CASE OF ANY CONFLICT BETWEEN THAT APPROVED JUDGMENT AND THE SUMMARY OF CONCLUSIONS SET OUT BELOW AND PROVIDED ON 28 JANUARY 2022, THE APPROVED JUDGMENT PREVAILS.

(1) ACL NETHERLANDS B.V. (AS SUCCESSOR TO AUTONOMY CORPORATION LIMITED)
(2) HEWLETT-PACKARD THE HAGUE BV (AS SUCCESSOR TO HEWLETT-PACKARD VISION BV)
(3) AUTONOMY SYSTEMS LIMITED
(4) HEWLETT-PACKARD ENTERPRISE NEW JERSEY, INC

-v-

MICHAEL RICHARD LYNCH AND SUSHOVAN TAREQUE HUSSAIN

SUMMARY OF CONCLUSIONS OF MR JUSTICE HILDYARD - 28TH JANUARY 2022

This summary

1. I will summarise my key findings in the statement I am about to make. This is a public statement. However, I will also deliver by 8pm today to the parties' legal representatives, but only to them, a copy of my draft judgment setting out much more fully the reasons for my conclusions. **That draft will remain at all times strictly embargoed.**

2. Neither that draft, nor any part of its contents, is to be made available to persons other than those on the lists notified by the parties' legal representatives to me, and agreed by me. **Any breach of the embargo would be a contempt of court**. My final judgment will be handed down after the usual process of checking and correction is completed. As the judgment is of considerable length, that will take longer than usual. That is the principal reason for this summary of my conclusions today. As with any summary, it

may not entirely capture what the much longer document is intended to convey. If there is any conflict between this summary and my judgment as finally delivered, my judgment will prevail.

3. Even this summary of the draft is not short. Copies can be made available. But I do not wish to cause unnecessary suspense. I will start by saying that the Claimants have substantially succeeded in their claims in these proceedings. Quantum will be determined in a later judgment, but I would anticipate that, although substantial, it will be considerably less than claimed.

The proceedings

4. These proceedings relate to acquisition ("the Acquisition") for approximately $11.1 billion in cash of the entire issued share capital of Autonomy Corporation Limited ("Autonomy") by a special purpose vehicle called Hewlett Packard Vision BV, which was incorporated in the Netherlands for the purpose of the Acquisition . I will refer to the acquisition vehicle as "Bidco". By a merger in 2018, all of the assets and liabilities of Bidco were transferred to the Second Claimant.

5. The Acquisition was declared wholly unconditional on 3 October 2011, and completed on 5 January 2012.

6. The fallout from the Acquisition has spawned not only these proceedings, but also at least two sets of criminal proceedings in the Northern District of California, USA. One has led to the conviction of the Second Defendant (hereafter "Mr Hussain"), for wire fraud under US legislation, and he has been imprisoned. He could not attend this trial. The First Defendant, (hereafter, "Dr Lynch") has been indicted in a further set of criminal proceedings in Northern California, in respect of which the US authorities now seek to extradite him to face trial there.

7. All of the assets and liabilities of Autonomy, including all claims it has against the Defendants, were transferred to the First Claimant in 2017.

8. The real bidder and acquirer, through Bidco, was Hewlett Packard Company ("HP"). HP was the ultimate holding company in the Hewlett Packard group, one of the first companies to set up in Silicon Valley and since then a household name.

9. Autonomy was and is an English company. Autonomy acted as a holding company for a group of companies, all in the business of infrastructure software ("the Autonomy group").

10. Autonomy was founded in 1996. It was spun out of a company called Cambridge Neurodynamics, which was an early venture into using "machine learning" to develop software techniques which Dr Lynch had explored in his PhD thesis at Cambridge University and his subsequent research fellowship in "adaptive pattern recognition".

11. Autonomy, and in particular its core product called IDOL, was the creation of Dr Lynch. IDOL is an acronym for Intelligent Data Operating Layer. IDOL was the core technology at the heart of nearly all of Autonomy's software. IDOL technology was focused on the analysis of unstructured data.

12. Put shortly, using IDOL technology, computers could make sense of unstructured data. There are two types of data: structured and unstructured. Structured data is found in spreadsheets or in prescribed fields in a database. When data is entered into a database it is easily searchable. Unstructured data is data that is not contained in the prescribed fields. Most data is unstructured. Books, newspaper articles, websites, voice recordings, videos and indeed, most forms of communication comprise unstructured data. Unstructured data is obviously much more difficult for computers to interpret and analyse. In 2009, the vast majority of computer software could only process structured information. It was Autonomy's ability, using IDOL technology, to handle unstructured information that set it apart. HP chose barely to acknowledge this in the course of the proceedings, but IDOL was, in words attributed to Meg Whitman, who became CEO of HP, "almost magical"

13. In consequence, by the beginning of the period to which the contested accounting information related, Autonomy had grown from a small start-up into a market leader in

enterprise technology, especially in the field of unstructured data analysis. It went public in 1998, with an initial listing on the EASDAQ. It was admitted to the official list of the LSE in November 2000. It joined the FTSE 100 in 2008.

14. The Autonomy group was highly profitable. It generated annual revenue of about $900 million, collected all the cash it reported, and (as an illustration) held cash reserves of $1.1 billion at the close of 2010. Its customers included blue-chip companies in every sector. In 2011, based on market capitalisation, it was the largest British software company.

15. On the other side of the Atlantic, HP was a giant company, with an annual turnover of $130 billion, but it was in the doldrums. Its focus and reputation had remained in hardware, where margins are very tight. A new CEO, Mr Apotheker, wished to change this. He was wanting to effect what he called "transformational change" by the acquisition of a software company to drive a reorientation of HP towards high margin software. Software margins can be well over 60%.

16. However, when, together with other changes in HP's business, the Acquisition was announced, the markets reacted badly. Just over a month later Mr Apotheker was removed. The Defendants' case is that the claim was "manufactured" to cover and justify a change of corporate mind, and to cast the Defendants as scapegoats for what in reality is buyer's remorse coupled with management failings. The Claimants' case is that they were fundamentally misled.

Brief summary of the basis of each Claimant's claim

17. Before giving a brief summary of the various claims, I would note some matters of terminology:

    17.1. Throughout this summary, unless stated to the contrary, I use the term "the Claimants" as a shorthand to denote the Claimant making the particular claim. The Claimants do not in reality make any claims jointly. I should also clarify that in terms of describing the acquirer, I use the descriptions HP and Bidco

interchangeably. I shall explain why later by reference to an issue in the case which was called the *'Bidco point'*.

17.2. My references to "Autonomy" in the context of the various impugned transactions are by way of short-hand. In the context of an impugned transaction the reference is intended to denote (unless otherwise stated) whichever of the Autonomy group companies was the contracting party.

17.3. References to the "Defendants" are to whichever of the two of them is alleged to have been implicated in wrongdoing. I have sought to identify them individually when issues arise as to that individual's knowledge or involvement. On almost all other matters, Mr Hussain adopted Dr Lynch's arguments.

18. I shall now very briefly summarise the claims. The Claimants' essential complaint in respect of the Acquisition is that they were induced into making the Acquisition by dishonest statements and omissions in Autonomy's published information, and other representations made personally by the Defendants. The Claimants have in these proceedings accused both Defendants of fraud.

19. There are also other claims which do not relate to the Acquisition, but to alleged breaches of duty on the part of the Defendants whilst directors or shadow directors of Autonomy group companies.

The First Claimant's claim

20. By far the largest of the claims is brought under Schedule 10A of the Financial Services and Markets Act 2000 ("the FSMA claim"). The gist of the FSMA claim is fraud on the part of the issuer (Autonomy) in respect of statements or omissions in its published information on which the Claimant relied in making an investment decision. It is claimed that "*persons discharging managerial responsibilities within the issuers*" ("PDMRs") knew those statements or omissions to be untrue or misleading, or to amount to the dishonest concealment of a material facts. (An issuer's "published information" is specially defined but for present purposes the ordinary meaning it conveys will suffice.)

21. The FSMA claim depends on establishing first that Autonomy was liable (as issuer) to Bidco, and second, accordingly (as explained below) that the Defendants were liable to Autonomy.

22. It is not disputed that both Defendants were, for the purposes of the FSMA claim, PDMRs within the meaning of Schedule 10 A of FSMA (and previously section 90 A (4) before it's amendment). The basis for the issuer's liability is fraud on the part of at least one PDMR.

23. It may at first blush seem surprising that the claimant in the FSMA claim is the First Claimant, ACL Netherlands BV, which is the successor to Autonomy. Autonomy might appear to be suing in respect of its own fraud. The explanation is that its claim is in the nature of what is sometimes called a "dog leg claim". It is to recover from the Defendants the loss that Autonomy suffered by having (voluntarily) accepted liability for a claim brought by Bidco against it to recover its losses in having been induced to enter into the Acquisition.

24. The amount of accepted liability by Autonomy to Bidco is the sum of $4.55 Billion USD. That is therefore the principal sum which the First Claimant claims from the Defendants.

25. The reason for the "dog leg" structure of the claim is that under Schedule 10A of FSMA, only the issuer of published information is liable to persons induced to make investment decisions in reliance on dishonest statements or omissions in that published information. The position was the same under the equivalent provision of FSMA, section 90 A (3) which applied until 30 September 2010 and which Schedule 10A replaced. But a claim by HP against Autonomy would be of no benefit to HP since HP owned Autonomy. What HP/Bidco needed was recourse against the Defendants. Crucially under FSMA, an issuer can seek to lay off its own liability by suing key management persons called PDMRs on the basis that they were responsible for, or at least had knowledge of, the falsities.

26. To enable HP/Bidco to sue the Defendants, the following steps were taken.

    26.1. HP/Bidco notified its claim to Autonomy.

26.2. Controlled by HP, Autonomy (whose assets and liabilities are now held by the First Claimant) has admitted liability to Bidco (whose assets and liabilities are now held by the Second Claimant). The Claimants have accepted that this admission does not bind the Court. That liability has to be determined.

26.3. Autonomy then blamed and sued the two Defendants, who are both admitted to be PDMRs, for the loss.

27. No objection in principle was made by the Defendants to the 'dog-leg 'nature of the claim, although every part of its substance is contested. The Defendants 'case is that Autonomy had no liability to Bidco and should not have submitted to its claims.

28. Bidco's FSMA claim was thus founded upon allegations that, when proceeding with the Acquisition, HP and therefore Bidco reasonably relied on Autonomy's published information, which contained untrue and/or misleading statements and/or dishonestly concealed material facts which were wrongly omitted from the published information.

The Second Claimant's claim

29. The Second Claimant claims an aggregate principal amount of $420 million against Dr Lynch and Mr Hussain for false representations which it claims were made by them to HP/Bidco knowingly and/or recklessly and/or without reasonable belief in the truth thereof, and which they claim induced the Second Claimant to purchase shares in Autonomy from the First and Second Defendants. Those false representations include reaffirmations of the false statements within the published information.

30. The damages are claimed pursuant section 2(1) of the Misrepresentation Act 1967 and/or the tort of deceit.

The Third and Fourth Claimants' claim

31. The Third and Fourth Claimants claim against the Defendants for direct losses suffered by them in loss-making transactions which they claim Dr Lynch and Mr Hussain caused them to enter into in breach of their fiduciary duties or employment contracts.

32. These claims do not arise out of the Acquisition, but out of the Defendants' management conduct. The losses occasioned by those transactions are estimated by the Third and Fourth Claimant to amount to $76.1 million:

33. In the case of Dr Lynch, the claim is pursued against him as shadow director or assumed fiduciary of Autonomy Systems Limited (hereafter "ASL") and as an officer of Autonomy Inc, pursuant to the Companies Act 2006.

34. In the case of Mr Hussain, the claim is pursued against him as director of ASL under the Companies Act 2006 and under his contractual and fiduciary duties as an employee of ASL in respect of the Fourth Claimant. Those losses include those of another group subsidiary Zantaz Inc ("Zantaz"), the cause of action to which was assigned to Autonomy Inc on 31 October 2014. This is pursued against Mr Hussain on the basis of breach of his fiduciary duties as a director and officer of Zantaz.

The Defendants

35. Dr Lynch was the Director of Autonomy from the time of its incorporation in 1996 up until 30 November 2011. Throughout the period with which this litigation is concerned, he was the driving force and leading figure within Autonomy.

36. Mr Hussain was the Autonomy Group's Chief Financial Officer from June 2001 until 30 November 2011 and was a director of Autonomy from 1 June 2003 until 30 November 2011.

The fraud alleged

37. The fraud alleged, which underlies the legal heads of claim arising out of the Acquisition (the FSMA claim, the direct fraud and/or Misrepresentation Act claims, as distinct from the breach of duty claims for transactional losses) consisted of the publication of information to the market which was known by the Defendants to be false.

38. The allegation was based on (a) the allegedly dishonest description of Autonomy as being a "*pure software company*" when in fact it undertook and had become accustomed to

inflating what appeared to be the revenues of its software business by undertaking substantial hardware sales and (b) the allegedly dishonest presentation of its financial performance, which did not disclose (and instead disguised) improper practices which Autonomy adopted to boost and accelerate revenue.

39. The Claimants contended that all this resulted in Autonomy being in fact a considerably less valuable enterprise than it appeared on the basis of its published information.

40. These alleged improper practices included:

40.1. artificially inflating and accelerating Autonomy's revenues;

40.2. understating Autonomy's costs of goods sold by characterizing such costs as sales and marketing expenses so as to protect gross margins;

40.3. misrepresenting Autonomy's rate of organic growth; and

40.4. misrepresenting the nature and quality of Autonomy's revenues as well as overstating its gross and net profits.

Financial Services and Markets Act claims

41. In the FSMA claims, it is common ground that the Claimants need to make good their case at each stage, ie the liability of Autonomy, and the fraud by the PDMRs .

42. They have accepted also that each of Dr Lynch and Mr Hussain will not be liable except in respect of misstatements or omissions by the issuer about which he himself knew. It is not sufficient for the Claimants to demonstrate that the transactions or the way that they were accounted for was improper (the first limb). They need also to prove personal knowledge and dishonesty in respect of the false accounting on the part of the Defendants as PDMRs (the second limb).

43. As far as Bidco is concerned, the Defendants contended that no liability was owed to it because no representations were made to it, and it placed no reliance on any statements made. This is the *Bidco point* to which I have referred earlier. I have found that, if the

necessary elements are made out, Bidco (and therefore the Second Claimant) have a valid claim (both under FSMA and in respect of direct fraud and Misrepresentation Act 1967 claims against the Defendants).

44. I have accepted the Claimants' argument that the fact that it was HP which claims to have been influenced by Autonomy's published information (and specific representations) and that it was HP which undertook due diligence, does not mean that Bidco cannot satisfy this part of the reliance test. For the purpose of the acquisition, HP can be treated as the controlling mind of Bidco, and HP's reliance can be treated as Bidco's reliance.

Direct Fraud and/or Misrepresentation Act 1967 claims against the Defendants

45. The claims for fraudulent misrepresentation and/or under section 2(1) of the Misrepresentation Act 1967 are direct claims against the Defendants: they are based on personal liability, not on the liability of the issuer.

46. Specific representations are averred against the Defendants which in many cases traverse the same territory as the FSMA claims. The quantum of those claims is much lower than the FSMA claims: the damages sought relate only to loss attributable to the shares and share options which the Defendants themselves each held and sold to Bidco. The pleaded quantum of this loss is $420 million. Any sum recovered under this head of claim will be in the alternative to the FSMA claim. There cannot be double recovery.

47. A point which may be of general interest is that it is no defence to a FSMA or a fraud claim that the claimants had the means of discovering the truth. No defence of contributory negligence is available. Thus, even if (though I have made no finding that it was) HP's due diligence were considered to be rushed and deficient, and HP might have been expected to unearth and probe further into matters about which complaint is now made, that would not be a defence. It would be beguiling but wrong to think that the answer could be "caveat emptor". Of course, had I found that HP was in fact aware, before the Acquisition, of the matters of which complaint is now made, that would be different, for in those circumstances it could not say that it had reasonably relied on what

it saw and read. But I have found that it was not actually aware and that its reliance was reasonable.

Breach of Duty Claims brought By Autonomy Companies Against the Defendants

48. The claims for transactional losses based on breaches of fiduciary and employee duties stand on a different footing. They do not arise in consequence of the Acquisition (except in the sense that they would almost certainly not have been brought if the Defendants still directed Autonomy). They are claims for direct losses suffered by Autonomy Inc, Autonomy's main operating company in the US, incorporated in 1996 (now the Fourth Claimant) and another group subsidiary called Zantaz as a result of the Defendants' breaches of duty in causing the relevant subsidiary to enter into the impugned transactions without regard to the interests of that subsidiary.

49. The Claimants accept that in the ultimate quantification of loss, they must give credit for a recovery of $45 million made in a settlement of related claims (against Autonomy's auditors), after deducting the cost of such claims and any tax payable in respect of the settlement sum.

Factual basis: the FSMA and direct fraud and / or Misrepresentation Act claims

50. In relation to the first two of the three legal heads of claim that I refer to above (that is to say, in relation to the FSMA and direct fraud and Misrepresentation Act claims), the factual basis of the claims relate to six areas of Autonomy's business and accounting. These claims, each of which is substantial, are very briefly described below.

    50.1. The "**hardware case**" relates to the purchase and resale by Autonomy (usually at a loss) of "pure" hardware (in broad terms, hardware unaccompanied by any Autonomy software) in quantities (of over $100 million). The Claimants allege that these transactions were never disclosed to the market that by boosting apparent revenue, they gave a false impression of the performance of Autonomy's business. The Claimants say that they belied its presentation in its published information as a *pure software company.* The hardware case also raises issues as to (a) whether a proportion of the cost of the sales were

improperly accounted for as marketing expenses so as artificially to increase gross margins, and (b) whether Deloitte, who approved Autonomy's accounting treatment of the sales, were misled as to the true purpose of the hardware sales.

50.2. The "**reseller case**" or "**VAR case**" relates to 37 transactions between Autonomy (or in some cases, Autonomy Inc or Zantaz) and a small group of value-added resellers. The Defendant treated these transactions as sales giving rise to revenue which could be and was recognised immediately in Autonomy's accounts. The Claimants contended that this simply interposed a reseller between Autonomy and a true customer, and that these were not in substance true sales at all. The only true sale was to an end-user, if one eventuated. In many instances no end-user sale did eventuate, giving rise to a difficulty which I explain later. The Claimants' case is that in each VAR sale, the VAR was only a passive placeholder with no further participation expected or permitted of it after the VAR sale. Thus, the VAR sales were, in effect, devices to accelerate recognition of revenue in Autonomy's accounts, with the intended effect of misrepresenting its performance.

50.3. The "**reciprocal transactions case**" relates to certain transactions with the VARs which are described below, and what the Claimants alleged were back-to-back transactions with friendly counterparties. It is claimed that Autonomy purchased from the counterparty software or other goods or services that Autonomy did not need, in order to fund the purchase by that counter party of high margin software from Autonomy. The Claimants contend that these reciprocal, or round-trip transactions, also were contrived with the dishonest purpose of artificially boosting apparent high margin software sales. It is said that this had the effect of giving an exaggerated depiction of the success of Autonomy's core business.

50.4. The "**hosted case**" relates to transactions between Autonomy (or Zantaz) and existing customers. Under these transactions, Autonomy agreed to forego future recurring revenue from the provision of hosted archiving services (which was a substantial and lucrative part of Autonomy's business) for monthly (or other periodic) fees in return for the customer paying a one-off and heavily discounted capital sum for a licence to use Autonomy software outside the hosted

environment. The licence was alleged to be illusory, and its issue and sale was said to be for the dishonest purpose of treating it as akin to sale of goods so as to justify the immediate (that is at the transaction date) recognition of the sale proceeds as revenue. Again, it was alleged that the intended effect was artificially to boost apparent revenue in the period in question.

50.5. The **"OEM case"** relates to the presentation in the narrative part of Autonomy's accounts of information about the revenue from its OEM business, variously described as "*OEM*", "*OEM derived*" and latterly "*IDOL OEM*". The Claimants' case is that revenue so presented would be taken in the market to have been generated by a transaction with an Original Equipment Manufacturer ("OEM") for Autonomy software to be embedded in the OEM's hardware. Autonomy would in return receive royalty payments on all their sales of such hardware (and thus a recurring revenue stream). The Claimants say that in fact Autonomy included in what was compendiously described as the *"OEM Metric",* revenues from one-off sales of software licences to customers which were not OEMs under contracts which did not provide for royalties or any other recurring revenue. The Claimants did not impugn the transactions themselves but contended that it was misleading and dishonest to include the latter revenues within the OEM metric. The Claimants claim that this gave the false impression of a valuable recurring category of revenues, and thereby dishonestly misrepresented the quality and reliability of Autonomy's revenue and earnings.

50.6. The "**Other Transactions case**" relates to an amorphous collection of four sets of transactions entered into in late 2010 and early 2011 by ASL, Autonomy Spain SL and Autonomy Inc (and which I refer to as the "Other Transactions"). The Claimants' case in respect of three of those transactions is that what was sold was not simply a piece of software purchased together with separately charged additional services. They say that it was in fact a composite 'solution' of which the provision of services was an integral part. The Claimants alleged that it was wrong to recognise revenue at the point of sale (as Autonomy had done) and that revenue recognition was required to be deferred until the delivery of a fully functioning product had been concluded, or at least until some subsequent stage in the installation of the software for the customer had

occurred, enabling its use as a working solution. The fourth transaction raised an entirely separate and singular issue about whether the calculation of the *"fair value"* of the licence sold (to a company called Iron Mountain) was correct, which also determined whether revenue from the transaction had been correctly stated or overstated by Autonomy.

Factual basis: the breach of duty claim for transactional losses

51. The third legal head of claim was the breach of duty claim for transactional losses. This relates to four categories of transaction: (i) loss-making "pure hardware" sales; (ii) VAR transactions where a marketing assistance fee ("MAF") was paid to the VAR; (iii) alleged reciprocal; transactions and VAR transactions involving a reciprocal element and (iv) Schedule D hosting transactions.

52. In Schedule 12 of the Re-Re-Amended Points of Claim ("Schedule 12"), the Claimants identified a number of the hosting lump sum transactions (set out specifically in Schedule 12D). Autonomy Inc, the Fourth Claimant, was the contracting party for most of these transactions. Zantaz was the contracting party on three out of four of the Schedule 12D hosting transactions, and also for some of the MAF payments, and reciprocal transactions. ASL, as well as being the company within the group to which losses arising from these transactions were transferred (but not assigned), was also the original contracting or paying party in respect of some of the MAF payments and reciprocal transactions. Zantaz assigned to Autonomy Inc all of its rights, title to and interest in, amongst other matters, any claims, rights and causes of action that Zantaz had against third parties, and notice of such assignment was given to the Defendants on 27 March 2015.

Findings

53. In summary, my findings in relation to each of the heads of claim are as follows:

Findings: the FSMA and direct fraud and / or Misrepresentation Act claims

The hardware case

54. The purpose of the hardware selling strategy was to meet market expectations of revenue maintenance and growth, by misleading the market as to the true market position of Autonomy. These loss-making transactions were not commercially justified on any basis. The justifications advanced by the Defendants were no more than pretexts to increase stated revenue in the accounts. The strategy was not for the purpose of raising software revenue sales. That justification was a pretence, fashioned principally for the audit committee and Deloitte, who would not have approved the accounting treatment without the pretence.

55. Both concealment of the hardware sales and their true cost in Autonomy's accounts and other published information were necessary because revelation of the Autonomy's use of hardware sales, and the erosion of gross margin would have nullified their true purpose. This would have exposed that Autonomy's software business was not generating the accelerating revenue and profits which the market thought it was, and which heavily influenced its price.

56. In my judgment:

56.1. The hardware reselling programme was conceived, expanded and implemented in order to enable Autonomy to cover shortfalls in software revenue by selling hardware and including the revenue without differentiation in revenue shown in the accounts as generated by Autonomy's software business.

56.2. To succeed, the hardware reselling had to be concealed from the market, but sufficiently revealed to Autonomy's auditors and audit committee to secure their apparently fully informed approval of the company's accounts.

56.3. The imperative that the reselling should be concealed from the market required a variety of accounting devices which had to be presented in such a way as to secure the approval of the auditors and the audit committee. In particular, their approval had to be secured to treat the costs of the hardware reselling programme, not as Costs of Goods Sold ("COGS"), which would have eroded gross margin and encouraged both analyst and market inquiry and concern, but

instead as Sales and Marketing expenses which had no such adverse effect on key investment parameters.

56.4. The means by which this difficult balancing act was achieved are set out in my judgment. Suffice it to say that the auditors and audit committee were persuaded to regard the purpose of all hardware sales as being to generate revenue and new orders for the software business, and to account for hardware costs accordingly.

56.5. The strategy also required that the contribution of hardware reselling revenues to overall revenues should be disguised or concealed, and that again the auditors and audit committee nevertheless being satisfied that such disclosure as was given was sufficient. That balancing act also was successfully achieved.

56.6. The purpose of the hardware reselling strategy/programme was dishonest, and the way it was accounted for depended on its dishonest presentation.

56.7. The Defendants were well aware of this.

56.8. Although I doubt that this justifies the quantum of loss in the amount claimed in respect of it, in terms of liability the Claimants' hardware case has been established.

57. The Claimants reasonably relied on the truth of what was said about the revenue in the accounting material and were induced to buy Autonomy for $11.1b.

58. These facts satisfy both limbs of the FSMA claim and also give rise to liability on the part of both Defendants to the Claimants in respect of the direct fraud and/or Misrepresentation Act claims, and for breach of duty as employee and/or directors owed to the Autonomy companies in embarking on the hardware selling strategy.

The reseller or VAR case

59. Sales to VARs enabled Autonomy to recognize income before any sale to an end user. This enabled Autonomy to make good shortfalls in software business revenues relative to market forecasts. Dr Lynch and Mr Hussain kept a very careful watch over revenues, especially towards the end of a quarter when Autonomy would have to post its results.

If such a shortfall became apparent, a VAR sale would be arranged, usually on the same day, to cover it, with no questions asked. Almost all the impugned VAR sales were to a small group of “friendly” VARs.

60. Although the “VAR buyers” accepted they were legally bound by the terms of the contracts, the impugned VAR transactions had no commercial substance. They were a means by which Autonomy could maintain the appearance of meeting revenue targets at the end of a quarter.

61. In truth there was a pattern which emerged very clearly from all of the impugned VAR transactions. They were all large, entered into at the very end of the quarter, after no investigation by the VAR of the liability they were legally undertaking. The VAR would often not have the financial ability to meet the stated payment obligation out of its own resource, and in reality there was never any expectation or intention that it should do so, there never being any expectation on the part of either Autonomy or the VAR that the contractual terms would ever be enforced. There was a clear understanding, and it was invariably the fact, that the VAR would play no part in seeking to procure any contract with the end-user. If payment were ever required from a VAR, it would come either from the end-user, or if no contract were made with the end-user, payment would be waived or another transaction would be generated. This would involve Autonomy providing the VAR with the means to meet any obligation it owed under the VAR transaction. No VAR was ever to be left “on the hook” or “carrying the bag”.

62. The purpose of the strategy was to ensure that Autonomy continued to appear to be a company which met its forecasts out of the sales of IDOL and related software and thereby maintained its share price. The VAR strategy became of additional importance and increased in volume when the hardware selling strategy underwent difficulties when Autonomy’s main hardware supplier suddenly drew back from its association with Autonomy. VAR sales and hardware sales were turned on and off by Autonomy at the end of each quarter depending on the levels of revenue required to be shown in the accounts.

63. The VAR strategy was directed by Mr Hussain and encouraged and presided over by Dr Lynch. Both knew that the VAR transactions were not being accounted for according to

their true substance. Both knew that the recognition of revenue on the sale to the VAR was improper, and that the accounts were thus false.

64. Deloitte did not see the full picture, or alternatively preferred to accept reassurance that ostensibly negated the true purpose of the VAR transactions. In any event neither the approval of Deloitte nor that of the audit committee was fully and properly informed, and the fact of it does not avail the Defendants, who knew that.

65. The Claimants reasonably relied on the truth of the financial information provided by Autonomy (both numerical and narrative), including what was said about the revenue in the accounting material, and were induced to buy Autonomy for $11.1billion.

66. These facts satisfy both limbs of the FSMA claim and also give rise to liability on the part of both Defendants to the Claimants in respect of the direct fraud and/or Misrepresentation Act claims, and for breach of duty as employees and/or directors owed to Autonomy companies in embarking on the VAR strategy.

The reciprocal transactions case

67. There were two types of, so called, "reciprocals".

68. In the case of the VAR reciprocals (related to the VAR case above), which involved the purchase by Autonomy of a product from a VAR, I am satisfied that in each case Autonomy purchased from the VAR a product for which it had little or no identified need or use. It was done in order to funnel funds to the VAR to enable it to appear to discharge its indebtedness to Autonomy under a VAR agreement. The purchase by Autonomy was the means of getting the VAR "off the hook" of the legal obligation to pay, which it was never expected or intended it would in fact be required to meet out of its own resources. No revenue should have been recognized. The Defendants were in each case aware of the contrived nature of Autonomy's purchase and its true purpose. They had guilty knowledge accordingly.

69. In the case of reciprocal transactions, Autonomy would identify a counterparty with an interest in purchasing Autonomy software, but which would in all probability not make

any purchase at the price set by Autonomy unless it could sell Autonomy its own products and use the sale proceeds to fund its own purchase. The strategy was assisted by the fact that Autonomy had no list price for IDOL and could in effect choose its price. This would be a matter of indifference to the reciprocal purchaser, since it would be receiving funds from Autonomy under its reciprocal sale to Autonomy. By increasing the price, Autonomy could maximise its apparent revenue.

70. I am satisfied that in the case of each of the transactions impugned on this ground, the reason for Autonomy's purchase was to enable the counterparty to purchase a licence for Autonomy software. This would generate recognized revenue which Autonomy could show in its accounts to cover shortfalls in revenue for the relevant quarter. Thus, Autonomy's purchase was another means of Autonomy buying recognised and reportable revenue at substantial cost. The purchase and sale should have been accounted for on a net basis. I am satisfied that both Defendants knew that these reciprocal or round-trip transactions also were contrived with the dishonest purpose of artificially boosting apparent high margin software sales, with the effect of giving an exaggerated depiction of the success of Autonomy's core business.

71. As with the VAR, and Hardware cases, I find reasonable reliance on the part of the Claimants, and liability established on the FSMA claim.

72. There are also direct fraud and Misrepresentation Act claims made out in respect of these reciprocal claims. I also find the case made out in respect of those direct claims.

The hosted case

73. The impugned hosted transactions all involved a lump sum payment being made by the existing Autonomy customer who was already making periodic payments for Autonomy hosting its archive, for what on the face of it appeared to be a software licence. An example would be the right to transfer Autonomy software from Autonomy's hardware to the customer's in-house hardware, or to a third-party's directed hardware. These

transactions inevitably also involved substantially reduced periodic payments going forward. All of the lump sum would be recognised immediately as income by Autonomy. This was a true way of accounting for that income, if it was truly a payment for software rights. If it was no more than the price paid for the reduction in the later periodic payments for hosting services, then it was misleading to treat what was compensation for a later reduction in revenue as an immediately realized sum.

74. The lump sum arrangements I have just described were in reality almost invariably a response not to customer interest, but to the Defendants' obsession with ensuring Autonomy achieved or came as close as possible to meeting revenue forecasts. The licence was a device calculated to justify revenue recognition which conferred legal rights which neither side intended or expected would ever be deployed.

75. The introduction of a formal legal right of no intended commercial consequence would not in any material way alter the hosting arrangements between the contracting parties, which both parties intended to carry on as before.

76. Both Defendants were aware of the true nature of these lump sum arrangements and that they were driven by income recognition. Any software rights bestowed were never expected to be exercised. They knew it gave a false impression to recognise the income immediately.

77. The Claimants relied on the figures given as to revenue including the lump sum payments and it was reasonable for them to do so.

78. I have concluded that both limbs of the FSMA claim are established.

79. In Schedule 12, the Claimants identified a number of the hosting lump sum transactions (set out specifically in Schedule 12D) which involved significant reductions in periodic payments. The Claimants contended these contracts were commercially unjustifiable. Because they were only motivated by the desire for income recognition, the deals were commercially unfavourable to Autonomy and they had no purpose beyond income

recognition, I find the breach of duty established in respect of each of the Schedule 12D transactions.

The OEM case

80. I have concluded that the perception and attraction of the OEM Metric as presented to the market was that it comprised a distinctive revenue stream, which was recurring and reliable because it derived from royalty payments made by or through the OEMs in whose hardware the Autonomy software was embedded. That revenue stream also included incremental revenue from sales to the OEM of updates and upgrades for that software. It was a stream of income which involved little or no further cost of sales. OEMs also usually had established market reputations; and the embedding of Autonomy software in their hardware assisted Autonomy in terms of market penetration. There was evidence that the market placed special value on OEM business for all these reasons.

81. However, a substantial proportion of the sales categorized as OEM sales in the accounting documents, and in the representations made by the Defendants from March 2011 onwards, did not have this recurring nature, nor were they to OEMs. Instead, they were one-off sales to buyers. They would not offer the same advantages, did not yield a recurring royalty or royalty type payment, and they would not ensure the same certainty of incremental purchases of updates and upgrades to protect and enhance the OEM's own product and reputation.

82. I have found that both Defendants knew that the accounts and the representations they made in this regard gave a misleading picture of Autonomy's OEM business. They did so because they knew revenues were included from transactions lacking the characteristics associated with OEM business. They knew that such revenues were considered in the market to generate a particularly dependable and valuable revenue stream.

83. The direct representations which the Defendants made confirmed the depiction of Autonomy's OEM business and the revenue it generated which was given in Autonomy's published information.

84. This was another matter on which HP reasonably relied on in proceeding with its Acquisition for $11.1 billion.

85. Both the FSMA claim and the direct fraud and/or Misrepresentation Act claims are made out against the Defendants.

86. There are no breach of duty claims under this head

The Other Transactions case

87. The Other Transactions allegedly had, and were designed to have, the effect of enabling Autonomy to recognise or accelerate the recognition of revenue for the purpose of achieving revenue forecasts in a given quarter.

88. The Claimants did not, apparently *"due to time constraints",* cross-examine Dr Lynch in relation to any these four transactions. Therefore, the Claimants accepted that they could not pursue an allegation that Dr Lynch had knowledge of their false accounting.

89. However, they submitted that the Other Transactions remain relevant given that:

    89.1. the Claimants maintained that there was false accounting in relation to each of the transactions and they continued to allege that Mr Hussain knew of that false accounting; and

    89.2. if (as the Claimants alleged) there was false reporting in relation to the Other Transactions, it fell to be taken into account when assessing loss.

90. In my draft judgment I have considered each of these four Other Transactions in detail. I have concluded in respect of each of them, that the Claimants have failed to establish that the accounting treatment adopted with the approval of Deloitte was wrong rather than a matter of accountancy judgement on which views might properly differ. In those circumstances, the question of Mr Hussain's guilty knowledge does not arise, and this head of claim makes no contribution to any loss calculation.

Findings: the breach of duty claim for transactional losses

91. In relation to the claim for transactional losses, Dr Lynch was the President of Autonomy Inc, and he owed legal duties to that company as a director. He was a de facto director of ASL and owed duties to it. I find that Mr Hussain was a de jure director of all three relevant subsidiaries, Autonomy Inc, Zantaz and ASL,- and owed duties to all three.

92. I find that the transfer pricing arrangements which gave rise to the losses from transactions being transferred to ASL do not allow ASL to sue for those losses, and nor is there any legal basis for impugning the conduct of the Defendants in entering into those arrangements. But nor do they cause the subsidiaries who suffered the original losses to be treated as though they had suffered no loss, nor deprive them of the right to claim in respect of the losses. How they deal with the losses subsequently for example by price shifting arrangements does not effect the claims.

93. In respect of each of the transactions impugned under the four heads identified in this claim, as being of no commercial benefit to Autonomy Inc, ASL and Zantaz I find that case made out. I find that both Defendants breached their duties in causing or allowing these transactions to take place in respect of ASL and Autonomy Inc.

94. I emphasise that the breach of duty in respect of ASL is not the transfer pricing arrangements, but the original involvement in the Schedule 12 identified MAF payments, and reciprocal transactions.

95. I find Mr Hussain liable in respect of each one of the Zantaz impugned transactions in Schedule 12, and their claim may validly be made as assignee by ASL. Dr Lynch was neither a de jure nor de facto director of Zantaz, and no direct claim succeeds against him in respect of any of Zantaz transactions.

96. The pleaded quantum of the loss for the direct claims is $76.1 million. Whether that is the correct figure, I will determine in the quantum judgment.

97. That concludes a summary of my findings. I now deal with a number of other matters.

Quantum

98. I have not included in my embargoed draft judgment to be delivered to the parties today detailed findings or conclusions on quantum. The parties have called evidence and addressed full argument on quantum. I considered it inappropriate to delay my judgment on liability when it could have an effect on other proceedings, in particular the extradition proceedings, to allow completion of the quantum section. I have however provisionally determined that even if adjusted to take account of the fraud, HP would still have considered Autonomy, with its signature product, IDOL, a suitable acquisition whereby to effect transformational change. I would expect the quantum to be substantially less than is claimed.

99. The evidence on the quantum part of the case was dense and voluminous. There was extended cross-examination. I will now proceed to consider that aspect of the case. That section will take some time to complete and further submissions may be necessary.

Counterclaim

100. Dr Lynch also brought a Counterclaim. Dr Lynch contended that HP's public and much- publicised announcement of a claim against the Defendants of $5 billion was precipitate and had no properly formulated basis. I need say nothing about this. My findings in the main claim undermine his counterclaim. I have not therefore addressed it in my draft judgment. If there remains anything of substance, I am sure I will be told of it.

Final matters

101. This has been an unusually complex trial, 93 days long. Dr Lynch was cross-examined for 20 days. There was a database of many millions of documents from which there was extracted a trial bundle containing more than 28,000 documents. These documents have been the most reliable source of evidence. But there were also hundreds of pages of

hearsay evidence, largely comprised of transcripts from previous proceedings in the United States, both civil and criminal. The determination of this matter in its plainly natural forum has been made the more difficult by the concerns I have had about the reliability of some of the Claimants' witness and hearsay evidence, which bore signs of having been fashioned, rehearsed and repeated in the course of multiple previous proceedings in the US and the preparatory stages for them, and in some cases, of the constraints (such as the terms of promised immunity) under which it had been given.

102. Nevertheless, I have reached clear conclusions in these proceedings on the civil liability of Dr Lynch and Mr Hussain for fraud under FSMA, common law, and the Misrepresentation Act 1967, applying, of course, the civil standard of proof of the balance of probabilities.

The Parties' representatives

103. Finally, the legal representation and assistance provided to me in this case have been of the very highest standard. The longer my labours have continued the more I have understood and appreciated theirs and quite how much work has been put into these proceedings. I have been shown patience and understanding throughout. I wish to express my profound and genuine appreciation to them all for the quality of their work, and in particular the enormous help they have provided to me in what has been for everyone involved an exceptionally onerous case.

End.