Neutral Citation Number: [2020] EWHC 901 (QB)

Case No: QB-2017-005208

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 17/04/2020

Before :

THE HON MR JUSTICE KERR

- -

Between :

MR AMJAD RIHAN	**Claimant**
- and -	
(1) ERNST & YOUNG GLOBAL LIMITED	**Defendants**
(2) ERNST & YOUNG EUROPE LLP	
(3) ERNST & YOUNG (EMEIA) SERVICES LIMITED	
(4) EYGS LLP	

- -

Ben Hubble QC and Matthieu Gregoire (instructed by **Leigh Day Solicitors**) for the **Claimant**
Daniel Toledano QC, Nehali Shah and Joshua Crow (instructed by **Orrick Herrington & Sutcliffe (UK) LLP**) for the **Defendants**

Hearing dates: 24, 27-28, 31 January, 3-6, 12-13 February 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Hon Mr Justice Kerr :

Overview

1. This is a claim for damages for negligence and conspiracy to injure brought by the claimant, who from 2008 until early 2014 worked mainly in the Middle East region for entities among those grouped together under the global banner of "Ernst & Young" (**the EY network** or **the EY organisation**). The claimant worked in the field of "climate change and sustainability services" (**CCASS**). The EY network entities provide accountancy and related services to businesses worldwide. The defendants are United Kingdom (**UK**) based limited companies and limited liability partnerships (**LLPs**) within the EY network.

2. The claim, in briefest outline, arises from the claimant's participation in 2013 in an "assurance" audit of a Dubai based precious metals dealer, Kaloti Jewellery International DMCC (**Kaloti**). Broadly, the purpose of such an audit is to provide an independent written view on the quality and propriety of the audit client's business practices. An assurance audit is not a financial audit but shares some of the characteristics of one. The word "assurance" is used because the auditor's written views are intended to assure a reader of the auditor's assurance report that the audit client's business practices, in the auditor's independent view, are as stated in the report.

3. The claimant was initially the audit engagement partner acting on behalf of Ernst & Young Middle East (Dubai Branch) (**EY Dubai**). His case is that early on in the audit of Kaloti in 2013, he became aware of the following serious irregularities, among others. Kaloti was knowingly dealing in gold bullion smuggled out of Morocco coated in silver, to deceive the Moroccan authorities into believing that it was silver, thereby avoiding restrictions on the export of gold from Morocco. The "silver" was then declared to be gold on arrival at Dubai (**the Morocco gold issue**). And, in 2012 Kaloti had taken part in cash transactions in gold involving about US $5.2 billion (**the cash transactions issue**).

4. These facts gave rise to a reasonable suspicion that Kaloti was involved in money laundering, as the defendants accept. Gold is a "conflict mineral" identified as such in certain international instruments, denoting a likelihood that it may be traded, especially when the trade is in cash, for the purpose of financing terrorist activity or organised crime. The claimant's case is that he informed the local regulatory body, a Dubai government body called the Dubai Metals and Commodities Centre (**DMCC**) about the irregularities.

5. The claimant says the DMCC then, progressively, put improper pressure on the claimant and EY Dubai to do its reporting work in a way that would reduce to vanishing point the visibility of the Morocco gold and cash transactions issues, thereby misleading readers of relevant reporting documents into thinking that Kaloti's business practices were essentially sound when, manifestly, they were not.

6. The claimant resisted this and, with the agreement and encouragement of his line manager, escalated the matter to representatives of the defendants at regional and global level. With the knowledge of his manager, he left Dubai with his family in mid-2013, not knowing if he would be able to return and fearing for his and his family's safety if he were to challenge the position of Kaloti and the DMCC from within Dubai. He and his family then lived temporarily in London and Sussex during the rest of 2013.

7. The claimant says his individual interlocutors, senior officers acting on behalf of all or at least some of the defendants, while professing to take his concerns seriously and engage with them, then made and developed proposals that amounted to acquiescence and collusion with the DMCC's agenda of protecting Kaloti against adverse audit assurance findings and preventing them being made public.

8. The claimant protested that this behaviour was unethical and amounted to professional misconduct. He argued that there was an obligation to report it immediately to the London Bullion Market Association (**LBMA**), a UK based private company (without share capital) acting as an international trade association and unofficial non-governmental regulator intent on promoting high standards of business practice within the international gold trade.

9. The claimant says his concerns were dismissed. He refused to sign assurance audit reports in the form proposed and was then replaced as audit partner by an accountant who, encouraged by global and regional leaders within the EY network, helped the DMCC and Kaloti to conceal the findings on the Morocco gold and cash transactions issues, sanitising the findings and improperly lending EY's name to a flagrantly misleading assurance reporting process.

10. The claimant's case is that he told his interlocutors that he feared to return to Dubai and asked to be relocated. After initial optimism that his request for relocation would succeed, he was then told to return to his duties in Dubai. He refused, citing safety concerns. After exchanges involving lawyers in which he asked that the EY organisation should publicly disclose the audit findings, he approached a non-governmental organisation and disclosed the gist of what he had learned, though not at that stage into the public domain.

11. During further exchanges between lawyers, while the claimant was on sick leave and still in this country, he was told he would be dismissed if he did not meet representatives of EY network entities. His lawyers warned that if the EY organisation did not itself disclose the findings and address his claims for compensation, he would disclose the wrongdoing he had encountered to mass media organisations, as a "whistleblower". He then resigned in January 2014 and did so.

12. In consequence, Kaloti's practices became public knowledge. Following a subsequent assurance audit by a different firm, Grant Thornton, Kaloti was "delisted" from the DMCC's "good delivery" list, causing damage to its gold trading business. Kaloti brought a criminal complaint in Dubai against EY Dubai. It was not pursued by the local prosecutor. The claimant and his family settled in Spain for a short time and then in the UK, his wife's home country.

13. The claims are for economic loss only, mainly in the form of loss of earnings. The claimant says his career within the EY network has been ruined and that he has found

little work elsewhere. He asserts that his employment prospects and earning capacity have been largely destroyed. The defendants, he says, breached duties of care in respect of the conduct of the Kaloti audit and in respect of his legitimate concerns for his and his family's safety.

14. The claimant argues that he had to dissociate himself from the unethical conduct in which the defendants sought to embroil him and acted reasonably in doing so. He could not then safely return with his family to Dubai, where the defendants instructed him to go. He further asserts that individuals acting on behalf of the defendants, or some of them, conspired to injure him by driving him out of the EY organisation by ordering him back to Dubai knowing he would not go.

15. The defendants deny any responsibility for what happened. They no longer assert that the whole dispute is governed by the law of the United Arab Emirates; they have recently accepted that English law applies to the dispute. But they deny the existence in English law of any duty of care to protect the claimant against the economic loss which he sustained, they say, of his own free will by resigning and then making disclosures to media organisations.

16. The defendants also deny breaching any duty or care or conspiring to injure the claimant. They say they are not the entities that had relevant dealings with the claimant; principally, those entities were EY Dubai; Ernst & Young Middle East & North Africa Limited (**EY MENA**), of which the claimant was a partner; and Ernst & Young EMEIA Limited (**EY EMEIA**). "EMEIA" stands for "Europe, the Middle East, India and Africa". EY MENA and EY EMEIA are not sued and have not taken part in the proceedings. It is not clear whether EY Dubai has separate legal personality from EY Bahrain. If EY Dubai is capable of being sued, it has not been. Nor has EY Bahrain.

17. Furthermore, the defendants say the claimant is a liar and an opportunist who has untruthfully invented important parts of his account, notably by concealing the true and unrevealed reason for leaving Dubai which, the defendants assert, was not connected to the Kaloti audit at all.

18. They also assert that the claimant was motivated not by his professional conscience or a desire to dissociate himself from unethical conduct but by a thirst for publicity and fame and in pursuit of compensation. According to the defendants, he is paranoid and a conspiracy theorist who sought to manufacture a non-existent obligation to report his findings to the LBMA for his own, unexplained, reasons.

19. The defendants say it is "none of his business" how an independent member firm such as EY Dubai deals with a particular client engagement. It is not for the claimant to require the member firm to terminate the engagement or breach its obligation of confidence owed to the audit client under the terms of the engagement. There was no duty to "safeguard his economic affairs".

20. The defendants also argued that it is not for an auditor to question the propriety of a local regulator's behaviour and that, in any case, the DMCC behaved impeccably and so did EY Dubai and the defendants. There was no evidence of any conspiracy to injure the claimant. He was treated properly.

21. The defendants raised further arguments in relation to the claimant's alleged losses. They were not caused by any wrongdoing on the defendants' part, even had there been any. The chain of causation was broken by his unreasonable decision to disclose his knowledge to the media, and to do so without securing anonymity. That disclosure was a *novus actus interveniens*.

22. The loss claimed, say the defendants, was therefore unforeseeable and too remote. The claimant had also unreasonably failed to mitigate his loss, they say. He had not tried hard enough to get suitable work after parting company with the EY organisation. If there was any negligence, there was also substantial contributory negligence. Finally, the quantum of his claims for lost earnings were inflated and unrealistic.

23. Since the claimants largely deny taking part in the events that occurred and are relied on in the claim, it is necessary to deal with the facts in full detail. Although there are many thousands of documents, some issues turn on the credibility of witnesses. Neither side accepted that the other's witnesses were truthful, honest and reliable. I have to resolve some issues of credibility of witnesses. I will do so during my account of the facts.

24. I have also taken account of the absence of some witnesses with relevant evidence to give. The names and roles of these notable absentees will become obvious later in this judgment. They are personnel within the EY organisation working in Dubai and elsewhere in the Middle East and beyond. The defendants' counsel attempted in an annex to their opening written submissions to explain, on instructions and without any waiver of privilege, why some of them did not give evidence.

25. I do not accept this as evidence, coming as it does from counsel and not from any witness. I was not told about the content of any discussions or conversations or written communications between the defendants' lawyers and the absent witnesses under the cloak of privilege. Counsel for the defendants did not say there were no such discussions covered by privilege. I therefore proceed from the premise that the witnesses are simply absent. I bear in mind that some of them were at material times based outside the UK, as were two of three witnesses of fact, and the expert, who gave evidence for the defendants.

26. Whether it is right to accept the claimant's invitation to draw appropriate adverse inferences is a matter I will consider in the course of stating my findings of fact, reasoning and conclusions. I had occasion to look at the law on this issue, in the context of an important absent witness, in *O'Hare v. Coutts & Co* [2016] EWHC 2224 (QB), at [18]-[50], where I reviewed some of the authorities. Neither side took issue with my account of the law.

27. I approach the issue of absent witnesses adopting the same approach in the present case. I need not repeat there the propositions I drew from the authorities. Of particular assistance here are *Gestmin SGPS SA v. Crédit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), per Leggatt J (as he then was) at [22]; and *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, per Brooke LJ at 340.

The Facts

The parties

28. The claimant is originally from Jordan, where he grew up. He speaks Arabic and English. He obtained a degree in chemical engineering in Jordan in 1997. He then worked in pollution control for a government body in the United Arab Emirates. In 2001, he married his British wife, Ms Penelope Montford, in Dubai. They moved to Canada in 2001. The claimant obtained a Master's degree in business and sustainability in 2003. He acquired Canadian citizenship. He worked for the British Standards Institute (**BSI**) in Canada on sustainability assessments for environmental management.

29. In 2007, they moved to the UK with their first child, but soon returned to the Middle East, where in April 2008 the claimant obtained a job with the Bahrain office of Ernst & Young (**EY Bahrain**), as a director in CCASS. His role was to build up a new business or "service line", providing advice and assurance audits to clients to help them run their businesses in a socially and environmentally responsible way. He did well, acquiring new business. In 2009 he was identified as a "high performer". In 2010 he was transferred to EY MENA, whose head office was also then in Bahrain.

30. The four defendants are all LLPs or limited companies forming part of the EY network. All four are based in the UK. Certain other relevant entities in the EY network, notably EY MENA, EY Bahrain and (if separate from EY Bahrain) EY Dubai, are not sued in these proceedings. Of the defendants, the second defendant (**EY Europe**) is a member body of the Institute of Chartered Accountants of England and Wales (**ICAEW**). I was not told whether the other defendants are ICAEW member bodies. The ICAEW is a member body of the International Federation of Accountants (**IFAC**).

31. There was much debate over whether the acts of which the claimant complains were done by, or on behalf of, any of the defendants. They say it was not they but other entities, principally EY MENA and EY Dubai, that did the relevant acts. They effectively deny responsibility for the audit of Kaloti. The claimant contended that the EY organisation functions in practice as a global network with common policies, practices, a common code of conduct and a management structure that reports upwards to the first defendant (**EY Global**); which exerts decisive influence over and de facto control over the activities of locally based EY organisations.

32. The legal structures governing the relationship between entities in the EY organisation are derived from a series of interlocking written agreements. Samples of these are before the court. They were agreed to be confidential. It is unnecessary to quote from them directly but their effect needs to be stated, omitting as much of the detail as possible. Local country based EY entities often, as in the Middle East, have to be locally owned and not in foreign ownership. They are, however, members of EY Global and their geographical area through joining agreements. Under the joining agreements, they agree to submit to the disciplines of the EY organisation.

33. They agree to abide by the regulations of EY Global, as amended, and to incorporate them into their constitutional documents. There are duties of cooperation, including provision of information and access to information, duties to transfer intellectual property rights as far as possible to EY Global, share knowledge and comply with global objectives. Under the regulations, breaches of discipline by member firms can

be visited with sanctions following investigation by the Global Executive, the highest executive body in the EY organisation. Termination of membership is possible and may require a payment by the departing firm to cover losses.

34. Local firms do their own client invoicing locally for their work but there are requirements to pay for services provided to the member firm for services provided from elsewhere within the EY organisation. Services to member firms are provided under separate agreements. In the case of EY Bahrain, for example, these are provided by the third defendant (**EY EMEIA Services**) for matters relating to the EMEIA area and by the fourth defendant (**EYGS**) for "global" matters ("GS" denoting "global services"). EY EMEIA Services may also procure global services from EYGS for a member firm.

35. Under the regulations binding member firms, EY Global is the coordinating body. Member firms must promote global objectives, namely the promotion by member firms of seamless consistent high quality client service worldwide; promotion of the EY brand and promotion of effectiveness at area and global level within the EY network. The objectives of that network are defined in similar fashion and include the implementation of and consistent performance and execution pursuant to global strategies and plans.

36. Member firms are obliged to do all they reasonably can to implement decisions or determinations of the Global Executive or any Global Executive member acting within the scope of his or her authority. In the present case, the relevant Global Executive member directly responsible for dealing with the issues raised by the claimant in relation to the Kaloti audit was Mr Mark Otty, the managing partner of EY EMEIA, who gave evidence at the trial.

37. The composition of the Global Executive is established by the relevant regulations, which bind member firms. The Global Executive includes the holders of the highest offices within the EY organisation: the chair, chief executive officer (**CEO**), chief operating officer (**COO**), the area managing partners for each geographical region (EMEIA being the largest by revenue and headcount), the global managing partners for the various "service lines", including "assurance"; and the global managing partners responsible for specific activities, including "quality and risk management".

38. At global level, management powers and responsibilities are exercised by the Global Executive. They include promotion of global objectives and development, approval and where relevant implementation of global strategies and plans, together with plans for their execution and implementation.

39. There is also a body called the Global Advisory Council (**GAC**) which deals with what could be called "human resources" issues such as appointments, people management policies, admission of member firms and issues raised under "whistleblowing" policies and procedures. There were no documents setting out such policies and procedures before the court, though a "transparency" policy document (to which I will return) was produced.

40. At area level, area managing partners, who are members of the Global Executive, are responsible within their area for promoting and co-ordinating the implementation of global objectives and any additional responsibilities given to them by the Global

Executive. Within each area, there is an Area Executive chaired by the area managing partner and established by area-wide regulations. Its composition broadly mirrors at area level the composition of the Global Executive, combining geographically based members with heads of service lines within the area.

41. The powers and responsibilities of the Area Executive include reviewing compliance at area level with obligations owed by member bodies, promoting, within its area, the global objectives and developing, overseeing and implementing EY strategies and plans, standards, methodologies and policies; ensuring area member firms are held accountable for the implementation and maintenance of those standards, methodologies or policies; and doing other things to promote high standards of performance within the area.

42. As at May 2013, the global head of the assurance service line was Felice Persico. The global head of risk management was Christian Mouillon. Both, together with Mr Otty, were on the Global Executive. The chair and CEO was Mark Weinberger; the COO was John Ferraro, also both members of the Global Executive.

43. The audited accounts of EY Europe for the year ending 30 June 2014 (signed by Mr Otty on 9 December 2014 and prepared by BDO LLP) described the EY organisation, at a global level, as:

> "the most globally integrated professional services organization in our mindset, structure and actions. This global structure is unique in our profession. It means that we can communicate and deliver our strategy worldwide and reinforce consistent standards around the world. The advantage that we have over our competitors exists where our global structure and our inclusive culture overlap and mix. It is the combination of these two elements that allows our global organization to win in the market and deliver the best service to each client …"

44. The same accounts show the existence of the Europe Executive, numbering among its members (in so far as relevant here) Olivier Breillot, Mr Otty and Felice Persico, the latter two being at earlier material times also members of the Global Executive. The Europe Executive is "responsible for developing and implementing strategy for the Group". The "Group" refers to the European entities that are direct subsidiaries of EY Europe. Apart from Angola, these are all in countries in Europe and, mostly, in the European Union. In the Middle East, though in the same EY area (EMEIA), direct ownership is not permitted by local laws.

45. The EY organisation had the benefit of a global code of conduct, with a foreword signed by Mr Weinberger emphasising the importance of ethical behaviour and good processes for dealing with ethical issues. The version before me is undated but, I understand, dates from 1 January 2013. This document set the standards the EY organisation required of everyone involved in it.

46. The "commitment" across the EY network is to encourage consultation and seeking of advice; deviations from the code of conduct are "unacceptable" and "we should feel able to raise them without fear of retaliation … EY does not permit discrimination or retaliation of any kind for good faith reports of illegal or unethical behavior". The code also emphasises the need to uphold "the professional standards and rules applicable to us", to "reject unethical or illegal practices in all circumstances" and to "avoid working

with clients and others whose standards are incompatible with our Global Code of Conduct".

The IFAC Code

47. As to external standards of ethical conduct, it is common ground that, at least, Mr Otty and Bernard Heller, the professional practice director for the EY EMEIA area were at material times bound by the ethical standards set by the IFAC. The relevant IFAC member body for ethical standards in England and Wales, where all the defendants are based, is the ICAEW; but the claimant based his claim not on the ICAEW's code of ethics but on that of the IFAC (**the IFAC Code**). I now have the more up to date 2012 version provided by the parties after the trial, which does not differ much from the July 2006 version used at trial. References below are to the 2012 version.

48. If the requisite control is exerted by the defendants over entities such as EY Dubai, EY Bahrain and EY MENA, the IFAC Code applies to the defendants as well as Mr Otty and Mr Heller; because in the definitions section, a professional accountant in public practice (a term which includes Mr Otty and Mr Heller) is "[a] professional accountant, irrespective of functional classification (for example, audit, tax or consulting) in a firm that provides professional services. This term is also used to refer to a firm of professional accountants in public practice".

49. Control can be through management or other means, not just through ownership. A "[f]irm" is:

> "(a) A sole practitioner, partnership or corporation of professional accountants;
>
> (b) An entity that controls such parties, through ownership, management or other means; and
>
> (c) An entity controlled by such parties, through ownership, management or other means."

50. A "[n]etwork firm" is a "firm or entity that belongs to a network"; and a "[n]etwork" is:

> "A larger structure:
>
> (a) That is aimed at co-operation; and
>
> (b) That is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of a common brand-name, or a significant part of professional resources."

51. The Preface to the IFAC Code includes the following:

> "A member body of IFAC or firm shall not apply less stringent standards than those stated in this Code. However, if a member body or firm is prohibited from complying with certain parts of this Code by law or regulation, they shall comply with all other parts of this Code.
>
> Some jurisdictions may have requirements and guidance that differ from those contained in this Code. Professional accountants in those jurisdictions need to be aware of those differences and comply with the more stringent requirements and guidance unless prohibited by law or regulation."

52. Part A of the IFAC Code requires compliance with the fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. Recognising that these can conflict with each other, the IFAC Code says that the accountant should try to resolve the conflict within the organisation (paragraph 100.17-100.21). If all else fails, the accountant should where possible withdraw from the engagement team or resign from the engagement or the firm (paragraph 100.22).

53. The rest of Part A spells out in more detail the content of the five fundamental principles. The principles of integrity includes an obligation not to be "knowingly … associated with reports … where the professional accountant believes that the information (a) [c]ontains a materially false or misleading statement; or … (c) [o]mits or obscures information required to be included where such omission or obscurity would be misleading" (paragraph 110.2); unless the report is "modified" in respect of that matter (paragraph 110.3).

54. The principle of objectivity requires that professional and business judgment must not be compromised by bias, conflict of interest or "the undue influence of others" (paragraph 120.1). The principle of professional behaviour includes paragraph 150.1, which:

> "imposes an obligation on all professional accountants to comply with relevant laws and regulations and avoid any action that the professional accountant knows or should know may discredit the profession. This includes actions that a reasonable and informed third party, weighing all the specific facts and circumstances available to the professional accountant at that time, would be likely to conclude adversely affects the good reputation of the profession".

55. In relation to confidentiality, paragraph 140.7(c)(iv) states by way of exception to the duty to keep client information confidential, that disclosure of confidential information may be appropriate, inter alia, where "there is a professional duty or right to disclose, when not prohibited by law … [t]o comply with …. ethical standards".

56. Part B of the IFAC Code deals with specific situations affecting professional accountants in public practice. The introduction includes paragraph 200.2:

> "A professional accountant in public practice shall not knowingly engage in any business, occupation, or activity that impairs or might impair integrity, objectivity or the good reputation of the profession and as a result would be incompatible with the fundamental principles."

57. By paragraph 280.2, with specific reference to "an assurance service":

> "Independence of mind and in appearance is necessary to enable the professional accountant in public practice to express a conclusion, and be seen to express a conclusion, without bias, conflict of interest, or undue influence of others. Sections 290 and 291 provide specific guidance on independence requirements for professional accountants in public practice when performing assurance engagements."

58. Suggested steps in difficult cases are set out at paragraph 280.4; these include withdrawing from the engagement team; discussing the issue with higher levels of management; and, if all else fails, declining or terminating the relevant engagement.

59. The paragraphs on assurance engagements have now been divided into those covering assurance reports expressing a conclusion on financial statements (section 290); and assurance engagements that are not financial audits or reviews of historical financial information (section 291). Paragraph 291.2 and 291.3 state, materially:

> "291.2 Assurance engagements are designed to enhance intended users' degree of confidence about the outcome of the evaluation or measurement of a subject matter against criteria. The International Framework for Assurance Engagements (the Assurance Framework) issued by the International Auditing and Assurance Standards Board describes the elements and objectives of an assurance engagement and identifies engagements to which International Standards on Assurance Engagements (ISAEs) apply. For a description of the elements and objectives of an assurance engagement, refer to the Assurance Framework.
>
> 291.3 Compliance with the fundamental principle of objectivity requires being independent of assurance clients. In the case of assurance engagements, it is in the public interest and, therefore, required by this Code of Ethics, that members of assurance teams and firms be independent of assurance clients and that any threats that the firm has reason to believe are created by a network firm's interests and relationships be evaluated. …."

60. There is then a "conceptual framework" to assist members of assurance teams to evaluate threats. Independence of mind is important "without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism" (paragraph 291.5(a)). Where there is a threat that cannot be eliminated or reduced to an acceptable level, its cause must be eliminated, or the professional accountant must decline or terminate the engagement (paragraph 291.6).

Narrative

61. Such was the structure of the EY organisation and the international ethical framework at the relevant times. Returning to the narrative, the claimant was transferred to EY MENA in 2010 and became the Middle East leader of CCASS, reporting to the then assurance leader of EY MENA. After a promotion in September 2010 giving him the title of senior director, normally a prelude to an offer of partnership, he ceased being an employee and, on signing a joining deed, became a partner of EY MENA from 1 July 2011.

62. A year later in July 2012, a new assurance leader of EY MENA was appointed, Imran Ali, the claimant's new line manager. It was agreed that it would be efficient to relocate the CCASS team to Dubai, where more business was done. With logistical help from EY MENA, the claimant obtained a resident's permit to live in Dubai with his family. I accept as truthful the claimant's evidence that he did not see until October 2013, in contentious solicitors' correspondence, a so-called contract of employment dated 29 October 2012 between him and EY Dubai, bearing his electronic signature.

63. The likely explanation is that it was needed for the claimant's resident's permit application and was generated for that purpose without reference to him. It was not consistent with his partnership status within EY MENA, which was not an employment relationship. He was not paid a salary by EY Dubai; he was paid monthly drawings by EY MENA, using the partnership payment structure. The remuneration system for partners is different from the system for employees.

64. I accept as truthful and honest the evidence of the claimant and Ms Montford that they intended to stay in Dubai and raise their family there; that they settled in and were happy and did not live in an "expat bubble" (in Ms Montford's phrase) but as part of a close knit local community. They became more prosperous. The claimant's career was going well and he did not have to pay income tax. The family rented an apartment on arrival and arranged for their children's education. They moved to an unfurnished rented house in December 2012, purchasing new furniture.

65. The claimant and the assurance team at EY Dubai led by him, began to research the trade in gold in the region. This was viewed as a potentially lucrative source of new assurance work. Gold is used in the banking industry, for investment purposes; in the jewellery industry; and in the electronics industry, for manufacturing. It is recognised internationally as being among the "conflict minerals" attractive to criminals and terrorists because it is relatively easy to move and holds its value well.

66. For these reasons, the importance of good due diligence and regulation in the gold refining industry and other "conflict minerals" trading is emphasised in guidance published by the Organisation for Economic Cooperation and Development (**OECD**) and in US legislation known as the Dodd Frank Act. The claimant and his colleagues at EY Dubai and EY MENA saw this as an opportunity to acquire fruitful work producing assurance reporting to gold refiners in Dubai and elsewhere in the region. Kaloti was the most substantial of the Dubai refiners, with the largest market share.

67. The local regulator of the precious metals industry in Dubai is the DMCC. Its creation was announced in 2002 by the then Crown Prince of Dubai, Sheikh Mohammed, now its ruler. In documents, the DMCC sometimes uses the suffix "Government of Dubai" after its initials. Its main stated purpose, according to press reports of announcements made at the time of its creation, was to cultivate the gold industry in Dubai and raise the profile of Dubai in the international gold trade.

68. Another important body in the world gold trade is the London based LBMA. In August 2011, it provided a letter to the US Securities and Exchange Commission (**SEC**) on the subject of conflict minerals, in which it described its mission. It represents the wholesale over the counter market for gold and silver bullion. The LBMA has three categories of membership: market making members, i.e. banks; ordinary members; and associate members. Kaloti was an associate member as at July 2011, as was the DMCC itself.

69. The LBMA explained in the letter that its "Good Delivery List" (**GDL**) is widely recognised as a sort of gold standard for the quality of gold and silver bars. Its criteria for inclusion on the GDL include criteria intended to ensure the refiner is "conflict free". To achieve inclusion on the GDL, a refiner had to follow the LBMA's "Responsible Gold Guidance", a five stage OECD inspired due diligence process which must be adhered to, together with "audited proof of compliance" by the refiner "to remain on the LBMA List".

70. The application of the Responsible Gold Guidance, the LBMA explained to the SEC in its August 2011 letter:

> "will ensure that GD refiners avoid contributing to conflict, and that they will play their part in combatting abuses of human rights, terrorist financing and money laundering."

71. In early October 2012, when the claimant and his family were settling in Dubai, EY Global issued a document called "Transparency Report 2012". It was preceded by a letter from the outgoing chairman and CEO, James Turley, shortly to be succeeded by Mr Weinberger. It described briefly the coordinating role of EY Global, the integrated network of firms and the role of the Global Executive, the GAC and other bodies.

72. Under the heading "[i]nstilling professional values", the report emphasised that "no single client is more important than professional reputation – the reputation of Ernst & Young and the reputation of each of our professionals." The importance of collaboration and consultation was emphasised "in dealing with complex or subjective accounting, auditing, reporting, regulatory and independence matters"; as also was the importance of "determining that an engagement team and client have correctly followed consultation practice."

73. The requirements of "[r]eview and consultation" were explained more fully later in the document: for "complex and sensitive matters, we require consultation outside of the audit engagement team with other personnel who have more experience or specialized knowledge, primarily Professional Practice and independence personnel". There is a "formal process" for this. Staff are encouraged "to speak up if a professional disagreement arises or they are uncomfortable about a matter having to do with a client engagement". If an individual remains unsatisfied, he or she:

> "has both the right and the obligation to see that the issue is referred to the next level of authority. If the engagement quality reviewer makes recommendations that the engagement partner does not accept and the matter is not resolved to the reviewer's satisfaction, the report is not issued until the matter is resolved by following the appropriate consultation processes for resolution of professional differences…"

74. There is also a section sub-headed "[d]ocument retention", under the heading "[c]ompliance with legal requirements". This requires member firms to retain and preserve documents in accordance with legal requirements, including "whenever any person becomes aware of any actual or reasonably anticipated claim, litigation, investigation, subpoena or other government proceeding involving a member firm or one of its clients that may relate to a member firm's work".

75. In December 2012, the LBMA decided that gold refiners must apply for GDL status before applying to become associate members. This was a new requirement, not applicable to Kaloti because it was already an associate member of the LBMA; but it signalled that Kaloti would be likely to need GDL status with the LBMA in order to maintain its associate membership.

76. Later the same month, EY Dubai agreed to undertake a financial audit of Kaloti for the financial year that was due to end on 31 December 2012. The financial audit is separate and distinct from any assurance process, which is not required to be done by a qualified accountant. The claimant's colleague responsible for the financial audit, Sharif Sikander, introduced the claimant to Kaloti as it (among other potential clients) wanted to undergo the audit process required under DMCC and LBMA protocols and procedures.

77. It was agreed that the claimant, through EY Dubai, would take the lead in developing its "conflict minerals" business in Dubai. He became the main point of contact with

the DMCC. He sought help from EY colleagues in the UK, Australia and the US to develop the gold proposals. The claimant met the Dubai refiners and selected his assurance audit team. I accept his evidence that it was understood the audits would conform to both LBMA and DMCC requirements, which at the time were similar.

78. The claimant had overall responsibility for the audits, as the engagement partner. He was helped by Andrew Britton, an expert in the field working as a senior CCASS manager at EY UK. Mr Britton travelled to Dubai to assist. I accept the claimant's evidence that his UK office invoiced the clients by the hour for his time and that he played a leading role (as he said in a later email sent on 7 May 2013) while working on the audits in Dubai with the claimant.

79. On 3 January 2013, the DMCC issued a review protocol on responsible sourcing of precious metals. Use of the review protocol was compulsory for the purpose of ensuring compliance with the mandatory requirement to implement the DMCC's practical guidance document (issued in April 2012) for the responsible sourcing of precious metals. The practical guidance drew on a process involving five steps developed by the OECD and the LBMA.

80. The five steps were: (1) establishing robust company supply chain management systems; (2) identifying and assessing the risks in the supply chain; (3) developing and implementing a risk mitigation/control plan; (4) carrying out independent third party audits of gold and precious metals companies' due diligence practices; and (5) reporting annually on responsible supply chain due diligence. For the fourth and fifth steps, refineries could only use DMCC approved reviewers, which included Ernst & Young and the three other "big four" accountancy firms.

81. The DMCC's review protocol provided in section 4, in relation to step 3, a "high", "medium" or "low" risk classification for characterising the adequacy and effectiveness of the audit client's plan and policies for "risk mitigation/control". Separately, in section 5, it provided that certain circumstances encountered during the review period would "constitute a breach of the review protocol".

82. These were: denial of access to relevant audit client locations, unethical means to influence the outcome, misrepresentation, falsification of documents by the refiner or by any supply chain actor with knowledge and acceptance of the refiner and dealings with any supplier directly or indirectly associated with conflict precious metals. The protocol continued:

> "Additional areas may also constitute a breach of the review protocol and accordingly areas of zero tolerance and/or corrective/preventive actions will be detailed in due course.
>
> In this case, the reviewer should report any of the above-mentioned breaches to DMCC with supporting evidence."

83. On 18 January 2013, the LBMA issued a document called "responsible gold guidance". The avowed purpose was "to combat systemic or widespread abuses of human rights, to avoid contributing to conflict, to comply with high standards of anti-money laundering and combating terrorist financing practice". The same five steps, in slightly different words, were to be followed. To retain or acquire GDL status with the LBMA, refiners had to undergo the five step process.

84. The same day, the LBMA issued much more detailed "third party audit guidance" addressed to auditors, for the purpose of their involvement at the fourth and fifth stages of the process. One of two international standards was to be used: ISO 19011 (not used in the present case) or ISAE 3000. The acronym "ISAE" denotes "International Standard in Assurance Engagements Other than Audits or Reviews of Historical Financial Information", i.e. non-financial assurance audit engagements.

85. As the LBMA explained in the third party audit guidance, in an ISAE 3000 engagement, the auditor "issues an independent assurance report for the stated reporting period, which expresses a conclusion designed to enhance the degree of confidence of intended users in the Refiner's reporting on compliance with the *LBMA Responsible Gold Guidance*." A "three-party relationship" exists between the refiner, the auditor and the end user.

86. The guidance document went on to explain that the auditor should be selected from an LBMA approved list; if the auditor was not on the list, the auditor should be required to submit specified information to the LBMA to show the requisite ethical conduct, competence and expertise. The document contained detailed methodology for conducting the audit and assessing risks.

87. The guidance document then explained that where non-compliance is encountered and ISAE 3000 is used, the risk is assessed as low, medium, high or "zero tolerance". Zero tolerance breaches must be addressed "immediately"; high risk matters within 90 days and medium risk matters within 12 months. Where ISAE 3000 is used:

> "Any instances of zero tolerance non-compliance should be reported by the auditor to those charged with governance at the Refiner within 24 hours and communicated to the LBMA Chief Executive".

88. On 5 February 2013, the claimant emailed Mr Ali expressing his gratitude to Mr Sikander for helping EY to become a DMCC approved auditor for conflict minerals. Mr Britton followed up on 11 February with some emailed queries about the DMCC responsible gold guidance process. Mr Britton debated the question of estimated hours and fees internally with an important audit team member, Saravanan D (referred to thus not because of any anonymity order but because he was known by that name).

89. On 19 February 2013, Rebecca Adamson of the LBMA emailed Etihad Gold, another refiner which also became an assurance client of EY Dubai, in response to a query, that the independent assurance auditor would have to meet the requirements set out in the LBMA's responsible gold guidance document; and that as Etihad Gold "intend to use one of the big four, you should not have any problems in ensuring that they complete the audit process".

90. Ms Adamson added that the LBMA was "currently creating a list of Recommended Auditors to help those refiners who don't have an auditor to start the process". Etihad Gold's general manager forwarded this news by email to the claimant. The next day, a draft application in the name of "EY Middle East (Dubai Branch)", a "Partnership Firm", was prepared (bearing the date 20 February 2013), naming the claimant as the primary contact and the "authorised person" and seeking to become a LBMA recognised audit body.

91. On 22 February 2013 Ruth Crowell, then deputy chief executive of the LBMA, gave a presentation with slides for third party auditors of refiners undergoing the responsible gold audit process. The presentation slides were also posted on the LBMA's website and participants could dial in to the presentation from across the world. One of the slides informed that there were only two auditors on the recommended auditors list; that an application form was available; and that "[a]ny independent, certified auditors are eligible to conduct the LBMA audit, provided they have the required credentials."

The Kaloti assurance audit

92. The next day, Mr D and the claimant met Tareq El-Mdaka of Kaloti. Mr D sent the final engagement letter the same day (23 February 2013), assuring Mr El-Mdaka that they "would give the right recommendations for you to meet the LBMA and DMCC guidelines". The engagement letter was signed by the parties on 26 February 2013. The claimant, as engagement partner, signed for EY Dubai.

93. The engagement letter heading referred only to an assurance process "in accordance with DMCC Guidelines" but the attachments were replete with references to the LMBA's responsible gold programme of January 2013. The work statement was clearly intended to satisfy the requirements of both bodies. That is no surprise because their respective requirements are similar and a refiner like Kaloti would want to be found in compliance with both. The period of the assurance audit was stated to be the calendar year 2012.

94. The work statement made clear that the auditor would make "a statement in relation to the application of the requirements as set out within the DMCC's … [review protocol and practical guidance] and the LBMA Responsible Gold Programme." The procedures were to be conducted in accordance with ISAE 3000. The auditing and reporting process was then described in detail. The DMCC review committee was to "decide the final outcome of the assessment"; but involvement of the "LBMA review committee" was envisaged as an assessing body.

95. The terms and conditions attached to the letter included what are likely to have been EY standard terms. A confidentiality clause in the standard form was included at clause 25, with an exception permitting disclosure of information where the information "must be disclosed under applicable law, legal process or professional regulations". A separate non-disclosure agreement was also signed by the parties, with a similar exception where information "is required by law, regulation or professional obligation to be released".

96. A copy of ISAE 3000 was before the court. Paragraph 4 required compliance with the ethical requirements in Parts A and B of the IFAC Code. I have mentioned these already. The process of evidence gathering and reporting is then described in detail. The content of the assurance report is then addressed. It should include, among other things, the auditor's conclusion or separate conclusions on different aspects of the subject matter.

97. Where a conclusion is "other than unqualified, the assurance report should contain a clear description of all the reasons …" (paragraph 49(j)). The following paragraphs (51-53) then state circumstances in which conclusions should be qualified; for example,

where the audit client impedes access to evidence; or where due to certain factors, an unqualified conclusion would be likely to mislead intended users.

98. Mr D asked Mr Britton in email exchanges in late February and early March 2013 to take the lead and to come over from the UK to Dubai to help with the engagement. Mr Britton agreed and subsequently did come. The claimant's budgeted hours for the Kaloti audit were quite low; he was to maintain oversight and responsibility but not undertake the day to day work, which would be done by Mr D and others in the team.

99. On 5 March 2013, Mr D and two EY Dubai colleagues on the claimant's audit team visited Kaloti and toured the gold souk office where customers bring in gold bars to be sold or refined. The gold souk office consisted of a laboratory, receiving area, vault area, posting area, financial audit area and a cashier. The audit team members met two members of the Kaloti family. Kaloti offered clients the services of laboratory testing and refining as well as purchasing gold, often in cash.

100. The audit team learned that about 40 per cent in value of the transactions were in cash. The team observed large quantities of cash in the vault. "High risk" cash transactions involving gold supplied from Sudan ($52 million) and Ghana ($100 million) were identified by the team. Other cash transactions were much larger, one as high as $775 million. Mr D or his colleagues recorded that "[a]ll transactions doesn't have documentation which increases the risk". The team calculated that about $5.2 billion of business was done in cash during 2012. This was the cash transactions issue.

101. About two tonnes of gold had been bought in cash from "call" customers who had no account with Kaloti and without any adequate documents or "KYC" ("know your client") procedures. These were considered high risk transactions. One of the suppliers of recycled gold to Kaloti for cash, Viren Jewellers, was known to deal with another entity, Yogesh Jewellers, which had been identified adversely in a UN Security Council report.

102. The audit team also discovered the evidence constituting the Morocco gold issue, which I have summarised already. The audit team saw about four tonnes of silver bars which, Mr Osama Kaloti explained, were not silver but more than 80 per cent gold, with a coating of silver. The team's subsequent note explained:

> "He took a scanner and showed that the gold content was more than 85% and these bars are silver coated which are from Moroccan supplier. He said that its normal to receive silver coated gold bars especially from Morocco due to the gold export limits imposed by the Moroccan customs. He also said that the silver coated gold bars are declared as gold in Dubai customs and they rely on Dubai customs paper."

103. The supplier was called Renade International which, as it later turned out, was run by two brothers subsequently the subject of an investigation by French police leading to convictions in a French court on charges related to drug trafficking and money laundering. The reason for coating the gold in silver, Mr Osama Kaloti explained, was that Morocco does not allow direct export of gold. The audit team regarded these as high risk transactions.

104. Mr D emailed Mr Britton on 6 March 2013 asking if he would apply to add EY's name to the LBMA's list of recommended auditors. Mr Britton replied that there were no UK based gold refineries but he would be happy for Mr D to deal with the process.

There was no mention of any impediment or further requirement for approval from elsewhere within the EY network, before the application could be submitted. It was logical for EY Dubai to make the application, in view of the new assurance business it was winning in the gold refining industry there. At the time, no one suggested otherwise.

105. Mr D and Mr Britton met Hassan Nasser of the DMCC on 19 March 2013. The DMCC then produced a document called "Notice to Approved Reviewers", which Mr D forwarded to Mr Britton. The latter commented on the document, noting that the DMCC did not expect refiners to be compliant immediately; full compliance could take three years or more. Government action would be needed. The DMCC needed advice and were open to advice from EY.

106. Mr Britton thoughtfully added that they would "need to consider the scope and activities of our current engagements to ensure that we are doing the right things, given this information and what we are seeing at our clients" – words that clearly included reference to the audit team's findings on 5 March. He reasoned that the focus would have to be on recommendations that help clients prepare for compliance since "we know already that none of our clients can comply".

107. At this stage, the Kaloti assurance audit envisaged the preparation of three reports:

(1) an unpublished "management report" by EY Dubai, detailing Kaloti's performance against applicable standards, stating the extent of compliance for each requirement, classifying the risk level in each case of non-compliance as low, medium, high or zero tolerance; and stating an overall conclusion on the extent of compliance with an overall risk rating;

(2) a published "compliance report" by Kaloti, stating its own level of compliance in a manner consistent with the management report, stating its level of compliance for each requirement, classifying risk levels using the same classification as in the management report and stating an overall conclusion on the extent of the refiner's compliance, with an overall risk rating; and

(3) a published "assurance report" by EY Dubai, explaining whether the compliance report fairly describes Kaloti's performance against the requirements of the applicable standards.

108. The claimant's team continued working on the Kaloti audit. In the first week of April 2013, the DMCC held a conference in Dubai. Ms Crowell attended on behalf of the LBMA. Mr D met her and emailed Mr Britton afterwards, reporting her view that the Dubai gold refiners would only partially comply with required standards during the first year. The LBMA's publication, engagingly named "The Alchemist", reported during the same month a decision of the LBMA's membership committee that only refiners that were "Good Delivery accredited" could apply to become members.

109. Also in April 2013, the LBMA issued its "Good Delivery Rules for Gold and Silver Bars", and "Application Procedures for Listing". This explained to would be applicants for inclusion in the "LBMA Good Delivery List" who are refiners of gold and silver bars how to apply for inclusion and the criteria that had to be met. Applicants would be "unlikely" to succeed unless (among other criteria) they had existed for more than

five years, been involved in gold or silver refining for at least three years and, in the case of gold refiners, they had implemented the LBMA's responsible gold guidance.

110. These developments meant that the prospects for Kaloti (and other Dubai refiners) to achieve GDL status with the LBMA did not look promising in the near future. It may be inferred that Kaloti's continued associate membership, which dated back to a time before GDL status was a pre-condition of associate membership, could be in jeopardy when its associate membership fell to be renewed.

The claimant's concerns

111. At about this time, the claimant started to become concerned about the role of the DMCC. I accept as honest and truthful his evidence that, based on his experience of other regulatory bodies, he had expected the DMCC to act like an independent non-interventionist industry regulator rather than as an advocate for the refiner; and that he was concerned to discover evidence that the DMCC was intervening in support of Kaloti and not behaving impartially.

112. I accept his evidence that he witnessed a telephone call from Chirag Sharma of the DMCC to Mr D while in a taxi with Mr D, during which Mr Sharma was disputing one of the team's adverse findings, namely that Kaloti was not differentiating between mined gold and scrap gold. Mr Sharma disapproved of the team's insistence that Kaloti should have distinct due diligence processes for mined gold and scrap gold. Mr D told the claimant it was not the first indication of the DMCC's lack of impartiality: Kaloti had already asked the team to refer an issue to the DMCC.

113. On 29 April 2013, Mr D emailed Mr Nasser of the DMCC, seeking a meeting to discuss issues of risk assessment methodology and levels of risk assessment. On 6 May, Mr Sharma sent the team version 2 of the DMCC review protocol, with an invitation to comment. Mr D met Mr Sharma that evening and impressed on him the need for distinguishing mined gold from scrap jewellery; cash management systems for transactions over 40,000AED; and enhanced due diligence for "hand carried gold shipments".

114. At the start of May 2013, Mr Sharma and Mr Nasser were in Paris for a conference of the OECD, where they briefly met Mr Britton. He told them, as confirmed in a follow up email of 7 May, that he needed to explain how ISAE 3000 worked, to avoid any misunderstanding. He explained that ISAE 3000 cannot be used to provide a direct opinion on the refiner's performance or management controls; in an ISAE 3000 audit, the auditor is "confirming whether or not the auditee has correctly described their performance".

115. Mr Britton explained that this was not consistent with the DMCC's guidance which required the auditor to determine the "auditee's" level of compliance. He explained that in practice, the refiner and the auditor would agree on the level of compliance and if there is agreement, the auditor would provide a "clean" audit report, but if the auditor believes the refiner has not correctly described its performance in the compliance report, the auditor will "describe such exceptions" in the assurance report.

116. The claimant's concerns were not allayed. No ratings had yet been applied and the cash transactions and Morocco gold issues remained. The team had uncovered transactions

involving gold from Sudan and the Democratic Republic of the Congo, and from Iran which was subject to US and European Union (**EU**) trade sanctions. On 7 May 2013, Mr D reported to the claimant that Mr El-Mdaka was "not so happy" about the measures discussed with the DMCC; Mr D had then met the DMCC with Mr El-Mdaka who had "agreed to take 'some' steps towards reducing cash transactions and quality measurements" and was "happy the issue was solved".

117. However, Mr El-Mdaka telephoned the claimant in the week of 18 May 2013 and sought a meeting, which was arranged. Before the meeting, on 20 and 21 May the team started to apply some provisional non-compliance ratings, some medium risk, some high risk. When the meeting took place on 22 May, the claimant met Mr El-Mdaka and his wife, Dina Kaloti, for the first time. I accept as truthful and honest his evidence that he faced a very aggressive and angry client when he presented the team's findings to them at the meeting.

118. I accept his evidence that the Kaloti representatives protested vocally about the Morocco gold and cash transactions findings and lack of due diligence and that they asked the claimant to refer these matters to the DMCC before confirming their findings. I accept, also, that Ms Kaloti complained of double standards and accused the team of being difficult in that EY Switzerland had issued a "clean" assurance report in respect of a Swiss refiner, "PAMP" (Produits Artistiques Métaux Précieux, SA (**PAMP**)).

119. The claimant was in a difficult position, as he made clear in oral evidence. He was trying to manage a very angry client while he could not ignore the findings his team had made. He agreed to provide a draft of the management report without, at that stage, including any ratings or a final conclusion and without including the findings disputed by Kaloti until these had been discussed with EY's internal legal department. He also agreed that the team would conduct further on site investigations and obtain more evidence.

120. At the end of the month, prompted by a confidential intervention from another refiner, the claimant floated with Mr D the idea of letting the DMCC decide on the interpretation of risk and the appropriate rating; he reasoned that "after all, this whole exercise was initiated by them and for them". He asked Mr D to fix a meeting with the DMCC. I accept his evidence that he still felt the DMCC would, as he put it in oral evidence, "do the right thing". Mr D agreed and said he would fix a meeting with the DMCC and a conference call with Ms Crowell of the LBMA "to discuss these issues from their perspective".

121. In accordance with what was agreed at the 22 May meeting, on 29 May 2013 another team member, Vishal Kumar, sent to Mr El-Mdaka a draft management report omitting some of the matters Kaloti had disputed, but adding in a subsequent email the next day that the Morocco gold and cash transaction issues were under consideration by the legal team and "our final stand would be conveyed to you by Monday [3 June]."

122. Mr D (who at around this time went to India for the birth of his child) commented the same day that he was still worried about the Morocco gold issue as "everyone in [Kaloti] including Tarek, Osama, Dina and the compliance officer verbally said that the gold was exported as silver and declared as gold in Dubai". He asked Mr Kumar to ask for the "the declaration document at the Morocco customs when the gold was exported".

The claimant expressed discontent, internally, that the draft report had been sent to Kaloti with ratings that downplayed the seriousness of the issues.

123. In cross-examination of the claimant, the defendants attempted to elicit that he was happy to leave the difficult issues to the DMCC. Although he did float that idea in the hope that the DMCC would start to behave independently and properly, subsequent events show that, to the contrary, the claimant's concerns increased to the point where he started to escalate the matter within the EY organisation.

124. Over that weekend, he emailed EY lawyers at MENA level, Marko Andjelkovic, EY MENA general counsel, and Primo Molin, EY MENA's risk management leader, asking for advice, explaining that the client's supply is supposed to be free from money laundering, support to non-state armed groups and bribery and corruption. Mr Andjelkovic advised that he seek further views on any reputational damage, perhaps at EMEIA or global level and, subject to them, make "a factual finding" and "state the facts without making any inference or opinions".

125. The claimant sent an SMS (text) message to Phil Stanton, the COO of EY MENA, asking to speak to him about the matter. Mr Stanton, I accept, called the claimant back, told him to continue with the team, confirm the findings with Mr Britton and meet him and Olivier Breillot, EY MENA head of quality and risk management and a member of EY's Europe Executive, in Dubai on 5 June 2013 to discuss it further. The claimant also sent an "urgent" email to Mr Ali, his line manager and MENA's assurance leader, on 3 June asking to speak to him on a secure land line about a conflict minerals issue in Dubai.

126. Eventually, he reached Mr Ali on his mobile telephone, in Europe. Mr Ali referred to a previous incident in which the EY Dubai office had been threatened with closure after discovering fraud within the Dubai subsidiary of a US based company. He said it was good that the claimant would be meeting Messrs Stanton and Breillot and advised him to contact Juan Costa Climent, a Madrid based higher line manager of the claimant and global head of CCASS.

127. These steps to escalate the issues to higher levels within the EY network are not consistent with the defendants' suggestions that the claimant was sanguine about leaving the difficult issues to the DMCC; and undermine the defendants' case that he later sought to inflate the risk levels artificially, in opportunistic pursuit of publicity.

128. I pause to interject that I found the claimant to be, in his account of events, a truthful, honest and reliable witness with a high degree of knowledge and recollection of events, nearly as good a knowledge of the documents as counsel, and a faithful memory of events. His evidence was delivered without embellishment or gloss or any attempt to weave covert advocacy into his account. He was relentlessly and vigorously cross-examined by Mr Daniel Toledano QC, for the defendants, over three full days with frequent challenges to the veracity of his evidence to the court. The longer it went on, the more apparent it was to me that his evidence was essentially true and honest.

129. Returning to the narrative, also on 3 June 2013, Mr Britton arrived back in Dubai to help and join in the discussions. The claimant and members of his team met Mr Sharma and Mr Nasser of the DMCC that day and, I accept, conveyed to them that it was likely the ratings of two refiners (not specifying which two) would be very poor. The DMCC

representatives expressed concern that this would damage Dubai's image internationally, could impact adversely on the gold trade and the Dubai economy, could discourage buyers of gold and lead to refusal by the LBMA of GDL status for Kaloti and loss of its LBMA associate membership.

130. On 5 June 2013, Mr Ali emailed the claimant saying he had briefed Mr Climent, who would shortly call the claimant. The same day, Mr Sharma of the DMCC emailed the claimant asking whether the review period could be changed to January to March 2013 (instead of the calendar year 2012) and if so "would there be a material difference that will impact the rating positively?"

131. This email did nothing to reassure the claimant about the probity of the DMCC's role in the audit process. It is consistent with Mr Britton's emailed comment the next day that the claimant "is getting some heat from the regulator who is keen to promote the Dubai gold industry on the global stage" and has "unrealistic expectations of their industry's level of compliance … there is an undercurrent of them looking to use EY's brand for their advantage …" and the regulator is "effectively an extension of the UAE government".

132. Also on 5 June, the claimant met Messrs Breillot and Stanton. None of the parties have disclosed any record of the meeting. I accept the claimant's account as honest, truthful and accurate. It was not seriously challenged in cross-examination and neither Mr Stanton nor Mr Breillot was called. What was put to the claimant was to the effect that the DMCC had done nothing to intervene improperly in the audit process. The claimant begged to differ.

133. The claimant complained of the DMCC's inappropriate behaviour, the importance of the underlying purpose of preventing money laundering and funding of armed conflict and the need for EY to retain its independence and integrity and avoid the risks to EY's reputation should they be compromised. Mr Stanton's proposed solution, supported by Mr Breillot, was a variant of the DMCC's suggestion. He proposed cancelling the audit and re-labelling it a "gap analysis", and then running a fresh audit with a different, future, compliance period.

134. It was suggested to the claimant at trial that there was nothing unethical about Mr Stanton's proposed gap analysis. The claimant gave reasons for disagreeing, both at the meeting on 5 June 2013 and in written and oral evidence to the court. To re-brand the present audit as a gap analysis, he said at the meeting, would obscure the serious findings of the team to appease the commercial interests of the DMCC and Kaloti and to win future business with the Dubai government. The findings were so serious, he said, that reporting to relevant national and international bodies must be considered.

135. He sought next to enlist the support of Joe Murphy of EY Dubai. Mr Murphy was concerned that the cash transactions issue may not have featured in EY Dubai's financial audit of Kaloti. He made a call to a person involved in the financial audit, which confirmed that EY Dubai had raised no issue about cash transactions in that financial audit. The claimant said it might be necessary to report the findings to the LBMA. Mr Murphy expressed concern; he repeated Mr Ali's anecdote about the fraud case involving the Dubai subsidiary of a US company and was worried that EY Dubai might lose its license to practise in Dubai. Mr Stanton then joined them, then left to catch a flight.

136. Mr Murphy telephoned the COO of the DMCC in the claimant's presence and asked for an urgent meeting. Mr Murphy suggested that the DMCC would not want to receive any briefing for the meeting in writing. The meeting was fixed for 10 June 2013. Mr Stanton then called from the airport and sought to schedule a conference call with Mr Murphy included, over the weekend. Mr Murphy said this was unnecessary and that the matter should not be discussed over the telephone.

137. The claimant was concerned that he was not getting support from his senior managerial colleagues and that the solution being proposed was unethical. References to avoiding conversations in writing and by telephone increased his concern. He feared persecution by the Dubai authorities if they perceived him as a troublemaker without the weight of senior EY management to protect him. His concerns extended to his family.

138. I accept that he considered at this point whether he might have to leave Dubai with his family and that he explained the situation and discussed it with his wife Ms Montford during the evening of 5 June 2013. I accept the evidence of the claimant and Ms Montford that they needed to be ready to leave Dubai if that became necessary and then return later if and when it was safe to do so. It was agreed that they would not leave before the meeting with the DMCC fixed for 10 June and that the claimant would not be confrontational at that meeting.

139. Ms Montford's evidence was that when the claimant told her the situation, she well understood that reporting the violations could seriously upset the Dubai government and the audit clients; that the government had a reputation for imprisoning those that upset them and not allowing them a fair trial. She was aware of penalties for what in the UK would be considered minor matters such as "kissing on the beach". She had heard of cases where people had disappeared and of travel bans imposed on the families of persons incurring the disapproval of the regime.

140. I accept that the accounts of both the claimant and Ms Montford are honest and truthful; that their fears were genuinely entertained and that they were not fanciful or manufactured for some undisclosed ulterior motive, as the defendants suggested. There is no evidence to support the defendants' speculation. The defendants contended that the claimant's position makes no sense. But those best placed to support the defendants' assertion (such as Mr Ali, Mr D, Mr Kumar and Mr Murphy), have not been called.

141. In my judgment, it is the defendants' position that makes little sense. It does not fit with the claimant's and Ms Montford's love of life in Dubai, including their prosperous, settled, comfortable and tax free lifestyle; nor with the application the claimant made for an entry permit (which arrived on 4 July 2013, valid for two months) to allow the claimant's mother to visit from Jordan.

142. The defendants also sought to argue that the government of Dubai would have no interest in a minor player such as the claimant. I find this reasoning naïve. It overlooks the following points: that the DMCC is a Dubai government organisation; that the DMCC's avowed purpose is to promote the gold trade in Dubai; that the turnover of the trade runs into billions of US dollars each year; that conflict minerals are internationally recognised as associated with terrorist financing and organised crime; that there were reasonable grounds to suppose that Kaloti could be involved in money laundering; that the claimant had personally warned the DMCC face to face that the ratings of two

refiners would be very poor; and that, as at 5 June 2013, he had good reason to apprehend that he did not enjoy the support of his senior EY managerial colleagues at regional or global level.

143. In closing submissions, Mr Toledano, for the defendants, conceded with minimal forensic enthusiasm that "if you are a very vocal critic of the government, then there are cases where there have been concerns about human rights which have been written up in Amnesty reports and so on". I accept that concession. I have documentary evidence to support it, in the form of reports from human rights and other non-governmental organisations.

144. On 6 June 2013, Mr Britton sent the claimant a near final (apart from formatting) version of EY Dubai's management report on Kaloti. It was damning, with four separate "high risk" non-compliance findings, including in relation to the Morocco gold and cash transactions issues, both described in the narrative; and an overall conclusion of "high risk" non-compliance with applicable requirements.

145. On 7 June 2013, Mr Stanton called the claimant and confirmed his and Mr Breillot's plan to substitute a "gap analysis" for the current audit, and move the compliance period back. The claimant repeated his disagreement and asked Mr Stanton for an email to confirm that he proposed that the claimant should put the suggestion to the DMCC at the forthcoming meeting fixed for 10 June. Mr Stanton said he would not put it in an email but that the claimant should trust him and that EY would stand by him. The claimant thanked him but remained uncomfortable, in particular because those involved at a more senior level were unwilling to put anything about the matter in writing.

146. On 9 June 2013, Mr D emailed the management report to Kaloti. In substance, it was the same as the version approved by Mr Britton. Mr El-Mdaka sought a meeting the same evening. The claimant emailed Mr Murphy asking him to come but Mr Murphy did not respond or attend the meeting. I accept the claimant's evidence that he regarded the correct risk rating as zero tolerance but was apprehensive about saying so to Kaloti or the DMCC, lest he put himself personally at odds with the DMCC. The rationality of that position is supported both by the seriousness of the Morocco gold and cash transactions issues and by the conduct hitherto of Kaloti and the DMCC.

147. The meeting with Mr El-Mdaka in fact took place the next morning, before the scheduled meeting with the DMCC. His tone was more conciliatory than previously, but he sought removal of references to Sudan. He asked what he could do to get the DMCC to help. The claimant said the DMCC could decide to cancel the whole audit. Mr El-Mdaka said that would not solve the problem as the cash transactions would continue; he did not wish to stop dealing in cash. He said the export documents from Morocco confirmed that the gold exported from there was described as silver.

148. The claimant then went to the DMCC's offices. Joe Murphy attended. So did the COO, Gautam Sashittal, as well as Mr Nasser and Mr Sharma. Mr Sashittal said the findings put the DMCC in a difficult position. Mr Nasser started to debate the findings but the claimant said they were supported by evidence and could not be changed. Mr Murphy then raised the possibility of cancelling the audit and treating it as a gap analysis. The claimant asked for a written communication from the DMCC embodying the proposal.

149. I accept the claimant's evidence that he regarded Mr Murphy's and the DMCC's plan as, in the phrase used in his written witness statement, "collusion with a conflicted regulator" and that the claimant decided, and told his wife that evening, that he could not lend his name to what was being done and would have to challenge it, and would have to do so from outside Dubai to avoid any risk to his family or himself.

150. Mr Climent had scheduled a call with the claimant for 11 June 2013. I accept as truthful the claimant's account of the call, which is not contradicted by Mr Climent or anyone else, or any document. Mr Climent spoke at length about the audit of PAMP. He offered to come to Dubai with Mr Mouillon, the global head of risk management. Mr Ali had briefed Mr Climent about the need to resolve the Dubai issue in a manner consistent with the PAMP issue. Mr Climent suggested to the claimant that EY could publish a "white paper" showcasing the DMCC's efforts to scrutinise the gold trade in Dubai.

151. The claimant passed this offer to Mr Murphy, who did not like the idea. He thought the help of the global office was not needed; EY Dubai could handle the issue itself. But when Mr Ali was in Dubai a few days later, he was concerned about the audit findings when the claimant relayed to Mr Ali his disagreement with the "gap analysis" proposal from Mr Stanton.

152. I accept the claimant's uncontradicted evidence that Mr Ali made the observation that "Dubai is not a democracy" and that they would have to do what they were told by the EY leadership. I accept also his evidence that Mr Stanton and Mr Breillot instructed him and Mr Murphy to suggest to the DMCC that the audit be cancelled and a fresh audit undertaken with a compliance period starting on 1 July 2013; and that Mr Murphy then proposed this to the DMCC.

153. On 18 June 2013, Kaloti emailed the claimant and asked whether EY could contact the LBMA and ask them whether they would accept cash dealings with "KYC approved" clients and suppliers and cheques with recognised banks instead of cash. The claimant sought help from Mr Britton, who responded by email saying he did not know what was meant by the LBMA accepting those proposals.

154. Mr Britton added that he had met Mr Sashittal, the DMCC's COO, that morning and explained that as auditors EY could not revise its opinion "just because the auditee doesn't like it" and that Mr Sashittal recognises the DMCC's responsibility to set standards. The next day, Mr Sharma emailed the claimant saying there were to be changes to the DMCC's standards as set out in its review protocol and asked for a meeting to discuss them.

155. The proposed changes were that the auditor's final rating in the assurance report would be removed and mentioned only in the (unpublished) management report; "non-compliant low risk" would become "compliant with low risk deviation", such that in the refiner's compliance report these items would be reported as "fully compliant"; and the DMCC review panel would no longer provide a "final rating", but would use the (unpublished) management report recommended final rating to decide on its next steps.

156. Mr Sharma made it clear that those changes were intended to be applied to "the current review process" and sought the claimant's advice "to ensure that the integrity of the current review process is not compromised". He proposed an extension of the reporting

deadline to 15 July 2013 to allow the claimant "sufficient time to re-assess the ratings". The claimant told Mr Sharma, despite the latter's efforts to dissuade him, that the reports would need to refer to these changes to applicable standards in mid-audit.

157. The claimant concluded that the DMCC had dropped its plan to cancel the audit and had decided instead to change the standards applicable to it. Mr Sharma confirmed by telephone to the claimant over the weekend that the DMCC had decided against cancelling the audits as this could raise suspicions internationally about the integrity of the audit process.

158. On 25 June 2013, the claimant and Ms Montford exchanged emails using the claimant's work email address, on the subject of planned summer holidays including a family wedding in England over the summer. Ms Montford referred to budget airline costs and a planned train journey to London, among other things.

159. I reject the defendants' suggestion that this exchange (available to EY, as Ms Montford pointed out) is evidence that the plan to leave Dubai if necessary was fabricated. The family did not yet know for sure that they would have to leave Dubai and, if so, whether and if so when they would be coming back. Meanwhile, ordinary holiday arrangements had to be planned and booked. As Ms Montford patiently explained to Mr Toledano, it was not beyond her and her husband to plan on the basis of alternative and contingent scenarios.

160. On 27 June, Mr Sharma emailed all market participants notifying them of the changes to the DMCC protocol, heralded in his previous email to the claimant. The latter responded the next day that this was not consistent with the LBMA's requirement that the compliance report must include the refiner's final conclusion and overall rating which should be compliance, partial compliance, non-compliance or zero tolerance.

161. The claimant drew the conclusion that the DMCC was making the changes to enable refiners to bury any negative findings rather than having to state them publicly; and that EY managers at regional and global level would be willing to cooperate with the DMCC in that regard. The individual ratings would still appear in the published compliance report, but without an overall rating appearing anywhere publicly.

162. I accept the claimant's evidence, uncontradicted by any other witness, that the claimant, the team and Mr Britton (who was not called and whose computer was "recycled" in 2014 when he left the EY organisation) had formed the view that the Morocco gold finding should be characterised as a zero tolerance finding and that the claimant was of the view that this triggered an obligation to report the matter immediately to the LBMA.

163. From about this time, the claimant started forwarding work emails to his private account. On 30 June 2013, he forwarded Mr Sharma's email announcing the changes to the protocol, copying his wife's private email address. He met Mr Ali and Mr Stanton in Dubai when they attended the annual MENA directors' and partners' meeting at the beginning of July 2013.

164. He told Mr Ali that a zero tolerance finding had been made and the matter had to be reported to the LBMA and perhaps other external bodies, subject to consulting the firm's legal and compliance experts. Mr Ali urged caution, repeating the warning that

"Dubai is not a democracy" and arguing that the decision how to proceed had to be made by EY at global level, given the seriousness of the matter.

165. He met Mr Stanton briefly. Mr Stanton agreed with Mr Ali that the matter should be escalated to global level and advised that the claimant should meet Mr Climent. Mr Stanton asked the claimant not to copy him, Mr Stanton, into the email the claimant was to send to Mr Climent. The claimant was unsure whether he would now receive support for his position from his superiors within the EY organisation, but hoped he might. He emailed Mr Climent on 5 July, copying Mr Ali but not Mr Stanton.

166. In his email, he explained the situation, including changes to the DMCC's audit protocol after the DMCC was made aware of the team's findings. He raised the concern that "EY might have obligations to disclose some of our audit findings to local authorities and some international bodies and governments". He said he had discussed these matters with EY MENA's leadership, who had advised that given the potential impact on EY's global reputation, "any course of action should be decided by the Global Office". The claimant therefore sought a meeting in London, as early as 13 July 2013.

The claimant's preparations to leave Dubai

167. He discussed the matter with Ms Montford, who was fearful of staying behind in Dubai with the children, feeling they would be at risk of a travel ban. They agreed that the whole family should travel to the UK and that they would make hasty preparations for this. By 14 July 2013, they had sold some furniture, given away some other furniture and arranged for some furniture to be shipped to the UK.

168. They did not at that stage deal with selling their cars, giving notice to the landlord that they were leaving the rented house or disconnecting their mobile phones, internet, television and utilities. They did not know when, or if, they would return. Ms Montford took part in these preparations for departure. I accept her evidence that she is a well educated, well travelled, experienced and worldly wise person who did not take the decision lightly.

169. I accept her evidence that they did not own a house outside Dubai and did not know in what country they would end up living, though they hoped to return to Dubai; that they did not confide in many people about their impending departure; that they decided to ship (and could afford to ship) such of their belongings as they valued particularly. Mr Toledano strove in vain to discredit the evidence of the claimant and Ms Montford that their decision to leave Dubai arose from the claimant's work on the Kaloti audit.

170. During the weekend of 6-7 July 2013, the claimant took part in a conference call with Mr Climent (who was in New York) and Mr Ali. The claimant had the impression that Mr Climent had not read his email, as Mr Climent spoke much about the PAMP audit issue in Switzerland. Mr Climent said he would brief Mr Mouillon about the Dubai issues. The claimant and Mr Ali agreed to set up a meeting in Paris with Mr Breillot and Christophe Schmeitzky (a CCASS partner of EY France). He would then meet Mr Climent in Madrid.

171. The same day, the claimant emailed Mr Schmeitzky and mentioned transferring CCASS resources to Canada. He added that he could be in Europe the following week.

The defendants suggested he did not intend to return to Dubai; if he did, he would not have shipped his furniture to the UK. It was suggested he could be interested in going back to live in Canada again, or at any rate not return to Dubai, for reasons unconnected with any safety concerns or his work on the Kaloti audit.

172. This does not fit with the stream of documents evidencing the claimant's opposition to the way the Kaloti audit was being done; nor with his forwarding of email correspondence from the DMCC to his private email account; nor with the references in communications between EY organisation members to avoidance of a paper trail or telephone conversations about the Dubai gold audits. I accept the claimant's denial that he wanted to live in Canada again; he said he had "done [his] time" there while studying and neither he nor Ms Montford had family there.

173. He explained that shipping the furniture was part of the "contingency plan" lest he be unable to return to Dubai. I accept that, though the defendants did not. It is supported by the email he sent Mr Ali on 10 July 2013, at the end of a chain which began with Mr Ali enquiring anxiously of the claimant after the arrangements to meet Mr Climent the following week. Once the arrangements were made and confirmed to Mr Ali, the claimant explained to Mr Ali that he could not be sure "how long this will take and how it will pan out, therefore, I feel more comfortable keeping my family with me…".

174. Mr Ali pressed Mr Climent to address the conflict minerals issue swiftly: it was "both delicate and critical" for EY's Dubai business. This echoed Mr Murphy's fear that EY could lose its license to trade in Dubai. Mr Ali urged Mr Climent to see the claimant sooner than 16 July and to involve "Risk Management". He stressed that "we need the Global firm to be fully aware of the facts and issues".

175. Those exchanges support the claimant's case, not contradicted by Mr Ali or anyone else, that Mr Ali well knew of the claimant's safety concerns; well knew he had taken his family with him; and well knew he could not say when he might return to Dubai. The view of Mr Ali and Mr Murphy that the matter was very serious for EY's business in Dubai supports the claimant's case that it was the Kaloti audit and its possible consequences that impelled him to take his family with him to Europe.

The meetings in Europe in July 2013

176. The claimant booked a flight to London for him and his family. On the evening of 13 July 2013, the day before their departure, they booked an apartment in London. They flew there the next morning, 14 July. On arrival at the apartment, the claimant went straight to Paris by train, arriving at about midnight. Over the next two days, 15 and 16 July, the claimant attended meetings in Paris and Madrid.

177. First, the claimant met Mr Schmeitzky and briefed him on the current situation regarding the Dubai gold audits. Second, he and Mr Schmeitzky went to join Mr Breillot and Mr Heller, the professional practice director for the EY EMEIA area, at about 10am. Mr Heller made a brief handwritten note of the meeting, the only disclosed note of any of the claimant's meetings with EY organisation personnel. The note is not very full or informative but is consistent with the claimant's account, which I accept, and with the trail of emails.

178. All present expressed concern. Mr Breillot said he would brief Mr Mouillon. The others asked the claimant if they had signed any agreements with the LBMA. The claimant said they had sent an application to the LBMA to be listed as a recommended auditor and they asked for a copy of the application, as well as the engagement letters, reports and guidance documents. The claimant did not have the application with him, but I accept his evidence that he was unaware it was still in draft and had not been sent to the LBMA.

179. The claimant suggested terminating the engagements and briefing the ruler of Dubai, Sheikh Mohammed. He argued this should be done to protect EY's reputation and mitigating reputational damage from being perceived to have colluded with the Dubai authorities in suppressing the findings in the audits. In oral evidence, the claimant explained that from a cultural perspective and from his experience of the Middle East, disclosure to the highest authority in Dubai would be likely to confer protection on EY and its reputation.

180. They also discussed, by way of analogy for comparative purposes, the PAMP audit in Switzerland where a clean assurance audit report had been issued. Mr Schmeitzky said he would follow this up with the Swiss office to see whether the PAMP assurance audit conclusions were accurate. The claimant also raised the issue of the Kaloti financial audit which had not mentioned any of the issues identified in the assurance audit.

181. Mr Breillot said the risk management and professional practice teams would do further work to understand the firm's legal and reporting obligations; the claimant should meet Mr Climent who would work with the leadership team to assess the options and their commercial and reputational implications. The claimant was told he could be needed further in Paris.

182. The claimant then lunched with Mr Schmeitzky, who said he hoped the firm would do the right thing and not allow politics to dictate its course of action. On the way to the airport to catch his flight to Madrid, the claimant called Mr D and asked him about the application to the LBMA. Mr D said he had been distracted by other matters, apologised for not having sent it and asked if he should do so, to which the claimant replied that he could go ahead and send it.

183. The defendants sought to argue that in authorising the application, the claimant acted without the authority of the "board of directors" of EY Dubai. Mr Toledano put this suggestion and attributed authority for his proposition to Hervé Labaude, who enters the story soon. Mr Toledano said that as general counsel for the region, Mr Labaude was "likely to be right about that".

184. The claimant did not agree that the board of directors of EY Dubai existed. The defendants produced no document from Mr Labaude or anyone else showing that it existed. The history of the draft application in February and March 2013 did not include any mention of such a body. It was clearly sufficient to EY Dubai then that the claimant and Mr Britton agreed that the application would be an appropriate step.

185. Mr Toledano then suggested that the claimant should have awaited the outcome of the discussions he was then having with EY persons at regional and global level before authorising the application and suggested it was done to create an obligation to report the audit findings to the LBMA where none had previously existed. The claimant's

response was that the obligation existed irrespective of the application, since it was not necessary to be on the LBMA's recommended auditor list; the application was a marketing measure.

186. En route to the airport to fly to Madrid, the claimant emailed Messrs Schmeitzky, Breillot and Heller thanking them for the discussion and forwarding the various documents they had requested, apart from the application to the LMBA which he did not have. Mr Breillot emailed Mr Mouillon, EY Global head of risk management, Mr Heller, and Mr Labaude, then EY Global's deputy general counsel and EY EMEIA's area general counsel. He asked Mr Heller to forward to Mr Labaude the package of letters, reports and regulations that the claimant had supplied to Mr Breillot.

187. Mr Breillot observed that Mr Labaude had already reviewed the EY Dubai letters of engagement, the LBMA regulations, the DMCC's regulations up to June 2013 and the new, altered DMCC regulations. He went on to explain that he would be seeing Abdulaziz Al Sowailim, EY MENA's managing partner, the next day, to consider the political aspects of the matter which they had not been able to address because they could not be discussed over the telephone.

188. Mr Breillot ended the email by informing that Mr Heller would ask Ben Wareing, EY MENA's new professional practice director, to review the audit files the next day; and asked Mr Mouillon to keep the others posted with any feedback from Mr Climent the next day. The last observation was a clear reference to Mr Climent's forthcoming meeting with the claimant.

189. It is clear from Mr Breillot's email that Mr Ali's concerns had been heeded; the leadership of the EY organisation was starting to engage at a high level with the issues arising from the Dubai gold refiner assurance audits, including risk management in the form of Mr Mouillon, as Mr Ali had requested.

190. Pausing there, I have no evidence of what then went on behind the scenes within the EY organisation, shielded from the claimant's view. The relevant documents are likely to be those not in the bundle by reason of privilege, or in the bundle but marked "redacted" where privilege is claimed (as in the case of Mr Breillot's partially redacted email, just mentioned).

191. The impact of the defendants' decisions thereafter can be seen from the open documents and other evidence, but the reasoning is to a large extent supported only by the evidence of the defendants' witnesses rather than by documents, because of the inhibition of unwaived privilege, to which Mr Labaude, in particular, refers in his witness statement.

192. The sparse open documentary history is the subject of interpretation by the witnesses, which the court must then assess. This task must be undertaken without the benefit of data from the laptops of Mr Breillot and Mr Mouillon which, the defendants explained during the disclosure process, had been lost or destroyed.

193. It is clear from Mr Breillot's email that further discussions took place, perhaps under the cloak of privilege, perhaps in the lost laptop data or perhaps deliberately left undocumented. I have already referred to the documentary evidence of reluctance on the part of EY personnel to create an open record or even discuss the issues over the

telephone. Later in the history there is direct evidence (to which I shall come) of a wish to discuss matters in circumstances of legal privilege.

194. So far as the open documents and parts of documents are concerned, we know that on the same day, 16 July 2013, Mr Heller consulted his global professional practice director, Karen Golz and asked to set up a conference call about an "issue with a Conflict Minerals report for gold activity and related findings", which he needed to discuss with Ms Golz.

195. Yet further, on 16 July 2013 Mr Schmeitzky emailed Mr Breillot to say he had contacted the claimant who had told him, Mr Schmeitzky, that nothing had been signed between EY Dubai and the LBMA and that EY did not appear on the LBMA's list of recommended auditors.

196. After landing at Madrid, the claimant emailed Mr Ali, updating him on the meeting and next steps. He reassured Mr Ali that the concerns were being taken seriously and, probably referring to the ruler of Dubai, included the remark that "[e]scalating the matter to higher authorities than DMCC within Dubai was [also] discussed". He said he would need to return to Paris.

197. Mr Climent met the claimant the same evening at the latter's hotel in Madrid. Mr Climent was not called; his laptop was examined during disclosure but, the defendants explained, no relevant documents were identified. The evening meeting was brief. I accept the claimant's evidence that Mr Climent showed him an email from Mr Mouillon, who was not called. A backup of data from Mr Mouillon's laptop was examined for disclosure purposes but, as the defendants explained, "only a small subset of his data exists".

198. The defendants made an unconvincing attempt to discredit the claimant's evidence about the email, based on textual analysis of the different wording used by the claimant's solicitor in a witness statement in the context of disclosure. The flimsy basis for putting to the claimant that he had "simply made this up" was that instead of using the expression "words to the effect of" as the claimant did in his witness statement, his solicitor had said the claimant recalled that the email contained "some brief information about the severity of the issues arising from the audit" but "does not remember the exact content".

199. For my part, having seen and heard the claimant give evidence which the defendants have not contradicted by evidence from either party to the email, I have no difficulty in accepting that the email was shown to him and stated words to the effect that "Olivier", Mr Breillot, had talked to Mr Mouillon, that the matter was serious, that Mr Breillot was aware Mr Climent was meeting the claimant the next day, that the claimant had "shipped his furniture" and that they should talk. I accept also that Mr Climent said he thought informing the ruler of Dubai would be a good idea, despite the defendants' contrary suggestion in cross-examination.

200. The claimant met Mr Climent briefly again in his office the next day, 16 July 2013. He told the claimant about a forthcoming review of the PAMP audit in Switzerland and said that he would be in Paris for a few days. The same day, Mr Andjelkovic, EY MENA's general counsel, had occasion to email the claimant about a document he had

spoken about to Mr Labaude. In the subject line, he discreetly referred to "That Matter … Your French Trip".

201. The claimant then called Mr Ali, who asked him to join a conference call the next day with the EY MENA leadership in the form of Mr Al Sowailim and Mr Molin. Mr Al Sowailim needed a briefing before speaking to Mr Otty, EY EMEIA managing partner, who was also on the Global Executive. This was the first time the claimant had heard of Mr Otty's involvement.

202. Just before the conference call, on 17 July 2013 Mr Labaude called the claimant from London and introduced himself. They agreed to meet in London the next day. The claimant had to take part in the conference call and said he would call Mr Labaude back.

203. The conference call then took place. The claimant provided an update, explained the risks to EY arising from the Dubai gold audits, mentioned the possibility of making disclosure to the ruler of Dubai and said that Mr Climent was supportive of that idea. Mr Al Sowailim disagreed, saying he did not have a direct communication line to the ruler. He wanted clarity about the legal position before deciding how to proceed.

204. The claimant then called Mr Labaude back. The latter was already au fait with the documents, as Mr Breillot had mentioned. Mr Labaude was also in contact with Mr Andjelkovic.

205. The accounts of Mr Labaude and the claimant differ at times. Where their accounts differ, I prefer the claimant's account. Mr Labaude is a shrewd and experienced lawyer, who qualified in France. He makes no notes of meetings, or at any rate of open meetings. His answers in oral evidence were carefully crafted and phrased in a way that clearly reflected his calculation of what answer or kind of answer would best serve the defendants' interests in the litigation.

206. He had read the documents carefully and did not fall into the error of contradicting any document; other than, at one point, erring by saying that there had been an earlier version of EY Dubai's engagement letter in the Kaloti audit which had made no reference to LBMA standards. Probably, he confused the assurance audit engagement letter with the financial audit engagement letter on that occasion.

207. I found unconvincing his invocation of the "board of directors" of EY Dubai as a necessary source of authority to sign an application form that in February 2013 everyone concerned would have been happy to see signed off by the claimant in his capacity as engagement partner, with the support of Mr Britton.

208. His written and oral evidence was not a disinterested attempt to convey the true content of his recall of past events. He sought to persuade the court to interpret events in the manner that would best serve the defendants' interests and best discredit the claimant's. His professed recollection of events was much better when recalling something favourable to the defendants and adverse to the claimant than vice versa.

209. In contrast, the claimant was prepared to volunteer candidly evidence that might be thought against his own interest, for example, that (as we shall see later), he approached and gave documents to a non-governmental organisation, Global Witness, in late

October 2013; something of which the defendants appeared unaware until the claimant volunteered it in cross-examination. Unlike Mr Labaude, he gave his answers from the heart rather than the head, without first calculating the impact they could have on the court or his case.

210. Returning to the claimant's telephone conversation with Mr Labaude on 17 July: Mr Labaude argued that there was no duty to report the zero tolerance finding to the LBMA unless and until the auditor had seen the client's "corrective action" in relation to the zero tolerance breach. The claimant disagreed; he thought this was not supported by any document and even if it were the position, Kaloti had discussed any corrective action with the team. He argued that the timing was critical because of the 24 hour time limit for reporting zero tolerance breaches to the LBMA.

211. They agreed to meet in London two days later. Mr Labaude said he would ask Mr Breillot to travel from Paris to join them. That evening, news came from Mr Ali that the claimant, now much sought after, was needed in Dubai to meet Mr Otty, Mr Al Sowailim, Mr Molin, Mr Murphy and himself as soon as possible. The claimant sent his apologies, explaining that he was required in London for the time being.

212. On 18 July, Mr Heller followed up his request to Ms Golz and she responded that they could talk the next day. I do not know if they did. Mr D sent the application to Ms Crowell of the LMBA that day, using the claimant's electronic signature. The electronic signature was dated 18 July 2013, but the date at the foot of each page was 20 February 2013, reflecting the time of its original creation.

213. The claimant sent a message to Mr Labaude - which he forwarded to Mr Breillot referring to the claimant as "notre ami" - saying the claimant had just been informed that "we did sign an application form with the LBMA to become an approved auditor" and "[t]he form includes a declaration that we will adhere to the LBMA guidelines." He did not explain why it contained two different dates nearly five months apart, but the dates were there for Mr Labaude to see. He forwarded the signed application to Mr Labaude that day.

214. I accept that the meeting on 19 July in London lasted about 7 hours rather than about two hours, as Mr Labaude suggested. He had asked to start at 9am rather than 10am. The claimant emailed Mr Ali just after it had ended, saying he had "just finished a very long meeting with Olivier [Breillot] and Hervé [Labaude]". Mr Labaude said he did not recall Mr Breillot attending the meeting, but clearly Mr Breillot did attend (as a later email makes clear).

215. Mr Labaude's evidence is therefore wrong on both the timing of the meeting and those attending it. I do not accept his evidence that he was "open-minded" at the meeting about the concerns the claimant was raising and was merely trying to form a view. Mr Labaude said he does not recall them calling Mr Britton during the meeting and the latter expressing agreement with the proposition that the LBMA must be informed. The claimant's account, which I prefer, is that Mr Britton expressed those views by telephone at the end of the meeting, after Mr Breillot had left.

216. Mr Labaude said he has a "firm recollection" that he discussed the matter on other occasions with Mr Britton and that he, Mr Britton, did not and would not express such views. Apart from not specifying the details of any such conversations, still less

disclosing any emails about them, the views Mr Labaude attributed to Mr Britton would sit uneasily with his earlier email exchanges with the claimant and the team.

217. Mr Labaude accepts that the claimant raised concerns about his safety during the meeting, but says the claimant was not clear what those concerns were. I have already explained why it would be naïve to profess incomprehension about his safety concerns. Mr Labaude is anything but naïve.

218. Mr Labaude was annoyed, as both the claimant and he accept, that the application to the LBMA had been sent a few days earlier. I accept the claimant's evidence that Mr Breillot seemed less concerned about this; but Mr Labaude said he would launch an investigation into why it was sent.

219. I accept also that the claimant reasonably drew the conclusion that Mr Labaude was looking for ways of avoiding disclosing the audit findings. The claimant mentioned that he was asked to meet Mr Otty in Dubai, but Mr Labaude asked him to stay in London and return for another meeting on Monday, 22 July.

220. When Mr Murphy enquired whether he would be in Dubai on Monday, he answered that he had to stay in London for further discussions. Mr Murphy emailed back asking whether Mr Otty and Mr Labaude were still planning to come to Dubai on the Monday? Mr Labaude evidently was not, since he had a meeting with the claimant planned.

221. Over the weekend, the claimant and his family moved out of London to less expensive accommodation in Arundel, Sussex. On Saturday 20 July, the claimant sent Mr Labaude (copying Mr Ali) information he had requested, including a sample draft assurance statement. Mr Ali asked him to flesh out the draft assurance report, which was a blank template, to show what it would look like "in scenarios such as non-compliance".

Investigations in Dubai

222. Mr Otty travelled to Dubai to take personal charge of the issue. He is an accountant but, as he said, he has not done an audit in 30 years. His very senior role was now one of leadership, as managing partner of EY EMEIA and the Global Executive member representing the whole of Europe, the Middle East, India and Africa. He said he was "not a note taker".

223. He accepted that he was bound by the IFAC Code but he had never read it. He struck me as uninterested in questions of professional ethics. Although he is still part of the EY organisation, and although he expressed confidence soon after the claimant's later resignation that EY would sue the claimant, the laptop he was using at the time was not preserved (although an image of it was taken in relation to another matter).

224. Like Mr Labaude, he crafted his answers carefully, calculating their impact before delivering them. He too professed clear recall of one matter in particular, adverse to the claimant, but less clear or no recall of other matters. He sought to play down his own involvement and that of the senior leadership and maximise the involvement of EY Dubai locally. This was in line with the defendants' case that the claimant had not sued the parties responsible for the wrongs he alleged but had targeted the wrong EY bodies.

225. I am satisfied that Mr Otty, assisted on the legal front by Mr Labaude (and later by Linklaters, solicitors), was more than any other individual deputed by the EY organisation at global level to take responsibility for resolving the issues the claimant had raised, in a manner satisfactory to EY at global, regional (EMEIA), sub-regional (MENA) and local (Dubai) levels alike.

226. His strategy, once he became involved, was more subtle and conciliatory than Mr Labaude's; it was that of a steely and suave diplomat rather than an aggressive lawyer. His aim, initially, was to engage with the claimant in an attempt to bring him back into the fold and prevent him from, so to speak, going rogue; while at the same time avoiding any awkward disclosure of the audit team's findings which, he well knew, would upset the authorities in Dubai.

227. On arrival in Dubai and on meeting local EY Dubai personnel, he says he did not read any of the key documents. Although this seems very surprising, I am prepared to accept his evidence on that point. He accepted in cross-examination by Mr Ben Hubble QC, initially with some reluctance, that he "would have" been told in Dubai about Kaloti's substantial cash transactions issue and the Morocco gold issue; but he sought to characterise the latter as an "assertion", not a "fact".

228. I do not accept that Mr Otty genuinely doubted the veracity of the Morocco gold issue; Kaloti had been quite open about it with Mr D and the team and later with the claimant. There is no evidence that Kaloti had at this stage ceased to be open about the issue or changed its story. It is not plausible that Mr D and the audit team would have falsely reported to Mr Otty that the irregularities found in March 2013 were mere assertion.

Further discussions in the UK

229. Meanwhile, back in the UK, on the Monday, 22 July, the claimant and Ms Montford decided not to pay the next required and due instalment of four months' rent (which would have covered the four months from 22 July to 21 November) but, instead, to pay one month's rent (about £3,500) by way of a month's notice to terminate the lease.

230. The defendants' sceptical probing in cross-examination of both witnesses failed to elicit anything remotely underhand or duplicitious about their decision. It was, I accept, a judgment they made based on the absence of positive signs that the matter would end happily for them. As Ms Montford pointed out, if they had never intended to return, why would they have exposed themselves to 37 days of rent payments for a vacant house?

231. The claimant returned that day to meet Mr Labaude again. Mr Labaude asked for a scan of the claimant's laptop. I accept the claimant's account that Mr Labaude called a member of technical staff to ask for the scan to be done there and then. I accept also that his tone was intimidating; as the claimant put it: "he is treating me as if I'm a criminal or something". He said it was "almost like your cross-examination". Mr Labaude was asking the claimant what he was trying to hide.

232. It is agreed that the claimant declined to surrender his laptop for a scan. I accept that he said it made him uncomfortable and that relevant information was on the EY server in any case. He said the request should be put in writing as a formal process. His frustration began to boil over and he said that in view of the clear obligation to report

the matter to the LBMA, he would do so independently if the firm refused to do so; there was "no room for interpretation" in the matter.

233. He confirmed this in writing in a detailed email in the early hours of 23 July 2013, sent to Mr Otty, Mr Al Sowailim, Mr Ali and Mr Weinberger. He thanked them for taking the conflict minerals matter seriously. He complained that over eight days of meetings and discussions, although the option of disclosing the audit findings to stakeholders such as the SEC, LBMA and OECD was described as the most straightforward scenario, the firm's leadership had, instead, focussed on "how the firm could justify closing the matter by giving the DMCC what they want and without making any disclosure".

234. He went on to say that he saw only one way forward: to disclose the audit findings to the relevant stakeholders and to terminate the engagements relating to the DMCC audits under recently altered DMCC guidelines, unless "we could objectively state our findings along with the risk ratings in the Assurance Statement". He referred to the recent modification of the DMCC's guidelines after becoming aware of the audit findings. He went on:

> "This is a huge responsibility and I would like that we all share carrying it together. If you decide not to, I will have to carry it on my own and would take the most legal and moral procedure to pass on the message to the relevant stakeholders.
>
> The matter is very time sensitive; every day that passes we are further away from meeting the LBMA's deadline and puts our reputation further at risk and more atrocities down the Conflict Minerals supply chain would be committed, some of which could have been possibly avoided if we disclosed the details that we have. I urge you to take my proposed solution described above; I hope that we don't end up going separate ways but given the time sensitivity, I need to know your conclusion by the end of tomorrow 23 July 2013. …"

235. Mr Otty succeeded in dissuading the claimant from making any disclosure at that stage. His response sent later on 23 July started with the news that he had now "taken the lead in relation to our investigation" of the issue and that he had "involved a number of other people including our Global COO [Mr Ferraro], Global Practice Protection Leader [Ms Golz], Global Head of Risk [Mr Mouillon], Head of Legal for EMEIA [Mr Labaude] and external legal advisers."

236. Mr Otty urged patience, saying the issues were complex and deciding what course to adopt "necessarily takes time" and "is not something we can or should rush". He agreed with the claimant that "it is … a huge responsibility that is best borne and discharged collectively as partners in the firm". He said that all options were under active consideration and that not even a provisional view had been reached on how to proceed.

237. He invited the claimant to "talk to the external counsel we have engaged" so they could fully understand his concerns and asked when this could happen. Finally, he asked the claimant to feel free to call him direct on his mobile number which Mr Labaude had already given to the claimant. They spoke the next day, 24 July 2013. The claimant said he had not felt supported and expressed dissatisfaction about the request to scan his laptop, which he had found intimidating. They agreed to meet two days later, on Friday 26 July.

238. Mr Otty's account of the meeting is a mixture of things remembered and things not remembered. Where the accounts differ, I prefer the claimant's account. I do not accept

Mr Otty's evidence that the claimant used the word "heroes" to describe how a report to the ruler of Dubai would be received. I find that the claimant did raise concerns for his safety at the meeting; that Mr Otty did assure him that EY "looks after its people"; that he knew the basis of the claimant's concerns and was no more naïve about them than Mr Labaude.

239. In relation to relocation away from Dubai, I am satisfied that Mr Otty knew that it was on safety grounds that the claimant wanted him to look into relocation elsewhere within the EY organisation. I am satisfied that Mr Otty told the claimant, and wanted him to believe, that he could and would look into relocating him elsewhere. I do not accept Mr Otty's evidence that relocation was not in his gift, other than in a strict legal and theoretical sense.

240. His influence was such that in practice he could have arranged a job elsewhere quite easily and quickly, if he and the relevant members of the Global Executive wanted that to happen. I reject his evidence that the claimant asked to replace Mr Climent as global head of CCASS, based in Canada, though I accept that there was mention of the claimant working on CCASS matters outside Dubai so as to assist or work with Mr Climent. I regard that as an example of a job transfer which Mr Otty could have organised quite quickly and easily, whether based in Madrid, Canada, Paris or London.

241. I accept the claimant's evidence that he left the meeting with hopes raised and feeling reassured. This was what Mr Otty intended. The next stage of his strategy was to try to agree a reporting strategy with the claimant that would square the circle by satisfying both the claimant and the Dubai authorities; no easy task given the distance between their respective points of view. The help of Linklaters was enlisted for that purpose.

242. On the following Monday, 29 July 2013, at Mr Labaude's request, the claimant took part in a call with him, Mr D and Mr Andjelkovic. Linklaters were to join the call but did not. In response to queries from Mr Labaude, Mr D corroborated the claimant's account of the circumstances of the recent and late submission of the application to the LBMA. Mr Andjelkovic opined that there was no legal difficulty about the LBMA application and it was open to EY Dubai to terminate the engagements because their scope had changed.

243. Mr Labaude then asked about the format of the assurance report, if the engagements were to proceed. The claimant explained the ISAE 3000 reporting method and the need for an adverse statement, including full "emphasis of matter", if the compliance report did not mirror the management report properly.

244. I accept the claimant's evidence that Mr Labaude then quoted in French a saying which, he explained, translates as "if we can't get in through the door we get in through the window". The claimant's evidence was that Mr Labaude's meaning was that the claimant was trying to prevent him, Mr Labaude, from devising a means of avoiding disclosure of the Kaloti audit findings.

245. Mr Labaude did not positively deny quoting in French the saying attributed to him (which the claimant would be hard pressed to invent, not knowing French). He did not positively deny that the call took place, said he could not recall it and was adamant that Mr Andjelkovic (who was not called) could not have said that the LBMA application was legally sound because there was no authority to make it. I do not accept his

assertion about what Mr Andjelkovic said, which he does not claim to base on his own recollection.

246. The same evening, Mr Otty and Mr Labaude either met or spoke by telephone to Linklaters and devised what they considered to be "a very good reporting proposal", as Mr Otty said in an email to the claimant the next day. He went on: "[w]hilst not without its challenges I expect you will feel very comfortable with our proposal. I understand you are meeting with Herve today and he will discuss with you. It is critical that we manage our approach to all stakeholders very carefully so I would ask you to keep confidential…. ."

247. The proposal was explained in Mr Otty's witness statement. The DMCC would be asked to extend the reporting deadline. The claimant would inform the refiners of the extension. The management reports would be finalised and discussed with the claimant; draft assurance reports in line with ISAE 3000 would be prepared; the management reports would be submitted to the refiners. EY Dubai would then inform the DMCC of the position taken covering the content and format of the assurance reports.

248. The claimant, Mr Otty and Mr Labaude attended a meeting with Mr Greg Reid and Mr Robin Ganguly of Linklaters on 30 July 2013. Both Mr Labaude and Mr Otty profess poor recall of the meeting. No note of it was disclosed. However, Mr Labaude's account in his witness statement is quite long and may be based on an undisclosed document, perhaps considered privileged. I reject Mr Labaude's evidence that the safety of employees was not mentioned at the meeting.

249. In cross-examination, the claimant's account was not seriously challenged. It was agreed at the meeting that Kaloti's compliance report did not accurately reflect the team's audit findings. It was agreed that a positive assurance report was not possible and that a strong adverse statement would have to be in the assurance report. However, Mr Labaude took the position that disclosure of the audit findings to the LBMA or any other external body was not required or permitted.

250. Pausing there, Mr Labaude stated in his witness statement, and repeated in oral evidence, that he had met Ms Crowell of the LBMA and that she had assured him that EY Dubai did not have any reporting obligation to the LBMA. He was unable to produce a record from the LBMA, anyone within the EY organisation or anyone else to show that this meeting ever took place. I do not accept that it did. I did not find Mr Labaude to be a reliable or candid witness on undocumented matters.

251. He was unable to say when the supposed meeting took place, even as an approximation; he did not say at whose instigation the meeting is said to have occurred; and he did not state the location of the meeting. He was not able to say whether it had already taken place at the time of his various meetings and conversations with the claimant.

252. None of the emails or other evidence about those contacts with the claimant makes any reference or mention of Mr Labaude having met Ms Crowell. Mr Otty's evidence was that informal reporting to the LMBA was not possible. That evidence, if taken at face value, would not be consistent with Mr Labaude having had an unrecorded and undocumented meeting with Ms Crowell.

253. Mr Labaude also says that he gave legal advice and Linklaters gave legal advice on whether there was a reporting obligation to the LBMA but he could not say what it was because privilege was not waived in relation to that advice. If the context in which that advice was obtained included the fact of a meeting with Ms Crowell having taken place, the fact that the meeting had occurred would not be privileged, although the content of the legal advice would be.

254. For those reasons, the balance of probabilities is firmly against the supposed meeting between Mr Labaude and Ms Crowell having occurred. Returning to the meeting with Linklaters on 30 July 2013, I accept the claimant's evidence that one or other of the lawyers (neither of whom gave evidence) commented that the legal obligation is to report "suspicious" transactions and that the term "suspicious" is subjective; and that they explained that the main reasons for their approach to reporting were to protect the safety of EY employees, to satisfy legal obligations and to take account of commercial considerations.

255. The claimant objected at the meeting that the justification for not reporting the findings to any external anti-money laundering body seemed unsound. He said he thought it was clear from the LBMA's guidance document that the LMBA had to be informed. He was also unhappy that there was no commitment to state in the assurance report not just the fact of the disagreement with the compliance report but, as ISAE 3000 required, the reasons for the disagreement. He said he would discuss the issues further with Mr Otty. He agreed to Linklaters' request that he seek an extension of time from the DMCC.

256. Mr Otty emailed Mr Al Sowailim the same day to update him. Much of the email is redacted on the ground of privilege but it included the observation that the claimant "appears to be positively engaged which is encouraging" though "we will have to watch him as he does move very quickly from one position and view to another." This was consistent with Mr Otty's strategy of containment. He gave Mr Al Sowailim an account of Mr Labaude's call with Linklaters the previous evening, which is redacted out and must correspond to the part of Linklaters' instructions that was not shared with the claimant.

257. Also that day, the claimant sent Mr Labaude Kaloti's final compliance report, just received from Kaloti. It did not begin to deal candidly with the Morocco gold issue. The next day, on 31 July, the claimant sought from the DMCC an extension of time for the assurance reporting until 15 August 2013, which was granted the same day. Mr Labaude sent the claimant and invited him to consider a revised draft management report on Kaloti, following a "re-format done with our PPD [professional practice director] team", to be "consistent with ISAE 3000". It was also to be considered by Linklaters. The rating given to the Morocco gold issue was high risk non-compliant.

258. On 1 August 2013, Mr Labaude included Mr Heller in the email to the claimant attaching the draft management report. He explained that Mr Heller had been "coordinating" the "mark-up" of the draft management report. This is not surprising since Mr Heller was the professional practice director for the whole EMEIA area. He gave written and oral evidence but was not a satisfactory witness. He is an accountant and as such, the defendants accept, is bound by the IFAC Code, but he did not know this himself. His answers to questions attempted to minimise his involvement in a drafting exercise in which, as we shall see, he was centrally involved.

259. On Friday 2 August 2013 the claimant asked Mr D to help with a "very thorough review" of the draft management report which had been modified by "QRM" (i.e. quality and risk management, the province of Mr Breillot). He instructed Mr D to characterise the Morocco gold issue as a zero tolerance finding rather than high risk non-compliant. Mr D made that change. The claimant then forwarded the draft management report to Mr Labaude, Mr Heller, Mr Reid and Mr Ganguly, explaining that the only change he had made was to change the Morocco gold rating to zero tolerance and the overall rating likewise to zero tolerance.

260. The following Monday, 5 August, saw the claimant meet with Mr Otty again. Mr Otty said in written evidence that he "cannot recall this meeting specifically". He added that he did not recall saying, as the claimant asserted, that the Kaloti assurance report would include a strong adverse opinion on compliance with applicable standards and that EY would inform interested stakeholders of the findings informally.

261. I accept the claimant's evidence that he did say that. If Mr Otty does not recall the meeting, he can at best deduce what he thinks he may have or would be likely to have said or not said. A strong adverse opinion would be consistent with what was said at the meeting with Linklaters a week earlier. A commitment to report to external stakeholders informally is consistent with a later email he sent (to which I am coming) saying that he expected a report to the LBMA would be made.

262. In response to the claimant's renewed attention to the subject of relocation to a new job, he accepts he said he would "look into it" and "may have said I would talk to those in the UK and Canada." He accepts that he did not do so, "save for raising with the UK the fact I wanted to have a conversation with them". In his written evidence the reason given was that he had "by this point realised that I could not advocate moving Amjad to another part of EY given his unpredictable behaviour".

263. That evidence is unsatisfactory on two counts. First, the witness statement reads as if he had already decided "by this point", i.e. on 5 August 2013, that he was no longer willing to help with relocation. But in oral evidence he tried to explain that "by this point" meant not by 5 August but by the time, he could not remember when, he decided he could no longer support the claimant's relocation. This change of timing would help acquit him of insincerity in what he said to the claimant. Second, he is unclear whether or if so when he talked to anyone in the UK about relocation of the claimant; in oral evidence he appeared to rely on a conversation with "our UK managing partner" but gave no details of it.

264. I am satisfied that Mr Otty had by 5 August 2013, and probably earlier, decided that he was not willing to help the claimant to relocate within the EY organisation. I am satisfied, also, that on 5 August he wanted the claimant to believe that, contrary to his true intention, he intended to help the claimant to relocate, to keep the claimant loyal to the EY organisation and to deter him from making any unwanted disclosure about the Dubai audits.

265. However, the claimant began from this time onwards progressively to lose faith in the Linklaters reporting proposal and to lose trust in Mr Otty and Mr Labaude. On 7 August 2013, Mr Labaude sent the claimant and the two lawyers at Linklaters what he described in the email subject heading as a draft assurance report template with proposed wording for an adverse opinion which, he said, would have to be discussed further. It did not

meet the claimant's concern that ISAE 3000 required reasons to be given for any conclusion that is other than unqualified.

266. As regards the draft management report, Mr Labaude proposed, instead of the expression "zero tolerance", the expression "high non-compliance" coupled with the words "this non-compliance is reported as per Section 5 of the DMCC Review Protocol". An astute reader of that wording who was familiar with, or researched the content of, the DMCC Review Protocol, would realise that Section 5 was the section dealing with "zero tolerance" findings.

267. Failing that, the finding appeared to be the lesser one of high non-compliance. That could enable the compliance report and, thus, the assurance report, to avoid any mention of zero tolerance. I agree with the claimant that it was reasonable for him to draw the inference he did draw, namely that Mr Labaude was unwilling to countenance use by EY Dubai of the actual words "zero tolerance", since that would lend force to the claimant's proposition that reporting to the LBMA was mandatory.

268. On 9 and 10 August 2013, the claimant obtained the wording of ISAE 3000 and conveyed to Mr Labaude, with a copy to Mr Heller, his disagreement with the absence from the assurance report template of any reasons for disagreeing with the compliance report. His judgment as engagement partner, he said in his email, was that "the proposed conclusion is incomplete, understates the reality and could be seen as misleading". It should be revised to say "why we disagree or at least makes strong reference to the Management Report which we agreed would be done during our last meeting in London."

269. As regards the zero tolerance rating in the draft management report, the claimant observed that it is common in the industry to use zero tolerance as a rating. He argued that in the DMCC guidance, the rating section included mention of the point that the DMCC "will enforce a zero tolerance policy, as detailed in section 5 of this document". He disagreed with Mr Labaude's proposed excision of the phrase "zero tolerance" from the management report.

270. On 12 August, Mr Labaude, copying Mr Heller, suggested some different wording with an additional paragraph preceding the adverse opinion. He wrote his suggested wording in italics. It identified four objectives of the DMCC guidance (called steps 1.3, 2.1, 2.2 and 2.3, 1.4 and 1.5) not properly covered in the compliance report. In oral evidence, Mr Labaude attributed that wording to Mr Heller and Mr Wareing. Mr Heller in his evidence denied authorship of it.

271. Whoever wrote it, the claimant telephoned and emailed saying he disagreed, referring back to his email of 10 August concerning the need to give reasons for disagreeing with a compliance report. He made some further comments about Mr Labaude's proposed wording. It was becoming increasingly clear that the claimant was not going to be prevailed upon to accept wording that he regarded as diluting the seriousness of the audit findings and avoiding the need to report the findings to the LBMA.

272. Several telephone conversations between the claimant and Mr Labaude took place on or about 12 August. Mr Labaude, I accept, urged the claimant to trust the leadership and agree to the proposed wording of the draft assurance report. In one of the conversations, the claimant told Mr Labaude that if he persisted with his approach to

the audits, the claimant would be unable to sign the reports. I accept the claimant's evidence that Mr Labaude indicated that if he refused to sign them, someone else would sign them and there would be "consequences" for his partnership and it would not be good for him.

273. I prefer the claimant's account to Mr Labaude's. The latter says he does not have a distinct memory of the call but then proceeds to give evidence about its content which he said made him consider the claimant was acting unprofessionally. Mr Labaude's position was that the EY organisation had gone far enough to accommodate the claimant's concerns and it was now time for the claimant to cease his objections. He continued to insist that there was no reporting obligation to the LBMA because EY Dubai was not on the list of LBMA approved auditors, a requirement the claimant regarded as irrelevant and unnecessary.

The replacement of the claimant as engagement partner

274. It is agreed that Anthony O'Sullivan, a Dubai based financial auditor, was appointed as engagement partner in place of the claimant, who was technically on holiday and was unwilling to return to Dubai or sign the reports. On 12 August 2013 the claimant obtained from Mr Murphy a message from the latter to Mr Labaude, saying Mr Murphy had spoken to the DMCC, which had granted an extension of time until 31 August and was "fully aware of the qualification". The message stated that the DMCC had "read the riot act to K[aloti] and given them 90 days to clean themselves up", after which "we will be asked to go back in to do another review".

275. The next day, Mr Heller informed Ms Golz that he had agreed with Mr Wareing that Mr O'Sullivan would be the new engagement partner, with Mr Wareing as risk manager; so "on team we are ok for the review"; with "some UK resource for technical support from CCaSS". Mr Heller went on to inform Ms Golz that he had reviewed the Kaloti report, had already made some comments and would review all the reports in more detail the following week. He had also, he said, "prepared a new draft of the Assurance report".

276. I find that Mr Heller wished to downplay his involvement in the content of the relevant reports in the Kaloti audit. In his witness statement, he said: "my involvement was limited to commenting on the wording used in the draft proposal by Kaloti. I did not 'hold the pen' or play any role in the substantive drafting; Kaloti retained control of the drafting process." Mr Heller's role is amply documented, including in a chronology prepared later, in February 2014, by Mr Wareing. That document, as well as numerous emails, show that Mr Heller extensively reviewed the relevant reports before they were finalised.

277. Mr Wareing's chronology also clarifies that the decision to "approve" Mr O'Sullivan as the new EQR partner from about 16 August 2013 was made jointly by Ms Golz, Mr Heller and Mr Labaude. Ms Golz responded in subsequent emails that she and Mr Heller should discuss the matter early the following week or over the weekend and that she wanted to "talk about the signing partner roles, etc".

278. By 26 August 2013, with the extended reporting deadline approaching, the draft reports had been revised by Mr D and the team in the light of comments given by Mr O'Sullivan and Mr Heller. Mr D sent the revised drafts that day to Mr O'Sullivan for him to review.

Comments on the draft management report were available to me, using the style "BH" to denote a comment from Mr Heller, or "EY" to denote a comment from someone unspecified within the EY organisation. Other comments marked "D", on the balance of probabilities come from Mr D, since they frequently explain audit findings in answer to questions from Mr Heller.

279. For example, to Mr Heller's question about Kaloti reporting certain concerns to the DMCC, Mr Heller asked "[w]hat is the nature of the concerns and does this address the High risk noted in some due diligence and other findings?" Mr D answered: "[w]e have seen sample emails reporting concerns like 'dubious offers with low gold price' and offers like '100 tons of gold from Tanzania' which is not possible as Tanzania doesn't have much gold reserve". In answer to Mr Heller's questions about EY Dubai's recommendations "[d]o the recommendation [sic] address all the High and Medium risks identified?", Mr D answered: "[y]es we have addressed all the major high risk areas".

Further discussions in the UK

280. On 27 August 2013, the claimant recorded four telephone conversations without informing the other party. At trial, the defendants criticised the claimant for resorting to this subterfuge. I agree that it is always regrettable when this happens but in some rare cases it can be justified. I would have more sympathy with the defendants' professed indignation if they had troubled to keep accurate records of meetings and conversations and to preserve for disclosure documents likely to have been lost. Much time and cost would have been saved and the claimant would have had no need to record any calls.

281. The first two recorded calls were with Mr Sharma of the DMCC. The claimant did not say he was no longer engagement partner for the audits. He did not want to "advertise" that fact to Mr Sharma, as he explained. Mr Sharma stressed that Kaloti had hired a new British director who, he hoped, would "talk some sense into Tareq [El-Mdaka] and Dina [Kaloti], to avoid "huge reputational issues for everyone". Mr Sharma used the word "transparency" several times.

282. The claimant recognised that if Kaloti and the DMCC decided to "go for another audit", then "that's their prerogative" and "we cannot stop them". The claimant emphasised that EY had to say "why we disagree" where there is an adverse opinion. Mr Sharma expressed concern at the prospect that Kaloti might have to be removed from the DMCC's "good provider delivery list". He recognised that the "decision" might "go against them" and "even if there's a reputation issue for Dubai, we will have to manage it".

283. In the second short call, after speaking to the new British managing director of Kaloti, "Jeff", i.e. Jeffery Rhodes, Mr Sharma called the claimant back and informed him that there would be a meeting the following Thursday (29 August 2013) with Mr D and Mr Rhodes.

284. Mr Toledano put to the claimant that the DMCC, through Mr Sharma, was behaving impeccably during the two calls. The claimant's response was cynical and, I infer, took account of later events to which I am coming:

> "I mean, you saw in the call I was happy with what he was saying. But that did not happen. It's similar to always making promises and talking and making lots of fluffy nice statements and then in reality what happens is shocking. [Q. But you accept that what he said was music to your ears; correct?] A. If everything is transparent and goes to the public domain and everything, I would be very, very happy."

285. The third recorded call was with Mr Otty, who was in Paris. Such was the lack of trust between them that he astutely divined that the claimant could well be recording the call and effectively treated it as on the record. The claimant outlined the impasse he had reached with Mr Labaude, his unwillingness to sign the Kaloti audit report and his position that he had "the right to disagree" and that this was "something healthy for the firm".

286. The claimant then referred to Mr Labaude's reference to adverse "consequences" for the claimant and complained that he did not like Mr Labaude's tone and "why I would … suffer consequences just for disagreeing". He then put to Mr Otty that he had given comfort by saying "Amjad don't worry. We look after our people"; and he said it was time to hear from "the leadership" and "from you".

287. Mr Otty responded that after extensive legal advice the conclusion was the same as already indicated; that it was "absolutely fine" for the claimant to choose not to sign the report; that the reports would be signed "as Ernst & Young", not in the name of an individual partner; and that he was comfortable with that. He said he had "no idea what consequences Hervé was talking about" but "we've got to go with what the practice protection group and the lawyers say".

288. The claimant then reverted to the question why he should suffer "consequences" or "even my partnership should suffer because of that". He reminded Mr Otty about the question of relocating and asked if he had "kindly had a chance to talk to the UK or to Canada or something". Mr Otty said that "a lot of the team in the UK have been away, so I've raised the fact that I want to have a conversation with them, but no, no conversation has happened yet".

289. He went on to say that "the focus has got to be clearly on getting this issue resolved" and he hoped for "some more clarity in the next couple of weeks". He did not see any adverse "consequences" from declining to sign the report. He was more interested in getting the work complete and "the reports in". That was his "priority". He ended by suggesting that the reports and the issue should be "resolved and sorted out". He added: "I will talk to the UK team, as I said I would, and we'll see what sort of other opportunities there are".

290. As noted, Mr Otty's evidence was opaque on the subject of any actual conversation on the subject of the claimant's relocation to another job. Mr Toledano put to the claimant in cross-examination that what Mr Otty said in the call did "credit" to him. The claimant's response again must have been influenced by what happened subsequently: "until there is action, they are just promises and I have seen some of these promises before. They were broken".

291. I do not accept that Mr Otty had any intention at the time of this conversation of assisting the claimant with relocation. If he had wanted to help and the claimant was to suffer no "consequences" from disagreeing with the EY organisation's collective

position, there was no necessary or logical reason for linking the relocation issue with completion of the Kaloti audit reporting. I find that he wanted the claimant to believe he would help with job relocation if and when he fell into line with the rest of the EY organisation and ceased being out on a limb on the subject of the Kaloti audit.

The September 2013 assurance audit reports

292. Meanwhile the same day, Mr Wareing was in email contact in a group comprising himself, Mr Heller, Mr Labaude and Mr O'Sullivan on the progress of the Kaloti audit, with at least a watching brief for Ms Golz. This group was dealing with finalising the Kaloti audit reports. To a request from Mr Wareing, Mr Heller responded that he was preparing "examples related to what we may expect in the compliance report on non-compliance in line with some wording already provided on the other two reports". He asked for feedback on his comments on the draft management report and noted that the deadline was approaching.

293. The next day, 28 August, Ms Golz emailed Mr Mouillon, at global level, on the subject of whether the financial audit report on Kaloti needed to be withdrawn in the light of the findings of the audit team dealing with the assurance audit. Mr Mouillon wanted an update and Ms Golz explained that it was necessary first to conclude the assurance audit reports. In the end, the Kaloti financial audit report remained undisturbed.

294. If I understand Ms Golz's reasoning correctly on that issue, it was that while the Kaloti financial audit reporting process made no mention of large cash transactions and while such transactions do tend to indicate a risk of involvement in fraud or money laundering, there was no need to withdraw the audit reports because there was no actual evidence of Kaloti being involved in fraud or money laundering, as distinct from a risk that it could be.

295. On 29 August 2013, the DMCC extended the assurance audit reporting deadline to 8 September. Over the following week, Mr D liaised with Mr O'Sullivan to get the gold refiners' audit reports completed. Mr D also kept the claimant, still on leave and in the UK, informed. On 1 September, Mr O'Sullivan met Mr Rhodes of Kaloti, who the next day sent a "re-worded draft management report", i.e. a report to come from EY Dubai, to Mr O'Sullivan, Mr Murphy, Mr D and Mr Kumar. Mr O'Sullivan promised to revert with "consolidated comments".

296. Mr Kumar then sent comments to Mr D, who forwarded the email chain and attachment to the claimant. It is clear from the attachment that the initials "VK" denote Mr Kumar; while the initial "D" probably indicates Mr D, as I have said. The rubric "Ernst & Young" is likely to denote any or all of Mr Heller, Mr Labaude, Mr Wareing, Mr O'Sullivan and Mr Murphy, who were collaborating closely. It could also denote Ms Golz, who in an email just over a week later admitted that the reports had also been "reviewed by … to a lesser extent myself" and that one Isabelle Tracq of EY France had also helped with drafting.

297. Mr O'Sullivan, as engagement partner, was plainly responsible for the wording. Mr Heller, as the EY professional practice director for the EMEIA area, also bears responsibility for the content of the reports. But it was clearly a collective effort.

298. The "Ernst & Young" author evidently decided that some changes should be made to Kaloti's compliance report. Under the heading "[d]oes the Refiner take into account geographical, counterparty and transactional risk?", he or they made the following alterations, with the changes indicated below, as far I can discern what they were, in italics:

> "We acknowledge the inherent transactional risks of dealing in physical gold against cash, which has historically been the typical modus operandi in Dubai's cosmopolitan wholesale gold market and we accept that during the period under review we actively participated in this sector of the market. *During the period our formal risk assessment did not adequately address the additional risks inherent in such transactions* [words added].
>
> *In addition we did not document our review of the risk assessment methodology utilised by our international subsidiaries.* [sentence or part of sentence added]
>
> We also acknowledge transactions [*with the bars coated with silver*] [words deleted] with respect to the supply of physical gold from [*Morocco*] [the word "Morocco" is deleted] *a North African country in which there were certain documentary irregularities which our risk assessment did not red flag*" [words substituted for "Morocco"].
>
> …."

299. Further down the page, reference was made to the closing of certain accounts; the word "*Moroccan*" on two occasions was deleted and "*a particular North African country*" and "*… this country*" substituted.

300. Thus, references to the Morocco gold issue in the compliance report, which the EY organisation then thought would become publicly available, were altered so that the name of the country was excised and mention of the bars being coated with silver was excised and became, instead, "documentary irregularities which our risk assessment did not red flag".

301. It may be that the "documentary irregularities" referred to the point that any documents at the Morocco end would have described the metal as silver, whereas in truth it was gold coated with silver. That state of affairs seems to me to go beyond documentary irregularities.

302. The claimant's evidence was to the effect that in his view it was improper and unethical, to the point of professional misconduct, for anyone within the EY organisation to sign reports where part of the compliance report's content had been written by the auditor, in a manner that concealed the strongest evidence grounding the reasonable suspicion that Kaloti was involved in money laundering.

303. The claimant also considered that the compliance report was misleading because it made no mention of the extent or value of the cash transactions, totalling over $5.2 billion during the calendar year 2012; was inaccurate in describing cash transactions as the "typical modus operandi" of the Dubai gold market (two other refiners in Dubai did not deal in cash); made no reference to transactions linked to Sudan, the Democratic Republic of the Congo or Iran; had been amended so that it covered only the period from June to December 2012 rather than the whole calendar year; and included comments on Kaloti's performance outside the audit period, whether taken to be the whole or only part of the calendar year 2012.

304. On 3 September 2013, Mr O'Sullivan sent Mr Heller the revised compliance report, altered by EY organisation people as I have indicated above, saying it had been "prepared by K[aloti] management" and in contrast to the claimant's view expressing his belief that it was "a much more transparent and appropriate document than the earlier draft". He added that Kaloti would "welcome our comments before finalising this". The same day Mr Rhodes of Kaloti sent Mr O'Sullivan "our final draft" of the compliance report.

305. On Thursday 5 September 2013, Mr Ali spoke by telephone to the claimant and asked if he would now be willing to return to Dubai, now that the gold refiner audits were complete. The claimant said that he had discussed relocation with Mr Otty a few times and was worried about the reaction of the Dubai authorities to his professional opinion which was opposed to the stance the firm had adopted.

306. Also on 5 September, an "emphasis of matter" passage was added to the draft assurance report in respect of Kaloti and was reviewed by Mr Labaude, Mr Heller and Mr Wareing. This found its way into the final assurance report and in its final form is quoted later in this judgment.

307. On 6 September 2013, Ms Golz spoke to Mr Heller who briefed her about the gold refiner audits. Ms Golz prepared a report on 7 September 2013 and sent it to Felice Persico, a member of the EY Global Executive and then assurance leader for the EY EMEIA area. She outlined the position over two pages of email text referring to the engagement being subject to DMCC and LBMA requirements, but referring also to the late application to become a recognised auditor and asserting that EY was therefore "not authorized to do such work".

308. She recounted the substitution of Mr O'Sullivan for the claimant as engagement partner after the claimant refused to sign the reports. She accused the claimant of not having made arrangements for an "EQR" (engagement quality review) of the assurance reports. She said three of the four public sets of reports (including those relating to Kaloti) were due to be released publicly soon. She said the "most challenging of the compliance findings" related to Kaloti.

309. She must have been referring to the cash transactions and Morocco gold issues, since she then referred again to whether the Kaloti financial audit report needed to be withdrawn. She reminded Mr Persico that Mr Mouillon was interested in this issue. She noted an absence of involvement by "CCaSS leadership"; the matter had "been left for the PPD [herself at global level and Mr Heller at EMEIA level] and GCO [general counsel, i.e. Mr Labaude at EMEIA level] to resolve."

310. She referred to "lessons learned": the CCASS professionals "need more supervision and training". She criticised the standard of their work. She praised the efforts of "the PPD and GCO teams" for the successful resolution which, she believed, was close. She singled out for praise Mr O'Sullivan, Mr Labaude and Mr Heller in particular. In a follow up email to Mr Persico, she enthused about Mr Labaude, saying he "did a really great job on this matter. He was actively engaged and worked very, very hard on this including communication with the Ccass partner." Mr Persico agreed: "Herve is absolutely outstanding".

311. On 8 September 2013, Mr D sent to the claimant the final and signed compliance report from Kaloti. It included the changes made by the EY authors. It included under the heading "[i]dentify and assessing the risks in the supply chain" the words: "[w]e acknowledge that during the period under review we were not compliant with a zero tolerance breach of the review Protocol".

312. However, the report went on: "[s]ubsequent to the period under review [June to December 2012] we have taken practical steps to strengthen our procedures in order to better identify and assess risks in supply chain. These are set out below… ." There then followed the section in which reference to Morocco and silver coated bars had been deleted by EY authors. A description followed of how Kaloti had "modified and upgraded our procedures and policies…". The $5.2 billion figure for cash transactions was not stated.

313. The same day, 8 September, the assurance report was signed "Ernst & Young", with no individual named signatory. It referred to the compliance report for the period 1 June to 31 December 2012 and opined that the refiner's compliance report:

> "describes fairly the activities undertaken during the period to demonstrate compliance and management's overall conclusion contained therein is in accordance with the requirements of the DMCC's Practical Guidance for Market Participants in the Gold and Precious Metals Industry, version 1 April 2012 and with DMCC Review Protocol on Responsible Sourcing of Precious Metals Version 3.1, June 2013."

314. There was no mention in the assurance report of the LBMA or its standards or guidance or procedures. There was no adverse opinion but the "emphasis of matter" paragraph appeared next:

> "Without modifying our conclusion, we draw attention to the description of the non-compliance contained within the Refiner's Compliance Report. This relates to inadequacies in internal supply chain due diligence documentation on a number of suppliers, inadequacies in strengthening relationships with some suppliers, a significant weakness in the processes for identifying and assessing risks in the supply chain. The Refiner's Compliance Report also describes the practical steps and amendments taken subsequent to the period of review in both the areas of non-compliance and compliance that will be reviewed as part of a future compliance review."

315. The management report from EY Dubai, to which Kaloti had contributed and which was not to be published, was finalised and issued in confidence to Kaloti and the DMCC in the name of "Ernst & Young" the same day. Collectively, these were the "September reports". Mr D sent them all to Mr Nasser at the DMCC on 8 September 2013. The EY organisation leadership members working on the matter no doubt expected that the compliance and assurance reports would be published and that this would draw a line under the matter, leaving the "lessons" to be learned, as Ms Golz put it.

Aftermath of the September 2013 assurance audit reports

316. But neither Kaloti nor the DMCC were content with the compliance and assurance reports being published. The compliance report contained the words "zero tolerance breach", albeit said to be in the past and being remedied. They took steps to stop publication from occurring, as we shall see. Before that happened, Mr Persico asked

Ms Golz to share the report with Mr Otty, Mr Ferraro, Mr Mouillon and Mr Carmine Di Sibio, all EY Global Executive members.

317. Ms Golz did so. An inquest into the matter had begun, prematurely as it turned out. Mr Mouillon was annoyed. He emailed back that Ms Golz "should never have written this report"; he thought that "some form of privileged [sic] and confidential is probably warranted". He was also indignant that she had sent it without first consulting him, Mr Mouillon. I infer that this was because of the reference to "an absence of involvement" by "CCaSS leadership", i.e. himself. He forwarded his response to Mr Labaude "for your eyes only".

318. Neither Ms Golz nor Mr Mouillon expressed any doubt about the propriety of signing the audit reports, however. Their concern was for the reputation of the EY organisation but not from an ethical perspective. For Ms Golz, the issue was one of "training and supervision" for CCASS staff such as the claimant. For Mr Mouillon, expressing himself in non-native English: "the réal bad work is coming from the auditors signing opinion not knowing what they sign client continuance".

319. Mr Mouillon warned Ms Golz that he would tell the Global Executive that he did not entirely share Ms Golz's assessment of the matter. The matter was, indeed, discussed by the Global Executive at its meeting on 9-10 September 2013. Messrs Ferraro, Mouillon, Otty, Persico, Di Sibio and Weinberger were among the members present. Ms Golz was in attendance. Under the heading "[o]ther risk management matters", the minute of the discussion read:

> "<u>Middle East.</u> With respect to a recent matter raised in MENA, J Ferraro gave assurance to the GE that we have a group of leaders working with M Otty to ensure we meet every obligation required – from a legal, regulatory and organizational perspective".

320. Mr Murphy emailed the claimant on 10 September 2013, copying Mr Ali and Mr Labaude, saying it was "our preference" that the claimant should now return to work in Dubai as the compliance and assurance reports were due to be published imminently and "there is now no tension or concern about reporting". Mr Murphy was not called and I cannot accept that he acted alone, without first obtaining the agreement of his superiors. It is inconceivable that what he described as "our preference" was EY Dubai's alone.

321. The claimant could not reach Mr Otty by telephone, but managed to speak to Mr Labaude. He recorded the call. Mr Labaude referred to the claimant having refused to sign the reports to preserve his own credibility, relinquished responsibility for the audits and left the country, citing a "security issue". They then had a disagreement about whether the claimant had just been doing his duty to the firm by registering his disagreement.

322. Mr Labaude said, on the contrary, the claimant had "dropped the ball" over a "personal credibility issue" and "you haven't done your job and your duty". The claimant insisted he had done his duty "100 per cent … and above and beyond" and that the issue was not personal but professional. Mr Labaude said the situation was now calm, "things are landing softly"; the firm still had to understand why the "wild application" to the LBMA had been made. But subject to that issue being investigated, there was now no bar to the claimant returning to his duties in Dubai.

323. The claimant complained that the team had behaved inappropriately in helping draft the compliance report. Mr Labaude said it had been done "with full involvement of all of the PPD team", not simply "two guys in Dubai". He said he was satisfied "we're doing the right thing". The claimant said the findings were "watered down". The "moral code" had been rewritten by Mr O'Sullivan and the reports were "untransparent".

324. The claimant asked for a letter from Mr Labaude saying that he thinks that everything is safe and that the firm would be liable if anything happened to the claimant. Mr Labaude declined, arguing that the claimant could have undisclosed reasons for his safety concerns. As for the assurance audits, he said he trusted the assurances of Ms Golz and the global PPD team that they had been handled properly. He was not going to be "fighting alone against the rest of the organization", as the claimant was doing.

325. The conversation continued in similar vein. The claimant said the firm should not work with the DMCC because "they are conflicted". Mr Labaude said "don't make this personal". He agreed that the DMCC is "certainly pissed off, but not against us, about K". He did not think the DMCC or the Dubai government would concern itself with the claimant. He did not think the government would be annoyed with EY, nor any individual partner; "unless the individual partner has been vocal, which I hope not ….", by saying that he would contact the LBMA and the like.

326. The claimant then began to express concern that the new team was now quite close to Kaloti and the DMCC and that they knew about his dissenting views and he was concerned they might mention something "informally" about the claimant to the DMCC for the sake of good relations between EY and the DMCC. Mr Labaude tried to reassure him that EY would not have any interest in doing such a thing because the audits were about to be closed.

327. The claimant put to Mr Labaude that he, Mr Labaude had written the email from Mr Murphy: "I know how Joe writes". Mr Labaude said "[w]e have discussed, obviously we have discussed … and he cc'd me". The claimant then referred to Mr Otty's assurances of relocation. He put to Mr Labaude that Mr Otty must have instructed Mr Ali and Mr Al Sowailim to summon the claimant back to Dubai, which was inconsistent with Mr Otty's assurance that he would assist with relocation. He pointed out that EY had 160,000 employees worldwide and said he would contact Mr Otty in the next few hours and ask for his opinion.

328. In cross-examination, Mr Labaude said he was aware Mr Murphy wanted the claimant back in Dubai but denied any involvement "in any particular local decision regarding this matter". I reject the evidence that the decision was made locally at the level of EY Dubai. In cross-examination, Mr Labaude answered, implausibly, that he had nothing to do with the decision:

> "Q. Well, let me suggest that the decision that Mr Rihan should be asked to return was one that had been agreed between yourself and Mr Otty.
>
> A. As a legal counsel, frankly, I had nothing to do in management decision concerning partners or non-partners regarding their either mobility or to return to their job position in a local member firm. I was a legal adviser for -- for the area. So I had no involvement whatsoever in that type of discussion and even less in the decision which, again, had to be made and was made locally.

Q. Well, I'm suggesting to you, Mr Labaude, that you knew he wouldn't go back to Dubai and so the request was made because that would drive him out of the organisation, and you knew that was the position and you wanted that to happen.

A. No, absolutely not. I mean, the decision made by the local leadership to suggest that Mr Rihan should go back is a legitimate decision after over two months to ask the partner to come back. That was a perfectly legitimate decision."

329. The claimant forwarded Mr Murphy's email to Mr Otty in the evening on 11 September, saying he had been asked "the same question" by Mr Ali already by telephone. He was unable to reach Mr Otty by telephone but, he explained, had spoken to Mr Labaude. He repeated his concern about "Dubai's reaction to my professional opinion … which opposes the approach that the firm undertook". He said Mr Otty had reassured him that he should not worry as "we look after our people" and had said he would help with relocating the claimant to another job outside the EY MENA area.

330. Mr Otty did not respond to that email directly or straight away. In cross-examination, he was asked if he had known in advance that Mr Murphy was going to send that email. He answered: "I really don't know". I reject that evidence. He was not being candid; his memory is not that bad and it is not plausible in view of the history of EY leadership involvement up to global level that the managing partner of EY EMEIA would not have been consulted; especially since it was he who had been liaising with the claimant over the issue of relocation.

331. The claimant emailed back to Mr Murphy explaining his reasoning, in the same manner as before, about why he did not feel able to return to Dubai and saying that Mr Otty "had been very understanding and reassuring", having told him several times not to worry as he would help relocate the claimant outside the MENA area. The next day, 12 September, the claimant sent Mr Labaude a summary of the recorded call. I do not have any response to that from Mr Labaude.

332. Also on 12 September 2013, Ms Kaloti and Mr El-Mdaka wrote to Franco Bosoni, the director of the DMCC, responding to an email (which I do not have) from Mr Bosoni of 9 September. They gave a completely different account of the visit of Mr D and others on 5 March 2013 from that set out in Mr D's note and hitherto accepted by EY Dubai as true. According to their new account in the letter, during the visit:

"…. it was explained that scrap gold Jewellery bars can be of varying purities and may contain other metals such as silver. By way of example we referred to gold bars received from Morocco that were mixed with silver to the extent that the bars appeared to be silver but were actually scrap gold bars. All of the documentation that accompanied such bars complied with the prevailing due diligence, supply chain and KYC requirements, and for the sake of clarity this means that the documents recorded accurately the actual amount of gold and silver contained in these bars. The Ernst and Young staff then asked us to supply the export documentation from Morocco to support this kind of supply, and we advised them verbally, subsequently confirmed in writing, that we did not have these documents, making the point that our procedures at that time did not require us to have such documentation. In response to questions from Ernst and Young our employee referred to market gossip that it was common practice to have unclear or deficient export documentation from Morocco. These comments, given in English (second language) rather than the employees native Arabic was interpreted by the English speaking E & Y staff as being confirmation that our management knew about this practice and somehow colluded in it. This was not the case at all, and indeed it was [Kaloti] that gave stress to

> this problem in subsequent discussions with E & Y. In retrospect perhaps such interviews should have been conducted in Arabic in order to avoid any potential misunderstanding or confusion."

333. For reasons that will become clear, I am satisfied that that account was untruthful and that Kaloti well knew and had admitted to Mr D and his colleagues, without any linguistic difficulty, that its management did know about the practice and did collude with it, were relaxed about it and regarded it as not unusual or concerning.

334. However, the letter evidently had the desired effect. Instead of being dismissed out of hand, it prompted further contact with EY organisation personnel. According to Mr Wareing's chronology, on the same day, Mr Heller and Mr Labaude both approved a response from EY Dubai. The chronology entry is unclear but reads:

> "K raised questions to DMCC around Moroccan Gold issue, implying that EY had been mistaken in our findings. We responded by seeking clarification from DMCC, which was provided informally [*a document is then attached but I may not have it*]. This clarifies that, in the opinion of the DMCC, such a finding is not zero-tolerance. Subsequent internal discussions determined that further work was required to ensure our understanding of this issue was correct, including formal interviews with team members."

335. It is obvious from a slightly later email I am coming to that this entry refers to a request to EY by the DMCC to revisit the zero tolerance finding in respect of the Morocco gold issue, which the claimant had insisted on and on which, up to that point, the relevant EY personnel had been willing to agree with him. It was this finding which, among others, formed the basis of the claimant's argument that the matter should be reported to the LBMA.

336. The next day, 13 September, saw Mr Heller researching the LBMA website and emailing an extract from it to Mr Labaude. It was Ms Crowell's presentation of 22 February 2013, which I have already mentioned. Although Mr Heller did not draw attention to the passage, it was the presentation which included a slide saying there were only two recommended auditors on the approved list but "[a]ny independent, certified auditors are eligible to conduct the LBMA audit, provided they have the required credentials."

337. The same day, 13 September, Mr Otty emailed the claimant. It was not a reply to the claimant's email of a few days earlier. He started afresh. Mr Otty said that he believed "the situation has changed dramatically and a lot has changed …". He suggested there was now:

> "no reason to be concerned about your safety. … I have no reason to think that anybody in Dubai could have any interest in the role which you played. Given that the proposed move no longer exists I suggest the most logical solution is to return to your role in MENA and I believe this is what is being suggested by Joe [Murphy]." He added: "[f]inally, we are in discussions with clients and regulator about reporting to the LBMA and I expect this will occur".

338. I have several difficulties with Mr Otty's sincerity in that email. First, I am sure he was aware that the claimant had said clearly to some or all of Mr Labaude, Mr Murphy and

Mr Ali that he would not return to Dubai. I do not think it is plausible that Mr Otty was unaware of this or that he expected the claimant to change his mind.

339. Second, Mr Otty's evidence at trial was that there came a time when he realised that he did not trust the claimant and was no longer willing to advocate his relocation to a different job. There is no explanation of why the claimant was acceptable to Mr Otty if working in Dubai, but not acceptable if working outside Dubai.

340. Third, I have no evidence to corroborate Mr Otty's word that "we", i.e. some EY body, was in any discussions with Kaloti or the DMCC about reporting to the LBMA. The evidence is that, on the contrary, the DMCC was at this time exploring with EY the possible downgrading of the zero tolerance finding – a point Mr Otty did not mention in his email. It would be bizarre in the extreme if EY Dubai was at the same time discussing with Kaloti and the DMCC a report to the LBMA.

341. Fourth, Mr Otty said "I really don't recall" in answer to Mr Hubble's question how he acquired an understanding at the time that there were discussions going on with Kaloti and the DMCC at the time about reporting to the LBMA. I do not accept that his lapse of memory is genuine. I find that no such discussions were going on at the time. His professed expectation at the time that there would be "a very open conversation" between the DMCC and the LBMA is unsupported by any document and is not consistent with the DMCC's attempts to persuade EY Dubai to revisit the zero tolerance finding.

342. My conclusion is that Mr Otty wanted the claimant to believe reporting to the LBMA was likely in order to counter the claimant's perception that EY's conduct of the Kaloti audits was unethical and to reduce any risk that the claimant might decide himself to make a disclosure to the LBMA or some other external organisation or organisations.

343. In fact, what happened was that two days later, on 15 September 2013, the COO of the DMCC, Mr Sashittal, emailed Mr Murphy asking EY Dubai to revisit the assurance report; the DMCC's "assessment of the situation" was such that "we believe Kaloti's response and actions in this situation would support a rating of Non-compliance High risk and would support your reconsideration of this issue and re-submitting the assurance reflecting a downgrade in the breach of protocol rating". Mr Murphy forwarded the email to Mr Labaude "as discussed".

344. The next day, 16 September 2013, the claimant sent Mr Otty (copying Mr Weinberger) a long email (which Mr Otty was not able to see, due to encryption, until 21 September) thanking Mr Otty for his email and responding to it in some detail. He recited some of the history, complaining that little had changed since the beginning of their discussions. He explained that he believed that gold traded in Dubai "should be under extreme international scrutiny". The support EY had given to the DMCC and the gold refiners "in recent weeks, including giving Kaloti a positive Assurance Opinion, is inappropriate and potentially professional misconduct, which I don't want to be professionally associated with".

345. He repeated his complaint that the "watered-down Compliance Report makes Kaloti look better and more compliant" than another refiner that had been far more transparent than Kaloti in its compliance report. He added that he professionally disagreed with

the firm's decision not to notify any of the "international stakeholders". He complained also of the clean audit report for PAMP, given its dealings in gold with Dubai refiners.

346. He went on to address the risk of returning to EY MENA. He reiterated the rationale for having concerns for his safety if he were to do so. He cited two examples to support his position. The first was "the state of panic amongst the MENA leadership when I initially explained the situation to them including the request of some senior members of the firm in MENA not to be copied on written communications … for fear amongst the leadership that we would lose our license in Dubai…".

347. The second example was: "it was explained to me twice by Herve and once by you that my safety and the safety of other employees in Dubai, and mitigating the risk of the clients' and/or Dubai Government's retaliation, were two of the main factors informing your decisions and approach described above"; a proposition with which the claimant disagreed because the firm could easily relocate partners across the world.

348. He complained that his "voice had been suppressed"; that he had had to make a "great personal sacrifice" in walking away from MENA and leaving with his family for safety reasons. He said he expected compensation and clarified that, but for the situation, it would not be in his interest to relocate outside MENA. This, he explained in oral evidence, was because of the contacts he had built up, his bilingual Arabic and English and his background in the Middle East. He suggested that the disputes needed to be referred to "an internal or external neutral third party".

349. Back in Dubai, Mr Wareing and Mr O'Sullivan obliged the DMCC by reopening the issue of whether the Morocco gold issue should be classified as a zero tolerance breach of applicable requirements. They interviewed Mr D on 18 September 2013. Mr D was adamant: "[a]sked specifically if he thought [Mr El-Mdaka], [Osama Kaloti] and [Dina Kaloti] knew that there was false documentation in the supply chain", Mr D said with reference to the visit on 5 March that he was "100% sure they were aware".

350. This is not surprising as it was consistent with the note made of the visit on 5 March 2013. He retold the history of Mr Osama Kaloti taking a purity measurement device ("x-ray gun") and testing the metal in front of the team, to show that while it looked like silver, it was in fact 85 per cent gold. He gave further details. The note of the interview suggests there was an intention to interview also Mr Kumar and another team member, Zena Saady.

351. The next day, 19 September 2013, Mr Wareing sent the note of Mr D's interview and the note of the visit of 5 March 2013 to Mr Heller, Mr Labaude and Ms Golz. Then on the evening of 20 September, Mr O'Sullivan, who had been present at Mr D's interview two days earlier, met Mr Bosoni of the DMCC to discuss Kaloti. His letter to the DMCC of 22 September refers to the meeting.

352. As the letter confirms, Mr O'Sullivan relayed the content of the interview of Mr D and mentioned that it had been verified by the other two team members who had attended on 5 March 2013. He referred to Mr Osama Kaloti's use of a "testing gun". He rejected the suggestion that any language barrier had led to a misunderstanding.

353. Despite all that, Mr O'Sullivan went on to say in the letter and, I infer, at the meeting, that "in these circumstances it is appropriate to undertake additional diligence on the transactions with the Moroccan suppliers". They would therefore be:

> "formally requesting Kaloti to provide us with evidence of their attempts to obtain the supplier documents for these transactions. If they have no such evidence at this time we will request them to make a formal request to their suppliers. We believe such evidence is required to further support Kaloti's assertion that they are unable to obtain such documents. We believe that this is a necessary step to ensure completeness of diligence on the part of Kaloti."

354. Mr O'Sullivan went on to ask the DMCC to consider the contents of the interviews and "provide us with your assessment in writing as to how to categorise the facts and findings stated above, and in particular regarding the application of Section 5 of the DMCC Guidance … on the Zero Tolerance policy. We indeed remain at your disposal for any further information you might need to proceed with this assessment."

355. Mr O'Sullivan was not called and I therefore do not have his explanation of why he regarded it as appropriate or correct, on the request of the DMCC, to make these further enquiries of Kaloti after the assurance report had been completed; and whether he was comfortable with what he was doing in EY's name. Instead, Mr Labaude, who received his copy of Mr O'Sullivan's letter at the time, was asked about the letter by Mr Hubble, in the following exchange:

> "Q … Are you able to help with how is it that making a request for documents in 2013, even if they're not provided, means that it can be said that Kaloti is compliant? It seems to be what's being suggested here.
>
> A. Well, when I have read that at the time, and when I read it with you today, I think that Anthony O'Sullivan, as client service partner, was basically doing his job by asking any question for additional information he wanted to. You know, regardless of what the client might think when he received this kind of request. So I think he was just doing his job.
>
> Q. But if Kaloti are well aware that the gold has come out of Morocco coated in silver, then getting them to write a letter to the supplier in September 2013 to ask for export documents, and if they're not then provided, I don't understand how that can be any evidence of Kaloti undertaking appropriate due diligence. It doesn't answer the problem that they're aware of the fact that the gold is being smuggled out of Morocco coated in silver.
>
> A. I see the questions raised by Mr O'Sullivan as part of the normal independent diligence that he had to run to seek further information if he thought he had to get more information, and this is exactly what he's doing with Kaloti.
>
> Q. Wasn't it obvious to you that the DMCC and Kaloti were working together to get rid of the zero tolerance finding?
>
> A. I never had the sense that there was the relationship you seem to imply, if I may. I think DMCC was implementing for the first year a new guidance and obviously EY, as reviewer, was raising a number of questions which probably were not necessarily welcomed by the gold refiner, but when I read that, I think Mr O'Sullivan was doing his job independently by asking the right question."

356. I do not accept that Mr Labaude, an astute lawyer with experience of many countries, is as naïve as that evidence sounds. I am confident that Mr Labaude well knew that the DMCC was working with Kaloti to try to get rid of the zero tolerance finding.

357. Mr Heller's evidence on the point in cross-examination was equally unrealistic:

> "Q. And didn't it occur to you at the time that there was a risk that the DMCC and Kaloti were working together to get rid of the zero tolerance finding?
>
> A. That honestly I don't know. We did our work, we reported and there was this discussion. I mean -- on my side I cannot assess any kind of collusion or whatever in between Kaloti and DMCC."

358. On 21 September, the claimant emailed Mr Otty asking for a response to his email of 16 September and had to send it again so that Mr Otty could read it. The next day, Mr O'Sullivan sent his letter, already mentioned, to the DMCC confirming the outcome of their meeting on 20 September. The letter was approved by both Mr Labaude and Mr Heller, as Mr Wareing's chronology demonstrates.

359. Mr O'Sullivan sent another letter, also dated 22 September, to Kaloti, asking it to provide clarity by providing evidence that Kaloti had requested copies of the export customs documents from Renade International or from any third party in relation to purchases from Renade International during the period covered by the engagement agreement; or, if Kaloti had no such documents, "then we would ask you to now make such a request to Renade, or any other third party … and provide us with evidence of this request."

360. Again, Mr O'Sullivan has not explained his reasoning. Mr El-Mdaka emailed him on 24 September reiterating his account and said that while he did not understand what material difference obtaining export documentation makes, he was keen to help and therefore attached a formal written request to the client (Mr Echchaouti at Renade International) asking that it provide "official export documents from you or your suppliers for the shipments originated in Morocco details … in the attached letter". The "attached letter" added only that the period was 1 June to 31 December 2012.

361. On 25 September 2013, Mr O'Sullivan confirmed to Mr Heller that the Dubai customs office did not require evidence of export customs clearance. Mr Heller commented that this was "the main element for conclusion in addition DMCC 'clarification' on the interpretation for the level of risks". This was a reference to Mr O'Sullivan's invitation to the DMCC to say what level of non-compliance risk it wanted EY Dubai to state.

362. On Saturday 28 September 2013, Mr Labaude replied to the claimant "on behalf of EY" to his various items of correspondence. He set out EY's case, denying that there was "anything approaching 'professional misconduct'" or breach of the law. He noted that these were serious accusations, as indeed they are. He suggested a meeting if the claimant wanted one. The claimant replied, joining issue with Mr Labaude, and saying he would provide suggested dates for a meeting.

363. Some correspondence followed with Mr Labaude, Mr Murphy and Mr Ali about communication channels, given that Mr Labaude was the claimant's counterpart in matters related to their dispute but the other two remained, at least in theory, his line manager and colleague. The claimant then became unwell and on 3 October 2013

notified Mr Murphy and Mr Labaude that he would be seeing a doctor shortly and hoped to meet Mr Labaude the following week.

364. On 7 October 2013, the claimant informed Mr Labaude that he had instructed a law firm to help him and that a letter from them was on its way. The firm was Bindmans LLP (**Bindmans**). The letter ran to eight pages and was addressed to Mr Weinberger, Mr Mouillon and Mr Ferraro. Its expressed purpose was to "request that you disclose or procure the disclosure of certain information, failing which our client intends to make a protected disclosure of information which reveals wrongdoing by business organisations in Dubai, a Dubai Government regulator and Ernst and Young." There was, it was contended, "an overwhelming public interest in this disclosure".

365. The rest of the letter set out in detail the background, his reasons for asserting that "the credibility of Ernst and Young is threatened by this decision", i.e. EY's agreement to "sign off an audit report in which highly critical findings appear to have been suppressed and will not be put into the public domain"; and the claimant's strong preference that "the conclusions of the report are disclosed by … the Dubai regulator or, if not … by Ernst and Young".

366. He said the firm "have a legal ethical and professional duty to ensure that the report with its full conclusions are [sic] put into the public domain." He would be obliged to report any refusal to the Financial Reporting Council (**FRC**) and himself take steps to make the report public, in that event. The letter pointed out that he was a partner, with an interest in the profit and equity of the firm. He did not consider it appropriate, said Bindmans, to accede to the request to return to Dubai. He set a deadline of 18 October 2013.

367. At some point around this time, an agreement was reached between EY Dubai (not including the claimant's participation) and Kaloti that the signed compliance report and the signed assurance report would not, after all, be published. Instead, Mr O'Sullivan and the team were in touch with Kaloti and attempting to improve its procedures, reducing the incidence of cash transactions and putting in place better procedures to verify ownership and origin of gold when purchased from counterparties in cash. The process that replaced publication of the two signed reports of 8 September 2013 was described by the DMCC as "the follow up audit".

368. The claimant was still in touch with Mr D in Dubai and was being kept informed of the situation regarding the Kaloti audit. Mr D was at this time sending some of the emails to the claimant's private email address. On 13 October, Mr D sent the claimant a copy of the "Kaloti-Mshreq Bank agreement", which was being considered by the team; and Mr O'Sullivan's response to it. Mr O'Sullivan noted that the agreement brought the cash transactions into the banking system and involves the bank doing "KYC" on suppliers, which was sufficient in his view.

369. On 15 October, Linklaters responded to Bindmans' letter, saying that they acted only for "Ernst Young Middle East (Dubai Branch)", a reference to what I have been referring to as EY Dubai; which they described as a "branch" of "Ernst & Young Bahrain", which "is a wholly separate firm from Ernst & Young UK"; pointing out that the Public Interest Disclosure Act 1998 provisions did not apply; warning that if the claimant were to make the disclosures mentioned, he would be exposing himself to

penalties under the law of the UAE; suggesting a meeting in an attempt to resolve the position; and reserving the right of EY Dubai to dismiss the claimant forthwith.

370. A new draft compliance report was prepared at about this time, which no longer contained the words "zero tolerance". Instead, it referred to the point on which EY had sought input from the DMCC and its "conclusion" on the Morocco gold issue. However, on 22 October 2013, Mr O'Sullivan and Mr Murphy met with the DMCC and Mr Wareing emailed Mr Heller that day, saying that the DMCC had asked that reference to EY having consulted the DMCC should be excised, lest the draft should appear to refer to "a 'conclusion' by the DMCC, which they do not like", Mr Wareing explained. He went on to say that they had:

> "therefore agreed to consider a wording which does not imply that the DMCC concluded on the risk rating, but instead that they provided us the guidance/interpretation/clarification we needed to conclude ourselves."

371. From about late October 2013, as he volunteered in cross-examination on a different point, the claimant was in contact with a non-governmental organisation, Global Witness. He disclosed to it, though not at that stage into the public domain, his account of the facts and some documents. The defendants did not know about this at the time. On 3 November, draft revised assurance audit reports were prepared, with Mr O'Sullivan still the engagement partner and with the approval and participation of, at least, Mr Wareing, Mr Heller and Mr Labaude.

372. Returning to the solicitors' correspondence, Bindmans responded on 5 November 2013, standing by the claimant's position, commenting that Mr Otty's assurances appeared to have been breached and saying that the claimant was unwell and would not meet with EY organisation representatives that week. They attached a specialist doctor's note signing him off sick until 1 December 2013. They were still willing to consider a meeting, if it would be constructive. They asked for dates to avoid in the following three weeks.

The November 2013 assurance audit reports

373. Mr O'Sullivan, meanwhile, met Mr Sharma and others at the DMCC in Dubai on 7 November. Mr Sharma emailed afterwards confirming the outcome: the DMCC:

> "recommend that the auditor should submit to DMCC a consolidated refiner's compliance statement and a consolidated auditor's assurance statement. … [I]f there are areas not covered in the follow-up audit these should be carried forward from the initial audit and those medium or high risk areas that were reviewed in the follow-up audit are reassessed based on the later review. Additionally, the consolidated reports are to make reference to the 2 audit periods and reference to the follow-up audit being conducted to address corrective actions due to non-compliance. We do not believe it necessary to identify the original non-compliance risk ratings of areas that were reviewed and reassessed, only the new rating would be relevant for reporting purposes. We will accept the publishing of these consolidated reports by a DGD [Dubai Good Delivery] member refinery as being in compliance with step 3 of the DMCC guidance. The corrective action plan based on the follow up audit outcomes is also to be submitted to DMCC by the auditor, however it is not required for the refiner to publish this document."

374. Furthermore, the documents should receive the "concurrence" of the refiners and after that the "finalized drafts" should be shared with the DMCC "prior to their issuance". This could fairly be described as drawing a veil over the past and looking to the future. The only documents to go into the public domain would contain no reference to past adverse ratings. It was, unquestionably, a considerably less transparent process than the intermediate position reflected in the never-published September reports.

375. Mr Heller, usually sanguine about DMCC requirements, was nonplussed by this new démarche, as appears from his email of 9 November 2013 to Mr O'Sullivan. He questioned whether an email could supersede published guidance and said aspects of the new process "do not make sense". Mr O'Sullivan did not seem as concerned. Mr Heller overcame his qualms and cooperated with the new procedure.

376. Kaloti produced a new signed compliance report on 9 November 2013. "Ernst & Young", collectively so described, produced a signed assurance report stated to be prepared in accordance with ISAE 3000. Kaloti provided a "representation letter", dated 9 November 2013. This assured EY Dubai that Kaloti had cooperated fully, provided all relevant documents and access and that its new compliance report complied with DMCC guidance and fairly described the activities undertaken to achieve compliance with the requirements of the DMCC practical guidance and review protocol.

377. The claimant regarded the changes to the reporting process as having the effect, as he saw it, of "absolving Kaloti from the high-risk non-compliance raised by my team". That finding was, indeed, not mentioned in any report intended for publication. The compliance report was dated 9 November 2013. The reporting period was now recorded as 1 July to 31 December 2012. The report cancelled and replaced the earlier one dated 2 September 2013.

378. The compliance report went on to state that, while Kaloti had not been fully compliant during the six month review period, it was now "fully compliant" in respect of each of the five steps under the DMCC guidance. Shortcomings during the review period were acknowledged: there had been "some high-risk deviations" in the area of internal documentation and records of supply chain due diligence; and "some medium risk deviations" in the area of engagement with gold supplying counterparties in building due diligence capabilities.

379. There had, the compliance report went on, been during the review period "some high-risk deviations" in the area of identifying and assessing risks in the supply chain. But practical steps had been taken since to strengthen procedures in that regard. This section included the wording changed by Ernst and Young to convert Morocco into "a North African country" and the gold disguised as silver into inadequate documentation.

380. The same shortcoming during the review period was acknowledged with regard to not having conducted "enhanced research on red flagged customers with respect to locations"; presumably, a reference to conflict minerals high risk areas such as Sudan and Democratic Republic of Congo though no such country was mentioned by name.

381. Step 4, with which Kaloti declared itself fully compliant, was arranging "annual independent third party audit of our gold and precious metals compliance and due diligence practices by engaging Ernst & Young, Dubai", which had "completed a

reasonable assurance audit of our due diligence practices and will conduct a follow up review in line with the guidance and protocols provided by the DMCC". The "original audit" had been "conducted … in accordance with …. ISAE 3000".

382. The management's conclusion in Kaloti's compliance report was that the experience had been rewarding and challenging and was a learning experience for all involved, as this was the "first ever review". The report claimed that the shortcomings acknowledged in the report during the review period from July to December 2012 "do not reflect our current practices" and "we have now fully implemented all aspects" of the LBMA and DMCC guidance and protocols.

383. The penultimate paragraph ended: "We acknowledge that Ernst & Young are not able to comment on this for this current report". The compliance report ended with a declaration of intent to comply with all rules and regulations intended to aid the fight against international money laundering and terrorist financing and invited any feedback or queries to be sent to a particular Kaloti email address.

384. The assurance report dated 9 November 2013 stated on the cover sheet that it was prepared in accordance with ISAE 3000 and emanated from "Ernst & Young", described at the end as "a global leader in assurance, tax, transaction and advisory services". The report described itself at the start as an "Independent Reasonable Assurance Report" on Kaloti's compliance report. However, the period was stated to be 1 June to 31 December 2012, not 1 July to 31 December 2012 as the compliance report stated.

385. The objective was "to provide an opinion on whether the … Compliance Report describes fairly the activities undertaken to demonstrate compliance and whether management's overall conclusion has been drawn in accordance with the requirements of" the DMCC's practical guidance and review protocol (the June 2013 version).

386. The assurance report was signed in the name of "Ernst & Young", not by any individual such as Mr O'Sullivan. The report declared that Ernst and Young had "complied with the Code of Ethics for Professional Accountants" issued by the ethics standards board of the IFAC, i.e. the IFAC Code, mentioned above; which "includes independence and other requirements founded on fundamental principles of integrity, objectivity, professional competence and due care, confidentiality and professional behavior".

387. The assurance report went on to describe the steps taken to assess Kaloti's business practices, internal controls, risk management and the like. These were set out in a series of italicised bullet points. Those procedures, the report explained, relate to the reporting period from 1 June to 31 December 2012 and "do not extend to any assertions made in the Refiner's Compliance Report regarding events subsequent to that period". However, Ernst & Young "believe that the evidence we have obtained is sufficient and appropriate to provide a basis for our opinion".

388. The opinion then expressed was that the Compliance Report "for the period 1 June 2012 to 31 December 2012 describes fairly the activities undertaken during the period to demonstrate compliance and management's overall conclusion contained therein is in accordance with the requirements of the DMCC's Practical Guidance … and … DMCC Review Protocol .. June 2013". That was followed by an "Emphasis of Matter" paragraph, given "[w]ithout modifying our conclusion". The text was almost the same

(with an immaterial amendment) as the text quoted above from the assurance report of 8 September 2013.

389. The reason for cancelling the earlier report was said to be explained in the "date of report" section of the compliance report, which attributed the cancellation of the earlier reports to Kaloti and Ernst and Young both having "separately sought clarification from the DMCC on interpretations regarding the classification of certain matters of non-compliance … Accordingly, we have revised the presentation of those matters".

390. Thus, the 9 November 2013 version of the assurance report, albeit elliptically and cryptically, implicitly acknowledged that the classifications of matters of non-compliance had been revised after discussions with the DMCC. The nature of the changes was not stated and could not be ascertained from the September reports, as these were not to be published. It takes a painstaking research and comparison exercise with access to the unpublished September reports, such as has occurred during this trial, to ascertain the changes to the classifications of non-compliance.

391. Between 9 and 27 November 2013, Kaloti liaised with the EY Dubai team under Mr O'Sullivan. There is little documentation on the detail but the emails show that Mr D was keeping the claimant informed on some matters and that Mr Sharma of the DMCC probably met Mr D at least once during the period. The work done from 9 to 27 November produced what became the final consolidated reports following the much extended Kaloti audit.

392. During that period the solicitors continued to correspond and the issue of the claimant's sick pay and his other financial issues remained unresolved. Bindmans wrote to Linklaters that he was not yet well enough to attend a meeting. On 21 November 2013, a consultant psychiatrist reported that he was preoccupied by his work issues, felt unable to return to Dubai for safety reasons and felt low and anxious at times.

393. On 27 November 2013, consolidated management, compliance and assurance reports were signed and provided to the DMCC. The compliance report was signed by Kaloti; the assurance report, again, by Ernst & Young, without any individual signature. The management report was not to be published but the compliance and assurance reports would be published; thus, they represented to the outside world what Kaloti and Ernst & Young were saying about Kaloti's level of compliance with the DMCC guidance.

394. The compliance report was a much blander document than the predecessor version dated 9 November 2013. The review period was corrected so as to start on 1 June not 1 July 2012. For some reason, Mr Rhodes was removed as a person responsible for the report. The explanation of the procedural history was completely different. Now, it did not mention changes to the DMCC's method of classifying types of non-compliance. The cancelled September reports were not mentioned at all. A reader would not know they had ever existed.

395. Instead, reference was made to the "initial audit period" from June to December 2012 and a "remediation period" to 3 August 2013 "for the non-compliance items noted during the initial audit period that are described at the end of Steps 1 and 2". The compliance report declared Kaloti "fully compliant" in all respects either without qualification or following "implementation of our corrective action plan".

396. Gone was any mention of documentary irregularities arising in relation to supply from a particular North African country. The "deviations" of the past had been superseded by compliance following implementation of the corrective action plan. Gone too was any mention of the LBMA and its responsible gold sourcing requirements. The "[m]anagement [c]onclusion" paragraph was shortened to excise reference to the LBMA but was otherwise the same as in the 9 November version.

397. The final version of the Ernst and Young assurance report dated 27 November 2013 changed the basis of the audit exercise, while still saying it was done in accordance with ISAE 3000. The assurance report looked at the compliance report covering 1 June to 31 December 2012 "and, in cases where high and medium risks deviations were noted, the subsequent corrective action plan implemented until 3 August 2013". The statements on independence and compliance with ethical standards were unchanged.

398. The auditor's responsibility was changed: the report was on not just whether the compliance report fairly described Kaloti's activities during the review period but also "in cases where high and medium risk deviations are noted the subsequent corrective action plan implemented to demonstrate compliance with the DMCC's Practical Guidance and whether management's overall conclusion has been drawn in accordance with the requirements of the DMCC's Practical Guidance and … Review Protocol".

399. The procedures carried out by Ernst and Young (in the list of italicised bullet points) were similar but expanded slightly, as compared with the 9 November 2013 version, so as to include references to review of the corrective action plan and steps taken to implement it. Those procedures were stated to relate to "the reporting period" i.e. June to December 2012 but:

> "do not extend to any assertions made in the Refiner's Consolidated Compliance Report regarding events subsequent to that period other than corrective actions implemented in consideration [sic] of areas where high or medium risk deviations were noted. The remediation of such deviations was tested for the period from 4 August 2013 to 3 October 2013."

400. However, despite the reference to testing of remediation from 4 August to 3 October 2013 the final assurance report then went on: "[w]e have no responsibility to report on the operations of the Refiner for any period subsequent to 31 December 2012". And in the opinion section, reference to the corrective action plan was added. Reference to the September reports was, in line with Kaloti's compliance report, excised so that a reader would not know they had existed.

401. Finally, the "emphasis of matter" paragraph at the end was changed significantly:

> "Without modifying our conclusion, we draw attention to
>
> - the respective instances of deviations noted for the period from 1 June 2012 to 31 December 2012 set out in the Refiner's Consolidated Compliance Report at the end of Steps 1 and 2 that have been subject to a subsequent corrective action plan; and
>
> - the description at the end of Step 2 … of the corrective actions on assisting suppliers in moving away from cash settlement that was remediated in November 2013 subsequent to the implementation of the corrective action plan."

402. Mr Wareing's chronology (dated a few months later, 13 February 2014) records under the date 27 November 2013 and under the heading "[r]eview process followed" that those responsible for reviewing those reports were Mr O'Sullivan, Mr Wareing, Mr Heller and Mr Labaude. The commentary from Mr Wareing states:

> "Compliance report differs from previously issued compliance report in that it reports full compliance in all areas, reflecting the outcome of our follow-up reporting in accordance with the revised protocol. Where non-compliance was noted previously, reference has been made to it but then explanation given as to how the non-compliance has been resolved.
>
> …
>
> Assurance report includes EOM [emphasis of matter] referring specifically to corrective action and drawing attention to non-compliance noted in the pre-remediation period."

403. As already noted, the claimant saw these changes as absolving Kaloti from the high-risk non-compliance raised by his team. He said in his witness statement that the further amendment to the DMCC's guidance "should have been a major red flag for EY about the integrity of the whole process, particularly in the light of the DMCC's previous conduct and the DMCC's previously expressed view that to amalgamate the two sets of reports would put the DMCC's credibility at risk". He complained that the consolidated reports "entirely obscured the nature and severity of the original audit findings".

The claimant's resignation and disclosures

404. In December 2013, the claimant was signed off sick and unfit to work until 14 January 2014. His pay was stopped. From 10 December, he emailed Mr Murphy and Mr Labaude confirming that he would turn off his Blackberry that evening until the end of his sick leave and that if they wished to contact him, they should do so through his lawyer. Linklaters sought a meeting on 17 December and assured Bindmans that their clients would pay the claimant whatever sums were due to him. Bindmans responded on 17 December that the claimant was not fit to meet that week but that he remained committed to seeking an amicable outcome.

405. On 30 December 2013, Tamsin Allen of Bindmans emailed Mr Ganguly proposing a meeting on Monday 13 January 2014. However, on the preceding Friday, 10 January, Ms Allen spoke by telephone to Mr Reid. Ms Allen was equivocal about whether the claimant would attend the meeting on the Monday. Mr Reid said his clients' patience was exhausted and that if the meeting did not take place on the Monday, his clients would be likely to take steps to dismiss the claimant.

406. On Sunday 12 January 2014, while the claimant was in Spain, Ms Allen wrote by email to Linklaters that the claimant was suffering from stress related illness and felt that a meeting the next day would not achieve anything constructive and would exacerbate his condition. She confirmed that the meeting was cancelled and that the claimant reluctantly resigned from the firm. She reiterated his financial claims.

407. The claimant emailed his EY MENA colleagues the next day wishing them a happy new year and informing them that he had resigned from 12 January and that he missed

them all and would be in touch soon. Separately, he informed Mr Ali, Mr Otty and Mr Labaude the same day.

408. On 11 February 2014, Mr Reid emailed Ms Allen explaining that his client had been contacted by a media outlet. He quoted from the allegations, which were that "gold which may have been coming from conflict zones in Africa may have been moved through Dubai"; that the concerns were raised with senior management in the EY organisation:

> "they did not appear in the final report available to the public and delivered on behalf of the client … [EY] effectively covered up its own findings by agreeing that they should not be made public or delivered to international stakeholders in breach of its moral and ethical responsibilities".

409. Mr Reid asked for confirmation that the claimant was the source and for an undertaking to "desist from further such communications with any person in relation to this subject matter". He added that "all of my clients' rights are reserved as regards any breach of your client's obligations that may already have taken place".

410. Ms Allen wrote the next day, confirming that the claimant was the source, pointing out that in Bindmans' letter of 7 October 2013 they had given EY the opportunity itself to disclose the matter and that, failing that, the claimant intended himself to make disclosures in the public interest.

411. After referring to various international sources on the need for transparency in high risk conflict-affected areas such as the gold trade, she stated that the claimant considered it "to be a matter of the highest possible public interest that the discoveries made by his team in Dubai should be made public and international stakeholders informed"; and that he "considers it essential that the public are made aware of your client's role in this scandal – its acceptance of changing regulatory standards in Dubai which had the effect of covering up the adverse findings, its refusal to relinquish the contract or make the matter public itself, and its behaviour towards our client".

412. Ms Allen ended the letter by saying that Bindmans were instructed to accept service of proceedings. Mr Otty's emailed comment a short time later was that he confidently expected that proceedings would be brought by an EY entity or entities against the claimant. However, none were brought against him despite Bindmans on his behalf effectively challenging the EY organisation to bring them.

413. The next day, 13 February 2014, Mr Wareing produced his chronology of relevant events, from which I have already quoted. It was clearly intended to trace who did what and when in relation to the Kaloti audit. The same day (as an email from Mr Mouillon three days later confirms) senior members of the EY organisation including Mr Mouillon and Mr Otty took part in a telephone call on the subject. No record of that call was disclosed.

414. On 16 February 2014, Mr Otty sent an email marked "high importance" to Mr Labaude and to his senior colleagues on the Global Executive, Mr Weinberger, Mr Ferraro, Ms Golz, Mr Mouillon; to a Mr Will White who worked in marketing and to Ms Ferne Whipp in communications. The email was headed "[u]pdate from Dubai – privilieged and confidential". It was clearly intended to set out Mr Otty's suggested "line" to use

in response to media or other queries about the claimant's disclosures and media reaction to them.

415. Mr Otty explained that he wanted to update the recipients on a number of "data points" of interest. In relation to the Morocco gold issue, he wrote:

> "The client … had 3 suppliers of gold in Morocco. All were in the business of buying second hand jewellery (ie this was not mined gold and therefore not likely to be conflict minerals). The 3 suppliers would melt the jewellery and ship bars to [Kaloti] for refining. By definition these 'bars' would be of varying quality and may in fact have had a quantity of silver. In our review we did not see any documentary evidence of gold disguised as silver. In fact all import documentation showed the imports to be gold. The reason for our team to suspect that this occurred is that a member of staff from [Kaloti] said he believed that some of the gold from morocco was likely to have been disguised as silver. The reason this may have occurred is that the individual entities in Morocco are restricted in the amount of gold they may export annually.
>
> Further, Morocco is not assessed as a high risk or 'red flag' country. This is all relevant to categorisation (Zero tolerance or high risk). Our assessment after consultation with DMCC was high risk. Factors considered would include; no documentary evidence of gold being disguised, import documents all confirm gold, country not red flag, supplier in jewellery smelting business not mining or raw gold trade. Worth noting that we understand LBMA would also consult on categorisation not surprising as for both regulators it is all new and they wrote their own rules which we seek to follow.
>
> The clients action to our 'finding' is to stop any importation of Gold from Morocco. In other words clear remedy."

416. He went on to explain that the team (while under Mr O'Sullivan not the claimant) had reviewed Kaloti's "remediation plan" and checked "implementation of action during the remediation period". The team were satisfied on all counts except for Kaloti's response to concerns about cash handling. Mr Otty said the team had identified that arranging a bank to pay cash to Kaloti's customers did not suffice and that Kaloti "then took action to ensure that all clients were payed [sic] through a bank transfer to their own account", from November 2013, and that the team had verified 15 days of that process operating; hence the final report says the issue was "fully remediated from November 2013".

417. Mr Otty went on to assert that the LBMA is actually "less 'transparent'" than the DMCC in its approach to reporting and to point out the DMCC's changes to their reporting rules were in "mid review". He pointed out that "all gold supplied by [Kaloti] has a stamp stating that it is Kaloti gold". A buyer from Kaloti would therefore know that it was the supplier and "need then only check the K website to see our reporting of compliance breaches"; the report also invited users to contact Kaloti's "compliance department" with any queries.

418. Mr Otty then dealt with the volume of cash Kaloti transacted and "the optics of the scale of cash handling". The question remained, he said, "why so much cash?" He accepted that "we clear[l]y have no answer to whether the cash is 'clean'". He went on to explain that it is traditional in this market to use a lot of cash, which was one of the reasons for establishing the DMCC. He suggested that EY should be credited with "the remedial action in which we have played a valuable part".

419. He mentioned that "our team" had "a clear expectation that we will sue Amjad for breach of our rules"; this would be expected of EY by the regulator, the rulers of emirates within the UAE. This was to be debated later. In fact, it never happened.

420. Mr Otty's account of the facts relating to the Morocco gold issue was misleading. It undermines the defendants' case that his evidence was honest and frank. His mention of the absence of documentary evidence, evidently seeking to confine that term to customs clearance documents, twisted the truth by concealing the existence of the note of the 5 March 2013 visit and the notes of the three interviews in September 2013.

421. The words "may … have had a quantity of silver" and the reference to the EY team merely suspecting that it did, concealed Mr D's conclusion that he was "100% sure" Kaloti were aware it did, which Mr Otty did not see fit to mention. The reference to a member of staff merely "believing" that the gold was "likely" to contain silver concealed the factual account from Mr D and the other interviewees, contemporaneously recorded in the note of the 5 March 2013 visit, of Mr Osama Kaloti using a scanner or x-ray gun to demonstrate that the "silver" was gold with a purity of 85 per cent or more.

422. This email supports my assessment of his written and oral evidence as calculating and given in search of legal advantage, without regard for objective truth or accurate recollection. His email was the spin he was inviting the global leadership of EY and its marketing and communications arms to use if and when commenting to media representatives or others on the content of the claimant's disclosures.

423. In cross-examination, he attempted to avoid the charge of misleading by attributing his account of the Morocco gold issue to information he had received from the "team" in Dubai to whom he spoke in February 2014. He said he had never seen the documents recording the testimony of Mr D and others who witnessed Mr Osama Kaloti demonstrating with his scanner the gold content beneath the silver.

424. I do not accept that evidence; even if, which I doubt, he did not read the actual documents, it is not plausible that he was unaware of the gist of them. At the end of the same email he sang the praises of Mr O'Sullivan, the leader of the team with whom he must have closely conferred. Mr O'Sullivan was not called as a witness to explain his conduct, but I am not prepared to infer that he duped Mr Otty into believing that the silver really may have been silver. Mr Otty is too astute not to have acquainted himself with what the documentary record would or would not show.

425. He received a positive response from Ms Golz the same day. She said Mr Otty's note "tracks with my own knowledge from the course of working on the matter including the volume of cash transactions …". Mr Mouillon also replied the same day, referring to "the call on Thursday" and observing only that the LBMA "seems to be more permissive than dmcc as it leaving time to reporter to clean and remediate issues".

426. Mr Weinberger replied thanking Mr Otty and asking that "this updated info" be put into question and answer form, and "update any other info as relev[a]nt". He added: "let's continue to find out what regulator and client plan to say. It would be convenient for them to rely heavily on our work…". To that, Mr Otty responded briefly in an email (partly redacted due to privilege) including his thought that he sensed "some real anger in the regulator …", which complained that it was more transparent than western

regulators but was challenged "because we sit in Dubai". Mr Weinberger responded: "[g]ot it, thx!"

427. The claimant attempted to stay in touch with Mr D, calling him on 19 February 2014. After Mr D reported the call, Linklaters complained to Bindmans that the claimant was contacting his former colleagues at EY Dubai. They sought an undertaking that he would cease to do so. Bindmans confirmed through Ms Allen on 22 February that he would not discuss the work of his former team with any EY employee in Dubai.

428. On or about 25 February 2014, the claimant's disclosures entered the public domain. Global Witness issued a report called "City of Gold" setting out the details of the claimant's account and emphasising the importance of auditors adhering to "the highest ethical principles". The claimant appeared on the BBC television programme "Newsnight" explaining, according to the BBC's website, "why he had to resign". Aljazeera issued a news item in similar vein.

429. The DMCC's executive chairman was quoted by Bloomberg Law as saying that the information in the Global Witness report came from "a disgruntled former E & Y employee" who had every opportunity to raise concerns during the audit. The quote continued by describing, ironically, exactly what the claimant did do:

> "[i]f this man genuinely did not like what he saw during the audit, why did he go through with it and say nothing? Why did he not stand up and then say I have a problem with this, or I resign, or we should not be doing this?"

Subsequent events

430. I accept the claimant's evidence that he was approached by a partner of another member of the "big four" firms of accountants, PwC; that he tried to follow this up through a contact in Canada but that the partner who had originally approached the claimant informed his Canadian contact that the claimant was regarded as "too hot" to recruit. The claimant concluded that it was not worth approaching the other two "big four" firms of accountants and began to think about alternative ways of making a living.

431. In a letter of 6 March 2014, Linklaters sought the return of "firm property" including a laptop and Blackberry. They sought to characterise the disclosures as "in flagrant breach of his obligations both to EY Dubai and EY MENA Limited"; and sought an undertaking that he would not "publish or disclose to third parties any confidential information relating to any other firm engagement, client or business, and that he will comply with his ongoing confidentiality obligations to EY Dubai and EY MENA Limited". Again, they concluded by saying that "[a]ll of our clients' rights are expressly reserved".

432. Bindmans replied on 13 March that property and information was only being retained on the basis that it is necessary for obtaining legal advice or making further disclosures in the public interest or supporting those already made. On 20 March, Linklaters wrote back disputing the proposition that these reasons entitled him to retain the property. Bindmans replied on 25 March that the claimant was abroad and making arrangements to return the Blackberry and laptop, having made one copy which would be retained by Bindmans for legal or regulatory uses only. The letter denied that there was "any confidence in documents or information which reveal wrongdoing".

433. Linklaters then wrote in response on 10 April 2014 complaining that the laptop and Blackberry had yet to be returned and disagreeing with Bindmans' statement that a copy of the information contained on those devices could properly be retained by the claimant or Bindmans. Further, they sought undertakings concerning the use of the information on those devices and again reserved all their clients' rights, but without bringing any proceedings.

434. The claimant and his family were in Spain that month, seeking to establish themselves there, having returned there from the UK on 24 March. On 28 April 2014, Ms Montford prepared and emailed to the claimant an application for residency in Spain for him and the family. She explained that he "plans to start a global fairtrade business, exporting Spanish products including olive oil, honey, almonds". The document explained that he planned to settle in Spain, mainly working with Spanish small business owners; and also wished to set up an educational institute. The residency application was anticipated to take four months.

435. Mr Toledano put to the claimant that he did not take any steps to earn a living at that stage and that there were no emails from "Olive Holdings", the entity the claimant said he attempted to establish in collaboration with a friend; but the draft residency application document makes clear that he had made a plan to start such an export business little more than three months after resigning. Emails in the court bundle from the start of the trial show the use by him from April 2015 of two email addresses relating to Olive Holdings. They are amjad.rihan@oliveholdings.net and info@oliveholdings.net. It is clear that Olive Holdings was not a sham or invention of the claimant, as was suggested in cross-examination.

436. The same day, 28 April 2014, Bindmans responded that the claimant was "currently out of the country, but we have been informed that he has destroyed the laptop and blackberry" though "one copy of its contents has been retained". As a result of that statement, it was put to the claimant in cross-examination that he had lied to his solicitors.

437. The claimant's explanation was that he was stressed to the point of breakdown, with no place to stay, he had thought about destroying the devices but had not done so; and that he regarded the physical devices as inexpensive and unimportant and what was important was the contents, which he had retained. He therefore did not accept that he was in substance being untruthful, though he accepted that he had not destroyed the devices. I accept that explanation and I do not accede to the defendants' invitation to treat the claimant as a dishonest witness in all other respects.

438. His account generally is consistent with and corroborated by the documents preserved by him and disclosed by the defendants. His later solicitors Leigh Day, by letter of 3 June 2018, volunteered that the devices had not been destroyed. His evidence at trial was consistent with Leigh Day's later letter of 3 May 2019, stating that the claimant's statement "was made at a time of extreme stress when our client had fled Dubai, had lost his career and was in a period of crisis … [he] feared that if he admitted the existence of the work laptop it would be seized from him and all of the original evidence of what had occurred during the Kaloti audit would be lost. His concern was therefore to preserve relevant documentation, not to destroy it."

439. In March 2015, different auditors (Grant Thornton) performed an assurance audit in respect of Kaloti, using the ISAE 3000 method. It covered the period from 1 October 2013 to 31 October 2014. The claimant's disclosures were, by this time, in the public domain. Grant Thornton noted deviations from DMCC and OECD guidelines, notably in the form of multiple yet small scale cross border payments not highlighted in the compliance report, from "high risk jurisdiction without full due diligence".

440. In the opinion section, Grant Thornton stated that the compliance report described fairly the level of general compliance with the DMCC practical guidance and review protocol; and that the "compliance controls" tested by Grant Thornton "were operating with sufficient effectiveness for us to obtain 'reasonable', but not absolute, assurance that the related level of compliance was achieved…. ."

441. The Grant Thornton assurance audit process revealed that Kaloti was still buying gold from Sudan, as the claimant's audit team had discovered, but which was not revealed in the Ernst and Young consolidated reports of 27 November 2013. After the assurance audit process done by Grant Thornton, the DMCC removed Kaloti from its good delivery list in April 2015.

442. The defendants sought to undermine the claimant's account of the steps he took to engage in remunerative activity from 2014 onwards. His evidence was, however, plainly truthful and consistent with the small number of documents originally in the trial bundle and the smaller number of documents subsequently discovered by the claimant during the trial, which I allowed to be used.

443. The business of Olive Holdings did not get off the ground. An attempt to provide training courses in anti-money laundering and financial crime did not succeed as the claimant was unable to reach agreement with the major training provider he approached. The training provider wished to retain ownership of the intellectual property the claimant intended to develop. This was not acceptable to him.

444. In Dubai, Kaloti brought a criminal complaint against EY Dubai and against Mr Otty based on a significant reduction in its business as a result of EY Dubai's reports. Kaloti effectively complained, as I understand from Mr Otty's witness statement, that the reporting process had failed to say that Kaloti's operations were in line with international standards; and that EY Dubai had revealed confidential information to the media. Mr Murphy was interviewed by the Dubai police and told them that Mr Otty was not part of EY Dubai.

445. In December 2015, the claimant established a company called Global Financial & Business Integrity (**GFBI**) in the UK, through which he hoped to deliver training courses. He concluded that it would be better to leave Spain and return to the UK. He contacted Professor David Wheeler, an academic at Cape Breton University in Canada with a respected reputation in the field of sustainability. The claimant had been his student in the past.

446. The claimant and Professor Wheeler agreed to collaborate in promoting training programmes and advisory services through the Institute for Sustainability Training and Industrial Modernization (**ISTIM**), a body associated with Cape Breton University. I accept the claimant's evidence that he and Professor Wheeler produced marketing

materials and that the claimant attempted to obtain markets in the Middle East for ISTIM's services; but the project was not successful.

447. In June 2016, the criminal complaint by Kaloti against EY Dubai and Mr Otty was discontinued by the public prosecutor in Dubai and no further action was taken on it.

448. The claimant and his family moved back to the UK in July 2016 and have lived there since. In October 2016, the claimant was registered with a recruitment agency specialising in corporate sustainability. He applied by email for the post of service director in the environment department of Cornwall Council among other local authority posts. He was not successful. He explored various positions including one with an employer who had previously worked within the EY organisation. He was not successful.

449. I accept the claimant's evidence about the other attempts he made in 2016 through to 2019 to obtain work through recruitment agencies; and that he kept GFBI active and (using the email address amjad.rihan@gfbi.net) attempted to secure work for that company, including courses at universities in the UK that did not materialise due to the low number of registrations. He has so far been unsuccessful in building a career in academia, though he has had discussions with two universities about becoming a research fellow.

450. The claimant has produced a schedule of his claimed losses which gives credit for relatively small amounts earned through engagements as a translator to or from Arabic and English; and for minor consulting jobs. The amounts earned are estimates. The defendants taxed him with not having disclosed any tax returns. He responded that he was advised his earnings were too low to meet the required threshold for filing tax returns.

451. If the defendants intended thereby to suggest that the claimant earned substantial undisclosed sums after parting company with the EY organisation, I reject that suggestion and accept that the modest amounts earned are a reasonable estimate of what he earned after January 2014. His account of his attempts to earn a living was not shaken in cross-examination and I see no reason to find that he has concealed secret earnings when the defendants' main criticism is, rather, that he made insufficient efforts to mitigate his loss.

452. The present proceedings were foreshadowed in a long letter before claim in April 2017 from Leigh Day, who by then had become the claimant's solicitors in place of Bindmans. The claim was issued in December 2017. The procedural history was complex and detailed and I do not need to set out much of it. There were disputes over the proper parties, disclosure and control over documents, the law governing the dispute (whether English or UAE) and expert evidence.

453. In September 2018, the defendants responded to a request for further information saying that two individuals (a Mr Lang and Mr Schmeitzky) had acted on behalf of EY Global Services Limited (which is not now a defendant). The claimant applied to join that body to include EY Global Services Limited as an additional, fourth, defendant. The defendants' solicitors, by now Orrick, Herrington & Sutcliffe (UK) LLP (**Orrick**) in place of Linklaters, then told Leigh Day that, in fact, the appropriate fourth defendant

was a different EY entity, EYGS LLP, the current fourth defendant which was then substituted for EY Global Services Limited.

454. Expert evidence on the content of UAE law was prepared for the purpose of addressing the defendants' contention that the entire dispute was governed by the law of the UAE. When that contention was dropped shortly before trial, the defendants then accepting that English law governed the dispute, expert evidence on UAE law was nonetheless permitted by me to address the much narrower remaining contention of the defendants that the claimant's disclosures into the public domain were criminal under UAE law, in case that issue should prove relevant.

455. I therefore heard expert evidence at trial (to which I shall return) from two eminent Dubai lawyers, to whom I am grateful for their reports and their oral evidence. They were Mr Michel Amado Chalhoub, instructed by the claimant and Mr Ali Ismael Al Zarouni, instructed by the defendants.

The Negligence Claim

456. The claimant relies on two duties of care which have been expressed in various ways during the course of written and oral argument. I paraphrase them as follows before considering each in turn.

457. The first is a duty to take reasonable steps to keep the claimant safe. It is said that the defendants owed a duty to do what was reasonable to avoid or mitigate the risks to his safety if he returned to Dubai after expressing his objections to the audit. This required the defendants to take reasonable steps to relocate him or provide him with alternative work outside Dubai. It is not suggested he should have been provided with physical protection inside Dubai, for example a bodyguard.

458. The second duty relied on is a duty to address appropriately the claimant's concerns about the Kaloti audit findings and the reporting of those findings and to deal with the audit appropriately. The case developed at trial was that it became increasingly obvious that Kaloti and the DMCC required the audit to be conducted unethically in a way that by internationally applicable standards was professional misconduct; therefore the defendants and EY Dubai were bound either to sign reports containing the truth, irrespective of the displeasure of the DMCC and Kaloti or to dissociate themselves, the claimant and the whole EY organisation from the Kaloti assurance audit engagement and to report the true findings to, at least, the LBMA.

459. The claim is for economic loss only, mainly in the form of lost earnings. No claim for personal injury is brought. Nor is any financial loss claimed except for lost earnings and other work related benefits (and some expenses) through loss of the claimant's career within the EY organisation. There is no claim for any other type of financial loss such as relocation expenses or the expenses of retraining for a different career.

460. The two duties relied on, if they exist, must therefore be to protect the claimant against financial loss resulting from loss of his career with the EY organisation. As the defendants emphasised and the claimant did not dispute, you cannot formulate a duty to take reasonable care without specifying the type of injury, loss or damage the defendant must take reasonable care to prevent the claimant from suffering; see e.g. *Caparo Industries plc v. Dickman* [1980] 2 AC 605, per Lord Bridge at 627D:

> "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless."

461. Lord Oliver similarly emphasised at 651F-G that:

> "the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained".

462. Mr Toledano referred me also to Stuart-Smith LJ's observation in *N v. Agrawal* [1999] PNLR 939, 943 to the same effect:

> "[i]f a duty of care exists at all it is a duty to take reasonable care to prevent the claimant from suffering injury, loss or damage of the type in question …"

463. Mr Hubble used the term "the safety duty" as a convenient shorthand for the first of the two duties of care on which he relied. That must be understood, accurately and fully expressed, as a duty owed by the defendants to the claimant to take reasonable steps to prevent the claimant from sustaining financial loss, i.e. loss of earnings, as a result of his reasonably apprehended concerns for his safety and that of his family if he were to return to Dubai.

464. Mr Hubble adopted the shorthand term "the audit duty" for the other duty of care on which the claimant relied. It became increasingly clear as the arguments developed that the duty the claimant was relying on, fully and accurately expressed, was a duty owed by the defendants to the claimant to take reasonable steps to prevent him from suffering financial loss, i.e. loss of earnings, by reason of the defendants' failure to conduct the Kaloti audit in an ethical and professional manner.

465. Mr Hubble included within his formulation of the "audit duty" the specific point that the defendants were bound, as part of the duty of care, to address and heed the claimant's concerns and protests that the audit was being conducted unethically, instead of overruling and disregarding those concerns. But I think that part of the formulation suffers from the vice to which Mr Toledano drew my attention, by reference to the authorities just mentioned: a duty may not be formulated by reference to what conduct breaches it.

466. I regard this part of the formulation as an allegation of breach of the duty to prevent loss of the claimant's career earnings through failure to conduct the Kaloti audit in an ethical and professional manner. I agree with Mr Toledano's proposition in his written opening that "there is never a duty of care to take particular steps, only a duty to avoid causing the type of damage sustained by the claimant"; albeit that such a duty "might give rise to a requirement to take or avoid certain actions… ."

The "safety duty" owed by the defendants to the claimant: to take reasonable steps to prevent the claimant from suffering loss of earnings as a result of reasonably apprehended concerns for his and his family's safety if he were to return to Dubai

467. The claimant's main submissions on this issue in opening were ultimately quite simple: the defendants, through Mr Otty assisted by Mr Labaude, assumed responsibility for the claimant's safety by undertaking, through Mr Otty, to help him to relocate to a

different job outside Dubai. They breached that duty by failing to do so. As a result, the claimant lost his career within the EY organisation and lost substantial earnings.

468. The claimant likened this case to *Vedanta Resources plc v. Lungowe* [2019] 2 WLR 1051, SC, per Lord Briggs at [42]-[62] and referred also to Sales LJ's judgment in *AAA v. Unilever plc* [2018] EWCA Civ 1532, at [36]. In *Vedanta* it was arguable that a parent body had undertaken a sufficient degree of supervision and responsibility for the activities of a subsidiary to found a duty owed by the parent body in respect of activities of the subsidiary, without any special doctrine or any novel or abnormal principles applying.

469. Further, or alternatively, the claimant argued that the "safety duty" should be owed by the defendants to the claimant on the ground that the three *indicia* of a duty stated by Lord Bridge in the *Caparo* case (at 617H-618A) were all present: the claimant's losses were foreseeable; there was sufficient proximity or "neighbourhood" between the defendants and the claimant; and it would be fair, just and reasonable for the law to impose on the defendants the duty for which the claimant contended.

470. In his closing submissions, the claimant relied on the notion of an "assumption of responsibility" in support of the proposition that the "safety duty" extended to protecting the claimant against financial loss, not merely personal injury; though the claimant accepted that the parent and subsidiary cases such as *Vedanta* and *Unilever* had, unlike the present case, involved claims for physical injury and not only economic loss.

471. The defendants denied that any of them owed the "safety duty". They made very detailed oral and written submissions which, at this stage, it is unnecessary to set out in full; a short summary is sufficient. They started from the premise that the "overarching requirement" is that the court should proceed incrementally, by analogy with decided cases.

472. They submitted that the asserted "safety duty" went far beyond anything permitted adopting that incremental approach. It was unheard of for a corporate body such as these defendants to be held to have undertaken responsibility to safeguard the financial future of an employee or partner of an associated entity (here, EY Dubai or EY MENA) against economic loss arising from an unsafe work environment.

473. The defendants submitted that the so-called assumption of responsibility cases - where a defendant comes under a duty to prevent the claimant from suffering economic loss - are far removed from the present case. They are, classically, cases such as *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 and *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, where the defendant is a professional person who knows that another person in a relationship of close proximity to the defendant is likely to rely on the latter's skill, care and judgment.

474. The defendants argued that outside the paradigm cases where a defendant supplies advice or services to the claimant on which the latter relies, the assumption of responsibility test is unlikely to be relevant and shades into the three stage *Caparo* test. The same conclusion, they submitted, is reached by applying those three tests, which help the court evaluate the situation in which the existence of the duty is claimed. On the facts, not one of the three tests was satisfied.

475. The cases such as *Vedanta* where a claimant sought to fix a parent company with a duty of care in respect of the activities of its subsidiary, were not in point. The claims in those cases were not for purely economic loss; they included claims for personal injury and physical damage as well as lost income. Furthermore, the corporate structure in the present case was a partnership structure not one where a parent limited company owned its subsidiaries. The defendants were not the bodies that dealt with the claimant.

476. In my judgment, the defendants did not owe the "safety duty" for which the claimant contended. I agree with the defendants that it would be an illegitimate extension of the law to make the leap from the standard employer's duty to safeguard its employees against personal injury, to a broad duty to safeguard them against pure economic loss incurred as a result of the claimant's need to cease working to avoid a threat to his physical safety.

477. The standard employer's duties in relation to the work environment of its employees include a duty (supplemented by numerous provisions in statute and regulations) to provide a safe place and a safe system of work, developed in cases such as *Wilsons & Clyde Coal Co Ltd v. English* [1938] AC 57 (per Lord Wright at 78; per Lord Maugham at 86) (see Clerk & Lindsell on Torts, 22nd edition at 13-13 for an account of these duties).

478. They exist to safeguard employees against personal injury and, where they are breached, lost earnings consequent on the injury are recoverable. But they have never extended to the protection of purely economic interests. The claimant argued in effect that he was compelled to turn his back on the EY organisation and lose his lucrative career because he was only allowed to work for the organisation in Dubai and it was not safe for him to work there.

479. I accept the claimant's premise that he reasonably considered that it was unsafe for him to return to Dubai. He was, then, justified in refusing to obey the instruction to return to Dubai and not in breach of his contractual obligations by declining to do so. He was in a position analogous to that of a builder ordered to work in an unsafe area where masonry is falling; or a salesman provided with insanitary hotel accommodation on a business trip; or a zookeeper ordered by his superiors to enter the lion's den at the zoo.

480. In such cases, there would be room for argument about the employee's contractual rights. Apart from refusing to comply with an unreasonable instruction to work in dangerous conditions, the employee might – in the second example – perhaps be entitled to claim the cost of alternative accommodation during the business trip.

481. Indeed, in some cases an employee who is told to work in unsafe conditions may be entitled to resign and claim constructive dismissal, relying on the instruction as a repudiatory breach of the employment contract. Where the employee ordinarily works in this country, he may claim in an employment tribunal if he raises health and safety concerns and suffers dismissal or a detriment in consequence.

482. But it is far fetched to suggest that the remedy of the employee who is sent to work in a physically unsafe work environment can claim by way of damages in tort the entire cost of a lost career if he decides to disobey the instruction and part company with the employer. If he refuses to expose himself to the risk of injury to which the employer seeks to subject him, his remedies are confined to the conventional ones available in

employment law. They do not extend to a claim for financial loss based on destruction of his career.

483. It does not assist the claimant to frame the duty as an "assumption of responsibility" by the defendants. The phrase has caused some difficulty in the case law and has not proved universally popular (see e.g. Lord Hoffmann's speech in *Customs and Excise Commissioners v. Barclays Bank plc* [2007] 1 AC 181, at [34]-[36]). Here, the claimant's submissions did not differentiate satisfactorily between at least two different senses in which the phrase has been used in the authorities.

484. The first sense was that used by Lord Devlin in *Hedley Byrne*, at 529. He used it to describe the duty owed by a provider of advice or services to a person likely to rely on them. There, the responsibility assumed is to take reasonable care to prevent economic loss being suffered by that person. The second is the quite different sense of the phrase, where "assumption of responsibility" describes the undertaking by a parent company of a supervisory role over the activities of a subsidiary; see e.g. Lord Briggs in *Vedanta* at [61].

485. The claimant's detailed written submissions at times elided the two distinct meanings of the phrase; though they were able to point to *White v. Jones* [1995] 2 AC 207 where, by a majority decision in the House of Lords, the plaintiffs were able to recover damages for a lost legacy because of a negligent failure to prepare a will. Lord Browne-Wilkinson at 273G-274C there used the phrase in a third sense, recognising the difference between assumption of responsibility for a task and assumption of a legal liability. He considered that assuming responsibility for a particular task could lead the law to impose a duty to carry out the task carefully.

486. I do not think that reasoning can assist the claimant here. Nor is his case improved if the threefold test derived from Lord Bridge's speech in *Caparo* is applied. If it is assumed that the claimant's losses were foreseeable and that a sufficient relationship of proximity existed between the defendants and the claimant (issues to which I shall return), it would not in my judgment be fair, just and reasonable to impose on the defendants a duty of such width as to go far beyond the conventional duty to safeguard an employee against personal injury and loss of earnings consequent on such injury.

487. For those reasons, I reject the existence of the "safety duty" contended for by the claimant. Whether, if it existed, it was breached by these defendants, is therefore not a question that arises on my analysis.

488. If however the duty did exist, I would have detected a breach of it since I have found as a fact that Mr Otty did represent to the claimant that he would help to relocate him, but then omitted to do so. I have also found that Mr Otty and Mr Labaude did not expect the claimant to comply with the instruction to return to Dubai, that the claimant's concerns for his safety were real and understandable and that their foundation was not a mystery to Mr Otty and Mr Labaude.

489. In accordance with those findings of fact, I therefore regard the claimant's refusal to return to Dubai as justified and not in breach of his duties as a partner in EY MENA. But that does not assist him in establishing a breach of the "safety duty" for the purposes of the tort of negligence.

The "audit duty" owed by the defendants to the claimant: to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner

490. The claimant submitted that the authorities and the facts point to the existence of the "audit duty". He submitted that the defendants assumed a responsibility to conduct the audit in an ethical manner by intervening and directing the manner in which it was carried out; that they assumed a responsibility to the claimant to protect him from the financial loss he suffered; that application of the threefold *Caparo* test leads to the conclusion that the law should impose the audit duty on the defendants; and that this would be a permissible incremental development of the law by analogy with decided cases.

491. The claimant submitted that he was encouraged to "escalate" the issue to the highest level within the EY organisation and that in doing so he acted in accordance with the procedures for resolving differences of professional opinion, set out in the Transparency Report 2012 and the EY Code of Conduct. The EY organisation went out of its way, the claimant pointed out, to foster the culture of a global network and it dealt with the claimant's objections to the course of the Kaloti audit in accordance with that culture.

492. In particular, Mr Hubble submitted, when the claimant's escalation of the issue reached its zenith with his email of 23 July 2013, Mr Otty responded that he had "taken the lead" and involved the EY organisation leadership at the highest global level including, apart from himself, such exalted figures as Mr Ferraro, Ms Golz, Mr Mouillon, Mr Breillot and Mr Climent, in addition to securing the legal services of Mr Labaude and Linklaters and involving the EY EMEIA leadership in the form of Mr Heller and Mr Breillot.

493. The claimant argued that the EY Dubai personnel such as Mr O'Sullivan and Mr Wareing were not able independently to decide on the course of the audit, any more than the claimant had been while he was the engagement partner. The EY Dubai team under Mr O'Sullivan, once he was in place, acted in accordance with the instructions, supervision, direction and control of Mr Otty, Mr Heller and Ms Golz, who were implementing a strategy determined and approved at global level as well as EMEIA level.

494. Mr Hubble submitted in closing that the authorities relied on by the defendants, to which I am coming, did not support their denial that the "audit duty" should be held to exist. The "parent and subsidiary" line of cases (*Vedanta*, *AAA v. Unilever plc* and others) established that it was essentially a question of fact, applying ordinary principles, whether the present defendants undertook responsibility for the audit.

495. He submitted (partly in the different context of the "safety duty" which I have rejected, but also as relevant to the "audit duty") that it would be extraordinary if English law provided no remedy:

> "where individuals acting on behalf of related (and hierarchically superior) entities to a firm, directed the approach of that firm in relation to a given situation (going so far as to draft emails on their behalf and draft reports) and stated that they would deal with safety concerns of an individual within the firm, and then proceeded, in the former case, to follow

> an approach that placed that individual in jeopardy and, in the latter, proceeded to do nothing at all in relation to the safety concerns, because … no duty of care arises…"

496. The claimant submitted that the defendant was relying on "inapposite" authorities. Most importantly, *James-Bowen v. Commissioner of Police for the Metropolis* [2018] 1 WLR 4021, SC, heavily relied on, was distinguishable and factually quite unlike the present case. In *James-Bowen* the claimant police officers were effectively publicly abandoned by the commissioner who ceased to support their position in litigation in which alleged violent misconduct was laid at their door.

497. The Supreme Court, submitted Mr Hubble, had rejected a duty of care essentially for policy reasons, because the interests of the officer and that of the Commission in the litigation fundamentally conflicted; which was not the position here. The duty of care could not exceed the scope of the commissioner's obligation not to damage trust and confidence in accordance with the "portmanteau" term to that effect forming part of the officers' terms of service (or "quasi-employment").

498. The present case produced a different outcome because, the claimant argued, it could not be said to involve a conflict of interest founded on a genuine difference of professional opinion. The defendants' position was indefensible and contrary to the professional and ethical obligations of the claimant and the EY network bodies alike. Their interests were therefore aligned. The solicitors' negligence cases such as *White v. Jones* involving third party beneficiaries under a will, said Mr Hubble, were equally fact specific.

499. The defendants denied that they owed the "audit duty" of care. I have already summarised above their general propositions on the law of negligence which are their starting point. More specifically, they commended to me Lord Reed's explanation of the *Caparo* case in *Robinson v. Chief Constable of West Yorkshire* [2018] 2 WLR 595, SC. Lord Reed drew attention at [21] to the point that the "whole point" of *Caparo* was:

> "to repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty of care exists, and instead to adopt an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities".

500. Thus, where the existence of a duty of care is already established from decided cases, there is no need (unless the Supreme Court is asked to depart from earlier authority) to reargue the issue whether it is fair, just and reasonable for the duty to exist. In a novel type of case, "where established principles do not provide the answer", consideration is given to whether an incremental development in the law, by analogy with decided case, is appropriate (*ibid.*, at [26]-[27]); and:

> "The drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned. The courts also have to exercise judgement when deciding whether a duty of care should be recognised in a novel type of case. It is the exercise of judgement in those circumstances that involves consideration of what is 'fair, just and reasonable'…."

501. Lord Reed further explained this method of reasoning at [29] as follows:

> "Properly understood, the *Caparo* case thus achieves a balance between legal certainty and justice. In the ordinary run of cases, courts consider what has been decided previously and follow the precedents …. In cases where the question whether a duty of care arises has not previously been decided, the courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability, in order to decide whether the existence of a duty of care would be just and reasonable…."

502. Lord Mance, agreeing, added at the end of [83] the observation that "[o]utside any established category, the law will proceed incrementally, and all three stages of the *Caparo* analysis will be material".

503. The defendants submitted that the duties of care proposed by the claimant here were entirely novel and that analogies with previously decided cases pointed clearly away from and not towards the existence of any duty of care on the present facts. In relation to economic loss as distinct from personal injury, Mr Toledano submitted that the limitations of the "assumption of responsibility" approach had been explained in *Customs and Excise Commissioners v. Barclays Bank plc* (in the speeches of Lords Bingham, Hoffmann, Walker and Mance); and that the test had no relevance to whether a duty of care exists outside the paradigm economic loss cases.

504. The defendants relied on *James-Bowen* as a case where a claim for economic loss was struck out "in very similar circumstances to Mr Rihan's". Mr Toledano relied on the judgment of Lord Lloyd-Jones. He noted that the duties arose in tort rather than contract because of the absence of a contract of employment but were closely analogous to the duties that would arise in an employment relationship. Lord Lloyd-Jones considered cases in which employers or former employers had been found to owe a duty of care in respect of economic loss. I shall return to those cases.

505. Mr Toledano submitted that none of them was in point; while an employer was under a duty to employees not to conduct a dishonest and corrupt business (*Malik v. Bank of Credit and Commerce International SA (in compulsory liquidation); Mahmud v. Same* [1998] AC 20, HL), that was "at a considerable remove from a duty to exercise care in the conduct of business so as to avoid economic or reputational damage to employees" ([18]). Lord Lloyd-Jones recognised at [24] that the common law "does not usually recognise a duty of care in the tort of negligence to protect reputational interests"; treating one of the cases, *Spring v. Guardian Assurance plc* [1995] 2 AC 296, HL, as a case of negligent misstatement governed by the *Hedley Byrne* principle.

506. Mr Toledano submitted that the factual position here was *a fortiori* against a duty of care because the relationship in *James-Bowen* was closer to that of employment than the claimant's relationship with the defendants; here, there was no direct relationship between the defendants and the claimant; a point the defendants say is "highly relevant" and, as in *Okpabi v. Royal Dutch Shell plc* [2018] Bus LR 1022 "[t]he corporate structure itself tends to militate against the requisite proximity" (per Sir Geoffrey Vos C at [196]).

507. In *James-Bowen*, Mr Toledano pointed out, an assumption of responsibility analysis was ruled out by the informality of any assurances given on behalf of the commissioner to the claimants, to the effect that the commissioner would look after their interests. The same was true in this case, Mr Toledano said: any assurances given or statements

made to the claimant were informal and, as the Court of Appeal in *James-Bowen* decided, fell far short of what would be necessary to found a claim based on a voluntary assumption of responsibility.

508. In relation to the facts, the defendants submitted that EY Global and EY Europe had "no involvement whatsoever". A few individuals acting for EYGS had minor involvement. Of the four defendants, only EY EMEIA Services had any "substantive involvement" but that was not dealing with the claimant but was by way of providing services to EY Dubai, his employer or reputed employer. The EY network, furthermore, is not a group in which subsidiaries are owned by a parent; the local firms are separate entities which, the defendants assert, can act independently and (albeit on pain of sanctions) against the will of the global and continental bodies within the EY network.

509. If the issue were considered by applying the threefold *Caparo* test, the defendants submitted that not one of the three criteria is met; while disclosures by the claimant into the public domain may have been foreseeable, his resignation and failure to seek anonymity were not. The economic harm he suffered was not foreseeable. There was no "economic or legal proximity" between the individuals acting on behalf of EY EMEIA Services and the claimant. He was not a partner of any of the defendants.

510. It would moreover, said Mr Toledano, not be fair, just or reasonable to impose a duty of care on the defendants. The claimant had chosen not to sue EY MENA or EY Dubai, but instead to ignore the structure of the EY network. There was a clear conflict similar to that in *James-Bowen* between the duties the defendants owed to their member firms, especially EY Dubai, and the supposed duty to the claimant, as well as a conflict between the defendants' own economic interests and the supposed duty to the claimant.

511. The EY Global code of conduct and the other factors said by the claimant to bind together the EY organisation bodies into a unified structure was not made out; the EY network "is not in fact structured in a particularly 'unified' way"; on the contrary, the local firms are independent and autonomous. EY Dubai alone was legally responsible for the Kaloti audit.

512. Having considered carefully the parties' rival contentions and the authorities, I come to my reasoning and conclusions and consider whether the defendants or any of them owed the "audit duty" of care, i.e. a duty to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner.

513. I do not accept the claimant's contention that the audit duty should be found to exist by applying any "voluntary assumption of responsibility" analysis in this case. I agree with the defendants that the facts and the decided cases do not support the existence of the duty of care via the proposition that the defendants assumed responsibility to protect the claimant's post-employment earning power by carrying out the Kaloti audit ethically and professionally.

514. I accept the defendants' submission that the assumption would have to be of responsibility towards the claimant. It would not suffice to establish the duty of care to show that the defendants undertook responsibility for the conduct of the Kaloti audit, directly through Mr Otty, Mr Heller and Ms Golz, or indirectly by undertaking a

supervisory role over the conduct of the audit by the claimant, succeeded by Mr O'Sullivan, and the rest of the audit team.

515. I agree with Mr Toledano that on the facts of the present case, the audit duty of care does not fit the "assumption of responsibility" analysis favoured in the paradigm cases where a person provides services or advice to another in circumstances where there is no contract but the provider knows or should know that the other will rely on the professional care, skill and judgment.

516. That is not the position here. The defendants were not advising or providing services to the claimant. They (for present purposes I assume for the sake of argument only that it was they rather than other entities or individuals, as they submit) were engaging with him in a dialogue in which he pressed his point of view and they pressed theirs, ultimately disagreeing with his objections, overruling them, taking the Kaloti audit out of his hands and making alternative arrangements for it to be concluded in the way it was concluded.

517. I agree also with the defendants that outside the scope of the paradigm negligent misstatement cases, the question of any assumption of responsibility does not generally help to provide the answer to whether there is a duty of care or not; and that the question whether the law should attribute any assumption of liability "shades into" (in Mr Toledano's phrase) the threefold *Caparo* test.

518. I do not agree with the claimant that there is nothing novel about the audit duty for which he contends. This is not a case where the duty is already established through decided cases. I must therefore adopt the approach which both parties accept is the correct one if the duty of care is novel: to consider whether the duty should exist by adopting an incremental approach to development of the law, by analogy with decided cases.

519. As explained by Lord Mance in *Robinson v. Chief Constable of West Yorkshire*, "[o]utside any established category, the law will proceed incrementally, and all three stages of the *Caparo* analysis will be material" ([83]). As Lord Reed explained in the same case "the drawing of an analogy depends on identifying the legally significant features of the situations with which the earlier authorities were concerned" and the court must "exercise judgement when deciding whether a duty of care should be recognised in a novel case" ([27]).

520. I therefore consider Mr Hubble's alternative contention that if the duty is novel, as I am clear it is, it is but a "short further step" from the decided cases. A novel duty recognised by an incremental development in the law may later become orthodoxy (with celebrated dissenting judgments along the way, e.g. that of Lord Buckmaster in *Donoghue v. Stevenson* [1932] AC 562 and of Lord Denning MR in *Candler v. Crane, Christmas & Co* [1951] 2 KB 164).

521. I must therefore look at cases that may display legally significant features for the purposes of drawing an analogy, to see whether they provide a sufficient basis for an incremental development of the law to impose the "audit duty" in the present case. My starting point is that, as Lord Lloyd-Jones pointed out in *James-Bowen* at [20], an employer is not under any general duty to an employee "to safeguard his economic

well-being"; and (at [24]) the common law "does not usually recognise a duty of care in the tort of negligence to protect reputational interests"; though "there are exceptions".

522. In *Scally v. Southern Health and Social Services Board* [1992] 1 AC 294, HL, the doctor plaintiffs successfully recovered damages for economic loss arising from a breach of a duty to notify them of their entitlement, for a limited period, to gain a particular financial advantage by purchasing added years of pension entitlement. The claim succeeded, however, on the basis of an implied term specific to their contracts of employment. The House did not base its decision on any general duty of care to protect the economic interests of the employees.

523. In *Spring v. Guardian Assurance plc* [1995] 2 AC 296, HL, the majority held that a duty was owed to take reasonable care in preparing a reference for a former member of staff engaged under a contract of services with a third party and appointed to represent the defendant (not on the facts a former employee of the defendant). The former employer (or defendant in a position analogous to that of employer) would be liable in negligence if it failed to do so and the former employee suffered economic loss in consequence.

524. Lord Goff founded his decision on a narrower basis than the other majority members, Lords Slynn, Lowry and Woolf. He regarded the source of the duty of care as the principle in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*, i.e. an assumption of responsibility by the defendant and the third party to the plaintiff in respect of the reference and reliance by the plaintiff on the exercise of due care and skill by them (316D-F).

525. He would have invited submissions on the issue as it had not been argued in the House of Lords; but did not propose this course because he recognised that the other three members of the majority proposed to allow the appeal on a broader basis. He would have dismissed the appeal if the principle in *Hedley Byrne* could not be invoked because he considered that the duty of care in negligence would be inconsistent with the policy of the law of defamation which protects the maker of a defamatory statement where the defence of qualified privilege is available.

526. There is no doubt that Lord Goff concurred in the result but not in the reasoning of the other three majority members of the court. The other three members did not regard the defence of qualified privilege in an action for defamation as precluding the existence of the duty of care in negligence, or by way of an implied term in the contract (not an employment contract) between the plaintiff and at least two of the defendants.

527. Lord Lowry rejected the argument that the duty of care should not be allowed to outflank the defence of qualified privilege in defamation; he preferred the view that the injustice to the claimant required a remedy; the damage could be "serious and … irreparable"; the victim's "entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in good faith may be irretrievably blighted".

528. Lord Slynn was clear that the point at issue was not covered by previous authority and "it is open to your Lordships to decide the question as one of principle on an analysis of the law of defamation and of the proper approach to considering whether a duty of care may exist when it has not been recognised before" (332G).

529. He rejected the argument based on the torts of defamation and malicious falsehood, preferring the view that they did not cover the same ground as negligence. A claim founded on a negligent reference "is essentially based on the fact, not so much that reputation has been damaged, as that a job, or opportunity, has been lost" (334G). He rejected the *Hedley Byrne* principle as decisive of the case (335D). He rejected the *in terrorem* argument that free speech would be inhibited or that employers would refuse to give references.

530. Lord Slynn was not concerned "to consider the precise contractual relationship between the plaintiff and the four defendants". They were "working very closely together in relation to Mr Spring's activities" (337F-G). He approved the judge's finding that the four companies were "so closely associated that all were to be treated as owing a duty and as being responsible for the reference" (339A). The existence and extent of any implied term in contracts of employment did not arise; there was an express duty under applicable industry rules. "The question is, thus, whether if a reference is given there is a duty to exercise reasonable care in giving it" (339G). His answer was yes.

531. Lord Woolf, similarly, did not find the contractual structure to be of significance: "all the defendants at the material time were part of a single group of companies and can be regarded as acting on behalf of each other" (341D). He recognised that the duty in *Scally* had been derived from contract not tort (341E) and noted that in the employment field "there has always been a considerable overlap between claims based on an alleged breach of duty in contract and in tort" (341F).

532. Lord Woolf straightforwardly applied the three *Caparo* tests and found all three satisfied. The judge at trial had accepted the description of the reference as the "kiss of death" to the plaintiff's career in insurance. Lord Woolf thought that, in simple terms, it was fair, just and reasonable that the employer should compensate the ex-employee for the economic consequences to him of a careless reference, just as the employer would have to if he injured the employee physically (342F-H).

533. He went on to recognise that Lord Oliver in *Caparo* had drawn attention to the risk of over-wide liability for negligent statements, given the potential of such statements to cause wide-ranging pecuniary damage. Lord Woolf recognised (after quoting *in extenso* from Lord Oliver's speech in *Caparo*) that the House was being asked "to make a measured extension to the ambit of the law of negligence" and that the circumstances should be defined as precisely as possible before deciding whether a duty exists (343A-344G).

534. He then considered the defamation issue at some length. Like Lord Slynn, he did not consider the plaintiff's claim to be merely for loss of reputation; it was for loss of employment opportunity (350F-G). The court should not transfer a defence of qualified privilege from one tort to another, if it was otherwise fair, just and reasonable for the duty to exist in negligence (351A-D).

535. Lord Woolf then asked himself whether any other identifiable public policy precluded the duty, and found none that did – not the risk of discouraging the giving of references nor the risk that freedom of speech would be inhibited (351E-352H). These were outweighed by "not depriving an employee of a remedy to recover the damages to which he would otherwise be entitled as a result of being a victim of a negligent reference" (352H).

536. Finally, he considered the claim in contract and the speech of Lord Bridge in *Scally*. In the circumstances of the case before the House, he was willing to imply a term in to the relevant contract (whether or not of employment) that the employer would provide a reference during or within a reasonable time after the employment ended and that the reference should be "based on facts revealed after making those reasonably careful inquiries which, in the circumstances, a reasonable employer would make" (354A-B).

537. In *Malik v. Bank of Credit and Commerce International SA; Mahmud v. same* [1998] AC 20, HL, two former employees of the insolvent bank whom the liquidator had dismissed, claimed damages for the "stigma" of having worked for it and in consequence unable to find work in the financial services industry because it was widely known that the bank's business had been conducted fraudulently, though the plaintiffs said they had no part in any of the bank's fraudulent dealings and did not know of them until after they had left.

538. The House unanimously reversed the decisions below and held that there was an implied term in the employment contracts that the employer would not carry on a dishonest or corrupt business; that damages for continuing financial loss were recoverable if it was foreseeable that there was a serious risk that future employment prospects would be handicapped; that it did not matter whether the employee only heard about the fraudulent dealings after leaving employment; and that damages were recoverable even though they might also be recoverable in an action for defamation.

539. The cases proceeded on the basis of an agreed and assumed set of facts which had not been proved. The two leading speeches were given by Lord Nicholls and Lord Steyn. Lords Goff and Mackay agreed with Lord Nicholls and Lord Steyn. Lord Mustill agreed with Lord Steyn.

540. On the assumed facts, Lord Nicholls noted, the corruption and dishonesty was so serious and pervasive that the bank itself could properly be identified with the dishonesty. The innocent employees were therefore entitled to walk away from the business to dissociate themselves from it. No employee, of whatever status, could be taken to have agreed to work for a dishonest business (34D-G).

541. By running the business dishonestly, Lord Nicholls went on, the bank was acting in repudiatory breach of the portmanteau term, not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner implicitly recognised in the employment contract. The employee may leave immediately, if aware of the employer's conduct; if he is not and leaves before discovering the conduct, he still has the ordinary remedy of damages for breach of contract.

542. Apart from "premature termination losses", which the plaintiffs could not have suffered because their ordinary contractual rights were fully paid out when they left, the employees could (aside from injured feelings and anxiety), exceptionally, be entitled to damages for reasonably foreseeable financial loss from the prejudicial effect on future employment prospects of the employer's conduct.

543. Lord Nicholls rejected the argument that the employees' losses were confined to premature termination losses. That was, he said, "an unacceptably narrow evaluation of the trust and confidence term" (37F-G). At 37H-38B he said:

> "Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."

544. The position should be no different, Lord Nicholls reasoned at 37C-D, whether the employer wrongfully dismisses the employee in breach of the trust and confidence term; whether the employee resigns and is constructively dismissed following a breach of the term; or whether the employee only discovers the conduct amounting to breach of the term after leaving the employment, as in the assumed facts of the case before the House.

545. Lord Nicholls rejected as "misconceived" the submission that the boundaries of the law of defamation should not be sidestepped by allowing a claim in contract that would not succeed in defamation (40B). Damages recoverable on ordinary principles of contract law ought not to be excised merely because the loss is brought about through a loss of reputation. Damages to a person's reputation often causes financial loss, but financial loss need not be proved in an action for defamation. Financial loss may be recovered as damages for breach of contract, whether or not also recoverable in a defamation action.

546. Lord Nicholls cautioned that claims of the type before the House would be rare; on the assumed facts, the business had been run dishonestly and corruptly. It would not suffice for the business to be run with gross incompetence; employees often suffer by having been associated with an unsuccessful business. The implied obligation is that the business will not be run dishonestly; not that it will be run competently (42D-E).

547. Lord Steyn noted (45F-G) that the implied term imposed an obligation that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. He referred (at 46A) to Lord Slynn's recognition in *Spring v. Guardian Assurance plc* that greater duties on employers existed now than in the past, whether by statute or judicial decision; a striking illustration of which was *Scally*'s case.

548. Lord Steyn reasoned (47D) that, assuming the employees could prove that "in the financial services industry they were regarded as potentially tarnished and therefore undesirable employees to recruit" and that in that way they were "able to sustain their assertions of fact that they have suffered financial loss", the conduct of the employer must be objectively judged; it did not have to be, subjectively, directed at the employee plaintiff.

549. I need not set out here the discussion of previous authority the House decided not to follow (viz. *Addis v. Gramophone Co Ltd* [1909] AC 488; *Withers v. General Theatre Corporation Ltd* [1933] 2 KB 536). Lord Steyn considered these cases and concluded at 51F-G that:

> "the Court of Appeal [in *Withers*] held that the plaintiff was not entitled as a matter of law to damages to his existing reputation. Nothing in *Addis*'s case supported this distinction. It

is difficult as a matter of principle to justify it. A rule that damages can never be recovered in respect of loss of reputation caused by a breach of contract is also out of line with ordinary principles of contract law"

550. And he added, after further analysis of previous cases, at 52F-G:

> "The majority [in *Spring v. Guardian Assurance plc*] considered that, if the reference had been given while the plaintiff was still employed, his claim could have been brought in contract. On that hypothesis he could have sued in contract for damage to his reputation. The dicta in *Spring v. Guardian Assurance Plc* show that there is no rule preventing the recovery of damages for injury to reputation where that injury is caused by a breach of contract. The principled position is as follows. Provided that a relevant breach of contract can be established, and the requirements of causation, remoteness and mitigation can be satisfied, there is no good reason why in the field of employment law recovery of financial loss in respect of damage to reputation caused by breach of contract is necessarily excluded."

551. In *Williams v. Natural Life Health Foods Ltd* [1988] 1 WLR 830, HL, the plaintiffs approached a company formed to grant franchises for health food shops. That plaintiffs wished to obtain a franchise and open a health food shop. The company provided detailed information through one of its employees, who dealt with the plaintiffs; much of the information was provided by another employee, the second defendant, whom the plaintiffs did not know and with whom they did not deal directly. The plaintiffs suffered losses and had to cease trading.

552. They sued the company, which then went into liquidation, and the second defendant, for negligent misstatement. The House of Lords reversed decisions below that the second defendant owed a duty of care to the plaintiffs under the *Hedley Byrne* principle. There had been no assumption of responsibility by the second defendant for the accuracy of the information provided; the information had been provided by the company and the statements it contained about the second defendant's experience were insufficient to create any special relationship between him and the plaintiffs.

553. Lord Steyn gave the leading speech, with which Lords Goff, Hoffmann, Clyde and Hutton agreed. He noted that the governing principles were set out in *Hedley Byrne*, as extended in the leading speech of Lord Goff in *Henderson v. Merrett Syndicates Ltd* [1995] 2 AC 145, which settled that the principle is not confined to statements but may apply to the provision of services. It also established that if a case falls within the *Hedley Bryne* principle, as extended in *Henderson*'s case, it is unnecessary to consider further whether it is "fair, just and reasonable" to impose liability for economic loss (834D-H).

554. After some discussion of the concept of an assumption of risk and the reasonableness of the other party relying on an assumption of personal responsibility, which I need not recite here, he considered academic criticism of the principle of assumption of responsibility (837C-E) as "often resting on a fiction used to justify a conclusion that a duty of care exists"; criticism which, he considered, was "overstated". "Coherence must sometimes yield to practical justice", he said. He pointed out that *Hedley Byrne* had been decided against the backcloth of the restricted conception of contract in English law, resulting from the combined effect of consideration and privity of contract; principles which might need to be re-examined.

555. Subject to that, he said, "while the present structure of English contract law remains intact the law of tort, as the general law, has to fulfil an essentially gap-filling role" (837F-G). He then turned to the facts and held that the second defendant had done nothing "crossing the line" which could have conveyed to the plaintiffs that he was willing to assume personal responsibility to them.

556. In *Johnson v. Unisys Ltd* [2003] 1 AC 518, HL, the House considered the impact of the statutory scheme of employment rights on the availability of a particular remedy for breach of an employment contract, and the interaction between the common law and a statutory regime occupying the same or overlapping territory. A particularly vulnerable employee was dismissed for misconduct and won his unfair dismissal claim, subject to a finding of 25 per cent contributory fault.

557. He then brought a common law claim for breach of contract, alleging that he had suffered mental breakdown through the manner of his dismissal, rendering him unable to work. He asserted a breach of the portmanteau "trust and confidence" term, saying the employer had, in the manner in which it dismissed him, harmed his professional development, health, welfare and future employment prospects. The House upheld decisions below to strike out the claim as disclosing no reasonable cause of action.

558. The employee relied heavily on *Malik* and *Mahmud*'s case. The employer submitted that Lord Nicholls' speech in that case should be taken as distinguishing not overruling *Addis*'s case, which barred the claim and should be followed; and that a right to damages suffered as a result of the manner of dismissal could not co-exist with the detailed statutory scheme for providing compensation for unfair dismissal.

559. Lords Nicholls, Hoffmann and Millett (Lord Bingham agreeing with the latter two) accepted the employer's proposition. Lord Nicholls thought that, in principle, the employee's position had much to commend it but it could not stand with the statutory scheme. Lord Steyn concurred in the result but based his conclusion on the proposition that the employee had no realistic prospect of overcoming the obstacle of remoteness of damage. Lord Hoffmann commented (at [55]) that "all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal."

560. The judiciary, said Lord Hoffmann at [58], should not construct a general common law remedy for unfair circumstances attending dismissal contrary to the intention of parliament that there should be such a remedy but that it should be limited in application and extent. He went on to note at [59] that there was also a claim based on a duty of care, but:

> "The same reason is in my opinion fatal to the claim based upon a duty of care. It is of course true that a duty of care can exist independently of the contractual relationship. But the grounds upon which I think it would be wrong to impose an implied contractual duty would make it equally wrong to achieve the same result by the imposition of a duty of care."

561. I return, next, to the judgment of Lord Lloyd-Jones in *James-Bowen*. The sole issue in the Supreme Court was whether the commissioner owed the claimants a duty of care to conduct the defence of the proceedings brought against her "as effectively as possible" in order to protect the officers from economic or reputational harm ([13]). Lord Lloyd-

Jones was content to proceed on the basis that the commissioner and the officers should be treated as if they were employer and employee, though in the absence of contract ([15]):

> "any duty derived by analogy with the standard terms implied in an employment contract must necessarily sound as a duty of care, rather than be absolute."

562. He observed ([16]) that the portmanteau trust and confidence term had been recognised in *Mahmud*'s case as a standardised term implied into all contracts of employment; and he noted the cases (which I will not set out here) in which the term had been held to oblige an employer to act responsibly; in good faith; and fairly when taking action directed at the very continuance of the employment relationship. Similarly, a decision making function entrusted to the employer must be exercised in accordance with the term.

563. Lord Lloyd-Jones then (at [17]) defined the issue, if viewed "on the basis of implied contractual terms", as "whether … it is possible to extract a duty of care owed by an employer to its employees to conduct litigation in a manner which protects them from economic or reputational harm". He rejected the *Mahmud* case as a basis for so deciding; that was different because the business had been run dishonestly and corruptly.

564. He noted that in *Scally*, while the claim had succeeded, the decision had been founded on a fact-specific implied contract term and not on "a more general duty of care owed by an employer to protect the economic interests of employees" ([19]). He noted the different result in *Crossley v. Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA, where an obligation to warn a company director about financial loss he would suffer if he resigned, could not be derived from the portmanteau trust and confidence term ([20]).

565. He then considered whether imposition of the duty contended for by the claimant police officers was fair, just and reasonable. He explained the incremental approach to proposed novel duties of care as expounded by Lord Reed in *Robinson v. Chief Constable of West Yorkshire* and traced back to Brennan J's much cited judgment in *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1, 43-44.

566. He considered (at [24]) *Spring v. Guardian Assurance plc* and found in it an exception to the proposition that the common law does not usually recognise a duty of care in the tort of negligence "to protect reputational interests". He suggested that *Spring* "was essentially concerned with negligent misstatement" and referred to Lord Goff's minority view that the appeal should be decided on that narrow basis, suggesting that "it may be that assumption of responsibility is the better rationalisation of the recognition of a duty in these circumstances".

567. He referred to *Calveley v. Chief Constable of the Merseyside Police* [1989] AC 1228, HL, holding that there was no duty to conduct disciplinary proceedings against police officers properly and expeditiously, failure to do which had allegedly caused them economic loss. He questioned why then a chief constable should owe a duty to protect "the economic and reputational interests of his officers" where a claim is brought by a third party, as in *James-Bowen*.

568. Moving on to consider policy arguments, Lord Lloyd-Jones discussed at some length (at [28]-[46]) three policy issues: conflicting interests and duties (not always conclusive against a duty, as the cases he cited showed); policy considerations relating to the conduct of litigation, including when a person is sued, the right to take part in litigation in the manner the defendant thinks fit; and possible undue pressure on a defendant to waive legal professional privilege. Having done so, he concluded that it would not be fair, just or reasonable to impose the claimed duty of care.

569. From that survey of the cases I find most relevant to this proposed novel duty of care, I draw the following. First, the law does not recognise any general duty, whether in the tort of negligence or as part of the portmanteau trust and confidence contract term, to protect the employee against economic loss suffered after the end of the employment.

570. Second, the cases do not differentiate sharply between an employee (or former employee) properly so-called, and what could be called a "quasi-employee"; a term I use as convenient shorthand for police officers or others in a relationship that closely resembles employment but is not defined by a contract of employment. I mean to include quasi-employees in the discussion below, unless I indicate otherwise.

571. Third, the employer (including, by the same token, a quasi-employer) may, by way of exception, come under a limited duty, in tort or pursuant to the trust and confidence contract term or some other bespoke implied term, to protect (in contract) or take reasonable care to protect (in tort) the post-employment economic interests of the employee. *Scally*, *Spring* and *Mahmud* are examples of cases where that exception applied.

572. Fourth, where the parties are in a close relationship (so that the requirements of foreseeability of damage and proximity are met) the analysis does not depend greatly on whether the claimant and defendant are in a contractual relationship of employment; save that if the relationship is not one of contract, the claim is brought in tort and the duty is to take reasonable care. The presence or absence of a contract does not appear to determine the outcome; rather, it determines whether the cause of action is in tort or in contract: see *Spring*, per Lord Slynn at 337F-G, 339A; per Lord Woolf at 340H, 341D-F and 354A-B; *Williams*, per Lord Steyn at 837F-G ("the law of tort, as the general law, has to fulfil an essentially gap-filling role"); *Mahmud*, per Lord Steyn at 52F-H, where the claim was brought in contract but *Spring* (a tort case) was relevant to the analysis; and *James-Bowen*, per Lord Lloyd-Jones at [21] and elsewhere.

573. Fifth, it is no surprise to find that the outcome in such cases rarely depends on the presence or absence of contract: the law recognises duties in other situations, arising in tort, contract or both, that are co-terminous in content or close to being so. The obligation to provide a safe place of work and a safe system of work is one example. The duty to exercise reasonable skill and care when providing services or advice is another. Indeed, in negligent misstatement cases the absence of contract is the very reason why it was necessary to develop the law to accommodate the *Hedley Byrne* principle.

574. Sixth, the cases such as *Vedanta* concerning parents and their subsidiaries may or may not yield a duty of care owed by the parent, depending on the facts (see also Arden LJ's judgment in *Chandler v. Cape plc* [2012] 1 WLR 3111, at [80]). The injured claimant is likely to have a contract with the subsidiary but not the parent. To win against the

parent the claimant must establish a duty of care in tort applying ordinary principles, but the content of the duty if established is effectively the same as, or close to, that of the duty owed by the subsidiary under the employment contract.

575. Seventh, the law gives weight to the quality of the defendant's conduct. It is a pointer towards a duty of care (or contractual equivalent) if the conduct is immoral and unethical and causes serious and unjustified financial harm, as in *Mahmud* (see the speeches of Lords Nicholls and Steyn (the others agreeing with one or both)). If the conduct is only careless but causes serious and unjustified harm, as in *Spring*, that is a less strong indicator, but still an indicator, that a duty should be recognised (as recognised in the speeches of Lords Lowry, Slynn and Woolf).

576. Eighth, the court may be unwilling to allow the common law to develop in a manner that cuts across the content of a statutory scheme ordained by parliament and occupying the same territory: *Johnson v. Unisys Ltd*. Parliament having trodden the relevant ground, the judiciary should leave the field clear for parliament to decide if or how the law should develop within the occupied territory.

577. Ninth, however, the majority in *Spring* (other than Lord Goff) rejected the invitation to apply that reasoning to deny recognition of a novel duty of care which overlapped with the territory of another tort or torts (defamation and malicious falsehood). Furthermore, the members of the court (or the majority) in *Spring* and *Mahmud* did not regard the economic damage in those cases as damage to reputation; the claimant's reputation could suffer and that could cause him financial loss, but conceptually the damage was loss of employment opportunity (see Lord Nicholls in *Mahmud* at 40B-41C; Lord Steyn at 50A-52G; and the speeches of Lords Slynn and Woolf in *Spring*).

578. I regard the above points as legally significant features of the situations with which those earlier authorities were concerned. I turn next to consider whether the law should develop incrementally to extend to the facts of this case the situations in which a duty of care in negligence is recognised, in the form of the "audit duty". In doing so, I must consider the three elements of the *Caparo* test: foreseeability, proximity and whether it is fair, just and reasonable for the duty to be imposed.

579. This brings me, first, back to my findings of fact. The claimant relied on the structure of the partnership entities within the EY network, not just expressed in documents such as the Transparency Report 2012 and the global code of conduct, issued to staff worldwide; but also on the content of the series of interlocking written agreements which give supremacy to the Global Executive and subject the lower level entities to the discipline of its will and leadership. I have already referred to relevant provisions in those agreements.

580. The claimant further submitted that the hierarchy created by the written agreements between the defendants was also played out on the ground, as shown by Mr Otty's leadership and the participation of the other global leaders in determining the strategy and approach to the Kaloti audit. The various EY entities including the defendants were, in effect acting in a coordinated way on each other's behalf and it was devoid of reality to regard them as providing services or advice to EY Dubai.

581. The claimant submits that the relevant dealings, therefore, were between the claimant and the defendants as well as EY EMEIA, EY MENA and EY Dubai; and suffice to

establish the requirement that the damage to the claimant was foreseeable by the defendants and that the relationship between the claimant and the defendants was sufficiently proximate.

582. As already observed, the defendants took a much narrower view of their role and functions, arguing that the first and second defendants had no involvement whatever; EYGS personnel played a minimal role; and EY EMEIA Services provided services to EY Dubai and in doing so did not deal with the claimant.

583. I accept that the claimant dealt with the relevant individuals at global level to a major extent. After the issue was escalated in accordance with the suggestion of the claimant's line manager, Mr Ali, responsibility for the strategy and approach in respect of the Kaloti audit was no longer, in any real sense, that of EY Dubai. It took its cue from Mr Otty, ably assisted by Mr Labaude. Mr Otty in turn consulted colleagues at global level and reported up, ultimately, to Mr Weinberger and the Global Executive.

584. I have already found as a fact that Mr Otty, assisted by Mr Labaude (and later Linklaters) was more than anyone else deputed by the EY organisation at global level to take responsibility for resolving the issues the claimant had raised, in a manner satisfactory to EY at global, regional (EMEIA), sub-regional (MENA) and local (Dubai) levels alike. I agree with the claimant's submission that EY Dubai and the other locally based EY organisations were subordinate to EY Global both under the contractual documents and in fact.

585. I ask myself whether the damage suffered by the claimant was foreseeable by the defendants. For reasons already given, I regard the knowledge and perceptions of Mr Otty, Mr Labaude and the other global and regional leaders as attributable to all four defendants, for this purpose. The EY organisation at global, regional and local level was acting in concert with and through its various subordinate associated bodies in the manner envisaged in the written agreements constituting the EY network bodies.

586. They were dealing closely with each other, as were the defendants in *Spring v. Guardian Assurance plc*. Like their Lordships in that case, I am not especially concerned with the precise contractual position of the claimant within the EY organisation. He was a partner in EY MENA and as such his partnership contract was with EY MENA. But he owed obligations to the EY organisation far beyond those he owed to EY MENA. He had many duties of collaboration and cooperation with persons and bodies above EY MENA in the hierarchy.

587. In my judgment, it was readily foreseeable that the claimant would suffer financial loss if the Kaloti audit was conducted and concluded in a manner the claimant considered unethical and unacceptable. It became progressively clearer to the defendants' main actors in the meetings, conversations, telephone calls and emails leading up to his email of 23 July 2013, addressed to the leadership up to and including Mr Weinberger, that the claimant would feel bound to dissociate himself from the audit and the EY organisation's role in it, if his protests went unheeded.

588. That would necessarily mean the claimant resigning from his position and parting company with the EY organisation. It must have been obvious to Mr Otty, Mr Labaude and their colleagues that this would self-evidently involve financial loss, namely the sacrifice of his career with EY. I do not accept that the defendants would be unaware,

or that it would be reasonable for them to claim to be unaware, that this would be a financial sacrifice for the claimant. He had recently been made a partner and the best years of his career lay ahead of him, if he were able to stay.

589. I have also found that Mr Otty and Mr Labaude did not expect the claimant to return to Dubai when asked. That means they were aware he would have to leave his comfortable and prosperous tax free work environment, a prospect obviously very likely to lead to financial loss at least in the short term. It is not necessary that the defendants should be able to foresee the quantum of the financial loss the claimant would suffer. It does not assist them that they did not then know or have means of knowing whether the claimant's financial loss would be great or small or in between, or to what extent he would or might succeed in mitigating it.

590. Furthermore, the EY organisation was supposed to have a written whistleblowing policy, though I have no evidence that it had one. It is generally known to professional persons such as accountants that to become a whistleblower often involves a major risk of financial loss through subsequent "unemployability".

591. I do not accept that Mr Labaude can have been ignorant of that point or that subsequent "unemployability" was not objectively foreseeable to a reasonable professional lawyer or accountant, when Mr Labaude said that the claimant's stance could have "consequences" for his partnership and it would not be good for him if he refused to sign the Kaloti accounts. Those observations show that financial loss to the claimant was foreseen as well as foreseeable.

592. The defendants themselves accepted in written argument that the making of public disclosures in the event of the claimant's resignation was foreseeable. They argued that it was unforeseeable that he would make them under his own name, without concealing his identity and insisting on anonymity. They submitted that it was only foreseeable that he would make the disclosures under cover of anonymity, which would protect him against financial loss.

593. I reject that submission. Anonymity was never more than a possibility; it would be very difficult to hide the claimant's identity in the course of applying to other employers within the profession and outside it. Unless he were to resort to deception, it would be necessary for the claimant to own up to being the person who made the disclosures about the Kaloti audit. He would have to explain why he lost a good career with the EY organisation. It was, in any case, foreseeable that the claimant would decide that the public should know about how he had been treated. That element of the story would lose much of its force if the identity of the person concerned remained unknown.

594. I ask myself next whether the relationship of the defendants and the claimant was one of sufficient proximity to found a duty of care. The notion of "proximity" goes back further than Lord Atkin's speech in *Donoghue v. Stevenson* [1932] AC 562, 580-581, where he spoke of it as the "neighbour" principle. I remind myself also of what Lord Oliver said in *Caparo* at 651E-F:

> "'proximity' in cases such as this is an expression used not necessarily as indicating literally 'closeness' in a physical or metaphorical sense but merely as a convenient label to describe circumstances from which the law will attribute a duty of care. It has to be borne in mind that the duty of care is inseparable from the damage which the plaintiff

claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained."

595. In my judgment, the requirement of proximity is met in this case, but only in relation to the audit of Kaloti and the other Dubai gold refiners, where the claimant was the responsible engagement partner. I do not accept that it was met by reference to the audit of any other bodies, whether or not trading in gold or other "conflict minerals".

596. Thus, I would not accept that the defendants or any entity within the EY network was in a sufficiently proximate relationship with the claimant in carrying out the audit of PAMP, done in Switzerland in the name of EY Switzerland, though leaders within EY became involved at higher levels. The claimant did not work on the PAMP audit, he was not responsible for it and his relationship with it was tenuous, remote and indirect. It became part of the narrative when Ms Kaloti cited it for comparative purposes; but that does not connect the claimant sufficiently closely with the conduct of that audit.

597. I reject the submission of the defendants that proximity is not present because the different EY entities were not part of a unified corporate structure or because there were different cost centres and for accounting purposes they charged each other for services rendered to one another – for example, EY UK charging EY Dubai for Mr Britton's time and trouble. Those facts have little or no relevance to the proximity issue.

598. Nor do I accept that the defendants are assisted by the dictum of Sir Geoffrey Vos C in *Okpabi* at [196] that "[t]he corporate structure itself tends to militate against the requisite proximity". That was so in the case before him, in his view and no doubt the view of the majority (Sales LJ dissenting; an appeal is now pending in the Supreme Court).

599. It does not mean the same conclusion must be reached after a trial in the present case. There are many reasons for adopting a particular partnership or corporate structure. I do not accept that preservation of local autonomy and independence from the global leadership loomed especially large among them in this case. If it is said that the partnership structure in the present case has successfully distanced the defendants from the claimant to the point where he is not their "neighbour" in the Atkinian sense, I do not accept that.

600. I consider, next, whether it is just and reasonable for the law to impose the "audit duty" on the defendants, or any of them, in the present case. I do not think the answer is different from defendant to defendant, for the reasons I have already given. They and the other EY entities involved were acting in concert, jointly with each other and on behalf of the others as well as themselves.

601. I remind myself that the "audit duty" is a duty owed by the defendants to the claimant to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner.

602. Performance of that duty would require the person subject to it to behave ethically and properly, in accordance with established norms of conduct which are found in documents such as the IFAC Code, the defendants' own code of conduct and the 2012

Transparency Report. It is at this stage of the argument that the standards established and set out in documents such as these become relevant.

603. If the defendants owe this duty, they will only be required to do what they are in any event bound to do as a matter of professional ethics, which accord with generally accepted views of morality in the context of reporting exercises such as this one. It is relevant also that the defendants themselves made provision within their constitutional documents for the GAC (which deals with human resources type issues) to deal with issues raised under "whistleblowing" policies and procedures.

604. Granted that professional ethics are important, likewise it is important also that accountants and other professionals should not have pressure put on them by their employers (or quasi-employers) to act unethically. At this stage of the argument, I am not considering whether that happened in this case. I am discerning a lack of merit in the defendants' assertion that it is just and reasonable for a person such as these defendants to be free from any duty not to act unethically.

605. The importance of standards of professional ethics being upheld is not controversial. The evils of terrorist financing, fraud and international money laundering are recognised in international instruments and bear witness to the importance of auditors acting with openness, independence and objectivity when dealing with bodies such as Kaloti that deal in conflict minerals.

606. However, the importance of upholding ethical standards might not of itself establish that it is fair, just and reasonable to impose the "audit duty" of care in this case. It might be said that professional standards are adequately safeguarded by the disciplinary regimes that exist in this and other countries and that the law of negligence should not become involved.

607. While there may be much to be said for this proposition in other contexts, here I do not consider that this is a sound basis for rejecting the justice and reasonableness of the duty to conduct the audit ethically and in line with professional standards. The defendants did not make any argument along these lines and I think they were right not to do so. Indeed, they pointed out that the conduct of the Kaloti audit was beyond the reach of the FRC's disciplinary jurisdiction because it occurred outside the UK.

608. I do not have evidence of a strong and effective international regime for disciplining accountants in the Middle East or elsewhere outside the UK, applying standards similar to those found in the IFAC Code. If the disciplinary regimes in other jurisdictions could be relied on as effective and adequate to safeguard against misconduct, I think Mr Heller would have appreciated that he was bound by the IFAC Code and Mr Otty would have had at least some idea of its content.

609. The defendants argue that it would not be just and reasonable to impose the audit duty here because, as in *James-Bowen*, the interests of the claimant conflict with and are not aligned with the duty and interests of the defendants. Lord Lloyd-Jones pointed out that a conflict of interest may be a weighty factor pointing against a duty, though he recognised that it is not conclusive against a duty of care (see at [29] and the cases there cited).

610. I do not accept the defendants' submission that there is any relevant comparison between the public duty and interests of the commissioner in *James-Bowen* in relation to the conduct of litigation and the duties and interests of the defendants in the present case. The defendants cannot have owed a duty to Kaloti or the DMCC to conduct the audit unethically.

611. Mr Toledano sought to argue that there was no more than a difference of professional opinion between the claimant and the defendants about what the defendants' (or EY Dubai's) professional duties were. He pointed in particular to the duties of confidentiality owed to Kaloti. He claimed that the frontier that separates ethical from unethical conduct is governed by the *Bolam* test, i.e. that it would be sufficient if a respectable body of opinion within the accountancy profession would support the defendant's position.

612. The difficulty with that argument is that the *Bolam* test goes to breach of duty, not to the existence of a duty. It is deployed to determine whether a duty, already found to exist, has been breached. The "audit duty" contended for is a duty not to conduct the audit in an unethical manner. If Mr Toledano is right that a respectable body of opinion within the profession would support the defendant's position, that could, at best, be a matter for expert evidence relevant to whether the duty was breached.

613. I asked Mr Toledano in the course of argument whether he would have consented to the claimant calling expert evidence addressing the *Bolam* test with respect to whether the conduct of the Kaloti audit was conducted ethically. He accepted that he would not have consented to the claimant adducing such expert evidence. Nor, rightly, did the defendants seek to call any such expert evidence.

614. I do not, in any case, agree that the *Bolam* test is relevant to whether an accountant has behaved unethically or in a manner amounting to professional misconduct; any more than the *Bolam* test would be relevant in a case where, for example, a solicitor had instructed a subordinate not to disclose in litigation a relevant document adverse to the client's interests; or where a silk instructed his or her junior to mislead the court.

615. An accountant giving expert evidence might be able to opine on what practices are commonly followed in particular parts of the world, but if the expert sought to defend as acceptable conduct objectively considered by the court to be unethical, applying and interpreting the standards found in relevant standard-setting documents such as the IFAC Code, the contrary opinion of the expert would not assist the court because the expert would be seeking to defend conduct the court considered unethical.

616. In my judgment it is, conceptually, not a huge leap from imposing a duty of care to protect against physical injury and consequent financial loss by providing a physically safe work environment, to imposing a duty of care to protect against economic loss, in the form of loss of future employment opportunity, by providing an ethically safe work environment, free from professional misconduct (or indeed criminal conduct though that is not this case) in a professional setting.

617. Such a duty closely mirrors the content of the portmanteau trust and confidence term in the context of regular employment, at issue in *Mahmud*'s case. Breach of the term is repudiatory, entitling the claimant to resign and claim constructive dismissal. The treatment of which the claimant complains in this case is akin to what in ordinary

employment would be a complaint of constructive dismissal. However, he had no remedy against any of the defendants for constructive dismissal; he was not employed by any of them.

618. Nor would he have any remedy against EY MENA; his partnership agreement lay beyond the reach of the jurisdiction of the UK employment tribunals, as Linklaters correctly emphasised during the correspondence with Bindmans. That is because he ordinarily worked outside Great Britain (Employment Rights Act 1996 (**the 1996 Act**) section 94(1) and other provisions, as interpreted in cases such as *Lawson v Serco Ltd* [2006] ICR 250, HL, *Ravat v Halliburton Manufacturing & Services Limited* [2012] ICR 389, HL and *Bates van Winkelhof v. Clyde & Co LLP* [2014] ICR 739, SC).

619. Where a person such as this claimant ordinarily works outside Great Britain and therefore cannot avail himself of the statutory regime, a duty of care in tort is the only "gap filling" (in Lord Steyn's phrase in *Williams*) option. The cases involving parent companies and subsidiaries (e.g. *Vedanta*, *Okpabi* and *Chandler*) illustrate the circumstances in which the requirement of proximity will be met. The judgment of Arden LJ at [80] in *Chandler*, decided on appeal after a trial, is particularly helpful in this regard, as noted above.

620. If, as I have found, the requirement of proximity is met; and if the claimant ordinarily worked outside Great Britain (which is common ground) but English law applies to the dispute (which is also common ground), it seems to me fair, just and reasonable for a duty of care to exist, as a matter of English law, provided the case ought properly to be identified as within the small class of exceptional cases such as *Scally*, *Spring* and *Mahmud* identified by Lord Lloyd-Jones in *James-Bowen*, where an employee, quasi-employee, former employee or former quasi-employee is protected against financial loss after the end of the employment or quasi-employment.

621. Is this such a case? In my judgment, it is. The duty is part of the obligation of the employer (or quasi-employer) to provide an acceptable work environment. The physical integrity of the employee is protected against injury by the classic duty of care to take reasonable steps to provide a safe place of work and a safe system of work. By parity of reasoning, I see no reason why, in certain circumstances, the moral and professional integrity of the employee (or quasi-employee) should not be protected by a duty to take reasonable steps to provide an ethically acceptable work environment, free of criminal conduct (see *Mahmud*'s case) and free of professionally unethical conduct.

622. Aside from the statutory regime of employment law and the jurisdiction of employment tribunals, to which I shall return in a moment, I think the law of tort would protect an employee or quasi-employee from having their career ruined by becoming "tainted with unemployability" after being embroiled by the employer or quasi-employer in unethical conduct and forced to dissociate themselves from the wrongful activity. I have already mentioned the example of the solicitor instructing a subordinate to bury a disclosable document or a barrister instructing a junior to mislead the court. A doctor instructing a more junior doctor to falsify medical notes is another obvious example.

623. One important point to mention is that if the duty exists, it should be confined to those persons and activities in respect of which the proximity requirement is satisfied. Thus,

in the present case, I have already noted that the defendants could not owe the claimant the "audit duty" of care in respect of, for example, the PAMP audit.

624. Similarly, in the example of a solicitor instructing the subordinate to bury a disclosable document, I do not think it likely that the solicitor and the firm would owe the duty of care to other subordinate lawyers or staff within the firm, not involved in the particular litigation but, say, involved in other litigation. The requirement of proximity (though it is always a question of fact) would probably only be satisfied in relation to the solicitor told to behave improperly on a specific occasion or in relation to a specific case.

625. In the example of a silk instructing a junior to mislead the court, the requirement of proximity would probably not be met (though it is always a question of fact) in the case of other juniors within the chambers who had not been asked to mislead any court but felt they should leave the set of chambers. The duty would be even less likely to be owed to the chambers clerks or administrative staff, by the same reasoning.

626. Applying that reasoning to the present case, the duty would be owed to members of the team conducting the Kaloti audit. Within that team, only those unwilling to lend their professional name to the conduct of the audit, i.e. the claimant, would be in any position to bring a claim in negligence for breach of the audit duty. Those such as Mr O'Sullivan and Mr Wareing who willingly took part in the conduct of the audit would be treated as having acquiesced in the conduct.

627. They and anyone else willingly taking part in the unethical conduct relied on could be met with a defence, if not of *volenti non fit iniuria* (which requires consent to be given free from pressure from an employer) that any loss suffered would be of their own making. Nor, probably (though it is not an issue I need to decide) would a person such as Mr D, inwardly unhappy about the conduct but outwardly acquiescing in it, be able to bring a claim.

628. One further aspect of the "audit duty" could lead to the conclusion that, despite the above reasoning, it would not be just and reasonable for the law to impose the "audit duty" of care. It arises from *Johnson v. Unisys Ltd* and the statutory system of redress in employment tribunals, enacted in the 1996 Act and other legislation.

629. In line with the reasoning in *Johnson*, it might be thought that the duty of care in relation to the ethical conduct of the Kaloti audit should not be allowed to co-exist alongside the bespoke statutory regime for the protection of whistleblowers, as they are known, in Part IVA of the 1996 Act, added by the Public Interest Disclosure Act 1998.

630. I only need to decide whether the audit duty exists on the facts of this case. However, the statutory regime for whistleblowers is relevant to whether it is just and reasonable to permit the emergence of a common law duty protecting them, alongside the statutory protection. I should make it plain that I would not have considered it reasonable to impose the audit duty in circumstances where the claimant could avail himself of the statutory protection.

631. Damages for "stigma" are available in statutory whistleblowing claims. As the learned editors of Harvey on Industrial Relations and Employment Law put it (at CIII [128]):

"One feature of whistleblowing cases which explains some particularly high awards (by unfair dismissal law standards) is that, although the claimant was legally in the right in making the protected disclosure in question, it may be that in practice the *fact* of being a whistleblower, if known to potential alternative employers, has a severely limiting effect on his or her future prospects of employment in that profession, trade or industry; in an extreme case it may end any such prospect altogether. Future loss may therefore be a major aspect of compensation, especially if the individual is obliged to take less remunerative work instead in the long term. Normally, future loss in unfair dismissal cases concentrates on how long the claimant would have stayed with the employer otherwise and/or how long it will be before he or she *does* obtain equally well paid work. However, in a whistleblowing case where the claimant maintains a major or indeed complete loss of such a prospect, it may be appropriate to consider 'stigma' damages akin to those available in discrimination cases …."

632. If the present case had arisen in a conventional employment context, where a claimant is able to invoke the statutory protection under Part IVA of the 1996 Act, the reasoning in *Johnson v. Unisys Ltd* would have persuaded me that the audit duty should not be allowed to supplement the statutory regime. In such a situation the employee obviously should not be allowed to bring a common law claim in tort after the expiry of the employment tribunal time limit (normally three months from the date of the relevant detriment or dismissal), circumventing the short deadline applying to the statutory cause of action.

633. For that reason, the examples I have given of solicitors, barristers or doctors putting pressure on their subordinates to behave improperly, might well in a UK context not attract the duty of care to behave ethically which I have been considering in this case. But parliament has only extended to whistleblowers the protection of the statutory regime where they ordinarily work in this country. There is no such protection for those, like the claimant in this case, who work outside it.

634. The duty is likely to be ruled out as inconsistent with the statutory regime, but only where that statutory scheme itself provides that a person may invoke its protection. If I am right about that, it is a duty that applies only in very narrow circumstances. For that reason the present case, like *Mahmud*'s case and some of the other cases (including, according to Lord Goff, *Henderson v. Merrett Syndicates Ltd*) should be regarded as an "outlier", with a factual basis that will rarely if ever recur.

635. I conclude that it is fair, just and reasonable to recognise the existence on the unusual facts of this case of the "audit duty": the duty of care owed by the defendants to the claimant: to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner.

Breach of the audit duty?

636. Was the audit duty breached? Both parties made detailed written and oral submissions on this issue. I will paraphrase their main points much more briefly, in this already lengthy judgment, than they were expressed to me. I say that without intending any criticism of either side's presentation of the arguments, which were both of high quality. The quotations below (and above) are from written submissions except where indicated.

637. The claimant made the following main submissions. The defendants failed to act on and accept as valid the claimant's concerns and objections to the audit and the reporting. Instead, they colluded with Kaloti and the DMCC to sanitise Kaloti's wrongdoing and conceal the grounds for reasonable suspicion (which they admit existed) that Kaloti was involved in money-laundering (whether or not those suspicions may have been reported to the authorities in Dubai, as to which there is no evidence either way). In support of that overarching submission, the claimant made the following specific points.

638. Messrs Stanton and Breillot improperly, said the claimant, accepted in June 2013 the DMCC's proposal that EY Dubai should change the audit and compliance period from 1 January-31 December 2012 to January-March 2013 and instructed Mr Murphy to suggest to the DMCC that the compliance period should be changed, which Mr Murphy did. The defendants then, improperly, were willing to acquiesce in the DMCC's changes to its review protocol, an exercise with which the claimant had refused to engage.

639. When he escalated the issue to higher levels within the EY organisation, leading to the further discussions in June and July 2013 and the "reporting proposal" of Messrs Heller and Labaude, at the end of July 2013, Mr Labaude and Mr Heller provided a draft management report which was acceptable to the claimant except for changing the Morocco gold issue rating and the overall rating to zero tolerance.

640. If the defendants had insisted on that report being submitted and the other reports had then faithfully mirrored its content and complied with applicable accounting standards, I infer that the claimant would have been content. But, he submits, Mr Labaude then provided a draft assurance report on 7 August 2013 which, contrary to ISAE 3000, did not provide any detail of why EY were disagreeing with the compliance report and gave "an incomplete and misleading impression of the Audit findings".

641. The claimant says Messrs Heller, Wareing, O'Sullivan and Labaude, and Ms Golz, then improperly colluded with Kaloti to change its compliance report at the end of August 2013. The changes were those that included altering "Morocco" to a "North African country" and altering the coating of gold with silver to "documentary irregularities". They then bowed to pressure from the DMCC to change EY's own assurance report, thereby making it misleading and "compromising the auditor's independence and objectivity".

642. The three reports submitted on 8 September 2013, i.e. the "September reports", sanitised Kaloti's wrongdoing. The assurance report used the euphemistic "emphasis of matter" formula instead of an adverse opinion, to water down the seriousness of the audit findings. The compliance report at that stage did include the words "zero tolerance" but it was diluted by saying without justification that the finding related to past events and was capable of being remedied.

643. The defendants then, says the claimant, improperly colluded further with Kaloti and the DMCC to suppress the September reports themselves. When the DMCC was not content with them, said the claimant, the EY leaders improperly agreed with Kaloti and the DMCC in and after September 2013 to get rid of any reference to the zero tolerance finding in the compliance report. The defendants compromised their objectivity by entertaining the DMCC's representations to the effect that the finding was "too harsh".

644. Further, the claimant submits that the defendants then engaged in the charade or "fig leaf" exercise (in Mr Hubble's phrase) of asking Kaloti for evidence of, or a request for evidence of, customs documents relating to the Morocco gold transaction, a process Mr O'Sullivan speciously called (in his letter to the DMCC of 22 September 2013) "additional diligence"; though he had just interviewed Mr D and knew from him the truth about the transaction.

645. Next, the claimant submits that the defendants oversaw the production of a new compliance report in October 2013 which no longer used the words "zero tolerance" and then, at the meeting on 22 October 2013, through Mr O'Sullivan and Mr Murphy (subsequently approved by Mr Heller and Mr Labaude) agreed to reword the assurance report at the DMCC's request to excise material that attributed to the DMCC and not to EY the decision on what the risk rating should be.

646. The claimant submitted that the defendants then, in late October and early November 2013, improperly accepted another change to the DMCC's review protocol to introduce the requirement for "consolidated" reporting, a process that caused discomfort even to Mr Heller who, however, went along with it nonetheless. This paved the way, submits the claimant, for the further sanitised "November reports" produced on 8 or 9 November and then rewritten and finalised on 27 November 2013.

647. The claimant said the November reports were the culmination of an unethical audit process undertaken in the teeth of his protests, which meant that "[t]he outside world would never be aware of the gravity of those findings on the basis of the publicly available reports". He submits that the engagement should have been terminated and "appropriate reports made to stakeholders".

648. Instead, the claimant says, the defendants suppressed his dissenting voice and ostracised him, falsely and unfairly accusing him (through Mr Labaude) of "dropping the ball", threatening him with "consequences" for his partnership and driving him out of the EY organisation by instructing him to return to Dubai, expecting him to react by resigning as he then did.

649. The claimant submits that the defendants' reasoning for not reporting the matter to the LBMA was spurious on two counts. The first was Mr Labaude's initial idea that reporting of a zero tolerance breach was only required where the refiner was an LBMA accredited "good delivery" refiner which, the defendants say, Kaloti was not. That argument was wrong, the claimant submitted; there is no support for it in any LBMA document and Kaloti was an associate member of the LBMA.

650. Second, the defendants sought to argue that reporting was not required and should not occur because the LBMA's third party audit guidance was prospective only and did not create an obligation to report zero tolerance breaches occurring before EY Dubai had become an accredited recommended service provider.

651. This, the claimant submitted, contradicted the position taken in the PAMP audit, an LBMA audit which occurred without EY Switzerland being an accredited service provider; and the LBMA itself had made clear that formal accreditation was not necessary, a point well understood by the claimant's audit team back in March 2013 but spuriously contradicted by Mr Labaude to avoid accepting any reporting obligation.

652. The claimant makes further complaints which I will set out more briefly: of his removal as engagement partner and replacement by Mr O'Sullivan who lacked the necessary experience; of the defendants' failure to keep the claimant informed that they were conducting the audit in a manner that contradicted the claimant's professional opinion as to its propriety; and of alleged breaches of the Proceeds of Crime Act 2000 (**the POCA**) and the Bribery Act 2010 (**the 2010 Act**).

653. He also complained that the defendants' conduct of the Kaloti audit breached the ethical obligations in the IFAC Code, namely the requirements to act with integrity, objectivity and professional competence and due care and to avoid any action that discredits the profession; and EY Global's own code of conduct, which creates obligations to similar effect. He also relied on the subsequent audit by Grant Thornton and its outcome as evidence that the audit duty was breached.

654. Such were the claimant's main points in brief outline. The defendants' position was very different. Mr Toledano advanced the following main contentions and again I paraphrase them very briefly and I do not include those founded on factual evidence from the defendants' witnesses which I have rejected in my account of the facts.

655. The defendants made the general submission, already mentioned, that it was not they with whom the claimant dealt, but EY Dubai and EY MENA; that EY Global and EY Europe had no involvement whatever; that EY EMEIA Services and EYGS had little involvement and that its involvement was not treatment of the claimant but the provision of services or advice to EY Dubai. The engagement was to report to the DMCC, not "to publicise without any regard to obligations of confidentiality any unethical practices which it uncovered about the gold industry or to expose or resolve any issues with the regulatory system in Dubai".

656. The defendants did not fail to comply with the principles relied on by the claimant in the IFAC Code. The defendants "did not take or cause to be taken an unreasonable, unprofessional, unethical and/or unlawful approach to the Audit". Nor did they fail to act upon or give proper consideration to the claimant's concerns about the audit. In written closing submissions, they submitted that:

> "[t]he reports issued were in accordance with the DMCC's Review Protocol (and the DMCC never suggested otherwise). There is no higher authority than the DMCC as regulator. The engagement was to report to the DMCC, which is what EY Dubai did. It was not to tell the truth to the world about what it had learned in a private engagement between EY Dubai and Kaloti, in circumstances where EY Dubai was bound by strict obligations of confidentiality … ."

657. In oral argument, Mr Toledano put it trenchantly; the duty, if any, was not owed to the claimant:

> "… it was simply none of his business. It's not for him to dictate how EY Dubai does or doesn't decide, and if they do decide to do -- not to terminate it, for example, that's a matter for them. They have got their obligations under their engagement agreement with Kaloti. He's entitled to disagree with them, of course, but the fact they don't terminate it cannot constitute some kind of a breach of a duty owed to him. …
>
> ….."

> … if he takes the view that it's unethical but EY Dubai take the view that it's not unethical, they have to decide what to do about a contractual engagement that they have entered into."
>
> He can of course decide not to sign the report, which he did, and then they have to decide: do we get someone else in to sign the report, which ultimately goes out as a report in the name of EY Dubai, or whether not to, or whether to terminate the engagement."

658. The defendants submitted that, in any case, they could not be required to accede to the claimant's requests as to how to conduct the Kaloti audit, as that would create a conflict of interest with EY EMEIA Services's (the third defendant's) obligation to advise and assist EY Dubai "to bring the audit to a satisfactory conclusion".

659. The defendants went on to submit that all the defendants' actions in relation to the Kaloti audit were reasonable and not such that no reasonable accountant would regard them as such (though as I have said, the defendants did not call or seek to call expert evidence in that regard, unlike the parties in *Sycamore Bidco Ltd v. Breslin* [2012] EWHC 3443 (Ch) on which the defendants relied (see Mann J's judgment at [252])). Mr Rihan merely held a different professional opinion from that held by the defendants and their associates.

660. It was not unreasonable or unethical, the defendants say, for Mr Stanton and Mr Breillot to ask Mr Murphy to meet the DMCC and suggest a new compliance period for the audit, to commence on 1 July 2013; and in any case, the DMCC decided not to change the compliance period.

661. The defendants submitted that great care and considerable time was taken by the professionals involved on the defendants' side, including the taking of internal legal advice from Mr Labaude and Mr Andjelkovic and external advice from Linklaters, albeit that the content of the advice could not be revealed to the court since privilege was not waived.

662. The defendants pointed out that a zero tolerance finding was reported by EY Dubai in the management report forming part of the "September reports". It was the claimant who had asked for this. It was not unreasonable for the defendants to find reasonable the view of EY Dubai that there should be a positive assurance report in September 2013 in respect of Kaloti's compliance report, which referred to the zero tolerance and high risk non-compliances.

663. Even if there had been any obligation to make a report to the LBMA, it was reasonable to conclude, after taking legal advice, that EY Dubai had no obligation to make a report to the LBMA, whether under the POCA, the 2010 Act, or otherwise, the defendants submitted. Kaloti, they pointed out, was not on the LBMA's good delivery list and there is no evidence that it was applying to join the list. The reporting obligation in the case of zero tolerance findings only applied to those already on the good delivery list.

664. Further, EY Dubai had no contractual or other agreement with the LBMA that could have generated a reporting obligation to it. It was the claimant who was artificially attempting to create a reporting obligation by belatedly arranging for the application to be made in July 2013, without the authority of EY Dubai to do so. In written closing submissions the defendants submitted that the PAMP audit did not assist the claimant; it was conducted by EY Switzerland and "there is no evidence as to whether EY Switzerland applied for approval from the LBMA to carry out that audit."

665. In any case, "EY Dubai eventually concluded (following the DMCC's guidance) that there was no zero tolerance breach under the DMCC's standards". As these were similar to the LBMA's, it is likely that EY Dubai's eventual conclusion would likewise have meant there was no zero tolerance breach of the LBMA's standards; or at least, it was not unreasonable to conclude that "the breach was not zero tolerance".

666. The EY organisation's professionals involved in the matter did not, contrary to the claimant's case, attempt to create a justification for not reporting the matter. The draft adverse assurance report from Mr Labaude of 7 August 2013 was not misleading or non-compliant with ISAE 3000. It was a "template" and is in any event irrelevant because it was superseded by other and different reports.

667. The claimant was not under threat of adverse consequences for his partnership within the EY organisation if he should continue to dissent from the reporting proposals of Mr Labaude and Mr Heller. On the contrary, Mr Otty assured the claimant quite properly that it was "absolutely fine" if the claimant wished not to sign the Kaloti audit reports. It was not the defendants who replaced him as engagement partner with Mr O'Sullivan; it was the claimant himself who stood down by leaving Dubai and refusing to sign the reports, making it impossible for him to continue as engagement partner.

668. Contrary to the claimant's case, the defendants "did not advise/assist Kaloti to rewrite its compliance report in such a way as to suppress/conceal/distort the Audit findings, or fail to address statements/omissions in the report which had that effect". The assurance report "was not such as to suppress/conceal/distort the Audit findings"; and "the September reports were not suppressed/concealed / distorted by [the defendants]."

669. While the defendants admit that "the Moroccan gold issue provided reasonable grounds for knowing or suspecting that Kaloti was engaged in money laundering", the claims that there should have been disclosures in accordance with the POCA and the 2010 Act were serious allegations of criminal behaviour which are baseless and ought never to have been made. The parties made detailed written (and to a lesser extent oral) submissions on these two statutes, but it is not necessary to set out the detail of those submissions.

670. There was no obligation to terminate the engagement merely because the DMCC's review protocol underwent changes during the audit process. At best, the changes would give EY Dubai a right to terminate the engagement which it was not bound to exercise. Indeed, the claimant himself at first sought to reach an agreed position within the EY organisation and did not advocate termination when he was doing so. Termination of the engagement would have generated no reporting to any person or entity, contrary to what the claimant wanted.

671. The defendants submitted that it was "reasonable to conclude that EY Dubai was acting reasonably in following the DMCC's guidance on the characterisation of the Moroccan gold finding in the 9 November reports"; and "reasonable to agree with EY Dubai's view that, in relation to the consolidated reporting process, the reporting format should accord with the DMCC's amended Review Protocol".

672. The Grant Thornton audit is not evidence of any breach of a duty of care by the defendants. The DMCC actually took Grant Thornton to task for being too soft on Kaloti. The claimant had no involvement in the Grant Thornton audit. The removal of

Kaloti from the DMCC's good delivery list following the Grant Thornton audit is not evidence that EY Dubai carried out the Kaloti audit improperly.

673. Such were the parties' submissions. I come to my reasoning and conclusions on whether there was a breach of the audit duty owed by the defendants to the claimant. First, I do not accept the defendants' submission that they were not the actors who did the acts relied on as breaches of the duty. I have already given my reasons for rejecting that artificial contention.

674. Second, I remind myself that the purpose of an assurance audit is to provide an independent written view on the quality and propriety of the audit client's business practices, which is expected to be relied upon by, among others, those interested in investing in or doing business with the audited body and those entrusted with regulating its activities to ensure that its behaviour is acceptable and not in need of sanctions, reform or restrictions.

675. Next, in order to consider whether the defendants' audit duty was breached, I need to decide whether the defendants' conduct in performing the Kaloti audit was unethical, improper and unprofessional and whether they put improper pressure on the claimant to take part in or acquiesce in unethical conduct and thereby exposed him to loss of earnings by having to dissociate himself from the improper conduct and the pressure to take part in or acquiesce in it.

676. In considering whether the defendants' conduct was ethical, proper and professional, I find it appropriate to test the relevant conduct against the yardstick of the IFAC Code. That is the best instrument to measure by, because it is common ground that Messrs Otty and Heller were bound by it; and because I regard the defendants also as bound by it, each of them being a "firm" and a "network firm" by virtue of their control, through supervision and management, of the activities of EY MENA and EY Dubai.

677. The IFAC Code is the best measure also because it is an external objective source of acceptable standards. The documents I have seen emanating from within the EY organisation, i.e. the EY global code of conduct and the Transparency Report 2012, would be likely to yield the same answers or answers that are no less exacting than those found in the IFAC Code. If they do not, the IFAC Code standards remain applicable.

678. It is common ground that, in the defendants' words expressed in written argument, "the Moroccan gold issue provided reasonable grounds for knowing or suspecting that Kaloti was engaged in money laundering". It was therefore clear from 5 March 2013, when Mr D and his colleagues discovered and internally reported that issue and other findings of concern, not least the cash transactions issue - about $5.2 billion of business done in cash during 2012 – that this could be no ordinary assurance audit.

679. Mr Toledano's proposition that "there is no higher authority than the DMCC as regulator" must be emphatically rejected. It is, of course, not intended to mean that the DMCC is above the court and the law of England which applies in this case. The submission is, rather, that compliance with the DMCC's review protocol was sufficient to ensure that the conduct of the Kaloti audit was acceptable and not wrongful.

680. I reject that proposition also. The confidentiality that bound the EY organisation in respect of the Kaloti audit was not absolute and is not itself an answer to the claim. That can be demonstrated in principle by thinking of other, worse examples. Suppose an assurance audit of a supplier of construction materials discovers that the audit client body is supplying materials to a hostile foreign state for use in building nuclear weapons, in breach of international sanctions.

681. The auditor's obligation of confidentiality is overridden, however illegal breach of it may be under the law of the state where the audit is carried out. For example, there might be an offence under local law of conduct that is "offensive to the Great Leader" of the country where the audit is carried out, which could also be the country to which the nuclear weapons construction materials are supplied. It would not be conclusive against unethical conduct by the assurance auditor that breaching confidentiality was against local law.

682. I conclude that an audit may be "ethical" by the standards of the country where it is carried out, but unethical by the standards of the IFAC Code and the law of England and Wales. That is sufficient to defeat the defendants' invocation of confidentiality as a trump card. I therefore reject also the bold submission that the conduct of the Kaloti audit was none of the claimant's business.

683. I do not thereby understate the importance of confidentiality. An audit client not involved in money laundering or other criminal activity must be able to trust the auditor with its commercial and other secrets, just as in the legal sphere a client must be able to trust his or her solicitor. But the solicitor's obligation of confidence is not absolute; it may have to yield to more weighty obligations to disclose possible criminal activity such as terrorist financing or money laundering.

684. That approach is also consistent with the policy of English private international law. This part of the discussion is also relevant to the defendants' contention that there was a *novus actus interveniens*, which I will consider later. I need not discuss the point in any detail; it is sufficient to note the similar approach found in rules 2 and 3 in chapter 5 of Dicey, Morris and Collins, the Conflict of Laws, 15th edition (at 5R-001 and 5R-019, omitting the footnotes):

> "English courts will not enforce or recognise a right, power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.
>
> …
>
> English courts have no jurisdiction to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State; or (2) founded upon an act of state."

685. I should mention again the Preface to the IFAC Code. A member body must not apply less stringent standards than those stated in the Code but if prohibited from complying with certain parts of this Code by law or regulation, they must comply with all other parts of the Code. Where countries have requirements and guidance that differ from those contained in this Code, accountants working there need to be aware of those

differences and comply with the Code's more stringent requirements and guidance "unless prohibited by law or regulation."

686. The defendants did not rely on the Preface as exempting them from complying with the fundamental requirements of integrity, objectivity, professional competence and due care, confidentiality and professional behaviour found in the IFAC Code. They were right not to do so. Rather, they denied breaching the standards set by the Code. As already noted, if local law mandates unethical behaviour in breach of the Code, English law requires the auditor to perform its duty of care.

687. That may require an auditor to have no truck with an audit required to be performed in an unethical manner. It may mean turning down business, terminating engagements that with hindsight should not have been accepted and even breaching client confidentiality.

688. By the same reasoning, I reject the defendants' proposition that they could not be required to accede to the claimant's requests as to how to conduct the Kaloti audit, as that would create a conflict of interest with EY EMEIA Services' (the third defendant's) obligation to advise and assist EY Dubai to bring the audit to a satisfactory conclusion. The issues the claimant raised and whether to accede to his requests, had to be considered by the defendants on their merits and, indeed, were considered.

689. I come next to events that occurred in the course of the Kaloti audit. Following the damning findings of the audit team on 5 March 2013, the claimant began to experience what Mr Britton later called "heat" from the DMCC and the ire of Mr El-Mdaka, the aggressive "very angry client", as the claimant called him. At the end of May 2013, he sought help at EY MENA level from Mr Andjelkovic, Mr Molin and subsequently Mr Stanton, who brought in Mr Breillot; and from Mr Ali, who brought in Mr Climent, global head of CCASS.

690. Mr Sharma emailed the claimant on 5 June asking for a change to the review period, from the calendar year 2012 to January-March 2013. Mr Stanton proposed a variant of that: a "gap analysis" followed by a fresh audit. Mr Stanton confirmed this suggestion in a telephone call of 7 June but refused to put it into writing. He did not support the claimant's protests that the DMCC was behaving improperly. Mr Climent in another call on 11 June proposed a "white paper".

691. A consensual variation of the terms of an assurance engagement, like that of any contract, is not controversial provided the variation does not compromise the integrity and objectivity of the auditor. The engagement letter clearly stated that the period of the audit was the calendar year 2012. I cannot accept that it was ethical to sweep under the rug the findings suggestive of involvement of money laundering by the expedient of changing the compliance period. By proposing a change to the compliance period to miss out the inconvenient year 2012, Messrs Stanton and Breillot put the defendants in breach of the principles of integrity, objectivity and professional behaviour.

692. They were not acting with integrity because it was obvious that the proposed audit report would mislead by omitting or playing down the damning findings about how Kaloti was running its business in March 2012. They were not acting with objectivity because they proposed to bow to pressure from the DMCC, which was obviously not impartial and unbiased, to conceal or minimise Kaloti's wrongdoing. The defendants

thereby sought to involve the claimant in unethical conduct, putting them in breach of the audit duty of care.

693. However, the DMCC did not take up that suggestion. The next matter of complaint is that the DMCC, on 19 June 2013, instead proposed that EY Dubai should discuss and approve changes to the review protocol which would be applied to the current review process. The DMCC was asking the EY organisation to agree to change the way in which it was going to report on Kaloti's business practices.

694. To recap, the auditor's final rating in the assurance report would be removed and mentioned only in the (unpublished) management report; "non-compliant low risk" would become "compliant with low risk deviation", such that in the refiner's compliance report these items would be reported as "fully compliant"; and the DMCC review panel would no longer provide a "final rating", but would use the (unpublished) management report recommended final rating to decide on its next steps.

695. I accept the claimant's submission that it was improper – I use the word as a convenient shorthand for breach of the fundamental principles of integrity and objectivity in the IFAC Code – to agree to these changes in the middle of the audit period. They would inevitably lead to misleading omission or dilution of the damning audit findings. They demonstrated a failure to stand up to the DMCC, thereby breaching the principle of objectivity.

696. It is no answer that the engagement letter referred to an assurance process "in accordance with DMCC Guidelines". The guidelines there mentioned were those applicable when the engagement letter was signed. The work statement in the engagement letter required EY Dubai to make "a statement in relation to the application of the requirements as set out within the DMCC's … [review protocol and practical guidance] and the LBMA Responsible Gold Programme." The latter's Responsible Gold Programme had not changed.

697. By agreeing to, or causing or permitting EY Dubai to agree to, changes to the DMCC's review protocol which were highly likely to lead to misleading concealment or dilution of Kaloti's wrongdoing during 2012, the defendants involved the claimant in improper, unethical conduct, putting them again in breach of the audit duty of care.

698. The next matter of complaint arises from the escalation of the issue to global level. With encouragement from Mr Ali and the agreement of Mr Stanton, the claimant did so by his email to Mr Climent on 5 July 2013 recording the advice of the EY MENA leadership that "any course of action should be decided by the Global Office"; and seeking a meeting in London in mid-July to air the matter at that higher level. This led to the meetings in Paris, Madrid and London in mid-July 2013.

699. I accept the submission of the defendants that entities within the EY organisation took much care and plenty of legal advice in addressing the issues that the claimant raised. Mr Ali's urging that the matter should be taken very seriously was heeded, as I have said. What I have to consider (and without knowing anything about the content of the legal advice received) is whether the outcome of the defendants' care, time and trouble was a breach of the audit duty or not. Merely taking the time and trouble does not answer that question.

700. The escalation of the issue to the level of the global leadership led to the claimant getting to know Mr Labaude and to their disagreement, in conversations on 17, 19 and 22 July 2013, about whether reporting of the matter to the LBMA was required. I have set out the parties' respective submissions on that issue. I am satisfied that Mr Labaude was not interested in the objective legal and ethical question whether reporting to the LBMA was required; and that, as the claimant rightly divined, he was looking for arguments that would avoid the need to report the matter to the LBMA.

701. At the meeting on 22 July, it will be recalled, Mr Labaude asked for a scan of the claimant's laptop; the claimant's frustration began to boil over and he insisted that there was no room for interpretation and that reporting to the LBMA of the zero tolerance finding was mandatory and he would do it independently if the firm refused. He sent his clear and detailed email to the leadership, up to and including Mr Weinberger, the next day.

702. The work statement in the engagement letter envisaged that the auditor would make "a statement in relation to the application of the requirements as set out within the DMCC's … [review protocol and practical guidance] and the LBMA Responsible Gold Programme." The procedures were to be conducted in accordance with ISAE 3000. The involvement of the LBMA review committee was envisaged as an assessing body, though the DMCC was to decide the "final outcome of the assessment."

703. The confidentiality obligation at clause 25 of the attached terms and conditions included the usual exception permitting disclosure of information where the information "must be disclosed under applicable law, legal process or professional regulations". The separate non-disclosure agreement contained an exception in, materially, the same terms. ISAE 3000 paragraph 4 required compliance with Parts A and B of the IFAC Code.

704. It is therefore clear that the confidentiality obligation could not prevail where the IFAC Code required disclosure that would, otherwise, breach confidentiality. The DMCC review protocol, issued on 3 January 2013 (before it was twice amended later) included within section 5 the concept of a zero tolerance breach of the review protocol; "[a]dditional areas may also constitute a breach of the review protocol and accordingly areas of zero tolerance and/or corrective/preventive actions will be detailed in due course".

705. The LBMA's "responsible gold guidance" document of 18 January 2013 required gold refiners wishing to retain or acquire GDL status within the LBMA to undergo the same five step process as found in the DMCC's review protocol. The LBMA's "third party audit guidance" issued the same day, required the use by auditors (involved in assurance auditing at steps 4 and 5) of either ISO 19011 or ISAE 3000.

706. I have accepted the claimant's evidence that, during his pre-engagement discussions with the Dubai gold refiners, it was clearly understood that the audits would conform to both LBMA and DMCC requirements. It would make little sense if it were otherwise, since, as the LBMA had announced in December 2012, the refiners needed to acquire GDL status with the LBMA in order to become associate members. The refiners therefore needed GDL status with the LBMA as well as the DMCC (itself an associate member of the LBMA) if they were going to get on in the world.

707. Under the LBMA's third party audit guidance, where ISAE 3000 is used, the auditor must issue "an independent assurance report for the stated reporting period, which expresses a conclusion designed to enhance the degree of confidence of intended users in the Refiner's reporting on compliance with the *LBMA Responsible Gold Guidance*." There was a "three-party relationship" between the refiner, the auditor and the end user.

708. If the auditor was not on the LBMA approved list, it must "submit specified information to the LBMA to show the requisite ethical conduct, competence and expertise". For EY entities, on the evidence of Ms Adamson's emails in February 2013 it was evidently good enough to demonstrate the requisite ethical conduct, competence and expertise that they were one of the "big four". In similar vein, Ms Crowell presented on 22 February that "[a]ny independent, certified auditors are eligible to conduct the LBMA audit, provided they have the required credentials."

709. Under the LBMA third party audit guidance document, where ISAE 3000 is used and a zero tolerance breach is encountered, it must be addressed immediately (high risk matters, within 90 days and medium risk matters, within 12 months); and "[a]ny instances of zero tolerance non-compliance should be reported by the auditor to those charged with governance at the Refiner within 24 hours and communicated to the LBMA Chief Executive".

710. Although he is not a lawyer and was not receiving independent legal advice at the time, it was evidently on that provision in the LBMA's third party audit guidance document, coupled with the claimant's zero tolerance finding in respect of the Morocco gold issue, that the claimant rested his case in July 2013 that reporting of the matter to the LBMA was mandatory.

711. In my judgment, the strength of that case at the time was formidable. The EY bodies involved had already compromised their independence, integrity and objectivity in the ways I have just found. The claimant was painfully aware of that. Mr Labaude's arguments at the time and those now advanced by the defendants are weak and, on the defendants' own case, do not rule out the proposition that disclosure to the LBMA was *permitted*, even if not required.

712. In my judgment, the breaches of the IFAC Code that had already occurred, the incorporation of LBMA standards into the terms of the engagement, the incorporation of ISAE 3000 into the LBMA standards, the incorporation of the IFAC Code into ISAE 3000, the exception to the confidentiality obligation where reporting is required under professional regulations (such as the IFAC Code) and the seriousness of the damning findings made on 5 March 2013 including principally the Morocco gold finding, all lead inexorably to the conclusion that reporting the latter issue to the LBMA was at least permitted.

713. It did not matter that EY Dubai had not become formally accredited by the LBMA; that argument is a triumph of formalism over substance. Nor did it matter that Kaloti was already an associate member of the LBMA and not on its GDL list; that is an arid technical point that cannot trump the audit findings of serious wrongdoing. Kaloti was plainly a seeker after LBMA approval and paying for assurance audits using the EY brand name to move towards GDL status with the LBMA.

714. I am satisfied, also, that it was open to EY Dubai to terminate the Kaloti engagement in reliance on Kaloti's wrongdoing and the improper pressure from the DMCC, egged on by Kaloti. Whether or not Kaloti was in repudiatory breach of the terms of the engagement, which I think very likely, the IFAC Code expressly permitted withdrawal from this engagement.

715. As noted above, in the 2012 version of the IFAC Code, independence of mind is important "without being affected by influences that compromise professional judgment, thereby allowing an individual to act with integrity and exercise objectivity and professional skepticism" (paragraph 291.5(a)). Where there is a threat that cannot be eliminated or reduced to an acceptable level, its cause must be eliminated, or the professional accountant must decline or terminate the engagement" (paragraph 291.6).

716. Against that legal and regulatory framework, I return to the position when the claimant sent his email of 23 July 2013. The defendants and their Middle East associates had already embroiled him in seriously improper conduct. His concerns were carefully considered but nothing was done to dissociate the EY organisation and all its member bodies from that improper conduct. To avoid further breaches of the audit duty of care owed to the defendant, it was critical at this stage for the EY organisation to rediscover its moral compass and, belatedly, to start complying with its professional and ethical obligations.

717. At the very least, the EY organisation at global level needed to make an immediate and very strong representation to Kaloti, the DMCC and, if necessary, the government of Dubai that EY Dubai would either report the audit findings openly, warts and all, in a published assurance report, or EY Dubai would be instructed to terminate the engagement. Indeed, that should have happened earlier, in June 2013 when it became clear that the DMCC was trying to manipulate the process and to manipulate EY Dubai for the purpose of promoting Dubai's gold refining industry and cloaking its darker side.

718. By July 2013, recognising that the Morocco gold issue was a zero tolerance breach of the applicable standards and as such reportable to the LBMA within 24 hours, EY's strong representation needed to include a warning that in the event of termination of the engagement, a report to the LBMA about the Morocco gold issue would become inevitable and would override the obligations of confidentiality in the terms of engagement.

719. For reasons I have already given, it is no answer to that proposition that suspicions that Kaloti was involved in money laundering may, or may not, have been separately reported to the government of Dubai. There is no evidence either way on the point, for reasons the defendants explained at trial. The DMCC was and is a Dubai government body and was evidently unconcerned about and keen to help minimise and draw a veil over the evidence connecting Kaloti with suspected money laundering.

720. If the issues raised by the claimant had been reported to the ruler of Dubai, Sheikh Mohammed, that might just have rescued the EY organisation from its untenable ethical and professional position. Contrary to the cross-examination of the claimant, his suggestion that the ruler be informed was logical. The Sheikh could act as a court of appeal from the DMCC. Only by going over the head of the DMCC, a Dubai

government body, could the EY organisation complain about the DMCC's improper role in the exercise.

721. In my judgment, by 23 July 2013, the EY organisation was required, to perform the audit duty and avoid further breaching it by involving the claimant in further improper conduct, to make it clear to the authorities in Dubai that the DMCC must, if the audit were to continue, cease trying to exert improper influence on it and cease its improper support for Kaloti. It was incumbent on the EY organisation to adopt and forcefully communicate that it must be "us or them"; i.e. that EY Dubai and not the DMCC would be running the audit.

722. Instead, the defendants enlisted the services of Mr Otty, of their Global Executive, to persuade the claimant not to worry and that everything would be fine; and through Mr Labaude, continued their efforts to persuade the claimant that he had better stop his protests if he knew what was good for him.

723. Mr Otty personified the conciliatory element of the defendants' strategy. His attempt to keep the claimant within the fold included inducing the claimant to believe, contrary to Mr Otty's true intention, that he would help the claimant relocate to a different job outside Dubai. Mr Labaude took a more crude approach, seeking to intimidate the claimant and threatening damage to his career if he persisted.

724. Mr Labaude exerted improper pressure on the claimant in four ways: by asking for a scan of his laptop; by cross-examining him aggressively about the LBMA membership application issue and saying he would launch an investigation into it; by threatening the claimant with "consequences" for his partnership; and by accusing him of behaving unprofessionally, using the phrases "dropped the ball" over a "personal credibility issue" and "you haven't done your job and your duty".

725. I accept that the reporting proposal devised at the end of July 2013 was intended, optimistically, to accommodate the claimant's concerns while at the same time being acceptable to Kaloti and the DMCC. To recap, the proposal was that the DMCC would extend the reporting deadline; management reports would be finalised and discussed with the claimant; draft assurance reports in line with ISAE 3000 would be prepared; the management reports would be submitted to the refiners. EY Dubai would then inform the DMCC of the position taken covering the content and format of the assurance reports.

726. The reporting proposal was not itself a further breach of the audit duty owed to the claimant because it left open the possibility that the audit might, depending on what was eventually reported, end up being conducted ethically after all. It was, however, procedural; it begged all the awkward questions about how the Morocco gold issue, the cash transactions issue and the sourcing of gold from high risk conflict countries would be characterised and reported.

727. If it had been backed by a prior statement of EY at global level of intent to withdraw from the audit unless the DMCC stopped interfering improperly (see above) and a warning that reporting would have to include open reference to the audit findings and independent characterisation of them, it might just have led to an acceptable outcome.

728. However, Mr Labaude sent the claimant a further draft assurance report template on 7 August 2013 with proposed wording for an adverse opinion, to be discussed later. For the draft management report he resorted to the cryptic use of "section 5" of the DMCC review protocol to avoid using the words "zero tolerance", thereby avoiding the need for Kaloti to use them in the compliance report which was intended to be published.

729. I agree with the claimant's points made in response on 9 and 10 August: the absence from the assurance report template of any reasons for disagreeing with the compliance report was contrary to ISAE 3000 and "the proposed conclusion is incomplete, understates the reality and could be seen as misleading" and should be revised to say "why we disagree or at least makes strong reference to the Management Report …. ."

730. In my judgment, Mr Labaude's draft management report and draft assurance report template did put the defendants in further breach of the audit duty owed to the claimant, to avoid involving him in improper conduct. Those draft reports did nothing to cure the prior breaches because they continued the theme of downplaying and veiling the damning audit findings made in March 2013. Once those findings had been made, they could not be wished away.

731. I do not accept the defendants' submission that these draft reports were irrelevant because they were drafts for discussion and were superseded by other reports. It is true that they were superseded by other reports, to which I am coming. But the fact that they were put to the claimant was an invitation to him to endorse them, thus seeking to involve him further in unethical conduct because they were not written in a manner that accorded with the principles of integrity and objectivity.

732. In my judgment, Mr Labaude's exertion of improper pressure on the claimant put the defendants, through him, in further serious breach of the audit duty of care. The claimant was intimidated, threatened with adverse career consequences and unjustly accused of lacking professionalism. That was a breach of the duty owed to him because the threats conveyed that he would have to remain associated with the unethical conduct and continue to conceal it from the outside world if he were to avoid loss of his lucrative partnership.

733. I come next to the issue of the claimant ceasing to be the engagement partner for the Kaloti audit, in mid-August 2013. I do not consider that the replacement of the claimant as engagement partner was itself a further breach of the audit duty of care owed to him. The replacement of the claimant as engagement partner put some distance between him and the prior conduct which I have found to be unethical.

734. The defendants were correct to say that it was not possible for the claimant to continue as engagement partner because he was refusing to sign the reports and unwilling to return to Dubai. Mr Toledano accepted that the claimant did not have the option of drafting the reports in the transparent way he wanted them to be worded and then signing them in his capacity of engagement partner against the wishes of the defendants. That can only be because the defendants and their Middle East associates effectively controlled and managed EY Dubai's approach to the Kaloti audit.

735. I come next to the period from Mr O'Sullivan's accession as engagement partner and the submitting of the September reports. On his watch, the absence of the claimant's restraining influence is striking. During that period, it may be recalled, individuals from

EY including, probably, most if not all of Mr Heller, Mr Labaude, Mr Murphy, Mr Wareing, Mr O'Sullivan, Mr D, Mr Kumar and Ms Golz were responsible for suggesting amendments to the drafts that became the September reports.

736. I accept as a fact that the defendants were responsible for suggesting to Kaloti that it should draft its compliance report in a manner that masked the reality of the Morocco gold issue, removing the reference to Morocco and changing the coating of gold bars with silver to documentary irregularities. I regard this as professional misconduct. It was a plain breach of the IFAC Code principles of integrity and objectivity. It was also improper that the compliance report made no mention of the cash transactions issue and that the review period had been changed to June to December 2012, omitting the first half of 2012.

737. Although the claimant was no longer the engagement partner and was technically on holiday during parts of the summer, he was still a partner in EY MENA. His removal as engagement partner did not remove him from the scope of the audit duty of care. The assurance engagement remained in being; it had not been terminated; the claimant had recently been in charge of it and it was still being done in the name of EY Dubai which was treated by the Dubai authorities as his employer. Further, from 5 September 2013, Mr Otty and Mr Murphy were requiring him to return to his position in Dubai.

738. The September reports were, therefore, tainted with improper conduct in breach of the audit duty of care owed to the claimant because Kaloti's compliance report included the changes made by the EY authors; even though it also included the words: "[w]e acknowledge that during the period under review we were not compliant with a zero tolerance breach of the review Protocol".

739. I accept also the submission of the claimant that the September assurance report improperly diluted the seriousness of the findings made against Kaloti in March 2013 and that it was wrong to use the period from 1 June to 31 December 2012 and not to include any adequate indication of the scale of the cash transactions ($5.2 billion during the calendar year 2012).

740. I reject the defendants' submission that they "did not advise/assist Kaloti to rewrite its compliance report in such a way as to suppress/conceal/distort the Audit findings, or fail to address statements/omissions in the report which had that effect"; and that the assurance report "was not such as to suppress/conceal/distort the Audit findings ….. ."

741. In my judgment, by the start of September 2013, the stage had been reached where to avoid further breaches of the audit duty owed to the claimant, it was necessary for EY Dubai to be instructed immediately to terminate the engagement. In addition, it was at the very least permissible, despite the confidentiality provision in the terms of engagement and the separate non-disclosure agreement, for the EY organisation to report its findings to the LBMA.

742. The claimant's efforts to persuade his superiors of that had failed. They knew from his email of 23 July 2013 that he would be likely to remove himself from the EY organisation. In my judgment, by 10 September 2013 if not earlier, he was plainly entitled to do so to avoid further involvement in the conduct to which he had objected and in response to Mr Labaude's treatment of him and Mr Otty's instruction to him to

return to Dubai instead of helping him to find a different job elsewhere within the organisation.

743. I come next to the period between the September reports and the November reports, submitted to the DMCC in final form in late November 2013. The key events relevant to the issue of breach of the audit duty were these. First, there was the interviewing of Mr D and his colleagues on 18 September and receiving confirmation of what had happened on 5 March 2013, including the account of Mr Osama Kaloti using his scanner gun to show the gold content of the "silver". Then, there was EY Dubai obliging the DMCC by agreeing to revisit the zero tolerance finding in respect of the Morocco gold issue.

744. Then, the DMCC, Kaloti and EY Dubai revisited the question of whether Kaloti knew that the gold bars had been coated with silver and effectively accepted Ms Kaloti's and Mr El-Mdaka's untruthful account in their letter to the DMCC of 12 September 2013 saying that on the issue whether "our management knew about this practice and somehow colluded in it", "this was not the case at all" and inventing a language barrier on the occasion of the 5 March 2013 audit team visit.

745. Then, there was the meeting between Mr O'Sullivan and Mr Bosoni of the DMCC on 20 September and the agreement recorded in Mr O'Sullivan's letter of 22 September that it was appropriate to undertake "additional diligence on the transactions with the Moroccan suppliers", followed by the request to Kaloti to provide evidence of their attempts to obtain the supplier documents for the transactions or, if they had none, to request it from them.

746. Then, there was Mr O'Sullivan's request to the DMCC to provide its suggested risk rating as to the Morocco gold issue in particular in relation to the zero tolerance finding. Then, in response, on 24 September Mr El-Mdaka of Kaloti provided a copy of a written request to Renade International for such documents. Then, there was the agreement in or about late September or early October 2013 that the September compliance and assurance reports would not see the light of day.

747. Then, there was the meeting on 22 October 2013 and Mr Wareing's email to Mr Heller saying the DMCC had asked that reference to EY having consulted the DMCC should be excised, lest the draft should appear to refer to "a 'conclusion' by the DMCC, which they do not like", and Mr Wareing's reference to having agreed to consider a wording which does not imply that the DMCC concluded on the risk rating, but instead that "they provided us the guidance/interpretation/clarification we needed to conclude ourselves."

748. Then, there were the contacts between Mr O'Sullivan and Mr Sharma of the DMCC on 7 November 2013, when it was agreed that the "consolidated" reporting method would be used instead and the revised methodology, not mirrored in the DMCC review protocol. Then there was the production of the initial version of the November reports on 8 and 9 November, omitting any mention of a zero tolerance finding.

749. I accept the claimant's submission that the defendants and EY Dubai well knew that the DMCC was colluding with Kaloti and the EY organisation to get rid of the inconvenient "zero tolerance" finding; that the defendants and EY Dubai well knew

that the account of Ms Kaloti and Mr El-Mdaka was untruthful; and that the "additional diligence" of asking Kaloti to ask for documents from their suppliers was not genuine.

750. I also accept that the DMCC, not EY Dubai, effectively decided that the risk rating should no longer be zero tolerance; that the defendants and EY Dubai allowed the DMCC effectively to decide the issue and did not exercise independent objective judgment on what the risk rating should be; and that they then allowed the assurance report to give the false impression that EY had only consulted the DMCC about the risk rating rather than accepted its decision on the point.

751. I reject the defendants' submission that they and EY Dubai acted reasonably and ethically during this period and that it was reasonable to agree with the DMCC's view that the finding should not be zero tolerance. The factual position is not compatible with that submission. I also reject their submission that because the DMCC's guidance is similar to the LBMA's, the latter would have been likely to agree that the finding should not be zero tolerance. There is no evidence of what the LBMA's view would have been; the DMCC's view is not a reliable guide. The LBMA would, I hope, form an objective view.

752. The defendants thereby compromised their integrity, objectivity and professionalism yet further, in further breach of the audit duty of care owed to the claimant who, they knew from his email of 23 July and subsequent correspondence which by November 2013 had become quasi-litigious, was likely to remove himself from the EY organisation and could publicly dissociate himself from the Kaloti audit including by disclosing publicly how it had been conducted and how he had been treated.

753. Finally, the two versions of the November reports, and the process that led to the second and final versions dated 27 November 2013, did nothing to remedy the situation. They were both, and especially the final version, misleading because by the expedient of changing the review period to the second half of 2012 and concentrating on remedial steps and on the future rather than the past, they managed to avoid any attention being drawn to the audit findings made on 5 March 2013.

754. I accept the claimant's submission that the defendants breached the audit duty of care owed to the claimant in that by issuing the final November reports, of which two were published, the compliance report and the assurance report, they involved him in further improper conduct in breach of the IFAC Code, further compromising their objectivity and exercise of independent judgment. I accept the claimant's submission that this was the culmination of an unethical audit and that the EY organisation should not have lent its name to the exercise.

755. I reject the defendants' submission that it was "reasonable to conclude that EY Dubai was acting reasonably in following the DMCC's guidance on the characterisation of the Moroccan gold finding in the 9 November reports" and that it was "reasonable to agree with EY Dubai's view that, in relation to the consolidated reporting process, the reporting format should accord with the DMCC's amended Review Protocol".

756. I reject the defendants' submission that there was a mere difference of professional opinion between the claimant and others involved. The facts do not admit of any justification for the defendants' and EY Dubai's conduct and the defendants did not call or seek to call any accountancy or other expert evidence addressing the *Bolam* test in

relation to that issue. As I have said, it would have been futile to do so because the conduct could not be justified.

757. I reject also the defendants' assertion at trial and in documents that the claimant was motivated by a desire for publicity and not by a wish to expose and publicly dissociate himself from what he regarded as unethical conduct. I accept as genuine the moral arguments he made in his email of 23 July 2013 and the point he made in cross-examination:

> "That is what we were hired to do, to tell the truth so that all the stakeholders, which is everybody in the world, would know whether to buy gold from Dubai or not. Whether you are buying a necklace or buying a phone or you are investing or you are a bank buying bullion, everybody has a stake when it comes to gold. We all use gold."

758. For completeness, I do not base my conclusions on the circumstances or content of the Grant Thornton report, which I have not considered in any detail because it is a subsequent and separate audit which may have had its own dynamics and issues, examination of which would not assist me.

759. Nor have I felt it necessary to form any view about the merits of the claimant's contention that the defendants' conduct entailed breaches of obligations not to engage in conduct contrary to the criminal law, arising under the POCA or the 2010 Act. As I observed during the trial, the court is loth to examine issues that are not necessary for determination of the case and which could, depending on the judge's view, amount to findings of criminal conduct but without any of the safeguards of the criminal trial process (see the judgment of Simon Brown LJ (as he then was) in the Divisional Court in *R. v. Director of Public Prosecutions ex p. Camelot Group plc* (1998) 10 Admin. LR 93).

760. For those reasons, the defendants are liable to the claimant for breach of the audit duty of care, subject to questions of remoteness of damage, causation of damage, mitigation, contributory negligence and proof of damage. I will return to these issues after I have considered the conspiracy claim, to which I turn next.

<u>The Conspiracy Claim</u>

761. It is common ground that a tortious conspiracy requires an agreement, combination, understanding or concerted action to injure, involving two or more persons, with a common intention (Clerk & Lindsell on Torts, 22nd edition, at 24-95). Where the conspiracy is to act by means that are in themselves not unlawful, Lord Bridge explained in *Lonrho plc v. Fayed* [1992] 1 AC 448, at 465G-H, citing previous high authority, that:

> "[w]here conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous is may now seem, finds a sufficient ground to condemn their action as illegal and tortious. …"

762. However, as Viscount Simon LC said in *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] AC 435, at 445 (cited by Lord Bridge in *Lonrho plc v. Fayed* at 465C):

"… [i]f the predominant purpose is the lawful protection and promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortious conspiracy, even though it causes damage to another person."

763. Mr Hubble submitted that there was clearly to be inferred from all the evidence an agreement or combination between Mr Labaude and Mr Otty – though they denied it - with the predominant purpose of injuring the claimant by driving him out of the EY organisation. He submitted that the defendants, as corporate bodies, thereby conspired with each other to injure the claimant. It is not suggested that unlawful means were used. It is, therefore, necessary for the claimant to show that the predominant purpose of the agreement or combination was to injure the claimant.

764. He submitted that they did this by treating him dismissively as unprofessional and a troublemaker; treating him with contempt, for example by Mr Labaude referring to him pejoratively as "notre ami" in an email to Mr Breillot; making unwarranted attacks on his professionalism; threatening him with adverse "consequences" if he refused to sign the Kaloti audit reports, through Mr Labaude again; removing him as engagement partner; accusing him through Mr Labaude of "dropping the ball"; and accepting that he reasonably felt at risk of persecution if he returned to Dubai, yet instructing him, through Mr Otty, to return there, fully expecting that he would not do so.

765. Mr Toledano emphasised that a charge of conspiracy is a serious matter, should not be made lightly and should be precisely pleaded and proved to a high standard. It was agreed at trial that the standard of proof was the ordinary civil standard of proof on the balance of probabilities and that there is only one civil standard (see Lord Hoffman's speech in *In re B (Care Proceedings: Standard of Proof)* [2009] 1 AC 11, especially at [5] and [13]).

766. The defendants submitted that none of those involved within the EY organisation, including Mr Otty and Mr Labaude, had any desire or wish to harm the claimant or any purpose to do so. There was no possible basis, they said, for finding that the defendants, or any two or more of them, combined together with the sole or predominant purpose of injuring them.

767. Mr Toledano also reiterated factual submissions some of which I have rejected: that Mr Otty did not and could not make any commitment to relocate the claimant in a new job; and that the defendants did not know or believe it could be unsafe for the claimant to return to Dubai and that he would refuse to return there through reasonable fears for his and his family's safety; and that Messrs Otty and Labaude were only acting on behalf of EY EMEIA Services.

768. There was no difference between the parties on the law. But I also observe that the circumstances of this alleged conspiracy arose from a relationship of quasi-employment and partnership, which is unusual. The situation did not arise from commercial dealings involving business rivals, as in many of the cases; nor from a collective industrial dispute as in other cases.

769. The alleged combination between the defendants quite closely resembles a constructive dismissal case, where individuals within an employing company or group of companies decide in combination that a particular employee should leave and then set about engineering his or her departure, without the employee being expressly dismissed but

by acts which amount to a breach of the portmanteau trust and confidence term, leading to the employee's resignation and constructive dismissal.

770. In my judgment, it is doubtful whether the "lawful means" version of the tort, often regarded as anomalous, should readily be found to apply in the field of employment or quasi-employment, where it is likely to overlap with other causes of action, statutory or at common law, arising from the contract of employment (or quasi-employment). That said, I find no conceptual basis for excluding its application merely because the context is employment or quasi-employment. I have already cited high authority against the notion that one tort may not overlap with another on the facts.

771. In the employment cases, the predominant purpose test may not be satisfied if the main purpose is to advance the legitimate business of the employer; but it could be satisfied in cases where, for example, the individuals act from malice against the claimant personally. However, hostility to the claimant personally is not necessarily indispensable to a finding of predominant purpose to injure; the purpose to injure might arise for business reasons or what could be called "reasons of state" where the purpose is politically not personally motivated.

772. This is a difficult area; cf. (in the slightly different context of interference with business by unlawful means) the speech of Lord Nicholls in *OBG Ltd v. Allan* [2008] 1 AC 1 at [164]-[166]. In the present case, the claimant does not allege that the conspiracy was to injure the claimant using unlawful means.

773. As to the facts, I have considered carefully the parties' rival contentions. I accept the claimant's submission that Mr Otty and Mr Labaude did not expect or intend that the claimant would resume his role in Dubai as if nothing had happened. I accept also that Mr Otty did not intend to help the claimant relocate to a different job, which he could have arranged quite easily; and that there is no reason why the claimant should be acceptable to Mr Otty and the EY organisation if working in Dubai, but not if working elsewhere within the EY network.

774. I do not find it plausible that Mr Otty and Mr Murphy would instruct the claimant to return to Dubai unless they had discussed the matter or taken (privileged) external legal advice on the legal implications of instructing the claimant to return to Dubai after he had made it clear he did not wish to do so and would not feel safe there. I reject the suggestion, notwithstanding their oral evidence, that they acted independently of each other, without coordination. They also had to liaise with Mr Murphy, who issued the instruction from EY Dubai.

775. However, in the end I do not find on the balance of probabilities that the predominant purpose attributable to two or more of the defendants was to injure the claimant. I think the predominant purpose was to put an end to the claimant's complaints about the Kaloti audit, to put an end to the trouble he was causing to the EY organisation, neutralise his influence over the reporting process and bring the Kaloti assurance audit and that of the other Dubai gold refiners to a conclusion.

776. It was easily foreseeable that the claimant would suffer the loss of his career and would respond to the instruction to return to Dubai by refusing to do so and eventually resigning from his position. But in the context of a lawful means conspiracy, foreseeability of damage is not enough to found liability; the foreseeability of damage

does not suffice to surmount the higher hurdle of showing a predominant purpose to injure the claimant.

777. Thus if, as I accept is more likely than not, Mr Otty and Mr Labaude had no specific ambition to secure the claimant's resignation and the consequent destruction of his career with the EY organisation but could readily foresee that it might ensue and were sanguine about the prospect, that could be a case of constructive dismissal in a conventional employment context but it is not enough for conspiracy to injure. I therefore dismiss that part of the claim.

Loss and Damage

Measure of damage

778. The measure of damage is the sum of money which will put the claimant in the position he would be in if he had not sustained the wrong for which he is to be compensated. That person may suffer a reduction for contributory negligence in an appropriate case. Further, the damage must be caused by the defendants' wrong in law and in fact and must not be too remote.

779. The claimant must take reasonable steps to mitigate his loss and cannot recover losses he reasonably ought to have mitigated; but it is trite that "[j]udges are reluctant to impose excessive demands on claimants" (Clerk & Lindsell, *op cit.* at 28-09) because criticism after the event of measures taken by the claimant to extricate himself from the consequences of the wrong may not come well from the doer of the wrong.

Causation and remoteness of damage

780. The defendants submitted that the claimant's claimed losses were not caused by any tort, were not foreseeable and were too remote; that there was contributory negligence on the claimant's part; and that the claimant unreasonably failed to take reasonable steps to mitigate his loss. The submissions were, again, detailed and I paraphrase the main points more briefly as follows.

781. An act will intervene to break the chain of causation if it is unreasonable, even if foreseeable: *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, per Lord Reid at 1623. As explained by Evans-Lombe J reviewing the authorities in *Barings plc v. Coopers and Lybrand* [2003] PNLR 34 at [838], it must be a new cause coming in and disturbing the sequence of events; it need not necessarily be reckless conduct. It may be an accumulation of events which in sum have the effect of removing the negligence sued on as a cause. The accumulation of events may take place over time.

782. The defendants say Gross LJ's observation in *Borealis AB v. Geogas Trading* [2011] 1 Lloyds Rep 482, at [44] ff, approving a statement in the then current (19th) edition of Clerk & Lindsell ("in order to comprise a *novus actus interveniens*, so breaking the chain of causation, the conduct of the claimant 'must constitute an event of such impact that it 'obliterates' the wrongdoing …' of the defendant") does not take the matter further; it is a question of fact in each case whether the chain is broken by the intervening event or events and if Gross LJ diluted Lord Reid's test in *McKew*, the latter must prevail.

783. The claimant is the author of his own financial loss: had he not resigned and disclosed the matters to media organisations, he would most likely have remained with EY or been employed by another of the big four accountancy firms and would not have been blacklisted. He could also have returned to work in Dubai. The "but for" test of factual causation is not satisfied on the claimant's own evidence. He was not justified in feeling at risk if he were to do so. The authorities would not be interested in him unless he were "vocal" in his criticisms.

784. The suggestion that the claimant's disclosures were "protected disclosures" under Part IVA of the 1996 Act is irrelevant and does not show that his actions were reasonable. The claimant was not a "worker" for any of the defendants. Section 43J of the 1996 Act (voiding confidentiality agreements between employer and employee if they purport to preclude a protected disclosure) is not relevant because the claimant was not employed by any of the defendants and the non-disclosure agreement with Kaloti he signed (on behalf of EY Dubai) is not caught by s.43J. Furthermore, he is not protected by the statutory regime because he ordinarily worked outside Great Britain.

785. His disclosures were, furthermore, not qualifying disclosures under section 43B of the 1996 Act because "the person making the disclosure commits an offence by making it" (section 43B(3)). Here, the disclosure was a crime under the law of the UAE. The expert evidence of Mr Al Zarouni was to be preferred to that of Mr Chalhoub on that issue.

786. Section 43B(3) refers to an offence under the law of a foreign state. It is sufficient to exclude the application of section 43B if the disclosure is an offence under the law of any country in the world, not just the law of the country where the disclosure is made or the law of England and Wales. However oppressive and repugnant a foreign law may be, it was "unthinkable that Parliament will have intended to permit a disclosure to be a qualifying one when it amounts to a criminal offence under a foreign legal system".

787. It was, in addition, unreasonable to make disclosure to the media without masking his identity to protect his future earning capacity. He could have avoided being blacklisted if he had taken this obvious precaution. His safety concerns were groundless. The idea that he could be at personal risk in the UK was even more fanciful and "is further evidence of Mr Rihan's irrational and self-obsessed approach to the entire matter".

788. By similar reasoning, the losses sustained were not foreseeable and were too remote to be recoverable. Further, even if these points are not sufficient to break the chain of causation or render the losses too remote, they are at the very least grounds for a hefty reduction in compensation by reason of contributory negligence, the defendants submitted.

789. The defendants also say the claimant's disclosure was financially motivated; it was not founded on moral concerns as set out in his witness statement but was "in fact for the sole or dominant purpose of litigation against [the defendants] or entities within the EY network". Disclosure to the media should be the "last resort" (*Jesudason v. Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73, per Sir Patrick Elias at [25]).

790. For the claimants, Mr Hubble made detailed submissions from which the main points I extract, in much briefer paraphrase, are the following. The claimant's case on causation

of loss is straightforward: the disclosures to media organisations flowed from the breach of duty and were not too remote. The defendants' contrary contention is inconsistent with their own policies, in particular EY's global code of conduct, which the claimant followed; and with a respect for disclosures in the public interest in good faith by whistleblowers.

791. The claimant had been pressing the EY organisation (through Bindmans) to report their findings to the appropriate authorities. Those requests were ignored in the correspondence with Linklaters. The defendants' position was that the UK authorities had no standing or jurisdiction in the matter. The disclosures were reasonable and lawful and cannot have amounted to an intervening act breaking the chain of causation. If tested against the provisions of the 1996 Act, the disclosures would have been protected.

792. They should not therefore be regarded as a *novus actus*. The law should not "go against the grain" of the statute by characterising as unreasonable a disclosure in good faith in the public interest, which it is the policy of English law to protect. The claimant was clearly a "worker" within section 230(3) of the 1996 Act. A partner in an LLP can be a worker. The disclosures would have been (if the employment tribunal had jurisdiction over a claim) qualifying disclosures within section 47B(3).

793. The exclusion of disclosures the making of which is an offence is confined to offences under the laws of Great Britain. It does not extend to an offence under the law of foreign states. By similar reasoning, in *R. v. Kelly* [1982] AC 665, HL, the House held that "offence" in section 686(1) of the Merchant Shipping Act 1894 referred to acts which if done in England, Wales or Scotland would be offences against the respective criminal law of those countries.

794. Further, section 47B(3) makes no reference to foreign laws, unlike section 47B(2), which states that "… it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory".

795. It would be absurd if a whistleblower had to check all foreign criminal laws to see if the disclosure offended any of them. "The criminal law in such countries may be, and often is, offensive to British public policy and indeed to the very principles which underpin the protected disclosure regime". But for the claimant's disclosures and Grant Thornton's subsequent audit, the true facts about Kaloti's dealings would have remained concealed, as the defendants, the DMCC and Kaloti intended, contrary to the public interest.

796. Further and in any event, the expert evidence of Mr Chalhoub should be preferred to that of Mr Al Zarouni and the court should find that the claimant's conduct cannot have amounted to a crime under the law of the UAE. An element of personal benefit is necessary for the relevant offence to be committed and here there was none and the alleged offence was committed outside the territory of the UAE.

797. The purpose of the whistleblowing provisions in Part IVA of the 1996 Act is to protect public interest disclosures made in good faith. It has been held both in the Court of Human Rights (*Heinisch v. Germany* [2011] IRLR 922, (2014) 58 EHRR 31) and in the Supreme Court (*Gilham v. Ministry of Justice* [2019] ICR 1655, at [29]) that a

whistleblowing complaint falls within the scope of article 10 of the European Convention on Human Rights.

798. A blanket exclusion of protection for workers where a disclosure happens to breach foreign law somewhere in the world would be a plain breach of article 10. Here, the disclosures were made in good faith and the claimant reasonably believed them to be true, which is sufficient: as Sir Patrick Elias said in the *Jesudason* case, at [21] (referring to what Underhill LJ had said in *Chesterton Global Ltd v. Nurmohamed* [2017] IRLR 837, at [8]):

> "… if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable."

799. Furthermore, disclosure to the media is protected in appropriate cases and may include disclosures of confidential information. Whether or not it was reasonable for the disclosure to be made is a question of fact when the statutory provisions are in play. The question must be assessed on a broad and common sense basis and as Sir Patrick Elias said in *Jesudason* at [48]:

> "… The question of reasonableness must be assessed as at the time the complaint or concern is raised not with hindsight after the complaint has been examined. If the appellant did reasonably believe that the facts on which he relied were substantially true, this might in principle have justified the disclosure … ."

800. I turn to my reasoning and conclusions on causation and remoteness of damage. The starting point is to bear in mind the nature of the duty of care: to take reasonable steps to prevent the claimant from suffering loss of earnings by reason of the defendants' failure to perform the Kaloti audit in an ethical and professional manner. The duty itself entails the proposition that the victim of a breach will sustain foreseeable economic loss.

801. I do not think the law of causation is controversial. The formulation of the test by Gross LJ in the *Borealis* case, by reference to the phrase, still found in Clerk & Lindsell (at 2-107 in the current 22nd edition) ("an event of such impact that it 'obliterates' the wrongdoing of the defendant") is not, in my judgment, inconsistent with other formulations such as that of Lord Reid in *McKew*'s case, nor with Evans-Lombe J's notion in the *Barings plc* case of an event or accumulation of events over time, not necessarily reckless conduct, being a new cause coming in and disturbing the sequence of events and removing the negligence sued on as a cause of the damage.

802. As to the facts, I think the key points are as follows. The defendants knew from early July 2013 that the claimant was "crying foul" about the propriety of the audit. They responded by considering the issue far above the level of EY Dubai. As early as 5 July 2013, the claimant emailed Mr Climent suggesting that EY Dubai may not be bound by confidentiality because "EY might have obligations to disclose some of our audit findings to local authorities and some international bodies and governments".

803. The defendants knew from the meetings with the claimant in Paris, Madrid and London in mid-July 2013 that the issue of disclosure to the LBMA was being raised by the claimant. On 15 July, he also suggested terminating the engagements and briefing the

ruler of Dubai, Sheikh Mohammed, to protect EY's reputation against a perception that it had colluded with the Dubai authorities in suppressing the findings in the audits.

804. The defendants were therefore made aware months before the claimant's departure that he was a keen advocate of disclosure of the audit findings outside the bounds of confidentiality. Mr Otty, Ms Golz, Mr Heller and Mr Labaude soon became involved. Mr Otty, in particular, said his concern was to prevent disclosure outside the organisation. It is unreal to suppose that the defendants were unaware that the claimant was considering "blowing the whistle". Nor could the defendants claim to be unfamiliar with what that means; EY Global was committed to having a whistleblowing policy.

805. Mr Otty, indeed, made it his business to prevent "uncontrolled" (his word) disclosure outside the EY organisation which the defendants now say was not foreseeable. The real possibility that the claimant might unilaterally make disclosures to outside bodies became even clearer when he sent his email of 23 July 2013, saying "[i]f you decide not to, I will have to carry it [the responsibility] on my own and would take the most legal and moral procedure to pass on the message to the relevant stakeholders" and "I hope we don't end up going separate ways".

806. The reporting proposal at the end of July 2013 was intended to persuade the claimant to keep the audit findings of March 2013 confidential within the EY organisation. The defendants were keenly aware that he may not do so if dissatisfied with the outcome of the audit. When in August and September 2013 the claimant lost faith in the reporting proposal, disagreeing with the propriety of a draft report from Mr Labaude and then refusing to sign the reports and refusing to return to Dubai, the possibility of disclosures by the claimant outside the EY organisation loomed again.

807. The likelihood increased with the claimant's email of 16 September 2013, sent to Mr Otty with a copy to Mr Weinberger, saying he believed gold traded in Dubai should be under "extreme international scrutiny" and that EY was involved in "inappropriate and potentially professional misconduct, which I don't want to be professionally associated with"; his "voice had been suppressed" and he had made a "great personal sacrifice" in walking away from EY MENA and leaving Dubai with his family.

808. The foreseeability of disclosure increased further when Bindmans wrote on 7 October 2013 making a "request that you disclose or procure the disclosure of certain information, failing which our client intends to make a protected disclosure of information which reveals wrongdoing by business organisations in Dubai, a Dubai Government regulator and Ernst and Young" and that there was "an overwhelming public interest in this disclosure".

809. Those facts remind me that, in assessing the reasonableness of the claimant's conduct in making the disclosures to judge whether they constituted a *novus actus interveniens*, the disclosures did not come out of the blue and cannot have surprised the defendants. That is a very different case from a plaintiff like Mr McKew who acted in an unpredictable way after sustaining an injury; or a claimant such as Borealis which could have dealt better with the defendants' contamination of its plant.

810. The defendants had an opportunity to manage the situation by making disclosures themselves or by negotiating with the claimant or by seeking an injunction to restrain

the disclosure which, I infer, they must have considered (since Linklaters reserved all their clients' rights) and decided not to attempt. Unlike in some cases, the defendants could have sought to influence the course of events leading to what they now say was the *novus actus*.

811. I do not accept the defendants' submission that the claimant's disclosures were unreasonable. There was no other way to bring the matter into the public domain where, the claimant considered, it reasonably belonged. I do not think, for my part, it was unreasonable for him to take that view. It was, at least, very strongly arguable that the disclosures were in the public interest and in accordance with the policy of English law, as distinct from UAE law which does not apply to the dispute.

812. I agree with the claimant's submission that the statutory regime in Part IVA of the 1996 Act, article 10 of the European Convention, the *Heinisch* case and the *Gilham* case are relevant in that regard. I reject the untenable submission of the defendants that section 43B(3) of the 1996 Act, if it applied to this case, would rule out protection for these disclosures if they amounted to an offence under UAE law. For the reasons submitted by the claimant, the "offence" in that subsection is an offence under the laws of the countries of Great Britain.

813. I should make it clear that I am not trying a statutory whistleblowing case under Part IVA of the 1996 Act. It is common ground that the statutory cause of action is not open to the claimant, for reasons discussed above. As Mr Hubble explained, he does not rely on the statutory provisions as a sword, but as a shield against Mr Toledano's proposition that the disclosures were a *novus actus* because they were unreasonable. The statutory provisions indicate in general terms the policy of the law but are not to be applied mechanically to determine causation or remoteness.

814. It is therefore not appropriate to deal in detail with all the submissions made on questions such as whether the claimant was a "worker" and if so whether he would have won a notional statutory whistleblowing claim. It is enough to observe that if an employment tribunal had had jurisdiction over such a claim and if he had brought it within time and against the right EY body or bodies, it would in my judgment have been a strong claim, applying the reasoning of Underhill LJ in *Global Chesterton* and of Sir Patrick Elias in *Jesudason*.

815. As for disclosure to the media being a last resort, in my judgment the claimant can fairly say the point of last resort had been reached. It does not follow that because the disclosures were to the media (in addition to Global Witness), the chain of causation must have been broken; nor that it must have been broken because the disclosures breached EY Dubai's confidentiality obligations; nor because the disclosures constituted a criminal offence under UAE law, even if made outside the UAE.

816. On that reasoning, the erudite expert evidence to which I was treated and for which I am very grateful to the experts, does not (as the parties knew it might not) serve to determine any decisive issue in the case. The experts will, I hope, pardon me if I do not therefore engage with the detail of their reports and oral evidence. In deference to their efforts, I will say only a little about their competing views on whether the disclosures were a crime in the UAE.

817. For the reasons submitted by Mr Toledano, which I need not set out, I think he is right that the view of Mr Al Zarouni should be preferred and that a Dubai criminal court would have convicted the claimant if he had been prosecuted in Dubai for breach of article 379 of the UAE penal code. In translation, that provides:

> "Shall be subject to a jail sentence for a minimum period of one year and/or to a minimum fine of twenty thousand Dirhams, whoever by virtue of his profession, craft, position or art is entrusted with a secret and divulge it in cases other than those allowed by law or if used for his own personal interest or for the interest of another person, unless authorized by the confiding person to disclose or use it."

818. The first of six issues debated by the experts was whether a necessary element of the crime is that there must be an element of personal benefit to the accused from making the disclosure in question. The second issue was what could count as a personal benefit. The third was whether "mixed motives" could satisfy the requirement, if any, that the accused must obtain a personal benefit.

819. The experts disagreed on the first and second issues, but in substance agreed on the third. Whether or not a "personal benefit" is a necessary element of the crime, Mr Chalhoub accepted that in a case of "mixed motives", where a claimant was motivated, say, in part by his own benefit and in part by a moral or professional concern, that would suffice to constitute the crime.

820. In my judgment, considering the expert evidence and the case law to which Mr Chalhoub referred, a Dubai criminal court would probably find the claimant's motives at least mixed, so as to include a personal benefit to himself; and would interpret that benefit widely rather than excluding from its scope high-minded disclosure in the public interest arising from moral concern and the accused's desire to dissociate himself from unethical conduct.

821. The fourth, fifth and sixth issues debated by the experts concerned whether the offence under article 379 of the penal code is committed where a secret is entrusted to the accused within the UAE but disclosed outside the UAE. This depends on the interpretation of article 16 of the UAE penal code, which in translation provides:

> "A crime shall be considered to be committed in the territory of the State if any of its constituent acts occurs therein or if its result has been realized or is intended to be realized therein."

822. Without going into detail, I prefer the view of Mr Al Zarouni that a criminal court in Dubai would treat the offence as committed in the territory of the UAE and convict the accused, rather than acquit him on the basis that the offence was committed outside its territory. Indeed, Mr Chalhoub accepted in cross-examination that it "[c]ould be argued" that the "result" of the crime had been "realized" in Dubai where the victim (here Kaloti) is based in Dubai.

823. Returning to the issue of causation, for the reasons I have given I do not accept that the chain was broken. The claimant did not act unreasonably so as to break the chain. By the same reasoning, I do not accept that the damage was too remote. It was the very kind of damage the duty of care exists to prevent. It was readily foreseeable and it was foreseen.

824. If the audit duty of care is to have any substance, a party who breaches it by exposing the victim to the taint of being embroiled in unethical conduct must expect the victim to dissociate himself publicly, not necessarily anonymously, from the unethical conduct. I have discussed the issue of anonymity already, earlier in this judgment. It is not for the wrongdoer to look to the victim to protect the wrongdoer by treating as unreasonable a personal choice by the victim to reveal his identity along with the facts of the wrongdoing.

Quantum of damage

825. I come finally to the amount of loss and damage. The claimant must prove his losses and has set out in a schedule the amounts claimed. The claims are for past loss of earnings up to the trial; past loss of private medical insurance cover; past loss of life insurance cover; recovery of business expenses owed to the claimant; interest on past losses; future loss of earnings; future loss of private medical insurance cover; future loss of life insurance cover; loss of end of service repayment of capital; and loss of end of service payment.

Generally

826. The defendants' main submissions were that the claimant unreasonably failed to mitigate his loss of earnings by working; that his evidence was mendacious; that his disclosure relating to efforts to find work was sparse; that he should have applied for jobs sooner; that he has not given disclosure relating to the small amounts he says he did earn; that his career with EY MENA would have been far less stellar than he says; and that there is no "lock-step" system of semi-automatic promotion after the first three years of partnership.

827. As for specific heads of loss, the defendants say he cannot claim for loss of private medical cover because he can use the National Health Service (**NHS**); that he was not owed the expenses he claims to have been owed at the time of his resignation; that in any event, that claim lies against EY Dubai or EY MENA, not the defendants; and that his interest calculations are wrongly made. The defendants also made certain points about the use of multipliers derived from the so-called "Ogden tables".

828. The claimant's schedule of loss dating from June 2018 claimed just under £13.7 million for the loss of his career. Mr Hubble pointed out that the defendants had called no witness to give evidence about levels of pay within the EY organisation. He submitted that the claimant's efforts were adequate and he was keen to work but hamstrung by the history of his involvement with the Kaloti audit and his justified exposure of it.

829. In evidence, the claimant pointed to the very high earnings considered attainable and attained by at least one superior colleague in the Middle East who had enjoyed a long and undisturbed career within the EY organisation. The claimant had been identified as a high flier and a person able to generate business in the Middle East, whose earnings were already on a steady upward curve three years into his partnership.

830. I accept that the claimant was doing well in his career when it started to go wrong in mid-2013. I accept that the levels of earnings claimed in respect of the first few years up to trial are not unrealistic for an up and coming EY partner with bilingual Arabic and English who was starting to develop good contacts in the Middle East.

831. I note the absence of any evidence from the defendants about remuneration, including the remuneration of other partners for comparative purposes. The evidence I had was an account from the claimant and what was elicited in cross-examination about the remuneration structure for partners and some documents about how pay is determined.

832. Such evidence as I had confirmed what I would expect in a meritocracy like the EY organisation; the more business you generate, the more you earn. Seniority does not guarantee higher pay. A hard working and successful partner would end a long career with very good earnings, other things being equal, but that could be derailed by economic downturns, political developments and all other usual vicissitudes of life such as ill health.

833. I remind myself of the main findings of fact. After making his disclosures in the UK in February 2014, the claimant attempted to settle in Spain with his family and set up a "global fairtrade" business exporting to the Middle East, evidenced by the draft residency application dated 28 April 2014. He was approached by one of the other three of the "big four" but dropped as "too hot". He did not approach the other two firms, seeing no point in doing so. He planned also to set up an "educational institute".

834. The export business did not prosper. Nor did an attempt to provide training courses in anti-money laundering and financial crime. Nor did his company, GFBI, set up in December 2015. He tried, through ISTIM, to provide sustainability related training in conjunction with a Canadian academic from his university days, Professor Wheeler. The plan to settle and live in Spain did not work and the family returned to the UK in mid-2016.

835. The period from early 2014 until mid-2016 was characterised by the defendants as one in which the claimant did not seek to earn a living. They say he did not apply for any job until 2016. That submission overlooks the point that he was living in Spain and trying to make a living as a self-employed person. I fail to see what was unreasonable about that. It was not a voluntary career break as the defendants attempted to suggest.

836. On his return to the UK, the claimant set about applying for salaried employment. He made many applications and registered with recruitment agents; the defendants described it as a "flurry" of applications. For the defendants, he was applying for the wrong jobs. He should have applied for jobs involving sustainability, which is what he is trained in, they argued.

837. But he did: with the Environment Agency, local authorities and even the UN. The defendants would not allow that these were reasonable applications to make; he had no experience of working in local or central government bodies, they argued. Actually, the claimant had worked in pollution control for a UAE government body.

838. The defendants said he should have applied for jobs closer to his old role with EY MENA. He did. Among the various positions he applied for, one was with an employer who had previously worked within the EY organisation. He has so far not succeeded in building a career in academia, though he has had discussions with two universities about becoming a research fellow.

839. In my judgment, the defendants' criticism that the claimant unreasonably failed to mitigate his loss comes ill from the parties whose tort put him in the predicament he

found himself in from early 2014. I found unfair their attempt to portray him as a mendacious workshy freeloader who wanted "to have his cake and eat it: i.e. to receive his full career earnings … without having to do any work for them".

840. The evidence of the claimant's conduct before and during the Kaloti audit is at odds with the defendants' portrayal of him. His work performance was commended. He was made a partner. He came close to achieving his financial target in 2013. He laboured at least as hard as Mr Labaude and others to resolve the Kaloti audit issues, under conditions of extreme stress and unpleasantness. Not once did he fail to communicate respectfully and courteously to colleagues and superiors. His family life was uprooted and his livelihood destroyed. He picked up the pieces as best he could.

841. I do not accept that he was bound by reasonableness to approach the other two members of the big four in order to mitigate his loss. The defendants do not explain how that could be combined with anonymity. Was he to lie to them about his career background and claim it contained nothing untoward? How would he explain his departure from the EY fold without either resorting to deception or prejudicing his position?

842. I reject also the allegation of contributory negligence. I have already explained why I do not think it is right to say the victim could have avoided damage by keeping the wrongdoing secret or keeping his identity secret. He was not bound to diminish the impact of his disclosures by making a gift to the defendants of his anonymity. His solicitors made clear at the time that the scope of intended disclosure included the role of the EY organisation and its treatment of the claimant.

843. I reject also the allegation that he unreasonably failed to mitigate his loss and I turn to the question of quantum. I accept that he has shown on the balance of probabilities that he would have continued and ended his career with the EY organisation up to retirement. The defendants' contrary contention relied too much on their sustained but unsuccessful attack on his integrity and character.

844. The claimant posited two alternative factual scenarios: either, that he would have returned to work in Dubai with "full institutional support" from EY; or, that he would have worked for the EY organisation elsewhere in the world, either in the Middle East or outside it. In my judgment the claimant would, more likely than not, not have returned to work in Dubai. Even with the full support of the EY organisation, it is likely that he would have taken a line of lesser resistance and accepted redeployment elsewhere in the world.

845. I take into account that the financial opportunities for the claimant and for EY Dubai and EY MENA would have been lowered by the fallout from the Kaloti audit and knowledge that the EY organisation was not willing to dance to the DMCC's tune. I think the most likely scenario is that he would have worked elsewhere in the Middle East for another 10 years or so and then moved to the UK or elsewhere in Europe.

846. I make that finding for the following reasons. The family were seasoned travellers, not afraid to move between countries. They enjoyed living in the Middle East and had friends there, not just in Dubai. The claimant's contacts were good in the Middle East and he speaks Arabic. His mother was in Jordan. His children were being educated in Dubai and Ms Montford favoured them being exposed to their Arabic heritage on their father's side.

Past loss of earnings

847. I bear in mind the defendants' point that there is no lock-step system of quasi-automatic promotion and annual pay increases. But I have to make my best estimate of the what the changes in the rate of pay over the years would have been. I do not accept in full the steep upward curve envisaged by the claimant.

848. On the balance of probabilities, I am prepared to accept an annual rate of increase of 8 per cent on gross remuneration year on year up to age 50.5 and 4 per cent thereafter to retirement. I therefore allow for an increase of 8 per cent (see below) from the 2012 financial year to the 2025 financial year.

849. I strike a balance between the upward pull of career progress and likely recognition of achievement with growing seniority, and the downward pull of unpredictable political or economic factors that could affect EY remuneration generally or the claimant individually. I also make allowance for the likelihood of an element of flattening out or "plateau" being reached later in the claimant's career, from age 50.5 onwards (see further below).

850. The EY financial year runs from 1 July to 30 June. The sums below are gross figures. In the financial year to 30 June 2012 (**FY 12**), he was paid $250,000, including his performance award of $25,000. In FY 13, he was not paid in full and his full earnings were never calculated. I accept the claimant's case that the total would have been $270,000. His drawings (i.e. sums received) in FY 13 were $252,000. The $18,000 shortfall is recoverable in respect of FY 13.

851. In FY 14, the claimant was paid $105,000 in drawings. I find that his annual earnings would have been $270,000 plus 8 per cent, i.e. $291,600. That amount less the $105,000 received is recoverable. I therefore award $186,600 for FY 14.

852. For FY 15, I award $291,600 plus 8 per cent, which comes to $314,928. For FY 16, I award $314,928 plus 8 per cent, which comes to $340,122. For FY 17, I award $340,122 plus 8 per cent, which comes to $367,332. For FY 18, I award $367,332 plus 8 per cent, which comes to $396,718. For FY 19, I award $396,718 plus 8 per cent, which comes to $428,455.

853. For FY 20, I make an award for ten months of the year, down to the date of the court's final order, which I take as 30 April 2020. The annualised award is $428,455 plus 8 per cent, which comes to $462,731. I reduce that figure by one sixth because my award is for ten months of the year only. The award for FY 20 down to 30 April 2020 is therefore $385,609.

854. The award for past loss of earnings for FYs 13, 14, 15, 16, 17, 18, 19 and part of FY 20 is therefore the sum of those individual awards, which comes to $2,437,764. I accept the claimant's case that there are no earnings to give credit for in respect of the period down to 8 June 2018 (the date of his schedule of loss), on the basis that his business expenses and investments exceeded any earnings and that the credit given in that schedule for the hoped for turnover of GFBI from then to trial has, unfortunately, not materialised.

855. However, the claimant has earned, in the period from 8 June 2018 up to trial, amounts he estimates at totalling $50,000. I accept that as his best estimate and I reduce the award for past loss of earnings by that amount. For those reasons, the court's award for past loss of earnings is $2,437,764 less $50,000, which is $2,387,764.

Past loss of private medical insurance cover

856. The claimant made a claim for the past loss of private medical insurance cover. I accept that he enjoyed this benefit while a partner with EY MENA. It does not matter that the benefit was payable by a non-defendant. It is recoverable as a loss sustained in consequence of the defendants' tort. I reject the contention that he is prevented by the availability of the NHS's services from recovering it.

857. I accept as the best and only evidence I have of the value of that benefit the quote included in the claimant's schedule of loss, with an annual cost of £3,012. I therefore make an award on the basis of that annual amount, from 12 January 2014 (the date of the claimant's resignation) to 30 April 2020, a period of six years and 110 days.

858. The resulting award is £3,012 x 6.3014 years, which comes to £18,980. I award that sum in respect of past loss of private medical insurance cover.

Past loss of life insurance cover

859. I accept the claimant's evidence that he had the benefit of life insurance cover with EY for $1.2 million. I accept as the best and only evidence I have the quote obtained by the claimant and referred to in his schedule, giving an annual cost of £2,256. By the same reasoning, I multiply that sum by 6.3014 years and make an award in respect of loss of past life insurance cover in the sum of £14,216.

Business expenses owed to the claimant

860. The claimant asserted through solicitors in late 2013 and early 2014 that he was owed expenses arising from his need to travel to and live in the UK during the second half of 2013. The defendants did try to question whether these expenses were properly incurred, but I am satisfied they were. I accept that he was entitled to be accommodated at the expense of the EY organisation and that his move to Sussex from London was intended to reduce expense.

861. I accept that these expenses are recoverable as tort damages since, on the balance of probabilities, they would have been reimbursed to the claimant if the tort had not been committed. The best evidence I have of the amount is the claimant's estimate, not seriously challenged, of £14,000. I therefore make an award in that amount.

Interest on past losses

862. Interest on past loss of earnings, loss of medical cover and life insurance cover should, in my judgment, be calculated at the special account rate of 0.5 per cent from the mid-point of the period of 6.3014 years, since the losses are continuing pre-trial losses.

863. In the case of the loss of earnings, calculated in US dollars, the calculation is: $2,387,764 x 0.5 per cent x 3.1507 years, which comes to $37,616. I award that sum in respect of interest on past loss of earnings up to judgment and the court's final order.

864. In the case of loss of medical cover and life insurance cover, calculated in pounds sterling, the combined award is £19,547 plus £14,216, which comes to £33,763. Interest on that combined award should be calculated in the same way, from the mid-point in the period of 6.3014 years. The resulting calculation is £33,763 x 0.5 per cent x 3.1507 years. The resulting figure is £523. I award that sum.

865. In the case of the award in respect of business expenses, I calculate interest on the £14,000 at the full special account rate of 0.5 per cent over 6.3014 years. They were due to the claimant in full on 12 January 2014 and are not a continuing loss. The resulting interest figure is £441. I award that sum.

866. Adding up the amounts in pounds, the court's award for interest on past losses in pounds is £523 plus £441, which comes to £964. The interest on past loss of earnings in US dollars is $37,616.

Future loss of earnings

867. For the purpose of future loss of earnings, I accept that the claimant intended to retire as a full time partner at age 60.5, though I think he will now, his need being greater than it would have been, go on earning part time for a further five years, to age 65.5. To calculate the loss of full time earnings, I start from 1 May 2020 and continue until the claimant's intended retirement date, 30 June 2035, the end of the EY financial year in which his 60th birthday falls.

868. By the end of the trial, the parties were agreed on the appropriate multiplier, derived from the Ogden Tables, in respect of each part of the relevant age range: 0.419 up to age 45.5; 4.225 from age 45.5 to 50.5; 4.275 from age 50.5 to 55.5; and 4.329 from age 55.5 to 60.5.

869. First, I find that the claimant would have earned one sixth of $462,731 in respect of the last two months of FY 20. That comes to $77,122 and takes the clamant to age 45.5, since he was born on 12 December 1974. I apply the agreed multiplier of 0.419 to that figure, resulting in an award of $32,314 for the balance of FY 20.

870. For the five years when the defendant will be aged 45.5 to 50.5, from the start of FY 21 (1 July 2020) to the end of FY 25 (30 June 2025), the multiplier is 4.225. The earnings would, per my best estimate, have increased by 8 per cent each financial year. The annually increased future earnings figures are therefore $499,749 for FY 21; $539,729 for FY 22; $582,907 for FY 23; $629,540 for FY 24; and $679,903 for FY 25.

871. The average of those amounts is their sum divided by five, and comes to, by my reckoning, $586,366. To that figure, I apply the agreed multiplier of 4.225. The resulting figure is $2,477,396.

872. For the five years when the claimant will be aged 50.5 to 55.5, from the start of FY 26 (1 July 2025) to the end of FY 30 (30 June 2030), the multiplier is 4.275. The earnings would, in my best estimate, have increased by 4 per cent each financial year. The annually increased figures are therefore those representing that increase each year, which I will not this time set out. Their average over the five year period is $765,975. To that figure, I apply the agreed multiplier of 4.275. The resulting figure is $3,274,543.

873. For the five years when the claimant will be aged 55.5 to 60.5, from the start of FY 31 (1 July 2030) to the end of FY 35 (30 June 2035), the agreed multiplier is 4.329. The earnings would, again, I estimate, have increased by 4 per cent each year and, again, I will not set out the figures. They produce average annual earnings over the period of $931,926. To that figure, I apply the agreed multiplier of 4.329. The resulting figure is $4,034,308.

874. The sum of those figures for loss of future earnings is $9,818,561. However, the claimant will be able to offset those lost future earnings to an extent which I have to estimate as best I can, from the evidence I have heard about his resourcefulness, capability and the diminishing stigma of being a "whistleblower" which may be all but forgotten in five years from now. The claimant will be helped by the age discrimination laws in this country, no longer being in the first flush of youth.

875. I estimate that the claimant will be able to earn, on average, $70,000 each year over the next 20 years, i.e. up to the age of 65.5 rather than his intended retirement age for full time work of 60.5. That produces a figure over the period of $1,400,000. I reduce the figure of $9,818,561 by that amount, producing a final future loss of earnings award of $8,418,561.

Future loss of private medical insurance cover

876. The claimant would have continued to receive private medical insurance cover up to the age of his retirement, at age 60.5. The annual cost which I have accepted as £3,012, at today's prices, therefore should be multiplied by the appropriate overall agreed multiplier of 13.248, to produce an award of £39,903, which I make.

877. I do not think I should make an allowance for the increasing cost as the claimant's age increases; he should be able to purchase a policy now with a discounted element for advance premium payment at today's prices.

Future loss of life insurance cover

878. Similarly, the claimant would have continued to receive the benefit of life insurance cover, down to his retirement at age 60.5. I have accepted his evidence of the annual cost, at £2,256. That should be multiplied by the overall agreed multiplier of 13.248, producing a figure of £29,887, which I award.

Loss of end of service repayment of capital

879. The claimant makes a claim for about $50,000 in respect of capital he was required to inject into the firm when he became an equity partner in 2011. He says he made that contribution to the firm and that it would have been reimbursed to him at the end of his partnership, on his retirement at age 65.

880. I do not accept that I should make an award in respect of that amount. I think it should be taken to be unproven as a separate head of damage or subsumed into the estimated figures for future loss of earnings. It is unclear to me and I regard as speculative what the capital recovery position will be in 2035.

Loss of end of service payment

881. A far more substantial claim for just over $4 million is advanced by the claimant in respect of loss of his "end of service" payment. He submits that by reason of provisions in EY MENA's regulations (paragraphs 13.13.2(i) and (ii)), he would be entitled at the end of his period of service, aged 60.5, to an end of service payment, containing two components, both calculated by reference to his annual earnings on retirement.

882. The first component is, the claimant says, of one twelfth of annual terminal gross remuneration, multiplied by ten (10 years being the cap on qualifying service under regulation 13.13.2(i)). The second component, he says, is one eighth of his annual terminal gross remuneration, without any cap on the number of years of service.

883. According to my loss of future earnings figures, the claimant's annual remuneration on reaching retirement age comes to $1,006,422. The claimant's claimed annual remuneration at that age is considerably higher.

884. Even using my lower figure, the formula relied on by the claimant, not gainsaid by the defendants, would produce a figure of $1,006,422 divided by 12, which is $83,869, multiplied by 10, which is $838,690 for the first component; and $1,006,422, divided by 8, which is $125,803, multiplied by (at least) 20, which is $2,516,060, for the second component.

885. The two components added together produce a total end of service payment of $3,354,750. I regard this part of the claim as not possible for the claimant to prove because it involves speculation about what EY MENA's regulations will provide for as at 2035 when the claimant reaches retiring age.

886. As indicated above, however, the claimant would not, on the balance of probabilities, have been working for EY MENA by that stage in his career; I think he would have moved back to the UK where Ms Montford's family is from, once his children were grown up; and that he would have been working for a different EY entity.

887. It is more likely than not that he would have received some form of end of service payment, but I would be speculating about what form it would have taken or how much it would have been. I do not think this loss is proved. For that reason, I do not make an award in respect of the loss of an end of service payment.

Total

888. I therefore make the following award of damages and interest combined:

Award in US dollars:

Past loss of earnings:	$2,387,764
Interest on past loss of earnings:	$ 37,616
Future loss of earnings:	$8,418,561
Total award in US dollars:	**$10,843,941**

Award in pounds sterling:

Loss of past medical cover:	£18,980
Loss of past life assurance cover:	£14,216
Business expenses due:	£14,000
Interest on loss of past medical cover loss:	£ 523
Interest on business expenses due:	£ 441
Future loss of medical cover:	£39,903
Future loss of life assurance cover:	£29,887
Total award in GBP:	**£117,950**

Disposal

889. For the reasons given above, the claim succeeds. I propose to give judgment for the claimant on the negligence claim in the sum of $10,843,941 in US dollars and £117,950 in pounds sterling. I dismiss the conspiracy claim. The judgment sums are subject to adjustment (upwards or downwards) to take account of the likely incidence of tax, on which, unless the figure is agreed, I will invite further submissions when dealing with consequential matters.