Indictment No: T2017 7247-7251

IN THE CROWN COURT AT SOUTHWARK

Southwark Crown Court
1 English Grounds
London SE1 2 HU

Date: 03/04/2019

Before:

MR JUSTICE JAY

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Between:

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- and –

JOHN VARLEY
ROGER JENKINS
THOMAS KALARIS
RICHARD BOATH **Defendants**

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Edward Brown QC, Annabel Darlow QC, Alison Morgan QC and Philip Stott (instructed by **Rakesh Somaia** on behalf of the **Serious Fraud Office**) for the **Crown**
Nicholas Purnell QC and Clare Sibson QC (instructed by **Corker Binning**) for **John Varley**
John Kelsey-Fry QC and Jonathan Barnard (instructed by **Herbert Smith Freehills LLP**) for **Roger Jenkins**
Ian Winter QC and Nicholas Yeo (instructed by **DLA Piper UK LLP**) for **Thomas Kalaris**
William Boyce QC and Karen Robinson (instructed by **Peters & Peters Solicitors LLP**) for **Richard Boath**

Hearing dates: Trial – 23rd January to 7th March 2019; Submissions on this application – 18th to 22nd March, 27th March, and 1st April 2019

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RULING

MR JUSTICE JAY:

Introduction

1. All four defendants apply at the end of the Crown's case for the case to be halted against them on the two Counts (as applicable), on the ground that there is no case to answer.

2. The application is really, or at least realistically, being brought under the second limb of *R v Galbraith* [1981] 73 Cr. App. R. 124. In short, a submission of this nature should be acceded to only when the court concludes that the prosecution evidence, taken at its highest, is such that no reasonable jury properly directed could convict on it. I have received copious submissions as to the applicable legal principles in a case involving circumstantial evidence and inferences, although I am well familiar with this terrain. Given those submissions, I will summarise these principles at an appropriate stage.

3. This application, reflecting as it does the vastness and interconnectivity of the underlying evidential material, is complex. I believe that it is about as complex as it has ever got in a criminal trial, or could and should be possible to get. The application has put the legal teams under immense, almost intolerable pressure. Mr Nicholas Purnell QC for JV observed at one point shortly before the application was even made that the intrinsic complexity of the evidence, and the court's likely inability convincingly to unify all the evidence into a completely coherent web, is a factor which weighs in his client's favour. I would not go quite that far, although I do see that the application of Occam's Razor may favour the defendants more than the SFO. Insofar as there are difficult matters of law, these must be resolved in the usual way by close analysis of the authorities penetrating down to the underlying principles. Insofar as the evidential picture is multi-faceted, variegated and not necessarily susceptible to an interpretation which irons out all possible wrinkles and judicial concerns, I must still undertake the *Galbraith* exercise in the usual way applying such additional assistance I may gather from the authorities as considered further below.

4. Lest it be thought that the complexity has arisen only because the defendants have made it so, that would be entirely wrong.

5. Given the exigencies of time and the desirability of avoiding unnecessary replication, this ruling should be read in conjunction with the following rulings and judgment, and probably most helpfully in this order:

   (1) my ruling on Barclays' dismissal application dated 21st May 2018;

   (2) my ruling on the application of these four defendants to dismiss dated 9th July 2018;

   (3) the judgment of Davis LJ on the SFO's application for a Voluntary Bill of Indictment dated 12th November 2018.

   (4) my ruling on RB's dismissal application dated 5th December 2018.

6. I should emphasise that my earlier rulings in this case (a) took the SFO's case at its reasonable pinnacle, (b) were not based on a consideration of all the available evidence, (c) were not necessarily based on a complete understanding of even the extracted evidence that was placed before me for consideration, and (d) did not take on board key elements of the respective defence cases. I do not put forward aspect (c) as a personal failing or an implied excuse: it reflects the inherent density and complexity of the material, and the fact that my understanding has deepened as the layers of the metaphorical onion have been removed, often strip by painful strip, as the evidence has unfolded and I have had time to think about it and cross reference it. As for item (d), no hint of *mea culpa* is required because I was left unsighted.

7. It follows from what I have just said that the assessments I made as to the strength of the SFO's case even as recently as 5th December 2018 cannot be regarded as immutable, still less necessarily sound. So much water has passed under the metaphorical bridge since then. Those assessments fall to be reconsidered in the light of all the evidence I have considered and the submissions I have received. In the interests of complete transparency, I must record that ruling (2) mentioned in paragraph 5 above seems to me now to merit complete overhaul and that certain facets of ruling (4) have not withstood the test of time and it appears, at least to me, to be superficial and jejune.

8. In order to reach the level of understanding I possessed on 7th March 2019 (before the defendants' submissions arrived), I must also record that apart from reading Mr Edward Brown QC's written opening at least three times, I had been through all the material on the ipad four times, had listened to key passages of audio tape at least once and often more than that, prepared detailed notes for the purposes of any summing-up, had considered with care the limited oral evidence of Mr Marcus Agius and Dr Glenn Leighton, and had studied the prepared statements and RB's lengthy interviews (parts of which were played to the jury). For this purpose I am ignoring all the preparatory endeavour I expended in April, May, June, July, November and December of last year.

9. As before, transcripts of the proceedings are available should this application fall to be considered further.

10. My understanding has deepened still considerably since 7th March because the parties have filed several batches of detailed, comprehensive and impressive written submissions which I have read and re-read before the oral hearings started, and thereafter. I am indebted to Counsel for their very considerable assistance in these circumstances.

11. The hearing of this application took seven days, with a number of gaps, and yet was still significantly abbreviated in line with my assessment of the overriding objective. I had given the SFO team, headed by Mr Brown ably assisted by two Leading Counsel and his extremely competent junior, the time that had been sought to finalise their written submissions, and a further opportunity to "re-group". Following what I said in court on 27th March, I gave the defence teams the same opportunity. In an ideal world the oral hearings would have taken longer. A balance had to be struck between giving the parties the appropriate opportunity to advance their best cases, me the opportunity to reflect, consider and prepare this ruling, and then not leaving too long a gap before the jury could be brought back. Ultimately, however, the one matter which has not

been compromised is the need to be fair to the defendants and to produce a ruling which provides me with sufficient moral and intellectual conviction as to its correctness.

12. I have not ignored the SFO's submission that the sophisticated amplitude of the defendants' case on the law came regrettably late. My endeavour during the course of the trial was to anticipate what the defendants' submissions were likely to be, and to provide the SFO, if I could, with spoiler alerts. On occasion, I sensed that this was not appreciated by the defence teams. I am completely uncontrite. The transcripts will show how accurate (or not) my predictive powers were. In my opinion, the SFO was given sufficient opportunity overall to respond to the defendants' case, and even if the perception may arise in its camp that an attempt had been made to secure an uncovenanted forensic advantage, that was not attained.

The SFO's Case as Opened to the Jury

13. It has always been the SFO's principal contention that the public-facing documents, namely the Subscription Agreements and the Prospectuses, were falsified by the co-existence of what were in substance and reality concealed commissions in the ASAs. Taking ASA1 as the more straightforward example, it is said that the consideration for that agreement was not genuine advisory services but an extra fee for the capital raising. The inextricable link between these arrangements rendered the statements in the public-facing documents that Barclays Plc was paying a commission of 1.5% of the maximum commitment to the conditional placees untrue and/or misleading. Mr Brown suggests that "misleading" might raise a separate issue, but I do not agree. On the facts of this case, the greater includes the lesser; and the representations on which the SFO relies were either false or they were not.

14. Although the SFO has always said that these were disguised additional fees, the proposition that the ASAs were "shams" has never been one that it has enthusiastically embraced. That this was, or at least ought to be, the true conceptual basis of an important part of the SFO's case began to become clear during the April 2018 dismissal hearing and perhaps solidified during the course of the VB hearing before Davis LJ in answer to judicial questions. I had noted that in 2013 the SFO expressly exonerated Qatar of any wrongdoing. On the other hand, "sham" was mentioned in the SFO's opening to the jury albeit far less often than "mechanism". Ultimately, the core question is whether the ASAs were a dishonest means of disguising a reality: that there were no genuine advisory services but rather hidden commissions.

15. With the defendants' complete agreement, but in the face of some opposition from the SFO, I sought to boil down the essential issues for the jury in a few opening remarks. It now appears that this reduction obscures a series of fundamental legal issues which are now advanced with full force and cogency in the submissions which were lodged on 7th March. I bristle slightly at this but can state that the jury have not been significantly misled. As I explained to the jury, the first question for them would be: has the SFO proved to the criminal standard that the ASAs were shams? That remains the position, although the SFO now (and in my view rightly) seeks to finesse this slightly in relation to Sheikh Hamad. The real question is whether the counterparty to ASA1, Qatar, appreciated that genuine services would not be provided. Who knew and did what and when raises a different question.

16. The SFO's reluctance fully to acknowledge the concept of sham was not altogether surprising, and I can suggest an additional concern. "Sham" is not a precise legal term, and to my mind it is capable of meaning one of two things, depending on the context. An agreement which does not intend to create legal relations is a sham and is unenforceable for that reason. An agreement which says that the consideration for it is X (*i.e.* the stated consideration) when in substance and reality it is Y (*i.e.* the hidden consideration) is also a sham. Whether or not that agreement is unenforceable, because as performed it is illegal or contrary to public policy, raises a somewhat different question. The present case, *pace* some of the defendants' submissions, engages this second category. I will need to return to this issue, but I will never lose sight of the defendants' case that a sham agreement entails dishonesty on both sides. Nor will I lose sight of the kernel of the SFO's case which is, whatever label is deployed, the ASAs were the mechanisms for disguising what were additional commissions or fees for participation in the capital raisings.

17. The SFO opened this case to the jury on the basis that the conspirators had every motive to lie to the market in 2008 because the future of Barclays as an independent bank was in jeopardy. The dishonesty that it has alleged was borne out of extreme circumstances. Once Qatar demanded a fee which was higher than the amount the other conditional placees were receiving (this was on 3rd June), senior executives within the bank were thinking of ways of meeting that demand by hiding the additional fee in some way.

18. The advent of the device or mechanism of the ASA cannot be precisely timed (there is a difficult seam of evidence from RB in his interview about that), but the evidence certainly shows that the concept was alighted upon, and approved in principle, by 15:51 on 11th June. The identity of the originator is unclear: both RJ and TK deny it was his idea. The case was opened to the jury on the basis that the conspiracy was in place by that time, and that RB and JV were brought in later that day. Further, as paragraphs 34 and 35 of the SFO's opening note makes clear:

> "34. In this case, the conspiracies came about because of three factors which were known to all of the conspirators and which necessitated the offence of fraud by false representation being committed: a) Firstly, they all knew that it was standard practice in capital raisings that all of the investors would expect to be paid fees/commissions at the same rate and to be given the same discount from the price of the shares they were acquiring. So, paying the Qataris more than the others was a problem. b) Secondly, they knew that the nature of the investments and the fees paid in relation to those investments would have to be presented to Barclays' shareholders and to the wider markets by way of the Prospectuses and Subscription Agreements. There was no getting around that as it was a legal requirement. c) Thirdly, they knew that the Qataris would not invest without being paid at a higher rate and their investment was truly needed – it was essential.
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> 35. It was against that background that the mechanism of the ASAs was devised. For each defendant, you will consider the evidence that shows that they were aware of that background. The point at which they demonstrated their awareness of that background and shared the intention that the ASAs were to be used as the answer to that problem

is the moment that we say that each conspirator entered into the agreement alleged against them. We will come to the point when we say that applies to each defendant as we go through the evidence."

19. Paragraph 41 of the SFO's opening note draws attention to the following additional considerations:

"a) Before the advisory services agreement 'ASA1' was devised by the conspirators, the Qataris demanded, and Barclays agreed a total fee to them for subscribing of 3.25%. That is how much the Qataris demanded to be paid. The £42 million fee in ASA1 as finalised and signed was a rounded calculation based on 1.75% of the Qataris' maximum potential investment plus LIBOR interest. This was the difference between the commission being paid to other investors, 1.5%, and the amount that the Qataris demanded. That fact in itself is indicative that the £42 million paid under ASA1 was a fee for investing.

b) As to ASA2, £280 million was the amount required by the Qataris to give them what was described as a "blended entry price" for both of their investments over both capital raisings. What that means is that the fee was calculated in order to provide a discounted share price across both capital raisings. Again, the fact that the £280 million paid under ASA2 was calculated by reference to the share price of both capital raisings (and not 'services') is, again, another obvious sign that it was a fee paid to secure the Qatari investment.

c) The ASA fees were in reality subscription fees or commissions. The ASA fees were, and remained, payments for the Qataris' agreement to invest. The ASAs were no more than mechanisms for the disguised payment of additional subscription fees and/or hidden discounts from the ostensible price paid by Qatar/Challenger for their investments. They were not intended to be enforceable agreements for the provision of services. 'Services' of some sort or another might well be rendered in the future in any event of course – Qatar was after all now a major shareholder in Barclays so it would potentially be in their own interests, and Roger Jenkins clearly had an ongoing (and pre-existing) relationship with the significant decision-makers in Qatar. However, those services, if any, would not be rendered as a result of the ASA. If the ASA fee was in fact for investing in the capital raising, then the provision of any 'services' by Qatar later would either be for free or require additional payment. It is therefore telling that, when an actual intermediary service like the introduction of Abu Dhabi investors did occur, not long after ASA1 was entered into - just 16 weeks later, the Qataris were offered, and received, an additional large payment of £66 million, quite separate from the payments already being made to them under the ASA – just one of a number of features that demonstrates that the ASA was not an agreement for intermediary/advisory services, but simply a mechanism for the payment of fees for investing.

d) There was obvious interdependency of the ASAs and the investments – another element. The Qataris would not have invested without the ASAs, and the ASAs would not have been made without the investments.

e) For both of the ASAs, the fees included sums to be received by Sheikh Hamad, the Prime Minister of Qatar (via a company called 'Challenger'), when he would and could not on any footing be providing advisory services (as the conspirators recognised at the time, it would be inappropriate for the Prime Minister of Qatar to be doing so). This is yet another indication that the ASAs were not genuine agreements for services to be provided.

f) The ASAs lacked key hallmarks of genuine stand-alone commercial agreements for services. A genuine commercial agreement is ordinarily made by arm's length negotiation, and ordinarily involves focused consideration of the nature (and specifics) of the services to be provided, of the value to be provided and received and thus of the price to be paid. None of that took place with regard to either ASA. For both ASAs, the amount of the fees under discussion related to the Qataris' demands (and in the case of ASA1, as the amount of the investment moved), without in either case any true consideration of the content or value of any "services".

g) As to ASA1, there is little objective evidence of intention to provide or receive genuine services for real value (all the discussions to that effect being much more concerned with presentation than substance); and no such evidence at all for ASA2. ASA2 was signed just four months after ASA1.

h) ASA2 was signed just four months after AS1. The fact that it was not genuine can be demonstrated by:

i. A pretence within it to the effect that its creation was attributable to the "great success" of ASA1 and that the services to be provided had been discussed "in detail"; and

ii. The fact that, for no explicable commercial or other reason, it involved a 5-year term, covering most of the same 3 years as ASA1, that had been signed only 4 months before, but at a vastly increased fee (over 6½ times the fee for the largely concurrent ASA1);

iii. The manner in which the figure of £280m was arrived at as a 'blended entry price', which was agreed upon in a very short period in negotiations conducted between John Varley and Roger Jenkins in late October 2008."

20. Some words of clarification and expansion of the SFO's formulation are required. First, in its numerous draft iterations the advisory fee for ASA1 was always calculated on the basis of 1.75% of the maximum commitment under CR1, plus an element of interest (usually LIBOR). This was an algorithm which appeared to anchor the

advisory fee in the capital raising rather than genuine services. Secondly, there was an obvious further connection between ASA1 and CR1 inasmuch as the one would not have been entered into without the other. Thirdly, ASA1 was clearly the means by which Qatar's demand for additional fees would be met. Fourthly, the commercial realities were such that Qatar, having agreed a composite fee of 3.25% on or about 5th June (how exactly that fee was going to be delivered had not been agreed), had no reason to revert to 1.5%.

21. I refrain from detailed comment at this stage but should note and underscore the second point I have just made: the obvious interconnection or interdependency. The point has already been made that this cannot, without more, prove the SFO's case. How far it really takes the SFO down the road to proof – that the consideration for ASA1 was not "advisory services" but an additional fee for CR1 – may be debated. As a matter of fact and commercial reality, ASA1 and CR1 were associated rather than dissociated. The purpose (but not necessarily the sole purpose) of ASA1 was to satisfy Qatar's demand for an additional fee. However, the key question here is whether the consideration for ASA1 *was* in fact an additional fee for participation in CR1: in other words, whether the "association" was sufficiently tight, close and complete in order for that inferential conclusion, being one of mixed fact and law, to be reached. In order to answer that question, an analysis of whether the parties ever intended that genuine services be provided is inescapable. Put simply, the aggregation of the factors I have bundled together certainly gave the impression that this was an unethical arrangement but are insufficient to prove the fact in issue.

22. As I have said, the SFO's case is that the conspiracy which has been indicted in Count 1 existed by late afternoon on 11th June. The evidence shows that the "mechanism" (TK's language and not the SFO's) was "sorted", i.e. agreed, between RJ and TK, and that the latter "cleared" it in principle with Bob Diamond (president of Barclays Bank Plc), Steve Morse (head of compliance) and CL. Messrs Diamond and Morse are not said to be co-conspirators. In opening the case to the jury, Mr Brown drew attention to the first discussion between TK and RJ but was not explicit as to the inference that should be drawn as to what they spoke about. Moving on to 15:51 and then the early evening discussions between TK and RB, these – according to the SFO – provide direct rather than inferential evidence of the rolling out of the conspiracy and the recruitment to it of RB. The issue here is, or should be, not so much *inference* but *interpretation* in the light of all the circumstances, including the inferences to be drawn from the circumstances. The SFO's case is that JV was recruited to the conspiracy as soon as he was aware of the "mechanism" as it has been defined – being the device to conceal the additional fee.

23. The relevant conspiracy could have existed as early as the SFO has pinpointed notwithstanding that it was conditional on Qatar agreeing to participate in the dishonest arrangement. Furthermore, at least in theory not all the defendants had to be full parties to the conspiracy at the outset: full-blown guilty knowledge could have been completed later. In practice, this only "works" in relation to RB, if it works at all, and I will be returning to this. The evidence shows that there was a telephone conversation between RJ and Sheikh Hamad on 11th June. The precise time cannot be identified but Qatar is 2 hours ahead of BST. In opening the case to the jury, Mr Brown was not explicit as to how this discussion would have proceeded on the assumption that the underlying premise is right: that this was a dishonest arrangement.

For a long time in this case I was of the view that for the SFO's case to be right RJ must have made it crystal-clear to Sheikh Hamad, one way or another, that what was to become ASA1 would not mean what it said. I now believe that a softer, subtler interpretation is possible, and an examination of the transcripts will show the evolution of my thinking.

24. In opening the case to the jury, the SFO placed considerable weight on a memorandum RJ sent to TK, RB and Judith Shepherd (hereafter, "JS") on 13th June, copied to Mark Harding ("MH") who forwarded it to CL. I will set out the relevant parts of its text later.

25. The SFO's case in relation to this memo was as follows:

> "This Memo was created in an attempt to lay a misleading "audit trail". It was evidently designed to stand as a purported record of Qatar's abandonment of their demand for a 3.25% subscription fee, and that they were now apparently happy with a 1.5% fee (a complete reversal of the Qataris' earlier demands) and to distance the advisory agreement from the payment of a subscription fee. If (as the Prosecution submits) the additional 1.75% fee was – and remained – a hidden subscription fee, then this "trail" and the Memo itself were false." [paragraph 170 of the SFO's opening note]

26. Who would be deceived by this misleading audit trail must also be considered. Paragraph 173 of the SFO's opening note makes clear that the in-house lawyers (to whom must be added Matthew Dobson, "MD") were amongst that cohort.

27. In opening the case to the jury, the SFO also relied on a series of additional circumstantial factors which were said to reinforce the case on "mechanism". Given that the SFO quite rightly continue to rely on these matters it is unnecessary to provide a full list because I must return to the issue. Key points include: the discussions between RJ and RB in relation to the proposition that genuine advisory services could ever be provided by the Prime Minister of Qatar; RB's increasing concerns about ASA1 and his attempts to distance himself from it; the way in which the terms of ASA1 were increasingly whittled down in the face of Qatari pressure; the fact that the interest component was not made explicit in ASA1 itself (for the obvious reason that the fact that it was being paid tended to support the contention that it was a disguised fee); and the frank discussions between RB and JS after the event during the course of which the former's disquiet was plainly displayed, including his use of the "B" word.

28. Finally, in opening the case to the jury on ASA1, Mr Brown made something of the fact that the effective entry price for Qatar included the consideration for ASA1. Given my initial strong attraction to this point, a word of explanation is required. Barclays' shares were trading at 310.75p/share on 24th/25th June 2008. Discounted at 9% brings the price down to 282p/share. The effect of the 1.5% published fee, once account is taken of clawback at 16.34%, brings the figure down still further to around 277p/share. So far, so good. In various calculations made after 25th June, those within Barclays included the amount of 11.5p/share payable as an interim dividend on 22nd August (debatable as an accounting or valuation exercise, but it does not matter). More importantly, they also included the £42M fee payable under ASA1. Taking

these two additional elements into account reduced the effective entry price to 259p/share or 260p/share, depending on rounding and whether interest was included.

29. My initial reaction was to say (and I did say it to Mr John Kelsey-Fry QC for RJ): does this not prove that the consideration for ASA1 was part of the consideration for the capital raising? As a matter of arithmetical logic, the proposition cannot be gainsaid. Mr Kelsey-Fry's response was along the lines that an investment banker or commercial man would see this differently. My concerns were not instantly allayed. Perhaps I was being unduly sceptical; maybe my fascination with numbers was driving me down the wrong road; maybe I lack sufficient commercial nous and experience. Whatever the reason or reasons, however, my concerns were not vitiated to any significant extent until I had reflected on the evidence of Dr Glenn Leighton; then they were largely dispelled.

30. Turning now to ASA2, the SFO's case as opened to the jury proceeded along similar lines, although it possessed these additional elements. As a matter of impression, £280M is rather more than £42M and needs to be explained, particularly when ASA1 still had a long time to run. This point troubled me when I first read the papers in April 2018, and Davis LJ's reaction to it is on the transcript. JV was more closely involved in ASA2 than he was in ASA1, and the pressures operating on him at the end of October 2008 were vast. The written submissions of Mr Purnell accept that he may have demonstrated an error of judgment (it is said that the SFO's case at its highest suggests this). Qatar's bargaining position was strong and it would have been obvious to Sheikh Hamad and Dr Hussain that Barclays would have to go cap in hand to HMT if the Middle East option proved fruitless. Precisely what happened in relation to the fee for ASA2 (strictly speaking, this was an extension to ASA1) is unclear, but what is clear is that what started life as about £125M became £185M, then £185M + £75M, and finally £280M. Timescales were short and all of this was done in an extraordinary rush. From indicative calculations which the SFO has helpfully performed, it does seem that in order to arrive at a blended entry price of 130p/share across both transactions, the figure of £280m would have to be the fee for ASA2. Someone in Qatar may have been performing a simpler version of what the SFO has done.

31. All these circumstances are, it is said, exceedingly suspicious, but there are two further factors that the SFO adds to the balance. First, although it is clear that the existence of ASA1 was disclosed to the Board and the BFC, the SFO opened the case to the jury on ASA2 that it was not. Furthermore, the jury was informed that JV did not disclose ASA2 even in gist to Mr Marcus Agius, the chairman of Barclays Plc, contrary to his normal practice. I will need to return to this issue, but the inference must be, submits the SFO, that JV's omission was for a reason. Secondly, the SFO contend that JS's team declined or refused to draft ASA2 (from which the inference should be drawn that they could not countenance participating in such a questionable transaction), inducing RJ to obtain legal advice from a BarCap lawyer in New York.

32. Mr Brown was less specific as to when the conspiracy forming the subject-matter of Count 2 crystallised. In opening the case to the jury, at my insistence that he should do so, he said that the jury may well think that the conspiracy came into being on 24th October which was when the £125M fee for what was to become ASA2 appeared in a series of calculations. This case was founded on the same logic that underpins paragraphs 34, 35 and 41 of the SFO's opening note in relation to ASA1. That logic is

fortified if there is a case to answer on ASA1, but if not it stands or falls by its inherent cogency. If the logic is removed, however, there is another way at looking at this but even that other way has to address the significance of the 24th October date.

The SFO's Case as Now Advanced for the Purposes of this Application

33. Analysing the written submissions filed on 16th March, two essential elements of the SFO's case remain in place: viz. (1) the mechanism was inherently dishonest (see paragraph 18 above), and (2) the lawyers were misled by the 13th June memorandum and generally. Mr Brown adds to item (1) the factor that "there was only a *need* for a "mechanism" *because* Barclays were not prepared to disclose the extra fee demanded by the Qataris" (paragraph 58 of the written submissions on the evidence). In the SFO's first set of written submissions and Mr Brown's oral argument, greater emphasis was placed on the defendants' consideration of dishonest solutions at all material times up to the inauguration of the "mechanism" of an advisory relationship, but this had always been a feature of the SFO's case.

34. The SFO's case is vastly greater than that, but the focus of the defendants' submissions draws attention to the SFO's conceptualisations. It is the two core features of the SFO's case which have driven this prosecution forward, and if they fail it is said that the case is fatally damaged.

35. I believe that it would be helpful to summarise Mr Brown's oral arguments on 21st and 22nd March at this point. He submitted that JV and CL were essential participants in both conspiracies because neither would or could have been brought to a successful conclusion without both of them. There was a need for tough leadership, and it is unrealistic to say that they both passed out of the picture. They were necessary to push this deal home, including putting the ASAs in a form which would achieve their purpose and be acceptable to Qatar. The jury would be entitled to conclude that they do so *qua* conspirators.

36. Mr Brown invited me to look for patterns, as well as consistency of behaviour and of reaction. In my view, these matters are important.

37. Mr Brown submitted that there is evidence supporting the proposition that the underlying motivation of Qatar was not strategic but to secure higher fees and the best deal possible; the defendants also believed that to be so. Sheikh Hamad was in a very strong bargaining position and would not be prepared to give away true value in relation to the figure that had been agreed. Mr Brown submitted that in the circumstances that existed on 11th June the "mechanism" could not have been effectuated honestly. At that stage he was including Sheikh Hamad within that envelope but since then there has been a change of emphasis.

38. After hearing Mr Brown develop the SFO's case orally for longer than a day, I remained concerned that he had not put forward what I would call a brief seamless narrative, that is to say one possible view of the evidence, being the SFO's case to the jury taken at its highest which was capable of persuading the jury to the criminal standard. To be frank, I was also concerned about two additional factors. The first that in Mr Brown's large team there may not have been complete unanimity of view as to exactly how the SFO's case might best be put. The second was the SFO might in

some way be seeking to accommodate my provisional thinking on one aspect at least rather than advance what they believed to be their best front foot.

39. I therefore invited the SFO over the weekend to produce another "one possible version of events" document (reflecting the jurisprudence on *Galbraith* summarised in a later chapter), if so advised. On 25th March the SFO took up that invitation, appearing to have misinterpreted the reason for my making it (this matters not at all), and the following formulation appears in that document:

> "i. The conspirators all knew that it was standard practice in capital raisings that all of the investors would expect to be paid fees/commissions at the same rate and to be given the same discount from the price of the shares they were acquiring. It followed that paying the Qataris more than the other investors was a problem.
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> ii. The conspirators knew that the nature of the investments and the fees paid in relation to those investments would have to be presented to Barclays' shareholders and to the wider markets by way of the Prospectuses and Subscription Agreements.
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> iii. When the conspirators agreed to use the ASA as the dishonest mechanism to get around the problem of how to pay the Qataris a greater fee than the other investors they entered into the conspiracy.

It is said that the SFO's case has not changed, but a comparison with paragraph 18 above and the submissions filed on 16th March demonstrates that it has. The reformulation of step (iii) is important, although the matter has been fudged somewhat. It is unclear whether the SFO's original "mechanism" is being abandoned, adjusted or adhered to. On one reading it is being indicated that the SFO is looking for other evidence, beyond the inherent circumstances, to support the conclusion that the ASA1 mechanism *was* dishonest.

40. Most of the remainder of this document seeks to examine the evidence without assuming what needs to be proved. There are two exceptions. First, the SFO continues to submit that the "mechanism" alighted upon on 11th June had to be dishonest either because there was no honest solution or the conspirators believed there could be none. It would have been better to say that in all the circumstances and at least on one view of the evidence, the jury could be satisfied to the criminal standard that the conspirators chose a dishonest mechanism. It would be better to put it in this way because it is perfectly plausible and reasonable to say in riposte that the mechanism of an advisory relationship was better than all the previous solutions because it could work for Qatar on the basis of being genuine. An honest solution was possible, and so if the SFO's case were wrong a strong argument could be maintained that the guilt of the defendants cannot be proved to the criminal standard. Secondly, it is said in the SFO document that Sheikh Hamad simply would not have given away value during the course of the call with RJ.

41. If one notionally strips away contentions and propositions which amount to assertions because they are being applied mechanistically and deterministically, we may have a

better and more compelling narrative which falls to be examined. It is that which I put forward on the morning of 27th March, and the transcript forms part of the Annex to this ruling. Whether it stacks up sufficiently well remains to be seen.

The Oral Evidence

42. The SFO called just two witnesses, Mr Marcus Agius and Dr Glenn Leighton. I had indicated to Mr Brown that I could not see how it was permissible for witnesses to comment on documents which spoke for themselves (unless they really did not) still less on documents which they did not see at the material time, unless it was to clarify or explain. That has been described as "a narrow approach", but I am unrepentant. In due course, Mr Brown whittled down the SFO's list of witnesses on the back of the indictment very considerably. I have to say that I really do not think that this harmed the SFO's case at all.

43. Transcripts of the evidence of Marcus Agius and Glenn Leighton are available, but a brief epitome may be given for present purposes.

44. Mr Agius said that during the financial crisis he adopted what he called a strategy of over-communicating with fellow board members. His most important personal relationship was with the CEO, JV. There was frequent contact by phone, email and informal meeting: their offices were on the same floor. Mr Agius also saw the other executive directors regularly. Relationships of trust were built up. Mr Agius spoke generally of a "cascade of trust and responsibility" which travelled from top to bottom.

45. Mr Agius told the jury that his relationship with the CEO was always excellent throughout. He had a high regard for JV: he described him as being of utmost integrity, high intelligence, formidable work-rate, and committed to the success of the bank. JV showed himself to being creative and courageous. During a difficult deal in 2007, Mr Agius said that he always found JV to be very open: "I never had any sense that he didn't tell me anything that he should have told me, and that he was someone I found it good to work with." During the febrile days of the financial crisis, Mr Agius said that his interactions with JV increased in intensity.

46. Mr Agius said that the board packs or the board decks provided for Board meetings were always prepared on time and to a high standard. The packs were often very substantial and they were studied over the weekend.

47. Mr Agius explained that, as the financial crisis deepened, there was a general perception in the market that the Tier 1 capital of banks should be strengthened. He discussed the wisdom and the need to be ahead of the market. Mr Agius said that in the spring of 2008 they did not anticipate how much worse things would get (that is to say, in September/October). At that stage, the thinking of the board was to increase Tier 1 capital and to boost Barclays' ambitions as a bank on a world-wide basis. The thinking was that Barclays would secure "favoured nation status" with the Chinese Development Bank, Sumitomo and Qatar.

48. Mr Agius told the jury that, in connection with an open offer and placement, the convention was that the commissions or fees for the placees would be the same. Knowledge of that convention would be widespread among bankers.

49. Mr Agius told the jury about his knowledge of Qatar. They were a SWF with extraordinary amounts of wealth. They were looking to find ways to take advantage intelligently of this phenomenal wealth. Mr Agius said that Barclays saw them as being progressive and interested in working with the bank in a way which was beneficial.

50. After Mr Agius was shown by Mr Brown the signed version of ASA1, he gave the following evidence. He could not recall exactly when he first saw this version.

> "In the course of all this high level of activity, I can recall, although I can't remember when, being made aware that in the equation, someone, probably John Varley, telling me that the people from Qatar have proposed, requested -- I don't know what the expression was -- an Advisory Service Agreement. And this, of itself, didn't surprise me because I know from my own personal experience with doing business in the Middle East, that signing off a negotiation is very complicated because things continually appear, and nothing is done until it is done, so the fact that something new had arisen was not of itself surprising.
>
> I didn't consider the detailed text of the document, nor did I think any of the other non-executive directors, but the generality of what was proposed was considered and was deemed to be attractive; in other words, Qatar was saying: look, we want to make this a meaningful and productive commercially beneficial relationship, a mutually commercial beneficial relationship to both of us; we are proposing to make an investment in your bank; we think it is a good bank; we think it will be a satisfactory investment for us to make, but we want to do so on the basis whereby we become, in effect, partners, and that we will seek to develop business opportunities, not just in the Middle East, but through contacts that we have, which may well have been in the Middle East; they may have been elsewhere.
>
> Members of the jury may recall that the Qatar authorities subsequently bought Harrods and maybe -- I don't recall whether Barclays was involved in that transaction, but they might have been.
>
> But what the Advisory Services Agreement was held out to represent was the establishment of the "most favoured nation" status for Barclays in respect of business opportunities arising out of Qatar. And to the extent that that was what it represented, it seemed like a sensible thing to do. I cannot recall whether, at the time of this meeting, we were told what the commission -- not commission, the fees that were going to be paid for the Advisory Services Agreement.
>
> I can't recall, but I think I would have taken it, that if they had been so material as to be noteworthy, that would have drawn to my attention. I would have assumed that they would have been a reasonable level. The point being is that Advisory Services Agreement are commonplace. They are not -- this wasn't a one-off thing. These things occur from time to time between various parties whereby they agree to establish such a relationship.

> So, here was something which purported to establish a special "most favoured nation" status between Barclays and the Qataris, and that was how it was put to the board and that was how the board understood it."
>
> And slightly later in his evidence:
>
> "But again, to put it into context, what I do recall is the -- is being told that the Qataris had proposed this agreement. I recall being told why they wanted to have it, and I recall there being a discussion, whether it was with a full board or a smaller amount of people, but certainly with John Varley, that there were attractions to us in such an arrangement, if it resulted in us achieving the favoured nation status, in relation to business opportunities arising out of Qatar and the Middle East. Therefore it was something that we would -- we should be -- we should welcome. And in that context, I don't recall when I was told the precise level of fee, £42 million. It may not even have been by the time of the issue, my being told about it. What I would have been clear was that the figure was in the context of £5 billion, not a material amount.
>
> Q. Would you have been involved in any discussion as to whether and to what extent, if necessary, it would be disclosed in a prospectus?
>
> A. I was not involved."

51. Mr Agius was asked a series of questions about the period 28th to 31st October, which was when ASA2 took shape. He had already made clear the strength of feeling within the bank as a whole that it should not be nationalised by the Government, and he explained why. The following questions and answers appear on the transcript:

> "Q: and between that, the 28th – that is the Tuesday – in the following days you were available, presumably, given what was happening?
>
> A: yes
>
> Q: and available for decisions to be made as they arose?
>
> A: Yes. The reason why the size of the finance committee had been reduced was because matters were moving almost on an hourly basis, and the smaller the group of decision-makers required, the more practical.
>
> …
>
> A: I was aware of the fees that – I'm not sure I'm looking at the right piece of the document here, but the underwriting fees and commissions for the two different tranches of capital that had been agreed, interestingly, whereas earlier there had been discussion of fees at 3% and 5%, in the final transaction they were at 2% and 4% for the MCNs. These were the only fees I was aware of.

> Q: the level of fees at 2% and 4% … these were in the circumstances at the time, late October, were they, in normal circumstances, a high level of fees or not, in any event?
>
> A: they were relatively high, reflecting the extraordinary nature of the financing, and indeed the instruments that were involved."

52. Mr Agius could not recall whether advisory fees were discussed at Board or BFC level in the context of what was to become ASA2. He told the jury that the first he was made aware of even the existence of ASA2 was in 2012. It was clear from his demeanour that he was angry about that: the jury could not have failed to pick up on his tone and body language.

53. I refused to permit Mr Brown to question Mr Agius on whether he believed that JV should have discussed ASA2 with him. My ruling on this issue is separately available. The fact remains, however, that the jury would be entitled to draw the inference that JV should have told Mr Agius about this: sufficient primary facts providing the springboard for that inference had already been adduced in evidence. It seems to me that JV's omission to discuss ASA2 with his chairman is a matter which is capable of requiring an explanation for the jury, subject always to a close analysis of the evidence and a proper understanding of the chronology.

54. Mr Agius was not asked any questions by the defendants. He appeared to be disappointed that his time in the witness box had come to an end. I decided not to question him.

55. The SFO's second witness was Dr Glenn Leighton. He is an extremely capable individual with law degrees in Australia and Japan as well as a DPhil in law from Oxford. He gave his evidence with precision and restraint.

56. The interpretation of Dr Leighton's evidence gives rise to some difficulty, for this reason. He worked under RB at the material time, and left Barclays in 2015. Although called by the SFO, my strong impression was that he was doing his best to assist RB and his employer, within of course the constraints imposed by his oath. A reasonable hypothetical jury could think likewise. The examination conducted by Mr William Boyce QC for RB with great skill, deftness and aplomb was always going to be a relatively straightforward exercise – once I factor in the immense work that has to be undertaken for any detailed cross-examination to stand a chance of being effective. It was sometimes difficult in relation to Dr Leighton to disentangle fact from opinion. I consider that I need to take care to interpret the evidence he could give, as opposed to the opinions he might hold about it, in a way which reflects the principles underlying the present application: namely, that the inferences to be drawn from evidence of primary fact should not be skewed, or even assumed, in the defendants' favour. Even so, I must continue to recognise that the SFO called Dr Leighton as a witness of truth, and that as far as I am concerned he should be treated as such. Nothing I have said should be interpreted as undermining his credibility and reliability.

57. Furthermore, I am convinced that the SFO took the right decision in calling Dr Leighton to give evidence even if the prior assessment had been made that he would say things that harmed aspects of their case. Dr Leighton was an important witness,

and the SFO is not in the business of wishing to suppress potentially significant evidence.

58. Dr Leighton explained that RB was head of Financial Institutions Group ("FIG"), and that he reported to RB. He and RB had been working together for 7 years, 2001-08. Dr Leighton was a director, not a particularly exalted rank in the bank apparently, and RB was a managing director. Dr Leighton agreed with the proposition put to him by Mr Boyce that the heads of division and the executive directors on the board were a world apart from RB and him. This was a hierarchical organisation where decisions were made on high and then filtered down, Dr Leighton said.

59. Dr Leighton added that RB's phone was recorded and he would have known that. Conversations in this open plan space could, he said, be overheard. However, the inferences to be drawn from this seem to me to be very much for the jury. Although it may be far-fetched to say that RB deliberately said things in some sort of protective way cognisant of the 24/7 recording, I do not accept the contrary proposition that RB (and others speaking to him knowing that RB's phone was recorded) would, as a conspirator, take care to avoid incriminating, unguarded remarks.

60. Dr Leighton gave detailed evidence in relation to a number of illustrative calculations. After Dr Hussain had delivered his big justification speech for a 3.75% fee on 3rd June, Dr Leighton was asked by RB to perform a series of calculations for an effective entry price based on a strike price of 360p/share, a discount rate of 9% and commission rates, with and without clawback, of 1.5, 3.25 and 3.5%. It may be seen from these calculations that, taking 1.5% first of all, clawback of 50% and 75% yields effective commission or fee rates of 3% and 4.5% respectively. Armed with this information, JV gave approval for a fee of up to 3.5%.

61. Interesting though all the arithmetic may be, none of this remotely proves that JV *et al* were thinking of paying Qatar up to 3.5% of the total commitment *qua* fee under CR1. If the economics of the deal were to remain unchanged, and that was CL's constant position, Qatar's extra fee could never be paid in that way, and Barclays never suggested that it could. The purpose of Dr Leighton's calculations was to demonstrate to Barclays, and in due course to Qatar, what the effective entry price would look like on the basis of these figures. That would be consistent with the "real fee" being fee for subscribing, but it could not prove it.

62. Dr Leighton also gave very detailed evidence about two further spreadsheets: items 436 and 498 on the chronology. The upshot of this evidence was that the consideration for ASA1 was calculated on the basis of 1.75% of the total commitment of QIA and Challenger, plus LIBOR interest at about 5.95%, plus an element of rounding up: the difference between the figure exactly yielded by this process before rounding, £41,685,000, and £42M. This evidence was somewhat laborious and possibly heavy-handed, because the jury had already heard me say that the method of calculating the fee was always 1.75% plus interest. This could not have been clearer.

63. This brings me to the significance of the effective entry price and the 259p or 260p/share figure. Dr Leighton gave some helpful evidence about the concept of "baking in" things. His evidence was that one must not see this as a formal legal or accounting exercise. It is just a way of combining figures in order to throw light on the overall economics of a transaction. The concept of "effective entry level" is

exactly the same. As Dr Leighton put it rather elegantly, this is a translation of all the various things that relate to the investment into a single all-in price at which the investment was made. In other words, Item 498 in particular was a front-loaded baked in picture, put together for the purposes of aiding RJ's discussions and negotiations with Qatar. Dr Leighton added that as far as he was concerned the ASA was a separate agreement but was nonetheless part of the bundle of the negotiation that was being described in or comprehended by the capital raising overall: in short, you throw in as much as possible to make the proposed investment look as attractive as possible. This sort of exercise was an entirely normal thing for him to do.

64. Dr Leighton's evidence on this topic, very skilfully adduced by Mr Boyce, was clearly supportive of the defendants' case, but it cannot be regarded as remotely decisive in the context of an evidential assessment which must be all-embracing. Without more, the baked in figure remains consistent with the SFO's case; and it is not impossible that, taken in combination with other evidence, it supports it.

65. On a related topic, Dr Leighton agreed with two things he said at interview with the SFO:

> "the ASA was entirely separate, to the best of my knowledge at the time ... and there was a fee paid for it. So, it's not the case that there was a combined fee paid for the subscription for the shares under the subscription agreement. There were two separate agreements …" [p.107]
>
> "the ASA, as with the MoUs, were all very much part of one very large transaction so it wasn't separate in the sense that they occurred years apart. You know, this was all one very large deal designed to raise Barclays over 4BN worth of new equity. So the genesis of it was the same. However, there was a separate consideration moving for the ASA, in other words, the Qataris had to perform their side of the ASA in order to obtain this income, was my understanding …" [p.120]

I think that a note of caution is required here. Dr Leighton could not have known whether the ASA was a genuine agreement or not. He first heard about it on Friday 20th June during the course of the morning call, or it may have been a couple of days earlier. He certainly gathered the impression that there was nothing amiss or unusual about it, and that impression was reinforced when Mr Diamond launched the capital raising on 25th June. Mr Diamond was entirely upfront about it. Of course, Mr Diamond too could have been deceived, but this is a factor which lends some support to the defence case. On the other hand, Dr Leighton's careful if not sedulous choice of language – "there was separate consideration moving for the ASA" – does not.

66. Dr Leighton was asked a number of questions by Mr Boyce directed to the issue of whether he knew at the time that the 1.75% was being used to find a fee for the ASA. Although it would ultimately be for the jury to make what it chooses of his answers, for present purposes I prefer to highlight the question I posed at the end of Dr Leighton's evidence, because it was not intended to elicit opinion or comment, or to assume anything:

> "Q: But, at the time, what was you thinking about the significance, *if any*, of the 1.75% figure?
>
> A: I think that it was a number that happened to equate to the advisory services fee, which was in and around 41 and 42 million, possibly including interest, or not. And it happened to give you that number, as a per cent of a subscription amount that was uncertain at the time.
>
> …
>
> A: I think, at the time, I would have thought, calculating it: oh yes, that – it is 1 and three quarter per cent of the subscription amount, as an observation, rather than knowing what it was and then going in and modelling around that … so there wouldn't have been any deep though behind 1 and three quarters, as opposed to any other percentage."

67. Finally, Dr Leighton gave evidence in chief about advisory services:

> "In the Middle East, I was very extensively involved in Qatar and the other Gulf countries from years afterwards, some of which, and some of the transactions that we won were, I think, partly an outcome of the advisory agreement."
>
> MR JUSTICE JAY: Just hang on. Can you give us details about that, Mr Leighton?
>
> So, for example, I had a project in Bahrain, which was advising a -- an investment fund that had gotten itself in a lot of trouble during the crisis and needed some financial advice. That entity and an entity in Kuwait that I also advised needed help over many months, and in both cases the Qataris were investors in those institutions. So, part of our success in winning those transactions came from the fact that we had our own shareholder pushing for Barclays to be involved in the trades."

JV's Prepared Statement

68. JV gave a prepared statement in July 2014 which was at the stage in the chronology when Barclays were still claiming legal privilege over the legal advice given in-house and by Clifford Chance. He made it clear that he did not have complete oversight over all activities carried on within such a large bank, and that a degree of delegation was inevitable. As he put it:

> "My perspective as Chief Executive may differ from that of others, both in the reporting line or at Board level. The effective running of an organisation as large as Barclays requires the exercise of delegation. My operational plan for the business on becoming the Chief Executive was to decentralise management within a clear and pre-determined framework of risk and strategy. This meant placing heavy reliance on the work of others, both those in the management chain and at the Executive Committee, whose members I describe in more detail later. Decisions were made at the appropriate levels. Of necessity the Chief

> Executive cannot acquire full visibility, nor command the detailed work; there is nothing unusual in such a business model. A large organisation would risk cirrhosis if the Chief Executive had to be involved in the detail of every decision. … However, that did not abrogate my executive responsibility for business decisions made by the Bank."

69. Barclays had been working for some time to develop a relationship with Qatar, both as shareholder and strategic partner, and both possibilities were discussed during the course of the meeting with Sheikh Hamad and his team at the Four Seasons Hotel on 23rd May 2008. JV was aware of the existence of ASA1, and he regarded it as the formalisation of a parallel strategic partnership. More specifically:

> "38. I regarded the Advisory agreement as symbiotic with, but not dependent, or conditional upon, the Qataris' participation in the Capital Raising. The significance of the agreement was that it marked the entering into of a formalised co-operation with QIA, which would direct business opportunities towards Barclays; this fulfilled an important element of my strategic plan. And the corollary for QIA was that every business opportunity that resulted from the partnership had the capacity to increase the value of their shareholding; the fact of their imminent investment and its intended size enhanced the appeal for QIA to direct business our way.
>
> 39. The timing of the entry into the strategic partnership and into the Share Subscription agreement was not a coincidence; it was intentionally simultaneous. It reflected the beneficial effect for both parties of engaging with each other on these two levels. From the Bank's point of view, it committed the Qataris to a continuing commercial relationship beyond a passive financial investment. The terms of the Advisory agreement, as it became, notwithstanding differences in form, in substance fulfilled a fundamentally similar objective to the Memorandum of Understanding with China Development Bank; it facilitated a wider commercial relationship with a key investor."

70. These paragraphs, as one might suspect, are extremely carefully worded. Taken in isolation, the first sentence of paragraph 38 may appear slightly disingenuous, but this may depend on how JV is choosing to define his terms. In any case, the first sentence of paragraph 38 must be read with the first sentence of paragraph 39.

71. JV's prepared statement is diffident as to his state of mind in relation to the consideration for ASA1. JV accepts that he was aware of Qatar's demand for a higher fee, and that he gave approval for up to 3.5%. But was he aware that the ASA was the means of delivering the difference between 1.5% and 3.25%; or, if he was not aware of the last figure, that this was its genesis? Paragraph 50 of the prepared statement is somewhat equivocal on this point. By the time ASA1 was presented to the BFC and then the Board on 19th June, it is a strong inference that JV was aware of the connection. The reference to "agreed fees" in the relevant minutes, although never specified, is likely to have been understood by JV as a reference to Qatar's additional demand.

72. JV accepts that his role and involvement was greater in relation to ASA2. In relation to the Board meeting on Sunday 26th October, JV states as follows:

> "There are handwritten notes of that meeting, which record there being a broader commercial arrangement with the Qataris, which I believe refer to the October Advisory agreement extension."

I note that it is now said that these minutes should be interpreted as referring expressly to a fee under a further advisory agreement of £115M. JV's prepared statement is consistent with that proposition albeit less specific.

73. As for the circumstances in which ASA2 came into being:

> "75. The limited email traffic in late October will reflect the extent to which I was involved in the negotiations. The commissions eventually agreed with the Qataris on the Capital Raisings were 2% on the RCIs and 4% on the Mandatory Convertible Notes. The Board Finance Committee had agreed ceilings of 3% and 5% for the RCIs and MCNs respectively on 22 October. On 31 October the extension to the Advisory agreement was signed. This was a significant commercial transaction in its own right; it considerably broadened the scope of the June Advisory agreement. The fee payable was £56 million a year, amounting to £280 million over five years. The Advisory agreement extended the relationship we had with the Qataris to regions beyond the Gulf. I thought at that time that the Tinbac deal was within reach and that other large-scale opportunities would follow. I was aware of the potential size of the income flow which a successful partnership would generate. The fees payable were not material and were not disclosable. No legal obstacle to the extension was presented to me. Roger Jenkins negotiated this agreement and brought me a document, which I understood to have been prepared by the legal team for my authorisation and signature. I came to my decision on the basis of my judgement that the Bank would receive value from the opportunities that the relationship would have developed over the period of the agreement and that there had been robust negotiations by Roger and his team in the interests of the Bank. I had confidence in Barclays Capital and Roger Jenkins to generate significant income for the Group from the extension to the Advisory agreement.
>
> "76. I recall a last-minute demand from the Qataris for an increased fee on the extension of the Advisory agreement. I had to assess the value of this extended relationship against the fee they were asking for. In making this judgement I took into account the prospect of substantial revenue flows from Project Tinbac and I was influenced by my considered view of the evident ability of the Qataris to generate significant additional income for the Group over the five year period. I did not consider that there was a scientific way of arriving at a precise value to be placed on the Advisory agreement, or its extension in October, but I considered that it was an appropriate and worthwhile investment.

> "77. The Advisory agreement in June had been approved by the Board and disclosed to the market. The extension had been discussed on 26 October and it was within my discretion as Chief Executive to authorise in the interests of the Bank. My views on the value of the relationship had not changed …"

74. JV was not obliged to answer SFO questions, and certainly in 2014 he was hampered by the stance taken by Barclays in relation to legal privilege. JV was not similarly hampered in 2016 when he went "no comment". It might be said that his response was carefully crafted. That, of course, was his right but the weight to be given to any prepared statement must be a matter for the jury. At this stage, I endorse the SFO's submission that a defendant's pre-trial exculpatory statement carries little or no weight unless supported by independent, objective evidence: see *R v Pearce* [1979] 69 Cr. App. R. 365. Yet, what JV said about not having complete oversight, or visibility, over all the activities of the bank must be correct. What he said, or hinted at, as to his state of mind, must be open to interpretation and comment. Finally, and as accepted by Mr Brown, no issues arise at this stage in the context of s.34 of the Criminal Justice and Public Order Act 1994, as amended.

The Prepared Statement of RJ

75. RJ gave a prepared statement in March 2014, and thereafter did not answer the SFO's questions. Neither did he do so in 2016. His statement is not particularly illuminating. His basic contention was that he was not responsible for decision-making within the bank, and that at all material times there was the cover of high-powered legal advice.

76. The following paragraphs of RJ's prepared statement seem to me to be key:

> "In June 2008 the Qataris made a request for additional fees of 1.75% of their subscription amount. Ultimately, Barclays decided it could not pay these additional fees of 1.75% for the Qataris subscribing to the shares. After the careful consideration described below, the bank decided that it could, however, satisfy the Qatari request through obtaining additional value to Barclays under an advisory services agreement. This approach delivered the solution, from the Qataris' perspective, of meeting their request for additional fees, and, from Barclays' perspective, of providing significant commercial value. Barclays was only willing to pay these sums because it believed the advisory services agreement would secure a deeper and broader relationship with the Qataris, delivering substantial economic benefits to the bank in excess of, indeed potentially very significantly in excess of, the value of the agreement.
>
> The possibility of using an advisory services agreement originated with others. I was made aware by either Richard Boath or Tom Kalaris, or both, that this might be a possible solution. All material aspects of the advisory services agreement were approved by senior management, including John Varley and Chris Lucas, and reviewed and approved by Barclays compliance, senior Barclays in-house lawyers and external lawyers.

> I also discussed the advisory services agreement directly with Sheikh Hamad. Through the discussions I understood that Barclays would become one of the two preferred providers (alongside Credit Suisse) of investment banking and related services to the Qatar Investment Authority. We would also receive introductions to other Qatari entities as well as other major investors and individuals throughout the Middle East and North Africa. ***The Qataris also saw this as a good deal, because the cost to them of delivering the advisory services was very low.***" [emphasis supplied]

77. The sentence I have highlighted is critical. I made the same point in a different way in my RB Dismissal Ruling handed down on 5th December 2018, and it is a point which derives its force from the inherent circumstances rather than RJ's direct evidence. It is obvious to me, as it would to anyone, that the services Qatar would be providing, assuming that there were to be any, could not by their very nature be valued in any sensible or mechanistic sense, and that it would cost them very little to deliver. This does not prove that Qatar *did* agree to provide them, or that RJ's prepared statement is true; but it is a relevant consideration.

78. To be fair, RJ's prepared statement also says that he tested the potential value and commercial reasonableness of the proposed agreement with product heads throughout Barclays Capital and senior colleagues, that he took steps to record and monitor the services that were provided, and that such services were indeed provided. I cannot accept any of that as being true in the absence of independent, objective evidence supporting it.

79. As for ASA2:

> "It must be understood that the October transaction essentially happened at great speed in the last three weeks of October 2008. Discussions with the Qataris began in earnest as a result of a meeting in Doha on 12 October 2008 between Sheikh Hamad, Bob Diamond (President of Barclays Capital), and me. These initial discussions were followed by a dinner on the evening of 21 October 2008, which was attended by Sheikh Hamad, Dr Hussain, John Varley and myself, among others. The purpose of this dinner was to discuss the potential terms of the Qatari participation in the capital raising. The dinner meeting was followed by several further telephone calls between Sheikh Hamad and John Varley between 24 and 29 October 2008. In the context of these discussions, and in negotiations with Dr Hussain, it became apparent, as it had in June, that the Qataris were requesting additional value (ultimately £280 million) in connection with the October capital raising.
>
> The sums payable to the Qataris under the October advisory services agreement were once again derived from a Qatari request for additional value, and Barclays was again only willing to satisfy that request because it believed the advisory services agreement would deliver substantial economic benefits to the bank in excess of the value of the agreement.

> By this time, we had seen evidence of what could be achieved through our relationship with Qatar. We had worked up projections regarding potential revenue streams for the region, seen greater deal flow from various Qatari entities and, in the same discussions regarding the October capital raising, the Qataris presented an opportunity for us to participate in a very large oil and gas price hedging programme, which we understood could yield US$250 million for Barclays (Project Tinbac). Further, Sheikh Hamad introduced Barclays to Sheikh Mansour of Abu Dhabi and the Libyan Investment Authority as potential investors in Barclays. Sheikh Hamad also reiterated to me his strong desire to take a broad-based approach to Qatar's economic relationship with Barclays, extending beyond simply being a significant shareholder in the bank.
>
> John Varley and I confirmed with Dr Hussain and Sheikh Hamad that they had the same understanding we did …"

80. My approach to these paragraphs is the same as that I have adumbrated in relation to JV.

The Prepared Statement of TK

81. TK provided a brief prepared statement in April 2014, a very detailed one on September 2016, but otherwise gave "no comment" interviews. Similar considerations apply to him, although the fact that his statement was more forthcoming should be acknowledged by me.

82. TK's statement made clear that the concept of and the aspiration for an advisory relationship with Qatar preceded the first capital raising and was, at least to that extent, free-standing. I should add that TK's legal team has recently filed additional documentation which supports that proposition. TK's statement also makes it clear that, although the situation was highly-pressurised in June 2008, he categorically believes that he was acting responsibly and lawfully.

83. The following two paragraphs represent the best encapsulation of TK's thinking as to the relationship between CR1 and ASA1:

> "The problem therefore was in finding a lawful and acceptable way of transferring that value to the Qataris without paying it to them in underwriting fees. The first ASA, which I explain in more detail below, was a means of the Bank being able legitimately to pay the Qataris the value they were seeking for their investment in the context of their wider strategic relationship with the Bank. The reason why the first ASA was perfectly lawful was because the Qataris agreed to accept the fees of 1.5% and to take the additional value they required for their investment by entering into a significant strategic relationship with the Bank instead. Because the Bank derived separate and additional value in return for those fees the first ASA had genuine, stand-alone commercial value to the Bank. There was plainly a link to the first capital raise but it was an independent, commercially justifiable services agreement that was of significant financial value to

> the Bank as a standalone. I believe it to be the case that the services that have been provided under it fully justify the price paid by the Bank. That relationship and the fact of the ASA were disclosed to the market in a manner that the Bank was advised and which was indeed perfectly lawful. I feel very strongly that the two elements of the underwriting and the ASA were legal and commercially justifiable.
>
> Moreover, as I discuss in further detail below, the Bank sought legal advice from its internal and external lawyers on the use of the ASA as a means of giving the Qataris more value and such a mechanism was approved by the Bank's internal and external lawyers as well as by the Board."

84. It might of course be objected that this is not really TK's authentic voice. I am not suggesting professional impropriety by anyone or anything close to it. We know from the transcripts that TK is highly intelligent – as indeed, in their rather different ways, are RJ and RB. We know much less about JV because his emails are short and there are no transcripts, although Mr Agius' encomium is likely to be right. The only point I am making is that TK's utterances hereabouts could be true but they do not have to be true. They could be true in the sense that they are consistent with logic and the legal position (about which more later), and they are more cogent than JV's "symbiosis". In my judgment, however, that this could be true is not enough for TK to win this application. This remains a prepared statement, and all the evidence in the case falls to be considered.

85. TK was aware on or about 3rd June of Qatar's demand for a higher fee, and thereafter he was involved in internal discussions as to how value could be transferred to Qatar, the premise for this being that Qatar would and could not be paid 3.25% under the subscription agreement. The concept of a "side-deal", first ventilated on 4th June, was wholly consistent with the thinking underlying the passages I have specifically cited. A side-deal does not connote impropriety, unless that is the value to be provided pursuant to or under it was illusory, or the circumstances were such that a legitimate arrangement could never have been made. However, the sort of side-deals that the bankers then went on to consider, and reject, would have been improper.

86. TK's prepared statement deals in some detail with the conversation he had with RB at 18:19 on 11th June. The whole of that conversation needs to be considered, and I will be undertaking that exercise in due course. In short, RB had pointed out that the ASA then under contemplation might not lawfully co-exist with the warranty to be found on page 13 of the draft subscription agreement. TK's statement continues:

> ""Mr Boath then said, 'he [Mark Harding) might say it's okay, right, because whatever we do ... will not be related to the subscription agreement, but, but frankly we all know that whatever we enter into we are entering into in exchange for the subscription agreement. So you know, he's got to get his head around it.'
>
> This was absolutely correct. The ASA was linked to the investment in the capital raise. Mr Boath was stressing his view that if the Bank was entering into the ASA in at least partial exchange for the investment the legal department needed to understand the consequences of this. It

> does not mean however that the ASA was not a genuine agreement: it was. The ASA was necessary to tie the Qataris into the overall deal, which comprised the investment into the Bank and the strategic relationship in parallel and to deliver them the value they sought for their investment.
>
> As is evidenced further down the conversation, Mr Boath and I were concerned with the possible interpretation of the wording and so we wanted the General Counsel of the Bank, Mark Harding, to be completely comfortable with the wording in the context of the ASA. This is why I said, "none of us want to go to jail here". This is an important and very clear conversation and one upon which I rely in my defence. We were not prepared to act unlawfully and ensured that we were not doing so. Mr Boath and I were stressing the fundamental importance of ensuring that the transaction was lawful and one that the Bank could enter into. It was obvious that it might be said that the use of the ASA to provide value to the Qataris might be thought to be a way of providing a disguised fee to them for their investment. I was stressing that the legal department and Barclays' external lawyers needed to be sure that it was a commercially justifiable agreement of value to the Bank and that it was a legitimate vehicle for the transference of value in a manner that did not amount to a disguised fee. By saying "none of us want to go to jail here" I certainly did not mean that the matter should be disguised or hidden so that no one would be caught. I categorically and emphatically meant that the transaction had to be legal. One cannot go to jail if no crime has been committed. I was anxious to ensure just that: the transaction had to be lawful.
>
> Ordinarily, Mark Harding, who was General Counsel of the Bank, would not have been involved at this level. Judith Shepherd was primarily handling the legal advice in relation to the capital raising. However, Mr Boath was sufficiently concerned about this point and wanted Mark Harding's higher level sign off which is why he brought this to me. I agreed with him that high-level legal advice was required in this regard."

Given that Mr Brown opened the case to the jury on the basis that the TK/RB call timed at 18:19 was evidence of preparations being made by the two of them to mislead MH, TK's detailed explanation of it is important, but I do not have to accept it.

87. TK has provided a similarly detailed explanation for the next call he had with RB timed at 18:34. During the course of that call TK said in effect that even if the ASA were being entered into on an entirely arms' length basis it would make commercial sense for the bank. This was on the express premise that services were being provided. TK's explanation for a particular segment of that call upon which considerable reliance is placed by the SFO, is as follows:

> "Mr Boath then said, "I mean obviously the, the, the jeopardy is that you know we're rumbled and people say 'well that was bullshit, you

know, this is just a fee in the backdoor...' ". I observed that the same could have been said about the MOU that the Bank had entered into with the Chinese and then said, "my guess is that we will be completely protected if we disclose that we had an arrangement, right?".

I understood Mr Boath when he said that if *"we're rumbled and people say .... this is just a fee in the backdoor"* to have meant that if people appreciated that the ASA was indeed related to the first capital raising (i.e. that they 'rumbled' that there was a link between the ASA and the Qataris entering into the capital raise) they would conclude that it was a disguised fee. That is why Mr Boath said that the ASA had to be disclosed in the prospectus whereas it hadn't been in relation to the MOU with the Chinese. He said, *'we'll have one with [Qatar]'* (i.e. we will have an announcement of the ASA in the prospectus). I replied, *'for you and me that's the safe",* meaning that the Bank would be safe if it was disclosed in the prospectus. He agreed and then added the line about not wanting to go to prison. I rely upon what we said in this passage in my defence. Neither he nor I wanted to go to prison and were determined to ensure that no criminality was committed by us or the Bank. I firmly believed that disclosure of the ASA was the way in which to ensure that the ASA was a completely legal way of transferring the value that Qatar wanted for their investment without paying them a fee for it. Legal advice categorically confirmed that view.

Mr Boath is a cautious individual and works in the capital markets division of the Bank where he is constantly exposed to innovative financial structures. I was comforted by the fact that Mr Boath was comfortable with the use of the ASA, notwithstanding his cautiousness. If he was comfortable and the lawyers approved then in my view, there was nothing wrong with it.

Mr Boath and I were clearly aware of the sensitivities around this aspect of the deal in the light of the wording of the subscription agreements and so it was important to us, for our own peace of mind, that Mr Harding had complete oversight. Messrs. Diamond, Varley, Lucas and the board were to approve and sign off the deal. In my view there was no prospect of that happening unless to do so was fully legal.

The transcript shows that Richard Boath and I were giving sensible consideration to the obvious possibility that the ASA might subsequently be said to be *"not economic"* or that it was a *'fee through the back door".* My view was and remains that paying the Qataris for the relationship and the advice made good commercial sense and that payment for their commitment to the Bank, advice and support in the region, even on a pure arm's length basis was a good deal. However, we were thinking around the issue, looking at what might be said about it in due course, bringing those concerns to the Bank's legal counsel so as to ensure that the matter was dealt with lawfully and properly.

> Furthermore, it is clear that similar concerns to those raised by Mr Boath and me were held by the Bank's lawyers."

88. TK also makes clear, and to that extent is supported by the transcripts and contemporaneous documentation, that he was not involved in the negotiation of the fee for ASA1 or its terms. However, he was aware of the arithmetical or algorithmic nexus between the fee and the extra 1.75%.

The Interviews of RB

89. RB adopted a completely different strategy from his colleagues in these proceedings. He participated in 38 hours of interview over many days in 2014 and 2016. The parties are to be congratulated for editing these interviews down to about 15 hours of court time. In the event, sections of interview were played to the jury from the audio; other sections were read out from the transcripts by Mr Stott and Mr Webb; other sections were summarised. It is not possible to derive a fair impression of the entire interview without sitting through it as I have done.

90. I should record that I excluded from account two sections of one interview which covered RB's response to the question: was the prospectus, with its reference to a 1.5% fee, fair and accurate? This was a perfectly reasonable question to ask, although RB had in fact directly answered it before, and he had also answered it indirectly on many occasions. As I mentioned during the hearing, the reasons I gave *extempore* for refusing the SFO's application at common law and under s.34 may have lacked the (intellectual) purity that Mr Brown attributed to me in a different context during the hearing; but I must say that I am completely satisfied on a retrospective basis with the overall justice of the position, and the basis of the exercise of my discretion.

91. Having said that a proper judgment cannot be made of RB's interview without sitting through the exercise that was carried out in my court over several days, I am not to be understood as saying that there is only one proper judgment to be made, nor am I to be understood as saying that reaching a judgment is a straightforward exercise. I consider that this entails, or at least should entail, a fair amalgam of reason, logic, empathy, commercial understanding and humanity.

92. For the purposes of this exercise, I have returned to the interviews and the passages I highlighted when they were being adduced in evidence. On any fair reading of the interviews, RB was making it clear that the factual link between ASA1 and CR1 was as patent to him as it was to everyone else: namely, that the one would not have been entered into without the other, and the mode of calculation of the fee for ASA1 was the extra 1.75% plus interest. In that way, the genesis for ASA1, and (subject to precise defining of one's terms, its purpose) was to meet Qatar's demand for an extra 1.75% fee. These basic and obvious facts enabled RB's interlocutors to invite him to address the possible corollary, although the manner in which it was put to him suggested not just a contingent but a necessary or logical link: namely, does this not demonstrate that the fee under ASA1 *was* for the purpose of the capital raising? What follows is just a selection of RB's answers on this topic:

> "Why was the release of the subscription agreements in exchange for 'our signed advisory letter'?"

R BOATH: Well, because he wasn't going to sign the subscription agreements until he had the advisory letter.

S COTTMAN: Did he tell you that?

R BOATH: Absolutely."

…

"S COTTMAN: You've told us that this fee was calculated as 1.75% of the maximum aggregate subscription amounts of Qatar Holding and Challenger, plus interest, rounded up to 42 million. Is that correct?"

R BOATH: Yes.

S COTTMAN: How much of the £42 million fee was calculated in relation to services?

R BOATH: It wasn't, it was calculated based on the subscription at a rate of 1.75% plus interest."

…

"Was the sum of £42 million being paid in return for the provision of services?"

R BOATH: Right, I'll have a go at it. So, the request, sorry, the advisory services agreement, we're going over old ground a bit, see if I can answer the question. The advisory services agreement was entered into in response for a request for additional fees. As we went, as we talked about yesterday, everybody knew that.

The advisory services agreement was put in place on the basis that it was legal. I was told it was legal, provided Barclays obtained value for the payments. So I had precisely nothing to do with verifying whether we would get value for services. That was not my responsibility.

The fee that we've talked about has been calculated as described, as 1.75% on the total subscription of both parties.

Whether the bank would obtain value for those services was not, I repeat not, my responsibility. And nobody at the bank, I think, would suggest that it was.

…

"So I was, I was, so I'd been concerned throughout. I'd had my concerns allayed through a combination of what I, the, the advice I'd received but also, you know, the fact that legal were really driving the, the execution of these documents. But I, you know, I'd had a lot of comfort, legal comfort, I'd had comfort from the, you know, the other

seniors, particularly from Tom and conversations that he'd had with others. And I also knew that everybody was aware of it, and I'd seen the email traffic."

All of that gave me comfort actually, but the, the, but I genuinely believed that Roger would get value from this relationship, I really did. And Roger's a very impressive individual, so, and I knew that the relationship that he had was special. So, so I did think, you know, he must… I also knew that he wouldn't take, you know, he, given how sensitive, sensitive it was, he wasn't going to put himself at risk. So, I would have, I will say, that I was confident that he would get value."

…

"You have also said that the £42 million was paid for advisory services. It's the same £42 million, so which is it? Was the £42 million paid for the Qatari participation in the capital raising or was it paid for advisory services?"

R BOATH: It was a mechanism entered into to pay additional fees to the Qataris in exchange for services. Isn't that the answer? My state of mind, my state of mind at the time was that was legal provided you got value for the services. I wasn't responsible for getting value for the services. And as we've said a number of times, I wasn't in any way responsible for the decision as to whether or not to disclose the existence of the agreement or the fees."

…

"So, can you explain why you're saying that Lucas's view was we need to be convinced that the two things are dis-associated?"

R BOATH: Well I think that's, err, I think that's my point about being able to defend the Advisory Services Agreements as a stand-alone arrangement and not, err, a mechanism to pay the Qataris additional fees. And that they should be unconnected with the capital raising so what he wants to be convinced of and what he's using that what we Barclays need to be convinced about, is that they are commercial, genuinely commercial. Err, it's a commercial arrangement and remember I've been told that that's legal and that it is not in exchange for the subscriptions."

…

"The primary purpose was to find a way to give them additional money and so how it emerged, how the disclosure was ultimately done, was a consequence of the further discussions that people had, or the lawyers had, at a much later stage. And bearing in mind I was, err, I knew it was on the line but I'd been assured both in relation to the legal advice that I was made aware of, erm, that it was the right side of the law and

> when I say the right side of the law I mean the agreements themselves."

93. RB also accepted during interview that he was not the only once concerned with the apparent link between ASA1 and CR1, and that unrealistic or inappropriate attempts were made to conceal that fact. For example:

> "When Roger Jenkins references the, firstly 3¾ fee, he then says 3¼, he then says, 'Which you wouldn't want to print anyway'.
>
> R BOATH: What he's meaning is, is, is don't print, don't put the advisory services 42 million into the calculation because they're not paying additional fees for having a separate advisory agreement so I don't want to be seen to be linking those two things. That's what he's saying.
>
> S COTTMAN: But were those two things linked?
>
> R BOATH: Of course they were.

94. Towards the end of this lengthy process, RB gave a number of answers to precise and persistent questions which on one reading could be said to favour the SFO's case. Drawing attention to just a selection of these:

> "Judith Shepherd, erm, in her email goes on to say, 'this reflects the acceptance by Quail of the placing commission's one and a half per cent only can that additional value must be provided for any additional payment' […] Are those premises correct? "
>
> R BOATH: Right well we're back to where we were a few moments ago. I don't know what's been discussed between Roger Jenkins and the Qataris because I wasn't in the room."
>
> …
>
> "You say, 'they want 35 million pounds on the 10th of July, we're not going to give them 35 million pounds on the 10th of July'. What are you saying there?
>
> R BOATH: Erm, this, obviously, is what Roger's told me they want. Either I've spoken to Judith or Roger said to me they want the money on the 10th of July and they want 35 million pounds and he said, 'well we're obviously not doing that'. So, I am conveying to Matthew what I've heard from Roger. There is a possibility that Ahmed Al-Sayed has phoned me up and saying 'I want 35 million pounds on the 10th of July' and I've obviously told him well 'we're not going to do that'. So those, both those things are possible but I think more likely Roger has informed me of this demand and I'm passing it to Matthew and, so what we're going to do or what Roger wants to do, so I think it's Roger, so it sounds like it's Roger that I've spoken to. So, Roger's probably told, probably told me they want 35 million pounds 10th of

July and now I'm telling Matthew what Roger wants, okay? So, Roger, what Roger wants to do is to pay them 12- pay them over 12 months and pay them 3 million a month over 12 months, which actually is 36 million. And they said, 'alright but we want interest'. So, the fact that they receive 36 million over 12 months is sort of a bit of interest in it though I can't be bothered to try and calculate it and that's the deal, icing. […] So, I think at this point in the in the process, err, certainly the Qataris are of the mind they're getting 1.75 per cent on the 2 billion that they're, at this point, proposing to invest. That is where the 35 will most likely have come from.

D WEBB: And were the Qataris looking for payment of it on the 10th of July because the Qataris regarded it as payment for their subscription?

R BOATH: I I, I mean that's a hard one, yes I mean, probably, I mean probably, they wanted the world so, you know, they wanted additional fees, they wanted three and a quarter per cent on the transaction. Barclays had told them that we wouldn't do additional fees and even though they'd heard that, and there was a discussion and there were drafts of an advisory services agreement which had a longer maturity, they they wanted their money."

…

"Was there a serious intention by the Qataris to provide services?"

R BOATH: Uhm, well now that's, that's actually, err, a question you need to address the Qataris to be quite-that's a question you need to address to the Qataris.

D WEBB: Okay, did you see anything which indicated that the Qataris were seriously intending to provide services? In your conversations with Ahmed Al-

R BOATH: No, it's above his head. It was above his head, we didn't talk about it, I didn't talk about it with him. He and I did not have a mandate to discuss services; this was all being done between Roger and Doctor Hussain and HBJ."

…

"Just returning to the transcripts, you do say here 'I'm already feeling sick'."

R BOATH: Well it's just, she's just mentioned the FCA, the FSA the UKLA, Criminal Authority and the Fraud Office. Pretty scary.

B IRWIN: But if your position is effectively this is a matter for the bank, a matter for for Barclays, why would you be feeling sick?

R BOATH: I wasn't feeling sick then, it was an aside.

B IRWIN: […] when you use language like 'I'm already feeling sick there's not need to use all those words to make me feel sicker'. […] Does that suggest that you're you're nervous-

R BOATH: Yes. […] I don't like this whole thing. Never did. And I particularly don't like the Hamad piece 'cos he's the Prime Minister of the country.

B IRWIN: And did you not like it because-

R BOATH: […] he's the Chief exec or Chairman or whatever it is of QH, and he's, I did, I tell you what, I didn't like him investing personally. That's like I'm I'm responsible for the sovereign wealth fund of the state and I've got to put some of my own money side by side, we'll co-invest personally in transactions that the Government, err, sovereign wealth fund which I am responsible for, invest. Thought that was yeah I thought, I thought, surprised by that, at the time, that that struck me as a bit weird.

B IRWIN: […] Does this demonstrate that at that time you didn't really think that those services were going to be forthcoming?

R BOATH: No, it demonstrates that I'm worried that they're not, so I'm feeling sick because oh well hang on we're going to have to demonstrate that they are forthcoming. Well we jolly well ought to make sure that they are forthcoming because if we're not [laughs] then we're going to be in front of the FSA, the UKLA, Criminal Authority and the Fraud Unit. So, no I didn't go into that, let's be clear, I didn't go into anything. I believed, the the bank believed they were going to get value for the money and I I don't think Chris Lucas or John Varley would ever have signed off on it, if they thought that they were not going to get value for their services. Uhm, I was worried because I'm a worrier that while the bank might not get service, get value for those services, so I'm asking the right questions, do we have to demonstrate that we get services? Yes we do. Who to? Shareholders, other investors, crikey okay, and the FCA and UKLA, [audible exhale] Fraud Unit right, pretty serious shit isn't it? So that's the nature of that comment.

B IRWIN: Judith Shepherd goes on to say 'It's serious stuff. We're not playing any game here' and you say, 'No no no I hate, I wouldn't, well if it were me I wouldn't have agreed to it but but there you go'. Does that follow on from what you've said already?

R BOATH: Yes, and furthermore it's consistent with the way both Judith and I felt, which is somebody at Barclays ought to tell them to 'fuck off!' 'Fuck off!'

B IRWIN: Judith Shepherd goes on to say 'well big dog will be in the dock first'

R BOATH: Yeah. That's Roger by the way.

B IRWIN: What had he done that would lead him to the dock?

R BOATH: Well he negotiated the deal.

B IRWIN: And why would he be first in the dock?

R BOATH: Because he's responsible for it, and he's responsible for getting the services.

B IRWIN: You you respond 'Yes yes otherwise known as the Dodger so maybe he might, he might even dodge that one. By the way are the Board going to see this agreement'? Why did you want to know if the Board had seen the advisory services agreement?

R BOATH: Didn't like it, nervous about it. What does the Board know? Again I'm asking all the right questions.

B IRWIN: The response from Judith Shepherd is 'Of course they are'. Matthew Dobson says 'Yes it's their necks on the block' and Judith Shepherd says 'Well they're being told that it exists and they're going to have it described to them'. What did you understand by that?

R BOATH: Exactly what she said."

…

"You discuss paying the Qataris a fee for underwriting and Shepherd says 'But they're getting them on the basis that they will then parcel them out or' sorry 'are they getting them on the basis that they will then parcel them out or are they taking them because, they want them' and you say 'I'm sure, I'm sure they'll tell you whatever they need in order to get the 3%.' What did you mean by that?"

R BOATH: Err, I don't entirely trust them.

D WEBB: Why?

R BOATH: Oh, because they're impossible. I mean it's just impossible. Well we learnt from the first transaction how impossible they are to deal with.

D WEBB: But if they say things can you believe what they say?

R BOATH: Err, not necessarily no.

D WEBB: So, if they say they're going to provide services can you believe that?

R BOATH: Well, do you know what, I never had a conversation with the Qataris about providing a services, never."

95. At the conclusion of this phase of the case, I asked Mr Webb whether he or a colleague ever put to RB the following proposition: you knew that the ASA was never intended to provide genuine services because RJ or someone else told you that on 11th June? Mr Webb could not recall whether that proposition had ever been put. It was not. Maybe that was just an oversight on behalf of the SFO investigation team. Another possible explanation is that the high watermark of the SFO's case against RB is not that he *knew*, because he was told; but because he *believed*. Either would suffice for the SFO's purposes but there is an important difference in practical terms. And there is also an important difference between belief, wilful blindness and a high index of suspicion. These are themes to which I will be returning.

96. I should mention this last point almost by way of postscript, although the more I have thought about it the more difficult it has become. RB told the SFO that on some occasion on or between 5th to 7th June he was sure that he and RJ had a telecon with MH on the speaker phone in his RB's office during the course of which the concept of an ASA was approved by Group General Counsel in these circumstances provided that genuine services were intended to be supplied. During the course of his interview, RB provided important contextual information in relation to this call:

> "So, I then went and spoke very specifically to one person who works in my team. His name is Mauro Mariani [spelt out]. He's the guy in my team who has done most of the sort of structured trades that we do which tend to involve redcap or derivatives or, he's at the sort of, the more financial engineering end of the stuff we do."
>
> And I mentioned to him, 'Look we're involved in a deal and you know we're trying to get, you know trying to get. There's a discussion about fees and I've been told, asked, to go and find, discuss ways in which we might be able to give value to the counterparty.' And he says, 'Well', he talked about a couple of different things but the one that I, that's relevant to this conversation that I remember is, he said, 'Well look in the past I've seen' and I can't remember if he said, 'I've been involved in' but 'I've seen counterparties entering into advisory agreements, advisory arrangements as a, you know, involving the payment of money for services given'. And he said 'They're quite difficult. You have to be careful with them because you need to be, you know, you need to be sure you're getting, you know, if you're receiving fees you're giving value. So you're getting something. You're getting what you're saying you're getting in exchange.' And I said, 'Okay fine. I think I understand that sort of concept.'
>
> When that finished, I called Roger and I said, 'Look I've, I've kind of been thinking, so I've been thinking about things we could do to give the Qataris additional value away from this deal. And the kind of things that I've sort of been thinking of is well maybe we could give them, we could do M&A work for them free. That gives them value. They

> don't have to pay a fee. Or we could do bond issues for them at subsidised fees, at lower fees than we would normally do but that's quite complicated itself. And the only other thing, that you know, I came across was this thing that was mentioned was the concept of an advisory agreement or arrangement, which I'm told is quite difficult because you need to be sure you're getting value for, for money.'
>
> And he said, 'Well that's quite interesting. I'll call you back.' So some time later and I'm not sure how long it was but it was, it wasn't a long time afterwards Roger called me back and said, 'The Qataris like that advisory thing. They think that's a good idea.' I said, 'Well hang on Roger.' So I said, 'Hang on Roger, just, before, before you get too far down the road you know we can't do that. We can't have. We can't do a capital markets transaction in which we give one set of fees to the market or to one set of investors, one set of, economics for one group of investors and we have a different set of economics for another set of investors because if they found out they'll go completely nuts. You can't do that. We can't do that.'
>
> And I was quite vigorous in the way I said it because I felt it quite strongly. And, I said, you know, 'We just we can't' and I swore, I said, 'We can't fucking do that Roger, it's just like, we're not doing that.' So, and he said, 'Well why? What's the problem?' And I said, 'Because if, if subsequently they were to find out that we'd done a deal on the side or a sweetheart deal or something that you know they didn't know about in connection with this transaction and they haven't been offered it, they'll go nuts.' And he said, 'Right' and his words were the following and I remember them vividly and he said, 'Well fuck that, I'm not taking a hit to save John and Bob's job. Fuck that.' And I said, 'Well you go and talk to them then and call me back'. So a little while later on, he called me back. I said, 'So what was the, what was the response?' And he said, 'Well I spoke to Bob and Bob told me to speak to John and we've got to speak to Mark Harding'. And I said, 'Fine, great, good'. Very shortly after that there was a call with Mark Harding."

97. As for the call involving RJ, RB and MH, there is no reference to any such conversation in any email or telephone conversation that has been transcribed, but the particular conversation, if it took place, would not have been recorded. As for RB's discussion with RJ, involving the suggestion that as early as 5th – 7th June RJ had raised with Qatar the idea of an ASA and that was met positively, I really have difficulty making any sense of that within the contemporaneous transcripts. The inference I have drawn from all the available evidence is that it is highly likely that the concept of an ASA was not mentioned in the context of meeting Qatar's demand until 11th June, and that MH was not asked for his opinion about it until then. For example, had MH been asked about it before then, as RB claims, it is very difficult to

accept that RB would not have put forward the advisory arrangement as being *the* solution during the course of his lunchtime conversations with CL and TK, and in my view he would also have referred to MH's recent advice at some stage during the 18:19 and 18:34 calls with TK. All of this could be RB's memory now playing tricks with him, but other explanations are available.

Joint Defence Submissions on Conspiracy/Interaction with the Fraud Act 2006

98. In impressive and detailed submissions on the law, which I understand to be a pooled effort, the defendants make the following points.

99. First, it is said that there is insufficient evidence to support the contention that the ASAs were sham agreements because the SFO has not surmounted the high evidential bar of proving that there was a shared intention that Qatar would perform no genuine services under these agreements.

100. Secondly, and in the context of an indictment founded on s.1 of the Criminal Law Act 1977 and what is described as the SFO's unswerving focus on the public-facing documents, it is contended that there is no evidence of an agreement which would, if carried out in accordance with the parties' intention, necessarily involve one of their number committing a substantive offence.

101. This second point sub-divides into several. Let me seek to expose its central elements in the following summary which is an extreme compression of the arguments as fully advanced and elaborated:

(1) The offence under s.1 of the Criminal Law Act 1977 is complete as soon as the conspiracy comes into being (e.g.by close of business on 11th June).

(2) The substantive offence for the purposes of the indictment is the offence of making a false representation contrary to s.2 of the Fraud Act 2006.

(3) In order for the offence under s.1 to be constituted fully, the agreement must be such that the parties, or at least two of them, intend or know that one of the conspirators will necessarily commit the substantive offence of making a false representation contrary to s.2 of the Fraud Act 2006.

(4) A statutory conspiracy cannot be constituted by an agreement to aid, abet, counsel or procure the commission of the offence under s.2.

(5) On the true construction of s.2 of the Fraud Act 2006, which is said to be a hybrid section, the substantive offence can only be committed by a person with concomitant *mens rea* - and that means the actual maker of the representation.

(6) Further, given the scheme of the legislation governing equity prospectuses, and the application of general principles of contract law and agency, the substantive offence for the purposes of s.2 of the Fraud Act 2006 could only be committed, in the particular circumstances of the present case, by the entity responsible in law for the making of the representations, viz. the company.

(7) There is no room for any wider doctrine of criminal responsibility based on procurement or innocent agency, not least because the former collides with

proposition (4) above and the latter subverts the statutory scheme (proposition (5) and/or general principles (proposition (6)). In any event, to the extent that JV and CL participated in the subscription agreements and/or the prospectuses, it is incoherent to assert that they did so *qua* principals.

(8) Given that the company has been dismissed from the case, the combined effect of the foregoing propositions is that representations made by Barclays Plc were not false in law (an essential component of the *actus reus* of the hybrid offence is lacking) or in fact (the representations reflected what Barclays Plc intended to do and no one else; and, in any case, no false representations could be regarded as having been made by JV and/or CL *qua* principals, or by anyone else.

(9) In the alternative to proposition (8) above, there is an insufficient case on the evidence that JV and/or CL knew that the ASAs were shams, assuming – *pace* all of the above – that they were. It follows that the SFO's case based on innocent agency, or any variant of it, is all the more hopeless if the conclusion must be that JV and/or CL were not co-conspirators. On this version of events, the remaining conspirators, RJ, TK and RB, would have on the SFO's analysis to be principals in connection with the making of public-facing documents for which they had no direct responsibility. It is said that this thesis is flat inconsistent with my May 2018 ruling and Davis LJ's judgment on the VB application.

102. I have not overlooked that the defendants' analysis is founded on there being three key points rather than two. I do not think that it really matters, provided that I have understood them properly, both in isolation and in terms of their interconnection. I believe that I have. What I have done in the foregoing paragraph is to attempt to set out the essential steps in the defendants' reasoning without dwelling on intermediate, explanatory and subordinate reasoning.

103. What may be pointed out at the outset is that the defendants' highest, perhaps purest, case (proposition (8)) would succeed, if it were well-founded, regardless of whether there is a case to answer against JV and/or CL on the merits. I rejected that case on 9th July 2018 on the basis of very limited submissions: the defendants' case was limited to the argument that the logic of my 21st May ruling impelled that conclusion. I suspect that the forensic judgment made by those advising the defendants was that I was unlikely to accede to this argument at that stage in circumstances where no timeous application to dismiss had been made by JV, RJ and TK, RB's application to dismiss was being advanced on a rather different basis (although a gentle genuflection towards the argument had been made in Mr Boyce's written submissions), and it was apparent that my understanding of these complex facts could only improve. That was a sound judgment, as far as it goes, although Ms Annabel Darlow QC calls it into question on another basis. I will need to return to this point at the very end of this ruling.

TK's Further Arguments on the Law

104. For reasons which are not entirely clear, but probably do not matter, Mr Ian Winter QC on behalf of TK had advanced a series of further legal arguments which have not been embraced by his colleagues. Putting to one side the submissions on the evidence which are specific to TK's case, these legal arguments may be listed as follows.

105. First, given that ASA1 was intended to be a legally binding agreement, being the legally enforceable way of Qatar obtaining the £42M and Barclays obtaining the services, "the fact that it was [legally binding] is determinative of the case: ASA1 cannot be envisaged as a sham. Neither the conspirators nor Qatar could deploy its sham nature as a reason for not seeking to enforce ASA1". In a similar vein, Mr Winter submitted that the evidence surrounding the $39M fee for the proposed $1.3B investment in September 2008 supported his client's case because it was predicated on ASA1 being legally valid: one cannot extend an invalid agreement.

106. Secondly, there is insufficient evidence that TK was dishonest or that he intended anyone to gain or lose by making the indicted representations. There needs to be causative link between the intention to cause a gain or to cause risk of loss, and the making of the false representation. The submission is that neither the other investors nor Barclays itself could fall in the relevant category of putative gainer or loser.

107. Thirdly, there is no evidence that TK, or as it happens any of the other conspirators, intended that the actual indicted representations be made, as opposed to generalised false representations.

108. Fourthly, it is said that the distinction between Barclays Plc (as the party to the subscription agreements and the maker of the prospectuses) and Barclays Bank Plc, as the party to ASA1, is critical. Barclays plc was always going to pay just 1.5%, and the warranties could not be falsified by the payment of additional sums by a separate entity, Barclays Bank Plc, whatever their real nature.

109. Fifthly, the "maker" of the false representations could only be the company, acting through the Board, and in no intelligible sense could it be said that JV and/or CL made the subscription agreements by signing them. In any event, there is no evidence to the effect that it was inevitable that a named conspirator would sign these documents rather than any other director.

The Submissions of the SFO on the Conspiracy/Interaction with the Fraud Act 2006

110. I have been equally impressed by the SFO's submissions. These boil down to the following propositions:

(1) The conspiracies were fully constituted, and the offences under s.1 of the Criminal Law Act 1977 were perpetrated, when the agreements were made. The focus must always be on what was agreed to be done rather than on what was actually done.

(2) Conspiracy is a continuing offence, and it is sufficient if a conspirator has *mens rea* at some point during the continuance of the *actus reus*. It follows that a defendant could have joined the conspiracy after 11th June 2008 (for Count 1) or 24th October 2008 (for Count 2).

(3) The key issue is whether an individual conspirator, viewing the case against him separately, intended that the ASA under consideration should be a sham. This will answer the concomitant key question: whether the defendant under consideration agreed with at least one other that a course of conduct should be pursued that, if carried out in accordance with their intentions, would necessarily result in the

commission of the offence of fraud by false representations being committed by one or more of the parties to the agreement.

(4) It is not incumbent on the SFO to prove an intention on the part of each conspirator that the substantive offence should be committed.

(5) A conspirator does not have to intend that there would be no genuine services: a conspirator has to have known that if the plan was carried out in accordance with their intentions, then the advisory agreement under consideration would be a sham and therefore create the appearance of there being an agreement to provide services to the full value of the fees payable.

(6) The primary route to liability of the defendants for the false representations derives from the proposition that JV and CL incur direct responsibility for the relevant representations, both as a matter of fact and law, and that this responsibility equates to and is synonymous with their making of the false representations. This is because the documents JV and CL signed were integral to and causative of the false representations made in the public-facing documents.

(7) The secondary route to liability is that the defendants, acting as principals, used innocent agents through whom they procured the making of false representations. Either the innocent agents were the Board and/or the BFC; or, alternatively, if there is no case to answer against JV and CL, they were the innocent agents for this purpose. This is a principle of principal and not accessory liability, it being accepted that the latter would be insufficient for the purposes of an indictment based on a statutory conspiracy.

(8) Innocent agency is a doctrine of the common law which is deemed to have been preserved by the Fraud Act 2006, either on ordinary principles or on a purposive construction of that statute.

(9) Section 2 of the Fraud Act 2006 does not include a requirement of *mens rea*. It follows that the rare situations in which the common law principle of innocent agency cannot apply to a particular statutory provision are not germane to this particular provision.

(10) It follows that the concept of innocent agency applies to s.2 of the Fraud Act 2006 to the extent necessary to constitute the defendants, or at least a sufficient number of them, as principals: either JV and CL as principals *vis-à-vis* the company *qua* innocent agent (with the remaining defendants as co-principals), or RJ, TK and RB as principals *vis-à-vis* the company and/or JV and CL as innocent agents procuring the making of the false representations.

111. The SFO also advances a detailed riposte to Mr Winter's separate arguments which it is unnecessary for me to summarise.

The Submissions of JV, RJ, TK and RB on the Evidence

112. Detailed submissions were advanced on behalf of all four defendants that there is insufficient evidence against them on the four questions I outlined in my RB ruling handed down on 5th December 2018 to permit this case to go before the jury; and, as I

have said, Mr Winter went further. In the circumstances, and in line with my approach to the SFO's submissions on the evidence, I do not think that it is necessary even to summarise these submissions at this stage. I will be coming to the merits, if I may so describe them, later.

Pausing to Take Stock: I

113. Having reflected on the parties' submissions and mindful always of the need to retain a logical and coherent flow of reasoning and decision-making which appears manageable, proportionate and in line with the overriding objective, it seems to me that I should address all the various legal arguments before making any evaluations of the evidence. Although the respective positions of JV and CL remain important to the extent that the SFO's routes to liability are completely unsustainable without at least one of them being co-conspirators on each Count, I consider any standalone approach or judicial shortcut would be entirely misconceived. Whether or not there is a sufficient case on the evidence that the ASAs, taken separately, were sham agreements in the context of the alleged conspiracies is an issue which applies across the board; but beyond that it must be obvious that the requirement to consider the cases for and against the defendants separately could lead to different conclusions on the issues of knowledge and dishonesty. As the case has developed, and my understanding has matured, the need for a completely holistic rather than sequential approach to the evidence has been reinforced.

The Legal Framework: Galbraith Limb Two and the Drawing of Inferences

114. The classic passage of Lord Lane CJ in *R v Galbraith* has never been improved. It reflects the principle that the judge, although required to undertake an evaluation of the evidence, should not usurp the "constitutional primacy" of the jury: see *R v F(S)* [2011] 2 Cr. App. R. 28. Its application to situations where the Crown's case is based on circumstantial and inferential evidence has, however, given rise to a measure of difficulty.

115. The inferences that the Crown will invite the jury to draw as part of a composite package are that: (1) both ASAs were dishonest mechanisms or shams, (2) the defendant whose case is under consideration knew or believed this to be so, (3) that defendant was dishonest, and (4) there was a conspiracy to make false representations.

116. Turning to the general approach to the drawing of inferences, in *Teper v R* [1952] AC 480, the Privy Council explained that circumstantial evidence should be "narrowly examined", owing to the possibility of fabrication. Lord Normand, giving the judgment of the Board, added:

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference." [at 489C]

As a statement of the general principle, this cannot be controversial, although Lord Normand was not of course dealing with the approach of the court to a no case to answer submission where the evidence against a defendant is largely or wholly based on circumstantial evidence. There is no real possibility of fabrication in the present

case: the issue is not that the evidence that the Crown relies on may be unreliable or not credible; it is that it may be open to more than one interpretation. In such circumstances I see no need for an examination which is purposefully narrow. To the contrary, it should be as broad as possible, and include a consideration of the inferences which a reasonable jury could permissibly draw at all stages in its reasoning process anterior to the ultimate issue in this case.

117. In *DPP v Kilbourne* [1973] AC 729 Lord Simon of Glaisdale explained:

> "Circumstantial evidence is evidence of facts from which, taken with all the other evidence, a reasonable inference is a fact directly in issue. It works by cumulatively, in geometrical progression, eliminating other possibilities." [at 758B]

Three points fall to be made about this passage. First, the drawing of the final inference as to a critical fact in issue, essential to the determination of guilt, may only be considered when all the relevant evidence in the case has been considered. As I have said, anterior inferences may be drawn from the primary facts, provided that there is a sufficiently solid basis for doing so. Secondly, the drawing of those inferences – as part of the geometric progression – does not require the court to be satisfied to the criminal standard at each and every stage of the process. Thirdly, there are cases, and this is clearly one, where the progression may proceed deductively on a provisional basis. Even when some pieces of the jigsaw appear to be in place because one group of powerful inferences is capable of being drawn, we may be back to the start once other evidence is considered. The final placing of the pieces has to await the point when the court has considered and fully understood the entirety of the evidence.

118. My second point receives authoritative support from the decision of the Court of Appeal in *R v Nicholson* (unreported, 17th July 1995). In that case the Court of Appeal made it clear that inferences may be combined from two or multiple sources such that the criminal standard of proof is satisfied, even if each source taken individually could not discharge that burden. In my view, the most compelling analysis of these issues is to be found in the decision of the High Court of Australia in *Shepherd v R* [1990] 170 CLR 573. In essence, there is a distinction between situations where inferences may permissibly be combined because they are all directed to the same fact in issue; and situations where they may not be, because the purported combination would be directed to more than one fact in issue. The analogy drawn by the High Court of Australia is that of wires forming part of the same cable (the first category) and separate links of a chain (the second category).

119. In the context of the submissions upon which I am ruling, if the focus is placed on the first of the core inferences that is essential for bringing home the Crown's case – that the ASAs were shams – it seems to me that we fall within the department of cables and not chains. Furthermore, evidence bearing on an individual defendant's knowledge, or state of mind, is capable of throwing light on the nature of these agreements. This cannot be a question, therefore, of taking the issue of sham/dishonest agreement as some sort of compartmentalised preliminary issue; it falls to be considered in the round.

120. The Court of Appeal, Criminal Division has considered the application of the second limb of *Galbraith* to circumstantial or inferential evidence on at least the following

occasions: *R v Jabber* [2006] EWCA Crim 2694, *R v Hedgcock* [2007] EWCA Crim 3486, *R v Darnley* [2012] EWCA Crim 1148, *R v G and F* [2012] EWCA Crim 1756, *R v Masih* [2015] EWCA Crim 477 and *R v Sardar* [2017] 1 WLR 917.

121. My attention was also drawn to the judgment of the Privy Council in *Kwan Ping Bong v R* [1979] AC 609, where Lord Diplock said this:

> "The requirement of proof beyond all reasonable doubt does not prevent a jury from inferring, from the facts that have been the subject of direct evidence before them, the existence of some further fact, such as the knowledge or intent of the accused, which constitutes an essential element of the offence; but the inference must be compelling – **one (and the only one) that no reasonable man could fail to draw from the direct facts proved.**" [at 615G/H] (emphasis supplied)

This passage was expressly applied by Laws LJ in *Hedgcock* where it was also suggested that there was no real difference between it and Moses LJ's slightly different formulation in *Jabber*. With appropriate diffidence I think that there is quite an important difference which should be noted. Lord Diplock was not dealing with the second limb of *Galbraith*; he was focusing on the terms of the direction that should be given to the jury in any given case: that jury should be directed that the relevant inference can be drawn only if they are sure that it flows from the direct facts that have also been proved. When a judge, as opposed to a particular jury, is evaluating a half-time submission, she or he must assess the available evidence but must do so from the perspective of a hypothetical reasonable jury, implicitly acknowledging that there may be room for more than one reasonable viewpoint, both of the direct evidence and the inferences capable of being drawn from it. In short, I prefer Moses LJ's analysis over Laws LJ's and note that it lends some assistance to the SFO.

122. At paragraph 36 of *R v G and F*, Aikens LJ for the Court of Appeal said this:

> "We think that the legal position can be summarised as follows: (1) in all cases where a judge is asked to consider a submission of no case to answer, the judge should apply the "classic" or "traditional" test set out by Lord Lane CJ in *Galbraith***.** (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from a combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer does involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether **a** reasonable jury, not **all** reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that **a** reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not it must be withdrawn from the jury."

123. The link between steps (2) and (3) is clear. Step (2) represents the application of Lord Diplock to *Galbraith* and is subject to what follows. Step (3) recognises that the determination of a submission of no case to answer cannot depend on the judge's

personal assessment of the evidence. The point that Aikens LJ was making that there is, or may be, room for more than one reasonable assessment of the evidence even applying the criminal standard of proof to it. The issue for judicial assessment at the "half-time" stage is whether a reasonable jury could, properly directed, draw the relevant adverse inference and, in the process, reject all realistic possibilities consistent with innocence.

124. In *R v Masih*, this issue was reinforced by Pitchford LJ for the Court of Appeal at paragraph 3 of his judgment:

> "The prosecution case was based upon circumstantial evidence. There is no dispute between the appellant and the respondent as to the correct approach in law to a submission of no case to answer when all the critical evidence is indirect and inferential. The ultimate question for the trial judge is:
>
> Could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?
>
> It is agreed that in a circumstantial case it is a necessary step in the analysis of the evidence and its effect to ask:
>
> Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?
>
> Matters of assessment and weight of the evidence are for the jury and not for the judge. Since the judge is concerned with the sufficiency of evidence and not with the ultimate decision the question is not whether all juries or any particular jury or the judge would draw the inference of guilt from the evidence adduced but whether **a** reasonable jury *could* draw the inference of guilt. These propositions are derived without contention from the decisions of this court in *Galbraith [1981] 1 WLR 1039*, *Jabber [2006] EWCA Crim 2694* (approved by the Privy Council in *Goring [2008] UKPC 56* at paragraph 22), *Hedgcock, Dyer and Mayers [2007] EWCA Crim 3486*, *Darnley [2012] EWCA Crim 1148* and *G and F [2012] EWCA Crim 1756* ."

125. Finally on this topic, two appellate courts in this jurisdiction have approved the following dictum of King CJ sitting in the Supreme Court of South Australia, in *Question of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1:

> "it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution … ***Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence*** … He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence.

> "I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence." [emphasis supplied by me]

126. The whole of the King CJ's first paragraph needs to be considered, but in deference to the concerns of the SFO I have highlighted one key sentence. My reading of this passage chimes with what I have already said about *Hedgcock* and *Jabber*, as well as the reconciliation between steps (2) and (3) in *G*.

127. Judicial approval here has come from paragraph 17 of Sir Brian Leveson P. judgment (for the Court of Appeal) in *R v Sardar*, and from the following passages in Lord Carswell's judgment (for the Privy Council) in *DPP v Varlack* [2008] UKPC 56, which in my view I should apply:

> "If the case depends upon circumstantial evidence, and that evidence, if accepted is capable of producing in a reasonable mind a conclusion of guilt beyond a reasonable doubt … there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all the inferences most favourable to the prosecution were reasonably open to be drawn, a reasonable mind could not reach a conclusion of guilt beyond a reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence. [at paragraph 22]
>
> …
>
> … it follows that the fact that another view, consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury. [at paragraph 24]"

Sham

128. My point of departure for this section of my ruling is that the ASAs were, at least on their face, legally binding contracts. The court is quite entitled to penetrate any veil of dissemblance and deception in order to ascertain the underlying truth, since were it

otherwise the law would fly in the face of common sense and commercial reality; but principles of contract law are clearly in play. This should be no surprise to anyone, because principles of company law were relevant to my May 2018 ruling on corporate attribution. These should be regarded as stepping-stones to the correct application of the principles of criminal law.

129. In the *locus classicus* on the point, *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, Diplock LJ (as he then was) made clear that the concept of "sham", if it has any meaning in law, predicates the following:

(1) that the parties to the agreement at issue must have intended to give to third parties or the court the appearance of creating legal rights and obligations different from the actual legal rights and obligations (if any) which they intended to create.

(2) this intention must be common to both parties.

(3) "no expressed intentions of a "shammer" affect the rights of a party whom he deceived". [at 802C-F]

130. The parenthetical "if any" is important because it suggests that there may be situations in which the common intention of the parties to a sham agreement was to create no legally binding arrangement. That, however, is not essential: hence the parenthesis.

131. In *Miles v Bull* [1969] 1 QB 258, Megarry J (as he then was) added this important qualification:

> "On the other hand, a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it. If in *Ferris v Weaven* the purchaser had sought to exercise rights of ownership, and the husband had ceased to do so, and there had been no common objective of enabling the husband (as distinct from the purchaser) to dispose of the property, it would, in my judgment, be very difficult to contend that the low price and the failure to pay it made the transaction a sham. After all, some genuine transactions within the family are carried out at low prices, and some genuine purchasers fail to discharge their obligation to pay the full purchase price, if the vendor is incautious enough to make this possible. Mere circumstances of suspicion do not by themselves establish a transaction as a sham; it must be shown that the outward and visible form does not coincide with the inward and substantial truth." [at 264B-E]

Of course, in a criminal case, this must be shown to the criminal standard. In the context of this application, that means: could a reasonable jury, properly directed, conclude that the outward and visible form does not coincide with the inward and substantial truth?

132. *Midland Bank Trust Co v Green (No 1)* [1980] 1 Ch 590 at Court of Appeal level is an important and controversial case which needs to be considered with care. The case was controversial owing to the strong differences of opinion between Oliver J (at first

instance) and Sir Stanley Rees (in the Court of Appeal), and the majority in the latter court, Lord Denning MR and Eveleigh LJ. Strictly speaking, the case turned on, amongst other things, the true construction of s.205 of the Law of Property Act 1925, but the reasoning of Lord Denning MR went further. As for the point of statutory construction:

> "To my mind the key words are "for money or money's worth". They mean for an adequate sum in money or money's worth. I cannot believe that the legislature intended to protect a purchaser who paid far less than the land was worth – in collusion with the vendor. If that were the case, it would open the door to fraud of the worst description. All that a man – who had contracted to sell his land – would have to do to get out of his bargain would be to convey it to his wife for a very small sum. I know that, in the ordinary law of contract, we never inquire into the adequacy of the consideration. But this is different. "Money or money's worth" means a fair and reasonable value in money or money's worth: not an undervalue: particularly a gross undervalue as here." [at 624D-F]

As for the position at common law:

> "By fraud here, I do not mean only the sort of fraud which is actionable in deceit. I mean the sort of fraud as was spoken of by Lord Coke when he condemned conveyances made in fraud of creditors … Fraud in this context covers any dishonest dealing done so as to deprive unwary innocents of their rightful dues. The marks of it are transactions done stealthily and speedily in secret for no sufficient consideration.
>
> …
>
> If it were necessary, I should have thought that the agreement between W and E might amount to conspiracy. The predominant purpose was to damage …: see *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 …" [at 625B-E]

133. These passages expose a variety of conceptual and practical difficulties which it is unnecessary to spell out. However, I should just touch on the issue of predominant purpose in the context of the law of tort and an unlawful means conspiracy. When I asked Mr Purnell some weeks ago what he said the legal test was for a sham agreement, he did mention predominant purpose. In my view, he was wrong to do so (I indicated that at the time), and he was in danger of underselling his case.

134. Mr Winter may be entirely exonerated of any such suggestion, because he drew my attention to the decision of the House of Lords in *Welham v DPP* [1961] AC 103, where Viscount Radcliffe stated in a different statutory context that:

> "… the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not

> have done but for the deceit, or not doing something that but for it he would have done." [at p.125]

135. Returning to *Midland Bank v Green (No 1)*, Eveleigh LJ expressed the principle more narrowly, and perhaps more precisely than Lord Denning MR, as follows:

> "Counsel has argued that it is not permissible to go behind the transaction. This would include the contention that it is not permissible to inquire into the true value of the land. It is said that we are dealing with a genuine conveyance which transfers the legal estate and as that is achieved it is wrong to say that the conveyance is a sham. I do not say that the conveyance is a sham. In my opinion, however, the consideration of £500 expressed in the conveyance is a sham. It is not for £500 that the property was conveyed. The true transaction, in my opinion, was a gift coupled with a token of £500 sought to be included to meet the requirements of section 13 of the Land Charges Act 1925. It is not dissimilar from the giving of a halfpenny when one makes a friend a present of a knife.
>
> I think that the court is always entitled to look behind the form adopted and ascertain the true nature of the transaction. The cases where a bill of sale masquerades as a hire purchase agreement are good examples of this: see *In re Watson (1890) 25 Q.B.D. 27*. In those cases the whole of the document is treated as being a deceptive form to cover the real nature of the transaction. In the present case I do not say that the conveyance was a deceptive form but I do think that the statement of the consideration was deceptive. Money would never have passed had it not been thought necessary in order to satisfy section 13. Its role in this transaction was simply a token. I do not regard the transaction as a conveyance following a contract of sale of the land. I regard it as a conveyance giving effect to a gift coupled with the reference to a payment of £500 in an attempt to secure the advantage of section 13. In my opinion, the court is entitled to ask the true value of the land in order to discover the true character of the £500." [at 628B-E]

136. Had the matter ended there, I would unhesitatingly have preferred the approach of Eveleigh LJ over Lord Denning's, and even then with some reservations. As it happens, the matter does not end there because the case went on appeal to the House of Lords and the judgment of Oliver J was restored: see [1981] AC 513. Lord Wilberforce's judgment did not address any of the wider matters reflected in the reasoning of the Court of Appeal; it is limited to an analysis of the statute. However, at the very end he said this:

> "This conclusion makes it unnecessary to determine whether £500 is a nominal sum of money or not. But I must say that for my part I should have great difficulty in so holding. "Nominal consideration" and a "nominal sum" in the law appear to me, as terms of art, to refer to a sum or consideration which can be mentioned as consideration but is not necessarily paid. To equate "nominal" with "inadequate" or even "grossly inadequate" would embark the law upon inquiries which I cannot think were contemplated by Parliament." [at 532B-C]

137. Lord Wilberforce was not of course addressing the issue of fraud, still less one arising in a criminal context. In my judgment, the critical question here is whether, as a matter of substance and commercial reality having regard to the intention of the parties to the transaction, the consideration for the agreement under scrutiny was its outward expression (here, genuine services) or something else (part of the fee for participation in the capital raising). Ultimately, that question permits of only one answer at the very end of the court's inquiry because the analysis must be binary or dichotomous. We have already seen from *Miles v Bull* that a transaction is not a sham merely because it is carried out with a particular purpose or object. It seems to me that part of the analysis *en route* to the ultimate conclusion must entail an examination of the consideration purportedly moving from both parties. The more obviously inadequate it seems, the easier it may be for the court to hold that it does not represent the true bargain between the parties. This is always subject to the application of the criminal standard of proof. If, for example, there are few if any objective measures to permit the ascription of commercial value, the more difficult it will be for that outward appearance to be displaced: all the more so, in my opinion, where there is some evidence that services *were* provided. However, it should be clear from the foregoing that the defendants cannot succeed on this application simply by demonstrating that some services were in fact provided. The court is entitled, indeed must, look deeper and further.

138. The issue of sole purpose, following Viscount Radcliffe in *DPP v Welham*, is not straightforward and I will come back to this in due course.

139. My foregoing sentiments are entirely consistent with the more thorough analysis provided by Arden LJ (as she then was) in *Hitch v Stone* [2001] EWCA Civ 63:

> "63. The particular type of sham transaction with which we are concerned is that described by Diplock LJ in *Snook v. London & West Riding Investments Ltd*, above. It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations. The passage from Diplock LJ's judgment set out above has been applied in many subsequent decisions and treated as encapsulating the legal concept of this type of sham. Mr Price referred us to *Sharment Pty Ltd v. Official Trustee in Bankruptcy (1988) 82 ALR 530 in which the Federal Court of Australia* drew on Diplock LJ's formulation of sham in *Snook's* case."
>
> 64. An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
>
> 65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.

> 66. Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> 67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> 68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example *Garnac Grain Co. Inc v H.M.F. Faure and Fairclough Ltd. [1966] 1 QB 650*, 683–4 per Diplock LJ, which was cited by Mr Price.
>
> 69. Fifth, the intention must be a common intention: see *Snook's* case, above. This is relevant to issue 3 below."

140. This passage was expressly approved in a criminal context by the Court of Appeal, Lord Thomas CJ giving the judgment of the court, in *R v Quillan* [2015] 2 Cr. App. R. 3. He added this:

> "88. In the light of these principles, it is in our judgment clear that a high-level and unparticularised invocation by the prosecution of the concept of sham is not good enough, and could never have provided safe grounds for a conviction on counts 2 or 8. If the prosecution wished to establish that the arrangements which the promoters of Schemes 1 and 2 made with the clients did not generate relievable pension contributions, it would have been necessary for them to satisfy the jury, to the criminal standard of proof, that the contributions lacked any true legal substance, notwithstanding their payment into the registered pension schemes of which the clients were members."
>
> 89. In our judgment it would have been impossible to make good any contention of this nature without also establishing that the clients were conscious participators in the sham transactions, with the intention (for example) that their apparent contributions should be no more than movements of money in a fraudulent plan designed to extract RAS from the Revenue. If there is one thing which the authorities insist upon, it is that a sham must reflect the common intention of all the parties to the impugned transaction. Yet the prosecution had throughout studiously refrained from alleging that the clients were necessarily implicated in the alleged fraud. As the judge aptly remarked in [64] of his ruling, albeit in the context of counts 1 and 7,

> the prosecution's stance in relation to the SIPP clients "has remained throughout this trial as one of studied neutrality if not masterly inactivity". For this reason, if no other, the sham allegation is in our judgment a hopeless one which could never have been permitted to go before the jury. …"

141. In the context of Lord Thomas CJ's "studied neutrality", I must return to the position of Qatar. Here, I think that I need to be extremely careful, because the point cuts both ways. On the one hand, the SFO does not have to prove that Qatar was a co-conspirator. However, if this were a sham agreement, it is difficult to understand how Qatar could not have been dishonest. The SFO would surely wish to rely on positive evidence of dishonesty in relation to Qatar, subject to an appropriate measure of caution. On the other hand, proof that Qatar was dishonest, without more, should not drive the jury to the conclusion that any defendant was dishonest. I believe that I expressed that concern to Mr Brown when my opening remarks to the jury were being discussed, and it is a solecism that must be avoided (it has never been perpetrated by Mr Brown). The logic of the position in relation to contracts which are bilateral rather than unilateral is that, at the very end of the inquiry, proof of sham agreement means that both parties must be dishonest; but at all intermediate stages of the analysis the focus should really be on the position of the defendants: it is in relation to them, their knowledge and their dishonesty, that the criminal standard of proof continues to operate. It is safer to direct myself on the basis that the Qatari picture, if I may so describe it, throws light, maybe considerable light, on the mental state of the defendants, but that I must continue to focus on them.

142. Finally on this topic, I must address the SFO's submission formulated in these terms:

> "A conspirator does not have to intend that there would be *no* genuine services. A conspirator has to have known that if the plan was carried out in accordance with their intentions, then the advisory agreement would be a 'sham' and therefore create the appearance of there being an intention to provide services to the **full value** of the fees payable." [emphasis in italics supplied by the SFO; emphasis in bold is mine.]

143. This is a difficult submission which brings me back to *Midland Bank v Green (No. 1)* and other authorities. The ultimate question is, of course, whether the appearance and the reality have diverged. That is the fact in issue. In deciding where the truth lies, without prejudice at this stage to the criminal burden of proof and *Galbraith*, consideration must be given, amongst other things, to the parties' intentions in relation to the "services" their agreement has specified, and whether services were in fact carried out. Inferences may be drawn as to the real nature of the agreement from subsequent events because the latter are capable of throwing light on this: no one disputes that. If there is solid evidence of genuine services, the inferences point one way; if, on the other hand, that evidence is shaky or appears synthetic, the inferences might point another way. If there were a sound and robust means of valuing the services, evidence that these were being provided at a clear undervalue would also be a highly relevant factor. However, the concept of "full value" is problematic, particularly in a situation where there really is no objective means of performing the valuation. Thus, in the particular circumstances of this case, it seems to me that if a reasonable hypothetical jury could not exclude the possibility that the intention was to provide some genuine services which could reasonably be assessed to be "worth",

say, £42M over the life of ASA1, proof of a sham arrangement would founder. This notional jury would be able to exclude that possibility if: (1) there is sufficient evidence that the "services" in question could or would never be provided; or (2) there is sufficient evidence that the services in question were so obviously not worth £42M, or £280M, or anything close to such an amount that the inference can safely be drawn that these were not genuine services at all; and/or (3) the subsequent evidence bearing on "services" is, or (at this stage) seems to be so obviously manufactured or exiguous that the inference can safely be drawn that these are not genuine services at all.

144. In formulating the issue in this way, I am in fact reformulating both sides' cases. I am rejecting the SFO's case based on "full value", and I am also rejecting the defendants' submission that ordinary contractual principles demand that the court's investigation cannot proceed beyond the identification of *some* consideration, in the contractual sense, which is effective to bind the parties. If Barclays were paying £42M for a peppercorn, no one would say that the agreement was other than a sham. A stringent application of pure contractual principles takes one only so far.

Knowledge, Intention and Belief

145. Section 2 of the Fraud Act 2006 requires proof of dishonesty (s.2(1)(a)) and that the maker of the representation "knows that it is, or might be, untrue or misleading" (s.2(2)(b)). Section 1(2) of the Criminal Law Act 1977 is more stringent, and provides:

> "Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstances necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

146. On its express wording, s.1(2) applies only to offences of strict liability, but in *R v Saik* [2007] 1 AC 18 the House of Lords construed the subsection as to apply more generally.

147. There remain, however, two issues of statutory construction to resolve. The first is whether the concepts of intention or knowledge in s.1(2) are any different from the element of knowledge specified in s.2(2)(b) of the Fraud Act 2006. The second is whether there is any difference between intention or knowledge of the relevant circumstance indicated in the last part of s.1(2) of the 1977 Act, and the relevant circumstance indicated in s.2(2)(b) of the 2006 Act.

148. Much of the debate before me has focused on the issue of belief. I said on a number of occasions that only RJ would *know* the true position, because he had the critical conversation with Sheikh Hamad. I now think that was wrong inasmuch as it was incomplete. The first steps in the conspiracy involved RJ and TK, and then TK and CL. They would know whether the mechanism under contemplation would be genuine or not. If the latter, TK and CL would naturally assume that the arrangement could not go ahead without Qatar agreeing to it, and it may have been for this reason

that TK wanted RJ's advice as to whether it would work for them. But if Qatar did agree to proceed on this premise, it would also have to be on the basis that the mechanism entailed dishonesty.

149. The position is different in relation to RB and JV but the reasons for this do not coincide. I will be returning to JV, but as regards TK it is clear from the transcripts that he did not inform RB in terms that the mechanism was dishonest. So, in RB's case the issue is as to his belief.

150. Belief would seem to require something less than knowledge. It seems to me, however, that this is in danger of getting too complicated. The language of s.1(2) focuses attention on intention or knowledge. Both of these concepts are capable of including "belief", provided that one is clear about what that means. Intention in the context of some future event or fact includes "belief" in the sense that if one foresees something as virtually certain to occur, one both intends it and believes that it will occur. Knowledge is capable of incorporating a state of mind in which the individual possesses an apprehension that something is virtually certain to be the case or will be the case. One does need to be a philosopher to point out that in the strict sense the future cannot be *known*.

151. My attention has been drawn to the decisions of the Court of Appeal in *R v Hall* [1985] 81 Cr. App. R. 260, *R v Forsyth* (Court of Appeal, Criminal Division, unreported, 17/3/97) and *R v Ali* [2006] QB 322. In *R v Saik*, any difference between knowledge and belief did not fall to be addressed directly because the question there was whether suspicion could suffice. It was held that it could not. I have been particularly assisted by Beldam LJ's compelling analysis, including the paradox he mentions, but it is unnecessary to go further.

152. In my view, proof of belief would be sufficient for the SFO's purposes provided one is clear about defining one's terms. As Lord Brown pointed out in *R v Saik*, approving Hooper LJ in *R v Ali*, knowledge and belief are often one and the same. Suspicion, or an intuitive sense that something is not right, is insufficient. The belief must be subjectively held, and in my view it is not the same as shutting one's mind to the obvious or wilful blindness, although Lord Nicholls left that last point open in *R v Saik*. On the other hand, the more obvious something is, the more likely it should be that the jury could infer subjective belief. Moreover, the belief must be "true" in the sense of being correct. On the facts of this case, this means no more than that the ASA under consideration was in fact a sham. If a conspirator believed that it was when it was not, an unlikely scenario maybe, paragraph 26 of Lord Nicholls' speech in *R v Saik* applies.

153. These distinctions are capable of generating problems of practical application in the instant case if one proceeds on the premise that at least some of the conspirators left the matter unspoken as between themselves. These difficulties are not incapable of being surmounted, but precision is required in analysing the evidential factors existing in the case which enable the SFO to travel across the wavy line which divides suspicion from belief.

154. The second issue concerns the difference between "shall or will exist" in s.1(2) of the Criminal Law Act 1977 and "is, or might be, untrue or misleading" in s.2(2)(b) of the Fraud Act 2006. As Lord Nicholls explained in *R v Saik*, the mental element for the

statutory conspiracy "is distinct from and supersedes the mental element in the substantive offence" (paragraph 8). Thus, s.2(2)(b) becomes, as Lord Nicholls put it, otiose and an immaterial averment. Furthermore, as he made clear at paragraph 4 of his speech:

> "Thus under this subsection the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily involve commission of the crime in question by one or more of the conspirators. The conspirators must intend to do the act prohibited by the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with the prescribed intent."

155. The defendants submit that it is not enough for present purposes for the SFO to prove the *mens rea* sufficient for the substantive offence, as specified in s.2(2)(b) of the Fraud Act 2006, because that subsection must give way to s.1(2) of the Criminal Law Act 1977. In my judgment, that submission is well-founded, although for the defendants' purposes one needs to examine the whole of Lord Nicholls' speech in order to arrive at that conclusion.

156. I note that the House of Lords in *R v Saik* did not expressly consider its previous decision in *R v Anderson* [1986] 1 AC 27, although I covered it in my December 2018 dismissal ruling on RB's application, and the authority was cited to their Lordships on this later occasion. *R v Anderson* is authority for the proposition that the SFO does not have to establish an intention on the part of each conspirator that the offence in question should in fact be committed. This was directed to the factual structure under appellate consideration, namely a defendant who was saying that he supplied equipment which could assist another's escape from prison but it was never his intention that any substantive offence be committed because he never believed that the escape plan could succeed.

157. Speaking with appropriate diffidence, I struggle with Lord Bridge's formulation. The obvious answer to *Anderson* was that the appellant's apparent pessimism was nothing to the point. His intention in supplying the diamond cutting wire was to facilitate the escape, and the fact that he was claiming (absurdly) that the escape was impossible was an additional piece of evidence which supported the prosecution. This was not the impossibility of ascending Mount Everest without oxygen; it was closer to the facts of *The Count of Monte Cristo*.

158. My concern has been shared by the Court of Appeal in *R v Siracusa* [1989] 90 Cr. App. R. 340 and *R v King* [2012] EWCA Crim 805, as well as by Professor Ormerod. I need go no further.

159. Paragraphs 4 and 5 of Lord Nicholls' speech in *R v Saik* provide the true lodestar for a judge sitting at first instance:

> "Thus under this subsection the mental element of the offence, apart from the mental element involved in making an agreement, comprises the intention to pursue a course of conduct which will necessarily

> involve commission of the crime in question by one or more of the conspirators. **The conspirators must intend to do the act prohibited by the substantive offence. The conspirators' state of mind must also satisfy the mental ingredients of the substantive offence. If one of the ingredients of the substantive offence is that the act is done with a specific intent, the conspirators must intend to do the prohibited act and must intend to do the prohibited act with the prescribed intent.** A conspiracy to wound with intent to do grievous bodily harm contrary to section 18 of the Offences against the Person Act 1861 requires proof of an intention to wound with the intent of doing grievous bodily harm. The position is the same if the prescribed state of mind regarding the consequence of the prohibited act is recklessness. Damaging property, being reckless as to whether life is endangered thereby, is a criminal offence: Criminal Damage Act 1971, section 1(2). Conspiracy to commit this offence requires proof of an intention to damage property, and to do so recklessly indifferent to whether this would endanger life.
>
> An intention to do a prohibited act is within the scope of section 1(1) even if the intention is expressed to be conditional on the happening, or non-happening, of some particular event. The question always is whether the agreed course of conduct, if carried out in accordance with the parties' intentions, would necessarily involve an offence. A conspiracy to rob a bank tomorrow if the coast is clear when the conspirators reach the bank is not, by reason of this qualification, any less a conspiracy to rob. In the nature of things, every agreement to do something in the future is hedged about with conditions, implicit if not explicit. In theory if not in practice, the condition could be so far-fetched that it would cast doubt on the genuineness of a conspirator's expressed intention to do an unlawful act. If I agree to commit an offence should I succeed in climbing Mount Everest without the use of oxygen, plainly I have no intention to commit the offence at all. Fanciful cases apart, the conditional nature of the agreement is insufficient to take the conspiracy outside section 1(1)." [emphasis supplied]

160. Putting to one side the somewhat bizarre factual basis on which *R v Anderson* was considered, it does appear that Lord Nicholls approached the wording of s.1 – "if the agreement is carried out in accordance with their intentions" – somewhat differently from Lord Bridge. According to Lord Nicholls, "their intentions" means "the intentions of all the conspirators"; but according to Lord Bridge, it means "the intentions of at least one of the conspirators". My construction of the possessive determiner would match Lord Nicholls'. In a case already brimming with complex issues, it is sufficient to hold that with two competing approaches in the House of Lords, the later case should generally be preferred. This issue only really matters in connection with the SFO's proposed case on the Warrants Prospectus.

161. Finally on this topic, Mr Boyce helpfully drew my attention to the clear advice contained in the Crown Court compendium, which is as follows:

> "The jury should be directed to the following effect, as appropriate to the particular case:
>
> (1) To show that D knew 'X', the prosecution must prove that 'X' was in fact the case, and that D was sure that 'X' was the case.
>
> (2) To show that D believed 'X', the prosecution must prove that because of the circumstances and/or what D had seen and/or heard, D realised that the only reasonable explanation was that 'X' was the case.
>
> (3) To show that D suspected 'X', the prosecution must prove that D thought that there was a real possibility that 'X' was the case, even though D could not prove / be sure about it."

I would respectfully endorse these statements in their entirety as accurately representing the law. As for Item (2), I would add the gloss in Blackstone, paragraphs A2.14 and A5.59, that for a substantive offence a person who is virtually certain of something can be regarded as knowing it. This also applies to a statutory conspiracy.

Conspiracy: "Will Necessarily Amount to or Involve the Commission of any Offence"

162. Inevitably, it is necessary to return to aspects of my May 2018 dismissal ruling and those parts of it which touch on the issue of "disconnect", "the essential criminality" and the indicting, so it said, of the wrong conduct. Here, I trust, a reinvention of the wheel is not required. My purpose is limited to identifying who made the relevant false representation for the purposes of s.2 of the Fraud Act 2006.

163. On 28th May 2008 the Board of Barclays Plc gave approval to CR1 on the basis of commissions of 1.5% to the conditional placees. At the same time, the Board delegated to the BFC authority "to approve, execute and do or procure to be executed and done all acts it may be necessary or desirable to have approved, executed or done in connection with the Placing and Open Offer". As has also been pointed out, on the same day and under the aegis of the Board all of the directors signed responsibility letters in the standard form which expressly vouched the accuracy of the prospectus for the capital raising, which was then only in draft. JV and CL, on their own respective behalves and on behalf of the company, therefore took continuing responsibility for the information contained in the document and for it being "in accordance with the facts". This continuing responsibility was on the premise that the Prospectus would be "in the form in which it is approved for issue by resolution of the Board … or a duly authorised committee". The provision of directors' responsibility letters ("DRLs") is a requirement of equity prospectuses: see s.84(1) of the Financial Services and Markets Act 2000 and r.5 of the Prospectus Rules. The emphasis must be on "responsibility" because this is the thread running through the legislative regime.

164. In her astute and focused submissions on the law, Ms Darlow invited me to consider with particular care and precision the text of relevant provisions of these letters. This was a valuable exercise. Paragraphs 3-8 are germane. Paragraph 3 is set out in paragraph 170 below and is important. Paragraph 4 is more general but covers "all statements of fact in the Prospectus relating to the Company". Paragraph 7 is an

acceptance of responsibility for all the information contained in the Prospectus and the taking of all reasonable care to ensure factual accuracy.

165. Mr Winter has also drawn my attention to the fact that on 27th and 28th May JV and CL signed powers of attorney authorising any other director to sign any document created for the purpose of CR1 on their behalf.

166. On 19th June 2008 the BFC approved the final terms of CR1 and the accompanying documentation, considering and noting ASA1 on the premise that Qatar would be providing advisory services to Barclays Bank Plc on the basis of "certain agreed fees in respect of value received under these arrangements". The documentation in question included the draft subscription agreements and the Prospectus "prepared in accordance with the requirements of the Prospectus Rules made by the FSA pursuant to Part VI of the Financial Services and Markets Act 2000 as amended".

167. On the same day, the Board of Barclays Bank Plc approved amongst other things ASA1. In addition to the authorisations given on 28th May, it was resolved that any Director, the Company Secretary or the Group General Counsel "be severally authorised on behalf of the Board: (i) to approve any matters in relation to the Placing and Open Offer, and (ii) sign and deliver on behalf of the Company any document considered necessary or desirable in connection with the Placing and Open Offer and/or any document approved by the Board, with such amendments thereto as he may consider necessary or desirable".

168. On 25th June 2008 JV signed ASA1. CL had signed an earlier draft. The intention was that RJ should sign ASA1, and there were some concerns within the bank when that did not happen. In my May ruling I made it clear that ASA1 was not signed pursuant to the resolution of 28th May. Even if the SFO's case is right and ASA1 was in substance and reality part of CR1, the authorisation cannot be read in that way. JV could proceed on the basis of his general authority up to £150M, and in my view he did so.

169. On the same date the Prospectus for CR1 was issued by Barclays Plc. The point has been advanced by the defendants that, to the extent that it contains representations, these are made by the company and by no one else. The Prospectus was not signed by anyone for and on behalf of the company: the combined effect of ss.73A and 85 of the 2000 Act, together with the Prospectus Rules, is that it was issued by Barclays Plc pursuant to its obligation to do so in connection with the selling of equity.

170. Part X of the Prospectus should, however, be noted:

> "The Directors [including JV and CL], whose names appear at paragraph 2 below, and Barclays accept responsibility for the information contained in the document. To the best of the knowledge of the Directors and Barclays (who have taken reasonable care to ensure that such is the case), such information is in accordance with the facts and does not omit anything likely to affect the import of such information."

The DRLs were not formally included within the Prospectus. Once signed, they were provided to the bank and then retained. It would be understood by any investor with

basic knowledge that the company must have obtained DRLs in accordance with the law.

171. Finally, on 25th June 2008, CL signed all bar one of the Subscription Agreements (I have counted four, but it matters not) and JV signed the agreement with CDB. Both did so for and on behalf of Barclays Plc under the authority of the BFC pursuant to the prior authorisation given by the Board to the BFC on 28th May 2008. The Subscription Agreements contained a series of warranties by the company as to the truth of certain statements. The warranties in issue here are that "there are no further agreements" and "Barclays has not agreed to, nor intends to pay any fees … or other amounts to the Investors".

172. The basis of my conclusion in May 2018 that JV and/or CL were not acting as the DMW of Barclays when executing the Subscription Agreements was that they did so under the authority of the Board and the BFC which entities within Barclays Plc made the relevant decisions. I did not hold in terms that the signing of the Subscription Agreements was some sort of mechanical act by these directors, although if there had been no question of any impropriety in this case that would clearly have been the position. The signing was in one sense "mechanical" because the anterior decision by the Board had been made and whoever signed these documents would merely have been executing them. Even if JV and/or CL should be treated as knowing, or believing, that the representation to the effect that the fee or commission Barclays Plc was or would be paying, namely 1.5%, was untrue the DMW of the company for this purpose would still be the Board and the BFC. On the other hand, if JV and/or CL had guilty intent, their act of signing, seen in isolation or in combination with the other formal statements of truth that they made, does not mean that they are somehow promoted to constituting the DMW of the company; but it should not be regarded as neutral.

173. Before I analyse the legal effect of these interlocking arrangements in connection with CR1 and ASA1, it is possible to undertake a similar exposition in relation to CR2 and ASA2, although I may be briefer.

174. In this regard, I may cite verbatim paragraphs 65-67 of my May 2018 ruling:

> "65. The key meeting of the Board was on Monday 27th October. Sixteen members were present, including JV and CL. The Board approved the transaction in principle, resolving that its proposed terms "are fair and reasonable", although there were important matters of detail which remained outstanding. In approving the transaction on this basis the Board was aware of the fee structure which I have already summarised. The Board was made expressly aware that Qatar would be paid a commitment fee but its amount was unspecified and no draft ASA was made available. It resolved that "[t]he Company should pay such other fees, commissions and expenses in connection with the Transaction as may be fair and reasonable in the circumstances". The Board resolved that the BFC "be vested with authority to approve, execute and do or procure to be executed and done all acts it may be necessary to have approved, executed or done in connection with the Transaction". This included authority to "finalise the terms of the

> Transaction and to amend, revise, vary and extend the terms of the Transaction which the BFC considers necessary or desirable".
>
> 66. On 28th October the BFC was convened. JV and CL were present. The BFC resolved that "the Chairman [Mr Agius] and the Chief Executive [JV], acting jointly (together with Authorised Persons) be vested with full authority to approve, execute and do or procure to be executed and done all acts they consider necessary or desirable to have approved, executed or done in connection with the Transaction". In other words, the authority vested in the BFC by the Board was now being vested in two individuals. On the SFO's case nothing turns on this.
>
> 67. On 30th October 2008 Mr Agius and JV resolved on behalf of Barclays as follows:
>
> "We refer to the minutes of [Barclays] and [the BFC].
>
> We also refer to the attached schedule setting out the details of the subscription by the [investors] for the RCIs, Warrants and MCNs … and the draft agreements setting out the terms and conditions on which [they] would subscribe ("the Subscription Agreements"), each provided for us to review.
>
> We, being the Authorised Persons … after full and careful consideration, HEREBY RESOLVE that:
>
> the Subscription Agreements be approved in the form provided to us …"

175. On 31st October 2008 six Subscription Agreements were signed by CL; on this occasion, JV signed no such agreement. CL clearly did so under the joint approval of Mr Agius and JV conferred on them by the BFC on 28th October. Ultimately, the authorisation may be traced back to the BFC and then to the Board. Although no submissions had been made about this by the SFO, I did deal with the joint approval or duumvirate point in May 2018. I felt that it was important to do so, covering all possible angles.

176. On 31st October 2008 RJ signed ASA2 for and on behalf of Barclays Bank Plc. The point has been made by Mr Kelsey-Fry that ASA2 could be signed before it was clear that the second capital raising would necessarily obtain the approval of shareholders at EGM. I will need to return to this.

177. The MCN Prospectus, the RCI Prospectus and the Warrants Prospectus were issued by Barclays Bank Plc and Barclays Plc respectively on 25th November 2008. On 20th November JV and CL had signed DRLs in relation to the Warrants Prospectus alone. This contained another explicit statement as to the directors' responsibility for the information contained in the Prospectus and that the directors have taken all reasonable care to ensure that the information contained therein is in accordance with the facts, and so forth. Given that the first two Prospectuses I have mentioned were

not for equity, there were no supporting letters and statements from the directors personally.

178. In January 2019 I refused an application by the SFO to amend the Indictment to include the Warrants Prospectus. I did not appreciate, because I had not been told in terms, that the reason the application was being made was to allow the submission to be advanced in connection with Count 2 that the DRLs and the Prospectus Statement fixed JV and CL with personal liability. The application has now been renewed, and for obvious reasons it was opposed by the defendants on the grounds of irrelevance, lateness and prejudice. I will need to rule on this application, but the merits should be examined first of all.

179. It is convenient to address the SFO's primary case at this stage notwithstanding that so much time has been expended on innocent agency. This case has evolved as the arguments have progressed. The first formulation involved causation, and "equation with and synonymous to". This formulation did not make it explicit that the signatories of the DRLs were making any false representation for the purposes of s.2 of the Fraud Act 2006. Indeed, I believe that the real point being made was that the representations were part of a package. The second formulation, as advanced in oral argument, was that the directors made representations jointly with the company. The third formulation, which was responsive to an email I sent on 23rd March, was that the representations were made separately.

180. Ms Darlow's essential submission, based on a combination of all her arguments, is that the directors did make representations in the DRLs and the Prospectus as to what the company would do. These representations precisely tracked, or reflected, the representations the company was making. Thus, as a matter of fact the directors' statements may be accommodated within the structure of s.2 of the Fraud Act 2006, and as a matter of law light is thrown by a consideration of the terms of s.397 of the 2000 Act, which at the relevant time provided as follows:

> ""**Misleading statements and practices**"
>
> This subsection applies to a person who-
>
> Makes a statement, promise or forecast which he knows to be misleading, false or deceptive in a material particular;
>
> Dishonestly conceals any material facts whether in connection with a statement, promise or forecast made by him or otherwise; or
>
> Recklessly makes (dishonestly or otherwise) a statement, promise or forecast which is misleading, false or deceptive in a material particular."

181. The defendants submit that the SFO's argument amounts to an artificial mechanism and is flawed. In particular:

(1) The letters were signed on 28th May 2018 which was well before the conspiracy started.

(2) They were no more and no less than a regulatory requirement within a specific regime which, insofar as criminal liabilities are imposed, is distinct from the general regime of the Fraud Act 2006. They were not the same thing as the making of any representation, still less those made by any individual.

(3) They were made to the company and not to the world at large.

182. In further written submissions filed on 26th March, these arguments were amplified to some extent, but they were not transformed. First, it is said that the directors made no representations at all. Secondly, it is submitted that the statements in the DRLs and the Prospectus should be understood as part of the acceptance of responsibility for truth and accuracy which the regulatory regime requires. Thirdly, it is said that the DRLs do not contain any statements or representations which are made to the outside world. They were provided to the company. The only outward statement is contained in the Prospectus Statement. That Statement contained a joint acceptance of responsibility which is based, and only based, on what the company has authorised. In other words, any statement made by a director is inextricably bound to and fused with the acts of the company and must be considered in exactly the same context as my May ruling. The defendants' principal objection to the application to amend to include reference to the DRLs is that it would be pointless.

183. I regret that I did not properly understand the SFO's principal case (and, indeed, that it was the SFO's preferred route to liability) until late in the day. I have explained the circumstances. I could have dealt with this in January. But I also consider that, given the terms of the Indictment and the course of the litigation up to that point, it was primarily incumbent on the SFO to raise this issue with me and to insist that it had to be ruled on before the trial started.

184. In my judgment, the key to the determination of this issue is to understand the basis on which any statements in the DRLs and what I am calling the Prospectus Statement were being made. The representations made by the company in the Prospectus all related to the 1.5% being the only fee. These were representations as to the intentions of the company which form the subject-matter of the Indictment. At one stage I was attracted by an analysis which held that the directors made representations which were related to the company's representations but were separate and additional to them. In substance and in law, the directors were stating, and therefore representing, that the company's representations were true. In other words, JV and CL were independently representing that the warranties in relation to the sole and self-contained nature of the 1.5% fee were true: the warranties they effectively gave exactly overlapped with, and supported, the company's representations in relation to exactly the same subject-matter.

185. However, I have been persuaded that this is not the correct analysis. The DRLs and the Prospectus Statement can only properly be understood within the framework of the regime which requires them. The DRLs contain no statements, let alone representations, made to the outside world. They are one of the many preconditions to the company's publication of an equity prospectus, but they are not one and the same thing. The company did not authorise the signing of the letters, but it did authorise, because it had to, the making of the Prospectus Statement which presupposed the existence of those letters. It follows, in my judgment, that the joint Statement by the directors and the company is one which is made by the company, because it is the

only entity with power to make it and cannot be conceptualised in some way as a separate statement made by the individual director. It is unnecessary to decide whether JV or CL could have been indicted on the basis that each made a misleading statement for the purposes of s.397 of the 2000 Act (this was repealed in 2012). Even if they did, this does not bear on the true construction and application of a different statutory provision, and I have noted the defendants' submission that the 2000 Act is based on the concept of responsibility, not the making of false representations.

186. I would tend to agree with the SFO that the language of "joint" and "joint and several" is more appropriate to civil law. It may also tend to obscure the correct approach by assuming what needs to be proved. The real issue is whether the directors should be treated as the "maker" of a representation in the Prospectus Statement for the purposes of s.2 of the Fraud Act 2006. This brings the analysis back to the statutory and regulatory regime in which the Prospectus Regime was made, including the role of the directors. If the company had still been a defendant, the Prospectus Statement would have been part of the overall picture of falsity, although reliance upon it would probably have been unnecessary. The departure of the company from the case elevates the Prospectus Statement to an uncomfortable, and somewhat artificial, centrality. My conclusion that one cannot properly separate the directors' statement from the company's statement reflects the legal reality that it is the company which publishes the whole of the Prospectus and should therefore be regarded as the sole "maker" for the purposes of the Fraud Act 2006.

187. There is a further difficulty with the Warrants Prospectus in connection with Count 2. This is not so much procedural as substantive. The SFO's reliance on the representations in the MCN and RCI Prospectuses creates no difficulty on the facts, and also recognises that it is the co-existence of the £280M with the statements made in them that engenders the falsity. The argument becomes strained and artificial in relation to statements made in the Warrants Prospectus because these were true even if the £280M is taken into account. The SFO relies on recondite statements in unaudited financial information referred to in the Warrants Prospectus which were introduced very late in the day. This was not new information. There is really no evidence that JV and CL applied their minds to this, either generally or in the context of the DRLs signed on 20th November. Although I have no difficulty with the submission that for the purposes of s.5 of the Fraud Act 2006 specific intent can be proved by demonstrating that the directors must have appreciated that the extra £280M would falsify the MCN and RCI Prospectuses, I accept the defence submission that this becomes entirely artificial, indeed untenable, in relation to the Warrants Prospectus. This is a synthetic argument which aspires to transcend a legal difficulty. My January 2019 ruling was correct, although not given for all the right reasons, and I will not reverse it.

188. For the avoidance of doubt, I would have granted the SFO permission to amend the Indictment if the sole issue had been the inclusion of the DRLs. It is arguable that no amendment was even required. There is no real prejudice in relation to Count 1 because the falsification of the Prospectus is clear. It would remain open to individual defendants to take evidential points on s.5 of the Fraud Act 2006 on whatever basis. I would not have granted the SFO permission to amend in relation to the Warrant Prospectus even if I were of the different view that the DRLs constituted a sustainable

route to criminal liability. I should add that I also decided that I could fairly rule on the SFO's renewed application to amend without hearing oral argument.

189. I must therefore hold that the primary route to liability cannot succeed. In any event, the primary route could only have succeeded on both Counts if there were a case to answer against either JV or CL. I will of course be addressing this in due course.

190. Having reached my conclusion on the SFO's primary case, it is tempting to absolve myself from the very considerable burden of addressing its secondary case on innocent agency. However, I have no doubt but that the quality of the submissions and the overriding objective in all its various aspects requires me to do so. It is also necessary to correct what I held, admittedly provisionally, on 9th July 2018.

191. The case on conspiracy may be addressed in two ways.

192. First, if all the defendants were party to a conspiracy, their intention was that the services to be described in the ASA (I am fixing this, as does the SFO, at 11th June) would not be genuine services but disguised commissions. The primary object of the conspiracy was to work towards the attainment of such an ASA, whoever signed it. Subject to the defendants' subordinate arguments, none of which I can accept, the inevitable consequence of ASA1 being untrue was that the statements of fact in the public-facing documents were untrue. I remain of the conviction that it would have been easier, and perhaps better, to have stopped there. However, the way in which the SFO has chosen to indict this conduct, despite the essential criminality residing in the ASAs, inevitably draws attention to the substantive offence which would be committed in connection with the Prospectus and the Subscription Agreements. The 1.5% figure is false because ASA1 renders it so, but the substantive offences relied on are predicated on the making of the false statements about that 1.5%. If JV and CL are conspirators, the factual bridge between ASA1 and CR1 appears relatively easy to cross. They were directly involved in making statements in the public-facing documents and in signing them. It is not fanciful to say that this involvement amounts to such a close connection with the making of the formal making of the representations that JV and CL should be regarded in some general and non-specific way as part and parcel of that making, but whether that is legally sufficient is very much in issue.

193. The second way of looking at this is to remove JV and CL from the picture. On that basis, RJ, TK and RB are conspirators, and JV and CL are innocent agents. On this approach, the relatively narrow bridge I have referred to completely disappears, and the focus shifts right back to the anterior conduct. The SFO has to find an analysis which holds that in some way RJ, TK and RB brought about the relevant falsities in the public-facing documents in such a manner that they should be regarded as principals, alternatively brought about the actions of JV and CL, the latter acting as innocent agents. As a matter of immediate impression, it is far harder to say that the remaining defendants acted as principals.

194. Who made the indicted representations in the Prospectuses and the Subscription Agreements? The simple answer to that question is that in fact and in law the company was the maker and the individuals could not have made them. It follows, the defendants say, that the individuals could not have procured the relevant making, and in the alternative that if they did so they acted as procurers in the strict sense of that

term, i.e. not as principals but as secondary parties. As I have said, there are a host of subordinate arguments, but this is really the defendants' case.

195. The SFO's first riposte is based on the application of what it calls the doctrine of innocent agency. The SFO's second riposte depends on JV and CL being co-conspirators. It concentrates on the combined effect of the signing of relevant agreements, the signing of the DRLs, and the personal statements of truth made in the Prospectuses. In examining this submission, I must do so on the premise that my legal conclusion about the direct route to liability is incorrect although as part of the overall factual evaluation the directors' personal statements should not be excluded from account.

196. It is convenient to examine these ripostes in the order in which they were made.

197. My point of departure for that analysis is to agree with most of Ms Darlow's submissions on the law. To be clear, I agree that:

(1) the common law recognises the concept of "innocent agency" (I would prefer not to call it a doctrine), and it is capable of applying to a statutory conspiracy.

(2) in any case of innocent agency, although the defendant *procures* the *actus reus* of the agent, the prime mover is regarded as the principal. He is the individual who commits an *actus reus* with accompanying *mens rea*. In such a situation, there is a direct and inextricable causative link between the positive action of one individual and its operation on another: see *AG's Ref (No. 1 of 1999)* [2000] QB 365. The innocence of the agent is predicated on the absence of *mens rea*.

(3) there can be more than one innocent agent: the chain is sound provided that the principal's intention is made out, and there is a clear causative link: see, for example, *R v Michael* [1840] 9 C&P 356.

(4) innocent agency operates perfectly well in the context of a pre-2006 Act fraud case: see *R v Stringer* [1992] 94 Cr. App. R. 12 (in fact, this was a case under the Theft Act 1968). There is no reason in principle why it cannot operate in a case governed by s.2 of the Fraud Act 2006. If that building block is firmly in place, the principle also applies to a statutory conspiracy where the substantive offence is the commission of an act contrary to s.2. This analysis does not engage the fallacy that there cannot be a statutory conspiracy to procure a substantive offence where the procurement is some species of accessory liability. The position here is that the procurer acts *qua* principal.

(5) There are situations, however, where the principle of innocent agency cannot apply. These are all situations, cf. s.2 of the Fraud Act 2006, where the defendant lacks some characteristic essential for criminal liability.

198. The point of departure for my consideration of this issue is to return to May 2018. The determination of who was the DMW of Barclays Plc for the purposes of the issuing of the public-facing documentation was critically important for this reason: if the conspirators were to be regarded as the DMW, either because they "did the deal" and/or because JV and CL signed the Subscription Agreements in such circumstances that their actions and intentions could be attributed to the company, it would follow

that Barclays Plc would be a co-conspirator. It would also follow that the guilty mind of JV and/or CL could be attributed to the company by the same route.

199. However, as soon as Barclays Plc passes out of the picture because the DMW of the company for the purposes of the issuing of the public-facing documents was not JV *et al*, we have a state of affairs whereby these documents are issued by the company in circumstances where the guilty mind of JV and/or CL cannot be attributed to Barclays Plc.

200. This analysis does not depend on any reasoning which holds that the false representations were made by the Board and/or the BFC. The representations were made by Barclays Plc and, to the extent that they needed to be published to the market, s.2(5) is applicable. It is unnecessary to be more specific, save to say that the representations were not made by any human individual and could not have been formally regarded as "made" for the purposes of the section as a whole until some sort of administrative action was taken, probably electronically.

201. With the scene having been set in this fashion, let me return to the defendants' sophisticated analysis of the law of conspiracy, principals and secondary parties, and innocent agents, which analysis was narrowed by Mr Purnell in oral argument in the light of the SFO's written submissions.

202. The general principle, established by authority which is binding on me, is that on the true construction of s.1 of the Criminal Law Act 1977, "the commission of an offence by a party to an agreement" means commission by a principal in the first degree and not a secondary party. An agreement to aid, abet, counsel or procure an offence cannot amount to a statutory conspiracy. Authority for this general principle may be found in *R v Hollinshead and others* [1985] 80 Cr. App. R. 285. This was upheld by the House of Lords on narrower grounds, although the general principle was not expressly doubted. Whether *R v Hollinshead* remains binding authority does, however, need to be considered.

203. During the course of his judgment on behalf of the Court of Appeal, Hodgson J expressly approved a passage in the 1983 edition of Smith & Hogan:

> "Under the heading "Agreement to do acts of secondary participation," they say: "Persons may agree to do an act which would render them liable to conviction as secondary parties if that offence were committed. Is an agreement to aid and abet an offence a conspiracy? The Criminal Attempts Act 1981 makes it clear that there can be no attempt to aid and abet an offence but it leaves open the question whether there can be a conspiracy to do so. D1 and D2, knowing that E intends to commit a burglary, agree to leave a ladder in a place where it will assist him to do so. E is not a party to that agreement. If E uses the ladder and commits burglary, D1 and D2 will be guilty of aiding and abetting him to do so. Are they guilty of conspiracy to commit burglary? If the course of conduct is placing the ladder, it seems clear that they are not. Placing the ladder is not an offence, not even an attempt to aid and abet burglary, since the Criminal Attempts Act 1981 makes it clear that this is not an offence known to the law. It has been argued above that 'course of conduct' should be interpreted to include

> the consequences intended to follow from the conduct agreed upon, including the action of a third party to the agreement—in that example, P, who takes up the poisoned tea and drinks it. So it might be argued, consistently with that, the course of conduct ought to include E's use of the ladder in committing burglary. If that should be accepted, the next question would be whether the burglary is 'the commission of any offence by one or more of the parties to the agreement.' E is not a party to the agreement, so the question becomes, do the words 'commission of any offence' include participation in the offence as a secondary party? Since all the parties to a conspiracy to commit an offence will be guilty of that offence if it is committed, but section 1(1) contemplates that it may be committed by only one of them, it is clear that 'commission' means commission by a principal in the first degree. It is submitted therefore that an agreement to aid and abet an offence is not a conspiracy under the Act. This conclusion rests on the interpretation of the Act." (The learned authors then went on to consider a Hong Kong case [*i.e. Po Koon-Tai* [1980] H.K.L.R. 492] which it is not necessary for us to refer to.) We are in complete agreement with the reasoning of the authors in the passage cited."

204. Hodgson J did not directly address the issue of innocent agency, although his poisoned tea example (see *Harley* [1830] 4 Car & P 389) clearly touches on it. In such a situation it is not difficult to envisage the imbiber of the tea as an innocent agent because she was entitled to assume that the tea was not toxic. The principal was the servant who "administered" the toxin. It is, however, clear from Hodgson J's reasoning overall that s.1 of the Criminal Law Act 1977 cannot apply to secondary parties; and, to the extent that there is an exception for innocent agents, the entity committing the substantive offence would be doing so *qua* principal.

205. The Court of Appeal returned to the issue of secondary parties and statutory conspiracy in *R v Kenning* [2008] 2 Cr. App. R. 32. On the facts of that case, the substantive offence, if any, could only have been committed by a non-conspirator. In the course of his judgment for the Court of Appeal, Lord Phillips CJ reviewed Blackstone, Smith & Hogan and *Hollinshead*, and affirmed the general principle that an agreement to procure etc. could not suffice. He doubted whether *Hollinshead* was binding authority in his court, but agreed nonetheless with its essential conclusion. It follows that both cases are binding on me.

206. Two passages in *Kenning* are worthy of express mention. First, at paragraph 18:

> "The course of conduct to which the would-be aiders and abettors agree will, *ex hypothesi*, involve their performing acts that are no more than accessory to the offence intended to be committed by the primary offender. If they do all those acts, they will not amount to an offence unless the primary offender commits the primary offence. There can be no certainty that he will do so. Thus, even if the aiders and abettors do all that they agree to do, their course of conduct will not necessarily amount to the commission of an offence. This result is not surprising. It would be odd if it was an offence to conspire to aid and abet, although no offence to attempt so to do."

The defendants have relied on this passage in support of a submission that, on any view of the facts, there was no certainty (I would prefer to interpolate "virtual", in the light of Blackstone) that JV and/or CL would sign relevant documentation; and this was so regardless of whether they were co-conspirators. My attention has been drawn to the powers of attorney, for example. The difficulty with that submission is that Lord Phillips CJ was specifically dealing with a situation where the primary offender was not a conspirator. I agree, however, that if I am driven to conclude on the evidence that there is no case to answer against JV and CL, paragraph 18 of *Kenning* presents an additional difficulty for the SFO: there was no virtual certainty that either of them would be signing relevant documentation on behalf of the company. I would see this differently if JV and/or CL were co-conspirators, because on that hypothesis it would be reasonable to infer that they would want to have control over the physical act of signing.

207. Secondly, at paragraph 21 of *Kenning*, Lord Phillips CJ said this:

> "Whether, in these circumstances, the reasoning of the Court of Appeal remains a binding precedent may be a matter for debate. Whether it is or not, we endorse the court's conclusion that an agreement to aid and abet an offence is not in law capable of constituting a criminal conspiracy under section 1(1) of the 1977 Act. We are unable to see how the origin of the offence of aiding and abetting so studiously researched by counsel for the Crown has any relevance."

208. In an article published in the *Criminal Law Review* in 2009, Professor Ormerod expressed his disappointment that the Court of Appeal in paragraph 21 did not deal with the issue of *participation* as secondary party. Instead, all that the Court of Appeal did was to endorse *R v Hollinshead*. Subject to exactly what Professor Ormerod meant by using this term, I think that the reason that the Court of Appeal did not deal with the issue was because it was not argued and did not arise on these facts. As will be seen, the baton of *participation* has been picked up by Ms Darlow.

209. In the same article Professor Ormerod observed that there have been situations where the commission of an offence by the principal through an innocent agent would not preclude liability. The Court of Appeal did not address that point either because it did not arise on the facts. I have already referred to the difficulty in saying that on the facts of that case the non-conspirators were innocent agents.

210. Turning now to the key authorities on innocent agency, in *Thornton v Mitchell* [1940] 1 All ER 330, the driver of a bus was charged with an offence of driving without due care and attention. The conductor was charged with aiding and abetting that offence. The driver relied on the signals of the conductor before reversing his vehicle. The case against the driver was dismissed by the justices, but the case against the conductor as secondary party was found proved. The twin bases for the decision of the Divisional Court, Lord Hewart CJ presiding, were that the conductor could not aid and abet an offence which had not been committed, and he could not be convicted as principal, because only the driver could ever be guilty of that. We see a similar result, reached for the same reason in the dangerous driving case of *R v Loukes* [1996] 1 Cr. App. R. 444. Given that there was no *actus reus* of that offence, there could be no procurement of it.

211. In *R v Bourne* [1952] 36 Cr. App. R. 125, the appellant was convicted of aiding and abetting his wife to commit buggery with a dog. He sexually excited the animal and compelled his wife by duress to submit to anal intercourse. For Lord Goddard CJ giving the judgment of the Court of Appeal, it did not matter whether the appellant was to be envisaged as principal in the second degree (*i.e*. roughly corresponding to an aider or abettor) or as an accessory (*i.e.* roughly corresponding to counsellor or procurer). It was not suggested that the appellant was a principal in the first degree, although the duress operating on his wife, and her consequent innocence of any crime, might suggest that this was exactly what he was. *R v Bourne* turns on its unusual facts, does not directly support the proposition that the SFO now requires, and in my view takes the argument no further.

212. In *R v Cogan and Leak* [1976] 1 QB 217, there were three individuals, L (the husband), C (the husband's friend) and W (L's wife). W was compelled by L to have sexual intercourse with C, and both L and C were in due course convicted of rape. Later, C's conviction was quashed on appeal. The issue then arose of whether L's conviction was vitiated by that finding. The Court of Appeal, Lawton LJ presiding, held that it was not.

213. His reasoning has been criticised in certain quarters, and I would share some of the concerns. My reading of the *ratio* of the decision is that W was raped; that L procured a criminal purpose; that L's criminal purpose was not somehow negatived or nullified by the absence of criminal responsibility in C; and, that it would be an affront to justice to allow the appeal. Lawton LJ further stated that L could have been indicted as a principal offender [at 223E/F] but I read that as *obiter*. If that opinion were correct, which I strongly doubt, it could only be on the footing that L was present at the scene and that his will effectively overbore that of his wife who, acting under duress and terror, was an entirely innocent agent. I would prefer to conceptualise *R v Cogan and Leak* as being a clear and paradigm example of secondary liability. The SFO has, quite properly, placed a health warning against this case.

214. Another case which has attracted some controversy is *R v Millward* [1994] Crim. L.R. 527-30 (I have been provided with a full transcript). In that case the driver of a tractor and trailer was acquitted of causing death by reckless driving: the alleged recklessness was in failing to ensure that the hitch was properly maintained. B, the person responsible for maintaining the hitch, was convicted as secondary offender, on the basis that he procured the offence. The Court of Appeal upheld the conviction notwithstanding that the principal offender, the driver, lacked *mens rea* and was entitled to be acquitted. This was because the *actus reus* of the offence of causing death by reckless driving was committed by taking the vehicle in its defective condition onto the road, and B had procured that result.

215. It is immediately apparent that the *ratio* of *R v Millward* is based on the proposition that B procured the reckless outcome rather than acted *qua* principal. But the defendants submit that there is a further problem, namely that the language of procurement could only bring home the conviction if *mens rea* in the driver was not an essential element of the offence. Scott Baker J touched on that issue at page 8B of the transcript (my copy has no page numbers) but his reasoning and conclusion did not depend on it. Instead, the Court of Appeal relied on *Cogan and Leak* in order to conclude that the appellant procured an offence by the driver notwithstanding that he lacked *mens rea*. On the facts of *Millward*, the recklessness inhered in the taking of

the vehicle onto the road rather than the driving, and so the issue did not strictly speaking arise. The offence could be committed by someone other than the driver.

216. The Court of Appeal's reliance in *Millward* on *Cogan and Leak* is not problematic if the analysis being undertaken is on the basis of procurement and secondary liability. That was the sole analysis that was undertaken in that case.

217. Professor Smith's commentary addresses the issue which I have said did not arise:

> "It seems that the result would be different on a charge of procuring dangerous driving contrary to section 2A(1) of the 1988 Act. Where a competent and careful driver is not, and could not be expected to be, aware of the defects which make driving the vehicle dangerous, he does not commit the *actus reus* of the offence, so there can be no question of one who is aware of the defects procuring its commission. That case is like *Thornton v Mitchell*, distinguished in the present case."

218. The latest edition of Blackstone proceeds along similar lines:

> "… it is probably preferable to adopt the principle that an accessory can be liable provided that there is the *actus reus* of the principal offence even if the principal offender is entitled to be acquitted because of some defence personal to himself.
>
> It may well be, however, that this principle is limited to cases where the accessory has procured the *actus reus* (i.e. has caused it to be committed as was in the case in both *Bourne* and *Cogan*). This would also be consistent with the proposition that procuring does not need a common intention between the accessory and the principal whereas other forms of aiding and abetting generally do. If the principal lacks the *mens rea* of the offence there can hardly be a common intention that it should be committed, but that is not required for procuring.
>
> The above two paragraphs were specifically approved by the Court of Appeal in *Millward* …" [A4.18]

219. I was also shown the decision of the Court of Appeal in *DPP v K and B* [1997] 1 Cr. App. R. 36. This is a very difficult case which turned on its own facts, and I would rather say no more about it.

220. The last authority that was drawn to my attention on this issue was *Idrees v DPP* [2011] EWHC 624 (Admin). In that case the Administrative Court was seized of not unfamiliar facts: the appellant leaving his driving licence with an unknown person who then took a driving test masquerading as him. Moses LJ had no difficulty in finding that an offence under ss.1 and 2 of the Fraud Act 2006 had been committed. The basis of the decision is unclear from Moses LJ's judgment, but it seems to me that an implied representation was made by the appellant, giving instructions to the unknown person, that he was the person taking the test. The appellant caused this to happen by providing his driving licence to the unknown person with the relevant intention to make a false representation; the unknown person, although he was part of the fraud, was the conduit. Thus, the most compelling explanation of this authority,

assuming that it was correctly decided, is that on these unusual facts the appellant was liable as principal offender: he made the representation intending and knowing that the unknown person would present the licence at the test centre. He was no different from the person who administered the poison who was also not present at the scene.

221. The defendants draw attention to the particular wording of section 2 of the Fraud Act 2006. It is convenient to set this out at this stage:

> "2 **Fraud by false representation**
>
> 1. A person is in breach of this section if he —
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.
>
> (2) A representation is false if —
>
> (a) it is untrue or misleading, and
>
> (b) the person making it knows that it is, or might be, untrue or misleading."

222. The short submission is that this is a hybrid provision in which the requisite knowledge is defined as being part of the *actus reus*. A representation cannot be false unless the person making it knows that it is or might be untrue etc. No offence is committed unless dishonesty and specific intent are separately proved, but this is not an example of a statute which invites the court to address falsity as an objective or antecedent question before the mental element of the maker is brought into account.

223. It follows, so the submission runs, that not merely were the relevant representations made by the company, these could only have been false representations if the company knew that to be so (I simplify). *Mens rea* in any servant or agent who was not the company for these purposes would be legally irrelevant.

224. In developing his legal argument orally, Mr Purnell did not make it entirely clear whether his case was that innocent agency could never apply to s.2 of the Fraud Act 2006 despite its curious wording. The final resting point of his submission was that innocent agency only operates in the context of section 2 where the act of procuring was by X of Y of an act which X could have carried out himself. On the facts of the present case, the SFO has to prove, so the submission runs, that JV could personally have committed this offence. If he did not, there could be (1) no innocent agency (JV as principal, the company as innocent agent) and (2) no procurement in its more natural sense of secondary or accessory liability. Mr Purnell does not really need (2), but the logic of his submissions took him there.

225. In my judgment, the issue must be considered in this specific corporate context, and it is unnecessary for my analysis to extend much further. I must also limit myself to the

factual scenarios which are directly germane to the disposal of the present application. These factual scenarios are applicable to a state of affairs where only the company *could* commit the relevant offence under s.2 because the statutory and regulatory regime placed all the obligations referable to the public-facing documents on the company. Whatever the state of mind of individual agents who might or might not bind the company, it is only the latter which on these facts could ever commit the substantive offence. In terms of the individual agents, the converse is the case: they could never commit the substantive offence. The problem here is not the presence or absence of *mens rea*; it is the nature of the offence that could be committed in the public-facing documents.

226. This point may be explored further in this way. The first analysis examines the position on the counterfactual premise that JV and CL act as the DMW of the company and therefore bind the bank. The second analysis proceeds simply on the basis that the company on these facts was the only person which could commit the offence, with the individuals, assumed to have guilty knowledge, being in the converse position. The particular wording of s.2 of the Fraud Act 2006 is examined in that context. The third analysis examines the proposition that it is the particular wording of s.2 of the Fraud Act 2006 which creates the difficulty in all so-called innocent agency cases.

227. The first analysis is straightforward. The company commits the substantive offence contrary to s.2. The conspirators are co-principals in relation to the substantive offence – the agreement - which is the statutory conspiracy. Separately, though, could it be said JV and CL procure the company's substantive offence and/or act as co-principals in that context? The point is entirely academic, and the deeming provision in s.8 of the Accessories and Abettors Act 1861 has the effect that JV and CL could be indicted as if they were principals. But my analysis would be, if it had to be advanced, that the liability of JV and CL would be as secondary procurers, and that they could not be regarded as co-principals: they could not commit the substantive offence on these particular facts. Here, I am parting company with Lawton LJ's *dicta* in Cogan and Leak.

228. The second analysis is not so straightforward. However, it is clear that the company does not commit the substantive offence because it is lacking relevant *mens rea*. The difficulty arises in connection with the position of JV and CL in a situation in which they have *mens rea* which cannot be attributed to the company. The SFO's solution to that difficulty is to say that the only issue here is the company's lack of *mens rea*, the company is innocent, and that there is no impediment to the individuals being regarded as principals. But the difficulty goes deeper than that. The issue is not merely the company's want of *mens rea*: the company is the only person who could ever have committed this offence; and, more importantly, the individuals could never have committed it. The SFO's argument must of course focus on the position of the individuals who remain on the Indictment. In my judgment, the fact that they could never have committed an offence in the public-facing documents means that they cannot be regarded as principals. This may not be altogether surprising for the additional reason that as a matter of the law of agency the individuals would ordinarily be seen as acting *qua* agents and the company *qua* principal, and not the other way round.

229. It is in this context that s.2 of the Fraud Act 2006 falls to be considered. Whatever the difficulties as to the true construction of s.2(2)(b), the position on these facts, focusing in particular on the position of the individual directors, is that they cannot be regarded as "making" any representation which is false. The impediment is not merely the wording of s.2 but the factual and legal reality being that the directors cannot be regarded as the makers *qua* principals of any representations in the public-facing documents. The highest that the case may be put against them is that they acted *qua* secondary parties; but that does not work for the SFO.

230. On this approach, it is unnecessary to decide whether s.2 of the Fraud Act 2006 could ever apply to a situation of innocent agency.

231. Turning now to my third stage, which enters this unnecessary domain, there was a lively debate between Ms Darlow and me as to the correct analysis in a paradigm case of innocent agency seen through the legal structure of s.2. I have already expressed a view about *DPP v Idrees*. Ms Darlow invited me to consider a dishonest individual who submits her or his dossier of papers to an accountant expecting the latter to complete a tax return which is false. The accountant is entirely innocent. It is said that any relevant representation has to be made by the accountant as innocent agent, but the impact of the defendants' construction of s.2 must be to lead to the conclusion that such a representation is not made owing to the want of *mens rea*. The upshot, says Ms Darlow, is that the dishonest client cannot be liable as principal on the defendants' thesis, which cannot be right. Ms Darlow invited me to be realistic.

232. I would like to take this in two stages. The first is to disagree with Ms Darlow's analysis of these hypothetical facts. On her assumed facts, I think that the correct analysis is that the dishonest client should be regarded as making a representation which is false by handing the dossier to the accountant in the knowledge that the information in it will be transmitted through the accountant to the authorities. The situation is very similar to *Idrees* and it is also comparable to the early poisoning cases. The offence contrary to s.2 is one which could be committed by the client who chooses not to have an accountant. The latter is simply a conduit.

233. I appreciate that this construction of the section adopts a flexible rather than a rigorously analytical approach and one which ignores the distinction between result crimes and conduct crimes that has appealed to some commentators. This approach treats s.2 of the Fraud Act 2006 as being a result crime, where the agent completes the act, rather than a conduct crime, where the agent performs it. I can see the force of the argument that this offence, properly understood, is a conduct crime, although I would prefer not to be constrained by labels of this sort. Moreover, for the SFO's purposes that tends to prove too much, because conduct crimes are exactly those crimes where innocent agency is not the appropriate mechanism.

234. My preferred analysis, therefore, is that innocent agency can be accommodated within s.2 of the Fraud Act 2006 and will work sufficiently well as a concept in most situations. The present difficulty arises only because of this particular factual matrix.

235. What I am calling the second stage, which is only necessary if my analysis at the first stage is wrong, involves picking up the gauntlet left by Ms Darlow and examining the language of s.2(2) on a more wide-ranging basis. The wording is certainly curious and it has attracted some concern from academics and experienced practitioners. I would

hesitate before using the labels of *actus reus* and *mens rea* as analytical tools, because ultimately this is a matter of statutory interpretation.

236. Putting the matter entirely neutrally, s.2(2) has two elements: the representation as made must be untrue; the person making it must know that. The representation is not "false" unless these two elements are in place. Knowledge is insufficient because the offence is only constituted in a case of dishonesty and specific intent. However, the falsity of the representation does not depend on that.

237. The Fraud Act 2006 was not a consolidation Act and the previous common law is of limited relevance. This is not a situation where Parliament is legislating against the backdrop of a settled understanding of the common law, still less a principle whose mode of application is clear: cf. *Robinson v SSHD* [2019] UKSC 11: paragraph 62, per Lord Lloyd-Jones.

238. I would certainly hesitate before concluding that the true construction of s.2(2) leads to the result that in all cases innocent agency must be inapplicable and that, whatever the facts, the procurers could never be liable even as secondary parties. That is the logic of the defendants' submissions if one needs to proceed to this stage of the argument because, if the effect of s.2(2) is that the representations as made were not false, it would follow that there was no *actus reus* to procure.

239. In my judgment, however, this is a criminal statute whose express and clear language cannot be ignored, even if the outcome is uncomfortable. The principle of legality applies. Despite my concerns, I consider that the language of s.2(2) is clear. If the maker of the representation lacks knowledge, there is no false representation for the purpose of this provision.

240. I invited Ms Darlow to offer a construction of this provision which did not do complete violence to it. The proposition that the *actus reus* does not include the *mens rea* is fine so far as it goes, but a route to a proper interpretation of the provision which meets the SFO's case must be found. In my judgment, it cannot be found because what would be required would be a decoupling of sub-paragraph (b) from the subsection and placing it elsewhere. The provision as rewritten would look like this:

> "2 **Fraud by false representation**
>
> (1) A person is in breach of this section if he —
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.
>
> (c) knows, by making the representation that it is or might be untrue or misleading.
>
> (2) A representation is false if it is untrue or misleading."

With this adjustment it may be seen that the *actus reus* (as redefined) is located entirely in sub-section (2) and that the three elements of the *mens rea* (as redefined) are entirely in sub-section (1). This may be an elegant solution, not that the SFO has proposed it, but Ms Darlow could not point to a paragraph in Bennion which might permit it. I can see the force of the argument that the result is close to being absurd, and that it may well have been unintended. However, in the context of a criminal statute that would be insufficient. For whatever reason, but it must have been deliberate, the draftsperson has selected an equally elegant solution which fuses untruth/misleading with knowledge for the purposes of defining falsity.

241. This conclusion brings the instant case close to the driving cases where the technique of the draftsperson has often been to include the nature and quality of the driving within the definition of the offence itself. Professor Smith's commentary on *Millward* is germane.

242. It follows that if *necessary* I would hold that s.2(2) of the Fraud Act 2006 could never apply to a case of innocent agency. This is a conclusion to which I would come without any enthusiasm. I repeat that my preferred analysis is that paradigm situations of so-called innocent agency can be accommodated within this atypical statute, and that it is these particular facts which create the difficulty.

243. Furthermore, I cannot lose sight of the fact that many of these difficulties arise because the SFO has chosen to frame this Indictment in a particular way. If I have been driven into an uncomfortable position at various stages of the foregoing analysis, it is because the SFO has set that agenda.

244. It follows that I must uphold the defendants' primary case on the innocent agency issue. This route to liability is precluded to the SFO even if there were otherwise a case to answer on the merits against all of the defendants.

245. The subordinate, or alternative, submission advanced by the defendants is that the SFO's case on innocent agency must fail if neither JV nor CL was a conspirator in connection with Count 1, and CL was not a conspirator in connection with Count 2. The answer to this submission is rendered academic by my conclusion that there is a case to answer on the issue of sufficiency of evidence against CL, but the overriding objective clearly requires me to proceed.

246. I have pointed out that the remaining conspirators would have to be regarded as in some way acting as principals in relation to the public-facing documents over which they had no control and certainly no responsibility in fact or in law; and they were not the DMW of the company. Equally, the Board, the BFC, JV and CL would, on this version of events, all fall to be regarded as the innocent agents of the piece. Ms Darlow submitted that the company's decision-makers were deceived such that their decisions should be regarded as of no effect. She also submitted that it is sufficient for her purposes to demonstrate that the remaining conspirators knew and understood what would happen, and therefore intended it. She added that the concept of innocent agency includes more than one such agent.

247. I cannot accept Ms Darlow's submissions. As I pointed out, it is the SFO's case that JV and CL have to be conspirators because the conspiracy could not otherwise have worked. That submission has obvious ramifications. I consider that the SFO's

submissions on this alternative case creates impossible difficulties for the purposes of s.1 of the Criminal Law Act 1977 in connection with (1) intention, (2) knowledge and foresight of consequence (see *Kenning*), and (3) causation. The focus is now entirely on the criminal activity which relates to the ASAs. We are really miles away from the poisoning cases where the factual and causative link is plain and intermediate steps may be possible. The submission that the decisions of the Board and the BFC should be regarded as legally nugatory is plainly wrong. The submission that it was somehow the intention of the remaining conspirators to deploy JV and/or CL as innocent agents flies in the face of the SFO's primary case on the facts, and to the extent that the SFO can plausibly advance an alternative theory that cannot in my opinion be sustained on any examination of the facts. It did not require any positive activity by the remaining conspirators to "cause" JV and CL to participate in the decision-making of the Board and sign relevant documents.

248. The SFO's written submissions, as Ms Darlow expressly confirmed, also invite me to examine this case on a third basis, namely *participation*. On closer analysis, this third way has two different formulations. First, it is said that the Subscription Agreement, the DRLs, the Prospectus Statement, and the Prospectus itself are so intertwined in fact and in law that JV and CL should be regarded as the relevant "maker" for the purposes of s.2 of the Fraud Act 2006. This argument is really another way of addressing "caused by, equated to and synonymous with", and is undoubtedly a powerful point on the merits. Secondly, and taking its steer from Professor Ormerod, it is said that this combination of factors renders JV and CL as participants in the making.

249. There is no authority which comes close to supporting the SFO's analysis. If deconstructed into its various elements, it immediately falls apart. There may be a procuring by the directors in signing the letters, but that is not enough; innocent agency does not work; and so forth. Of course, the issue arises of whether an amalgamated or fused approach may be viable, which is really what Ms Darlow is saying. In my judgment, aside from the lack of jurisprudential support, there is no principled basis for accepting the SFO's proposition. If the component parts add up to zero, why is the whole any better, and what exactly is the whole? It was not put to me that in the circumstances of this case the corporate veil should be pierced, and I say nothing more about that. I regret to say that, in the absence of a clear and structured analysis which might enable me to embrace a novel principle, I will not take that step. The concept is amorphous and without clear content and specific boundaries. Professor Ormerod's disappointment may be shared but it makes me none the wiser. I should add that the concept of *participation* that Professor Ormerod was addressing appears to be a species of secondary liability. That cannot avail the SFO, and effectively disposes of the second formulation of the third way.

250. There is a further issue, although it applies only to ASA1. JV signed ASA1. If there is no case to answer against him on Count 1 because he did not know of any sham arrangement, it would appear to follow that he as signatory to the putative sham agreement would not harbour the necessary intention to participate in a sham. Barclays Bank Plc is bound contractually only because JV signed the document *qua* its agent. Difficult issues arise in the context of the law of agency. Furthermore, it might be said that in these circumstances we would have a situation whereby one of the parties to ASA1 – Barclays Bank Plc, bound only by the signing of JV – did not

have the intention to participate in a sham arrangement, but Qatar Holdings did (I am making the assumption that its signatory did know of the fraud – that maybe raises yet another issue).

251. I indicated during oral argument that this was not an issue that I have to resolve. However, I do not now believe that I should leave the issue lingering undetermined on this basis. I need to go further.

252. On reflection, I consider that I raised a thoroughly bad point. I have confused two issues. The first and principal issue must be the terms of the agreement made on 11th June. The second issue is the identification of the substantive offence which is necessarily committed by at least one of the parties to it. The SFO is not alleging that one or more of the conspirators committed a substantive offence in connection with ASA1. Thus, to focus on ASA1 in this way creates the basic solecism of ignoring that the statutory conspiracy is fully constituted by the agreement. The parties to the agreement intended that the fee would be disguised in ASA1, and for this purpose it does not matter who ended up signing it and with what intention. Equally it does not matter whether the agreement as signed would be enforceable or not. This is the same error that Mr Winter has perpetrated in connection with what I am calling his first and fourth submissions: see paragraphs 254 and 258 below.

The Additional Arguments Germane to Sham and Conspiracy

253. At this stage it is convenient to bring into consideration Mr Winter's five further submissions. I consider that I may do so quite briefly.

254. Mr Winter's first additional submission is that ASA1 had to be regarded by the parties as legally binding because they both wanted, and were insistent on, rights which could be legally enforced. I think that there are two flaws in this submission. The first is that not all shams are intended to be legally unenforceable. Assuming that ASA1 was a sham, the intention of the parties was that the consideration for it would be in exchange for participation in CR1 rather than genuine advisory services. Had the truth ever come out, the courts would have concluded that this was a contract illegal as performed, and unenforceable for that reason, but there was still an intention to create legal relations. Secondly, the fact that the conspirators, and for that matter Qatar, would fervently hope that the truth be concealed is nothing to the point. If the sham nature of the transaction remained private to the parties, the contract would be (illegally) performed according to its unlawful terms and no one would be any the wiser. If the truth emerged in all its aspects, the court would refuse to enforce it. But it is the very essence of a sham arrangement that the parties intend that the truth remains cloaked and the contract is performed according to its outward appearances. Thus, Mr Winter's first additional submission proves too much and must be rejected.

255. For similar reasons, I would reject Mr Winter's submissions based on the separate $1.3B proposed investment and TK's exoneration from involvement in ASA2. From his perspective these are neutral considerations. They cannot retrospectively prove the validity, and the lawfulness, of ASA1.

256. Mr Winter's second submission is more subtle. No other defendant wishes to join with him in advancing it. I think that their reluctance, borne perhaps out of an indication from me to Mr Purnell as my many ideas about this complex case were still

a state of germination that the point seemed to have no merit, remains well-founded. It is said by Mr Winter that his client could never have intended that anyone would be caused gain or suffer loss: see s.5 of the Fraud Act 2006 read in conjunction with s.2(1)(b). There are two answers to Mr Winter's submission. The first is that, although proof of specific intent is required, this may be established by proof on a subjective basis that the individual in question foresaw the probability of X occurring as little short of overwhelming: see *R v Moloney* [1985] AC 905 (but cf. the slightly different treatment of this topic by Lord Simon of Glaisdale in *DPP v Majewski* [1977] AC 443, not cited to their Lordships in *R v Moloney*, and the earlier decision of the House of Lords in *DPP v Hyam* [1975] AC 55). Secondly, I think that Mr Winter's submission ignores the position of ordinary investors, perhaps even those who did not own Barclays' shares in June 2008, who were proceeding on the basis that the conditional placees were all receiving 1.5%. If the market as a whole had known that one conditional placee was being paid more, and that the others should have been getting more, it seems obvious to me that that would have impacted in some way on the share price. At this stage, it is arguable that TK foresaw all the ramifications of that because he was an experienced banker. His remarks about prison conditions also need to be addressed in this context.

257. Mr Winter's third submission is that there is no evidence that TK intended that the actual indicted representations be made rather than "generalised false representations". But I do not consider that it is incumbent on the SFO to establish that TK knew the exact wording. All that he needed to know was that the subscription agreement warranted that there were no other fees and commissions. He did know that, and also knew in general terms about equity prospectuses. He knew, one way or the other, that if the fee for ASA1 was in substance and reality a disguised commission, the warranty would be falsified. An examination of specific intent does not require a microscopic approach. I accept that the position is more complex in relation to the DRLs signed under CR1, although had I ruled in the SFO's favour on the law I would still be inclined to think that does not matter. On the other hand, it *does* matter in connection with CR2 and the Warrants Prospectus (factually irrelevant to TK's case), and for that reason amongst others I would have refused the SFO's application to amend even if I had been of a different view on the issue of direct liability.

258. Mr Winter's fourth submission relies on the distinction between the party to CR1 being Barclays Plc and the party to ASA1 being Barclays Bank Plc. In order to evaluate this submission, I must proceed on the basis that TK really needs it, which he does. On that premise we would have a situation where there is a superficial mismatch as between the two corporate entities, but the fact remains that the consideration for ASA1 was *not* genuine advisory services to be provided to Barclays Bank Plc, but rather a disguised commission payable in substance and reality by Barclays plc to Qatar. The effect of these arrangements would be to falsify the warranties, and it does not matter who was responsible in law for ASA1. The one advantage which the SFO may properly derive by focusing on the public-facing documents is that a close analysis of the legal relationships is naturally required at that point, but it is not also required in connection with the ASAs. Mr Winter is seeking to have his cake and eat it.

259. Mr Winter's fifth submission, and here he is not parting company with his colleagues, is that the representations contained in the public-facing documents were representations as to the intentions of Barclays Plc, and were true. The company intended to pay no more than 1.5%; others who were not the DMW of the company had a different intention. However, it seems to me that this is no more than a reformulation of the defendants' primary submission. If any one of the SFO's routes to liability is correct, it would follow that the defendants *did* make representations as principals as to the intentions and expectations of the company. The fact that the public documents made representations as to the company's intentions and expectations could not be an answer to that. I agree that the form and substance of the company's representations strongly suggests otherwise, but that is a further argument in support of the defendants' case on the principal point rather than a separate argument which can be invoked in the alternative.

Conclusion on the DRLs, Innocent Agency and Participation

260. My conclusion is that the SFO's case must fail on the law on all three candidate routes to criminal liability even if a case of evidential sufficiency were made out.

Cross-Admissibility

261. In my RB dismissal ruling given in December 2018 I said, without giving reasons, that ASA2 was admissible evidence in the case on ASA1. During the course of the trial, I doubted this because I was having difficulty with the notion that propensity evidence could be "reverse engineered" in this way. The SFO submits that my ruling was correct whereas the defendants submit that those doubts were soundly based.

262. All the evidence in the case is before the jury, whether because it falls within s.98 of the Criminal Justice Act 2003 or otherwise. It is also clear on authority, and I have directed juries in this way in the past, that the court does not have to be satisfied to the criminal standard of fact in issue X before it may be used in evidence in relation to fact in issue Y.

263. The critical question for present purposes is: if there is not a case to answer on Count 1, viewed on a standalone basis, is the evidence bearing on Count 2 admissible so as to make a decisive difference?

264. In propensity cases properly so called the law does not insist on a strict temporal sequence. This is because propensity is usually a personal characteristic which, if present, will have a tendency to be enduring. This is particularly so in sex cases but there is no reason why it could not be so in cases involving dishonesty. If a defendant has paedophilic tendencies, these are highly likely to be of long-standing. In relation to dishonesty, the issue is less clear because it will always depend on the facts of individual cases.

265. In *R v Wallace* [2007] 2 Cr. App. R. 30, the Court of Appeal upheld a conviction in relation to four robberies which shared certain common features. The Crown did not argue propensity but submitted instead that the evidence as to the appellant's involvement was stronger if the evidence on each count was viewed as a whole rather than in isolation. So, this is an example of what the SFO characterises as a "holistic"

approach, not based on any strict sequencing but a mixture of quasi-propensity and quasi-similar fact.

266. Moses LJ visited this territory in *R v McAllister* [2008] EWCA Crim 1544 giving the judgment of the Court of Appeal. He said:

> "Asking a jury to look at evidence relating to a number of allegations as a whole in order to cast light on the evidence relating to the individual offence is not asking a jury to consider a propensity to commit an offence; on the contrary, it is merely asking the jury to recognise that the evidence in relation to a particular offence on an indictment may appear stronger and more compelling when all the evidence, including evidence relating to other offences, is looked at as a whole. In other words, the evidence is adduced not as evidence of propensity, but rather to explain and augment other evidence of guilt, Such evidence may loosely be described as 'similar fact' evidence, although attaching labels in this area of the law, as in so many others, aggravates the confusion." [paragraph 14]

267. I would agree that the application of labels may not assist, but the principle still needs to be identified. I think that it works along the following lines. It is very much fact specific. It depends on how many alleged offences there are and how close they are to one another in terms of time and any common features. Ultimately, the judgment is for the court having considered all relevant circumstances. Identification of a relevant gateway under s.101 of the Criminal Justice Act 2003 may not really matter. Even if it does, the court is required to consider considerations of overall fairness: see ss.101(3) and 103(3). These are relevant to questions of admissibility.

268. The SFO submits that if the jury consider ASA1 to have been a sham then they would be entitled to use that in deciding whether ASA2 was a sham. I consider that it is necessary to be slightly more precise. The real question is the knowledge and/or the intentions of JV, CL and RJ as the case proceeds from Count 1 into Count 2.

269. Looking at (1), RJ's knowledge, I consider that the connection between ASA1 and ASA2 is sufficiently close in time, design and circumstances that, should there be a sufficient case of sham in relation to ASA2, that would be admissible against RJ on ASA1. It is true that the circumstances were not exactly the same, and that the bank was under greater pressure etc. in late October 2008, but the connections are sufficiently similar to enable the evidence to be treated as relevant, probative and cross-admissible on Moses LJ's approach. Issues of dishonesty are really subordinate to this. The same applies to CL, but only for the reason that I will be holding in due course that there is a case to answer against him

270. The SFO submits that the same analysis could apply to JV even if there is no case to answer against him on Count 1. This is where I begin to struggle. On this premise, JV would know that ASA1 contained a fee for advisory services in the amount of £42M. If the case fails against him on the issue of knowledge, he would be entitled to assume that these were genuine services. There would be no proper basis for any other approach. Furthermore, he would also have known that the agreement had been drafted by lawyers.

271. Moreover, I cannot begin to see how the SFO's case can be retrospectively "reverse engineered" against JV such that an *ex hypothesi* insufficient case on ASA1 is converted into sufficiency with reference to ASA2. In this regard, the sequencing of these events is a critical factor.

Section 118 of the Criminal Justice Act 2003

272. An issue arose during the course of Mr Brown's final submissions as to the admissibility of statements made in a hearsay document or transcript admitted under s.117 to the actions or state of mind of co-conspirators. Section 118 preserves common law rules relating to this exception. On this occasion I will take my steer from paragraph 33-66 of Archbold, in particular the second sub-paragraph but noting the decisions of the Court of Appeal in *R v Smart and Beard* [2002] EWCA Crim 772 and *R v Platten* [2006] EWCA Crim 140. The evidence will be admitted on a conditional basis, assessed for its weight (through the lens of a hypothetical reasonable jury), and a final decision as to its admissibility will be made only if there is other evidence of common purpose. In other words, there would have to be other admissible evidence of the conspiracy the SFO alleges. The application of the co-conspirator evidential rule, as Mr Winter described it, is of particular relevance to the RB/CL call timed at 12:09.

Pausing to Take Stock: II

273. Notwithstanding my conclusions on the law, it is essential that my ruling proceeds into the issue of evidential sufficiency across the board. The reasons are so obvious that I need not state them.

274. Initially, I was of the view that I should consider whether there is a case to answer on the merits against JV and/or CL in relation to both Counts on some form of preliminary issue basis. This would have been on the foundation that the ASAs were shams but the issue of knowledge could be separately addressed. I have long since reached the firm conclusion that such an approach would be profoundly unsatisfactory, and that it is inevitable that I consider the entirety of the case against all the defendants in a composite way, drawing out where necessary any case-specific matters. This cannot be a question of finding short-cuts or easy judicial circumventions.

275. In any case, I have concluded that the four-stage approach I applied on December 2018 in relation to RB's sole application is too hierarchical and formulaic. All stages need to be considered holistically with regard to the entirety of the evidence, and not sequentially.

ASA1 as a Mode of Disguise: A Case to Answer on the Conspiracy Count?

276. This is the longest section of my ruling, and I have decided to sub-divide it into a number of sub-headings to aid rigour and clarity of analysis as well as comprehensibility to readers.

A Holistic Approach

277. I think that I have already made it sufficiently clear how and why the only proper approach to this complex issue must be holistic, abandoning therefore any aspects of the appearance of a layered, hierarchical approach in my RB ruling handed down in December 2018. Not merely is this a case with numerous possible evidential interconnections, the available evidence comes from multifarious, diverse sources and, viewed in isolation, may be capable of different reasonable interpretations. All the evidence has to be analysed and considered before a proper conclusion may be reached on any issue.

278. The proper application of what I am calling a holistic approach discards assertive, mechanistic and deterministic reasoning. It must be more nuanced and fluid.

Inherent Probability

279. The defendants have submitted with considerable force, elegance and cogency that there are a number of personal, psychological, commercial and human factors which combine to suggest, if not indicate, that the proposition that ASA1 was a disguise or sham is inherently improbable. Mr Winter's further submission is that the court should apply a higher "practical" standard of proof. I reject that last submission because the criminal standard of proof is inflexible. The inherent probabilities are taken into account in evaluating whether the burden has been discharged.

280. These factors include, by way of drastic summary:

(1) the good character of all the defendants, and the utmost probity and integrity of JV.

(2) the wealth of Qatar, and the inherent improbability that its Prime Minister would wish to enter into a dishonest arrangement over as little as £42M or at all, given that there was no need for him to do so.

(3) the "cascade of trust and responsibility" working within the bank: per Mr Agius.

(4) the evidence which suggests that Barclays had been exploring for a considerable period of time the possibility of a strategic relationship with Qatar, and ASA1 was merely the culmination of that aspiration. Mr Agius mentioned "favoured nation status" to capture this idea.

(5) ASA1 was of considerable commercial value to Barclays, yet it would cost next to nothing to Qatar to deliver the requisite services in accordance with its terms.

(6) ASA1 was heavily "lawyered" at all material times, on a full disclosure basis by the defendants, contradicting the notion that it was somehow dishonest.

281. The SFO place into the mix a series of countervailing considerations. It is said that without CR1, the bank was basically "dead"; that Barclays was highly motivated to enlist Qatar which was the lead investor in June 2008; that without Qatar, there was a high risk that the other investors would walk away because the market was expecting £4B; and that the commercial reality here is that Qatar would not have given away something for nothing on 11th June.

282. The SFO draws attention to evidence which militates against the proposition that Qatar was seeking a strategic relationship: Items 3, 41 and 140. Qatar was looking for a large cash fee to invest. Dr Hussain, it is true, said something completely different on 3rd June.

283. Without prejudice to the SFO's case that certain factors are decisive, the weight to be given to the factors the parties have enumerated would ultimately be for the jury to assess, but the following considerations must be germane to this issue.

284. First, the defendants and CL are all men of good character, and JV has positive good character evidence in support. The more conspirators there are said to be, the greater the strength of the good character evidence militating against the proposition that there was such a conspiracy. The observation could, I suppose, be made that the SFO's case would be stronger if JV's positive good character is removed from the equation.

285. Secondly, the character of Sheikh Hamad must be regarded as a neutral consideration if for no other reason than that his character is not formally in evidence. In relation to him, it is more profitable to examine the commercial realities. What was being proposed was an advisory agreement which would secure his fee (in two ways), would cost Qatar very little to deliver, would be in his interests as much as the bank's because he would be a significant shareholder for at least 90 days, and – subject to legal advice – would entail no wrongdoing. However, the analysis cannot stop there.

286. Sheikh Hamad appears to have been motivated by "his dosh", and for him it may have been particularly important to secure a better deal than everyone else. There is powerful evidence that RJ well understood this – when he said that even if the deal were based on 3% across the board, Sheikh Hamad would be paid an extra 2% for "consultancy". These factors potentially carry considerable weight and in the estimation of the notional jury could easily outweigh those on the defendants' list. Here, there must be room for a range of reasonable views. However, I entirely reject Mr Brown's attempt to persuade me that the "he wants his dosh" factor could in some way be conclusive. By putting his case far too high, any good point was in danger of being undermined.

287. Thirdly, the SFO's case is that the essential elements of the conspiracy, including the agreement, were in place before RJ's call to Sheikh Hamad on 11th June. I have been asked to consider the circumstances of that call. RJ was in South Africa and Sheikh Hamad was in Qatar. Is it likely that in these circumstances RJ proposed a dishonest arrangement and that Sheikh Hamad immediately accepted it?

288. Mr Kelsey-Fry went further and submitted that on the SFO's case "for some unfathomable reason" his client, a man of good character, almost out of the blue put forward a dishonest scheme to the Sheikh without first trying the honest route. It was submitted that RJ would have to be "a nutter" to have tried that. Had he done so, the high risk was that Sheikh Hamad would have walked away. RJ needed to preserve his commercial reputation at a time when Qatar was spending large sums. There is considerable force in these submissions but in my view they go too far. My later assessment of how this call is likely to have transpired on the SFO's version will throw light on this.

289. Fourthly, evidence does exist that the concept of a strategic relationship which might include a fairly "soft" advisory component features in the evidence even before May 2008. Such an arrangement was neither novel nor heterodox, and Mr Agius took it in his stride. "Favoured nation status", if that is what it was, would be of considerable value to Barclays in circumstances where its profile in the Middle East was low, Qatar was becoming a major player and the opportunities were extremely lucrative. It would also be of value to Qatar. Again, the weight to be given to this evidence would be for the jury to assess in the light of the precise sequence of events, both in the period from 4th – 11th June and then on the day itself.

290. I have pondered on the inherent probabilities and have come to the conclusion that how they finally weigh in the balance is difficult to assess. Some of the defence points are very strong, and the commercial realities would have to reflect the real cost to Qatar. Sheikh Hamad could pocket "his dosh" and yet properly deliver the consideration for the additional value that was being conferred by allowing Qatar to provide valuable advice. The two propositions are not inconsistent. Besides, it is difficult for me to make a proper assessment through the lens of a notional reasonable jury because in a case such as this there is room for a broad spectrum of evaluation. Moreover, the inherent probabilities must yield to the evidence of what happened and a reasonable interpretation of it, seen in context.

<u>As from 3rd June 2008, were the Defendants Working to Hide the Fee?</u>

291. I consider that there are two aspects to this. First, and as I have said, Qatar wanted 3.25% (the amount inferentially agreed on 5th June) and did not care how it was paid. Barclays, on the other hand, was always proceeding on the basis that the fee under CR1 would remain at 1.5%, and the balance of 1.75% would be delivered by some other mechanism. At this stage, I am using the term "mechanism" entirely neutrally. TK undoubtedly used the term in this neutral sense in at least one document before the jury: see Item 3.

292. The evidence which supports the proposition that the defendants and Barclays generally were proceeding on this basis and had never agreed to pay Qatar 3.25% *under CR1*, has been collected by Mr Kelsey-Fry and his team in their written argument. It is entirely compelling and cannot be gainsaid. The point is important in the context of the 13th June memorandum, but it is not dispositive. This is because the memorandum could still be misleading even if Barclays had always treated the 3.25% as being split. The point here is that the memorandum attributes a state of mind to Qatar.

293. By way of summary of that evidence:

(1) TK's reference to RB of a deal on the side (4th June, Item 93) is plainly inconsistent with the proposition that the entirety of the fee was being paid under the structure of CR1. It was not; it would be paid "on the side". If this meant that it would appear to be on the side but in reality it would be part of the consideration for CR1, then "on the side" would be a misnomer or deceptive label. However, that raises a rather different point.

(2) On 6th June RJ arranged for RB to resend to Qatar the term sheet which continued to specify 1.5% (Item 114).

(3) The discussions which took place internally after 3rd June were all about getting Qatar its money by some separate, or apparently separate, route.

294. Insofar as the SFO's case is based on the proposition that Barclays, as opposed to Qatar, ever had it in mind to pay a 3.25% fee under CR1 before 11th June, I do not think that a reasonable hypothetical jury could accept that. Even so, I have to say that this was always a straw man which never needed to be put up in the first place.

295. The second aspect is that a fair examination of the evidence bearing on the period 3rd - 11th June invites consideration being given to the solutions the defendants were thinking about as being the means of paying the additional 1.75%. Thus, there are references in the papers to side deals, cash deposits, option structures, artificially reduced commissions, hedging agreements and other arrangements which appeared to be unrelated to CR1 because of a temporal gap. There is also plenty of evidence that the defendants, and others within the bank, were struggling with this issue, and wanted to deposit the problem in someone else's inbox. Mr Brown submitted that it simply would not have been possible to devise an honest arrangement to deliver the 1.75%. This was putting the matter far too high. It was possible, but did the defendants believe that it could be done; and, if so, what was their thinking?

296. Depending on how they are interpreted, the arrangements under prior contemplation could not have worked legitimately. This was because they would have been regarded as transparent attempts to deliver Qatar its additional fee on a factitious, possibly disguised, basis. It is said on behalf of the defendants that ideas were thrown up for consideration and were then rejected; none was seriously pursued. There is no evidence too that any of these moved off the drawing board into viability, which would have included the obtaining of legal advice.

297. I would continue to agree that it does not follow from the fact that the defendants were considering solutions which could not have passed the "smell test" that the "mechanism" that was finally alighted upon would have fallen into the same category. However, on one possible view of the evidence, this background is by no means a neutral factor, particularly when consideration is given to the precise sequence of events in the immediate run-up to the SFO's alleged conspiracy.

The SFO's Case Theory as Opened to the Jury: the "Mechanism"

298. This was central to the way in which the SFO through Mr Brown opened the case to the jury. The forensic benefit of this platform from the SFO's perspective is that it irons out all the difficulties would otherwise be faced in proving knowledge and belief in relation to all the defendants. This is because, if the SFO's mechanism is sufficient, they all had relevant knowledge of it and belief does not come into play at all.

299. The logic underscoring the SFO's original case on mechanism proceeds along the following pathway:

(1) Qatar demanded an additional fee of 1.75%.

(2) the defendants wished to accommodate that demand and/or believed that they had no choice in the matter because Qatar would not have invested otherwise.

(3) the defendants knew that all the conditional placees had to be paid the same fee, agreed at 1.5%, and CL in particular did not want to alter that.

(4) The purpose of ASA1 was to accommodate Qatar's demand.

(5) ASA1 was indissolubly linked to CR1 because the former was designed to facilitate Qatar's participation in CR1 and would not have been concluded without the latter.

(6) It follows that part of the consideration for CR1 was paid under ASA1, and that the services mentioned in ASA1 were not genuine. In restating this in oral argument, Mr Brown referred to the "impossibility" of achieving the desired outcome in an honest way.

300. These factors, taken individually and cumulatively, may be described as inherent in the *concept* of the advisory services agreement as it was initially conceived. I would agree with the SFO that they were all in place when the mechanism was "cleared" by CL, Mr Diamond and Mr Morse on the afternoon of 11th June, and – on the SFO's contention – when the conspiracy came into being, even if aspects of the detail remained to be sorted out. As was said in opening:

> "the point at which they demonstrated their awareness of that background and shared the intention that the ASAs were to be used as the answer to that problem is the moment that we say that each conspirator entered into the agreement alleged against them".

This was on 11th June. For RJ, TK and CL, this point was reached at some stage before 15:51. For RB it may have been more of a process.

301. As I have said, the fact that Qatar had not yet assented to the mechanism does not, I think, invalidate this proposition, because the s.1 agreement could be fully in place notwithstanding that it was conditional on X happening. The proposition has other difficulties, which I am about to investigate.

302. The SFO also relies on the fact that the services were never properly negotiated, their specification was always vague, LIBOR interest was included, the manner in which the Challenger investment was addressed, the fact that Qatar was being paid in full after 12 months although the agreement was to run for 36 months, and that at a later stage in the negotiation Qatar insisted on a less ample description of them.

303. I would describe these factors as "additional circumstances". In my view, they do not logically inhere in the concept of the ASA, on either view of what that concept involved, but in any case they flow from a consideration of what happened after 11th June in connection with the rolling out of the concept. The distinction is not germane to what my approach should be to the binary issue of whether ASA1 was a sham, properly analysed, because evidence of subsequent events and matters is obviously relevant to that; but it does bear on the issue of knowledge. But this distinction *is* salient to the manner in which the SFO chose to open its case to the jury because these additional circumstances did not exist when the alleged conspiracy came into being and the SFO was insisting that guilt could be established simply by demonstration of awareness of the background and sharing the intention that the

ASAs were the solution. Of course, the SFO was also saying that the additional circumstances threw light on the intentions of the conspirators but given its case on mechanism this was entirely belt and braces.

304. Finally, the SFO relies on the inferences to be drawn from the numerous recorded telephone calls and the emails. Plainly, these too are capable of throwing light on whether ASA1 did specify genuine advisory services. However, the point I have just made also applies to this evidence.

305. At this stage of my analysis, I am addressing the SFO's "mechanism" and what I have called the circumstances inherent in ASA1. The key question which arises is: does the SFO's logic stack up?

306. In my judgment, it does not, because it puts the case too high and assumes what needs to be proved. It amounts to an impermissible attempt to transmute inherent probability into inherent certainty. The fact in issue for the jury is always the following: was ASA1 a disguise for an additional fee for subscribing or was it the intention of the parties that genuine services would be provided? Proof of the mechanism, without more, does not prove that the parties did not intend that genuine services be provided. The parties *could* have reached an agreement to that very effect notwithstanding that all the various elements of the SFO's case were satisfied. This is because RJ and Sheikh Hamad could lawfully have agreed that Qatar would provide services and be paid for them on the basis of the 1.75%. As will be seen, this (by irresistible implication) was also the legal advice given or endorsed by Clifford Chance, and in my view it was sound advice.

307. I think that one needs to be careful with the noun "purpose", in the context in particular of the questioning of RB at interview, but also more generally. I return to Megarry J in *Miles v Bull* and Viscount Radcliffe in *DPP v Welham*, two formidable judges. It is sometimes difficult to differentiate between ulterior and real purposes, and in any event the law is more concerned with the issue of intention rather than of motive or purpose. In my view, the intention of the parties to ASA1 *could* have been that genuine advisory services be supplied notwithstanding that the purpose was to accommodate Qatar's demand for an additional fee. These are not inconsistent propositions. RB was asked a plethora of questions at interview which were seeking to compel him to accept an inherent logic which in my judgment simply did not flow.

308. In my judgment, it is the final step in the SFO's logic which is problematic. The conclusion, as a final deduction from all the anterior steps, that there *could* not have been genuine services is a *non sequitur*. I would add this: if mechanism *simpliciter* is sufficient, how and why could it be the case that Messrs Morse and Diamond were not co-conspirators, as well as a host of others?

309. In my view, a more nuanced, and more complex, analysis is required, and I will be returning to this. However, the SFO's adherence to a concept which is overly mechanistic in its false logic has had the consequence that the basis on which the case was opened to the jury was overly prescriptive, and the defendants have been able to draw a massive forensic advantage from this by deliberately, and not inappropriately, directing their arguments to the target they have been asked to address. The SFO has dictated the (wrong) agenda, and the defendants have been content to collect that particular gauntlet. Indeed, the defendants have been able to proclaim: I *did* know

about the mechanism you say is enough to constitute my guilt, but so did everyone else and what is more, it is not enough to prove my guilt.

310. A more nuanced approach continues to focus on what happened on 11th June, drawing such inferences as may be appropriate and taking into account the extent to which later evidence throws light on what happened. This approach recognises that the factors the SFO has enumerated in relation to "mechanism" are or may not be neutral factors, and they certainly increase the index of suspicion (without more, a point which cuts both ways because that was well understood). My "additional factors" feed back into the events of 11th June only to the extent that there is other evidence that the defendant whose case under consideration was a conspirator on that date; or, possibly in relation to RB, was not quite "virtually certain" then (I will need to come back to this). The same applies to the inferences to be drawn from the transcripts. Additionally, and in substitution for any false deductive conclusion that flows from the SFO's mechanistic approach, the evidence in relation to any intention to provide services and the provision of them must be considered.

311. If, at the very end of such an enquiry the court were to conclude that the agreement was a sham, it would I think follow that the court would also be concluding that no part of the purpose was to provide genuine services, and that the sole purpose was to pay the additional fee. This proposition derives from Viscount Radcliffe in *DPP v Welham*. Another way of expressing it would be that the conclusion must be that it was not the common intention of the parties to ASA1 that genuine services be provided. The real point I am making, perhaps labouring, is that the reasoning does not proceed directly and mechanistically from identification of the purpose to conclusion, but takes on board the issue of intention in relation to the stated consideration for the agreement, being services, as well as the quality of the evidence relating to that issue.

312. The fact that an important plank of the SFO's case as opened to the jury has been demonstrated to be unsustainable may have significant ramifications, not least because the jury would have to be directed in any summing-up that they could not convict any defendant on this basis alone. Again, this is a matter to which I will have to return.

11th – 13th June 2008: the Evidence

313. The defendants have focused on this period taking the view that it is the most important. I would entirely agree with that evaluation.

314. My purpose in examining this evidence with care is to investigate, amongst others, the following:

(1) the inferences to be drawn in connection with the TK/RJ conversation and the TK/CL conversation(s) on 11th June.

(2) a possible view, or interpretation, of the TK/RB exchanges on the 11th June.

(3) the inferences to be drawn from, or connection with, earlier exchanges that day.

(4) whether the defendants knew or intended that no services would ever be provided (as opposed to being concerned with the appearances and the optical jeopardy).

(5) the extent to which the lawyers were aware of "all the moving parts" or were or could have been misled.

(6) whether there is evidence that Qatar was proceeding on the basis that the ASA was simply a means of delivering an additional fee.

(7) whether, looking at the matter more generally, there is evidence of dishonesty.

(8) whether the evidence supports the proposition that a conspiracy was in place by late afternoon on 11th June.

This list is not exhaustive. I will also include an analysis of how the SFO's case plays out in connection with the 13th June memorandum if (1) its version of "mechanism" is preserved, and (2) it is removed.

315. What follows cannot be an exposition and analysis of all the evidence in the case. There is too much of it. However, I have reflected carefully on the parties' written submissions, have returned to the ipad, and have had available my detailed notes prepared for the purposes of my summing-up. I believe that I have left nothing out of account even if I may not mention it.

316. I must begin this examination of the evidence with what happened on 11th June 2008. Given the SFO's contention that the conspiracy was made on that date, an examination of the *minutiae* is inevitable. This is one of those rare cases where, if the SFO is right, there is direct evidence of at least part of the conspiracy as it came into being. The direct evidence may not be complete, but this is not an exercise in having to infer the conspiracy from subsequent events. I fear that some of Mr Brown's submissions sought to place too great a weight on "actions done in furtherance of the conspiracy": here, there was a tendency towards circularity.

317. What follows is what I would regard as the SFO's best case on "one possible view of the evidence", reflecting Aitkens LJ's formulation in *R v G*.

318. At 11:40 on 11th June there was a wide-ranging conversation between TK and RB (Item 133). TK had spoken to CL who made it clear that he did not want to change the structuring or economics of the transaction. The deal would therefore be based on 1.5% across the board. TK then reported to RB what CL had been telling him: namely "I can figure, I'm happy to figure out as many different ways as possible to, to take care of the economics on the other end". It was suggested that RJ needed to "step up and pat the pony here a little bit". RB was particularly concerned that they would get the deal over the line in all other respects but this issue would prove to be the sticking point; that would be "a disaster of unmitigated proportion", and the issue therefore had to be resolved immediately. This sets the scene for subsequent conversations, and I agree that it would be fanciful to say that CL was already proposing a dishonest solution to TK, who in the context of the way forward used the term "mechanism". This conversation, seen by itself, is neutral as to the possible solutions within the range CL had in mind. It follows that CL was not sending TK away to devise a dishonest solution.

319. At 12:09 on 11th June an important call took place between RB and CL (Item 135). The transcript (part of the Annex to this ruling), and the audio, need to be examined with care. I have re-listened to this, and other key audio-files, more than once in the course of preparing this ruling. CL said first of all on this topic that Qatar must have some experience of UK subscription agreements and "the question really comes down to are they fairly relaxed about these sorts of things or are they nitpicky etc. etc." As will be demonstrated, CL appears to have had a somewhat relaxed view of these matters. It is suggested by Mr Winter that CL was talking more generally about the Subscription Agreement and that Qatar had already instructed lawyers to deal with these issues. The merit in that submission, and there is undoubtedly some merit, would be for the jury to decide because the potentially powerful contrary argument is that it may not be possible to insulate the "nitpicky" observation from what CL was about to say.

320. CL then said that "the additional fee" could not be something which Barclays was offering everybody else. The inference must be that CL did not want to pay more across the board. The next critical part of the transcript reads as follows:

> "CL: So therefore it cannot, it cannot be a, it cannot be linked to the transaction.
>
> RB: No.
>
> CL: But, but outside of that I can be pretty flexible.
>
> RB: Yep.
>
> CL: And you know I really don't care about if they get it paid in a lump sum or over time or anything like that. I just can't have it linked into the transaction so that it has to be unconditional.
>
> RB: No, we need to find, we need to find a way of, a mechanism for doing that, because, I mean, we face this all the time, as you'd expect, in, in, in, actually I say we face it all the time, we used to face it all the time when, um, when the, when one, in the old days, was competing for business and, and, you'd do a discount on fees or something …
>
> CL: Mmmm
>
> RB: … and you'd have to try and get some value back from somebody …
>
> CL: Mmmm
>
> RB: And, and certain investment banks used to use, just used to send, you know, disclose fees of X and then send the cheque back for blob and of course we never did that and, and we were uncompetitive. But, but finding a way of doing it which is, which, you know, passes the smell test …
>
> CL: yeah.

> RB: Is really the issue.
>
> CL: Yeah, but we must, we must have ways we've done that in the past.
>
> RB: I would have thought so and I said to Tom 'look we can't …' I said, 'someone needs to decide who's, who's, who's got the problem, is it Roger's problem, is it Tom's problem, whose problem is it, because we need to bottom it out.' … very quickly, because whilst we, whilst we of course should engage fully with them, on all the documents, we wouldn't want to run the risk that can get them over the line on, on all of that and …"

and slightly later in the same call:

> "CL: And you know, it has to be some sort of transaction they do which could be very short but which they make £25M or whatever the number of pounds profit.
>
> RB: Yeah.
>
> CL: Er, but as long, I think as long as it's linked to a transaction that we're not committed to but have an agreement with them we will, I think we can find a way.
>
> RB: Yes, I agree
>
> CL: He says
>
> RB: Hopefully."

321. The defendants draw attention to the use of the preposition "into" in CL's utterance – "I just can't have it linked into the transaction so that it has to be unconditional". CL used the preposition "to" slightly earlier, and I think that nothing can turn on this. That was a bad point. CL's understanding was that the arrangement would have to be separate and unconditional. This could mean: "entirely standalone and independent"; it could mean: "factually connected but commercially viable on a standalone and independent basis", or it could mean: "we will make it appear separate but the reality is that there is a complete connection, both factually and commercially". I do not have to make a choice. A reasonable interpretation of what CL was saying could be that the solution he was proposing at the outset would have been dishonest: not so blatant as a brown envelope, but more or less on the lines of RB's cheque for "blob". He did not care whether it was paid as a lump sum or over time; it just could not be linked "into" the transaction. I am not particularly attracted by the argument that payment in the form of a lump sum could have been honest; or, put slightly differently, that this is what CL must have meant. I will examine the alternative method of payment over time, but I will end up in a similar place. Or, at the very least, this would be for the jury to consider. The fact that CL's tone is so relaxed and easy-going on the audio is not a factor which necessarily helps the defendants (he is not on trial), as I will be explaining.

322. RB's immediate response was to agree with the last part of what CL said and suggest that they needed to find a "mechanism" for doing that which passed the smell test. The term mechanism has obvious resonance because we will be hearing it again soon. His comparison between the past behaviour of Barclays with that of other institutions gives him some credit. However, that was in the context of a mechanism – an antique practice no doubt of Barclays' competitors - which was patently dishonest. RB made it clear that the mechanism needed to "get some value back from somebody" *and* pass the smell test. RB agreed with CL that the bank must have found ways of doing that in the past. RB also made it clear that he had been discussing the issue with TK: the issue was either TK's or RJ's problem.

323. I have thought very carefully about the "smell test" in the context of examining the SFO's case on "one possible view of the evidence". This part of the case, I must emphasise, is not a new case at all because the SFO has always focussed on this particular call. It could mean something which is: (1) honest, or (2) dishonest but appears to be honest, because you cannot smell it. Taken entirely in isolation, what RB said should probably better be interpreted as meaning (1) rather than (2). However, it certainly does not have to be interpreted in that way, and (2) becomes a stronger candidate as the conversation proceeds. CL's observation that "we must have ways we've done that in the past" could be either (1) or (2), but I must continue.

324. CL then suggested "some sort of transaction they could do which could be very short but from which they make £25M or whatever". The point he was making was that this would not be linked to the principal transaction. Mr Winter has submitted that this either definitely was or could well have been honest, but I have to say that is a benign interpretation. In my view, there is a reasonably compelling argument that, even though CL was taking this entirely in his stride, the solution he was proposing was on the wrong side of the line. It was little or no different from many of the solutions which people were coming up with on previous days, not that CL was necessarily aware of any of these. Or, at the very least, a notional reasonable jury might see it that way. It would have passed the smell test because the link would not have been apparent, and there would have been no smell. When this was put to him, RB merely said "yeah". That does not mean that RB was necessarily agreeing with what was put to him. CL was his senior and RB's expertise in the bank did not cover subscription agreements. However, he did understand what CL said, whatever it was. We are or may well be in definition (2) territory for both of them, and we clearly are for CL. Or, a hypothetical reasonable jury could so decide.

325. My further comment is that on one possible view of the evidence CL may inadvertently have been offering his listeners an insight into the culture, practices and ethics of this particular bank, and maybe it goes even further. Barclays would not apparently do anything that was transparently wrong, but others did. The CFO of Barclays, without batting an eyelid, was prepared to recommend a short transaction which would pass the smell test only on his definition of it. However, there are clear difficulties in seeing this brief episode in quite these terms, not least because it creates the danger of stereotyping.

326. It is important to understand that CL did not appear to believe that what he was proposing could properly be regarded as dishonest under recent Supreme Court authority. On one level, that it is a point in his favour: he was not proposing anything dishonest at all. On another, the fact that he did not appreciate this may be the whole

point. What I would entirely repudiate is the notion that I am ascribing to Barclays a "criminal culture" in some crude or undifferentiated sense. One needs to paint this in more muted colours: dishonesty, applying the two-stage test of Lord Hughes, is capable of operating across a spectrum. I reiterate that I am not I tarnishing anyone in particular, beyond CL that is, with any "culture" if it exists, because the need for separate consideration of the defendants and for the avoidance of stereotyping remains paramount.

327. RB concluded the conversation that with the observation that it was for TK, RJ and others to come up with something. RB did not understand that CL was instructing him to do anything. This was because CL was not. I agree with Mr Winter that an honest solution, if found, could still have been adopted; and the defendants are able to contend with some force that such solutions may still have been in the process of being pursued with others in the bank. The die had not been cast. Nor is it a case of deploying this evidence against TK (as opposed to RB) directly. It is a case of understanding the context for what was about to ensue.

328. At 12:22 there was a conversation between TK and RB (Item 142) in which the latter put forward a complicated proposal (he did not use the term "mechanism", although that would not have been inapposite) involving a hedge fund arrangement, described as a "structured finance solution". It was the best he could come up with. If carried into effect, it probably would have been dishonest. RB would need to explain to the jury why it was not. TK did not expressly reject it on that basis; his concerns were of a more practical nature. The fact that RB was thinking along these lines reflects poorly on him, whether or not he had taken his cue from CL.

329. At 15:51 came the first of the trilogy of critical conversations between TK and RB. This conversation was quite brief because its purpose could not have been to spell out the detail of the "mechanism" which in due course became ASA1 but rather to say that the issue had been "sorted out". The material part of the transcript reads:

> "TK: … I've sorted out a mechanism, er, with Roger, um, and I've got it cleared in principle with Bob, Chris and Steve Morse.
>
> RB: okay.
>
> TK: Um, and so what it has to do with is, is an advisory relationship so I think we're – I think we're in pretty good shape. He's going to present it to –
>
> RB: Do you think – do you think it works for them?
>
> TK: I think that it works for them and he's going to present it to, er, to them this evening in principle.
>
> RB: Okay
>
> TK: So I just, the reason I am calling is just to allay your concerns. (he laughs)
>
> …
>
> RB: So if we have a solution, that's tremendous."

330. For the SFO's case to be viable, I think that the position must be that the first step in the conspiracy was an agreement between RJ and TK to hide the additional commission in an advisory relationship, the second step was to bring in CL on the same basis (in the context of his clearing it in principle), and the third step was for TK to recruit RB because he was responsible for executing the deal. The exact temporal sequence at stages one and two perhaps does not matter, because it is probable that there were other conversations which were not recorded. In order for this third step to work, the SFO does not have to prove that RB necessarily understood that this would be a dishonest arrangement from the outset.

331. TK's use of "mechanism" is interesting. On occasion in May he had used it in its entirely neutral sense. But did he do so on this occasion? That is the central question in the whole case. One naturally starts with an open mind, in full recognition of where the burden of proof lies as well as its standard, although the jury would be entitled to have regard to the post-4th June period. One possible view, and I will return to this, is that the allaying of RB's concerns, which TK knew about (transmitted in all probability during the "clearing" conversation with CL), was in the context of a mechanism which could pass the smell test according to my second definition. TK knew that Qatar was likely to accept this mechanism in principle because the inference must be that RJ had told him just that. Either Qatar would be doing so because a strategic arrangement underpinning the commercial reality would be attractive, or it would be doing so because, as CL had said, it would not be "nitpicky". CL had also told RB that everybody knew that this was a real problem, including "them" (*i.e.* Qatar). For this purpose, it is not necessary to fix TK with what CL told RB, save to the extent I have already indicated: that TK was aware that RB had concerns, whatever their nature.

332. It is said by Mr Winter that the "mechanism" which his client sorted out with RJ and had got "cleared in principle" by Messrs Diamond, Morse and CL, is consistent only with TK having thought that Qatar would be prepared to enter into a genuine advisory relationship. The contrary view is, apparently, "frankly absurd". There is some force in that submission although I would certainly baulk at the adverb "only" and the epithet "absurd", with or without any rhetoric. If the SFO is being criticised for mechanical thinking, the tables are now being turned. In fact, these tables are asymmetrical to the extent that the defendants are not required to advance a properly reasoned case. Another possible view of the evidence is that everyone thought that Qatar would be as relaxed about this as the bank.

333. There is also considerable force in the submission that, on the SFO's analysis, TK was clearing this advisory relationship on one basis with CL and on another with Mr Diamond and Steve Morse. Mr Brown did not accept that, but the logic is irresistible. However, the logic is by no means fatal to the SFO's case, even if, taken in isolation, it is a strong defence point. All that was required was slightly different explanations by TK to different people.

334. If this conversation is seen and understood not against the SFO's principal case theory as opened to the jury but in a broader and less mechanistic way, it is certainly consistent with the proposition that the "mechanism" TK was mentioning would pass the smell test because no one would be able to prove that this was a disguised commission. RB would not necessarily have understood that immediately or possibly at all, but it does not matter. I would tend to agree that RB thinking that this was

"tremendous" is likely to be a point in his favour, but it cannot help TK. It all depends on what exactly was discussed between TK and RJ, and TK and CL, in whichever order this was.

335. I am not saying for one moment that the SFO's case could be proved to the criminal standard if there were no other subsequent evidence: far from it. I am examining the 15:51 conversation in the light of what preceded it, and I will soon be examining it in the light of what followed.

336. This analysis places CL and TK much closer to the centre of the SFO's conspiracy, although RJ's role was obviously critically important. It was not as if he just being despatched by TK to ascertain from Sheikh Hamad whether it worked for them. RJ would have to understand the subtext, if that was what it was, and his judgment would be required on whether the Sheikh was likely to fall in the relaxed or the "nitpicky" school (TK would no doubt have used his own language). As I have said, CL was the CFO who had been setting out his views to RB and we know that TK had gathered that RB was concerned about something. It is possible that RB's concerns just related to the collapse of the whole deal, but everyone was obviously concerned about that, so why did TK mention them? When TK touched on RB's concerns, he laughed: the tone here is important. I have been urged not to read too much into that, but the jury could read something important. It is a reasonable inference that TK was told something about the way forward by CL which reflected the RB view – including, as I have said, the smell test.

337. I agree with Mr Winter that it is highly implausible that CL instructed TK or indeed anyone else to pursue a solution which would have been described or characterised in some way as a dishonest solution. CL would never have been so explicit; there was no need. CL did not need to give any instruction of any sort: all he ever had to do was to "clear" the proposal, whether it was honest or dishonest. In my judgment, it is necessary to move away from an approach which sees everyone in black or white.

338. Returning to the prepared statements of TK and RJ, each denies that this mechanism was his idea. The available evidence does not inform the notional jury as to whose idea it was, but the principal candidates must be these two. It was not CL's idea because he was seeking help from RB during the earlier call. As for RB, the position is more complex. The transcripts of these calls do not suggest for one moment that an advisory relationship could have been his idea, although I have covered the Mauro Maurani conversation at paragraphs 96-97 above. The mechanism of an advisory relationship came to the table eight days after the 3rd June meeting, and followed a series of concepts that were all or at least appeared to be dishonest. Each had been rejected, but – according to the defendants – *this* was different: it was honest. It may have been for that very reason that TK told RB that he was phoning to allay his concerns. On the other hand, TK certainly did not spell out what was different about this mechanism, nor was there anything in his intonation which suggests that this was a brainwave which ticked all the boxes. Furthermore, as this exercise proceeds in real time, it is apparent that this new idea, which would have been a brilliant idea if it was honest, was one which no one really wanted to boast about at all.

339. As I have said, the correct interpretation of the 15:51 call cannot stop at that precise time. We need to proceed in real time through the 18:19 and 18:34 calls, and then into the subsequent evidence. All of this is part of a free-flowing continuum.

340. The next conversation in sequence is the 9-minute call between TK and RB timed at 18:19 on 11th June (Item 145). I have returned to the audio file on a number of occasions. At the outset, I agree with Mr Winter and Mr Kelsey-Fry that by the time this call was taking place both MH and JS were "on the case". By that I mean that they were separately aware that the co-existence of the concept of an advisory agreement and CR1 created a legal issue which required resolution. Moreover, this legal issue may be expressed in exactly the same terms as my epitome of the SFO's case on mechanism. That is important in terms of its impact on the SFO's case as opened to the jury but at the moment I am looking at this more widely.

341. The fact that MH was "on the case" is evident from what TK said. The fact that JS was also "on the case" is demonstrated by the additional documentation filed on behalf of TK. At 17:31 JS sent RB the draft Subscription Agreement, although she did not send the password to open it until 18:46, which was after this call had ended. The inference must be either that RB's understanding of what he thought was page 13 of the draft agreement (in fact, it was page 14) was derived from what JS *told* him, or that RB had obtained the document from a different source (and got the page number wrong). The resolution of which inference is the correct one is not necessary for the purposes of ascertaining RB's mental state. In fact, when one listens to the call carefully it is obvious that RB was reading from the printed word. I think that the better view on the evidence must be that RB had got the text from somewhere but that he had not heard any legal advice from anyone on this topic.

342. During the course of the 18:19 call, RB specifically drew attention to the concern, which operated in two ways. The first concern was that the Subscription Agreement warranted that there were no further agreements. The second concern was that there were no additional fees. TK's first reaction was to say that he had talked to CL who had talked to MH and that "Harding's okay". In the light of other evidence, I do not consider that this means that MH was okay about the two concerns. The reference to "protection air cover" meant only that Group General Counsel would be endorsing and drafting the agreement before it went out. There is little or no merit in the submission that TK and CL had wanted actively to mislead MH. The better submission must be that, one way or another, MH was advising without knowing one essential fact, and TK and CL knew that. The position of RB on this issue requires separate consideration.

343. TK was correct in observing to RB that the second concern was more disturbing than the first. TK said that the first concern could be addressed by making the MoU "clear and separate". He prefaced this with the observation: "we've said that we're not paying for the subscription, what we're paying for is we're paying for the advice". TK's choice of words, and the emphasis on "we've said" which is derived from listening to the audio file, is quite telling. It is clear from what TK said slightly later in the same call that this was on the footing that the MoU (i.e. what would become ASA1) would not be disclosed. That might have been the common understanding of him, CL and RJ, but ultimately this does not matter. What is more relevant is TK's surprise when RB told him that the MoU would be disclosed. From that moment TK knew that the advisory agreement could not be concealed completely, but it did not follow that any disguise would automatically fall away.

344. As for the second concern, TK's understanding was that "by the letter of the law" even payments which were made in the ordinary course of business would violate the

Subscription Agreement. RB told him that the point was not as simple as that, because the wording was "as a consequence thereof" and not just "in relation to". Mr Boyce has pointed out that his client misunderstood the text of page 13 and thought that "in relation to" could or did mean "as a consequence thereof". I agree with that analysis, and I will proceed on the basis of that misunderstanding. It matters not, because the focus must be on RB's state of mind and nothing else.

345. I have thought very carefully about this. For a long time I had been attracted by the proposition that this conversation would not have been taking place on this basis if both TK and RB knew that the services were disguised commissions. On that premise, they would know that whatever the legal niceties, the Subscription Agreement would be falsified and that would have been the end of it. However, I have come to the conclusion that this is too simplistic an approach, and that a reasonable hypothetical jury could see this very differently.

346. The approach which previously appealed to me is that TK accepted that he needed to phone MH and direct his concern to page 13 of the draft Subscription Agreement. The issue, as RB pointed out, was apparently more about "as a consequence thereof" than "in relation to". This was a problem which had nothing to do with any underlying truth as to the nature of the services but arose because everyone in the team knew that the advisory relationship was being entered into "as a consequence of CR1". This is also why TK referred to payments made in the ordinary course of business. Here, TK was simply referring to what the agreement would be saying. Logically, MH might advise that the bank could not proceed along this path at all, but alternatively he might advise that this arrangement was lawful on the basis that the MoU would not be seen in law either as related to or as a consequence of the subscription. In order to understand both these matters, MH needed to get his mind round the fact that the advisory relationship and the subscription were connected, perhaps closely connected, in commercial terms. That connection would create the appearance the bank was paying for the subscription, and MH had to understand that.

347. There remains, and will always remain, considerable force in this approach, and we have seen it in TK's prepared statement and parts of RB's interview. The question arises as to whether this approach amounts to a realistic possibility that cannot be excluded in the light of all the evidence in the case. For the time being, however, I am within the transcript.

348. The foregoing was part of the following exchange which then occurred:

> "TK: If you consider that, I mean I guess the question when we actually go down this path, you know, in the next 24 hours, is that we need to make sure that Harding is comfortable –
>
> RB: Harding's got to, Harding's got to, got to know, because I don't know anybody else – I do not know if Judith's looking at it [I have corrected the transcript in line with Mr Boyce's suggestion, shared by Mr Brown], but whatever we agree or whichever way we go, he's got -
>
> TK: Harding will – Harding will review. Yes.

> RB: He's got to go directly to page 13 of the Subscription Agreement and get his head round it …
>
> …
>
> TK: … I will call Harding –
>
> …
>
> TK: say to him, just, I want, you know, reconfirm, work on something but just so that you know our reading is the place you've got to be concerned about is page 13.
>
> RB: Yes, now he will say no he should – he might say it's okay, right, because whatever we do, right, you know, will not be related to these, this subscription agreement, but, but, frankly we all know that whatever we enter into we are entering into in exchange for the subscription agreement. So, you know, it is, he's got to get his head round it."

349. It is at this point, amongst others, when the SFO's adherence to the formulation it opened to the jury becomes completely uncompelling. MH would *ex hypothesi* be advising on that very "mechanism' and would be a co-conspirator. The SFO's original approach also fails to engage with the cogent arguments that TK and RB have separately advanced.

350. In my judgment, what *is* clear is that MH would be advising on what the agreement said. He was not advising on any different basis, namely that the agreement did not mean what it said. Neither TK nor RB said that MH needed to be briefed in any way. The assumption was that he would work out the commercial nexus for himself.

351. As I have said, RB appreciated that MH might endorse this mechanism because "as a consequence thereof" had a narrow legal meaning. If he did not, that would be the end of it. It is his next utterance which has caused the greatest difficulty – "frankly, we all know" etc. including the "in exchange for". RB said that MH had to get his mind round that. If, as seems to be Mr Winter's and Mr Boyce's primary case in response to the SFO's primary case as opened, MH was being asked to get his head round the "mechanism", RB's comment is not problematic in any way. However, if one breaks away from that, I consider that there are two possibilities which need to be examined. RB could simply have meant that MH needed to get his head round the commercial link. Alternatively, RB could have meant the following: everyone knew that the fee *was* in exchange for (i.e. but only as a lawyer would put it, in consideration for) the subscription.

352. There is considerable force in the submission that RB's comment did mean exactly this: everyone (i.e. the bankers close to this deal) knew that the fee was in exchange for the subscription. That this may have been because RB's state of mind had been conditioned by his earlier conversations with CL and TK, and the experiences of the previous eight days or so. TK was not telling RB this in terms, but the circumstantial evidence could lead the jury to that conclusion. Earlier, TK had said in connection with RB's first issue that "we've said" that the fee was not in being paid for the

subscription. If one listens to the audio-file, that does not ring particularly true. It is a reasonable view of the evidence that in being frank RB was contradicting this.

353. TK's immediate response was not to contradict RB's "we all know" in any way. That is consistent with either interpretation of the remark. I have noted that in his prepared statement TK now says that he interpreted the remark as "Mr Boath was stressing his view that if the Bank was entering into the ASA in at least partial exchange for the investment the legal department needed to understand the consequences of this". But RB did not insert the adjective "partial", and one school of thought might be that TK is indulging in sophistry.

354. On what basis, then, was MH being asked to get his head round the issue? From TK's perspective, it was obvious that MH would be doing so on the basis of what the MoU would actually stipulate: that is to say, advisory services. Assuming that the MoU was untrue, TK would not be wishing or hoping that MH would get his mind round that. The position as regards RB is more complex. *If* "in exchange for" means "in consideration for" (here, I am using shorthand because RB is not a lawyer), RB appears to have wanted MH to address the issue on that very basis. That is a powerful point for RB in a situation where the SFO must prove virtual certainty of belief and dishonesty. However, the point would only have force if RB's "we all know" included MH. It is inherently implausible that Group General Counsel would ever be told the truth, and I think it is also inherently unlikely that RB could have been hoping for that. On the other hand, it is necessary to avoid an analysis that assumes what needs to be proved (i.e. that there was an inward truth different from the outward appearance), and maybe we are returning in a small circle to the first interpretation which is that MH had to get round the commercial link point and nothing more.

355. I appreciate the logical and intellectual force of the defence points, but ultimately this needs to be seen in the round. There is further material in the transcripts which does not help TK. He and RB might have had different states of mind and of knowledge at this point. How TK interpreted what RB said is also open to question. The more natural meaning of what RB said, ignoring the comment about MH, is that the fee was in exchange for the subscription. If RB was intended to capture "as a consequence thereof" in the proposition that came from his mouth, it was a rather unfortunate way of putting it. The remark about MH getting his mind round it does not have to flow in some perfectly logical way from the "we all know" comment. RB could well have been saying that one way or the other, MH needed to get his head round the issue on the basis of what the agreement said, and that would enable them to relax somewhat. TK did not think that they could relax entirely. In relation to RB as much as TK, the interpretation of this critical section must reflect the conversations that had occurred earlier that day. And, as will soon be made clear, further illumination is thrown by what follows.

356. The conversation between TK and RB then moved on to prison conditions. One perfectly reasonable analysis would be to say that both TK and RB wanted to avoid these conditions by proceeding legitimately. Another would be to hold on one possible view of this section of the evidence that both TK and RB, or maybe just one of them, knew or believed that the risk here did not simply inhere in the appearances and the commercial link etc. but engaged the disguised reality. After all, if the truth was that there was no disguised reality, why worry: would there really be a risk of prison because TK and RB misapplied "as a consequence of" in circumstances when

they were acting under cover of legal advice on that very point? Or so it could be contended. I was not particularly impressed by Mr Winter's submission that these men could not have been aware of any relevant sentencing guidelines.

357. The next TK/RB call was at 18:34 (Item 147) by which stage TK had spoken to MH. I have also annexed this call although I will be setting out important sections. TK had drawn MH's attention to page 13 but this was solely in the context of disclosure. Given the intensity of RB's concerns, and TK's own worries, it is surprising that TK did not seek MH's advice on the real point. MH's opinion, contrary to RB's understanding, was that the MoU probably did not have to be disclosed. TK then said that he personally did not care whether the MoU was disclosed. Mr Winter draws attention to an obvious inference to be drawn from the apparent insouciance, and also makes the powerful point that the issue of disclosure would have been completely outside the scope of the conspiracy, because it would be decided on by lawyers and the Board. Mr Winter was able to make that last submission in the light of a false point made by the SFO. The SFO's case would naturally be stronger if the conspirators had been proceeding on the basis that the advisory agreement would not be disclosed at all. However, the real point here is that it was the agreement itself that did not disclose the fact that advisory services meant something else. Thus, the real point is not disclosure but disguise.

358. TK continued:

> "It's possible that we could turn this into our advantage, because actually it wouldn't be a bad thing to, you know, reinforce the strategic, you know, publicly maybe even reinforce the strategic commitment, right, but that's a – I think that's a decision which we can make in a couple of days' time, but Harding is aware of the subject and is – I told him I expected him to review all these documents with regards to this issue, not, you know, I love Judith, but I don't want to go to jail, so Mark you've got to make sure you're comfortable.
>
> …
>
> What we're proposing to them is that we – that a week or, or ten days or whatever from now, once we've signed the subscription, that we will then er, enter into an agreement where we, where we pay for – we set up a joint venture and, and also paid for advice on the entire region.
>
> …
>
> And so what we have is that we have … and that the joint venture is, is, is intended to advise and support our whole efforts in that region and frankly it's something that if you said to me, if you said to me pay the money and do it just on a pure arm's length basis, do I think I could make it work for the next, you know, over the next two years – why if I were, if I had a commitment on, on the part of that, of that client in that institution, absolutely right, I would do it arm's length."

359. TK's expectation was that MH would review the documents on the disclosure issue. In the event that MH advised that the agreement would have to be disclosed, it was

then possible that this could be turned to the bank's advantage. It may have been for that reason, at least in part, that TK did not really care. The fact remains that the truth would have remained disguised; albeit not as well hidden as before. Another possible reason is that TK's understanding of the structure, at least at that stage, involved a 7-10 day delay between CR1 and ASA1. If that had happened, the connection would be less apparent. The synthetic delay could easily have been intended to create a somewhat misleading impression and resonates with the sort of scheme CL had had in mind earlier. Finally, it is not clear from this section alone exactly what information MH was given, although we know from a later section of the transcript that MH was not necessarily made aware of the structure. It is an entirely reasonable inference that the idea for the 7-10 day delay came not from MH but from one or more of RJ, TK and CL.

360. RB asked if the £35M, the 1.75%, would be paid into the JV. TK confirmed that it would be, but Barclays' costs would be deducted. This subtraction does not prove that the services would be genuine. There then follows another very important section of the transcript:

> "RB: Oh I see that's how we're going to do it. Okay and Harding knows that does he?
>
> TK: I didn't mention that particular structure, but he was – I ran it through Lucas and Lucas ran it through Harding.
>
> RB: I see fine, okay, right.
>
> TK: But he will vet – he will have to vet this right beforehand.
>
> RB: Fine, as long as somebody like him has got a total oversight, a complete oversight of all the moving parts, then I think that that's fine. We can sort of relax I think.
>
> TK: Yeah, well I mean I don't think we can be relaxed until we -"

361. It was at this moment that RB completely understood exactly how the structure would work, although he must have appreciated its core elements earlier. His immediate reaction was to ask whether MH knew about the structure, which must be a point in his favour. He may have been assuming that MH was abreast of all its features, including what I have called, although TK and RB may not have seen it that way, the synthetic delay. That would have been surprising. Unfortunately, though, TK was unable to confirm to RB that he did run this particular structure past MH, and he could not know the basis of CL's explanation to MH. I do agree with Mr Winter that in terms of his client's state of mind the inference could well be that he believed that CL did run this particular structure through CL. Even then, it is a reasonable inference, putting the matter as low as I possibly can, that the structure was not put to MH on the basis of a 7-10 day delay and would not have been put to him on the footing that there would be no genuine advisory services. Other surrounding circumstances, and common sense, would also suggest otherwise. It remains open, of course, for the defendants to advance a different proposition to the jury.

362. RB's reference to "all the moving parts" remains, at least superficially, a strong defence point. If he is to be interpreted as saying that MH must get his mind round everything, by which I mean the internal moving parts - including the true nature of the fee - the jury would be unlikely to convict him. RB does not, and cannot, advance that interpretation. In any case, I have already explained how and why there is or could be a different approach. MH would get his mind round all the moving parts he could actually see. If MH's insight took him further, then so be it and this scheme would probably blow up anyway.

363. Immediately before this exchange TK had said this to RB:

> "… and frankly it's something that if you said to me, if you said to me pay me the money and do it just on a pure arm's length basis, do I think I could make it work for the next, you know, over the next two years. –why if I were, if I had a commitment on, on the part of that client in that institution, absolutely right, I think I would do it arm's length."

364. I have studied this passage with particular care. I cannot accept the SFO's submission that TK was somehow toeing the party line. There is nothing to indicate that he was laying down evidence for posterity (TK would not have been discussing prison conditions in the same breath) and RB did not need to hear any party line. The far better submission involves an examination of what TK actually said. On close analysis, he was not saying at this point that this was a genuine arm's length transaction. His use, at least in part, of the subjunctive and conditional moods points to this being a hypothetical. Or, at least a notional reasonable jury might see it that way, even if my grammatical analysis would have absolutely no appeal at all. On any view, I think that what appeared to me at one stage at least to be a strong point in TK's favour is clearly not.

365. TK then said that he was extremely sensitive and had also run "this" by Steve Morse, but it is unclear on what precise basis. But one reasonable inference is that it was on the same basis as he had run it by MH. Then this:

> "TK: … internally we are going to be incredibly transparent. You know, we need to think about what are the worst case scenarios right. The worst case scenario is somebody says, 'well, it's not economic' and I say 'bullshit' … 'we're paying the amount of money, in this relationship, with these guys, we're delighted to do it.
>
> RB: Yeah, I mean, I mean there's obviously the, the, jeopardy is that you know we're rumbled and people say, 'well that was bullshit, you know, this is just a fee in the backdoor and, and, and –
>
> …
>
> TK: … because I mean this is, this is one of these things where you know, if you go down the whole place goes down with you right?

> RB: That's correct, we're all, we're all going for the shit, the shit – we'll be going for the shit food and the bad sex. I don't really want, that's not what I want.
>
> TK: Nor do I, so, so stay. It's important that you – by the way don't think I think that you're … wimping out on this stuff, it's actually important that you're, that you're nervous about a lot of … because if you're not we probably are going to be.
>
> RB: Well no, fine, I'm going to continue to, continue to spot, try and spot at least the jeopardy and that, and that strikes me in the context of all of this this is one of the most dangerous aspects of the whole transaction."

366. TK was saying that the bank would be transparent *internally* but the risk or jeopardy was that someone would think that this was not economic. That would be the case if (1) the ASA were genuine, or (2) the ASA were a disguise. One interpretation of what TK was saying was that if the risk materialised he would and could justify the arrangement as being economic by saying "bullshit etc." TK did not say that the bank would be in a position to prove that the relationship was commercial, and that would dispel any doubts. Further, TK's "by the way don't think I think you're wimping out on this stuff" could just be a reference to these two early evening conversations, or it could be chiming with his understanding by 15:51 that RB had concerns. As for RB, his choice of words, albeit very far from conclusive, does rather tell against him: the continuing to "spot at least the jeopardy", and in particular the terminology of being "rumbled". The "jeopardy" could have related to either (1) or (2) above, but "rumbled" is far more indicative of (2). Another way of putting this point is to say that (1) is the version that holds that RB's apprehension of the jeopardy concerned "as a consequence thereof" and no more, whereas (2) is the version that treats "frankly we all know that whatever we enter into we are entering into in exchange for the subscription agreement" as essentially being a frank recognition of the nature of the fee. The use of "rumbled" at a slightly later stage could help the jury in interpreting what RB meant when uttering this crucial remark.

367. The use of language by people speaking freely and easily in this sort of discussion needs a modicum of sensible give and take by those seeking to interpret it subsequently. Moreover, there are no applicable rules here: it is a matter of analysis, judgment and impression. The point could fairly be made that all of this is placing too much weight on terminology such as "rumbled" and is simply unfair. RB is someone whose choice of words is sometimes sub-optimal, as we shall see. However, although TK was never explicit in what he said to RB, it could properly be argued that the overall tenor of what he said was serving to reinforce RB's developing or maybe complete understanding that this was exactly the sort of "mechanism" that had featured in his earlier conversation with CL.

368. Could it realistically be argued that RB picked up on TK's use of the subjunctive and conditional moods? The grammar flows into TK's state of mind but the idea that RB picked up the nuance may be somewhat recondite, and the SFO has not put it forward. The point I am making is the more general one about overall tenor.

369. TK said that his guess was that they would be completely protected if the bank disclosed it had such an arrangement. Here, as is often the case in analysing these transcripts, it depends on one's starting-point. On one basis, the bank would be completely protected; but on another it would not be, unless MH advised on the explicit basis that these were not genuine advisory services.

370. RB then said:

> "Yeah, I mean you could, you could, you know frankly, it would, people will have, everyone will have a view on this right, but, but, but it – but why **wouldn't** – why **couldn't** you have a MoU about, you know, joint ventures in the region which would, which **would kind of sound like** you've got with the other guys and, and you'd have as part of that agreement you were going to pay for advisory fees …"

I have highlighted relevant wording. It is unnecessary to comment further.

371. A careful analysis of these four key conversations is important. It needs to be conducted from the correct perspective, and my analysis is incomplete. The fact in issue is whether, in opening the 15:51 call with RB with "mechanism", TK meant not the SFO's formulation but either "a genuine advisory relationship" or "a mechanism for disguising the fee". The inherent probabilities and the overall commercial context must all be considered, but of ultimately critical importance is an examination of what the parties to these conversations said and meant at this critical phase of the putative conspiracy.

372. I understand that anyone reading this might think that my analysis of the four key conversations is over-analytical, and another manifestation of the vice that the SFO team courteously pointed out to me on 25th March – although on this occasion they may want to overlook that. I would accept part of that criticism and fully recognise that a notional reasonable jury will be wanting to stand back from these conversations, ignore the difference in the grammatical moods, and apply a modicum of common sense. But the process of standing back from the words used and looking more broadly, which I am entirely content to perform and indeed have conducted, does not lead to only one possible answer. The correct approach is an amalgam of the analytical and the standing back, and neither just one nor the other.

373. Mr Winter strongly submits in a very forceful final written and oral argument that the approach I am favouring reverses the burden of proof, places inappropriate reliance on a so-called culture, and assumes what needs to be proved. Although I have been content to remove "culture" from the equation, I disagree. The context, and I would add the subsequent evidence, throws light on the correct interpretation of these conversations. In any case, the approach I am favouring is no different from the SFO's after very necessary pruning, although I accept that the comment could be made that I have calibrated some of the prosecution points slightly differently.

374. A notional reasonable jury could interpret these conversations in a number of ways which range from being supportive of the defence case on the one hand to being highly supportive of the SFO case on the other. There is a very broad range of reasonable assessments, and it is not for me to make the ultimate judgment. My

assessment is that this evidence is probably stronger against TK than against RB, although one or two key remarks the latter made could be interpreted as powerful evidence against him.

375. I must move on, albeit not necessarily in real time, to the RJ/Sheikh Hamad conversation.

376. The purpose of that conversation was to secure the latter's agreement in principle to an advisory services agreement. Mr Brown submitted that Sheikh Hamad's one and only concern was his "dosh" and that it is unthinkable that he would have given away value to Barclays. In a footnote to its written argument submitted on 16th March, the SFO observes that the arrangement appears to have been agreed straightaway without "any period of contemplation, discussion or negotiation as to the services to be provided under the agreement". If the focus is intended to be on Sheikh Hamad, that point leads nowhere because it was only his agreement in principle that was being sought and he would never have been involved in the detail. In any event, what Mr Brown was really saying is that, because Sheikh Hamad would not have given away real value, it is unthinkable that he really did so. He used the language of impossibility in oral argument. The corollary must be that the Sheikh did not do so and that advisory services meant the additional commission. My difficulty with this submission is that it is another example of a mechanical approach: because A therefore B. This is an approach which could not appeal to a reasonable hypothetical jury, and I am content to jettison it. The SFO still have the underlying point of course, but it is softer and more nuanced.

377. The key conversation between RJ and Sheikh Hamad on 11th June could have gone in one of two ways. Either RJ explained to Sheikh Hamad that Barclays *could* not pay more than 1.5% because the law prevented it, and that if he wanted his additional fee he would have to accept the balance of 1.75% under an arrangement for advisory services; or RJ communicated to him the message, however deftly, that this would be how it would need to appear, even if he did not spell that out.

378. On oral argument on 21st March, I pressed Mr Brown yet again on the inherent probabilities. Is it inherently probable that (1) RJ would even have attempted such a negotiation, because he risked losing an extremely valuable client in an instant, and (2) Sheikh Hamad would have entertained this? At that point, I did not feel that Mr Brown was giving me a satisfactory answer; he repeated his submission about dosh and value. Mr Brown's answer had been very effectively addressed by Mr Kelsey-Fry and flows from another aspect of the inherent probabilities, namely that Sheikh Hamad could well have understood that if Barclays could not pay him his 3.25% under CR1, he either had to walk away or accommodate RJ's proposal. The latter would not, after all, have cost him very much, and he also had the benefit of a strategic relationship with the bank. Although the second proposition may be controversial on the evidence, the first cannot realistically be.

379. The fact that the inherent probabilities may seem to point in one direction in relation to this call is not the end of the matter. Reflecting on this still further, I consider that the focus has been too much on Sheikh Hamad's character (i.e. either good or bad) and that all the human factors are so important. RJ was exploring the possibility of an advisory agreement on an "in principle" basis. RJ's ability to cement a special relationship with Sheikh Hamad had been based on his empathy and judgment, and

everyone in the bank knew that. On one reasonable interpretation of the evidence, RJ could simply have said to Sheikh Hamad that the bank could not pay his 3.25% under CR1 but the balance of 1.75% could be paid under an advisory agreement. One needs to bear in mind how sophisticated people tend to interact. RJ could have been extremely subtle, at least in the first instance, and the dishonest message could still have been transmitted, even if it was not immediately picked up. He might have taken it in stages, leaving it to Sheikh Hamad to work it out. Taking CL's line, RJ may have thought that Sheikh Hamad would take a relaxed view of this: after all, TK had understood that this arrangement was likely to work for him. One cannot of course reach the position whereby RJ was somehow being so subtle that Sheikh Hamad would have understood the proposal as being for genuine advisory services and never worked it out. There are obvious legal difficulties with that formulation as Mr Winter submitted. I fully appreciate that it must have been understood by Qatar *at some point* either during or shortly after the call that an agreement stipulating advisory services could not be taken at its face value, and that someone on Qatar's side needed to know that was not the case. In reality, it would not have been possible to disguise the fee in ASA1 when the document came to be negotiated and signed without Qatar being in the know. The concept of sham in the context of this bilateral arrangement arrives on the scene at some point in one's consideration of this case, although not necessarily during the course of that call.

380. At 10:00 on 12th June there was a meeting between RB, Mr Ahmad Al-Sayed (Qatar's internal lawyer) and JS. RB could not recall at interview whether the advisory agreement was discussed, but he did not believe so. RB reported back to TK at 10:40 when events were fresh in his memory (Item 155). One topic of conversation was Sheikh Hamad's personal investment which at that stage had to be kept secret. There were obvious sensitivities about it. RB's belief was that the deal would go ahead and he said that Mr Al-Sayed was "very, very pragmatic". The SFO submits that Mr Al-Sayed may not have been briefed about an advisory relationship, and I accept that is possible. He could not have understood the detail because Sheikh Hamad certainly would not have done. But the better inference to be drawn is that the deal was going ahead on the basis of an advisory relationship which had been agreed in principle between RJ and Sheikh Hamad the previous evening. The deal could not go ahead otherwise. The reference to pragmatism is almost certainly a reference to the additional 1.75% going into the ASA, or that something would be devised in the context of an advisory relationship that would sort this out. That, after all, was a practical solution whether it was dishonest or not.

381. It is possible that Mr Al-Sayed's thinking went beyond pragmatism into the realm of dishonesty, or that he was being either ironic or over-literal (assuming always that these were Mr Al-Sayed's actual words). It is also possible that too much is being read into one epithet. At the end of the day, it may not matter.

382. RB also mentioned the drafting of a two-page letter. In due course, he attended to that the self-same morning. Strictly speaking, what he drafted was not an advisory services agreement but a letter of intent, but nothing really turns on this. What is more important, and I will touch on it later, is that JS placed manuscript annotations onto RB's draft. The fact that he mentioned the issue during the call to TK indicates that the ASA, and the fee payable under it, was under close legal consideration. According to the transcript:

> "RB: So I'm going to – Judith's going to think about how to do that, if that works.
>
> …
>
> And I think it does work, and I'm going to propose it to the guy, you know, I'm going to call him later and when he lands …"

The "guy" was Mr Al-Sayed who was now *en route* from London to Oslo. The proposal related to Sheikh Hamad's personal investment. I do not read this as directly relevant to the mechanism for paying Qatar.

383. RB's draft of the letter of intent was sent on two occasions by fax machine rather than scanned email. JS was the recipient of one of the faxes, a consideration which somewhat weakens the concern surrounding this mode of transmission. It certainly remains available to the SFO but it is, I think, a relatively small point.

384. The SFO, unsurprisingly in my view, places considerable weight on the TK/RB call timed at 11:59 on 13th June (Item 169). The call is also relevant to the 13th June memorandum. The critical exchange proceeded as follows:

> "RB: Come up with a sort of net, you know, net view and then, you know the idea would be that we would dissociate the conversation that we've been having and have them minute that they were entering into the transaction in accordance with the subscription agreement –
>
> …and, and reference the existence of a, you know, of a, of a MoU or another –
>
> TK: type of relationship
>
> RB: - relationship document of some description which goes through all of that and, and Roger's view was that provided we were convinced of the commercial, you know, or Lucas' view was well we need to be convinced that the two things are dissociated and, and that the commercial value in the whatever we want to call it document is, is equivalent, equivalent to the payment however it is made."

385. By this stage, as will be demonstrated in due course, there had been in-house legal advice on these issues. The verb "dissociate" naturally gives rise to concern, particularly in the context of "the conversation we've been having". However, it is unclear what exactly was being "dissociated" and from which conversation(s). If the focus is on the previous day, the critical TK/RB conversations were all about the very thing that now apparently has to be dissociated; and query from what. None of that makes any sense. However, if the dissociation is in connection with earlier conversations, it all makes complete sense because in those conversations it was clear that Qatar wanted 3.25%. Thus, the memorandum would say that Qatar would now accept 1.5% and would reference the advisory services agreement. RB and TK knew that this would accommodate the 1.75%, but the important point here is that the in-house lawyers knew the generalities of this too: they were advising on the memorandum and the need for it.

386. I consider that the "provided we were convinced of the commercial" raises different issues. RB attributes this to RJ and CL. There are two reasonable interpretations: the literal and the not so precise. The latter proceeds on the basis that "we were convinced" means something along the lines of "convinced ourselves". This is certainly more strained, but it is not unreasonable. The strained interpretation does not work particularly well in relation to RB's state of mind, but (and to the extent that this is admissible evidence against CL), we know that on one view of the evidence he is someone who could see no difficulty in setting up a commercial arrangement for delivering additional value on a dishonest basis. In such a situation he would be convincing himself, if he had to, of the genuine commercial value.

The SFO's Case Theory as Opened to the Jury: the 13th June Memorandum

387. For this purpose I need to return to 11th June, albeit quite briefly. On that date both JS and MH were aware of the problem: the lawful co-existence of an advisory services agreement with the warranties in the Subscription Agreement.

388. The SFO is entitled to submit that the lawyers could only have been working on the basis of their instructions, and if the truth was that no advisory services were ever within contemplation, no amount of legal advice could alter than fundamental reality. The fact remains submits the SFO, and I agree, that the lawyers never knew, because they were never told, that these were not genuine services, if that be the case.

389. If the case continues to be conceptualised through the lens of "mechanism" as opened to the jury, the submission that the lawyers were misled about that is deeply unpromising. This is because they knew the essential elements of this "mechanism", and so were not misled about it. Advancing the case in this way serves to gift the defendants an uncovenanted point.

390. One possible exit route from the obvious circularity is to submit that the lawyers were actively or positively misled, as indeed the jury were told when the case was opened to them. The issue is important for a number of reasons, not least because it featured rather heavily in my RB ruling given in December 2018. At that stage, I had I believe seen the problem with the SFO's case on "mechanism" but here the issue is slightly different. The evidence on this issue requires close examination.

391. Following the 10:00 meeting on 12th June which JS attended, at 10:58 TK reported to RJ (and this was after the debriefing with RB):

> "Good session with the lawyers of Q. Working on draft and conversation with MH and CL." [Item 159]

392. At 11:39 RB faxed the draft ASA to JS (Item 165) and on 12:34 he faxed it to TK (Item 162). The draft received JS's annotations. According to Item 162, a conference call had been set up for 18:00 on 12th June to be attended by CL, RB, TK, MH and JS. The evidence surrounding this call is limited, but its purpose was to consider the draft that JS was working on. We know that JS did work on a draft, from which it follows that if the 18:00 call took place it was that draft which was under scrutiny.

393. It is unnecessary for me to assume that this call did in fact take place, although the better view must be, in the absence of evidence that it was cancelled, that it did. What

is clear is that at 07:19 on 13th June TK sent an email (Item 167) setting up a conference call at 09:15 including MH, JS and this time RJ, who did not participate in any call which took place the previous day. TK was not proposing to dial in.

394. It is clear that the 09:15 call did take place because TK asked RB about it at the start of the "dissociation" conversation timed at 11:59 on 13th June (Item 169). I have already set out part of that conversation. It began as follows:

> "RB: So the conclusion was that he, Roger, would go away and would script all of the touch points that we have with them in relation to existing business and prospective things and that we would, you know, we would look at that and kind of total up all of that in terms of you know value that we were getting from them and vice versa."

395. This conversation needs to be read in conjunction with the memorandum itself (Item 173). It was emailed by RJ to TK, RB and JS, copied into MH. I have raised the issue of its authorship and inquired of the parties whether JS's interview under caution threw any light on the issue. Strictly speaking, her interview is not in evidence, although I was informed that she said that she recognised that some of the contents of the memorandum looked like playing back her and MH's words from the meeting. It does not really matter, because both MH and JS advised both on the need for the memorandum and the need to script the touch points. The lawyers saw it before it was finalised.

396. The memorandum stated:

> "Following my meetings in Doha with Sheikh Hamad and Dr Hussain, we discussed a different approach to the proposed Project Heron transaction.
>
> Upon reflection the QIA, through Qatar Holdings, would be content with the fees of 1.5% for their £2 billion commitment to the conditional placing with claw back.
>
> Given the increasing strategic content of our discussions and the development of our relationship we agreed that we should enter into a memorandum of understanding ("MOU"). This MOU would become the framework under which we would operate in the future. The basic tenets of the MOU are as follows:
>
> 1. … I have asked QIA to advise IBIM on the development of our strategy and contacts in the region …
>
> 2. QIA is an active investor in the GCC and emerging markets and will as appropriate, at their sole discretion, offer Barclays Capital co-investment opportunities as they arise.
>
> Barclays agree to pay an advisory and introductory fee per quarter of £_____in advance. In addition, Barclays will provide potential secondments to assist QIA with the development of the infrastructure, administration and investment review processes.…"

I have seen no evidence that RJ in his scripting of the touch points ever went further that these two rather anodyne matters, or that anyone else did. The issue was not addressed, if that is what happened, before early October.

397. The SFO submits that this is false and misleading, because (1) Qatar did not change its mind, (2) the connection between CR1 and ASA1 is not spelled out: on the contrary, it is concealed, and (3) the consideration is not spelled out either.

398. In my judgment, the lawyers were not significantly misled in any positive way and the inference cannot be drawn that part of the purpose of the Memorandum was to mislead them. They were aware of the problem; they were aware of the obvious interconnection between CR1 and ASA1; and they were also aware by that stage, I would hold as a matter of very strong inference, that the problem arose because the fee would be calculated with reference to the missing value. If the 1.75% was not fully understood on 13th June, it certainly was by 16th June. The missing value created the need to list the services in order to clinch the point that these were genuine and for value. The memorandum did not state in terms that there was a factual connection, an association in that sense, because this was not its purpose. Its *raison d'être* was to minute the fact that Qatar had agreed to proceed down this path.

399. The terminology – "scripting of the touch points" – caused me concern in December but I now think that was misplaced. This is a mixture of jargon and executive-speak which is not in itself suspicious. The far better point, and this arises not in connection with any misleading of the lawyers but more generally, is that the scripting did not go very far and RJ never improved upon it.

400. In terms of the lawyers, the position is that at all material times after 3rd June, when the demand was first made, the defendants had it in mind to pay the additional fee, if they could, under a separate arrangement. It was never in contemplation that they would or could do so under the Subscription Agreement. However, Qatar is unlikely to have understood the legal niceties notwithstanding that the term sheet, with 1.5% clearly marked, was re-sent on 6th June. I regret to have to point out that even after Latham & Watkins came onto the scene they were rather slow to pick up on this. The key point is that from Qatar's perspective, before the Sheikh Hamad/RJ call took place, it had in mind a payment of 3.25% under CR1.

401. Regardless of the honesty of the parties to the Sheikh Hamad/RJ call, there can be no doubt but that the former came down from 3.25% to 1.5% under the Subscription Agreement, with the remainder to be placed under ASA1. Factually, that was what happened. On that basis, the choice of the words – "upon reflection" – would be accurate. This needed to be minuted, and an audit trail created to that extent and effect; but it was not misleading: either in terms of Qatar's state of mind, or in relation to what the lawyers knew and understood. By that stage the lawyers had a full understanding of the mechanism (being the SFO's "mechanism" in all its aspects), and of the fact that the ASA was designed to capture either the additional 1.75% or whatever the missing value was. The proposition that Qatar would on reflection be content with 1.5% means that its was coming down from a higher figure. JS and MH knew what that was and how it came about.

402. Even if the lawyers were not misled at all, could it be said that the note was still misleading in that others could be misled? The answer is that anyone who did not

have the full picture would not necessarily make the connection between CR1 and ASA1. However, any misleading of others would have been fully sanctioned by the lawyers, and this point leads nowhere.

403. Furthermore, the available evidence convincingly demonstrates that the senior in-house lawyers and Clifford Chance were well aware soon after this of all the additional factors I have listed under paragraphs 302-3 above. For this purpose it is unnecessary to go to the transcripts of the RB/JS and/or MD calls, although I have these well in mind. I will consider them later.

404. At 19:03 on 16th June 2016 Mr Sloan of Latham & Watkins emailed his client and Clifford Chance (Item 205) with the following:

> "I have spoken again with Ahmad Al-Sayed and he advised that he had spoken to Raven [presumably RB] about the following:
>
> …
>
> 2. Quail is to paid an additional fee of 1.75% of the maximum commitment. This is to be paid in equal instalments over 12 months, with interest."

405. My initial reaction to this is that Mr Al-Sayed told Mr Sloan at Latham & Watkins that this was an additional fee for the capital raising, payable under the Subscription Agreement. SFO therefore relies on this as evidence against the defendants, despite their disinclination until very recently even to suggest that Qatar was equally dishonest. However, at best this piece of evidence should be seen as an insight into Mr Sloan's understanding of his client's instructions, and in any case how the additional fee would be paid was not made explicit. I cannot fairly parse this piece of evidence as carrying any probative weight against RB or anyone else.

406. The email was forwarded to JS and at 19:49 (Item 206) she added the following annotation in block capitals:

> "THE FEE IS FIXED AT 1.5% AS FOR OTHER INVESTORS. ANY ADDITIONAL PAYMENT MUST BE IN EXCHANGE FOR ADDITIONAL VALUE DELIVERED AND BE INDEPENDENTLY JUSTIFIABLE."

407. JS's interpretation of the email may have been in line with my initial reaction to it. She corrected any misapprehension, as did RJ when he responded to the email at 21:08 (item 207):

> "Ther is cpfusion here the extra fee does nopt relate to the placing it relates to our advisory deal with them."

408. I am not to be understood as saying that RJ's alert response necessarily represented the truth, nor that he was being overly attentive to the final detail. It is appropriate to keep an open mind about that. What I am saying is that JS *and* Clifford Chance knew exactly what the 1.75% was, what it represented, and how the fee in ASA1 was being calculated. The inference must be that JS and Clifford Chance knew that the

consideration for the services specified, or mentioned, in ASA1 was never separately negotiated but was always mechanistically tethered to what I have called the algorithm, namely 1.75% plus LIBOR interest. This was so notwithstanding that the size of Qatar's composite investment kept changing.

409. On the same theme, it is completely clear that JS and Clifford Chance knew that the mechanism created the risk that the fee could be perceived as a disguised commission (see, for example, Item 208: MD's email timed at 22:16 on 16th June), that the advent of the Challenger "slice" only served to enhance that risk, given the status of Sheikh Hamad, and that the fees were being paid over 12 months notwithstanding that the life of ASA1 was 36 months.

410. The position is that, apart from any inferences that may be drawn from the numerous transcripts I have mentioned, the whole of the SFO's inferential case as to "mechanism", as originally defined, was completely understood by the lawyers, both in-house and external. As I remarked in oral argument, it is slightly disappointing that Clifford Chance do not appear ever to have set out their concerns in the form of a written note or email or obtained Counsel's advice on the issue. If my understanding is incorrect, then some significant failure in the disclosure process has occurred, or a relevant piece of advice has been lost. But they and the in-house lawyers are not on trial and I must leave the matter there.

411. If the mechanistic aspects of the SFO's case are stripped away, a different perspective immediately becomes available. The short point here is that the lawyers knew of the "mechanism" but they did not know that these were not genuine advisory services, if that be the case. Whatever their suspicions, they were never told that these were disguises. The conspiracy would continue unless and until the moment a lawyer blew the whistle on it. This never happened, and if there is evidence elsewhere to support the SFO's case they were therefore misled in the more limited sense that they were proceeding under a misapprehension of which they were never disabused.

412. The approach that I favour as being the SFO's best case on a possible view of the evidence does not ignore the earlier period but draws particular attention to the events of 11th June. Here, the starting-point is what was said by CL (in particular) and by RB in the 12:09 call; the inferences that could drawn from TK's discussions with RJ and CL; the fact that the solution was in TK's or RJ's inbox and all previous ideas appeared to be dishonest; an analysis of the three TK/RB conversations; and the further inferences to be drawn from the Sheikh Hamad/RJ conversation, and what followed on the Qatari side. The SFO's case does work better if Sheikh Hamad was not being invited, at least expressly and overtly, to participate in dishonesty, and I have explained how and why that is. To be fair, the SFO responded to my open invitation to be frank by pointing this out; but I had already formed that view.

413. No lawyer was aware of the background to these critical discussions involving RJ, TK and CL. All the lawyers assumed the truth of their clients' instructions that these were genuine services. Of course they had their suspicions, sometimes profound, but these do not appear to have gone any further. Here, I am not to be understood as either saying, or ruling, that powerful defence points do not arise from the involvement of the lawyers, but those do not have to regarded as givens. The lawyers understood all of the moving parts, but there is one essential missing ingredient, assuming that it is missing: they did not know that it was the intention of at least some individuals that

there would never be genuine advisory services. Provided that this proposition is properly proved by other evidence, the lawyers were misled by their client instructions which were obviously based on the genuineness of these services.

414. ASA1 betrays a number of aspects which may only fairly be described as non-commercial and heterodox – the payment of LIBOR interest before the services were performed; the treatment of the Challenger "slice"; the payment of the entire consideration over 12 months; and the paucity of the services as eventually described in the final version.

415. All these features were known and understood by the lawyers, and on occasion they agreed to solutions which had previously been ruled out. The degree of "air cover protection" afforded by legal advice must depend on the basis on which it was given, and what was known by whom. However, one matter must be clear: *if* defendant X knew or believed to the requisite standard that no services would be provided, no degree of legal "air cover' would *necessarily* avail him. At that point, a jury question would arise. Furthermore, I cannot accept Mr Kelsey-Fry's contention that all these additional considerations are neutral because, properly analysed, they derive from the original concept. I will return to this latter.

Subsequent Evidence: the Period 13th – 25th June 2008

416. In my judgment, the trial has focused far too much on the state of mind of RB. This is because he gave a lengthy interview and only his phone had been recorded. RB was a senior managing director and was given the responsibility of leading the deal execution team. RB is clearly an able man, but his co-defendants were senior to him and an exploration of their respective states of mind would be more illuminating. Although RB's relatively junior role would not preclude him being a conspirator, he could not take the key decisions.

417. In examining what I am calling the subsequent evidence, special attention should be paid to the position of RJ. Although TK was the quarterback, it is not essential to the SFO's case that he was the originator or the mastermind. He may just have been distributing the ball in a number of directions, but he was the linchpin between RJ, CL and RB, with instructions going up and down according to the level of seniority and everything else. No version of the SFO's conspiracy can relegate RJ to the position of mere ball carrier or running-back. Further, in relation to the subsequent period there is little evidence bearing on TK and CL directly, but some of the limited evidence in respect of CL is important. In terms of the conspiracy that has been alleged, and the nexus between the TK/RJ call and then the TK/CL call, evidence bearing on RJ which improves the SFO's case against him may have consequences for TK and CL. The importance of the subsequent evidence relating to RB is that it bears on the issue of whether his belief originally was, or ever became, a virtual certainty.

418. I am not proposing to set out an entirely comprehensive account of the subsequent evidence. That would be unnecessary and supererogatory in the context of a ruling which is inevitably enormous enough. Inevitably, I think, I need to see this from the best reasonable perspective of the SFO.

419. My starting-point is to rewind the tape slightly to 12th June and RB's handwritten edits on his draft of the letter of intent for ASA1, being the version he faxed both to TK and JS. The annotations included the following:

> "No reference to money … Long Term investors!! Qatar Holdings! … Can't be binding."

These are somewhat curious annotations, and one or two merit explanation.

420. On 13th June Mr Al-Sayed had said that he needed his "guideline" from RJ and RB regarding how to deal with the additional fees and Sheikh Hamad's private investment (Item 171). On 14th June a meeting took place between RB and Mr Al-Sayed at the Hyde Park Hotel. According to RB's contemporaneous notes:

> "Fees/Advisory fees, not want to do long term – agreed to keep it secret between us for now! Said I would talk to you.
>
> HE is Chairman of Qatar Holdings. So he can't be transferring stock (how does he get his extra fee?) Same mechanism!"

421. The apparent need for secrecy surrounded the fact that Qatar did not want a long-term arrangement for advisory services. An agreement of relatively short duration would not be a problem, but Mr Al-Sayed's request for secrecy maybe ties in with the point about pragmatism. It cannot be regarded as a neutral point; on one view of the evidence, this helps the SFO. RB may also have been alive to the issue that there might be difficulty delivering Sheikh Hamad the extra fee via the "same mechanism" (note the exclamation mark, although RB has a tendency to use this mode of punctuation). This was because, aside from his position as Prime Minister, the idea that Sheikh Hamad would be providing any services might have struck RB as being anathema to him.

422. Exactly how the conversation proceeded between RB and Mr Al-Sayed is unclear. One possible inference to be drawn is that RB's viewpoint was coloured by his previous conversations with TK which I have already analysed at length. This inference would include the possibility that RB's concerns (at whatever intensity these already were) were solidifying. It was not RB's responsibility to define or negotiate the services, but there is no reference to what these were.

423. At 17:17 on 16th June there was a conversation between RJ and RB (Item 202) regarding the call log. RJ told RB that on 23rd May Sheikh Hamad stated that he wanted fees at 2½% and a discount of 10%. There is no independent evidence of the 2½%. According to RJ, it was on 5th June that he and Sheikh Hamad agreed the 1.5%. At one stage, I was troubled by this, forming the opinion that RJ was being misleading, because on that date the deal was bagged at 3.25%. On reflection, however, I really see no reason why he would be misleading RB, who after all was a co-conspirator. Also, the fee under CR1 *was* agreed at 1.5%. I do not think that it is arguable that RJ was somehow seeking to trick RB into thinking that the deal had not been done at 1.5% plus 1.75% delivered separately. This was only 11 days beforehand, and RJ surely knew that RB could not have forgotten. Finally, it is to be noted that during this call RJ referred to his phone call with Sheikh Hamad on 11th June made for the purpose of "exploring the advisory agreement". That may well have

been close to the truth. It would have been close to the truth whatever the nature of the services to be provided.

424. At 12:07 on 17th June there was a further conversation between RJ and RB (Item 221). By that stage, RB was describing the ASA as "fucking horrible". RJ appeared more insouciant. He thought that the bank should pay 3% across the board with "Quail" receiving an extra 2% as a consultancy fee. RB did not take issue with this proposition, save to say "agreed". There is force in the observation that RJ was moving very glibly into this in recognition of the fact that Quail was about to walk. Whatever the position regarding other investors, Qatar had to be paid something on top. And whatever the amount, the mechanistic application of the advisory agreement or "consultancy fees" would apply.

425. I accept that RJ's personality needs to be considered. One interpretation is that he is just extremely quick-witted, fluent, emollient, and occasionally off-hand with his colleagues in private. Another interpretation is that he is just too slick. I cannot say which interpretation is right; it must be for the jury to decide.

426. During the course of the same call, RJ said that JV would not increase the fees on the trade. I cannot interpret that discussion as being about the same 3% plus 2%; it must have been about the trade as was. RJ added:

> "watch his shit turn white on the following comment, 'Quail are walking'."

Mr Brown made much of this. The language is certainly singular. However, all that RJ was saying was that JV was under pressure and understood the need for Qatar to remain in the picture. It does not go further than that.

427. On the same day, there were a number of conversations surrounding the duration of ASA1 (36 months) and the payment period of 12 months. This was RJ's idea, although JS had refused to do this. She later changed her mind. RJ was pleased that a typographical error he had made led him to a solution whereby the whole of the fee would be paid over 12 months and not 36, with interest in addition. I heard some of the audio-tapes. RJ's tone appears self-confident if not slightly self-congratulatory. On occasion, RB's displays a rather nervous laugh. RB was, at the very least, appreciative of the difficulty. If one listens to the transcripts carefully, RB's nervous laugh maybe gets worse over time.

428. According to Item 236, RJ intended to discuss this issue with CL, and the transcript suggests that he did. The in-house and external lawyers were party to whole of the ebb and flow surrounding the 36 versus 12-month issue, as well as Qatar's aspiration, which the bank had no intention of delivering, of paying the entire 1.75% at the closing of the subscription (Item 246). At Item 247 MD sent an email to JS stating that "Roger is asking Chris Lucas if we can pay Quail £36M over 12 months at £3M per month". JS then said that the debate was currently taking place between CL and TK. As regards TK in particular, this evidence is only admissible on a conditional basis, but I will bear it in mind at the appropriate stage. By 15:20 that afternoon (Item 250), RJ told RB that CL had agreed to the proposal to pay £36M over 12 months.

429. If, but only if, there is sufficient evidence which takes the conspiracy back to 11th June in the lead-in to the 15:51 call, this little piece of evidence becomes more important. Qatar wanted its money as soon as possible. The lawyers thought that Qatar was just driving a very hard bargain and/or that the defendants or some of them should negotiate more effectively. However, particularly if CL and TK knew the truth, their negotiating stance was fairly hopeless.

430. By 18th June the discussions moved on to Sheikh Hamad's separate investment and the fee attributable to that. It was understood by everyone close to the negotiation that this investment would attract the same additional fee payable under the same mechanism. RB had clearly understood that on 14th June, and his concern about it has been noted. At 08:15 on 18th June there was a discussion between RB, JS and MD during the course of which the application of the mechanism to Sheikh Hamad personally was discussed (Item 273). JS asked how the Prime Minister was going to deliver value for that. RB then made a remark which JS interpreted as a lewd suggestion. The problem was becoming more acute. On any view, there are elements of light-hearted and witty banter between RB and JS in particular, but it would be wrong for me to interpret material of this nature in a manner favourable to RB and (as appropriate) RJ. We are on quintessential jury terrain. Further, during the course of this conversation JS warned RB about deleting an email which related to this additional fee. Following that, RB told JS that he would phone RJ and tell him that "the only way we can get Sheikh Hamad some fees is he's going to have to provide some services". RB was now stiffening his resolve. One interpretation is that he really needed to, because RJ was driving this deal forward into very uncomfortable territory.

431. One particular remark by RB on this transcript (Item 273) caused me concern and I raised it with Mr Boyce. RB had been very frank with JS and MD about the problem with Sheikh Hamad's extra fee. This is a consistent point in his favour. We then see the following exchange:

> "JS: Well, the easiest thing is to chuck it on the advisory assignment, obviously bearing in mind that you're telling me that this is all market –
>
> RB: No, I think Roger told you that."

This is inadmissible evidence against RJ (subject to s.118 etc.) but it is relevant to the case against RB. The point has been made that, if RJ did say this to JS, it could well have been true. That does not answer the concern. I consider that the fact that RB was so quickly imparting the message to JS that *he* had not said that this was "all market" and that *RJ* had said it is capable of being regarded as a proper reason for taking it into account in respect of RB's belief to the contrary effect: i.e. that it was not "all market" at all. Why else would he seek to deflect this onto RJ? Immediately after RB uttered this, JS told him "don't you dare start backsliding". Here, I have taken into account RB's explanation at interview, but it is not for me to judge the strength of that.

432. At 09:46 on 18th June RB did telephone RJ in order to explain the problem (Item 278). I agree with the SFO that RJ very speedily and slickly said that the answer to the question, "what are the services?" was "same thing, advice". It appears that at that stage RJ had not discussed this solution with Sheikh Hamad, although we know from

the Al-Sayed/RB discussion on 14th June that this had been RB's understanding. On analysis, RJ did not give a satisfactory answer to RB's question. At 12:14 on the same day (Item 281), RJ told RB that the way forward was "just replicate the fee letter". Again, this is all somewhat knee-jerk and slick.

433. Another important RJ/RB call took place at 16:08 on 18th June (Item 299). To be fair to the SFO, this really does need to be listened to with care. I set out the critical part:

> "RB: … on this other thing, what do you want to about that?"
>
> RJ: what other thing? The fees?
>
> RB: the advisory agreement [there is a special emphasis here which needs to be listened to on the tape]
>
> …
>
> RJ: what's wrong with that? [i.e. two ASAs]
>
> RB: Well only other … only, only, only that he …
>
> RJ: Only that they look like 3.25%
>
> RB: Yes, and he's the Prime Minister.
>
> RJ: right
>
> RB: so him, him, him providing …
>
> RJ: Advisory services …
>
> RJ: Actually that's true. Actually I can see that … Fuck, I don't know what to do with this …"

434. RJ then said that Sheikh Hamad wanted his money, his fee. RB pointed out, and this is in his favour, that there was no point going down this road "until we've got some sort of commercial understanding of what we're doing". RJ said that Latham & Watkins needed to advise their side, and he rejected RB's proposal of paying a flat 3% across the board.

435. This conversation is capable of at least two interpretations. One is that RJ had not previously appreciated the difficulty: that Sheikh Hamad could not be seen to be providing services to Barclays. That interpretation would presuppose that Sheikh Hamad would, if he could, be providing genuine services. Another interpretation is that RJ saw this as a specific aspect of a wider phenomenon: that there were no genuine fees all round.

436. There was another important conversation involving RB, JS and MD at 16:13 on 18th June (Item 302). JS said that "Lathams are concerned that they need to get their money no matter what they do, no matter how much they breach the agreement". This could be read one of two ways. JS made it clear that Qatar had to provide valuable services in exchange for the money. She was clearly doubting that this would ever be so. Those doubts are highly likely to have been generated by the nature of her

discussions with her counterpart at Lathams and were not limited to a consideration of the circumstantial evidence. There was then this exchange:

> "RB: Are we going to have to demonstrate over time that they have provided these services?
>
> JS: If anybody challenges us.
>
> RB: Like, like any of the other investors?
>
> JS: Any of the other investors, the FSA, the UKLA, the Criminal Authority, the Fraud Unit.
>
> RB: I'm already feeling sick. There is no need to use all those words to make me feel sicker.
>
> JS: Well I haven't even finished my list.
>
> RB: Right
>
> JS: It's serious stuff, we're not playing a game here.
>
> RB: No, no no I, hey, I wouldn't, well if it were me I wouldn't have agreed to it, but there you go."

437. The depth of RB's concern is plain and obvious. One reasonable inference must be that he did not really believe that genuine services would be provided. Perhaps he was feeling sick because his intuition, perhaps his moral sense, was telling him that something was wrong. Perhaps it went far deeper, and he was hoping or expecting JS to kill the deal of whose dishonesty he was virtually certain. It is not easy to say, and taken in isolation this sort of evidence takes one only a certain distance. It would be insufficient without evidence of the TK/RB calls of 11th June, which remain critical to the whole case against RB, and the entirety of the later evidence considered in the light of those calls. I also bear in mind RB's claim at interview that he did not mean it when he said that he was feeling sick. That is not particularly convincing, but it would be for the jury to decide.

438. Later that same afternoon, there were conversations between RJ and RB in which the former made it clear that it would be wrong for Sheikh Hamad to accept a fee for providing services (this must be a point which cuts both ways), the directors were on the line and then "you and I", and joint surprise was expressed about JV "doing this" given his ethics. RJ's unwillingness to proceed on the explicit basis that Sheikh Hamad would be providing services is a point which avails him, although it only goes so far. One way or another, his fee would have to be paid. The solution, entered into under the cover of legal advice cognisant of all relevant facts, was to include the Sheikh's personal fee in a composite agreement.

439. By 16:46 on 18th June RJ had spoken to Dr Hussain (Item 306) and he reported back to RB. Dr Hussain's view was that there should be one ASA, "you should just be a gentleman about the number", and that interest should be included. What happened in due course was that LIBOR interest was separately calculated but that the advisory agreement did not expressly specify it. Although the lawyers knew all about that, this had the appearance of concealing the interest element from the gaze of outsiders. The

lawyers were not party to RJ's conversation with Dr Hussain, and only he will be able to say exactly how it went.

440. RB was not a party to it either. However, there is this following exchange:

> "RJ: cos I said 'we don't want the interest in there'. And he's going away to talk to whoever his governance people are at Qatar Holdings just to understand that Qatar Holdings are subscribing, getting a consultancy fee and that he gets his money.
>
> RB: what, from them?
>
> RJ: Yeah. It's just like increasing your salary, right?
>
> RB: It's quite a …
>
> RJ: [Laughing]
>
> RB: Do you know, it's the exercise of absolute power, isn't it, it's fantastic."

441. As ever, there is not just one interpretation of these utterances. However, it could reasonably be argued that RJ was not differentiating in any way between the different elements of the transaction.

442. On 23rd June at 08:12 (Item 361) RB reported to JS the upshot of a call he had just had with Mr Al-Sayed. The latter had been spitting down the phone demanding the removal of all the "crap" about "His Royal Highness's assistants meeting politicians, all this kind of stuff". Mr Al-Sayed wanted a "nice short soft letter" which covered the matter. JS then offered to do precisely that: "I can write the services as long as they sound expensive. I can write them short, I can write them long". The version which she did go on to write fell firmly into the first category. It was soon to be described as a "beaut" by RB to RJ (Item 373), although the latter seemed to think that Latham & Watkins had drafted it.

443. The final section of the 08:12 transcript, before JS's offer to script a further draft, is revealing:

> "JS: I do know what he's getting at but he's got to grow up. This is not how it's going to be, he is going to have to give the services in exchange otherwise you are going to end up in the front of the Fraud Squad explaining why.
>
> RB: No. I'm not.
>
> JS: Well I think you and I are on the periphery of it and knowing what everyone else is like it's going to be you and me.
>
> RB: No I've got a house in Brazil, there's no extradition treaty, I'm off.
>
> JS: Okay can I come and stay with you some time?
>
> RB: absolutely

> JS: But you know we've got to have something that looks as if in the face of it, it works.
>
> RB: he hates it"

444. One possible inference from what Mr Al-Sayed said is that Qatar had no intention of providing any services, taking this exchange in conjunction with other evidence in the case. However, it is well short of being irresistible. Mr Al-Sayed was entirely right about Sheikh Hamad providing services being a "crap" idea. On the other hand, albeit under the cover of legal advice with full knowledge of the facts, it was becoming obvious that part of the consideration for ASA1 was being linked to services which could not and probably would not be provided.

445. There is other evidence on the ipad which I have not touched on. I have considered it all. I consider that I have given sufficient of the flavour.

Post-ASA1 Evidence: the Interregnum Between ASA1 and ASA2

446. On 2nd July RB telephoned JS at 13:35 (Item 460) and proclaimed that he was "a bit of a fretter". He was concerned about the appearance of ASA1 with the fee written in manuscript. JS emphasised that it was important to sketch out and record "what the services are going to be and how they are to be valued". She later suggested that to MH and CL, and the latter agreed. JS reminded RB that Qatar had "ended up getting edgy because we referred to HE and that was what really made them throw everything out". Just before that, we have the following exchange:

> "RB: my worry is a journalist just gets it and says "This is" you know.
>
> JS: Yeah.
>
> RB: This is well I hate to use this phrase, so I'm not going to use it.
>
> JS: No, no, no. Because we don't even think that phrase. Those are just words that never come across our lips.
>
> RB: It begins with B.
>
> JS: … I think we do want a paper trail about what we got for it … we don't want to be sitting there and thinking, 'Oh God, we've got to create one now …"

447. This could be seen as offering a fascinating insight into the state of mind of JS which it is quite unnecessary to explore for these purposes. As for RB, the submission has been made that it is consistent with appearance, interdependency and therefore proves nothing more. However, by now we have a pattern emerging, and we may be able to connect that with the origin of the conspiracy.

448. By mid-July 2008 the results of CR1 were in, and it was clear that it had not been a success. Existing shareholders had not taken up the offer to the predicted extent, and Qatar was left holding far more than it had been expecting, which had been a clawback of about 50-70%. The actual clawback ended up being 16.34% although

some of the earlier calculations were based on 19% (the reason for this discrepancy is complex but has been explained). A spreadsheet was prepared (Item 483) which reflected an effective entry price of 259p or 260p – this took into account the value of ASA1. The purpose of the spreadsheet was to aid RJ in what was likely to be a difficult conversation with Sheikh Hamad at the latter's villa in Cannes. If the £42M had been completely ignored, logic would suggest that this would be a very powerful point in the defendants' favour. The converse does not follow in the light of Dr Leighton's evidence about baked-in prices.

449. At 14:15 on 16th July (Item 479) RB referred to the "other stuff" which must have been to ASA1 and the 1.75%. However, that was in the context of a frank conversion with Mr Meredith-Jones, a non-conspirator, who must have understood the allusion. The point that the SFO makes about this is that RB was telling Mr Meredith-Jones that the "other stuff", the 1.75%, would not be included in the calculation of the effective entry price on a baked-in approach. In fact, the £42M was included in the spreadsheet. I am not sure what to make of that point. Why mention it to Mr Meredith-Jones at all, and why then mislead him about the baked-in calculation? I have to say that "we are not talking about the other stuff", the 1.75%, is unlikely to mean "we are excluding it from the calculation". Reading this several times, I think that RB was saying that the baked-in price was based on "the lot", being the 1.5% and the "other stuff" which was in addition to that figure. Thus, and as it was to turn out, the £42M was being included and not excluded; and there was no attempt to mislead Mr Meredith-Jones.

450. Conversely, there is other evidence which on first impression supports a less benign inference. I am referring in particular to a series of conversations and emails between 16th – 18th July (Items 478-491) in which various things were said on which the SFO relies.

451. Here, it is vitally important to get the sequence of events right and to understand the whole context. On the one hand, RJ needed the ammunition to explain to Sheikh Hamad in Cannes that the picture was not quite as bad as it appeared. For this, as I have said, he needed the baked-in calculation of the effective entry price and the 259p/share figure. On the other hand, Qatar needed to be told exactly how much it had to pay the bank for investing in CR1. This calculation was based on the 282p/share figure which reflected only the 9% discount and the 1.5% fee. Reference to the 259p/share figure in the formal letter to Qatar would only serve to confuse matters.

452. I must say that I think that the SFO has confused matters in relation to this distinction, and that confusion was part of the reason why on 20th March I pressed Mr Boyce on one issue arising out of this sequence of events. Amongst other things, I was concerned about RJ's use of the term "code". Mr Boyce was unable to put me right, but Mr Kelsey-Fry invited me to read the documents again the following day. I then understood the position.

453. On 16th July (Item 478) RJ's conversation with RB was all about the baked-in price and 259p/share. This presupposed full account being taken of the 3.25%. RJ said "you wouldn't want to print that anyway" in the context of Qatar not getting the full benefit of the 3.25%. This was because the full benefit depended on the expected clawback of 50-70% and would have generated an effective entry price of around 240p/share (a

ballpark figure: I have it slightly higher). It is unclear which part of this explanation RJ apparently did not want to print, and there may be a point to go before the jury, but the fact remains that there was no subterfuge vis-à-vis the Sheikh or indeed anyone else because RJ also said, "you have a separate section on the advisory fee".

454. As I have said, the Cannes meeting was on 17th July for which purpose RJ had a briefing pack and the spreadsheet.

455. All the other documents between Items 484-491 relate to the actual entry price. As I have said, this was based on the 282p/share figure. CL was involved in this exercise and was keen to ensure that Qatar was provided with the correct amount to pay, as was RJ. The bank was preparing a covering note which set out the position. The fact that CL was sent the email from RJ at 07:58 on 18th July (Item 485) was not remotely suspicious. RJ felt that he had been "offsided" the previous day and that the calculations might not be correct. CL was the CFO and accountant and could clarify the position.

456. At 11:39 on 18th July RB told RJ that "we can't put the 259p/share figure "in an email" (Item 490). This was in the context of the formal calculations which only reflected the 282p/share figure. Further, RJ told RB:

> "That's fine. Okay. And then, the only the thing we should sit at the bottom is, 'And we're delighted – 'and then you – the covering letter should say – so, this is code – and we're delighted that we also … something along the lines of the advisory agreement" (Item 490)

457. So, what RJ wanted to do was to send a signal to Qatar in the formal covering note to the effect that the amount it was paying was not as much as it appeared; there was a further £42M to be taken into account. The use of the term "code" would ordinarily be suspicious, but my reading of this is that all that RJ was saying was that the commercial reality should be telegraphed to Qatar in some way. My concerns about this have not been entirely dispelled because a reasonable hypothetical jury fully cognisant of the detail might see this differently but it could never be a particularly powerful point. In the result, the covering note at Item 491 made no reference to the coded message at all. I cannot accept the SFO's further written submissions about this which still read too much into RJ's choice use of language.

458. From the end of July 2008 Qatar was clamouring for its fee, submitted four invoices simultaneously, although three were post-dated, and RB had to "field" in RJ's absence a fairly irate phone call from Sheikh Jassim demanding direct payment on behalf of Challenger (Item 500). The adverse inferences to be drawn from these matters, taken in isolation, may not be particularly strong, but they are available.

459. At 10:48 on 22nd September RB and JS discussed the 3% fee on the Lehman extension (Item 567). Its relevance as a free-standing matter is considered elsewhere. The same presentational or optical difficulties were understood by both of them. RB then said that the other thing he did not like about this "is that it may raise questions about what they actually got last time round". He had previously mentioned the "dark days of June" in a similar sort of context.

Evidence of Services Performed

460. The SFO opened the case to the jury on the basis that:

> "The ASAs were no more than mechanisms for the disguised payment of additional subscription fees and/or hidden discounts from the ostensible price paid by Qatar/Challenger for their investments. They were not intended to be enforceable agreements for the provision of services. "Services" of some sort or another might well be rendered in the future in any event of course – Qatar was after all now a major shareholder in Barclays so it would potentially be in their own interests, and Roger Jenkins clearly had an ongoing (and pre-existing) relationship with the significant decision-makers in Qatar".

461. On 4th September, which was the date of RJ's return to work after his heart attack, he sent an email (Item 544) to the effect that he would be meeting Dr Hussain and Sheikh Mansour the following week and there was scope for moving forward on the advisory agreement.

462. On 3rd October CL asked for "high level details of the services provided to date (by way of list or explanation)" under ASA1. On 6th October Paul Emney provided the following list (Item 579):

> "To date QIA have provided us with the following assistance:
>
> - Helped with our application to open a branch in Doha by agreeing with the regulator an extension to our opening date
>
> - Facilitated an introduction to Qatar Telecom in connection with a potential transaction
>
> - Discussed with us a potential role on a transaction involving a UK listed company
>
> - Helped with our understanding and strategic thinking as we look to expand our franchise in the Middle East region."

463. This evidence has been admitted as a business record under s.117 of the Criminal Justice Act 2003. Given its hearsay nature, its weight must be for the jury to assess. The SFO invites me to consider all the surrounding circumstances regarding this evidence, as well as its intrinsic character. Indeed, Mr Brown's submissions do not seek merely to neutralise this evidence but positively to build on it.

464. The starting-point must be Mr Emney's list. I do not think that I can properly proceed on the basis that the list was untrue even if it were procured by CL's dishonesty (of which I believe there is a sufficient case). Unless Mr Emney knew or suspected that he was being asked to participate in some way in a false audit trail, the point has no force.

465. The SFO's far more compelling submissions are based on a close examination of Mr Emney's list in the light of the evidence on the ipad and other evidence. I propose to take these matters quite shortly. As for the branch in Doha, an examination of the chronology reveals that any assistance afforded by Qatar pre-dated ASA1. As for

Qatar Telecom, the evidence is less clear on the timings, because this was an existing client. It is said that the September "introduction" appears to have been specific to RJ, was not therefore related to Barclays Bank Plc, and in any case could not have been promoted under ASA1 because the relationship pre-existed it. In my view, the jury would have to make what it will of that issue. As for the UK listed company, the surrounding evidence demonstrates that this was Sainsbury Plc and that it was QIA which sought advice from RJ and/or the bank in connection with increasing its stake in the company. Insofar as there was any advice, it was flowing in the other direction, from RJ/Barclays to QIA. As for helping with Barclays' understanding and strategic thinking as it looked to expand its franchise in the Middle Eastern region, this it seems to me was the main purpose of ASA1 assuming that it was genuine. The fact that Qatar's financial interests became aligned with Barclays because it had become a significant shareholder does not prevent this being a genuine contractual service. On the other hand, the only evidence that any services were or might have been provided under this category is Item 571, which refers to the RJ/Sheikh Hamad meeting in New York on 23rd September 2008 during the course of which there was "valuable input on the geographical issues impacting on the Middle East". The only possible source for this could have been RJ.

466. Evidence filed on behalf of RJ for the purposes of this application is consistent with Mr Emney's list being true. Furthermore, this material did not come out of the metaphorical blue because RJ had been in contact with Mr Emney in the summer: see Items 475 and 543.

467. Further documents filed on RJ's behalf - see paragraphs 64-72 of Mr Kelsey-Fry's written argument – also amount to hearsay evidence of genuine services admissible under s.117. However, the SFO points out with some force that a close examination of that evidence is required: see paragraph 69 of the submissions on the evidence. I think that RJ's strongest point is that Sheikh Hamad's son, Sheikh Jassim, may have been instrumental in seeking to open doors for Barclays and develop business opportunities in Qatar and elsewhere. On the other hand, a different interpretation is entirely possible.

468. On 12th October 2018 RJ, Mr Diamond and Stephen Jones met Qatar Petroleum. According to the recently-filed papers:

> "HE offered the oil hedge opportunity and fund raising seeing $8 billion in financing: Bob Diamond appreciative of huge opportunity – very profitable for Barclays [12th October]
>
> Bob Diamond briefed the Board … he also advised that Barclays Capital looked likely to be appointed to manage a very large oil price hedging contract for Quail which had previously been given to Goldman Sachs. [Item 605]
>
> RJ email dated 16th October: "Hamad keen we get this over Goldman."

In the end, the hedge fund opportunity did not go the Barclays. Whether Sheikh Hamad's apparent keenness had anything to do with ASA1 rather than being a part a negotiating tactic in what was becoming CR2 must be open to debate.

469. Added to the evidential mix is Dr Leighton's oral evidence which I have already mentioned. A reasonable jury could conclude that this evidence provides independent support for the defendants' case that genuine services were furnished, but in my view they certainly would not be bound to do so.

470. The significance and saliency of this evidence cannot, in my opinion, be assessed in any definitive way. We are in classic jury territory. Any direction to the jury would make clear that the issue of intention (i.e. on 11th June) is paramount, but this evidence is capable of throwing light on it. How much light, and whether it is positive or negative light, are for me open questions.

471. It follows that, at least at this half-time stage, I am left in a state of evidential agnosticism. A reasonable jury could properly conclude that this evidence helps the defendants, in which circumstances they would have to apply a legal direction which reflects my understanding of the law and approach to the issue of contractual consideration and gross undervalue: see paragraph 143 above. A reasonable jury could properly conclude that this evidence is neutral and does not really take them any further either way. Or, finally, a reasonable jury could deploy this evidence in some way against RJ and, possibly, CL. I have hesitated before reaching this last conclusion, but it is one possible view of the evidence. It does not make any significant difference to the outcome.

CL: Sufficient Evidence of Knowledge in his Case?

472. I have already touched on some of the evidence which bears on the separate case against CL. It is clear from the available material that CL was aware of Qatar's demand for an additional 1.75% shortly after it had been made.

473. I have already addressed the important call between CL and RB at 12:09 on 11th June (Items 135). In his case, CL:

(1) would not pay the extra 1.75% across the board.

(2) was otherwise pretty flexible.

(3) agreed with RB that the bank could not simply pay 1.5% and then the balance in the form of a cheque for the 1.75%.

(4) agreed with RB that the solution would have to pass the "smell test".

(5) then proposed a solution would have passed the smell test only to the extent that no one would have found out.

474. It is of course true that this was not a conversation about an advisory services agreement, but it does provide important, maybe vitally important, context in relation to CL's thinking. I have covered the ground here.

475. The later TK and RB transcripts refer to a conversation between CL and MH. This evidence is close to the frontiers of admissibility in relation to CL. It is clear from what TK said that he did not know whether CL ran the structure past MH. There is no evidence that CL did, and TK said that he personally did not.

476. CL was in receipt of legal advice from MH, including Item 176 (email timed at 18:33 on 13th June) and Item 185 (email from MH to CL copying him on the memorandum of 13th June). Mr Purnell has drawn attention to this. It is a very powerful point if the case is viewed only through the prism of the SFO's original definition of "mechanism". It is very much weaker if a more nuanced approach is adopted because MH did not know what CL and TK knew: they knew, one way or the other, whether genuine services were within contemplation. MH could only assume that. I have already pointed out that if the defendants wish to advance a positive case against MH, that would be their decision.

477. As against CL, where we do not have evidence of his conversation with TK, the SFO's inferential case really depends on the jettisoning of its version of "mechanism" as opened to the jury. A rigid application of that case draws the mind away from the real issue, which is whether this mechanism *was* genuine or not, rather than "it was impossible to have been otherwise". Insight into the true position, at least on one possible view of the evidence, is to be drawn from a close analysis of the TK/RB transcripts. This is because if TK knew that this was a device, sham or improper mechanism, there is a strong case that CL did so as well. The interconnection between CL, RJ and TK is important, as is – on at least one view of the evidence - CL's relaxed attitude to dishonest solutions.

478. Reliance is placed by the defendants on RB's explanation to TK given at 11:59 on 13th June that it was "Lucas' view … we need to be convinced that the two things are dissociated and, that the commercial value in the whatever we want to call it document is, is equivalent, equivalent to the payment however it's made". Exactly how RB interpreted CL's view requires separate consideration, but an approach which holds that it was CL's opinion that "we had convinced ourselves" would be available.

479. Looking at the period 11th–25th June 2008, CL was aware of the Challenger investment, but there is no evidence that it was his idea to pay 3% across the board and an additional 2% to Qatar as a "consultancy fee" (Item 221). RJ's remark followed RB's evinced concern that Sheikh Hamad could not be paid any fee. Item 250, dated 17th June and timed at 15:20, indicates that CL agreed the unusual payment terms, namely the payment of the entirety of the consideration of £36M over a 12-month period, notwithstanding that the agreement was for 36 months. As I have said, the importance of this rather depends on one's starting point. If there were insufficient evidence fixing CL to the conspiracy on 11th June, this material would make little or no difference. This unusual feature was known by so many people. If, on the other hand, there is evidence to indicate that CL knew that there was no intention to provide services, this unusual feature would have been of no surprise to him.

480. Even more troubling, but only on this latter premise, is RJ's remark that CL's intention was apparently to inform the Board, if needs be, that this was a £36M contract for 3 years. Directors would assume that this would mean £1M a month, which was not the case. I was not particularly impressed by Mr Kelsey-Fry's argument based on the wording of clauses 1.3.1 and 1.3.2 of the ASA draft then in circulation: the real issue here is the first sub-clause and not the second. In the result, the figure was not vouchsafed to the Board, but if RJ's evidence is right this was the intention. Again, and working on the assumption that this is admissible evidence, CL's idea was misleading, inasmuch as he would not be explaining the abbreviated payment terms. Shortly thereafter, CL received an email from JS to the effect that the

fee for ASA1 did not have to be disclosed in the Prospectus, and the Board pack included a draft of ASA1 which did not include the fee. That might explain why no explanation was given to the Board, but it is CL's intention which is relevant.

481. On 18th July CL was sent an email by RJ which related to the "actual entry price" for CR1 (Item 485). CL's email timed at 10:15 asked RB's note to "cover this". Accordingly, CL was aware that the calculation of the actual or effective entry price included the value of ASA1. I do not think that this really matters. It depends from what premise one starts.

482. Reliance is also placed by the SFO on various emails sent in early October 2008. On 3rd October Bill Castell, part of Barclays Corporate development, wrote to Paul Emney who was or about to be Barclays' COO seconded to QIA (Item 574). The email continued:

> "Further to the current discussions with QIA, Chris Lucas has asked if he could have high level details of the services provided to date (by way of a list or explanation) in relation to the QIA advisory services agreement [in fact, the counterparty was QH] date 25 June, this should include the upside from general relationship benefits arising from the collaboration. There is a possibility that an extension to the agreement may be made and as part of those discussions he would find it useful to know what benefits have arisen to date."

As we know Paul Emney provided a list on 6th October, and at 16:52 his email was forwarded by Mr Castell to CL (Item 580). CL acknowledged that email. Taken in isolation, none of this is particularly suspicious. I have already made the point that it is not realistic to maintain that Mr Emney's list could have been contaminated by CL's dishonesty. However, once sufficient evidence of such dishonesty is available elsewhere, there is a pattern of behaviour which may be seen as consistent.

483. The case against CL hinges on the assessment a hypothetical reasonable jury could make about the critical conversations on 11th June 2008 taken both in isolation and in conjunction with the subsequent evidence in his case and in the cases of RJ and TK. What I would call "bootstraps reasoning" must be avoided, but that is not what I consider is happening.

484. At the appropriate stage, which is now, I have to make a decision as to whether evidence conditionally admitted at common law should be admitted for the purposes of this application. In my judgment, there is sufficient evidence elsewhere against CL elsewhere which makes it right to admit this additional evidence. My conclusion that there is a case to answer against CL reflects my evaluation of the case against him and the case on Count 1 taken as a whole.

<u>JV: Sufficient Evidence of Knowledge in his Case?</u>

485. My assessment of the case against JV, always from the perspective of a hypothetical reasonable jury, is that it does substantially depend on the viability of the SFO's case on "mechanism" as opened to the jury. He knew of *that* mechanism, but there is insufficient evidence that he knew of much else. Furthermore, and in contrast to CL, he was not involved in the genesis of the conspiracy, and the remark that JV would

have to "sign off" on the transaction provides woefully insufficient support for the notion that JV became a conspirator at that point. JV could be signing off without guilty knowledge. When TK in fact said that JV and "Bob" would be doing the signing off.

486. In outline, the SFO submits that the jury would be entitled to conclude that the situation was so serious in June 2008 that JV might be more motivated to engage in dishonestly sanctioning what was truly an extra commission fee and not declaring it. Apart from Mr Agius' evidence – he described market conditions at that time as being relatively benign with Qatar being a desirable investor but not essential – the discussion paper at Item 52 suggests that Barclays was outperforming the market. In any case, I have to say that the proposition that a man of utmost integrity was significantly more likely to contemplate illegality in circumstances which were not existential (cf. October 2008) presents a somewhat dismal view of human nature and one which would be disloyal to a positive good character direction. I entirely reject this.

487. The SFO says that so far as Barclays was concerned there was no realistic possibility of disclosing the increased fee that was going to be paid to Qatar or paying the increased fee to other investors. JV knew that the increased fee was not going to be paid to the others. He also knew that the advisory agreement would be based on the balance of 1.75%. That would only be disguising the fee if it were not for genuine advisory services. It was not impossible, *pace* Mr Brown, for Qatar to have agreed to participate on a legitimate basis even though some value was being relinquished. JV must have understood these matters, but here we revert to the SFO's case on "mechanism" as opened to the jury. JV, as much as Mr Diamond, wanted to disclose the existence of ASA1 because there was or appeared to be commercial advantage in doing so. Legal advice was that the amount of the fee did not have to be disclosed.

488. Turning to the chronology, JV attended the meeting with Qatar (including Sheikh Hamad and Dr Hussain) which took place at 12:30pm on 23rd May 2008 at the 4 Seasons Hotel, Park Lane. Clearly, this was a high-level meeting because Mr Diamond was also present. The purpose was to persuade Qatar to invest although the strategy could not be as blunt at that. It is clear from the "running order" email (Item 47) that JV and Mr Diamond were intending to tell Sheikh Hamad that Barclays wanted a strategic as much as a financial partnership. Whatever Qatar's motivation at that time, there is no reason for doubting the sincerity of this email. At that stage Qatar had not upped the ante.

489. JV was aware that Barclays was negotiating on the basis of a commission or fee to all the conditional placees of 1.5%. On 3rd June Dr Hussain upped the ante and demanded 3.75%, giving a "big justification speech". He also said that he wanted a strategic relationship. As a result of that, Dr Leighton was asked by RB to perform some indicative calculations of effective entry prices based on a strike price of 360p/share and commission rates of 1.5, 3.25 and 3.5%. Dr Leighton's email (Item 88) was forwarded to TK for onward transmission to JV. At 06:46 on 4th June TK copied and pasted Dr Leighton's data into an email to JV which was copied into CL and Mr Diamond (Item 91). It is clear from the email that there had been a discussion about this, and at 18:09 on 3rd June, when TK and RB were discussing the topic, it was reported that JV could "live with" 3.5% (Item 86).

490. At 16:52 on 5th June JV reported to Mr Agius: "Quail is bagged at 2bn of the conditional" (Item 107). I draw the inference, contrary to Mr Purnell's submission, that an agreement had been struck on the basis that Qatar would invest £2BN as conditional placees (*i.e.* this was the maximum commitment) on the basis of a discount to the share price of 9% and a composite fee of 3.25%.

491. However, it is necessary to be very precise about this, as the defendants rightly urge. The "bagging", the agreement, was subject to contract. I feel that I have laboured that point sufficiently in the May 2018 ruling. Furthermore, this was not an agreement, even in principle, to pay Qatar a fee of 3.25% for the "underwriting" (I use inverted commas to reflect JS's lapidary explanation to RB of the legal position as regards conditional placees: this was not strictly speaking an "underwriting" at all). The evidence bearing on this point does not bear repetition.

492. In my judgment, it is a reasonable inference that JV was aware in general terms that efforts were undergoing within the bank to pay Qatar the extra 1.75%. Even if it could be inferred that he was aware of the difficulty, there is no evidence that any of the possible solutions were run by him, or that he was party to the sort of conversation CL had with RB on 11th June. I have rejected Mr Brown's submission, which I think he does need in JV's case, that the mechanism could not have been lawful. The inference that JV must have been aware that the solution was going to have to be unlawful is not supported by the evidence, JV's good character, the fact that it would have been obvious that lawyers would be involved (leading to the further inference that any dishonest solution would have necessitated the connivance or deception of the lawyers) and commercial reality. It may be important for the SFO's purposes to bring JV into the conspiracy at an early stage, but there is no evidential basis for it.

493. RJ emailed JV at 16:09 on 10th June with the news that Qatar "are in a good place" (Item 120). JV's reply was:

> "Fine roger. Thanks. When the dust settles let me know what I should do to thank him [Sheikh Hamad], and memorialise in some way our new partnership."

I accept Mr Purnell's submission that the notion that JV would memorialise a sham agreement makes no sense. At any rate, at that stage no sham agreement in the form of an ASA appears to have been within contemplation.

494. The SFO relies on the fact that at the Board meeting on 11th June which JV attended the fees were recorded as being a universal 1.5%. I reject the submission that this was a misrepresentation. The extra arrangement with Qatar was not mentioned because the concept of the ASA had not been conceived. The problem was in the inbox and no solution had been found.

495. The precise stage at which JV became aware of ASA1 as a concept is unclear, and his prepared statement is unhelpful on this issue. But the inference cannot reasonably and properly be drawn from all the circumstances that JV knew or believed that ASA1 was a sham arrangement. The SFO submits that "whilst there is direct evidence of the concerns of RB and the reasons for them, the same understanding and state of mind can be inferentially attached to all defendants who knew about the problem and the proposed solution". With respect, this goes both too far and proves too much. On the

one hand, the case against all the defendants must be viewed separately. On the other, the submission rests very uneasily with the proposition that there is insufficient evidence that Messrs Diamond and Morse were dishonest. RB said "we all know", but regardless of his use of the pronoun "we" a proper legal analysis cannot sweep everyone up.

496. The next stage is to consider whether there is anything in the subsequent material which could generate the inference that JV became aware that ASA1 was not as it purported to be. The short answer is that there is next to nothing. I agree with Mr Purnell that JV had next to no involvement in the development, negotiation or execution of ASA1. All the later emails, all the recorded conversations between RJ and RB, and between RB and the lawyers, either do not touch JV or are inadmissible against him.

497. In any event, this later material is extremely sparse in its evidential potency against JV. He was aware of the Challenger slice (see Item 271 and "bravo the extra") and may well have assumed that the 1.75% would apply to it, but there is no evidence that he was aware how this issue would be resolved and the nature of the problem that was highlighted by RB and then grappled with by others. At 15:32 on 18th June (Item 294) JS described JV to RB, without irony, as "honest John". At 16:33 on the same day, RJ said to RB:

> "I'm very surprised that John Varley, given his ethics, is doing this."

and RB said that he was "amazed". Even if this is conditionally admissible at common law and under s.118, it is not clear to what the "this" exactly refers, and the evidence is in any case much better viewed as offering an insight into the assumptions of the makers. I take Mr Kelsey-Fry's point that by reading this in context it is difficult to accept that what RJ and RB were saying was that they were amazed that JV was participating in a sham transaction. Their amazement was far more likely to have been expressed on the premise that JV was participating in an arrangement which he must have appreciated was sailing a bit close to the wind, although was on the right side of the law. On any view, RJ and RB should be interpreted as saying that JV's ethics were different from theirs, although this snippet of evidence, taken by itself, does not enable the notional jury to go further. At 16:34 on 20th June RB told Leigh Bruce that he got JV "to tell a tiny porky on where we are on size". Mr Brown relied on this, but he was clutching at straws.

498. ASA1 was approved by the Board and the BFC on 19th June 2008. This was on the basis of "certain agreed fees" which were not spelt out to these bodies. JV and CL led the meetings on these issues, and the inference must be that they were both aware that the agreed fees represented in arithmetical terms the difference between 1.5% and 3.25%. I have referred to the evidence that CL appears to have been prepared to mislead the Board if the need arose (strictly speaking, I am now treating this as admissible against CL on the ground that there is a sufficient case against him elsewhere), but this cannot avail the SFO against JV. It may be speculated, but cannot be inferred, that CL had a discussion with JV about this.

499. Paragraph 30 of the SFO's 16th March submissions on the evidence contain a number of bullet points virtually all of which have been taken out of context. None of these is of assistance.

500. Is there a further inference to be drawn on the basis that JV did not explain to the Board and the BFC that the "certain agreed fees" had been calculated in a certain way in order to meet Qatar's certain demand? That is a slightly different point. I have thought carefully about this, although it does not seem to be a point which particularly appeals to the SFO. A fair reading of Mr Agius' evidence would not permit the drawing of such an inference, but that is not the end of the matter. Legal advice was to the effect that the existence of ASA1 had to be disclosed in the Prospectus but not the level of the fee, because it was not a "material contract". There is no suggestion that this legal advice was either tainted nor incorrect. There may be some force in the contention that JV should have been entirely forthcoming with the Board and the BFC, if for no other reason that these arrangements were not free from difficulty, controversy and the taint of suspicion, and the issue could always return to bite Barclays' back. However, any further inference of knowledge, belief and/or dishonesty could not reasonably be drawn from these primary facts.

501. There is no evidence that JV knew of the various iterations of ASA1 with its expanding and then shrinking list of services, and of the incidence of LIBOR interest. Mr Purnell drew my attention to the fact that the company secretary, Mr Lawrence Dickinson, was on 18th June sent an email which encapsulated what might be called all the unusual features of ASA1. The only reason he did this was to neutralise the submission he anticipated would come from Mr Brown that the Board was not fully sighted. In that respect, I think he succeeded. Mr Purnell did not submit that JV in fact knew all the information contained in the Dickinson email, and I leave the matter there.

502. The circumstances surrounding the signing of ASA1 are curious. This has been described as a "highly etiolated version", and there is force in that. The submission would also have force in relation to JV if he had known of the process of expansion and contraction, but there is no evidence that he was involved. On 24th June CL signed an undated draft (it was the same as the final version, subject to the amount of the fee) which included a typed figure of £41,685,000. This had been calculated on the basis of 1.75% of the combined maximum commitment of both QIA and Challenger together with LIBOR interest. There is no evidence that CL knew how the figure had been calculated, but there is certainly a suspicion that an accountant would have bottomed this out against the backdrop of other knowledge. In the end, this does not matter as against CL. At 23:22 on 24th June Matthew Dobson sent an email to Clifford Chance, JS and RB stating that the previous signed copy had been superseded and that "£42M fee agreed". Attached to his email was a version of ASA1 signed by JV with the fee of £42M written in rather than typed. On 25th June Mr Diamond opened a "Q and A" session with investors, after CR1 had been launched to the market, with a brief speech which lauded the advisory relationship and its commercial importance to the bank. JV was present on that occasion. At 10:22 on 26th June there was a conversation between RB and MD in which the following exchange appears:

> "MD: You see I managed to get Varley's signature on it.
>
> RB: yes, I saw that.
>
> MD: I was in trouble with Judith for that and she said how could you get John to sign for …

> RB: well –
>
> MD: God it's just Barclays and she said 'No, you're supposed to get Roger to sign it.
>
> RB: Well I said Roger was going to sign it, but the fact is, very funny, a very interesting vignette actually, in the evening, was about 11:30 –
>
> …
>
> I phoned Roger and said, "You have to sign this letter [I paraphrase what follows: RJ was somewhat reluctant to do so]
>
> …
>
> MD: And then they quibbled about the fee, they wanted it a round 42 –
>
> RB: God I hope they –
>
> MD: So we ripped that one up [the version signed by CL] and I went upstairs and Chris wasn't there, so John was there and I said, well 'Sorry, excuse me, do you mind signing this?' and he said, 'What is it?' and I said, 'It's the fee letter' and he said 'Oh that's fine' and just signed it, blank.'"

503. Mr Purnell has not applied to admit this evidence as hearsay under s.114(1)(d) of the Criminal Justice Act 2003, and I am not convinced that this evidence is admissible in JV's favour under s.118 etc. If I am wrong about that, it provides additional support for Mr Purnell's argument. I consider that all that I need say is that there is no evidence that JV knew the exact amount or its precise mode of calculation, beyond the 1.75%.

504. JV's good character, indeed utmost integrity, weigh strongly in his favour, but they would have to yield if by this point in my analysis I had reached the conclusion that there was a case to answer against him on Count 1.

505. Finally, I must address the SFO's submission that the conspiracy could only have worked if JV had been a party to it. If I am being asked to find a case to answer against JV on the basis that, if there is a sufficient case against others then there *must* also be a case against JV, I would reject that submission without hesitation. In any event, the SFO's case works perfectly well without JV being a conspirator. We have seen that in connection with the actual signing of ASA1, and all the public-facing documents could have been signed by JV, or indeed any other director, without knowledge of the true facts: these documents would always be based on the 1.5%. The reason why the SFO's case does not work so well without JV is that this is the consequence of the application of s.1 of the Criminal Law Act 1977.

506. My conclusion on a free-standing basis is that there is not a case to answer against JV on Count 1.

TK: Sufficient Evidence of Knowledge in his Case?

507. Following the safe landing of CR1 TK was lauded by JV for his "immense feat of leadership" (Item 450). This in itself generates no inferences save that TK had an important role in keeping the four elements of the deal synchronised and on track. He would not necessarily have been *au fait* with all the detail, and the extent to which he was would depend on the inferences to be drawn from a close rather than a more generalised examination of the evidence.

508. The whole of Mr Winter's extremely detailed and effective written submissions filed on 7th March were directed to the case that he thought that he was meeting: viz. the SFO's "mechanism" as opened to the jury. He was therefore seeking to persuade me to view all the evidence in relation his client through that prism alone. That was an extremely effective approach and was one which Mr Winter was entitled to take in the light of Mr Brown's written opening which had been made available on 20th December. He was not alone in taking it. However, my analysis of the conspiracy as it was developing in real time has been undertaken in a less restrictive manner.

509. At this stage, I must address the SFO's written submissions on the evidence insofar as they apply to TK (paragraphs 111-127). My approach to this is that it all depends on from where one starts. Taken in isolation, or even cumulatively, they may not amount to much; but they do begin to make a difference when connected to the events of 11th June. Here, I believe I have covered the ground more than adequately in TK's case, recognising always that there is little subsequent evidence against him. Let me address any points I have previously missed.

510. On 23rd June TK was copied into an email which mentioned the advisory agreement in very general terms (Items 375 and 376). A copy of ASA1 in draft (JS's draft) was attached. It was clear from this draft that the services were not being described with any specificity and the fee was left blank. TK was not aware of the background to this and could not have appreciated the circumstances in which JS was slimming the draft down from earlier versions. He had not been sent those versions. The SFO submits that, given that TK had been engaged in the genesis of the ASA mechanism from the start, there was nothing in the draft document which could have persuaded him to a different view. That would only be right if the premise is correct, and in that respect it is a perfectly reasonable point. TK would understand from seeing the draft that there was very little in it about the services that were under contemplation. The premise cannot be correct on the basis on which the case was opened by the SFO, but it might be correct for a different reason.

511. The point is made by the SFO that TK was the recipient of an email dealing with Sheikh Jassim's request, or demand, for the Challenger fee (Item 500). RB said that he might punt the issue to TK (Item 508). I do not see how that helps on the issue of knowledge and dishonesty. The issue here was on whose books the payment would appear.

512. In an email sent to JV, CL and Mr Diamond at 13:49 on 8th September 2008 (Item 546), TK reflected that the bank had created two exceptional strategic relationships, one of which was by implication with Qatar. There are only two possibilities here: the truth, or disingenuous misleading. I am not convinced that the circumstances surrounding this email, including the fact that it was sent both to conspirators and non-conspirators, could help a hypothetical reasonable jury decide which of these is right. Insofar as any inferences could be drawn, they may be more helpful to TK.

513. In my judgment, this additional evidence lends some further support to the SFO's case if sufficient evidence already exists of knowledge and participation in a conspiracy based on a consideration of the period 11th-13th June. If, on the other hand, insufficient evidence exists in this regard, this additional evidence lends next to no support. TK was effectively in the same position as many others. To say that these were acts in furtherance of a conspiracy assumes what needs to be proved, given in particular the evidential feature of the instant case that direct evidence of the alleged conspiracy is available. Nor, in my view, can virtually all of this material be used to rewrite or restate what was said in the key transcripts, although I have obviously taken it into account in arriving at a possible view of the evidence through the eyes of the notional reasonable jury.

514. However, on the approach I have adopted as to the SFO's best case on "one possible view of the evidence", this later material provides some support for the SFO's case against TK seen just on a standalone basis. It provides even better support if the evidence against co-conspirators, in particular RJ but possibly CL, is also considered.

RB: Sufficient Evidence of Knowledge in his Case?

515. Mr Boyce advanced a series of sustained, powerful submissions on RB's behalf. His client has also been well served in this case, and a fair evaluation of the evidence remains troubling.

516. By way of overview, Mr Boyce emphasised that RB played an executant and not a decision-making role. It was not his task to verify whether services would be provided under ASA1. In an institution which depends on integrity and trust running up and down the line, RB was fully entitled to rely on the sincerity of what he was being told directly by TK and RJ, as well as TK's report of Mr Diamond's, Mr Morse's and CL's opinion; and on the reasonable assumptions he was making in relation to what the seniors knew and what the Board would be told, always acting on legal advice.

517. Mr Boyce submitted that there is no evidence that RB was told in terms by RJ or TK that this was a dishonest arrangement. Furthermore, in a context where RB knew that his conversations were recorded but at no stage appears to have modified his language or his openness to reflect that, there is no evidence of any conversation where the conspiracy or knowledge of it is expressly articulated. The SFO's entire case would seem to depend on reading between the lines.

518. Mr Boyce drew attention to an important distinction between evidence which is consistent with guilt and evidence which is probative of guilt. The quest must be for material which truly discriminates between innocence and guilt, which supports the SFO's case or contradicts the defence case. The entirety of the telephonic record, submitted Mr Boyce, falls within the first rather that the second category. Specifically, all the evidence demonstrates no more than RB's concerns about inter-dependency, conditionality and the "jeopardy", and do not come close to true belief.

519. Mr Boyce further submitted that the SFO's whole case is based on the theory that this was dishonest from the start, but that a proper interpretation of the evidence bearing on 11th June, and if necessary 11th–13th June 2008, shows otherwise. If that case is insupportable on the footing that no hypothetical reasonable jury could accept it, any subordinate or alternative case should not be considered. This is particularly so if

there is no case to answer against TK because he was the conduit through which the alleged dishonest instruction passed at 15:51 on 11th June.

520. Perhaps more by way of forensic observation or as a jury point, Mr Boyce observed that if RB had done or said nothing, we would not be here.

521. It was a consistent theme of Mr Boyce's submissions that RB's knowledge and belief precisely tracked that of the lawyers at all material times. All the problems with this arrangement, including the optical aspects, were appreciated by the lawyers and addressed. It follows, submitted Mr Boyce, that RB's state of mind and of thinking was always exactly in pace with the lawyers, and there may be no question of the notional jury drawing an adverse inference.

522. Mr Boyce further submitted that RB's mode of discourse, choice of language, tone of voice and comportment generally did not change through the whole of the period under scrutiny. This contradicts the inference of knowledge of sham.

523. Finally, Mr Boyce submitted that there is insufficient evidence of dishonesty and of the taking of positive steps to further the conspiracy. I am able to reject those particular points fairly briefly. If RB knew that genuine services would not be provided and all the lawyers never knew that, there would be a sufficient case to go before the jury on the issue of dishonesty. The active steps which RB performed, to the extent that it is necessary to prove any such steps in connection with the timing of the *actus reus* of the statutory conspiracy, would include the discussions with the lawyers which led to changes in the draft ASA, and in particular the discussion with JS following the Al-Sayed "spitting" conversation.

524. I have set out some of the key evidence in relation to RB. There is much more, and some of it is supportive of RB's case. The difference between suspicion and belief of virtual certainty is difficult to draw in a case as complex as this. In my judgment, a notional reasonable jury could properly conclude that by 18th June at the very latest, RB was virtually certain in his state of belief that there would be no services. He derived that mental state from a number of sources. If he joined the conspiracy after 11th June, none of that would make any difference. However, the position here is that there is sufficiently cogent evidence that RB was becoming, if he was not already, a conspirator by close of business on 11th June, and the later evidence could be treated as clinching the issue for the SFO as part of a fluid, developing picture.

RJ: Sufficient Evidence of Knowledge in his Case?

525. I do not consider that his case merits a separate sub-heading although I have been considering it carefully in my analysis of the conversations he had with RB in particular. In many ways, the case against him is the strongest. I have reached that conclusion on the basis of (1) one possible view of what occurred on 11th June, (2) an interpretation of the later taped recordings taken in combination, and (3) all the other evidence in the case.

Synthesis and Conclusions on ASA1: Sufficient Evidence of Knowledge and Conspiracy?

526. I must return to what I said towards the beginning of the proceedings on 27th March. The transcript forms part of the Annex. I have not corrected it for minor errors of

transcription or verbal infelicity on my part. I was proceeding *ex tempore*. These remarks should also be considered in the light of the frank exchanges I had with Mr Boyce which appear on the transcript for 1st April 2019, pages 86-88.

527. Mr Winter and Mr Boyce submitted in writing that what I said amounted to an impermissible descent into the arena by the trial judge and/or created the perception of a real possibility of bias: see *Michel* [2010] 1 WLR 789, *R v Grafton* [1993] 96 Cr App R 156 and *R v Malcolm* [2011] EWCA Crim 2069. Mr Boyce came close to submitting that I should recuse myself.

528. Mr Brown referred me to the line of cases where the trial judge summed up the case to the jury on a different basis from that advanced by the Crown: see *R v Cristini* [1987] Crim LR 504, *Harbans Singh v R* [2011] EWCA Crim 2292, *R v Japes* [1994] Crim LR 605, *R v Williams* [1994] 99 Cr App R 163 and *R v Evans* [1990] 1 Cr App R 173. I take the point he seeks to make, and the present situation has nothing to do with my summing-up to the jury. My role at this stage is to identify the Crown's best case, not because I have any interest in somehow wanting to like or accept it, but because the overriding objective requires it.

529. My analysis of the case-law so far as it goes is that the judge should not at any stage become the prosecutor or risk the perception that this has occurred. The judge cannot create a fundamentally "new case" which transforms the whole case. However, if the judge removes the unworkable parts of an existing case, thereby permitting all its moving parts to run more freely and without impediment, I would not accept that any line has been crossed. The issue then becomes a different one, which is whether the defendants have been given sufficient opportunity to deal with the judicial reformulation. Mr Brown urged me to consider the issue in those terms, and I agree. I will expand on this.

530. In considering these written submissions the following must also be borne in mind:

(1) I have said nothing in the presence of the jury which could possibly raise a perception of bias. If anything, any such concerns will have been harboured by the SFO (not that I would accept this).

(2) the exercise I am conducting is designed to ascertain whether there is a case to answer.

(3) in improving the SFO's case I have added virtually nothing new. What I have done is to strip away lines of reasoning which are incorrect, unhelpful and prevent a proper analysis of these complex facts.

(4) the defendants' first line of defence has been to submit that the SFO's version of the "mechanism" is unsustainable. I would agree, and that is why it has gone. But it does not follow that the defendants, having knocked down a version which is untenable, should now be acquitted. Now that the defendants are required, for the first time, to defend the case against them in a rather different way, consideration must be given to the submission that this is both uncovenanted and unfair. By changing the agenda, and creating a better case, the defendants or certainly one of them are in that regard clearly in a worse position.

531. The only consideration which has caused me any concern is the last, although I obviously bore it in mind before deciding to proceed down this path. That does not mean that the judgment I had made was correct. It should be properly and dispassionately reconsidered.

532. The removal of the SFO's original case theory, as well as pieces of reasoning which assume what needs to be proved, enables a fair and proper analysis to be conducted and a similar judgment to be exercised. My concern was that the SFO's original approach was on one level unfair to the defendants because it amounted to an impermissible attempt to elevate inherent probability to inherent certainty, but the jury might accept it. In removing that unfairness, the SFO's case becomes simultaneously more and less difficult to prove. More difficult, because the shortcuts have gone; less difficult, because this judge at least can see the competing arguments better in the absence of the dead wood. The fact remains that the SFO's task remains difficult.

533. Of course, the case was opened to the jury on a particular basis which was too simplistic, and it should not have been. The removal of this original approach does not create any separate unfairness. I can explain the position to the jury, to the extent that I need to, and the effect of doing so may well undermine, at least to some extent, the SFO's case. The defendants after all would be advancing that very argument in their closing speeches.

534. Additionally, if this case were to proceed beyond half-time, I am not sure that I could prevent Mr Brown from restoring all aspects of his original case formulation. That would be unwise because it would lead to me having to explain to the jury the flaws in it.

535. The upshot is that I cannot simply accept that this is unfair. The better approach does not require the propounding of different arguments on different evidence. The arguments, in my view at least, fit together better, but there is nothing new. Nor am I saying that the best version of the SFO's case is correct and/or that guilty verdicts would or should follow. The identification of a case to answer is just that, and it stops there. The case would be summed-up entirely fairly.

536. The only point which may arguably be new was my mention of culture, practices and ethics. On reflection, I see the difficulty with that, if only because it may permeate unfairly into the case of TK in particular.

537. In any event, the real issue here is whether the defendants have been given a proper opportunity to address my comments and seek to persuade me that the "better case" does not add up to a case to answer. I made it clear on 27th March that I was not expressing a view about that. The defendants were given four clear days, including the weekend, to prepare detailed submissions on this topic. I have addressed those submissions with an open mind because I genuinely had an open mind on 27th March.

538. Furthermore, the only defendant in this court who has been placed in a worse position, if I may put it that way, is TK. I gave Mr Winter in particular a full opportunity to address me both in writing and orally. CL is also put in a worse position but that cannot create an unfairness issue.

539. Mr Boyce submitted that I should have given the defendants an opportunity to object before delivering my bombshell. I do not understand how that could have happened, without telling everybody what it was. Now that I have heard full argument on the point, it would be open to me, and indeed my duty, to return to the SFO's formulations if I were of the view that some constitutional principle has been violated or the result were otherwise unfair. That is not my view.

540. The overriding objective in criminal trials is to convict the guilty and acquit the innocent. In my judgment, a trial judge in an extremely complex case is entitled to put it on what may be better tracks if he fears that the overriding objective is not being fulfilled. This is what has happened here, and there has been no unfairness. When it came to oral argument, Counsels' objections were less forcefully expressed. I proceed, therefore, to the final stage of the process.

541. The defence teams have advanced powerful submissions to the effect that what they call the "new case" does not work. I have borne those submissions carefully in mind and have reflected their stronger points at an earlier stage of this ruling. I should recognise, as I believe I have done throughout this trial, the particular force of Mr Kelsey-Fry's contribution. His oral argument quite briefly delivered on 1st April was a true *tour de force*, exceptional in its deftness, judgment and forensic power. By way of summary, the key points he made were these:

(1) A fair reading of the 12:09 call does not indicate that CL was dishonest at all, but even if he was, that does not carry through into TK or RJ.

(2) No remotely sensible reason has been advanced for RJ not wishing to, and actually, presenting the idea of an advisory relationship to Sheikh Hamad on 11th June on other than a genuine basis. The SFO's final version of this call, that RJ gave the Sheikh reassurance, goes too far in terms of its subtlety. On this issue, the case is now on a tightrope (my metaphor, not Mr Kelsey-Fry's): either RJ advanced a version which *was* honest, or he made a proposal which sounded honest. The SFO has to accept that RJ communicated something that was dishonest, and that Sheikh Hamad understood it as such, otherwise the agreement would be for genuine services, and there would be no case. But how does this work in fact and in law, and how is the jury supposed to work this out? Besides, Mr Kelsey-Fry's submission was that, one way or another, the SFO's case has to be that his client was taking the absurd and unnecessary risk of blowing apart his hard-earned relationship with Sheikh Hamad in the course of a few ill-judged seconds.

(3) The "additional factors" I have itemised are all derivative of the mechanism and are inherent features of it because Qatar wanted to be put in exactly the position it would have been in before the call was made. Therefore, they are neutral.

542. These were powerful submissions, as were the submissions of Mr Winter and Mr Boyce on slightly different topics, I have thought carefully about them.

543. Any synthesis or process of standing back must be conducted from the perspective of a reasonable hypothetical jury who must also be deemed to have undertaken at least the essential elements of the analysis demonstrated by or in this ruling. It incorporates all of the available evidence and must be loyal to the glosses on *Galbraith* provided

by appellate courts. I have interpreted "one possible view of the evidence" as being the SFO's best case as properly advanced and understood. The authorities require me to consider whether that possible view could satisfy a reasonable hypothetical jury to the criminal standard of proof that the defendant whose case under consideration is guilty, in the process eliminating all other realistic possibilities.

544. This is an absolutely classic situation where Lord Simon's "geometric progression" and the High Court of Australia's "cables and not chains" are directly applicable. Inferences may be aggregated if they go to the same issue, and they have, or at least are capable of having, a dynamic and multiplicative effect. All of this must be achieved within the limitations of *Galbraith* and the need to avoid piling inference X onto Y in a situation where the answer is always zero. All of this must be achieved by progression and without sudden jumps.

545. In the present case there are (1) other possible views of the evidence that could be put forward with varying degrees of compulsion, (2) a range of possible views as to the strength of what I am calling the SFO's best case, and (3) a range of possible views as to whether, in connection with (2) all realistic possibilities consistent with innocence have been excluded. At this stage, it is unnecessary for me to analyse each of (1) and form a view about them. My task is more limited. *Galbraith* requires me to assess whether the SFO's version (my (2)) *could* withstand all the scrutiny demanded by the application of the criminal standard of proof. The process, I repeat, does involve the elimination of all other realistic possibilities consistent with innocence (step (3)), but I am not performing that exercise for myself. I must decide whether a hypothetical reasonable jury could exclude all realistic possibilities consistent with innocence.

546. In that regard, appropriate latitude must be given to the judgment of jury in a situation where there must be room for more than one reasonable view. Many of the submissions filed by Messrs Winter and Boyce on 31st March were, in my view, far too prescriptive as to the inferences to be drawn and the interpretations to be performed. It is obvious that the more compelling the SFO's narrative is judged by the jury to be, the more probable it is that they would be excluding all other realistic possibilities *en route* to their conclusion.

547. The matters which have caused me to hesitate in determining this application on the ground of insufficiency of evidence surround the correct interpretation of a limited number of transcripts of the key conversations which took place on 11th June. A serious issue arises as to whether excessive weight is being placed on one interpretation of the CL/RB conversation at 12:09, on TK's laugh at 15:51, and on a few very unfortunate pieces of vocabulary to be heard in what RB said to TK. A serious issue arises as to how the RJ/Sheikh Hamad conversation *could* have gone if the SFO's case theory is right. A serious issue arises as to exactly how all the subsequent evidence feeds into the events of 11th June without assuming what needs to be proved.

548. In pausing for further reflection as I have done, I must recognise that I have already addressed all of the foregoing matters in the course of this lengthy ruling. The short answer to Mr Kelsey-Fry's submission that RJ would not have wanted to bring about a complete disaster in a flash of indiscretion, is that he knew his man. I would return to RB's comment to TK: "frankly, we all know etc." It is not fanciful to say that RJ believed that Sheikh Hamad would assume that this was a means of getting around the

legal technicalities and that he would communicate the gist of that to his subordinates. If Sheikh Hamad had taken umbrage, or shown moral compunction, RJ could simply have told him that there had been a misunderstanding.

549. My final assessment is that the SFO's best narrative is only reasonably compelling and that this is by no means a particularly strong case. However, in terms of conducting my constitutional role, it has to be reiterated that the evidence available to test that narrative comes from so many sources and is capable of being analysed and understood in so many different ways. Subsequent evidence is relevant to the extent that it informs the jury's overall understanding in the context of a holistic approach, but the weight to be given to it will vary across the spectrum of reasonable hypothetical juries.

550. In relation to CL, TK and RJ, the examination of the subsequent evidence is looking for patterns, consistency and further insights, without at each stage assuming that which needs to be proved. I do consider that it would be open to the jury to conclude that subsequent evidence bearing on the state of mind of RJ in particular is capable of throwing light on the original state of mind of TK and CL, given my evaluation of the strength of the case against them in terms of an examination of the contemporaneous evidence. I have examined this evidence with care and it is unnecessary for me to repeat my conclusions about it.

551. For RB, the situation is slightly more complicated, because there are two possible routes to guilt, although both pass through the conduit of TK. Either the jury could be satisfied that RB was virtually certain that this was a dishonest mechanism by close of business on 11th June, or the jury might not be satisfied of that to the requisite standard if the clock notionally stops then, but comes to the conclusion that he must have been virtually certain by 24th or 25th June (strictly speaking, that would be the latest possible moment, but in practice it would have to be the "spitting" conversation on 23rd June). Although the SFO did not expressly advance the case in that latter manner, it does not create a legal difficulty. Here, I may be adapting very slightly *Fagan v MPC* [1969] 1 QB 439. It would be different, in my view, if it were being said that RB was recruited to the conspiracy after 11th June, but that is not the position. I have received express confirmation from Mr Brown that the SFO would, if necessary, advance its case in this way.

552. If one takes each item of subsequent evidence piece by piece, it is possible for the defendants to neutralise much of it. This possibility has been enhanced by the SFO advancing certain submissions which are either not compelling or fail to analyse the evidence properly. However, in my judgment not all of the evidence has been effectively neutralised by any means; or, at the very least, a hypothetical reasonable jury, properly directed to the criminal standard etc., might consider otherwise.

553. What I have called the "additional factors" fall to be considered in this context. Here I am referring to the payment terms, LIBOR interest, the addition and subtraction of services, and so forth. I do not agree that these should be understood as being necessarily derivative of the original concept. Qatar was pressing very hard for them, and one corollary of their agreeing to perform advisory services was that they had to accept payment in the appropriate way. The lawyers could rationalise this as being solely a Qatari demand to be placed in notionally the same position, but the defendants would not necessarily see it that way. In my judgment, these are not

neutral factors provided one starts from the right place: that there is evidence of a conspiracy on 11th June. Of course, all of this recognises that the Qatari demand was predicated on the services being other than genuine.

554. At this stage, it is unnecessary to relist these additional factors or examine each in turn. It is also unnecessary to re-examine the transcripts. RB's increasing desperation, almost tragic at times in its intensity, could well lead the jury to acquit him at the end of the trial. However, at this stage it may properly be understood as an insight into his state of mind: he knew, because he believed, that this was dishonest; he may have been hoping that the whole thing would be pulled; he was terrified that they would be "rumbled".

555. Additionally, it is a compelling feature of the evidence, or rather its absence, that there was no separate commercial negotiation between both parties about the advisory services that would be provided, putting to one side their value. This was all done through the lawyers. I have not been shown any proper instructions given to the lawyers from Barclays' side.

556. I continue to recognise the potentially cogent and compelling nature of the defendants' contrary arguments and am not for one moment downplaying or ignoring them. However, the key issue is and remains this: could a hypothetical reasonable jury, at the very end of its task and in the process of conducting it, discount or exclude all realistic possibilities consistent with innocence? I cannot say with complete moral and intellectual conviction that the answer to that question is straightforward. It cannot be ducked, and I have considered it with the utmost care and precision.

557. Given the range of possible responses by a notional jury to this extremely complex case, I simply cannot properly conclude, in relation to the cases of RJ, TK and RB, each separately considered, that a jury could not exclude all realistic possibilities consistent with innocence. Although the challenge for that jury in this case would be immense, and arguably at the very outer limit of the capacity of any jury, and my duty in fairly summing-up this case would be monumental, this is what the law requires. At the very end of this exercise on Count 1, I am satisfied that there is no case to answer against JV but that there is a case to answer against RJ, TK and RB. Given that it is necessary to extend my finding to CL, I hold that there is also a case to answer against him.

558. I turn to consider the issues on Count 2.

ASA2: Sufficient Evidence of Knowledge and Conspiracy?

559. About 90% of the trial was dedicated to ASA1 because the evidence there was larger and the timescales involved longer. CR2 was much more complicated than CR1 in terms of the financial instruments involved, and the arithmetic has proven to be more difficult; but in many ways the story is far simpler. Regardless of the impact of the ASA1 history on ASA2, as to which more later, it had always been my impression that the SFO's case was stronger in relation to ASA2 for a number of fairly obvious reasons. Barclays was in mortal peril, and Qatar was known to be tough. As JS observed on 22nd September (Item 569), "how much advice do we need?". The amount involved was far greater. There appeared to be a lack of clarity as to how the figure of £280M was eventually arrived at and for what reason. Furthermore, I have

the SFO's point that all of this seems to demand explanation, and yet JV was not altogether forthcoming with his chair, Mr Agius.

560. Indeed once I had understood, with Ms Darlow's assistance, the economics of CR2 with its various complex components, I was severely exercised, and told Mr Kelsey-Fry that in terms. As I have explained, Dr Leighton's evidence largely dispelled that disquiet. It seemed to me that the SFO's strongest case was against RJ and I am sure that Mr Kelsey-Fry would not dispute that. However, to bring home the charge of statutory conspiracy, aside from all the legal and conceptual problems, the SFO would have to prove that there was at least one other conspirator. I was keeping an open mind *vis-à-vis* JV and the position of CL, who has not been present in court to defend himself, fell to be considered separately and with care. I therefore invited Mr Brown to open his case to the jury against CL on Count 2. The defendants have been astute to seek to protect CL's position.

561. Although the positions of JV, CL and RJ must be considered separately, the analysis which follows will cover the evidence in the same holistic way as before.

562. On 3rd October 2008 MD prepared a draft extension to ASA1 to cover a fee of $49M referable to an investment Qatar then had it in mind to make of $1.3B. The figure was originally $39M, based on 3%, but the arithmetic does not matter. This investment did not go ahead. The problem this time concerned a different aspect of the ABI Guidelines. The draft extension (Item 575) did not purport to supersede ASA1; it covered what were described as "additional services" which related to the same region and the same time period. MH as Group General Counsel was alerted to the issue on 22nd September (Item 568). He was told by RB that the latter did not like it because "it may raise questions about what they actually got last time round".

563. The draft extension agreement was "in recognition of the great success of the agreement to date". The SFO relies on the alleged falsity of that in relation to ASA1, but in my view this carries little weight at least at this stage. I have addressed the quality of the evidence regarding the performance of services at paragraphs 461-71 above. Any hyperbole may be of greater relevance to ASA2, although by the time that came specifically under contemplation Project Tinbac and the oil deal was also on the radar.

564. Both parties have sought to make something of the draft extension agreement, whose purpose was to pay for the purchase of the rump of Lehman. In ruling on an application with so many complex points, I do not propose to cover everything. In my judgment, little of positive value to either side's cases can properly be derived from a close examination of this issue. I understand the SFO's case that this draft was carried through into ASA2 and that advisory services were always in contemplation. I think that this is all I need for present purposes. The sole exception may be RJ's remark on 8th October in relation to this 3%: he said that it was for the subscribing. I take Mr Kelsey-Fry's point that it must be considered in its proper context and he made detailed submissions about that. They have not been directly answered by the SFO, but I was not entirely convinced. It is not a "frank admission" about ASA1 although it could be interpreted as a statement to the effect that these arrangements, whatever the precise context, did cover the fee for the subscription.

565. On 14th October there was a lengthy conversation between RJ and RB. The contours of the new deal were discussed, including the RCIs and the equity component. According to RJ, he explained to CL that Qatar would invest £1.6B and be given a £52M fee – "and another fee. I won't embarrass you". Assuming that I can take into account this evidence against CL on a provisional basis, it is unclear what explanation RJ gave him. One possible view of the evidence, although this may be a stretch, is that RJ could not embarrass CL but did not want to embarrass RB.

566. I think that it is necessary to examine the evidence over the period 21st to 31st October 2008 with some care and precision.

567. At 23:55 on 21st October 2008 CL, Mr Agius and others were informed by JV's email (item 635) that Qatar "will be very demanding on economics". This followed a dinner at RJ's home attended by Sheikh Hamad and his team. That was hardly surprising: Barclays' bargaining position was extremely poor, and the choice was between Middle Eastern SWFs and HMT. It could not be starker than that. Early the next morning, there was an informal meeting between JV and CL (and others) when, it is to be inferred, the latter was debriefed and decisions were made. I am prepared to infer that the fees were discussed at that stage, but it matters not because they certainly were later that day.

568. On 22nd October there was a meeting of the BFC which CL attended in person. JV reported to the BFC the outcome of the "conversation" with Qatar which had taken place the previous evening. It is clear that fees were mentioned at that meeting:

> "… + then want a large amount of cash for underwriting etc. $250M for all three pieces - we could increase to £325M - £600M is what they asked for - £325M OK where 3% for RCI + 5% for Equity + rest on arrangement fees. We put 120m to them + they laughed."

569. The reference to "all three pieces" is to the RCI coupon, the Equity (what become the MCNs) and the arrangement fee payable to Qatar for introducing Abu Dhabi. The fees on the first two elements then calculated on the basis of 3% and 5% were in the region of £80M in aggregate. JV's offer of £120M, which appears to have been brushed aside, seems to have predicated on £40M for the arrangement fee, but at the Mayfair dinner this may not have been made specific. JV was making also it clear that Barclays could increase to £325M and that Qatar in fact wanted £600M. The missing value would have to be supplied in some other way. Sir Richard Broadbent felt that anything above £325M would be hard to justify. On my arithmetic the missing value would be anything between £40M (the offer of £120M less £80M accounted for), the bank's final negotiating position of £245M and Qatar's aspiration for £520M. However, the inference cannot necessarily be drawn that the whole of Qatar's demand, whatever it was, would be accommodated under the arrangement fee. In any case, there is other evidence which would contradict that inference.

570. Conversely, I do not think that it is realistic to argue from a consideration of this piece of evidence that JV, or even CL, was somehow misleading the BFC at this stage. Even if both knew that part of the value would go into an ASA, this was a general discussion about ballpark figures. It was not being said that, whatever the outcome of the negotiation, the entire missing value would be allocated to the arrangement fee. This could well have happened if Qatar had accepted the low offer, but there was a

long way to go. I think that the SFO's submissions filed on 25th March seek to make something out of virtually nothing, particularly in the context of the case against JV.

571. From RB's notebook entries for around 23rd October (Item 735 and the additional pages) it is clear that Qatar was looking at various solutions some of which depended on a blended entry price. This was never as low as 130p/share, although that figure appears to have been crossed out in one of the additional pages. I reject the SFO's written submission that a 130p/share blended price could have formed part of the missing value as early as 22nd/23rd October but I accept the submission that blending was already part of the negotiation. Whatever the correct interpretation of RB's additional pages, the real point is that 130p/share is inconsistent with the figure of £125M which was negotiated and agreed on 24th October. According to Item 735, RJ offered Dr Hussain £250M but he wanted more. The calculations on the first sheet at Item 735 did not make it explicit how this could be achieved but my arithmetic leads to the conclusion that the figure of £250M must have been based on a higher blended price, if that was the methodology being deployed. Even so, it is a probable inference that RJ already had it in mind to allocate some of the additional value to an ASA. That inference is strongly reinforced by taking into account all the ASA1 evidence.

572. On 24th October at 14:30 Mr Michael Todd QC advised in consultation, by telephone, that the maximum amount that could be paid as an arrangement fee was £65M. At about this time there is other evidence that MH and Clifford Chance were already discussing the issue on the basis of an advisory fee in the region of £120M. At around the same time, there was a telecon between MH and both JV and CL in which it was said, it is unclear by whom, that any other payment to Qatar would be for other commercial services and at market. Clifford Chance's instructions to Mr Todd stated that there would be an arrangement fee *and* a co-operative agreement. One realistic possibility, and I think that it is a high one, is that Clifford Chance had already spotted a problem with s.89 of the Companies Act 1985 in putting the whole of the additional value into the former, and had therefore advised Barclays through MH that a co-operative agreement would have to be part of the solution. Clifford Chance, after all, completely understood the utility of such agreements because of their role in June. To be clear: from Clifford Chance's perspective, this utility was predicated only on genuine services. The alternative inference is that RJ in particular had always intended to put some of the additional value in an ASA because it had worked so well last time from his perspective. If there is sufficient evidence against CL on Count 1, the same applies to him. However, this does not apply to JV.

573. Mr Todd's advice was then discussed internally at 17:00. On Saturday 25th October one of the lawyers' "action points" was the fee letter for Qatar. The lawyers were clearly involved in the genesis for ASA2 although who originated the idea, and the precise sequence of events, is not completely clear.

574. On 24th October a spreadsheet was prepared by Mr Castell (Item 664). This was last modified at 16:45 but I have not been told when the document was created. I accept that it is probable that the spreadsheet was started before Mr Todd's consultation finished. It could have been responsive to the Clifford Chance advice, or it could simply have reflected the fact that an ASA was always intended to be part of the solution. The spreadsheet showed the total fees to all the investors as £500M. The fees were separately itemised as £240M (the 4% on the MCNs), £70M (the 2% on the RCIs); and, additionally, in relation to Qatar specifically, £65M (the introductory fee

referable to Abu Dhabi) and £125M (described as "separate agreement"). The point is that someone had it in mind to place the additional value of what was then £125M into a "separate agreement".

575. By email sent after 17:16 on 24th October (Item 665) CL received a "summary of proposed transaction" which did not include the £125M. By further email timed at 19:42 (Item 669) CL amongst others was informed by JV that "I believe that we have a deal". He and Sheikh Hamad were, apparently, "properly triangulated". The inference to be drawn from this is that JV had agreed with Sheikh Hamad that Qatar's demand to receive "additional value", whatever it was and however it was composed, was to be placed in this separate agreement. I think that it is a reasonably strong inference that this would be an advisory services agreement, and that JV knew that. At that stage the discussions were on the basis of a figure of £125M: see, for example, Item 676, and the reference to £125M under "other". It needs to be emphasised, though, that any deal was "subject to contract" and could not be regarded as completely in the bag. Assuming that the figure was agreed at £125M, Qatar soon changed its mind. The fact that it was prepared to do so is slightly disconcerting, but in focusing on the case against JV, we must proceed for present purposes that the triangulation included the £125M which was intended to be allocated to an ASA.

576. What is important to underscore here is that Mr Todd's advice was that an advisory agreement was perfectly lawful provided that genuine services were being provided. This was an essential predicate of his advice and could never be circumvented. For the purposes of the case against RJ and CL, none of this really matters on account of my findings in relation to ASA1. From JV's perspective, and I will need to bear this in mind in connection with his separate case, the £125M fee in the advisory agreement, or an amount in that region, had been approved by the lawyers. That approval had been on the foundation of what I have called an essential predicate but it is inconceivable that JV was somehow negotiating with Sheikh Hamad without being aware that favourable legal advice had been given. That advice may have been flawed, but JV did not know that.

577. If the SFO's case continues to be seen through the mechanistic prism it created at the outset, the foregoing analysis seriously damages it in connection with the case against JV. The foregoing analysis is really problematic for the SFO even without its "mechanism", given its inability to connect the history of ASA1 to JV. But there may be another perspective. In considering this perspective, I will continue to bear in mind that it was Mr Brown's submission to the jury in opening that "you may think" that the conspiracy was in place on 24th October. Does this leave open the possibility of a later onset of conspiracy date for JV? I must press on.

578. There was an important Board meeting on Sunday 26th October which CL attended. The contemporaneous minutes are not altogether easy to interpret but the exercise has become easier as the evidence has unfolded. The Board was told that the fees would be £135M in relation to Abu Dhabi, and that "all Q = £250". "All Q" clearly included £30 + £40M + £65M = £135m. The difference between that and £250M is £115M. This suggests, but in itself does not prove, that the Board knew that the missing value was at that stage in the region of £115M. Mr Agius could not remember one way or the other, and Mr Purnell did not cross-examine him on this.

579. I return to RB's notebook (Item 735), which circumstantial evidence indicates had been completed on 23rd October (Item 655). RJ offered Dr Hussain a total fee of £250M, although "Hamad wants more". This is consistent with "All Q" being £250M but alternative explanations are, I suppose, possible. I have not been told what they might be. Given this arithmetical consistency, a better picture is beginning to form in relation to the £115M.

580. There are two further pieces of evidence which clinch the matter.

581. First, the best evidence in support of the proposition that an advisory fee was mentioned by JV on 26th October is to be found in the following note of Ms (now Baroness) Patience Wheatcroft's contribution to that meeting:

> "Q fees – 2 unconnected forms of comp = £135M fee – also co-operative actions - pay them a further £115M for that reality - recognising we are paying fees in adv."

The £135M is the aggregate of £30M + £40M + £65M. The further £115M, described as referable to co-operative actions, is the difference between that and £250M. I am not sure that any other reasonable interpretation is possible.

582. Secondly, I am not overlooking the minutes of the Board Meeting which took place on 27th October (Item 691).

> "It was noted that, under the current proposals, the Company would pay an arrangement fee to Quail and commitment fees to the MCLS placees … It was noted that these were considered to be legitimate costs in facilitating the capital raising and that they were on normal commercial, arm's length terms."

This must be a reference to the ASA fees and to Mr Todd QC's advice. I cannot read "normal commercial, arm's length terms" in any other way. I am not suggesting for one moment that this somehow proves that this was a normal, commercial transaction; the point here is that the Board was not misled by JV, unless he did not think that it was a normal commercial transaction.

583. Returning to the previous day, the SFO now places considerable emphasis on Baroness Wheatcroft's "unconnected". The submission is made that she was under the impression that ASA2 was "unconnected" to CR2, and that was misleading because it was obviously connected to CR2. In terms of the SFO's case against JV, what he told the Board could only have been misleading if he had thought that the £115M fee under ASA2 could not be commercially justified; but if it could be, "unconnected" would not be a misnomer. What is also very interesting in this context is what Mr Diamond told the Board about ASA2:

> "BD. Good example, an enormous piece of bus. Not signed up – need to get – no connection between the 2 – The unusual circ's – we can say that – Need a further Board Meeting – People want another chew on it – session tomorrow night we should not seek a decision then + Decision on Timing …"

This speaks for itself. The enormous piece of business was the Tinbac deal.

584. Looking at the respective cases of CL and JV, it is important to recognise that it was at a late stage in the negotiation that Qatar alighted on the notion that it should be paying a "blended share" price across the transactions based on 130p/share. How this would be achieved in practice was complicated, but there is no evidence that CL was involved in those negotiations. We can see how 130p/share blended price entered the discourse from RB's notebook entries for, I believe, 29th October. There is no evidence that CL was aware of this (cf. JV), although it was to have an important impact on the level of the consideration for ASA2. As I have pointed out, the figure leapt in stages to £185M, then to £260m and finally to £280M.

585. As it happens, CL appears to have been unaware that the negotiation was moving away from the bank. At 10:41 on 30th October Mr Dennis sent the following email to RB and Stephen Jones (Item 719):

> "Please could you confirm the services or agreements relating to the additional £125M of fees. We are looking to finalise the reported and pro forma earnings dilution and need to agree the appropriate accounting treatment.
>
> Without any specific details about the fees I have made the simple assumption that they relate to services provided in the short term and have therefore expensed this through the P&L as an upfront fee. Chris is keen to explore the possibility that we may be able to spread this over a longer period of time, i.e. when the expenses are incurred, such that the impact is much less pronounced. However, we need sound rationale in order to capitalise and amortise the cost over the useful life of the agreement/commercial relationship.
>
> Chris is looking to finalise a version of the numbers as soon as possible today, so I would really appreciate your help in clarifying his point."

586. A number of issues arise in connection with this email. I proceed on the basis that it is admissible evidence against CL under s.117 of the Criminal Justice Act 2003; the weight to be given to it could only be for the jury. CL was behind the curve inasmuch as the fee was by that stage higher than £125M. Matters were moving so quickly that he was not being kept in the loop. This is surprising, if the proposition under scrutiny is that CL was a fellow-conspirator and that the dishonest scheme was in place by 24th October. Even so, the inference must be that he was aware by 30th October that the additional fees demanded by Qatar would be located in an ASA. The email taken in isolation, would tend to lend some support to the proposition that these were intended to be genuine services.

587. My assessment of the evidence against CL on Count 2 is that, taken on a standalone basis, it is not particularly strong. However, I accept Mr Brown's submission that in his case the ASA1 history is clearly relevant; and in my judgment that tilts the balance. Thus, in relation to his knowledge, there is a sufficient evidential case against CL on Count 2.

588. Turning now to the case against JV and RJ, it is clear that matters moved on very quickly after 26th October. Between then and 29th October, but exactly when is unclear, Qatar had revised its demand. The markets were in turmoil and the risks were in flux. It is clear from RB's notebook entry (Item 735), that Qatar was now seeking its blended entry price of 130p/share. This was intended to reflect what had already been paid for CR1 (for some reason, RB appears to have been working on an effective entry price of 262p/share) and what was then in contemplation for the equity component of CR2, the MCNs. That figure changed in the fluctuating market but was in the region of 139p/share. It follows that, in order to bring the average share price down to 130p/share, substantial additional money or value would have to pass from Barclays to Qatar.

589. RB's notebook cannot be completely reconciled arithmetically, but it matters not. The figure for the "advisory fee" was £185M. On my understanding of his calculations, however, a shortfall remained. It was in these circumstances that the figure had to be increased by £75M (Item 743) before ending up at £280M. The inference must be that the figure needed to be as high as £280M in order to reach the 130p/share blended price. That is the key point.

590. The SFO also opened the case to the jury on the basis that the Barclays' in-house lawyers in London declined to draft or review ASA2. On 28th October MD sent the following email to RB, Stephen Jones copying in JS and MH:

> *"*Just to clarify, we in group will not draft or review any contracts for services – there will just be the 2% RCI and 4% C-bond commissions plus the £65M arrangement fee (the latter will for Companies Act purposes be classified as an additional element of Quail's equity-linked commission to be disclosed on a Companies House Form 97). Any other contract is essentially a BAU matter.*"*

591. The upshot was that RJ, having obtained an electronic copy of the 3rd October draft ASA, caused his PA to forward it to Jonathan Hughes working in Barclays Legal in New York (Item 706).

592. The SFO observed that all of this is immensely suspicious. According to Mr Kelsey-Fry, Mr Hughes was "the most senior lawyer in BarCap". I do not think that I may base any finding on that. What I am prepared to infer is that "Group" in London, *i.e.* Group Legal, would not draft ASA2 because it was essentially a "BAU" matter, i.e. "business as usual". It may well be, although I cannot be sure, that BarCap would handle such matters. It remains unclear why a senior BarCap lawyer in London could not attend to this. In my view, the inference is certainly not as powerful as Mr Brown suggested in opening, and I have seen no reference to it in SFO submissions since then.

593. There is an extreme paucity of evidence surrounding the drafting and negotiation of ASA2, although Latham & Watkins were involved. ASA2 was signed by RJ on 31st October before there was any certainty that the EGM would approve CR2. The opening paragraph of ASA2 was lifted straight out of the 3rd October draft. The agreement continued:

> "You agree to continue to provide various services to us as an intermediary, in addition to those set out in the 25th June agreement. You may provide some or all of these services in association with Challenger Universal Ltd. These services include, though will not be limited to (i) the development of our business in the Middle East; (ii) the furtherance and execution of our Emerging Markets business strategy; (iii) the expansion of our global Commodities business; (iv) referral of opportunities in the oil and gas business sectors; (v) introduction of infrastructure advisory and financing opportunities; and (vi) introduction of potential investors, clients or counterparties interested in conducting a variety of business with us. You will provide these services over a period of 60 months from the date of this letter. In return, we will pay you 20 equal quarterly instalments of £14M, the first within three months of the date of this letter, and the last on 31st October 2013.
>
> We have discussed in detail the type and scale of services that you will provide in order to deliver the additional value to us in exchange for this further fee and we know that these will need to be refined by mutual agreement during the period in which you will provide the services."

594. Thus:

(1) ASA2 overlapped with ASA1 but was to last for a longer period.

(2) The geographical area was wider.

(3) The services were more precisely specified.

(4) Challenger (i.e. Sheikh Hamad) was to have an associative role and on this occasion invested £300M in MCNs.

(5) "opportunities in the oil and gas business sectors" would include Project Tinbac, although that never came to fruition.

595. On the other hand, all of the detail of how all of this came about is shrouded in mystery. The explanation for this lacuna is also unclear, and although there may be one I have not yet heard it. The jury is aware that I ruled in January that the SFO failed to take sufficient steps to obtain disclosure of the Latham & Watkins cache. Neither JV nor RJ applied to stay the proceedings, and RB's application was limited to June 2008. I do not think that it would be right to draw an inference adverse to the SFO in connection with ASA2.

596. The forceful submission advanced by Mr Kelsey-Fry runs along these lines:

(1) there is no case to answer on ASA1.

(2) there is evidence of genuine services provided under ASA1.

(3) It cannot be established that "in recognition of the great success of the agreement to date" was false.

(4) The SFO's case based on "mechanism" is logically flawed.

(5) Clifford Chance, Leading Counsel and MH advised on the principle – at that stage the fee was in the region of £115-125M.

(6) A fee of £125M, which almost certainly was mentioned to the Board, possesses no different characteristic than the fee of £42M for ASA1.

(7) If £125M is supportable, the logic must be that £280M is also supportable.

(8) In fact, if £125M is supportable because some services were within contemplation, the amount of the fee does not really matter.

(9) In any case, ASA2 was not connected to CR2 because it could be, and was, signed on 31st October which was well before CR2 was legally sanctioned by the EGM of the company.

(10) No adverse inferences flow from the circumstances, still less the involvement of Mr Hughes.

(11) Qatar may have been driving a very hard bargain, but the inference of impropriety and dishonesty cannot be borne out.

(12) Reliance is also placed on Mr Purnell's submissions relating to Mr Todd's advice that the arrangement fee could not be more than £65M.

597. RJ's later emails also need to be considered. RJ's email to Mr Ricci timed at 19:47 on 27th November (Item 810) refers to various business opportunities and that "his" (*i.e.* Sheikh Hamad's) choice was for binning Goldman: "[t]he business potential is huge, Rich". There was then some delay in paying the first instalment under ASA2. CL had a discussion about this with Patrick Clackson, who had been involved in the first payment under ASA1 (Item 814). When an issue arose as to the services actually provided under ASA2, RJ forwarded his "diary" which itemised these (Item 841). My assessment is that the diary rather scrapes the metaphorical barrel when it comes to October 2008 and beyond. On 11th October 2009 RJ, who had left Barclays and was by now a consultant, warned Mr Ricci that ASA2 needed to be monitored (Item 844). RJ's departure rendered it more difficult for him to ensure that Qatar delivered under ASA2, assuming that was ever the intention. On 12th January 2010 (Item 849) PwC were "eager to understand that there is real activity supporting the payments, even if they are expensive". None of this material is remotely decisive, but its overall tenor is not particularly helpful.

598. On the other hand, two of JV's emails should be added to the mix. On 14th October 2009 JV told Mr Agius (Item 845) that "the qataris are going out of their way to put business to us. They have their own unique way of ensuring that the value terms are equitable, but we are treated as a favoured partner". On 27th November 2009 JV reported to Mr Vitalo (Item 847) that Mr Al-Sayed was concerned about the lack of a regular dialogue.

599. In his submissions, Mr Purnell placed particular emphasis on the timing of the genesis of ASA2 in the context of Mr Todd's advice, that Clifford Chance was well aware

that the advisory fee was a nine-figure sum, and that the Board and the BFC were kept informed about the likely scale of the fees and the advisory agreement. JV was aware in general terms of the level of the fee but felt that it was commercially justified in the circumstances. It is said on his behalf that the highest the case may properly be advanced against him is that he is guilty of an error of judgment.

600. Mr Kelsey-Fry's submissions were all powerful, some more than others, but they must all succumb to my finding that there is a case to answer against RJ on the issue of knowledge on Count 2. However, the case against JV is far more complex, and here I take into account both Mr Purnell's and Mr Kelsey-Fry's submissions.

601. I have found the determination of whether there is a case to answer against JV on the issue of knowledge extremely difficult to resolve. JV must continue to be regarded as a man of utmost good character against whom there is no case to answer on Count 1. The SFO relies on the ASA1 history against JV even if there is no case to answer against him on Count 1. I was not impressed by that: on this premise, JV's knowledge of ASA1 is a factor which, if anything, can be deployed in his favour, because his assumption would have been that it was legitimate. The SFO has JS's point about what further advice do we need, but there is no evidence that JV was aware of the nature of the "services", if any, that had apparently been provided under ASA1.

602. There is considerable force underlying an analysis which states that if no adverse inference could safely and properly be drawn in relation to £125M, what changes in relation to £280M? The SFO does not submit that JV knew that genuine services would not be performed under ASA2, because he was told that in terms by Sheikh Hamad or RJ. The difficulty here is that JV had a number of conversations with Sheikh Hamad about the fee. If he did not know that this was all a sham as a result of such conversations, on what basis did he believe to the requisite standard that this would be so? Further, albeit connectedly, if there is no case based on his belief in relation to the £115M or £125M, by what means or for what reasons *precisely* does the position change in relation to the £280M?

603. I agree with the SFO that the inferences to be drawn from all the surrounding circumstances cannot be ignored. The last week of October 2008 was desperate beyond measure, the threat was existential, JV was under intolerable pressure and Qatar was known to be extremely tough. The enhanced demand for a blended 130p/share appears to have come rather late, and Barclays was now completely over a barrel. Even the most cursory examination of this transaction demonstrates where the economic power lay: Qatar was going to receive an RCI coupon of 14%; the MCNs were heavily discounted and there was a 9¾% coupon in the interim; the warrants (effectively free from Qatar's perspective) were cheap; and yet Qatar also wanted additional value to arrive at the blended price. The price of money in the marketplace was extremely expensive in October 2008.

604. None of this was improper and dishonest in a system based on market forces, but I have made the point at great length already that an ASA would be lawful only provided that these were genuine services. At least in principle, there could come a point at which the scale of the fee, the way in which the final negotiations occurred, and the absence of evidence touching on inter-party discussions about services, begins to tilt the scales: or, at least, might to do in the estimation of a hypothetical reasonable jury. An error of judgment may be the real explanation, but perhaps the jury would

not be bound to draw that inference. If JV had no real choice, and Qatar appreciated that, the possibility of dishonesty becomes more substantial. As the fee rocketed upwards, would a reasonable commercial man begin to believe that what was driving this was not genuine services but an unswerving and intractable desire to secure as much money as possible from an ailing British bank?

605. Further, I think that there is *some* force in the contention that JV should have raised the £280M fee with Mr Agius. If the Board were proceeding on the basis of about £125M, but it went up nearly two and half times, all the more reason perhaps that the matter should have been discussed between the CEO and the chairman. At the very least, there would be a "jeopardy", a perception of impropriety, which is stronger here than it was in relation to ASA1. It is arguable that JV would want to explain that to Mr Agius, depending on course on whether there was the time and opportunity to do so. The focus here is primarily on the events of 29th October.

606. Mr Agius' moral outrage that JV did not discuss the £280M fee with him did not particularly impress me at the time. He could not have separated after-acquired knowledge from what he knew at the time. We now have convincing evidence that a nine-figure fee for advisory services was discussed at Board level, and Mr Agius has forgotten that. Mr Agius' judgment that JV was a man of utmost integrity is also relevant here. JV's ethics appear to have differed from others in bank. Mr Agius was not aware of the brevity of the timescales in the context of the opportunity he believes he should have been afforded. It is possible that the outrage would have been better directed elsewhere.

607. It is not an answer to say that ASA2 and CR2 were not factually connected because they were not signed simultaneously. This is a modest factor in JV's and RJ's favour, but no proper explanation for the date of signing has been given. ASA2 and CR2 could have been conceived as being inextricably intertwined in all senses, but a late decision was made, perhaps even a foolish one, to sign ASA2 without a binding commitment to CR2. This point is not a trump card.

608. My overall assessment, always from the perspective of a notional reasonable jury, is that viewed in terms solely of JV's knowledge – acquired on this basis only on 29th October – is that the issue is extremely finely balanced. I do not need to come down one way or the other, for this reason.

609. The SFO's case is based on a conspiracy opened to the jury as having been concluded on 24th October, subject to "you may think", Here, all reasonable inferences must be considered. Unlike Count 1, direct evidence of the conspiracy is lacking. The 24th October date works well enough against CL and RJ because for them the SFO's case can be based on the £125M figure combined with the inferences to be drawn from Count 1.

610. However, at this stage I am considering the separate case of JV. I do not think that it is arguable that he joined the conspiracy on that earlier date; indeed, the evidence points strongly the other way. In addition, no reasonable jury could infer that CL had a frank discussion with JV at around that time. Apart from the fact that this amounts to speculation, the fragment of evidence relied on by the SFO on 25th March 2019 tends to point the other way: Clifford Chance participated in that particular conversation. In any case, for the reasons I have given I do not consider that the case

on knowledge is even close to being sufficiently strong against JV based on just the £125M.

611. Flowing on from my analysis of the case on knowledge against JV, the corollary must be that he joined the conspiracy *after* 24th October, and probably shortly before the final deal was wrapped up. 29th October is the most likely candidate, given the discussions involving JV, RJ and Sheikh Hamad. I find this extremely difficult, both analytically and in the context of Mr Brown's opening. JV could just about have believed to the requisite standard of virtual certainty that this was not "commercial", but he need not have shared that belief with RJ, and there is absolutely no evidence that RJ told him anything of relevance. As Mr Purnell pointed out in his reply, we are now examining a different conspiracy in which Sheikh Hamad must have been a party. Whether that last step is right, we are examining a different conspiracy and a different case. In relation to RJ, all that JV needed to do was authorise RJ to sign ASA2. That authorisation, I note, was problematic, because I have been told that JV's authority was limited to £150M; but it is not being said that this constituted the conspiracy.

612. The more I examine the proposition that JV was a late entrant, the greater the difficulty I have with it. I did not understand the SFO's final written submissions to be advancing such a case, and I gave Mr Brown a final opportunity to address me on this basis. Insofar as there was any sort of agreement or understanding shared between RJ and JV on 24th October, JV was not dishonest but RJ arguably was. The thesis that a second inferred agreement arose at a later stage is theoretically possible, inherently highly unlikely, and completely different from the case the SFO is running.

613. I have come to the conclusion that I simply cannot not allow the case to proceed against JV on a basis which so significantly departs from the SFO's opening, both in terms of the reasoning which supported it and its placing of the timing of onset. The evidence supporting that proposition is in any case very tenuous. My ruling is that there is no case to answer against JV on Count 2.

614. Subject to my ruling on the legal issues, there would be a case to answer against RJ and CL on Count 2.

No Preparatory Hearing: Quillan

615. The Court of Appeal has sternly warned the parties to criminal cases, and judges, that difficult points of law must be resolved at a preparatory hearing, before the trial starts before a jury. Pursuant to my Order given on 4th December 2018, the defendants were required to provide particulars of any other point of law it sought to raise by 17th December. The defendants failed to do so. In my view, the defendants should have specified their cases in relation to the innocent agency issue by the due date. The defendants also must have known that points were likely to arise in connection with the DRLs, but in this regard I am more critical of the SFO.

616. All these things having been said, it is my duty to point out the following. From the second day of the dismissal hearing brought by the companies, by which I mean from 24th April 2018, it should have been apparent to the SFO that their focus on the public-facing documents was creating a problem. At the time, I was somewhat surprised that my question to Mr Brown about s.1 of the Criminal Law Act 1977 and

the necessity to be clear about the substantive offence was appearing to cause consternation. It is clear from my published ruling that I did not think that this problem was necessarily decisive *vis-à-vis* the individual defendants, but it could not somehow go away. During the course of the VB hearing before Davis LJ in late October 2018, the problem was still there, and he mentioned, without being specific, the possibility of an amendment. An examination of what Davis LJ said at paragraph 116 of his judgment is important. The next hearing before me started on 23rd November, at which time the SFO's aspiration was to take Davis LJ's ruling to the Supreme Court. He later refused to grant a certificate. So, the SFO has ploughed on with a case which has always appeared difficult on the law: whether the problem was "mismatch", "disconnect" or a failure to indict the "essential criminality" (see Mr Richard Lissack QC's second submission at the dismissal hearing in April 2018). We are where we are, but it is not as if the problem came out of the blue.

617. I agree with Mr Brown that the defendants' legal teams have been tactical, possibly strategic, but there has been no overt manipulation of the system.

618. In terms of my role, which does fall to be addressed, however invidiously, I did not flush out the defendants' case on innocent agency, and rule upon it, for two essential reasons. First, my first attempt to address the issue in July 2018 had favoured the SFO in providing a route to criminal liability. Secondly, I was concerned that by mid-January a large jury panel had been organised for the near future, and that any delay would cause practical difficulties.

619. I did not flush out the SFO's case on the DRLs. I cannot blame myself for that.

620. I am not convinced that the conclusion I have reached about innocent agency in this ruling would have been the same in January, although it almost goes without saying that it ought to have been. There have been many complex sub-issues, and the ultimate resolution of this question has taken time. My conclusion on the DRLs would have been the same then as it is now. In any event, it is likely that both decisions would have been appealed to the Court of Appeal. This trial would have been delayed, but legal certainty would have been achieved, and if my ruling on both issues had been upheld (assuming that I did not repeat the error in relation to innocent agency that I made in July 2018), there would have been no trial at all, subject of course to any successful application to amend. In the result, I have been required to deal with these complex legal arguments during the course of a mammoth ruling covering a plethora of other difficult issues, and that has certainly been challenging. The only countervailing benefit, and it has been a very substantial one, is that these legal arguments have been considered against the backdrop of a proper understanding of the evidence.

621. Aside from my evaluations of the evidence in relation to each defendant, which are of no free-standing importance unless this ruling is successfully appealed by the SFO on points of law, it will be apparent that I have covered numerous difficult legal matters which could never have been dealt with in January on any sensible basis. Many of those matters raise appeal points, and some are, or at least would be, critical to any determination of guilt if this case ever returns to the Crown Court.

622. The SFO did not apply to amend the Indictment before I handed down this ruling at about 10:30 on 3rd April 2019. An examination of the transcript for that morning will

reveal exactly what happened in the lead up to this. On that occasion I granted the SFO an adjournment for the purposes of s.58(4) of the Criminal Justice Act 2003 in order to decide whether to appeal my terminating ruling to the Court of Appeal.

Other Final Observations

623. After 7th March 2019 there was direct communication by email between me and Counsel to all the parties over the weekend and on limited further occasions when my clerk was not available. This sped up the process and probably saved a limited number of days' time overall in the context of an application which had to be kept moving with a jury waiting. This procedure was sub-optimal and could have been problematic, although it in fact caused no difficulties in the present case owing to the scrupulous professionalism of all Counsel. It has been my good fortune that this has been a feature of the entire litigation and extends to the teams of defence Solicitors and (in the case of the SFO) the lawyers, and the investigating and other officers who have been working flat-out behind the scenes.

624. It cannot be stressed too strongly that my evaluation of the strength of the evidence against RJ, TK and RB has been undertaken from the perspective of the SFO's best case as assessed by a hypothetical reasonable jury and cannot be understood as amounting anything close to the expression of a judicial opinion of guilt. Far from it: all that I have done is to determine that there is a case to answer. At the very least, had the matter proceeded the defendants would have been given every opportunity to testify in their respective defences. The responsibility for determining innocence or guilt would have remained with the jury.

Disposal

625. The outcome of this application is as follows.

626. I uphold the defendants' submissions in answer to the SFO's three postulated routes to legal liability (sc. the primary route, via the DRLs; the secondary route, via innocent agency; and the tertiary route, via "participation"). Regardless of the evidence and the findings of fact made by a hypothetical reasonable jury, there is no case to answer against the four defendants on Count 1 and the two defendants on Count 2.

627. If it should be determined on appeal that one or more of these legal determinations are wrong, then (subject to its precise terms and assuming that a route to criminal liability has been identified):

(1) (subject to the SFO's appeal on this issue) the application of JV succeeds in any event on Count 1 and Count 2. He therefore leaves this court with his reputation preserved.

(2) there would be a case to answer against CL on both Counts.

(3) the application of RJ would fail on both Counts.

(4) the application of TK would fail on Count 1.

(5) the application of RB would fail on Count 1.