

ENGLAND AND WALES / JUDGMENT

Argyle UAE Limited (in liquidation) v Robert McKellar & Anor

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Neutral Citation Number:

[2025] EWHC 1258 (Ch) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES BUSINESS LIST Case No: BL-2020-001971 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 27/05/2025 Before : MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE

- ----- Between : ARGYLE UAE LIMITED (IN LIQUIDATION) (ACTING BY ITS JOINT LIQUIDATORS DAVID STANDISH AND MICHAEL LEEDS)

- and -

(1) ROBERT MCKELLAR

(2) SEAN VERITY

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- ----- Claimant Defendants Hilary Stonefrost (instructed by Fieldfisher LLP) for the Claimant Robert McKellar in person Paul Clarke (instructed by MDS Advisory) for the Second Defendant Hearing dates: 25, 26, 27 November 2024 and 4 December 2024

- ----- Approved Judgment This judgment was handed down remotely at 10.30am on 27 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Master Kaye sitting as a Deputy High Court Judge : 1. 2. 3. 4. This judgment concerns a payment of £525,000 (US \$836,257.40) (“the Payment”) made on 12 November 2014 by Argyle UAE Limited (“the Company”) to the Second Defendant (“SV”) pursuant to an invoice raised by SV and addressed to the Company (“the Invoice”). The Payment was made from the Company’s EFG bank account in the Cayman Islands to SV’s bank account at Coutts, London on 12 November 2014. The fact of the Payment is not in dispute. The Company was incorporated in the city of Ras Al Khaimah Emirate (RAK/RAKIC) in the UAE on 4 June 2012. The First Defendant (“RM”) was the Director, Secretary and sole shareholder of the Company. I have had the benefit of oral and written submissions from Counsel for both the Company and SV

and from RM in person. I have reflected on those submissions and taken them into account when reaching this decision even if I do not set out every argument or issue raised by every party. Summary of the claim: 5. 6. 7. 8. 9. The Company was the subject of a winding up order made in this jurisdiction on 17 October 2018. This claim is brought by the Company acting by its joint liquidators, currently David Standish and Michael Leeds of Interpath Advisory (“the JLs”). The JLs seek a declaration that RM breached his fiduciary duties as a director of the Company when he caused the Company to make the Payment to SV and further seek an order that RM should pay equitable compensation to make good the loss suffered by the Company. The JLs plead in the Re-Amended Particulars of Claim (“RAPOC”) at [17] to [26] that the Payment was made in circumstances where any agreement to pay SV was not an agreement with the Company or not of benefit to the Company. Consequently, the JLs say that making the Payment from the Company to SV was a breach of duty. They plead further that RM knew or ought to have known that at the time when the Payment was made the Company was or there was a real risk that it was insolvent or likely to become insolvent. The JLs’ rely on the common law duty that a director must not misapply the Company’s assets, and the statutory duties set out in the Companies Act 2006 (“CA 2006”), in particular section 172, the duty to act in good faith to promote the interests of the Company and section 175, the duty to avoid conflicts of interest. The JLs advance their claim against SV in knowing receipt and seek an order and declaration that SV as the beneficial recipient of the Payment is required to pay equitable compensation to make good the loss suffered by the Company as a consequence of the Payment. 10. The JLs say that SV (i) knew that he had no agreement with the Company for the Payment including because the agreement if any was made pre-incorporation; (ii) MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor knew or appreciated at the time of the Payment that any agreement was in fact with RM and/or that the services were provided to RM or Arcturus, and the Company had no legal obligation to pay him. Alternatively, they argue that SV knew that the conditions for the Payment had not been met. The JLs therefore argue that it is unconscionable for SV to retain the benefit of the Payment (RAPOC at [27] to [30]). In order to succeed in its claim against SV for knowing receipt the Company will need to first satisfy the court that RM acted in breach of duty. RM denies breach of duty. He says the Payment was made for services which SV provided to the Company between 2011 and 2014 and was properly payable. However, his evidence about what had been agreed with SV and when was inconsistent. SV said he had undertaken work throughout the period 2011 to 2014 which entitled him to the Payment from the Company, although he was not clear about what had been agreed or when. RM and SV’s evidence differed from each other and had changed over time. There are therefore contested issues about whether the Invoice was properly raised against the Company and whether the Payment was properly made by the Company. There was no agreed list of issues for trial. Each party had produced their own. The Claimant’s ran to 53 issues when all the sub-issues were included. D2’s list of issues set out 12 main issues in relation to SV. These largely overlapped with the Claimant’s list of issues. RM had listed 10 issues many of which reflected a misunderstanding of the relevant principles and law applicable to the claim

being advanced against him and/or what could be determined as part of this claim. 11. 12. 13. 14.

Conclusion

15. 16. 17. 18. Despite the many issues and sub-issues advanced by the parties the starting point was the factual basis for the Invoice and the Payment which then needed to be considered in its legal context. The claim is a discrete claim, however, the original source of the funds for the Payment form part of a wider multi-jurisdictional long running dispute and as a consequence this judgment is lengthy. For the reasons set out in this judgment I have found that RM was in breach of each of the duties relied on by the JLs as a director of the Company when the Payment was made and is not entitled to relief under section 1157 CA 2006. The claim against him therefore succeeds. The JLs are entitled to an order for equitable compensation against RM. However, I am not satisfied and do not find that SV had the requisite knowledge for the purposes of the claim in knowing receipt and it is not unconscionable for him to retain the Payment. The claim against him fails and it is not therefore necessary to consider the other aspects of his defence. 19. The complex background to those multi-jurisdictional disputes make it helpful to provide a dramatis personae and some definitions. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Dramatis Personae and other definitions: Entity Description Definition Argyle UAE Limited now (in liquidation) David Standish and Michael Leeds of Interpath Advisory Ailar King Robert McKellar Sean Verity Argyle Limited now in liquidation Amstel Securities Holdings SA Anca Capital Partners LLC Peter Sermol Incorporated on 4 June 2012 in Ras Al Khaimah (RAK/RAKIC). RM was the sole director and shareholder. Winding up Order made in this jurisdiction on 17 October 2018 on the petition of PLV and now in liquidation. Current joint liquidators of the Company in liquidation “the Company” or “the Claimant” “the JLs” Associate director of Interpath Advisory assisting the JLs. “Ms King” Witness for the Claimant Sole director and shareholder of the Company: director and 50% shareholder in Argyle Gibraltar; director and 50% shareholder in Arcturus; and former English solicitor A senior employee of BNYM employed by them from July 2010 until his retirement in about 2016 as an executive vice president. Originally retired from banking in 2007 A Gibraltar company of which RM and Amstel Securities Holdings SA were the shareholders. RM was one of the directors. Placed in liquidation by the Supreme Court of Gibraltar on 1 July 2016 A regulated brokerage firm with access to Pershing. PS was a director. RM was a consultant PS was a director. He moved from Amstel to Anca in late Ran the Toronto office of Amstel until November 2012 from late 2012 he was “RM”, or “D1” “SV”, or “D2” “Argyle Gibraltar” “Amstel” “Anca” “PS” MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Pershing LLC Dr Craig Smith Arcturus Investment Advisory Limited (in liquidation) Linear Investments Limited Albert Maasland Mike Boyd Sunil Rao Bank of New York Mellon (BNY Mellon) Ian Gass Managing Director of Anca. Colleague/friend of D1. A witness for D2 An investment

management company – a subsidiary of BNYM. Provides clearing, trading services. Amstel had an existing relationship with Pershing. Former Global Head of Trading at Commerzbank. A director and 50% shareholder in Arcturus FCA regulated. Died on 25 January 2015 An English Registered Company incorporated on 19 September 2014 of which Dr Smith and RM were each 50% shareholders and directors. Appointed Representative of Linear for FCA purposes. It went into compulsory liquidation on 3 September 2018. FCA regulated and the responsible principal for Arcturus Contact of D2's CEO Knight Capital in 2015 A witness for D2 Known to both RM and SV through film related funding projects and introduced them in late 2010 Senior board director of Barclays in the UAE based in Dubai and RM's contact in Barclays Dubai Introduced to RM by MEO D2's employer at the material times. But also, one of the target banks for RM Contacts at BNYM introduced to RM/PS/ Amstel/the Company by SV included Ian Gass, Craig Messenger, William Dombek and Alex Veroude Treasury Manager at BNYM in 2011 later part of the Corporate Trust team. "Pershing" "Dr Smith" "Arcturus" "Linear" "AM" "Mike Boyd" "Sunil Rao" "BNYM" "Ian Gass" MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor The bank and branch where the Company held its bank account when incorporated The bank and branch where the Company held its bank account after about November 2014. A development company for a proposed development in Hamilton Bermuda. A winding up petition was presented against PLV on 9 October 2015 and provisional liquidators were appointed by the Supreme Court of Bermuda. Private Bermuda Trust settled by MM and YM on 19 October 2014. Receivers were appointed by the Supreme Court of Bermuda on 18 February 2016 Of KPMG Bermuda – appointed as receivers of the Trust and liquidators of PLV Director of PLV and settlor of the Trust. Beneficiary of the Trust MM and YM made payments on behalf of the Trust to Argyle Gibraltar/the Company in October/November 2014 from their personal bank account at Clarien Bank. Director of PLV, Settlor and beneficiary of the Trust, Wife of MM Hamilton is the capital of Bermuda. Guarantor of the loan to PLV from MIF A Company incorporated in Delaware USA which entered into a credit agreement with PLV guaranteed by COH A former client of RM and potential supplier of BGs and SBLCs Introduced RM to Sunil Rao. EFG Bank Cayman Islands Falcon Bank Switzerland Par-La-Ville Hotel and Residences Limited (in liquidation) Skyline Trust (now in receivership) Michael Morrison and Charles Thresh Michael Maclean Yasmin Maclean Corporation of Hamilton Mexico Infrastructure Finance LLC Middle East Oil Bank Guarantees Standby Letters of Credit Trade and Profit Share Agreement An agreement dated 20 October 2014 (though not executed until about 31 October 2014) between the "EFG Bank" "Falcon Bank" "PLV" "the Trust" "the PLV Liquidators" "MM" "YM" "COH" "MIF" "MEO" "BGs" "SBLCs" "TPSA" MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Protected Cell Structure Trust and Argyle Gibraltar "PCC" 20. 21. The background to the wider dispute is set out in the judgments of Mr Wyand QC sitting as a Deputy High Court Judge¹ in 2017 and the subsequent Court of Appeal judgment² in 2018 (the "PLV proceedings"). In those proceedings the PLV Liquidators obtained summary judgment against both the Company and RM. The judgment was in

respect of the monies received by the Company in about November 2014 and utilised in part to make the Payment. The PLV Liquidators subsequently petitioned to wind up the Company based on that judgment. SV was not a party to the PLV proceedings. There have also been proceedings in Bermuda. These included a claim by MIF against PLV and MM and others in respect of which MIF obtained a freezing injunction dated 10 February 2015 against PLV and MM (“the MIF Injunction”). MIF was granted summary judgment against PLV and others in Bermuda on 27 May 2015. That judgment in turn was the basis for the winding up of PLV and the subsequent appointment of receivers over the Trust. There were also proceedings about the validity of the guarantee given by COH which culminated in a decision of the Privy Council in 2019 (together the “MIF proceedings”). In New York there were further proceedings. A judgment was handed down by Denise Cote, United States District Judge in July 2023 (the “MIF US proceedings”). Neither RM nor SV were parties to the MIF proceedings or the MIF US proceedings. Miscellaneous: 22. In order to simplify other aspects of this judgment I have addressed some of the issues raised by RM first. Freezing Injunctions: 23. 24. 25. RM and the Company were first made the subject of a freezing injunction in the PLV proceedings on 5 July 2016, and post judgment freezing injunctions remain in place against RM. He says that the most recent order was dated 12 July 2019 (“the PLV Injunction”). The PLV Injunction restricted RM’s access to assets/funds. He had not applied to vary it. In these proceedings, he seeks an order to vary or discharge the PLV Injunction to provide him with access to assets/funds to enable him to obtain legal representation to investigate possible claims he considers arise as a consequence of the MIF US proceedings judgment (see below) but not for the purposes of these proceedings. He submits that the PLV Injunction should be discharged in any event as a consequence of the MIF US proceedings. He also wants to vary or discharge the PLV Injunction to 1 [2017] EWHC 1915 (Ch) 2 [2018] EWCA Civ 1762 3 [2019] UKPC 2 4 5 July 2023: Mex. Infrastructure Fin. v The Corp. of Hamilton, United States District Court, 17 cv6462 (DLC) MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor obtain funds to enable him to investigate whether the sale of his property as part of the PLV proceedings enforcement action was at an undervalue. He says it would be unfair if he had to ask the PLV Liquidators to approve his legal fees. 26. This is not the right forum in which to seek to vary the PLV Injunction. If RM considers that he has a proper basis to do so he will have to make an application within the PLV proceedings. COMI 27. 28. 29. On 17 October 2018, Deputy Insolvency and Companies Court Judge Addy was satisfied that the PLV Liquidators, as petitioner, had established that this jurisdiction was the centre of main interest of the Company (“COMI”) and made a winding up order which continues in full force and effect. The JLs are the liquidators of the Company pursuant to that winding up order. RM continues to maintain that this court does not have jurisdiction over the Company and that its COMI was the UAE. In 2018 RM applied to rescind the winding up order including a challenge to the determination on COMI as he argued that the Company had never conducted business in this jurisdiction. However, the determination of COMI is not based on whether the Company conducted business in this jurisdiction. RM’s application to rescind the winding up order was dismissed on 28

November 2018. He did not appeal. 30. These proceedings are the wrong forum in which to challenge to the winding up order and it appears to me that it is far too late to do so in any event. Jurisdiction 31. 32. 33. RM argued that whether he was in breach of duty as a director could only be assessed by reference to the law of the UAE where the Company had been incorporated. He argued that any determination about the Invoice and Payment would also be subject to the law of the UAE. This formed a central part of his defence, evidence and

submissions.

RM does not plead the content of any relevant UAE law against which his conduct as a director should be measured. He did not seek permission to rely on any expert evidence of UAE law to support his contention that UAE law governed his conduct as a director of the Company. He did not plead or seek to rely on any UAE law expert evidence about the nature and extent of any relevant UAE director's duties and what UAE law said about breaches of those duties. There is an evidential presumption of similarity which applies where the content of the foreign law said to apply has not been pleaded (see for example Lord Leggatt SC in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 at [108] to [112]). This presumption of similarity allows the court to proceed on the basis that the content of foreign law should be taken to be similar to English law rather than to superimpose it in place of English law. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment *Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor* 34. The JJs set out their case on the presumption of similarity and the defects in RM's case in their Reply dated 15 September 2023. Despite re-amending his defence in November 2023, RM did not seek permission to amend his defence to address these issues nor did he seek permission to adduce expert evidence on UAE law. In the absence of any pleaded case about the content of UAE law or any evidence about the content of UAE law the court proceeds on the basis that it is similar to English law. 35. It was in any event a bad point: Clause 72 of the Company's Articles of Association provided: "Applicable law The beneficial owner/s of the Company shall have the liberty to opt by virtue of the provision of the [Emiree Decree No.6/2006[decreed by H. H. Sheikh Saqr Bin Mohd Bin Salem Al Qasemi, Ruler of Ras Al Khaimah]] to decide matters concerning

- (a) dispute between the partners or beneficial owner/s – Laws of United Arab Emirates.
- (b) in the event of the death of partners or beneficial owner/s – Laws of England and Wales.
- (c) any other matters which are not specified, however, touching the affairs and continuation of the company- Laws of England and Wales." 36. 37. Clause 72 appeared to provide for this dispute to be determined in this jurisdiction under clause 72(c). RM explained that when he incorporated the Company, he was given a choice about the applicable law for each part of clause 72. He explained that he chose to adopt the law of England and Wales in relation to clause 72(b) as he thought it would be easier for his family to administer his estate and the Company in the event of his death. He explained that he viewed clause 72(c) as being related to clause 72(b) and only applying to matters arising following his death. He did not accept that it had a wider applicability. Clause 72(c) is not complicated and should have been easily understood by anyone reading it let alone a solicitor with over 20 years of experience. It is

clear that RM considered clause 72 and made a choice about which law to apply to each sub-clause given his explanation in relation to clause 72(b). Clause 72(c) does not limit its applicability to post death matters but instead in clear terms states that it applies to “any other matters which are not specified”. RM’s attempt to construe clause 72(c) as only applying post death made no sense on the natural and plain reading of clause 72. He did not explain what law would apply to any other matters not specified that were not post death matters if clause 72(c) was limited in the way he suggested. Clause 72(c) is not limited in the way suggested by RM; it applies to all disputes relating to any matters touching on the affairs of the company other than those included in clause 72(a) (or clause 72(b)) which includes this claim. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 38. I am satisfied that any claim to determine whether RM was in breach of duty as a director of the Company is to be determined as a matter of the law of England and Wales. MIF US proceedings: 39. 40. 41. 42. 43. 44. In the PLV proceedings PLV obtained a judgment against the Company and RM in the sum of US\$13,278,110.04. Enforcement against the Company resulted in its winding up. Enforcement against RM resulted in some recoveries but a large part of the judgment debt remains outstanding. PLV is currently the only creditor to have submitted a claim/proof of debt in the Company’s liquidation. In the MIF US proceedings COH were found liable to repay US\$22m under the terms of its guarantee. This included the original US\$18m from which the monies paid to the Company (and from which the Payment was made) had been sourced. RM argued that as COH had been found liable under its guarantee to repay US\$22m to MIF in July 2023 that these proceedings no longer had any purpose. He argued that as COH would have repaid MIF there was no longer any liability for him/the Company. There was no evidence that COH had in fact paid MIF. RM’s approach confused the different claims and liabilities. Whilst the events that ultimately gave rise to this claim might be said to have started with the non-repayment of the sums due to MIF under the credit agreement on 31 December 2014 that is not an answer to this claim. If MIF were repaid in full including any interest and costs, they might cease to be a creditor of PLV. If PLV have no other creditors and/or if the sums collected in by the PLV Liquidators are sufficient to meet all PLV’s other liabilities, then it is possible they may then no longer have a claim in the liquidation of the Company. Ms King explained the costs to date and other potential liabilities of the Company as at 15 November 2024 were greater than the PLV judgment. It may be that if PLV ceased to be a creditor that the assets of the Company including any sums collected in by the JLs would be sufficient to meet its other liabilities. But even if that happened it would not mean that the claim by the Company against RM for breach of director’s duties for having paid away Company assets to SV without a proper basis for doing so would cease to exist. Nor would it mean that the claim against SV in knowing receipt would fall away. It might mean that in due course if the claim against RM and SV were successful and equitable compensation were paid that there might be a surplus in the Company in liquidation to return to its members. 45. The MIF US judgment does not extinguish any duties that RM had to the Company. It would not extinguish the judgment in the PLV proceedings nor undermine its basis. The MIF US proceedings do not provide an answer to this claim.

Service MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 46. 47. 48. 49. 50. RM submits that the claim against him has never been properly served on him because the address used on the claim form was not an address at which he could be served as the property had been sold. The Claim Form is dated 6 November 2020. The claimant made an application for permission to serve by alternative means pursuant to CPR 6.15 dated 2 March 2021. The JLs knew that RM no longer lived at the address used on the claim form, but it remained registered in his name and was his last known address. In support of the application the JLs had explained that on 23 February 2021 RM had confirmed that his address for service should be the address they used on the claim form, despite the fact that it had been sold and the JLs did not think RM could be living there. By an Order dated 2 March 2021 the court granted an order for substituted service permitting the claimant to serve the claim form and any other document in these proceedings by any of the methods identified in it including by first class post at the address on the claim form and by email. The claim was validly served pursuant to an order of the court. RM acknowledged service indicating that he should be served by email. He subsequently filed a defence and no application to challenge the jurisdiction of the court was ever made. Witnesses and credibility

51. When considering the credibility of witness evidence, the court should be astute to the unreliability or fallibility of human memory (see for example *Gestmin SPGS SA v Credit Suisse Securities (Europe) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22] and the Statement of Best Practice in relation to Trial Witness Statements at PD57AC Appendix at [1.3]). 52. 53. 54. The events giving rise to this claim primarily took place between 2011 and 2014. Both the passage of time and the number of times RM and SV have revisited the same facts, and the circumstances in which they have done so has significantly impacted their recollection of events. Whether the reconstruction which may have occurred (and in this case appears to have occurred) was conscious or natural and/or unconscious the court must be particularly cautious about the reliability of the witness evidence. The caution with which the court should approach the factual evidence of RM and the risk of reconstruction after the event is further heightened because he has been representing himself and the Company since 2017 in various proceedings connected to the wider dispute as well as self-representing in this claim. In such circumstances the relative objectivity of documentary evidence, particularly contemporaneous documentary evidence, may provide a more objective view of the factual background or help to corroborate the factual witness evidence. However, the context in which a document was prepared, by whom and the purpose for which it was prepared may affect whether it can be treated as objective at all. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 55. 56. 57. Here that issue is particularly acute. Not only is there said to have been a data loss (see below) but there are documents created in the course of the PLV proceedings and in the investigations undertaken by the JLs and the PLV Liquidators including records of interviews with and witness evidence from RM and SV. There is an

inherent risk that documents created some years after the events are themselves prone to the same issues of unreliability, fallibility and reconstruction as witness evidence. Often such documents are prepared for a particular purpose and/or represent a particular view at a particular time and/or are overlayed with hindsight. They should be considered in their proper context so far as possible. Given the nature of the claims advanced it is important to try to determine what each of RM and SV knew by 12 November 2014 and to try to distinguish or untangle that from what has been said or written by RM, SV and others since 2016 about what they then said the position was in November 2014. Neither the Company's nor Argyle Gibraltar's servers were maintained by the JLs/PLV Liquidators and SV no longer had access to his BNYM emails. This data loss was relied on to explain gaps in the contemporaneous documents by the defendants. However, no one was able to point to any evidence that there were any relevant missing documents. I do not consider that the data loss adds anything to the problems caused by the more general lack of documents and the passage of time. The Witnesses 58. I have had the benefit of hearing evidence from Ms King, RM, SV, PS and AM. Ms King

59. Ms King's written evidence was contained in witness statements dated 12 April 2024 and 15 November 2024. The JLs have no first-hand knowledge of the events giving rise to this claim. Ms King outlined the investigations and events in the course of the liquidation of the Company relevant to the claim. She attended the trial and was cross examined including in relation to the JLs meeting with SV on 30 July 2019 which was also attended by the JLs' lawyers. I am satisfied that Ms King gave honest and straightforward evidence and was seeking to assist the court. Third party witnesses: 60. 61. 62. PS and AM's trial witness statements were dated 11 April 2024. They appeared as witnesses for SV. PS had also provided a witness statement for the PLV proceedings on behalf of RM dated 23 June 2017. Their evidence was peripheral but they both gave careful and considered answers. AM's witness statement records a lunch meeting with SV in March 2015 sometime after the Payment. It records that he met SV who explained to him that he was a consultant with the Company and discussed the BGs business opportunity and sought his advice on settlement and introductions. In cross examination he explained that his recollection of the discussion with SV was about the nature of the interesting business opportunity coming out of the UAE/ Dubai rather than the entity which was offering it. He did recall that an entity was putting the MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor opportunity together but not which one. AM's evidence was clear and considered and entirely consistent with other contemporaneous documents in March 2015 but provided no assistance in relation to the position in November 2014. I accept AM's evidence. PS did not appear to have any independent recollection of his 2017 witness statement or the TPSA or the timeline. He took time to consider the questions he was asked and to consider the contemporaneous documents he was referred to. He was straightforward in his answers accepting when his witness evidence, particularly his 2017 witness statement, may have been wrong. Having been taken to the underlying documents he accepted that the reference he had prepared for

MM dated 27 October 2014 was a reference for Argyle Gibraltar not the Company. He confirmed that he believed it would have been possible for Argyle Gibraltar to have performed under the TPSA and to have produced a profit of US\$18m by the 31 December 2014. He did not know the business relationship between SV and RM. He explained that in 2012 there was no process by which BGs could be processed or settled using Swift direct or Euroclear. He agreed that the meetings set up by SV in 2012 were introductory meetings to introduce Amstel to BNYM and to various banks. He explained the need to have an interbank dealer or intermediary to capture the profit which I refer to below. He provided some helpful but general background evidence, but it did not impinge on the key issues which need to be determined. I was satisfied that he was an honest and straightforward witness doing his best to assist the court in respect of events that took place many years ago. 63. 64. 65. 66. RM and SV 67. 68. 69. Neither RM nor SV were wholly satisfactory witnesses but for different reasons. The trial witness statements were dated April 2024 and differed from earlier evidence or explanations advanced by both of them. RM's recollection has been subsumed under numerous layers of reconstruction. Given his involvement in the wider dispute that is not entirely surprising. His recollection of the timeline had altered and/or was not consistent with the contemporaneous documents. RM had been deeply embedded in the events of the last 13 years. He had firm views on certain points (see for example the Miscellaneous section above) but it did not appear that he had any real independent recollection of many of the events in question (see below). SV had little if any clear independent recollection of the detail of the events or emails the subject of this claim. Much of his witness statement was based on his review of the underlying emails. His lack of any independent recollection of the events in question was reflected in the WhatsApps exchanged between him and RM in relation to these proceedings. The WhatsApp messages between them demonstrated that he had relied on RM to provide him with dates and detail and input for many of his interactions with others relating to the Payment and the Invoice from about 2016. His 2017 witness statement was prepared for him by RM/RM's solicitor. Although SV had signed it in evidence, he explained that the 2017 witness statement was incorrect MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor in a number of important respects. I agree it was inaccurate based on the contemporaneous documents. SV's lack of recollection was in part because he had not been involved in the events in question to the extent that either the JLs or RM maintained (see below). 70. The contemporaneous documents suggest that RM and SV became friends after being introduced in 2011 and met socially including playing golf, having lunch and attending sporting events together. Following the PLV Injunction, SV provided RM with some financial assistance. 71. Their relationship was not well documented, but from 2011 up to about mid-2016 their engagement included an ongoing business relationship.

72. With the commencement of the PLV proceedings in 2016 the nature of their engagement changed. RM and SV were engaged in correspondence with each other and the PLV Liquidators about the Payment. SV was interviewed by the PLV Liquidators in 2016. Emails

and WhatsApp messages between SV and RM through this period show them discussing what approach to take and how to fend off questions from the PLV Liquidators and their lawyers and in some cases sharing drafts. Those WhatsApps include engagement in 2016 and 2017 about RM's defence and their respective witness statements in the PLV proceedings (now rightly said to be inaccurate). That does not assist either RM or SV when assessing the veracity of their evidence in these proceedings. 73. 74. RM and SV were both interviewed by the JLs about the Payment and the Invoice in 2018/2019. Again, the contemporaneous documents show that they discussed at least the Invoice and the Payment by WhatsApp and email on numerous occasions. There was evidence of further collaboration between RM and SV after these proceedings commenced including about the nature of the defences to be advanced by both of them. RM and SV ask me to prefer the version of events advanced in this claim rather than the 2017 witness statements or the information and answers given to the JLs and PLV Liquidators, in particular in relation to the basis for the Payment. The JLs ask me to prefer a version of events based on the position advanced by RM and SV from 2016 and in particular the 2017 witness evidence. However, it quickly became apparent that those earlier statements were unreliable and incorrect and not just because RM and SV said they were.

75. When I reflect on the lack of clarity and the lack of contemporaneous documentation about what was agreed in about 2011, 2012 or 2014, I keep in mind that both RM and SV are very experienced businessmen who had worked in highly regulated businesses over a considerable period of time. RM was a very experienced solicitor by background. He had worked for a number of well-known firms from about 1980 to 2000 in the areas of tax, trust and property and towards the end of that period he set up his own firm. He subsequently ran an investment fund. SV was a banker with over 40 years of experience. 76. As I set out below, I did not find RM to be straightforward in his evidence, nor had he been entirely straightforward in his dealings with SV at the relevant time nor with others involved in the wider dispute. On occasions he had simply not told the truth. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 77. On other occasions it is clear that he was at best economical with what he told SV about the progress of the Company. He was secretive about the development of the BGs business more generally. I did not find him to be a straightforward witness. He was inconsistent, vague and/or opaque and at times obfuscatory and/or simply evasive. He was not a reliable witness. SV's explanation of his limited role in RM's business activities including in relation to the Company, at least until January 2015, appeared to me to be consistent with the contemporaneous documents, contrary to both RM's and the JLs description of his role. His heavy reliance on RM for information about the background coupled with his more peripheral role in the key events reinforced my concerns about his evidence. I was not persuaded that SV retained much, if any, independent recollection of the events giving rise to the claim nor that he had had much knowledge of them at the time they took place. The merger of what he was subsequently told with what he might have once known had caused confusion. I gained the clear impression that SV was not a details person.

Where his evidence was vague, I did not necessarily form the view that it was deliberate or that he was being evasive but rather that it reflected the passing of time, and his lack of involvement and knowledge of the events giving rise to the claim. 78. I will address particular elements of RM and SV's evidence in the rest of this judgment but my starting point in relation to both RM and SV is that I should treat their evidence with some caution where it is not supported by the contemporaneous documents but for different reasons. However, I should be even more cautious of later explanations provided by RM and particularly SV and consider them in context. The Legal Principles: Directors Duties: 79. 80. The JLs rely on three particular duties which they say RM breached in making the Payment to SV in November 2014. For the reasons set out above I have rejected RM's primary defence that English law does not apply. A number of the general duties of a director were codified in ss. 171 to 177 CA 2006. Whilst they take effect in place of certain of the prior common law rules and general equitable principles as they apply to directors (s. 170(3)) not all the general duties were codified. In part that is because of the nature of those duties. As a director controls the assets that belong beneficially to the company, the law treats directors as analogous to trustees of those assets (see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1253] ("*Ultraframe*"). The duty not to misapply the company's property 81. Consequently, the law treats a director who causes or permits the company's funds to be misapplied as being in breach of their fiduciary duty at common law (see *In Re Paycheck Services 3 Ltd*, *HMRC v Holland* [2010] UKSC 51; and *Goldtrail Travel Ltd (in liquidation) v Abdulkadir Aydin* [2014] EWHC 1587 (Ch) and [2016] EWCA Civ 371). The duty to promote the success of the company MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment *Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor* 82. Section 172 CA 2006 provides: "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole... 83. There are two different approaches to considering whether there has been a breach of duty in respect of section 172 CA 2006 depending on whether the director has turned their mind to the question of what is in the best interests of the company at all. The approach where the director has considered the best interests of the company 84. If the director considered whether the conduct was in the best interests of the company, then the court is required to consider whether the director subjectively had a good faith belief that what he did was in the best interests of the company.

85. When considering the subjective state of mind of a director, the courts can consider whether the director acted rationally when deciding what would be most likely to promote the success of the company. In *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch) at [30] Trower J held that "irrationality" was not interchangeable with good faith but was part of the mix when the court is assessing the evidential question of whether or not the directors acted in good faith. Ultimately the decision is a commercial decision for the directors, and the court does not take on a supervisory board role but does have to consider the director's state of mind when making the decision which is being challenged. The approach where the director has not considered the best interests of the company

86. Where there is no evidence of any actual consideration by the director of what is in the best interests of the company, it is long established that the proper test is objective. Whether an intelligent and honest person in the position of a director of the company concerned could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company (see *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74 and *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch)). A finding of bad faith does not require a finding of dishonesty 87. A finding of bad faith does not require a finding of dishonesty; it is sufficient that the interests of the company are subordinated by the transaction; *Wrexham Association Football Club Ltd v Crucial Move Ltd* [2008] 1 BCLC 508 CA at [37]. The interest of creditors 88. 89. S. 172(3) CA 2006 provides that the duty to promote the success of the company “has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of the creditors of the company.” This requires a director to consider when exercising their duties to promote the success of the company under s.172 whether and if so when it is necessary for that director to have regard to a company’s creditors. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment *Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor* 90. 91. 92. 93. In *BTI 2014 LLC v Sequana SA* [2022] UKSA 25, Lord Briggs, with whom Lord Kitchin and Lord Hodge agreed, provided some guidance on when the duty arises and how directors are expected to act when it does arise. They held that there was no independent duty owed to the creditors. Instead, there would be a point where, depending on the director’s knowledge about the solvency of the company, the duty under s. 172(1) would be modified such that it would extend to the interest of creditors even whilst the duty owed to the company continued to be to act in good faith in the interests of the company. Lords Briggs, Hodge, Reed and Lady Arden each articulated when the creditor interest duty might arise differently, but the broad thread running through their speeches was that the duty would arise if the company in question were insolvent or bordering on insolvency. The question of the level of the director’s knowledge was not finally determined by them. Lord Briggs’s analysis was that actual insolvency created a very real risk of insolvent liquidation or administration whilst just a risk of insolvency was too remote. They did, however, reject Richards LJ’s formulation in the Court of Appeal. In *Hunt v Singh* [2023] EWHC 1784 (Ch) (“Hunt”) Zacaroli J (as he then was) considered the position where a company was faced with a claim to a liability such that its solvency was dependent on successfully challenging that claim. In *Hunt*, the company’s challenge to HMRC in relation to tax liabilities failed. As a consequence, although it would have been solvent had it been successful it was in fact unsuccessful and therefore insolvent at the time of the relevant transaction which occurred. Zacaroli J considered that the creditor interest duty would have arisen if and when the directors knew or ought to have known that there was a real prospect of the company’s challenge to HMRC’s determination failing. Pursuant to section 123(1)(e) of the Insolvency Act 1986 a company is insolvent if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. When evaluating the company’s future position, contingent and prospective liabilities are to be taken into account; *Re Cheyne Finance Plc* [2007] EWHC 2402. The issue as to how far in the future a court can look was

described by Lord Walker in his leading judgment in BNY Corporate Trustee Services Ltd v Eurosail-UK-2007-3BL Plc [2013] UKSC 38 at [35] and [37] when he said that once the court has moved beyond the near future any attempt to use the cash flow test is speculative, but just what the near future is depends on the circumstances. The duty to avoid conflicts of interest 94. S. 175 CA 2006 provides that: “(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

- (2) This applies in particular to the exploitation of property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity) ...
- (7) Any reference to this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.” MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 95. This statutory provision is founded on the principle explained by Lord Upjohn in Phipps v Boardman [1967] 2 AC 46 at 123 that: “[T]he fundamental rule of equity [is] that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict.” 96. RM did submit that in the event that English law applied that he was entitled to relief under Section 1157 CA 2006 which provides power to the court to grant relief in certain cases: “(1) If in proceedings for negligence, default, breach of duty or breach of trust against–
 - (a) an officer of a company, ... it appears to the court hearing the case that the officer or person is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case ... he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.” 97. RM had the burden of proving he acted honestly and reasonably (Re Loquitur Ltd [2003] 2 BCLC 442 at [228]). Whether a director has acted reasonably can be tested by asking whether they have acted “in the way in which a man of affairs with reasonable care and circumspection could reasonably be expected to act in such a case”; see In Re Duomatic Ltd [1969] 2 Ch 365; applied in PNC Telecom plc v Thomas (No 2) [2007] EWHC 2157.
- 98. Where a director has benefitted personally from the misfeasance, relief is almost certain to be refused where the company is insolvent; Re Marini Ltd [2003] EWHC 334 (Ch). Knowing Receipt: 99. For a person to be liable for knowing receipt it is necessary to establish that: (1) there was a disposal of the assets of the company in breach of fiduciary duty; (2) (3) there was beneficial receipt by the defendant of the assets which are traceable as representing the assets of the company; the defendant acted with knowledge that the assets are traceable to a breach of duty. 100. For the purpose of a knowing receipt claim property that is legally and beneficially owned by a company but subject to the fiduciary duties of directors is trust property (Ultraframe). A breach of fiduciary duty by a company director is sufficient to

found MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 101. 102. 103. 104. liability for knowing receipt. The personal liability of the recipient is dependent on the receipt of the relevant property and not on the retention of that property. There is no dispute that the Payment was made from the Company's assets, and that SV received the Payment from the Company. If I find that RM was in breach of duty, the issue to be determined will be whether SV had the requisite knowledge of RM's breach of duty in making the Payment to make it unconscionable for SV to retain the benefit of the Payment. In *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437 ("Akindele"), Nourse LJ (with whom Ward and Sedley LJJs agreed) held that the test of knowledge was whether the defendant's state of knowledge was such as to make it "unconscionable" for them to retain the benefit of the receipt. (see also *Byers v Saudi National Bank* [2022] EWCA Civ 43 at [15]-[19] ("Byers")). It is not necessary to establish dishonesty for it to be unconscionable for the recipient to retain the benefit of the receipt. The question is whether the defendant has a sufficient degree of knowledge of the breach of trust to make it unconscionable for him to retain the benefit of the receipt and to justify making him personally liable. It is sufficient that the recipient's knowledge is such as to affect their conscience to justify making them personally liable. Prior to *Akindele* the quality of the defendant's actual knowledge had been considered by reference to the *Baden* classification (*Baden v Société Général pour Favoriser le Développement du Commerce et de l'Industrie en France SA* (1983) [1993] 1 WLR 509 ("Baden")). This identified five categories of knowledge which include (1) actual knowledge; (2) wilfully shutting their eyes to the obvious; or (3) wilfully or recklessly failing to make such inquiries as an honest and reasonable man would make. There had been some doubt prior to *Akindele* about whether the requisite knowledge for a knowing receipt claim involving a commercial transaction (as here) extended to the *Baden* classification types (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (5) knowledge of circumstances which would put an honest and reasonable man on inquiry which involve questions of constructive knowledge.

105. When considering the question of the recipients' state of knowledge and the utility of the *Baden* classification in cases of knowing receipt, Nourse LJ expressed grave doubts about the utility of the *Baden* classification preferring a single test: "68. ... any categorisation is of little value unless the purpose it is to serve is adequately defined, whether it be fivefold, as in *Baden*, or twofold, as in the classical division between actual and constructive knowledge, a division which has itself become blurred in recent authorities.
69. What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to enable the court to determine whether, in the words of Buckley LJ in *Belmont No. 2*, the recipient can "conscientiously retain [the] funds against the company" or, in the words of Megarry VC in *Re Montagu's Settlement Trusts*, "[the recipient's] conscience is sufficiently affected for it to be right to bind him MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor by the obligations of a constructive trustee". But if

that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.

70. For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt. A test in that form, though it cannot, any more than any other, avoid difficulties of application, ought to avoid those of definition and allocation to which the previous categorisations have led. Moreover, it should better enable the courts to give common-sense decisions in the commercial context in which claims in knowing receipt are now frequently made, paying equal regard to the wisdom of Lindley LJ on the one hand and of Richardson J on the other.” 106. The approach to the test to be applied where there is actual knowledge or constructive knowledge is addressed in Lewin at 42-075 “There is support both for the view that knowledge should be confined to types (1) to (3) knowledge [Re Montagu’s Settlement Trusts [1987] Ch (“Re Montagu”) and Lipkin], and for the view that knowledge extends to types (4) and (5) knowledge. [Baden] ... knowledge within types (1) to (3) of the Baden classification suffices to affect the conscience of the defendant but knowledge within types (4) and (5) may not. If it is shown that the defendant had actual knowledge of the trust and of all the circumstances which made the payment or transfer a breach of trust or fiduciary duty, it is no defence that the defendant was subjectively unaware that as a matter of law those circumstances involved a breach of trust or fiduciary duty. But proof of such knowledge is not necessarily sufficient in order to satisfy the test of unconscionability. It is not enough to show that there was merely a muddle in the distribution of assets from a trust involving the oversight of provisions contained in the trust instrument, nor that the defendant became involved in transactions of an unusual kind under which he received a much higher rate of interest than was commercially available.” 107. Lewin describes the position in the context of commercial transactions (as here) at 42- 076: “One view which has been expressed is that in the context of commercial transactions knowledge within types (1) to (3) of the Baden classification is requisite. The alternative view, MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor which now prevails in England and Wales, is that, with qualification, types (4) and (5) knowledge are sufficient. The qualification is that the inferences which should be drawn and the inquiries which should be made must be considered in the particular context involved and it is only if in that particular context the inquiries in question ought reasonably to be made that the defendant may be fixed with knowledge. Further, types
- (4) and (5) knowledge suffice in the commercial context, only if, on the facts actually known to the defendant, a reasonable person would either have appreciated that the transfer was probably (as distinct from possibly) in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust.”

108. Ms Stonefrost submits that in a commercial context the difference between claims based on categories (1) to (3) and (4) and (5) is that the test for the latter two types of knowledge is higher requiring the court to be satisfied that a reasonable person with the facts known to SV would have appreciated that the Payment was probably made in breach of trust or in breach of fiduciary duty rather than the lower test for categories (1) to (3) only requiring possibly. 109. 110. The Baden classification is often still used when considering claims in knowing receipt despite Akindele but is not regarded as comprehensive nor are the precise boundaries between the different types of knowledge often easy to determine. Indeed, following Akindele it arguably forms no more than a useful cross check when considering the overall question of unconscionability. In *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) Stephen Morris QC sitting as a Deputy High Court Judge considered the approach to take in a knowing receipt claim relating to a commercial transaction following Akindele. Having noted that, Lewin and Goff & Jones at the time still considered the Baden classification to be useful in distinguishing different types of knowledge.
111. He continued at [132] “In my judgment, the position, in a commercial context, can be summarised as follows:
- (1) Baden types (1) to (3) knowledge on the part of a defendant render receipt of trust property "unconscionable". It is not necessary to show that the defendant realised that the transaction was "obviously" or "probably" in breach of trust or fraudulent; the possibility of impropriety or the claimant's interest is sufficient.
 - (2) Further Baden types (4) and (5) knowledge also render receipt "unconscionable" but only if, on the facts actually known to this defendant, a reasonable person would either have appreciated that the transfer was probably in breach of trust or would have made inquiries or sought advice which would have revealed the probability of the breach of trust.” MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
112. Although the approach by the parties was to use the Baden classification to make submissions the judge rightly used it as a cross check with the focus of his assessment following Nourse LJ's guidance in Akindele to approach the question by reference to ultimately the single test of unconscionability. 113. In *Group Seven Limited and others v Nazir and others* [2017] EWHC 2466 (Ch) Morgan J having considered the passage from Akindele set out above, was referred to how the single test had been applied in *Armstrong* which he noted was apparently agreed by the parties. No one had submitted he should not take the same approach, and he was prepared to do so.
114. Ms Stonefrost submits that following Akindele the test is a single one of unconscionability and that the approach particularly in relation to commercial transactions has moved away from the Baden classification. The test to be applied is as set out in *Armstrong* which is to follow Nourse LJ's approach and determine whether the SV's conduct was unconscionable but with the assistance of the Baden classification.

115. Mr Clarke agrees that the approach is as set out in Akindele at [69] but argues that it is not enough for the JJs to say that SV “could have known”. The court has to be satisfied that SV’s knowledge was such that his conscience was affected and consequently it was unconscionable for him to retain the benefit (Re Montagu). I accept that general principle, but it does not change the overall approach to the exercise. 116. The test for knowing receipt was considered more recently in Byers at [82] Lords Briggs view was that Nourse LJ’s test of unconscionability was too uncertain saying: “... so flexible a test of the requirement for knowledge wrongly elevates unconscionability from an equitable objective into an unruly and unpredictable test for liability, with unacceptable adverse consequences for certainty in resolving issues as to priority of title to property.”
117. And Lord Burrows at [101] considered Nourse LJ’s terminology to be unhelpful: “[Nourse LJ’s] terminology of “unconscionability” has unhelpfully obfuscated the answer to the important question of whether the required knowledge for knowing receipt extends beyond actual knowledge to include constructive knowledge. That question is one of law to be decided once and for all and the answer to it does not vary depending on the facts. But resolution of that question is not now before us and we have heard no submissions on it.”
118. In Byers Lord Briggs and Lord Burrows favoured an approach of having a distinct separate test for knowledge but left the articulation of that test for another day. This leaves the question of whether constructive knowledge will suffice to be considered consistent with the existing authorities. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE
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119. Mr Clarke submitted that the claim in knowing receipt against SV is unusual. He accepts that if SV had received payment from the Company knowing he had done nothing for the Company and his work was entirely unrelated that a knowing receipt claim would be possible (see International Sales and Agencies Ltd and another v Marcus and another [1982] 3 All ER 551 (“Marcus”)). Here he says it is clear that SV had done work for the Company and/or reasonably believed the work he had done was for the Company. The JJs’ position is that the work if any undertaken by SV was not for the Company as set out below. 120. There remained a dispute between Ms Stonefrost and Mr Clarke about the scope of the claim and the particulars of knowledge relied on and/or whether the claim as pleaded went far enough to enable the JJs to rely on the full range of the Baden classification.
121. Mr Clarke argued that the JJs must be held to the particulars of knowledge at [27] to [29] RAPOC and [15] to [17] Reply and should not be permitted to range outside them when seeking to advance their argument that it was unconscionable for SV to be entitled to retain the benefit of the Payment, relying on Lewin [42-071]: “Allegations of knowledge, especially allegations of knowledge involving want of probity, must be properly particularised in the statement of case. If it is alleged that the defendant knew or ought to have known of the matters in question, then the allegation must be supported by particulars which differentiate between the case based on what the defendant knew and the case based upon what the defendant ought to have known. And if the statement of case does not specifically

allege want of probity on the part of a defendant, it is not open to the court to find the defendant guilty of want of probity on the basis of a general allegation, unsupported by the particulars, that he knew or ought to have known of the matters in question [Lipkin Gorman v Karpnale Ltd [1989] 1WLR 1340 (“Lipkin”)] As the law now stands it will not suffice to plead what the defendant ought to have known. The statement of case and particulars should plead what the defendant is alleged to have actually known and set out any facts and matters upon which the claimant relies as showing that in view of the knowledge pleaded retention of the receipt was unconscionable.”

122. Ms Stonefrost argues that there is a difference between proof of knowledge and degree of knowledge as explained in Lewin at 42-072. “A distinction needs to be drawn between the degree of knowledge which has to be established on the one hand and proof of that knowledge on the other hand. Knowledge may be proved affirmatively or inferred from circumstances. The persuasive burden of proof, on a balance of probabilities, falls, of course, on the claimant. But the court will infer knowledge if the facts established indicate on a balance of probabilities that MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor the person sought to be made liable had the requisite degree of knowledge.” 123. The particulars relied on are set out in the APOC [28]: PARTICULARS OF KNOWING RECEIPT
- (1) The Second Defendant knew the features of the agreement that he had made with the First Defendant to provide the Consultancy Services to the First Defendant for the purpose of helping the First Defendant with regard to the establishment of and business development of an entity that was intended to conduct investment advisory business. (2)The Second Defendant knew or appreciated that he had not made an agreement with the Company that he would be paid for the Consultancy Services as the Company did not exist at the date when the Second Defendant agreed with the First Defendant to provide the Consultancy Services. (3)Before the Second Defendant sought payment for the Consultancy Services he knew or appreciated that Arcturus and not the Company had been incorporated for the purpose of conducting the investment advisory business in respect of which the Second Defendant had provided the Consultancy Services. (4)Before the Second Defendant submitted the Invoice to the Company, he knew or appreciated that the business he intended to be conducted by Arcturus was not the same business as that purportedly conducted by the Company and/or knew that the business was to serve as an investment advisory firm for a new PCC to be formed in the Channel Islands.
- (5) In these circumstances, the Second Defendant submitted the Invoice to the Company when he knew or appreciated that: (a)The agreement for the provision of the Consultancy Services was made with the First Defendant and not with the Company; (b)The Consultancy Services were for the benefit of the First Defendant and/or Arcturus; (c)The Company had no legal obligation to pay for the Consultancy Services and/or (d)The Consultancy Services were not for the benefit of the Company.”

124. By their Reply, the JLs pleaded in addition that if SV proved that he undertook work that benefited the Company he must also satisfy the court that the requirements of a MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor claim in quantum meruit were met. However, it seemed to me that the question of quantum meruit would only arise, if at all, if SV had the requisite knowledge to found a claim in knowing receipt. 125. The JLs included further particulars to support those set out in the APOC [28] at Reply [17]: PARTICULARS (1)The Second Defendant requested payment from the First Payment of £975,000 on 7 October 2014, including £525,000 to his Coutts bank account in London, Ref: Arcturus Investment Advisers. (2)Second Defendant drafted an invoice dated 13 October 2014 and addressed that invoice to Arcturus for work done to establish and develop Arcturus (the Draft Invoice). The amount was £975,000. The Second Defendant asked that sum to be paid to the Second Defendant's bank account in London with Coutts. (3)The Second Defendant amended the Draft Invoice to change the company to be invoiced from Arcturus for the work stated to have been done for Arcturus to Argyle UAE Limited". 126. The court must first determine whether SV had the requisite knowledge in relation to RM's breach of duty in respect of the Payment and then the real question is one of unconscionability particularly in relation to commercial transactions. In the absence of any further guidance the appropriate course is to follow Nourse LJ's single test to and determine whether SV's state of knowledge was such as to make it unconscionable for him to retain the benefit of the Payment taking a common-sense approach in light of the commercial context using the Baden classification by way of a cross check. Defences:
127. A thumbnail sketch of the statements of case is set out above together with the legal principles for the claims made against each of RM and SV. 128. To provide a framework for the factual chronology it is helpful to understand how the defendants' positions developed in relation to the Invoice and the Payment over time.
129. Based on SV's interview by the JLs in 2019 and the contents of the Invoice itself, the claim was advanced on the basis that SV had agreed with RM in October 2011 on the basis of a handshake that he would be paid £150,000 a year for his work when the business was successful, up and running, and made some money. He explained to the JLs that the payment was contingent and/or the work was speculative, and he was taking a risk that the business would not make any money, and he would not be paid. SV had always been clear that the agreement was contingent and that remained his evidence at trial. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
130. He explained to the JLs that he had no equity in the new business and was not going to be actively involved. The lack of active involvement was certainly supported by the contemporaneous documents. There was a lack of clarity and/or a considerable element of confusion in his interviews as to whether that was work for RM, the Company or Arcturus. The Invoice was addressed to RM at the Company but referred to Arcturus in the description

of the work and referred to investment advisory work. The combination of the interviews and the Invoice itself led the JLs to plead that SV's agreement was either with RM or Arcturus not the Company to undertake investment advisory business at £150,000 per annum. SV and RM's position was that the work SV did was for the Company whether before or after incorporation and was not investment advisory business. 131. SV's original defence described the payment arrangements as being contingent on the success of the new business enterprise. By the time of the re-amended defence the version of the agreement relied on by SV was: "5. The parties discussed how the Second Defendant would be paid for the Services to the new company, and agreed that:

- (i) payment would be contingent on the new company being successful, in which case; (ii) the new company would pay the Second Defendant £150,000 per year for the Services when invoiced by the Second Defendant."
132. At that stage "successful" was said to mean: "'Successful" in this context was a loose concept. The parties simply understood that the Second Defendant would be carrying out work for the Company knowing that he might not be paid since the project might not come to anything: the Company might not even come into existence. The Second Defendant trusted that if the Company did come into existence and he did work for the Company, he would be paid by the Company." 133. This remained SV's position until the re-re amended defence ("RRAD") dated 10 July 2024 when the terms of the agreement were amended to: "5. The parties discussed how the Second Defendant would be paid for the Services to the new company, and agreed that:
- (i) Payment would be made once the new company began to carry on business; (ii) the new company would pay the Second Defendant at the rate of £250,000 per year for the Services."
134. This was an entirely different agreement to the one discussed with the JLs in 2019, and different to the one relied on in the earlier versions of the defence and different to MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor the version initially advanced in SV's trial witness statement dated 12 April 2024. Although SV corrected his witness statement when he was sworn in to accord with the RRAD the changing nature of his recollection of what he had agreed did not assist him or RM.
135. When the change in the defence was put to SV in cross examination he responded: A. I think the number 250,000 had been discussed in Switzerland. I think the 150,000 was where we ended up at the time the invoice was finally settled on to be paid. They had clearly been successful. They had clearly done well in my mind. I could see the success that Mr McKellar exuded. So I knew I had done the work for Argyle UAE, categorically. I knew that we had an agreement that I would be paid.
136. He explained that when he was told by RM that it was time to invoice that there was a negotiation, and the figure eventually agreed upon for the Payment was £525K as being a figure satisfactory to both partners. There was no evidence that they had ever discussed an

annual figure of £150,000 and it was not recorded in any contemporaneous documents. It was at odds with RM's recollection of any annual figure which ranged between £125,000 and £130,000. But £525,000 did coincidentally equate to 3.5 years at £150,000 which was the period from 2011 to November 2014.

137. However, despite his evidence about the annual figure, RM explained the agreement with SV in his amended defence: "8. ...Mr Verity agreed to work as a Consultant on a contingency basis from 4 June 2012, following the set up of Argyle UAE Limited, which also included related work directly relevant to and for the benefit of Argyle UAE Limited for the period from January 2011 until the payment of his invoice in November 2014, the whole of which work was conducted entirely outside of the United Kingdom. Mr Verity set his rate for the work as was appropriate for the value of the work to be conducted and the level of clearing required. It is for Mr Verity to comment on the full extent and manner of work conducted as this is outside of my knowledge as to every meeting and communication made by Mr Verity where I was not directly present or involved."
138. RM confirmed the contingent nature of the arrangement with SV and that the pre-incorporation work was to be paid for by the Company. However, his defence was not that there was an agreed rate with SV but rather SV was to set his own rate. RM did not know the extent of the work that SV had undertaken to justify any fee. Whether the work was undertaken for the Company or Arcturus it was not obvious to me how such an arrangement would have been consistent with his directors' duties. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
139. RM accepts that the Company had not undertaken any trades at all by the time of the Payment and had not carried on any business. Indeed the Company never in fact undertook any trades before it was wound up in 2018. It was difficult to reconcile SV's pleaded agreement that the Payment was to be based on the success of the new business or the new business simply starting to do business with the making of the Payment in November 2014 in those circumstances. There did not appear to be any basis for the Payment.
140. Although neither SV or RM's position in these proceedings was that the agreement was with Arcturus, it too had not been successful, nor did it appear to have done any business by 12 November 2014 having only been incorporated on 19 September 2014. There would therefore have been no basis for it to make any payment either.
141. RM's evidence as to the nature and extent of any agreement with SV whether in 2011 or later and whether with the Company, RM or anyone else was fluid. RM's evidence appeared to be inconsistent with SV's position. He explained the basis for the Payment in 2014 as follows: "... I paid him for the work that he did at the time that I considered reasonable when he put in the invoice because we needed him to continue with his work so that we could sell the SBLCs to the people he introduced in New York. He got paid for that." Factual Narrative: 142. In about 2010 RM was contacted by a former client, MEO which was having difficulties

monetising/obtaining security against BGs and SBLCs. Sellers of unrefined products such as MEO would be provided with BGs or SBLCs by their buyers to protect or secure the future/deferred payments for those products. The BGs or SBLCs could be called on if the payments were not made by the maturity date. To ameliorate the delays in receipt of the payments the sellers would use the BGs or SBLCs to secure loans for working capital and/or sell them at a discounted rate. Banks in the UAE were no longer willing to do that and MEO was looking for a solution.

143. MEO introduced RM to Sunil Rao at Barclays in Dubai. RM discussed MEO's problem with PS who then had discussions with Sunil Rao about the possibility of acquiring BGs from Barclays and about how settlement might work. How settlement might work would be an ongoing issue through into 2015. These discussions were the genesis of the idea to find a way to trade BGs and SBLCs in the wider market ("the BGs business").
144. At about the same time RM met Mike Boyd through the Media Investment Fund and film funding work RM was doing through Argyle Gibraltar. Mike Boyd introduced RM to SV. 145. SV explained that he had retired from banking in about 2007. Like RM he appeared to have a number of ongoing business interests and projects including investing in a film script analysis business. SV had returned to banking with BNYM in July 2010 where MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor his role was to develop strategic relationships with specified banks or institutions. Both he and RM relied on SV's BNYM remuneration package which included a salary of £240,000 and a bonus in the region of US\$800,000 to US\$1,000,000 to seek to support the Payment. It did not. Nor did RM's argument that he had negotiated SV's fee down to be about half of his usual salary. Not only was SV still being paid by BNYM throughout the period, but this argument/submission/evidence did not appear to have any factual basis and did not in any event make any sense. However, the level of remuneration that SV received would have some relevance to the question of knowledge and unconscionability. SV was receiving his remuneration package from BNYM at the same time as he says he was working as a consultant in parallel for RM/the Company (or on the JLs' case Arcturus) and leveraging his contacts at/for BNYM for the benefit of RM/Amstel. SV said he did not know/did not seem to have considered whether this was permitted under the terms of his employment with BNYM. Ultimately that was a matter between him and BNYM, but it may be a reason why he considered there were limits to the extent of his involvement with the BGs business. In about early 2011 RM and SV discussed how to solve the BGs and SBLCs issue and how to make money from doing so. RM's idea for the BGs business was to open up the market to the global investment banking market so that the UAE BGs and SBLCs could be traded – he was particularly interested in the possibility of using New York and consequently tapping into SV's connections in New York through BNYM. SV's role was both to make the introductions to banks who might be interested in the BGs business but also to make introductions to banks or clearing platforms who might be able to provide execution and settlement services for the BGs business. SV explained to the JLs in 2019 that he would travel around the world undertaking his role for BNYM and RM would travel to join him so

that SV could also introduce RM to SV's contacts. The meetings were set up and looked like they were BNYM meetings (because they were) entirely consistent with SV's role in BNYM. The clearest evidence of this was meetings in April and May 2012 with Amstel (see below). SV and RM explained the BGs business would have trade values of US\$100m plus so that even a small commission/margin would provide a good return. However, this meant that any structure for the BGs business had to be designed in a way that enabled a commission/margin or profit to be extracted by it. The solution was a structure that enabled RM to interpose an entity to act as an intermediary enabling a profit or margin to be extracted from the trade on its way between the UAE and New York. 146. 147. 148. 149.

150. What they were trying to achieve was most clearly explained by PS: "Q. Did Sunil Rao in Dubai ask that settlement be set up in a company which was in the UAE? A. Yes. Q. To capture the spreads between the purchase from Dubai and the sale to New York, it was necessary to have an MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor intermediary buyer and agree a settlement procedure between the three parties you mentioned? A. Yes. Q. So that was correct, it was necessary to have essentially an interbank dealer or a party sitting in the middle? A. Yes, bearing in mind we were talking about buying from Barclays Dubai and selling to Barclays in New York. If they knew that they were buying and selling to one another, then they would just cut us out of the trade completely. Q. So the intermediate buyer was necessary to capture the profits between the sale price and the buying price? A. Definitely to capture the sale price, but it also makes the trade anonymous because the buyer doesn't know who the real seller was. Q. Otherwise the New York bank would simply buy directly from Dubai? A. Yes and there would be no trade." 151. 152. 153. In about September 2011 SV introduced RM to Ian Gass of BNYM. In a series of emails involving SV, RM and Ian Gass around 21 September 2011 the idea for the BGs business was mapped out. Throughout this period RM, SV and Mike Boyd were discussing a number of different projects or opportunities not just the nascent BGs business. In 2011 one of RM's ideas was to form a new business through Argyle Gibraltar using a PCC structure with BNYM as trustee and Argyle Gibraltar as the end investor but not the entity through which any business was to be traded. RM intended to set up a BVI company with an administrator trustee in Gibraltar. Argyle Gibraltar would acquire the BGs from Barclays in the UAE. The JLS submitted that this description of the proposed structure in 2011 supported their contention that Arcturus was the entity created for the purpose of undertaking the BGs business. Whilst a possible PCC structure was being discussed in 2011 it is clear from the factual narrative as set out below that Arcturus was not that entity but instead an entirely separate enterprise set up by Dr Smith. RM hoped to use Arcturus not for the Channel Island PCC structure that Dr Smith hoped to set up to undertake matched trades, but to enable RM to finally resolve the settlement issue with the BGs business by enabling SWAPs/MTNs to be used to convert the BGs into something more widely tradeable. That idea did not emerge until about September 2014, some years in the future in 2011.

154. On 11 October 2011 RM explained that “Ian is to come back to me with costings for set up of a new PCC (to reduce the Due Diligence on the newco) so that is the latest MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor sitrep.” SV invited RM and Mike Boyd to Switzerland for the weekend of 14 October 2011 to discuss finalising their plans: Would also be REALLY helpful if you could show me the documentation flow of the original transaction you completed a few weeks back. I won't need to keep any of it but will need to be sufficiently clear about the specifics and validate that I 'know the customer' and the nature of his business. Can you possibly bring this stuff with you? Obviously I also think it would be a good time to also agree how we are going to manage this going forward and share in our collective success!” (my emphasis) 155. SV's email was consistent with his evidence that he was not involved in the details of the BGs business but just needed enough information to make the introductions and then leave RM/Amstel/PS to take things forward. He was also keen to understand what benefit he would get from his involvement with the BGs business. Despite SV's significant remuneration package with BNYM he appeared to have a requirement for additional funding throughout 2011 and 2012 in part it appears to assist with funding his son's projects.
156. On 18 October 2011 RM emailed Ian Gass and his team saying: “... the way forward is for me to arrange for the PCC/Corporate Structure. Set that up at Barclays. Have that funded and administered. Then when I am in that position arrange for the Account in BNY for the Euroclearable securities to be traded. So I will get on with that now and come back to you when we are done.” 157. 158. The structure for any BGs business was still very unclear, whilst Amstel could trade Euroclearable securities through Pershing BGs were not Euroclearable. Again, it was only some years later when the SWAPs idea emerged in 2014 that this appeared to be a possibility. Following the weekend in Switzerland in an email dated 18 October 2011 @ 00.54 SV summarised the steps to establish an operating framework and set out tasks for each of SV, RM and Mike Boyd. The anticipated transaction cycle set out in the email identified where and how and how much it was intended to extract as a margin/profit if the various difficulties with trading the BGs could be ironed out. This email included a proposal that the New Co be set up “as a Dubai company with a Dubai bank account at Barclays. Ownership RM 33.3%, SV 66.7.% (holding MB's one third stake on trust). RB to organise asap.”.
159. RM's evidence was that at this stage the intention was still that Argyle Gibraltar would be the company through which the BGs business would be undertaken using Amstel and its links with Pershing and a PCC structure and a new BVI company with MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor the BGs business providing in effect the core funding for all the other projects through that structure. 160. It was not clear when the plan changed. Despite references to Dubai in emails in October 2011 the contemporaneous documents confirm that RM took steps to set up New Co as a BVI company from about November 2011 until late April 2012. RM's evidence was that his plan only changed when Sunil Rao told him that the

BGs business had to be undertaken through a UAE company. On the basis of the contemporaneous documents that discussion took place in late April 2012. The JLs noted that there were no contemporaneous documents to support RM's evidence that a UAE company was needed whether from Sunil Rao or anyone else. 161. The proposal in about October 2011 was that New Co would be the vehicle for the BGs business which would be owned equally by RM, SM and Mike Boyd but the overall structure was still very fluid and other projects were still being discussed: The spread in Barclays is to be divided 50% to [Argyle Gibraltar] for non media projects (of which 25% of [Argyle Gibraltar] Non Media Projects Share goes to Amstel) - and the balance 50% goes to [New Co] - which is owned one third each between us... .. The combined total of [Argyle Gibraltar] Non Media and [New Co] amounts is held at Barclays until the total of all such payments exceeds Euros 100M. I am not suggesting we keep every penny from day one like this. I think we should pull out our salary and an initial payment from the first trade - say Euro 1M each to cover salary and expenses for the first year - and then let the capital build up from there until it reaches Euro 100M. (my emphasis) 162. SV says this supports his case that it was agreed that he would be paid by the New Co for the work he was already undertaking, when and wherever New Co was set up, once the first BGs trade had been completed. Whatever the strict legal position in relation to pre-incorporation work, it is clear that SV expected to be paid by the New Co for work done prior to its incorporation in due course. RM also said this was what had been agreed. SV and RM say that the Company when it was incorporated was New Co. RM also expected them all to receive a payment when the New Co did its first trade though that appeared to be in relation to salary and expenses for the first year and looking forwards from June 2012.

163. On 19 October 2011 SV emailed RM and Mike Boyd @16.21: "Agreed re [Argyle Gibraltar] split 50:50 until we have got €100MM in our account - which would presumably be approximately the 55([NEW CO]) 45 (Your retained share of [Argyle Gibraltar]) split initially. I thought we agreed in principle to then continue on that basis until [NEW CO]'s MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor retained earnings had grown to €100MM (at which point your [Argyle Gibraltar] share would be put to Aston Martin etc) and then we would essentially be equal shareholders in [New Co] which would be the only beneficiary? Is that your understanding? Agree re initial withdrawal of consultancy fees/salary - did we finalise on £250K Pa each to be invoiced and subject to individual tax liabilities based on circumstances. Also am comfortable with something like an initial drawing of €1MM each. (my emphasis) 164. This is the source of the £250,000 figure relied on by SV in his RRAD. The contingent or ambivalent nature of the wording "did we agree" does not obviously support the existence of a finalised agreement in October 2011. The submission that because RM had not rejected SV's email one could assume an agreement in those terms did exist was not at all compelling. Further, the subsequent contemporaneous documents do not support the existence of an agreement in October 2011 for any particular level of consultancy fee or drawings. That was only reinforced by SV's own defences to this claim none of which

reflected this email. But it was not in any event RM's understanding. He responded @ 19.59. He explained what he intended and what he thought had been discussed over the weekend: "The 45M is for the Aston project. They require Euro 160M initially. I did mention this over the week-end and the funding required. So what I am going to do is put the 45M into the 100M and then take out 45% until it reaches 160M. THEN I will be fully into the [New Co] project. Otherwise I am taking out 45% all the time and it takes longer to get to the 100M which is in none of our interests. But of course while I am not taking out the 45% Aston has no money so I want to compensate them in the 100M investment instead. Hope that is all clear. There are several reasons for this. The main one is I want to do the Aston Project personally - it has been a long standing promise to the owner. Second is I am being fair and fulfilling my obligations to Amstel, without whom we would not have this opportunity. I am being very generous to Amstel but there is more than enough to go around here so I would feel comfortable with this, both legally and more important, morally if I did not split the initial investment and fund the Aston Project. In doing so I will have done right by Amstel which have supported my company for several years now. Without them I would not be talking to Barclays at all so we have to put this into the equation. I have sort of assumed the other film projects of [Argyle Gibraltar], the two projects totalling Euro 30M I mentioned, I am putting into my share of [New Co] returns because I would MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor appreciate your help in getting this out into the cinema with your studio connections. But the Aston Project is not media and I have to keep it separate. Once the Aston Project is funded - so once the 45% return gets to Euro 160M - then assuming we all get along and Mike keeps the shorts wearing to a minimum - then I am committed to NFW full time. I want to grow the [New Co] fund to about Euro 2B that I mentioned, because I think that is roughly all we will get from the trades (it may be more it may be less, but for the time being let us assume that is realistic) then we proceed along the lines of 1B in the "Mike" managed investments through the PCC into the various non media funds - and 1B into the "Rob" managed film and media fund investments, but we call agree the films etc. I think this is what we have agreed already." 165. 166. 167. The concept of the BGs business was still part of a broader discussion around a number of different projects and initiatives being discussed between RM, SV and Mike Boyd. RM ignored the question of remuneration entirely. In evidence RM said that the £250,000 related to something entirely different. What this email does suggest is that RM intended to kick the New Co project down the road whilst he progressed some other projects which SV was not involved with concluding "I think this is what we have agreed already." RM explained that this was "just a generic discussion", and he did not recall it having anything to do with the Company. Ms Stonefrost noted that there was no evidence of any response from Mike Boyd. SV accepted that there had been a broader discussion including film financing, the Aston Martin project and the funding for those projects and that the structure discussed in October 2011 did not proceed. I do not consider that these email exchanges record an agreement that SV would be paid £250,000 per annum at all let alone on the particular terms pleaded by SV. The evidence supported by the contemporaneous documents confirms that at this stage there was a broad concept of a

BGs business which was not fully formed and not yet capable of being implemented. The proposed structure was to create a New Co which RM intended to be a BVI company which would be the holding vehicle using a PCC structure. The underlying core idea was that the BGs business would fund the other projects. SV accepted that the original proposed New Co idea morphed into the Company which did not involve Mike Boyd. He and RM maintained that he was a consultant to the Company in relation to the BGs business and that covered the work he had undertaken since 2011 in relation to that BGs business. 168. Paragraph 16 of SV's trial witness statement recorded that the 19 October 2011 email demonstrated that "we appear to have agreed my consultancy fee" at £250,000 per annum. That was equivocal at best and not consistent with the agreement he told the JLs about or his pleaded defence until the RRAD. It was not consistent with or supported by the contemporaneous documents nor RM's evidence. SV was unable to MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor articulate clearly or consistently what he said had been agreed by 19 October 2011 in relation to his consultancy fee. SV was certain that he was entitled to be paid for work he had undertaken for the BGs business but that any payment was contingent or conditional on that BGs business getting under way in some sense. It was all entirely speculative in 2011.

169. Whilst it was clear that SV understood that he had agreed with RM that he would be paid by whatever structure or entity took the BGs business forward in due course I do not accept that there was ever any agreed annual consultancy fee in any particular amount. That is not supported by the contemporaneous documents nor by SV or RM's evidence. 170. There remained a concern about how to ensure that the profit or margin could be extracted without alerting the banks to the possibility of them undertaking the BGs business direct and cutting out the intermediary. Unless that could be achieved the BGs business was not going to be remunerative at all. On 23 October 2011 @ 21.21 SV noted: "This route clearly has the advantage of 'mystifying' the process so no-one can join up the dots, thereby protecting our ongoing opportunity."
171. He continued setting out an alternative route: "I have an alternative approach which would include effectively selling the [BGs] directly to a select group of investment banks (who would be prepared to sign a commitment to both [BNYM] and [New Co/Argyle Gibraltar] not to approach any oil producer introduced to them under this program – but [Mike Boyd] remains (reasonably!) concerned that this will be impossible to enforce. This advantage of the bank approach is that it is simple, [BNYM] would be providing them the funds to purchase the BG's and if they tried to disintermediate us by going to MEO we would find out as they would be talking to you!"
172. RM considered that the alternative proposal risked removing the protection/opportunity to make a commission/fee for Argyle Gibraltar or New Co. There was still no certainty of structure with Argyle Gibraltar still an option.

173. At this stage there was an idea that Insight Investment, a BNYM subsidiary, might be able to help. SV introduced Alex Veroude of Insight Investment in November 2011.
174. On 22 November 2011 @ 21.50 SV emailed RM “Any update re company set and bank account...How large do you think the first transaction will be?” On 23 November 2011 @ 12.28 RM explained: “I spoke with [Sunil Rao] in Dubai yesterday. The new company is well underway. He is also arranging through MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Barclays the local licence needed for the company to be able to trade securities. I have agreed to fly down to meet him next week once it is all done to go through the transaction with him. ... I have to agree with [Sunil Rao] just how this is going to work in practice through [Argyle Gibraltar]/Amstel/ [New Co] when I get there, so nothing for Alex to do at the moment. All going to plan. MEO is bringing in the assets needed for us to start into their account. All cleared through by their bank officer (and verified to me by their banker). Amstel primed and standing by. So nearly ready.”
175. By January 2012, New Co had still not been incorporated. RM was progressing a trade of his own. He told SV: “we are about to close our first trade” ... “we are closing and that should release a lot of funding imminently.” It was not clear who “we” was in that context. Although RM clarified in early March that the trade was not part of the BGs business this was one of several opaque emails which gave the impression that the BGs business was progressing. These emails not only reinforce SV’s peripheral role and lack of knowledge about or involvement in the day-to-day progress of the BGs business but provide some explanation for his later belief that the BGs business had got going by 2014.
176. On 1 March 2012 Mike Boyd chased RM (copied to SV): “Sean ...also indicated that you were awaiting the money from the trade(s). ...I'm not trying to be a pest, but if the current status is that the trade(s) have been completed and that some of the profits are about to be distributed (as you have suggested to Sean, i.e., holding some back for set up expenses, etc.) I'd like to be able to state such to ...let them know when they might receive their funds from ME.”
177. RM responded (copied to SV) on 1 March 2012 @19.26 explaining: “I am waiting on funding from the first trade which is due this week. I have to move that to a couple of jurisdictions to set up the next trade and for payment to the funder's project that we set the first trade for. So I cannot make tomorrow as I want to get the money to the right accounts and move on to the next trade. Nothing is straightforward so I am staying on top of it hour by hour at the moment. I will let you know when the money is in and how much there is over so you can make your own decision ...”

178. Again, RM's email was opaque and gave the impression of progress in respect of the BGs business. Mike Boyd was puzzled by RM's response. On 2 March @ 14.40 he responded copied to SV: MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor "please allow me to summarize that which I think you are saying.
1. The first trade has been completed. Sincere congratulations!!
 2. You know the P&L on the first trade. However, the profit has not yet been sent to you. I assume it will be sent "momentarily". The share to [SV] and I will be forwarded to us --I believe you had indicated approx 500,000 Euros to each of us with the balance of the profit being used to set up [New Co], etc...
 3. You refer to a "funder". I had assumed that Amstel was "selling" the BG or mktable security to one of their institutional accounts...
 4. Given #3 above, I am confused as to why there is a "funder" and a payment to a "funder's project"? In other words, why didn't Amstel simply sell the instrument to a fixed income investor like an insurance company or asset manager? ...
 5. As long as we have BGs (or MTNs / ISINed notes deliverable via Euroclear), why would we ever need a funder with a project? ...
 6. BNY or the new beneficiary will require due diligence on [Argyle Gibraltar]. (This assumes that Argyle is the "seller" of the BG to BNY / the new beneficiary. The fact that the issuing bank will change the beneficiary and / or deliver the instrument does not change this fact that Argyle is BNY's counterparty;" (my emphasis)
179. Mike Boyd and SV clearly knew at the time that this trade had involved Argyle Gibraltar and Amstel not New Co (which had still not been incorporated). History does not relate why Mike Boyd believed he and SV would receive a payment of €500,000 from this trade which bore no relationship to the figures previously discussed in the emails. I note that some of the monies from the trade were intended to be used to pay for New Co's set up costs.
180. RM's response to Mike Boyd and SV was to explain that the trade was through Argyle Gibraltar and Amstel. It was not clear that this did not involve BGs business in its broadest sense even though it was not done through the new structure given the references in earlier emails to using Argyle Gibraltar for the BGs business in some way: "I am not doing this the way that was proposed with BNY previously as it took too long to set up. I am doing this my way, and they way I have traded in the past with Amstel, through a project finance route utilising a funder to purchase the instrument and then resell it. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor ...I was not able to wait to set up a new structure with BNY or anyone else for that matter... I am going to close two transactions and then discuss with Sean/BNY what they want to do in the circumstances. If that works, then fine ..."

181. On 20/21 March 2012 RM introduced SV to PS. PS asked for information about SV and to be introduced to BNYM and Insight Investments. SV explained to PS: “1) I work for BNY Mellon where I am an Executive Vice President and a member of the Operating Committee of the Company. I report to Gerald Hassell, our Chairman and CEO and have global responsibility for delivering the entire company to a small number of financial institutions. I am also responsible for investigating and developing some potential capital market solutions for our insurance market segment.
- 2) in the second of those capacities I was introduced last year to Robert McKellar of [Argyle Gibraltar], and we discussed the whole area of Bank Guarantees. I introduced Rob to colleagues in the Bank's Capital Market Division and also one of our Asset Management companies, Insight Investment where meetings were held in our offices in London.
- 3) ...the discussions held were to determine whether BNY/Insight stand ready to buy from Amstel bank guarantees issued by HSBC, Barclays, Credit Suisse, Deutsche or similar credits at or close to market price as introduced via [Argyle Gibraltar]/Amstel, subject to normal due diligence and closing formalities...
182. Consistent with SV using his BNYM role to leverage introductions and contacts, this email introduced SV in his BNYM role, developing potential capital market solutions for insurance clients of BNYM. And also consistent with that PS accepted in evidence that the meetings in 2012 that followed on from this email were introductory meetings to introduce Amstel to BNYM. 183. 184. Following PS's call with SV, Amstel staff had focussed on the BNYM/Insight Investment settlement stage of the BGs business. Again, this was not necessarily entirely inconsistent with the broader BGs business given the intention to find a way to close in New York but also was consistent with Argyle Gibraltar still being an option for the BGs business. The pressure to make a payment to SV and Mike Boyd was building. From the contemporaneous documents when analysed now it was unclear why or from whom they thought they were entitled to a payment. The contemporaneous documents make it clear that SV knew that any payment was conditional or contingent on the success of or at least the start of the BGs business. When seen together it is clear from the documents that that had not happened. But RM had implied that there had been MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor potentially relevant trades and there is no evidence that he took any steps to disabuse SV or Mike Boyd of the idea that they might receive a payment.
185. On 26 March 2012 SV said: “I have not told Mike about this development but as you would expect he is keen to know the status of the company set-up and any disbursement.”
186. RM explained that the New Co would not be set up until towards the end of April 2012 when Sunil Rao returned to Dubai. He would then open an account so that he could: “release some money and then take the company to Geneva to open up there.”

187. Again, history does not relate the source of this money or why SV or Mike Boyd would have any entitlement to any part of it. RM's email again gives the impression that at least one trade has been completed when he refers to "set up next contract for sale to BNY/Insight via Amstel" even though he had previously made it clear that the trade was not BGs business. These statements by RM again help to explain SV's later belief about the success of the BGs business and whether any business had started. 188. SV was hoping to obtain a cash injection from the BGs business to fund a project for his son. He asked: "Are you pretty confident we will have everything in place by end April as I really want to do this trade with my boy and give him the go ahead knowing that the funding is secure. Given that the first two trades are actually done I think it's pretty safe, right?" (my emphasis) 189. The reference to the first two trades came directly from RM's email of 2 March 2012 @ 16.06 where he referred to closing two transactions. SV persisted. On 2 April 2012 he emailed RM: "The funds that are coming shortly.... for my share can I use the new RAK company to effectively make a loan to my son rather than pay me in Switzerland. Are you comfortable using New Co this way?" RM responded: "no problems at all." Consistent with SV's position throughout he was not expecting any payment from RM personally but from the New Co. Again, RM does nothing to clarify the position with SV. He does not say there is no RAK company, there has not been any BGs business, nor that SV is not entitled to any payment.
190. On 11 April 2012 SV contacted PS to discuss how to progress the trading relationship between BNYM and Amstel and RM. The impression given by the email including its nature and tone was that SV was sending it with his BNYM hat on. RM's email of 16 April 2012 appeared to reinforce that intention or impression: "Just met Sean Verity of BNY Mellon for lunch. He can introduce you in NYC to their major buyers". 191. There followed a series of meetings in April and May 2012 set up by SV's PA at BNYM to enable SV to introduce RBS, BNYM, Credit Suisse, and Barclays to Amstel. SV, PS, RM and representatives of the various banks were invited to those meetings. The appointments were sent out by SV's PA at BNYM on BNYM appointment emails which were each headed "Invitation: [Bank/Institution]/[Amstel] MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Introduction – Pre Call". The meetings were hosted by BNYM. The potential trade in BGs was discussed. The key question was how to turn the BGs into a tradable instrument. The implication was that RM/PS had not yet found a way to do so.
192. RBS clearly thought they were being introduced to Amstel by BNYM and that they had received a pitch from PS at Amstel. For example, Shad Quraishi's email to SV on 26 April 2012 @ 11.02; "I think its an interesting concept. I need to discuss internally with our oil&gas team and capital markets group. You guys are a very important client so diane and I will push this internally and determine next steps." RBS asked SV for a summary packet of the opportunity from Amstel.

193. RM provided SV with an indicative Term Sheet for discussion. His email of 30 April 2012 @ 17.46 records: “We have based it on an HSBC BG but of course there may be other banks as issuer and other sizes, but we think it best that we focus on getting one deal under way and then we can adjust as we go along.” (my emphasis) “We” may well have been Argyle Gibraltar/Amstel, but it is not clear. However, despite RM’s earlier emails, this email is consistent with no relevant trade having yet been undertaken.
194. Barclays also showed some interest and asked for sample terms and BG documentation to allow them to consider it further. RM/PS/Amstel did not provide the information and did not respond to Barclays despite being chased up in November 2012. 195. SV explained that he considered that the meetings set up through BNYM were part of his consultancy agreement with RM and the Company explaining that it was part of his role to make the meetings happen. He explained that it was not as simple as setting up a meeting but that there was prior work involved in identifying the right person at the relevant bank and giving them some idea about the proposed venture. He disavowed any ongoing involvement in the relationships after the initial introductions. He consistently maintained in his evidence that this was the extent of his work despite RM’s evidence to the contrary and despite the description of his “services” in other documents including his RRAD. On the basis of the contemporaneous documents there is no evidence to support him having a wider involvement in the BGs business until after the Payment. The later descriptions of the extent of his services/work relied on by both the JLs and on his behalf appear to me to conflate work he undertook before and after the Payment. 196. SV explained why the meetings were set up as they were: “The I it that titled reason way was Amstel Securities was the corporate vehicle that had the trading relationship with Pershing at BNY Mellon. Mr McKellar had a 50/50% relationship with Argyle Limited, with Amstel, and it was Mr McKellar's idea on the bank guarantees, which I had explained to these people before these actual meetings were set up was what the purpose of the meeting was to discuss. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor It was not out of the blue. A lot of work had gone into identifying and finding the right person in the bank to meet and I pre-explained to them the purpose of the meeting, which was around the bank guarantees idea, because I thought they would find it attractive to have a new asset class to trade now the mortgage backed securities and everything else had gone to a bad place post the financial crisis. They were looking for new assets to trade. So that was the positioning.”
197. On 21 April 2012 SV sent RM his Swiss Bank Account details but there is nothing in the documents to explain why. He made an introduction to Simon Morrell of Prefequity LLP on 25 April 2012. But despite Mr Clarke’s detailed chronology there was very little evidence of SV doing much at all and almost nothing beyond the introductions through BNYM the majority of which had taken place before the Company was incorporated in June 2012. The introduction to Mr Morrell was a rare example of SV making an introduction not apparently through BNYM. 198. In about late April 2012 RM says that Sunil Rao explained that to trade BGs in the UAE there would have to be a UAE company. He introduced RM to Trident Trust to

assist him with setting up a UAE (RAK/RAKIC) company. There is nothing from Sunil Rao or anyone else to explain why this was necessary.

199. On 4 June 2012, the Company was finally incorporated under the Ras Al Khaimah Free Trade Zone Authority, UAE. RM was shareholder and director. Its registered office was in the UAE and Trident Trust was its Registered Agent. 200. In his defence RM said that “[SV] agreed to work as a Consultant on a contingency basis from 4 June 2012 following the set up of Argyle UAE Limited”. Ms Stonefrost pressed him on when this was agreement was made. His responses were vague and inconclusive culminating in: “Well, we were discussing the business back in 2010, when we went to the meetings in New York, about business that was going to be conducted out of UAE. So that was the business in which Mr Verity was helping as a consultant because he was making the introductions to that business.” The meetings in New York were the ones referred to above in April and May 2012 before the Company was incorporated.
201. RM explained that the initial discussions from 2011 included the BGs business and SV’s consultancy included the pre-incorporation work. The incorporation of the Company was the formalisation of all that had been discussed. Given the potentially significant returns from the proposed BGs business and SV and RM’s professional backgrounds the absence of any coherent document to explain what they (including Mike Boyd) had agreed weighs against them. There was not even an email exchange to record this apparent agreement with the Company. 202. Further given RM’s role as a director of the Company and his associated duties to the Company coupled with his background and experience the continued vagueness about SV’s role and the failure to document it at all, at least at the point at which the MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Company was incorporated, particularly if RM intended the Company to pay for pre- incorporation work weighs against him. 203. For completeness: there is nothing at all in the contemporaneous documents to suggest that there had been any change of plan and/or that there was any intention at all at this stage to set up an investment advisory business. There was no need to do so for the BGs business as proposed.
204. On 7 June 2012 @ 13.13 Mike Boyd emailed RM asking for his money. He understood that there were funds from executed trades held by either Barclays or Amstel pending the setting up of the Company and its bank account: “I spoke with Sean about a week ago ...He indicatd that you had completed all necessary documentation and payment for all work re: the establishment of the new Dubai company that would receive the fees from the Barclays (or Amstel??) account and that we should expect such without delay. ...May I assume that Sean's account will be credited with our joint share this week?” 205. There was still no evidence that any trades that may have been done by Argyle Gibraltar and Amstel or even RM personally related to the proposed BGs business. Nor was there any explanation of the basis on which Mike Boyd or SV would expect to receive any payment from those trades. This time RM did explain that the trades were unconnected with the Company and any payment

was ex-gratia. This seemed consistent with the other contemporaneous documents: "Once the company is formed an account will be opened in Barclays and I will arrange all funds to be directed there. To manage expectations here, I do not expect the company and the account to be ready before end next week. Also so that there is no misunderstanding here, the trade I have carried out did not involve Sean nor BNY. It was a trade I did through Amstel to our own exit for which my company will receive half the net profit. I have agreed with Sean that I will pay to him ex gratia funds to help out his situation and yours, but there is no ongoing transaction with Sean nor BNY at the moment. I want to be clear that there is still a lot of work and discussion still to take place with BNY - if they agree to be involved - so there is no working BNY platform until the basics are in place. I will send the funds to Sean after they are credited in Dubai and he will arrange with you to send payment on to you." (my emphasis) MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor

206. RM explained that although the Company never undertook any trades RM was still looking at other deals and opportunities not just with Argyle Gibraltar. RM says he had assumed that SV's requests were just requests to help SV and not because there was any obligation to make a payment at that stage. However, despite that RM emailed: "...I will get on with Argyle UAE Account opening so we can get some funds out." This again gave the impression that the Company had at least an entitlement to some of the funds derived from the other trades and that in some way some BGs business may have started. It was hardly surprising given RM's email that SV might think he had an entitlement to a payment from the Company for his work to date on the BGs business.
207. On 15 June 2012, SV emailed RM: "I know Dubai is closed today but per our discussion it would be ideal if the sterling equivalent of the \$500k could be in [his son's] bank account no later than Monday for onward transmission to his solicitor's client account for Wednesday... Could you please ask Barclays Dubai to provide all revenue details so that in the event of any problem we can have everything to hand to resolve immediately" 208. 209. It was not entirely clear if this was a loan or investment or ex-gratia payment or by/from whom. By 1 July 2012, SV had not received any funds. He asked RM to send an email from RM's Argyle Gibraltar email address to SV in terms drafted by SV. The email was intended to provide reassurance that US\$600,000 would be in his son's bank account by the following Wednesday. He asked RM to include reference to the time it had taken to set up the Company and that the money was their own. SV sought to correct his trial witness statement saying that the reference to Argyle Limited was intended to mean the Company. He said that he had believed the Company would be closing a trade which would generate income. Mr Clarke sought to rely on the draft email prepared by SV as evidence that SV expected the payment to come from the Company.
210. RM said that this was nothing to do with the BGs business or the Company. His evidence was that he and SV were still looking at a whole raft of deals and that SV knew that RM was looking at a number of transactions at this stage. He explained that SV would just request

monies from him to help his son and assumed that RM would help him out. There is some support for that in the contemporaneous documents but there is also support for SV's belief that there were funds generated by the BGs business and/or which would be transferred to the Company. 211. 212. From the contemporaneous documents it appears that the trade which was the source for any payment or loan had been done through Argyle Gibraltar. The reference to Argyle Limited (Argyle Gibraltar) in the draft email would therefore appear to have been correct. I do not accept the late revision to SV's evidence. It was inconsistent with the factual chronology and what he appears to have known about the source of the monies and that trade at the time he drafted the email. The reference to Argyle's account with Barclays Dubai was at best ambiguous. Although there is reference in the earlier emails to opening an account in Dubai, in fact the Company's only bank account when opened was with EFG Bank in Cayman until late 2014. There is no evidence that Argyle Gibraltar ever had a bank account in Dubai. The draft email therefore appeared only to demonstrate SV's lack of MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor knowledge about the progress of the BGs business and the Company or a lack of attention to detail. 213. The draft email is an example of where one has to consider who prepared it and for what purpose. SV drafted the email to say what he needed it to say to assist his son. I consider it to have very limited evidential weight.

214. RM sought to suggest that SV's role included looking at clearing and exit for the BGs business so he would have known there was no trade. I accept one of the reasons he was making introductions in April and May 2012 was to introduce RM to those who might be able to help with clearing and exit, but that is rather different from having any active role in those elements of the business. Nor does it explain the at best ambiguous emails that RM sent him which appeared to suggest that there had been relevant trades. SV's evidence was that he would not have been allowed to be involved in that level of detail by BNYM. But he also did not see that as his role in the Company, he explained the limits of his day-to-day involvement in the Company which was consistent with the contemporaneous documents. I accept his evidence: "My role was to make the introductions. Similarly, if I had made an introduction to someone in the wealth management side of the bank, I would never expect that department to share with me the knowledge of any investments or private work that had been done with their client. Similarly, here, with [RM] and [the Company] I was not a shareholder/employee or whatever of the company. I introduced him to the right people and expected him then to move it forward. I would not have expected to be given all the specific details going forwards." 215. SV did become more involved after the Payment and particularly following the death of Dr Smith in January 2015 and then more so after SV's retirement from BNYM in January 2016.
216. No money was paid to SV but the possibility of RM investing in SV's son's business remained. On 26 July 2012 SV asked, "How do you think we should articulate the rationale for the transfer?" RM proposed that SV explain the advance as follows: "we have agreed to make a private investment through you to close the [deal SV's son was doing] because of our

personal relationship and business matters we have worked on together which lead to [Argyle Gibraltar] closing a deal, so we are happy to make the advance out of those fees, hopefully due today.” Again, this refers to the Argyle Gibraltar trade not the Company and is consistent with the contemporaneous documents. RM was clear that there were transactions going on with Argyle Gibraltar not relevant to these proceedings, so he did have deals he was looking to close but nothing in relation to the Company. No payment/advance/loan was made in July 2012.

217. By July 2012, the Company had been incorporated for a month. SV had made some introductions to some potentially useful contacts in BNYM and to some banks in April and May 2012 for RM and PS/Amstel to enable them to both seek to work out how to make the BGs business work and to identify end recipients in New York. SV had made at least one other non BNYM introduction. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 218. 219. 220. In December 2012/January 2013 Ian Gass’s team at BNYM were looking into settlement for the BGs business. PS provided his thoughts on whether it might be possible for BGs to be listed as a Euroclear eligible instrument. There is no evidence of this idea being progressed any further during 2013 and 2014. The subsequent SWAPs idea was formulated by Dr Smith and RM in summer/autumn 2014. SV explained that from quite early on RM had been frustrated with Mike Boyd. On 14 December 2012 SV drafted an email for RM to send to both SV and Mike Boyd which proposed reaching a full and final settlement in return for an ex-gratia payment to each of SV and Mike Boyd of US\$500,000. The proposal for an ex-gratia payment is more consistent with there not yet having been any BG business at all (as was the case) to justify a payment and or no agreement at all. RM explained that this was not his proposal, but that SV and Mike Boyd had some arrangement, and that SV wanted him to write something offering to make an ex-gratia payment. Mike Boyd did not feature in the documents thereafter and neither RM nor SV referred to him. From the contemporaneous evidence there are only two emails which are relied on by Mr Clarke as evidence that SV was continuing to work on the BGs business and for the Company in 2013. These was an email in August 2013 to AM copied to RM (but not on his Company email) asking AM about subletting some trading space. There was nothing in the evidence or documents to explain whether this was for the Company or some other project and/or whether it went any further. In September 2013 there was an email between Barclays and SV with his BNYM hat on introducing him to a former Barclays employee in case it is of interest to BNYM. SV forwarded that email to RM.
221. On 16 November 2013 SV took RM to the England v New Zealand Rugby Autumn International as a guest of BNYM. SV said that RM told him that things were going very well with the Company, and that he would be “in for about £5m”. Even on SV’s best case it was unclear how he could ever have thought that he would be in for about £5m which bore no resemblance to any of the versions of the agreement he has sought to rely on in relation to the Payment. SV explained that he believed that the Company had been trading in 2013, although he accepted, he was not aware of any individual trades. He said he had been both

delighted and surprised that things were going well. He said that RM exuded success. This evidence highlighted SV's lack of knowledge and more peripheral role in the Company and the BGs business. It appeared to reinforce that so far as SV was concerned nothing had been happening in 2012 or 2013.

222. RM said that conversation about the £5m did not take place and that he did not know where SV got the figure of £5m from. He certainly did not agree to it. There was no rational explanation for the £5m figure. It is far removed from and inconsistent with all the other evidence and anything in the contemporaneous documents. Whilst I accept that SV appears to have genuinely believed that RM had said something about £5m I cannot accept SV's evidence about the £5m.
223. RM's evidence was that by November 2013 he thought that the Company was going to be able to trade SBLCs. He did not explain why and there is nothing in the contemporaneous documents or evidence to explain why he thought that or why it might be so. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
224. RM did accept that he had told SV that the business was going well. That was untrue. There is nothing in any later documents that provides any clue to why RM told SV the business was going well in November 2013. However, as SV explained, not unreasonably, he believed that the Company had been trading in 2013 and there is no evidence that RM told SV otherwise whether in 2013 or 2014. This is a factor that affects SV's state of knowledge when the Payment was made in 2014. 225. 226. The BGs business seemed to have run out of steam or have been put in the too difficult box by the summer of 2012. RM had not managed to find a way to trade the BGs end to end (UAE to New York) profitably. Over the course of the next 2 years there was no obvious progress. Mr Clarke accepted that there were fewer emails during that period but pointed to the apparent data loss as an explanation. I do not accept that submission. In closing RM asserted that there had been meetings involving SV concerning the BG business in the period May 2012 to November 2014. There is no evidence of any such activity from either RM or SV, no reference back to it in later documents in these proceedings and no evidence of that activity provided to the JLs, the PLV Liquidators nor in the proceedings the subject of the wider dispute. It is inconsistent with RM's later complaint to SV in March 2016 that SV had not done much work for the £525,000. Although RM said that he only said this because he was angry with SV. I am satisfied that there is no evidence of the many meetings RM referred to in closing.
227. Based on SV and RM's evidence and their later WhatsApp messages and snippets from the later contemporaneous documents there was no evidence of any progress in respect of the BGs business whether through the Company or otherwise through that period and SV had undertaken only limited, if any work for the Company in that period. I am reinforced in that view by the activity in September 2014 and subsequently. Dr Smith and Arcturus:

228. RM moved back to the UK in the summer of 2014. He met Dr Craig Smith in about June 2014, and they had a number of meetings over the summer of 2014. RM explained that Dr Smith wanted to set up a PCC structure in the Channel Islands to trade Euroclear securities and derivatives coupled with an FCA regulated Investment Advisory Company. Dr Smith asked RM to get involved with his new project. 229. This resulted in Dr Smith taking steps, including instructing lawyers, to set up the structures he wanted for his new business culminating in the incorporation of Arcturus as an English registered company on 19 September 2014. Dr Smith and RM were the directors and shareholders. Arcturus was to be an advisory company to Dr Smith's proposed PCC structure. There were board minutes/resolutions and board approved service agreements for Dr Smith and RM. 230. The discussions with Dr Smith over the summer of 2014 seemed to unlock the potential for the BGs business causing RM to re-engage with both SV and PS in relation to it. 231. It is not clear when SV first met Dr Smith, but it seems likely to have been around or shortly before the incorporation of Arcturus. By 7 October 2014 not only had it been MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor agreed that SV would become a consultant to Arcturus but there was a draft consultancy agreement in circulation prepared by Arcturus' lawyers. No copy of that draft consultancy was in the trial bundle, and no one explained what its terms were. Given the dispute about the terms of the agreement between RM/the Company and SV, the Invoice and the Payment that was surprising.
232. By 7 October 2014 Dr Smith thought that the linked PCC structure for Arcturus would be incorporated the following week with regulatory approval in the Channel Islands to follow a few days later. 233. The apparent link between the Invoice and the Payment and Arcturus which forms the basis of the JLs' claim gains some support from these events. There having been no progress on the BGs business for nearly two years, it was at least a coincidence that it was Monday 22 September 2014 when SV sent his email seeking payment of £5m (see below) immediately after the incorporation of Arcturus.
234. Dr Smith arranged for Arcturus to become an Appointed Representative of Linear Investment Limited so that it had FCA authorisation. He was registered with them for FCA purposes. Although Arcturus' appointment was only registered in about mid December 2014 with Dr Smith being registered by the FCA as CFI Director from 18 December 2014, the appointment seems to have taken effect on 12 November 2014. Dr Smith and Arcturus's FCA registration would have enabled it to trade in the UK. RM started studying to obtain his own FCA authorisation and registration in about October 2014.
235. Dr Smith's intention was to use Arcturus for a Euroclear Securities matched trades business for Euroclear registered bank securities which Dr Smith would obtain through his contacts with German banks linked to a PCC structure. This was not the BGs business. Arcturus was an entirely separate enterprise. However, the way in which Arcturus was presented by RM particularly after Dr Smith's death in January 2015 appears to have blurred or confused that separation. Coupled with the later evidence and documents one can see why sometime after

the event, and with hindsight, the JLs formed the view that Arcturus was always intended to be the vehicle for the BGs business. However, when one considers the contemporaneous documents chronologically it is clear that Arcturus was not, and had never been, the intended vehicle for the BGs business.

236. RM introduced Dr Smith to PS. They discussed using Arcturus for SWAPs for BGs. The idea would be that the BGs would be swapped to MTNs which could then be more widely traded including through Euroclear and so through for example Arcturus. If this could be done it would finally unlock the potential of the BGs business. 237. SV's 2017 witness statement as drafted said that he met with Dr Smith at least twice a month between September 2014 and January 2015 and was in contact with RM and Dr Smith and his own BNYM colleagues in London daily to develop the settlement side of the transactions for Arcturus. In evidence he said this was not correct: he had only met Dr Smith twice, an introductory meeting and a more substantive meeting and they had had a couple of phone calls. That seems to me much more likely and more consistent with the contemporaneous documents. His primary contact was RM but even then, since RM appears to have been unwell including a period of time in hospital and unable to speak between October 2014 and January 2015 the suggestion MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor that they spoke daily also seems unlikely. Again, the loose and inaccurate later evidence/reconstruction after the events by both SV and RM seems to have confused the position. The Invoice and the Payment 238. The critical time period for the purposes of this claim is the period between about 10 September 2014 and the date of the Payment on 12 November 2014. A period of about two months. There are few if any contemporaneous documents related to this period relevant to the Invoice and the Payment despite that being the core issue in the claim. Whilst some of the later contemporaneous documents immediately after 12 November 2014 provide some assistance, I do not find that the evidence in 2016 and later prepared either for proceedings or in interviews with the JLs and PLV Liquidators without, it appears, much reference to underlying documents provides much assistance in assessing the factual position in that two-month period. As set out below much of that later "evidence" appears to be a reconstruction from the wrong end of the telescope. 239. There are issues about why there was an Invoice or Payment at all in 2014, how the amount of the Invoice and Payment were determined and on what basis, what and/or which entity they related to and how the wording of the Invoice came about.
240. RM had lunch with SV on about 10 September 2014, SV says he recalls the particular lunch at the Plateau because RM told him he had just got engaged and that is referred to in the following email.
241. RM accepted that they had met at Plateau on a number of occasions but was more equivocal about whether this particular lunch had taken place but ultimately accepted they had met at the Plateau and discussed his engagement.

242. RM could not remember telling SV that the Company was going well and that it could make the Payment in September 2014. He said he had no independent recollection of doing so even when taken to the emails. RM says he does not recollect inviting SV to invoice in September 2014. On the basis of the contemporaneous documents and SV's evidence I am satisfied that RM said something to SV on or around the 10 September 2014 that caused SV to believe that he could submit an invoice, and that RM knew he had done so.
243. RM accepts he told SV that the Company was going well in November 2013 but does not accept that he said that at the lunch in 2014. It is possible that SV had conflated what he recalled from November 2013 with the lunch in 2014 which might explain SV's starting point of £5m. But I am satisfied that RM said something that caused SV to believe he could submit an invoice which must have included some reference to the ability of the Company to pay SV whether he positively said the Company was going well or something more nuanced. SV said: "I could see the success that Mr McKellar exuded. So I knew I had done the work for Argyle UAE, categorically. I knew that we had an agreement that I would be paid. I knew the company had done well. So it was entirely logical that when he said, "Now's the time to invoice", I could invoice. And we did MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor discuss the amount and the amount was -- ended up as £525,000 which was satisfactory to both partners." 244. The evidence in relation to the Invoice and the Payment was confused and critically the state of knowledge of RM and SV appears to be asymmetrical. Following lunch on 10 September, the next day on 11 September 2014 SV emailed RM: Re details of bank account to be credited two questions!
1. I won't want to use UBS to convert the sterling into Swiss Francs (or other currencies) so it might be that when the funds are ready to be transferred I might ask for two or three separate payments. Is there any problem with that?
 2. You talked about having some form of background evidence/ documentation we might need to provide. How do you see that being done - so I can be consistent in communicating with my various banks when I preadvise the receipt of funds to be expects.
245. Given the questions raised by SV about evidence or documentation needed to support any payment it seems to me unlikely that RM said something as certain as "Now is the time to invoice" at the lunch. But I am satisfied that he discussed with SV that there was to be payment and that there would need to be some form of document to support that payment.
246. The email from SV clearly did not come out of the blue and RM did not react as if it had. RM did not tell SV that he was mistaken, nor did he say there was no legal obligation to make the Payment. He allowed SV to continue to believe that he could raise an invoice and it would be paid.
247. RM did not provide any explanation as to how or why in September 2014 the Company was in a position to pay SV any sum even if there was a basis for doing so. The position remained that the Company had not yet undertaken any trades. 248. 249. In September 2014 PLV/the

Trust were all in the future. The only other development or factor that might have caused RM to be more positive was the SWAPs idea he had discussed with Dr Smith over the summer of 2014. RM seemed to be more optimistic that the BGs business/the Company could finally achieve its aim of end-to-end trading in a way that enabled the Company and/or possibly Arcturus to take a profit or margin as intermediaries. It would certainly have been on RM's mind in September 2014. The re-emergence of Company related activity in September 2014 appeared to be directly linked to the discussions with Dr Smith. It was therefore linked in that sense to Arcturus though in fact it was the SWAPs idea not Arcturus itself that was the catalyst. Arcturus' proposed FCA registration would in due course provide a suitable vehicle through which to undertake the SWAPs but again that was still in the future in September 2014.

250. Arcturus was incorporated a few days later. SV was intended to be involved as a consultant. I am satisfied that RM and SV must have discussed that opportunity and MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor what it would entail, possibly even at the lunch at the Plateau on 10 September 2014. Even if RM did not positively say that the business was going well it seems SV will have gained the impression from the discussions with RM including those relating to him raising an invoice and a possible payment coupled with RM's statement in November 2013 that the business was going well. The reference to £5m as SV's starting point for a payment seems to support that even if I do not accept RM said that in 2013. There would have been no reason for SV to propose a payment of £5m if he had not been given to understand that the Company was doing well.
251. After Arcturus was incorporated RM, who was a director of both, increasingly blurred the lines between the Company and Arcturus particularly after Dr Smith's death with them being presented as part of the same offering at meetings in Dubai in February
2015. From about February 2015 he had pivoted to Arcturus and the Company essentially faded away. 252. SV's explanation seemed to be consistent with the events of September 2014: ... my understanding for Arcturus and the reason for Arcturus was that Mr McKellar had gone back to England in the summer of 2014 and would need to be properly regulated both personally and whatever vehicle he needed to transact business – advisory business and execution business in the UK, and he needed a UK regulated company to do so. Concurrently with that he met Dr Smith who said he would set up or had set up a company, which was Arcturus, and they could combine efforts together to provide (a) the regulated vehicle for Mr McKellar to talk to investment funds or whatever in London, and (b) Dr Smith had deep expertise from his time at Commerce Bank dealing in Euroclear securities. Between them they came up with this notion of developing SWAPs from the bank guarantees that were organised by Argyle UAE into securities looked to be traded via Arcturus on Euroclear. So that was the concept of why Arcturus needed to be set up."

253. On 22 September @ 22.58, the Monday after Arcturus was incorporated, SV emailed RM: “Rob Per our last discussion please find attached the payment details for the GBP 5 million:”. This email made no reference to Arcturus or to the Company. It was simply a list of payments to be made to various third parties and to SV amounting to £5m.
254. RM’s response was “Sorry Sean- where do you get the £5M from?”. SV replied: “Wasn’t that what you said? Thought we clarified? Is that the wrong currency?”. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Followed by a further email “When you clarify I’ll obviously rework the payment schedule.”
255. RM did not say that SV was mistaken, he did not say that SV was not entitled to any payment at all. He clearly accepted that SV was entitled to something. He did not reject the concept of a payment only the amount. This undoubtedly will have embedded SV’s view that the Company had started doing business and he was entitled to a payment. However, SV’s own emails would not appear to support any agreement having been reached as to the annual fee he was to be paid. 256. There were subsequent discussions/a negotiation but neither SV or RM had provided any evidence about those discussions nor were they recorded in the contemporaneous documents. RM relied on having negotiated SV down from £5m to £525,000 as evidence that he was not in breach of duty but that did not assist him. The existence of those negotiations and RM’s evidence would appear to be inconsistent with an annual fee having been agreed at all. That did not appear to be in the best interests of the Company. 257. The inability to recall what were important discussions for the purposes of this claim seemed inconsistent with the apparent ability to recall other conversations or discussions many years after the events in question.
258. On 7 October 2014 SV emailed RM with details for a payment of £975,000. This email included proposed payments of £400,000 to third parties and then a payment to SV of £525,000 in respect of which SV said the following: “3. £525,000 to : Account name : Sean Verity [SV’s Coutts Bank Account details] Ref : Arcturus Investment Advisers I will make the £/CHF trade myself to get the best rate. Did the lawyers come back with a draft Consultancy Agreement. We also need to set up the charity payments to the school in Manchester. 259. The email refers to discussions having taken place. Between 22 September 2014 and 7 October 2014 something in those discussions caused SV to use the reference Arcturus for the £525,000 payment. There was still no draft invoice.
260. On 14 October 2014 SV sent RM a draft invoice dated 13 October 2014 which was described as a draft consultancy invoice. He asked RM to review and amend as appropriate. Consistent with the 7 October 2014 email, the invoice was addressed to RM at Arcturus and referred to work carried out for Arcturus. Following on as it did MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor from the 7 October 2014 email which included reference to a draft consultancy agreement and with reference to a draft consultancy invoice it might be said to point in the direction of it being intended to represent the invoice as being for Arcturus as

the JLs argue: Mr Robert McKellar. Date : 13 October 2014 Managing Director Arcturus Investment Advisory Limited London Dear Mr McKellar Invoice : Sean Verity Invoice : For Advice and Financial Management Consultancy provided with regard to establishment of and business development for Acturus Investment Advisory Limited for the period January 2011 through October 2014 Amount : GBP 975,000 Please arrange for the following account to be credited: [then SV's bank account details at Coutts London] 261. 262. This draft invoice was for £975,000 with a description of the work as being for Arcturus but also a time period of January 2011 to October 2014. This still pre-dated the PLV discussions and the TPSA. On the basis of the evidence available it was still the case that neither the Company nor Arcturus were in a position to make a payment to SV and further that the description of the work in the draft invoice was for the reasons set out below a reference to prospective work. The apparent encouragement or at least lack of discouragement to SV about invoicing and payment would have only further embedded his understanding that the Company had been doing well and he was entitled to be paid. Encouraging SV to invoice when the Company was not in the position to pay him and had no legal obligation to do so was not in the Company's best interests. It would create a liability that the Company was not in a position to meet.

263. RM could not have known that there was even the possibility that there would be any funds to meet the Invoice and make the Payment until after 20 October 2014 and only then if the Invoice were to be paid by the Company.
264. Between 14 October 2014 and 7 November 2014 further discussions must have taken place. A final figure was negotiated and there was a discussion about the contents of the Invoice.
265. On 7 November 2014, a draft of the new proposed invoice was emailed to RM. It was now addressed to RM at the Company; the total had reduced to £525,000 but otherwise the wording remained the same: MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Mr Robert McKellar. Date : 07 November 2014 Argyle UAE Limited Al Attar Tower Level 29 Office 2906 PO Box 214745 Dubai Dear Mr McKellar Invoice : Sean Verity Invoice : For Advice and Financial Management Consultancy provided with regard to establishment of and business development for Acturus Investment Advisory Limited for the period January 2011 through October 2014 Amount : GBP 525,000 Please arrange for the following account to be credited : Account name : S. L. Verity [SV's Coutts bank account details]
266. RM and SV agree that RM told him to address the Invoice to the Company there is a dispute about whether the rest of the text was a mistake and if so whose mistake.
267. By 7 November RM knew that the Company was/would be in funds to pay the Invoice because it had already received some of the funds under the TPSA. SV issued the invoice on 7 November 2014 and chased for payment on 8 November 2014. 268. The Company paid the Invoice on 12 November 2014. The source of the money used to make the Payment was ultimately the Trust (see below). SV did not know the source of the Payment. At the time of the Payment RM had already told the Trust and MM that the Company/Argyle Gibraltar

would not be able to meet their obligations under the TPSA.

269. RM went into hospital to have an operation the day after the Payment (see below). SV clearly had some knowledge of RM's ill health as he made reference to it in emails later in 2014.
270. RM's evidence about the agreement with SV and the basis for the Invoice and the Payment differed from SV's recollection of what had been agreed in about 2011. RM explained that SV was a consultant to the Company whose entitlement to any payment was contingent. Given his evidence that the Company had not yet traded there was no basis for the Invoice and Payment at all. RM said that on the basis of the original discussions in about 2011 the amount which SV was entitled to should have MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor been about £125,000 a year from 2011 to 2014. This would have produced a figure lower than the sum of £525,000 he agreed the Company would pay. He did not provide any explanation or justification for paying a sum greater than the sum that would have been derived from the annual figure he said had been agreed or why that was for the benefit of the Company. 271. In relation to pre-incorporation work RM said that the agreement was that SV would be "a consultant to be paid for work that he had done and that [the Company] was the appropriate company to pay it because that was the business we were discussing, the SBLCs." This and other evidence and emails from RM supported SV's explanation that once the Company was incorporated SV believed he was entitled to be paid for pre and post incorporation work but that it was always contingent. The question of whether the Company had any obligation to pay for pre-incorporation work even if it otherwise had an obligation to make a payment raises a legal question considered below and again affects the question of whether making the Payment was in the best interests of the Company.
272. One additional issue in relation to the work or services undertaken by SV was what parts of the pre-incorporation work were properly to be included in any invoice or payment leaving aside any pre-incorporation argument. RM, SV and Mike Boyd were discussing a number of projects over the period 2011 to 2012, the BGs business was only one part of that.
273. RM's defence appeared to recognise this distinction pleading that SV was only to be paid for his work directly relevant to or for the benefit of the Company. As a director considering his duties to the Company in those circumstances RM would have to be able to establish what elements of the work or services undertaken by SV were properly chargeable to the Company to justify the Invoice and the Payment as being for the benefit of the Company. 274. If SV had the requisite knowledge for the purposes of a knowing receipt claim it would be necessary to be able to understand the extent of the work/services he had undertaken for the Company whether pre or post incorporation when considering the question of unconscionability.

275. Neither SV nor RM engaged with how to identify what aspects of SV's work related solely to the BGs business prior to incorporation and which they therefore said were attributable to the Company once incorporated. Indeed there did not appear to be any real understanding of the nature or extent of the work undertaken by SV and no records of it.
276. RM's evidence on the nature of the agreement with SV and the amount that had been agreed included the following: "Well, it was up to him what he wanted to be paid. Depending on the level of work"
277. And then: "Well, it was his consultancy. It was up to him how much he was going to charge, but MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor it had to be relative to the work that he did, yes."
278. His evidence continued: Q. So the company didn't ever agree a rate with him, he just charged what he thought was appropriate? A. Well, I obviously disputed rates subsequently, saying I was not going to pay 5 million for work – Q. Yes, you did, yes. So there was no agreed rate of pay? A. Well, no, he was charging at his rate. We discussed terms around 125,000 a year. But if he had done work that was vastly in excess of that, we would have paid more because we would have received more and it would have been as a result -- so he wasn't on a fixed fee. It would have been relative to the work that was carried out. Q. And no annual salary agreed? A. No, because he wasn't working for the company. consultancy. was It a
279. RM's explanation of what had been agreed was far from certain and appeared to alter slightly each time he was asked a question. He remained adamant that there was an agreement and there were some consistent underlying themes to what had been agreed such as the contingent nature of the entitlement to any payment but otherwise its terms were uncertain. Given RM was a director of the Company, Arcturus and Argyle Gibraltar his approach and this ambiguity was difficult to justify.
280. He explained that (i) only SV knew the full extent of the work he did (ii) it was up to SV to set his rate based on the work he did but that he knew there had been a lot of meetings and (iii) the negotiated figure of £525,000 was reasonable. This did not address the agreed contingent nature of the agreement.
281. RM sought to justify the Payment on the basis that he had negotiated from £5m but since on his evidence that was never the right starting point that was not a persuasive argument. His evidence about the amount to be paid varied (i) he considered that the £525,000 reflected an annual rate that was about half SV's BNYM salary (ii) the agreed annual rate was about £125K or £130K (iii) there was no agreed rate at all and (iv) he had just negotiated a figure that he considered reasonable. On RM's own MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor evidence the sum of £525,000 was higher than any annual figure he thought he had agreed and the conditions for payment which he was consistent about (as was SV) had not

been met.

282. He said that £525,000 was a reasonable sum in circumstances where he was not in a position to assess what SV had done. He said “So he did a lot of things which I didn’t know about... I don’t know what he did.” But this still did not deal with either the contingent nature of the basis for any payment nor how, as a director, he could authorise a payment if he did not know what SV had done for the Company.
283. However, by the end of RM’s evidence it was clear that in fact his evidence was that the Invoice and Payment related to an entirely new and different agreement to the one that formed the basis on which SV thought he was being paid (see below).
284. Ms Stonefrost submitted that on the basis of RM’s own evidence there was no prior agreement with either RM or with the Company that could justify the Payment. I agree in the sense that on the basis of RM’s evidence the Invoice and the Payment were not based on the consultancy agreement that RM and SV contended for since the contingency had simply not been met. This was the case even if the arrangement was that SV should be paid something for the work he had undertaken whether pre or post incorporation. 285. Instead from RM’s perspective the Invoice and Payment were based on a negotiated fee for past work because he wanted to secure SV’s ongoing assistance. RM said: “I paid him for the work he did at the time that I considered reasonable when he put in the invoice because we needed him to continue with his work so that we could sell the SBLCs to the people he introduced in New York. He got paid for that.”
286. And also: “A. No, it isn't. The 575 was to do with work on the SBLCs and everything he had done to that date, which is why I paid it, because I was there for a lot of those meetings, and I knew the value of that work and we needed Sean from that date onwards to help with the sale of the SBLCs and the clearing of the SBLCs. So 525 was reasonable based on what we had already discussed as a remuneration up to that time and because it was vital for Argyle UAE to be able to sell the SBLCs and clear them.”
287. Whether that future work was for the Company or Arcturus RM believed that the Company would need to pay for some of the work that SV considered he had undertaken to date. From RM’s perspective it was securing the future work and assistance that appeared to be the driver for the Payment. There was no evidence at all that RM explained this to SV. He did not tell SV that there was no legal obligation to MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 288. 289. pay nor is there any evidence that SV had refused to undertake any further work or provide any further services without payment. The JLS make a broader point about this arguing that SV not having undertaken any work for the Company at all post incorporation, there had been no novation or new agreement with the Company in relation to pre-incorporation work and in any event the contingency had not been met. SV’s knowledge when he was invited to submit an invoice was different largely as a result of what RM had led him to believe. He had no other source of information. If RM told him that the

Company was doing well and then enabled him/encouraged him to invoice and paid him why should he think that the Company had not been doing well or had not traded?

290. Whilst his evidence as to the rate at which he was to be paid was inconsistent he remained consistent about the existence of an agreement that entitled him to be paid for the work and services he provided and about the conditionality of any payment. He understood that whether pre or post incorporation that was to be paid by the Company. Again, on the basis of the contemporaneous documents and what RM told him it was reasonable for him to have thought this to be the case. There was nothing obvious to put him on notice that it was wrong. 291. The figure SV advanced at trial was consistent with the October 2011 email but was not consistent with the position he had adopted with the JLs or in these proceedings up to July 2024. He explained that he believed that the figure of £975,000 recorded in the draft invoice was calculated as £250,000 for nearly four years. His evidence was that he had compromised at £150,000 per annum when agreeing the amount of the Payment: “I do believe we ended up agreeing that 150,000 was a fair and proper amount...” But none of that was in his witness evidence nor did he explain it to the JLs. 292. SV’s explanation for the change was: “I think the number 250,000 had been discussed in Switzerland. I think the 150,000 was where we ended up at the time the invoice was finally settled on to be paid. They had clearly been successful. They had clearly done well in my mind. I could see the success that Mr McKellar exuded. So I knew I had done the work for Argyle UAE categorically. I knew that we had an agreement that I would be paid. I knew the company had done well. So it was entirely logical that, when he said, “Now’s the time to invoice”, I could invoice. And we did discuss the amount and the amount was – ended up as £525,000 which was satisfactory to both partners”.
293. And: “A. No. I think it is fair to say that 525,000 was negotiated with Mr McKellar in September 2014. He was happy to pay it at the time for the work done for Argyle UAE. I had no reason to MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor suppose that there was an issue at that time. We subsequently find out that Mr McKellar has other issues” 294. I am satisfied on the basis of the contemporaneous documents and the evidence that both RM and SV considered that they had agreed in about 2011 that SV would be paid for the work he undertook for the BGs business by the entity or structure set up for the BGs business in due course and that included pre-incorporation work. That agreement was contingent on the BGs business starting up or getting going in some form. Both RM and SV’s evidence had always been consistent on that aspect of the agreement. But I am also satisfied on the basis of the evidence available that no specific annual fee had been agreed between them at any point. 295. I am also satisfied that SV believed that the Invoice and Payment were to be made on the basis of the agreement reached in 2011 and did not know and had no reason to know that RM was agreeing the Invoice and the Payment on a different basis. 296. The evidence seeking to explain the wording of the Invoice was also unsatisfactory.

297. When questioned about the requirement for an invoice RM explained that “if it was being paid out of the business account which it would have been, we needed some evidence to support the payment.” This was consistent with SV’s 11 September 2014 email and supports SV’s evidence that RM asked him to provide something to support the Payment. I am satisfied that it was RM who asked SV to provide something whether in invoice form or otherwise to support the proposed payment. 298. SV prepared the draft invoice dated 13 October 2014. It referred to work undertaken for Arcturus both in the body of the Invoice and was addressed to Arcturus. Although it was re-addressed to the Company it continued to refer to the work having been undertaken for Arcturus between 2011 and 2014. RM recalled that SV had had meetings with Dr Smith around the time of the Invoice and suggested that might have been a reason for his use of Arcturus. He said he did not tell SV to use Arcturus and in fact told him not to.
299. RM and SV blame each other for the apparent failure to change the description of the work in the Invoice after 14 October 2014. RM says it was for SV to redraft it whilst SV says that RM dictated the invoice to him. RM said that the reference to Arcturus was SV’s mistake, he had got mixed up. He says he told SV not only that the amount was wrong but also that it should be addressed to the Company. It was not clear when he thought SV had got mixed up since the change to the Company name only appears to have been quite late on in the process of agreeing the amount of the Payment. 300. SV’s evidence about the content of the Invoice was that he had no particular interest in the content and that the wording was the wording that RM wanted and dictated to him. When explaining the change from the draft invoice to the Invoice SV said: “But I do know that [RM] came back and said, “That’s not the right number. It should be 525,000. Just the bit for Arcturus””.
301. Whether RM was using shorthand to explain which part of the earlier draft invoice was to be included in the final Invoice or whether the reference to Arcturus was MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor intentional it might be said to be more consistent with the JLs case that the Invoice was for Arcturus. 302. SV explained that he knew that RM was involved in various companies and if RM wanted him to invoice through a particular company, he was indifferent. I have had the benefit of seeing SV give evidence and am satisfied that his lack of interest in the wording of the Invoice provided he was paid was entirely consistent with the contemporaneous documents and the nature of his role in the BGs business. I accept SV’s evidence that he had not focussed on the reference to Arcturus and had no interest in the wording on the Invoice or the detail. It follows that I accept that the contents of the Invoice were as a result of something RM said to SV whether or not RM dictated the precise words used.
303. Having regard to the timing of the discussions around the Payment and the draft invoice and the Invoice, I consider that it is likely that at the outset RM did in fact intend that any invoice should be addressed to and refer to Arcturus. RM knew that the Company was not in a position to pay any invoice and had not traded. He was optimistic about Arcturus and the

opportunity it presented. I infer from the timeline and the evidence and documents available that it is more likely than not that RM asked SV to provide the draft invoice addressed to Arcturus and referring to work for Arcturus in about early October 2014 resulting in the draft invoice dated 13 October

2014. The contents of the invoice reflect the work that RM wanted SV to undertake prospectively. 304. 305. It seems to me that it is likely and can be inferred from the timing of the change to the invoice that RM's intentions in relation to who any invoice should be addressed to changed after the TPSA was entered into and once the Trust monies were to be paid to the Company. That is consistent with the late change to the Invoice at some point between 14 October 2014 and 7 November 2014. As set out below the TPSA was signed and returned by RM on 31 October 2014 and funds were received into the Company between 31 October 2014 and 7 November 2014. This is entirely consistent with the timing of the change in the Invoice. By the time the terms of the Invoice were agreed RM knew that the Company had or was about to receive the monies from the Trust and would be in a position to not only pay the Invoice but to make payments and/or loans to him and others. It is possible therefore that there was an error at that late stage in changing the wording of the Invoice to remove the reference to Arcturus. I accept RM's evidence that his intention was that SV was to be paid in November 2014 because RM considered that SV's services were needed for future work. But it is clear from the evidence both before and after the Payment that that was for the BGs business in its broadest sense in that RM wanted SV to make introductions and assist not just the Company as he had done in 2012 but with making the connections and introductions to enable Arcturus to link up with BNYM so that it could trade the SWAPs that were the potential solution to the settlement aspect of the BGs business in that broad sense.
306. After Arcturus was incorporated RM would present/give the impression that the Company and Arcturus were connected – for example, the Overview document prepared in early 2015. This made sense if the intention were to use them together to run the BGs business from late 2014. But SV was not at all clear about how the two MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor worked together only that he understood them to be connected in some way and part of an overall package. That is clear from both the contemporaneous documents and his later evidence. In 2019 he told the JLs that Arcturus was established by the Company to provide advice and support to the Company. This supports his lack of distinction between the two and adds further weight to why for SV at least whether the Invoice referred to the Company or Arcturus was not really of any interest to him. He just wanted to be paid.
307. RM's blurring of the lines between his various corporate entities is more obvious when considering the approach to the TPSA. It appears to me that he was not particularly focussed on the distinction between the various different corporate entities he was involved with. For example, the first PLV meeting took place in Arcturus' offices when he was at the time

advancing Argyle Gibraltar's interests as the counterparty to the TPSA. And later as set out below he redirected monies to be paid to Argyle Gibraltar to perform under the TPSA (which it appears PS considered it would be able to do) to the Company which was not in a position to perform under the TPSA. In doing so he enabled the Company to make the Payment.

308. RM's evidence is that the Payment and the Invoice were for the past work SV had undertaken to the date of the Invoice for the Company and the BGs business generally since 2011 (including the pre-incorporation work) but that it was paid for the purpose of securing SV's future services which included establishing Arcturus as part of the wider BGs business to enable the Company to trade BGs. If I accept RM's evidence, as to his purpose in agreeing the Invoice and the Payment, it makes more sense of at least part of the description of the services in SV's 2017 witness statement which is an after the event reconstruction from RM's perspective (see below).
309. There is no evidence to suggest that SV knew what RM's intentions were in relation to securing his future services nor that he had any idea about the source of any of the funds that were to be used to pay the Invoice.
310. Ms Stonefrost submitted that the description of the work undertaken by SV in both the draft invoice and the Invoice, RM and SV's later interviews with the PLV Liquidators and the JLs, and the 2017 witness statements including the description on the Invoice and the description of the works and services undertaken all support the JLs' case that Arcturus was the entity intended for the BGs business from the outset. It is the JLs' case that the Invoice simply reflected reality.
311. 312. The claim was advanced on the basis that the reference to Arcturus on the Invoice was deliberate and that the past work had in fact been done for Arcturus and should not have been charged to the Company at all. As the evidence came out, I do not accept that that is the correct analysis. It seems to me leaving aside the pre-incorporation issue that by June 2012 the only vehicle for the BGs business was the Company. I do not accept that the references to the earlier PCC structure in 2011 are a precursor to Arcturus. In so far as SV undertook any work prior to June 2012 relevant to the BGs business he and RM understood it was for the Company as the vehicle for that BGs business not for RM personally and not for Arcturus. That is supported by the evidence and the contemporaneous documents. I am satisfied that any of the work undertaken by SV from June 2012 to September 2014 relevant to the BGs business was intended by RM MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 313. 314. 315. 316. and SV to be for the Company not Arcturus or RM personally. Absent the SWAPs idea developed by RM and Dr Smith over the summer of 2014 there would have been no link at all between Arcturus and the regulated matched trades and advisory business it was seeking to develop and the BGs business. Indeed, unless RM found a way to make the SWAPs idea work there would still have been no link between them but for the death of Dr Smith in January 2015 and the MIF Injunction. From SV's perspective the use of Arcturus in the text of the final Invoice may be a simple mistake in not changing both parts of the Invoice at a late stage when asked to do so by RM. It seems most likely it was a combination of what he was told by RM coupled with a lack of attention to detail or interest. From RM's perspective there may have been a mistake

in not ensuring that he corrected both parts of the Invoice to refer to the Company when he made the late change. I am not persuaded that the later references from 2016 to Arcturus helps to untangle whether it was deliberate or a mistake on RM's part. But even if the reference to Arcturus was deliberate, I do not find that that was because the historic work up to September 2014 had been done for Arcturus. It seems to me that as the evidence came out the work up to September 2014 was work done for the Company or pre-incorporation work which RM and SV considered was for the Company once it was incorporated. The position overall therefore appears to be more nuanced. Whilst I am satisfied on the evidence available that any work that had in fact been undertaken by SV relevant to the BGs business was intended to be work for the Company up to September/October 2014 the position prospectively was different. Going forwards from RM's perspective, SV would be undertaking work and introductions for both the Company and Arcturus with a particular focus on getting Arcturus up and running if RM were to have any prospect of finally converting the BGs business. The references to a consultancy with Arcturus support that conclusion. RM may not have paid enough attention to the contents of the Invoice when it was switched from Arcturus to the Company prior to 7 November 2014 but what is clear from RM's evidence was that RM wanted SV's assistance, contacts and introductions going forwards and not just for the Company but for Arcturus as well and in order to achieve that he was prepared to have the Company pay the Invoice and make the Payment from the money redirected from the Trust. The late change to the Invoice, agreed to be at RM's direction is an important part of the jigsaw. Up until the TPSA money was redirected to the Company in late October 2014 booking the invoice to Arcturus and wrapping in the historic work to keep SV working made sense even if it were not appropriate from a company law perspective. But once the Company was to receive the money under the TPSA RM changed direction. The Company was now in a position to make the Payment. The Invoice was re-addressed to the Company and could be booked to the Company. This did not change RM's intentions prospectively to have SV undertake work for both the Company and Arcturus.

317. On balance I believe that the failure to change the description was an error. I accept SV's evidence that RM not only told him that he could be paid but was directing how the payment should be documented including changing the name to the Company at a MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor late stage. He did not make it clear to SV whether deliberately or otherwise or did not think about the additional change needed in the body of the Invoice when switching it to the Company.
318. On the basis of the evidence, I accept SV's evidence and do not find that SV considered, thought about or had any interest in the wording of the Invoice. Nor did SV have any reason to think that the contingency that entitled him to a Payment had not been met. The fee/ Payment itself was a negotiated fee which SV considered to be reasonable. His attempts to seek to reverse engineer the Invoice and the Payment so that he could say it was based on an agreed annual consultancy were not at all persuasive and did not help him either in these proceedings or in his engagement with the JLS. 319. There is some support for that analysis

in some of the WhatsApp messages between RM and SV in March and July 2021: 28/03/2021, 20:12:07] Rob McKellar: Looking through all KPMG arguments it seems they are saying that you were working on the set up of Arcturus Investment Advisory Limited (AIA) only - and AIA only got formed in September 2014. That is what your invoice seems to say. You mention it in emails to them as well. They are therefore saying £525K is too much and Argyle UAE shouldn't pay for AIA. Clearly AIA didn't exist and wasn't even thought about before I met Craig Smith in June 2014 - as he in fact set it up not me. I was 50% owner and Director but Craig did all the legwork as he was FSA registered at the time. ... 6). References to Arcturus was on the latter stages talking about Swaps of instruments from Bank Debt to MTNs - as that was the bit Craig was going to do through Arcturus. All of this is true. Argyle UAEs business was BG and SBLC trades from oil companies/banks in Dubai selling to NYC. None of it was through AIA. Only at the end - just before your invoice - did we talk with Craig about Swaps to MTNs through Arcturus. ... [02/07/2021, 11:45:44] Sean Verity: I think we need to address somewhere why the invoice I sent referred so specifically to Arcturus when it was addressed to Argyle. [02/07/2021, 11:49:19] Rob McKellar: I don't agree with that. Your Defence at the moment is you do not need to put in a MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Defence because they didn't serve you in time. [02/07/2021, 11:52:09] Rob McKellar: Also it is a very weak point for you as it brings in the point that you should only have billed from September to November 2014 and possibly only billed Arcturus itself. Not Argyle UAE. Works and Services

320. RM's reference to obtaining some evidence to support the Payment from the "business account" would seem to fall squarely within his role as a director. It is not sufficient to blame SV and/or say he got it wrong. 321. 322. 323. 324. From the factual narrative between 2011 and 2014 up to the Payment there is little if any contemporaneous evidence setting out in any coherent way the nature or extent of the works or services that SV was to undertake or did undertake. In the subsequent disputes and/or for the JLs or the PLV Liquidators and in these proceedings various descriptions of SV's work and services have been provided. Each of those descriptions was prepared after the event with a considerable dose of hindsight and/or for a particular purpose. They have obviously conflated the work undertaken by SV before and after the Payment. They merge past and future work and events including events and work that could not have been contemplated in September/October 2014. This affected how the parties viewed the position of Arcturus and why the Invoice included reference to it. The description of the works and services relied on after the event are constructs created after the events in question. For the reasons set out below none of those descriptions provide a credible basis for assessing what work or services SV had in fact provided between 2011 and September/October 2014 when he was asked to provide an invoice. They provide some limited assistance in understanding aspects of the future work RM was seeking to secure by arranging for the Company to make the Payment. The description of the services provided by SV in the 2017 witness statement recalls regular meetings with RM between 2011 and 2014. These included meetings with BNYM colleagues

to discuss SWAPs aspects of trades. However, this appears to conflate the earlier work up to September 2014 and in particular the 2012 meetings with the later post Payment services. SV and RM's own evidence consistent with the contemporaneous documents is that the SWAPs/MTN idea was a new idea in about September 2014 which would not then have formed part of the work already undertaken by September 2014 when the discussions about the invoice and payment started. 325. The 2017 witness statement refers to the April and May 2012 meetings which pre- date the incorporation of the Company. It also describes work between September 2014 and January 2015. This may have been the future work that RM wanted to secure by paying for the past work up to September 2014 but was not work or services up to September/October 2014. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 326. 327. 328. 329. 330. It then describes work between October 2014 and February 2015 including redirecting trades via Anca because Arcturus was not up and running (its registration with the FCA does not appear to have completed until December 2014). This of course post- dates the Payment and appears to be related to seeking to undertake matched trades under the TPSA (see below) which would not have been the BGs business. This would have been an unknown future workstream at the time of the Invoice and the Payment. SV says he was talking to PS regularly at the end of 2014. One might have expected PS to have been asked to provide some evidence of this if it were relied on, but it was not dealt with in his witness evidence, and he was not asked about it. But this was also unknown and, in the future, when the Invoice was issued and the Payment made. The 2017 witness statement then describes work with Dr Smith and RM relating to Arcturus in late 2014 and the need for Arcturus to have an account with BNYM. That is consistent with the work that SV would have had to undertake for Arcturus in that period to ensure it was in a position to engage with the BGs business and SWAPs that RM was working on. But it would have been work or services which took place after the Invoice and the Payment. It is likely that it was some of the future work that RM wanted to secure at the time he was negotiating the Invoice and the Payment. Finally, SV referred to the meetings in Dubai in 2015. These were not set up until end January 2015 and were not on the agenda until late in 2014/early 2015 after the Invoice and the Payment. SV's involvement in those meetings only came about following the death of Dr Smith. These were unknown events in September 2014. The work and services described in the 2017 witness statement primarily took place after the Payment. Much of it could not have been anticipated at the time of the Invoice and Payment even if, as RM said, he wanted to secure the future services of SV for the Company. It would have required a crystal ball. I do not therefore consider that the 2017 witness statement can be considered credible or reliable when considering the purpose of the Invoice and Payment nor when trying to assess what work or services SV had provided. It might be said to support an argument that SV had not done anything to justify a payment of £525,000 at all. 331. In the RRAD the services SV said he was retained to undertake were: "the services ("the Services") the Second Defendant would be providing to the new company would include :

- (i) Advising on business strategy for Argyle UAE Limited, this was particularly focused on analysing the core idea of effectively providing liquidity to oil refining companies and other businesses where the producers were looking for liquidity in the post financial crisis environment. (ii) Reviewing, evaluating and discussing the banking and legal structures to be employed, this included looking at how to implement the First Defendant's proposal on protected cell companies which would effectively be segregated accounts in banking terms. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor (iii) Advising and providing the necessary global connections to deal with trading in bank debt instruments (standby letters of credit and bank guarantees) as well as securities which would involve the execution, clearing and settlement of various trades in the Argyle UAE Limited target market. (iv) Identification of the major entities that were active in the capital markets and in particular who in these organisations would understand the securities that Argyle UAE Limited were proposing to trade in and to ascertain their interest in trading them.
- (v) Arranging meetings with the Second Defendant's various bank contacts in New York, Switzerland, Dubai, Singapore and Hong Kong in order to introduce Argyle UAE Limited; and (vi) Attending meetings in all the jurisdictions identified in 4
- (v) above where the First and Second Defendant would present the Argyle UAE Limited product to the banks. 332. The RRAD sets out what in fact SV is said to have done at RRAD [9]. "The First Second Defendant carried out considerable work for the Company during this time, including:
 - (i) Attending meetings with the First Defendant on a regular basis being approximately 1 - 2 times per month to understand the product in order that the Second Defendant could advise on its application to the global capital markets and then enable the Second Defendant to contact his network, explain the Company proposition and then arrange meetings with his contacts with the Company; (ii) Arranging and attending various meetings with RBS, Credit Suisse, Deutsche Bank, HSBC, AXA, ING, Barclays, Knight Capital and Standard Chartered. Much time was spent by the Second Defendant speaking with his contacts to ascertain who the appropriate person was in each of these organisations so that the Company could present its product and proposal. (iii) Typically, the travel would entail two trips to Asia, which would always include Hong Kong and Singapore. There would then be a trip to the US for ten days per month. Trips to Zurich, Paris and Amsterdam would take place every month. (iv) When not in New York or Asia, meetings would also take place to discuss Company business in Anzere, Switzerland. 333. This description of the work which SV agreed to undertake and the work which he says he in fact undertook was contradicted by his own evidence and the contemporaneous documents. Like the 2017 witness statement it conflates or MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor compresses the timelines between 2011 and 2015/2016 and is an after the event construct. 334. For example, 9(ii) includes meetings which took place in 2012 before incorporation and 2015 after the

Payment. 9(iii) describes SV's role at BNYM – there is simply no evidence at all that all these meetings and all this travel were not simply part of his day-to-day work for BNYM, and it is entirely at odds with his own evidence of the work he in fact undertook. It is possible that RM travelled to join SV and was introduced to some of his contacts. But there is no credible evidence that such extensive meetings took place before September 2014 even if after Dr Smith's death in January 2015 and into 2016 SV became more involved with the Company. 335. SV ought to at least have been able to detail the number of times that he and RM had meetings at his home in Anzere, Switzerland: the only one referred to in his evidence or the contemporaneous documents is the meeting in October 2011.

336. His evidence in these proceedings simply did not support this description of the work he had undertaken whether before or after the Payment. His explanation of the work or services that he had provided was so confused about what he had done or when that very little weight can be attached to it where it is not supported by contemporary documents. And very little of it is. 337. 338. SV's evidence is not that the Invoice and Payment included payment for any future work after the Invoice. And it is clear that is not what he thought from his subsequent proposal to invoice Arcturus in 2016 for the period from November 2014. Notably that invoice was intended to cover work relating to the set-up of Arcturus which puts in context both SV's understanding of the work to be covered by the Invoice and Payment and his lack of focus on any description of the work in the Invoice. SV did not know precisely what work he was going to be asked to do in the future when the Invoice was submitted. However, by October/November 2014 he knew that going forwards he was also going to be asked to undertake work for Arcturus as well as the Company. He understood/ believed that Arcturus was connected to the Company in some way. His later evidence about what he actually did in 2014/2015 for Arcturus to seek to justify the wording on the Invoice and Payment for work between 2011 and 2014 seems to me to have added to the confusion about what in fact the position was in November 2014.
339. Whilst RM may have anticipated that in paying SV for his past services, he would secure his future assistance to include obtaining an account for Arcturus with BNYM not even RM could have anticipated that Dr Smith would die in January 2015 and SV would have to accompany him on visits to Dubai in February 2015. RM could not have anticipated the MIF Injunction nor his need to pivot to Arcturus in February 2015.
340. On the basis of RM and SV's explanations of the work and services undertaken by SV coupled with the wording of the Invoice it was not unreasonable for the JLs to have assumed that the work for which SV invoiced was current and future work for Arcturus as at November 2014 including pre-incorporation work when they issued the claim even though as I have found and as it now seems clear based on the contemporaneous documents that that was not the case. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 341. To understand how the Company came to have sufficient monies to make the Payment and why there was and continued to be a blurring of lines between the Company, Argyle Gibraltar

and Arcturus in late 2014 and afterwards it is necessary to detour to Bermuda, PLV and COH. This is relevant in particular to RM's position in relation to the breach of duty claims. MIF and PLV Part 1.

342. MIF entered into a credit agreement on 9 July 2014 by which it provided credit to PLV in the sum of US\$18m. It was a short-term credit arrangement due to be repaid on 31 December 2014. The credit was guaranteed by COH. The purpose of the US\$18m was to enable PLV to both discharge some debts and enable it to secure further financing for its development project in Hamilton Bermuda. The net proceeds of the loan were held in an escrow. PLV was not able to obtain further financing and started to look at its options in about October 2014.
343. On 16 October 2014 RM/Argyle Gibraltar were introduced to PLV and MM through BNYM (but not SV). A meeting took place in London at Arcturus's office. PLV needed to find US\$18m by 31 December 2014 to meet their obligations under the credit agreement. It was interested in using matched trade Euroclear transactions to do that. This type of trading had to be undertaken by regulated entities and was the type of trading that Arcturus had been set up to do and which Argyle Gibraltar had been/could do through Amstel. It was not an opportunity for the Company which was a UAE company with no FCA regulation.
344. RM rejected the original proposal from PLV/MM due to concerns about the use of the money in the escrow account. He says MM asked him to set up a similar arrangement for a private trust. He says he discussed the proposed transaction and the possibility of matched Euroclear trading with both Dr Smith and PS. PS confirmed that it would be possible if the trades were conducted through regulated entities.
345. On 20 October 2014, the Trust and Argyle Gibraltar entered into the TPSA the terms of which included a requirement for Argyle Gibraltar to deliver US\$18m profit for the Trust by 31 December 2014 using matched trades on Euroclear, DTCC or Swift. 346. The Trust was to pay not less than US\$12.5m held at Clarien Bank in an account in the name of MM and YM to Argyle Gibraltar (or as it directed) for the purpose of undertaking those matched trades. The payment was to be made on the date the TPSA was entered into, and time was of the essence. The Trust signed the TPSA on 20 October 2014 but did not remit the funds immediately. RM only signed it on around 31 October and suggested it be redated for that date. 347. From 20 October 2014 steps were taken by PLV and COH to extract the monies from the escrow account and move them to an account in the names of MM and YM at Clarien Bank. Those monies were then to be paid on to Argyle Gibraltar as if they were Trust funds. There were delays in remitting the monies.
348. However, between 31 October 2014 and 7 November 2014 US \$12.5m was remitted to and dispersed at Argyle Gibraltar's direction. US\$11.5m eventually arrived in the Company's EFG bank account on about 11 November 2014. It is unlikely that the MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) - v- Robert McKellar and anor 349. Invoice was redirected to the Company until RM was confident of receipt of funds from the Trust and so after 31 October 2014. From the date on

which the TPSA was signed by the Trust, 20 October 2014, RM raised the delay in receipt of the US\$12.5m and its consequences with MM. He explained that Argyle Gibraltar would not be able to start trading until the full sum had been received and that the consequence of the delay was that it would not be possible for the US\$18m to be delivered by 31 December 2014. On 31 October 2014 RM emailed MM from his Argyle Gibraltar email saying, "It is critical that the USD500K is sent today." And on 7 November RM emailed again "We have not received all the funds yet. The USD500,000 has still to be transferred. Clarien Bank asked to call back the GBP 310K they sent last week. Until we receive the full USD12.5M we cannot proceed." These monies were used to make the Payment. Prior to making the Payment RM's evidence both in these proceedings and elsewhere was that he had already confirmed to MM/the Trust that in light of the late receipt of the monies, Argyle Gibraltar/the Company were not going to be able meet the obligations under the TPSA to deliver US\$18m by 31 December 2014.

350. Despite PS's confirmation on 27 October 2014 that Argyle Gibraltar could have met the 31 December 2014 deadline to achieve profits of US\$18m using matched Euroclear trades, RM says that US\$11.5m was diverted to the Company because, having told MM about the BGs business and the Company, MM had asked that the investment be made through the Company. He had been told by RM that the Company could achieve the greater spreads/quicker/better returns through the BGs business. Even if conceptually this was true, the Company was not yet in a position to trade the BGs/SBLCs at all and it was therefore untrue.
351. When considering whether RM was in breach of duty it is important to keep in mind that the monies used for the Payment were only diverted from Argyle Gibraltar to the Company because RM told MM that the Company would be able to achieve better and quicker returns. That was untrue. RM does not explain why he agreed to the diversion of the funds to the Company when he knew that the Company had never traded and would not be able to meet the obligations under the TPSA. 352. The JLS argue that it cannot have been in the interests of the Company for RM to put the Company in a position where it took on an obligation it knew it could not meet and further to make the Payment and other dispersals in those circumstances. I agree and RM has not provided a credible explanation as to why it was in the interests of the Company.
353. RM said that MM was willing to be flexible about the 31 December 2014 deadline and told RM this around 5 November 2014. He says that MM had told his lawyers to confirm the relaxation of the date and to amend the TPSA. There is no evidence to support this at all. All the contemporaneous evidence points to the discussions about a possible extension commencing on about 24 December 2014. The only contemporaneous evidence of MM's willingness to agree any extension was 2 January 2015 (see below).
354. None of the contemporaneous documents between 20 October 2014 and 24 December 2014 provide any evidence to support RM's assertion that there had been a proposed extension or flexibility in the deadline but instead consistently confirm the continuing MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In

Liquidation) -v- Robert McKellar and anor existence of an obligation to provide US\$18m by 31 December 2014 in accordance with the TPSA. In the PLV proceedings RM's argument that there had an extension of time beyond 31 December 2014 based on the contemporary documents available in those proceedings was rejected. I also reject RM's submission that there had been any agreement to or even proposal for an extension of time or any flexibility in the date for compliance with the TPSA at the date of the Payment on 12 November 2014 but nor do I find that there was an agreement to extend time by 31 December 2014.

355. When the Payment was made on 12 November 2014 RM knew that the Company and Argyle Gibraltar would be unable to meet their obligations under the TPSA and knew that no extension had been granted.
356. RM dispersed a substantial part of the monies received from the Trust between 12 November 2014 and 31 December 2014. This included a loan to himself of US\$8m, money spent on two properties, an Aston Martin and an engagement ring and money transferred to Arcturus/related to Arcturus's establishment. Notably given the wording of the Invoice and RM's evidence about the future work that he wanted SV to undertake the monies transferred to assist with Arcturus were not transferred until about December 2014. That is consistent with the text of the Invoice describing future work. RM's health:
357. RM's health seems to have been another significant factor in the Company's ability to perform under the TPSA. RM was unwell. He refers to being unable to undertake any work from middle October 2014 until January 2015 and in particular he had a throat operation on 13 November 2014 and was unable to speak or travel for a period. He therefore took on the obligations under the TPSA and diverted the funds to the Company of which he was sole director and shareholder at a time when he was not going to be in a position to undertake the work that might be necessary to meet those obligations in any event. As is clear from the contemporaneous documents and evidence, and consistent with that, it was Dr Smith, PS and to some extent SV who appear to have been participating in various meetings in late 2014 although after the Invoice and the Payment. Also consistent with that RM told MM and his lawyer that his office was closed until 26 January 2015. October 2014 to December 2014
358. 359. The contemporaneous documents and the evidence demonstrate an increase in activity over the latter part of 2014 after the Payment. From about late October 2014, Dr Smith, PS and SV were all involved in trying to facilitate trades focussed on Europe and Euro trading. There was no evidence from RM, SV or PS explaining how the work in that period related to the Company or was intended to enable the Company to meet its obligations under the TPSA. The contemporaneous documents appear to be more consistent with the work related to matched trades for which Arcturus was set up and not the BGs business. The reference to trades being redirected to Anca (because Arcturus's FCA registration was not yet complete) would seem to support that. There is no evidence that SV knew or understood what RM was doing with the Company, Argyle Gibraltar, Arcturus or the Trust in late 2014.
- MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 360. In fact, the only trade referred to

in this period was a trade arranged by Dr Smith involving a Euroclear Security from Volksbank to be sold to his exit buyer in late February 2015, long after 31 December 2014. Dr Smith died on 25 January 2015, so the trade was never concluded and nothing to do with the Company or the BGs business. TPSA extension

361. As set out above RM argued that he had already obtained an extension of time to the TPSA when the Payment was made. There is no contemporary evidence to support that argument and I do not accept it, a similar argument was rejected in the PLV proceedings.
362. RM says that the 31 December 2014 date was renegotiated on the basis of a payment of US\$375K made to MM's lawyers in early January 2015. It is clear that was what was being discussed in late December 2014 but it does not appear to have ever been finalised and was in any event not in prospect at the time of the Payment. 363. In the PLV proceedings RM argued that the TPSA was varied by the payment of the US \$375K allowing further time for him/the Company to perform. This was not accepted by the judge at first instance nor by the Court of Appeal: "46. Third, so far as the payment of U. S. \$375,000 is concerned, in my judgment the judge was quite right to conclude that this was not part performance of the obligation of Argyle under the TPSA. It is important to focus on the appellant's pleaded case, which is that the TPSA was varied so that the obligation to pay U. S. \$18 million was replaced by the obligation to pay U. S. \$375,000. Quite apart from the complete commercial implausibility of that contention, it is entirely inconsistent with the contemporaneous documentation in which Mr McKellar describes the payment as ex gratia and unconnected with the TPSA and acknowledges time and again that the U. S. \$18 million remained due even after the U. S. \$375,000 was paid.
47. The email from Wakefield Quinn of 4 January 2015 is no answer to this point, since there is no evidence that Mr McKellar or Argyle UAE in fact paid the U. S. \$375,000 on the basis that it was part payment of the U. S. \$18 million. Furthermore, the contemporaneous documentation after payment, specifically the emails of 20 February 2015 and 7 March 2015 and the press release of 7 May 2015, all acknowledging that the full U. S. \$18 million remained due, is all inconsistent with payment having been on that basis. In addition, no such case is pleaded by the appellants.
364. MIF became concerned about the escrow account in about October 2014. In December 2014 they sought information about the payments made to Argyle Gibraltar (the US\$12.5m). The MIF US judgment explains that an event of default was declared under the MIF credit agreement as early as 15 December 2014 followed by a default MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor notice on 31 December 2014. MM will have known this when he and his lawyers engaged with RM about a proposed extension in late December 2014.
365. On 24 December RM emailed MM to say he had put in place an instruction to the bank to pay US\$18m to MM's Clarien account if that total was reached. This was disingenuous, RM knew the Company had not yet started to trade and the only pending trade was one Dr Smith

had put in place which was not due to close until February. Neither Argyle Gibraltar nor the Company were going to be able to meet the obligations under the TPSA. RM continued: “bearing in mind we did not receive the funds until November, rather than mid October as we asked, I will also put in place a contingency payment of USD300,000 as set out in my earlier email and will write to confirm that the larger USD18m payment will be made on or before the end of January 2015, when our office reopens... as a gesture of goodwill to help you to gain an extension of your loan arrangement.”

366. RM did not say was that he had already agreed an extension to the end of January 2015 and/or for a year. He knew in December 2014 that when he made the Payment on 12 November 2014, there had not been any extension of time.
367. By 29 December it was clear that RM knew that the Company and Argyle Gibraltar were in difficulties. No extension had yet been agreed. MM’s lawyer records: “the purpose of both calls would be solely to discuss the logistics of making the contingency payment of \$300K to gain an extension of the PLV loan. This gesture of good will is appreciated.” 368. The request for an extension in return for a month’s default interest was rejected by MIF. Again RM did not say there was an agreed extension to TPSA to the end January or for up to a year – arguments he was later to advance in the PLV proceedings.
369. On 31 December 2014 RM said he would transfer to MM US\$375K to be used as a part payment and/or default interest on an ex-gratia payment basis and that the US\$18m should be paid into court in January 2015. This would be a transfer back of part of the US\$12.5m received by the Company. Again, this was entirely disingenuous – the Company had still not undertaken any trades at all. 370. It was not until 2 January 2015 that MM confirmed that PLV and the Trust would agree the extension to 31 January 2015 on the basis that the proposed good will payment of US\$375K was made. This offer of a proposed extension was made over 7 weeks after the Payment. RM paid the US\$375K to MM’s lawyers on about 12 January 2015. On 16 January 2015 he told MM they were on track for 31 January
2015. This was simply untrue. 371. The Court of Appeal considered the subsequent emails as set out above, it does not appear that any extension of time was ever granted. The Company was not in a position to and did not pay US\$18m by 31 January 2015 or at all and was not in a MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor position to return the US\$12.5m having dispersed the majority of it for RM’s benefit including set up costs for Arcturus as well as making the Payment.
372. MIF commenced litigation in Bermuda in January 2015. The MIF Injunction was obtained on 10 February 2015. A copy was served on RM by no later than 13 February 2015. This was before his meetings with SV in Dubai (see below). January to March 2015 373. In about January 2015 RM wanted to see if he could progress the SWAPs/MTN idea. Arcturus had been registered with the FCA in December 2014 and RM was getting back to work. This emphasises that whatever his hopes when he negotiated the terms of the Invoice and the

Payment that the work described was prospective.

374. He asked Dr Smith to travel with him to Dubai for meetings with banks and lawyers. He prepared an Overview document for those meetings which were to take place in February 2015. The Overview document represented Arcturus as part of the overall offering in relation to the BGs business. This appears to have embedded SV's belief that the two companies were linked or part of the same group. He still believed they were connected in these proceedings. 375. Following the death of Dr Smith in January 2015, there was a change of focus for the meetings in Dubai. With his death the prospect of imminently developing the SWAPS idea through Arcturus fell away. RM says that he tried to revive the idea in 2016 but that was then overtaken by the PLV proceedings.
376. With Dr Smith's death both the Company and Arcturus were under RM's control. After Dr Smith's death SV's role/work for Arcturus and the Company seems to have increased, eventually culminating with him retiring from BNYM in January 2016 with a view to taking on a full-time role running a US\$200m fund through Arcturus.
377. On 30 January 2015 SV emailed his contacts about Argyle Gibraltar not the Company. This email highlighted SV's confusion between Argyle Gibraltar, the Company and Arcturus: "Argyle's previous shareholder (Amstel Securities) is a longstanding client of Pershing, and Argyle has recently been separately authorized by the FCA in the UK to conduct business and are establishing their own relationship with Pershing – hence the Bank of New York Mellon's referral."
378. RM asked SV to travel with him to Dubai in place of Dr Smith. SV explained to the JLS that this was the only time that RM/the Company had met his travel expenses. This was entirely consistent with his explanation that usually he travelled on BNYM business and RM simply met up with him wherever he was. It was also entirely consistent with the beginning of a change in his role and engagement with the Company and Arcturus.
379. RM said that the February 2015 meetings were originally intended to be for the Company and most of the contemporaneous documents support that intention up to the time of the meetings themselves. However, the MIF Injunction reached RM just MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor before the meetings in Dubai on about 13 February 2015. RM explained that he did not want to risk anything. He thought that there was a potential issue with the Trust and the TPSA despite MM's assurances, so he decided to pivot his focus from the Company to Arcturus. Although the meetings in February 2015 went ahead, from RM's perspective these were now meetings with him with his Arcturus hat on. The Overview of the BGs business and the Company had already been prepared and already included reference to Arcturus as an apparently related company or entity under other regions.

380. An email exchange between RM and SV on 21 February 2015, including SV's draft email to AM, makes it clear that SV was by then aware that they were moving forward with Arcturus not the Company. "My friend has established an FCA authorised company for which I will be working (although I have not personally applied for authorisation) through which we want to trade standard high quality fixed income trade receivables (Bank guarantees, SBLC's etc) issued by only high quality banks (JPM, HSBC, Credit Suisse, Barclays etc) in favour of oil companies. The tenor would be less than one year. We will also arrange SWAPS to MTNs of various Terms and Coupons depending on our Buyer's requirements and sell those via Euroclear." 381. Thereafter SV's involvement with RM was for Arcturus and the description of the work and services he provided in 2015 and 2016 is consistent with this switch. There is no evidence that SV undertook any work for the Company after the pivot in February 2015.
382. On 31 March 2015 RM was registered as the CFI director of Arcturus. In principle it could now undertake FCA regulated work in the UK but there remained unresolved issues about how the BGs business would work end to end, how it would settle and how the profit could be extracted. MIF Part 2: 383. In Bermuda, by October 2015 MIF had obtained a judgment against PLV. The PLV Liquidators had been appointed. Receivers were appointed in respect of the Trust in
2016. The PLV Liquidators sought repayment of the US\$12.5m from Argyle Gibraltar under the TPSA. Neither Argyle Gibraltar, nor the Company to whom the monies had in fact been paid met the demand. Argyle Gibraltar was placed into liquidation in Gibraltar in July 2016. 2016 and beyond 384. SV retired from BNYM in about January 2016. Later documents and his evidence explain that this was because there was the prospect of managing a US\$200 million fund with RM through Arcturus.
385. On 4 March 2016 SV requested a payment from Arcturus for the period from November 2014 to end of 2015 in the sum of £975,000. He proposed that the invoice be based on the draft invoice of 13 October 2014, which had been addressed to MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Arcturus. He proposed to invoice for historic set up/consultant costs for Arcturus. The JLs submitted that SV's reference in his email to rejuggling the earlier invoice was evidence that the earlier invoice also related to Arcturus. I do not accept that submission for the reasons set out above.
386. RM rejected SV's request: You have already had £575k as a consultancy fee - and be honest you did not do £575k's worth of work nor help me close any deal - the transaction I paid that from had been closed by me before I met you - so I cannot add another £975k to that. RM's explanation for the source of the Payment was untrue but is yet more evidence that SV did not know/could not know the real position in respect of the Payment. 387. The JLs argue that this email demonstrates that RM knew that the earlier Invoice was unjustified which goes to the question of whether as a director he could ever have considered it to be in the interests of or for the benefit of the Company. RM says he was just angry with SV for making another request for money.

388. By September 2016 SV still did not have any idea who he was or should have been invoicing. He explained to the PLV Liquidators' solicitor that he had been helping RM to set up Arcturus which he now says was inaccurate. It was at least inaccurate in relation to the Invoice but did form part of the work he undertook after the Payment and particularly after the pivot in February 2015. He had sent his draft letter to RM before sending it but RM did not comment at the time although he now says it was inaccurate. 389. 390. 391. In October 2016 SV's explanation to the PLV Liquidators referred to working as a consultant for Arcturus and to making introductions which appears to be consistent with his work for both the Company and Arcturus. He also referred to providing advice on mechanical issues such as clearing and settlement which appeared to be more consistent with his role following Dr Smith's death. The JLs rely on SVs differing explanations for the work and services he provided and to whom from 2016 onwards. They say this supports their argument that the Invoice was correct and reflected work done for Arcturus from the very beginning. The PLV proceedings against RM and the Company commenced on 5 August 2016 with the PLV Injunction. Even in 2019 (as well as in these proceedings) there continued to be a lack of clarity about what work, or services had been provided to which company and when. RM explained told SV in a WhatsApp message that the funds received by the Company were used not only to make the Payment but also to pay the set up costs for Arcturus which he referred to as having been set up for the BG/MTN trades. That appeared to be true. However, he also said that the source of the funds was a trade that had been closed by the Company. That was untrue as RM has subsequently confirmed. Even in 2019 RM was not being straightforward with SV about whether the Company had ever traded and the source of the money for the Payment or at all. 392. In July 2019 RM gave evidence that the Payment related to start up work for Arcturus which he said had been done over four years despite also referring to it being for the business that he and Dr Craig were starting up. That description of what Arcturus was for would be consistent with the JLs' case that the Invoice and the Payment were MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor always intended to be for work undertaken for Arcturus whether pre or post incorporation in September 2014. However, for the reasons set out above I do not accept that the Invoice and the Payment related to past work undertaken for Arcturus.
393. RM was shown WhatsApp messages from 2019 which appeared to conflate the Company and Arcturus and who was doing what for whom and when. I have referred to the further discussion between RM and SV in the WhatsApp messages in 2021 above. Conclusions:
394. Having considered the evidence and the contemporaneous documents as set out above RM and SV had a very different understanding and different knowledge about the BGs business, the Company and Arcturus. 395. The main cause of that asymmetrical knowledge and understanding was RM's deliberate evasiveness and opaqueness. He was not honest or straightforward with SV about what he was doing and the success or otherwise of the Company. He told untruths. That asymmetry is particularly significant when considering SV's state of knowledge for the purposes of the knowing receipt claim.

396. RM, whether deliberately or not, had over the course of 2016 to 2019 provided evidence and explanations that deflected attention from the Company and sought to emphasise the role of Arcturus. Much of that was information or evidence that was constructed sometime after the events in question looking backwards. The focus on Arcturus may have been a compression or conflation of the timelines in the events that had occurred, but I consider it more likely to have been deflection at least in relation to PLV.
397. Despite their apparent friendship, RM did not involve SV in his business dealings and projects to any great degree. He was secretive. He provided SV with information and/ evidence from 2016 to 2019 which emphasised the Arcturus role and which simply would not and do not stand up to scrutiny of the contemporaneous documents.
398. Given his background his failure to document the arrangements with SV and his lack of openness/frankness and his obfuscation appears to be more calculated than accidental. 399. The contemporaneous documents and SV's own evidence emphasise the peripheral nature of his role in the day to day work of the Company and even Arcturus until much later in 2015/2016. SV was not a director or shareholder in either company. He was described as a consultant at times but in reality, he was an introducer – a connector of people. That was what he was doing for BNYM and what he was asked to do for the Company by RM.
400. As he explained he needed to know enough to ensure he introduced RM to the right people but that was the limit of it. His role changed as did his level of engagement following Dr Smith's death in January 2015 and then again in 2016. His later involvement may have led to confusion about the extent of his role up to the Payment which was then exacerbated by the later evidence and/or explanations and justifications put forward for the Invoice and the Payment. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 401. 402. SV only knew or could know what RM told him and RM told him very little and did not tell him the truth. He did not have documents or information that would enable him to assess the veracity of what he was being told and there is no evidence that at the time there was anything to put him on notice that he was not being told the truth. SV and RM had become friends and SV was being told that for very little work he might receive a lucrative return. He knew it was speculative and conditional. There was nothing obvious to put SV on notice of any issues before the Payment. Reviewing the contemporaneous documents in a granular way and with hindsight it is possible to discern that some of the things that RM said could not be true and or did not support any idea that the BGs business or the Company had got off the ground. But there was no reason for SV to go back though the correspondence from 2011 when he was told in terms that the business was going well. There was no reason for him not to believe RM and no obvious reason for RM to lie to him given that he would only be paid if the business did get going and do well.

403. When considering SV's state of knowledge about any breach of trust one has to consider it against that background. 404. The JLs' case was that the original business idea or plan was either always intended to be Arcturus, was for Argyle Gibraltar and/or included a PCC but on any basis was not intended to be and/or was not the Company. Having reviewed the evidence carefully it seems to me clear that the Company was the eventual entity or structure set up for the BGs business in 2012.
405. RM had had a number of different ideas and projects that he was developing in 2011 and 2012 as well as a number of different ideas about the way in which to structure the BGs business. Those involved Argyle Gibraltar, a possible PCC structure and a new BVI company. Some of the ideas involved combining different projects in a single structure. Eventually the ideas coalesced around the Company as the entity to undertake the BGs business. 406. I am satisfied that none of the proposals for the structure of the BGs business was Arcturus or the idea of Arcturus. Arcturus was an entirely separate entity set up for a different business and purpose by Dr Smith but involving RM in 2014. Dr Smith did not set it up to be part of the BGs business. His proposed PCC structure was for the regulated matched trade and advisory business. It was entirely separate to the BGs business even if RM had the idea of using Arcturus if the SWAPs idea worked.
407. Arcturus was not incorporated until 22 September 2014. Dr Smith had lawyers who assisted with the incorporation and the PCC structure in September and October 2014. There is no evidence that SV provided any services to Arcturus in relation to its establishment or its setting up prior to the Invoice and the Payment and no suggestion of what they would have been. Funds were only transferred to Arcturus to enable it to progress its set up in December 2014 when it was regulated. 408. The Invoice appears to describe some of the future work that RM explained that he had hoped to secure by making the Payment and/or may support further a deliberate intention on the part of RM to provide a basis for booking the invoice to Arcturus in about September 2014 but which was in error not changed in November 2014. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
409. RM recognised that SV should only be paid for work undertaken for the benefit of the Company but without having any clear evidence of what SV had done. 410. 411. It seems to me that there might well be an issue around the extent to which any pre- incorporation work undertaken by SV was in fact for the benefit of the Company/BGs business and not just because of the issue about whether the Company had any legal obligation to pay for the pre-incorporation work. The evidence of the works and services said to have been provided by SV is set out above. Some work is identified pre-incorporation that may be said to relate to the Company/BGs business. limited evidence of work undertaken/introductions made between incorporation and the Invoice and Payment. The majority of the work and services relied on postdates the Invoice and the Payment. is very There

412. As set out above I am satisfied that RM and SV had entered into an agreement in about October 2011. The terms of that agreement did not include agreement on a specific fee annual. Instead, it was agreed that SV would be paid for the work he undertook in making introductions and leveraging his contacts whether through BNYM or otherwise for the benefit of BGs business but that any payment would be contingent/conditional on the BGs business actually getting going or being successful. 413. 414. 415. It was also agreed that any payment would be made in due course by the entity or structure to be set up to do the BGs business. RM and SV intended the entity or structure to pay for SV's work from 2011 and not RM. Neither RM nor SV ever considered that RM would have any personal liability to pay SV as part of their joint understanding of the conditional or speculative nature of the proposed business opportunity presented by the BGs business. That was entirely consistent with the speculative nature of the opportunity since whatever entity or structure was eventually set up, it would not be in a position to make any payments unless or until it had managed to do some trading and earn some profits or margins or had been funded in some way. There was no satisfactory explanation for not having reduced the agreement to writing in 2011 and/or for not formalising it once the Company was incorporated. It is clear that from at least late February 2015 after the pivot to Arcturus, SV's work and services were provided for Arcturus and that he knew that is what had happened, but it is not clear that he had any idea why until much later.
416. RM admits that at a Rugby match in November 2013 he told SV that the business was going well. That was untrue but SV did not know that. 417. I am satisfied that it was RM who triggered the discussion about invoicing in September 2014 and was the cause of the original reference to Arcturus. The contingency under the 2011 agreement had not been met and there was no legal obligation on the part of the Company to pay SV. SV did not know this, and RM did not tell him. 418. In September 2014 RM was negotiating the terms of the Invoice and the Payment by reference to the new agreement he described in his evidence. The Company would MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 419. 420. 421. 422. pay the Invoice and Payment to cover historic work from 2011 in respect of the BGs business and the Company (both pre and post incorporation) to lock in and ensure that SV would continue to undertake work and services in the future. That was future work and services were to be provided for both Arcturus and the Company in the development of the BGs business. SV did not know this. He understood that the Company had been successful and consequently he was entitled to a payment on the basis of the agreement reached with RM in 2011. SV accepted that in 2014 he negotiated what he considered to be a reasonable fee for his past work both pre and post incorporation of the Company. I have accepted SV's evidence that the contents of the Invoice were of no particular interest to him. In the context of the knowing receipt claim I do not consider that this was because he was seeking to avoid having any relevant knowledge about RM's activities. I am satisfied that the contents of the Invoice were a result of RM's instructions. In September/October 2014 RM asked SV to produce an invoice in the name of Arcturus but made a change to the Company on or

around 7 November 2014. He either failed to ask SV to change the body of the Invoice or SV mistakenly failed to do so. I find that the change was linked to the receipt/prospective receipt of funds into the Company under the TPSA. I do not find that SV knew this. The Invoice was always intended to cover SV's work for the Company (pre and post incorporation). I find that would have been the case whether it was addressed to Arcturus or the Company and whatever the precise wording on the Invoice. I do not accept Ms Stonefrost's analysis that the Invoice and the Payment related entirely to Arcturus. But the combination of the Invoice and the Payment were intended by RM to secure future work from SV for both the Company and Arcturus. SV did not know this is why RM had asked him to invoice or that is why he was being paid.

423. RM and SV would not be the first litigants who had been caught out after a liquidation by the informality of their prior arrangements. Entirely consistent with that SV explained: "A. I looked at it this way, Mr McKellar had various companies, of which I was involved with Argyle UAE. He had just set up, he advised me, Arcturus, literally that week or that same time. If he wanted me to invoice through that particular company, I was indifferent to it. I wasn't a UK resident, subject to UK oversight or whatever. This is his company. If that's what he wanted, I was moot about it."
424. On 12 November 2014 when the Payment was made, I find that RM knew and should have taken into account when considering whether to make the Payment and or disperse other monies from the funds received by the Company under the TPSA was in the best interests of and for the benefit of the Company the following: MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor i) ii) iii) iv) v) vi) vii) There was no written record of the agreement entered into by RM and SV in around October 2011 in respect of the work SV was to undertake for the BGs business and no record of the work actually undertaken and no agreed annual fee; The agreement that the Company would pay for pre-incorporation work had not been formalised with the Company at incorporation or since and it therefore had no legal obligation to pay for pre-incorporation work; Any payment under the 2011 agreement was contingent and the contingency had not been met as the Company had not yet traded or carried on any business so there was no legal obligation to pay SV; RM had told SV that the business was going well at least in November 2013 and this was untrue; The Payment was not in fact being made pursuant to the agreement reached in 2011 but on a different basis including to secure SV's future work and services for both the Company and Arcturus; the Company would not be able to comply with its obligations under the TPSA by 31 December 2014; That there not been any extension to the 31 December 2014 deadline under the TPSA. viii) RM was unwell, not working and about to have a throat operation; ix) x) RM intended to pay away a substantial part of the monies received from the Trust in addition to the Payment for his own benefit; The Company would not be a position to repay the monies received under the terms of the TPSA from other sources.

425. At the time of the Payment there were a number of known unknowns and therefore further risks that RM as a director of the Company was aware of, and which should have been considered prior to making the Payment. These included: i) ii) Whether any extension of time/variation of the terms of the TPSA could be obtained by 31 December 2014 or at all and if so whether there was any realistic possibility of the Company being able to undertake any BGs business by 31 December 2014 or any extension that might be obtained; Related but separately whether the SWAPs/MTN idea could be harnessed to enable a trade in BGs in time to meet the 31 December 2014 deadline or at all; iii) Whether Arcturus and Dr Smith would be in a position to obtain the relevant FCA authorisations to assist with those trades by 31 December 2014 or by any extension; 426. The two key unknown unknowns at the time of the Payment but which all occurred after the 31 December 2014 deadline but which RM relies on included: MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor i) ii) The unexpected death of Dr Smith on 25 January 2015; The MIF Injunction on 10 February 2015 and the subsequent proceedings and wider dispute; Directors Duties: 427. I am satisfied that RM was in breach of his duties as a director of the Company when he caused the Company to make the Payment when it had no legal obligation to do so.
428. He misapplied the Company's funds when making the Payment because (i) the Company had no legal obligation to make the Payment at all (ii) the Payment included payment for pre-incorporation work and there had been no novation or new agreement once the Company had been incorporated and (iii) even if the Payment was made on the basis of a new agreement for a different purpose and so could overcome the pre- incorporation issues that was an agreement that the Company pay for SV's work to date to secure his future work for both the Company and Arcturus. In each case that would be a misapplication of the Company's funds because it would not be a genuine payment that could have been made by RM in his capacity as a director of the Company. He knew there was no legal obligation to make the payment and/or that it was not of benefit to the Company in whole or in part.
429. He was in breach of his duty to act in good faith and preferred his personal interests to those of the Company for the same broad reasons. Ms Stonefrost submits that any services provided by SV were not provided for the benefit of the Company so the Payment could never have been made in good faith for the benefit of the Company since there was no/very little benefit to the Company.
430. Whilst RM was more optimistic about the future prospects of the BGs business and the Company in September 2014 the Company had yet to trade and had not yet been successful or started to do any business. As set out above there were a number of factors that RM should have considered when he decided that it was in the best interests of the Company to make the Payment. 431. 432. In particular the Company had no legal obligation to make the Payment for the historic work undertaken since 2011 and it cannot have been for the benefit of or in the interests of the Company to do so. There is no evidence that SV was pressing for or pursuing payment from the Company in September 2014. There is no evidence that RM

asked SV to assist the Company and/or Arcturus prospectively and he refused. There was no evidence that if asked SV would not have agreed to make further introductions or renew introductions whether for the Company or Arcturus without a payment until the contingency had been met. SV's evidence was very clear that his entitlement to any payment was always contingent and speculative. RM did not explain why he did not simply tell SV the truth. 433. In making the Payment from the monies received under the TPSA and paying away the majority of the monies received for his own benefit, he left the Company at risk when he already knew it could not comply with the TPSA and had no other means to repay the monies so paid away. This was not in the best interests of the Company or MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor for its benefit for the reasons set out above even if they were for the benefit of RM and his broader interests. 434. In closing RM submitted that the Payment was of benefit to the Company because "it was vital that [SV] continue with his introductions and assistance in the clearance and sale of the SBLCs and [BGs] to be purchased in Dubai and to be settled through to buyers in New York in a manner that created a profit spread that could be retained by [the Company]."

435. Ms Stonefrost submits that RM's position about the basis for the Payment was entirely inconsistent with SV's position. I agree, but as I have found that is because there was an asymmetric understanding at the time that the Payment and Invoice were negotiated caused by RM's lack of straightforwardness. That further affects the position in relation to SV's knowledge and understanding.
436. However, from RM's perspective it becomes another factor that weighs against him in relation to the breach of duty claims. It is not clear how he can have negotiated a new legally binding agreement unilaterally on behalf of the Company such that each of he and SV thought they were agreeing the Payment on a different basis. That is no agreement at all. But in any event on his case he was agreeing to make a payment to SV to secure a future benefit for both the Company and Arcturus. 437. For the purposes of the breach of duty claim under section 172 CA 2006 I need to consider RM's conduct having regard to his subjective state of mind or knowledge if he in fact considered whether the Payment was in the interests of and for the benefit of the Company. If RM did consider whether making the Payment was in the best interests of or for the benefit of the Company then the question is whether that decision was made in good faith, rational and in the commercial interests of the Company. If he did not then the decision to make the Payment and whether it was in the interests of or for the benefit of the Company would need to be considered objectively considering the state of mind or knowledge of an intelligent and honest person in the position of a director.
438. RM's evidence was that the purpose of the Payment was to secure SV's future services for both Arcturus and the Company. This was not the basis on which SV thought he was being paid.

439. A new agreement if it had been entered into on a proper basis for the benefit of and in the interests of the Company might have overcome some of Ms Stonefrost objections to RM agreeing that the Company would pay for pre-incorporation work in the absence of a novation. But there is no explanation as to why it would be for the benefit for or in the interests of the Company which had no legal obligation to pay SV at all in 2014.
440. Ms Stonefrost argues that there is no evidence that SV made any introductions for the Company after incorporation. As set out above there is very little evidence of any activity at all after June 2012 and prior to the Payment. The JLs therefore argue that there had been no benefit, advantage or profit gained by the Company as a consequence of anything done by SV at the time of the Payment. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor
441. Certainly unless there was some proper basis for RM to enter into an agreement on behalf of the Company or novate the existing agreement to include pre-incorporation within the Payment on the basis it was for the benefit of the Company it is difficult to see how the Invoice and the Payment could be justified in relation to work undertaken between 2012 and 2014. 442. The same core issues arise under both agreements and RM still had to consider whether it was in the interests of or for the benefit of the Company (i) to make any payment for the pre-incorporation services (ii) to make any Payment to the Company under either form of the agreement when there was no legal obligation to do so under the 2011 agreement and (ii) whether it could ever be in the interests of the Company to pay SV to secure his future services for Arcturus.
443. Mr Clarke submitted that at the time of the Payment RM thought that the Company was going to be successful and needed SV's help to secure that successful future. He submitted that it was no breach of duty to pay the Invoice based on past work to secure future services. I agree that in such a scenario it would not automatically be a breach of duty but here there are a number of factors that tip the balance against RM and two in particular: (i) the pre-incorporation work without a novation or new agreement (ii) the prospective work for the benefit of Arcturus. 444. The JLs argue that had RM considered what was in the best interests of the Company he could not have decided it was in the interests of the Company or of any benefit to make the Payment which was of benefit to Arcturus. I agree. If one applies the subjective test if RM had thought about it, he could not have made the Payment to SV in good faith from the Company on the basis of the facts as I have found them and what RM knew as at 12 November 2014.
445. RM's personal interests and the interests of the Company and Arcturus (and those of Argyle Gibraltar) are different even if closely connected or aligned in November
2014. RM had duties as a director to each of the corporate entities to act in their respective best interests. RM's position unravels where it is clear that he has not considered those separate duties but had rather approached the issue more globally as seems clear from his evidence and submissions. This highlighted his conflict of interests (see below). 446. Taking into

account the matters set out above and considering them objectively an intelligent and honest director in RM's position could not possibly have made the Payment in good faith and in the interests of the Company. There was no obligation to make the Payment at all, and it was not in the interests of the Company to do so. RM simply could not articulate why it would be for the benefit of the Company, there was no evidence at all that it was necessary to make the Payment to secure SV's future work for the Company nor any explanation of why or how an intelligent and honest director would be able to justify making the Payment to secure future work for Arcturus. 447. Objectively the Payment could never have been made in good faith and in the interests of the Company where there was no benefit to the Company. It was not a rational commercial decision to make the Payment to SV in November 2014. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor

448. Additionally, it appears to me that when the Payment was made RM was already in a position where he should have had regard to the interest of the Company's creditors which included the Trust. The position then becomes even more stark. 449. It seems to me that there was already a real prospect that the Company was or would become insolvent if the Payment were made and if he were not legally obliged to make it (see Sequana and Hunt). The JJs say that by 12 November 2014 RM was already in the position where he had to consider the interest of the Trust to be repaid in full when he caused the Company to make the Payment and then the other dispersals in November and December 2014. It seems to me that making the Payment when (i) the Company was not under a legal obligation to do so (ii) had no means of meeting its legal obligations under the TPSA and (iii) no way of repaying the Payment to the Trust in the event that they were called upon to do so created a very real prospect that the Company was or would become insolvent if the Payment were made.
450. Given the position of the Company as set out above there was at the very least a very real risk if not close to a certainty all known to RM that at the time of the Payment if he could not secure an extension of time and/or find a way to generate US\$18m to comply with the terms of the TPSA before 31 December 2014, the Company would be insolvent as at the date at which the Payment was made. The Company was already not in a position to and would have provided no consideration for the monies received. And that was what was eventually found in the PLV proceedings.
451. RM had resisted this argument on the basis that he said that the Company was in a position to pay its debts when the Payment was made and had paid its bills since it was incorporated. But this misunderstood the issue. When evaluating the Company's future position contingent and prospective liabilities likely to arise in the near future can and should be taken into account. Even if on 12 November 2014 the Company was in a position to pay its normal day to day expenses that failed to address the position in relation to the dispersal of the monies received under the TPSA including the Payment and RM's knowledge that the Company was not in a position to repay that liability. When the Payment was made the

Company was not in a position to perform its obligations and RM already knew that it would not be able to do so. 452. It seems to me this was a clear example of a situation in which there was a real risk of insolvency in the very near future if not already at the time of the Payment and that the interests of the creditors should have been a relevant consideration. It is clear they were not taken into account. No director could have considered the Payment was in the interests of the creditors in November 2014 given the position at that time in relation to the Company.

453. Whether considering RM's position from a subjective or objective perspective making the Payment was not a rational decision that any director could have made in good faith for the benefit of or in the interests of the Company because there was no benefit for the Company. It could never have been bona fide in the interests of the Company. 454. That simply highlights RM's conflict of interest. He plainly had a conflict of interest at the relevant time and no means of ratifying his actions even if he had thought about it. The rules are strict. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 455. 456. The Company had no legal obligation to make the Payment, then the Company did not receive any benefit from the Payment. Even on RM's new agreement at least part of the Payment related to securing SV's future work for Arcturus, the beneficiary of the Payment in whole or part was then either RM personally or Arcturus (of which he is a 50% shareholder). RM could not personally ratify the Payment in circumstances where he was the only shareholder and director of the Company. For those reasons it seems to me that RM was also in breach of his duty not to put himself in a position of conflict. There is an additional difficulty for RM in respect of the breach of duty claims which relates to the pre-incorporation work undertaken by SV. This should be considered more strictly in the context of the breach of duty claims against RM than when considering the knowing receipt claim on the facts as set out above and particularly where RM as the sole shareholder and director would not be able to ratify any actions if they arose out of a conflict of interest. Pre-Incorporation: 457. The Invoice and the Payment include work undertaken prior to incorporation. Whilst RM and SV's intention was that any pre-incorporation work or services were to be paid for by the Company when incorporated any such agreement would not have bound the Company unless or until it was novated. Section 51 CA 2006 provides that: "A contract that purports to be made by or on behalf of the company at a time when the company has been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly." 458. There is no evidence that the Company either expressly or impliedly novated any agreement to pay SV for his pre-incorporation work in June 2012 or thereafter. There is no evidence of any new agreement after incorporation to include payment of the pre-incorporation work or services although as I note above the new agreement RM contends for might have solved the problem were it a binding agreement at all.

459. At the time of the Invoice and Payment there was no legal obligation on the part of the Company to pay for the work undertaken prior to June 2012 entirely separate to the fact that there was no legal obligation to pay in any event under the 2011 agreement. 460. It is not sufficient that the company performs a pre-incorporation contract in the mistaken belief that it is binding: *Royal Mail Estates Ltd v Maple Teesdale Borzou Chaharsough Shirazi* [2015] EWHC 1890 (Ch). Whatever RM and SV had agreed in 2011 when considering the position in the context of RM's director's duties the lack of formality and documentation, the lack of any new agreement in 2012 or at all weighs against him as does his conflict of interest.
461. Mr Clarke argued it would be a triumph of form over substance if RM as a sole director and shareholder were in breach of duty in making the Payment for services provided by SV to the Company in relation to pre-incorporation services when it could have been cured by a novation which could have been evidenced by or inferred from conduct (Marcus). However, I am not persuaded that argument overcomes MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment *Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor* section 51 CA 2006, *Royal Mail* nor RM's conflict of interest where I am satisfied that there was no legal basis for making the Payment.
462. Mr Clarke further submits that even if SV were technically minded, he would assume that a novation had taken place when he received the Payment particularly when he had been told to invoice the Company. I do not consider that that would have assisted. If SV were technically minded then he would have understood that more was needed to perfect his entitlement to be paid for pre-incorporation work. However, in fact, based on SV's evidence I am satisfied that he was not at all technically minded and will have relied on his agreement with RM and not have thought about it at all. Whilst that may benefit SV when I consider the question of knowing receipt, it does not assist RM in relation to breach of duty. Section 1157 463. Section 1157 does not assist RM. He relies on the circumstances as they emerged in
2015. But that is the wrong approach, the wrong end of the telescope. The question is whether he acted honestly and reasonably between September and 12 November 2014 when the Payment was made. His submissions do not address why he agreed to the diversion of the monies to the Company when he knew the Company could not meet its obligations under the TPSA and had never traded. Not does it address why in those circumstances it was honest and reasonable for him to make the Payment from those monies when there was in fact no legal obligation to pay SV at all. 464. For the reasons set out in this judgment I do not consider that when making the Payment in November 2014 having regard to all the circumstances and his knowledge at the time that he acted honestly or reasonably nor that he ought to be relieved or excused from his liability. Knowing Receipt
465. As set out above there are three requirements for a knowing receipt claim. Here it is accepted that the Payment was made from the Company's money, and it was received by SV from the Company. This issue is therefore one of knowledge on the part of SV that the assets

he received are traceable to RM's breach of fiduciary duties. Ms Stonefrost accepted there was a distinction between the degree of knowledge and proof or knowledge with the persuasive burden on the claimant. Whilst I could infer knowledge if the facts established on the balance of probabilities that SV had the requisite degree of knowledge, it is for the JLs to persuade me.

466. Although it is a single test of unconscionability (Akindele) that means that all five types of knowledge within the Baden classification can be considered but that the inferences to be drawn in relation to types (4) and (5) which relate to constructive rather than actual knowledge require me to be satisfied on the balance of probabilities that SV appreciated that in this case the Payment was probably made in breach of trust rather than merely possibly.
467. Ms Stonefrost argues that one must also have regard to objective norms of commercial conduct when considering particularly types (4) and (5) such that a reasonable person in the position of SV would have appreciated or enquired about the particular transaction. Mr Clarke argued that the particulars of constructive MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor knowledge would still have to be pleaded for the purposes of a claim in knowing receipt. I agree to the extent that the claimants cannot seek to rely on particulars in support of the single test of unconscionability that do not form part of their claim, it has to be properly framed.
468. Mr Clarke submits that SV was not obliged to satisfy himself that the money used to make the Payment was money which the Company was entitled to use unless he had actual knowledge within the Baden classification types (1) to (3) that the money used to make the Payment was trust money.
469. A core element of the JLs' claim in knowing receipt was that the Invoice and Payment were for the benefit of Arcturus or RM not the Company. This is coupled with an argument that SV knew that he did not have an agreement with the Company and/or that he had not done anything of benefit for the Company to justify the Payment. Consequently, the JLs' claim is that the agreement if any was with either RM or Arcturus and that SV knew when he submitted the Invoice that the work he had undertaken was for the benefit of RM or Arcturus not the Company. 470. For the reasons set out in more detail this judgment I am satisfied that SV believed he had reached an agreement in 2011 pursuant to which he understood and honestly believed that he was entitled to be paid. He did not know that the Company had no legal obligation to pay him when the Payment was made whether in relation to the pre-incorporation work or at all. I am not satisfied that SV had any knowledge of the source of the Payment. 471. SV did not know at the time of the Payment that the Payment was traceable to RM's breach of duty. RM's own conduct in misleading SV about the progress of the Company and its success were the prime cause of SV's lack of knowledge.

472. Ms Stonefrost argued that the approach that SV took to the wording of the Invoice was clear evidence of requisite knowledge and unconscionability. 473. 474. 475. I have accepted his evidence that the wording of the Invoice was of no interest to him. He said he was outside the jurisdiction, so it did not matter. Ms Stonefrost argued this demonstrated a level of understanding about the need for the Invoice to correctly reflect what it was for but a failure to ensure that it was accurate. For the reasons set out above I do not accept that it does. She further submitted that his explanation for the wording of the Invoice had changed. In 2019 SV explained to the JLs that the Invoice was correctly addressed to and paid for by the Company because if he had been retained by Arcturus, he would have sent his Invoice to Arcturus. Again Ms Stonefrost argues this shows that he knew enough for it to impinge on his conscience. I have already addressed the reconstruction, and construction that had taken place between 2016 and 2019 and the source of much of SV's knowledge about the events in 2014. I do not consider that what he might have been told, discovered or reconstructed in 2019 impinges on or provide any assistance with understanding or determining his state of knowledge or how to assess his response to the contents of the draft invoice in 2014. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 476. 477. 478. 479. SV's knowledge has to be assessed at the time of the Invoice and the Payment (Re Montagu's Settlement Trusts [1987] Ch). Although later events might put his knowledge in November 2014 in context and or provide some insight into whether SV had the requisite knowledge in November 2014 what subsequent events cannot do is overlay that knowledge with a later reconstruction and or evidence given for a different purpose. It seems to me that those later documents which have been heavily relied on by the JLs have obscured the position in 2014. I do not find that SV's lack of any interest in the contents of the Invoice in 2014 is evidence of any knowledge, actual or constructive, of any breach of trust in 2014. There was no obvious reason why he should have sought further information beyond what he had been told by RM in 2014 in relation to the Invoice and the Payment. I do not find his lack of interest to be deliberate to avoid a situation in which he might gain knowledge of RM's breach of fiduciary duty. I have considered the genesis of the Invoice and its wording above. I have not found that SV was responsible for determining the wording in the Invoice. But I have also found that it did not reflect the work which SV had undertaken up to September 2014 for which he understood the Payment was being made. I do not find that SV undertook any work related to set up or establishment of Arcturus prior to the Payment, nor was he involved in undertaking investment advisory business. The work described in the Invoice relating to Arcturus was the future work that RM hoped to secure. There is no evidence in the contemporaneous documents or the evidence other than the wording of the Invoice itself to support any finding that SV had any role in or for Arcturus at the time of the Payment beyond the prospective consultancy agreement.

480. His lack of interest in the wording of the Invoice may not reflect well on him, but it was consistent with his level of involvement and lack of attention or interest in detail. It is not enough to override his reasonable belief that he was entitled to be paid by the Company for the work and services he had provided since 2011. There has to be something that makes it unconscionable and that something must impinge on SV's knowledge of some relevant facts or matters whichever one of the Baden classification types are considered.
481. On 12 November 2014 when SV received the Payment, he always understood that his entitlement to any payment was contingent but he had been led to believe by RM that the contingency had been met. Although I have found that there was no agreed annual consultancy fee, RM's and SV's evidence was that they negotiated what they considered to be a reasonable fee. From SV's perspective that was pursuant to the agreement he reached in 2011 under which he was entitled to be paid.
482. Whilst SV's evidence was that he was surprised that the Company was going well, surprise does not provide a basis for saying that SV acquired actual or constructive knowledge and should subsequently have appreciated that the Payment was possibly or probably being made in breach of trust. 483. I am satisfied that he did not know that MIF/PLV or the TPSA were the source of the Payment. In fact, even in 2019 RM lied to him about the source of the monies used to make the Payment. MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor 484. There is very little evidence of the work SV had undertaken either pre or post incorporation of the Company. The only evidence of any work undertaken for the Company between June 2012 and September 2014 seems to be two emails.
485. Mr Clarke argues that it is not necessary to determine the precise legal analysis of any right to the Payment when considering SV's position. All that needs to be determined is whether SV's state of knowledge on receipt of the Payment was such that his conscience was affected. He argues that if SV can satisfy the court that he had a legal right to some payment from the Company the claim for knowing receipt does not arise at all. Ms Stonefrost accepted that if SV did not have the requisite knowledge that he was not entitled to the Payment from the Company and that it was therefore being paid in breach of trust it could not be unconscionable for him to retain the Payment.
486. Mr Clarke further argues that SV does not have to prove or establish whether the entitlement to the Payment was based on a contractual agreement for the payment of a specific fee or a claim in quantum meruit. 487. 488. In this context I agree that the quantum of the Payment itself is not directly in issue but it is not irrelevant. If for example the Payment had been £5m it might be argued that such a payment would have exceeded any sum SV might reasonably have been entitled to and that would have affected his conscience and his state of knowledge. It might well be said to give rise to actual knowledge. In this case SV's substantial remuneration package with BNYM comes into focus and reflects on what he and RM might consider to be a reasonable fee. In that context I have found that there was no agreed fee, but that RM and SV negotiated a fee that they both considered to be

reasonable although what they considered it represented differed.

489. Ms Stonefrost argues that if there was an agreement at all with the Company, it was not the agreement that SV relied on in the RRAD. The changing nature of SV's defence did not assist him but for the reasons I have given that does not mean there was no agreement at all and I am satisfied that there was.
490. Ms Stonefrost further argues that in any event whatever the terms of the agreement neither SV nor RM has attempted to identify the benefit of SV's work to the Company. She argued that there must be some advantage or profit gained as a consequence of something having been done by SV. Here she argues that there was no such benefit because RM's clear evidence to this Court was: "Q. It is right to say that Argyle UAE never conducted any transactions from the date of its incorporation until the date it went into liquidation. A. It didn't conduct any trades no." Consequently she argues that is an end of the issue.
491. However SV did not know that that the Company had not undertaken any trades. He believed, because that is what RM had led him to believe, that the Company had started to trade successfully in 2013 and had no reason to question that and no reason to assume that his work and introductions had not provided some benefit to the MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor Company to enable it to achieve that. There was no reason for him to question whether there might be some other reason for the Payment in 2014. 492. There was no novation or new agreement when the Company was incorporated. Whilst that is significant in relation to the breach of duty claim when considering SV's state of knowledge it has less significance. SV believed he had entered into an agreement in 2011 pursuant to which he believed that the Company when incorporated would pay for pre-incorporation work. He is not a lawyer nor as Mr Clarke put it technically minded. He did not know, appreciate or understand that something might need to be done for the Company to become liable to pay for the pre-incorporation work. He had no reason to know. RM then negotiated the Payment to include payment in relation to the pre-incorporation. If either RM or SV had understood the need for a novation or a new agreement then on the facts it is likely that they would have entered into one. That would not have resolved RM's breaches but would have further assisted SV. 493. In those circumstances it would be a triumph of form over substance if SV's knowledge of a breach of trust and the unconscionability of his entitlement to retain the Payment were assessed by reference to his understanding of the legal requirements for a novation when the Company were incorporated without some factual basis for saying he should have had such knowledge.
494. RM considered that SV's contacts and introductions were of value to the Company, to the BGs business more generally. He agreed to pay SV for that work from the Company in due course. SV's lack of detailed involvement or interest other than when he would be paid does not make the receipt of the Payment unconscionable of itself. 495. 496. 497. I am simply not satisfied on the basis of the evidence that on the balance of probabilities the claimants have established that SV had actual knowledge that the Payment was possibly made by RM in

breach of fiduciary duty. There is nothing in the evidence and the documents that satisfies me that he had shut his eyes to the obvious wilfully or at all nor that he had sufficient information that an honest or reasonable man would have been put on inquiry. I do not consider that he even had constructive knowledge that the Payment was probably made by RM in breach of fiduciary duty sufficient to render the receipt of the Payment unconscionable. There is nothing in the factual narrative that seems to me to provide any evidence that SV had any actual knowledge that the monies used to make the Payment were trust monies. RM appears to have purposefully not told SV the true position and/or to have deliberately misled him as to the progress of the BGs business and the Company. I have some sympathy with how the JLS have come to plead the particulars of knowledge set out in the RAPOC at [28] and the Reply but for the reasons set out above I do not accept the JLS characterisation of the evidence and the documents nor that the Invoice and the Payment were in fact evidence that any work undertaken by SV was for Arcturus or RM personally which was at the heart of their claim. 498. For the reasons set out in this judgment I am not satisfied that SV had any reason to know that there was possibly or even probably a breach of trust by RM at the time SV received the Payment on 12 November 2014. He did not have the requisite knowledge MASTER KAYE SITTING AS A DEPUTY HIGH COURT JUDGE Approved Judgment Argyle UAE Limited (In Liquidation) -v- Robert McKellar and anor whether actual or constructive to render it unconscionable for him to retain the Payment.

499. Objectively that may not be considered an attractive outcome where there may have been issues about the value of any relevant work undertaken by SV but that is not what the claim against SV is ultimately about. That question and issue relates back to the claim against RM and his breach of his director's duties where his conduct misled SV such that he did not have the requisite knowledge to enable the JLS to seek to recover the Payment. 500. 501. 502. The particulars relied on by the JLS do not provide a basis for a finding that SV had the requisite knowledge for him to retain the Payment and the knowing receipt claim therefore fails. It is therefore not necessary to consider the other defences pleaded by SV. They include a defence of estoppel, quantum meruit and change of position and section 61 Trustee Act relief. I note that they were not seriously advanced by Mr Clarke, and it appeared to me as noted by Ms Stonefrost that they had some difficulties. This judgment will be handed down remotely via email. As RM is unrepresented, I consider that it will be necessary to have a consequential hearing but I will extend time to a consequential hearing to be fixed. I will provide directions for that hearing when the judgment is handed down.

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Prepared on 23 October 2026 · Esheria