Neutral Citation Number: [2023] EWHC 1743 (KB)
Case No: QB-2020-003693

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 July 2023

Before :

MRS JUSTICE MAY DBE

- -

Between :

ALEXANDER HAMILTON	**Claimant**
- and -	
(1) MARK BARROW	**Defendants**
(2) CLAIRE BARROW	
(3) MARTIN WELSH	

- -

Legal Representation

Mr Alexander Hamilton appeared in person with the assistance of a Mackenzie friend
Mr Hugo Page KC & Madeline Dixon (Counsel) on behalf of the First and Second Defendants
Mr Martin Welsh appeared in person

Hearing dates: 25-31 January 2023

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May J:

Introduction

1. By this claim the Claimant ("Mr Hamilton") seeks the return, with interest, of sums totalling US$698,888 which he invested between April 2015 and June 2016 into an unregulated foreign exchange futures enterprise known as the Currency Club. Mr Hamilton maintains that he was induced to invest as a result of fraudulent misrepresentations made to him by the third defendant (Mr Welsh), for which the first and second defendants (Mr Barrow and Mrs Barrow respectively) are also responsible. The facts are also said to give rise to a claim against all the defendants for breach of contract and additionally for the tort of conspiracy (unlawful means).

The parties

2. Until he ceased practice in July 2001, thereafter resigning from the Roll in 2004, Mr Hamilton was a practising solicitor. On ceasing to practise, he moved full-time into property development and investment. Although at the start of these proceedings he was represented by solicitors and counsel, by the time of trial Mr Hamilton was representing himself, with the aid of a Mackenzie friend. I have been impressed with his grasp of the (voluminous) case documentation, his retention and presentation of relevant legal principles and his robust, focussed cross-examination of the defendants when giving their evidence.

3. Mr Barrow was an independent financial advisor, spending most of his early professional years in this country. He and his wife left the UK in 2004, moved for a short time to the US and then to Spain before settling in Cyprus where they lived and worked between 2005-2011. In 2012 they moved to Malaysia, where they remained during the period of operation of the Currency Club. Shortly after the Club folded in 2017 they moved to the Cayman Islands. Mrs Barrow worked at one stage in the UK for Barclays Bank, in their compliance department, before moving abroad with her husband. As far as I understand it, Mr and Mrs Barrow are now retired and reside in Portugal. They were represented at trial by Hugo Page KC and Madeline Dixon. I am grateful to counsel for their assistance at trial, also to their instructing solicitors, Messrs Lupton Fawcett LLP for taking on the significant burden of preparing the 25 bundles of documents for this 5-day trial.

4. The third Defendant, Mr Welsh, was also at the material time an Insurance Office Manager. I understand that he and his wife (who was not present at trial and did not give evidence) currently live in the United Kingdom. They are long-time friends of Mr and Mrs Barrow.

Applicable law and jurisdiction

5. As will appear, Mr Hamilton embarked on his foreign exchange investing activity with a conspicuous lack of documentation. Likewise, the Barrows, Mr Welsh and the other Currency Club leaders took and dealt with their investors' funds with minimal arrangements in writing. There are no written terms of any description, whether

between Club Leaders or between leaders and investors. No one appears to have signed any terms of investment; there is no recorded agreement as to the proper law of the arrangements, or any agreed jurisdiction for the resolution of any claim arising from the investments. Although, on the evidence, most of the activity in relation to Mr Hamilton's investments took place in Cyprus or the Far East, all parties appear to have consented to submit to the law and jurisdiction of England and Wales for the purposes of deciding his claims, or at least no one has sought to argue differently before me. I need say no more on the matter of the applicable law and jurisdiction.

Oral/documentary evidence

6. In addition to his witness statements dated 23 July 2020 and 23 December 2022, Mr Hamilton relied on evidence at trial from the following witnesses:
   (i) Andreas Jacovides, Compliance Officer of FX Pro Financial Services Ltd, statement dated 16 January 2023;
   (ii) Menelaus Kouzoupis, partner at Stevenson Harwood LLP (Mr Hamilton's former solicitors with conduct of the case), statements dated 24 September 2021, 27 September 2021;
   (iii) A number of other investors in the Currency Club: Paul Croft, statement dated 29 November 2022; Paul Clayfield, statement dated 5 December 2022; Paul Martin, statement dated 10 December 2022; Keith Squire, statement dated 11 December 2022, Garry Thurogood, statement dated 12 December 2022; Kathleen Doody, statement dated 17 December 2022, Teresa Clark, statement dated 17 December 2022.

   Neither Mr Jacovides nor Mr Kouzoupis were called (or required) to give oral evidence. Mr Hamilton and all the investors at (iii) above appeared and gave evidence in person at trial.

7. For the defendants I had evidence from each as follows:
   (i) Mark Barrow: an affidavit dated 21 August 2020, a (third) witness statement dated 29 July 2022 and a (fourth) witness statement dated 19 December 2022.
   (ii) Claire Barrow: an affidavit dated 21 August 2020, a (third) witness statement dated 29 July 2022 and a (fourth) witness statement dated 19 December 2022.
   (iii) Martin Welsh: a witness statement (dealing with specific disclosure) dated 29 July 2022 and a witness statement for trial dated23 December 2022.

   Each of the above persons gave evidence at trial.

My approach to the evidence

8. The events with which the issues at trial are concerned took place in 2015/16, over 7 years ago. A person's memory of events so long ago, however firmly held and bona fide related, is by no means always a reliable record of what actually took place: see the observations of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15] to [24].

9. As I have indicated, there is no formal documentation recording the discussions which took place, or arrangements which were made, in relation to substantial investments made by Mr Hamilton, and very little in the way of informal record. In these circumstances, and where the parties have a great deal invested in their own versions of

the truth, I have had to pick my way carefully through the oral evidence, considering what witnesses told me about how the Currency Club operated at the time Mr Hamilton invested, matching it, where I could, with evidence from others and with such contemporaneous documents as exist. In what follows I set out the background leading up to, and the circumstances of, Mr Hamilton's investments, making findings on the disputed evidence where necessary.

FACTUAL HISTORY

Daniel Arkian and the formation of the Currency Club

10. Mr Barrow's evidence was that he and his wife moved from Cyprus to Kuala Lumpur in 2012. He was working there as a self-employed independent financial advisor (IFA) for Montpelier Malaysia; Mrs Barrow was employed by the same company. In March 2012 Mr and Mrs Barrow were introduced to Daniel Arkian ("DA"), who was also an employee of Montpelier Malaysia. In August of the same year DA invited Mr Barrow out to lunch to discuss an opportunity to invest in foreign exchange trading. DA told him that he was engaged part-time in foreign exchange trading in an unregulated way but through a reputable trading organisation known as FXPro. He invited Mr Barrow to join his list of clients whose funds, DA told him, were held in an account with FX Pro in London.

11. Mr Barrow said that he had invested a total of $5000 with DA's business, Arkian FX, between August and September 2012 which had grown to $42,000 by October 2012. On visits back to Cyprus between October 2012 and February 2013 Mr Barrow mentioned DA's foreign exchange investing scheme to some of his clients and friends. These people joined the scheme, by transferring sums into Mr Barrow's account at Standard Chartered Bank, and/or his joint account there held with his wife, which sums Mr Barrow passed on to DA. Mr Barrow said that the scheme generated such good returns (or appeared to) that others soon joined and the "Currency Club" grew very fast.

12. Mr Barrow's evidence was that he sought further information from Mr Arkian in January 2013 about how the trading worked. DA told him that he was "fiddling the system" in order to access a better platform for trading, saying that he used a broker at FX Pro, one Antone Valdes. DA forwarded Mr Barrow an email from Mr Valdes confirming that DA's clients deposited money into Arkian FX's business account, which deposited the funds with a second party over which a third party had control. This system allowed clients to "benefit a (sic) fully regulated system", even though Arkian FX was itself unregulated.

13. There was no evidence to suggest that Mr Barrow passed this information on to his investors, telling them that control over their funds would pass from Mr Barrow to a second and then a third party, as DA/MrValdes had said. On the contrary, as I set out below, the evidence from a number of Mr Barrow's clients was that Mr and Mrs Barrow's presentations to them left them with the clear impression that their funds would remain at all times under the control of the Barrows. Mr Page sought to criticise the evidence of these witnesses, as being in the same or very similar wording on this point, and biased, each person having an interest in seeing Mr Hamilton succeed in his claim, thereby advancing any claim which the witness him- or herself might bring in future. But I do not accept this criticism: in the first place I heard each of the witnesses

give their evidence and respond to the challenge under cross-examination by Mr Page; in the second place, many of the witnesses (for instance Mr Thurogood, Mr Clayfield, Mr Squire) had themselves sustained no loss of investment and accordingly had no such interest to serve.

Banking arrangements, commissions, and "netting off"

14. When the Currency Club first started, the Barrows were using their personal account to receive funds from investors. However, as the numbers of investors increased, from May 2013 Mr Barrow began to use the bank account of his company, Blanmont Consulting, to receive funds for onward transfer on to DA. By August 2013, according to DA's figures provided to him, Mr Barrow's account with DA held $1m.

15. By late 2013 commission arrangements had been set up for the Barrows' benefit as follows: 15% commission was deducted from the profit on "winning trades", of which 5% went to the Barrows. Of the remaining 10% DA kept 6% and 4% went to the Barrows. From every "winning trade", therefore, Mr and Mrs Barrow made 9%. In evidence I asked Mr Barrow how much he had invested in, and how much he had made from, the business with DA. His response was that he had invested $20,000 and had withdrawn $3-4m over the 5 years from 2012 to 2017 when the Currency Club failed.

16. At some point, the Barrows started to pay commission to persons who introduced new investors to the scheme. Mr Welsh was one such introducer, along with a Mr Beazley, through whom Mr Hamilton first learnt of the existence of the Currency Club. These introducers were paid a percentage, usually 3%, of the commission on "winning trades" taken by the Barrows.

17. By September 2014 Standard Bank (where Blanmont Consulting had its account) became concerned at the nature of the activity on the account, presumably as it had raised "red flags" for money laundering, and closed it. At that point another friend of the Barrows working at Montpelier Malaysia, John Bowles, offered them the use of his company account, in the name of IIMM Ltd ("IIMM"), at Bank of China in Macau. Mr Bowles was the director and sole shareholder of IIMM, and at all times remained the sole signatory on the IIMM account. Mrs Barrow was appointed a director of IIMM in January 2015, and became a 50% shareholder of IIMM in October 2015, but was never a joint signatory on the account at Bank of China.

18. From September 2014, therefore, all funds received by the Barrows for investment with DA were routed through the IIMM account. Mr Barrow's evidence was that, as DA was finding the administration difficult, at around this time they began to operate a "netting off" system as follows: any investor wishing to withdraw funds was required to notify the Barrows in advance of the month end. Funds to pay out these investors were taken from new sums coming in. The new sums coming in were also used to fund any commission payments due on "winning trades" which the Barrows (and in due course any other section leaders) elected to withdraw at that time. The balance remaining after this "netting off" process was sent on to DA. In the event that investors requested more out of the fund than was being paid in, then a payment out would be sought from DA. All payments in from investors, and any withdrawals received back from DA were routed through the IIMM account. In evidence Mr Barrow confirmed that, as the Currency Club fund was growing so fast, there were very few occasions

when payments out had to be sought from DA. On the last occasion, when a transfer out of $2-3m was requested in October 2016, no monies were received back from DA. That was when the fund failed and all the sums then invested in the fund were lost (see the section on the failure of the fund, below).

The Currency Club splits into five sections 2014-15

19. As the numbers of persons investing in the Currency Club grew, the Barrows decided to split the Currency Club into different sections. They continued to manage one collection of investors, the remainder being loosely geographically organised and each managed by close associates or family members of the Barrows. By March 2015 Mr Welsh, who had himself been an investor and "introducer" to the Currency Club, had become head of the Cyprus section. There were other section heads as follows: John Bowles, Tony Davies, Barrie Humphries (the Barrows' brother-in-law) and David Barwell.

20. The Barrows' case was that each section operated independently, having its own website and commission arrangements. On paper, each section had its own account with DA. It remained the case, however, that all new monies were routed to DA through the IIMM account and later also the Marela account, both of which were controlled by John Bowles at Bank of China, and that the Barrows continued to earn, and take, commission on profits from "winning trades" across all the funds in all the section accounts held with DA. The evidence did not establish whether the "netting off" activity referred to above was conducted across all funds together, or operated separately for each section.

21. As is evident from the above short summary of the operations of the Currency Club the way in which investors' funds were treated was cavalier, to say the least. If there were accurate statements of account held by the Barrows and other section heads, detailing the precise movement of monies in and out from the IIMM account and/or, later, the Marela account (I refer to the opening of this account below), then I never saw them or was taken through them. The evidence did not reveal how many investors there were overall, let alone how many in each section, how much each invested/took out over the years and how much, overall, investors including Mr Hamilton have lost. What the evidence did establish was that, so far as the Barrows and Mr Welsh were concerned:

    a. On Mr Barrow's evidence the Barrows invested $20,000 of their own funds. Asked how much they withdrew, Mr Barrow responded "I imagine 1-2million dollars". He was evidently unable/unwilling to say precisely how much he had taken, and said in terms that it was "impossible" to tell whether it was from commissions, or interest on commissions or original capital. Mr Barrow explained:
    "Each month the commissions would be reconciled at month end together with any withdrawals or top-ups from members. So if there was, for example $75,000 left after reconciliations I would either withdraw it or ask John (Bowles) to add it to his personal account".

    b. When I enquired at the start of his evidence Mr Welsh said that he had invested none of his own capital but had had £180k in profits. Later, in

response to cross-examination from Mr Page, he said that he had invested Euros2,500-3,000. Asked how much total commission he had received or removed from club funds Mr Welsh responded *"roughly $928,000, although some of that may have gone into other people's accounts"*. It appears that this included an amount of $138,000 taken as a "loan" from funds received by/held in the account of his section; when Mr Welsh took this loan, from which account or whose funds and on what terms remained undisclosed. He said he had used the monies to buy a property in Spain. It seems that Mr Welsh has taken no steps, following the failure of the Club, to repay the loan. Nor did he advance any explanation at trial as to why he has not done so in circumstances where many of the investors in his section, including in particular Mr Hamilton, have lost their entire capital investment.

Mr Hamilton receives information about the Currency Club

22. Mr Hamilton's evidence was that he first obtained information about the Currency Club from Simon Beazley in 2014, when Mr Beazley was an introducer for the Barrows, getting commission for each new investor delivered to the Club. It seems that Mr Beazley did some work at Mr Hamilton's house in Cyprus, as a satellite dish installation engineer, and mentioned the foreign exchange trading scheme run by the Barrows to him at that time.

23. Mr Beazley provided Mr Hamilton initially with copies of emails sent from the personal email account of Mark Barrow announcing trading successes; they included a reference to Arkian FX as the trading entity. The emails identified the founders of the Currency Club as Mr and Mrs Barrow.

24. On 9 and 10 January 2015 Mr Beazley and Mr Hamilton exchanged emails, in the course of which Mr Beazley attached a copy of the "currency club info sheet", signed by "Mark and Claire". The attachment to Mr Beazley's email was not included in the trial bundles but I accept that the information sheet which he attached was in substantially the same form as the sheet later sent to Mr Hamilton by Mr Welsh (see below). The information sheet included the following statements and information:
"Thanks for showing an interest in joining the Currency Club that we have been involved in since August 2012.
Whilst we look after the club on behalf of the members, it is actually Daniel who places the trades. We met Daniel through our work in Kuala Lumpur, he is 27 years old and a former graduate from Manchester University with a degree in Economics.
When we started this back in August 2012, we had no idea of how successful we would be and hence did not keep track of it until we asked friends if they were interested in late October. At the start of 2013 the club had $73,000, which through a combination of top ups and wins grew to $156,000 by February 2013.
...
How does it work?
Through research, calculations and many other factors Daniel looks at the likely outcome of what will happen between a pair of currencies that he selects. He typically risks around 3-5% of our balance at any one time but the potential return can be much bigger than this.
...[explanation of "trading table" and table set out]

If we have a losing trade we do not pay Daniel anything, if we have a winning trade currently 15% of the gross winnings are deducted for Daniel's commission and the rest is shared between us

...

[table summarising recent trades/profits]

When you join the Club we will notify you what your percentage holding is and these figures will change as and when we receive monthly top ups or withdrawals.

New members and top ups typically take 7-10days before they go live and will only go live on the weekend nearest the 1st of the month and we will notify you as soon as this is completed. Members can withdraw funds at the same time as the above providing they confirm by the 20th of the month.

We can accept GBP, USD or Euro and we will inform you of the relevant bank details once you confirm you would like to proceed with joining the Currency Club and advise which currency you will be transferring."

Mr Hamilton's decision to invest and his first meeting with Mr Welsh

25. Towards the end of 2014 into the beginning of 2015, Mr Welsh became leader of the section of the Currency Club covering investors in or around Paphos, Cyprus. On 2 April 2015, prompted by Mr Beazley, Mr Welsh emailed Mr Hamilton with an introduction attaching the "current information sheet" and giving details of the IIMM bank account into which any investment monies were to be transferred. The information sheet was in precisely the same terms as the earlier one sent by Mr Beazley, save that the table of trades had been updated and the names of "Mark and Claire" had been removed from the end. Not knowing of Mr Welsh, Mr Hamilton emailed Mr Beazley to ask who he was, to be told that Mr Welsh was "a close friend of "Mark and Clare(sic) and he now runs all the admin for the club".

26. By a further email exchange on 5-6 April 2015 Mr Welsh arranged to meet Mr Hamilton at a café in Cyprus. During their exchange Mr Welsh said that he had been a manager at Abbeygate Insurance brokers in Cyprus since 2008 and had met the Barrows during this time. He told Mr Hamilton that Mr Barrow had been an IFA for many years and that Mrs Barrow was a Compliance officer. They had been in the UK before moving to Cyprus and then to Malaysia. The discussion moved to DA, whom Mr Welsh described as the firm's "head trader", employing 3 or 4 others. Mr Hamilton's evidence was that Mr Welsh was protective of the name and contact with DA, emphasising that direct access to DA by members of the Currency Club was not allowed, for reasons of protecting the "business goodwill" of the club's founders. Mr Welsh said that as a result of the growth in membership "Mark and Claire" could no longer manage all the administration, accordingly they had divided the membership into sections, for easier management and communication, and that he, Mr Welsh, was responsible for the Paphos section.

27. The discussion moved to the IIMM account and the account used by DA for trading. What was said about this is a key area of dispute in this case. Mr Hamilton's evidence was that he asked Mr Welsh which broker platform was being used to trade the Club's funds, to which Mr Welsh responded that they used an FXPro PAMM account. Mr Hamilton asked him what a PAMM account was and who had the mandate; Mr Welsh replied that the mandate had been with Mark and Claire but that he had taken over the

account for his section members. He said that a PAMM account was a system where the funds on the account were made available to DA for trading but that DA had no direct access, ie that control over the funds remained with Mr Welsh. Mr Welsh accepts that he may have referred to a PAMM account, but only as an example of the kind of account which they were working towards, not as confirmation of the type of account which he then had with DA.

28. Mr Welsh's evidence was that he told Mr Hamilton at the meeting that DA was an "unregulated trader" who operated from Malaysia. He explained about monies being sent via a Bank of China account and that the amounts going in were "netted off" against monies members had requested to withdraw, with the balance being sent to DA where they were held in an account of which Mr Welsh was the account holder.

29. Having heard and seen the evidence I am quite satisfied that Mr Hamilton's account of the conversation is correct. It is supported by contemporaneous written material as follows:
    (i) A note made at the meeting by Mr Hamilton in his Filofax diary reading "mycurrency com" and "PAMM A/C". I accept that he had not heard of such an account previously, hence his asking Mr Welsh to spell it for him and then making a note of it in his diary.
    (ii) Mr Hamilton's subsequent emails to Mr Welsh (set out in the following section of this judgment)
    (iii) Mr Welsh's email to a Mr Robert Webb dated 30 October 2014 approving *("sounds like you have described it down to a tee"*) Mr Webb's description of the scheme as follows:
    "1. It is anticipated that Martin will handle all Cyprus clients
    2. He will open up a separate account with FXP in what is known as a PAMM. It works as follows
    a Martin creates a separate vehicle and opens the account in that name
    b Clients put money into Martin's vehicle
    c Martin then sends one lump sum to the PAMM…"

30. Another contested event at the heart of this dispute relates to the information which Mr Welsh says he gave to Mr Hamilton about the treatment of funds received into the IIMM account, namely the "netting off" procedure, by which funds received in were used to pay out investors who had given notice of withdrawals, also to make any payments of commission sought to be withdrawn by section leaders. In his evidence Mr Welsh said that he explained this procedure to Mr Hamilton, the latter denied it. In closing Mr Page pointed to an exchange with Mr Hamilton in cross examination, submitting that Mr Hamilton had accepted his knowledge of netting off. Mr Hamilton disputed that he said anything of the sort. In order to check precisely what was said, a verbatim note has been made from the court recording. I set out below the passage from the relevant email, and Mr Hamilton's response to questions asked about its content:
    (i) The email is dated 15 April 2015, from Mr Welsh to Mr Hamilton and includes the following passage:
    "The account details for the transfer to follow but it won't be the one in Macao due to daily limits etc (we use this account to collate funds and then send to Daniel)…"

(ii) Mr Page's question and Mr Hamilton's response in cross-examination were as follows:

Q	What did you understand Mr Welsh to mean by "using the IIMM to collate funds"?
A	It was a repetition. What I understood there and then was that it was a repetition of what he was – he was "and then send" - he was collating funds for sending to the FXPro and then the - getting monies back from FXPro and distributing to those clients – those investor clients - who were withdrawing.
Q	So, you understood there were different members of the Paphos section putting money in, the funds were put together and send off to Daniel Arkian?
A	That's what it said. And I accept it was probably – given presumptions I carried – it was probably careless not to, cause me to suspect that anything else was being said to me, or meant to be said to me. And that came about on 24th April when I had a further lengthy meeting with him because I sought clarification of all of it. You will arrive at 24th April in due course.
Q	What did you understand would happen about withdrawals from IIMM account?
A	That they would be paid to me or anyone seeking who was withdrawals.
Q	Would they be part of the collation?
A	[long pause] Yes, the IIMM was used, he told me, to deal with incoming deposits and outgoing withdrawals. So if the word 'collation' – that's your phrase 'netting off' – amounts to same thing, then that was the equivalent language.

31. It is apparent to me from the above exchange that Mr Page and Mr Hamilton were using the phrase "netting off" differently: as he explained, Mr Hamilton accepted that he knew the IIMM account was to be used for "collating" (ie collecting) funds for deposit, and also for collecting funds coming back in order to satisfy requests for withdrawals. The former would be sent on to DA for investment and the latter would be distributed out to investors who had given notice of withdrawals. But as Mr Hamilton understood it, these were two separate activities of collation: one for monies coming in to be transferred to the FXPro account held with DA and another for monies coming back out of that account. Mr Page was intending to put a further proposition, namely that funds collected into the account for investment would be offset against, and used to satisfy requests for, withdrawal with the balance only being sent on to DA for investment. Mr Page understood Mr Hamilton to have assented to his further proposition, but I did not understand Mr Hamilton to be accepting this at the time he gave his evidence and a careful reading of the transcript, above, seems to me to bear out my understanding at the time.

32. Accordingly, I am satisfied that Mr Hamilton was not told, and never understood the position to be, that his funds might never actually be sent to DA for investment but would instead be used to pay out other investors' withdrawal requests and/or percentage commission payments apparently due to one or more of the section leaders (including the Barrows). In the event, although the paucity of Currency Club records does not allow any, let alone any detailed, tracing of what happened to funds transferred by investors including Mr Hamilton into the IIMM and/or Marela accounts at Bank of China, it seems highly likely that the majority, if not all, of the funds which Mr Hamilton transferred into the IIMM account were sent straight out from there to

other investors and/or the Barrows and/or other section leaders, without any onward transmission to DA for investment in foreign exchange trading, if indeed any funds sent to DA were ever invested, which is itself by no means certain.

Mr Hamilton and Mr Welsh's communications after the first meeting

33. Mr Hamilton followed up his meeting with Mr Welsh by an email dated 8 April 2015 asking for confirmation of various pieces of information relating to the club and the trading:

> *"Hi Martin,*
>
> *...*
>
> *I am now committed to make a material investment into the Daniel Currency club and funding the investment within the next 10 days –before deadline 20 April*
> *For my records, please provide me with the following information:-*
> 1. *The full names and addresses and contact details ...of the PAMM Account holders signatures at FXPRO managing the funds. I think you identified yourself as one of the two account holders*
> 2. *For my records also similar full individual name, and business name…and contact numbers and email of Daniel*
>
> *...*
>
> 5. *You highlighted on your Pad* (sic) *the economic news/data gathered and researched used and provided/emailed by Daniel to you which forms part of his thinking leading to Trades..Is this information available for all investors..not just YOU..?*
> 6. *by way of open disclosure*
> *Please confirm a/your and your business partner receive some remuneration for introducing new investors*
> *And b/ do you receive further income out of the 15% paid to Daniel from the profitable trades"*

Mr Welsh's response sent later the same day answered the points raised as follows:

> *"Thank you for this email and the points raised, please see my reply as noted below*
> 1. *For the [sic] my name and address would be*
>
> *[address given]*
> 2. *We would not be in a position to pass direct contact details for Daniel as we have had instances in the past where clients have tried to go direct to Daniel and circumvent the arrangement that we have in place with him.*
>
> *...*
> 5. *The economic data provided by Daniel is sent usually just to myself as we need to ensure that clients do not act on their own initiative and place trades independently from ourselves, like a kind of insider dealing. But I could send an edited version if you were happy with that.*
> 6. *The remuneration would be as follows, from each winning trade we deduct 15% and the balance is paid into your account. There is no further deduction*

allocated to us, we only take 15% from winning trades we do not charge anything for placing trades that go on to lose…

I hope that you are happy with the answers provided and do not feel that we are trying to hide anything from you, we are just trying to protect our own position as we had those in the past who have tried to circumvent the process that we have in place…"

34. In evidence Mr Hamilton said that overnight after the meeting on 7 April he had thought about who would operate the account if Mr Welsh had a heart attack (for instance) and assumed that there was another account holder, hence his request for details of both. Mr Welsh's response appeared to him to confirm that there was only one holder of the PAMM account at FXPro, so he sought further clarification in a follow up email on 10 April:

"Martin
Thank you for your prompt reply
Re no 2
…
I do not have any problem with you maintaining privacy/confidentiality of Daniel…
Nevertheless Daniel's firm is going to be the principal business of trading with my funds via your MAPP Account at FXPro
So I would like to have the name of the firm on my WATCHLIST…
From what you are informing me.of only one name and address (yours) I am assume you are the SOLE signature on the account, facilitating withdrawals This would be unusual. What happens if you are deceased? Please confirm any contingency arrangement.
…
I expect to have £300K in my bank account for transfer on Monday"

Getting no reply to this email Mr Hamilton emailed Mr Welsh again on 13 April 2015:

"Dear Martin,
…
Further to email Friday please confirm name or names/identity/addresses of account signatures required for release/transfer of funds held in FXPro Mapp Account (sic)
Is this a joint/trustee account requiring 2 signatures or just one? Do Mark and Claire –(no surname address so far) have responsibility for the custody of the funds or does Daniel. Or, are the funds solely under your control, whom I have now met, you holding responsible executive position at Abbeygate.
I accept the risk of currency trader <u>not</u> succeeding, and funds losing value, but I am being invited to invest in unregulated fund entrusting custody of funds to individuals not hitherto known to me.
Of course, all the identity data in world (sic) will not protect in the event of criminal enterprise/intention…
If you can answer me on these issues funds custody issues more comprehensively I can get on with funds transfer (£300K) ***tomorrow latest."*** (emphasis in original)

Asked about the contents of this email in evidence Mr Hamilton stressed his reference (again) to an FXPro PAMM (which he typed wrongly as "Mapp") account. He said

that in writing of an unregulated fund he was referring to the Currency Club, which he understood to be an unregulated scheme, not to the account at FXPro. The "individuals" to whom he understood he was transferring his funds were Mr Welsh and any business partner(s) in the Currency Club scheme and his reference to "not hitherto known to me." was to the Barrows/John Bowles, whom he understood to be the holder of the IMM account into which monies were to be transferred. He said that the purpose of meeting Mr Welsh had been to satisfy himself that he could place trust in the person whom he understood would be holding his funds. He was not concerned to meet DA as he had been told and understood that DA would not have access to Currency Club funds, save only for trading purposes via the PAMM account.

35. Mr Welsh's response on 13 April 2015 was brief:

"Dear Alex,
Thank you for this email
I have emailed Daniel to ask if he is happy with me releasing his details and I will get back to you asap.
Mark and Claire do not have any responsibility for the account, they were the initial point of contact but this has now been amended to myself.
I read with interest the article that you provided and the difference with us is that we send the trades to you live as they happen which I am sure no other FX will do.
I will update you as soon as possible
Thanks for your understanding
Martin"

36. Mr Hamilton wrote back later the same day, pressing for further information:

"Dear Martin…
I have already confirmed to you my undertaking that, unless in extremis, eg you out of contact…I shall NOT ever contact fund manager Daniel.
…
Nevertheless Daniel must have ***some control/custody of funds*** *at some point(??) to make the trades via FXProPlatform and I do appreciate clarification together with valid identity-contact data.*
I guess Thursday will be my real deadline to get invested although I want to get on with this, if possible, tomorrow.
As ever,
Alex"

Mr Welsh responded on 14 April 2015 providing telephone and email contact details for DA and stating:
"I can confirm that I am the signature on the account for the withdrawal of the funds and in the effect (sic) *of my death, my wife Pamela would have access to the account.*
If you are happy with these details and wish to proceed then please let me know as we may need to make an alternative arrangement for the bank transfer due to the sums involved and the restriction imposed on the macao account.."

It is notable that at no time during these exchanges did Mr Welsh respond to Mr Hamilton correcting his understanding about the nature of the account by stating in terms that the account through which funds were to be traded was not a FXPro PAMM account. Nor did he at any point say that he, Mr Welsh, retained no control over funds remitted to DA for trading. Mr Page suggested that Mr Welsh's reply on 13 April indicated that DA was signatory to the account holding investor funds, but I cannot read his email in that way; on the contrary it appears to me, both by what is said and what is not said in this and Mr Welsh's subsequent email on 14 April, to be confirming that he, Mr Welsh, was the sole account-holder.

Information given to other investors about how funds were held

37. It is convenient, at this point, to summarise the evidence given by other witnesses called by Mr Hamilton as to what they were told about the handling and treatment of their investments in the Currency Club. Not because this evidence is capable of bearing directly upon what Mr Hamilton was told by Mr Welsh, but as it gives a useful indication of the nature of the information that the founders of the Club, namely the Barrows, were giving out.

38. Teresa Clark attended a lunch with Mark and Claire Barrow in September 2015 to talk about the Currency Club investment scheme. At one point during the discussion Mr Barrow said that Claire held the funds in a private bank account, to which Claire nodded. The Barrows were definite, Ms Clark said, that DA would never have control of all the funds, that only 4% of the fund would be "gambled" at any one time.

39. Kathleen Doody was a member within the section led by John Bowles. She said that they had gone to a presentation by Mark and Claire Barrow in August 2015. Mark said that he was one of the founders and he introduced Claire as his wife. Ms Doody said that they knew going into the meeting that the club had been founded by Mark Barrow and his wife Claire. Claire spent 15 minutes at their table with them talking about the scheme. She told the people at that table that the money went from the IIMM account in Macao to an account at Barclays. Ms Doody asked whether it was a holding account to which Claire responded that it was similar. Ms Doody asked what if someone runs off with it and Claire said that that was not possible as three signatures, hers, Mark's and John Bowles' were needed, giving them full security over the funds. Mr Page suggested that this information had been given in response to questions about members of the club making unauthorised withdrawals, Ms Doody accepted this but repeated that Claire Barrow had said three people's signatures were needed for any withdrawal (including hers). Obviously, she said, they knew there had to be some transfer to DA for trading the funds but as far as the lump sum was concerned it could not be moved unless the three of them signed to remove the money.

40. Garry Thurogood said that he had not lost any money as he had withdrawn all of his capital and profit before the club collapsed. His evidence was that he had been introduced to Mark and Claire Barrow at the Aphrodite Hills Golf and Tennis Club in Cyprus on 18 May 2015. Mark had been talking to some others and Mr Thurogood overheard him saying that he was in charge so DA could not do a runner, to which everyone laughed. Mr Thurogood sent an email to Paul Martin, a work colleague and fellow investor, two days later repeating what Mr Barrow had said. Why would anyone

expect a 27-year-old guy in KL to be responsible for a fund of $70million? Mr Thurogood asked rhetorically in response to a challenge from Mr Page. Mr Thurogood accepted that he had not remonstrated with what was said about having given DA full control over the funds when the club collapsed in 2017, he responded that he had had his own funds back by then and was just giving encouragement to efforts to recover funds belonging to others.

41. Paul Clayfield was a member of, and latterly an introducer to, Barrie Humphries' section of the Currency Club. His evidence was that he understood that three signatures – Mark, Claire and DA – were required for withdrawals from the club. He was told that the funds were held in an account at Barclays in London to which DA had access to the tune of 3 or 5% only. He had asked Mark Barrow what would happen if something happened to him, Mark responded that Claire was his equal partner and that they had always worked together on that basis. She did the administration whilst he was client-facing. Later, after the club collapsed Mr Clayfield exchanged emails with Mr Barrow in which the latter confirmed his understanding that the Currency Club was one entity with five sections. In cross-examination Mr Page suggested to Mr Clayfield that Mr Barrow had never told him Claire was a signatory, Mr Clayfield responded that he was quite positive Mr Barrow had said this, it was an important point for due diligence and for telling prospective clients when they asked. He needed to tell people how the club worked.

42. Dr Paul Croft is an academic in the Department of History and Archaeology at the University of Cyprus. He accepted that he was not disinterested in the outcome of these proceedings, but spoke to notes which he made during a meeting with Mr Welsh when the scheme was first presented. His notes recorded Mr Welsh telling him that DA "has no direct access", which he took to be access to the main body of funds. Dr Croft understood that monies from the fund would be released to DA for trading, but assumed that the sums released would be within the 5% limit which they had been told would be the maximum loss on any one trade. The email sent to members in March 2017 referring to DA having had full control over the funds came as a surprise and a shock to him, being the opposite to what he had been told about how the monies were held, as recorded in his notes.

43. Mr Squire was a member of Barrie Humphries' section of the Currency Club and an introducer of members to that section. His evidence was that he took out more than he put in but that some of his friends and family members had lost money. Mr Page put it to Mr Squire that he wanted Mr Hamilton to win, he said that he wanted justice to be done. His evidence concerned what he and others had been told by the Barrows at a meeting at the Saracen's Head pub on Sunday 16 March 2014. Claire Barrow had said at that meeting that she was involved in the Currency Club; they were told about her background in compliance which gave them confidence that the club was being run properly. Mark Barrow had told them that the funds were being held in an FXPro account at Barclays to which he was a signatory. Mr Squire had sent an email the next day recording what they had been told; in his evidence he said he had been comforted by the fact that DA could not run off with the funds, as Mr Barrow was the signatory, but had suggested that Barrie Humphries also became a signatory, as extra security in case something happened to Mr Barrow. Mr Squire accepted that after the club failed he had brought a civil claim (ultimately unsuccessful) against Mr Humphries in which

the complaint was essentially that he had invested in an unregulated scheme managed by Mr Humphries which had collapsed, leaving him out of pocket. Mr Page pointed out that at no point during those proceedings had Mr Squire mentioned Mr Barrow or anything that Mr Barrow may have said to him, to which Mr Squire responded that he had been unprepared at that time of issuing proceedings against Mr Humphries.

Mr Hamilton's initial investment attempt and subsequent investments

44. Unknown to Mr Hamilton, on 11 April 2015 Mark and Claire Barrow sent an email to Mr Welsh, Barrie Humphries and John Bowles notifying them of the decision to cap new members' deposits "to $50,000, Euro 40,000 or £30,000 or equivalent with immediate effect…to protect our IIMM bank account". The email went on to explain the reasoning for this restriction as follows:

> *"As some of you are aware we had our account with Standard Bank closed last June and we have had similar episodes for Martin [Welsh] and Barrie [Humphries] this last few weeks. We cannot afford to jeopardise our only live bank system…*
> *We need to work together to try and find other banking solutions ASAP as we now have all of us using IIMM and John [Bowles] has his own clients on top of that."*

45. Mr Hamilton wished to invest £400,000 from the sale proceeds of a property sale in the UK. Mr Welsh, in his email to him dated 13 April 2015, gave Mr Hamilton to understand that the restriction on the amount that could be transferred into the IIMM account was one imposed by the Bank of China (rather than by the Barrows). On 15 April Mr Hamilton notified Mr Welsh by email that he had £400,000 ready for transfer from his HSBC account and asked what arrangements Mr Welsh wished him to follow. Mr Welsh responded in an email at 13.35 on 15 April as follows:

> *"I have asked Daniel if we can send in GBP and will advise of his response. I think that as the trading account is in USD it just makes it easier but if (sic) I will confirm if we can send in GBP.*
> *The account details for the transfer to follow but it won't be the one in Macao due to daily limits etc (we use this account to collate funds and then send to Daniel but we are going to send direct to him)…."*

46. In submissions Mr Page emphasised Mr Hamilton's preparedness to send funds direct to DA, as evidencing his knowledge of control over the funds passing to DA or, at the very least, his entire lack of concern as to who was to have control over the funds. He put this to Mr Hamilton who insisted that, although the funds were to be routed through DA's account, he believed they were to end up in an FXPro PAMM account in respect of which Mr Welsh held the mandate and to which DA had access for trading purposes only.

47. Between 16 to 22 April 2015 Mr Hamilton attempted 5 transfers of £50,000 (the maximum daily limit which his bank, HSBC, permitted to be transferred overseas). However, the transfers did not go through as he had omitted/mis-entered necessary details on the transfers forms.

48. In the meantime, having discovered that Mr Welsh had tried to get Mr Hamilton's funds sent direct to DA, Mr Barrow intervened to stop it. His email to Mr Welsh was firm:

> *"Martin,*
> *Having spoken to Daniel, John and Barrie this morning we have decided to return any funds sent by Alex [Hamilton] to his account as this has breached our club rules of $100,000 PCM.*
> *We cannot have individuals making decisions on their own that could have a negative impact on us all and will not accept this type of behaviour.*
> *If there is a repeat of this incident then we will withdraw the use of our banking facilities going forward in order to protect our members,*
> *If you can let Alex know and ask him to recall what he can as Daniel does not need any hassle or problems going forward and will only deal with Alex through our system.*
> *Mark"*

In his evidence Mr Barrow denied that he had put a stop to the direct transfers so as to ensure that Mr Hamilton's monies went through the IIMM account, thereby protecting the Barrows' commission arrangements, and ensuring that there were monies in the IIMM account from which to pay out withdrawals/commission. He said that he wished to stop the risk of the Bank closing the IIMM account, adding that he was concerned about how Mr Hamilton would receive his money back if his funds did not go via the IIMM account.

49. Mr Welsh's explanation given to Mr Hamilton at the time, by his email of 23 April, was that *"Daniel can only accept funds direct from a company account not from personal accounts*". This was untrue.

50. Mr Hamilton responded by suggesting that he could open an account at FXPro to be operated by DA, to which Mr Welsh replied:

> *"I am afraid that you cannot open an account direct with Daniel as he currently does not have any capacity for this,*
> *I have explained that the restriction on receiving funds is on Daniel's account and does not suggest anything untoward with your funds or where they have came from.*
> *Daniel cannot accept funds into his personal account I am afraid."*

Again, none of this was accurate: in an email to Mr Welsh dated 14 April 2015 DA had offered to open a separate account for Mr Hamilton, saying that he had several gaps for new clients, nor were there any restrictions on his HSBC bank accounts. The difficulty, which Mr Welsh did not explain to Mr Hamilton, was that Mr Barrow wished all funds to be directed through the IIMM account at Bank of China operated by Mr Bowles, and in order to protect access to that account the club leaders had agreed to impose a limit on the monthly amounts paid in.

51. In evidence, both Mr Page and Mr Welsh challenged Mr Hamilton about aspects of these exchanges with Mr Welsh: it was suggested to him that Mr Welsh had told him about DA being unregulated, Mr Hamilton denied it, saying that he had asked Mr Welsh if DA was an authorised trader and had been told that he had a licence in

Malaysia. Mr Hamilton said that at the time he invested he understood that the Currency Club was not itself a regulated scheme, but he believed from what Mr Welsh told him that DA was investing through a regulated FXPro PAMM account.

52. Mr Page referred Mr Hamilton to an email in which he was being told that the normal procedure was to collate funds in the IIMM account and send on to DA, with no mention of any FXPro account, Mr Hamilton responded that having been told about the FXPro PAMM account at the beginning he continued to believe that that was the account into which the monies were being sent. Mr Page asked why, when there was a difficulty transferring his funds to DA, Mr Hamilton had not asked for the details of Mr Welsh's FXPro account, if he believed he had one? Mr Hamilton responded that it had not occurred to him to ask, he had simply sought to follow instructions he was given by Mr Welsh as to how to make the transfers into the Currency Club.

53. Mr Welsh challenged Mr Hamilton as to why, if he believed there was a PAMM account with a mandate access code, he had never referenced that access code in any of his correspondence, Mr Hamilton said that it had not occurred to him to ask for the code, the fact that a PAMM account needed such a code bore out what Mr Welsh had told him about having the mandate for the account with DA.

Further meeting on 24 April 2015

54. In the confusion over how his monies were to be transferred into the Currency Club for investment, Mr Welsh offered to meet with Mr Hamilton once more. The second meeting was at the same café as before. Mr Hamilton's evidence was that he told Mr Welsh of his concerns about his funds which he had transferred out but had not yet received back, Mr Welsh assured him that the Currency Club would reimburse him for any banking costs and exchange rate losses. Mr Hamilton asked about transaction limits imposed by the Bank of China (as he understood the position to be), to which Mr Welsh responded that the Bank of China had set a limit of $200,000 and that the Paphos section of the club had access to half that. He offered to take two tranches of $50,000 from Mr Hamilton during May and June 2015, with the rest to follow in the autumn.

55. According to Mr Hamilton Mr Welsh went on to explain that FX Pro provided PAMM investor accounts for companies, but not individuals, and that DA's account was correspondingly restricted to accepting funds from corporates, rather than from private individuals. When Mr Hamilton queried the incorporation of the Currency Club Mr Welsh said that the original FXPro PAMM account had been set up in the name of Blanmont Consulting International Ltd, a company belonging to the Barrows. Mr Hamilton said that he pressed Mr Welsh as to why he could not himself open an individual FXPro PAMM account, asking whether the restriction to corporate entities was an industry-wide restriction or FXPro's own regulations. He said Mr Welsh responded "I don't know about industry-wide, but they are FXPro regulations". Mr Hamilton sent an email after this meeting, referring to the sum of £250,000 which he had transferred but not received back and stating:

> "*I note the responsibility of Blanmont/MyCurrencyClub/DA for making up any £ capital shortfall due to any currency fluctuations arising from this ((FXPro*

Regulatory) Account….ly Management fiasco…being bewildered at explanation that investor client must be LTD or LLP" (emphasis added)

Mr Welsh's response the same day assured Mr Hamilton that he was working to get his funds returned, but said nothing further about the nature of the account with DA.

56. In order to progress his enquiries with HSBC for the return of his funds, Mr Hamilton emailed DA directly to ask for his address. Mr Welsh initially sought to remonstrate with Mr Hamilton at his contacting DA directly, at the same time making enquiries with Mr Barrow as to the nature of the account held with DA, by email dated 28 May 2015 asking:

"As per our chat
1. Is the account in Barclays in my name or Ark's name?
2. Does the account that we send Daniel money to, is this his personal account or a business account
3. When the funds come back from Barclays do they come from Ark's account or Barclays?"

Mr Barrow's answers came in a short email to Mr Welsh dated 3 June 2015:
"1. FxPro and they have you in a sub-account.
2. Business Account
3. FxPro's account but touches Daniel's account for a split second and then on to you.
Off the record we are fiddling the system as 3 people in FxPro are involved and we need to be careful how far you go with questions regarding FxPro.
Cheers"
(emphasis added)

57. By 8 June 2015 Mr Hamilton had made two transfers of $50,000 into the IIMM account at Bank of China. In evidence Mr Page suggested to him that his desire to get his funds into the Currency Club in order to secure the expected returns overrode any concerns he may previously have had about how the monies were being held, to which Mr Hamilton responded that, having made the decision to invest he was keen to get on with it, but only having (as he believed) been satisfied that Mr Welsh had the mandate over, and thus ultimate control of, the FXPro PAMM account in which his monies were to be held.

58. On 9 June 2015 Mr Welsh visited Mr Hamilton at home. Mr Hamilton's evidence was that he expressed to Mr Welsh his disappointment and concern at DA's response to his request for details, refusing to provide his address. Mr Hamilton told Mr Welsh that he was planning to travel to Kuala Lumpur in order to obtain further information about the restrictive FXPro regulations. At that point in the meeting Mr Welsh suggested using his own funds invested in the club to provide compensation to Mr Hamilton for his losses incurred as a result of the abortive HSBC transfers, which Mr Hamilton accepted, with alacrity and some surprise, he said, given that the situation with HSBC had not been of Mr Welsh's making.

59. At the same meeting Mr Hamilton reverted to the topic of the FXPro regulations and raised with Mr Welsh the possibility of adding to the $100,000 by then invested by employing an alternative corporate vehicle. His evidence was that he followed this up by making calls to a cousin with a retail clothing business and to his accountant, a firm with LLP status, to ask about investing through their businesses. Having done so, Mr Hamilton emailed Mr Welsh on 10th June notifying him that he would be able to transmit funds from a corporate vehicle to the FXPro account to be traded by DA. Mr Welsh responded as follows:

> *"Daniel will only accept funds that have been transferred via a company account for direct clients who hold accounts with him. I am a direct account holder and that is why he can accept from me."*

There was no mention in this email from Mr Welsh of FXPro regulations, or the fact that the account which he held with DA was not in fact an FXPro account.

60. On 13 June 2015 Mr Hamilton forwarded details of his investment in the Currency Club to his executor, a Ms Gail Stubbs, explaining it as follows:

> *"I have now invested 100,000 US dollars in funds being traded on FX markets by a professional currency trader.*
>
> *Daniel Arkian Arkian FX No address provided(!) but based in Kuala Lumpur Malaysia..*
> *The funds are initially placed into Currency Club introducer bank account currently Bank of China in Macao all managed by Martin Welsh…then directed by Martin into an FxPro account run by Daniel Arkian*
>
> *Martin Welsh is sole signatory of the my Currency Club Account unless incapacitated and then his wife has signature.*
>
> *You should now print off this email and 8th April emails from MartinWelsh and keep secure with all other records to be used in the event of my demise*
> *…*
> *The first $50,000 of the aggregate $100,000 has already been invested by the currency club with daniel arkian since 1st June and has already shrunk >hopefully short term !!!!!!!! I am taking these result (sic) calmly as all my own risk*
> *No comments WHATSOEVER please*
>
> *THE 2ND $50,000 is topping up the 1st £50,000 to go trader from 1st July and the aggregate $100,000 (or less!) is being traded from 1st July*
> *COPY OF THIS EMAIL TO MARTIN WELSH*
> *PLEASE FILE AWAY carefully"*

61. In cross-examination Mr Page suggested to Mr Hamilton that he had prepared this version of events for his executor carefully, pointing out that he had described the FX account as "run by" DA, not mentioning an FX Pro PAMM account with a mandate held by Martin Welsh. Mr Hamilton said that on the contrary he had been in a rush when sending this out, at 19.40pm, and had wrongly identified Martin Welsh as

managing the IIMM account. He stressed that this message to Ms Stubbs followed his having sent her all the April emails referencing the FXPro PAMM account.

62. It was Mr Hamilton's evidence that the reference in his email to Gail Stubbs to the "My CurrencyClub Account" was intended to refer to the FXPro PAMM account for which he believed Mr Welsh had the mandate. In his witness statement and at the start of his evidence at trial Mr Hamilton said that wherever he referred to the "MyCC account" he meant the FXPro account over which Mr Welsh had the mandate. In cross-examination Mr Page suggested that this was wrong, and that Mr Hamilton in fact used this phrase in a number of emails as shorthand for the accounts at Bank of China into which his investment funds were to be transferred. When taken to the emails Mr Hamilton accepted that his witness statement was erroneous to an extent, but said that this was only insofar as, by referencing the IIMM/Marela accounts in connection with "MyCC" he meant to refer to the monies going "via" such accounts to the FXProPAMM account.

63. At this stage of Mr Hamilton's evidence I was unable fully to accept all that he said about his use of the "MyCC" reference, the context of its use in contemporary messages suggested to me that Mr Hamilton used it interchangeably to refer to the account at Bank of China into which his monies were initially sent for investment, and to the trading account into which he understood his and other investor's funds were to be held for trading by DA. But this interchangeable use of the "My CC" phrase does not, as I see it, indicate Mr Hamilton's awareness of the fact that his funds were going to be sent direct to DA, who would have full access to them for all purposes, not for trading only through a PAMM account.

Further investments via IIMM and through a new Bank of China account

64. It is not disputed that Mr Hamilton made several further investments into the Currency Club over the next 18months, until he had invested a total of US$698,888. From January 2016 the transfers were made into an account in the name of Marela Ltd at the Bank of China, Macao, also held and operated solely by John Bowles. It appears that Mr Welsh had some limited access to the Marela account, in that Mr Bowles gave him a bank dongle allowing him access to check the balance and make transfers.

Collapse of the Currency Club

65. I can take this part of the history relatively briefly. On the evidence of Mr Barrow and Mr Welsh, in July 2016 DA informed them that he had had some audit issues and would need to cease trading for three months. The club leaders responded by deferring all withdrawals for that time. In October 2016 they requested a total withdrawal of $3-4million. DA failed to make any payment, saying that his accounts had been "red-flagged". In December 2016 Club leaders advised their members not to make any more investments. Mr Barrow said that notwithstanding their concerns, club leaders still believed in DA and wished to continue to trade with him.

66. On or around 17 March 2017 investors across all sections of the Currency Club were sent an identically-worded message including the following statement:

> *"We collate money sent in from Members and forward it to Daniel, and we request withdrawals from Daniel and organise the distribution of those funds out to*

members..Once the money reaches Daniel we have no control on what he does with the funds, which brokers he uses, which bank etc. This is how it has been since day one. All based on trust"

Mr Hamilton's evidence was that his receipt of this message was the first time that he understood the true position, namely that Mr Welsh retained no control over any of the funds which Mr Hamilton had invested into the Currency Club.

67. Over the next two years the club leaders employed various lawyers, investigation agents and others in an attempt to discover what had happened to the funds under DA's control. At the outset DA attended some meetings, including with Mr Hamilton who went out to Malaysia to make enquiries on his own account. However, DA soon vanished and no funds have ever been recovered from him. The reports from investigation agents which were in evidence at trial appear to reach different conclusions as to whether any of the trades which DA reported were ever placed. On one view the trades were all entirely fictitious, with such withdrawals as DA sent back coming from new investors' funds, rather than from the profits of any trading. On another view, DA did engage in some trades but these then ceased after which he made off with the remaining funds.

68. Mr Hamilton sought to make a case at trial that none of the trades were genuine and that the "commission" payments taken from the IIMM/Marela accounts by the Barrows and Mr Welsh in the "netting off" process, came from his and other investors' funds. Mr Page objected to Mr Hamilton running a case based on fictitious trades, on the basis that the genuineness (or otherwise) of the trades had not been raised on the pleadings. In their evidence Mr Barrow and Mr Welsh maintained that they believed the trades had all been genuine and their commission had accordingly been properly earned and (through the application of the "netting off" process) properly taken.

69. I agree that the issue as to whether there were actually any genuine trades is not directly raised on the pleadings; Mr Hamilton is not therefore entitled to run a case at this trial for the recovery of his capital and/or damages on the basis that the entire trading edifice was false. Nevertheless, what was subsequently discovered concerning DA, including his production of a forged "proof of funds" letter purporting to come from SAXO Bank, indicates just how vulnerable members' investments were, and why club leaders needed to be entirely frank with new members as to how their funds would be held and about the degree of trust that they were being required to place in DA.

Meetings between Mr Hamilton and Mr Welsh in Kuala Lumpur in June 2017

70. Following the collapse of the Club, and in the course of his involvement in seeking to recover funds, Mr Hamilton met with Mr Welsh in Kuala Lumpur on two consecutive days in June 2017: on 19 June at the Wild Honey restaurant and on 20 June at Chatterbox restaurant.. It seems that either Mr Welsh or Mr Hamilton (I was not clear which) made a contemporaneous recording of at least the first of those meetings, since there was a transcript of that meeting in the evidence at trial.

71. Mr Page and Mr Welsh relied on the transcript to challenge Mr Hamilton's evidence about what had been discussed at the meeting. In his witness statement Mr Hamilton

maintained that he had started the meeting by reminding Mr Welsh of his statement made in April 2015 that any investment monies were to be under his control, in an FX Pro PAMM account. The transcript shows that nothing like that was said during the meeting on 16 June, to which Mr Hamilton responded that he must have said it at the second meeting, not the first.

72. If, as he now says, he had been misled about control over the funds, surely he would have made that point to Mr Welsh, and pursued it? Mr Hamilton was asked. He had accused Mr Welsh of negligent control, but at no point during the Wild Honey meetings had he said that the funds were to have been held in a PAMM account. Mr Hamilton responded that he had chosen not to make that accusation to Mr Welsh at that time; he wanted to keep a connection with him with a view to seeking the return of monies, working together to try and recover funds from DA. He had also had an email from Mr Barrow warning him off so he decided to express criticism, but not then to the extent of accusing Mr Welsh of deceit. He was invited to join a team with a Mr Robin Leigh, attempting to pursue and recover funds, so he determined not to send "salvos" across the bows of Mr Welsh or Mr Barrow at that time. Mr Hamilton made the point that he was not alone amongst the victims in trying to remain positive in 2017-18, whilst being increasingly convinced that something criminal had gone wrong with their funds. He pointed to his email dated 30 June 2017 to another investor, copied to Mr Welsh and Mr Barrow amongst others, in which he had complained of being misled about funds going into a PAMM account.

73. Mr Hamilton said that he had followed up the meeting at Wild Honey with an email dated 20 June 2017. Mr Welsh asked him about this email, in particular about his request for information in the first paragraph:

> "*Please identify to which of Daniel's bank accounts (name of bank, branch and Account no) you wired the funds, which I deposited in IIMM and Marela (both Bank of China)"*
>
> Mr Hamilton responded that when he invested his funds in 2015/16 he had followed Mr Welsh's directions to put funds into Currency Club banking facilities for onward transmission to a trading account at FXPro. He denied that his request for information in the above email in June 2017 confirmed his awareness at the time of making the transfers that the fund was not in a FXPro PAMM trading account.

74. Mr Page also took Mr Hamilton to a long email dated 2 August 2017 sent to Mr Welsh and copied to others:

> *"Hi Martin,*
> *Keeping you very up to date..*
> *…*
> *D—Given that SAXO forgery, it beggars belief that any experienced businessman could continue to have one shred of confidence in what DA says…*
> *…*
> *Whilst on a personal side he is a most pleasant man, his fiduciary ethics are of a code not fitting for sole management of other people funds…*

It is evident that Daniel, whilst a first class FX trader, Daniel is not competent to distinguish and understand the vital moral distinction between honest and dishonest conduct. He just does not have the DNA of honest fiduciary conduct, resorting wilfully to criminal deception to cover his tracks. He ignores/betrays the ethical duty of transparency and speaking the truth, if such truths embarrass him.

…

G Despite retirement plans, I am now starting again to seek work as lawyer consultant, as I am out of funds for retirement Daniel has had my dough and will not explain, honestly and transparently, what he did with it, sent to him by you, Martin for trading on my behalf, risking approx. 3-4%of my capital per trade and remunerating Daniel handsomely from every winning trade. That was the deal."

Mr Page suggested to Mr Hamilton that this email showed what had been his understanding all along, namely that funds were remitted to DA for trading without restriction. Mr Hamilton responded that this had not been his understanding at the time of investing, but that after the letter to investors of 21 March 2017 he had become aware of how the scheme had in fact operated. He pointed out that by this time he was being critical of Mr Welsh, he had put it in short form but he was criticising Mr Welsh for sending the funds to Daniel without retaining any control over them.

75. Mr Page also pointed to a number of communications from Mr Hamilton in 2017 indicating his apparent trust and confidence in DA, even at one stage appearing to indicate that he, Mr Hamilton, may have been attempting to set up his own fund for trading with DA. Mr Hamilton responded that he had met and attempted to "befriend" DA at that time in order to find out more about where his funds might be, and how they could be recovered.

76. There was a great deal of evidence in the trial bundles of communications after the failure of the Currency Club between club leaders, and members and club leaders, concerning DA, where DA was, where the funds might be and what steps were being taken to discover information which might lead to the recovery or all or part of the monies which had been sent to DA for trading. Whilst I found that some of these communications furthered my understanding of the nature of the relationship between club leaders and investors like Mr Hamilton (as to which see further below), I did not find them to be of any great assistance in reaching conclusions as to what Mr Hamilton knew or had been told, prior to investing, of the control which would (or would not) be retained over his funds by Mr Welsh and/or the other Club Leaders. Thus, whilst I accept that Mr Hamilton might have been expected to respond to the revelation in the March 2017 email (at 66 above) that Club Leaders retained no control over funds sent to DA, by remonstrating immediately, I do not conclude from his failure to do so that he had known all along that DA would be handed such control. I accept Mr Hamilton's account of putting his concerns about what he had been told in April 2015 to one side in 2017, instead directing his efforts towards informing himself about the trading process, the attempts at investigation, meeting DA, seeking any information that might lead to a recovery of his funds.

NATURE OF THE RELATIONSHIP BETWEEN CLUB LEADERS AND INDIVIDUAL INVESTORS

Was there a partnership between Club Leaders?

77. A partnership is defined under s. 1(1) of the Partnership Act 1890 ('the 1890 Act'):

> **"Definition of partnership.**
>
> Partnership is the relation which subsists between persons carrying on a business in common with a view of profit. […]"

78. The existence of a partnership involves an objective determination of both law and fact. In addressing the question as to whether or not a partnership between section leaders existed here I bear in mind the following:

(1) The labels that parties themselves attach (or do not attach) to their relationship are not determinative. As Lord Cozens-Hardy MR put it in *Weiner v Harris* [1910] 1 K.B. 285 at 290:

> "Two parties enter into a transaction and say 'It is hereby declared that there is no partnership between us.' The Court pays no regard to that. The Court looks at the transaction and says 'Is this, in point of law, really a partnership?' It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

It follows that no conclusions can properly be drawn from the titles and descriptions of the Currency Club adopted by the Defendants. The way that Club Leaders referred to themselves and the Currency Club is just one factor to consider in all the circumstances of the case.

(2) A partnership requires two or more people to carry on a single business "in common". This means that collaboration between separate businesses does not result in a partnership but, equally, a single business may comprise various divisions (see *C Connelly & Co v Wilbey* [1992] S.T.C. 783 at 790a for an example of a partnership in which the partnership "was that of […] two offices together because the partnership was carrying them on a single combined business"). Paragraph 2-16 of *Lindley and Banks on Partnership* (21st ed) expresses it thus:

> "[…] this also presupposes that the parties are carrying on that business *together* for their common benefit and, thus, that they have, as regards the business, expressly or impliedly accepted *some* level of mutual rights and obligations as between themselves."

(3) A 'view of profit' does not imply or necessitate a sharing of profits, despite this being a common occurrence in practice: *M Young Legal Associates Ltd v Zahid* [2006] EWCA Civ 613.

(4) There are no requisite formalities for the creation of a partnership nor is there a checklist of features against which the existence of a partnership can be determined. Each case must be judged on its own facts with appropriate weight

afforded to different features. Lord Coulsfield summarised the law in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 S.L.T. 186 at 195F as follows:

> "… it is undoubtedly true that there is no one provision or feature which can be said to be absolutely necessary to the existence of a partnership, so that the absence of that feature inevitably negates the existence of a partnership … "

He also cautioned that "some degree of common interest must be involved in any commercial contractual venture". In other words, all partnerships will involve a common interest but a common interest does not create a partnership.

79. As I have already noted (and see further below), there was here a conspicuous lack of paperwork for a venture involving such large sums of money. The Defendants submit that this reflects the informality of the Club. That may well have been the case at its inception, but the Currency Club had become an entirely different creature by the time of Mr Hamilton's investments in 2015-16. By that time, according to Mr Barrow, there were thousands of members and millions invested (despite the Defendants being unable to provide a final figure). A reason for the continuing absence of paperwork may be found in Mr Barrow's evidence that the Club Leaders were attempting to keep the scheme "below the radar" for regulatory purposes. The lack of formal written documentation requires the existence or non-existence of a partnership to be inferred from the Defendants' conduct.

80. Mr Hamilton relied on the following as indicating a partnership between club leaders:
    (i) Mr Barrow received a 4% cut of DA's 10% commission from every successful trade, across all sections;
    (ii) There is no evidence of a dissolution of partnership document that would be typical for a multi-million-dollar business nor was members' consent sought to be transferred to Mr Welsh's section;
    (iii) All members funds continued to be processed via the IIMM/Bank of China bank account;
    (iv) The Club Leaders continued to correspond on banking solutions;
    (v) The emails to members presented the division of the Currency Club into sections as an administrative process.
    (vi) Mr Welsh continued to use the Information Sheet produced by the Barrows to attract new members to his club;
    (vii) In an email to another member during the attempted recovery period Mr Barrow asserted that *"we have always classed us as one club. Just Different sections";*
    (viii) The Club Leaders agreed the text of updates to members so that every member received the same message. Mr Barrow gave evidence that the texts would be voted on, such that he may have sent a message out in his name even if he had voted against it;
    (ix) Mr Barrow gave evidence that the Club Leaders discussed their operations every day, at least two Club Leaders on a group call;
    (x) Mr Welsh's original Defence described the Currency Club as something that *"had grown over time into an entity that […] had different sections managed by different Club Leaders*";

(xi) Mr Barrow reprimanded Mr Welsh when Mr Hamilton attempted to send his funds directly to DA, suggesting that Mr Welsh was not free to act independently from other club leaders;
(xii) Mr and Mrs Barrow attended meetings with existing and potential members together;
(xiii) Mr Welsh refers to "The Currency Club" in his Witness Statement of 23rd December 2022 rather than separate clubs; and
(xiv) Mr Barrow gave evidence that the Club Leaders were working closely together before recovery efforts.

81. Mr Page relied on the following features as indicative of there being no partnership between Club Leaders:
(i) The Welsh section was not held out as part of a wider organisation;
(ii) Members of different sections did not share profits after the deduction of commissions;
(iii) Each Club Leader had their own account with Arkian FX, by virtue of which they received individual accounts of profit from DA;
(iv) Each Club Leader determined their own commission rate;
(v) Each Club Leader corresponded with their own members and not with members of other sections;
(vi) Each section had its own accounting system;
(vii) Each section had its own website.

Mr Page also submitted that similar businesses can share facilities such as a bank account and agree rules with one another on the use of those facilities, such as limits on amounts passing through the account, without compromising their independence. Further, he submitted that Mr Barrow's agreement on receiving 4% commission of all trades with DAwas irrelevant and that DA distributing part of his commission with a party unrelated to the Currency Club would not render that party a partner.

82. Mr Welsh adopted Mr Page's submissions on the partnership issue.

83. I have attached varying weight to the features set out by Mr Hamilton and Mr Page. For example, very little turns on Mr Hamilton's submission that there was no formal documentation for the establishment of the Welsh Club, or on Mr Page's submission as to separate websites and correspondence with members. Other factors are weightier in the determination, such as the Club Leaders' votes on the text of correspondence to members on which Mr Hamilton relies and Mr Page's submission that the Club Leaders had different rates of commission.

84. Mr Page may be correct that independent businesses can collaborate and share resources, but the Currency Club went well beyond that. It is not simply the case that the different sections shared banking facilities and followed self-imposed rules on the use of those facilities. The conduct of the Club Leaders was that of individuals who considered themselves to have mutual rights and obligations as to the running of their business. At least two Club Leaders met daily in meetings that were not open to regular investors and they were in near constant contact on email and messaging services about the running of the sections. Decisions were taken by majority vote, including on the texts of emails sent to members. Indeed, Mr Barrow's explanation for an inconsistency

between a statement he made in an email to a member during the recovery process and his oral evidence was that the majority voting system could result in him making statements with which he disagreed. Mr Bowles took a higher rate of commission than that of other Club Leaders but this shows that Mr Barrow felt able to dictate terms on commission for other sections of the Club.

85. The emails sent from Mr and Mrs Barrow to members and to Mr Welsh and his wife regarding the establishment of the Welsh section of the Club are also revealing. The Barrows reassured members that their accounts would continue to be managed by Mr Welsh "in the same manner as before". This could not have been written with any confidence if Mr Barrow had not believed that he would have influence over the manner in which the Welsh section would be run. In the email of 10th January 2015 signed by him and his wife to Mr Welsh and his wife, he described it as their "duty to members to ensure [that] the same level of service" continued. I find that the division was largely administrative, as suggested in the emails, and reject the suggestion that Mr Welsh could have unilaterally decided to dissolve the section for which he assumed responsibility.

86. I conclude that there was a partnership between Mr Barrow and the other section leaders as defined by the 1890 Act.

If there was a partnership, was Mrs Barrow a partner?

87. I now turn to the question of whether Mrs Barrow was a partner with her husband in the Currency Club. It is the First and Second Defendants' case that if, contrary to their primary case, there was a partnership between section leaders then Mrs Barrow was not a partner, her involvement being limited to administrative support to her husband.

88. The line between a couple's marriage and their business relationship in a partnership that had friends and relatives as clients and which avoided formalities is not an easy one to draw. Like many married couples, Mr and Mrs Barrow had joint bank accounts into which money from the Club was paid, and which also received Mrs Barrow's salary. Mrs Barrow suggested succinctly that the funds derived from the Currency Club in their joint account were *"jointly owned but not jointly earned."*

89. Both Mr and Mrs Barrow gave evidence that she provided administrative support to her husband, primarily in the form of typing what he dictated, data entry, and dealing with members' requests. Mrs Barrow left her job in 2014, at which point Mr Barrow said her participation in the Currency Club increased.

90. The evidence as to the nature and extent of Mrs Barrow's role in the partnership is to be found in the Information Sheet sent to members, certain key emails, evidence of Mrs Barrow's participation in member meetings, and her directorship of IIMM Ltd.

91. Dealing first with the Information Sheet sent to members, this was signed "Mark and Claire" and used the pronoun "we" throughout. Mrs Barrow accepted in evidence that she "probably" typed the document, but explained that she would have "typed what [Mr Barrow] asked [her] to type". She said that the original recipients were friends and family who knew them as a couple, as such she did not see any untruth or inaccuracy in

the statements. In his evidence Mr Barrow "took [Mr Hamilton's] point" that there was an inconsistency between the statements in the Information Sheet and his evidence that his wife had not been involved from August 2012. He said that "with hindsight" he would not have used "we", but, like his wife, explained this by way of early members knowing them as a couple.

92. There were a number of emails shedding light on the nature of Mrs Barrow's role:

(i) Many messages about the Currency Club from email accounts associated with Mark Barrow were signed off 'Mark and Claire' and/or with a graphic signature 'Mark and Claire Blanmont Consulting International'. Mr Barrow explained that he frequently signed emails as 'Mark and Claire' and used 'we' rather than 'I' as early investors knew them as a couple. He continued to do so when persons previously unknown to them began to join the Currency Club in 2013 and explained the reason for doing so as follows:

"My wife's name stayed on the email signature but it was more of a reflection of the informal nature of the Currency Club not because she was involved in the running of the Currency Club. I could have changed the template to remove her name and the references to "we" but it never occurred to me to do so".

(ii) An email from Mark Barrow's Blanmont Consulting email address sent on 9th September 2015 to a potential member, Paul Martin, responding to questions posed by Mr Martin on the operation of the Club, which read:

"…We don't have any formal meetings as there has been no real need as we have made profits for our members every month since inception.
We have a group of 7 people <u>including us two</u> that meet regularly to discuss key issues with the members['] interests at number one where they have always been.

…
Mark and Claire"
(emphasis added)

It was put to Mr Barrow that the "group of 7 people including us two that meet regularly to discuss key issues" must refer to himself, the other five Club Leaders, and Mrs Barrow. His evidence was that those words were a mistake and that he did not word the email as "as well as [he] should have done". He said that he could not recall an in-person meeting with his wife and Club Leaders. He volunteered that the email from Mr Martin had been addressed only to him – Mark – so he was "surprised" that he had used his wife's name in the signature.

(iii) An email from an AOL email account associated with Mark Barrow on 11 November 2014 to Martin Welsh, forwarding an email from DA attaching a form for Mr Welsh to sign. Mr Barrow asked:

"… Can you sign this and send back <u>to us</u> ASAP please.
Thanks
Mark"
(emphasis added)

Mr Barrow's evidence was that the "us" referred to him and DA, not him and his wife.

(iv) An email from Mark Barrow's Blanmont Consulting email to Mr Welsh on 10th January 2015, sent in the lead up to Mr Welsh establishing the Welsh Club:

"Hi Martin and Pamela [Mr Welsh's wife]*,*

We have had [a] chance to discuss exactly how we intend to proceed with regard to transferring the members over to you eventually and run the fund assuming all goes well. […]
We will separate all your clients from our on line system and allocate all their holdings to your own on line account (an exact copy of our existing on line account). Tony will transfer all your members to your own system on the 31st January and you would then need to input all top ups, withdrawals, commissions, new members etc that weekend ready to be live on the Monday. […]
We will however retain all the monies except funds already allocated to your account with Arkian and look at transferring the balance a few months down the line assuming everything is running smoothly. […]
Cheers
Mark and Claire

Mark & Claire
Blanmont Consulting International Ltd"

93. When asked about this email Mr Barrow initially suggested that the "we" who had had a chance to discuss the matter and make decisions on the Club business was himself and Tony Davies. He abandoned this explanation when it was pointed out that Mr Davies was referred to in the email in the third person. Mr Barrow settled on the explanation that Mr Welsh and his wife were good friends with the Barrows and that they would have found it "weird" if Mr Barrow had used the first-person pronoun.

94. Several of the Claimant's witnesses recalled Mr and Mrs Barrow being present at meetings for potential investors. They recalled that Mrs Barrow was introduced as a co-founder, with her husband, of the Currency Club, and further that she would come to tables on her own to speak to individual investors about the Currency Club. Mr and Mrs Barrow did not deny that this is what occurred, but pointed to her presence at the meetings as an indication of the informal nature of the Club and the fact that many of the members were or became their personal friends.

95. Mrs Barrow was also present at meetings with her husband and other Club Leaders. Mr Barrow again attributed this to the informality of the Club and recalled meeting with Mr Welsh and his wife and having "general chit-chat" about the Club but was clear they never discussed "important decisions on new banking solutions or expansion" in those meetings.

96. I turn finally to Mrs Barrow's role at IIMM, the corporate vehicle set up by John Bowles, whose account at Bank of China was used by all sections of the Club for the transfer of funds. In December 2014, Mrs Barrow became a Director of John Bowles' company, IIMM International Limited. In an email of 14th December 2014 to a corporate adviser to make the appointment, Mr John Bowles stated: "Mark will be [my] new business partner as of January 1st. For Tax reasons, his wife Claire will be the new Director rather than Mark himself."

97. Mr Barrow could not identify any possible tax reasons for making Mrs Barrow the director rather than himself. He suggested that it was done as a new account had been opened with DA in Claire Barrow's name and that a new 'Claire's Club' was set to be established. Despite the use of Mrs Barrow's name, the account and club were to be managed by John Bowles as a mark of appreciation or as compensation for the use of his IIMM bank account. When challenged by Mr Hamilton that an account with DA did not require Mrs Barrow to be a director of IIMM, Mr Barrow cited as a second reason his concern that Club Leaders would not be able to convince the Bank of China that they had any claim on the funds in the account if anything happened to John Bowles. He pointed out that his wife had not become a co-signatory of the IIMM bank account.

98. In her evidence, Mrs Barrow could not recall the circumstances of her appointment as a director of IIMM other than that her husband had liaised with John Bowles about it and had asked her to accept the appointment. She proffered two possible reasons: first, for consistency with the new account with DA and the new club in her name to be managed by her husband and John Bowles; second, that she and Mr Barrow were concerned that "[they] would have no claim" on the funds in the IIMM bank account if anything happened to John Bowles.

99. I accept that Mrs Barrow provided administrative support to her husband but I cannot accept that this was the extent of her involvement in the Currency Club.

100. Even if the Club developed organically in the way that Mr and Mrs Barrow claim, it had ceased to be an informal club amongst family and friends by 2013 by which time (according to Mr Barrow's evidence) it had acquired thousands of members and had millions of pounds/dollars invested. The fact that both Mr and Mrs Barrow gave up full-time jobs to run the Club is an indication of their involvement in, and full-time commitment to, running the business of the Club. The fact that some of the initial investors knew, or got to know, the Barrows as a couple cannot fully account for statements about business decisions being presented as having been made by both Mr and Mrs Barrow. It is clear to me, considering the evidence, that notwithstanding the personal relationships that the Barrows had with other Club Leaders and members Mrs Barrow clearly played an executive role in the development and management of the Currency Club.

101. Neither Mr Barrow nor Mrs Barrow could satisfactorily explain why she became a director of IIMM Limited (and, later, a shareholder) rather than her husband. Both witnesses' recollections on this matter were strikingly vague compared to the rest of their evidence. If Mr Barrow did believe that directorship of IIMM would afford some protection, he could not explain why it was his wife and not himself who was appointed. Separately, the fact that an account with DA was being opened in her name

in anticipation of the establishment of 'Claire's Club' to be run by either Mr Bowles or Mr Bowles and Mr Barrow casts no light on the motivation behind making her a director/shareholder.

102. Taking all the evidence together, I am satisfied that Mrs Barrow was a partner with her husband in the Currency Club within the meaning of section 1 of the 1890 Act.

Were individual investors partners with each other, or clients of the head partnership?

103. Mr Page argued that Mr Hamilton was a co-partner with other investor members of Mr Welsh's section, such that the funds which he deposited became part of the sub-partnership assets. The other partners had not agreed to indemnify him against loss, accordingly he has no claim in respect of the funds which formed part of those assts.

104. A sub-partnership is defined by Lindley and Banks on Partnership (21st ed) at paragraph 5-109 as:

> "a partnership within a partnership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to the agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is [that] […] it makes the parties to it partners inter se; but it in no way affects the other members of the principal firm.

105. Mr Welsh's evidence was that he viewed his commission as remuneration for administrative work, namely notifying new members of trades and associated wins and losses; updating the website portal at the end of each month; sending a monthly email to members with information of their online portal account balance; and making bank transfers with the Bank of China 'dongle'. He said that he did not consider himself to be taking any responsibility for members' money.

106. The investments made by members of the Welsh section of the Club were doubtless made with 'a view to profit' in the sense that each member invested money in the hope of making a return on their capital, but they could not be said to be carrying on a "business in common". Members did not necessarily know one another or even know how many other members were in the Welsh section of the Club. Members were not privy to the Club Leaders' meetings and did not have the oversight and information which Mr Welsh had. Mr Welsh himself asserted in evidence that he could have 'closed up shop' at will, without any reference to his responsibilities to other supposed partners in the Welsh Club. I note also, in his introductory emails with Mr Hamilton (at [33] and [59] above) Mr Welsh's adoption of the terms "clients" to refer to investors in his section.

107. I am entirely satisfied that the members of the Welsh section were not in partnership with each other, whether as a free-standing partnership or as a sub-partnership of the main Club partnership. The members of the Welsh section, including Mr Hamilton, were clients of the main partnership.

MISREPRESENTATION CLAIM

Did Mr Welsh misrepresent how investment funds were to be held and supplied?

108. I turn now to the question of whether there was a misrepresentation made to Mr Hamilton, upon which he relied in transferring his investment funds to the account(s) at Bank of China. I fully accept that, where deceit is alleged, a court will examine the evidence closely, to a degree commensurate with the seriousness of the charge: *Re H (Minors)* [1996] AC 563.

109. Having done so, I am entirely satisfied, on the evidence, that Mr Welsh misrepresented the nature of the account which he held with DA and, linked to this, the extent of the control (in fact, nil) which he was to retain over Mr Hamilton's funds sent for investment. I find that Mr Hamilton's contemporaneous note of a PAMM account at FXPro must have come from Mr Welsh, in discussions at their original meeting; I accept Mr Hamilton's explanation that he made the note as he had not heard of such an account before. The picture painted of control retained over the funds was bolstered by the description of commission on winning trades set out in the Information Sheet, prepared by the Barrows and adopted by Mr Welsh. It is notable that Mr Welsh never responded to Mr Hamilton's emails referencing the PAMM FXPro account by correcting his understanding, never once pointed out that funds sent to DA would be under DA's sole control, that Mr Welsh would not retain any control over Mr Hamilton's funds transmitted to IIMM, whether at IIMM or once transferred to DA.

110. I include, in this mischaracterisation of the business, the practice of "netting off". Mr Welsh submitted that he explained the practice to Mr Hamilton in response to a question in one of his emails. In closing Mr Welsh relied upon the terms of an email dated 4 August 2017 sent to Mr Bowles, copied to Mr Welsh in which Mr Hamilton sought information from the Bank of China account(s) "to show where you have drawn any money from Marela or IMMLTD you have done so honestly as per agreement with investor using incoming money and sending net outgoing to Arkian". But this email was not put to Mr Hamilton when he gave evidence and I decline to accept that it evidences the understanding on the part of Mr Hamilton at the time of investing (as opposed to his understanding after the email advice to investors in March 2017) that Mr Welsh suggests. I find as a fact that Mr Hamilton was unaware that his funds transferred to the IIMM and, later, the Marela accounts at Bank of China, would be used to fund withdrawals made by other investors wanting money out of the club and/or payments of commission to the Barrows or to Mr Welsh said to have accrued from "successful trades". In the absence of any accounts produced by any of the defendants recording how incoming funds were applied, where the funds were directed and to whom (see below), I decline to accept that different sections' funds were kept and accounted for separately.

111. I note that Mr Welsh, in an email dated 21 May 2017 to Robin Leigh (the lawyer given responsibility by club leaders for investigating what had happened to club funds) told him that "the only transfer to [DA] was for $60,000 in 2016". Even if the whole of that sum came from funds transferred by Mr Hamilton as a new investor in 2015-16, that leaves $638,888 of his investments unaccounted for.

Absence of accounting/other club records

112. Where persons like the Barrows and Mr Welsh, having all the knowledge of how many investors there were, how funds were being received and applied and (presumably) themselves making, keeping or having access to records demonstrating this, seek to counter a case criticising their descriptions of the scheme made to potential investors and the discharge of their responsibilities concerning member's funds, then there is at least an evidential burden on them to make good their account of what actually took place. These defendants, between them apparently responsible for millions of dollars of investors' funds, including $698,888 of Mr Hamilton's money, have made assertions about the separation of funds, how they accounted for investors' money, recorded profits, took commission, for which they have produced not a jot of accounting evidence. I have not been shown any evidence of ledgers showing funds received, or separately accounted for, or indeed of any commission calculations.

113. When I put it to Mr Barrow, during the course of his evidence, that the online system which had been set up to administer the Club must have retained a record of cash deposits from members, together with profits and commissions, he responded that the online system was "flawed", such that it was impossible to ascertain now how much individual members had invested, how much original capital had been lost, or what amount of overall profit accrued had been paid to each member. There is nothing to substantiate the defendants' assertions as to how much they invested or how much they took out, whether they were entitled to such monies as they removed, nothing to show how many investors there were overall or in each section, what proportion of the fund allegedly held by DA was profit, as opposed to original capital. Accordingly where, as part of their defence, the Barrows or Mr Welsh seek to suggest that funds belonging to different section members were accounted for separately, or that different sections had different commission arrangements, I treat it with a degree of caution, even scepticism, in the absence of their producing any accounting evidence to support such claims. Likewise when they assert that the substantial commission payments which they took out of funds coming into the IIMM/Marela accounts were properly calculated as a percentage of "successful trades". Whilst none of this goes directly to whether the alleged misrepresentation was made or relied on, it forms the backdrop against which the defence positions are to be assessed.

Did Mr Hamilton invest in reliance on any misrepresentation made by Mr Welsh?

114. Mr Page submitted that Mr Hamilton's enthusiasm for investing in the Currency Club was such that he closed his eyes to anything other than how soon he could place his funds with DA. Even if, which the Defendants did not accept, there was a misrepresentation concerning the nature of the account into which the funds were to be passed and/or the degree of control which Mr Welsh was to retain over the funds, there was no reliance, Mr Page suggested.

115. I do not accept this. I am quite satisfied that, had the true position as to the way in which his funds would be applied, the account in which the monies were to be held and DA's unrestricted control over all investment funds been explained to him, Mr Hamilton would not have invested in the Currency Club in 2015/16. It is clear from his original emails in April 2015 that Mr Hamilton was concerned to establish a degree of

security over his funds. Moreover he reverted to FxPro regulations and to the mandate which he believed Mr Welsh had over the FxPro account during later meetings with Mr Welsh in June 2015 (see paragraphs [58] – [59] above). Even if I were to accept that his concern over security waned as the time passed and he became more focussed on getting his money into the Club, I could not conclude that the misrepresentation about the nature of the account in which the monies were to be held, and/or the degree of control over the funds which Mr Welsh would retain, had no influence on him at all at the time(s) Mr Hamilton invested. Moreover, where a knowing or reckless misrepresentation is established, as here, very little is required for a court to find the necessary degree of reliance: *BV Nederlandse Industrie Van Eiproducten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596; *Autonomy Corporation Limited & Ors v Lynch and Anor* [2022] EWHC 1178 (Ch)

Partnership – are Mr and Mrs Barrow jointly liable with Mr Welsh?

116. The general principle of agency between partners is found at section 5 of the 1890 Act which provides that:

> "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular manner, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

117. The distinction between the two separate limbs was analysed by Chadwick LJ in *Bank of Scotland v Henry Butcher & Co* [2003] 2 All ER (Comm) 557 at [88]-[89] as follows:

> "The inquiry under the first limb of s 5 of the 1890 Act is whether the act of one partner, say partner A, is done for the purpose of the business of the partnership. If it is, then, in doing that act, A is the agent of the firm and the other partners are bound by A's act. There is no need, in such a case, for the persons seeking to rely on the act to invoke the second limb.
>
> The hypothesis which underlies the second limb of s 5 is that A's act is not, in fact, done for the purpose of the partnership business – so that the first limb is not in point. The inquiry under the second limb – in a case where it is necessary to invoke that limb – is whether A's act is an 'act for carrying on in the usual way business of the kind carried on by the firm'. That requires consideration of two elements: (i) what business is 'business of the kind carried on by the firm'; and (ii) is A's act 'an act for carrying on in the usual way' that business. Where those two elements are present, the person with whom A is dealing is entitled to treat the act as done for the purpose of the business of the partnership unless he knows that A has in fact no authority, or does not know or believe A to be a partner."

118. Liability of partners for wrongs committed by one of the partners is dealt with by 10 of the Partnership Act 1890 which provides:

> **"Liability of the firm for wrongs.**
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."
>
> There are, accordingly two ways by which partners can be liable for the wrongs of another partner: (1) where that partner is acting in the ordinary course of the business of the firm, or (ii) where they have acted with the authority of their co-partners.

119. The issue of whether a particular act by a partner is to be treated as having been done in the ordinary course of carrying on the partnership business "is essentially a mixed question of fact and law" (Lindley & Banks at para 12-19, referring to the observations of Lord Nicholls and Lord Millett in *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [18], [24] and [112]). In *Dubai Aluminium* Lord Nicholls formulated the test for liability under s.10 as follows, at [23]:

> "…the wrongful conduct must be so closely connected with acts the partner… was authorised to do that, for the purpose of the liability of the firm…to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business…"

120. Mr Page relied on the authority of *The Ocean Frost* [1986] 1 AC 717 to argue that even if Mr Welsh misrepresented the nature of the account into which Mr Hamilton's monies would be transferred for trading, he was not acting for the Club Partnership in doing so. Mr Page suggested that Mr Welsh was acting purely for himself, in order to obtain the 5% commission on successful trades done with the money put in by Mr Hamilton. He sought to argue that it was necessary for Mr Hamilton to show that Mr Barrow induced him to believe that Mr Welsh was acting in the course of Mr Barrow's business and that Mr Hamilton relied on that belief in making the investment.

121. Mr Hamilton disputed that Mr Welsh's representations concerning retained security over the funds fell outside the business of the partnership. He argued that everything Mr Welsh said about the Club and its arrangements was said in the course of his conducting partnership business, namely signing up new members whose funds were to be sent to the Bank of China account(s) operated by Mr Bowles. Mr Welsh's descriptions and explanations were all part of promoting the benefits of becoming a member of the Club, which was a key part of Mr Welsh's role as a partner with the Barrows and other section Leaders, namely to bring business into the partnership. That work included answering questions about the security of the funds. Insofar as Mr Welsh's answers misled Mr Hamilton as to the true position then he was doing so in his capacity as a partner within the Currency Club.

122. I have no doubt that, in misrepresenting the position regarding the way in which Mr Hamilton's funds would be applied together with the nature of the account into which his funds were to be sent and the degree of retained control over funds to be traded by DA, Mr Welsh was acting within the ordinary course of the partnership business. A

key part of that business, from at least 2015 onwards, was to sign up new members to the Currency Club and receive new funds into the Bank of China accounts. Assuming for these purposes that DA was in fact trading funds and making profits, the acquisition of new members and new funds contributed to the business of the partnership, and partnership profits, in two ways: first, by increasing the amount of the funds to be traded and thereby increasing the profit and the commission accruing to Leaders/Partners on those funds; second, by reason of the practice of "netting off", making fresh funds available from which existing members' withdrawal requests could be satisfied and Club Leaders could withdraw substantial amounts of "earned" commission, as in fact happened.

123. I am supported in this conclusion by evidence at trial suggesting that Mr and Mrs Barrow themselves were less than fully frank in addressing questions of retained control over members funds and/or the extent of DA's access to those funds:

(i) Ms Clark's evidence was that at a lunch meeting at the Aphrodite Hills Golf and Tennis Club in September 2015 she asked questions about the security of investor funds. Mr Barrow made it clear, she said, that his wife was the holder of all the Currency Club monies. They were in her name and were therefore "safe". Ms Clark said that Mrs Barrow agreed, saying "Yes, that's right". Mr Page challenged her evidence but Ms Clark repeated that she was sure this had been said. Mr and Mrs Barrow were always "definite" that DA did not have the money, that only 4% of the fund would ever be gambled.

(ii) Mr Squire said that, at a Currency Club promotion event at the Saracen's Head pub on 16 March 2014, an attendee asked who was in control of the Club's funds. Mr Barrow's response was that the funds were held in an FXPro account in his name at Barclays Bank, Knightsbridge. Mr Squire said that the safety of funds had been a "prominent topic" during the meeting, with investors wanting reassurance, which Mr Barrow gave, with Mrs Barrow nodding her agreement. Mr Squire referred to an email which he sent on 17 March 2014 following up his understanding that Mr Barrow had control of the monies held in an FXPro account, and to the response from Mr Barrow which appeared to confirm it.

(iii) Ms Doody's evidence was that she had been invited to a meeting in early August 2015 at the Lion Pub, Pattaya, Thailand where there were about 30 people. At one point Mrs Barrow came over to her table and started a discussion about the Club, in the course of which Ms Doody asked "What is to stop [DA] or any other person in the management accessing the members' money and disappearing over the horizon with it?". Mrs Barrow's response was that this would not be possible as there was secure control over the funds, there were three levels of security and three signatures would always be required, namely hers, her husband's and John Bowles'. In cross-examination Ms Doody repeated what had been said about security of Club funds, explaining further that she obviously realised that there would be some transfer to DA for trading purposes but as far as the lump sum was concerned

she understood from Mrs Barrow that it could not be moved unless three of them signed to remove the money.

(iv) Mr Thurogood's evidence of hearing Mr Barrow saying that he was in charge so that DA could not do a runner, and following this up with his email to Paul Martin of 22 May 2015 repeating what had been said.

(v) Mr Clayfield's evidence of a conversation with Mr Barrow in Cape Town on 14 January 2016 during which he asked Mr Barrow how the funds were secured to ensure that the trader did not disappear with club funds, to which Mr Barrow said that access to the funds required two out of three signatures, namely Claire (Barrow), himself or DA.

(vi) The information sheet given to potential investors, prepared by Mr and Mrs Barrow said that on losing trades "we do not pay Daniel anything", implying that they retained control over the funds. In his evidence Mr Barrow accepted that the phrase *"could possibly"* carry such an implication.

(vii) Mr Barrow's email to Mr Welsh dated 3 June 2015 in which he stated *"...Off the record we are fiddling the system as 3 people in FXPro are involved and we need to be careful how far you go with questions regarding to FXPro."*

CONTRACT

Was there a contract and if so, what were the terms?

124. I am also satisfied that, on the balance of probabilities, Mr Hamilton has established that there existed a contract between himself, as an investor/client, and the Currency Club partnership, for the investment of his funds. I can find no other sensible explanation for the nature of the transaction under which Mr Hamilton sent funds, at Mr Welsh's direction, to the IIMM, and then the Marela, accounts at Bank of China, to be invested in foreign exchange trades.

125. On the evidence I have heard and seen, the contract was oral, based on discussions at the meeting on 7 April 2015, confirmed in emails exchanged thereafter and concluded by the sending of funds. Whether it was one contract, concluded by Mr Hamilton's first payment, or a series of individual contracts makes no difference to the end result.

126. However, whilst the nature of the transaction as a contract (or series of contracts) seems straightforward, elucidating the precise terms is far less so. Having considered the evidence I find that I can only be satisfied of the following terms:
    (i) That his funds would be transferred to and held in a FXPro PAMM account such that DA would have access to the funds for trading purposes only.
    (ii) That 15% commission would be deducted from successful trades.
    (iii) That Mr Welsh would use reasonable skill and care in administering the funds invested with the Currency Club and in reporting to investors, including to Mr Hamilton.

127. Mr Hamilton sought to rely on a further term, derived from the information sheet by which his funds (presumably comprising capital and any share of profit) would be returned if he gave notice before the end of the month. I am not prepared to find that

there was a definite term to this effect. It does not appear to have been discussed in any detail at the meetings with Mr Welsh in April 2015.

128. It is not in dispute that Mr Welsh and the Currency Club partnership relinquished all control over investors' funds, in sending them to DA for investment. Had Mr Welsh retained control then Mr Hamilton's capital investment would not have been lost.

CONSPIRACY

129. Mr Hamilton's pleading included a claim in conspiracy, but the precise allegation was never very clear. In his cross-examination of Mr Welsh, Mr Hamilton appeared to base his case in conspiracy on the email exchange between Mr Barrow and Mr Welsh referred to at [123(vii)] above. He suggested that the exchange showed the two men agreeing to misrepresent the unregulated nature of DA's FX Pro trading. In closing Mr Hamilton also referred to the netting off process as an unlawful activity.

130. The lack of accounting evidence to which I have referred above is very concerning. The Currency Club appears to have had millions of dollars of private individuals' funds invested, with negligible documentation, traceability or accountability on the part of the Club Leaders. In the light of what is now known about DA there must be a very real question mark over whether there ever were any foreign exchange trades, let alone "winning trades", or whether he was simply operating a fraudulent scheme from the outset. Against this background, communications between Mr Barrow and Mr Welsh in which the former, apparently knowing that DA was "fiddling" the FXPro system, instructed the latter to give as few details as possible are at least indicative of sharp practice on that occasion.

131. However as the evidence and argument at trial was primarily directed at the case on misrepresentations made by Mr Welsh to Mr Hamilton, very little attention was directed to the issue as to whether there was an agreement between Mr Barrow, Mr Welsh and possibly other Currency Club partners to misrepresent the trading arrangements with DA more generally. I would not conclusively rule out such an agreement, since there was certainly evidence which was to my mind consistent with it, for instance the email to which I have already referred. But I find myself unable to conclude that the evidence as a whole has established a conspiracy to mislead investors in general, or Mr Hamilton in particular, to the necessary standard.

132. There clearly was an agreement to operate a netting off process, but although Mr Hamilton asserted that the process was unlawful its illegality has not been pleaded and he did not address me at trial as to the basis for his claim that the practice itself was illegal. Further, it is not clear to me what loss can be said to have arisen from the operation of the netting off process.

TRUST CLAIM

133. Mr Hamilton pleaded a trust claim which, again, was never very clearly elucidated. However, in closing he indicated that he was no longer pursuing this claim, accordingly I need say no more about it.

CONCLUSION ON LIABILITY

134. I conclude that the Defendants are each jointly and severally liable to Mr Hamilton for damages arising from misrepresentation and breach of contract.

QUANTUM

135. There was very little argument on quantum at trial, the parties' submissions being directed mainly at issues to do with liability. In his skeleton argument prepared for trial Mr Page submitted that the limit of recovery should be the capital amount invested plus interest at a rate of 1% over US$LIBOR. I propose to give Mr Hamilton a short time to respond to this, otherwise that is the amount which will be ordered.