Neutral Citation Number: [2020] EWHC 2598 (Ch)

Case No: FL-2016-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
FINANCIAL LIST

Rolls Building, Fetter Lane
London EC4A 2NL
Date: 2 October 2020

Before :

MR JUSTICE SNOWDEN

- -

Between :

BILTA (UK) LIMITED (in liquidation) (and others) — **Claimants**

- and -

(1) NATWEST MARKETS PLC
(2) MERCURIA ENERGY EUROPE TRADING LIMITED

Defendants

- -

Christopher Parker QC, Orlando Gledhill QC and Patricia Burns
(instructed by **Rosenblatt Limited)** for the **Claimants**

John Wardell QC and Michael Ryan
(instructed by **Pinsent Masons LLP**) for the **First Defendant**

K**enneth MacLean QC, Steven Elliott QC and Tamara Kagan**
(instructed by **Slaughter and May**) for the **Second Defendant**

Submissions received in writing

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 4.30 p.m. on 2 October 2020.

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MR JUSTICE SNOWDEN

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1. On 10 March 2020 I handed down a lengthy judgment finding the Defendants liable to the Claimant companies for dishonest assistance and knowingly being a party to fraudulent trading by the Claimant companies: see Bilta (UK) Limited v Natwest Markets plc and Mercuria Energy Europe Trading Limited [2020] EWHC 546 (Ch). The claim arose out of the Defendants' involvement in VAT MTIC fraud committed by the directors of the Claimant companies in the summer of 2009.

2. I now have to resolve a number of matters consequential upon that judgment. I shall use the same abbreviations as in the judgment.

The principal amount to be awarded

The issue over Epicure Deal 34

3. The parties are agreed that the principal sum due to be paid by the Defendants to the Claimant companies to compensate them for the loss that they suffered as a result of the MTIC frauds which were established exceeds £44.72 million.

4. That sum comprised the losses caused to the Claimant companies as a result of so-called "deal chains" which had been admitted or established on the evidence to have involved a linked series of artificial transactions in which carbon credits had been sold by the Claimant companies either via a buffer company or directly to CarbonDesk, which thereafter sold the credits on to RBS. The VAT fraud occurred when VAT paid by RBS to CarbonDesk was then paid on by CarbonDesk and diverted at the instigation of the directors of the Claimant companies, either before or after receipt by the Claimant companies.

5. There is, however, a dispute over one of the deal chains, referred to as Epicure Deal 34. The dispute is worth €386,400 (just under £330,000), which if resolved in favour of the Claimant companies would take the amount payable by the Defendants, excluding interest, to £45,049,882.60.

6. Epicure Deal 34 was alleged in the pleadings to be a sale of 200,000 carbon credits by Epicure to CarbonDesk and then on to RBS. The VAT involved was said to be €386,400. It was listed by the Claimants' own expert, Mr. Steadman, in his first report (dated 22 September 2017), as one of 6 exceptions out of 51 deal chains which he did not consider to be established. His reason appeared to be that the relevant CarbonDesk deal number (5891B) related to a trade from Kaplan to CarbonDesk.

7. The Claimant companies, acting by their liquidators, accepted the great majority of Mr. Steadman's views, but disagreed with him on Epicure Deal 34. In his first witness statement, one of the liquidators, Mr. Richardson, suggested that the CarbonDesk deal number schedule showed that deal number 5891B was a purchase by CarbonDesk from RBS and the corresponding deal 5891A was a sale by CarbonDesk to Kaplan. Mr. Richardson pointed out that according to EUTL records and RBS's records, CarbonDesk never bought any carbon credits from RBS and did not sell any to Kaplan. Mr. Richardson also referred to the Schedule to a letter from CarbonDesk

denying liability which he suggested showed that deal 5891B was linked with an invoice in respect of a sale from Epicure to CarbonDesk. That is indeed what the Schedule shows, albeit that I note that the amount of VAT said to be involved on that transaction was €387,000 rather than €386,400.

8. In his second report, dated 19 January 2018, Mr. Steadman acknowledged Mr. Richardson's evidence and stated that the court was faced with a choice between two contradictory documents from CarbonDesk. Mr. Steadman was of the view that he could not, as an expert, resolve that evidential difference.

9. In her first expert report dated 23 February 2018, Ms. Hughes (for the Defendants) stated that she disagreed with Mr. Steadman. She was of the view that the Epicure Deal 34 chain had been demonstrated with a VAT liability of €386,400.

10. In the joint memorandum of the experts dated 29 March 2018, Mr. Steadman simply commented that he maintained his assessment of Epicure Deal 34. Ms. Hughes stated that she regarded the deal chain to have been demonstrated because the transfer had been identified within the EUTL and the payment flows identified or reconciled on the bank statements, which she regarded as more reliable than the CarbonDesk documents.

11. Mr. Steadman served a second supplemental report on 13 April 2018.

12. The Defendants then made formal admissions in their Notices to Admit dated 3 May 2018 to admit the transaction chains that Ms. Hughes accepted as having been demonstrated in her expert report. This therefore included Epicure Deal 34.

13. On 6 July 2018, before she gave evidence, Ms. Hughes produced an Amended Supplemental Report. The report responded to Mr. Steadman's second supplemental report. In summarising that report to which she was responding, Ms. Hughes commented "by way of reminder" that she agreed with the Claimants that one of Mr. Steadman's exceptions was, in fact, demonstrated.

14. In a subsequent section of her Amended Supplemental Report headed "Re-categorisation of Transactions Chains", Ms. Hughes indicated that she had re-categorised seven Epicure Deal Chains which she had earlier considered to be demonstrated and that she now regarded them as not demonstrated. Those deal chains were listed in a footnote as "Epicure Deals 19-22 and 34-36".

15. However, in the next following section of the report, under the heading "My updated findings – Demonstrated Transaction Chains", Ms. Hughes explicitly referred to Epicure Deal 34 as a demonstrated deal chain, stating,

> "By way of reminder, I consider Epicure Deal 34 with an associated VAT liability of €386,400 to be demonstrated (and still do) and Mr. Steadman does not."

16. At the trial, when giving her evidence in chief on 10 July 2018, Ms. Hughes expressly verified her belief in the accuracy of her contribution to the joint memorandum of the experts as at 29 March 2018 and of her Amended Supplemental Report dated 6 July 2018. There was no indication that she planned to put forward any corrections to either document either on that day or the next when she was cross-examined. None of Mr.

Richardson, Mr. Steadman or Ms. Hughes was asked any questions in cross-examination about Epicure Deal 34.

17. Ms. Hughes was the last witness at the trial. However, at the end of the next day after the conclusion of evidence, at 4.45pm on 12 July 2018, the Defendants sent the Claimants a one-page schedule purporting to contain a "List of corrections" to Ms. Hughes' Amended Supplemental Report. This schedule indicated, without further explanation, that Ms. Hughes wished to remove the two sentences which had referred (implicitly and explicitly) to Epicure Deal 34 as a demonstrated deal chain, because "I now agree with Mr. Steadman that Epicure Deal 34 has not been demonstrated."

18. Given the very late stage of the trial at which this correction was sought to be made, there was no practical opportunity for Mr. Steadman and Ms. Hughes to meet or confer further on Epicure Deal 34, and so far as I am aware they did not do so.

19. Instead, in paragraphs 902-903 of its written closing served the next day, 13 July 2018, RBS referred to Epicure Deal 34 and one other deal chain (Classic Mark Deal 43) as "agreed not to be demonstrated" and asserted that,

> "On the basis that both forensic experts reject these transaction chains, they should be excluded from the claim and the associated VAT claims should be deducted from the amounts claimed by Epicure…"

That was also the position taken in a colour-coded document produced by Ms. Hughes on 16 July 2018, which stated, in relation to Epicure Deal 34 and Classic Mark 43, that "Mr. Steadman and Ms. Hughes agree that these two chains/deals are not demonstrated."

20. In oral closing submissions, Mr. Gledhill QC, for the Claimants:

    i) objected to the Defendants attempting to introduce new evidence from Ms. Hughes or attempting, in effect (but without saying so in terms), to withdraw their formal admissions in relation to Epicure Deal 34;

    ii) made it clear that he was not making submissions on the factual detail of Epicure Deal 34, and would rely on the Defendants' formal admissions unless and until an application to withdraw them was granted; and

    iii) said that he would oppose any such application, not least because the evidence had closed and Ms. Hughes had not been cross-examined on the point.

21. The point relating to Epicure Deal 34 was not addressed in oral submissions by either leading counsel for the Defendants.

22. I dealt with Epicure Deal Chain 34 very briefly at the end of the judgment which I circulated in draft to the parties. In paragraph 576 I stated,

> "The experts were agreed that Epicure Deal 34 was not established and should be excluded."

23. None of the parties raised any issue over my treatment of Epicure Deal 34 before the judgment was handed down in approved form. However, after I had handed down my judgment in approved form, and as part of the process of seeking to agree the amount to be ordered to be paid by the Defendants to the Claimants, the issue of Epicure Deal 34 was raised.

24. The position of the Defendants was that the approved judgment should stand on the basis that the point had been raised at the trial, I must have rejected the Claimants' contentions, and the Claimants should not be entitled to reopen that decision. The Claimants' argument was that my judgment contained an obvious error in that it was inconsistent with the Defendants' formal admissions, and that they were entitled to hold the Defendants to their formal admissions.

25. In the absence of agreement, on 18 March 2020 the solicitors for the Second Defendant, RBS SEEL, issued an application under CPR 14.1(5) seeking permission to withdraw its admission in relation to Epicure Deal 34.

26. The witness statement in support indicated that the lawyers concerned could not recall why the Defendants did not seek formally to withdraw their admissions during the trial but speculated that it is likely that was because "the very issue was brought to [the court's] attention during trial, and a formal application to withdraw an admission in relation to a single transaction chain was therefore not thought necessary." The statement also suggested that, "given Mr. Steadman and Ms. Hughes were in agreement that Epicure Deal 34 is not demonstrated, it is unclear what potential prejudice the Claimants could have suffered in not cross-examining Ms. Hughes on Epicure Deal 34".

Analysis

27. The parties are agreed that I have jurisdiction to reconsider the point concerning Epicure Deal 34 prior to the order being sealed under the principles outlined in Re Barrell Enterprises [1973] 1 WLR 19 and further discussed by the Supreme Court in Re L [2013] UKSC 8. In Re L the Supreme Court held that the exercise of the power to reconsider a point prior to the order being perfected did not require exceptional circumstances, but that the overriding objective is to deal with a case justly. Lady Hale also mentioned some of the examples suggested by Neuberger J in Re Blenheim Leisure (Times 9 November 1999), and also referred to the comment of Peter Gibson LJ in Robinson v Fernsby [2004] WTLR 257 at [120] that,

> "… if the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting his error so long as it lies within his power to do so?"

28. I now recognise and accept that in giving my decision on Epicure Deal 34 in paragraph 576 of the Judgment, I made an error in overlooking the existence of the formal admissions by the Defendants and the exchanges that had taken place with Mr. Gledhill QC during the closing argument. The task of a trial judge is to decide the issues between the parties identified by the pleadings and any formal admissions, and given that no application to withdraw the formal admissions had been made by the Defendants, I should not have reached a decision to contrary effect. At the very least,

had I intended to decide the point contrary to the formal admissions, I should have given my reasons for rejecting Mr. Gledhill QC's submissions to me.

29. I therefore consider that justice requires me to reconsider the conclusion reached in paragraph 576 and deal with the issue of Epicure Deal 34 fully.

30. The starting point must be that the Defendants made formal admissions that Epicure Deal 34 was established. This was the basis upon which the matter went to trial, the issues were defined, and all the evidence was heard. The Defendants therefore now require the permission of the court to withdraw those admissions.

31. The jurisdiction of the court to permit an admission to be withdrawn is not fettered by the terms of CPR 14.1(5) but must be exercised justly having regard to all the circumstances of the case. It is also relevant to have squarely in mind that the general purpose of formal admissions is to serve the overriding objective by encouraging parties to narrow the issues which need to be resolved at trial, thereby saving costs and reducing delay.

32. Paragraph 7.2 of the Practice Direction to CPR 14 gives some guidance as to the factors that the court might take into account when deciding whether to allow an admission to be withdrawn,

> "7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

33. Having regard to those factors, the first point in paragraph 7.2(a) is that the basis upon which the Defendants seek to withdraw the admission is not that new factual evidence has come to light after the formal admissions were made by the Defendants. Rather, for reasons that are not entirely clear, Ms. Hughes apparently changed her opinion as to whether the deal chain was established on a review of the existing evidence and Mr. Steadman's further reports.

34. As to the second point in paragraph 7.2(b) concerning conduct, the fact is that Ms. Hughes' change of mind and her reasons for so doing were not clearly communicated to the Claimants or to the court, either in her Amended Supplemental Report, or in any amendment to the joint memorandum of the experts, or indeed when Ms. Hughes gave evidence at the trial. The most that can be said is that Ms. Hughes' Amended Supplemental Report was ambiguous. In reality, I consider that the two statements ("reminders") in the body of Ms. Hughes' report that she (still) regarded Epicure Deal 34 as having been established were considerably clearer than her inclusion of a reference to that deal chain in a footnote to another paragraph indicating that she had re-categorised that deal.

35. In that regard I reject the suggestion now made by the Defendants that it was for the Claimants to cross-examine Ms. Hughes to resolve the ambiguity in her Amended Supplemental Report, or indeed to seek to have her recalled after the evidence had closed once it appeared that she wished to correct the evidence that she had given. It is commonplace for the party calling a witness to introduce any corrections or amendments to the witness' written evidence before they affirm its truth and accuracy in their evidence in chief. That was not done in this case. It is also normal practice that if a witness realises that they have made an error in the evidence that they have given to the court, that witness and the party who has called them takes the initiative in seeking to correct the position, either during the course of evidence or by seeking to be recalled and to submit to further cross-examination on the issue. That must be all the more so when the party who called the witness also wishes to withdraw a formal admission made on the basis of the earlier evidence. In this case, the onus to ensure that Ms. Hughes' evidence was corrected in a timely manner lay squarely on the Defendants.

36. I also would observe that it is not strictly speaking correct that Mr. Steadman and Ms. Hughes had "agreed" that Epicure Deal 34 was not demonstrated. The eventual position of both experts was that Epicure Deal 34 was not established, but they had reached that position independently and had not discussed or addressed in their joint memorandum why that was. For his part, Mr. Steadman's non-acceptance related to the inconsistency in the CarbonDesk documents, which he had left to the court to determine; whereas Ms. Hughes appeared to be concerned that Mr. Steadman had included the transactions in question with other transactions, albeit that she had been initially satisfied that the EUTL entries and money flows tallied for the Epicure Deal 34 chain of transactions.

37. That observation is relevant to the third, fourth and fifth points in para 7.2 of PD14, which I can take together. It is very obvious that the application to withdraw the formal admissions as regards Epicure Deal 34 has been made extraordinarily late in the trial process. As I have indicated, the purpose of formal admissions is to narrow the issues to be resolved at trial in the interests of saving time and costs. Any application to withdraw an admission which is only made after conclusion of a trial necessarily cuts

across that purpose and is likely to cause prejudice to the other parties. I also would observe that the Defendants have not given a cogent explanation of why they did not make the application to withdraw their admissions in a timely manner at the trial.

38. In this case, I consider that it is overwhelmingly likely that had Ms. Hughes' change of opinion been made clear by way of a timely correction to her evidence in chief and if an application had been made at the time to withdraw the admission in relation to Epicure Deal 34, the Claimants would have had the opportunity to address the issue with her in cross-examination. At very least Mr. Richardson's unchallenged evidence about the explanation for the CarbonDesk documents could have been put to Ms. Hughes. The point that Ms. Hughes was initially satisfied by the EUTL register entries and money flows in relation to Epicure Deal 34 could also have been investigated and explained in proper detail. Mr. Steadman and Mr. Richardson could, if necessary, have been recalled to deal with any points arising.

39. Had that been done, I would have been in a position to do that which Mr. Steadman had initially suggested was required, and to which Mr. Richardson's evidence was directed prior to the formal admissions having been made, namely that I should form a view on the accuracy or otherwise of the relevant CarbonDesk documents in light of the other evidence as to the Epicure Deal 34 transaction chain.

40. The fact that the application to withdraw the formal admissions was not made by the Defendants, either at that time or even after the need for it had been expressly flagged in the course of closing argument by Mr. Gledhill QC, means that the Claimants have been prejudiced by not being able to take such a course. If the application were now to be granted, I would also be faced with having to decide a disputed point on Epicure Deal 34 without the benefit of potentially relevant evidence or assistance from the Claimants' witnesses.

41. That leads in turn to the sixth factor in paragraph 7.2 of PD14, namely the prospects of success on the point if the admission were to be withdrawn. I find it difficult to reach any clear view on this point in the absence of further assistance from the witnesses. I would, however, note that Mr. Steadman had not positively rejected the Epicure Deal 34 chain, but had simply reached a conclusion that it could not be demonstrated to his satisfaction due to inconsistencies in the CarbonDesk documents. Mr. Richardson had, however, then provided an explanation of the inconsistencies which seems at least plausible.

42. I also note that Ms. Hughes' stance was, unusually, to assert that even though Mr. Steadman was not satisfied, she did regard Epicure Deal 34 as being demonstrated on the basis of the EUTL entries and cash-flows, which she remarked in the joint memorandum she considered to be more reliable. Ms. Hughes' satisfaction with Epicure Deal 34 stood out as being contrary to the general tenor of the remainder of her report. In the circumstances, I do not think that I can conclude that the Defendants are likely to succeed in showing that, contrary to their admissions, Epicure Deal 34 should be regarded as not established.

43. The final point is the interests of the administration of justice. For the reasons already given, allowing the Defendants to withdraw their admissions after the conclusion of the trial and after judgment has been given would run contrary to the purposes of CPR 14 in encouraging admissions with a view to limiting the issues to be decided at trial. A

proper investigation of the issues concerning Epicure Deal 34 would also require further evidence and cross-examination. That would occupy additional time and court resources to the detriment of other litigants. In addition, although the amount involved is not, in absolute terms, small, in the overall context of the case I consider that the costs involved in reconvening to determine the point on Epicure Deal 34 would be disproportionate.

44. For these reasons I do not believe that it would be just or appropriate to permit the Defendants now to withdraw their admissions. I therefore propose to reverse the decision that I gave in paragraph 576 of my judgment.

45. Given that the judgment has undoubtedly now gained wider currency, I do not see how I could practically amend paragraph 576 of the judgment as handed down. Instead, what I propose to do is to indicate in this judgment that since the Defendants formally admitted that Epicure Deal 34 was established, and I do not give permission for those admissions to be withdrawn, the amount payable in my order from the Defendants to the Claimants should include the VAT in respect of Epicure Deal 34. That conclusion will, of course, be incorporated into my final Order.

Interest

46. The parties are agreed that interest should be payable by the Defendants to the Claimant companies to compensate the Claimant companies for being kept out of the monies that were dissipated or diverted by their directors, and that such interest should run from 6 October 2015, being the date upon which RBS SEEL rejected the Claimant companies' letter before action. However, the parties disagree radically as to the rate of interest and whether it should be simple or compound. The Claimant companies seek interest at a rate of 12% compounded with quarterly rests. The Defendants submit that simple interest at a rate of 2.5% over base would be appropriate, being the HMRC statutory rate applied to unpaid liabilities for VAT.

47. The approach to determining the appropriate interest rate was explained and summarised by Hamblen LJ in Carrasco v Johnson [2018] EWCA Civ 87 at [17], drawing upon various earlier authorities including Tate & Lyle Food and Distribution Ltd v Greater London Council [1982] 1 WLR 149, Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm), and Reinhard v Ondra [2015] EWHC 2943 (Ch):

> "17. The principles to be derived from these cases include the following:
>
> (1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular

> attributes or any special position in which they may have been.
>
> (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
>
> (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.
>
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates."

48. The Claimants' first contention in this respect was that they were small, impecunious and uncreditworthy companies who could not have borrowed money easily or at all in the commercial lending market, and that the rate of interest which should therefore be awarded should be that which would have been applied either by high street banks or other providers of credit or loans to small businesses with bad credit ratings.

49. So far as the question of whether interest should be simple or compound is concerned, whilst there is no jurisdiction to award compound interest under s.35A of the Senior Courts Act 1981, the Claimants contend that there is an equitable jurisdiction to award compound interest, both as against a dishonest fiduciary and against a defendant who has dishonestly assisted them: see FM Capital Partners v Marino [2019] EWHC 725 (Comm) at [32]-[35] referring to and applying the dictum of the Privy Council in Central Bank of Ecuador v Conticorp [2015] UKPC 11 at [185]. The Claimants contend that this would be appropriate in the instant case because it would reflect the fact that interest on commercial lending is ordinarily compounded and that the Claimant companies have in fact had to finance their pursuit of this litigation by borrowing from litigation funders who charge a very high rate of interest.

50. I do not accept these arguments. The basic purpose of an award of interest is to compensate a claimant for being kept out of money which should have been paid to it or which has been misappropriated from it. I consider that paragraph 17(3) of Hamblen LJ's judgment in Carrasco is based on a general presumption that but for the wrong committed by the defendant, a commercial claimant would have had the benefit of being able to use the monies of which it has been deprived in its business, and that in the absence of such monies, it would have had to borrow money at commercial rates to make good the shortfall.

51. That is simply not the situation in the instant case. The Claimant companies are corporate vehicles that were used by their directors or controllers for VAT fraud. They had no legitimate commercial business in which to deploy their income and assets. The monies which were diverted from them or dissipated by their directors were not monies generated by their commercial activities in any ordinary sense. The monies diverted or

misapplied represented the VAT which the Claimant companies were obliged by statute to charge on the transactions in the deal chains and in respect of which the companies were liable under statute in a corresponding amount to HMRC.

52. Although not trust monies in the strict sense, the reality is that such monies were not ordinary income on business activities and they were never freely available to the Claimant companies to be ventured in their own businesses. The monies should instead have been used promptly by the Claimant companies to discharge their liabilities to HMRC on a quarterly basis. It therefore makes no sense to ask what interest rate the Claimants would have been charged if they had approached a commercial lender for a loan to replace the monies diverted or misapplied, since they had no legitimate business need for such monies other than to discharge their VAT liabilities to HMRC.

53. If anything, I consider that the more relevant comparator for the purpose of determining interest is to assume that the Claimant companies could have invested the monies that were diverted or misapplied for the period after they should have been received or were misapplied, up to the date upon which payment should have been made to HMRC. If that had been done, the Claimant companies would have earned investment income on such monies in the intervening months. Thereafter, any further investment income earned would have been (more than) offset by the fact that HMRC charges an interest rate for late payment of VAT, which by statute and regulation is fixed at a simple 2.5% over base rate and which is doubtless set at that rate to discourage late payment.

54. The Claimants' response to that analysis was to assert that they had been rendered "impecunious" by the diversion or misapplication of funds, and so they had to obtain funding to conduct "the business" of recovering assets for the benefit of their creditors. But that argument misses the point that the Claimant companies were never really pecunious in their own right by virtue of such monies, because they had an obligation to pay an equivalent amount of VAT to HMRC. Moreover, an order for payment of such costs by way of interest would represent compensation for the costs of litigation rather than compensation for the loss of use of the money. In addition, rather than simply requiring the court to consider the position of persons with the claimants' general attributes (which Hamblen LJ envisaged in paragraph 17(2) of Carrasco), it would also require an investigation into matters such as a funder's assessment of the specific prospects for success in the litigation and its desire to make a commercial return on litigation funding.

55. For these reasons I accept the Defendants' submissions that the appropriate rate of interest to compensate the Claimant companies for the loss of use of the monies which were diverted or misapplied is a simple interest rate of 2.5% over base rate.

56. The result is that a sum of £6,686,500.30 will be due by way of interest to the Claimants from 6 October 2015 to 2 October 2020 on the principal sum of £45,049,882.60.

The basis of assessment of costs

57. The Claimants seek an order that their costs be assessed on the indemnity basis. The Defendants do not dispute that they should be liable for costs, but do dispute that those costs should be assessed on the indemnity basis.

58. In Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879 the Court of Appeal confirmed that in normal circumstances the appropriate order for costs is an order for costs to be assessed on the standard basis, and that an order for costs on the indemnity basis requires there to be some conduct of the action or some circumstance which takes the case out of the norm: see per Woolf LCJ at [19] and per Waller LJ at [39].

59. The Court of Appeal also emphasised, referring to the earlier case of Reid Minty v Taylor [2002] All ER 150, that although many cases in which it would be appropriate to award indemnity costs will involve conduct of the litigation which deserves disapproval or moral condemnation, that was not a pre-requisite for an order for indemnity costs.

60. Further, in Esure Services v Quarcoo [2009] EWCA Civ 595 at [25] the Court of Appeal also clarified that, the word "norm" was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as "normal", but it was intended to reflect something outside the ordinary and reasonable conduct of proceedings.

61. In Esure, the claimant had made a dishonest insurance claim contending that his BMW had been stolen, and when his claim was rejected, he brought proceedings against the insurer which he supported with dishonest evidence of the "theft", and made allegations that the claims hander had acted dishonestly. The first instance judge had taken the view that this was a fairly frequent occurrence, but the Court of Appeal took the view that it ought to mark its disapproval of the bringing of a dishonest case, supported by lies and accompanied by an attack on the credibility of the claims handler (albeit ultimately not pursued in cross-examination), by an award of indemnity costs.

62. In the instant case the Claimants rely upon a number of matters to justify an award of indemnity costs. They contend (a) that I found that the Defendants, through the traders, had acted dishonestly in assisting a large-scale VAT fraud on HMRC, which they submitted was unacceptable for regulated entities, (b) that the traders had given extensive evidence in writing and at trial which I found to have been deliberately false and a dishonest construction, (c) that RBS had made attacks in their submissions against the Claimants' lawyers and the liquidators to the effect that they were acting improperly in making the claim without sufficient evidence of dishonesty, (d) that the Defendants had not made appropriate admissions that the directors of the Claimant companies had been involved in MTIC fraud and had not admitted that any of the transaction chains were established, until shortly before the PTR, six weeks before trial, and (e) that the Defendants had put forward an unrealistic offer to "drop hands" a few weeks before trial and had then rejected an offer from the Claimants made before exchange of written openings for trial to settle the claim in return for a payment of £35 million (i.e. an offer to settle for less than I will order to be paid by the Defendants to the Claimants).

Participation in VAT fraud

63. So far as point (a) is concerned, I found both corporate Defendants vicariously liable for the wrongs committed by the Traders (dishonestly assisting the breaches of duty and fraudulent trading by the directors of the Claimant companies) and found RBS liable for dishonest assistance on the basis that the Traders' states of mind were attributable to it. The conduct of the Traders in turning a blind eye to the fact that the

extraordinary and sustained increase in their trading with Carbon Desk was part of an MTIC fraud was reprehensible, but it was not conduct of these court proceedings, and I do not consider that the authorities support the proposition that the singular fact that a defendant has committed or been involved in an underlying fraud ordinarily warrants the making of an indemnity costs order against him if the claim succeeds.

64. Although the authorities such as Excelsior naturally keep the options of the court open by referring in general terms to the "circumstances" of the case, the primary focus of the authorities (and indeed CPR 44.2(4)(a) and (5)) is on how the proceedings themselves (and any pre-action steps) have been conducted by the paying party. So, for example, in Esure it was the bringing of court proceedings supported by false evidence that the Court of Appeal considered justified an award of indemnity costs, rather than the underlying attempt to cheat the insurance company by a fraudulent insurance claim. Likewise, in Nat West v Rabobank [2008] 1 All ER (Comm) 243 at [28], Colman J summarised the position as follows,

> "Where one is dealing with the losing party's conduct, the minimum nature of that conduct required to engage the court's discretion would seem, except in very rare cases, to be a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense in relation to that party's pre-litigation dealings with the winning party or in relation to the commencement or conduct of the litigation itself. "

The giving of dishonest evidence at trial

65. A stronger argument on behalf of the Claimants is point (b) - that the defence of the claim was based upon evidence given by the Traders in writing and at trial which I found to be untrue and fabricated in order to conceal the fact that the Traders had decided to turn a blind eye to the fact that the trading with CarbonDesk was part of an MTIC fraud.

66. The giving of false evidence cannot, of course, be condoned and should be discouraged. As such, in the same way as Esure indicates that a claimant who knowingly puts forward a false claim may well be the subject of an indemnity costs order, so also a defendant who knowingly puts forward a false defence must be at risk of an indemnity costs order when it fails. As Esure makes clear, the depressing fact that defendants faced with a claim often lie in court to avoid liability is no reason not to make an indemnity costs order when they are found out.

67. But the instant case does have unusual features, and I think there is some force in the point made by the Defendants that, as corporate bodies, they acted reasonably in basing their defences upon the evidence of the Traders who they had employed or engaged to conduct business on their behalf, who were of previous good character, and who maintained their innocence. When tested at trial, I found the evidence of the Traders to have involved a series of lies, but there is no suggestion that the corporate Defendants knew the evidence of the Traders to be false, or that they should have dismissed it as a manifestly incredible basis for their defences. Indeed, I did not find that the Traders pursued a dishonest scheme from the start as the Claimants had alleged. Rather, it was only at a later date that the Traders had decided to ignore their suspicions about

CarbonDesk's vastly increased levels of trading and did not then make the obvious inquiries that an honest man would have made.

68. In passing in that regard, I should indicate that I do not accept the characterisation of my decision advanced by RBS SEEL, which suggested that,

> "In effect the Court has concluded that a morally innocent party (RBS SEEL) is strictly liable to a morally culpable party (the Claimants) for the benefit of an innocent party, HMRC."

69. The true position is that my decision was not based on morality but on law. The Defendants were vicariously liable because the policy of the law (as explained in Various Claimants v Catholic Child Welfare Society [2013] 2 AC 1 at [34]-[35] and Viasystems v. Thermal Transfer [2006] QB 510 at [77]-[80]) is to ensure that in so far as it is fair, just and reasonable, liability for a tortious wrong committed by a person is borne by a defendant who has employed that person or is using their services for its own benefit as part of its work, business or organisation, who can usually be expected to have the means to compensate the victim and/or to insure against the risk of such liability. It is also not the case that the Claimant companies were morally culpable. The persons who were morally and legally culpable were the dishonest directors who breached their duties to the Claimant companies. There was no suggestion of a defence of *ex turpi causa*.

RBS's conduct of the case

70. So far as (c) is concerned, there were suggestions by RBS in correspondence and submissions that there was some professional impropriety in the allegations being made against it by the liquidators and their legal representatives. Those criticisms by RBS were unfounded. The claims were properly advanced by the representatives of the Claimants, and could have been defended robustly by RBS and its legal team without resort to playing the man rather than the ball.

71. That said, the case was exceptionally hard fought and without quarter being given by either side, and I note that the Claimants also made allegations of impropriety against professionals that were not warranted. In particular, as I described in paragraph 503 et seq. of the Judgment, the Claimants alleged that the decision to continue trading after 3 July 2009 was dishonest. That decision followed a suggestion by Mr. Savage which the Claimants also at one point alleged to have been dishonest, but that allegation was not put to Mr. Savage, and was only dropped during oral closing submissions – which was very late in the day indeed.

Response to the Notices to Admit

72. Point (d) relates to the timing of the admissions by the Defendants in response to three notices to admit facts which were served by the Claimants on 21 July 2017.

73. The First Notice to Admit requested that the Defendants admit the chains of transactions pleaded in paragraphs 17-20 and Appendix 2 of the Amended Particulars of Claim. The Second Notice to Admit requested the Defendants to admit the loss suffered by each Claimant company as pleaded in paragraph 34 and Appendix 2 of the Amended Particulars of Claim.

74. The Third Notice to Admit covered a variety of facts. These included some basic facts about the Claimant companies and some of the buffer companies pleaded in paragraphs 11A and 22 of the Amended Particulars of Claim. However, the Third Notice to Admit also extended to,

> "the facts concerning the [Claimant] Companies' participation in MTIC and/or carousel fraud pleaded at sub-paragraphs 25(1) to (10) and paragraphs 30 and 31 of the Amended Particulars of Claim".

75. Paragraph 25 of the Amended Particulars of Claim asserted,

> "The Sales were not consistent with legitimate commercial trading."

"The Sales" were defined in paragraph 17 of the Amended Particulars of Claim as all of the chains of transactions between 8 June 2009 and 6 July 2009 under which the Defendants acquired 46,177,000 spot EUAs and in which the Claimant companies were parties.

76. The following ten sub-paragraphs of paragraph 25 included allegations which were said to support the allegation that the Sales were not consistent with legitimate commercial trading such as,

> "(2) The Companies commenced a huge volume of trading in EUAs in circumstances where they: (a) were incorporated only shortly beforehand or, if incorporated before, had directors who had only recently been appointed; (b) had no credit history; (c) had no funds with which to trade; and (d) had no assets on which credit could have been raised.
>
> (3) The level of trading in EUAs by the Companies was not compatible with genuine commercial trade.
>
> …
>
> (7) Further, the banks used by the Companies and other parties to the transaction chains (as set out in Appendix 1) were often the same, a fact not explicable by reference to genuine business reasons or mere coincidence.
>
> …
>
> (10) In certain instances, EUAs were carouselled from one transaction chain to another on the same day. In those cases RBS was the Exporter in one chain supplying EUAs to overseas Suppliers in a subsequent chain to which RBS was once again the Exporter."

77. Paragraphs 30 and 31 of the Amended Particulars of Claim were as follows,

> "30. In dishonest breach of the aforesaid fiduciary duties, the directors of the Companies:
>
> (1) caused their respective companies to enter into the acquisition and sale of the EUAs as set out in Appendix 2 … with the result that the Companies incurred VAT liabilities in respect of the Sales in the sums shown in Appendix 2, …; and
>
> (2) deliberately arranged their respective Companies' affairs such that no part of their VAT liabilities could or would be discharged.
>
> 31. Further, the directors of the Companies conducted their affairs knowing and intending that the Companies would be rendered insolvent and would be unable to meet, or had no reasonable prospect of meeting, their liabilities (including their VAT liabilities) and were (alternatively would become as a result of the aforementioned sales) insolvent."

78. After service of the Notices to Admit, the Defendants asked the Claimants to provide a schedule of documents supporting the factual allegations in the Third Notice to Admit as regards the illegitimate activities of the Claimant companies. This was provided by the Claimants on 28 July 2017. The Claimants contend that having received this, by no later than the end of August 2017 the Defendants should have admitted that the Claimant companies' trading had been illegitimate as pleaded, and that the Defendants' failure to make those admissions until shortly before the PTR in May 2018 meant that the Claimants were forced to prepare lengthy factual evidence from the liquidators (in particular Section A of Mr. Richardson's witness statement) proving the points.

79. I accept that the basic facts about the Claimant companies and buffer companies in paragraphs 11A and 22 of the Amended Particulars of Claim were relatively uncontroversial matters that were capable of being easily verified and admitted. However, the Claimants' real complaint in this regard relates to the issues of whether the Sales by the Claimant companies were inconsistent with legitimate commercial trading and whether the directors of the Claimant companies had acted dishonestly as alleged in paragraphs 25, 30 and 31 of the Amended Particulars of Claim.

80. In that regard, I do not accept that the Defendants' decision not to make admissions in relation to these aspects of the Third Notice to Admit until shortly before the PTR was out of the norm. This was complex litigation in which the Defendants were facing a very substantial claim of many tens of millions of pounds in which dishonesty was alleged by inference from a number of facts. The Third Notice to Admit extended to all of the Sales with which this claim was concerned, and I do not think that it was unreasonable for the Defendants to await the completion of the expert evidence as to whether, and if so, which of those transaction chains were in fact established in order to assess whether to admit that any, and if so, which, of the Sales were not legitimate commercial transactions. It was not a simple question of admitting that the Claimant companies had engaged in *some* illegitimate trading.

81. Further, the claim against the Defendants was based in part upon allegations that the Traders must have appreciated that the very substantial and rapidly increased levels of

trading which they conducted with CarbonDesk were not consistent with legitimate commercial trading. The similarity of some of the points raised in paragraph 25 of the Amended Particulars of Claim as regards the inferences to be drawn from the volume and timing of the level of trading by the Claimant companies make it understandable that the Defendants would wish to be entirely clear about the number and identity of the transaction chains that had been established, and the implications that might be drawn from that, before conceding that any particular Sales with which they had been concerned had been the result of illegitimate activities by the directors of the Claimant companies.

Offers to settle

82. Point (e) relates to the Defendants' conduct (i) in putting forward a "drop-hands" offer of settlement, and (ii) their refusal of an offer by the Claimants to accept £35 million in settlement of the claim. Both were made in May 2018, relatively close to trial. The Claimants contend that the former offer was an "unrealistic" offer for the Defendants to make to insolvent claimants with ATE insurance in place. The Claimants also contend that their offer to settle has turned out to be more than reasonable, given that they have beaten it by a substantial margin, and hence the Defendants acted unreasonably in rejecting it.

83. Offers made to settle which are not offers under CPR Part 36 can be taken into account in determining what costs order to make: see CPR Rule 44.2(4)(c). It is therefore possible, for example, that a defendant's refusal to accept an offer of settlement which, if accepted, would have left him in a far better position than was ultimately the case, can justify an indemnity costs order: see e.g. Franks v Sinclair [2006] EWHC 3656 (Ch). However, the mere fact that a defendant would have been better off accepting the claimant's offer of settlement does not justify an indemnity costs order. Defendants who believe that they have a good defence often reject offers of settlement that, with the benefit of hindsight after the trial, they would rather they had accepted. The general principle must remain that to justify an indemnity costs order, the defendant's refusal of an offer must have been sufficiently unreasonable to take his conduct of the case out of the norm, and in my view the reasonableness of his conduct must be judged by reference to the circumstances at the time.

84. In this case I do not think that either the Defendants' "drop hands" offer or their rejection of the Claimants' offer could be regarded as unreasonable so as to be conduct of the litigation which was out of the norm. This was a complex case in which the positions of the parties on the merits were polarised – the Claimants contending that the Traders had been dishonest from the start, and the Defendants relying upon the explanations which they had been given by the Traders to justify their conduct. There were also significant differences of principle in the approaches of the experts to the question of whether transaction chains had been established and the resultant quantification of loss.

85. Given these significant uncertainties, I do not consider that the Defendants' offer to the Claimants to drop hands was unreasonable in itself; and it did not become so simply because accepting it would have meant that those who had funded the litigation by the Claimants would have had to cut their losses on their investment. Nor do I consider that it was obviously unreasonable for the Defendants to reject the offer to pay £35 million to settle from the Claimants. As I have explained above, although the Traders

did not tell the truth at trial, they did not act dishonestly from the start as the Claimants were alleging, and in that respect it was not unreasonable for the Defendants to decide to go to trial on the basis of the Traders' evidence.

Conclusion on the basis of assessment of costs

86. Taking the factors above into account, I do not consider that this is a case in which the Defendants' conduct of the litigation was sufficiently unreasonable or out of the norm so as to justify an indemnity costs order.

Permission to Appeal

87. The Defendants seek permission to appeal. For the most part, the grounds do not raise issues of law, but contend that I reached my factual conclusions as to the dishonest states of mind of the Traders against the weight of the evidence or by failing to take into account or give sufficient weight to features of the evidence that were said to exculpate the Traders. That argument is buttressed by a submission that the delay in delivery of the Judgment meant that I failed to take advantage of hearing the evidence at the trial. It is also suggested that my findings of facts did not support a conclusion that the Traders had turned a blind eye in accordance with the test in Manifest Shipping v Polaris [2003] 1 AC 469.

88. In addition, RBS SEEL contends that I should have found that Mr. Savage and the other senior officers of the Defendants, rather than the Traders, were the relevant decision-makers on behalf of the Defendants after Mr. Savage gave his instruction to the Traders on 1 July 2009; alternatively that by acting in accordance with those instructions the trading by the Traders after that date could not have been dishonest. RBS SEEL also contends that I should have adopted a different interpretation of the contractual and business arrangements between RBS and RBS SEEL, and thereby found that RBS SEEL's role was limited to that of formally employing the Traders and other senior managers and making them available to act as agents of RBS, such that it was only RBS that was vicariously liable for the activities of the Traders.

89. The Claimants resist leave to appeal being given on the basis that my findings of fact were well supported by the evidence and cannot conceivably be described as ones which no reasonable judge could have reached or plainly wrong so as to warrant interference by an appellate court. They also submit that delay in the giving of a judgment does not of itself warrant permission to appeal being given unless there are realistic grounds for contending that the judgment contains errors that are attributable to the delay; and they contend that there are no such grounds.

90. The Claimants indicate that they would also wish to have permission to cross-appeal on the basis that I applied too high a test in acquitting the Traders of dishonesty prior to 26 June 2009, and also that I should have found dishonesty in relation to the trading with GW Deals.

91. The test for granting permission to appeal is whether an appeal has a realistic prospect of success or that there is some other compelling reason for an appeal to be heard.

92. I am not convinced that there are realistic prospects of success on the factual grounds advanced by the Defendants or the Claimants. In particular, I do not believe that my

central findings of fact were unsupported or plainly wrong. Indeed, for the most part, the Defendants do not appear to criticise my findings on the basis that I have misremembered or misunderstood the evidence, but rather on the basis that I should have given different weight to the various factors to which they refer. Nor, for similar reasons, do I consider that the Claimants have identified any real basis for questioning my conclusion that this was not a case in which the Traders closed their eyes to the obvious from the start.

93. I also do not think that the delay in production of the Judgment led to any errors in my analysis of the evidence in circumstances in which, as both parties urged me, I paid close regard to the contemporaneous documents and tested the oral evidence against them; and as regards my assessment of the evidence given at trial, I had the benefit of full transcripts and a full audio recording of the entire hearing on Magnum, and comprehensive and very lengthy written submissions.

94. However, I have in mind that this was a significant and complex case, both in terms of the very large amounts at stake and the unusual factual and legal issues which it raised. Although the draft grounds of appeal do not cause me to believe that I was wrong in my findings, at least some of the points made cannot be dismissed as fanciful. I also have well in mind the potential effect of findings of dishonesty in relation to the Traders and institutions operating in a regulated sector. These points, when coupled with the observations made in the authorities that a long delay in the production of a judgment may require an appellate court to conduct a careful review of findings of fact to be satisfied that no injustice has been caused to parties by the delay, narrowly persuade me that I should grant permission to appeal.

95. As the facts and legal issues are closely inter-related, I think it would be practically unworkable to attempt to segregate out some specific grounds of appeal on the facts from others. I shall therefore grant permission to appeal generally to all parties. The only exception in that regard relates to the Claimants' request for permission to appeal my dismissal of the case in relation to GW Deals. I simply cannot see that such appeal has the faintest prospect of success given that the case of dishonesty in that regard was not squarely put to relevant witnesses, and it formed no real part of the arguments before me. I shall therefore refuse the Claimants permission to appeal on that ground.

Interim payment on account

96. I am asked to determine the amount of an interim payment on account of costs pursuant to CPR 44.2(8). The parties have agreed a mechanism under which any sums ordered to be paid on account will be dealt with prior to the resolution of any appeal.

97. The Claimants have provided a costs schedule to 3 April 2020 in the total amount of £14,477,732.31. The schedule breaks down the amounts claimed by recipient and gives very brief descriptions of the categories of costs and expenses but does not contain any supporting detail of, for example, times spent on specific tasks or workstreams. In approximate terms, the amount claimed includes about £6.7 million for Rosenblatt Solicitors, £3.43 million for counsel, £1.53 million for experts, £2.25 million for ATE premiums and the balance of just under £570,000 on the liquidators' litigation costs and other disbursements. The amounts claimed for the lawyers include significant recoverable uplifts under their Conditional Fee Agreements ("CFAs").

98. The Claimants seek a payment on account of "a reasonable sum": see Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm) at [22]. They contend that a reasonable sum would be 65% of the total amount claimed, namely £9.41 million.

99. The Defendants do not dispute that an interim payment of a reasonable sum on account of costs should be ordered, subject to the regime that has been agreed between the parties.

100. However, the Defendants contend, first, that the total figure claimed to which an appropriate percentage should be applied for the purposes of arriving at an interim payment should not include those parts of the fees of the Claimants' lawyers under their CFAs which are only payable on condition that the Claimants "win" the case. They contend that since "win" is defined in the CFAs as "where the Claim is finally decided in the [Claimants'] favour…" (my emphasis), and the Defendants have permission to appeal against my Judgment and Order, those elements of the fees have not yet accrued due and should not be taken into account when ordering an interim payment. The Defendants contend that this should reduce the total figure to which a percentage should be applied from £14,477,732.31 to £9,268,103.79.

101. The Defendants also contend that although an assessment on the standard basis generally results in a recovery of 60-70% of the costs claimed, I should allow a further generous margin for error given that the Claimants have not yet provided a detailed costs schedule. They therefore contend that I should order a payment on account on a double discounted basis of 60% x 66% = 39.6% of the appropriate total amount. On the basis of the Defendants' contentions as to the appropriate total figure from which to start, this would result in a payment of 39.6% of £9,268,103.79 = £3,670,169.12.

102. I do not accept that I should reduce the total (base) figure claimed to which a reduction should be applied on account of the fact that some of the elements of the Claimants' costs are expressly only recoverable under the CFAs if the Claimants "finally" win the case.

103. Interim payments are ordered on account of the amount that will ultimately be recovered on a detailed assessment in favour of the receiving party. Thus, if the CFA uplifts will be recoverable on a detailed assessment in favour of the Claimants, they should be included for the purposes of computing an interim payment. Interim payments on account of costs are frequently ordered when a first instance decision is subject to an appeal, notwithstanding that in such a situation the ultimate assessment and payment of costs is conditional upon the first instance decision surviving the appeal. That being so, I do not see that the fact that certain elements of the costs claimed are subject to an express condition in that respect in the CFAs should make any difference.

104. I also do not consider that a double discount of the level suggested by the Defendants is necessary or appropriate to cater for the lack of detail of the fees claimed which has been provided. It is certainly true that the costs schedule provided is not in the form of the final bill of costs that would be required for a detailed assessment or even in the form that is usually provided for the purposes of summary assessment or for determining an interim payment on an application of far more modest extent where some indication of the nature of the work done is usually provided. To that extent, I accept that I should be cautious when determining a reasonable amount. But the

Claimants' costs schedule is verified by the Claimants' solicitor and I have no specific reason to believe that any particular items in it would be reduced on a detailed assessment by any greater amount than normal for a case of this magnitude.

105. Taking these points into account, in my judgment a reasonable sum to be paid on an interim basis on account of costs in this case is £8 million, which is about 55% of the total amount claimed by the Claimants.