Neutral Citation Number: [2019] EWHC 1558 (Comm)

Case No: CL-2016-000195

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice,
Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/06/2019

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

(1) MR AYOUB-FARID MICHEL SAAB **(2) MR FADI MICHEL SAAB**	**Claimants**
- and –	
(1) DANGATE CONSULTING LTD **(2) BARRINGTON LONDON LIMITED** **(3) MR NIGEL BROWN** **(4) MR ALEC LEIGHTON**	**Defendants**

- -
- -

Mr David Allen Q.C and Mr Jason Robinson (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**
Mr Steven Kay Q.C and Ms Gillian Higgins directly instructed by the **Defendants**

Hearing dates: 1, 2, 3, 8, 9 April

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Approved Judgment

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

....

MRS JUSTICE COCKERILL:

1. This slightly unusual case concerns a question of the enforceability by a client of confidentiality obligations against the private investigators retained by it to investigate allegations of regulatory non-compliance.

2. The Third and Fourth Defendants, Mr Brown and Mr Leighton, are former police detectives who have since specialised in confidential private investigations for an international clientele. In 2014 they were retained by the Claimants, the owners of FBME Bank ("the Bank"/"FBME") to investigate, following the Cyprus Branch of the Bank being taken under the administration of the Central Bank of Cyprus ("CBC"). That event occurred in the wake of money laundering concerns formally expressed in a notice by the US regulator FinCEN ("FinCEN").

3. The document evidencing that retainer, which Mr Brown and Mr Leighton signed, contains strict terms as to confidentiality.

4. They are now sued by the Claimants in this action because, following the termination of the investigation, they gave documents and/or information derived from their retainer to *inter alia* the CBC and FinCEN and other law enforcement agencies. It is also said that they gave such information to media outlets and investigative journalists.

5. The Defendants defend the action on the basis that, while they did make disclosures to regulators and law enforcement agencies, they did this for the right reason; namely because their conclusion was that there was criminality being conducted through the Bank. Moreover they say that they effectively had no option but to assist the CBC. That being the case, they say that they are entitled to invoke the defence of public interest disclosure and also the defence of compulsion of law. They (in essence) deny that their disclosures extended to disclosures to the media or journalists.

6. I should note one point at the outset. It will be obvious to many readers that there are potential issues as to the proper law of the torts alleged against the Defendants – and the proper law of the breaches of contract alleged. However such obvious potential issues of foreign law formed no part of the debate before me, save in passing as regards the limited question of compulsion of law. The parties both elected not to plead or prove the content of any foreign law. That being the case, I must proceed on the default basis, assuming that the relevant foreign law would be the same as English Law, and I therefore decide the case as a matter of English Law.

7. I would wish to say that this strikes me as unsatisfactory, given that the questions in issue here are ones on which lines may well be drawn in slightly different places by different legal systems. Consequently the result I reach may be artificial in some respects. It is however the approach which the parties have chosen, following discussion at the Case Management Conferences of the relevance of foreign law, and permission being given to call such evidence.

8. The trial has been conducted over five days. Mr Farid Saab gave evidence for the Claimants, and Mr Brown and Mr Leighton for the Defendants.

9. The witness evidence was not entirely satisfactory. Mr Farid Saab was a careful and somewhat defensive witness. It was apparent that his own involvement in the Bank's

affairs was in general at the highest level and that he was not necessarily familiar with the areas of detail on which the Defendants had focussed. Mr Brown was, as many individual defendants are, unhappy with the constraints of the cross-examination process, but was polite and tried to answer clearly. He tried to be clear about what he could not recall. However I was persuaded that, as is almost inevitably the case, the clarity of his recollection was somewhat affected by the way that the litigation process had forced him to go over particular areas of evidence repeatedly and by the need to defend his actions. Mr Leighton, although the author of the longest account of the Defendants' work, was barely questioned at all.

10. Although the Defendants were represented at trial by counsel, they have conducted the bulk of the preparation for the trial themselves. It is fair to say that while not formally being in the position of litigants in person (indeed they had the benefit of representation by a very experienced leading and junior counsel, for whose assistance I am most grateful) they have not had available to them the wealth of resource upon which the Claimants have been able to call.

11. I will deal with the issues under the following headings (references are to paragraph numbers below):

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The Facts

12. The Bank was, until its liquidation in 2017, an international bank incorporated under the laws of the Republic of Tanzania. It carried out the bulk of its business through a branch in Cyprus (the "Cyprus Branch"). The Claimants were at all material times the ultimate owners of the Bank.

13. On 15 July 2014, the US Treasury's Financial Claims Enforcement Network ("FinCEN") issued a Notice of Finding stating there were reasonable grounds for designating the Bank, its branches, subsidiaries and offices, as an institution of "*prime money laundering concern*" (the "FinCEN Notice").

14. The FinCEN Notice stated *inter alia* as follows:

> "This document provides notice that …. FBME … is a financial institution operating outside of the United States of primary money laundering concern …
>
> **II.The extent to which FBME has been used to Facilitate or Promote Money Laundering in or through Cyprus and Tanzania**
>
> *1. FBME facilitates Money Laundering, Terrorist Financing, Transnational Organised Crime, Fraud Schemes, Sanctions Evasion, Weapon Proliferation, Corruption by Politically-Exposed persons and other Financial Crimes*.
>
> FBME facilitated a substantial volume of money laundering through the Bank for many years.
>
> FBME is used by its customers to facilitate money laundering, terrorist financing, transnational organised crime, fraud, sanctions evasion and other illicit activity internationally and through the U.S financial system.
>
> FBME performs a significant volume of transactions and activities that have little or no transparency and often no apparent legitimate business purpose.
>
> Through relationships developed by FBME's management since at least 2006, as well its large shell company customer base, FBME facilitates the activities of international terrorist financiers, organised crime figures and money launderers.
>
> For example, since at least early 2011, the head of an international narcotics trafficking and money laundering network has used shell companies' accounts at FBME to engage in financial activity.
>
> In late 2012, the head of the same international narcotics trafficking and money laundering network continued to express

interest in conducting financial transactions through account with FBME in Cyprus.

Separately, in 2008, an FBME customer received a deposit of hundreds of thousands of dollars from a financier for Lebanese Hezbollah.

FBME also facilitates financial activity for transnational organised crime. As of 2008, a financial advisor for a major transnational organised crime figure who banked entirely at FBME in Cyprus maintained a relationship with the owner of FBME.

FBME facilitated transactions for entities that perpetrate fraud and cybercrime against victims from around the world, including in the United States. For example, in 2009, FMBE facilitated the transfer of over $100,000 to an FBME account involved in a High Yield Investment Programme ("HYIP") fraud against a U.S person. In July 2012, the FBME customer operating the alleged HYIP was indicated in the United States District Court for the Northern District of Ohio for wire fraud and money laundering related to HYIP fraud.

FMBE has processed payments for cybercrime networks. In September 2010, FBME facilitated the unauthorised transfer of over $100,00 to an FBME account from a Michigan-based company that was the victim of a phishing attack. Several FBME accounts have been the recipients of the proceeds of cybercriminal activity against U.S victims. For example, in October 2012, an FBME account holder operating a shell company was the intended beneficiary of over $600,00 in wire transfers generated from a fraud scheme, the majority of which came from a victim in California. ….

2. FBME's weak AML controls encourage use of the Bank by Shell Companies and allow its Customers to perform a significant volume of Obscured Transactions and Activities through the U.S Financial System.

In just the year from April 2013 through April 2014, FBME conducted at least $387 million in wire transfers through the U.S financial system that exhibited indicators of high-risk money laundering typologies, including widespread shell company activity, short-term "surge" wire activity, structuring and high-risk business customers.

FBME has a significant number of shell company customers nominally based in Cyprus and in other high-risk jurisdictions. Wire transfers related to suspected shell company activities accounted for hundreds of millions of dollars of FBME's financial activity between 2006 and 2014. For example, FBME

> was involved in at least 4,500 suspicious wire transfers through U.S correspondent accounts that totalled at least $875 million between November 2006 and March 2013.
>
> The FBME customers involved in these wire transfers exhibited shell company attributes, and other financial institutions involved in the transfers reported that they were unable to verify the identities of FBME's customers.
>
> … FBME's customers, including its many shell company customers, have frequently used FBME's Cyprus address to conduct collectively tens of millions of dollars of transactions …
>
> Although there may be rare occasions when use of the bank's address as a bank customer's address of record is legitimate, such a practice is highly unusual and indicative of the bank's potential complicity in its customers' illicit activities… Obscuring the true address of the customer inhibits compliance checks by counterparty or intermediary financial institutions."

15. On 22 July 2014, FinCEN issued a Notice of Proposed Rulemaking against the Bank which confirmed that it proposed to impose measures preventing the Bank from having any further access to the US banking system (the "Notice of Proposed Rulemaking"). The Notice of Proposed Rulemaking stated that any written comments thereon needed to be submitted within 60 days.

16. Soon after the FinCEN Notice, the CBC assumed the administration of the Cyprus Branch on 18 July 2014.

17. On 21 July 2014, the CBC placed the Branch under the administrative control of a Special Administrator with a view to selling the assets of the Branch.

The Engagement of the Defendants

18. In mid-late July 2014, following contact between the Defendants and a contact at the Bank, the Claimants corresponded with Mr Brown and Mr Leighton with a view to engaging them.

19. Shortly thereafter, the Claimants engaged the Defendants to conduct an independent internal investigation into the allegations outlined in the FinCEN Notice, with a view to assisting the Claimants and the Bank in responding to those allegations (the "Engagement"). This retainer formally took place through the lawyers representing the Saab family, Quinn Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel").

20. Mr Brown and Mr Leighton provided their services to the Claimants through the First Defendant ("Dangate") and the Second Defendant ("Barringtons"). Mr Brown was at all material times the sole director of Dangate and a director of Barringtons. Mr Leighton was at all material times an employee of, or engaged as a consultant to, Dangate and Barringtons. There was a small issue as to whether Barringtons was in fact

involved. To the extent that this issue remained live, I find that it was. In Mr Brown's affidavit of 7 July 2015, he stated that he and Mr Leighton provided their services *"through Dangate and later Barringtons"*. This was also apparent from the documentation in play in the trial – the Investigation Plan which the Defendants produced was on its face a Barringtons document, with Barringtons' logo and address on the first page

21. It is accepted by the Defendants that:

 1) Mr Brown, on his own behalf and on behalf of Dangate, signed an engagement letter with Quinn Emanuel on 1 October 2014 which formalised the terms on which the Defendants were to perform the Engagement (the "QE Engagement Letter").

 2) Dangate, Mr Brown and Mr Leighton were all bound by the terms of the QE Engagement Letter.

 3) The terms of the QE Engagement Letter applied to any persons affiliated with Dangate who worked on the Engagement.

 4) The terms of the QE Engagement Letter contained express terms imposing obligations of confidentiality on the Defendants.

22. The terms of the Engagement letter are material. They are as follows:

> "This letter sets forth the terms and conditions under which your firm, Dangate Consulting Ltd ("Dangate"), has been retained by Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") on behalf of our clients, Ayoub-Farid M Saab and Fadi M Saab. As counsel for Messrs. Ayoub-Farid and Fadi Saab, Quinn Emanuel is retaining Dangate for its investigative capability and experience in order to provide comprehensive legal advice to Messrs. Ayoub-Farid and Fadi Saab in connection with the U.S Department of Treasury Financial Crimes Enforcement Network's ("FinCEN") proposed rulemaking regarding FBME Bank Ltd (RIN 1506-AB27), (the "Engagement").
>
> Dangate agrees not to disclose any confidential information related to the Engagement to any third party without Quinn Emanuel's consent. Confidential information includes any of the following related to the Engagement: (1) all communications between Dangate, Messrs. Ayoub-Farid and Fadi Saab, and Quinn Emanuel; (2) all internal communications at Dangate; (3) all information provided to Dangate by Messrs. Ayoub-Farid and Fadi Saab and Quinn Emanuel, and anyone working with or at their direction; and (4) all reports, analyses, work papers and other records created by Dangate. The obligation to maintain the confidentiality of confidential information shall survive the completion of Dangate's work on the Engagement. The terms of this letter apply to any person affiliated with Dangate's investigative services who work on the Engagement, including

> any independent contractors ("affiliated persons"). You agree to communicate the restrictions on the disclosure of confidential information contained in this Agreement to any and all affiliated persons.
>
> All confidential information maintained by Dangate related to this Engagement constitutes property of Quinn Emanuel. Dangate agrees to return all confidential information to Quinn Emanuel at its request.
>
> All written communications from Dangate to Messrs. Ayoub-Farid and Fadi Saab and/or Quinn Emanuel shall be marked as follows: Privileged & Confidential – Subject to Attorney-Client Privilege and Attorney Work-Product Doctrine."
>
> Dangate agrees that it shall immediately notify Quinn Emanuel of (1) the unauthorised disclosure of any confidential information in its possession; and (2) any request by anyone to obtain confidential information from Dangate. In the event of any such request, Dangate further agrees to (1) assert, as applicable, the attorney-client privilege or attorney work-product doctrine; and (2) decline production of confidential information pending resolution of any motion for protective order or similar motions filed on behalf of Messrs. Ayoub-Farid and Fadi Saab, unless specifically authorised in writing by Quinn Emanuel to disclose the requested confidential information.
>
> You agree that Messrs. Ayoub-Farid and Fadi Saab shall be solely responsible for payment of Dangate's invoices. You shall submit Dangate's invoices to Quinn Emanuel for review, with a copy to Messrs. Ayoub-Farid and Fadi Saab. You further agree that Quinn Emanuel does not assume any liability for the acts or omissions of Dangate arising out of or in connection with the performance of this agreement.
>
> Please indicate your acceptance of this agreement by countersigning and dating below and return one copy of this letter to us. We look forward to working with you to assist us in our representation of Messrs. Ayoub-Farid and Fadi Saab."

23. Although Mr Brown appeared in his evidence to suggest that the terms of this letter were really there to protect the Defendants, it was (rightly) not seriously argued that this document did not have contractual effect or impose the obligations which it set out. Plainly this was a contractual document, intended as such and it had contractual effect.

24. One point which should be noted is the ambit of the obligations, as this has a significant impact on the findings sought - and in a sense also on the remedies. Those obligations went beyond mere observance of confidentiality and extended to obligations to:

1) Notify Quinn Emanuel before making any disclosure of confidential information to third parties ("Obligation 2").

2) Notify Quinn Emanuel of any disclosures of confidential information to third parties without consent ("Obligation 3").

3) Decline to produce confidential information in response to a request from a third party ("Obligation 4").

4) Deliver up confidential documents in their possession, custody and/or control on demand of Quinn Emanuel and/or the Claimants ("Obligation 5").

24. The Engagement was carried out by the Defendants from around mid-late July 2014 until November 2014.

25. There was an issue at trial as to the purpose of the engagement of the Defendants, in the sense of the aim which it served. It was common ground that the Defendants entered into the Engagement to assist the Claimants to understand more about the actions of FinCEN and the CBC and to help them robustly respond to FinCEN's Notice of Findings. Beyond this however there was a certain difference of emphasis.

26. Mr Brown was keen to suggest that the purpose was effectively to enable the Saabs to go to the authorities, in particular the CBC, with a full knowledge of what underpinned the FinCEN Notice to enable a self-reporting/mitigation strategy to be pursued. He said it was fundamental to his understanding of what Dangate was doing that it was with a view to taking information to the regulators. Mr Saab's position was that the Defendants were there to get to the bottom of who was behind the interest of the regulators in FBME. It was his view that this turn of events had been triggered by business rivals, and he said that he wanted the investigators to find out who they were.

27. Mr Leighton's position was that the Defendants were employed by the shareholders to:

1) Conduct an independent investigation into the allegations in the FinCEN Notice;

2) Attempt to establish specific information relating to the individual allegations and the source of them;

3) Attempt to prove that the allegations were misguided or untrue;

4) Attempt to establish why the notice was issued in the first place;

5) Discover whether there was a mechanism to try to have the notice rescinded.

28. His evidence was that going to the authorities (he mentioned FinCEN and the US Department of Justice) to self-report was one option. But unlike Mr Brown he did not recall it as being a necessary feature of the retainer, merely one option which might be pursued depending on what was found. On this issue I preferred Mr Leighton's evidence over that of Mr Brown and Mr Saab. I consider that the retainer did cover all the matters referred to above, and was not designed to be the search for enemies only which Mr Saab recounted as his focus. While I accept that this was Mr Saab's primary interest I do not consider that this was quite how it was put to the Defendants on behalf of the Saabs or what was, objectively, agreed.

29. However I do not find Mr Brown's evidence on this persuasive; it smacks of *ex post facto* revisionism. It made no logical sense to commit to one path before the situation had been to some extent clarified. It was not consistent with some of the later emails where it appeared that the future course was to be decided once the investigators knew exactly what had been done by who. Further the decision not to tell Hogan Lovells, the solicitors for the Bank, about the investigation was most consistent with bets being hedged as regards whether it would be necessary to self-report.

30. During the engagement Mr Leighton was the *"man on the ground"* assisted by Mr Keith Pedder, while Mr Brown was predominantly liaison between the investigating team and the clients. Mr Brown gave evidence about how his time was taken up with a constant round of meetings; being updated by his team, then updating the clients, feeding responses from them back and so on.

The investigation

31. During August the Defendants seem to have focussed primarily on historical issues. They sought information (which they did not entirely receive) about how some accounts had been selected for closure or enhanced checks following an issue with Deutsche Bank. They raised concerns about the fact that FBME did not make any report to MOKAS (the Cyprus Unit for Combating Money Laundering) about these accounts and the issues that had arisen in relation to them. It was plain from the evidence that Mr Brown considered that this was the correct thing to have done. Mr Saab's evidence was that FBME's actions in closing the accounts had been the appropriate and preferable ones, given the lack of concrete proof of wrongdoing. Which of these was correct would of course have been a matter for Cypriot law evidence, which was not called by either side.

32. The Defendants looked into what was termed "the Magnitsky matter", the essence of which was that Mr Magnitsky had alleged that there had been large scale theft from the Russian state, and had been arrested and died in prison in 2009. There were allegations that the money in question had been laundered through FBME. While this was denied by the Bank the Defendants had doubts about this and continued to look into this.

33. Another matter into which they looked were the past problems with FBME's Card Services arm ("Card Services"). In 2011-2012 there had been an issue with Visa, who had expressed grave concerns about business being conducted by Card Services. In essence Visa had identified excessive chargebacks into the Visa Europe payment system, and that FBME's fraud rate for cardholder-not-present transactions exceeded the Visa Europe threshold by more than three times the Visa Europe average, and that was the case for 14 months from May 2010. Visa also identified over 70% of FBME cardholder-not-present transactions as being from "High Risk" merchants.

34. Whether the initiative came entirely from Visa (as the minutes of the Card Services Board meeting tended to suggest), or was acquiesced in by Farid Saab, who confirmed in evidence that he had close links with Visa and that he had wanted to "remediate" the situation when he heard about it, that acquiring licence had been withdrawn for a period. However it had been reinstated shortly prior to the FinCEN notice being issued.

35. This episode was covered in what was called the Kroll Iago Report dated 2 May 2012. Mr Leighton's evidence was that that report (commissioned by Visa, but apparently

charged by them to FBME) identified issues concerning the activities and regulatory breaches committed by some individuals who were customers of Card Services. It looked at the merchants with the biggest sales volumes in 2010-2011. It highlighted the fact that a number of these merchants were linked through beneficial owners and bank settlement accounts as well as through a particular Los Angeles based notary. Kroll highlighted what appeared to them to be hallmarks of *"dilution of sales"* to overcome Visa's chargeback ratios, extensive use of pre-paid cards, unusual purchasing patterns through sequentially numbered cards and suggestions of what is known as "layering" – which Mr Leighton's evidence indicated was a key element of money laundering.

36. This material prompted the Defendants to take a close look at Card Services. They concluded that Card Services or someone in Card Services had been operating and engaging in illicit schemes designed to undermine the Visa and Mastercard analytical software that was designed to identify fraudulent activity, money laundering and gambling. The involvement of someone in Card Services was apparently inferred through two things. The first was the provision to merchants of large numbers (thousands) of pre-paid credit and debit cards which were then used to transact large numbers of non-existent sales or transactions, thereby diluting the numbers of chargebacks for fraud, gambling and other activities which were unacceptable to Visa and Mastercard. The second was information indirectly from an acknowledged operator of fraudulent transactions who indicated that he always had someone inside any bank through which he was operating.

37. The Defendants concluded that these issues were a substantial reason (but not necessarily the sole reason) for the issuance of the FinCEN notice. The attempt to identify those involved was something upon which the Defendants were still engaged when their retainer was terminated, although they had formed the view that it was likely that some of those involved had left the Bank during the process of "remediation" instituted after the Visa licence was suspended. Their intention was to conduct a full internal investigation with a view to making that identification. However what was discovered, although it was considered to be material which was probably already known to FinCEN, was inclining the Defendants to think that the self-reporting route would be likely to be the most advisable route in due course.

38. As part of the investigation into these aspects of the past history of the Bank, the Defendants looked at some historic KYC files. Mr Leighton described them as *"a prime example, if not the worst example I had seen of 'tick box' due diligence with false UBO's, poor KYC documentation some of which had not been certified and much of which had been certified by the same LA based Notary Public"*.

39. It was apparent that the investigation did not proceed entirely harmoniously. Farid Saab was plainly frustrated by the Defendants' focus on uncovering problems at the Bank, and on their desire to delve into detail of what he saw as historic issues with Visa, when he wanted their focus to be on the question of who had been behind the FinCEN notice, and what he regarded as the thoroughly suspicious alacrity of CBC in effectively closing Cyprus Branch of the Bank down.

40. For their part Mr Brown and Mr Leighton both made clear, in their different styles, that they found it wearing and unhelpful when any discussion of anything negative which had happened was diverted from an attempt to get to the bottom of what had happened and the extent of the problem and onto the question of the Bank's ill-wishers. Mr Brown

expressed his frustration fairly freely. Mr Leighton said: *"It made me wonder what it was that motivated so many people to dislike the Bank or the shareholders to that degree"*.

41. Both were also candid about the fact that they found the approach of Farid Saab's nephew, Michel Saab, to be extremely unhelpful. They considered that he was hostile to what they were doing, often telling them that they were wasting time in conducting an investigation into Card Services. They considered that he was prone not to give helpful answers but fond of distracting them with requests for meetings which then did not turn out to have any content. They felt that he withheld information and emails from them. Indeed Mr Leighton had on occasion threatened to resign because of his frustration with what he considered to be a lack of support for the investigation.

42. By early October the Defendants felt under pressure and aware that they were being criticised for not having achieved much in the time they had been there. They continued however to focus on the Card Services investigation, interviewing individuals who had some knowledge of the pre-pay cards and dilution issues. They uncovered a narrative regarding the Mastercard business which was a close parallel to that which the Kroll Iago Report had indicated for Visa.

43. This was reported back to the Saabs in mid-October 2014, highlighting also issues regarding what appeared to be false UBO's and poor KYC records, as well as the absence of reports to MOKAS when problematic accounts had been identified.

44. In the period after this meeting the Defendants focussed some attention on the Bank's Compliance Officer Ms Lilit Khachatryan ("Lilit"), discovering that her claims to having Harvard qualifications were false. They were shocked by the fact that the Saabs seemed to take this lightly and still kept her in this significant post.

45. It was also in this period that they became aware of an email which was much relied on before me. It was an email between Michel Saab and a man to whom I shall refer as Mr X, concerning assistance which Mr X had offered to give in settling claims between the Bank and another person. He indicated a willingness to settle at a reasonable rate:

> "…say 35% - which is reasonable given that the money that they are claiming is from aggregating, child porn and other nefarious activities). To tell you the truth I am in extremely guilty conscience about even settling ... given that I know he knowingly facilitate child pornography – a crime that should be dealt with through a court system, and result in an indefinite incarceration."

46. This email formed the basis for the allegation that Michel Saab (and hence the Bank) clearly knew that accounts and companies he was working with in FBME Cards were heavily involved in serious crimes, specifically child pornography.

47. By late October 2014, the Defendants requested complete access to the Bank's email server to enable them to get more details regarding the issues which were in their sights. However, despite requests to FBME's Director of IT the Defendants were not provided with unrestricted and independent access to any emails or documents collected from the server. They were "drip fed" documents pre-reviewed by Michel Saab, and remained concerned that they were not seeing the full story.

48. By late October 2014 the *"rumblings of discontent"* from the shareholders as to the progress of the investigation became more apparent, and the Defendants decided to produce an investigation plan. An email dated 25 October from Mr Leighton to Mr Brown said:

> "we need to do a serious timeline investigation into the whole card services process from start to finish as that is where a lot of the FinCEN issues seem to exist. … We really need to have some sort of investigation plan and we really need to be coordinating and exchanging information between ourselves as well as between QE and ourselves otherwise this will dissolve into a fragmented dis-jointed mess (more than it already is now)."

49. The Defendants shortly thereafter put together an investigation plan for what they termed "Project Waxwing". As it to some extent reflects the state of the investigation at this point, as well as illustrating the extent to which there was an overlap with what FinCEN had said, I quote from it at some length:

> "Project Waxwing Investigation Plan…..
>
> In order to properly exonerate FBMECS or to mitigate their involvement in the illegality that clearly resulted, we consider that it is necessary to further investigate and to compile evidence to prove the conspiracy between: … FBMECS employees who acted illegally, …, (iv) the merchants, (v) the Directors and officers of the merchant companies who acted as front-men … and (vi) the UBO's.
>
> Once such an investigation has been conducted and completed satisfactorily then it may be possible to self-report on the matter to FinCEN or the Department of Justice (DoJ) and to mitigate the bank's exposure from a more solid foundation.
>
> We would suggest that the shareholders consult with their legal representatives, Quinn Emanuel, and Hogan Lovells LLP in order to assess the bank's exposure and the benefits of conducting an investigation into this issue with a view to self-reporting.
>
> 4.2 MasterCard Promo & Visa Promo Enquiries
>
> As the investigation into Card Services continues it is quickly becoming apparent that the 'Promo Projects' form a substantial part of the FinCEN allegations.
>
> Evidence suggests that some senior FBMECS employees were heavily involved in a conspiracy with 'Gateway' operators or PSP's that allowed them to conduct highly lucrative cybercrime related business……
>
> Those FBMECS employees who were identified or suspected of having been involved in a criminal conspiracy have either been

sacked or have left the company before the criminal activity was identified. There are some current employees who could be considered to have been 'acting in concert' with the main perpetrators but this will only be confirmed either way by further investigation. …

Once such evidence has been collected, the lawyers will be able to evaluate it and establish whether it is sufficient evidential value and suitable for presentation to FinCEN and/or the Department of Justice in an effort to mitigate and minimise exposure to proposed sanctions such as the 'fifth special measure'. …

Following consultation with the QE legal team, and analysis of the FinCEN notice, it is considered that the 'rogue' Gateway activity forms a considerable part of the issues outlined and raised in the FinCEN notice.

If it is eventually decided to go down the 'self-reporting route', it is considered by the legal team and the investigation team that a full analysis of the preparation work undertaken by FBMECS should be conducted. The results of the 'self-cleansing' program that took place should be thoroughly documented. …

We would thoroughly recommend the investment in the production of a timeline document. ….

The investigation team are aware of previous submissions of formal requests for information from the bank of law enforcement agencies, some of which have been presented to the bank as formal ex-parte Court Orders.

We understand that it may have become a common practice that, if such a request is received by the bank from a regulatory body, it is usually followed by the bank closing the account. By closing an account immediately following a request from a law enforcement agency this could be misconstrued as potentially 'tipping off' to the individual or company under investigation.…

With the closure of the individuals accounts and the closure of Deutsche Bank accounts mentioned above, FBME could be perceived to be a bank that 'tips off' its clients the moment that there is any form of interest by law enforcement agencies. ….

Based on the understanding that the bank is considering going down the self-reporting route, it is our opinion that we must explore every area of potential vulnerability that may exist before 'bearing our soul' to FinCEN/DoJ. …..

> The enquiry lines outlined above are not an exhaustive list of all of the issues that the bank faces. There are surely other additional areas of investigation required.
>
> Although the allegations in the FinCEN Notice of Finding are very serious, there are some positives that may be drawn. Much depends upon whether the allegations have been understood and interpreted correctly. An important point to remember is that many of the allegations contained in the FinCEN documents are historic in date.
>
> In some instances, the bank had already identified problem areas and weaknesses similar to those highlighted in the FinCEN Notice of Findings. Evidence exists to demonstrate that the bank had commenced making reparation and implemented extensive changes in many of the problem areas and weaknesses that were identified in advance of the FinCEN notice.
>
> The allegations in the FinCEN notice clearly state that "FBME Bank Ltd… IS a financial institution… of primary money laundering concern".
>
> We would suggest that the allegations are not only historic, but that a lot of preparation work that has been undertaken has gone unrecognised, making some of the allegations no longer relevant."

50. The plan was not welcomed with open arms. The Saabs' reaction was to say that it did not deal with the issues they were interested in, with Fadi Saab claiming that the Defendants had wasted thousands of pounds achieving nothing. The Defendants were asked to produce progress reports twice a month.

51. On 14 November Mr Leighton produced an Interim Investigation Report. This was a two and a half page document, with a heavy disclaimer at the start that:

> "It has been explained to the client several times that our investigations are incomplete and are on-going… Interim report before completion of an investigation, are also likely to lead to ill-informed information, assumptions, judgments and opinions being published that may have a negative impact upon any later legal proceedings …"

52. Mr Leighton indicated that the Investigation Plan was intended to *"serve as an indication to the client of the tasks that we are and have been involved with"* and that he was confident that quite a lot of the FinCEN issues related to Card Services and the Visa and Mastercard dilution programmes. He indicated that benefits from the schemes would be regarded as proceeds of crime.

53. The Defendants also became concerned when they asked to see any due diligence which had been done on Mr X and what appeared to be a spurious due diligence file was produced in November 2014 by Ms Khachatryan, consisting of a few sheets of paper, described as a *"work in progress"*.

54. A meeting was arranged in London for 18 November. Whilst on the aeroplane flying to London Mr Brown mentioned the Magnitsky-related accounts to Farid Saab, who derided his *'silly theories'*.

55. The engagement was effectively brought to an end during a *"pencils down"* meeting on 18 November 2014 between the Defendants and Hogan Lovells.

The Disclosures

56. The timeline appears from the documents to run thus. After the *"pencils down"* meeting the Defendants continued to work, partly because they still wanted to get to the bottom of things that were concerning them and partly in order to bring Hogan Lovells up to speed with the investigation. They continued to work on their timeline.

57. At roughly the same time there was correspondence about the outstanding fees. Thus on 4 December 2014, 20, 23 January and 1 February 2015 there were requests for payment from Mr Brown. The Defendants were discussing the financial situation amongst themselves with a degree of unhappiness. Reference was made to an email of 3 February 2015 in which Mr Pedder said the following:

> "the fact we have been entirely loyal to the cause does not necessarily mean that this will always be the case. The product of a lot of our effort still remains unpaid and as such how does that sit within the framework of the confidentiality agreement…"

58. None of this correspondence produced any joy. On about 24 February 2015 the Defendants met with Cypriot lawyers, ID Law, supposedly to get advice about their fee dispute, though it was also said to be because the Defendants were concerned that they may be criminally exposed should a criminal investigation be instigated by the Cypriot or US law enforcement agencies and it become known that they had not reported their knowledge of the crimes.

59. The choice of ID Law was said by the Claimants to be precisely because the Defendants knew that firm was hostile towards the Saabs and the Bank. This submission seemed on the evidence before me to be somewhat of an overstatement. However certainly the Defendants knew ID Law's name from documents they had encountered in their investigation, as a firm associated with people who Farid Saab had identified as being inimical to him. They knew that ID Law were not likely to be professionally embarrassed by any existing retainer by the Saabs or unwilling to act against them. I was not persuaded that there was more to the decision than this.

60. At that meeting the Defendants indicated at least in general terms the nature of their concerns. It was their case in opening, and the evidence suggests, that in fact the Defendants explained their knowledge in detail to Andrew Demetriou of ID Law.

61. I pause at this point to evaluate the question of why the Defendants made this disclosure and the disclosures which then followed. In one sense this question does not matter. The subjective intention of a person when making a disclosure need not be disinterested or concerned only with the public interest if the disclosure is, as a matter of law, one which attracts the public interest defence. Yet it has seemed to me that the Defendants' reasons for acting as they did at least illuminate the situation in which they now find themselves.

62. The case as to motivation advanced by the Claimants was simple. It was that the Defendants acted out of pique; they were furious at not having been paid. The case advanced by the Defendants was slightly less clear. Pique was conceded to have existed, but not as a motivation. Mr Brown's position was that he acted out of a sense of duty, because he considered that the arrangement was always one which was to have led to a disclosure exercise. As noted above, I do not entirely accept this evidence. Also acknowledged in the mix was a concern about the position in which they found themselves.

63. In evaluating the evidence I have concluded that this latter very acute and genuine concern as to their own exposure, allied to considerable annoyance at being out of pocket, drove the situation. The Defendants were annoyed at not being paid; but they would probably not have acted as they did but for a worry on their part that they had been left exposed by the actions of their former clients. Having anticipated a consensual approach to what was discovered, having over time formed the view that self-reporting was the right route to go down, and having been unpersuaded by the alternative view settled on by their client, I do accept that the Defendants were worried that they might ultimately find themselves the focus of legal steps by regulators or law enforcement agencies for having facilitated money laundering by not reporting everything they knew.

64. However were it not for their issue as to payment, it seems likely that the Defendants would have addressed this issue differently and as a separate matter. In the context of a multi-jurisdictional issue involving confidential material, a stringent contract and at least three possible relevant legal systems this would have been the prudent course. Had it been followed, it seems highly unlikely that this judgment would have been written. As it was, however, the Defendants took advice from ID Law in the context of the fees dispute, in that context they mentioned their other concerns, and the two issues became conflated, with extensive disclosures resulting.

65. In any event, as a result of that meeting on 25 February 2015 ID Law filed a Suspicious Activity Report with MOKAS and spoke that day with the Attorney General of Cyprus.

66. Following that, on 27-28 February the Defendants met with the Governor of the CBC and Members of the Resolution Committee. At that meeting they gave some information about their engagement. There was an issue as to whether they asked to be compelled to give evidence, or whether compulsion was effectively threatened, and they responded that they would speak if required to do so.

67. On 2 and 3 April 2015 the Defendants' claims for unpaid fees were issued in Cyprus.

On 9 April 2015 the CBC wrote to the Defendants. That letter, to which I shall return, contained a request that they hand over their confidential information and documents.

68. By 12 April 2015 Mr Brown and Mr Leighton had done a good deal of work in copying documents which they had from their engagement. Mr Leighton sent an email talking about how he had filled a pink suitcase with confidential documents and had another two files on top. Mr Brown too was collating documents for supply to the CBC.

69. On 14 April 2015 the AG of Cyprus wrote to the Defendants seeking that they hand over confidential information and documents.

70. Meanwhile the Defendants started work preparing affidavits. This was initially done in the offices of DLA Piper LLP. But Mr Leighton was not impressed with the assistance they were getting, and they decided to prepare the affidavits themselves from home. This was duly done. The affidavits, which are very lengthy documents and contain the Defendants' best recollections of the progress of their investigation, were signed on 7 July 2015.

71. Mr Brown produced a 46-page affidavit headed "*Central Bank of Cyprus: FBME Bank Ltd v FBME Card Services Ltd*". It covered, in considerable detail, information about (a) meetings and discussions that took place between the Claimants, officials/employees of the Bank and the Defendants as part of and in relation to the Engagement; and (b) matters investigated by the Defendants during the course of their Engagement.

72. Mr Leighton produced a 139-page affidavit with the same heading. It disclosed the same type of confidential information about the Engagement including matters the Defendants were told by Bank employees, the gist of the contents of the Kroll Iago report and much other material. It made reference to 122 separate exhibits.

73. Later in 2015 Mr Leighton met with MOKAS in Cyprus and provided copies of the affidavits prepared by the Defendants, including the exhibits. The Defendants also met with the Cypriot Police in Nicosia and gave them information about the Engagement.

74. On 11 August 2015 the affidavits (but not the exhibits) were then provided to FinCEN on an unsolicited basis. Further disclosure was made by Dangate on 18 January 2016 ("the January Disclosure"). The document submitted was said to describe the "*main highlights of evidence against FBME bank, the shareholders, subsidiaries and staff*". It contains a series of allegations of wrongdoing with respect to the Claimants, the Bank, its officers and employees said to have been discovered during the Engagement.

75. On 3 February 2016 ID Law wrote to FinCEN to ask them to confirm receipt of the Dangate Disclosure and to confirm they would post the disclosure online. This was, it was accepted, prompted by a desire on the part of the Defendants that the disclosure be made public.

76. There were apparently some further disclosures. In Mr Leighton's witness statements his evidence was that the Defendants have made a number of other voluntary

disclosures of confidential information to other law enforcement and regulatory agencies in the United States. This apparently reflects at least a disclosure to the FBI which Mr Brown mentioned in evidence. This apparently included the affidavits and all of the exhibits. Mr Brown indicated in his evidence that there was a disclosure to unspecified law enforcement agencies in the UK.

77. There were two further issues as to the ambit of disclosure:
    1) Firstly as to whether between 28 January 2017 and 21 June 2017, Mr Brown exchanged a series of emails with Mr Hollingsworth, under cover of which emails he supplied Mr Hollingsworth with confidential documents ("the Hollingsworth emails").
    2) Secondly there was also an issue as to whether one or more of the Defendants disclosed confidential information and documents to journalists and/or media outlets, including to Private Eye ("The Media Disclosure Issue").

The Hollingsworth allegations

78. There were in the trial bundles a number of emails dating from early 2017 which appeared on their face to disclose a correspondence between Mr Brown and Mr Hollingsworth, an investigative reporter, during the course of which Mr Brown provided Mr Hollingsworth with confidential information. They were disclosed by the Claimants, not the Defendants.

79. The Claimants served a statement from a Mr Halloran, an investigative journalist who had provided the emails to the Claimants. As a journalist he declined to name his source, but the clear inference from his statements is that he obtained the documents from Mr Hollingsworth. He is adamant that they are genuine. He had not provided metadata or native copy formats. Mr Halloran was not required to be tendered for cross-examination. Neither party sought to call or compel Mr Hollingsworth.

80. Mr Brown's position was in essence that he did not have these emails on his system, he did not send these emails to Mr Hollingsworth and did not recall receiving them. I say that this was his position in essence because his response to the allegations was somewhat more fluid and nuanced than this. In his written evidence he appeared to be denying any such contact and to be alleging that the emails had been forged and were essentially inserted into Mr Hollingsworth's records by a hacker.

81. In oral evidence however he was plain that on further reflection he wished to go no further than giving evidence as to what he knew or did not know. On this basis he said that he did now know their origin, and whether they were forged and did not know for sure whether he had sent them. He accepted that they appeared to originate from his account and that in some respects they looked authentic – particularly where for example there was a discussion. There was effectively a sliding scale ranging from one email which he accepted he did send, through emails about which he was agnostic, to ones where he tended to the view that he would not or could not have sent them.

82. In one sense there is an easy answer to this point, as Mr Allen QC pointed out. There is (unsurprisingly) a procedure by which the authenticity of documents relied on in court can be challenged. That is set out in CPR 32.19: *"A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection*

of documents) unless he serves notice that he wishes the document to be proved at trial."

83. The default position is that such a notice must be served within 7 days of disclosure of the document. The Commercial Court Guide, with an eye to the ambit of disclosure often involved in commercial cases, has amended that limit for cases in this court to the latest date for serving witness statements or 28 days after disclosure, whichever is the later (paragraph E7.1(a)). In this case no such notice was served. Strictly, therefore, the authenticity of the documents should be taken to be proved.

84. However in the light of the Defendants' somewhat disadvantaged position, and in the light of the content of Mr Brown's witness statement, I will nonetheless evaluate his position on these documents. My conclusion is that the evaluation does not assist Mr Brown.

85. There were a number of problems with Mr Brown's approach. One was the oddity of the concept that one email in a chain could be authentic, with others being forged; though plainly that is a possibility. But at times he was suggesting that an email was forged, when the next email which actually referred to the "forged" email was not said to be forged, and where the removal of the disputed email would render the rest of the chain nonsensical. Another was that certain of the emails alluded to subjects which he accepted he had discussed with Mr Hollingsworth – in particular regarding a story about a third party on whom Mr Hollingsworth wanted to write a story. Similarly the tone of at least some of the emails is chatty and allusive, as between friends or colleagues with common hinterland; the forging of such emails in a "pitch perfect" way seems highly implausible.

86. A further issue was the fact that for a number of the emails about which he was most sceptical, his grounds for being sceptical were based on the apparent time at which the email was sent. However in adopting this position he neglected to take into account that these emails were ones where either he or Mr Hollingsworth was in a different time zone. In each of these cases once the appropriate time zone was factored into consideration the oddity disappeared. Thirdly there was the fact that the chain of emails finished with an email about which Mr Brown was sceptical which email involved making arrangement to meet. That arrangement was for a location which Mr Brown accepted he had previously used for meeting Mr Hollingsworth for exchanges of information. It would be odd if a hacker were to come up with such a credible location.

87. Further all of this dispute was to an extent arid because Mr Brown in his oral evidence accepted as genuine an email to Mr Hollingsworth wherein he sent a package of materials. Some of this package was material relating to this litigation – the claim form and application to dispute jurisdiction, for example. Other materials sent were public domain materials. But also included in the package were the Investigation Plan and the affidavits of Mr Brown and Mr Leighton. On the basis of this undisputed disclosure I can and do therefore conclude that Mr Brown was in breach of contract in that he disclosed confidential information and documents to Mr Hollingsworth.

88. To the extent that it is relevant I also conclude that Mr Brown further breached his contract by the further disclosures of other confidential material in the contentious emails. I was invited to conclude that his evidence regarding these emails was untrue and that he was lying in his responses. I decline to do so, essentially for the reasons I

have given at paragraph 9 above. I do however consider that his approach to these emails evidences a tendency on the part of Mr Brown to jump to conclusions on an insufficient basis.

Disclosure to Media

89. The issue of disclosure to the media is in some sense an "add-on" to the Hollingsworth allegations, in the sense that the two allegations are of the same type: disclosure to a third party who could not credibly fall within the public interest defence.

90. The Claimants endeavoured to persuade me that the fact that Mr Leighton and Mr Brown had previously spoken of use of media campaigns to their clients' advantage provided some evidence in favour of a conclusion that they had breached their contract by providing such material to various media outlets in the context of their dispute with the Claimants. I was not persuaded that this would be appropriate. Disclosure on behalf of clients in an authorised way can give no indication of the likelihood that the Defendants would make an unauthorised disclosure against their client's interests. Those are fundamentally different things. The fact that they knew how to contact the media is far from being enough to ground such an inference. Any conclusion as to disclosure to media outlets must therefore be reached on the basis of the evidence regarding those alleged disclosures, against the background I have outlined above.

91. What does however become part of that relevant background, in the light of the conclusions I have reached above, is the following email sent under a subject line FBME and referencing this litigation, dated 28 January 2017 from Mr Brown to Mr Hollingsworth:

> "This appeared in the Private Eye. Maybe you can use this as an anchor to write a much bigger story? I really want something decent in the serious press."

92. There are three allegations:

 1) Articles in the Asia Sentinel, in particular an article dated 17 August 2017;

 2) Articles in Buzzfeed on 13, 14 and 15 December 2017

 3) An undated article in Private Eye.

Asia Sentinel

93. The article that the Claimants place particular reliance on is dated 17 August 2017 and titled *"A Fox in Charge of a Global Money-Launder's Henhouse"*. At page 4 the article displayed a flowchart purporting to show the flow of funds between a large network of companies and trusts including FBME Ltd (the 100% owner of FMBE Bank).

94. What appears to be the exact same flow chart was disclosed by the Defendants in the proceedings. The evidence of its "properties" suggests that it was in the Defendants' possession two months before the article was published. Mr Brown's evidence was that it was a document he had obtained from someone else.

95. The Claimants also asserted that Mr Brown had links to the Asia Sentinel. He accepted he had a client who he believed to have a link to the Asia Sentinel. The Claimants also asserted a link via the fact that the Asia Sentinel had done a feature article about 5 Stones Intelligence, for which Mr Brown acts as EMEA Director.

96. I do not regard this material taken together as providing a case on which it would be proper to infer that it is more likely than not that Mr Brown provided material to the Asia Sentinel. What has been adduced is no more than an interesting collection of facts. There are likely to have been numbers of other people (including the author of the flow chart) who could have provided the information to the Asia Sentinel.

97. Further the content of the Asia Sentinel article to which I have been referred does not seem particularly apt or likely to be content supplied by Mr Brown or Mr Leighton in the context of their relationship with and dispute with the Saabs, the focus being far more obviously on FBME's administrator. The flowchart itself has a much wider focus than that which Messrs Brown and Leighton had evidenced.

Buzzfeed

98. These articles provide somewhat contrary indications. On the one hand they contain many lines which read as if they came direct from Mr Brown or Mr Leighton and which certainly tempt one to the conclusion that that was indeed their derivation. Thus: *"Brown recalled telling him…."*,*"What on earth is this, asked Brown"*, *"The detectives stared in amazement …"*,*"Fuck FinCen, Brown recalled one of the owners telling him."*.

99. But on the other hand the pieces are plainly written in a heavily stylised way, not confined to passages relating to Mr Brown and Mr Leighton. Moreover the articles expressly disavow direct contact with the Defendants:

> "Brown and Leighton also declined to comment, citing client confidentiality. But Buzzfeed News has reconstructed their investigation using the leaked files and their detailed affidavits sent to government investigation in the US and Cyprus."

100. A close examination of the articles indicates that caution is justified. Indeed nearly all of what is cited could have been spun out of the affidavits, for which Mr Brown and Mr Leighton would not be the only credible source. What is needed therefore is for the Claimants to show that the Buzzfeed articles contain materials which could not have come from those affidavits or a similar source which had a much wider circulation.

101. The Claimants implicitly accept this is necessary and seek to achieve this by reliance on what they say are references to underlying documents such as emails, minutes and so forth. I was not provided with a schedule of such materials but it appeared from the cross-examination of Mr Brown to be common ground that such documents were referred to. However it also appeared to be common ground that FinCEN, Cypriot police, the CBC, and the Attorney General of Cyprus would have had access to such documentation. While that appears on the surface to be a tight pool, of course there would be a variety of individuals at each entity who would have had access to such materials. I am therefore not persuaded that it would be appropriate to conclude that Mr Brown and Mr Leighton were the only persons privy to this material who may have had

a motive for such disclosure, or that they were on the balance of probabilities the persons who shared this material.

102. There were suggestions of conversations to which only the Defendants were privy being referenced in the articles. However this suggestion, so far as it concerned any conversations not reported in the affidavit, was not made good.

103. Finally the Claimants relied upon the reference to *"Project Waxwing"* (the codename given by the Defendants to the investigation in the Investigation Report) as being a detail which was never mentioned in the affidavits. However this too had a not inconsiderable pool of people who knew this detail and could have supplied it: Mr Brown identified as possibilities the Saabs, or their secretarial support team, or PAs, or their lawyers, or Kroll, Mr Pedder, or the CBC or ID Law.

104. The Claimants also rely on the timing of the Buzzfeed articles, which closely preceded the hearing of the Defendants' application for stay of payment of costs. This, they say, supports the inference that Mr Brown orchestrated their publication. In my view, the timing point is purely speculative and can be given no weight. It is difficult to draw any inference from the fact that the articles were published on consecutive dates; they were part of a three-part series. In any event, there is no evidence that Mr Brown had such control over Buzzfeed as to dictate the timing of their publication.

105. I am therefore equally unpersuaded that the Defendants made the disclosures complained of to Buzzfeed.

Private Eye

106. The third disclosure that the Claimants rely upon is based on an undated article in Private Eye titled *"Proven Bankers"*. The article is relatively short, giving an overview of the situation including the existence of the affidavits, and a brief outline of some of the contents of those affidavits as well as the existence of this litigation. It features two apparently direct quotations from Mr Brown:

> "Although the Saabs clearly wanted to enlist the investigators in their defence, Brown and Leighton were so appalled by what they discovered – "crimes of enormous magnitude" in Brown's words – that they turned against their paymasters and signed affidavits to the US government and Cypriot police that supported the initial allegations made by the American regulators.…
>
> As Brown told the Eye: "If they succeed in getting an order for bankruptcy they will get all the documents without a trial"."

107. Mr Brown did not deny making the last statement. He recalled being called by Private Eye and giving this response. However he did deny making any other disclosure to Private Eye, to which he derisively referred as an *"insignificant media outlet"*.

108. As for the first alleged quote it appears again to bear some resemblance to Mr Brown's witness statement and his affidavit. Although the exact phrase is not used, there are

references in those documents to *"massive criminality"* and similar phrases. It appears to me likely that this phrase was something which Mr Brown did say to Private Eye when he made the second statement which he accepts giving.

109. There is one further complication, which is that there is no date on the document and the parties have (somewhat surprisingly) been unable to establish the date of the publication. In cross-examining Mr Brown, Mr Allen QC for the Claimants indicated that it was the Claimants' case that this article dated from sometime around 28 January 2017. This is apparently because of the correlation between what Mr Brown accepts he said to Private Eye and the email he sent to Mr Hollingsworth on that date.

110. However that being the case on the evidence it is impossible to say whether or not this article did date from January 2017 or later – and in particular whether it pre or post dated the Buzzfeed articles, which essentially brought large parts of the contents of the affidavits (and all of the substantive content of this article aside from the quotes) into the public domain.

111. The second quote above involves no breach of confidence. As for the first quote, I do not accept that this statement alone would count as breach of confidence, in the circumstances where the substantive content of the article was already in play in the public domain and the quote itself is merely Mr Brown's view. As it is impossible to say whether the underlying material was in play, it follows that the same applies to this quote.

112. Mr Brown certainly appeared to deny being the substantive source. When asked about the article in oral evidence his firm reaction was *"Why don't you ask Quinn Emanuel, because they spoke to Private Eye?"*.

113. His reason for so saying was because the article also featured what appeared to be a quote from Mr Bunting of Quinn Emanuel, the Claimants' solicitors:

> "We are confident that an English court would have no hesitation rejecting the contention that your clients are entitled to disregard their confidence obligations altogether, simply because they believe that they had identified evidence of wrongdoing by our clients"

114. It transpired however that that quote came from a letter sent by Quinn Emanuel to ID Law, the Defendants' Cypriot lawyers, on 12 May 2016. It would seem to follow, as the Claimants submitted, that the candidates for providing this letter to Private Eye were as follows: the Saabs, Quinn Emanuel, ID Law or the Defendants.

115. Taking all these matters together, I reach the following conclusions:

1) I am satisfied that it is more likely than not that either the Defendants or ID Law passed the Quinn Emanuel letter to Private Eye. However I do not accept (if it is so suggested) that disclosure of that letter constituted a breach of the Defendants' confidentiality obligations;

2) As for the remaining material I do not consider that the burden on the Claimants to prove on the balance of probabilities that confidential material was given by the Defendants has been discharged.

116. I therefore conclude that the allegation as regards disclosure to media outlets fails.

The issues in summary

117. As outlined above, two legal defences were advanced by the Defendants. They argued that the disclosures were not unlawful because they were:

1) Compelled pursuant to lawful request from the Attorney General of Cyprus and the Governor of the CBC; and

2) Made in the public interest, which outweighed any interest the Claimants had in maintaining confidentiality.

118. The first of these defences was only relevant to some of the disclosures (those to the AG of Cyprus and the Governor of the CBC). The ambit of the second defence is a subject to which I will turn following a consideration of:

1) The other obligations

2) The uncontroversial aspects of the relevant law.

The "other" obligations: Obligations 2-5

119. One significant issue is that the defence of public interest disclosure has only ever been asserted to relate to the act of revealing confidential information. It is not said to be a defence to claims for breach of Obligations 2-5. The Claimants accordingly asserted that the Defendants had no defence to the claims based on breach of those obligations. Although Mr Kay QC valiantly attempted to argue that upon the discovery of *"such institutionalised criminality"*, the information was no longer covered by the cloak of confidentiality and any remaining terms of agreement between the parties thereafter fell away, he was unable to bring any authority to support this proposition.

120. I have given some thought to this issue also. One submission made for the Defendants in opening was that the position here was akin to "tipping off". The Public Interest Disclosure Act, although acknowledged to be inapplicable, was cited as analogous. One way of grounding this analogy in applicable law is that it might conceivably be said that in the circumstances compliance with (at least) Obligations 2-3 would have amounted to an illegal act.

121. However the relevant English statute, the Proceeds of Crime Act ("POCA"), is not applicable given the geographical location of the acts relied on, and I was given no evidence as to the relevant Cypriot law. Nor does the relevant EU Law - Article 39 of Directive (EU) 2015/849 on the Prevention and Use of the Financial System for the purposes of Money Laundering or Terrorist Financing - appear to be applicable to the Defendants. I conclude that there is no relevant analogy to the position under PIDA.

122. The Defendants were perhaps also attempting to engage some overarching principle of public policy. The relevant public policy might well be that of the location of each relevant jurisdiction where disclosures were made, in which case evidence of public policy in that jurisdiction would have been necessary. But even assuming English public policy were to apply, or that the relevant other public policies were coterminous with it, I cannot see why Obligations 2 and 3 should fail on these grounds in

circumstances where the outcome in the event of compliance would not have been a complete bar on the matter being aired. Rather, compliance would probably have resulted in a court determining the validity of the public interest arguments.

123. As regards Obligation 4 however it seems to me likely that the conclusion on the public interest defence could carry over to this Obligation, which is in effect a mirror image of the obligation not to disclose.

124. As regards Obligation 5, the possibility of a lien argument was floated by Mr Brown in his evidence. However this was (rightly) not pursued by the Defendants' legal team. There appears to be no basis for a general lien akin to that established in the context of solicitors; and the authorities indicate that the Court should be slow to extend the categories where general liens operate. Furthermore the terms of the QE Engagement Letter, in particular the wording *"[a]ll confidential information maintained by Dangate related to this Engagement constitutes property of Quinn Emanuel. Dangate agrees to return all confidential information to Quinn Emanuel at its request"*, would appear to override any such lien, if one could be established. There is therefore no available defence to the claim for breach of Obligation 5.

125. It follows that breaches of Obligations 2, 3 and 5 are established, regardless of the outcome in relation to the main issue.

The Public Interest Defence

General Principles

126. The Defendants' case is that they believed they were entitled to disclose to the AG of Cyprus, the CBC and FinCEN information concerning FBME because the nature of the criminal conduct and the extent of it was so serious that it represented a threat, not only to the banking system but to the safety and welfare of other people.

127. Both parties referred me to a number of authorities in this interesting area. Although there was not a huge amount in issue on the law, because of the unusual nature of this case some recitation of the principles is nonetheless appropriate.

128. It was common ground that the starting point when one looks at the public interest defence, is the "defence of iniquity". In this connection the leading authority is *Gartside v Outram* (1857) 26 LJ Ch (NS) 113. In that case Wood V-C said as follows:

> "The true doctrine is, that there is no confidence as to disclosure of iniquity. You cannot make me a confidant of a crime or a fraud, and be entitled to close my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part: such a confidence cannot exist……
>
> … no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare."

129. Both also referred me to the well-known dictum of Lord Denning MR in the leading case of *Initial Services v Putterill* [1968] 1 QB 396, from which many of the clearest statements as to the ambit of the defence derive. He stated:

> "…[It] should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. The reason is because "no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of the society, to destroy the public welfare"….
>
> The disclosure must, I should think, be to one who has a proper interest to receive the information…. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press."

130. The leading modern iteration is in *Lion Laboratories Ltd v Evans* [1985] QB 526 a case where manufacturers of electronic breath-testing equipment sought to restrain breaches of confidence by former employees who had obtained confidential internal documents, which cast doubt on the accuracy of the equipment and passed them to journalists. Griffiths LJ refers to disclosure of confidential information being capable of justification if the plaintiff had behaved:

> "so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information".

131. O'Connor LJ states:

> "Everything depends upon the facts of the case; thus, the court will not restrain the exposure of fraud, criminal conduct, iniquity; but these are only examples of situations where the conflict will be resolved against the plaintiff. I do not think that confidence can be overridden without good reason to support the contention that it is in the public interest to publish. The plaintiff will not necessarily be seeking to prevent publication of matters derogatory to himself, but nevertheless there may be circumstances that make it just not to restrain publication."

132. Lord Toulson's *Confidentiality* (3rd ed.) (2012), at paragraph 6-075 provides a useful summary:

> "(1) Respect for confidentiality is itself a matter of public interest.

> (2) To justify disclosure of other confidential information on the grounds of public interest, it is not enough that the information is a matter of public interest. Its importance must be such that the duty otherwise owed to respect its confidentiality should be overridden.
>
> (3) In broad summary either the disclosure must relate to serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare in matters of health and safety, or of comparable public importance, that the information should be known by those to whom it is disclosed or proposed to be disclosed.
>
> (4)(i) Even if the information meets the test, it does not necessarily follow that it would be proper for the defendant to disclose it.
>
> (4)(ii) The court must consider the relationship between the parties and the risks of harm which may be caused (or avoided) by permitting or prohibiting disclosure, both in the particular case and more generally. […]
>
> (5) Ultimately the court has to decide what is conscionable or unconscionable, which will depend on its view of what would be acceptable to the community as a fair and proper standard of behaviour. This requires the court to make an evaluative judgment, but it does not have an unfettered discretion."

133. Paragraph 4(ii) in that summary reflects a balancing exercise *"weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure"* which it was common ground requires to be performed in any case in which a breach of confidence is sought to be justified by the public interest defence.

134. As to this balancing exercise it must, as the authorities make clear, be fact specific and tailored to the facts of the case; or to put it another way "*it is not general and unstructured, but specific and structured appropriately to the particular public interest in question*" (Paul Stanley QC *The Law of Confidentiality: A Restatement* (2008), p.54).

135. Finally it was common ground that in general a disclosure must, in order to attract public interest disclosure protection, have some evidence base. This is best expressed in Lord Goff's judgment in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283:

> "… a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source."

136. I shall refer to this test as "the Goff test".

Initial conclusions on potential ambit

137. This review of the uncontroversial principles clears a certain amount of the ground. A disclosure which attracts a public interest defence must have a focus, and a utility. There must be an answer to the question of why it is in the public interest to make the disclosure. Countervailing factors may still mean the defence is not available, but even before proceeding to the balancing exercise it may be possible to discern that it could not be available in any event if that key question cannot be satisfactorily answered, by an answer which falls within the ambit delineated by the authorities.

138. This is, at least in some respects, such a case. The Bank was based in Tanzania with its main branch in Cyprus. It is plainly possible that disclosures to regulators in those countries of matters going to the legality or proper conduct of the Bank's operations (for example as to money laundering) could engage a public interest defence. However that defence could not extend to any disclosures to Mr Hollingsworth or the media. It also could not, in the circumstances, extend to the disclosures admittedly made to ID Law.

139. It follows that even before proceeding to a more detailed consideration of focus and utility and the balancing exercise it can be seen to be the case that the Defendants did breach their obligations of confidentiality in making those disclosures to Mr Hollingsworth and to ID Law.

140. Whether the other disclosures in the US and the UK, where the Bank did not operate, could be covered would depend on the nature of those disclosures (as to whether they engaged any relevant public interest – such as for example national security). There is no obvious ground of public interest in those jurisdictions, but given the broad influence of regulators in those jurisdictions I shall consider them with the remaining disclosures on the assumption that they clear this hurdle. That contingent interest would probably not however apply to law enforcement agencies in those jurisdictions, and accordingly separate disclosures to law enforcement agencies in those jurisdictions would not be capable of attracting the public interest defence.

141. It follows from my conclusion at paragraph 125 above and from this conclusion that some relevant breaches of all the obligations can be established against the Defendants. In essence it would be possible simply to move to paragraph 198 below and deal with remedies.

142. However as the remaining allegations were at the heart of the oral hearing, and as the conclusion on them might have an impact at least as to costs I do proceed to consider them below.

The effect of the QE Engagement Letter

143. As regards the allegations concerning disclosure to the remaining regulators it will therefore be necessary to balance the factors which incline in favour of disclosure with those that weigh against. In this connection it is necessary to look at the authorities concerning this countervailing factor – the public interest in upholding rights of confidentiality.

144. There are two overlapping sources for a duty of confidentiality. The first is common law. It was common ground that duties of confidentiality may be imposed as a matter of law by virtue of the nature of the relationship between the parties in question.

145. It was not in issue that the relationship between the Claimants and the Defendants was one which would attract this duty at common law. It was plainly a relationship where the information was received in the course of a relationship which a reasonable person would regard as involving duties of confidence, as one where the Claimants were volunteering to the Defendants information or documents that were confidential in nature.

146. What was more contentious was whether there is a difference as regards the application of the public interest test deriving from whether the duty is imposed by law only or an express confidentiality agreement between the parties, or both.

147. It was the Claimants' case that the authorities, properly regarded, did indeed support the view that express confidentiality rights ought, in appropriate circumstances, to be afforded more weight than duties of confidence imposed by other means.

148. So far as this point is concerned the starting point is the judgment of Lord Phillips MR in *Campbell v Frisbee* [2002] EWCA Civ 1374. That was a case where the defendant, a supply management services company, had signed a confidentiality agreement requiring it to keep confidential information about the claimant, who was a well-known celebrity. The case concerned whether disclosures were in the public interest to correct a false public image fostered by the claimant. Lord Phillips stated:

> "[22] We consider it arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement…".

149. The Court of Appeal relied on and affirmed this statement in *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 522 (Ch), at [69], noting that "*the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case*".

150. To similar effect is *Attorney General v Parry* [2002] EWHC 3201 (Ch), a case where a footman under an express contractual duty released information to a journalist who published stories about the Royal Family. Lewison J stated at [14-17]:

> "In my judgment, it is, to put it no higher, well arguable that a contractual duty of confidence should be given greater weight than an implied duty arising under the general principles of equity…The second defence is one of public interest. It seems to me to be difficult to assert that the public interest is a complete defence to a claim based on a contract where it is not alleged that what is being revealed is any illegality which might make the contract unenforceable …".

151. In my judgment where one is dealing with information which would otherwise not be confidential there is no good reason for an obligation assumed expressly to attract any greater protection than would be available under common law in relation to information which is by its very nature confidential. However when dealing with information which would, in any event, attract confidentiality at common law, and there exists also an express obligation of confidentiality, the better view is that some greater weight should be given to that obligation of confidentiality. This is consistent with the fact that the court is looking to protect not only the public policy in favour of confidentiality, but also the well acknowledged public policy in favour of upholding freedom of contract (noted by Scrutton LJ in *Weld-Blundell v Stephens* [1919] 1 KB 520, 545).

152. This view is endorsed by noted commentators. In particular Stanley in *The Law of Confidentiality: A Restatement* at p 57, suggests that in such a case:

> "… looking at the amalgam of circumstances through which a reasonable expectation of confidentiality is established, the express agreement tends to strengthen the force of the expectation. It operates synergistically with the other factors."

153. That is echoed, albeit somewhat hesitantly, in Toulson where he says at paragraph 6-047: "*there may be cases in which a written agreement would fortify the existence and scope of a duty which might otherwise be open to possible doubt*".

154. I conclude that the existence of the QE Engagement Letter, and its terms, may therefore add a further element of weight in the balance between maintaining confidentiality and disclosure.

Public Interest disclosure: Disclosures to CBC and FinCEN

155. In the light of the conclusions reached above I now fall to consider whether the disclosures in particular to the CBC and FinCEN were justifiable as public interest disclosures.

156. The first issue to be considered here concerns this central question of whether the Goff test set out at paragraph 98 above is satisfied. However that question must be referable to what was considered to be the relevant allegation and what was disclosed.

157. In relation to this the Defendants' case was regrettably unclear. There was a tendency to refer to "criminality" in broad terms and not to focus on what allegations might need to be brought to a regulator's attention. This was perhaps the natural correlate of the extent of the disclosure made. While I was never provided with a precise list of the materials supplied, it appeared clear from the evidence that what was supplied was virtually a *"document dump"* of the materials which the Defendants had acquired during the course of their retainer, together with the products of their work. For example in a set of particulars the Defendants stated that they *"did disclose their investigation papers and reports to the Cyprus Agencies"*. It is likely that this extensive disclosure was done, as I have noted above, at least in part because of the Defendants' own concerns about their exposure. But the consequence has been that a case of public interest has had to be advanced which covers the entirety of the disclosure.

158. In a sense therefore in order to run a defence of public interest as regards the entire spectrum of disclosure the Defendants were really driven to a very broad case on the necessity for that disclosure. The problem for the Defendants is that the cases are clear that a defence of public interest disclosure has to be related back to the material disclosed. The exercise which the court does is to look at what was disclosed and to decide whether the disclosure of that material was necessary in the public interest. Generally therefore the authorities where the defence is made out deal with relatively focussed disclosures. For example in *Lion Laboratories* the focus of the defence on four documents dealing specifically with the question of the reliability (or otherwise) of the Claimants' intoxicometer. In *Initial Services* the Defendant had given the Daily Mail "smoking gun" documents said to evidence a price fixing agreement.

159. In the end it was plain that such a broad disclosure of multiplicitous documents going to different aspects could not reach the hurdle required on the evidence in this case (with which I deal further below). Indeed I suspect that it would be vanishingly rare for a situation to arise which justified such a very broad disclosure.

160. This approach to the case, driven by the circumstances of the disclosure, was the more to be regretted because it seemed to me that had the exercise of disclosure been approached purely as one of public interest disclosure, with careful advice and focussed disclosure being made, there was a real possibility that some part of the disclosure in fact made would have been capable of being justified on this basis. However because of the primary approach taken (*"widespread and serious criminality"* as a justification for disclosure at large) the case as presented lacked focus on the individual heads where disclosure might have been considered, the materials disclosed relevant to each such head and the specific public interest in those particular disclosures. As a result it has not been possible for me to perform as complete a balancing exercise on the individual points as would otherwise have been the case.

161. I have however endeavoured to do this exercise to the best of my ability in any event as a part of the process of evaluating the question of the overall justification for the overall disclosure. Ultimately it seemed to me that the relevant allegations were in essence the following:

1) Money Laundering via Card Services (the Visa and Mastercard dilution schemes)

2) Money Laundering (Magnitsky money)

3) Facilitating money laundering (poor KYC practices)

4) Involvement in child pornography

5) Involvement in terrorist financing

162. I conclude that as regards some, indeed most, of the material the conclusions reached by Mr Brown were premature and speculative and accordingly could not satisfy the Goff test. Thus:

1) As regards the "Child pornography" allegations, the existence of a single email by Michel Saab referring to "knowledge" that a person is involved in such

matters does not provide a valid basis for an allegation that the Bank knew that specific accounts and companies it was working with in Card Services were involved in child pornography. Nor is the basis or source of the "knowledge" to which Michel Saab refers anywhere apparent. The email appears as loose gossip, which might or might not reflect fact. The fact that Farid Saab reacted with horror to this revelation (*"I knew that stupid boy would bring us all down, idiot, idiot, idiot."*) does not add anything in terms of credible allegation/reliable source;

2) The Magnitsky allegations were essentially based on hearsay opinion evidence from Mr William Browder that he had a *"strong belief that the accounts at FBME held by"* two named companies were involved in laundering the proceedings of the Magnitsky fraud (and other unspecified crimes). Mr Browder was not called to give evidence. I could not conclude that this evidence came close to the necessary hurdle. I do not know enough about his reliability or the basis for his belief to conclude that this met the test.

163. One question which arose in this context was whether the test could be sidestepped by reason of the fact that the disclosure was to a regulator.

164. In *In Re A Company's Application* [1989] Ch 477 an employee threatened to disclose information to FIMBRA (the precursor of the FCA) dealing with circumstances which he said involved breach by his employer of the regulatory scheme to which it was subject. The case deals with an application for an interlocutory injunction. In that context and in particular weighing the balance of convenience Scott J declined to make any preliminary evaluation of the merits of the disclosure. He held that:

> "Where the disclosure which is threatened is no more than a disclosure to a recipient which has a duty to investigate matters within its remit, it is not, in my view, for the court to investigate the substance of the proposed disclosure unless there is ground for supposing that the disclosure goes outside the remit of the intended recipient of the information."

165. Although they did not explicitly do so, I assume the Defendants would wish to rely on this, and to say that they were indeed making disclosures to an investigative body, so that the fact that their disclosure was based on belief, not the requisite fact base, is excused.

166. However, aside from the fact that it is dubious whether disclosures here would be said to be to investigative bodies, I accept the submission that this is not the tenor of the wider authorities. These suggest that some merits base must first be established. Stanley says (p 63):

> "There is an obvious difference between disclosing confidential information based on the merest suspicion or hint of wrongdoing, and disclosing such information where there is solid evidence of wrongdoing. […] The court has to walk a difficult line here. On the one hand, it cannot sensibly be expected to decide whether the suspicions are in fact justified – that is for the investigative body to which disclosure is made. On the other hand, some assessment of the weight of the allegations

> to be made may be necessary. The mere assertion by the defendant that he has suspicions ought not to be enough."

167. This is reflected in *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 74 ALR 428, 450 where Gummow J referred to the need for there to be a "*real likelihood of the existence of a … crime, civil wrong or serious misdeed of public importance*".

168. Ultimately there was no overt issue that the test as stated by Lord Goff was applicable, even in the context of disclosure to regulators. Had it been in issue I would have accepted the submission that there is no logical or juridical reason for a different test to apply in this specific context. I consider that the judgment in *Re A Company*, made in the context of an interlocutory injunction to restrain a threatened disclosure, is no sound basis for applying a different test in the context of the question of the public interest defence after a disclosure has been made.

169. Essentially the Defendants looked to base their case in this regard (and in relation to terrorist financing) on Mr Brown's subjective beliefs, which were recorded in his statement and which he gave again in his oral evidence. The problem is that these beliefs were not supported by any evidence base. Mr Brown was essentially asking the court to take his views as a sufficient basis for a conclusion that disclosure was in the public interest. He was the reliable source, and his belief provided the necessary credibility.

170. This brings into focus the question of the relevance of the discloser's subjective beliefs. In general an honestly held but unreasonable belief that disclosure is justified in the public interest will not suffice: Toulson, *Confidentiality* paragraph 6-036.

171. There is a limited exception to this. It seems that a professional person exercising his objective and considered judgment when deciding to disclose will generally have his judgment respected. The example given was *W v Egdell* [1990] Ch 359. In that case the Claimant was a paranoid schizophrenic with a history of extreme violence, who hired a psychiatrist to report on his state of mental health for the purposes of an application for his release from secure hospital. The consultant psychiatrist formed the view that the Claimant was even more dangerous than his care-giver had believed, and forwarded his report to the hospital in breach of his duty of confidence to the patient. The doctor was permitted to rely on the public interest defence. In the course of his judgment, Bingham LJ held that whilst the public interest defence did not turn on what the doctor believed, his medical opinion went to whether the Claimant was a danger to the public and so was not irrelevant. His sound professional judgment was to be given such weight "*as seems in all the circumstances to be appropriate*".

172. To similar effect was *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 in which the regulatory body for nursing sought a police interview transcript. The Court of Appeal held disclosure was permitted on the basis that, if the police come into possession of confidential information which – in their reasonable view – is in the interests of public health or safety to disclose, they are free to provide the information to the appropriate regulatory body, but should first inform the person affected.

173. The salient point which emerges from this line of authority is that unless a person is a responsible professional in the sense contemplated in those authorities, such that his or her opinion has (like expert evidence) an evidential weight of its own, the subjective

belief of the discloser will not be relevant. The Defendants do not fall within this limited exception.

174. Accordingly the Defendants cannot satisfy the Goff test in relation to these heads of disclosure, and hence the disclosures were not protected by the public interest defence.

175. To the extent that anything were to turn on Mr Brown's own reliability (for example if I were wrong about the question of subjective belief as a basis for credibility) I would have found that he was not himself a reliable source for this material. There are two reasons for this. The first is that it was plain from his account that he was not the man on the ground with in-depth knowledge of the details on each of the relevant areas. The second was that it appeared that he was somewhat prone to jump to conclusions without a reliable evidence base. I place no weight on the passing comments in the authority to which Mr Allen referred me in this regard. But I do take into account the facts that (i) Mr Leighton differed from Mr Brown, and had a better grasp of the detail and (ii) the evidence in relation to the Hollingsworth emails itself demonstrated how Mr Brown had jumped to conclusions.

176. Moving on from these allegations however, it did seem that there was a core of material which might in appropriate circumstances have enabled the Defendants to say that there was reason based on credible evidence to consider that there had been some criminality. This was the material as to the Card Services dilution issues, which I have outlined above. However that material related only to issues which were already highlighted by FinCEN and to matters which had been discovered in the past, before the remediation.

177. Even in closing this was apparent. It was the Defendants' case that the later Kroll Report, which was based on the Defendants' disclosure, found that there were strong indications of money laundering at Card Services and stated that a deeper investigation would likely provide *"additional evidence to corroborate and substantiate FinCEN's findings as well as confirm whether the findings of [this report] relate to more endemic money laundering and other illegal activity at FBME"*. At its highest therefore it was their case that the disclosures as they stood (i) related to Card Services and (ii) confirmed the FinCEN findings.

178. Would this material therefore satisfy the test for public interest disclosure (had this been the case made)? In my view it would not. The nature of the material was apt; the Card Services allegations were allegations of criminality which either arose out of reprehensible laxity on the part of the Bank or was colluded in by Bank employees. I accept that, based on the material which they had discovered, the Defendants had sufficient grounds for a conclusion that it was the latter.

179. But did the public interest require the disclosure (to quote *Initial Services* p. 405)? Was there a "*pressing need [for the public] to know*" what was disclosed (as it was put in *Lion Laboratories Ltd v Evans* [1985] QB 526, 537)?

180. The problem for the Defendants here is that the public in essence knew this already via the FinCEN Notice; what was added by the Defendants was granularity not substance. The Defendants did not point to any item as being a new addition to the picture painted by FinCEN. Indeed it was clear that the Defendants themselves had not reached a conclusion; as was said in correspondence: *"We were sacked before we had completed our enquiries so we never got to the source of the problem"*.

181. It follows that the public had no sufficient need to know what was disclosed on this topic.

182. There is also a second problem, which is that the Card Services allegations related to the past, and there had been "remediation" leading to Visa being satisfied enough to restore the licence. This is a problem for the Defendants because there is authority which indicates that necessity may have a temporal aspect; in that disclosure will not be necessary if the matter is in the public domain or the danger which could give rise to a public interest is past.

183. So in *Schering Chemicals Ltd v Falkman Ltd* [1982] QB 1, Shaw LJ said that there could be no public interest defence when the matter which formed the subject of the breach of confidence was already in the public domain *"Neither the public nor any individual stands in need of protection from its use at this stage in the history. There is no occasion to beat the drum again"*. To similar effect are *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613 (regarding Thalidomide) and *Gurry on Breach of Confidence*, 2nd edn (2012) paragraphs 16.24 - 16.25.

184. This authority may perhaps be viewed as a logical development of the principle that in order to attract the defence the information must be important for safeguarding the public welfare in matters of public importance; if there is no need for safeguarding going forward, how can there be a need for the disclosure?

185. In circumstances where (i) the matter was in the public domain (ii) there was apparently no ongoing issue to which the disclosure related and (iii) the Bank was in any event now in administration, the breach of confidence could not fall within the ambit of the public interest defence.

186. This leaves over two topics. The first is "terrorist financing". So far as Tredwell and terrorist financing is concerned, it falls into both camps identified above. On the one hand the level of information did not reach the Goff test; and then also the FinCEN notice made exactly the same connection as the Defendants rely on. It therefore would fail for the necessity test as it added nothing new.

187. The final topic relates to the KYC failures. These are, in one sense, similar to the Card Services issues, since some of the KYC issues arose alongside the Card Services issues. Where this is the case, disclosure would fail to attract the public interest defence for the same reasons.

188. Here it did seem that the work which the Defendants had done might have moved the narrative on somewhat and that there was some evidence that there remained KYC issues. The Defendants had looked at how this issue linked up with the FinCEN concerns on terrorist financing and had obtained material specifically about how individuals with Syrian/Russian dual nationality were brought into FBME Bank as customers by the FBME Russian branch in Moscow with deficient KYC procedures. They had looked in some detail at a service called "Holdmail" which appeared of concern in that a customer would appear to be resident in Cyprus rather than in their true residence location. There were also the concerns about Lilit's continuance in her important role given her history and the incident of the "work in progress" KYC file. However this was an area where the case as developed in the evidence lacked sufficient focus for me to be able to conclude that this aspect of the concerns would have justified

a portion of the disclosure, particularly given the very high hurdle to be faced in a case where the obligation of confidentiality was bolstered to some extent by a detailed contractual arrangement. Further the decision of FinCEN that the disclosures made to it (which included this material) were irrelevant/lacked sufficient underpinning to give credibility does suggest that it considered that it added nothing material. Essentially therefore here the Defendants' case would have failed (if advanced as a discrete disclosure) to reach the relevant hurdle.

189. I conclude that the public interest defence fails.

Compulsion by Law

190. The Defendants contend that as regards the Cypriot disclosures, these were made under compulsion pursuant to lawful requests from the Attorney General of Cyprus and the Governor of the CBC.

191. Compulsion by law is an entirely separate head of defence to an action for breach of confidence. The defence is available where a party is under a duty to disclose information pursuant to an order issued under statutory authority, or by a court of competent jurisdiction.

192. This is of course an area where one would have expected expert evidence of Cyprus Law to be adduced by the Defendants. However the Defendants have chosen not to do so. They submit that it is a matter for the court to determine the case on compulsion and that it should not hold against them the fact that they are effectively litigants in person and do not have the funds available to be able to instruct experts in this case. They submit that the court may make an assessment on this matter on the basis of documents and the evidence given at trial from both the Third and Fourth Defendants.

193. While this is an unusual contention, it so happens that in this case I consider that the court can do this exercise relatively satisfactorily. I am well able to judge whether the language used is that of compulsion, and the nature of the documents relied on.

194. The first document relied on is a letter from the CBC on 9 April 2015 which was sent to the Defendants at an address in London. It *"requests that you forthwith provide"* information and documents, and asserts that failure to do so "*may*" lead to an administrative fine and "*may*" lead to the commission of a criminal offence in Cyprus. That is not, in my judgment, the language of compulsion. It is the language of request, albeit that it trails a possibility of future attempts to compel or sanction. However as to this contingent threat, it is not clear how it is said that the Defendants as English residents were subject to the Cyprus Courts' jurisdiction or how they could be compelled or sanctioned effectively.

195. Although Mr Brown's evidence was to the effect that he understood that there was some form of compulsion, and that DLA Piper and ID Law told him he was compelled, what he said as to the details of what he was told was that he was told that *"if we didn't comply with it, they would apply for .. a penal notice to be attached to it"*. The logical correlate of this is that the Defendants were under no form of compulsion at the time, and that any attempt to compel depended on a future application. Nor was it ever explained how, if such an application was in future made and granted, that compulsion could operate, or what advice the Defendants had received as to that aspect.

196. The second document relied on is a letter from the Attorney General of Cyprus. It followed on from the SAR filed with MOKAS by ID Law and was sent to ID Law (copying the Defendants). It said: *"you are kindly requested to submit a relevant report"*. Again this is very much the language of request. It is not the language of compulsion.

197. It follows that the case on compulsion by law fails.

Conclusions

198. In the light of the foregoing I conclude that the Defendants were in breach of their obligation of confidentiality in all respects alleged, save as regards the allegations of disclosure to the media. On that basis there is no issue as to the entitlement of the Claimants to the relief sought.

199. That relief is:

1) A declaration that the Defendants, or any one or more of them, breached the Confidentiality Obligations owed to the Claimants, or any one or more of them;

2) An order prohibiting the Defendants, or any one or more of them, from making any further unauthorised disclosures of confidential information or documentation that remain in their possession;

3) An order requiring the Defendants to deliver up any and all documents containing confidential information obtained or produced by them during the course of their Engagement; and/or

4) An order requiring each of the Defendants to provide details of any and all unauthorised disclosures of confidential information or documentation made by them during the course of their Engagement and/or after the end of their Engagement, including identifying by reference to each unauthorised disclosure:

   a) The specific information and/or documentation disclosed;

   b) The date or dates on which such information and/or documentation was disclosed;

   c) The identity of the party or parties to whom that information and/or documentation was disclosed; and

   d) The format in which that information and/or documentation was disclosed.

200. There was one more controversial aspect to the relief. That was the claim for costs to cover the period April 2015 to May 2016 relating to correspondence from the Claimants' legal representatives asking for return of confidential information, undertakings to make no further disclosures and explanations as to what disclosures had been made. The sum of £120,000 *"or such other sum as the Court may assess"* is sought in respect of this claim. No proper basis has been put forward for this quantification.

No evidence allowing me to make any meaningful assessment has been tendered. I therefore dismiss this aspect of the claim.

201. The other claim which was made, in paragraph 53 of the Amended Particulars of Claim was for €100,000 which was received by the Defendants in around May 2015. The issue is whether that was a payment to settle the claim against the Bank, or whether it was a payment made for the provision of the confidential material.

202. The mechanism of the payment was as follows. The Special Administrator of the Cyprus Branch of the Bank transferred €125,000 from the Bank's minimum reserve account at the CBC to his own personal account, and subsequently transferred €100,000 to the Defendants. It is the Defendants' case that the sum was allegedly transferred to settle their claim in Cyprus for recovery of fees not paid in respect of the Engagement.

203. This is supported by an affidavit dated 10 December 2015 and filed by the Special Administrator filed as part of the Cypriot proceedings, in which he says in terms that: *"the above amount was paid ... in order to have the case withdrawn… Although the aforementioned civil claim has not yet been withdrawn ... this is a matter considered settled ... such instructions have already been provided to my lawyers whereas I am advised the only pending issue are the legal fees"*. The claim was ultimately withdrawn sometime around September 2016.

204. The Claimants maintained their claim for this amount as being analogous to the payment by the CBC of the Defendants' expenses, and relied on the absence of documentary evidence from the Defendants in support of their case, as being indicative that the payment was for the information and not a settlement. Despite this submission and although Mr Brown's evidence, that such documentation had not been provided because ID Law had told him that it was privileged, was unsatisfactory, I am not persuaded that the payment was one for the breaches of confidence.

205. The only evidence which I have on this comes from a *prima facie* independent third party, the Special Administrator of the Bank. On the face of it the payment comes from him, not the CBC. That is more consistent with a payment to settle a claim against the Bank than it is as a payment on behalf of CBC for the confidential information. The Special Administrator confirms making the payment, and he also provides an explanation for the payment. This is stronger evidence than the suspicions which point in the other direction. Accordingly, the claim for an account of profits fails.

206. The precise terms of the relief which is to be granted in the light of the above conclusions will be required to be dealt with at a further consequentials hearing.

Post Script: The *Prince Jefri* Point

207. That being the case, the issue referred to as "the *Prince Jefri* point" is of academic interest only. However, since it was the Claimants' primary submission in closing I will nonetheless deal with it.

208. The issue is one which was unpleaded, although it is probably not to be regarded as a pure point of law. It was also not trailed in the Claimants' opening submissions. The Defendants might have, but did not, object to its being run at this late stage.

209. The Claimants' case was, based on the authority of *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, that the Defendants should be treated as being akin to the Claimants' lawyers such that the public policy which would support a public interest disclosure case is outweighed by the public policy that accused persons should be properly defended.

210. The case is one which is better known in the context of Chinese Walls, but involved a situation where KPMG was providing forensic accounting services and litigation support and acted *qua* solicitors.

211. In giving judgment Lord Millett stated:

> "The Extent of the Solicitor's Duty…
>
> Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by any other otherwise than for his benefit….
>
> It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest…"

212. The Claimants submitted that the Defendants are, in this context, to be treated as were KPMG – that is as akin to lawyers. The Claimants instructed lawyers in the USA and employed the Defendants as part of a legal team to robustly combat and respond to those serious allegations. The lawyers instructed the Defendants on behalf of the Claimants to help and assist them. It was agreed that all information and communications would be confidential and privileged. They worked as an integral part of the legal team. Like KPMG "*they investigated the facts, interviewed witnesses with or without solicitors being present, searched for documents…"*. As such, they submitted, I should find that the Defendants were subject to a strict overriding duty; that there was no public interest defence available at all to the Defendants because it is strictly outweighed by the duties of the Defendants by the nature of their engagement.

213. The point is not devoid of interest, but appears to me to be clearly a step too far. The *Prince Jefri* case is a very different case, arising in a very different context. I say this not because of the size of the case (a point which Mr Kay QC submitted marked a relevant

distinction) but because that case was one about conflicts of interest (*"whether, and if so in what circumstances, a firm of accountants which has provided litigation support services to a former client and in consequence has in its possession information which is confidential to him can undertake work for another client with an adverse interest"*). It was not about the interface between duties of confidentiality and public interest disclosure. The issues were entirely different to those which have been before me.

214. Despite Mr Allen QC's best attempts, I do not regard the case as authority for the proposition that the public interest defence to an action based on breach of confidentiality can never be available to lawyers (or those to be treated as analogous to lawyers). The fact that the duty is said by Lord Millett to be "unqualified" does not necessarily import that there are no exceptions to it.

215. Much weight was placed on the inability of a lawyer to reveal his client's confession of guilt. However as is clear from the report at page 236, that is a point which is based on both confidentiality and, critically, legal professional privilege. This is a point echoed in *Weld-Blundell v Stephens* [1919] 1 KB 520 at pp 544-5 on which the Claimants also relied. As for the passage from Lord Hope's judgment at 226E-227B on which reliance was placed, this is a passage which does not seem to have attracted support, and also seems inapt to take the matter any further.

216. I would add that I would regard it as surprising if the proposition contended for were to represent the law in the context of cases such as *Egdell* where a similarly important duty of confidentiality was displaced by a truly overriding case on public interest. If a client disclosed crucial details of an intended bomb attack on a nursery school as part of his consultations with his lawyer, would this court say that the obligation of confidentiality could not be overridden by the need to save the lives of hundreds of children? I strongly suspect it would not.

217. I do not therefore accept that the case is authority for the proposition contended for. Were it to be so, I am not persuaded that I would be bound by it, deriving as it did from a concession. But in any event the cases are plainly distinguishable: KPMG were offering litigation support services in connection with active litigation, whereas here the basis for privilege is hard to discern. The fact that the parties tried (for their own protection) to label it so, does not mean that the legal requirements for establishing legal advice privilege or litigation privilege could be ignored. No authority was cited for the proposition that parties can create a privilege which otherwise does not exist, by private agreement. On a conventional basis the purpose for the Defendants' retainer: "*to assist the lawyers in providing comprehensive legal advice to the Saabs in respect of the FinCEN notice*" falls neatly between the two stools of legal advice privilege and legal professional privilege.