Neutral Citation Number: [2011] EWHC 1731 (Ch)

Case No: HC09C00709

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14.7.11

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

F&C Alternative Investments (Holdings) Limited	**Claimant/Part 20 Defendant**
- and -	
(1) Francois Barthelemy **(2) Anthony Culligan**	**Defendants/ Part 20 Claimants**

No. 15000 of 2010

AND IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

In the Matter of F&C Partners LLP
and
In the Matter of the Companies Act 1985
and
In the Matter of the Limited Liability Partnerships Act 2000

Between :

(1) Francois Barthelemy **(2) Anthony Culligan**	**Petitioners**
- and -	
(1) F&C Alternative Investments (Holdings) Limited **(2) F&C Partners LLP** **(3) F&C Asset Management plc**	**Respondents**

No. 3555 of 2010

AND IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

In the Matter of F&C Partners LLP
and
In the Matter of the Companies Act 2006
and
In the Matter of the Limited Liability Partnerships Act 2000
and
In the Matter of the Limited Liability Partnerships
(Application of Companies Act 2006) Regulations 2009

Between :

F&C Investments (Holdings) Limited	**Cross-Petitioner**
- and -	
(1) Francois Barthelemy **(2) Anthony Culligan** **(3) F&C Partners LLP**	**Respondents**

- -
- -

Miss Catherine Newman QC, Mr Andrew Ayres & Mr Sam O'Leary (instructed by **Norton Rose**) for the **Claimant**
Mr Leslie Kosmin QC & Mr Andrew Thompson (instructed by **Jeffrey Green Russell**) for the **Defendants**

Hearing dates: 14/6/10 – 24/3/11

- -

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.

....

THE HONOURABLE MR JUSTICE SALES

INDEX

Index

Introduction	paras. 1-8
The course of the hearing	para. 9
Hedge funds, funds of hedge funds and the making of the Agreement	paras. 10-21
The classes of client, marketing services and fees payable by the LLP to Holdings under the Agreement	paras. 22-28
The terms of the Agreement	paras. 29-66
The legislative framework	paras. 67-80
The Service Agreement and F&C Group IT policies	paras. 81-93
The FSA regulatory context	paras. 93-114
F&C Group policies and procedures	paras. 115-138
The regime governing provision of IT services to the LLP by F&C IT	paras. 139-146
The funds managed by the LLP	paras. 147-158
Market disruption in 2008/9, the reaction of the Partners and the LLP to the threat to the LLP's business and the development of the dispute: general overview	paras. 159-188
The witnesses	paras. 189-203
Were the representatives of Holdings on the LLP Board agents of Holdings?	paras. 204-206
Did the Members of the LLP owe fiduciary duties to each other?	paras. 207-216
Fiduciary duties owed by the Members to the LLP	paras. 217-220
Content of the fiduciary obligations of LLP Board members, ManCom members and Compensation Committee members	paras. 221-254
Clause 13.6 – Holdings' duty of utmost good faith	paras. 255-259
Clause 11.1 and an implied term in the Agreement	paras. 260-274
The LLP's client base, the Defendants' allegations of mis-selling by F&C and their complaints that F&C failed properly to market the LLP Funds	paras. 275-334

The Defendants' complaints that F&C improperly blocked the pursuit of new business opportunities by the LLP — paras. 335-361

(i) CTA fund — paras. 340-351

(ii) Fiduciary product involving provision of fiduciary services — para. 352

(iii) UCITS product — paras. 353-354

(iv) Hedge fund replication product — para. 355

(v) QFII product — paras. 356-361

The course of events to the end of 2008 — paras. 362-520

IT issues — paras. 521-605

(i) Disputes regarding F&C IT's e-mail and remote access services — paras. 521-569

(ii) The LLP sets up a new IT infrastructure to arrange for external e-mail and remote access services without interference from F&C IT — paras. 570-581

(iii) F&C's complaints in the Cross-Petition regarding the creation of the LLP's new IT infrastructure — paras. 582-598

(iv) Knowledge within the LLP of its new IT infrastructure, e-mail and remote access arrangements — paras. 599-605

January and February 2009: the First Put Option Notices — paras. 606-720

The validity of the First Put Option Notices and the legal position as at the end of February 2009 — paras. 721-739

(i) Is there any defence based on mistake by Mr Ribeiro and Holdings? — paras. 722-723

(ii) Is Holdings' change of position after 25 February relevant? — para. 724

(iii) The relevant breaches of the Agreement — paras. 725-729

(iv) "Gross misconduct", "gross negligence" and "materially adverse effect" — paras. 730-738

(v) Conclusion as to the validity of the First Put Option Notices — para. 739

The period to the Second Put Option Notices: 27 February to 22 May 2009 — paras. 740-868

The validity of the Second Put Option Notices — paras. 869-880

Events from 22 May 2009 to December 2009: The Third Put Option Notices — paras. 881-1059

The validity of the Third Put Option Notices paras. 1060-1065

Events in 2010 paras. 1066-1093

The Petition: the Defendants' unfair prejudice claim paras. 1094-1107

The Cross-Petition paras. 1108-1112

Conclusions paras. 1113-1114

Mr Justice Sales :

Introduction

1. This case concerns a limited liability partnership, F&C Partners LLP ("the LLP"). The LLP has two individual members and a Corporate Member. The individual members are Mr Anthony Culligan ("Mr Culligan") and Mr Francois Barthelemy ("Mr Barthelemy"). I refer to them together as "the Defendants", since they are the Defendants to the Part 7 claim which forms part of the proceedings before me. The Corporate Member is F&C Alternative Investments (Holdings) Limited ("Holdings").

2. Each of the Defendants has a 20% interest in the LLP's profits and capital and each has 20% of the members' voting rights. Holdings has a 60% interest in the LLP's profits and capital and 60% voting rights as a member.

3. Holdings is part of the F&C group of companies, which carry on a range of businesses in the field of asset management. The head company in the group is F&C Asset Management plc ("F&C plc"). Holdings is a wholly-owned subsidiary of F&C plc. I refer to the F&C Group collectively as "F&C".

4. The board of directors of Holdings comprises F&C plc as corporate director and Mr Alain Grisay ("Mr Grisay"). Mr Grisay is the Chief Executive Officer ("CEO") of F&C plc. He is one of two executive directors on the Board of F&C plc. The other is Mr David Logan ("Mr Logan").

5. The LLP is constituted under an agreement dated 3 December 2004 between Holdings, the Defendants and the LLP itself ("the Agreement"). The Agreement included terms under which, in certain circumstances involving breach of contract by Holdings, the Defendants could exercise a Put Option to require Holdings to purchase their respective 20% interests in the LLP at a stipulated multiple of the profits of the LLP in defined periods. The Defendants maintain that Holdings has acted in such a way as to trigger their right to exercise the Put Option under the Agreement. They say that they validly exercised their Put Options by notices given on 25 February 2009, alternatively by notices given on 22 May 2009, alternatively by notices given on 24 December 2009. Holdings denies that there has been any valid exercise of the Put Option.

6. The Defendants also maintain that Holdings and F&C plc have engaged in unfairly prejudicial conduct in the operation of the LLP so that they are entitled to relief under the provisions of sections 994 to 996 of the Companies Act 2006 ("sections 994 to 996" - formerly sections 459 to 461 of the Companies Act 1985), in the form of an order that Holdings and F&C plc buy out their interests in the LLP. Sections 994 to 996 apply in relation to the LLP by virtue of the Limited Liability Partnerships Act 2000 ("the LLPA") and the contractual choice made by the parties to the Agreement not to exclude the operation of those provisions. Holdings and F&C plc deny that they are liable under these provisions. Holdings also maintains a claim of its own against the Defendants under sections 994 to 996.

7. This is the judgment in three inter-related sets of proceedings in respect of the LLP:

i) A claim under CPR Part 7 by Holdings against the Defendants ("the Part 7 claim"), seeking declaratory relief to the effect that the purported exercise of the Put Options by the Defendants is invalid. This claim was issued on 6 March 2009 after the first purported exercise of the Put Options on 25 February 2009 and has been amended to cover the other purported exercises of the Put Options on 22 May 2009 and 24 December 2009. In these proceedings the Defendants counterclaim for orders to give effect to what they maintain are their rights to have their respective interests in the LLP bought out by Holdings pursuant to their exercise of the Put Options;

ii) A petition by the Defendants for relief under sections 994 to 996 ("the Petition"), claiming that the affairs of the LLP have been, or are being, conducted in a manner unfairly prejudicial to their interests as members of the LLP. In the Petition, the principal relief the Defendants seek is a declaration that their exercise of the Put Options was valid and effective and/or an order that Holdings or F&C plc purchase their respective interests in the LLP at a price advantageous to them;

iii) A cross-petition by Holdings for relief under sections 994 to 996 ("the Cross-Petition"), claiming that the affairs of the LLP have been, or are being, conducted by the Defendants in a manner unfairly prejudicial to Holdings' interests as a member of the LLP. In the Cross-Petition, the principal relief sought by Holdings is an order requiring the Defendants to transfer their interests in the LLP to Holdings at a price advantageous to it.

8. The hearing before me constituted the trial on liability, with questions of the amount of any payment to be made by any party found liable being hived off to a later hearing. With the agreement of the parties, argument in relation to fixing the principles to be applied in determining the amount of any payment to be made (which is to be treated as part of the trial on liability) has been postponed until after this judgment is handed down.

The course of the hearing

9. The trial was very long (some 95 days), starting on 14 June 2010 and concluding on 24 March 2011, with breaks at various points. Norton Rose are the solicitors acting for F&C. Jeffrey Green Russell ("JGR") act for the Defendants. Catherine Newman QC was leading counsel for F&C; Leslie Kosmin QC for the Defendants. Unfortunately, part way through the trial Mr Kosmin fell ill and had to drop out of the case. This was at a point after the witnesses of fact for F&C had all given their evidence and been cross-examined by him. Fortunately, Mr Kosmin's junior in the proceedings, Andrew Thompson, is very experienced. He took over the presentation of the Defendants' case, a task which he ably performed.

Hedge Funds, Funds of Hedge Funds and the making of the Agreement

10. F&C is a group of companies providing asset management services to clients. As a group it offers a wide range of financial products and services. Unsurprisingly, F&C attaches great importance to its client relationships in order to retain clients and keep their assets under F&C management. F&C devotes considerable effort to maintaining its relationships with clients on a long-term basis, in particular by seeking to

understand and respond to their investment needs. To retain the trust and confidence of its clients, F&C's client account managers and marketing staff seek to ensure that clients are given sound advice appropriate to their needs about what assets and investment products they should invest in. F&C has an obvious interest to attract its clients to invest in its financial products to earn the fees associated with that, but it also has a long-term interest to retain the confidence of its clients which tempers the extent to which its personnel advising clients will seek to press them to invest in particular F&C products.

11. By 2004, F&C had identified that it had a gap in its product range in the form of a fund of hedge funds ("FoHF"). A FoHF is a managed fund investing in a portfolio of hedge funds. Hedge funds are investment funds set up to pursue specialised trading strategies, including hedging transactions, short selling of investments to benefit from market movements and so forth. An investment in a hedge fund (or in a FoHF) is not a standardised investment product and there can be considerable differences between hedge funds and the particular investment strategies they pursue. Hedge funds are thus to be distinguished from investment funds, sometimes referred to as "long only" funds, which hold shares or bonds in the hope that they will rise in price. Hedge funds hold themselves out as being able to generate high returns for investors above general market movements, on the basis of the financial skill and acumen of those managing them. They generally charge high fees each year of the order of 2% of the value of assets under management ("AUM"), plus 20% of the increase in value of those assets (which may be contrasted with, for example, the far lower fees charged in relation to investment in financial products which simply aim to track particular market indices).

12. FoHF managers such as the LLP hold themselves out as being able to generate high returns on the basis of having skill in picking high-performing hedge funds to be included in their FoHF's portfolio of investments. As is common for FoHFs, the LLP charged annual management fees of the order of 1% of the value of AUM plus 10% of the increase of the value of those assets over the year. These fees are levied by FoHFs in addition to the fees levied by the underlying hedge funds in which they invest. Investment in FoHF products is thus a relatively expensive form of investment in financial products.

13. Hedge funds and FoHFs often market themselves as "absolute return" financial products. The LLP held its funds out as absolute return products. The objective of an absolute return product is to increase the value of the investment whatever may be happening to the general equity or bond markets. An absolute return investment product is thus to be distinguished from a relative return investment product, where the investor understands that the performance of the investment is to be assessed by comparison with movements in the general markets or indices to which it is linked.

14. An absolute return product in the form of an investment in a hedge fund or FoHF is not risk free. On the contrary, there may be substantial risks associated with the trading strategies adopted. Nonetheless, the aim and hope is that the strategies adopted by hedge funds will allow for a degree of de-coupling or non-correlation of their investment performance with the general trends of equity and bond markets. This feature of hedge funds can make them attractive to large institutional investors such as pension funds or insurance companies, since it affords them an option to diversify their basket of investments in managing their overall risk and liability profile

and offers scope to purchase (at significant cost, as noted above) what is hoped will be an element of protection against a significant downturn in general markets.

15. There is no complete guarantee that hedge funds will achieve absolute returns, and the extent to which they can avoid correlation of performance with general markets will depend upon their particular strategies and the specific factors which may move markets in one direction or another and the time period over which such factors may operate. If there is a general fall in the market, that may affect hedge funds too. But the aim and hope is that the strategies they adopt may allow them to recover more speedily than the markets in equities or bonds.

16. It may be observed here that, in a certain sense, the holding of cash in an interest-bearing bank account is an absolute return product, since its nominal monetary value will steadily increase with the payment of interest. But a cash holding is fundamentally different from an absolute return product in the form of an investment in a hedge fund or FoHF, in that it does not carry with it the significant risk of a decrease in its nominal value which is associated with hedge fund investments and, as the other side of the same coin, it does not carry with it (as hedge fund or FoHF investments do) the prospect of a significant increase in its nominal value above the rate of inflation and bank lending rates.

17. By 2004, the Defendants had acquired extensive experience in the financial markets, working for various institutions, and particular expertise in managing FoHF products. They were looking to find a more profitable outlet for their talents than employment in a financial institution. They put together a detailed business plan for a proposal to set up a FoHF business in which they would have shares as part owners alongside a financial institution. They approached several institutions with their proposal and found that F&C was interested in pursuing it.

18. F&C had an extensive client base, which it could introduce to FoHF products launched and marketed under its auspices, and the Defendants had the expertise in managing a FoHF which F&C lacked. The business proposal put forward by the Defendants was for them to be the managers of FoHF products marketed under the F&C brand name. The particular expertise they presented themselves to F&C as having was in the management of FoHF products. They laid claim to no special expertise in the management of other financial products, including what were referred to at trial as "single strategy hedge funds". Single strategy hedge funds are funds invested in a particular specialised area following a specific investment strategy. The nature of expertise in running a FoHF is to have a reasonable understanding of and knowledge about a range of hedge funds so as to be able to select a basket of hedge funds which offer good performance overall (as distinct from being expert in the implementation of any particular hedge fund strategy).

19. It was agreed that F&C (using Holdings as the relevant vehicle) and the Defendants should form a limited liability partnership together on the basis of respective interests of 60%, 20% and 20%, to carry their FoHF proposal into effect. Accordingly, in December 2004 the LLP was formed by the making of the Agreement between Holdings (as the Corporate Member), the Defendants and the LLP. The primary focus of the Agreement was upon the LLP being operated as a vehicle to manage FoHF products and that was the sole focus of the LLP's business from its inception. All the parties hoped that the LLP would be very profitable.

20. The Agreement created the LLP as a limited liability partnership governed by the LLPA. The Agreement set out a detailed constitution for the LLP and contained elaborate provisions governing the division of income to be received from clients and the distribution of its profits.

21. F&C maintained that the formation of the LLP proceeded on the basis of certain understandings between the parties, not set out in the Agreement, such as that the LLP would confine its business to FoHF products alone. I find that the evidence does not support such a case. Judged on an objective approach, the parties agreed that the terms of the Agreement should govern their relationship, without it being qualified by such understandings as F&C alleged. This position was further underlined by the inclusion of an 'entire agreement' clause in the Agreement, stating that the Agreement constituted "the entire understanding between the parties relating to the LLP" (clause 34, set out at para. [58] below).

The classes of client, marketing services and fees payable by the LLP to Holdings under the Agreement

22. The Agreement defined three classes of client. The division as between Holdings and the LLP of income from any particular client was to be governed by the class into which that client fell. The classes were set out in the Fifth Schedule to the Agreement, which stipulated the amounts which the LLP was to pay Holdings for general marketing services. The classes were:

    i) "Core Clients" (paragraph 1.1 of the Fifth Schedule). These were clients with whom F&C had an especially close and established relationship in the provision of investment management services. This category included companies in the Friends Provident associated group companies and the Friends Provident Pension Scheme (referred to together in this judgment as "Friends Provident"), companies in the Eureko BV associated group companies (including, in particular, companies associated with Achmea Holding NV, referred to together as "Achmea"), and "PVF Associated funds/entities" (a group of Dutch pension funds, referred to together as "PVF");

    ii) "Existing Clients" (paragraph 1.2 of the Fifth Schedule). These were other clients for whom F&C was already managing investments as at the date of the Agreement; and

    iii) "New Clients" (paragraph 1.3 of the Fifth Schedule).

23. The Fifth Schedule to the Agreement provided for a different allocation of fees received from clients of the LLP depending upon which class of client they fell into. It stated that "the LLP shall pay the Corporate Member for the general marketing services provided pursuant to clause [13.7 of the Agreement] as set out below", and stipulated that:

    i) in relation to Core Clients, "the LLP will rebate to the Corporate Member any fee charged … above [0.5% of AUM] per annum" and that "where the LLP charges a performance fee… the LLP shall pay 40% of any such performance fee to the Corporate Member";

ii) in relation to Existing Clients, where funds were transferred from a mandate managed by F&C into a fund or mandate managed by the LLP, the payments by the LLP to the Corporate Member were to be the same as for Core Clients, and where new funds were invested for management by the LLP, the LLP would retain from any management fee the first 0.5% of AUM per annum and would pay the Corporate Member 50% of any management fee above that (since the management fee would ordinarily be 1% of AUM p.a., the amount to be paid by the LLP to the Corporate Member would usually be 0.25% of AUM p.a.), together with 20% of any performance fee; and

iii) in relation to New Clients, the LLP was to keep the entirety of the fees charged to those clients where the LLP "has been independently and directly engaged by such clients" (i.e. not through the marketing efforts of F&C), and where such clients "have been introduced to the LLP by F&C" the payments by LLP to the Corporate Member were in principle to match those in respect of Existing Clients that awarded new money for management by the LLP, but "subject to Board approval by the LLP" (such approval "to be assessed on the basis of the contribution of the F&C sales staff").

24. Clause 13.7 of the Agreement provided as follows:

> "13.7 The Corporate Member shall provide general marketing support as determined at the discretion of the Corporate Member for the activities of the LLP using the existing marketing operations of the F&C Group. The LLP shall pay the Corporate Member and/or F&C Group for such services as set out in the Fifth Schedule, as amended by unanimous Board approval from time to time."

25. Paragraph 1.3.1 of the Fifth Schedule expressly provided that "marketing will be co-ordinated by the Corporate Member". Since Holdings, the Corporate Member, did not have a marketing department or function of its own, this meant that Holdings was to procure the provision of marketing services by the marketing (or distribution) function within the F&C Group, subject to what was said in clause 13.7. Paragraphs 1.1 (Core Clients) and 1.2 (Existing Clients) of the Fifth Schedule did not contain any express provision equivalent to that in paragraph 1.3.1 regarding co-ordination of marketing by the Corporate Member, but it is clear from the context of the Fifth Schedule in which they appear that it was contemplated that the payments for which those paragraphs provided would be for "general marketing services" by F&C involved in retaining Core and Existing Clients as clients of the F&C Group and encouraging investment by them in the LLP's funds.

26. The Fifth Schedule also included provision at paragraph 1.4 for the payment of an additional incentive fee by the LLP to the Corporate Member on assets managed by the LLP belonging to a Core Client or an Existing Client increasing in value when above certain threshold amounts. This fee was intended to provide a further incentive for F&C to encourage its clients to invest in funds managed by the LLP.

27. The payments by LLP to Holdings provided for in the Fifth Schedule in respect of marketing services by F&C were expenses of the LLP and were payable out of its funds in the same way as other expenses (such as the remuneration costs of employees of the LLP), irrespective of (and prior to calculation of) the LLP's profits or losses in any year. The fees for marketing services were thus a way in which F&C extracted value from the LLP which operated apart from F&C's rights to share the profits of the LLP according to its 60% ownership of the LLP.

28. Similarly, the Defendants were not confined to receiving monies from the LLP equivalent only to their respective 20% shares in the profits of the LLP. As set out below, under the terms of the Agreement they had a right to take monthly advance drawings from the LLP as, in effect, a priority claim on the profits and resources of the LLP.

The terms of the Agreement

29. The Agreement is a carefully drafted contract which comprises the constitution of the LLP and governs the relationship between the Corporate Member and the Defendants as members and between them and the LLP itself. As set out in the First Schedule to the Agreement, Holdings provided £500,000 of equity capital for the LLP, £500,000 of equity preference capital, £1,000,000 of regulatory capital and £500,000 of working capital - a total capital contribution by Holdings of £2.5 million. The Individual Members each provided only £1,000 of capital.

30. Holdings also assumed certain obligations to ensure that the working capital of the LLP would be maintained at a certain level for the first two years of its existence (clause 8.4) and that the regulatory capital of the LLP, as required by the Financial Services Authority ("the FSA"), would be maintained at the necessary level (clause 8.3). I was informed that the minimum required regulatory capital for the LLP was about £300,000. If for any reason the LLP's capital became depleted below that amount, Holdings could come under an obligation to inject further capital into the LLP to ensure that it met the FSA's capitalisation requirements.

31. Clause 8.3 provides:

> "The Corporate Member shall be required, upon the request of the Board, to make from time to time such additional Capital Contributions, which shall be designated as forming part of the Regulatory Capital, as are necessary, in the reasonable opinion of the Board, to ensure that the LLP maintains the minimum level of regulatory capital required by the FSA …"

32. Clause 8.4 imposed a further obligation on Holdings, upon the request of the Board, to provide additional capital if more were required to provide the LLP with sufficient working capital to continue its business operations for at least two years from the commencement date set out in the Agreement, 3 December 2004 (a period which had elapsed by the time the dispute between the members arose).

33. Clause 4 of the Agreement provides:

> "4. BUSINESS
>
> 4.1 The Business of the LLP shall be to carry on the business of (1) conducting on a discretionary basis the management of fund of hedge funds vehicles and segregated accounts and investment management services; (2) marketing and promoting shares or interests in such vehicles; (3) activities associated therewith; and (4) such other business activities as may from time to time be determined by the Board."

34. Clause 5 provides for the business of the LLP to be carried on in the name of "F&C Partners LLP" and for the LLP to make use of the F&C name and brand subject to certain conditions. This reflects the underlying commercial bargain that the LLP should trade using the F&C name and offering investment products branded as part of the F&C's suite of investment products.

35. Clause 6 provides for the production of accounts for the LLP. Clause 6.1 states:

> "It shall be the responsibility of the Board to ensure that proper books of account are maintained giving a true and fair view of the Business and the affairs of the LLP."

Clause 6.3 provides:

> "The Board shall ensure that, in respect of each Accounting Year of the LLP, there is drawn up a profit and loss account and a balance sheet (taking no account of goodwill) of the LLP in accordance with generally accepted accounting principles in the United Kingdom (the "LLP Accounts"). The Board shall also ensure that the LLP Accounts in respect of each Accounting Year of the LLP are audited in accordance with the requirements of the Act."

36. Clause 8 governs the operation of capital accounts for each member of the LLP and the capital contributions to be made by them.

37. Clause 9 governs the allocation of income profits and losses through the mechanism of Distribution Accounts for each member. Clause 9.3 sets out an ordered sequence for allocation of income profits of the LLP. First, an amount equal to notional interest on the working capital contributed by the Corporate Member is to be allocated to Holdings' distribution account. After that, clause 9.3.2 provides:

> "Second, there shall be allocated to the Distribution Account of each Member (other than the Corporate Member) an amount equal to the aggregate of the Drawings made by that Member for that Accounting Year. In the event that the balance of Income Profits of an Accounting Year is insufficient to make

> such an allocation, the available Income Profits shall be divided amongst the Members (other than the Corporate Member) in the same proportions as each Member's aggregate Drawings for that Accounting Year bears to the total of the aggregate of the Drawings of all Members (other than the Corporate Member) for that Accounting Year."

The effect of this is that, after payment of notional interest on working capital, the Defendants have first claim upon income profits for payment of their drawings in each year.

38. Clauses 9.3.3 and 9.3.4 provide for allocations of income profits to the Corporate Member's Distribution Account in certain circumstances where the Corporate Member has borne additional costs or losses in the past. It is only after this series of priority allocations of income profits has been worked through that, under clause 9.3.5, any remaining income profits are allocated to the Distribution Accounts of the members according to the agreed proportions set out in the First Schedule (60% for Holdings and 20% for each of the Defendants).

39. Clause 9.5 provides:

> "Any Income Losses of the LLP in respect of an Accounting Year shall be allocated to the Distribution Account of the Corporate Member."

40. The overall effect of clause 9, therefore, is that, after allocation of notional interest on working capital, the Individual Members have priority claims in relation to the income profits of the LLP in any year, while the Corporate Member bears any income losses. This is of significance because this distribution of risk in respect of profits and losses coloured the respective attitudes of the parties to what should be done in running the business of the LLP as it entered the difficult environment in the financial markets which arose in the course of 2008.

41. Clause 10 of the Agreement provides for allocation of capital profits and capital losses. Clause 11 deals with drawings and withdrawals of profits. It provides in relevant part as follows:

> "11.1 There shall be paid to each Member (other than the Corporate Member) on the Payment Date in each month an amount of Drawings (the "Drawings Amount") in anticipation of that Member's entitlement to Income Profits for the Accounting Year. The Drawings Amount in the case of each Member shall be such amount as is determined by the Board and notified to that Member in writing. The Board shall have discretion from time to time to vary the Drawings Amount in respect either of all Members or such Members as the Board may determine and notification of any such change shall be given by the Board to the Member(s) whose Drawings Amount has been changed. …

> 11.6 If the LLP Accounts show that in the relevant Accounting Year any Member drew pursuant to the provisions of this Clause 11 in excess of the amount credited to that Member's Distribution Account for that Accounting Year then such excess shall not be debited against the Distribution Account of the relevant Member but shall be allocated as a debit to the Capital Account of the Corporate Member."

42. I refer to the payments contemplated by clause 11.1 as the Defendants' "advance drawings". By letters dated 16 March 2005, the LLP notified each of the Defendants that his advance drawings amount each month would be £12,500. It was agreed that these amounts were to be paid on the 25th of each month.

43. This part of the Agreement and the letter are significant because they define the extent to which the Defendants have a right to receive a monthly income from the LLP by way of advance drawings (amounting to a total of £150,000 p.a. for each Defendant) taken as a priority charge against any income profit of the LLP and, absent such profit, to be taken out of the LLP's capital provided by F&C. By virtue of clause 18.4.11 of the Agreement (set out below), any variation to the monthly advance drawings of the Defendants requires the unanimous decision of the Board of the LLP. It was the failure of the LLP to make payment of the monthly advance drawings due to the Defendants on 25 February 2009 which led them to serve their first Put Option notices on that date ("the First Put Option Notices").

44. Clause 12 of the Agreement governs the transfer of members' interests in the LLP.

45. Clause 13 is headed "Members' Obligations and Duties". Clause 13.1 provides in relevant part as follows:

> "Each of the Members (other than the Corporate Member) agrees that:
>
> 13.1.1 he shall devote his whole time and attention to the Business, subject to the necessary time and attention which such Member is required to devote to other business activities as agreed by the Board, except during holiday leave (as provided for in Clause 16), or following the occurrence of a Withdrawal Event;…
>
> 13.1.4 he will conduct himself in a proper and responsible manner and use his best skill and endeavour to promote the Business; and
>
> 13.1.5 he will comply with all statutes, regulations, professional standards and other provisions as may from time to time govern the conduct of the Business or be determined by the Board as standards to be voluntarily applied by the LLP to the Business."

46. Clause 13.6 provides:

> "Each Member shall at all times show the utmost good faith to the LLP."

47. Clause 13.7 is set out at paragraph [24] above. For discussion of the effect of this provision, see paras. [325]ff below.

48. Clause 15 is headed "Non-Disparagement". Clause 15.2 provides:

> "The Corporate Member agrees, on behalf of itself and all entities in the F&C Group, that entities in the F&C Group and their respective employees shall not at any time make, publish or communicate to any person or entity, including but not limited to persons who to the extent the Corporate Member is aware are or have at any time been clients or customers of the LLP or any Affiliate of the LLP, or investors in funds or other investment vehicles whose assets are managed by the LLP or any Affiliate of the LLP, any disparaging remarks, comments or statements concerning other Members of the LLP, any officer, member, partner or employee of such other Member or any fund or other investment vehicle whose assets are or have at any time been managed by the LLP or any Affiliate of the LLP."

49. The Agreement provides for there to be a Management Committee ("the ManCom"), a Board for the LLP ("the LLP Board") and a Compensation Committee ("the Compensation Committee"). Clause 17 is headed "Management of the LLP". It provides in relevant part as follows:

> "17.1 The LLP shall have a Management Committee which, subject to any applicable legislation, including the Act [the LLPA], shall have responsibility for the management and control of the Business and the affairs of the LLP and shall have the power and authority to do all things necessary to carry out the purpose of the LLP. In particular, and without prejudice to the generality of the foregoing, the Management Committee shall be responsible for:
>
> 17.1.1 the determination of the day-to-day allocation of the resources of the LLP;
>
> 17.1.2 the monitoring of all aspects of business control and processes;
>
> 17.1.3 the proposing of annual budgets for the approval of the Board;

> 17.1.4 the determination and monitoring of marketing strategies;
>
> 17.1.5 the determination and monitoring of risk management strategies;
>
> 17.1.6 the determination and monitoring of due diligence processes; and
>
> 17.1.7 the determination and prioritization of IT development requirements.
>
> 17.1.8 The Management Committee shall carry on and manage its responsibilities with the assistance from time to time of the Members and of agents or employees of the LLP as they shall deem necessary. The Members, other than in the capacity of members of the Management Committee, shall have no right or authority to act for the LLP or to take any part in the management of the LLP or to vote on matters relating to the LLP other than as provided in [the LLPA] or as set forth in this Agreement. …
>
> 17.3 The members of the Management Committee shall be Francois Barthelemy, Anthony Culligan and such other persons as may be determined by the Board from time to time. The Board may at any time resolve to remove any person from the Management Committee or appoint any person to the Management Committee and such removal or appointment shall be effective on the date falling one month after the passing of such Board resolution. The Board shall also be responsible for appointing the Chairman of the Management Committee. The Chairman shall have the right to appoint an alternate for any meeting. In the event that any person wishes to resign as a member of the Management Committee, such person shall give written notice of his wish to resign to the Board and his resignation shall be effective on the date falling one month after the date of such written notice.
>
> 17.4 The Management Committee shall meet regularly as determined by the Chairman and in any event at least once every two months. … All decisions of the Management Committee may be reached by a simple majority and each member present … shall have a single vote. In the event of a tied vote, the Chairman of the Management Committee shall have a casting vote or may escalate such vote to the Board."

Mr Fernando Ribeiro ("Mr Ribeiro"), a senior manager within F&C, was the designated Chairman of the ManCom.

50. Clause 18 is headed "The Board of Members". It provides in relevant part as follows:

"18.1 The LLP shall have a Board which, notwithstanding clause 17, shall be responsible for the following matters (together with such other matters as are referred to elsewhere in this Agreement as the responsibility of the Board):

18.1.1 the determination of the strategic direction of the LLP and the making of any material change in the general nature of the Business of the LLP or the business of any subsidiary undertaking of the LLP from time to time;

18.1.2 the approval of the business plan of the LLP, including the marketing strategy of the LLP, the annual budget of the LLP and any subsequent increases in the annual budget of the LLP in excess of 10%;

18.1.3 the draw-down of Working Capital for the LLP from the Corporate Member;

18.1.4 the creation of, or entering into of management agreements with, any fund vehicles, accounts or investment products;

18.1.5 the service of a Notice of Removal on any Member in accordance with clause 26.1; …

18.1.10 the making of any change in the location of the Registered Office or the office from which the Business is principally carried on; …

18.1.13 the entering into of agreements with service providers where the total price payable under any such agreement is in excess of £50,000 and the termination of any such agreement;

18.1.14 any decision to sell or transfer the Business, any part of the Business or any asset of the LLP …

18.2 The initial Members of the Board shall be the Founder Members [Defendants] and such other persons, being not more than three in number, who are appointed by the Corporate Member as its Board representatives. The Board may at any time resolve to remove any person from the Board or appoint any person to the Board and such removal or appointment shall be effective on the date falling one month after the passing of such Board resolution. The Corporate Member shall be responsible for appointing the Chairman of the Board. …

18.3 The Board shall meet at least once every two months in the first year from the Commencement Date and at least once every three months thereafter. The Corporate Member shall be responsible for calling meetings of the Board. At least one day's notice of a meeting of the Board is required to be given to

> all Board members and a meeting of the Board shall be quorate if at least three members, including the Chairman (or an alternate person designated by the Chairman) and at least one of the Founder Members [Defendants], are present, either in person or by video or telephone conference call. Subject to clause 18.4, all decisions of the Board may be reached by a simple majority and each member present, whether in person or by video or telephone conference call, shall have a single vote. In the event of a tied vote, the Chairman of the Board shall have a casting vote. The Chairman may appoint an alternate for any meeting and any member of the Board may appoint the Chairman, or the Chairman's alternate, as its proxy. Unless otherwise notified, the Chairman will be deemed to be the proxy for any Board member who is not a Founder Member where such member is not present in person or by video or telephone conference and has not appointed another person as proxy.
>
> 18.4 Notwithstanding clause 18.3 or any other provisions of this agreement, the unanimous agreement of all members of the Board (whether or not each such member is present at a particular meeting of the Board) shall be required for the following matters:
>
> 18.4.1 any increase in the annual budget of the LLP in excess of 25%;
>
> 18.4.2 the service of a Notice of Removal on any Member in accordance with clause 26.1 (provided that the agreement of the Member on whom the Notice of Removal is to be served, if such Member is a member of the Board, shall not be required);…
>
> 18.4.7 the removal of a Founder Member [a Defendant] from the Board, Management Committee or Compensation Committee at a time when he remains a Member. …
>
> 18.4.11 variations to the monthly Drawings of the Founder Members [the Defendants] as per clause 11.1. …"

Mr Ribeiro was the designated Chairman of the LLP Board.

51. At this stage attention should be drawn to two features of clause 18. First, an issue arises between the parties regarding the proper role and duties of members of the LLP Board appointed by the Corporate Member as its "representatives" under clause 18.2. Pursuant to this provision, Holdings appointed Mr Ribeiro, Mr Patrick Johns ("Mr Johns") and Mr Peter Cole ("Mr Cole") as members of the LLP Board. I address this issue at paras. [204]ff below. Secondly, clause 18.4 sets out important protections for the Members of the LLP and, in particular, for the Defendants. By virtue of clause 18.4.2, neither Mr Culligan nor Mr Barthelemy could be removed as a member by notice served under clause 26.1 if the other did not consent to such a step. By virtue

of clause 18.4.7, neither of them could be removed from the LLP Board, ManCom or Compensation Committee. By virtue of clause 18.4.11 their existing monthly advance drawings of £12,500 each could not be varied without their consent. Clause 18.4.11 is an important provision for the analysis of the position when Mr Ribeiro stopped the payment of the Defendants' advance drawings on 25 February 2009.

52. Clause 19 of the Agreement set out restrictions on the powers of the LLP Board in relation to certain matters for which the prior written consent of the Corporate Member would be required. These restrictions are principally directed to protecting the value for F&C of its investment in the LLP and protecting the integrity of any consolidated audited accounts to be produced by the F&C group, which would include the accounts of the LLP as an F&C subsidiary. The restrictions included the following:

> "19.1.5 The adoption of the audited accounts in so far as the audited accounts are the accounts of the LLP and the approval of the audited accounts by any other LLP Group Entity in so far as the audited accounts are the accounts of such other LLP Group Entity. …
>
> 19.1.10 The sale of any LLP Group Entity [a term which included the LLP] or any material part of the business of any LLP Group Entity …"

53. Clause 20 of the Agreement made provision for the Compensation Committee to deal with remuneration for employees of the LLP. The members of the Compensation Committee comprised the Defendants, Mr Ribeiro and Mr Cole (as "the head of the human resources department of the Corporate Member", i.e., in practice, of the F&C Group). Mr Cole was the chairman of this committee, but clause 20.3 of the Agreement provided that Mr Ribeiro as Chairman of the LLP Board would have the casting vote on the Compensation Committee as well as on the LLP Board and the ManCom.

54. Clause 21.1 is headed "Exculpation". It provides:

> "The members of the Management Committee, the Board and the Compensation Committee shall not be liable, responsible or accountable in damages or otherwise to the LLP or to any of the Members, their successors, or assigns, except by reason of acts or omissions due to bad faith, negligence or wilful default, or for not having acted in good faith in the reasonable belief that its or their actions were in, or not opposed to, the best interests of the LLP."

55. Clause 22 makes provision for "Meetings of Members" in these terms:

> "22.1 All decisions which are required by [the LLPA] to be reached by a meeting of Members shall be determined at a meeting of the Members held in accordance with the provisions of this clause 22.
>
> 22.2 Meetings of the Members shall be convened by the Board as and when it believes such a meeting to be necessary in accordance with the requirements of [the LLPA] or any other statutory provision.
>
> 22.3 Not less than 15 calendar days notice of any such meeting shall be given to all Members, provided that any resolution passed at a meeting of which shorter notice or no notice has been given shall be deemed to have been duly passed if it is afterwards ratified by the required majority of the Members at a meeting of Members which has been duly convened.
>
> 22.4 Meetings of the Members shall be chaired by such Member as shall be appointed for the purpose by those present at the meeting.
>
> 22.5 The quorum for a meeting of Members shall be three Members, provided the Corporate Member is represented, present in person or by video or telephone conferencing at the time the relevant business is transacted, provided that any resolution passed at an inquorate meeting shall be deemed to have been duly passed if it is afterwards ratified by the required majority of the Members at a quorate meeting of Members duly convened.
>
> 22.6 Each Member shall be entitled to cast the percentage of the voting rights as shall be set against their name in the First Schedule (as amended from time to time) and votes shall not be cast on the basis of a show of hands.
>
> 22.7 Save as required by law, all decisions at a meeting of Members shall be taken by a simple majority."

56. Clause 22.6 refers to the respective voting rights for Holdings (60%), Mr Barthelemy (20%) and Mr Culligan (20%) set out in the First Schedule to the Agreement. It indicates that members in a Members' meeting are entitled to vote on the basis of the extent of their respective interests in the LLP (the same division of interests between the Defendants and Holdings in the First Schedule also governs profit entitlements under clause 9.3.5 and capital entitlements under clause 10.1). In my view, the parties to the Agreement intended a meeting of Members under clause 22 to operate in a way similar to a general meeting of members of a Companies Act company, where votes may be cast according to the extent of the shareholdings of the respective shareholders in the company: see paragraphs [207]-[216] below. I was informed by Miss Newman QC in her closing oral submissions that it may be that there is no

statutory requirement which makes a meeting of Members "necessary", to use the language of clause 22.2. No-one had raised this question previously in the trial; nothing appeared to turn on this point so far as her submissions were concerned; and in light of the way in which events developed I do not think this is a significant matter.

57. Clause 26 deals with the removal of members. It provides in relevant part as follows:

> "26.1 Subject to the provisions of clause 18.4, the Board shall have the absolute right to remove any Member from the LLP by serving a Notice of Removal on that Member if that Member: …
>
> 26.1.2 by his actions or omissions brings the name or reputation of the LLP into serious dispute or seriously prejudices the interests of the Business; …
>
> 26.1.4 fails to comply with the rules, regulations or decisions of any appropriate regulatory or self regulating organization to whose requirements the LLP is for the time being subject;
>
> 26.1.5 ceases to be approved by the Financial Services Authority as a person who can undertake any controlled function; …
>
> 26.1.7 commits any serious breach of the LLP's compliance and procedures manual or any policies or procedures adopted or amended from time to time by the LLP;
>
> 26.1.8 misuses any confidential information relating to the LLP or any customer or client thereof;
>
> 26.1.9 fails to comply with the principles and code of practice for approved persons and the rules of the Financial Services Authority;
>
> 26.1.10 otherwise acts in contravention of any law relating to the conduct by the LLP of the Business which has a materially adverse or prejudicial impact on the affairs or prospects of the Business or the reputation of the LLP; …
>
> 26.1.12 commits any serious breach, or continues to commit any repeated or continual breach after having been warned in respect thereof, of any of his obligations under this Agreement.
>
> 26.2 Subject to clause 27.2, a Notice of Removal shall be of immediate effect and the Member in question shall immediately cease to be a Member of the LLP. …"

The opening words of clause 26.1 should be noted. The LLP Board may not remove one of the Defendants as a member if the other Defendant votes against that course (see clause 18.4.2).

58. Clauses 27 and 28 contain provisions governing the situation which arises upon death, incapacitation, resignation or removal of a member. Clause 29 governs the winding up of the LLP. Clause 33 provides that the Agreement is governed by English law and that the courts of England are to have exclusive jurisdiction in relation to any dispute arising out of or in connection with the Agreement. Clause 34.1 sets out an 'entire agreement' provision, as follows:

> "This Agreement constitutes the entire understanding between the parties relating to the LLP and supersedes all prior understandings, arrangements, representations, proposals or communications between the parties, whether written or oral. Both parties [sic] acknowledge and accept that they have not relied on any such understandings, arrangements, representations, proposals or communications in entering into this Agreement."

59. The Fourth Schedule to the Agreement ("the Fourth Schedule") contains a "Put and Call Option Agreement". The Fourth Schedule sets out elaborate provisions for options as between the members for them to sell their interests in the LLP to other members or to buy the interests of other members. The principal features of the option regime may be summarised as follows.

60. Paragraph 1.1 of the Fourth Schedule provides:

> "1.1 The Corporate Member will grant each of Francois Barthelemy and Anthony Culligan an option (the "Put Option"), exercisable, subject to clause 1.6 below, in each case at any time within the period of 3 months from the fifth anniversary of the Commencement Date and within each period of 3 months following every second subsequent anniversary of the Commencement Date (in each case, a "Put Option Period"), to sell the whole (but not part only) of his interest in the LLP to the Corporate Member for a consideration calculated in accordance with clause 1.2 below (the "Put Option Price"). The Corporate Member's obligation to pay the Put Option Price in accordance with this option agreement shall be guaranteed by [F&C plc]."

61. Paragraph 1.2 sets out the formula for the calculation of the Put Option Price. The relevant parameters in the calculation under that formula (subject to certain other factors) are that the price should be calculated by applying a multiplier to an amount "that is calculated by dividing by two the sum of the Income Profit from each of the two years in which the Income Profits were the greatest, from the periods comprising the Accounting Year in which the Put Option is exercised, the two preceding Accounting Years and the following Accounting Year." The multiplier in the case of the Put Option defined in paragraph 1.1 – which arises without fault on the part of any party – is six.

62. Under paragraph 1.5, upon exercise of a Put Option under paragraph 1.1, the Corporate Member has the right to notify the other members within 60 days that it intends to seek a purchaser for the LLP's business. If such a contract of sale is then entered into within 12 months (with completion to take place within a further 12-month period), the exercise of the Put Option lapses and the members are remitted to their rights to share in the capital realisation upon sale of the business. This provision does not apply, however, where the Defendants have a right to exercise a Put Option under paragraph 1.7 of the Fourth Schedule.

63. According to paragraph 1.6, if there is a change of control of the Corporate Member it may declare that as a trigger event which can have the effect of postponing the right of the Individual Members to exercise their Put Option for a period. In fact, such an event occurred in July 2009, which led Holdings to serve a notice on the Defendants to postpone their Put Option rights for a period. Nothing in this judgment turns on this having occurred.

64. Paragraph 1.7 of the Fourth Schedule is of central importance in this case. It provides:

> "Francois Barthelemy and Anthony Culligan shall also each have the right to exercise the Put Option at any time within the period of three months following a discovery by either of them that the Corporate Member is in breach of any provision of this Agreement in a manner that amounts to gross negligence or gross misconduct (and where such breach does not arise from an administrative error) and which has a materially adverse effect upon the LLP or upon either of them, and in the event of an exercise of the Put Option in these circumstances the provisions of clauses 1.1 and 1.2 shall apply, provided that applying the provisions of those clauses in these circumstances M [the multiplier, M] shall be eight (and not six) and, for the avoidance of doubt, the provisions of clauses 1.3, 1.4 and 1.5 shall not apply."

65. This provision confers a right upon the Defendants, where there has been a breach of the Agreement by Holdings of the specified character, to require Holdings to buy out their respective interests in the LLP at a preferential profit multiplier of eight, rather than a multiplier of six as in relation to the five-year Put Option contained in paragraph 1.1. The multiplier of eight corresponds to that provided for in relation to the exercise by Holdings of a Call Option under paragraphs 1.9 and 1.10 of the Fourth Schedule, according to which Holdings is entitled at any time to require the Defendants to sell their interests in the LLP to it at that preferential price formula.

66. In the course of the dispute between the parties, the Defendants gave notice to exercise Put Options under paragraph 1.7 of the Fourth Schedule on three occasions: on 25 February 2009 (after non-payment by the LLP of their monthly drawings due at that time, and referring to clause 11.1 and clause 13.6 of the Agreement); on 22 May 2009 (relying in addition on further complaints of breach by Holdings of clause 13.6 of the Agreement, of failure to have accounts drawn up as required by clauses 6.1 and

6.3 of the Agreement and of failure to provide general marketing support as required by clause 13.7 of the Agreement); and on 24 December 2009 (relying in addition on complaints regarding Holdings' conduct in sending a report to the FSA regarding alleged misconduct by the Defendants relating to their regulatory responsibilities).

The Legislative Framework

67. The LLPA introduced the limited liability partnership as a new form of legal entity with corporate personality. Section 1 provides, in relevant part, as follows:

> "(1) There shall be a new form of legal entity to be known as a limited liability partnership.
>
> (2) A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act …
>
> (3) A limited liability partnership has unlimited capacity.
>
> (4) The members of a limited liability partnership have such liability to contribute to its assets in the event of its being wound up as is provided for by virtue of this Act.
>
> (5) Accordingly, except as far as otherwise provided by this Act or any other enactment, the law relating to partnerships does not apply to a limited liability partnership. …"

68. Section 2(1) provides, inter alia, that for a limited liability partnership to be incorporated "two or more persons associated for carrying on a lawful business with a view to profit must have subscribed their names to an incorporation document". On the incorporation of a limited liability partnership those persons are its members: section 4(1).

69. Section 5(1) provides:

> "5. – **Relationship of members etc.**
>
> (1) Except as far as otherwise provided by this Act or any other enactment, the mutual rights and duties of the members of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its members, shall be governed–
>
> > (a) by agreement between the members, or between the limited liability partnership and its members, or
> >
> > (b) in the absence of agreement as to any matter, by any provision made in relation to that matter by regulations under section 15(c)."

70. Section 6 provides in relevant part as follows:

> "6. – **Members as agents.**
>
> (1) Every member of a limited liability partnership is the agent of the limited liability partnership.
>
> (2) But a limited liability partnership is not bound by anything done by a member in dealing with a person if–
>
> > (a) the member in fact has no authority to act for the limited liability partnership by doing that thing, and
> >
> > (b) the person knows that he has no authority or does not know or believe him to be a member of the limited liability partnership. …"

71. Sections 14 and 15 provide that regulations may be made so as, inter alia, to apply to limited liability partnerships any law relating to companies or the insolvency thereof with appropriate modifications. Section 16(1) provides that "Regulations may make in any enactment such amendments or repeals as appear appropriate in consequence of this Act or regulations made under it". Section 17 makes general provision for the making of regulations including regulations to make "any appropriate consequential, incidental, supplementary or transitional provisions or savings" (section 17(3)(a)).

72. The Limited Liability Partnerships Regulations 2001 ("the 2001 Regulations") were made on 19 March 2001 under these provisions. They came into effect on 6 April 2001.

73. Regulation 5 of the 2001 Regulations makes provision for the application to limited liability partnerships of various parts of the Insolvency Act 1986, including section 122(1)(g) (so that a limited liability partnership may be wound up if the court is of the opinion that it is "just and equitable" that it should be wound up).

74. Regulation 7 provides as follows:

> "7. *Default provision for limited liability partnerships*
>
> The mutual rights and duties of the members and the mutual rights and duties of the limited liability partnership and the members shall be determined, subject to the provisions of the general law and to the terms of any limited liability partnership agreement, by the following rules:
>
> (1) All the members of a limited liability partnership are entitled to share equally in the capital and profits of the limited liability partnership.

(2) The limited liability partnership must indemnify each member in respect of payments made and personal liabilities incurred by him -

> (a) in the ordinary and proper conduct of the business of the limited liability partnership; or
>
> (b) in or about anything necessarily done for the preservation of the business or property of the limited liability partnership.

(3) Every member may take part in the management of the limited liability partnership.

(4) No member shall be entitled to remuneration for acting in the business or management of the limited liability partnership.

(5) No person may be introduced as a member or voluntarily assign an interest in a limited liability partnership without the consent of all existing members.

(6) Any difference arising as to ordinary matters connected with the business of the limited liability partnership may be decided by a majority of the members, but no change may be made in the nature of the business of the limited liability partnership without the consent of all the members.

(7) The books and records of the limited liability partnership are to be made available for inspection at the registered office of the limited liability partnership or at such other place as the members think fit and every member of the limited liability partnership may when he thinks fit have access to and inspect and copy any of them.

(8) Each member shall render true accounts and full information of all things affecting the limited liability partnership to any member or his legal representatives.

(9) If a member, without the consent of the limited liability partnership, carries on any business of the same nature as and competing with the limited liability partnership, he must account for and pay over to the limited liability partnership all profits made by him in that business.

(10) Every member must account to the limited liability partnership for any benefit derived by him without the consent of the limited liability partnership from any transaction concerning the limited liability partnership, or from any use by him of the property of the limited liability partnership, name or business connection."

75. Section 994(1) of the Companies Act 2006 provides:

> "*Petition by company member*
>
> (1) A member of a company may apply to the court by petition for an order under this Part on the ground –
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

76. If a complaint under section 994 is made out, the court has wide remedial powers under section 996. Regulation 4 of and Schedule 2 to the 2001 Regulations made provision for the application to limited liability partnerships of provisions of the Companies Act 1985, including sections 459 to 461 (now sections 994 to 996 of the Companies Act 2006) with certain amendments. By virtue of Regulation 4 of and Schedule 2 to the 2001 Regulations the parties to an agreement creating a limited liability partnership were entitled to agree to opt out of the Companies Act unfair prejudice provisions, but the parties to the Agreement did not do this. Accordingly, sections 994 to 996 apply to the LLP in the same way as they would to a company. This result is now, as from 1 October 2009, achieved by regulation 48 of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009, which have in this respect replaced the 2001 Regulations.

77. The Defendants and Holdings, in the Petition and the Cross-Petition respectively, each seek to rely on section 994(1) as it has effect in relation to the LLP as a limited liability partnership. The approach to be adopted by the Court in assessing the respective claims of unfair prejudice under section 994(1) was broadly agreed. The leading authority is *O'Neill v Phillips* [1999] 1 WLR 1092, HL, particularly the speech of Lord Hoffmann at 1098-1102. At 1098E-1099A Lord Hoffmann said:

> "Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

> In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that his would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

78. The primary focus, accordingly, is on whether the affairs of the LLP have been conducted in the manner agreed between the parties, or not. In this case, the Defendants' complaints under section 994 are directed against both F&C Holdings and F&C plc. F&C plc was not a party to the Agreement and played no direct role in the management of the LLP. Even if the affairs of the LLP had been conducted in a manner unfairly prejudicial to the interests of the Defendants, F&C plc denied that it was responsible for such conduct and denied that it could be held liable to them under section 994(1). I address this issue of the responsibility of F&C plc at paras. [1094]ff below.

79. At this point in the judgment it is also convenient to set out section 1(1) of the Computer Misuse Act 1990 and section 55 of the Data Protection Act 1998, which are of relevance to the dispute. Section 1(1) of the Computer Misuse Act 1990 provides:

> "A person is guilty of an offence if –
>
> (a) he causes a computer to perform any function with intent to secure access to any program or data held in any computer, [or to enable any such access to be secured];

> (b) the access he intends to secure, [or to enable to be secured,] is unauthorised; and
>
> (c) he knows at the time when he causes the computer to perform the function that that is the case."

80. Section 55 of the Data Protection Act 1998 provides in relevant part as follows:

> "(1) A person must not knowingly or recklessly, without the consent of the data controller -
>
> (a) obtain or disclose personal data or the information contained in personal data …
>
> (2) Subsection (1) does not apply to a person who shows –
>
> … (b) that he acted in the reasonable belief that he had in law the right to obtain or disclose the data or information …"

Section 1(1) of the 1998 Act defines "data controller" to mean "a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed".

The Service Agreement and F&C Group IT policies

81. Part of the arrangements contemplated by the parties in setting up the LLP and by the Agreement was that the LLP should be able to make use of F&C's resources in providing a range of administrative back-up and computing services for the LLP. The arrangement was summarised in a Regulatory Business Plan for the LLP submitted to the FSA in September 2004, as follows:

> "F&C will provide the infrastructure and institutional contacts while the partners will provide the investment expertise and the day-to-day management of the business."

82. To that end, the LLP and F&C Management Limited entered into a service agreement which took effect from 1 January 2005 ("the Service Agreement"). Although F&C Management Limited was the contracting party under the Service Agreement, it was entitled to delegate its performance of the obligations under that contract to other entities in the F&C Group. The Service Agreement was for five years with a rolling one-year term thereafter, subject to notice provisions on each side.

83. Article 3.1 provided:

> "PERFORMANCE
>
> 3.1 Each party will conduct its obligations under the Agreement with integrity, due skill, care and diligence and observe proper standards of market conduct, take reasonable care to organise and control its affairs and responsibilities in relation to each other and will not exercise its rights under this Agreement in bad faith."

84. Article 3.5 provided that the provisions of article 11 set out "both parties' sole remedy for any default or dispute" relating to their respective performances of the Service Agreement.

85. Article 11 was in these terms:

> "ARTICLE 11
>
> DISPUTE ESCALATION
>
> 11.1 In the event of any dispute or difference arising out of or relating to this Agreement, such dispute shall be escalated as follows for resolution:
>
> (a) *First Level Review:* Either party may notify the other that it requests a review of a dispute by the relevant Service Managers for each party.
>
> (b) *Second Level Review:* If agreement cannot be reached within 7 calendar days of the notification of the First Level Review, or such further period as the parties shall agree in writing, the dispute may be escalated by either party for review by F&C Partners' managing director and any board director of F&C Management.
>
> (c) If agreement cannot be resolved within 14 calendar days of notification of the Second Level Review, or such further period as the parties agree in writing, either party may waive the Service in dispute in accordance with Article 5.1 of this Agreement and each party shall bear its own costs in this regard."

86. The schedules to the Service Agreement set out the services to be supplied by F&C under it: audit risk and compliance services (Schedule 1); company secretarial services (Schedule 2); legal services (Schedule 3); facilities services (Schedule 4); finance services, including preparation of statutory accounts, tax advice, invoicing and payroll services (Schedule 5); human resources services (Schedule 6) and information technology ("IT") services (Schedule 7).

87. Article 2 of Schedule 7 included the following:

> "2.1 Desktop/PCs
>
> 2.1.1 F&C will provide desktop PCs to each member of staff of F&C Partners working in Exchange House. The desktop will be built as a standard XP build with no applications installed save for the standard F&C Corporate Desktop software. All additional applications over and above the F&C Corporate Desktop software will be installed by F&C Partners staff.
>
> 2.1.2 F&C Partners will receive desktop support on their desktops by requesting service through the IT Service desk. Desktop support will be provided on a best endeavours basis, in other words they will fall outside of the normal PC support SLAs.
>
> 2.1.3 Partners Corporate desktop users will be required to sign and follow the F&C Information Security policy.
>
> 2.2 Server Environments
>
> 2.2.1 F&C IT will provide shared areas to allow the F&C Partners staff member to share files and documents with each other. These areas will be secured so that only authorized staff will have access to these areas. Change requests for users to get access to these files shares will be authorized by senior F&C Partners Management.
>
> 2.2.2 F&C IT will provide a single Intel based server for SQL Server development activities. F&C IT will build the hardware and put a standard build of Windows Server 2003 onto this server. F&C IT will install anti-virus on this server. F&C IT will apply service packs and anti-virus software to this server on a periodic basis; these updates will be scheduled with the F&C Partners team where possible. F&C Partners will be responsible for installing other software required on these servers (such as SQL Server). F&C IT will provide support on these servers in the event of hardware or operating system failure but not in the event of SQL Server issues. All DBA tasks will be undertaken by F&C Partners. To ensure that back-ups work correctly, F&C Partners should schedule SQL Server to do a nightly dump of data onto the server. This server will be backed up nightly by F&C IT. …
>
> 2.4 E-Mail
>
> 2.4.1 F&C IT will provide e-mail accounts to all F&C Partners staff on the F&C Exchange e-mail system. This

> will allow F&C Partners staff to both send and receive e-mail. The format of e-mail accounts will be <firstname>.<lastname>@fandc.com. Group mailboxes will also be provided.
>
> 2.5 Software Development Services
>
> 2.5.1 F&C IT will provide no software development services apart from ad-hoc advice.
>
> 2.6 BCP [Business Continuity Planning]
>
> 2.6.1 In the event of a disaster, F&C Partners will benefit from standard F&C IT DR [Disaster Recovery] procedures. This will include seats at the F&C DR sites and the recovery of standard F&C applications such as e-mail, Corporate Desktop and file/print services.
>
> 2.6.2 SQL Server back-ups of the F&C application server will be made available at the back-up site to F&C Partners staff.
>
> 2.7 Licensing
>
> 2.7.1 F&C IT will provide software licenses for F&C Partners to use the following standard F&C Corporate Desktop software: Windows XP, Microsoft Office 2003, MS Outlook and Anti-Virus software. …
>
> 2.8 General IT Support
>
> 2.8.1 F&C Partners will be able to make requests for IT staff (such as IT Project Managers) to work on F&C Partners projects in the same way as other business teams through the ITPB.
>
> 2.8.2 F&C Partners will also be able to use the "help desk" to request general IT assistance. …"

88. The LLP was to be responsible for the development of its own bespoke software for use in its business. The Service Agreement did not contain any term obliging the LLP to meet its various service requirements, including its IT requirements, only by obtaining services from F&C.

89. The security of computerised data and IT systems is a high priority for asset management businesses such as those carried on by F&C and the LLP. F&C promulgated IT policies from time to time, aimed at promoting good work practices, to safeguard its IT systems and governing matters such as the authority of management to scrutinise the e-mails and computer records of employees.

90. F&C IT policies were formulated with their focus on operation within companies which were wholly-owned subsidiaries of F&C plc within the F&C Group. They were not tailored to address the specific needs of an entity such as the LLP which was only partly owned by F&C. Thus, for example, where F&C IT policies made reference to decision-making procedures to allow for various actions in relation to computer systems, they typically provided for authority to be granted through F&C Group management structures. This presupposed the application of F&C Group decision-making authority which was simply inappropriate in the context of the LLP, which had its own governance structures for taking relevant decisions which, by the terms of the Agreement and in accordance with the regulatory context in which it operated, were intended to have responsibility for the conduct of the LLP's affairs and to act independently and not at the dictation of F&C Group management. On an objective approach, it could not plausibly be thought that the LLP had somehow delegated important decision-making functions and responsibilities - which under the Agreement and in the regulatory context in which it operated were assigned to its own governance structures - to persons or bodies external to the LLP, such as the senior management or the Board of F&C plc.

91. An example of particular importance in this case relates to the authority for a manager to have access to the e-mail correspondence of an employee, as Mr Culligan had access to the e-mail correspondence of Mr Brian Tilson ("Mr Tilson", the Chief Financial Officer – "CFO" – of the LLP) and others at a certain point in the development of the dispute. The F&C Group IT policies contemplated that where necessary (e.g. to check whether an employee had been guilty of misconduct), senior management could authorise access to what would otherwise be regarded as the private e-mail records of employees, where such authorisation would be given by a member of the Management Committee of the Group (a body which became the Executive Committee, a small group of very senior managers at Group level: I will refer to both the Group Management Committee and the Executive Committee as "Execom"), or a member of the Board of F&C plc.

92. But in the context of the LLP, requirement for authorisation by F&C Group management is misplaced. The LLP is subject to regulatory responsibilities (see paras. [93]ff below) and duties to clients and has its own management, distinct from the management of F&C, which is responsible for taking action to ensure compliance with such responsibilities and duties. In relation to the LLP's affairs it should, in accordance with ordinary expectations, be the LLP's own governance structures which make provision for such matters as authorisation for scrutinising employees' e-mails where that might be relevant to the fulfilment of the LLP's and its management's responsibilities and duties. There is thus an uneasy tension inherent in the application of the F&C Group's IT policies to the LLP which was not fully recognised and resolved in the various IT and operating policy documents promulgated at LLP and F&C Group levels. In my view, that tension falls to be resolved by construing the relevant policies in light of the background regulatory and legal context of responsibilities imposed on the management of the LLP.

The FSA regulatory context

93. The LLP is an entity regulated by the FSA and by virtue of the relevant governing legislation (the Financial Services and Markets Act 2000) requires FSA approval to carry on its asset management business. Certain of the officers and employees of the

LLP also require FSA approval for their roles within the business. The basic aim of FSA regulation in relation to approval of individuals' roles is to ensure that functions within a business are carried out by fit and proper persons of integrity and with the requisite skills to carry out such functions in a competent fashion.

94. The FSA has promulgated a Handbook ("the FSA Handbook") which, in the version applicable at material times in these proceedings, set out a set of general Principles for Businesses regulated by it and detailed rules of conduct for those businesses and approved persons working in them. The Principles are as follows:

1 Integrity	A *firm* must conduct its business with integrity.
2 Skill, care and diligence	A *firm* must conduct its business with due skill, care and diligence.
3 Management and control	A *firm* must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
4 Financial prudence	A *firm* must maintain adequate financial resources.
5 Market conduct	A *firm* must observe proper standards of market conduct.
6 Customers' interests	A *firm* must pay due regard to the interests of its *customers* and treat them fairly.
7 Communications with clients	A *firm* must pay due regard to the information needs of its *clients*, and communicate information to them in a way which is clear, fair and not misleading.
8 Conflicts of interest	A *firm* must manage conflicts of interest fairly, both between itself and its *customers* and between a *customer* and another *client*.
9 Customers: relationships of trust	A *firm* must take reasonable care to ensure the suitability of its advice and discretionary decisions for any *customer* who is entitled to rely upon its judgment.
10 Clients' assets	A *firm* must arrange adequate protection for *clients'* assets

	when it is responsible for them.
11 Relations with regulators	A *firm* must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the *firm* of which the FSA would reasonably expect notice.

95. The Handbook contained a section of rules and guidance on systems and controls ("SYSC"), with various chapters. Rule SYSC 2.1.1 on apportionment of responsibilities provided that a firm was required to maintain:

> "a clear and appropriate apportionment of significant responsibilities among its directors and senior managers in such a way that:
>
> (1) it is clear who has which of those responsibilities; and
>
> (2) the business and affairs of the firm can be adequately monitored and controlled by the directors, relevant senior managers and governing body of the firm."

96. Rules SYSC 2.1.3 and 2.1.4 provided that the functions of dealing with allocation of responsibilities under SYSC 2.1.1 and overseeing the establishment and maintenance of a firm's systems and controls should, in the case of a body corporate such as the LLP, be allocated to its chief executive or equivalent such as a managing partner (in the case of the LLP, therefore, to Mr Culligan).

97. Rule SYSC 3.1.1 required a firm to take reasonable care to establish and maintain such systems and controls as are appropriate to its business, having regard to the nature, scale and complexity of its business. The guidance in paragraph SYSC 3.2.4 stated that "A firm cannot contract out its regulatory obligations", so "… a firm should take reasonable care to supervise the discharge of outsourced functions by its contractor." Paragraph SYSC 3.2.11 stated that "A firm's arrangements should be such as to furnish its governing body with the information it needs to play its part in identifying, measuring, managing and controlling risks of regulatory concern".

98. Paragraphs SYSC 3.2.7 to 3.2.9 referred to the compliance function within a firm in relation to compliance with the rules set out in the FSA's Conduct of Business Sourcebook. They referred to the need for the compliance function to be adequately resourced and to "have unrestricted access to the firm's relevant records as well as ultimate recourse to its governing body" (paragraph SYSC 3.2.7) and required a firm such as the LLP to allocate a director or senior manager to have oversight of and report to the firm's governing body in respect of the compliance function. Paragraphs SYSC 6.1.1 to 6.1.5 required "a common platform firm" such as the LLP to maintain

adequate policies and procedures to ensure compliance of the firm and its managers and employees with its obligations under the regulatory system and to maintain a permanent and effective compliance function which operated independently to monitor the adequacy and effectiveness of such policies and procedures and any actions taken by the firm to address deficiencies in its compliance with its obligations and "to advise and assist the relevant persons responsible for carrying out regulated activities to comply with the firm's obligations under the regulatory system".

99. Paragraph SYSC 3.2.19, headed "Business continuity", stated:

> "A firm should have in place appropriate arrangements, having regard to the nature, scale and complexity of its business, to ensure that it can continue to function and meet its regulatory obligations in the event of an unforeseen interruption. These arrangements should be regularly updated and tested to ensure their effectiveness."

100. Rule SYSC 4.3.1 stated that for "a common platform firm" (such as the LLP) senior personnel within the firm "are responsible for ensuring that the firm complies with its obligations under the regulatory system" and should "take appropriate measures to address any deficiencies."

101. Rule SYSC 8.1.1 stated that a common platform firm must:

> "(1) When relying on a third party for the performance of operational functions which are critical for the performance of regulated activities… on a continuous and satisfactory basis, ensure that it takes reasonable steps to avoid undue additional operational risk;
>
> (2) not undertake the outsourcing of important operational functions in such a way as to impair materially: (a) the quality of its internal control; …"

102. Rule SYSC 9.1.1 required firms to maintain orderly records of their business and internal organisation sufficient to enable the FSA to monitor its compliance with the requirements under the regulatory system.

103. Turning to FSA approval of individuals, the FSA Handbook specified a list of controlled functions to be performed by individuals who would need approval from the FSA. These included controlled functions designated as CF 3 ("Chief executive function", one of the designated "significant influence functions"), CF4 ("Partner function"), CF10 ("Compliance oversight function"), CF 27 ("Investment management function") and CF30 ("Customer function", including acting in the capacity of an investment manager). The CF3 function involved "having the responsibility …, under the immediate authority of the governing body, for the conduct of the whole of the business …". For the LLP, Mr Culligan was approved to

carry out the CF3 function and also CF27 and CF30 functions; Mr Barthelemy was approved to carry out CF27 and CF30 functions; the Defendants and F&C Holdings were each registered with a CF4 function; and Mr Eric Mackay ("Mr Mackay", the Head of the F&C Group's Audit Risk and Compliance Department – "the F&C ARC Department") was approved to carry out the CF10 function. At material times during the dispute Mr Ribeiro and Mr Tilson did not have assigned to them relevant functions for the LLP requiring FSA approval. Mr Ribeiro replaced Mr Culligan in the CF3 function with effect from 14 January 2010. Mr Tilson was approved to carry out the CF28 function (responsibility for systems and controls) with effect from 12 January 2010.

104. As the sole CF3 approved person in relation to the LLP, Mr Culligan was responsible for ensuring that the proper lines of authority within the LLP for carrying on its business were not subverted. The point of the FSA individual approval regime is to ensure that persons who are accepted by the FSA as fit and proper to carry out their designated functions, and not any unapproved person, carry out those functions. Mr Culligan very properly took his regulatory responsibilities as the CF3 approved person for the LLP seriously, and that affected his reaction to what he regarded as attempts by Mr Ribeiro, an unapproved person, to subvert the proper conduct of the business of the LLP in communications with Mr Tilson and affected his reaction to Mr Mackay's investigation of his own conduct in running the business of the LLP by covert review of staff e-mails and installation of the LLP's own discrete IT network.

105. Rules SUP 10.13.6 and 10.13.7 in the FSA Handbook provided that a firm was obliged to submit to the FSA a completed Form C within seven days after an approved person ceased to perform a controlled function, and to inform the FSA as soon as practicable when it became aware that it was likely to submit "a qualified Form C in respect of an approved person" (i.e. a form containing information relating to the fact that the approved person had been dismissed or suspended or which "otherwise reasonably suggests that it may affect the FSA's assessment of the approved person's fitness and propriety").

106. Rule SUP 10.13.16 provided:

> "If a firm becomes aware of information which would reasonably be material to the assessment of an approved person's … fitness and propriety …, it must inform the FSA on Form D, or (if it is more practical to do so and with the prior agreement of the FSA) by fax or email, as soon as practicable"

107. Rule SUP 15.6.1 provided:

> "A firm must take reasonable steps to ensure that all information it gives to the FSA in accordance with a rule in any part of the Handbook … is:
>
> (1) factually accurate or, in the case of estimates and judgments, fairly and properly based after appropriate enquiries have been made by the firm; and

> (2) complete, in that it should include anything of which the FSA would reasonably expect notice."

108. The FSA Handbook contained a section entitled, "Statement of Principle and Code of Practice for Approved Persons" ("APER"), divided into chapters. The Principles applicable to approved persons set out at APER 2.1.2 were as follows:

> "Statement of Principle 1
>
> An *approved person* must act with integrity in carrying out his *controlled function.*
>
> Statement of Principle 2
>
> An *approved person* must act with due skill, care and diligence in carrying out his *controlled function.*
>
> Statement of Principle 3
>
> An *approved person* must observe proper standards of market conduct in carrying out his *controlled function.*
>
> Statement of Principle 4
>
> An *approved person* must deal with the FSA and with other regulators in an open and cooperative way and must disclose appropriately any information of which the FSA would reasonably expect notice.
>
> Statement of Principle 5
>
> An *approved person* performing a *significant influence function* must take reasonable steps to ensure that the business of the *firm* for which he is responsible in his *controlled function* is organised so that it can be controlled effectively.
>
> Statement of Principle 6
>
> An *approved person* performing a *significant influence function* must exercise due skill, care and diligence in managing the business of the *firm* for which he is responsible in his *controlled function.*
>
> Statement of Principle 7
>
> An *approved person* performing a *significant influence function* must take reasonable steps to ensure that the business of the *firm* for which he is responsible in his *controlled function* complies with the relevant requirements and standards of the *regulatory system.*"

109. In relation to Statement of Principle 5, paragraph APER 4.5.14 provided guidance as follows:

> "Suitability of individuals
>
> If an individual's performance is unsatisfactory, then the appropriate *approved person* (if any) performing a *significant influence function* should review carefully whether to allow that individual to continue in position. In particular, if he is aware of concerns relating to the compliance with requirements and standards of the *regulatory system* (or internal controls) of the individual concerned, or of staff reporting to that individual, the *approved person* performing a *significant influence function* should take care not to give undue weight to the financial performance of the individual or group concerned when considering whether any action should be taken. An adequate investigation of the concerns should be undertaken (including, where appropriate, adherence to internal controls). The *approved person* performing a *significant influence function* should satisfy himself, on reasonable grounds, that the investigation is appropriate, the results are accurate and that the concerns do not pose an unacceptable risk to compliance with the requirements and standards of the *regulatory system* (see in particular *Statement of Principle 6 ...*)."

110. The FSA Handbook gave examples of behaviour which in the FSA's opinion would not comply with Statement of Principle 6, including the following:

> "APER 4.6.4
>
> …(4) accepting implausible or unsatisfactory explanations from subordinates without testing the veracity of those explanations;
>
> (5) failing to obtain independent, expert opinion where appropriate; …
>
> APER 4.6.6
>
> Failing to take reasonable steps to maintain an appropriate level of understanding about an issue or part of the business that he has delegated to an individual or individuals…
>
> APER 4.6.7
>
> Behaviour of the type referred to in *APER 4.6.6...* includes but is not limited to:
>
> (1) disregarding an issue or part of the business once it has been delegated;
>
> (2) failing to require adequate reports once the resolution of an issue or management of part of the business has been delegated;

(3) accepting implausible or unsatisfactory explanations from delegates without testing their veracity.

APER 4.6.8

Failing to supervise and monitor adequately the individual or individuals… to whom responsibility for dealing with an issue or authority for dealing with a part of the business has been delegated…

APER 4.6.9

Behaviour of the type referred to in *APER 4.6.8* ... includes but is not limited to:

(1) failing to take personal action where progress is unreasonably slow, or where implausible or unsatisfactory explanations are provided; …"

111. Paragraphs APER 4.6.13 and 4.6.14 stated in relevant part as follows:

"4.6.13 *Delegation*

(1) An *approved person* performing a *significant influence function* may delegate the investigation, resolution or management of an issue or authority for dealing with part of the business to individuals who report to him or to others. …

(4) The FSA recognises that the *approved person* performing a *significant influence function* will have to exercise his own judgment in deciding how issues are dealt with and that in some cases that judgment will, with the benefit of hindsight, be shown to have been wrong. …

4.6.14 *Continuing responsibilities where an issue has been delegated*

Although an *approved person* performing a *significant influence function* may delegate the resolution of an issue, or authority for dealing with part of the business, he cannot delegate responsibility for it. …"

112. Mr Culligan called attention to these paragraphs as showing that there was no regulatory requirement on him, when it came to deciding who should investigate suspected misconduct by Mr Tilson, to assign that function to Mr Mackay as the LLP's Compliance Officer. Mr Culligan was the relevant "approved person performing a significant influence function" within the LLP. By use of the words "may delegate" in APER 4.6.13(1) and APER 4.6.14, the FSA Handbook

contemplated that such a person might choose not to delegate the function of investigation; and APER 4.6.14 reinforced that impression by making it clear that such a person could not delegate responsibility for the investigation.

113. Section APER 4.7 provided guidance regarding the operation of Statement of Principle 7 and matters which the FSA would regard as failing to comply with it, including at paragraph APER 4.7.5 "Failing to take reasonable steps adequately to inform himself about the reason why significant breaches (whether suspected or actual) of the relevant requirements and standards of the regulatory system in respect of [the firm's] regulated activities may have arisen …". Paragraph APER 4.7.13 stated:

> "*Possible breaches of regulatory requirements*
>
> Where the *approved person* performing a *significant influence function* becomes aware of actual or suspected problems that involve possible breaches of relevant requirements and standards of the *regulatory system* falling within his area of responsibility, then he should take reasonable steps to ensure that they are dealt with in a timely and appropriate manner (…). This may involve an adequate investigation to find out what systems or procedures may have failed and why. He may need to obtain expert opinion on the adequacy and efficacy of the systems and procedures."

114. F&C entities and the LLP were also subject to regulatory requirements concerning maintaining the confidentiality of customer data held on their computers and the security of their records. When the LLP applied to the FSA in 2004 for approval to carry on its asset management business as a FoHF, it informed the FSA that it would be ready, willing and organised to meet the FSA's threshold conditions for approval, including the condition that the LLP would have adequate resources to carry on its business, including in relation to security and business continuity planning ("BCP"). In that regard, the LLP's Regulatory Business Plan agreed by Mr Culligan and Mr Barthelemy, submitted in support of its application to the FSA for approval, stated:

> "Security and Business Continuity Planning ("BCP")
>
> Security and BCP will be undertaken in close co-operation with F&C. The Applicant will be subject to the same Information Security and IT policies. All individual PCs and servers will be equipped with active anti-virus software. Access to the internet will be restricted in terms of content and functionality using F&C configured filter software."

F&C Group policies and procedures

115. At the time the application to the FSA for approval for the LLP to commence business was made in late 2004, F&C had in place a Compliance Manual which dealt with the principal regulatory matters applicable to the group, setting out such general principles as that an approved person should act with integrity and with due skill, care and diligence in carrying out his or her controlled functions and should deal with the FSA, other regulators and the F&C ARC Department in an open, honest and co-operative way. (The same points were repeated in the updated version of the Manual issued in December 2008).

116. In line with the requirements set out in the FSA Handbook, the F&C Group Compliance Manual also included a principle that "an approved person performing a significant influence function [i.e. in senior management] must take reasonable steps to ensure that the business of the firm for which he is responsible in his control function is organised so that it can be controlled effectively". This principle required such a person to take reasonable steps to ensure that responsibilities within the firm were apportioned appropriately, i.e. including by ensuring that properly approved individuals carried out relevant functions within the firm and subject to the prescribed lines of authority in the firm, leading back to its senior managers at Management Committee and Board. The F&C Group Compliance Manual stated that it was not its purpose "to deal with the different operating procedures that exist for the different businesses" in the group, which would be covered in the detailed Procedures Manual for each business (paragraphs 1.2 and 4.7 of the December 2008 version of the Manual made the same point).

117. The F&C Group Compliance Manual stated at paragraph 3.8 as follows:

> "*3.8 Procedures Manuals*
>
> The core to a Governance Culture is management, organisation structure and properly documented procedures. Management and organisational structure rests with the Board of the parent company, F&C Asset Management plc. Procedures Manuals are the responsibility of each line manager who should ensure not only that they are in place and are kept updated, but also that each member of his team is fully conversant with them and complies with them. …"

(The December 2008 version of the Manual contained a statement in similar terms at para. 4.8). This statement was not fully apposite in the context of the LLP, since the LLP was not a wholly-owned subsidiary of F&C plc, but had its own distinct ManCom, Board and governance structures. Its management and organisational structure did not rest with the Board of F&C plc, which was not its parent company, in the full sense of the term.

118. Also in place for the F&C Group by March 2007 was an F&C Group Code of Ethics for "all F&C employees" (which was re-promulgated in similar form in December 2008). This emphasised that the honesty, integrity and ethical behaviour of all F&C employees was fundamental to the reputation and success of the F&C Group as a whole. It contained a statement of general principles, including the following:

> "- all employees must familiarise themselves with and abide by the core principles of business as contained in the Group Compliance Manual;
>
> - all employees should at all times exercise honesty, objectivity and diligence in performing their duties and fulfilling their responsibilities;
>
> - all employees are loyal to the firm and its clients;
>
> - no employee should act in a manner which will discredit any of client [sic] or the firm;
>
> - employees should avoid any conflicts of interest with clients or the firm and, if such a conflict arises, declare it and involve an independent third party from within F&C to ensure that fair treatment is applied to all parties;
>
> - no employee should place him/herself in a position where he/she contravenes any law, or regulation relevant to the firm's business; …"

119. The LLP drew up an Operations Procedures Manual for itself, dated 1 August 2005. This was compiled by Mr Tilson. It stated at paragraph 1.4 that the LLP had a dedicated BCP programme that was reviewed and updated on a regular basis. Under the heading "Compliance and Risk", the LLP Manual stated that the Head of Compliance for F&C plc was the appointed compliance and audit contact for the LLP (in the relevant period this was Mr Mackay) and that the F&C ARC Department managed the relationship with the FSA in respect of the LLP.

120. The LLP Manual also stated (paragraph 1.5.2) that the LLP had adopted the compliance standards of F&C plc "with the following exceptions", and there then followed a note in these terms: "Exclusions to be noted here". No detailed exclusions were in fact noted. The impression is of a document compiled as a working draft but not finally completed. The Manual referred to the Service Agreement then being negotiated between the LLP and F&C, including in relation to provision of IT services by F&C. The Manual was clearly something of a work in progress and, it transpired, it never was revised further to explain in detail the relationship between the LLP's operating procedures and policies and the general F&C Group operating procedures and policies.

121. This was remiss of the LLP and, in particular, of Mr Tilson (whose immediate responsibility it was to compile the operational manual for the LLP), Mr Culligan (as the Managing Partner of the LLP), the ManCom and the LLP Board, Mr Mackay (as the Compliance Officer for the LLP) and the F&C ARC Department (as the provider of audit, risk and compliance services for the LLP under Schedule 1 to the Service Agreement). However, it did not cause any difficulties in practice until the relevant policies applicable to the LLP became relevant to part of the dispute between the parties in the course of 2009. The position of the Defendants and, presumably, of the

LLP Board and ManCom was that there was a sufficient framework of operating procedures and policies for the LLP indicated by the general F&C Group procedures and policies for the purposes of ensuring that the LLP complied with regulatory requirements, albeit leaving unresolved the precise relationship between the detailed statements of principles and rules in the F&C Group documents and the applicability of those principles and rules in the context of the LLP.

122. Mr Culligan's position, as explained in his evidence, was that the F&C Group procedures and policies provided a suitable general framework for the LLP and that where the LLP did not have a specific written policy of its own, it could adopt the relevant F&C Group policy and adapt it, as appropriate, to the specific circumstances of the LLP. As a general approach, I can see that this had the merit of minimising cost and effort in running the LLP, but it had the disadvantage of leaving the interface between F&C Group policies and LLP practices vague and rather uncertain. In many cases, however, it was tolerably clear how F&C Group policies might best be adapted to the circumstances of the LLP. Although the LLP's approach in not completing and updating its own Operations Manual and policies fell below best practice, I do not think it was unreasonable in the context of a small operation like the LLP, embedded in a close relationship (albeit not fully spelled out in the various policies and manuals) with the general F&C Group.

123. Others involved in the management of the LLP, in particular Mr Tilson and the members of the ManCom and the LLP Board, appear to have acquiesced in this general approach. Certainly the developed and regular production of LLP operational manuals and policies was not required or suggested by them. Likewise, Mr Mackay, as Compliance Officer for both the F&C Group and the LLP, did not press the LLP to produce a final and complete version of the Operations Manual which F&C Group policies contemplated it should have. Since in practice the situation did not lead to practical problems, no-one seems to have given the issue much, if any, thought.

124. The area of uncertainty concerning which policies applied to the LLP and how exactly they should be taken to operate in the context of the LLP came to the fore at trial in relation to F&C's complaints about the conduct of Mr Culligan in covertly reviewing e-mail traffic of staff of the LLP (in particular, of Mr Tilson) in April to July 2009 and in arranging for a new IT infrastructure to be put in place for the LLP in December 2008 and January 2009. By that time, F&C had a much revised and far more elaborate set of policies in place governing a wide range of topics, including security of IT systems, monitoring of data and the use of computer systems. Again, the exact relationship between these policies and the LLP was not clearly specified.

125. F&C's Group Information Security Policy in place in December 2008 and thereafter ("the F&C Group Information Security Policy") set out policies and procedures designed to protect the F&C IT system. The term "Group" as used in the Policy was defined to mean F&C plc "and any of its subsidiary undertakings from time to time". The Policy stated that it was to be enforced by the Group Information Security Committee ("the GISC"), made up of representatives from all areas of the Group's business and chaired by the Head of the F&C ARC Department (i.e. Mr Mackay). The Policy also identified a Group Information Security Officer within F&C IT, Mr Graeme Smith. The GISC did not include a representative of the LLP and there was uncertainty whether the LLP's relations with F&C IT were regulated by the F&C Group Information Security Policy or by the Service Agreement. (An earlier version

of the Group Information Security Policy which I was shown and which I was told was introduced in about 2005 was broadly similar, though less detailed - it made reference to a Group Information Security Officer in F&C IT with responsibility for ensuring that suitable security controls were implemented, maintained and monitored, who reported to the GISC: paragraph 3.1; it also described the controls against infiltration of the F&C IT network by computer viruses, including at the system's firewalls which operated as the border between the network and the Internet: paragraph 3.8.2, "network anti-virus controls").

126. The F&C Group Information Security Policy included:

i) A section on management of third party suppliers of IT services which provided that "all contracts must be reviewed by F&C Legal Department and signed by Company Secretary" and stated at paragraph 3.3:

> "3.3 System Connections
>
> Before F&C connects to a third party location, a risk assessment must be carried out and documented in order to identify any requirements for specific controls. The security requirements for Internet, Intranet and Network Security must also be followed for all third party connections."

ii) A section on acceptable use of e-mail, setting out the measures taken by F&C to manage the day-to-day operations of the e-mail service it provided, including a statement that "to protect the operational integrity of the e-mail system, F&C regulates the amount of storage allocated to mailboxes to a maximum of 300 Mb [megabyte]". (This 300 Mb mailbox limit was a new feature of the F&C IT system introduced in January 2007 which gave rise to arguments between the LLP and F&C). This section prohibited the redirection of company e-mail messages to non-company e-mail accounts. It also set out guidance as to the unacceptable use of e-mail, including as one item: "Management access to read employees' mailboxes without a legitimate business reason to do so".

iii) A section on asset classification and control which set out procedures for control of IT equipment used "within F&C" (meaning the F&C Group, a term of rather uncertain application in relation to the LLP, which is not a full member of the F&C Group). The policy stated: "It is essential that assets are controlled and effectively managed to ensure they are adequately protected against … misuse/interference". On any sensible view, this broad objective was also relevant for the LLP as well as the F&C Group generally. This section contained details of a legal notice appearing on all log-ins to F&C computers; but, as F&C was aware, the LLP configured its own computers, and they did not show this. Paragraph 2.2 of the section stated that various actions were prohibited, including:

> "4. The introduction, reconfiguration or upgrade of any system software without authorisation.

> 5. Connecting unauthorised equipment to the network (or to any authorised system).
>
> 6. Deliberately wasting computer resources, including network capacity, disk space, running or installing games or other unauthorised software (such as music, animation or video). All new software and hardware must be approved by the IT Department before installation.
>
> 7. The use of Company computer facilities to gain unauthorised access to any computer system. This may also constitute a breach of the Data Protection Act 1998 or the Computer Misuse Act 1990 (or local equivalent)."

Under the heading "Data Security", this section included the following statement:

> "3. Attempting to monitor, read, copy, transmit, change, delete or tamper with another staff member's electronic communications, files or software without the express authorisation of the staff member or as authorised under this Policy is prohibited. Where there is shared data only those staff with permissions to the data should be attempting access, as the above conditions still apply. NOTE: From time to time managers may authorise staff to access emails registered to another staff member.
>
> 4. Knowingly or recklessly running or installing (or causing another to run or install) a program (such as a "worm" or "virus") intended to damage or place an unauthorised excessive load on a computer system or network is prohibited."

Paragraph 2.5 of the section described an asset register of IT hardware maintained by F&C IT. However, over the years of operation of the LLP the requirement that equipment used should be entered in the register was not applied by the LLP or F&C's IT Department ("F&C IT") in relation to the LLP. The LLP would purchase its own IT equipment using its own resources, though often placing the purchase orders through F&C IT, and the equipment would not be entered on F&C's asset register. Also, although the policy contemplated that there should be an annual asset audit by F&C IT against the register, that does not seem to have been carried out in relation to the LLP. This was one of the areas in which both F&C and the LLP seem to have treated the applicability and operation of F&C's IT policies in relation to the LLP as a grey and uncertain area. At paragraph 2.17 the policy prohibited employees from installing software onto any F&C asset without the approval of F&C IT, since such activity might compromise the security of the F&C IT network. However, as F&C was aware, the LLP regularly developed and installed its own bespoke software on the computers used in the LLP's business, which were connected to F&C's computer network, without obtaining the approval of F&C IT.

iv) A section entitled "Monitoring Policy", which set out F&C's policy in relation to monitoring of F&C's various systems and employees' communications. This included a statement of purpose at paragraph 1:

> "1. Purpose
>
> F&C has a legal responsibility for data held on company-provided computer and communication equipment, and therefore must retain the right to monitor the content of such data and the use of such equipment. The company must ensure that it complies with current legislation governing both the company and individuals. The purpose of this policy is to establish the extent to which the company will perform monitoring activities."

Here again, in the context of the LLP, the simple reference to F&C was not apposite. In the context of the LLP's business, it was the LLP which had legal responsibility for data held on its computers and which therefore needed to retain the right to monitor the content of such data and the use of such equipment. The section included the following notes:

> "1. F&C respects the right to privacy, complies with data protection law and observes the implied duty of trust between employer and employee. This includes an employee's rights not to have information about their private life or behaviour widely known.
>
> 2. Covert monitoring will only take place in exceptional circumstances, for example, in connection with the prevention or detection of criminal activity or equivalent malpractice. Covert monitoring will only take place with the authorisation of a member of the Management Committee or Board."

Again, the reference to "the Management Committee or Board" (meaning F&C plc's Execom or F&C plc's Board) was not apposite in relation to the LLP. Since the LLP was not a wholly-owned subsidiary of F&C plc and had its own management and governance structure, it could not reasonably be thought that covert monitoring within the LLP's own business either required authorisation by or could be authorised by the Management Committee or Board of a distinct entity, F&C plc (see also paras. [90]-[92] above). In the absence of a more precise policy applicable to the LLP, I agree with the Defendants that on an objective approach the proper interpretation of this policy so far as concerned the LLP was to read it *mutatis mutandis*, so that covert monitoring required to be authorised by a member of the equivalent corporate governance bodies in the LLP, namely the LLP's ManCom or its Board.

127. It is convenient to interpose here reference to Part 3 of the Employment Practices Code promulgated by the Information Commissioner under the Data Protection Act 1998, entitled "Monitoring at Work", which deals with issues regarding monitoring of employees' e-mails. In this Part, the Information Commissioner explains, "In broad

terms, what the Act requires is that any adverse impact on workers is justified by the benefits to the employer and others." The Code refers to "occasional monitoring … where the employer introduces monitoring as a short term measure in response to a particular problem or need, for example by keeping a watch on the e-mails sent by a worker suspected of racial harassment …". In section 3.4, the Code deals with Covert Monitoring, stating that it should only be used in exceptional circumstances; should normally be authorised by senior management; and that senior management "should satisfy themselves that there are grounds for suspecting criminal activity or equivalent malpractice and that notifying individuals about the monitoring would prejudice its prevention or detection" (it appears that the guidance in F&C's Group Information Security Policy at para. [126(iv)] above was drawn from this). The Code also advises that employers should undertake impact assessments before embarking on monitoring of employees' e-mails:

> "In all but the most straightforward cases, employers are likely to find it helpful to carry out a formal or informal 'impact assessment' to decide if and how to carry out monitoring. This is the means by which employers can judge whether a monitoring arrangement is a proportionate response to the problem it seeks to address."

128. Two points may be made at this stage regarding the operation of the Employment Practices Code and the F&C Group Information Policy in relation to the covert review of employee e-mails at the LLP conducted by Mr Culligan. First, one criticism made of him by F&C at trial was that he did not have a sufficient justification for carrying out such a review, in that there were no exceptional circumstances equivalent to suspecting Mr Ribeiro and Mr Tilson of engaging in criminal activity. I reject that criticism. In my view, the Code and the Policy do not restrict the possibility of covert monitoring only to investigation of criminal activity or equivalent – that is only referred to as an example of relevant exceptional circumstances. I consider that a genuine concern based on objective grounds that the proper governance of a regulated entity is being improperly subverted may amount to exceptional circumstances for the purposes of both the Code and the Policy, and did so in this case: see paras. [821]-[825] below. Secondly, F&C complain with some force that Mr Culligan did not undertake a distinct impact assessment before embarking on his investigation. However, in the highly unusual circumstances in which he was operating (where he suspected that the proper governance of the LLP was being subverted by F&C) he had reasonable grounds for omitting to seek advice from F&C HR or F&C's ARC department about the procedures to adopt, and in practice he did take care to minimise the intrusion upon the privacy of employees in the course of the investigation: para. [823] below. His investigation was in line with his regulatory responsibilities under the FSA Handbook: paras. [108]-[113] above

129. In December 2008, F&C also promulgated an updated version of the Group Compliance Manual ("the F&C Group Compliance Manual"). This dealt "with the key regulatory obligations applicable to the F&C Group", setting out group policy on such matters. It stated: "Ultimate responsibility for compliance matters falls to the Chief Executive and the Board [i.e. of F&C plc]…". Although the LLP was identified in the manual as an "F&C Group entity" which was regulated in some form,

once again the Compliance Manual was not expressed in terms which were fully apposite for application in the context of the LLP. Thus, for example, ultimate responsibility for compliance matters for the LLP fell not to the Chief Executive and Board of F&C plc but to the persons and bodies responsible for the conduct of the LLP's affairs - Mr Culligan as Managing Partner, the ManCom and the LLP Board, according to the relevant distribution of responsibilities between them under the Agreement. So again, in working out the significance of the F&C Group Compliance Manual for, and its application in relation to, the LLP, it is necessary to translate its provisions into the distinct context of the LLP.

130. The F&C Group Compliance Manual incorporated an overview of group policies which included the following statement:

> "You should seek appropriate guidance from ARC in reasonable time before: …
>
> Delegating or outsourcing activities to third parties."

131. Paragraph 6.5.6 of the F&C Group Compliance Manual dealt with outsourcing:

> "***6.5.6 Outsourcing***
>
> [Specified safeguards - i.e. assessment whether the body appointed is suitable to carry out the delegated task, clear specification of the extent of any delegation, and putting in place arrangements to monitor the discharge of the delegated functions] are … relevant to external delegation or "outsourcing". Steps should be taken to obtain sufficient information from contractors to enable F&C to assess the impact of outsourcing on its systems and controls.
>
> F&C cannot contract out its regulatory obligations and remains fully responsible for their proper discharge therefore reasonable care should be taken to supervise the discharge of any outsourced functions by contractors.
>
> When relying on a third party for the performance of operational functions which are critical for the performance of F&C's business, F&C must ensure that it takes reasonable steps to avoid undue additional operational risk. Operational functions are regarded as critical or important if a defect or failure in their performance would materially impair F&C's compliance with its regulatory obligations or its financial performance, or the soundness or the continuity of its services and activities.
>
> F&C must in particular take steps to ensure:

- the contractor has the ability, capacity, and authorization to perform the outsourced functions, services or activities reliably and professionally;

- the contractor carries out the outsourced services effectively, and to this end F&C must establish methods for assessing the standard of performance of the contractor;

- the contractor must properly supervise the carrying out of the outsourced functions, and adequately manage the risks associated with the outsourcing; …

- F&C can terminate the arrangement for the outsourcing where necessary without detriment to the continuity and quality of its provision of services to clients; …

- respective rights and obligations of F&C and the contractor are clearly allocated and set out in a written agreement.

Where outsourcing takes place between entities within the F&C group, the delegating firm may take into account the extent to which the firm controls the contractor or has the ability to influence its actions."

Where the Manual referred to F&C being unable to contract out its regulatory obligations, in the context of the LLP the relevant entity to which such a statement would apply would be the LLP itself: see, to similar effect, paragraph SYSC 3.2.4 of the FSA Handbook, set out above. The Manual and other F&C Group policies were created against the background of the FSA Handbook and to give effect to the requirements set out in it, and fall to be construed taking into account that background. As applied to the business of the LLP the logic of this section and of the guidance in the FSA Handbook, therefore (as with other provisions in F&C Group policies and in line with the Defendants' submissions as to how they should be read), is that references to F&C should be read as references to the LLP when translating the Manual as it fell to be applied in the context of the LLP. Since the LLP computers were linked to the F&C Group IT system, issues could arise regarding the interaction between them. I analyse the legal position regarding such interaction at paras. [139]ff below.

132. The F&C Group Compliance Manual also included statements regarding F&C's policy on regulatory reporting, emphasising that local Compliance Officers and the F&C ARC Department were responsible for ensuring that regulators were notified timeously of significant matters coming to their attention.

133. Each year each of the Defendants was required to sign a personal declaration form to say that he was aware of and acknowledged his responsibility to comply with F&C policies that were relevant to him and the position he held. The forms included an introductory section stating the form had to be completed by all F&C employees and any consultant or contractor operating on the basis of a contract lasting more than three months, and that "It is a condition of employment that all employees comply with these policies and procedures". The Defendants were not employees, consultants

or contractors, but were nonetheless provided with the standard form declarations to sign. Mr Culligan signed such forms on 3 April 2007 and 27 March 2008, making it clear that he did so in his position as a partner in the LLP. Mr Barthelemy signed such a form on 20 April 2007, stating his position as "Partner" (i.e. in the LLP), and another on 19 May 2008, stating "none" against "Position" (presumably to indicate that he did not hold any of the standard positions in the F&C Group to which the form was directed). Both Defendants thereby indicated that they were signing the forms in an unusual, non-standard context.

134. The forms contained the following declaration addressed to F&C plc:

> "I hereby confirm that I have read and understood the attached quick reference guide to the detailed procedures contained within the declaration and have referred to the relevant policy or procedure published [on the F&C IT network] where appropriate. I also confirm that to the best of my knowledge and belief, I have complied with the policies and procedures listed below that are relevant to me and the position that I hold: [a list of policies was set out which included the F&C Group Code of Ethics, the F&C Group Compliance Manual and the F&C Group Information Security Policy].
>
> I agree on an ongoing basis to abide by these principles of conduct and rules. Furthermore, I undertake to advise the Audit, Risk and Compliance Department of F&C should I, for any reason, breach any of the rules or principles of conduct, or am uncertain as to whether I have exceeded my responsibilities."

135. The Defendants were taxed in cross-examination with the fact that they had signed such declarations. It was put to them that they must therefore have accepted that they were bound by F&C Group policies in relation to their activities within and on behalf of the LLP. Their response was that they took it that they were declaring their acceptance to be bound by F&C Group policies only in so far as they were relevant to them and the position which they held (as was indicated on the face of the declaration). Since they were not employees in the F&C Group, but were partners in the LLP (which was not a wholly owned subsidiary of F&C plc and hence not a member of the F&C Group in the full sense, but a distinct entity with its own governance structures responsible for adopting, developing and adapting its own policies), and indicated their unusual position on the face of the declarations which they signed, they considered that F&C Group policies had only limited relevance for the LLP. There was nothing in the declarations which contradicted their general stance on that issue.

136. F&C submits that by signing such declarations the Defendants must be taken to have accepted the fully applicability of F&C Group policies to them and the LLP, so that any failure by them to follow those policies according to their terms ought properly to be treated as a potential regulatory misdemeanour or disciplinary offence on their part, bearing on their rights and obligations under the Agreement and on the question

whether they have been guilty of conduct constituting unfair prejudice to F&C Holdings for the purposes of the Cross-Petition.

137. In my view, the Defendants' stance in this part of the case is correct. The difference between them and F&C about the significance of the personal declaration forms which they signed stems from the unconsidered use by F&C of standardised Group policies and Group forms in relation to a non-standard entity (the LLP) and individuals (the Defendants, as partners in the LLP). I have explained above that although the position was unclear and unsatisfactory – a situation for which the Defendants bore part of the responsibility, but along with others, including F&C's ARC Department - on an objective reading of the various F&C Group policies they did not apply in a simple and straightforward way to the LLP, but had to be read as subject to adaptations to take account of the distinct position of the LLP (see, in particular, paras. [90]-[92], [126(iv)], [127] and [129] above). For similar reasons, on an objective interpretation, the personal declaration forms could not be read as an acceptance by the Defendants that F&C Group policies applied to them and the LLP other than in a limited fashion, with due modification to take account of the position of the LLP.

138. I would add that I do not think it would have been open to the Defendants to have sought to bypass the various governance structures of the LLP by simply signing personal declarations which appeared to accept the managerial authority in relation to the LLP in certain respects of bodies external to the LLP, such as the Execom or Board of F&C plc. This is a further factor which tends to support the objective interpretation of the declaration forms to which I have referred. These are points of significance when one comes to consider such matters as whether Mr Culligan had proper authority to conduct covert scrutiny of the e-mails of Mr Tilson (see paras. [821]-[825] below).

The regime governing provision of IT services to the LLP by F&C IT

139. The Defendants' position was that F&C IT was providing outsourced IT services to the LLP under the Service Agreement, and that it was therefore the Service Agreement which was the primary source of rights and obligations of the LLP (and hence of the responsibilities of the management of the LLP) in relation to F&C IT. F&C, by contrast, attributed greater significance to the F&C Group Information Security Policy in relation to the LLP's use of F&C supplied computers and the services to be provided by F&C IT. This difference of view again reflects a basic difference in the general outlook of the Defendants and F&C regarding the relationship between the LLP and the F&C Group.

140. The Defendants regarded the LLP as a distinct legal entity with different ownership shares from an ordinary member of the F&C Group, so that the management of the business and relations between the owners of the LLP (they as to 20% each, Holdings as to 60%) fell to be governed in accordance with its own legal regime (which did not accord F&C the same full degree of control as it would expect to exercise in relation to a wholly-owned subsidiary). On their view, the LLP's relations with the F&C Group were governed by its contractual rights and obligations in its dealings with entities in the Group as set out in the Agreement and Service Agreement, rather than by more informal governance structures such as might operate as a matter of practice

within a corporate group composed of parent company and wholly-owned subsidiaries (subject directly or indirectly to ultimate ownership and hence control by that parent).

141. F&C, on the other hand, regarded the LLP as part of the F&C Group and therefore subject to general group governance measures, including under the F&C Group Information Security Policy and other group policies, in the same way as other members of the Group which were wholly-owned subsidiaries of F&C plc.

142. In my judgment, the analysis adopted by the Defendants is the better view. Although for certain purposes the LLP did fall to be treated as a member of the F&C Group (e.g. in relation to production of F&C consolidated group accounts), it was not a full member of the F&C Group and F&C could not properly treat it as a wholly-owned subsidiary subject to the same full powers on the part of F&C plc to impose IT governance practices and statements of policy on entities which were completely owned by it.

143. So far as concerned provision of IT equipment and IT services by F&C to the LLP, the primary source of the LLP's rights and obligations was indeed the Service Agreement. Throughout the course of the dispute and, in particular, in relation to its complaints in the Cross-Petition about the Defendants' conduct, F&C went too far in trying to impose upon the LLP and upon the Defendants, as its managers, the standards and discipline to be derived from general statements of F&C Group policy in relation to IT matters and failed to point to proper grounds in the Service Agreement for the complaints which it made about them. Mr Culligan and Mr Barthelemy were therefore justified, in my view, at feeling aggrieved and distrustful as a result of F&C's attempts simply to treat them as subject to F&C's Group IT policies. They were senior managers of a discrete legal entity, the LLP, which was not wholly owned by F&C, and were entitled to exercise their own judgment about how the business of the LLP should be conducted.

144. Having made these points, however, it should be noted that F&C had a clear and obvious interest in maintaining the security and the integrity of its group IT network and infrastructure which, from the start of the LLP's business, incorporated the LLP's computers. The security of F&C's IT network operated for the benefit of the LLP as well as the wider F&C Group.

145. In those circumstances, I consider that the obligations contained in article 3.1 of the Service Agreement requiring each party to "observe proper standards of market conduct" and to "take reasonable care to organise and control its affairs and responsibilities in relation to each other" included an obligation that the LLP should take reasonable care to ensure that F&C's IT network was not put at risk by its activities. In that regard, the LLP was on notice of the F&C Group Information Security Policy, as it existed from time to time, and of the standards of careful conduct by users of the IT system which it laid down. This is relevant to that part of F&C's case which involves complaint about the creation of what it says was an unacceptable security risk to F&C's IT network by the introduction by the LLP of its own discrete IT network in December 2008 and January 2009, which was joined to F&C's IT network via three dual-homed computers located in the LLP's office, which were linked to both the LLP IT network and F&C's IT network: see paras. [582]-[589] below.

146. However, the obligations in the Service Agreement did not purport to govern how the LLP regulated its own internal affairs. It did not govern the circumstances in which senior management in the LLP might be authorised covertly to review the e-mails of LLP staff. That was a matter falling within the sole discretion of the LLP and the authority for any manager to conduct such a review is a matter to be determined by analysis of the distribution of authority within the LLP according to its constitution and relevant policies and practices. The relevance of Mr Culligan's covert review of the e-mails of Mr Tilson and others to F&C's position in these proceedings is therefore in doubt. If Mr Culligan and Mr Barthelemy had proper authority from the LLP for what they did in that regard, the propriety of the action of F&C in treating their conduct as improper is itself open to question.

The funds managed by the LLP

147. The principal funds managed by the LLP were the F&C Select Alpha Fund ("the Select Fund") and the F&C Balanced Alpha Fund ("the Balanced Fund"). For limited periods the LLP also managed other more specialised FoHFs, known as the F&C Event Driven Fund ("the Event Driven Fund"), the F&C Credit Alpha Fund ("the Credit Alpha Fund") and the Pushkin Fund.

148. The Select Fund and the Balanced Fund were constituted as mutual funds in the form of companies registered in the Cayman Islands, each with its own Board of Directors. At material times the Directors of both the Funds were Mr Breukink, Mr Tiernan, Mr Browne, Mr Laurent and Mr Ribeiro. The Funds contracted with the LLP for the LLP to act as their investment manager. They also contracted with a company called PNC to act as administrators for the Funds, with responsibility for sending communications to investors in the Funds.

149. Investors in the funds took a class of investment share in the Fund companies. The Balanced Fund invested in hedge fund securities as chosen by the LLP. The Select Fund acted as a feeder fund for the Balanced Fund, meaning that it invested in Balanced Fund shares and so indirectly invested in the portfolio of hedge fund securities held by the Balanced Fund. The difference for investors between the Balanced Fund and the Select Fund was that the Select Fund was marketed as a leveraged fund (in which the amount invested on behalf of clients would be increased by money borrowed from credit providers) while the Balanced Fund was unleveraged.

150. For investment in the Select Fund, the LLP had a power to commit the investor to borrow money from certain banks – the leverage providers – with which the LLP had arranged borrowing facilities (Crédit Suisse, Rabobank and ABN Amro). Although, according to the investment agreement for investors in the Select Fund, the LLP had a degree of discretion about the amount of leverage it could allocate to the investor, it was important for the LLP to maintain a reasonably constant rate of leverage in order to ensure that the Fund met the expectations of investors as to the degree of exposure and risk they accepted by investing in it and did not significantly vary such exposure and risk by changing the extent of leverage. Accordingly, until it was wound down and the leveraging arrangements brought to an end in early 2009, leverage for investment in the Select Fund was maintained at a fairly constant rate at around 50% (that is to say, for each $1 of an investor's own money invested in the fund an additional $1 was borrowed and was also invested in the Fund in that investor's name). An investor in the Select Fund therefore took on twice the exposure to the

underlying hedge fund portfolio managed by the LLP for each $1 invested as an investor who invested directly in the Balanced Fund. The effect of the leveraging in the Select Fund was broadly to multiply the risk taken and the good or poor performance of the underlying hedge fund portfolio for an investor who invested $1 of its own money by a factor of about two.

151. The way in which the leverage arrangements operated was also relevant to the way in which the fee income for the LLP was then divided up between the LLP and F&C under the marketing fee provisions set out in the Agreement. Where a client of the LLP wished to invest $1 of its own money in the Select Fund, with an additional $1 of leverage, the Select Fund would arrange for the client to pay $1 to the leverage provider and the leverage provider would invest that and an additional $1 in the Balanced Fund in its own name. Contractual arrangements were in place to transfer any profit or loss on that investment from the leverage provider to the client and to ensure that the client bore the cost of all the LLP's fees in relation to the full $2 investment and borrowing costs for the leverage. However, as a matter of the LLP's own internal accounting, the investment would be treated as an investment of $1 by the client and $1 by the leverage provider. This affected the amount of the marketing fee payable by the LLP to F&C in respect of that investment. The leverage provider was treated as a new client for the purposes of the Fifth Schedule to the Agreement, so under paragraph 1.3.1 of that Schedule the LLP could keep the entirety of the fees attributable to the $1 of investment contributed by the leverage provider. On the other hand if, say, the client who invested was a core client of F&C, for the purposes of the Fifth Schedule the LLP would be obliged to pay to Holdings a significant proportion of the fees attributable to the $1 of investment contributed by the client, in accordance with paragraph 1.1 of that Schedule.

152. The Offering Memoranda for the Balanced Fund and the Select Fund and the monthly fact sheets for investors produced by the LLP for those Funds explained that the Balanced Fund had target returns of 5 to 10% (for each $1 of a client's own money invested) and annualised volatility (a measure of the risk profile for each $1 of a client's own money invested) of around 5%, while the equivalent figures for the Select Fund were returns of 8 to 13% and annualised volatility of around 10%.

153. The fees payable by clients to the LLP were an annual management fee of 1% of the value of AUM for that client (including, in relation to the Select Fund, as increased by the leverage attributable to that client) payable monthly in arrears and a performance fee of 10% of any increase in the value of those AUM over a year.

154. The Pushkin Fund was established in 2006. The LLP managed it as the vehicle for investment in a FoHF portfolio by a Russian investor introduced to the LLP by the Defendants. The Defendants sat on the Board of the Pushkin Fund (a situation which Mr Ribeiro disliked for various reasons and occasionally objected to). Since the Pushkin investors qualified as new clients for the purposes of the Fifth Schedule to the Agreement, the LLP did not remit any part of the fees paid by them to Holdings under that Schedule. Over the course of 2008 various redemption requests were received in respect of the Pushkin Fund, amounting in total to the whole sum invested in the fund.

155. In June 2008 the LLP launched the Credit Alpha Fund as a specialised FoHF investing in a portfolio of hedge funds focused on transactions involving distressed debt. The Fund was created as a subsidiary of the Balanced Fund by grouping all the

investments in hedge funds of that type held in the general Balanced Fund portfolio into a distinct portfolio within the general portfolio and transferring that distinct portfolio to the new Credit Alpha Fund corporate vehicle as a wholly-owned subsidiary of the Balanced Fund. The commercial object of this was to create a discrete FoHF portfolio in this specialised class of hedge fund which could generate an investment track record over time, which could then be used (if the performance were good) to market the Credit Alpha Fund to investors as an investment product distinct from the Balanced and Select Funds. As it transpired, the business of the LLP and its funds never developed in a way that allowed for that. On 29 April 2010 the directors of the Credit Alpha Fund resolved to place the fund into liquidation. However, the treatment of the launch costs for the Credit Alpha Fund in the accounts of the LLP became a point of contention between the parties as the dispute between them developed.

156. The Event Driven Fund was established as a company incorporated in Guernsey in April 2007 and was listed on the London Stock Exchange until early December 2008. It also did not prosper. Poor market conditions resulted in a declining net asset value of the Fund, with resulting investor dissatisfaction. Pursuant to a recommendation of the LLP and the directors of the company, the investor shareholders in the company passed a resolution on 5 December 2008 to place the company into members' voluntary liquidation.

157. Investment in the Balanced and Select Funds could be arranged in US dollars, pounds sterling or euros: the underlying portfolio of hedge funds in which the funds were invested was the same in each case. Since investments in hedge funds are typically denominated in US dollars, it is conventional to analyse FoHF performance in US dollars. That is typically the currency in which FoHF performance is marketed to investors. Where an investment is made in a FoHF product denominated in another currency, such as euros, but invested in dollar-denominated hedge fund securities, it is usual for the FoHF to take out hedging transactions to minimise the risk of currency fluctuations which might have an impact on the investment performance of that non-dollar denominated product. Hedging was a feature of the Select and Balanced Funds until late 2008, when the LLP abandoned currency hedging on the euro-denominated funds as a cost-cutting measure. There was, in fact, significant currency fluctuation in the highly volatile market conditions before the end of 2008 and it seems that the absence of currency hedging on the LLP's euro-denominated FoHF hedge fund products may have contributed to the fact that their performance for 2008 was markedly worse than the (very bad) performance of the dollar-denominated funds for that year.

158. The AUM managed by the LLP in the Balanced and Select Funds (including the leveraged element in the Select Fund) varied over time. At its height, the AUM of the Balanced Fund, taking account of investment via the Select Fund, exceeded $1 billion. The bulk of this investment came from established clients of the F&C Group, including in particular certain Dutch pension funds and insurance funds. Apart from in relation to the Pushkin Fund, the LLP was not successful in attracting investment from investors who did not already have an established relationship with F&C. There was a very heavy withdrawal of funds by F&C clients from the Select and Balanced Funds in the last part of 2008 and early 2009 in circumstances which I examine in detail later in this judgment.

Market disruption in 2008/09, the reaction of the Partners in the LLP to the threat to the LLP's business and the development of the dispute: general overview

159. In late 2008 and 2009, global equity and bond markets suffered huge losses as investors panicked in reaction to a major "credit crunch", particularly after Lehman Brothers went into administration on 15 September 2008.

160. The great majority of hedge funds and FoHFs sustained severe losses over the same period. The LLP's funds were no exception. They struggled to show positive returns from about mid-2007 onwards and suffered major losses in 2008.

161. The US dollar denominated Balanced Fund showed modest gains in 2008 in terms of Net Asset Value ("NAV") per share in February, April and May and significant losses in January, March and June to December as follows: January -2.01%, February +0.84%, March -3.12%, April +0.85%, May +1.26%, June -2.72%, July -1.53%, August -0.4%, September -8%, October -5.9%, November -2.87%, December -1.35%. The performance of the US dollar denominated Select Fund in terms of NAV per share in 2008 showed a similar pattern, with the losses and gains magnified by virtue of the effect of the leveraging of the Select Fund, as follows: January -4.74%, February +1.25%, March -5.57%, April +1.25%, May +2%, June -5.06%, July -3.02%, August -0.98%, September -16.66%, October -13.66%, November -7.58%, December -2.52%.

162. The total reduction in NAV per share for the US dollar denominated Balanced Fund in the course of 2008 was -22.61%. The total reduction in NAV per share for the US dollar denominated Select Fund for that year was -44.42%. The total reduction for the Euro denominated Select Fund in 2008 (the version of the Select Fund in which many of the Dutch clients had invested) was even worse, at -50.9%. These results were produced by Funds which were supposed to be absolute return funds with an objective of generating positive returns of between 5% and 13%. Investors in the funds became dissatisfied with their performance and placed redemption notices to withdraw their funds from them, sharply reducing the AUM of the Funds.

163. This is the important backdrop to the dispute between the parties. A major part of the dispute stemmed from the different views of the Defendants and F&C about how the LLP should react to the LLP's deteriorating performance in terms of the losses sustained by its hedge fund portfolio, the reduction in its AUM and, consequent upon both of these, its loss of fee income (both management fees and performance fees), such that it faced the prospect of potentially losing money for the first time in 2009.

164. F&C, represented in particular by Mr Ribeiro on the LLP Board and ManCom, wished to see significant cuts in the budget of the LLP for 2009, including several redundancies. F&C regarded the LLP's funds as practically unsellable in the extreme market conditions in late 2008 and early 2009, both because of a shift in general sentiment among its clients (which switched at this time to becoming markedly more averse to risk and with a heightened appetite for liquidity and cash which made hedge fund investments unattractive for them) and because of the poor performance figures for the LLP's Funds. F&C's attitude was that the appropriate approach for the LLP was for it to hunker down while the economic storm passed, spend time rebuilding its investment track record by securing positive returns for its FoHF products over a period and then, on the basis of that restored track record and an eventual return of

markets to something approaching normality, to return to marketing the products in an active way so as to build the AUM up once again.

165. On this strategy, since fee income would be down for a period and activity by the LLP would (F&C thought) be comparatively reduced, F&C considered it made sense for the LLP to budget to cut its costs significantly for 2009, including in particular by reducing the number of staff. In an asset management business such as the LLP staff costs are typically one of the greatest cost elements, so to F&C's way of thinking it seemed that staff reductions should be a natural way of reducing the LLP's costs for a period while it took steps to rebuild its investment performance.

166. In my view, F&C's attitude was also influenced by the fact that under the terms of the Agreement, if the LLP sustained losses, it would be F&C which would bear the brunt of that economic cost. This was because the Defendants' drawings in respect of the LLP's profits were protected as to £150,000 per annum each under clauses 9.3.2 and 11.1 of the Agreement (even if the LLP made a loss), and where losses were sustained by the LLP, they would, in the first instance, be drawn down against the capital of the LLP (the bulk of which had been provided by F&C and which F&C was obliged to maintain at a satisfactory level for regulatory purposes under clause 8.3 of the Agreement). The cost to F&C might be recouped against profits in later years by virtue of the operation of the provisions on the allocation of profits set out in clause 9.3 of the Agreement, but that would, of course, depend on sufficient profits being made in those later years.

167. However, in my judgment, the business strategy favoured by Mr Ribeiro and F&C was a reasonable and legitimate one, proposed by F&C in good faith. The way in which Mr Ribeiro and F&C were influenced in forming their views by F&C's financial interests was something which the Agreement contemplated could properly happen: Mr Ribeiro and the F&C representatives on the LLP Board were not to be disqualified from acting by reason of the fact that F&C's commercial interests were engaged by a wide range of business judgments which would have to be made by the LLP Board and ManCom from time to time. The fact that they favoured a strategy which tended to accord with F&C's own commercial interests in relation to the operation of the Agreement does not undermine the assessment that it was a reasonable and legitimate strategy for them to press for. Businessmen's views as to what it is best for a business to do quite often naturally reflect what they think is in their own best interests. Their interests colour the way they see the world, but that does not necessarily mean that their assessment of what is the best way forward is not a genuine, *bona fide* assessment.

168. Similar points can be made in relation to the Defendants' reaction to the considerable stresses to which the business of the LLP was subject in late 2008 and 2009. They genuinely and strongly believed that it would be detrimental to the business of the LLP to cut staff. They considered that the LLP still had marketable products which (although they had performed very badly in absolute terms in 2008) had not performed particularly badly when compared with other F&C investment funds, nor when compared with other hedge fund or FoHF businesses (whose results had also generally been very poor during the extreme market circumstances from late 2008). They believed that they needed to retain staff to ensure that they had a credible fund management team to attract business when markets recovered, as they felt they would do. They were prepared to look at other ways of saving costs in the LLP's business

(which, for various reasons, were not attractive to F&C) and wished to expand the LLP's business to generate revenue by developing new products (which F&C regarded as too costly and speculative to launch).

169. It informed the Defendants' assessment on these points that any losses which their preferred approach might create would be borne primarily by F&C, given the way in which the Agreement operated. This made them more willing than Mr Ribeiro and F&C to speculate that there would be an upswing in F&C's revenues in 2009 and to think that the LLP should take the risk that that might not prove to be the case.

170. As with F&C's proposed approach, this was a reasonable and legitimate strategy for the Defendants to seek to promote. In a way similar to Mr Ribeiro and F&C, their views about the best way forward for the LLP in difficult circumstances were naturally influenced by their own commercial interests so far as concerned the operation of the Agreement, but this was something which the Agreement contemplated could properly happen. Like Mr Ribeiro and the F&C representatives in relation to the financial interests of F&C, they were not disqualified from participating in decision-making by the LLP Board and ManCom by the fact that their personal financial interests were engaged from time to time in relation to such decision-making. As with Mr Ribeiro and the F&C representatives, that did not prevent their views from from being genuine and honest views about the best way forward for the LLP. As with F&C and its representatives, I find that the business strategy of the Defendants for the LLP was proposed by them in good faith, genuinely believing it to be in the best interests of the LLP.

171. Unfortunately, although both sides held their respective views in good faith and for genuine and legitimate reasons, each side became increasingly frustrated by the other and – informed by an acute consciousness of how the business strategy proposed by the other appeared to favour that other's own best commercial interests under the Agreement – increasingly distrustful of the motives and good faith of the other. F&C felt that the Defendants (who, F&C emphasised, were part owners of the business) were unreasonable in refusing to face up to the need for significant cost savings at the LLP which, in F&C's view, realistically meant that staff should be cut. The Defendants felt that F&C was unreasonable in pressing for such a course (which they believed would be profoundly damaging to the LLP's business prospects) and in blocking their proposals for new products for the LLP. They became deeply suspicious that F&C had decided upon a strategy of driving the LLP out of business (so as to avoid having to buy out their interests under the call option provisions in paragraphs 1.9 and 1.10 of the Fourth Schedule), pursued by means which included arranging for F&C clients to withdraw their funds from the LLP's FoHF products and failing to market those products to persuade those clients to stay in the funds or to attract new investors.

172. The Defendants also came to believe that there was a particular reluctance by F&C to market the LLP's products to its client base because F&C's marketing team in F&C Netherlands BV ("F&C Netherlands"), which had promoted the LLP's funds to clients of F&C in the Netherlands and persuaded them to invest in it, felt that to market the products actively in 2008 would or might expose them to complaints from clients that the products had been sold to them in the first place on the basis of misleading information about their risk and return profile.

173. I find that the Defendants' suspicions in this regard were misplaced. F&C Netherlands had not mis-sold the LLP's products to clients. There was no belief or concern on the part of the marketing team at F&C Netherlands that there had been any mis-selling of the products by them and the fact that they did not, in late 2008 and early 2009, feel able to press F&C's clients in the Netherlands to invest or remain invested in the LLP's products was due wholly to their clients' distraught reactions to the general extreme fall in the values of all their investments, leading to a strong desire at the time to get out of risky products and a strong desire (backed up by domestic regulatory requirements) to invest in liquid assets. The marketing team at F&C Netherlands were in the middle of a storm of client anguish and recrimination as a result of the massive failure of investments to match their expectations and the catastrophic fall in the value of those investments, where their investments in the LLP's Select Fund had done particularly badly against an expectation that the Fund would provide absolute returns. For entirely legitimate reasons, the F&C Netherlands marketing team did not consider it an opportune time at which to try to persuade clients to invest or remain invested in a comparatively unfamiliar, illiquid and risky set of FoHF products on offer from the LLP.

174. I also find that the Defendants' belief that F&C decided on a strategy to destroy or undermine the LLP's business and to close it down was misplaced. F&C did not wish to see the LLP destroyed. It wanted it to hunker down while the storm passed, cut its costs and then re-emerge to profitability at some point in the future when it was once again possible to market its products successfully. Contrary to the Defendants' assertions, F&C did not illegitimately block the development of new business ideas by the LLP.

175. The dispute between the parties arose out of the mutual distrust and suspicion on each side which grew and came increasingly to poison relations between them. F&C began to look at ways in which it could exert pressure on the Defendants in order to force them to see sense (as F&C looked at it) and conform to the business strategy favoured by F&C. It was as a result of efforts by F&C to do this, in particular by threatening to cut off the Defendants' income to which they were entitled under the Agreement, which led the Defendants to serve the First Put Option Notices on 25 February 2009, as I set out in detail below. I find that in acting as it did, F&C breached the Agreement in important respects such that the Defendants were entitled to serve those notices.

176. For their part, their trust in F&C severely undermined by its actions and their suspicions fuelled by its breach of the Agreement, the Defendants accused F&C of deliberately seeking to damage or destroy the LLP's business. From the end of February 2009, relations between the partners in the LLP were very tense indeed.

177. The Defendants make further complaints about the conduct of Holdings in the period after February 2009, and maintain that their later Put Option Notices served on 22 May 2009 ("the Second Put Option Notices") and 24 December 2009 ("the Third Put Option Notices") were also valid notices under the terms of the Agreement. I find that Second Put Option Notices were valid and justified by further breaches of the Agreement by Holdings after February 2009, but there was no further distinct breach of the Agreement after 22 May 2009 to provide discrete justification for the Third Put Option Notices.

178. The Defendants also complain that F&C plc and Holdings were responsible for the conduct of the affairs of the LLP in a manner unfairly prejudicial to them, contrary to section 994. I find that this complaint is made out by the Defendants. As part of this complaint, alongside matters referred to above, the Defendants complain about an investigation carried out from mid-2009 by Mr Mackay in relation to their having covert access to staff e-mails and setting up a new, discrete IT network for the LLP in December 2008, and a report produced by him which was critical of them which was used as a basis for expelling them from their executive roles in the management of the LLP's business in late 2009 and was sent to the FSA. The Defendants say that Mr Mackay's investigation and report were inadequate and unfair to them, and that the report was acted upon and sent to the FSA without them having a fair opportunity to respond to it first. I have come to the conclusion that this part of the Defendants' case is made out. Although Mr Mackay was entitled to commence an investigation as he did, it was not conducted fairly and the LLP should not have treated his report as final, but rather as a statement of case against the Defendants to which they should have been permitted to respond before it was acted on and sent to the FSA. The Defendants did in fact have good answers to the criticisms of them in the report.

179. It may be that the Defendants' success in their claim under section 994 does not ultimately assist them, as it is open to question whether they would be entitled to or could achieve a higher price for their interests to be purchased by F&C under sections 994 to 996 than the enhanced price payable as a result of the successful exercise of their Put Options. But these are matters for debate at a further hearing.

180. The Cross-Petition was issued by F&C on 28 April 2010. In it, F&C put forward its own complaints that the Defendants had conducted the affairs of the LLP in such a way as to cause unfair prejudice to Holdings, as co-owner of the business, contrary to section 994. The main contentions of F&C in the Cross-Petition are that the LLP was set up on the basis of a relationship of mutual trust and confidence between the Defendants and Holdings and on the basis of certain understandings between them. F&C contends that Mr Culligan and Mr Barthelemy became antagonistic and confrontational and refused to accept decisions of the LLP Board and ManCom in breach of that relationship and such undertakings; that they caused the LLP to change to an external e-mail service provider without properly informing or getting approval from the LLP Board; that they caused the LLP to set up a new IT infrastructure in December 2008, creating a serious security risk to F&C and the LLP, and did not adopt an adequate BCP arrangement; that they served Put Option Notices without proper justification which made the business of the LLP unviable; that they covertly accessed the e-mails of Mr Tilson and Nicholas Sparks ("Mr Sparks", the risk manager of the LLP) to further their own interests in the litigation and without proper justification; that Mr Culligan improperly obstructed the work of Mr Mackay, as Compliance Officer for the LLP, in investigating it and reporting on the covert monitoring of staff e-mails and the LLP's adoption of new IT arrangements; and that Mr Culligan and Mr Barthelemy avoided Board meetings of the LLP and so impeded the conduct of its affairs.

181. For the most part I do not accept F&C's contentions in the Cross-Petition. The respective rights and obligations of the parties in relation to the LLP were set out in the Agreement. The Agreement is a carefully negotiated contract setting out an elaborate regime for the governance of the LLP. In my judgment, there is no

indication that the parties intended to accept any extra obligations towards each other by way of addition to the terms of that Agreement such as to treat the foundation of their relationship as one of mutual trust and confidence in the sense pleaded by F&C.

182. In late 2008 and 2009, the conduct of the affairs of the LLP did become far more confrontational and antagonistic but that did not involve any breach of duty by the Defendants. It was the natural consequence of each side adopting different views of the appropriate strategy for the LLP to adopt in the conditions of considerable market dislocation and stress on the LLP's business at that time and seeking forcefully to promote their competing views, and also of F&C engaging in conduct which breached the Agreement (particularly by taking steps to close off income for the Defendants), to which the Defendants legitimately reacted with anger and distrust. Responsibility for the antagonism and confrontation in the management of the LLP lies primarily with F&C rather than with the Defendants.

183. The adoption of an external e-mail service provider for the LLP was within the authority of Mr Culligan, as Managing Partner of the LLP, was not concealed from the LLP Board or ManCom and, in any event, occasioned no significant relevant prejudice to F&C Holdings or the LLP.

184. The Defendants had proper justification for serving their First and Second Put Option Notices, and the service of their Third Put Option Notices had no relevant impact on events.

185. They had proper authority and sufficient justification to engage in covert monitoring of the e-mails of Mr Sparks and Mr Tilson. They acted out of genuine concern for the interests of the LLP and not out of a misplaced selfish desire to further their own interests in the litigation. Although they were uncooperative in their attitude to Mr Mackay in his investigation, there was good reason for that: he made exorbitant claims regarding his own authority to investigate, gave no clear explanation and justification for what he was doing in his investigation, and produced a report which was seriously defective and unfair to them. Moreover, the Defendants' attitude did not cause significant prejudice to F&C or the LLP.

186. The Defendants had legitimate reason to avoid Board meetings of the LLP at which F&C proposed to remove them as partners of the LLP, and they made it clear they would attend to deal with other matters and would cooperate in the proper management of the LLP, which in fact they did.

187. There is force in F&C's complaints about the setting up of a separate IT infrastructure for the LLP in December 2008 which bypassed F&C's IT network security measures and thereby created risk for both the LLP's and F&C's IT systems. So far as concerned the LLP's own business, the risk created was within acceptable and legitimate bounds. However, the risk created for F&C's IT system was, through inadvertence, outside what was acceptable - but this involved placing the LLP in breach of its obligations to F&C under article 3.1 of the Service Agreement rather than conduct of the LLP's own affairs in a manner unfairly prejudicial to the interests of its members. By virtue of article 3.5 of the Service Agreement, this breach of article 3.1 did not expose the LLP to any damages claim by F&C and the change in the LLP's IT arrangements did not cause any significant prejudice to Holdings in the conduct of the affairs of the LLP. The fault in setting up such a system was Mr

Culligan's alone (Mr Barthelemy had no IT knowledge or expertise and was entitled to rely on the combined knowledge and expertise in that area of Mr Culligan and Nicholas Pennington – "Mr Pennington" - the LLP's IT manager), and merely constituted a failure to fulfil his management responsibilities to a satisfactory standard in this one limited respect. Mr Culligan acted from proper motives and without intention to harm the LLP or F&C. This isolated lapse below the standard of proper diligence to be expected of someone in Mr Culligan's position is not sufficient to qualify as conduct occasioning significant prejudice to Holdings in relation to the conduct of the affairs of the LLP and does not justify the grant of any relief under section 994.

188. The net result of the claims and counterclaims, therefore, is that the Defendants succeed in the Part 7 proceedings and are entitled to have their interests in the LLP bought out by F&C, pursuant to their valid exercise of the Put Options under paragraph 1.7 of the Fourth Schedule; the Defendants fail in their wider claim under the Petition that F&C conspired to close the LLP, but succeed in other parts of their complaint in the Petition; and Holdings fails in its claims under the Cross-Petition.

The witnesses

189. There were wide-ranging allegations of conspiracy and complaints of lying and deceptiveness made on each side of the dispute. In particular, a major part of the Defendants' case was that F&C had taken a decision to close the LLP without respecting their rights under the Agreement and then moved to implement that decision. A major part of F&C's case was that the Defendants decided in late 2008 or early 2009 that they wished to leave the LLP and hatched a plan to lure F&C into committing breaches of the Agreement by reference to which they could serve Put Option notices requiring F&C to buy out their interests at the enhanced price set out in paragraph 1.7 of the Fourth Schedule. Assessment of the witnesses and of their honesty both in giving their evidence and in the course of their dealings with each other has therefore been important in forming the findings made in this judgment, and in particular in rejecting the main conspiracy allegations levelled by each side against the other.

190. The main protagonists giving evidence were Mr Barthelemy, Mr Culligan and, for F&C, Mr Ribeiro. Each of them was in the witness box for lengthy periods, giving evidence covering a great deal of ground and dealing with many allegations being made by the opposing side against them.

191. Mr Barthelemy is a French citizen who has worked in financial services in City of London since 1994. In the mid-1990s he met Mr Culligan while they were working together at Robert Fleming. He and Mr Culligan are close friends and have at all times been close allies in running the LLP and in this litigation. Mr Barthelemy was designated as senior partner in the LLP (i.e. as a senior executive partner in the LLP). He and Mr Culligan were the portfolio managers for the LLP, responsible for researching and selecting hedge fund investments to be included in the investments portfolios for the LLP's FoHF products. For both Mr Barthelemy and Mr Culligan, the LLP was the first time they had been involved in running a financial services business as joint proprietors of it.

192. Mr Culligan entered employment in the financial services industry in the City of London after spending six years as a software engineer. He has a strong interest in IT which he has maintained. When the LLP was set up he was designated as the managing partner (i.e. as the other executive partner in the LLP, with a role equivalent to being the CEO of the business).

193. Mr Ribeiro has had a lengthy career in the asset management business. He joined F&C in 2001 as Head of Retail Portfolio Management and was the Head of Investments at F&C plc between December 2005 and the end of 2008, when he was appointed as Head of Advisory and Strategic Relationships at F&C plc. At all material times he was a member of the F&C Group's Execom. He had overall responsibility for handling a range of important client relationships for F&C. He was the non-executive chairman of the LLP until December 2009 (when he assumed an executive role as the Defendants were expelled from the management of the LLP) and was throughout the main point of contact between the F&C Group and the LLP.

194. There were points of weakness in the case being pursued by each of these witnesses, and in my view each of them was open to some degree of criticism. Each of them exhibited defensiveness at points in their evidence where they were not forthcoming or where I was left with a degree of scepticism about what they said. In relation to Mr Ribeiro, I was, in particular, left unpersuaded by his evidence about his state of mind in January and February 2009 regarding his understanding of the terms of the Agreement and in relation to the powers of a Members' meeting. Having said this, however, it was not my assessment that any of these three witnesses made concerted efforts to lie in giving their evidence. Their emotions ran high in relation to the dispute, and in the case of each of them I consider there was a degree of reconstruction in their evidence in which they persuaded themselves of the truth of what they said, even when I found it to be unpersuasive and unreliable. As between them, in general terms I found Mr Culligan to be the better witness. He was not as slow and circumspect in giving answers as Mr Ribeiro, and tended to be clearer and more precise in his evidence; he was more restrained and careful than, and not as argumentative as, Mr Barthelemy in giving his evidence.

195. Mr Pennington was the only other witness of fact called by the Defendants. He was and is the IT manager for the LLP. I found him to be honest and open in giving his evidence. He is friendly with the Defendants (with Mr Culligan in particular), but I do not consider that his evidence was affected in any significant degree by this relationship.

196. A large number of witnesses of fact were called by F&C, many of them being required to address the Defendants' allegation that F&C decided in 2008 to close the LLP and then conspired to implement that decision:

   i) Mr Cole. At all material times Mr Cole was the Head of the F&C group Human Resources department ("F&C HR") and a non-executive member of the LLP Board. He was a member of the LLP's Compensation Committee, on which his human resources expertise was relevant. He was an honest and straightforward witness, albeit in his actions as a member of the LLP Board and Compensation Committee and in his assessments of what the LLP should do he was heavily influenced by the perspective associated with his position in the F&C Group. The Defendants argued that he was someone who, in relation

to the affairs of the LLP, did not bring his own independent judgment to bear but was unduly willing to follow the lead or directions given by Mr Ribeiro. I do not accept that. In my view, whilst properly giving considerable weight to the opinions of Mr Ribeiro, Mr Cole applied his own judgment about how to act and how the business of the LLP should be conducted;

ii) Mr Johns. Mr Johns joined F&C in 2000 as the Head of Institutional Business, responsible for sales, marketing and client service, and was a member of the Execom. In 2004 he assisted Mr Ribeiro in promoting within the F&C Group the establishment of the LLP. Mr Johns was a non-executive member of the LLP Board throughout. On 30 April 2008 he retired from all his executive roles within the F&C Group, but retained his position as a Board member for the LLP. On 19 October 2009 the LLP Board passed a resolution for Mr Johns to be appointed to the ManCom, which appointment took effect on 13 November 2009. Like Mr Cole, I found Mr Johns to be an honest witness, albeit he also was heavily influenced in his actions by the perspective associated with his connections with the F&C Group. As with Mr Cole, the Defendants argued that Mr Johns was unduly disposed to follow the lead or directions given by Mr Ribeiro and did not bring his own judgment properly to bear in relation to the affairs of the LLP. I do not accept that. My assessment of the attitude of Mr Johns is the same as for Mr Cole;

iii) Mr Tilson. Mr Tilson joined the F&C Group in 1995. His expertise is in finance accountancy. At all material times he was formally employed by F&C Ireland, but he was seconded to the LLP as its CFO and the LLP was in substance his employer. He was a member of the ManCom. He lives in Ireland, and arrangements were made for him to work for the LLP from Dublin, coming into the LLP's offices in London for only part of the time. As discussed in the judgment below, he came to ally himself with Mr Ribeiro and F&C in the course of the dispute, to the point where he was actively disloyal to the Defendants and did not fulfil his duties to the LLP as he should have done. However, as a witness I consider that Mr Tilson did his honest best to tell the truth as he saw it;

iv) Mr Mackay. Mr Mackay is the Head of the F&C ARC Department. In that capacity he is responsible for dealing with FSA, which is the United Kingdom regulatory authority for entities in the F&C Group. He is the designated regulatory Compliance Officer for the F&C Group and for entities within the group, including the LLP. The F&C Group provides the services of Mr Mackay as Compliance Officer for the LLP as part of the audit, risk and compliance services it provides under Schedule 1 to the Service Agreement. Part of the dispute came to revolve around the investigation conducted by Mr Mackay from mid-2009 into certain actions of the Defendants, in the course of which he produced a draft report dated 8 October 2009 and a final report dated 4 December 2009, both of which were highly critical of the Defendants. Those reports were used as the basis for actions of the LLP, led by F&C's representatives on the LLP Board and ManCom, against the Defendants, culminating in the Defendants being expelled in December 2009 from their executive management roles within the LLP. The Defendants were, in turn, highly critical of the way in which Mr Mackay conducted his investigation and

drafted his reports. As appears in the judgment, I accept the Defendants' basic criticism that Mr Mackay's investigation was one-sided, insufficiently thorough and was unfair to them. However, at points they sought to go further than this, and to suggest that Mr Mackay acted in bad faith, with a view to assisting F&C in its dispute with the Defendants rather than with a view to conducting a proper investigation and producing a proper report. I do not accept this suggestion. As regards his evidence, I assessed Mr Mackay to be an honest witness;

v) Mr Marrack Tonkin ("Mr Tonkin"). Mr Tonkin is the Company Secretary of F&C plc and of companies in the F&C group. He acted in the role of Company Secretary for the LLP. He was responsible for arranging meetings of the LLP Board, circulating the agenda and any relevant documents for such meetings and drawing up the minutes for them. As the parties fell out with each other in late 2008, it proved difficult to agree the minutes of meetings. From then on, Mr Barthelemy and Mr Tonkin both made manuscript notes at meetings. Mr Tonkin would draft minutes of the Board meetings and the Defendants would then propose amendments to them. I find that both Mr Tonkin and Mr Barthelemy tried in good faith to record what was said, subject to the pressure of time (as the meetings proceeded with often acrimonious debate), with each of them tending to note perhaps more carefully points which seemed of significance from F&C's or the Defendants' point of view, respectively. To make findings about what happened at meetings, I have had regard to all versions of the notes and minutes available in relation to those meetings and the evidence given about them. On the whole, I found Mr Barthelemy's manuscript notes fuller and more helpful than those of Mr Tonkin in conveying what happened at the meetings. I found Mr Tonkin to be an honest witness;

vi) Mr Cristobal Mendez de Vigo ("Mr Mendez de Vigo"). Mr Mendez de Vigo is the Head of the F&C Group's Distribution and Business Development Department ("F&C Distribution"). F&C Distribution is the division in F&C primarily responsible for marketing F&C branded financial products and maintaining relationships with clients. Mr Mendez de Vigo is a qualified Spanish lawyer. He joined the F&C Group in early 2007, having worked for 11 years in the asset management division of the Allianz Group, including in its Asia Pacific operation. He took up his position as Head of F&C Distribution in mid-2008. I found Mr Mendez de Vigo to be a good witness. There is an aspect of his conduct concerning the dispute in relation to which I think some criticism can be made of him, concerning the written material which from late May 2009 he told the Defendants he required them to produce before he would meet them to discuss active marketing steps which might be taken to promote the LLP's financial products with existing F&C clients and potential clients (paras. [887]-[888] and [910] below). However, it should be recorded that this was not an area where Counsel for the Defendants sought to maintain any criticism of him in cross-examination, so he was not given an opportunity to comment on this point. I readily find that he acted at all times in good faith, even if at times he paid insufficient attention to the detail of the demands he seemed to be making of the Defendants. His rather unfriendly attitude to the Defendants was born out of a sense on his part that the

Defendants were themselves acting in an unreasonable manner towards him and his department;

vii) Mr Bernardus Kramer (known as Ben – "Mr Kramer"). Mr Kramer joined F&C Netherlands in December 2007 as the Head of F&C Distribution in the Netherlands, reporting (from mid-2008) to Mr Mendez de Vigo. In my view, despite criticism levelled at him for how he gave an account of certain historic documents produced on disclosure by F&C Netherlands which had been brought into existence before he came on the scene, he was a truthful and reliable witness about matters within his own knowledge;

viii) Mr Julian Lyne ("Mr Lyne"). Mr Lyne joined F&C in June 2008 as the Head of Global Consultants for the F&C Group (the part of F&C Distribution responsible for F&C's relations with independent investment consultants). He reports to Mr Mendez de Vigo. He was an honest and reliable witness;

ix) Mr Hugh Moir ("Mr Moir"). Mr Moir is currently Head of Client Solutions & Strategy for the F&C group. He was appointed to that position in July 2009 after his involvement in matters pertaining to the dispute had ceased. He has worked in senior positions at a series of leading firms in the asset management sector, in roles involving the design and implementation of business strategies. From 2001 Mr Moir was involved in a number of consultancy projects for the F&C Group, and came to know the group well. In early 2008 he was engaged to assist F&C in formulating its business strategy for operating in increasingly difficult market conditions. He recommended that the group take action to reduce its costs base. This developed into a group initiative to achieve that objective, called "Project Fitness". For the most part, I assess that Mr Moir gave reliable evidence. However, while he was in the witness box it emerged that one of his handwritten notes made in the course of his work on Project Fitness in November 2008 had been altered in a material respect in the period after disclosure had been given of it (see paras. [478]ff below). The discovery that his notes had been tampered with in this way led to evidence being called from a handwriting expert and a careful examination of when and how that tampering might have occurred and how, why and when other notations in Mr Moir's notebooks made at other times might have been made. The Defendants submitted that Mr Moir was responsible for the tampering and put this to him in cross-examination; he denied it. I have given very careful consideration to whether this submission is made out, including having regard to character evidence adduced by F&C. I have come to the conclusion that Mr Moir did make one small but significant change in his notebook before going into the witness box by way of tampering with his notes, and that he lied when denying that he had done this (see paras. [475]-[486] below). In the light of that finding, I have in turn given careful consideration to my general assessment of his evidence and to what inferences should be drawn from that finding as regards other evidence called by F&C and its overall case. For reasons given at paras. [487]ff below, I continue to assess that Mr Moir was otherwise honest in the evidence he gave. I reject the Defendants' submissions that Mr Moir tampered with the evidence in his notebooks in any other way. It is also my view that no general adverse inference can properly be drawn from this action by Mr Moir which undermines other evidence given by F&C's witnesses;

x) Ms Victoria Bomba ("Ms Bomba"). Ms Bomba has been employed in the F&C Group since 2004. She worked as an assistant to Mr Moir in the course of the second phase of Project Fitness from November 2008. When that project came to an end in April 2009, she became Co-Head of Insurance in the F&C Group. In that capacity, she had responsibility for managing relations with two of F&C's biggest clients, Achmea and Friends Provident, who had invested in the LLP's FoHF products. Ms Bomba was an honest and careful witness. I found her evidence about what happened in relation to Project Fitness, and in particular her denial that any decision was taken by F&C to close the LLP, wholly persuasive. Her evidence in that regard provided corroboration of the truthfulness of the major part of Mr Moir's evidence and also of important parts of the evidence of Mr Ribeiro and Mr Mendez de Vigo;

xi) Mr Paul Niven ("Mr Niven"). Mr Niven is Head of the Asset Allocation division of the F&C Group, a team based in London and the Netherlands responsible for devising investment strategies to inform advice to be given to F&C clients (I will refer to Mr Niven's team generally as "F&C Strategy", and to the Netherlands part of the team as "the F&C Netherlands Strategy team"). F&C Strategy work closely with F&C Distribution, providing them with investment guidance and ideas. Mr Niven reports to Mr Ribeiro (in his capacity as the person responsible for F&C's main client relationships). Mr Niven was a good witness;

xii) Mr Michael De Groot ("Mr De Groot"). Mr De Groot joined F&C Netherlands in 2004. He is the Head of the F&C Netherlands Strategy Team, reporting to Mr Niven. He too was an honest and straightforward witness;

xiii) Mr Ashley Smith. Ashley Smith is the Head of IT Development and Projects for the F&C Group, a senior position within F&C IT with responsibility for managing the F&C Group's IT infrastructure. He has extensive IT-related experience in the asset management sector. He joined F&C in about 2004. He was an honest and careful witness;

xiv) Lisa Hall ("Ms Hall"). Ms Hall is the Head of F&C's Alternative Investments unit ("F&C Alternative Investments", which comprises single strategy hedge funds run by F&C managers). She joined F&C in about 1999. She too was an honest and straightforward witness;

xv) F&C also adduced evidence in the form of a witness statement by Fergus McDonald ("Mr McDonald"). It was not necessary for Mr McDonald to attend court to be cross-examined on his statement.

197. Finally, in this review of the witnesses, I should mention two witnesses available to F&C who were not called by them: Mr Grisay, the CEO of F&C plc and the F&C Group, and Mr Logan, the CFO of F&C plc and the F&C Group. Mr Grisay and Mr Logan are the sole executive directors on the Board of F&C plc. In turn, F&C plc is one of the two directors of Holdings; the other is Mr Grisay. The Defendants maintained that Mr Grisay and Mr Logan had relevant evidence to give, and that I should draw inferences of fact adverse to F&C from F&C's decision not to call them as witnesses. In an appropriate case, the court will draw adverse inferences from the failure of a party to call as a witness someone who has obviously relevant evidence to

give: see e.g. *JD Wetherspoon Plc v Van de Berg & Co. Ltd* [2009] EWHC 639 (Ch), [170]-[171]; *Law Debenture Trust Corporation Plc v Elektrim SA* [2009] EWHC 1801 (Ch), [176]-[179] (the decision went on appeal, but not on this point: [2010] EWCA Civ 1142).

198. There are three main areas in the case where it is particularly relevant to consider whether inferences should be drawn from the non-appearance of Mr Grisay and Mr Logan at trial. First, they were members of Execom who were parties to the discussions within Execom as part of Project Fitness in late 2008 regarding what steps should be taken in relation to the LLP. Should I infer that they would give evidence to the effect that F&C's Execom did indeed decide that the LLP should be closed, as the Defendants contend? In my view, it would not be appropriate to draw that conclusion. F&C fielded a range of witnesses who gave evidence about what Execom decided, and who were cross-examined extensively on the topic (principally Mr Ribeiro, Mr Mendez de Vigo, Mr Moir and Ms Bomba). There is an abundance of evidence about this on the basis of which I am satisfied it is correct to proceed to make findings of fact.

199. Secondly, there was an issue at trial whether Mr Ribeiro, in taking certain steps directed against the Defendants, acted with the authority of Holdings as its agent. This was important for the purposes of the Part 7 proceedings and evaluation of the submission of the Defendants that Holdings (the Corporate Member of the LLP) acted in breach of provisions of the Agreement so that they became entitled under para. 1.7 of the Fourth Schedule to exercise a put option against Holdings. There were a number of indicators that Mr Ribeiro did act as agent for Holdings (see, for example, the claims by Mr Ribeiro and Mr Mackay in correspondence that he did so: paras. [923] and [925] below), and the general impression from the whole of the evidence was that Holdings had authorised Mr Ribeiro to act as its representative for all its dealings with the LLP. If Holdings wished to challenge that impression, I think it was clearly incumbent on it to do so by calling the two natural persons who most obviously represented the corporate mind of Holdings, namely Mr Grisay (as director of Holdings in his personal capacity and as one of the two executive directors of the corporate director of Holdings, F&C plc) and Mr Logan (the other of the two executive directors of F&C plc). In my view it is appropriate to draw the inference in relation to this issue that Mr Grisay and Mr Logan would not have felt able to deny that Mr Ribeiro did indeed act as agent for Holdings in its dealings with the LLP. This inference supports the general impression from the rest of the evidence that Mr Ribeiro acted at relevant points as the agent for Holdings.

200. Thirdly, there was an issue at trial whether, for the purposes of the Defendants' petition under section 994, F&C plc could be treated as sufficiently responsible in a relevant sense for the actions of, in particular, Mr Ribeiro in relation to the management of the LLP and his conduct in eventually causing the Defendants to be expelled from their roles as executive managers of the LLP's business, so as to justify an award of a remedy under section 996 for the Defendants against F&C plc. Relevant factors in that assessment include whether F&C plc was aware of the steps which Mr Ribeiro was arranging to be taken against the Defendants in the course of the dispute, whether F&C plc acquiesced in or approved those steps being taken and whether F&C plc regarded those steps as being for its benefit and was supportive of Mr Ribeiro in proceeding as he did. On these issues, Mr Grisay and Mr Logan, as the two executive

Board members of F&C plc, would again have been obvious witnesses for F&C plc to call if it wished to challenge the general impression that it must have known at least in general terms (and sometimes quite specifically) what Mr Ribeiro was doing in the name of promoting the interests of the F&C Group, or wished to suggest that he was in any way acting on a frolic of his own. The fact that they were not called as witnesses gives rise to the inference that they would not have felt able to deny these points in their evidence, and supports the conclusion that the general impression in that regard derived from the totality of the evidence which was before the court is indeed accurate.

201. I also heard evidence from IT experts (Mr Pearce for F&C; Mr Steinbeck-Reeves for the Defendants) and experts on the hedge fund industy (Mr Engineer for F&C; Mr Kermisch for the Defendants). The IT experts addressed the IT security risks created by the adaptation by Mr Culligan of the LLP's IT infrastructure. On that topic, I was on the whole more impressed by the evidence of Mr Pearce, who had superior expertise in the specific field of IT security and who gave a precise and clear account.

202. I found the evidence of the hedge fund experts of limited value, since for the most part the case did not depend on general questions of practice in the hedge fund industry but on the particular circumstances of the LLP. One area where the evidence of Mr Engineer and Mr Kermisch was helpful was in confirming the impression given by other parts of the evidence that once the Defendants served their First Put Option Notices on 25 February 2009 (and the dispute was not thereafter promptly resolved), the business of the LLP was bound to be very substantially affected in a detrimental way. By that action, the portfolio managers (the Defendants), whose abilities were the principal foundation for carrying on the LLP's business and an important factor in persuading investors to invest in its products, had intimated that they intended to leave the business. It was clear from that point that the management of the business was riven by a very serious dispute, and it would not be feasible or proper to conceal this from investors.

203. I turn now to examine some legal issues where the parties made opposing submissions. Aspects of these issues are relevant to the question whether Holdings acted in breach of the Agreement so as to give rise to an entitlement on the part of the Defendants to serve Put Option notices under paragraph 1.7 of the Fourth Schedule and also to the question whether there was a departure from the standards of behaviour which Holdings and the Defendants were entitled to expect in the conduct of the affairs of the LLP such as to satisfy the requirements of section 994.

Were the representatives of Holdings on the LLP Board agents of Holdings?

204. The Defendants submitted that the three "representatives" of Holdings appointed under clause 18.2 of the Agreement to sit on the LLP Board (Mr Ribeiro, Mr Cole and Mr Johns) were, by virtue of their appointment under that provision, the agents of Holdings when acting in their capacity as LLP Board members. The main object of this submission was to enable the Defendants to hold Holdings directly responsible for all actions of its three "representatives", in particular when they (according to the Defendants) acted in breach of fiduciary duties owed to Holdings and hence (so it might be said) caused Holdings to be in breach of its obligation of utmost good faith to the LLP under clause 13.6 of the Agreement.

205. I do not accept this submission of the Defendants. In my judgment, when Mr Ribeiro, Mr Cole and Mr Johns sat on the LLP Board they did so not as agents for Holdings, but as its "representatives" in a looser sense of that term:

i) By accepting their appointment, they each undertook personal fiduciary obligations owed to the LLP in a manner similar to the way in which a director of a company undertakes such obligations. Clause 18 of the Agreement established a Board for the LLP with responsibility for taking decisions for it across a range of important areas. Since they had the power of managing the LLP's affairs in these areas, on ordinary principles the members of the Board would owe personal fiduciary duties to the LLP in relation to the exercise of their functions as Board members: see e.g. *White v Jones* [1995] 2 AC 207, 271E-G (Lord Browne-Wilkinson). Clause 21 of the Agreement indicated that the parties understood that the individual members of the Board and ManCom owed personal obligations to the LLP, including an obligation to act "in good faith in … the best interests of the LLP". Since they owed personal fiduciary duties to the LLP in relation to decision-making in the course of conducting the LLP's business, they could not reasonably be expected to owe Holdings the duties which an agent would owe his principal. For example, if one of the "representatives" of Holdings on the LLP Board formed the view that a particular action should be taken in the interests of the LLP he could not – in light of the fiduciary duty owed by him to the LLP - obey an instruction to him from Holdings to vote against it;

ii) It would require very clear language in the terms of an appointment or a very clear inference from the circumstances of such appointment to relieve a person appointed to have the power and responsibility to make important business decisions for a corporate entity from a basic duty of loyalty to that entity and to authorise him to act at the behest of another person without reference to the interests of the entity. Clause 18.2 does not contain any such language. It does not say that the three "representatives" are to be agents of Holdings. The use of the word "representatives" does not necessarily connote an agency relationship, and particularly does not do so in this context. The use of that word is explicable by reference to the intention of the parties that the three Board members appointed by Holdings should not be disabled from deliberating and deciding on matters affecting both the LLP and F&C by virtue of any potential conflict of interest involved because of their relationship with F&C. The fact that according to clause 18.2 they are appointed to the LLP Board as F&C's representatives is one of a number of indicators that they are not intended, in this respect, to be subject to the usual, very strict no conflict rule which may apply in other fiduciary contexts. By contrast, where Holdings wished to retain its own control over particular decisions of the LLP, it negotiated for a direct right to that effect for itself: see clause 19 of the Agreement;

iii) If an agency relationship had been intended to be created between Holdings and any "representative" on the LLP Board, it is difficult to see why clause 18.2 should make provision for three such "representatives" to be appointed. One natural person armed with three votes and required to act on instructions from Holdings would have been sufficient. Indeed, provision could have been

made for Holdings itself to be appointed as a corporate Board member with three votes, and it would then have been entitled to send its agent along to each LLP Board meeting to act for it. In my view, the clear commercial objective in providing for Holdings to appoint three natural persons to the Board was that each should bring his own judgment to bear in taking decisions in the best interests of the LLP, albeit that in doing so each could be expected to assess the interests of the LLP from an F&C perspective (of course, the judgments of the "representatives" might not coincide, in which case the differences might have to be resolved, like all differences between Board members, by a vote of the Board);

iv) Under the terms of the Agreement, the Corporate Member itself has no management tasks to perform for the LLP. On the face of the Agreement, therefore, there is no natural foundation for the imposition of fiduciary duties on Holdings as Corporate Member here: contrast Lord Browne-Wilkinson's description in *White v Jones* at p. 271 of the circumstances in which fiduciary obligations are typically found to arise and see paras. [221]ff below. Moreover, the inclusion in clause 13.6 of an express contractual duty of utmost good faith owed by Holdings (as the Corporate Member) to the LLP tends to support the view that it was not intended that the Corporate Member should owe, in addition, fiduciary duties to the LLP in relation to its management. This in turn suggests that the fiduciary duties that one would expect to be owed by persons exercising powers of management in relation to the LLP's affairs are owed by those natural persons who are members of the LLP Board, to the exclusion of any agency relationship between them and the Corporate Member;

v) The Defendants sought to gain support for their submission from the fact that clause 18 of the Agreement has the heading, "The Board of Members". Since the individual representatives of Holdings on the Board are not members of the LLP, so the argument ran, the intention must have been that they should act as agents for Holdings, which was the Corporate Member. A flaw in this argument is that clause 1.6 of the Agreement provides that "The headings in this document are inserted for convenience only and shall not affect the construction or interpretation of this Agreement" (another difficulty with the argument is that the heading to clause 18 involves a clear misnomer, since Holdings is not a member of the Board even though in principle it could be, since a corporate person may be a director of a company or a member of the Board of a limited liability partnership). Where the "Board" is defined in the body of the Agreement, in clause 1.1, it is simply said to mean "the board of the LLP, constituted in accordance with clause 18". That definition supports an interpretation of the Agreement in which Board members are expected to owe duties and act in a way analogous to the way in which members on the Board of a company would act, owing their primary fiduciary duties to the company to the exclusion of any agency relationship with the person who appointed them. The same point may be made by reference to the operative part of clause 18, which simply states that the LLP "shall have a Board" (not a "Board of Members") which shall be responsible for certain business decisions in relation to the LLP, and appears to invoke and rely upon the (obvious) analogy of a company's Board of directors;

vi) Clause 18 may be contrasted with clause 22 of the Agreement, which makes provision for "meetings of Members". A meeting of members is clearly contemplated as being something distinct from a meeting of the Board of the LLP. But on the Defendants' argument, the Board would in substance operate as a meeting of members (the Defendants and Holdings, by its three agents). This would distort the intended scheme of the Agreement;

vii) It is also relevant that before the dispute came to be formulated in technical legal terms, the Defendants, Mr Ribeiro, Mr Cole and Mr Johns all thought in terms of the latter three owing personal fiduciary duties to the LLP when sitting on the Board of the LLP (which would not be consistent with them acting as agents for Holdings when so sitting), and did not regard them as mere agents for Holdings. In particular, the logic for the Defendants making a presentation of their grievances against F&C at the LLP Board meeting on 21 January 2009 (para. [664] below) was that they wished to bring matters to the attention of Mr Cole and Mr Johns precisely so that they could form and act on their own personal judgment about what was in the interests of the LLP, in accordance with the personal fiduciary obligations which the Defendants believed they owed the LLP. In a novel legal context, where the question is how the conscience of an individual might be affected in relation to some matter, I think it is material to have regard to what the persons involved on the ground at the time believed or expected the position to be.

206. Although when acting as members of the LLP Board the three "representatives" of the Corporate Member did not act as agents for it, questions still arise for the purposes of section 994 as to the wider responsibility of both Holdings and F&C plc for their actions. I address that issue at paras. [1094]ff below.

Did the members of the LLP owe fiduciary duties to each other?

207. The Defendants submitted that, in addition to the contractual obligations set out in the Agreement, the Corporate Member and the Defendants (as the Individual Members) each owed the others fiduciary duties as co-partners in the LLP. I do not accept this submission.

208. A limited liability partnership is not a partnership in the traditional sense, in which the individual partners owe fiduciary duties to each other in relation to the management of the affairs of the partnership and when acting as agents for the partners. The LLPA has established a new form of entity, with its own separate legal personality: section 1(1) and (2). Such an entity may be expected to have its own corporate governance structures. Except to the limited extent that it is preserved by the new legislation, the general law relating to partnerships does not apply to it: section 1(5). The LLPA and the associated regulations do not provide for the members in a limited liability partnership to owe each other fiduciary duties. They lay down a minimal legal framework for the operation of a limited liability partnership, leaving most of the detailed rules for the operation of such an entity to be worked out by the parties to the agreement which establishes it, with a considerable degree of freedom of contract.

209. When the legislation was being considered, the Department for Trade and Industry issued a consultation paper in February 2000 (paper URN 00/617) on what should be the regulatory default provisions governing the relationship between members of a

limited liability partnership. The question was asked whether provision should be made for the members to owe a duty of good faith to each other. A possible objection to this was stated to be that individual members could face parallel fiduciary duties (to the limited liability partnership and to each other) with no mechanism to provide for which should prevail. The Department published a summary of responses to the consultation in May 2000 (paper URN 00/865). The responses on this issue had been split virtually 50/50. The Department stated that it was "unconvinced that a general duty of good faith should be included" as between members. The result was that no such duty was included in the LLPA or the regulations.

210. Notwithstanding the deliberate decision to omit provision for a general duty of good faith between members, some commentators have expressed the view that members in a limited liability partnership will owe a duty to the limited liability partnership to act in good faith in relation to the conduct of its affairs alongside certain duties owed between members between themselves, including a duty to act in good faith in partnership relations: see *Palmer's Limited Liability Partnership Law* (2002), paras. A5-37 to A5-39. Mr Thompson relied upon the discussion in *Palmer* in support of his submissions on this point.

211. In my view, the discussion in *Palmer* proceeds a little too quickly here, and does not take fully into account section 1(5) of the LLPA, the fact that a limited liability partnership (unlike a traditional partnership) has corporate personality, the stipulation in section 5(1) of the LLPA that the mutual rights and duties of members of a limited liability partnership "shall be governed" primarily by agreement between the members, the extent to which the parties are left free under the legislative regime to fashion a range of different forms of governance arrangements in relation to a limited liability partnership and the underlying legal principles according to which a fiduciary duty to act in good faith towards another person will be found to arise. In view of the wide range of governance structures which parties are free to contract for, it is difficult to make generalisations about the circumstances in which a duty of good faith or other fiduciary duties as between the members in a limited liability partnership may arise. It is necessary to refer back to basic equitable principles in order to decide whether and what fiduciary obligations arise in the context of a limited liability partnership.

212. Fiduciary obligations arise from particular circumstances, where a person assumes responsibility for the management of another's property or affairs. Lord Browne-Wilkinson gave a helpful general description in *White v Jones* [1995] 2 AC 207 at 271D-G as follows:

> "The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, pro tanto, for B's affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. Thus, a trustee assumes responsibility for the management of the property of the beneficiary, a company director for the affairs of the company and an agent for those of his principal. By so assuming to act in B's affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties (including

> duties of care) will vary from case to case some duties (including a duty of care) arise in each case. The importance of these considerations for present purposes is that the special relationship (i.e. a fiduciary relationship) giving rise to the assumption of responsibility held to exist in *Nocton's* case [*Nocton v Lord Ashburton* [1914] AC 932] does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B's affairs. Thus, a trustee is under a duty of care to his beneficiary whether or not he has had any dealing with him: indeed he may be as yet unborn or unascertained and therefore any direct dealing would be impossible."

213. In the present case, under the Agreement the Corporate Member did not undertake responsibility to act as agent for the LLP, let alone for the Individual Members. Nor did it undertake responsibility for the management of the LLP's affairs (see in particular clause 17.1.8 - that was primarily the responsibility of the ManCom, subject to a degree of supervision and decision-making power on the part of the LLP Board), let alone for management of the affairs of the Individual Members. Therefore, neither by operation of statute (see section 1(5) of the LLPA) nor by operation of general principles of law was there any basis on which a fiduciary obligation of good faith arose between the Members themselves in relation to the conduct of the LLP's affairs.

214. There was also no basis on which the Corporate Member could be found to owe a fiduciary duty of good faith to the LLP, save that the Agreement made express provision for such a contractual duty in clause 13.6. As regards the relationship between the Members, clause 13.8 of the Agreement made express provision for the Corporate Member to provide to the Individual Members only a very limited class of information out of the range of information which an ordinary fiduciary might be required to provide to his beneficiary or principal. The fact that express provision was made for there to be such duties is a further indicator that the parties did not intend that there should be a general duty of good faith applying as between the Members.

215. A comparison of the governance structures for the LLP created under the Agreement with those which are familiar from company law also indicates that the parties did not intend that the Members should owe a duty of good faith between themselves. The role of the Corporate Member in running the affairs of the LLP was limited to its ability to veto certain actions of the Board under clause 19 of the Agreement (according to which the prior written consent of the Corporate Member was required for certain actions to be taken) and its participation in Members' meetings under clause 22. The drafting and subject matter of clause 19 indicates that it was intended to be a provision according rights to the Corporate Member for the safeguarding of its own private interests, which suggests that it was not intended that the Corporate Member should owe any duty of good faith in relation to its exercise of such rights (save the duty expressly stipulated in clause 13.6).

216. According to clause 22 of and the First Schedule to the Agreement, at a Members' meeting the Corporate Member would have the right to cast votes equivalent to its

60% stake in the LLP (reflecting its right to a 60% share in the profit stream to be generated by the LLP). The natural analogy here is with the position which applies in relation to the general meeting of a company, at which (subject to certain narrow exceptions to prevent oppressive abuse of rights by the majority) the members owe no general duty of good faith towards each other but are entitled to exercise their voting rights according to their perception of their own private interests.

Fiduciary duties owed by the Members to the LLP

217. Mr Thompson submitted that the Members of the LLP, in particular Holdings, owed fiduciary duties to the LLP, including a fiduciary duty of good faith (abeit he accepted that this might add little to the contractual duty contained in clause 13.6). I do not think the full width of this submission is correct. In the context of the Agreement and the running of the LLP's business, Holdings does not have direct control over the affairs or property of the LLP, and so there is missing the usual basis on which the law would impose a fiduciary duty.

218. Mr Thompson submitted that the LLP was a joint venture between the Members, and that for that reason the law would impose fiduciary obligations owed both by them to the LLP and between themselves. However, the phrase "joint venture" is not in my view a precise term of art which in itself has any particular significance for an analysis of the existence and content of fiduciary obligations. Rather, it is necessary to look at the specific roles and responsibilities arising in the particular context in question in order to assess whether and what fiduciary obligations might arise. Neither Holdings nor the Defendants in their capacity as Individual Members (as distinct from in their capacity as senior managers of the LLP's business and as members of the LLP Board, ManCom and Compensation Committee) had direct control over the affairs or property of the LLP (or of each other) in a manner which could lead to the imposition in law of any general set of fiduciary obligations.

219. That would still leave open the possibility of imposition of more limited fiduciary obligations in relation to actions taken by them in particular situations. In particular, section 6(1) of the LLPA provides that every member of a limited liability partnership is its agent, and there is nothing in the Act to qualify the usual fiduciary obligations which an agent owes his principal in relation to the transactions which the agent enters into on the principal's behalf. But Holdings did not purport to do anything of relevance as agent for the LLP, so section 6(1) does not take the Defendants anywhere in terms of their complaints.

220. Mr Thompson also submitted that regulation 7 of the 2001 Regulations (set out at para. [74] above) - in particular, regulation 7(9) and (10) - supported the view that a general fiduciary duty of good faith is owed by members of a limited liability partnership to the partnership. I do not accept this. Regulation 7 does not provide expressly for there to be such a duty owed by members nor can such a duty be spelled out from it by implication. Regulation 7(9) and (10) implies that there are specific duties owed by members to the limited liability partnership (respectively, not to compete, unless the partnership gives its consent; and not to take benefits from transactions concerning the parthership, unless the partnership gives its consent), and does not imply that there is any more general duty of good faith as contended for by Mr Thompson.

Content of the fiduciary obligations of LLP Board members, ManCom members and Compensation Committee members

221. I turn, then, to consider the content of fiduciary obligations owed by the members of the LLP Board and the members of the LLP's ManCom and Compensation Committee to the LLP.

222. In some contexts, for instance in the paradigm cases described by Lord Browne-Wilkinson, the content of the fiduciary obligations which arise will be reasonably standard and well-known, having been worked out in the cases over decades if not centuries. Where a person agrees to be appointed as a company director in ordinary circumstances, for example, the fiduciary obligations which are attached to that role are known, at least in general terms. However, there has always been scope for fiduciary duties to be found to arise in a range of other contexts which have important similarities to the paradigm cases, but also significant differences. In those contexts, it is necessary to examine with some care what is the precise content of the particular fiduciary obligations arising in the specific circumstances of the individual case.

223. Fiduciary obligations may arise in a wide range of business relationships, where a substantial degree of control over the property or affairs of one person is given to another person. Very often, of course, a contract may lie at the heart of such a business relationship, and then a question arises about the way in which fiduciary obligations may be imposed alongside the obligations spelled out in the contract. In making their contract, the parties will have bargained for a distribution of risk and for the main standards of conduct to be applied between them. In commercial contexts, care has to be taken in identifying any fiduciary obligations which may arise that the court does not distort the bargain made by the parties: see the observation by Lord Neuberger of Abbotsbury writing extra-judicially in "The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity" [2009] CLJ 537, 543 and *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), [351]-[352]. The touchstone is to ask what obligations of a fiduciary character may reasonably be expected to apply in the particular context, where the contract between the parties will usually provide the major part of the contextual framework in which that question arises.

224. Lord Browne-Wilkinson, delivering the judgment of the Privy Council in *Kelly v Cooper Associates* [1993] AC 205 (a case concerning the relationship between an estate agent and their client), explained the approach in this way at 214B-215E:

> "In a case where a principal instructs as selling agent for his property or goods a person who to his knowledge acts and intends to act for other principals selling property or goods of the same description, the terms to be implied into such agency contract must differ from those to be implied where an agent is not carrying on such general agency business. In the case of estate agents, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, despite this conflict of interest, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function. Yet it

is normally said that it is a breach of an agent's duty to act for competing principals. In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals. The position as to confidentiality is even clearer in the case of stockbrokers who cannot be contractually bound to disclose to their private clients inside information disclosed to the brokers in confidence by a company for which they also act. Accordingly in such cases there must be an implied term of the contract with such an agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals.

Similar considerations apply to the fiduciary duties of agents. The existence and scope of these duties depends upon the terms on which they are acting. In *New Zealand Netherlands Society "Oranje" Inc. v. Kuys* [1973] 1 W.L.R. 1126, 1129-1130, Lord Wilberforce, in giving the judgment of this Board, said:

> "The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v. Boardman* [1967] 2 A.C. 46. It retains its vigour in all jurisdictions where the principles of equity are applied. Naturally it has different applications in different contexts. It applies, in principle, whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Phipps v. Boardman*, at p. 123: 'Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.'"

In *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 C.L.R. 41, 97, Mason J. in the High Court of Australia said:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must

> accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency.

Applying those considerations to the present case, their Lordships are of the view that since the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in doing so would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor."

225. As Lord Walker of Gestingthorpe put it in *Hilton v Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567, at [30], obligations of a fiduciary type "may have to be moulded and informed by the terms of the contractual relationship" (and see *Hawkes v Cuddy* [2009] EWCA Civ 291; [2009] 2 BCLC 427 at [44]). There are similarities between the reasoning by which terms may be implied into a contract and the way in which fiduciary obligations may be found to arise in a contractual context, and it may be that with the new, unified approach to the question of implication of contract terms set out in *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 the law is moving towards some assimilation of the relevant tests (see the discussion in J. Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302), albeit the two processes have traditionally been conceptualised as different. Fiduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another. As between the parties to a contract, the existence of express or implied contractual terms may be directly inconsistent with the imposition of such duties, and hence exclude them; and that may also be true where a person who is not a party to the relevant contract (as, here, the F&C representatives on the LLP Board were not parties to the Agreement) accepts appointment to carry out functions defined by the contract and on the basis of the terms set out in the contract. It may also be the case that the overall contextual framework created by the contract simply means that it is not appropriate for the law to impose the whole range of possible fiduciary duties or fiduciary duties of particular types in that specific context - in other words, it may be found that the parties could not reasonably expect that some particular duty of a fiduciary character should apply in the context of their particular relationship or in the context of their relationship with a person accepting appointment as a manager or board member.

226. In the present case, a number of features of the contractual and business context are prominent, which are relevant to an analysis of the precise content of the fiduciary obligations to be identified as applicable to the members of the LLP Board, ManCom and Compensation Committee:

i) The primary commercial objective of the parties in setting up the LLP was to marry together the expertise of the Defendants in running a FoHF portfolio with the F&C reputation and established client base;

ii) F&C provided the great bulk of the capital needed for the business. The Defendants had a priority call to be paid out of its funds each year a basic advanced withdrawal of profits of £150,000 each, effectively in lieu of salary;

iii) There was a careful working out in the terms of the Agreement of the governance structures within the LLP, whereby a certain balance of power between the Defendants, representatives of F&C and (at the ManCom level) other managers would apply in relation to decisions how to carry forward the business of the LLP;

iv) Some tension between the interests of F&C and those of the Defendants was inherent in the structure of the LLP as created by the Agreement. There were bound to be circumstances in which the interests of the Defendants would tend to pull in one direction and those of F&C might pull in another. The governance structures set out in the Agreement were intended to be the way in which those tensions would be debated and resolved. This is not a case in which the concept of "the interests of the LLP" as a distinct entity is always easy to disentangle from the balance to be struck via those governance structures between the underlying interests of the Defendants and F&C;

v) The parties to the Agreement contemplated that the Defendants and F&C's representatives would be entitled to be involved in decision-making for the LLP at the various levels contemplated by the Agreement (including on the Board, ManCom and Compensation Committee, as well as at ordinary executive manager level in the case of the Defendants) notwithstanding that (in the case of the Defendants) their own personal financial interests might be affected by the decisions to be taken and that (in the case of F&C's representatives) the financial and other commercial interests of F&C might be affected by such decisions. The parties expected the F&C representatives to wear, so to speak, both an LLP hat and an F&C hat when participating in business decisions for the LLP, and that they would not be disqualified by that fact from participating in those decisions: cf *Hawkes v Cuddy* [2009] EWCA Civ 291; [2009] 2 BCLC 427 at [33], referring to Australian authorities referred to in the judgment of Lewison J at first instance at [2007] EWHC 2999 (Ch); [2008] BCC 390 at [189]-[190] (*Re News Corporation Limited* (1987) 70 ALR 419, 437; *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWR 1648, 1663; *Canwest Global* (1997) 24 ACSR 405). The parties to the Agreement wished to have F&C executives involved in the running of the LLP, because of the considerable benefits that would bring for the LLP in providing a close link with the client base which the LLP would seek to tap into and a close link with the various marketing and other services to be provided to it by F&C, as well as (from F&C's point of view, and accepted by

the Defendants, since F&C was providing almost all the capital for the venture) to ensure that F&C's interests were not forgotten;

vi) It was known that the price for involving F&C representatives in this way was that they would have loyalties and responsibilities divided between the LLP and F&C. For example, where those representatives were party to decisions by F&C about how to conduct its relationship with the LLP, whether in terms of deciding what strategic direction F&C would prefer for the business, how and what marketing services should be provided under clause 13.7 of the Agreement or how and what administrative and other services should be provided under the Service Agreement, some practical accommodation between their loyalties and responsibilities would be called for. For such aspects of F&C's relationship with the LLP which concerned arm's length dealings between them as between investor and corporate entity, or as between service provider and service recipient, it could not reasonably be thought that the F&C representatives would have an obligation to inform the LLP about all of F&C's own internal discussions and decision-making processes in deciding what position to adopt in relation to the LLP; nor that they would have an obligation when participating in the deliberations of F&C to try to ensure that F&C would take decisions favourable to the LLP.

227. I turn from these basic features of the context in which the LLP was established and carried on its affairs to consider the content of the obligations of a fiduciary character which arose in relation to members of the LLP Board, ManCom and Compensation Committee in that context. In usual circumstances:

i) A fiduciary must not put himself in a position of a conflict of interest (whether a conflict by way of a duty to promote the interests of another or a conflict with his own self-interest) without informed consent. In this case, it was known to all parties from the outset that the Defendants would have a personal financial interest in the LLP and the business decisions taken by it and also that the F&C representatives could be expected to have in mind the interests of the F&C group, in a similar way, when participating in business decisions to be taken by the LLP. There was informed consent on all sides that this should be the case: cf *Kelly v Cooper Associates*; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18H-19B; *Hawkes v Cuddy* [2009] EWCA Civ 291; [2009] 2 BCLC 427 at [44]. I have already referred to the way in which the Defendants and the F&C representatives could naturally be expected to assess the interests of the LLP through the prism of their own self-interest and the interest of F&C respectively without any breach of fiduciary obligation: see paras. [166]-[170] above;

ii) A fiduciary must not make a profit from his position without informed consent. To the extent that the Defendants and F&C hoped to make profits from the operations of the LLP, to be distributed in accordance with the terms of the Agreement, there was informed consent on all sides that this should be the case. Conversely, had either Defendant or any of the F&C representatives sought to make some personal, undeclared profit from their management positions outside the operation of the Agreement, that would not have been something which was agreed and would have been contrary to the reasonable expectations regarding the behaviour of persons holding such positions (it may

be observed in passing that, so far as concerns the Defendants, they would also have been subject to an obligation to account in relation to any such unagreed benefit by virtue of regulation 7(10) of the 2001 Regulations);

iii) A fiduciary is required to act in the best interests of his beneficiary (Millett LJ in *Mothew* called this "the duty of good faith": [1998] Ch at 18D). It is in relation to this requirement that I have found the practical working through of the accommodation to be achieved between the Defendants' self-interest and the interests of the LLP, on the one hand, and the F&C representatives' role to promote and protect the interests of F&C and the interests of the LLP, on the other, more difficult. The precise content of this duty in this particular context requires careful assessment. I discuss this further at paras. [228]ff below;

iv) A fiduciary must act in good faith. This can be regarded as a compendious expression of duty, comprehending each of (i) to (iii) above. It may also be taken to add a general obligation of openness and fair dealing as between fiduciary and beneficiary. But, again, the precise content of that obligation will vary depending on the particular circumstances and what is reasonably to be expected of the person acting in those circumstances. In the context of the LLP, I do not consider that the F&C representatives on the Board had a simple fiduciary obligation to inform the LLP about all the decision-making processes within F&C which might have an impact at some point on the LLP (see paras. [241]ff below).

228. Part of the difficulty in relation to (iii) arises from considering the statement by Millett LJ in *Mothew* at p. 19D-H about the strictness of the obligation upon a fiduciary who acts for two principals not to allow the performance of his obligations to one principal to be influenced by his relationship with the other, and the consequent obligation to cease acting for one or both principals if an actual conflict of interest arises. That statement is readily understandable in the context with which Millett LJ was dealing in that case, namely a solicitor acting for two clients. The solicitor/client relationship involves a particularly strong degree of confidence and trust, and the content of the fiduciary duties associated with it is well established and demanding. It is also relevant that there is a ready supply of alternative solicitors who are able to act and can readily be substituted if an actual conflict of interest is perceived to arise. But in my view, read on its own, Millett LJ's statement does not take full account of the wide and varied range of circumstances in which fiduciary obligations of different types and of greater or lesser force may arise. The paradigm cases of fiduciary relationships, such as those between solicitors and their clients, are at the centre of a family of such relationships sharing some but not necessarily all characteristics, where the force of the obligations to be identified as inhering in those relationships (what is reasonably to be expected of the person who has taken on the task of acting for another in those relationships) may vary and become weaker the further one moves from the those central cases.

229. As Lord Nicholls of Birkenhead has suggested, writing extra-judicially, a trustee's duty to act in the best interests of his beneficiary may best be analysed as an obligation to act for the proper purposes for which the trustee has agreed to act (D. Nicholls, "Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge" (1995) 9 Trust Law International 71, 74; Edelman, *loc. cit.*, 322-323; and see *Vatcher v Paull* [1915] AC 372 (PC), per Lord Parker of Waddington – the court

will intervene if a power in a trust instrument is "exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power"). This is a formulation which I think is particularly appropriate for application in the context of this case, where it is difficult to regard the interests of the LLP as an entity as wholly distinct from those of its Members. It is a formulation which allows for a degree of variation in the content of the duty depending on the particular circumstances which give rise to the duty, as one would expect.

230. In that regard, it should also be noted that there are established exceptions to the strict operation of the actual conflict rule outlined by Millett LJ in *Mothew*, even in relation to fiduciaries falling within the paradigm categories of fiduciary relationship. The fact that circumstances arise which inevitably mean that a trustee has a personal financial or other interest in some decision to be taken may not disqualify him from acting as trustee, where he is not responsible for creating those circumstances: *Edge v Pensions Ombudsman* [1998] Ch 512, 538F-541F per Sir Richard Scott VC, and the authorities cited by him, and [2000] Ch 602, CA; *Dore v Leicestershire County Council* [2010] EWHC 1387 (Ch) at [239]-[241]. Depending on the circumstances, the trustee may legitimately consider that his primary responsibility is to continue to act, as the settlor intended he should, rather than to step down to allow someone else, less well-qualified than him, to take over. If that is the case, the trustee's conscience in continuing to act as trustee will not be affected by the fact that an actual conflict of interest has arisen, provided he seeks in good faith to take proper account of the interests to be promoted by the trust alongside his own interests.

231. This approach to assessing the content of the fiduciary obligations of the members of the LLP Board to act in the best interests of the LLP (where the LLP is itself the embodiment or bundling together of the sectional interests of the Defendants and F&C, which may be in tension with each other) is also supported by a line of authority which considers the content of the fiduciary obligations of directors of a company or those exercising fiduciary powers to act in good faith for the benefit of the company as a whole, where the issue of balancing underlying sectional interests of shareholders is in the foreground, including in particular *Peters' American Delicacy Co. Ltd v Heath* (1939) 61 CLR 457, *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 and *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch); [2006] 1 BCLC 149.

232. The decision of the High Court of Australia in the *Peters' American Delicacy Co.* case concerned the articles of association of a company which gave rise to a conflict of interest between different classes of shareholder and an amendment to the articles to resolve that conflict (but inevitably favouring one class of shareholders) which was carried by a majority of the shareholders by way of a special resolution. The resolution was challenged on the grounds that, it was argued, it was not passed for the benefit of the company as a whole as required by law. The High Court overturned the decision at first instance and dismissed the challenge. Dixon J said (61 CLR 457 at 511-513):

> "The chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise,

which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power. It is to exclude the purpose of securing such ulterior special and particular advantages that Lord Lindley [in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 at 671] used the phrase 'bona fide for the benefit of the company as a whole'. The reference to 'benefit as a whole' is but a very general expression negativing purposes foreign to the company's operations, affairs and organisations. But unfortunately, as appears from the foregoing discussion, the use of the phrase has tended to cause misapprehension. If the challenged alteration relates to an article which does or may affect an individual, as, for instance, a director appointed for life or a shareholder whom it is desired to expropriate, or to an article affecting the mutual rights and liabilities *inter se* of shareholders or different classes or descriptions of shareholders, the very subject matter involves a conflict of interests and advantages. To say that the shareholders forming the majority must consider the advantage of the company as a whole in relation to such a question seems inappropriate, if not meaningless, and at all events starts an impossible inquiry. The "company as a whole" is a corporate entity consisting of all the shareholders. If the proposal put forward is for a revision of any of the articles regulating the rights *inter se* of shareholders or classes of shareholders, the primary question must be how conflicting interests are to be adjusted, and the adjustment is left by law to the determination of those whose interests conflict, subject, however, to the condition that the existing provision can be altered only by a three-fourths majority. Whether the matter be voting rights, the basis of distributing profits, the basis of dividing surplus assets on a winding up, preferential rights in relation to profits or to surplus assets, or any other question affecting mutual interests, it is apparent that though the subject matter is among the most conspicuous of those governed by articles and therefore of those to which the statutory power is directed yet it involves little if anything more than the redetermination of the rights and interests of those to whom the power is committed. No-one supposes that in voting each shareholder is to assume an inhuman altruism and consider only the intangible notion of the benefit of the vague abstraction called by Lord *Robertson* in *Baily's Case* ([1906] AC, at p. 39), "the company as an institution". An investigation of the thoughts and motives of each shareholder voting with the majority would be an impossible proceeding. When the purpose of a resolution is spoken of, a phrase is used which refers rather to some characteristic implicit in the resolution in virtue of the circumstances or of some larger transaction of which it formed a part or step. It is not far removed from what Lord *Sumner* called "one of those so-called intentions which the law imputes … the legal construction put

> on something done in fact" (*Inland Revenue Commissioners v Blott* [1921] 2 AC, at p. 218). But, when the very question to be determined is a conflict of interests, unless the subject matter is held outside the power, the purpose of the resolution, as distinguished from the motives of the individuals, often must be to resolve the conflict in favour of one and against the other interest.
>
> In my opinion it was within the scope and purpose of the power of alteration for a three-fourths majority to decide the basis of distributing shares issued for the purpose of capitalizing accumulated profits or profits arising from the sale of goodwill, and in voting for the resolution shareholders were not bound to disregard their own interests. … In these circumstances it appears to me that the resolution involved no oppression, no appropriation of an unjust or reprehensible nature and did not imply any purpose outside the scope of the power."

233. Although the case was concerned with the exercise of a power conferred on the shareholders in a company rather than the directors, I consider that it provides useful guidance for the approach I should adopt to the content of the fiduciary obligations of the members of the LLP Board, ManCom and Compensation Committee in the present case to act in the interests of the LLP. This is because the interests of the Members of the LLP were brought so directly into consideration by those bodies by virtue of the fact that they were made up of people who either were the Individual Members (the Defendants) or were "representatives" of the Corporate Member (so that there was no radical separation of roles as between directors and shareholders as there may be in a company situation) and because the case was focused on the problem which arises here, of how to assess the content of fiduciary obligations owed to a notionally distinct corporate entity but where in reality one can see that behind that distinct entity a decision balancing the competing interests amalgamated in that entity is called for.

234. The Privy Council in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 adopted a similar approach, this time in respect of the exercise of powers of directors of a company (rather than the shareholders), in relation to which they owed a fiduciary obligation to act bona fide in the interests of the company as a whole, but where again the reality was that the exercise of the power involved having to make a choice between the competing sectional interests of different shareholders. The judgment was delivered by Lord Wilberforce. At pp. 834-835 he observed:

> "…the directors' power under this article is a fiduciary power: and it remains the case that an exercise of such a power though formally valid, may be attacked on the ground that it was not exercised for the purpose for which it was granted. …
>
> …To define in advance exact limits beyond which directors must not pass is, in their Lordships' view, impossible. This clearly cannot be done by enumeration, since the variety of

> situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase – such as 'bona fide in the interest of the company as a whole' or 'for some corporate purpose'. Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially: i.e. improperly favouring one section of the shareholders against another. Of such cases it has been said:
>
> > 'The question which arises is sometimes not a question of the interest of the company at all, but a question of what is fair as between different classes of shareholders. Where such a case arises some other test than that of the 'interests of the company' must be applied, … (Mills v. Mills, 60 C.L.R., 150, 185-186, *per* Latham C.J.)…"

235. These authorities were helpfully reviewed by Rimer J in *Redwood Master Fund Ltd* at [99]-[104]. In that case, lenders under a loan facility agreement were divided into three separate classes with potentially differing interests. A term of the agreement provided that it could be amended by the vote of a two-thirds majority of the lenders by value. An amendment was voted through against the objections of certain minority lenders, who complained that it discriminated against them as a class by exposing them to an unfair degree of risk in relation to recovery of the lending. The court found that the power of amendment had been properly exercised. At para. [105] Rimer J said:

> "I derive from these two authorities that, at least in a case such as the present, where there is a clear potential for conflicting interests between the three classes of lenders, an assessment of the validity of a majority decision exclusively by reference to whether or not it is 'for the benefit of the lenders as a whole' is, at any rate if those words are applied according to their literal meaning, a misplaced one. The vice against which control on the exercise of majority power is directed is the potential for a dishonest abuse of that power. The starting point in assessing the validity of its exercise in any case must be to assess, by reference to all available evidence, whether the power is being exercised in good faith for the purpose for which it was conferred. If it is, then the mere fact that it can be shown that a minority of those affected by it have been relatively disadvantaged by it as compared with the majority cannot automatically mean it has been exercised improperly. Of course, if it can be shown that the power has been exercised for the purpose of conferring special collateral benefits on the majority, or if the obtaining of such collateral benefits can be shown to have been the motive for the exercise of the power, that will be likely to lead to a conclusion that the exercise has

> been bad. It would not have been exercised for the purpose for which it was conferred, and its exercise in those circumstances would or might amount to a fraud on the minority. Equally, if the exercise of the power can be shown to have been motivated by a malicious wish to damage or oppress the interests of the minority adversely affected by it, then that too will vitiate the exercise, since that too will clearly amount to the commission of fraud on the minority, which is also obviously outside the scope and purpose of the power."

236. In the case of the LLP, it was known and intended that F&C should have its "representatives" on the Board and other governance organs of the LLP to balance out the Defendants' membership of those organs, and that the Defendants and those representatives should not be disabled from acting by the fact that there might at times be an actual conflict of interest nor disabled from having regard to some degree to their own interests and F&C's interests respectively. Given the interests which the LLP was intended to serve and the way in which the parties intended those interests to be balanced within the governance structures of the LLP, there was no ready set of alternative Board members whose judgment of what the LLP should do would be uncontaminated by consideration of either self-interest or the interests of F&C (so, for example, although in relation to the decision in early 2009 how a balance should be struck between salary and bonuses in the remuneration packages of LLP employees each side accused the other of having improper regard to their own self-interest, neither side suggested that the other should not play any part in taking the decision, knowing full well that the same objection could be levelled against their own involvement in taking it: see paras. [745]-[750], [771]-[772] and [783]-[787] below).

237. On the formulation set out in the paragraph above, the difficulty lies in identifying the degree to which it was legitimate for the LLP Board members to have regard either to their own self-interest (in the case of the Defendants) or F&C's interests (in the case of the F&C representatives). This is highly dependent on the particular factual circumstances in which the question what to do might arise. Whilst not being able to specify precisely in advance what they could or could not do is somewhat frustrating, that is simply a function of the blurring of roles which the parties intended should occur within the LLP and the usual flexibility of equitable standards of conscionable behaviour once one moves away from the clear paradigm fiduciary relationships, especially where those standards fall to be applied in relation to the management of a business in a relationship which was intended to continue over a substantial period of time and which would have to adapt to meeting a wide range of often unforeseen business situations.

238. One can take the operation of clauses 8.3 and 8.4 of the Agreement as a particular example of the problems which could, in principle, arise. Both provisions required the Corporate Member to make additional capital contributions to the LLP "upon the request of the Board" where "in the reasonable opinion of the Board" certain circumstances had arisen. On one view, since F&C was underwriting the capital of the LLP in this way, it might be said that LLP Board members should always have been willing to take adventurous business decisions, knowing that if they went wrong F&C would have to provide a safety net and ensure that the LLP could continue to operate

by calling for additional capital. If it came to a decision of the LLP Board under these provisions, it might be said that from the point of view of the LLP it would always be in the interests of the LLP to have more of F&C's money. But I do not consider that these provisions were intended to create a form of blank cheque for the LLP to call for funds; rather, the parties contemplated that in making the assessment whether a demand for more funds should be made, the F&C representatives on the LLP Board would be entitled to give weight to the interests of F&C as a major interest holder in and the primary funder of the LLP so as, for example, to vote against making a demand for funds if they considered that they were likely to be wasted on loss making activities. A similar point could also be made about the marketing fees payable by the LLP to Holdings in relation to the marketing services provided by F&C: clause 13.7 of the Agreement provided that the fees could be amended by unanimous decision of the LLP Board, and the parties could not sensibly have thought that the F&C representatives on the Board would be obliged to vote in favour of reducing or eliminating those fees (as exclusive reference to the interests of the LLP might suggest should happen), without having regard to the countervailing interest of F&C that it should be paid for the marketing services it provided as the parties had agreed should happen.

239. A similar issue arises, in somewhat less acute form, in relation to a range of other decisions to be taken by the LLP Board, ManCom and Compensation Committee. In my view, following on from the discussion above, the F&C representatives on those bodies were entitled to take the interests of F&C into account alongside those of the LLP as a distinct entity, but not so as wholly to subordinate the interests of the LLP to those of F&C. In practical terms this means that they were obliged to strive to maintain a fair balance between the distinct interests of the Defendants and F&C bundled up collectively in the LLP. They were also entitled to give weight to the interests of the LLP in being linked to the F&C Group, such that the LLP could be expected to benefit from being closely allied to a strong F&C. In light of that, the view could legitimately be taken that sometimes a degree of restraint by the LLP in pursuing its interests, so as to assist F&C in the pursuit of its wider interests, might overall be in the interests of the LLP.

240. Of course, the fact that this departure from the ordinary requirement that a fiduciary avoid all conflicts of interest was intended to create a business vehicle within which the tensions associated with such conflicts would in practice be mediated and regulated through the governance structures within the LLP made it important that those structures should be carefully adhered to, if the whole set of relationships established by the Agreement was to work properly.

241. In the context of the LLP, the F&C representatives had to reconcile in a practical way the interests of the LLP (as a corporate entity which itself represented the interests of the Defendants and F&C) and F&C. Mr Thompson's submission was that the F&C representatives owed the LLP the usual type of fiduciary obligations that would be owed by a fiduciary in a paradigm case. So, for example, he submitted that the F&C representatives had an obligation to inform the LLP about information derived from their positions within the F&C Group which might have an impact upon the business of the LLP. I do not accept these broad submissions.

242. The Defendants sought particularly to rely upon *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324. In that case, in 1946 the appellant society, in

conjunction with the respondents on the appeal, established a subsidiary company to carry on the manufacture and sale of rayon cloth. The involvement of the respondents was critical to the success of the business at that time, since it enabled the subsidiary to obtain licences for the production of rayon cloth when the industry was tightly and restrictively regulated. The respondents had a minority shareholding in the subsidiary company. The society appointed three directors of the company as its nominee directors. The business was a success, and as regulation of the industry was relaxed came to depend less on the involvement of the respondents. The society sought to buy out their interest in the company at a low value, which offer was refused. The society then decided on a policy to transfer the company's business to a department of its own. The three nominee directors were aware of this policy, but did not inform the respondents about it and took steps to promote it. As a result, the business of the company came to a virtual standstill. This was held to be conduct by the society of the affairs of the company in a manner oppressive to part of the members, contrary to section 210 of the Companies Act 1948, and the society was therefore ordered to buy out the interest of the respondents in the company.

243. This is an authority which would have had particular relevance if the Defendants had been able to sustain their contention that F&C decided to take steps to close the LLP's business. But I have found that that contention is not made out on the facts. It is an authority which would also have been significant if the Defendants had been able to sustain their contention that F&C sought to divert business opportunities which were properly to be regarded as opportunities of the LLP to itself. But again I have found that the evidence does not support that case. So far as concerns indications in *Scottish Co-operative Wholesale Society* about the obligation of the nominee directors to provide information to the company, I consider that the legal and factual context in the present case is significantly different and requires more specific analysis as set out in this judgment. Where I have found the authority more helpful is in relation to the question of the attribution of responsibility to F&C plc for unfairly prejudicial conduct of the affairs of the LLP by the representatives of Holdings, as supporting the wider approach to that question contended for by the Defendants. I address that issue in detail at paras. [1094]ff below.

244. Miss Newman, in her written submissions, suggested that the set of obligations owed by each member of the LLP Board, ManCom and Compensation Committee was the following: (i) a duty to act bona fide in what he considered to be the best interests of the LLP; (ii) a duty to exercise powers for proper purposes; (iii) a duty to exercise reasonable skill and care in the discharge of his duties and performance of his functions; and (iv) in any circumstances where the person is acting as agent for the LLP, an obligation to comply with "a fiduciary's standard of disclosure and fair dealing towards the LLP and the normal avoidance of conflicts of interest". This formulation appeared to suggest that obligations of disclosure were confined to (iv), but it is not difficult to see that it might also be argued that some obligation of disclosure of information could arise under the obligation at (i). At one point in her oral submissions, Miss Newman appeared to say that there could be an obligation of disclosure wider than that involved in proposition (iv), and that, by analogy with *Kelly v Cooper Associates*, the limit upon the obligation of disclosure would be any duty of confidence owed by F&C's representatives to F&C or third parties (according to this approach, she said that it was possible that the duty of disclosure upon Mr Johns

might have expanded after April 2008 when he ceased to be an executive director of any F&C company).

245. In my judgment, the extent of the fiduciary obligations of disclosure resting upon the F&C representatives has to be assessed having regard to the specific context created by the factual background and the contractual framework constituted by the Agreement and the Service Agreement. Assessed in that context, the obligations of disclosure of information material to the LLP resting upon them fall between the extreme obligation of disclosure argued for by Mr Thompson and the very narrow obligation proposed by Miss Newman in her written submissions. I consider that the obligations of disclosure which did arise were also somewhat narrower than might be suggested by Miss Newman's wider formulation offered on her feet under questioning from me.

246. The proper analysis here is to ask what obligations of disclosure the F&C representatives can reasonably be expected to have assumed in this particular context. The question is of practical significance, for example, in relation to consideration of the extent of the obligation of the F&C representatives to inform the LLP acting by its Board or ManCom about matters bearing on the marketing of its products. A lot of information passed across Mr Ribeiro's desk pertaining to the marketing of all F&C branded products (including those of the LLP), such as reports by F&C's distribution personnel about discussions with clients about their investment plans and so forth. This information could have a bearing on the LLP, even when the LLP had not been discussed (since that would tend to indicate that no investments in LLP products might be forthcoming from particular clients). Apart from this, but still bearing on the marketing of the LLP's products along with other F&C branded products, was the policy decision taken by F&C on 20 August 2008 to move to an "open architecture" distribution model (paras. [422]ff below).

247. According to the logic of Mr Thompson's wide formulation of the duty of disclosure in relation to F&C's representatives in the LLP, all this material should have been disclosed by Mr Ribeiro to the LLP. The difficulty with this submission is that it does not take proper account of the context against which the content of the fiduciary obligations in this case falls to be assessed and it is out of touch with practical reality, as the parties understood the Agreement and how the LLP should operate from its inception. The Defendants never suggested during their involvement with the LLP from 2004 that they should be given a detailed account of F&C's dealings with its clients, for example by having all reports on client contacts copied to them (nor did they plead any such case). This is a relevant factor to be taken into account in gauging what was the reasonable expectation of the parties of the extent to which the conscience of the F&C representatives would be engaged in terms of any requirement of disclosure of information. The Defendants did not bargain for themselves or the LLP to have a specific general right of disclosure of such information (contrast the right to information contained in clause 13.8 of the Agreement with the absence of any specific right to information relating to F&C's exercise of discretion in the marketing of the LLP's products in clause 13.7). The contractually stipulated protection for the LLP was that Holdings would "show the utmost good faith" (clause 13.6), but this did not extend to include an obligation to provide a detailed account of F&C's dealings with its clients (see paras. [255]-[259 below). The marketing of the LLP's products was a matter left to the discretion of F&C (clause 13.7), rather than

requiring decisions to be made by the LLP, and was not an area where F&C or the F&C representatives acted as agents or on behalf of the LLP (so as to be expected to give a detailed account to the LLP of what was being done with each client).

248. The point may be spelled out in this way in relation to Mr Ribeiro, by way of example. He was involved in the management of the LLP only because he was appointed as a representative of Holdings, and not by reason of any distinct personal capacity. His knowledge of matters affecting the LLP may properly be regarded as the knowledge of Holdings in its dealings with the LLP. The extent of Holdings' relevant obligation to the LLP regarding disclosure of information (along with other matters) is the obligation of utmost good faith contained in clause 13.6 of the Agreement. It would be an adventitious addition to the LLP's rights of disclosure of information if in this context Mr Ribeiro were found to have imposed upon him an obligation to disclose wider categories of information relating to F&C than Holdings was obliged to disclose under clause 13.6. As regards the marketing of its products, the LLP's reasonable expectations regarding disclosure of information were primarily framed by its rights under clause 13.6. It could expect to look to Holdings for disclosure of appropriate information under that provision, supplied usually via Mr Ribeiro, and could not reasonably expect him to be subject to a further obligation to supply more information than that. Since the LLP had been accorded suitable express contractual rights governing such matters, Mr Ribeiro could not reasonably be regarded as having a wider fiduciary role to account to it for information regarding such matters.

249. Therefore, in my judgment, to impose a fiduciary obligation of disclosure of the sort of detailed marketing information referred to above upon the F&C representatives would amount to distorting the bargain contained in the Agreement in a way which is not sufficiently justified by reference to the roles which the F&C representatives were expected to fulfil within the LLP. The same process of reasoning also indicates that Mr Ribeiro owed no fiduciary duty to inform the LLP of the detail of the internal debates within F&C regarding how it might conduct its relationship with the LLP. I consider that the error in Mr Thompson's approach is to assume at the start of the analysis that there is a fixed standard of disclosure required of all fiduciaries, and then to say that there is no basis for finding any implied term to cut down that standard; whereas in my opinion the proper approach here is to analyse what precise fiduciary obligations could reasonably be expected to apply in the particular context created by the Agreement, without making any assumption at the outset what they should be.

250. The correct approach leads, in this context, to a rather narrower fiduciary obligation of disclosure than might be suggested by Miss Newman's approach in oral submissions. Mr Ribeiro may or may not have owed F&C or its clients relevant obligations of confidentiality in relation to the detail of F&C's marketing efforts, but even if he did not I think he did not owe an obligation to make disclosure in relation to such matters. (There was virtually no analysis in the submissions or evidence relevant to the question of what obligations of confidentiality might have been owed in relation to any item of information; the relevant assessment of the confidentiality position could be complex in a multi-partite context, where the interests of the LLP, Holdings, the F&C Group generally and its clients might all be relevant to working out the reasonable expectations of each party about what could be disclosed and to whom).

251. However, Mr Thompson maintained a narrower alternative case, that even if Mr Ribeiro did not have a general fiduciary obligation to disclose all details of F&C's marketing efforts he did have an obligation to disclose the decision taken on 20 August 2009. I found this submission more persuasive. In my view Mr Ribeiro did have a fiduciary obligation as a member of the LLP Board and ManCom to inform the LLP acting by its Board and ManCom about the policy decision on 20 August 2008 to move to an "open architecture" distribution model. This was a policy decision with wide implications and of potentially profound significance for the LLP which went well beyond the ordinary day-to-day running of marketing to clients referred to above. It was recognised within F&C and by Mr Ribeiro as a major change in F&C's approach to marketing F&C branded products. In my judgment, such a decision going to the heart of the general marketing approach which the LLP could henceforth expect to be applied by F&C in the exercise of its discretion under clause 13.7 of the Agreement, and which might have a general and substantial effect on the likelihood that investments would be made in the LLP's products, was a matter which Mr Ribeiro could reasonably be expected to disclose to the LLP. By virtue of clause 13.6 of the Agreement there was also an obligation upon Holdings (acting by Mr Ribeiro) to disclose such information, with no expectation that it could be regarded by F&C as confidential as against the LLP.

252. The parties themselves defined a principal obligation of the Corporate Member owed to the LLP as being an obligation of utmost good faith (clause 13.6 of the Agreement). This was a contractual duty analogous to a fiduciary duty, owed by Holdings as, in effect, representative of the F&C Group. It is a form of contractual duty which requires the obligor to have regard to the interests of the obligee, while also being entitled to have regard to its own self-interest when acting: *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, paras. [13] and [147]. Clause 13.6 represented the parties' own statement of how the competing interests of F&C and the LLP should be reconciled, and in my view provides a sound guide for the court in working out the practical content of the fiduciary obligation to be imposed on the F&C representatives on the LLP Board so far as concerns the provision of information available to them from their involvement with F&C and its decision-making processes. The Defendants did not bargain for and the Agreement did not provide for any obligation that specific categories of information should be provided by F&C to the LLP (e.g. in the form of a running account of all marketing efforts with clients under clause 13.7 of the Agreement). The Defendants could not reasonably expect that the F&C representatives would disclose to the LLP every item of information about F&C's actions or decision-making which might affect the LLP. On the contrary, it was to be expected that F&C should have some private space to consider its own interests internally before acting. What the Defendants could reasonably expect was that the F&C representatives would disclose the sort of matters which the F&C Group (represented by Holdings) was itself required to provide under clause 13.6. This expectation was also reinforced by the fact that everyone expected Mr Ribeiro, the main representative of F&C on the LLP Board, to act as the agent for Holdings in its dealings with the LLP, so that his fiduciary obligation to the LLP in relation to provision of information could be expected to conform to the obligation of Holdings under clause 13.6 in that regard (see paras. [255]-[259] below).

253. Another aspect of characterising the obligations of fiduciaries as being obligations of good faith, loyalty and fidelity is that they operate by reference to the conscience of the fiduciary and his subjective good faith in acting rather than an objective standard of competence: *Mothew* at p. 18E-F; *Re Smith and Fawcett Ltd* [1942] Ch 304, 306. In particular, in assessing the business decisions of LLP Board members, it should be emphasised that the courts will have regard to what they genuinely believed to be in the best interests of the LLP (subject to their obligations, set out above, not to act for improper purposes).

254. The LLP Board members also owed duties of reasonable care to the LLP in conducting its business. Mismanagement of a business may be relied upon for the purposes of a claim under section 994, but will only found such a claim if the mismanagement is serious, and the court will be astute not to "second guess" legitimate management decisions taken upon reasonable grounds at the time, albeit as events transpired they may not have been the best decisions in the interests of the business: *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354 at 404-406 per Arden J; *Fisher v Cadman* [2005] EWHC 377 (Ch); [2006] 1 BCLC 499, at [95]. In my view, no mismanagement of the LLP's business according to these standards has been made out.

Clause 13.6 – Holdings' duty of utmost good faith

255. As with the fiduciary obligations considered above, the precise content of the duty of utmost good faith which Holdings owed to the LLP under clause 13.6 of the Agreement is informed by the particular factual and contractual context in which it is located. The decision of the New South Wales Court of Appeal in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 provides helpful guidance as to the approach to be adopted. The case concerned the operation of Heads of Agreement (HOA) between Macquarie and its holding company (MHC) and the respondent (Area Health) which related to the development of a private hospital on land owned by Area Health. The HOA contained contractual obligations for the parties to act with utmost good faith in their dealings with each other. Regarding the content of those obligations, Hodgson JA said this at paras. [146]-[148]:

> "146. Writing extra-curially, Sir Anthony Mason has argued that a contractual obligation of good faith embraces no less than three related notions:
>
> (1) An obligation on the parties to co-operate in achieving the contractual objects;
>
> (2) Compliance with honest standards of conduct; and
>
> (3) Compliance with standards of conduct that are reasonable having regard to the interests of the parties.
>
> See A. F. Mason "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66 at 69. That the obligation has these three elements is consistent with Australian authority: *Alcatel Australia Limited v Scarcella*

(1998) 44 NSWLR 349 at 369 (Sheller JA, with Powell and Beazley JJA agreeing), *Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187; (2001) 69 NSWLR 558 at [171] (Sheller, Beazley and Stein JJA).

147. However, a contractual obligation of good faith does not require a party to act in the interests of the other party or to subordinate its own legitimate interest to the interests of the other party; although it does require it to have due regard to the legitimate interests of both parties: cf *Overlook v Foxtel* [2002] NSWSC 17 at [65] – [67] (Barrett J).

148. Applying that approach to the HOA, in my opinion the obligation of utmost good faith did not go so far as to require Area Health to defer to the interests of MHC and/or Macquarie in developing its own plans for [the hospital], or to include MHC and/or Macquarie in its own planning processes. But in my opinion, when Area Health's planning processes would make a substantial difference to what MHC and/or Macquarie could reasonably expect concerning the flow of persons between the hospitals or the creation of a campus concept, the obligation of utmost good faith would require that MHC and/or Macquarie be informed of this, at least to enable them to take account of it in the design and construction of the works contemplated by the HOA."

(see also the concurring judgment of Allsop P. at paras. [12]-[14])

256. Other formulations in the cases of the content of such an obligation are in line with this guidance. For example, in *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 at [86]-[97] Morgan J. construed a contractual obligation on the parties to "act with the utmost good faith towards one another" (see para. 33 of the relevant schedule to the agreement, set out at [33]) as "imposing on the Defendants a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with their actions which related to the Agreement and also requiring faithfulness to the agreed common purpose and consistency with the justified expectations of the First Claimant" ([97]).

257. The balance of interests established by a contractual duty of utmost good faith in the context of a commercial joint venture, which permits Holdings to have regard to F&C's own commercial interests while also imposing an obligation upon it to have due regard to the legitimate interests of the other parties to the Agreement, represented the parties' considered reconciliation of the interests of F&C and the LLP and the Defendants under the Agreement. This was the essence of the bargain which they made, and it is appropriate that it should inform the content of the fiduciary obligations assumed by the F&C representatives on the LLP Board, ManCom and Compensation Committee as set out above. The adoption of such a standard of conduct made sense in the context of an arrangement which sought to marry together the disparate strengths of the Defendants and F&C through the vehicle of the LLP in a

relationship intended to last a long time (and which therefore required considerable flexibility of application to cope with the wide range of unforeseeable business challenges which might arise), where they were each required to have regard to the legitimate interests of the other parties to the Agreement while at the same time being entitled to take into account their own self-interest.

258. The dividing line set out in *Macquarie International Health Clinic* at [148] as regards the extent of the obligation of disclosure inherent in the obligation of utmost good faith provides broad support for the dividing line which I find applies in the present case, between information relating to the routine marketing operations of F&C and information about the decision in relation to marketing strategy taken on 20 August 2008: see paras. [251]ff above. The decision of 20 August 2008 was a major strategic decision which had the potential to make a substantial difference to what the LLP could reasonably expect concerning the flow of business to it, and so fell into a category of information which ought to have been disclosed by Holdings under clause 13.6 of the Agreement and by Mr Ribeiro under his fiduciary obligation of disclosure.

259. Having made that point, however, I find that it leads nowhere on the facts of the case. As regards the Defendants' claim based on their Put Option Notices and the Fourth Schedule, the breach of obligation by Holdings was not of the requisite character (see para. [729] below). As regards the Defendants' claim under section 994, the breach of fiduciary duty by Mr Ribeiro was inadvertent and not particularly serious; it had no practical impact on the business or business decisions of the LLP (the LLP had no right to prevent the more to "open architecture" relationships with clients, which fell within F&C's marketing discretion contained in clause 13.7, and the breach of duty by Mr Ribeiro was swiftly overtaken by events, as redemption notices were received from most of the LLP's clients and any marketing opportunities, whether under "open architecture" arrangements or otherwise, were undermined by market conditions in late 2008, particularly as the markets went into free-fall after the collapse of Lehman Brothers on 15 September); the Defendants were already forewarned by Mr Niven in March and July 2008 that some such change was likely to be forthcoming and had been given an early opportunity to adapt to it; and if it had become relevant to the LLP's position as marketing opportunities for its products revived, there is no doubt that the LLP would have had the position explained to it. Therefore, I consider that this aspect of the case adds nothing to the Defendants' unfair prejudice claim.

Clause 11.1 and an implied term in the Agreement

260. By a late amendment which, after argument, I permitted to be made, the Defendants pleaded a distinct term which they contend should be implied into the Agreement, to the effect that Holdings was obliged not to take steps to procure the LLP not to pay the Defendants their monthly drawings due under clause 11.1 of the Agreement; and they pleaded that Holdings, acting by Mr Ribeiro, breached that implied term by arranging for the monthly drawings to be stopped on 25 February 2009. The issue is of significance because, in order to establish a right to serve a Put Option notice under paragraph 1.7 of the Fourth Schedule, the Defendants have to show that Holdings acted in breach of the Agreement. Despite amending their pleadings as a precautionary measure, it was and remained the Defendants' submission that they did not need to plead this implied term, since they had pleaded the relevant express terms of the Agreement (in particular, clause 11.1 itself) and it was open to them to argue that the Agreement gave rise to such an implied obligation as a matter of law (they

referred to *Barque Quilpue Ltd v Brown* [1904] 2 KB 264, 271-272 per Vaughan Williams LJ; *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717 per Lord Atkin).

261. I do not accept that submission. In my view, it is incumbent on a party who wishes to rely upon an implied term in a contract or an obligation said to arise in relation to the contract actually to plead that term or obligation. The basic function of a pleading is to inform the other side to litigation what case they have to meet in sufficient detail to enable that party to prepare to answer it (see, e.g., *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd*, unrep., Court of Appeal, 15 December 1994; Report and Recommendations of the Commercial Court Long Trials Working Party, December 2007, paras. 44-49, esp. at 44: "It is obviously imperative that in any litigation a claimant sets out the case it wishes to make so that the other parties to the litigation can see what issues they have to meet and defendants can set out their defences and counterclaims to the claimant's points"). It is not consistent with that purpose for a party to leave an alleged implied term or any other obligation to be relied upon off the face of the pleadings only to bring forth an argument based upon such a term or obligation in closing submissions. It is nothing to the point that it may be contended that the term is to be implied or the obligation is said to arise as a matter of law (as distinct from by reference to the particular factual context in which the contract was made). The opposing party still needs to know that a case based on such a term or obligation is to be advanced, so as to be in a position to marshal any case it may have to dispute that such a term is to be implied or such obligation arises, to argue about its precise formulation and, as appropriate, to call evidence designed to meet the case being made as to how it may have been breached. I do not read *AG of Belize v Belize Telecom Ltd* nor any of the other authorities referred to by Mr Thompson as diluting this basic function of pleadings where alleged implied terms or other specific obligations are to be relied upon. An express contractual term to be relied upon in proceedings needs to be pleaded; so does a duty of care in a claim in negligence; an implied contractual term or similar obligation to be relied upon should likewise be pleaded.

262. I allowed the late amendment to the Defendants' pleadings by reference to the usual principles which govern late applications to amend, and gave the parties permission to adduce further written submissions.

263. In their further written submissions, the Defendants put their case against Holdings in relation to the non-payment of drawings by the LLP on 25 February 2009, contrary to clause 11.1 of the Agreement, in four different ways:

i) On the true construction of clause 11.1, Holdings was in breach of that provision itself simply as a result of the non-payment of the drawings by the LLP; alternatively,

ii) On the true construction of clause 11.1, Holdings was in breach of that provision itself because (acting by Mr Ribeiro) it procured the non-payment of the drawings by the LLP; alternatively,

iii) Holdings (acting by Mr Ribeiro) breached the implied term referred to above by procuring the LLP not to pay the drawings; alternatively,

iv) as a result of a positive rule of law (see *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 717 per Lord Atkin) Holdings was in breach of the Agreement by procuring the non-payment of the drawings by the LLP.

264. The difference in the formulations at (i) and (ii) turns on whether a degree of linkage between activity by Holdings and the non-payment of the drawings by the LLP is required in order to show that Holdings is itself directly in breach of clause 11.1. I do not think that such a degree of linkage is required and I accept Mr Thompson's primary submission at (i).

265. Clause 11.1 is expressed in the passive voice ("There shall be paid to each Member …"), which in a multi-party contract of this kind is significant. The obligation in that provision was not expressed to be solely the obligation of the LLP - if that had been intended, it would have been a simple matter to say, "The LLP shall be under an obligation to pay [etc]". This basic linguistic point is reinforced by consideration of the context surrounding clause 11.1. It appears in an agreement which provides for Holdings and its representatives to have a great deal of practical power in relation to how the LLP behaves; where the LLP was created as a corporate vehicle to carry on a joint venture between Holdings and the Defendants directed to providing each of them with the benefits stipulated in the Agreement; where it was contemplated that F&C would in practical terms organise payments under clause 11.1 by virtue of its provision of payroll services to the LLP under the Service Agreement; and where, although the payments were stated to be drawings in anticipation of payment of Income Profits, they were still to be made even if there might be no expectation of such profits (cf clauses 9.3.2 and 11.6), if necessary out of the capital provided by Holdings (or to be provided by Holdings, under clauses 8.3 or 8.4). The affairs of the LLP were so bound up with the conduct of Holdings and funding provided by it that on an objective interpretation of clause 11.1 it falls to be construed as an obligation binding on all parties to the Agreement (including Holdings). It should be noted that on this wider interpretation of clause 11.1 for which the Defendants contend, the terms of paragraph 1.7 of the Fourth Schedule (requiring there to be a breach of contract involving gross misconduct or gross negligence) would afford Holdings a distinct degree of protection against being found liable to buy out the Defendants' interests in the LLP under Put Option notices served under that provision.

266. But on the facts of the case the distinction between the formulations at (i) and (ii) is not critical, since there was a direct link between action taken by Mr Ribeiro as agent for Holdings in arranging to stop the payments due to the Defendants and the breach of clause 11.1 on 25 February 2009. Mr Ribeiro took this step to put into effect a strategy he had devised on behalf of Holdings, to put pressure on the Defendants for the benefit of Holdings. In my view, Holdings was in breach of clause 11.1 of the Agreement when Mr Ribeiro arranged for the drawings to be withheld on that date. It then becomes relevant to examine the circumstances surrounding that breach in order to determine whether it was of a quality which entitled the Defendants to serve their First Put Option Notices on that date (see paras. [721]ff below).

267. It is therefore not necessary for the Defendants to rely upon the way in which they put their case at (iii) and (iv) above. But in case I am in error in my view regarding breach of clause 11.1, I will deal with those formulations as well. The formulations at (iii) and (iv) are based on the submission that the principle relevant to a situation in which there are two parties at an agreement (to the effect that one party may not take steps to

prevent the performance of the contract by the other, as illustrated by *Stirling v Maitland* (1864) 5 B&S 840, *Barque Quilpue v Brown* and *Southern Foundries v Shirlaw*) is also applicable, by extension, to a three party situation: one party to a contract may not take steps to prevent performance by a second party to the same contract of an obligation owed to a third party to the contract. In my view, the relevant principle does extend to a three party situation as Mr Thompson contends.

268. In both the two party and the three party situations the parties to the contract are taken to contract on the footing that they wish the contract to be performed, and on an objective interpretation of their agreement have therefore impliedly agreed that they will not actively prevent performance (adapting the way in which the position is summarised in Lewison, *The Interpretation of Contracts*, 4th ed., at para. 6.12). It was an implied term of the Agreement that Holdings would not take steps to prevent the LLP from fulfilling its obligation to pay the Defendants advanced drawings under clause 11.1 (or, putting the same obligation in different language, that Holdings would not procure the non-performance by the LLP of what it was required to do by clause 11.1 of the Agreement).

269. I also consider that the implication of such a term in the present context is supported by reference to the well-known statement of Lord Blackburn in *Mackay v Dick* (1881) 6 App Cas 251, at 263:

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there be no express words to that effect."

270. In the present case, all the parties to the Agreement agreed that the advance drawings should be paid by the LLP to the Defendants under clause 11.1. Holdings, acting by Mr Ribeiro, was in a position to prevent that from happening. In my view, *a fortiori*, the natural conclusion here is that the reasonable expectation of the parties was that Holdings should be bound by an obligation not to take active steps to prevent that thing being done (i.e. a negative form of obligation of a kind that may more readily be found to be implied than an obligation to take positive steps to bring about the doing of a particular thing, as contemplated by Lord Blackburn) - that is to say, by an obligation not to procure the non-performance by the LLP of its obligation under clause 11.1.

271. In my view, the term in question is properly to be implied into the Agreement on the basis of the principles governing implication of terms set out in *AG of Belize*, in particular at [21]: this is what the Agreement, read as a whole against the relevant background, would reasonably be understood to mean. It can equally be said that this term is necessary to make the contract work (using the language of Lord Clarke MR in summarising the effect of *AG of Belize* and other authorities in *Salvage & Towage Ltd v Seamar Trading & Commerce Inc.* [2009] EWCA Civ 532; [2009] 1 CLC 909, at [15]). Where Holdings was in a position to prevent the Defendants having the

benefit of a payment which Holdings had agreed they should have, it was obviously incumbent on Holdings not to take positive action to prevent such a payment being made and by those means stopping the contract from working in the way it was intended to.

272. I think that, in so far as it has been suggested in some judgments (such as in the speech of Lord Atkin in *Shirlaw*) that the implication of such a term operates by virtue of some free-standing principle of law, the better view now is that the implication arises on the basis of the general principles set out in *AG of Belize*. There will, of course, usually be no difficulty about implying such a term by reference to those principles, and if the implication sought to be relied upon cannot be justified by reference to those principles it is difficult to see why the general law should be found to supply some obligation equivalent to an implied term affecting the operation of a contract but which would not reasonably be understood to be what the contract means.

273. F&C submitted that if such a term is to be implied in the Agreement, it should be on the basis of a formulation requiring a significant degree of *mens rea* on the part of Holdings in relation to the prevention of performance, informed by an analogy with the tort of inducing breach of contract: see *Lumley v Gye* (1853) 2 E&B 216; *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 AC 1, [39]-[41] (Lord Hoffmann), [192] and [202] (Lord Nicholls). I do not think that is right. The authorities referred to above do not suggest that the implied term is to be formulated in this way. It is unusual for breach of contract to require a subjective mental element of this kind, since the law of contract generally involves adoption of an objective approach to the formation and interpretation of contracts, rather than a subjective approach, and that objective approach informs the meaning to be given to and content of contractual obligations. It is not an answer to an allegation of breach of contract for a party to say that he did not know he was acting in breach. These considerations all point against the limited formulation of the implied term proposed by F&C. Judged on an objective basis, a party to a contract is reasonably entitled to expect that another party to the contract will not actively prevent performance of the contract, whether or not that other party knew that its actions would involve a breach of obligation.

274. In other contexts it might be relevant to debate further what is meant by active prevention of performance or procuring non-performance, but it would serve no purpose here. Holdings, acting by Mr Ribeiro, took a deliberate step to stop the LLP performing as it should have done under clause 11.1 of the Agreement, and so clearly did actively prevent performance of the Agreement (or, putting the same point in different language, did procure its non-performance) in breach of the implied term.

The LLP's client base, the Defendants' allegations of mis-selling by F&C and their complaints that F&C failed properly to market the LLP Funds

275. I turn from discussion of these legal issues to consider in more detail the principal factual matters which require explanation and determination in order to decide on the proper outcome of the proceedings.

276. F&C has a strong client base amongst Dutch institutional investors, in particular various Dutch pension funds and insurance companies which invest in order to

generate capital value and income to meet their rolling liabilities to pay pensions or insurance claims. F&C maintains its relationships with such investors through its distribution team at F&C Netherlands. Such investors constitute the principal group of clients who F&C and the Defendants hoped would invest in the LLP's FoHF products when they were launched in early 2005 and thereafter.

277. The distribution team at F&C Netherlands reports to the Head of Distribution and Business Development for F&C plc (from 2007 this was Mr Mendez de Vigo). It is given investment guidance and advice by the F&C Netherlands Strategy team, headed at the relevant time by Mr De Groot, who in turn reported to F&C Strategy in London, headed by Mr Niven.

278. F&C Netherlands' relationship with the relevant Dutch institutional clients varied depending on the client. Of the 28 Dutch institutional clients who eventually invested in the Select Fund, 12 were discretionary portfolio management clients (known as the "ex-PVF clients") for whom F&C Netherlands was the discretionary investment manager (one of these had already given notice to terminate its relationship with the LLP Funds in 2006/7); 12 were from the group known as "Achmea GBD clients", whose investment portfolios were run by a Dutch company called Achmea, whose investment panel was advised by F&C Netherlands; and 4 were from the group known as "Achmea own risk clients", comprising proprietary funds of Achmea run by its own investment managers who again received advice from F&C Netherlands.

279. For the ex-PVF clients at the relevant times, F&C Netherlands had discretionary authority, as their direct investment manager, to make investment decisions on their behalf. In about the autumn of each year, F&C Netherlands' distribution team, with assistance from the strategy teams, went through a process of advising each ex-PVF client on its basic investment strategy plan for the forthcoming year and the client was invited to agree that plan, giving authority to F&C Netherlands to operate within the plan for that year. Traditionally, F&C Netherlands' advice and investment planning were restricted to F&C Group products, which meant that F&C's own products competed with each other for a place in the investment plans for those clients, but did not have to compete with outside products. Within the range of F&C products, F&C Netherlands' duty to its ex-PVF clients was to offer the best advice it could as to which product to select to meet their particular investment needs.

280. The clients, however, became increasingly dissatisfied with such a restrictive choice of product and came to put F&C Netherlands under pressure, especially from about early 2008, to accept a wider fiduciary management role, offering advice not just for investing in F&C products but also in external products (i.e. an "open architecture" relationship). It was proposed that the basis of the relationship would remain an obligation on F&C Netherlands to offer the best investment advice it could, but this time in selecting from a far wide range of products. This proposed shift to a wider fiduciary management role for F&C Netherlands constituted a major change in the nature of its relationship with these clients. The proposed change would mean that, under an "open architecture" relationship, F&C products would now have to compete not just with other F&C products but also with other products in the general market in order to be included in client investment plans.

281. For the Achmea GBD clients, Achmea was the discretionary investment manager but had sub-contracted certain asset management services to F&C Netherlands. F&C

Netherlands met with the Achmea investment committee on a regular basis to give strategic advice regarding investment choices for the clients. F&C Netherlands would agree annual investment plans for the clients, but principally in negotiation with Achmea. F&C Netherlands did not have the same discretion to manage the investment portfolios within their annual plans as for the ex-PVF clients. Relevant investment decisions in the course of the year would be taken instead by the Achmea investment committee.

282. The Achmea own risk client portfolios were owned by Achmea companies and Achmea gave instructions to F&C Netherlands how to invest them on their behalf. For these clients, F&C Netherlands' role was essentially confined to that of executing instructions given to it by Achmea. Any discretion given to F&C Netherlands within the agreed mandates for these clients was very limited.

283. In 2005, F&C's strategy teams and F&C Netherlands advised the Dutch institutional clients to invest part of their assets in F&C-branded FoHF products managed by the LLP, secured their agreement to such investments and executed the investments. The advice by F&C Netherlands was founded on its view that investment of a small portion of the clients' assets in a suitable FoHF product within a wider portfolio strategy was an appropriate way of adjusting the risk/return profile of the overall portfolio.

284. In order to understand the Defendants' complaints in the dispute relating to concerns about mis-selling of the LLP's FoHF products, it is necessary to say some more about the concept of an absolute return product and to explain something about benchmarks.

285. The LLP's FoHF products were marketed as absolute return products (see paras. [13]-[15] above). When hedge funds and FoHFs market themselves as absolute return products, they represent that their managers will seek to adopt investment strategies which are flexible and not tied to general fluctuations in the bond or equity markets, and which are capable – by virtue of the fund manager's skill in fashioning an investment strategy – of offering better returns than simple investments in such markets, especially if the markets fall in value (so that the value of a portfolio invested in them falls, unlike the absolute returns which are supposed to be secured by absolute return products). In this way, absolute return products are said to have low correlation with general market movements.

286. The risk/return profile of absolute return products can be adjusted to cover a wide range, depending on the investment strategies they adopt, and (for FoHFs) the nature of the hedge fund products they invest in. However, it is a fundamental feature of such products that they depend for their success in achieving the returns they offer on the investment skills of their managers and that they carry a significant degree of risk.

287. In the case of the Balanced and Select Funds, the marketing information, offering memoranda and monthly fact sheets provided by the LLP all expressly referred to the significant volatility (or risk profile) which the funds offered (10% in the case of the Select Fund). They also expressly referred to annual return targets for them well above ordinary interest rates (8% to 13% for the Select Fund) which, again, was a clear indication that investments in those funds involved significant risk above that associated with simply putting money on cash deposit with a bank.

288. There was considerable debate at trial about the concept of benchmarks in relation to an investment product. The term "benchmark" is used for different purposes in different contexts. It can refer to a standard used by an investment manager in constructing an investment portfolio for a client; it can refer to a target for the performance of an investment product (what it is hoped it will achieve); and it can refer to an objective standard of performance (which might be contractually agreed between the product manager and client, e.g. for use in a formula for determining fees to be paid in relation to the performance of the product) where the benchmark offers a suitable proxy for the risk/return profile of the investment product in question (what I will call a "proxy benchmark").

289. In this last, proxy sense, benchmarks are most likely to be adopted where there is a clear market standard which is suitably representative in its risk/return profile of the risk/return profile of the particular product in question. Then, if the product's performance beats its benchmark, it may be inferred that it is due to the investment skill of the manager. Such benchmarks are typically adopted in relation to long only funds, where there is usually a market index (e.g. of equities within a particular class or sector) which provides a suitable representative standard appropriate for measuring the performance of such long only funds. Conversely, if there is no straightforward market standard which corresponds to the risk/return profile of an investment product, a proxy benchmark is unlikely to be used.

290. Hedge funds pursue a wide variety of investment strategies and there is no ready market yardstick which can provide a proxy benchmark in the way that a market index can do for a long only fund. The same is true for FoHFs which invest in hedge funds. Part of the reason hedge funds are marketed as absolute return products is so that their managers are free to pursue their individual investment strategies rather than being obliged broadly to follow the general market. There are some market indices for hedge funds, including the Credit Suisse First Boston Tremont index ("the CSFB Tremont index"), but because of the wide differentiation in investment strategies between hedge funds these can provide only a very rough and ready indication of how the hedge fund sector generally is performing.

291. In the sales and contractual literature for the Select and Balanced Funds, the LLP did not refer to the CSFB Tremont index as setting a proxy benchmark for those Funds. In the monthly fact sheets for the Funds, the performance of the Funds was compared with the CSFB Tremont index, along with a number of other general market indices, but without suggesting that the CSFB Tremont index had any role as a proxy benchmark for the Funds. The CSFB Tremont index is an index of hedge funds which do not carry leverage and so would not have been an appropriate proxy benchmark for the Select Fund, even if the other objections to using such an index as a proxy benchmark for any hedge fund or FoHF could somehow have been overcome.

292. Sometimes hedge fund or FoHF clients wish to specify a benchmark for investments they hold in such funds. They may do so for a number of reasons. In this case, there was evidence that the Dutch institutional investors in the Select Fund were subject to a Dutch regulatory requirement to specify a benchmark for their holdings in hedge funds or FoHFs. In cases where a benchmark is required for absolute return products in the form of hedge funds or FoHFs, it is common practice to choose, as an appropriate benchmark, a market representation of the value of cash in the form of a bank interest rate. The Dutch institutional investors in the Select Fund used the 3

month Euribor rate as a benchmark in their investment plans agreed with F&C Netherlands. There was nothing untoward about this. As Mr Niven and Mr Kramer explained, other institutional investors for whom F&C had no responsibility adopted the same practice when specifying benchmarks for their hedge fund or FoHF investments. Use of benchmarks based on bank interest rate figures is common for hedge funds and FoHFs: see the discussion in F-S Lhabitant, *Handbook of Hedge Funds* (2006), at para. 21.4.1, p. 509, and in the chapter entitled "Evaluating the Performance of Your Hedge Funds" by Vinh Q. Tran in a standard textbook prepared for the Chartered Financial Analysts Institute, esp. at p. 135 – "The risk-free rate [i.e. a bank interest rate] has been recommended by many consultants and used by many institutional investors as a benchmark for hedge fund performance".

293. However, the Defendants have used the fact that F&C Netherlands recommended to the Dutch institutional investors who invested in the Select Fund that they use the 3 month Euribor rate as a benchmark as the foundation for their contention that F&C Netherlands misled those investors about the true nature of the risk/return profile of the Select Fund and that a consciousness on the part of F&C and F&C Netherlands that there had been mis-selling – or may have been mis-selling – of the Select Fund along these lines in turn led F&C and F&C Netherlands to omit to undertake vigorous marketing of the LLP's products with those investors in late 2008 and 2009. In particular, the Defendants complained that this led to an absence of proper marketing efforts by F&C in relation to LLP products after redemption notices had been put in by clients in late 2008 to withdraw their money from the Select Fund. This was at a time when, according to the Defendants, there would have been a good prospect, if F&C and F&C Netherlands took proper marketing steps, to have persuaded at least some of the clients to withdraw those notices. The Defendants make a similar complaint in relation to the opportunity presented to clients in early December 2008 to switch their investments from the leveraged Select Fund into the comparatively less risky Balanced Fund. This was at a time when, according to the Defendants, there would have been a good prospect, if proper marketing had been undertaken, of persuading at least some of the clients to switch their investments into the Balanced Fund rather than withdrawing them from the LLP's funds altogether.

294. In the Defendants' submission, F&C and F&C Netherlands chose to omit to market the LLP's funds at this critical juncture because they feared that the Dutch investors would look back at the Euribor benchmark they had been advised by F&C Netherlands to choose when investing in the Select Fund and would – if the true risk profile of the Balanced and Select Funds were now explained to them – suddenly realise that they had been led by F&C Netherlands to invest in a risky investment product in the form of the Select Fund rather than a product as risk-free as holding cash. The Defendants' suggestion was that F&C and F&C Netherlands thought that advising the Dutch institutional investors to use the 3 month Euribor rate as the relevant benchmark could have led them to believe that investment in the Select Fund was as risk-free as investment in a bank deposit account and that to explain to them in late 2008 or 2009 that that was not the case and to explain in 2008 or 2009 the true risk associated with the Select and Balanced Funds might have galvanised the Dutch clients into bringing expensive mis-selling claims against F&C Netherlands. Therefore, so the argument ran, F&C and F&C Netherlands deliberately failed to market the LLP's products to those clients at that time, in breach of the obligation under clause 13.7 of the Agreement.

295. I reject this argument. In my judgment, there is nothing in it. There are two fundamental objections to it which should be mentioned. First, there had in fact been no mis-selling of the LLP's products by F&C Netherlands or any other F&C entity to the Dutch clients when they invested in the Select Fund, and that was clear to F&C and F&C Netherlands. Therefore, they had no reason to be concerned about possible mis-selling and it is implausible to suppose that any such concern affected their choices as to how to proceed in relation to those clients in late 2008 and 2009.

296. Secondly, the relevant evidence from the F&C Netherlands personnel on the ground dealing with clients in late 2008 and 2009 was clear and unequivocal that their conduct was in no way motivated by any consciousness of, or concern regarding, mis-selling or possible mis-selling of the LLP's products by F&C to the Dutch clients in the past. I accept their evidence. I develop these two points in turn.

297. The distribution team of F&C Netherlands were the group who were primarily responsible for selling the LLP's FoHF products to F&C's Dutch institutional clients in 2005. They were investment adviser generalists and did not have a detailed understanding of FoHF products. They therefore had to seek advice from the LLP – in particular, from Mr Barthelemy – about its FoHF products, with a view to passing on the information to the clients by way of general explanation of the products or in answer to questions posed by particular clients.

298. Thus, for example, a Ms Meijer of F&C Netherlands sent an e-mail dated 14 February 2005 to Mr Barthelemy asking for his help in answering a questionnaire sent on behalf of the Achmea GBD clients and pointing out, "as this is basically a new area for us and you are the expert, would you please be so kind to provide us with the answers". Mr Barthelemy supplied detailed answers to the questionnaire as he had been asked to do. In response to the question, "Is there a benchmark for this fund? If so, which?", he wrote, "As we are absolute return, we don't follow a benchmark but for performance measurement purposes there are a few available such as MSCI, HFR or Barclays Fund of HFs". He was there making the basic point referred to at para. [290] above. In his answers he also explained the risk/return profiles of the Select Fund ("an expected return of 10% and an expected volatility of 10%") and the Balanced Fund (for which the figures were 5% and 5% respectively). It was thus expressly made clear that the risk/return profile for both Funds was very different from that of a cash deposit.

299. He also explained clearly the fee structure for the LLP's funds – a management fee of 1% of NAV of an investment and a 10% performance fee subject to a high water mark ("this means that if the year after the funds go down, no performance fee is payable until the highest ever NAV has been reached again"). This fee structure again made it clear by implication that investment in the LLP's FoHF products could not be regarded as equivalent to placing money in a cash deposit at bank. The fees were very different in structure from, and in practice likely to be far greater than, any fees which would be charged by a bank for holding a cash deposit (usually, of course, a bank would pay interest to the fund holder on such a deposit and not expect a net payment from the fund holder).

300. This feature of the LLP's products indicated that an (inherently risky) investment strategy would be followed by the LLP in the hope of high returns. The high fees to be paid were in recognition of the skill of the LLP's management in devising a

profitable strategy. Moreover, the reference to the high water mark made express reference to the fact that the funds could go down in value, unlike the nominal value of a bank deposit.

301. F&C Netherlands adopted Mr Barthelemy's text in their answers to their Achmea GBD clients, but added some limited text of their own on the question of benchmarks to supplement Mr Barthelemy's comment that, as the LLP's products were absolute return products, they did not follow a benchmark, as follows: "However, we advise to use [3 month] Euribor because one can see this investment [as] an alternative for cash".

302. It is likely that this was added because F&C Netherlands recognized that the Achmea GBD clients would need to show some benchmark in their investment plans for regulatory reasons and considered 3 month Euribor to be an appropriate benchmark to use for those purposes. That accorded with common market practice and reflected the absolute return nature of the LLP's funds (i.e. their primary stated objective was to generate a positive return in nominal terms, an objective appropriately measured by reference to the positive return on a cash deposit at bank).

303. The Defendants suggested that this stray supplementary comment in the answers to the clients' questions showed that the Achmea GBD clients were misled into thinking that the risk/return profile of the LLP's FoHF products was the same as cash, or that F&C Netherlands in late 2008 and 2009 feared that the clients might have got that impression. I reject both suggestions. The comment added by F&C Netherlands appeared in a document which still contained all the statements by Mr Barthelemy about fees, returns and volatility of the LLP's funds, from which it would have been abundantly obvious (and F&C Netherlands would have considered it was abundantly obvious) that the risk/return profile of the LLP's products was *not* the same as that of a cash deposit at a bank. No-one reading the whole document would be misled into thinking otherwise and it is clear that no-one was.

304. By an e-mail dated 12 May 2005, F&C Netherlands relayed to Mr Barthelemy further questions from the Achmea GBD clients highlighted on the document already sent to them, with a request that Mr Barthelemy provide answers. It is very probable that Mr Barthelemy studied the document with care and did not think there was anything odd or calling for rectification in the statement which had been added to the document by F&C Netherlands set out at para. [301] above.

305. Just below that statement, Achmea had posed this question:

> "Stated is that the FoHF is an alternative for cash. But the expected return and the risks are rather different. In what way can the 3 months Euribor be a good benchmark?"

It is clear from this that Achmea appreciated that the LLP's funds did not replicate the risk/return profile of a cash deposit. This is also clear from other questions Achmea superimposed on the document previously supplied to them, including detailed questions about the LLP's Funds' fees, expected returns and volatility.

306. Mr Barthelemy provided F&C Netherlands with answers to all these questions, including a detailed explanation of the volatility and risk/return profile for the

Balanced and Select Funds, and the following answer to the question regarding use of 3 month Euribor as a benchmark:

> "The choice of benchmark is entirely up to what you are trying to measure, because it is not used as part of the investment process (as opposed to what happens in long equity world, for instance). Euribor is easy to get and is aligned with the absolute return of the fund but you are absolutely correct in pointing out that it will not be a good measure for an asset that will by definition experience some form of volatility. Again, there are a few hedge fund indices available on Bloomberg such as the CSFB Tremont Investable index or the Hennessee Global hedge fund index. Generally though it is important to keep in mind that the hedge fund universe does not lend itself to rigorous index calculations – as a result some qualitative analysis is required to understand the particular behaviour of any of the indices mentioned above. I would be happy to meet with you to discuss these issues if you want."

307. By this answer, Mr Barthelemy explained that the LLP did not use a benchmark as part of the investment process as a tool for selecting investments or for devising an investment strategy for its funds. He gave reasons why Euribor could appropriately be used as the benchmark for other purposes, since it was an objective figure readily available in the public domain and could be regarded as a simple measure of whether the funds had met their basic absolute return objective. But he also correctly and clearly confirmed the clients' view that it would not represent a proxy benchmark, precisely because the LLP's funds would experience volatility (i.e. risk to which a cash deposit would not be exposed). Mr Barthelemy also correctly made the point that hedge fund indices also did not provide a good proxy benchmark for the funds (see para. [290] above).

308. Mr Barthelemy's answers were dutifully relayed on by F&C Netherlands in a comprehensive document to the Achmea GBD clients. Again, no-one reading that document as a whole, and in particular Mr Barthelemy's answer on the question of use of Euribor as a benchmark, could have been misled into thinking that the Balanced and Select Funds had a risk profile equivalent to cash. At no stage did F&C Netherlands have any concerns at all arising from these exchanges with Achmea that the Achmea GBD clients had been misled on this point.

309. Aside from these specific communications with the Achmea GBD clients, F&C Netherlands provided all investors in the Select and Balanced Funds with full detailed contractual documentation in the form of offering memoranda. These documents made no reference to use of Euribor as a benchmark. They did explain the fees, expected returns and volatility profiles of the respective funds. Again, no investor reading those documents could be thought to have been left with the impression that an investment in either the Balanced or the Select Fund could be regarded as having the same risk profile as a cash deposit at bank, and at no stage did F&C Netherlands have any concerns that any investor had been misled on that score.

310. I turn then to consider the evidence given by F&C Netherlands' employees who in late 2008 and 2009 actually dealt with the Dutch institutional clients who were invested in the Select Fund, namely Mr De Groot and Mr Kramer. I found both of them to be good witnesses. Both were adamant that in their dealings with those clients at that time they were not motivated in any way by a concern that F&C Netherlands might be accused by those clients of having misrepresented to them that the Select Fund had a risk profile equivalent to a cash deposit and, indeed, denied that any such a thought crossed their minds. I accept their evidence.

311. They accepted that they had not made efforts, in meetings with those clients at the time or in any other way, to press the clients to remain invested in the Select Fund or to switch their investments into the Balanced Fund when that was presented to clients as an option in December 2008. But their conduct in that regard was fully explained by the situation which confronted them from September 2008, in which virtually all equity and bond markets were in free-fall and the clients were experiencing severe losses, including in particular in relation to their investments in the LLP's Funds.

312. The client relationship managers at F&C Netherlands at that time were dealing with institutional clients who had extensive portfolios across a wide range of financial products, virtually all of which were losing substantial amounts of their value. Their investments in the Select Fund were, in each case, only a small part of their overall portfolio, but their losses on the Select Fund had been particularly bad (as Mr Kramer put it, it was one of the worst "bleeders" within their portfolios). Moreover, the Select and Balanced Funds appeared to have completely failed to live up to their own stated fundamental investment objective of being funds which would generate absolute returns (there did not seem, in late 2008 or early 2009, to be the remotest prospect that they could recover the losses suffered in 2008 in the short or even medium term). F&C Netherlands and their clients felt that the LLP Funds were a form of investment carrying significant risks, which had been exposed as not living up to their billing as absolute return products which would exhibit a lack of correlation with the performance of equity or bond markets. It was their supposed absolute return nature which had provided the principal justification for their inclusion in the general investment portfolio of an institutional client as a way of balancing the client's portfolio and providing some protection against investment risks associated with those markets. That justification fell away with the poor performance of the LLP Funds in late 2008.

313. At the same time, the Select and Balanced Funds were expensive investment products - the 1% management fee and 10% performance fee for the LLP were payable in relation to underlying investment in hedge fund products which typically charged their own 2% management fee and 20% performance fees as well. F&C Netherlands and their clients felt that the clients were paying high fees for products which had failed to perform effectively and as they had been led to expect they would. Adopting the way Mr Mendez de Vigo put it in his evidence, the clients had paid for a Ferrari but had only got the performance of a Fiat.

314. In my view, it is no surprise that both F&C Netherlands and the Dutch institutional clients were very displeased with the performance of the Select Fund in this period and that they did not regard the Balanced Fund as an attractive alternative. Although the Balanced Fund had not fallen so badly in value as the Select Fund, because it was not leveraged, it had still dropped some 22% in value in 2008, was expensive and had

failed to demonstrate that it performed in a way which was not correlated to equity markets and which would deliver absolute returns.

315. Still more fundamentally, the Dutch institutional clients (in particular the pension funds) were being driven to seek to “de-risk” and to find liquidity for their portfolios, for both commercial and regulatory reasons. Having started 2008 with a healthy ratio of assets to future liabilities and good liquidity, so they could be confident of meeting their liabilities to make pension or insurance payments on a current basis and fully over the extended periods they had to plan for, the collapse in the markets in late 2008 played havoc with their ratios of assets to liabilities and ready liquidity to make on-going payments as they accrued due disappeared. The unsurprising reaction of these clients was to try desperately to limit the risks in their general portfolios by getting out of riskier products and to seek liquidity by selling or redeeming investments. These commercial factors were reinforced for Dutch pension funds by regulatory requirements of the Dutch authorities, requiring them to maintain stipulated assets to liability ratios and acceptable liquidity. F&C Netherlands had to provide their clients with investment advice to assist them to pursue their new, pressing objectives in the market conditions which had arisen.

316. For all these reasons, from late 2008 the LLP’s Dutch institutional investors were pushing strongly to exit from the Select Fund. It carried substantial risk (as had been shown by its precipitous fall in value in 2008), investment in it was illiquid (three months’ notice to withdraw was required to be given at set quarterly periods in the year), it had failed to meet its stated investment objective as an absolute return fund by a very substantial margin, it was a comparatively unfamiliar investment product (and so difficult to explain to the regulators, pensioners and the boards of pension funds) and it was comparatively expensive.

317. The Select Fund was not the only investment product the F&C Netherlands distribution team had to deal with. They had to explain to their institutional clients why their portfolios were collapsing in value across all asset classes. Relationships between F&C Netherlands and the clients were very fraught at this time. F&C Netherlands’ advice to them inevitably and legitimately had to be tailored in light of the particular circumstances and concerns which were being pressed on F&C Netherlands extremely forcefully by their institutional clients at this time.

318. In the judgment of F&C Netherlands, based on hard experience of client reactions to the general market situation and client priorities emerging in light of that situation, the Dutch institutional clients were in no mood to consider product pitches by F&C Netherlands to press them to consider remaining invested in the Select Fund or to consider switching to the Balanced Fund. In the words of Mr De Groot, in the context of the market falls in late 2008, the great stress that had been placed upon F&C Netherlands’ institutional clients and the particularly poor performance of the Select Fund in which they were invested, if he had tried to raise with them the possibility of remaining in the Select Fund or switching to another LLP FoHF product, the Balanced Fund, they would have regarded it as an insult. It was not remotely viable for F&C Netherlands to seek to do that while retaining any credibility with and the respect of their clients.

319. That was a judgment F&C Netherlands was well placed to make. In the light of that assessment, it was in my view entirely reasonable and legitimate that F&C

Netherlands did not try to persuade their clients about the merits of remaining invested in FoHF products, but focused instead on other products and investment strategies which would be better suited to meeting their clients' immediate pressing concerns at the time. As explained below, this involved no breach of obligation under clause 13.7 of the Agreement.

320. At trial, the Defendants set out an argument why investors should have been prepared to invest in the Balanced Fund, in support of their case that F&C Netherlands failed to market the LLP's products properly in late 2008 and early 2009 and that this had a serious detrimental impact on the LLP. They pointed out that if one took the Balanced Fund and compared its performance in 2008 with the performance of the range of the F&C's other funds (the great majority of which were long only funds), the Balanced Fund had performed better than most of those other funds. Therefore, it was suggested, it would have been rational for investors to wish to invest in the Balanced Fund in late 2008 and early 2009, and the fact that they did not have such an argument put to them and did not invest showed that F&C's decision not to market at least the Balanced Fund actively had been taken improperly, with a view to harming the LLP's business, and had in fact harmed its business.

321. The Defendants also produced figures to show that the Balanced Fund had performed reasonably well by comparison with the CSFB Tremont index of hedge funds and Mr Kermisch, their expert on the hedge fund market, described the Balanced Fund's performance in 2008 as average for FoHFs in that period. His evidence was that the Balanced Fund was a marketable proposition in early 2009, in the period before the overt eruption of the dispute between the parties when the Defendants served their First Put Option Notices on 25 February 2009.

322. I do not think any of this evidence supports the conclusion that F&C improperly failed to seek to market the Balanced Fund or caused detriment to the LLP by doing so. The Defendants' comparison with the performance of the Balanced Fund in 2008 with the performance of other F&C products fails to take account of the fundamental difference between products marketed as absolute return products (like the Balanced and Select Funds) and products marketed on the basis of their relative performance to certain benchmark indices (typically, long only investment funds where the index benchmark will frequently be a suitable proxy benchmark).

323. When general markets fell steeply in 2008, clients expected F&C's relative performance products to fall with them, as they did. But one of the main arguments for investing in an expensive absolute return product such as the LLP Funds had been that they were supposed to produce absolute returns and not to fall along with general markets as relative performance funds would do. The fact that the LLP's absolute return products had failed to meet client expectations in that regard made it unsurprising that clients should have lost confidence in them and consequently unsurprising that F&C Netherlands' distribution team should assess that the time was not propitious for seeking to market the Balanced Fund to new investors or to persuade existing investors in the Select Fund (who had had their fingers badly burned by the LLP's failure to meet their expectations in relation to the performance of that fund) to switch to another LLP FoHF product, albeit a less leveraged one.

324. The argument for new or continued investment in the Balanced Fund was not a strong one. Even when times were good, between 2005 and 2007, the LLP itself had not had

significant success in attracting investors who had no pre-existing connection with F&C (and the only such investor in the Pushkin Fund had also withdrawn its investment in late 2008). The F&C clients who had been persuaded to invest in the LLP products up to 2008, now, in the latter part of 2008 and early 2009, had what they regarded as compelling reasons to withdraw from them as set out above. The evidence is that they wished to withdraw from FoHFs and hedge funds altogether at that time, so the fact that the Balanced Fund could be regarded as having achieved average performance for that asset class would not have been an argument with any realistic prospect of success.

325. In the context of these complaints by the Defendants, I should comment on the scope of F&C's obligation under clause 13.7 of the Agreement to provide marketing services to the LLP. The obligation of Holdings (representing F&C) was to provide "general marketing support as determined at the discretion of [Holdings] … using the existing marketing operations of the F&C Group". F&C's existing marketing operations included the whole process of maintaining good links with its existing customers, including meeting with them from time to time to discuss their investment wishes and requirements and providing them with advice about F&C products and (as F&C's relationship with their clients came to shift to an "open architecture" model with a greater element of fiduciary management) about other products in the market.

326. The express reference in clause 13.7 to "the discretion of [Holdings]" reserved to F&C the right to use its own judgment how its general marketing facilities might be deployed in relation to the activities of the LLP. This provision allowed F&C to balance what it regarded as the effective and proper handling of its relationship with its clients, including by ensuring that they were presented with advice appropriate for them, with the promotion of the LLP's products according to its (F&C's) own judgment.

327. The provision did not give F&C an absolute discretion to do what it liked – it could not act in bad faith or for reasons unrelated to the proper and effective handling of its relationship with any client and nor could it act in a wholly unreasonable way in deciding how to proceed in marketing in relation to the LLP's products. However, it did allow F&C to decide not to press clients to invest or remain invested in the LLP's FoHF products at times when, in F&C's honest judgment, it would be inappropriate or counterproductive to do so, and allowed F&C instead to wait until circumstances seemed more propitious before doing so. F&C was not obliged to try to engage in pressurised selling of the LLP's products if that might, for example, jeopardize a client's sense of trust and confidence in F&C as an adviser and as a provider of appropriate investment strategies and products tailored to that client's assessment of its own needs. To proceed to market products in a way which might jeopardize the underlying client relationship would be counterproductive for F&C and also the LLP. The LLP's interests were safeguarded to a degree by their alignment with F&C's in terms of the sharing of fee income under the Fifth Schedule to the Agreement, but F&C retained the power to decide how its client relationships should be conducted and what investment products should be pushed most strongly at any particular time to satisfy its clients and meet their needs.

328. This approach to marketing of investment products was not unique to the LLP's products, but was the general approach of F&C in relation to all F&C branded products. F&C fund managers competed against each other for a place on F&C

Distribution's list of "front foot products" – those investment products thought to be particularly appropriate to present to clients for their consideration. As F&C's client relationships came to include a stronger fiduciary management element during 2008 and 2009, all F&C branded products also had to compete with external investment products for a place in the recommendations made by F&C's distribution and strategy teams.

329. In my judgment, F&C and F&C Netherlands were entitled under clause 13.7 to make the assessment, in late 2008 and early 2009, that the Select and Balanced Funds were unlikely to be attractive to their clients (particularly the existing clients in the Select Fund), and accordingly they were entitled to adopt a stance which did not involve seeking to push those Funds forward at the risk of antagonizing their clients. They were entitled to think that a pause would be a good idea before trying actively to press the LLP's products on the Dutch institutional clients once more, while the LLP rebuilt its investment performance track record.

330. This did not involve a failure to provide any of the marketing services as contemplated by clause 13.7 of the Agreement, since F&C continued to put time, effort and resources into seeking to maintain good client relationships in this period which could provide the foundation for an effective marketing drive for the LLP's products when circumstances improved. It was an approach which was, in my judgment, fully open to F&C to adopt without any breach of its obligations under clause 13.7 or the Agreement more generally.

331. The marketability of the LLP's funds was severely compromised after service of the Defendants' First Put Option Notices on 25 February 2009. Once it was clear (as it was shortly thereafter, at least from early March 2009 when the Part 7 claim was commenced) that the matters giving rise to the service of that Notice were not going to be swiftly resolved and the Notice was not going to be withdrawn, it was no longer practicable for the LLP's FoHF products to be marketed with any likelihood of success. Any new investor would be likely to ask whether there was any litigation on foot affecting the LLP and would have to be told about the dispute. Indeed, in all probability they would have had to be told about the dispute even if they did not ask. Moreover, on 12 April 2009 there was press coverage in *The Mail on Sunday* about the dispute. It was not possible to suppress the information.

332. Although the Defendants maintain that it would have been possible for F&C to have gone on marketing the LLP's products despite the dispute, since it could have told potential investors that it was taking steps to replace the Defendants as LLP portfolio managers with a new team, I do not consider that would have been a viable way to attract new investors. As explained above (para. [12]), it is central to a FoHF business that it has skilled management, good at selecting hedge funds to invest in and in adopting an effective investment strategy. By their First Put Option Notices of 25 February 2009, the Defendants gave notice that they considered that F&C was in serious breach of contract and was obliged to buy out their interest in the LLP, in which case there could be no realistic expectation that they would stay to manage the business. There was no identified replacement management team on hand with a proven successful track record who could replace the Defendants to manage the LLP's business. To recruit a successful management team from another FoHF business would be very expensive and there was no-one in the frame likely to wish to move to the LLP. To try to promote managers from within the LLP (such as Mr

Sparks) or the F&C Group would not have been attractive to investors, since they did not have the requisite experience nor a proven track record of success to persuade investors to put significant funds under their care in the specialist hedge fund market.

333. As events transpired, the Defendants stayed involved in the management of the LLP for an extended period but in circumstances where there was considerable uncertainty as to their ultimate intentions. On the face of it, since they maintained the validity of the successive Put Option Notices they served, their intention was to leave the LLP upon being bought out by F&C pursuant to those Notices. On any view, while they remained locked in such a serious dispute with F&C regarding the running and ownership of the business, their attention was likely to be diverted from management of the LLP's FoHF portfolio to arguing with F&C. Accordingly, even with the Defendants still in place, investment in the LLP's funds did not represent an attractive proposition.

334. It is for these reasons unsurprising that the LLP did not attract new business for its FoHF business from the end of February 2009. By reason of the problems caused by the giving of the First Put Option Notices on 25 February 2009, F&C was entitled in accordance with its discretion under clause 13.7 of the Agreement not to seek actively to market the LLP's funds until those problems could be resolved and the management of those funds could be presented in a positive and attractive light to potential investors.

The Defendants' complaints that F&C improperly blocked the pursuit of new business opportunities by the LLP

335. The Defendants had ambitions for the LLP to develop new investment products to increase its revenues and profits. They point to clause 4.1(4) of the Agreement, which provided that the business of the LLP should be to carry on, in addition to its FoHF business, "such other business activities as may from time to time be determined by the Board". They complain that F&C, by its representatives on the LLP Board and otherwise, improperly blocked their attempts for the LLP to diversify into new products. They say that this conduct by F&C and its representatives again supports their case that F&C decided to destroy the business of the LLP and took steps to that end.

336. Against this, F&C denies that there was any such decision on its part. It also submits that there was a fundamental understanding at the time the Agreement was entered into that the LLP would engage only in FoHF business, which continues to be binding on the parties notwithstanding the terms of the Agreement.

337. As to this last point, I reject F&C's submission: see paras. [21] and [181] above. The parties took great care in negotiating the terms of the Agreement, including clause 4.1, and there was no underlying agreement or understanding between them going beyond what was set out in that provision. The parties clearly contemplated that the LLP could expand into new business activities, but that the LLP Board would need to be persuaded that that was the right course for it to take.

338. On the other hand, I do not accept the Defendants' submissions that F&C improperly blocked such expansion by the LLP. For each of the ideas for new investment products put forward by the Defendants or the LLP, F&C and its representatives on

the LLP Board gave them proper consideration and rejected them for sound business reasons.

339. The potential new products which the Defendants complain F&C blocked were:

i) A Commodity Trading Advisory ("CTA") fund – a form of single strategy hedge fund based on mathematical modelling of market behaviour in an attempt to predict future movements by means of statistical analysis of previous market movements and to invest on the basis of those predictions;

ii) A fiduciary product involving provision of fiduciary services to clients by the LLP;

iii) A so-called "UCITS fund", being a vehicle for marketing the LLP's FoHF products on-shore within the European Union in compliance with strict requirements of liquidity and transparency contained in the relevant UCITS Directive;

iv) A hedge fund replication product, using a strategy of investment in futures designed to provide hedge fund type returns at lower cost; and

v) A Qualified Foreign Institutional Investor ("QFII") product intended to provide a vehicle to allow hedge funds to invest in the Chinese market.

These proposals were eventually grouped together as a suite of proposals in a paper presented by the Defendants at a meeting of the LLP Board on 20 May 2009, at which the F&C representatives declined to pursue them (see paras. [852]-[867] and also [972] below).

(i) CTA fund

340. CTA type hedge funds had already developed in the market by 2008. There is evidence that those in existence in 2008/9 produced reasonably good investment performance during the market turmoil at that time. In that period, a range of hedge funds and FoHF businesses were therefore looking with interest at developing CTA-based funds and the LLP was not unique in that respect. In fact, Mr Sparks had been working on a CTA project for the LLP since about 2007, to develop a mathematical model which might be suitable as a foundation for a CTA trading strategy. He had also engaged the help of Fiona Ross ("Ms Ross"), an F&C employee with marketing skills seconded to the LLP, to assist him in working up the idea.

341. Mr Ribeiro had a strong objection to the idea of the LLP launching a single strategy hedge fund, notwithstanding the terms of clause 4.1 of the Agreement. In his view, the proper location for any single strategy hedge fund to be offered as an F&C-branded product to clients would be in the Alternative Investments division of F&C, headed by Ms Hall. It was in that division that all F&C's single strategy hedge funds were located and managed. Mr Ribeiro considered that the original arrangement with the Defendants was that they should run a FoHF under the F&C brand, not single strategy hedge funds. That was the expertise which they offered to F&C at the outset and they had not acquired expertise in running single strategy hedge funds or a CTA fund since then.

342. Ms Hall's evidence also was that in her early meetings with the Defendants, when they were pitching their business proposal for the LLP to F&C in 2004, an understanding was arrived at that the LLP would not venture into the single strategy hedge fund business, since that would compete with her division. Although I do not accept that anything was said or done which qualified clause 4.1(4) of the Agreement, I do find that there were general discussions between F&C and the Defendants at the time the Agreement was under negotiation in which the concern of F&C to maintain coherence in the organisation and presentation of F&C branded financial products by keeping single strategy hedge funds in Ms Hall's separate Alternative Investments division was explained to the Defendants. This was a legitimate concern of F&C. In the light of this concern and the way it had been brought to the attention of the Defendants before the Agreement was signed, I consider that Mr Ribeiro's firm view that any single strategy hedge fund carrying the F&C brand, including any new proposed CTA fund, should be located in Ms Hall's unit and not as a new product in the LLP, was a reasonable one.

343. There were, however, still more fundamental commercial objections to establishing a CTA fund. Mr Sparks and Ms Ross were committed to work up a detailed presentation for a proposal to establish a CTA fund to be managed by Mr Sparks, for consideration whether it should be adopted as a proposal by F&C (whether to be located in the LLP or elsewhere in the F&C Group). The presentation they prepared provided a foundation for assessment of the proposal by F&C.

344. Many ideas for new business developments are brought forward within F&C and it obviously has to be selective about which ones to take up. F&C has a developed procedure for doing this which involves early consideration of any new proposal by identified senior managers within F&C, who may (if persuaded that the idea is a good and viable one) agree to it being forwarded for further consideration by F&C's Product Development Committee.

345. In this case, Mr Ribeiro asked Ms Hall and Mr Mendez de Vigo to meet Mr Sparks and Ms Ross to listen to a presentation regarding their CTA proposal. Mr Mendez de Vigo and Ms Hall were appropriate senior managers to consider the proposal. Mr Ribeiro did not give them any indication of his own views about what should be done – he invited them to consider the proposed product and give their opinion on it uninfluenced by him.

346. Mr Sparks and Ms Ross provided the written CTA fund presentation, which they spoke to at an oral presentation attended by Mr Mendez de Vigo and Ms Hall on 3 March 2009. The presentation did not go well. It was unfocused and insufficiently clear about the merits which Mr Sparks and Ms Ross maintained a CTA fund might have.

347. Quite apart from this, Mr Mendez de Vigo and Ms Hall each had strong reservations about the commercial viability of a CTA fund proposal at that time, based on their own extensive knowledge of the market for financial products. Although some CTA fund businesses had been set up from very small beginnings before the market turmoil in 2008 and had then attracted substantial assets into the funds under their management, the market had changed in light of that turmoil. In the view of Mr Mendez de Vigo and Ms Hall, potential investors in CTA funds were, in early 2009, now only interested in established CTA funds with proven successful track records

and substantial funds already under management. Mr Sparks had no experience of fund management and there was no track record established in real trading to point to. Mr Sparks had been running a paper portfolio which suggested that attractive returns could have been achieved using his mathematical model, but I accept the evidence of Mr Engineer, the expert on the hedge fund market called by F&C, that investors would be unlikely to be impressed by a mere paper exercise without real money having been invested.

348. Also, in the view of Mr Mendez de Vigo and Ms Hall, Mr Sparks's mathematical model did not appear to be significantly different from or better than the models already being used by established CTA fund managers in the market. There was no unique selling point in what Mr Sparks and Ms Ross were proposing which would make it more attractive to potential investors than other established CTA funds, and many strong reasons why it would appear less attractive. In the view of Mr Mendez de Vigo and Ms Hall, F&C would not be able to maintain credibility in taking the new proposed CTA fund to potential investors. There was little investor appetite in the market for new funds at that time.

349. In addition, there was, in their opinion, an insuperable hurdle to launching any such new fund. Such a fund would need significant seed capital at the outset, to enable it to get started and achieve a track record to attract further investors. In the market circumstances in early 2009, there was in their view no prospect of F&C providing any seed capital itself and no realistic prospect of sufficient seed capital being provided for this project by F&C's clients or by other investors (at one point Mr Sparks obtained an indication of interest from a Mr Campion in matching seed funding of $5 million if F&C would put up such an amount, but Ms Hall and Mr Mendez de Vigo were not impressed by this: there are plenty of early expressions of such interest which do not come to fruition and, in any event, there was no serious prospect of F&C being able to fund seed capital of $5 million itself at that time). The LLP did not propose to provide the necessary start up funding itself.

350. After the presentation on 3 March, Ms Hall made time to give feedback to Mr Sparks and Ms Ross about how the presentational aspects of their proposal might be improved. They redrafted their presentation document and presented it to Mr Mendez de Vigo and Ms Hall at a further meeting on 21 March 2009. The new presentation still did not address the fundamental difficulties with the proposal which led Mr Mendez de Vigo and Ms Hall to conclude that it should not be taken forward to F&C's Product Development Committee for more detailed consideration and development.

351. In my judgment, neither Mr Mendez de Vigo nor Ms Hall was party to any design to drive the LLP out of business. In taking their decision not to refer the CTA proposal to the Product Development Committee, they acted in good faith for legitimate business reasons. Their conduct cannot be regarded as being in breach of the Agreement or as being unfairly prejudicial to the Defendants or the LLP in any way. The same conclusion applies in relation to decisions in May and August 2009 not to take up time and resources in pursuing the CTA idea: see paras. [858] and [962] below.

(ii) Fiduciary product involving provision of fiduciary services

352. The Defendants never produced a worked up proposal in this area for the LLP Board or ManCom to consider. This remained a purely speculative idea. The F&C representatives were entitled to conclude in 2009, as they did, that the LLP should focus its efforts on trying to sustain its FoHF business. That was its core business and the area in which the Defendants had proven expertise. In fact, although the Defendants toyed with the idea of the LLP offering fiduciary services (i.e. an advisory service to clients to assist them to choose a hedge fund portfolio for themselves) – which would have made use of their skills – they themselves decided against a proposal in that form, and that was not a proposal that fell to be overruled or voted upon by F&C's representatives on the LLP Board or ManCom. The Defendants concluded that the fees which the LLP could charge for such a service would be very much less than it could charge as the manager of a FoHF business and that to offer such a service would potentially provide clients with a cheaper alternative to investing in the LLP's FoHF products and so could undermine that side of the business. On 20 May 2009 the Defendants' proposal was to offer the services of the LLP to clients to help select a wider range of investment products, but the proposal was not worked up with any significant detail and suffered from the fact that the LLP had no particular skill or expertise in carrying on such a wider investment role. The F&C representatives had good grounds for thinking it would not succeed and that the resources of the LLP should not be wasted on pursuing the idea: see para. [858] below.

(iii) UCITS product

353. Although originally hedge funds and FoHFs attracted investments from sophisticated, high net worth investors, by the mid 2000s there was a trend for them to seek means to tap into the wider investment market. Retail and on-shore sales of investment products within the European Union are regulated by the UCITS Directive, which imposes certain conditions for hedge funds or FoHF products (along with other products) to be marketed for such sales.

354. In 2007, the LLP was actively looking to expand its FoHF business by developing a UCITS product through which shares in its hedge fund portfolio could be sold on-shore within the European Union. F&C and its representatives on the LLP Board did not seek to block this move. The LLP wished to make use of F&C's general knowledge of and expertise in the European investment market to set up a UCITS wrapper for a LLP FoHF product based in Luxembourg, and F&C provided assistance to the LLP in the form of advice and planning to do this. At that stage and as market conditions deteriorated in 2008, the Defendants did not press for such a product to be launched. They revived such a proposal in May 2009, but in circumstances where, again, the F&C representatives had good grounds for thinking it would not succeed and that the resources of the LLP should not be wasted on pursuing the idea: see para. [858] below.

(iv) Hedge fund replication product

355. As with the fiduciary product, the Defendants never produced a worked up proposal for this for the LLP Board or ManCom to consider. As with that product and for similar reasons, F&C's representatives on the Board of the LLP were entitled to conclude that this was not an idea which the LLP should be pursuing: see para. [858]

below. It was too speculative and was likely to be a distraction from the effort the LLP needed to devote to sustaining its core FoHF business.

(v) QFII product

356. In 2008 the Defendants were keen to develop the LLP's business by means of launching a platform to enable the LLP's hedge fund contacts to invest in the Chinese market. To do that a QFII licence would be required from the Chinese authorities. There was some dispute about whose idea it was to develop the LLP's business in this way, turning on conflicting evidence of Mr Mendez de Vigo and the Defendants about what was said at a lunch between them in mid-2008. It is not of great significance in the context of the dispute whose recollection is correct, though I think it more likely that the basic idea originated with the Defendants, who had been discussing the possibility of investment in China on visits to hedge funds based in Hong Kong.

357. The idea of investing in China via a QFII licence was reasonably well known and Mr Mendez de Vigo, who had experience of his own in relation to doing business in China, was receptive to the idea and able to make contributions to it. In practical terms a QFII licence would have to be obtained by F&C, and would not be available to the LLP itself. It would require significant investment of resources by F&C to make an application for such a licence. Therefore, the availability of such a product for the LLP was dependent upon the Defendants persuading F&C that it would be in its interests to assist the LLP to launch such a product. At the outset, Mr Mendez de Vigo and F&C were helpful in providing the LLP with a good deal of assistance to develop the idea for a QFII platform for its business. However, the application for a QFII licence had not yet been made when the severe turbulence in the latter part of September 2008 hit the markets. The QFII licence to be applied for from the Chinese authorities would allow for investment of $500 million. F&C pressed the Defendants for assurances that they would be able to achieve a level of $300 million initial investment from interested hedge funds to whom they had been speaking.

358. There was debate at trial whether it was strictly necessary, according to the relevant Chinese regulations, for the QFII licence to be fully utilised at the outset. On the face of the English translation of the relevant regulations with which I was provided, it did not appear that that was a strict legal requirement. Nonetheless, the making of a full application to the Chinese authorities would take up a great deal of time and effort on the part of F&C and given the importance for any foreign investor of gaining acceptance by the Chinese regulatory authorities (whose confidence in the suitability of a licensee to be allowed a portal into the Chinese market might be undermined if a licence was applied for but not utilised to a very substantial degree), and given that the application was to be made in the name of an F&C entity rather than the LLP itself, I am satisfied that F&C's concern to be assured that the QFII licence would be substantially utilised from the outset was a genuine and legitimate one.

359. It was a concern which became greatly heightened in late 2008 when market conditions meant that it was going to be increasingly difficult to attract investment for any kind of investment products, and many hedge funds were encountering difficulties and suffering substantial losses. At this stage, it is unsurprising that F&C came to press the Defendants for something more than weak words of comfort about the interest of hedge funds to utilise the QFII licence to be sought by F&C for the use of the LLP: see paras. [431]-[436] below. F&C's concerns were genuine and did not

reflect a sudden change of heart based on a scheme to damage the business of the LLP. The LLP had no contractual or other right, as against F&C, to have a QFII set up for its benefit. It was always dependent on persuading F&C that it was a good idea which should be carried forward. In late 2008 the Defendants were unable to discharge that burden of persuasion.

360. The Defendants themselves thought that in late 2008 it was not a sensible time to be launching a QFII product because it was unlikely that hedge funds would wish to invest in it at that time. Accordingly, they did not press F&C to pursue the idea at that stage and the proposal was quietly dropped. The LLP Board was not presented with any final or concrete proposal for a QFII to consider.

361. The QFII proposal was revived by the Defendants in very different circumstances in May 2009, in an undeveloped and speculative form. The F&C representatives on the LLP Board were entitled to find it unpersuasive and to decline to allow the LLP to devote resources in trying to develop it, which they considered would be likely to be wasted: see para. [858] below.

The course of events to the end of 2008

362. In order to understand the many dimensions of the dispute it is necessary to give a chronological account outlining how it came to arise and explaining the directions in which it developed. I do not attempt to deal with every single point of controversy between F&C and the Defendants on the evidence, since that would unduly lengthen this already long judgment to no purpose.

363. Mr Culligan and Mr Barthelemy shared an employment history in investment banking and hedge fund investment. They had become good friends while working together and in 2004 were looking to utilise their skills as FoHF managers by setting up a FoHF business of their own in partnership with an established asset management group. They made approaches to a number of potential partners. Their approach to F&C bore fruit. Mr Ribeiro at F&C was looking to add FoHF products to the range of F&C-branded investment products which F&C could offer to its clients and the Defendants' proposal offered an attractive means for F&C to enter the FoHF market.

364. The Defendants were attracted to F&C because it had a prominent, long-established reputation in the asset management field and a large, well-established institutional client base which trusted the F&C name. They hoped that they would be able to tap into that client base to generate investment in the FoHF products which they planned to launch.

365. The Defendants provided Mr Ribeiro with a detailed business plan for a FoHF partnership proposal which he was able to develop, with their assistance, into a fully worked-up investment proposal for consideration by F&C plc's Execom and Board. Within F&C Mr Ribeiro was the champion of the LLP. It was he who thought it was a good idea for F&C to add F&C-branded FoHF products to its range of products in order to provide additional investment options for its institutional clients and it was he who presented the idea for a partnership with the Defendants, in the form of the LLP, to the decision-makers within F&C. Once the LLP was set up, he was instrumental in persuading F&C's institutional clients to invest in its FoHF products.

366. These are points of significance when I come to consider the Defendants' claims that Mr Ribeiro later sought to close the business of the LLP, in the context of the dispute. In my view, the background makes it unlikely that Mr Ribeiro set out in late 2008 or 2009 to destroy the LLP's business, since to do so would have amounted to an admission of failure on his part. It also helps to explain the intense frustration he felt at that time when the Defendants did not adopt what he thought was a sensible (indeed, in his view, probably the only sensible) approach to enable the LLP's business to survive, by cutting costs significantly by making staff redundant and hunkering down until the economic storm had passed and it could rebuild its fund performance and business again.

367. In Mr Ribeiro's written presentation to F&C plc's Board dated 19 May 2004, which the Defendants had helped him draft, certain points were made about the intended relationship between the LLP and F&C. The LLP would be based in F&C's London offices and established:

> "as a segregated, FSA regulated business but leveraging F&C existing infrastructure and support services (primarily Finance, Compliance, Internal Audit, HR, company secretarial)
>
> * Reporting to F&C Board Executive responsible for Alternative Investments, Corporate governance framework based on, and linked into, F&C's own practices… "

Its distribution and marketing strategy would be based on:

> "Close relationship with F&C: products will be targeted to F&C and [its associates'] distribution channels"

Under the heading "F&C Ongoing Control and Supervision", the presentation stated:

> "Majority control of Board; appointment of COO [chief operating officer] by F&C; regular Board and management meetings; direct reporting line for Risk Manager to the Board.
>
> Oversight provided by F&C Group Compliance and Internal Audit."

368. These were general statements at a high level of abstraction, broadly consistent with the regulatory arrangements put in place and do not cause me to alter my conclusions about the regulatory position and the applicable policies within the LLP: see paras. [115]ff above.

369. F&C plc was persuaded by Mr Ribeiro to invest in the LLP in partnership with the Defendants.

370. On 24 June 2004, heads of agreement were signed pending negotiation of more detailed terms. In November 2004, Mr Ribeiro, with assistance from the Defendants, put together a further written presentation for F&C's Manco regarding the proposal for investment in the LLP. This again contained very general statements about the

LLP being controlled by F&C and using its operational standards. It set out broad parameters for an initial marketing effort by F&C to launch the LLP's products.

371. On 3 December 2004, the Agreement was entered into by the Defendants, Holdings and the LLP. It is a detailed, carefully negotiated document which fully sets out the rights and obligations of the parties to it. The Defendants and F&C each looked to the Agreement as defining their legal relationship within the LLP and neither side accepted, or were bound by, any additional obligations such as are pleaded by F&C: see paras. [21], [181] and [337] above. The Agreement looked forward to the negotiation of the Service Agreement between the LLP and F&C Management Limited (in effect, on behalf of the F&C Group) which came into force on 1 January 2005 and was to run for an initial five-year period with automatic extensions if not terminated.

372. Mr Culligan became Managing Partner of the LLP. Mr Barthelemy became Senior Partner. Mr Ribeiro became the non-executive Chairman of the LLP. They were all members of the LLP Board, ManCom and Compensation Committee. Mr Cole and Mr Johns were appointed, with Mr Ribeiro, as the representatives of Holdings on the LLP Board pursuant to clause 18.2 of the Agreement. Mr Cole was not appointed as a member of the ManCom, but was appointed as the chair of the Compensation Committee. Mr Johns was not appointed as a member of the ManCom at the outset.

373. The staff of the LLP were recruited. Mr Tilson was appointed as its CFO with general administrative duties. He was appointed as a member of the ManCom. He was employed by another F&C company but was seconded to the LLP, which paid his salary and bonus. Mr Sparks was appointed as the LLP's Risk Manager. He also was a member of the ManCom. Mr Pennington was appointed as the LLP's IT manager. Marija Rattigan ("Ms Rattigan") was appointed as a personal assistant to the management team. In due course, Brad Reynolds ("Mr Reynolds") and Andrew O'Hara ("Mr O'Hara") came to be employed, with responsibility for carrying out research tasks.

374. In 2007 Ms Ross was employed within F&C Distribution (which bore her salary and bonus costs) with a view to assisting in the marketing of the LLP's products. She was seconded to work in the LLP's office as a person with specialist marketing experience in relation to FoHFs, who could liaise between the LLP and F&C Distribution to explain the LLP's business and products to the generalist sales representatives working in F&C Distribution.

375. The business of the LLP was conducted without significant incident for more than three years. Substantial investments were made by F&C's institutional clients into the Select Fund, generating a healthy fee income (a significant part of which flowed to F&C under the terms of the Fifth Schedule to the Agreement) and good profits. There were occasional business disagreements – including complaints by the Defendants about the effectiveness of F&C Distribution in marketing the LLP's products and complaints by Mr Ribeiro about the way in which the Defendants ran the Pushkin Fund – but all well within the normal bounds of what one would expect in a business like the LLP.

376. At trial, F&C mounted an attack on the personal manner of Mr Barthelemy in particular, accusing him of intolerable rudeness in his dealings with others. I reject

that criticism. There is evidence that Mr Barthelemy at times had an abrasive manner and could be blunt; but then so could Mr Ribeiro. Mr Barthelemy's general standards of behaviour were not outside the norms to be expected in the business environment in which he worked. As the dispute developed and distrust on both sides grew, relations became strained on all sides, as was to be expected.

377. The LLP was run from a single open-plan office (with an adjoining meeting room and service room) at F&C's London offices. The Defendants and all the staff of the LLP sat in its office, which made for a close working environment. Mr Tilson, who lives in Dublin, negotiated a special arrangement from about mid-2006 whereby most days he worked from F&C's offices in Dublin or from home, coming to the LLP's London office only a couple of times a month for a few days at a time.

378. On 20 October 2006, Mr Tilson sent Mr Ribeiro a confidential e-mail attaching a note he had produced, at Mr Ribeiro's request, "on potential options available to you in respect of changing the status quo" between Holdings as Corporate Member of the LLP and the Defendants as the individual founder members ("the October 2006 confidential note"). In the note, Mr Tilson set out various ideas how F&C might seek to manoeuvre to gain advantage against the Defendants, possibly with a view to acquiring or exiting from the LLP on terms favourable to F&C. He referred to the Agreement and the fact that clause 5.1 provided for the LLP's business to run for at least five years, and set out certain "events" or "initiatives" that could lead to earlier termination of the LLP, including:

> "- the LLP no longer being authorised by the FSA
>
> - the LLP being removed as Manager of F&C Balanced and F&C Select
>
> - the corporate member exercising its call option (could be for a number of reasons as provided for in the fourth schedule – one example being a "Trigger Event")
>
> - early exercise by the founder members of their Put Option (only possible if instigated by the corporate member)
>
> - misconduct of members"

379. Although protesting in the note that these ideas were not his personal preferences, Mr Tilson analysed each of them, pointing out possible ways in which Holdings might be able to engineer a route to acquire or exit from the LLP before the end of its initial five-year period at least cost to Holdings. So, for example, Mr Tilson speculated that changing FSA capital adequacy requirements for the LLP might be used as a route for Holdings to exit the Agreement. In relation to the possible exercise by Holdings of its call option under the Agreement, Mr Tilson set out ideas how Holdings might keep the price payable under the relevant formula at a low level, including by seeking ways to influence revenues and expenses. He noted, "Revenues can be impacted by terminating [investment management agreements] … or perhaps blocking/delaying the current pipeline of business". In relation to potential issues regarding conduct of

the founder members, Mr Tilson pointed out that, despite Mr Ribeiro's objections, both of them "have accepted an appointment as a Director of [the Pushkin Fund]".

380. At trial, counsel for the Defendants were very critical of Mr Ribeiro and Mr Tilson in relation to this document, and with good justification. In setting out these ideas, Mr Tilson acted without any regard for the duty of loyalty he owed the LLP as someone who was its CFO and (in substance) its employee. He also acted in an underhand manner vis-à-vis the Defendants, by feeding ideas to F&C as to how F&C could promote its interests in relation to the LLP to detriment of the Defendants.

381. In his evidence, Mr Tilson sought to defend his actions by saying that he thought he ought to provide the information contained in the October 2006 confidential note because he had been asked by the Chairman of the LLP for ideas how the status of the members of the LLP might be changed, by speculating that perhaps Mr Ribeiro wanted ideas how to control difficult behaviour on the part of Mr Barthelemy at the time, and by emphasising that he did not personally advocate the taking of the steps which he outlined in the note.

382. In my view, these points do not justify Mr Tilson's actions in drawing up and secretly sending the October 2006 confidential note to Mr Ribeiro. In my assessment, Mr Tilson made a calculation where his personal interests would lie if there was some kind of dispute between F&C and the Defendants about the future of the LLP, to the effect that it would suit him better, in terms of likely future employment within the F&C Group, to help Mr Ribeiro and side with F&C in this clandestine manner.

383. Mr Ribeiro's conduct in pressing Mr Tilson to produce the note is also open to serious criticism. I find that (as the terms of the note indicate) Mr Ribeiro had pressed Mr Tilson to breach his duty of loyalty to the LLP and to provide the secret advice to Holdings about how it might find ways to wriggle out of the Agreement. Mr Ribeiro had himself thereby acted in breach of the duty loyalty he owed the LLP as Chairman and (by seeking this information on behalf of Holdings) had caused Holdings to act in breach of its duty of utmost good faith to the LLP under clause 13.6 of the Agreement.

384. Mr Ribeiro explained that he sought ideas from Mr Tilson because F&C was at this time considering whether to seek to buy out the Defendants' interests in the LLP. I do not consider that that provides any justification for his actions, but rather supports the inference that he did ask Mr Tilson to provide ideas as to how the interests of the Defendants in respect of the LLP might be undermined and those of F&C promoted. He did not seek to reprimand Mr Tilson for sending him the October 2006 confidential note.

385. However, the October 2006 confidential note did not lead to any action being taken by Mr Ribeiro, Mr Tilson, Holdings or F&C generally to the detriment of the LLP or the Defendants. In my view, its significance in the context of the dispute is only as an illustration of the willingness of Mr Ribeiro and Mr Tilson to act in this underhand and disloyal manner and to contemplate actions which might harm the LLP and the Defendants.

386. The Defendants tried to make more of it than that. They relied on the suggestion by Mr Tilson in the note, that the LLP's revenues could be affected by action being taken

to block its "current pipeline of business", to bolster their case that, in late 2008, that is exactly what F&C chose to do, by procuring the service of notices by the Dutch institutional investors to withdraw their investments in the Select Fund and then ensuring that those notices were not withdrawn but took effect. In my judgment, however, there were quite different and innocent reasons for what happened in late 2008 in terms of withdrawal of funds from the LLP's FoHF products and it is not possible to infer from the circumstances in which the October 2006 confidential note was produced that the withdrawal of funds in late 2008 was affected by any improper motives on the part of those acting for F&C at that time.

387. In the course of 2007, there was growing friction between the Defendants and F&C IT regarding the service F&C IT provided to the LLP. This spilled over into a serious argument with Mr Ribeiro in late October 2007.

388. In early October 2007, the friction between the Defendants and F&C Distribution also increased. F&C was working on the group budgets for 2008 and Mr Ribeiro sought to check with Mr Mendez de Vigo, as the new Head of F&C Distribution, that he was comfortable with the estimate of £600 million net inflow of investment from institutional clients for the LLP to be included in the 2008 budgets. The LLP had provided this estimate based on figures agreed with F&C Distribution the previous year, before Mr Mendez de Vigo took up his position. Mr Mendez de Vigo queried the figure and wanted to know how much of the projected inflow was supposed to come from marketing efforts by the LLP itself and how much from efforts by his marketing team at F&C Distribution. Mr Barthelemy's response was that most of the contribution was to come from Mr Mendez de Vigo's marketing team, and he emphasised that they needed to push the Dutch clients to invest more in the LLP's products.

389. Mr Mendez de Vigo was not happy to sign up to this estimate of additional investment for the LLP, involving as it did such responsibility for his team to deliver the estimated figure. He complained to Mr Barthelemy that he did not like being surprised in this way (this was not a fair complaint, since it was really down to communication failures in his own department that he had not been fully briefed in good time about these points). Mr Barthelemy pointed out in an unhelpfully brusque manner that the numbers came from a three-year plan agreed with F&C Distribution the previous year, and thereby irritated Mr Mendez de Vigo, who complained about the tone of his response and referred it to Mr Ribeiro.

390. Mr Ribeiro e-mailed Mr Barthelemy to complain about his manner and to warn him about the dangers of his alienating his colleagues within F&C. This was a fair point for him to make, since the LLP had not been very successful in finding clients for itself and was very dependent on Mr Mendez de Vigo's department's efforts in attracting further investment from F&C's Dutch clients.

391. Mr Barthelemy, however, did not make significant changes in his manner of dealing with Mr Mendez de Vigo and remained disdainful of the quality of the marketing team at F&C Distribution and quick to complain about their failures to drum up yet more business for the LLP. The LLP had contractual rights against F&C in relation to marketing its products and I think Mr Barthelemy calculated that, by being a difficult and demanding customer, the LLP could get better service and could press for advantage in the competition with other F&C products for the attention of F&C

Distribution to adopt the LLP's products to be promoted as "front foot" products with the Dutch institutional clients.

392. This was a legitimate business strategy for the Defendants (in particular, Mr Barthelemy) to adopt. In particular, in relation to the spat with Mr Mendez de Vigo in early October 2007, Mr Barthelemy was justified in feeling a measure of irritation that Mr Mendez de Vigo was unaware of what had been going on in his own department. However, with the benefit of hindsight and standing back from the detail, I think it is fair to say that it may not have been an altogether wise strategy for Mr Barthelemy to pursue. The effect of it was to erode the extent of the goodwill which Mr Mendez de Vigo and F&C Distribution felt towards the LLP.

393. Since the LLP was unhappy with the e-mail service being provided by F&C IT, in July 2007 it took steps to set up an external e-mail service based on the domain name "fandcpartners.com". Mr Pennington contacted Mr Apfel of F&C's Legal Department ("F&C Legal") to make the relevant arrangements to configure that domain, which F&C Legal duly did.

394. At an LLP Board meeting on 24 October 2007, a row developed between the Defendants and Mr Ribeiro concerning the reactions of the Defendants to e-mail mailbox limits imposed by F&C IT (see paras. [542]-[544] below). This strained the goodwill of Mr Ribeiro towards the Defendants.

395. The next LLP Board meeting, on 20 November 2007, addressed Mr Ribeiro's concerns relating to Mr Barthelemy's interaction with F&C personnel, particularly Mr Mendez de Vigo and people working in F&C Distribution. Mr Culligan backed Mr Barthelemy. An uneasy compromise was arrived at:

> "It was agreed that, whilst F&C Partners should continue to demand the highest standards of service from within the various F&C Group functions, Mr Ribeiro should not expect to receive further representation from colleagues regarding Mr Barthelemy's verbal behaviour. Mr Ribeiro further requested that F&C's sales team be treated as clients of F&C Partners."

396. In December 2007 there was some discussion between Mr Ribeiro and the Defendants regarding the possibility of F&C buying out their interest in the LLP, but it came to nothing.

397. By early 2008 the investment performance of the LLP's funds had begun to slip: see para. [161] above.

398. In March 2008, F&C Strategy produced a paper arguing for a move to "a credible fiduciary offering to retain Dutch clients", by F&C being prepared to offer advice to those clients to invest in non-F&C products where appropriate, i.e. a form of open architecture advisory arrangement. F&C Strategy and F&C Distribution feared losing clients if they could not shift to this advisory model, since clients might lose patience with F&C if they felt that F&C was advising them to invest in a range of F&C

products which were underperforming by comparison with other products in the market.

399. On 6 March 2008, Mr Niven e-mailed Mr Barthelemy to alert him to the fact that there was pressure on F&C to provide fiduciary advice to clients covering both F&C branded products and external products and asking for information to support a credible argument with prospective clients that the LLP's FoHF products were better than those of other potential providers. Mr Barthelemy was away travelling and could provide only limited information.

400. By e-mail of 7 March 2008, Mr Niven informed Mr Barthelemy that F&C was under pressure in relation to the recent performance of the LLP's products and would probably have to propose some external FoHF providers to clients alongside the LLP's products. This drew a typically brusque response from Mr Barthelemy: "You are shooting yourself in the foot". He did not provide Mr Niven with information or arguments which might justify F&C not referring to external FoHF providers when advising clients.

401. At about the same time, Achmea issued a request for proposals ("RFP") for an FoHF investment, which was circulated to Mr Barthelemy. Problems arose regarding the co-ordination between Mr Barthelemy and F&C Distribution in relation to this RFP, and although the LLP did a significant amount of work to satisfy Achmea's requirements, the business eventually went elsewhere. By April 2008, the year to date performance of the Select and Balanced Funds had deteriorated still further and this probably contributed to Achmea's decision not to place this business with the LLP. The problems of co-ordination created further friction between Mr Barthelemy and F&C Distribution.

402. By e-mail dated 11 April 2008, Mr Ribeiro complained about the lack of co-ordination between the LLP and F&C Distribution, emphasised that the distribution team managed the relationship with the client and called for the LLP to furnish F&C Distribution with a statement of reasons for investing in its products, notwithstanding their poor performance at that stage. Mr Ribeiro reiterated this requirement at a ManCom meeting on 15 April 2008.

403. In an e-mail of 24 April 2008 from Mr Mendez de Vigo to Mr Ribeiro, Mr Mendez de Vigo emphasised that the poor results of the LLP funds could make it difficult to hold on to existing clients.

404. At an LLP Board meeting on 21 April 2008 the ongoing issue of e-mail provision was noted (see para. [547] below); there was a difference of view on the Board regarding how a client should be classified for the purposes of the fee distribution under the Fifth Schedule to the Agreement and a vote was taken, on which the Defendants were outvoted by the majority on the Board; in-flows of investment from the Dutch clients as a result of F&C Netherlands' efforts were noted; the Board reviewed the deteriorating performance of the Select and Balanced Funds; they approved the launch of the new Credit Alpha Fund and Mr Johns' continued appointment as a "non-executive director" of the LLP with effect from 1 May 2008 was confirmed.

405. In mid-May 2008, F&C Netherlands, who had an upcoming meeting with a major client, pressed Mr Barthelemy directly for an explanation of the LLP Funds'

performance. Mr Barthelemy offered to come to meet the client, but F&C Netherlands could not accommodate that because there was already a crowded agenda and again asked to be provided with an explanation that they could present to the client. Mr Barthelemy arranged for Ms Ross to respond, effectively by summarising the LLP's monthly fact sheets and by blaming the losses on "irrational market prices". F&C Netherlands responded that the explanation did not provide sufficient substance to persuade clients.

406. At the Board meeting of the Balanced Fund on 24 April 2008, the Board voted to set up the Credit Alpha Fund. The first Board meeting of the Credit Alpha Fund took place on 27 May 2008. The Credit Alpha Board resolved that Credit Alpha "should capitalise and amortise the organisational and offering expenses [i.e. the set-up costs] for 60 months". These set-up costs, or a part of them, were to be charged by the Balanced Fund to the LLP under an arrangement set out at para. [430] below.

407. At the LLP's ManCom meeting on 26 June 2008, the poor performance of the Select and Balanced Funds was again noted and Mr Ribeiro asked Mr Barthelemy to contact Mr Mendez de Vigo to set up a conference call to brief F&C Distribution about the performance of the funds. In the event, due to summer holidays and so forth, this exercise was postponed until Mr Barthelemy attended a conference with F&C Netherlands' sales team in Holland on 8 September 2008.

408. In about July 2008, the Defendants decided that the Balanced Fund should submit a significant number of redemption requests to withdraw its investments from a range of underlying hedge funds at the end of the relevant three-month notice period in each case. The reason the Defendants decided on this course of action was that they felt the market was getting more turbulent, that some hedge funds would be likely to want to increase their liquidity by selling investments in their funds cheaply in the latter part of the year, and it might be possible for the LLP funds to pick up some bargains by reinvesting in hedge funds at that stage.

409. In the event, because of events from September 2008, the LLP was not in a position to carry that plan into effect. It needed to use the cash it realised from its redemptions to satisfy redemption notices served on it by its Dutch institutional clients. The Defendants sought to suggest that F&C caused those clients to serve those notices in order to damage the LLP and drive it out of business. As appears from this judgment, I reject that case.

410. To counter that suggestion F&C, for its part, sought to argue that the Defendants' suggestion was disproved by the fact that they caused the LLP to serve these redemption notices of its own in July 2008. It may be noted in passing that that argument is not correct either, since the LLP and the Dutch clients had very different reasons for serving their respective redemption notices and the position in each case was not equivalent.

411. On 8 July 2008, Mr Kramer sent Mr Mendez de Vigo an e-mail reviewing the overall performance of the portfolios of the Dutch institutional clients who were F&C discretionary clients (i.e. the ex-PVF clients and Achmea GBD clients) and expressed concern about how the client base had been "severely hit" by performance in certain asset classes, including F&C's FoHFs and single strategy hedge funds. Mr Kramer pressed Mr Mendez de Vigo to open this area up for recommendation of external

providers as part of a shift of F&C strategy to a fiduciary service for clients (i.e. to move to open architecture relationships with the clients). Mr Mendez de Vigo took that proposal forward within F&C. There was resistance within F&C against the move towards open architecture relationships with its clients (since it would be likely to lead to lower AUM across a range of F&C funds and hence lower overall fees for F&C); but the risk of losing the confidence of clients (and hence of losing the clients altogether) was thought to be too great and eventually, in August 2008, the decision was taken to move in the direction of open architecture relationships with clients (paras. [422]-[423] below).

412. Meanwhile, on 9 July 2008, a member of the F&C Netherlands sales team (Mr Redeker) e-mailed Mr Niven, Mr De Groot and Mr Kramer to note the disappointing performance of the Select Fund and that the Dutch clients and investment consultants were losing faith in F&C's FoHF capabilities, and asking whether the clients could be offered an external FoHF product as an alternative. This was the sort of pressure upon F&C Netherlands about which Mr Niven had warned Mr Barthelemy in March 2008.

413. The next day Mr Redeker e-mailed Mr Barthelemy (copied to Mr Kramer) to register that returns from the Select Fund were lagging behind its performance targets and were lower than F&C's competitors and asking for a strong presentation of the LLP's explanation for that performance and positive reasons to stay invested in its products. Neither Mr Redeker nor Mr Kramer copied to the Defendants Mr Redeker's previous e-mail requesting permission for F&C Netherlands to offer clients' external FoHF products. I do not think that this was unreasonable. Mr Barthelemy had already been put on notice by Mr Niven of the risk that that might happen and at that stage no decision had been taken by F&C to move to that model of client relationship. The matter remained under consideration within F&C. Within F&C, the LLP's FoHF products were not being singled out for special treatment, but were considered alongside other problematic F&C products where F&C's clients were dissatisfied with their performance (including, in particular, F&C's single strategy hedge funds). Meanwhile, F&C felt that the Defendants were not doing a good job in presenting a strong case for the LLP's products.

414. On about 16 July 2008, Mr Barthelemy and other F&C fund managers made presentations to the sales team at F&C Distribution. The feedback from the team was critical of Mr Barthelemy's performance.

415. On 21 July 2008, Mr Ribeiro e-mailed the Defendants as follows:

> "Francois,
>
> I have been getting feedback from the presentations on Wednesday. People were quite upset with the fact that, despite poor numbers, there was no written paper from you. This became even more noticeable because yours was the only one missing.
>
> An additional comment was that actually despite what seemed to be quite a forward looking presentation, it was felt as rather defensive. I must confess I have seen you doing much better.

> I fear the above plus client pressure account managers have had to face has put the business further at risk. As a small piece of evidence, I have had a couple of calls of people willing to simply redeem or asking me to find suitable alternatives.
>
> I wouldn't be surprised if a wave of redemptions is received."

416. At trial, Mr Ribeiro was pressed in cross-examination on this e-mail, to the effect that F&C was, in reality, threatening the LLP with a wave of redemptions since F&C was the discretionary manager for most of the Dutch clients invested in the Select Fund. I reject that suggestion. In my judgment, Mr Ribeiro was not making a threat but an (accurate) prediction, based upon the LLP's poor performance and the weakness of the case for investing in its products which had been presented by Mr Barthelemy. I find that there was no attempt by Mr Ribeiro to influence the behaviour of the F&C Netherlands personnel who advised or exercised discretionary management functions for F&C's Dutch institutional clients, so as to induce them to issue notices of redemption from the Select Fund. F&C Netherlands' advisory team took those decisions for legitimate business reasons, based on their own judgment of how best to proceed in the interests of their clients, in order to provide their clients with freedom of manoeuvre at a point where the LLP funds' performance had been poor, the market was unsettled and it remained to be seen whether their performance would improve over the three months before the redemption notices took effect (so that clients might be persuaded to remain invested in them).

417. At an LLP Board meeting on 22 July 2008, the Defendants reported that there had been a £30 million redemption in relation to the Pushkin Fund and that "further redemptions should be expected across all funds". Mr Ribeiro expressed concern about the under-performance of the LLP's funds and about the impact that would have on the LLP's and F&C's reputation. He also informed the Board:

> "that given the disappointing performance of the Balanced and Select Funds he would not rule out a significant wave of redemptions unless the start of the turnaround could be evidenced."

Again, this was, in my view, a comment made in good faith with good justification in the circumstances.

418. On 29 July 2008 Mr Niven met Mr Barthelemy to discuss the performance of the Balanced and Select Funds. Mr Niven accepted that it had been the decision of F&C Strategy team at the outset to choose to recommend the Select Fund for institutional clients to invest in. Mr Barthelemy recommended that clients with a low risk appetite be switched from the Select Fund into the Balanced Fund, but Mr Niven said that he preferred to wait until the year end to see what would happen. It is likely that at this meeting Mr Niven again mentioned, in line with his e-mails in early March, that F&C was probably going to have to move to an open architecture form of relationship with its clients.

419. In mid-2008, work was proceeding on putting together the QFII proposal which was to be put to F&C's Execom in late August 2008 for a decision whether to proceed with it. Mr Barthelemy had responsibility within the LLP for reviewing F&C's work on the proposal. The quota to be applied for was $500 million with an initial take-up of $300 million proposed.

420. By e-mail dated 5 August 2008, Mr Mendez de Vigo sought a statement from Mr Barthelemy that he was convinced, on the basis of discussions with his potential hedge fund clients in relation to the QFII project, that he could bring in clients to contribute the $500 million investment to be asked for as the quota under the proposed licence.

421. This was followed up by an e-mail dated 8 August 2008 from a member of the F&C QFII team, stressing that information was urgently required from the Defendants about the support which could be expected from their hedge fund contacts. Mr Mendez de Vigo chased for information again on 18 August. Mr Barthelemy responded to say that he and Mr Culligan were happy to make a statement and asking, since they were travelling, whether they should call in to speak to the Execom meeting which was to consider the proposal. Mr Mendez de Vigo asked for a written statement, so as to be as clear and precise as possible in view of the importance of this issue. In the event, no suitable written statement was forthcoming, so eventually F&C decided not to pursue the QFII application as a vehicle for business for the LLP.

422. Meanwhile, an important meeting took place on 20 August 2008 between Mr Ribeiro, Mr Mendez de Vigo, Mr Jacob de Witt and Mr Kramer, at which the senior F&C management gave their approval for F&C Netherlands to move to an open architecture form of relationship with the Dutch institutional clients, in line with the approach F&C Strategy and F&C Distribution had been pushing for and about which Mr Niven had forewarned the LLP in March and July 2008. F&C Strategy and F&C Netherlands were given clearance to give advice to their clients and take fiduciary investment decisions under the portfolio mandates for those clients to include non-F&C investment products where they were assessed to be superior. In the language used at the meeting, there were to be no "sacred cows" (i.e. no special treatment for F&C products).

423. It was also agreed that the immediate focus under the shift of approach should be on F&C's GTAA hedge fund and the LLP's FoHF products. The F&C Strategy teams in London and F&C Netherlands were to be given free rein to construct, or advise on the construction of, client portfolios for the coming year to include, as judged appropriate, non-F&C competing investment products in these areas. Where the F&C Strategy teams recommended reallocation from F&C-branded products, that was to be implemented for the whole range of clients. In order to give the F&C Strategy and Distribution teams the flexibility to reallocate from F&C hedge fund and FoHF products to external or other products, as part of the thorough-going review of client portfolios which was to be undertaken, it was agreed at the meeting that notices of three months for redemption from the F&C hedge fund and FoHF products should be put in place and that actual execution of the notices should depend on the results of those products over the coming months. If their results improved and the F&C Strategy and Distribution teams decided the existing allocation in their clients' portfolios should remain, they could simply withdraw the notices. As Mr Kramer

noted in an e-mail to the F&C Netherlands sales team, if this new approach implied "shutting down a fund (e.g. GTAA), we will bear the consequences".

424. It was the Defendants' case that at this meeting Mr Ribeiro directed that redemption notices should be put in for clients invested in the Select Fund, contemplating that that might well lead the LLP's funds to have to close, and that he did so as part of a design to damage the LLP.

425. I reject these contentions. The shift to open architecture arrangements with clients was driven by growing pressure from the Dutch clients themselves, to which F&C felt it had to respond or risk losing those clients. The shift was not directed at the LLP's FoHF products specifically, though their poor performance was, along with the poor performance of certain other F&C products, one reason the pressure for change from the Dutch clients had been growing. The question of whether the Dutch clients should remain invested in the LLP's products and other F&C branded products was agreed at the meeting as something to be left for the judgment of F&C Strategy, and Mr Ribeiro did not seek to direct them how to behave. The decision that redemption notices should be put in for F&C-branded hedge fund and FoHF products was a natural consequence of the shift to open architecture relationships with clients, since the giving of such notices with a three month period before they could take effect was a necessary pre-condition for the F&C Strategy and Distribution teams to have the flexibility to be able to reallocate the monies invested in those F&C products into external products for the investment plans to be discussed with clients for 2009, if judged appropriate, when the notices expired. The decision at the meeting that F&C Strategy should be free to recommend the putting in of redemption notices was not motivated by any scheme to deprive the LLP of business in order to damage it. The shift to an open architecture relationship with clients was one which was, as between F&C and the LLP, allowed by the discretion in marketing matters reserved to F&C under clause 13.7 of the Agreement.

426. This assessment of the factual position is powerfully reinforced by the evidence of Mr Kramer and Mr De Groot, to the effect that when decisions came to be made from late August 2008 into November 2008 whether to put in redemption notices for the Dutch clients, it was they who took the decisions (or, in the case of the Achmea own risk portfolios, Achmea itself which decided) without being directed to do so by Mr Ribeiro. They took those decisions in good faith for commercial reasons to do with providing the best advice and investment strategies for the clients and were not motivated by any plan or desire to damage the LLP.

427. At a meeting of the LLP's ManCom, also on 20 August 2008, Mr Ribeiro stated that given the performance of the LLP's funds, "he saw the business [of the LLP] at significant risk and he could foresee a wave of redemptions". The Defendants called attention to this to suggest that Mr Ribeiro had in mind to cause redemption notices to be put in on behalf of clients in order to threaten the LLP's business. Again, I do not accept that suggestion. In my view, Mr Ribeiro merely called attention to the rather obvious fact that since the LLP's funds were performing badly, there was a serious risk that decisions would be taken by clients to pull out of those funds which could, in turn, threaten the viability of the business. This was not a new point, and Mr Ribeiro's comment does not support the Defendants' case that F&C had a scheme to damage the LLP.

428. I think that Mr Ribeiro is open to criticism in that he did not tell the Defendants, the LLP Board and the ManCom about the meeting of F&C senior management that day and about the decision to authorise F&C Strategy and F&C Netherlands to proceed with open architecture arrangements with clients, which was a decision that would be likely to increase the risk that redemption notices would be served in relation to the LLP's funds: see paras. [251] and [258]-[259] above. I think that he stayed quiet about that and confined himself to the more general statement, quoted above, out of a fear that to be more explicit at that stage might provoke anger and antagonism from the Defendants and put strain on relations between the LLP and F&C at an increasingly difficult time. I do not consider, however, that this was a reason which justified his suppressing information about the meeting of 20 August, which was of considerable potential significance for the business of the LLP.

429. However, I do not think this omission had a material effect on the course of events. The LLP was already on notice from Mr Barthelemy's exchanges with Mr Niven earlier that year that investment in its products was at risk because of the possibility of competition from external products which F&C's Strategy and Distribution teams might feel duty-bound to recommend to clients and the LLP already knew that retention of clients would be at risk if the performance of its products did not improve (and see para. [259] above).

430. In an e-mail dated 25 August 2008, Mr Tilson for the LLP confirmed the arrangement in relation to how the Credit Alpha Fund launch costs should be borne. The LLP agreed to reimburse the Balanced Fund for those costs to the extent that the Balanced Fund remained the only shareholder in the Credit Alpha Fund. The position was to be reviewed annually and an annual reimbursement payment was to be made based on the Credit Alpha Fund shareholder register. Mr Tilson recorded that the intention was to review the position over a 60-month period (that being the period specified in the Credit Alpha Fund offering memorandum for the amortisation of launch costs). The logic behind this arrangement was that if the Credit Alpha Fund managed to attract new investors – as it was hoped it would – the launch costs would be shared with them.

431. By 26 August 2008 Mr Mendez de Vigo had not yet received a document from the Defendants setting out assurances as to the amount of support they could garner from hedge fund contacts for the QFII project and was chasing for it. The F&C Execom meeting at which a decision was to be taken whether to carry the project forward was scheduled for the following day.

432. Later on 26 August, Mr Barthelemy provided an e-mail containing a very weak statement regarding support from potential investors for the QFII project, as follows:

> "As we speak Anthony and I think there is a good chance of extracting value from a qfii facility and we believe it is worth going for. We are happy to state that to your meeting tomorrow if you want us to. Right now the china a share [sic] market has been beaten down a fair amount, which has taken some interest away so the price might be lower than a year ago, but if you believe in the long term standing of the Chinese market then it will work out fine."

433. This was not remotely satisfactory from F&C's point of view. Mr Mendez de Vigo responded to the Defendants, "Guys, this is hardly enough". Therefore, the Execom meeting did not proceed to consider the QFII matter on 27 August. Instead, in mid-September, Mr Mendez de Vigo sought to enlist Mr Ribeiro to put pressure on the LLP to provide better supporting information.

434. On 12 September 2008, Mr Mendez de Vigo e-mailed Mr Ribeiro asking for his help in relation to a clear commitment from LLP Partners to locate investors for the QFII project, for which an application was due to be submitted to the Chinese authorities on 30 September. As Mr Mendez de Vigo observed:

> "Without a stronger view, based on discussions with potential investors, I feel very uncomfortable with submitting this application, as we cannot afford getting the quota and not filling it."

He complained about a lack of responsiveness by the LLP to queries and asked Mr Ribeiro if he could intervene to press the Defendants for a firm response. Absent that, he indicated that the LLP would have to be replaced on the QFII application with other F&C businesses which could deliver the required level of investors. There appeared to be no developments, so on 22 September 2008 Mr Ribeiro forwarded the e-mail to the Defendants in an attempt to provoke a response.

435. By 29 September 2008 F&C's QFII team was nearly ready to make the application to the Chinese authorities but was still being held up by the absence of a suitable letter from the Defendants regarding underlying support from their hedge fund contacts. The team noted that after the collapse of Lehman Brothers in mid-September the prospects of raising investment from potential hedge fund investors had worsened, and returned to the idea of looking to other sources to raise the $300 million required to fulfil F&C's initial quota.

436. Mr Ribeiro pressed Mr Culligan on the question of hedge fund investor support for the QFII project, which prompted him to e-mail Mr Mendez de Vigo on 30 September to say that he had resolved to push ahead with more vigour. However, by 7 October nothing had been forthcoming and Mr Ribeiro and Mr Mendez de Vigo agreed that in light of the state of the hedge fund and FoHF industry at that point support for the project was unlikely to be forthcoming from that source, so the QFII opportunity would be withdrawn from the LLP. This was a decision taken in good faith for legitimate reasons. The Defendants had been given a fair opportunity to satisfy F&C that they could drum up sufficient investor support to make the venture worthwhile for F&C, but had been unable to do so. The LLP had no special rights in relation to the QFII project. In fact, the Defendants' assessment about the difficulties of raising investor support from their contacts at this time was similarly pessimistic, and they did not continue to press for the involvement of the LLP in the QFII project at this stage. F&C was left to develop the project in other ways without the Defendants' assistance.

437. Meanwhile, by e-mail dated 29 August 2008 Mr De Groot gave Mr Niven notice that he was proposing to send the LLP an e-mail explaining that redemption notices in

relation to the Select Fund were to be sent on behalf of his Dutch institutional clients, whom he described as being "in a perfect storm" in terms of the poor performance of their general portfolios. Mr Niven asked for time to discuss this with Mr Ribeiro. Mr Ribeiro, as Head of Investments for F&C, had an interest in having oversight regarding major changes to clients' investment portfolios.

438. Mr Niven drafted a lengthy e-mail to Mr Ribeiro to explain the position to him, so as to alert him to this latest development in relation to a more general picture of "the fire-fighting which is ongoing in terms of client retention" in the Netherlands. Mr Niven summarised the state of play as follows:

> "In short, it is fair to say that we have a serious situation with regard to the NL balanced clients as a function of total fund level underperformance vs benchmark. This underperformance has some areas of focus (FoHF, GTAA, credits) but is widespread. Indeed, for some clients it is clear that we have been systematically underperforming not just for some quarters but we have lost value over a number of years. Patience has worn very thin and the clients are close to losing confidence in us completely. … we are close to the end game with a number of significant NL accounts…"

439. In the event, however, Mr Niven reflected on Mr De Groot's e-mail and e-mailed him that he did not in fact feel that he did need to alert Mr Ribeiro to it before it was sent, since he believed "FR [Mr Ribeiro] is aware that this will happen already" and there was no need for more discussion. This comment simply reflected the effect of the previous discussions within F&C about the implications of a move to open architecture relationships. Mr Niven concluded the e-mail, "Francois [Mr Barthelemy] will now be after my blood", recognising that the Defendants would be upset at the risk this move might pose for the continuing profitability of the LLP.

440. The Defendants sought to suggest that these e-mails showed that Mr Ribeiro was involved in the decision by F&C Netherlands to send redemption notices in relation to the Select Fund. I reject that suggestion. I accept the evidence of Mr De Groot and Mr Niven that he was not. These e-mails support their evidence, in that they show clear contemporaneous reasons on the part of F&C Netherlands and F&C Strategy why redemption notices should be sent and a process of decision-making within F&C Netherlands based on the assessment by F&C Netherlands regarding their clients' best interests without involvement by Mr Ribeiro (Mr De Groot did not even ask for Mr Ribeiro to be informed of what was to happen, notwithstanding its significance – it was Mr Niven who wanted to alert him, but then decided it was unnecessary). It is also significant that in his e-mail to Mr De Groot, Mr Niven thought that Mr Barthelemy would be after his (Mr Niven's) blood, since it was he who bore the responsibility for the redemption notices which were now to be sent.

441. On 1 September 2008 Mr De Groot sent his "perfect storm" e-mail to Mr Tilson for the LLP (copied to Mr Niven and Mr Ribeiro) as follows:

> "Brian,

> This e-mail is to inform you about the following:
>
> Our clients are currently in a perfect storm. Their solvency has been hit by beta and alpha across the board and as a consequence actions are inevitable. We have to take action on many fronts and one probable area is the F&C select alpha fund. Last 12 month return according to my information is -16% and on the longer horizon the fund is struggling to reach its own targets. I know discussions on the required steps have already taken place in London. To be able to act in a flexible manner when Dutch clients have to decide on their annual investment plan I hereby announce that redemption forms will be filled in. These will probably be sent to you following the normal process in September. What will happen during the decision quarter Q4 remains to be seen but given current performance and sentiment at our clients some clients will definitely sell the current exposure."

442. On 2 September 2008 Mr Ribeiro e-mailed Mr De Groot to inform him about the procedure that needed to be followed to put in the redemption notices for 15 September (rather than later in September, as Mr De Groot was proposing), but recognizing the possibility of withdrawing them before the end of 2008 if so decided. Mr Ribeiro pointed out that if Mr De Groot waited until later in September, the clients would miss the quarterly contractual date for giving notice in September and would be unable to withdraw their funds until April/May the following year. Contrary to the suggestion of the Defendants, there was nothing improper in Mr Ribeiro sending this e-mail. In my view, given the decision (of which Mr De Groot had informed him) to withdraw funds from the Select Fund, it was plainly appropriate that Mr Ribeiro – having regard to the clients' interests – should correct an error which Mr De Groot appeared to be making and provide him with accurate information as to the process which ought to be followed to give effect to that decision.

443. On 2 September 2008, a LLP ManCom meeting took place, attended by Mr Ribeiro, Mr Sparks and Mr Tilson. The Defendants were away travelling. The poor performance for the Balanced and Select Funds in August and during the year to date was noted. The indications of potential redemptions were noted, and Mr Ribeiro emphasised that there should be no direct contact by the LLP with clients – all communication should be via the responsible F&C account managers.

444. Although the Defendants were critical about this stance by Mr Ribeiro, it was in my judgment a legitimate position for him and for F&C to adopt. As had been noted by Mr Niven, F&C (and F&C Netherlands in particular) were fire-fighting in relation to a general wave of dissatisfaction on the part of F&C's Dutch institutional clients, which was not simply focused on the performance of the LLP funds. The poor performance of those funds was part of a bigger picture in relation to the clients' investment portfolios which the Defendants were not aware of and which the dedicated account managers within F&C Distribution were best placed to understand and deal with. Also, it was the F&C account managers who were known to and had the confidence of the clients, as people looking to give advice in the best interests of the clients rather

than simply to act as salesmen for some particular F&C product or other (as the Defendants would likely have been perceived). Mr Ribeiro's requirement on behalf of F&C that communication with clients should all be channelled through the responsible F&C account managers fell within the discretion of F&C as to the conduct of marketing in relation to the LLP's funds, as set out in clause 13.7 of the Agreement.

445. After a first draft of the minutes of the ManCom meeting were circulated, Mr Ribeiro asked for an addition to record that he had said:

> "…that in his mind, given current performance, the business was at considerable risk and if material redemptions were received the Committee would need to carefully consider the future course of action."

446. The Defendants were also critical of this statement, as suggesting some kind of threat by Mr Ribeiro. In my view, this is not borne out by the evidence. The statement did not constitute a threat by Mr Ribeiro that the business of the LLP should be regarded as at risk; rather, in light of the wave of redemptions expected imminently from the Dutch institutional clients, this was an unobjectionable statement of the obvious by Mr Ribeiro. Indeed, at about the same time, Mr Culligan himself was drafting a strategy review for the LLP which included the statement:

> "Going into the year end, we expect hedge funds will suffer a significant sell off as fund of funds put in their year end redemptions. We have received significant redemptions from the Select Fund investors and expect that a number of our competitors have also received large redemptions. Hedge funds are likely to be a smaller, more niche asset class going forward."

447. On 8 September 2008 Mr Barthelemy attended a meeting with the F&C Netherlands' sales team to explain the poor performance of the LLP's funds and furnish them with reasons why clients should remain invested in them. He recommended that clients remain invested in the Select Fund if their risk appetite remained unchanged; otherwise, he recommended a switch of investment into the Balanced Fund and also floated ideas of creating a hedge fund index tracker or creating individual tailored hedge fund portfolios. It does not appear that the sales team was persuaded by any of this.

448. The same day, Mr Barthelemy had a meeting, alongside Ms Ross and a representative of F&C Netherlands, with Mr van den Heuvel of Achmea to address the same topics. Mr van den Heuvel was sceptical about how the LLP's products compared with those of other FoHF providers and about the small size of the LLP's FoHF team compared with other FoHFs. Whilst indicating that Achmea potentially remained interested in FoHF-type products, Mr van den Heuvel would only respond to the question whether Achmea was planning to take money out of the LLP's FoHFs by saying that would

depend both on events at the LLP (probably meaning the performance of the LLP's funds in the months to come) and the decision of the Achmea Board. In broad terms, Achmea's position was equivalent to that adopted by F&C Netherlands on behalf of the ex-PVF clients, being critical of the poor performance of the LLP's products whilst also adopting a wait-and-see approach to see if it would improve. The same logic which led to protective redemption notices being put in for the ex-PVF clients to give them flexibility and the ability to exit promptly from the LLP's products if performance did not improve in the following few months led to the Achmea GBD and Achmea own risk clients putting in their own protective redemption notices.

449. On 9 September 2008, an important new chapter in relations between the Defendants and F&C opened. F&C commenced the preparation of group-wide budgets for 2009 and sought relevant assumptions and projections from all business units in the group, including the LLP. On 15 September 2008, Mr Tilson set out for Mr Culligan the figures for AUM and fees (reflecting reductions due to the redemption notices) and running expenses (to match those in 2006, 2007 and 2008 at about £1.1 million), which he proposed using in the budget for the LLP.

450. On 10 September 2008 Mr Mendez de Vigo e-mailed Mr Ribeiro with thoughts about F&C's problems in the FoHF arena, in particular since it appeared that the Select Fund would not be able to recover within a reasonable time to meet its performance objectives. He wrote:

> "While none of the available vehicles is currently competitive, we could argue that the Balanced Alpha fund is not "that bad" compared to its peers and can still recover. The main difference between both funds, leverage, has obviously not worked in positive months and has gone against clients in negative months.
>
> We may suggest to clients a switch from Select to Balanced with an increase on the high water mark to recover the amount lost before we charge performance fees. This may be seen as a sweetener to avoid clients forcing us to accept third party providers. We would then close Select and try to launch new product.
>
> What do you think?"

This was a genuine attempt by Mr Mendez de Vigo to review the position of the LLP and make proposals designed to safeguard its business.

451. Mr Ribeiro responded by e-mail as follows:

> "With the current information, looks sensible. Nevertheless I think this needs to be incorporated in the investment plan in a clear and well articulated way and we need structured approach, before account managers start shooting in all directions: I will have to put Paul [Niven] and Michel de Groot willingly on the case, as I don't think they will be in agreement. This also requires us to negotiate with the Partners in two

> fronts: a) the high watermark affects them and I don't want us to be forced to pay the partnership after agreeing with clients, because Partners decide to disagree and b) we may take the opportunity and say, as I had it written down in minutes, that the business is in such a risk that we are considering closing it down. We may do a very last effort, but we are unwilling to give partners a free ride, so we want an additional stake in the partnership plus change a few articles of our terms of agreement. …"

The e-mail indicates that Mr Ribeiro was not seeking to damage the LLP, but at the same time he was on the look out for opportunities to re-negotiate the Agreement to F&C's advantage at a time when the LLP's business was under stress.

452. It should also be noted in this chronological account that 15 September was the date on which Lehman Brothers went into administration. After that, world equity and bond markets entered a period of major turbulence and dramatic falls.

453. On 16 September 2008, a LLP ManCom meeting took place attended by Mr Ribeiro, Mr Culligan, Mr Sparks and Mr Tilson. The ManCom referred to the continuing poor performance of the Balanced and Select Funds; the healthy liquidity position of both funds supported by redemption orders the Balanced Fund had placed in the middle of the year in relation to a significant part of its underlying hedge fund portfolio; the significant redemption orders received for the Select Fund; and the possible need to communicate with the directors of the Funds and to consider the impact on the clients who remained invested in the Funds.

454. The position of the LLP was discussed at a meeting of F&C's Execom at about the same time. On 17 September 2008, Mr Ribeiro e-mailed Mr Logan to say:

> "For info. This business is at significant risk as per my comments at an Execom meeting. If performance doesn't improve, we may see a wave of redemptions that would put in question the viability of F&C Partners."

455. On 19 September 2008, Mr Tilson submitted the first draft of the LLP budget to Ms Bomba, who was co-ordinating the production of F&C Group budgets. The LLP budget reflected redemption notices received to that time and assumed no new business for 2009.

456. On 24 September 2008, following on from a preliminary meeting with Mr Barthelemy and Ms Ross at the LLP's offices on 10 September to discuss the LLP, Mr Lyne sent Ms Ross an e-mail to report on his contact with a firm of independent investment consultants. This contact had consisted of a general discussion about FoHF products with the following comment made about the LLP:

> "Re our product, he said that there was 'nothing wrong' but no clear USP [unique selling point]. Felt team and resources were 'slight' in comparison to the competition. We need to think

> about how we position our capabilities, and emphasize our key strengths."

457. On 24 September 2008, Richard Watts of F&C Strategy e-mailed Mr Ribeiro to say that he had been asked to advise Achmea whether it should put in redemption notices for "a contingent withdrawal of funds" in relation to the Achmea own risk accounts, as had already been done for the ex-PVF clients and Achmea GBD clients. Mr Watts asked for Mr Ribeiro's guidance how to proceed (in particular, if he advised Achmea to proceed with redemptions, he was concerned whether, by extension, F&C Strategy would then have an obligation to give the same advice to Friends Provident, who also invested with the LLP). Mr Watts later spoke to Mr Ribeiro and it was agreed that F&C would not advise Achmea to put in redemption notices in relation to its own risk accounts. Achmea was left to make its own decision without input from F&C on this point. Achmea chose for itself to put in protective redemption notices that day in respect of those accounts.

458. Mr Ribeiro explained the stance adopted by F&C in an e-mail to Mr Kramer and Mr Mendez de Vigo on 24 September, which made it clear that he wished F&C (and the LLP) to retain as much AUM as possible to preserve F&C's fee income stream. Again, it is very difficult to reconcile this stance by F&C (represented by Mr Ribeiro in particular) with the Defendants' contention that F&C and Mr Ribeiro were determined to seek to damage the business of the LLP by arranging for redemption notices to be served.

459. Also on 24 September, Mr Niven circulated to Mr Ribeiro and the F&C Netherlands strategy team and distribution team a model for best advice to F&C's larger Dutch clients, which F&C Strategy had now devised. This model was to operate as a guide for F&C Distribution and account managers in advising clients regarding the construction of their investment portfolios and reflected the shift to the open architecture model and the free rein for F&C Strategy which had been finally endorsed at the meeting on 20 August 2008. The guidance covered all asset classes. For hedge funds (which also included FoHFs) the guidance was "75% External, 25% F&C", with this commentary:

> "Material long term and short term performance issues have arisen which place us in an uncompetitive position vs peers. Retain some exposure as a diversifier. Majority outsourced."

This guidance was issued in good faith and for legitimate commercial reasons. It did not single out the LLP's products nor suggest any determination on the part of F&C to damage the LLP's business.

460. On 30 September 2008 there was a LLP ManCom meeting attended by Mr Ribeiro, Mr Culligan, Mr Barthelemy, Mr Sparks and Mr Tilson. The continued poor performance of the Balanced and Select Funds was noted. Mr Ribeiro insisted on the following point being included in the minutes:

> "FFR [Mr Ribeiro] said that the Balanced/Select Fund directors must be immediately informed of the redemptions and the

> implications therein. FFR mentioned that the Directors should have already been informed as full transparency is what they are used to getting from F&C. ADC [Mr Culligan] will draft a note with contributions from BT [Mr Tilson] and NS [Mr Sparks]…"

461. The Defendants worked with Schulte Roth & Zabel International LLP ("Schulte Roth", the legal advisers for the Balanced and Select Funds) on a formal letter to the Boards of the Balanced and Select Funds, which was sent out on 9 October 2008. It contained an analysis of the market situation and the current position of the Funds and a recommendation that investors in the Select Fund should be offered an option to switch their investments into the less risky Balanced Fund or to redeem their holdings for cash once that was received by the Select Fund after sale of underlying investments in the Balanced Fund's hedge fund portfolio.

462. In the severe economic turbulence from mid-September 2008 and the so-called "credit crunch" (contraction of credit) associated with it, there was a general scramble for liquidity on the part of investors. F&C's Dutch institutional clients pressed F&C to arrange to "de-risk" their investment portfolios and secure what liquidity they could.

463. The Defendants still hoped that significant numbers of the clients who had put in redemption notices in September would withdraw them before the year end, but the prospects of that receded as the performance of the Select and Balanced Funds went from bad to worse in the latter part of 2008. By early October 2008 F&C Netherlands was drawing attention to the LLP's FoHF products as one critical area where they expected to come under pressure at meetings with clients.

464. On 13 October 2008 Mr Barthelemy sent a report to F&C Netherlands for use with clients, setting out the best case he could to try to persuade clients to remain invested in the LLP's products. It made the point that in the extraordinary market falls at that time, hedge funds had outperformed other assets (as Mr Barthelemy put it: "amazingly, given their abysmal performance"), whilst also acknowledging: "On the negative side hedge funds are supposed to deliver returns irrespective of market behaviour. But what do you do when markets behave in a way that makes no sense?" He wrote, "…we don't know if hedge funds have a future", but argued that if things stabilised, hedge funds would "have a fantastic time". He went on: "We believe going forward a lot of clients will be in risk reduction mood so the Balanced Fund will be the better choice for them". In his assessment that clients would wish to reduce the risk in their portfolios, Mr Barthelemy was correct, but he was unduly optimistic in thinking they would still have an appetite to remain in FoHF products, even of the less risky type offered by the Balanced Fund.

465. At a meeting on 28 October 2008 attended by Mr Ribeiro, the Defendants, Mr Cole and Mr Johns, the LLP Board considered the first draft of the LLP budget for 2009 prepared by Mr Tilson, which showed a projected loss for the year of about £180,000. It was agreed that Mr Ribeiro, Mr Tilson and Mr Culligan would have discussions with a view to producing a revised version. The hope was that they could produce a budget which would break even for 2009. The Defendants tabled a report on the market crisis and the proposed investment strategy for the Balanced Fund.

466. There followed a process in which the Defendants and Mr Ribeiro each looked at ways in which the costs of the LLP could be reduced for 2009 so that, even with its reduced fee income, it could budget to break even for the year. Mr Tilson provided some suggestions. It is in relation to this process that the views of the F&C representatives on the LLP Board (in particular Mr Ribeiro) and those of the Defendants began to diverge and harden, ultimately creating a destructive sense of distrust on each side.

467. Put shortly, Mr Ribeiro thought that the only viable way of reducing the LLP's costs for 2009 was by making some of its staff redundant. This reflected the approach being adopted across the F&C Group, which was trying to reduce its costs across all its businesses. The LLP was by no means singled out for special treatment in this regard - painful cuts were being made elsewhere as well, as part of a group-wide exercise to cut costs developed as a result of the Project Fitness review.

468. The first phase of Project Fitness took place in the early part of 2008, with some success. This involved the easiest round of costs savings. However, F&C's assessment was that still further major savings (about £15 million p.a.) needed to be achieved across the group. This led F&C to embark upon a second phase of Project Fitness in early November 2008, with Mr Moir again acting as consultant to co-ordinate the project and help drive the implementation of the costs savings which were identified. The second phase of Project Fitness involved much more painful cutting of costs across the group, particularly by making staff redundant. It was the impact of this phase of Project Fitness in relation to the LLP that precipitated a serious confrontation between the Defendants and Mr Ribeiro for F&C, which escalated quickly and resulted in these legal proceedings.

469. For their part, the Defendants thought that the level of LLP staff was already at a minimum if proper and credible management of the LLP's FoHF portfolio was to be maintained, and that the redundancies which Mr Ribeiro proposed would threaten the credibility and viability of the LLP's business. They proposed different ways of trying to make the necessary savings, to which Mr Ribeiro had various objections. There were no easy solutions and each side acted in what it believed was the LLP's best interests: see paras. [163]-[171] above.

470. On 6 November 2008, there was an exchange between Mr Ribeiro and Mr Tilson about the Credit Alpha Fund launch costs incurred in mid-2008 which were borne by the Balanced Fund. These were in the sum of about $98,000. Mr Ribeiro's authorisation was required for payment of part of this amount, which he gave. At the same time, he told Mr Tilson that, pursuant to the arrangement whereby the LLP was to reimburse the Balanced Fund for those costs or some relevant part of them, the costs to be reimbursed should be fully amortised against the profit and loss account of the LLP for 2008 rather than spread over five years between the Balanced Fund and the LLP, as originally proposed, since "we cannot burden future years with this type of costs with such a reduced AUM base". Mr Tilson informed the Defendants the same day that Mr Ribeiro wished the launch costs to be brought into account in this way in the LLP's 2008 accounts.

471. This stance by Mr Ribeiro gave rise to another area of controversy between the parties, since the Defendants disagreed with his approach to these costs, maintaining instead that the reimbursement payments by the LLP should still be spread over five

years as originally contemplated. This would mean that the item would have a lesser negative impact on the LLP's profits in 2008 (a matter which would tend to favour the Defendants in terms of the distribution of profits under the Agreement, now that the LLP appeared to be about to enter a period of making no profits).

472. On 6 November 2008, the LLP produced initial figures for the performance of the Balanced and Select Funds for October showing falls for that month of 5.05% and 11.26% respectively. Hopes that performance might improve so as to encourage clients to stay invested were put in jeopardy. Therefore, Mr Ribeiro called for a meeting of the LLP's Board to discuss the future of the funds; as he commented, "to say this looks ugly would be an understatement!"

473. In November 2008, the second phase of F&C's Project Fitness cost cutting review got under way. F&C used the services of Mr Moir as a consultant to help drive the process forward. From about mid-November he was assisted by Ms Bomba. Mr Moir had meetings with the heads of F&C's various business divisions to press them to identify possible costs savings across the entire field of F&C's activities. He interviewed Mr Ribeiro, as Head of Investments, and they discussed possible costs savings at the LLP, amongst other topics.

474. On 12 November 2008 there was a cost cutting workshop with Mr Moir, attended by F&C's senior management team, including Mr Ribeiro and Mr Mendez de Vigo. Heads of the various business divisions were encouraged to propose cost cutting in other business areas (as an antidote to possible reticence by managers about cutting in their own business areas) and the heads of those areas had either to defend them against such proposals or adopt them. There was very significant corporate pressure brought to bear to cut costs in drastic and painful ways across the whole of F&C. Mr Moir then followed up on implementation of cost cutting proposals identified in this way.

475. At trial, the Defendants sought to suggest that in the course of this process Mr Ribeiro proposed, or F&C's Execom agreed, that the LLP should be liquidated (in a manner which would avoid the cost to F&C of having to buy out the Defendants' interests in the LLP pursuant to Holdings' call option in paragraphs 1.9 and 1.10 of the Fourth Schedule before closing it down), and that Mr Ribeiro then sought to carry that proposal into effect. There was considerable focus by the Defendants on various notes and manuscript jottings compiled by Mr Moir in the course of this phase of Project Fitness in an effort to bolster this case.

476. I do not accept the Defendants' case in this regard. I find that there was discussion amongst F&C's senior management in Execom whether it might be possible to close the LLP to save costs. A number of people at the meeting canvassed that as a possibility to be discussed, but Mr Ribeiro defended the LLP against his colleagues and warned them that that would not be possible. He continued to act as champion of the LLP within F&C. The LLP had been a good source of revenue for F&C and Mr Ribeiro thought it could achieve this again once the market settled down and a period had elapsed for it to rebuild its business. He was successful in his defence of the LLP and Execom took no decision to close it.

477. However, Mr Ribeiro came under very serious pressure from his peers to cut costs within the LLP, just as they were having to do within their own business areas. This

pressure spurred him, in turn, to seek to persuade the Defendants to accept the need to cut costs in a serious way within the LLP by making some staff redundant, and when they did not agree with his proposals, to seek to apply pressure to them to do so.

478. It is in the context of examination of what was said in the course of F&C's internal deliberations during Project Fitness that I should address one particular manuscript note made by Mr Moir on which the Defendants placed great emphasis. In preparation for a meeting with Mr Ribeiro on 4 December 2008, Mr Moir made a manuscript note about possible redundancies and included this text in reference to the business of the LLP: "advise Partners re plan to liquidate". The words "to liquidate" were then heavily scored out and the words "need agreement" were written underneath. Mr Moir's evidence was that the quoted text was a note to himself of a question that he wanted to ask Mr Ribeiro, namely whether a decision should be taken to liquidate the LLP and to tell the Defendants, and that at the meeting Mr Ribeiro answered that the LLP should not be liquidated since the agreement of the Defendants would be needed. Mr Ribeiro, in his evidence, also denied that there was any plan to liquidate the LLP and said that in the course of Project Fitness he sought to argue against any colleagues who wanted to close the LLP.

479. The Defendants sought to rely on the original text of Mr Moir's note to suggest that F&C had indeed taken a decision, concealed from the Defendants, to liquidate the business of the LLP. They questioned the evidence of Mr Moir and Mr Ribeiro to the contrary and questioned the circumstances in which the words "to liquidate" came to be crossed out (making the suggestion that this was done some time later in order to conceal the true position).

480. The picture was made considerably more murky when Mr Moir's original notebooks were produced, at the request of the Defendants, when he was about to go into the witness box. It emerged that someone had added a small curled mark at the end of the scored out word "liquidate", which could be read as a question-mark at the end of the word (although, in fact, no dot below the mark had been added), and that this must have been done after disclosure of the notebooks had been given and photocopies of the originals made for the purposes of the trial. The original notebook had been tampered with.

481. To complicate matters further, Mr Moir (at my request) produced a typewritten transcript of his note shortly before he went into the witness box. He prepared that from a copy of his notes taken from disclosure, where there was no question-mark type notation after the word "liquidate". But in his transcript he included a question-mark after the word "liquidate", all shown as crossed out. In the witness box he said that he added the question-mark in the transcript - although he accepted that none appeared in the copy of the document he was working from - because it was his recollection that he had gone to the meeting with Mr Ribeiro intending to ask a question.

482. It is a serious matter to find an original document, known to be material to a trial, tampered with in this way. A submission was made for the Defendants, which had considerable force, that the document had been tampered with by someone within the F&C camp and that this tended to show that Mr Moir's original text indeed had the significance which they said it did.

483. Evidence was called from a handwriting expert, who reviewed a range of manuscript notes made by Mr Moir in his notebooks kept for Project Fitness. She was unable to identify the person who added the question-mark type notation after the word "liquidate". Although handwriting had been added at different times in different pens on various pages of the main notebook and some pages had been extracted from it, assessing the evidence as a whole, I do not think that the notebook had been tampered with in any other respects after the various notes were made in the course of Project Fitness. The pages which had been removed from the notebook did not interfere with the run of the notes and had probably been removed for some reason before the Project Fitness notes were written. The notes added in different inks on the same page were consistent with Mr Moir using a range of pens and making notes on pages before and at meetings and, indeed, reviewing them after meetings as he checked what items remained outstanding for action.

484. What, then, should one make of the clear tampering which had taken place by the addition of the question-mark notation at one significant point in the notebook? Who was responsible for it and what inferences should be drawn? In the context of the dispute and the allegations being made by the Defendants, the use of the word "liquidate" by Mr Moir was of obvious importance and, in general terms, F&C had a clear interest to seek to downgrade its significance. But F&C gave disclosure of the notebooks in about October 2009 without modifying them in any way.

485. After very careful consideration, I have come to the conclusion that Mr Moir was the person who modified his original notebook in this way. I should say that in no other respects did Mr Moir strike me as someone who would engage in deliberate deception. He was plainly not a lying rogue in any general way. But having regard to all the evidence, I consider that he did make this alteration to his original notebook before going into the witness box. Particular matters, alongside Mr Moir's demeanour in the witness box, which I have in mind in drawing this conclusion are:

i) Mr Moir added a question-mark to his typed transcript of his notes without any justification based on the copy of the original document he was working from. That was a highly questionable thing for him to do, given that he knew he was supposed to be faithfully transcribing what was on the page. When he went into the witness box he did not explain to the court at the outset that he had added the question-mark in his transcript, even though it was not on the page, to reflect his recollection that he had made his note as a prompt to himself to ask a question. I found his lack of candour about that suspicious and his explanation why he had added the question-mark in the transcript unconvincing;

ii) When Mr Moir was in the witness box and was handed his original notebooks, I was struck by how quickly he referred the court to the question-mark notation after the word "liquidate" which appeared in his original notebook (Transcript, Day 27, p. 66). Also, when I immediately pointed out to counsel, who questioned the presence of a question-mark, that the presence of a question-mark within the heavily scored out word "liquidate" was borne out by the presence of a question-mark in Mr Moir's transcript, Mr Moir did not correct me to say that he had added that question-mark even though it was not in the copy of the notes he had transcribed. Rather, he referred to the question-mark notation as supporting the evidence he was then giving that his note

recorded a question he wanted to ask Mr Ribeiro. I do not think it is plausible that he could simply have forgotten what must have been a deliberate act of adding a question-mark in his transcript;

iii) It emerged that Mr Moir was the person who had had the greatest opportunity to modify the original notebook. It had been in his possession for most of the time after it was copied for disclosure purposes (when it is known it had not yet been tampered with) up to going into the witness box, by which stage he knew it was likely he would be questioned by reference to his original notebooks;

iv) If anyone else had tampered with Mr Moir's note, there would have been a significant risk that he would have spotted the alteration and drawn it to the attention of the court, so that the tampering would not have been effective to mislead the court and the person altering the document could easily have been exposed. On the other hand, Mr Moir was in the best position to interpret his own notes in an authoritative way and I think he did not foresee what a minute forensic examination would be undertaken of such an apparently trivial marking as the question-mark notation. He had provided the transcript of his notes including the question-mark and I think he calculated that everyone would focus on that and the original notebook (which corresponded with each other) rather than the photocopy in the trial bundle;

v) There was no other more likely candidate who would, or could, have tampered with the notebook in this way.

486. Having made the assessments that Mr Moir was responsible for tampering with his note and lied about it, it remains to assess the significance of this in the scheme of the evidence. In particular, should it lead to the conclusion that F&C in fact did reach a decision to liquidate the LLP's business and then took steps to implement that decision?

487. In my judgment, it does not lead to that conclusion. I have considered carefully why Mr Moir should have tampered with the document and lied about it, running the risk that he might be caught out on something so serious. In my view, it is likely that he did it because he was strongly identified with F&C and the team of people who had come under criticism from the Defendants. He was conscious that his note could be read as suggesting they were not telling the truth and he wished to insulate them from such a suggestion. The change he made brought his note into line with his actual recollection of events (so perhaps it did not seem to him to be morally outrageous to make the change) and he thought the chances of his being caught out were low. The basic thrust of Mr Moir's evidence, that his note reflected a question he asked, that Mr Ribeiro resisted the suggestion that the LLP's business should be liquidated and that there was no decision by F&C to close the LLP, was strongly supported by evidence from others (in particular, Mr Ribeiro, Ms Bomba and Mr Mendez de Vigo) which I found credible. Ms Bomba had attended the relevant meeting with Mr Ribeiro on 4 December 2008 and broadly corroborated Mr Moir's account of it, as did Mr Ribeiro.

488. The other notes by Mr Moir on the same page also support this view. They appear to record - and I find they are accurate in this respect - that Mr Ribeiro proposed three redundancies in relation to the LLP (this would have been an odd suggestion if his

proposal was to close the business altogether) and that he said words to the effect "Do not close to new business" (indicating that the LLP's business was to continue). Also, I consider that the words "need agreement" written below the scored out word "liquidate" reflect Mr Ribeiro informing Mr Moir that the LLP could not simply be closed, since that would require the agreement of the Defendants.

489. I also think this view of the evidence is supported by other documents produced by Mr Moir in relation to Project Fitness. On about 3 December 2008, Mr Moir (with assistance from Ms Bomba) produced a report which, *inter alia*, identified "Key discussion points", including the question of "Strategic involvement" for F&C (meaning whether it should continue to be involved in that area or not) in a number of areas, including the LLP. That is difficult to reconcile with the idea that F&C had previously made a decision to close down, or withdraw from, the LLP (for example, at the meeting on 12 November 2008). Mr Moir produced updated versions of this Project Fitness report thereafter, as a running document to keep a check on actions to be taken, or which had been completed, and the costs savings associated with them.

490. In an Annex to the 3 December version of the report Mr Moir noted as an action item, "Dissolve relationship with F&C Partners [i.e. the LLP]" next to Mr Ribeiro's initials, with a "Delivery target" of 21 December. Unlike other items in the report, no figures were shown as savings against this entry and I accept Mr Moir's evidence that this entry was an action item for him to discuss with Mr Ribeiro (with a decision to be taken about potential savings by 21 December), rather than a decision already taken by F&C for Mr Ribeiro to implement.

491. Against this entry Mr Moir also noted:

> "Possible 3-6mth unwind execution. Liquidation will be a complex issue. May operate with less capacity if deemed viable"

This reflected what Mr Ribeiro had told him and Ms Bomba at a meeting on 24 November, that if F&C was to unwind its relationship with the LLP that could take three to six months to execute, that liquidation of the Balanced and Select Funds would be a complex issue and that the LLP could operate with less capacity if deemed viable. The conditional tenor of this note is again difficult to reconcile with the Defendants' suggestion that a firm decision had been taken by F&C or Mr Ribeiro by this stage to close the LLP. The revised version of this note produced by Mr Moir and Ms Bomba on 9 December, reflecting their discussion with Mr Ribeiro on 4 December, indicated that no decision had yet been made to close the LLP: see para. [505] below.

492. One of the costs savings identified by F&C's Execom at the meeting on 12 November was that the LLP should not commission an Audit Assurance and Faculty ("AAF") report for 2009. An AAF report is a formal report, usually compiled by an asset management company's auditors, containing a review of that company's systems for safeguarding client assets. It is a document which can be used as a marketing tool by being available to be supplied to potential investors to give them comfort regarding the security of their funds in the management company's hands. The LLP had commissioned AAF reports for itself from 2006 (for the period from 1 January 2005). The AAF report for 2009 would have cost about £25,000.

493. No-one within F&C had discussed the possibility of cancelling the LLP's AAF report with the Defendants before this measure was proposed and adopted by Execom, nor were the Defendants informed of Execom's decision on this promptly after the meeting on 12 November. It was only raised by Mr Ribeiro in early December as an agenda item for the meeting of the LLP ManCom on 9 December 2008, and he did not explain the background of the discussion about it within F&C. This is one of the occasions on which F&C tended to treat the LLP as though it was just an ordinary F&C subsidiary, without paying careful attention to its discrete management structures and the Defendants' minority interests in the business.

494. Having said that, however, the view that the LLP could manage without an AAF report was a legitimate business view on the part of F&C and was eventually endorsed in good faith and reasonably by F&C's representatives on the LLP Board. An AAF report is by no means an indispensable marketing tool for a FoHF business. For example, most of the LLP's AUM were attracted into the business in 2005, before it had an AAF report to show investors. F&C's representatives on the LLP Board reasonably held the view (especially in the context of an assessment that the LLP was unlikely to attract new investment in 2009 and should focus rather on rebuilding its performance track record) that the AAF report did not represent value for money and in the difficult times in which the LLP found itself was a cost which ought to be eliminated.

495. The Defendants strongly disagreed with this assessment. They considered that the AAF report would be an important tool for retaining investors or attracting new business for the LLP in 2009. This also was a reasonable and legitimate view for them to hold. It was partly influenced by their more optimistic assessment of and hopes for the potential prospects for the LLP in 2009. The disagreement over whether to cancel the AAF report is one of the areas where the Defendants and F&C fell out over reasonably held but conflicting business judgments. The Defendants sought to rely on F&C's stance in cancelling the AAF report as a piece of a jigsaw which, they said, showed that F&C wished to damage the LLP's business and close it down. I reject that suggestion.

496. On 13 November 2008, Mr Ribeiro e-mailed managers in the Investment Division of F&C, including Mr Culligan, to report generally on the message coming from F&C's Execom that tough cuts would be expected throughout the Group's business.

497. On 13 and 20 November 2008, Mr Tilson e-mailed Mr Ribeiro (not copied to Mr Culligan) with information bearing on the LLP's budget discussions. Mr Tilson was nervous about the continued viability of the LLP's portfolio if none of the redemption requests from clients were cancelled. These were issues which he had probably discussed informally with Mr Culligan but, finding Mr Culligan felt a degree of optimism about the future of the LLP's business which Mr Tilson did not necessarily share and wanting to cover his own back, Mr Tilson felt he should raise them directly with Mr Ribeiro.

498. I consider that it was right that Mr Tilson should raise these points with Mr Ribeiro since, as Chairman and one of the three people working on the LLP's budget, Mr Ribeiro was entitled to know what Mr Tilson thought and to be alerted to his concerns. However, I think Mr Tilson felt that Mr Culligan might regard it as an act of disloyalty if he knew that Mr Tilson was raising these points with Mr Ribeiro (who,

in a certain sense, was an F&C outsider trying to impose cuts on the LLP), and this led Mr Tilson to adopt a pattern of communication with Mr Ribeiro which excluded Mr Culligan and Mr Barthelemy. Mr Ribeiro appreciated Mr Tilson's openness with him and did not try to discourage such communications. Mr Tilson's fear of being perceived as disloyal by Mr Culligan and Mr Ribeiro's reliance on Mr Tilson as a frank source of information about the LLP grew as the clashes over business strategy and cost cutting within the LLP grew more intense. Accordingly, the pattern of Mr Ribeiro and Mr Tilson communicating privately with each other became more entrenched, creating an unattractive air of secrecy and conspiracy between them, in line with what had happened when Mr Tilson had produced the October 2006 confidential note.

499. On 24 November 2008, Mr Moir and Ms Bomba met with Mr Ribeiro to discuss cost-cutting within Project Fitness. The possible dissolution of the LLP was discussed, but Mr Ribeiro also canvassed the idea that it might continue to operate with less capacity.

500. On 26 November 2008, in line with the decision of the LLP, the Boards of the Balanced and Select Funds resolved that investors in the Select Fund should be told of the closure of the Fund and offered three options:

i) to transfer their investment into shares in the Balanced Fund;

ii) to have their redemption request processed on the next available redemption day, deferring the payment of the redemption proceeds until the relevant hedge fund shares in the underlying portfolio held by the Balanced Fund could be sold off; or

iii) to have their redemption request processed on the next available redemption day and to have transferred to them immediately the relevant hedge fund shares in the underlying portfolio as the redemption proceeds *in specie*.

501. On 1 December 2008, a letter setting out these options was sent to each investor in the Select Fund ("the 1 December 2008 letter"). As an inducement to investors in the Select Fund to choose to switch to the Balanced Fund under option (i), the Balanced Fund agreed to accept a high watermark carried over from the Select Fund (i.e. no performance fees would be charged until an investor's investment fund again reached the high-point in terms of NAV per share it had reached when managed in the Select Fund).

502. Also on 1 December 2008, at Mr Ribeiro's request, Mr Tilson e-mailed F&C's Finance Department (which had responsibility for drawing up the LLP's statutory accounts) to ask that the full launch costs for the Credit Alpha Fund should be booked to the 2008 accounts for the LLP. Mr Tilson did not tell Mr Culligan that he was doing this. The Defendants were critical of Mr Ribeiro for proceeding in this way, arguing that it was an attempt by him to foist a decision on the LLP by bypassing its proper management structures.

503. I do not think this criticism can be sustained. Mr Ribeiro had already drawn his view on the Credit Alpha launch costs to the attention of the Defendants (para. [470] above) and they had not yet indicated dissent. The statutory accounts for the LLP

would have to be debated and resolved upon by the LLP Board and audited before they were adopted (clauses 6.3 and 6.4 of the Agreement), so the LLP Board and the Defendants would not, in practice, be bypassed by this step by Mr Ribeiro. However, the private use which Mr Ribeiro made of Mr Tilson, giving him instructions without reference to the Defendants, was a continuation of their unhealthy secret line of communication.

504. On 4 December 2008, Mr Moir and Ms Bomba had their further meeting with Mr Ribeiro (paras. [478]ff above) to press him on cutting costs within his division. Mr Ribeiro resisted any suggestion that the LLP's business should be liquidated at that stage but proposed instead that there should be three redundancies in relation to the LLP: one person employed by F&C (Mr Ribeiro had in mind Ms Ross) and two employed by the LLP. It was agreed that Mr Ribeiro would provide the names to Mr Moir. Mr Ribeiro also told Mr Moir that he would emphasise to the Defendants that the LLP would be closed unless it could achieve a strong turnaround in the performance of its portfolio.

505. This meeting was reflected in the revised Project Fitness checklist produced by Mr Moir and Ms Bomba on 9 December. This again showed the item "Dissolve relationship with F&C Partners" as an "ongoing" (i.e. open) item, but now with a delivery target date for savings figures of 15 December. Mr Moir's note against this item was amended to read:

> "Possible 3-6mth unwind execution. Liquidation will be a complex issue. Decision to operate with less capacity – reduction of 3 FTE [full time employees] (1 @ 100%, 2 & 60% F&C). Partners will be advised that the plan is to liquidate unless strong performance turnaround."

The statement that there had been a "Decision to operate with less capacity" provides further support for my assessment of Mr Moir's manuscript notes made on 4 December (paras. [487]ff above). The savings of 100% reflected savings from the redundancy of Mr Ross, as a F&C employee; those of 60% reflected savings from the redundancies of two employees of the LLP (since F&C had a 60% interest in the LLP).

506. On 8 December 2008, Mr van den Heuvel of Achmea e-mailed Ms Ross to protest at the high fees earned by the LLP in 2008, in contrast with the poor return for investors in the Select Fund, and threatened a visit on short notice from Achmea's auditors to go through all the relevant underlying documents "to achieve the highest security" that Achmea's interest was being secured. This seemed to carry an implied suggestion that the fees charged to Achmea by the LLP might have been improper.

507. Mr Barthelemy sent a short e-mail response to point out (correctly) that the relevant fees were a function of the amount of AUM which went up in the year. Mr Tilson, who was concerned that the Defendants might be unduly reticent in telling Mr Ribeiro about bad news affecting the LLP, pressed Mr Barthelemy to inform Mr Ribeiro about Achmea's approach, which he did.

508. At the same time, the LLP was coming under renewed pressure from F&C Netherlands to provide an explanation for the poor performance of their funds which

could be fed through to the Dutch clients. Mr Barthelemy replied to point to the severe dislocation in the market and offering to spend time with F&C Netherlands or the clients to go through the LLP's portfolio in detail, if that would help. In the event, F&C Netherlands and the clients did not ask for this. The decisions they took whether to stay in or exit from the LLP's funds did not turn on the fine detail of what had happened within the LLP's hedge fund portfolio to lead to the substantial losses that had been suffered on it.

509. On 11 December 2008, Mr Ribeiro set in train the process for Ms Ross to be made redundant. He did not at that stage inform the Defendants that part of the marketing service provided by F&C for the LLP was to be withdrawn. There was no obligation on F&C to provide marketing support for the LLP in this form, and its withdrawal fell within the ambit of F&C's discretion under clause 13.7 of the Agreement.

510. On 12 December 2008, Mr Ribeiro - without raising the issue with the Defendants - asked Mr Tilson for some text to send to the directors of the Select Fund to say that, to complete the deleveraging process for that Fund which the LLP Board had decided to pursue as soon as possible, the LLP would no longer collect a management fee in respect of AUM funded by leverage. Mr Tilson provided the required text in an e-mail which was not copied to the Defendants. The same day he sent Mr Ribeiro another private e-mail with his best up-to-date estimate for LLP revenues in 2009 and stating:

> "On this basis, there would be insufficient profit to cover drawings. This would then result in the depletion of the corporate member's capital that is retained within the LLP (i.e. the LLP capital base would be reduced). From an FSA perspective, I would have thought it would not be good to reduce the capital base."

511. It is probable that the basic financial information sent to Mr Ribeiro had already been provided by Mr Tilson to Mr Culligan in the course of their ordinary day-to-day work together. But Mr Tilson was now beginning to take his private communications with Mr Ribeiro further than before, by starting to feed him with comments directed to promoting F&C's sectional interest in the LLP and providing him privately with arguments which he might be able to deploy against the Defendants in the budget negotiations which were on hand. Mr Ribeiro gratefully accepted such help and did nothing to dissuade Mr Tilson from doing this.

512. On 17 December 2008, Mr Moir and Ms Bomba produced an updated version of their Project Fitness report. The LLP was no longer listed as a "Key discussion point". Against the item "Dissolve relationship with F&C Partners" in the Annex, a figure of £148,400 costs savings was recorded. This was the figure given by the LLP redundancies proposed by Mr Ribeiro to Mr Moir (100% of Ms Ross's employment costs and 60% of the employment costs of two LLP employees). Mr Moir's evidence, which I accept, was that the item title ("Dissolve etc") had simply been left unchanged from previous versions so that he could keep track of it as the document evolved, rather than because it reflected a decision by F&C or Mr Ribeiro to dissolve the LLP. This account is supported by the continued presence of the same note as

before against this item (see para. [505] above) and the precise figure now inserted for savings, which reflected only redundancies of some (not all) LLP staff, and not the liquidation or dissolution of the LLP.

513. Also on 17 December 2008, at 4.00 pm, an important meeting took place in Mr Ribeiro's office between Mr Ribeiro and the Defendants. It is likely that the Defendants asked to have this meeting in order to present him with a paper on strategic options in relation to the LLP ("the Strategic Options Paper"). This paper rehearsed the Defendants' analysis of the state of the hedge fund market, maintaining that hedge funds had been the best performing asset class apart from government bonds; set out their assessment that hedge funds would be "unpopular for a while, but eventually will perform extraordinarily well…"; referred to the position of the LLP, with clients wanting to redeem from the Select Fund and unwilling to switch to the Balanced Fund; but suggested that the LLP platform might be used to manage other funds and referred to high redemptions throughout the FoHF market.

514. The Strategic Options Paper then set out four options:

a) to do nothing, since current AUM would be sufficient to fund the business at a modest level;

b) the Members should sell the business to another FoHF on the basis that it provided an efficient operational platform;

c) F&C could buy another FoHF business to amalgamate with the LLP, although the Defendants recognized that it would be likely F&C would prefer other acquisition options; or

d) use the LLP as an efficient platform to do other things, such as providing general fiduciary management services as part of F&C's move towards open architecture and possibly by being integrated into F&C (in that regard the Defendants had in mind to propose that they should be given senior management positions within the F&C Group).

515. At the meeting the Defendants took Mr Ribeiro through the Strategic Options Paper. Mr Ribeiro was irritated by what he regarded as the unrealistic nature of each of the options – in his opinion even option (a) did not recognise the need for substantial cutting of costs in the LLP which he thought was essential. He told the Defendants that logically there was a fifth option, simply to close the LLP. In my view, he said this in an attempt to inject a degree of what he regarded as realism into the discussion, to try to make the Defendants realise that they might be overplaying their hand, rather than as a bald threat. In fact, he told them that he was not keen on this idea, but that it was an option. It is also likely that Mr Ribeiro mentioned that there was a mood within F&C's Execom in favour of closing the LLP (reflecting the pressure he had felt himself under within Execom, as part of Project Fitness), to try to emphasise to the Defendants the seriousness of the situation. But, contrary to the evidence of the Defendants, I find that he did not say that Execom had already decided to close the LLP. In the stress of the meeting, however, the Defendants seem to have come away with the impression from Mr Ribeiro's unspecific comments that some such a decision had been taken.

516. Mr Ribeiro told the Defendants that he might be willing to contemplate options (a) and (b) in the Strategic Options Paper, but subject to variations, with option (b) probably being the most attractive option; that option (c) was out of the question; and that the time was not right for anything along the lines of option (d). Mr Ribeiro emphasised to them the importance of cutting costs in the LLP and said that Ms Ross and LLP employees apart from Mr Pennington, Mr Sparks and Mr Tilson would have to be made redundant so that the LLP could be seen to be bearing its share of the cost-cutting pain across the F&C Group. He said words to the effect that he did not want to pick a fight with others on Execom to try to retain these staff. (Mr Ribeiro's comments at this meeting implied an additional redundancy as compared with what he had discussed with Mr Moir within Project Fitness, i.e. Ms Rattigan, Mr Reynolds and Mr O'Hara, in addition to Ms Ross - I think it is likely that he was setting out a more extreme position with the Defendants with an eye on what he thought would be a negotiation to come, in which he could give some ground so as to get back to the two redundancies of LLP employees which he had undertaken to try to deliver as part of Project Fitness). It is likely that, as the Defendants recalled, Mr Ribeiro said something along the lines that he was telling the Defendants this so that they could get used to the idea. Mr Barthelemy reminded Mr Ribeiro that the LLP was a separate entity with its own rules, and Mr Ribeiro acknowledged this and said that he would play by the rules.

517. Mr Culligan countered that a reduction in head count would threaten the viability and value of the business and that he thought improved financial figures and cutting of costs in other ways should be the way forward. He said that the LLP would not be credible as a business without, for example, a dedicated due diligence analyst. The Defendants asked Mr Ribeiro to consider other alternatives. He said he would wait to receive the Defendants' proposals in that regard. This exchange rehearsed the fundamental difference in view between the Defendants and Mr Ribeiro about the best way forward for the LLP in light of the pressure which it was experiencing in relation to its business.

518. Mr Barthelemy took notes in the meeting and Mr Ribeiro asked for them to be typed up as minutes and circulated (in the event, this was not done; as a result, Mr Ribeiro did not have any opportunity to comment on the notes). After Mr Barthelemy had put away his notebook at the end of the meeting, Mr Ribeiro said words to the effect that he had read the Agreement very carefully and that the Defendants should do the same; and that there was a big difference between being partners in a business and being an employee (the Defendants understood the implication to be that a partner would not have the same protection as an employee). Mr Ribeiro would not explain these points any further, although Mr Culligan asked him what he meant.

519. The Defendants left the meeting shaken and worried by what appeared to be cryptic threats made by Mr Ribeiro and his announcement that F&C wanted to see significant redundancies in relation to the LLP. Mr Ribeiro's comments about the Agreement sent them back to look closely at the Agreement for themselves and they began to think about obtaining legal advice.

520. On 22 December 2008, Mr Ribeiro chased the Defendants for their proposed action plan for the LLP and asked Mr Tonkin to convene an LLP Board meeting in early January 2009. The Board meeting was called for 6 January, with the main agenda item being "how to deal with the new environment, AUM and outlook".

IT Issues

(i) Disputes regarding F&C IT's e-mail and remote access services

521. It is convenient to set out discussion of the IT dimensions of the dispute at this point in the judgment. The LLP, with the knowledge and acceptance of F&C IT, configured its own computers and did not use the standard F&C desktop package. The LLP put a substantial amount of effort into developing its own software tailored to its own business needs.

522. From the outset of its existence, the LLP's computers were integrated into F&C's group-wide IT network. That network was protected against intrusive hacking or computer attacks by elaborate IT security arrangements including, in particular, by a double layer of high-grade firewalls in operation around the perimeter of the network. These firewalls mediated traffic between the network and the internet and scrutinised any electronic messages or signals seeking to enter the F&C network. Each of these firewalls operated sophisticated screening measures at a number of levels to review the computer source of any message entering the network, to ensure that it was properly addressed to a relevant part of the network and to analyse the content of the electronic signal entering the network (so-called "deep packet inspection") to ensure that the entry of that signal into the network was safe. The two firewalls used different hardware and software, which made them more difficult for a malicious attacker to penetrate.

523. The LLP needed to receive a constant inflow of substantial amounts of electronic information from market data services (Bloomberg and Pertrac) from outside the F&C network and had two computers in its office set up to receive that information. The LLP benefited from F&C's high-grade internet connection which permitted the smooth and efficient receipt of such data streams.

524. The IT services which F&C provided to the LLP included integration of the LLP into F&C's group-wide e-mail service. Those working in the LLP were, in common with everyone in the F&C Group, provided with e-mail addresses designated "@fandc.com".

525. Unfortunately, by 2006 F&C was experiencing significant problems with its e-mail service. In particular, the archiving function associated with it was subject to sporadic failures which jeopardized the efficient conduct of business. F&C IT came up with a solution to the problems which were being experienced which involved moving to a new e-mail platform. In order for the new platform to function effectively, however, the overall volume of electronic traffic and storage within it had to be kept within tighter limits than under the previous system. Therefore, F&C IT decided that each e-mail mailbox within the new system should henceforth be limited in size to 300 Mb, whereas previously it had not been subject to any significant limit in size. The restriction was to be enforced by configuring the e-mail system so that if someone's mailbox exceeded 300 Mb in size, they would be prevented from sending any e-mails (they could still receive e-mails). This sanction was imposed to provide an incentive for all F&C personnel to carry out regular weeding of their mailboxes to delete unwanted material and file other material elsewhere on their computers.

526. The new e-mail system incorporating the new mailbox limits was introduced across the F&C Group, including in the LLP, in January 2007. F&C did not consult the LLP or secure its agreement before unilaterally changing the e-mail service in this way.

527. The LLP did not initially object to the changes but soon found that the 300 Mb limit was very irritating and operated as a constraint on the way its personnel would wish to do business. Mr Culligan and others found that they had to spend a not insignificant amount of time weeding out their mailboxes, which was something of a distraction from focusing on running the business. They received a great deal of information from hedge funds by e-mail, which would quickly clog up their mailboxes. Mr Culligan, in particular, had to travel a good deal and it was not possible to weed out the mailboxes while on the move. Mr Barthelemy travelled a lot too. This could mean that Mr Culligan and Mr Barthelemy could become disabled from using their e-mail addresses to send e-mails while they were travelling on the LLP's business. The restrictions also appeared to give rise to a problem with the use of Blackberry mobile devices used by the Defendants when they were travelling away from the LLP's office.

528. On the other hand, as F&C pointed out when the LLP complained, many other F&C fund managers were in a similar position but managed to find satisfactory ways of continuing to work within the constraints imposed by the new system. F&C felt that the LLP's complaints were overdone and that – admittedly with a bit of extra work to ensure the weeding of mailboxes was thorough and up to date – the LLP could have made the new system work for its personnel too.

529. The Defendants did not query the introduction of the new e-mail system and its associated restrictions for the F&C Group as a whole but argued (correctly) that a special exception could be made for the LLP personnel to allow them to have substantially larger mailbox limits of 3 gigabytes which, provided the majority of F&C personnel remained bound by the lower 300 Mb limit, would still have allowed F&C to run the new, more robust e-mail system it had switched to. Such a special exception for LLP personnel might, of course, have led to complaints about their special treatment and other demands for exemptions from elsewhere in the F&C Group. F&C IT remained very loath to accommodate the LLP's request for exemption from the 300 Mb mailbox limit. However, an uneasy compromise was reached, whereby F&C IT allowed the senior personnel in the LLP (Mr Culligan, Mr Barthelemy and Mr Sparks) a rolling series of limited temporary extensions of their mailbox limits to 500 Mb. This compromise satisfied neither side and was also vulnerable to F&C IT simply terminating the arrangement, which they threatened to do on a number of occasions, on the basis that the LLP should comply with F&C Group policy.

530. The introduction of the 300 Mb mailbox limit for the LLP alongside the rest of F&C gives rise to a question whether F&C thereby acted in breach of the Service Agreement. At times the LLP complained that F&C was in breach of the Service Agreement (e.g. in an e-mail dated 12 June 2007 from Mr Barthelemy to Mr Luc Leclercq – "Mr Leclercq" - Head of F&C IT).

531. In the context of the dispute as a whole, this is a rather peripheral matter and it is not necessary to reach a final conclusion on it. There were reasonable arguments on each side. For the LLP it could be said that Article 3.1 of the Service Agreement imposed

obligations on F&C to provide the e-mail service to the LLP according to proper standards of market conduct and with reasonable care and that the obligations on F&C in Article 2.4 of Schedule 7 to the Service Agreement to provide access to the F&C e-mail system which would "allow [LLP] staff to both send and receive e-mail" were unlimited in relation to matters such as constraints in relation to mailbox limits.

532. For F&C it could be said that since the new e-mail system had been introduced for good business reasons (to rectify the fragility of the previous system) and with equal effect across the group, including in relation to group businesses subject to similar pressures as the LLP which all appeared to be able to cope with the new system, the new system did comply with proper standards of market conduct and F&C had exercised reasonable care in organising its affairs and responsibilities. It might also be said that Article 2.4 of Schedule 7 should be read as an obligation to provide e-mail accounts on the F&C system as it operated from time to time (i.e. including with the mailbox limits existing with effect from January 2007), and that that system still allowed the sending and receipt of e-mails.

533. I think it is fair to say that the new system was imposed by F&C IT on the LLP in a rather high-handed way, albeit in good faith and for legitimate business reasons. The manner of its introduction reflected the general tendency within F&C to regard the LLP simply as an ordinary part of the F&C Group, rather than as a distinct entity with binding contractual rights under the Service Agreement.

534. I do not find it to be a point of criticism of the Defendants that they felt aggrieved by the imposition of the new e-mail system on the LLP. They had genuine concerns about the detrimental impact of the new mailbox limits upon the way the LLP was run. That is so even though, as I think is likely, with greater effort on their part that impact could have been reduced; but they felt, with some justification, that they were not obliged by the Service Agreement to shoulder that additional burden, unlike other F&C personnel. As the senior executive managers of the LLP, they legitimately felt that the uneasy compromise arrangement arrived at with F&C IT was not a satisfactory long-term solution for the LLP's e-mail requirements. In my judgment, therefore, the Defendants were entitled to take steps to look into alternative e-mail arrangements that the LLP might adopt.

535. F&C complained that the Defendants did not take steps to ensure that the LLP properly operated the dispute escalation procedure under Article 11 of the Service Agreement. It is open to question whether that is correct but, in any event, it has little bearing on the dispute. The Defendants made very clear to F&C IT and to senior F&C managers (in particular, Mr Leclerq and Mr Ribeiro) that the LLP was dissatisfied with the e-mail services which were provided by F&C IT. As a matter of substance, if not form, Mr Culligan escalated the LLP's complaint in a manner equivalent to that contemplated by Article 11.

536. By May and June 2007, the Defendants were complaining to Ashley Smith of F&C IT about the change in mailbox limits and, since he was unable to satisfy them, by an e-mail from Mr Barthelemy dated 12 June 2007 had also taken their complaint to Mr Leclercq (who was the relevant "service manager" for the purposes of first level review under Article 11 of the Service Agreement). Mr Leclercq had not produced a satisfactory solution.

537. Mr Culligan then e-mailed Mr Leclercq and Mr Ribeiro on 15 June 2007, again raising the complaint and stating that it had become "a business critical issue for us [the LLP]", asking for a 3 gigabyte exception for the LLP and stating that, if that was not possible, the LLP would begin the process of migrating to an externally-hosted e-mail system. Mr Ribeiro was made an addressee of Mr Culligan's e-mail in order to give him notice of the dispute. Mr Leclercq replied the same day to Mr Culligan and Mr Ribeiro, to indicate he would not meet the LLP's request for an increase in mailbox size to 3 gigabytes. Mr Culligan therefore e-mailed him and Mr Ribeiro to state, "We will make alternative arrangements". Mr Culligan also raised the matter at LLP Board meetings attended by Mr Ribeiro, where it was agreed that the LLP should look into making alternative e-mail arrangements.

538. In my view, the Defendants gave F&C IT and F&C senior management fair warning that a satisfactory solution needed to be found or the LLP would have to investigate switching to its own independent e-mail system. F&C could not reasonably think that the problem had been resolved. Mr Ribeiro made no attempt to intervene to override the stance adopted by Mr Leclercq. Therefore, if anyone within F&C had actually been thinking about the terms of Article 11 of the Service Agreement at the time (which I doubt – F&C IT seemed to be completely unaware that it was supposed to be providing an e-mail service according to the terms of the Service Agreement), they should have appreciated that the LLP was in a position, under Article 11, to waive the e-mail service provided by F&C and obtain from another service provider an e-mail service which met its requirements.

539. By e-mail dated 18 June 2007 Mr Culligan took the responsible step of alerting Mr Mackay, as the LLP's Compliance Officer, that the LLP was looking for a replacement external e-mail service and sought guidance from him as to the regulatory storage requirements for e-mails. It is probable that there was discussion between them about what was required. There was considerable delay in the LLP actually moving to its own externally hosted e-mail system while it searched for an external service provider which could offer a suitable archive facility.

540. Meanwhile, the Defendants struggled on with the limited e-mail service being provided by F&C IT, arguing desperately for extensions of the temporary expansion of their mailboxes which F&C IT grudgingly provided but repeatedly threatened to remove. Tempers became frayed on both sides. Frustration on the part of the Defendants was understandable, although the brusqueness of, in particular, Mr Barthelemy's complaints about the situation did not help matters. F&C IT resented the complaints, because they felt they were simply doing their job in trying to enforce the new F&C Group policy (but without apparently giving any thought to the question whether the LLP might be in a different position because it was not an ordinary member of the F&C Group or to the terms of the Service Agreement). Mr Ribeiro did not step in to clarify the position or resolve the issue.

541. In early October 2007, F&C IT offered the LLP a trial of a new arrangement to control mailbox sizes by means of an automated shortcutting system. However, Mr Culligan was not persuaded that it would be a satisfactory solution and told F&C IT that the LLP was testing an externally provided e-mail service.

542. The Defendants raised the problem of the mailbox limits with Mr Ribeiro in advance of a meeting of the LLP Board scheduled for 24 October 2007. Mr Ribeiro was

attempting to manage the fractious situation which had developed by soothing frayed tempers and trying to find some acceptable reconciliation between the clashing expectations of the LLP and F&C IT. In private discussion with the Defendants in advance of the meeting, Mr Ribeiro accepted that the LLP had raised a legitimate issue, that it was a distinct entity entitled to a reasonable standard of service from F&C and that he would do his best to sort the matter out. But at the same time he pointed out to them that it would make his task more difficult within the F&C bureaucracy to emphasise that the LLP was different from other members of the F&C Group. Accordingly, it was agreed that the issue would be noted at the forthcoming meeting in a neutral way without referring to this point, leaving it to Mr Ribeiro to try to sort things out diplomatically behind the scenes.

543. Unfortunately, at the Board meeting itself Mr Barthelemy felt constrained to put on record that the LLP felt that F&C was not acting in compliance with the Service Agreement. The minutes record the discussion as follows:

> "Mr Culligan reported that F&C Partners had identified that the F&C e-mail policy as implemented was not compatible with F&C Partners' mode of operating. It was proposed that F&C Partners migrate, within one month, to an external e-mail provider, subject to an audit review and signoff. The Board approved this approach subject to F&C Partners working, as far as possible, within the F&C policy in the meantime. Mr Barthelemy noted that the service provided to F&C Partners under the terms of the service level agreement did not include such limitations and that the imposition of limits could be detrimental to the business. It was agreed, nonetheless, that F&C Partners would employ reasonable efforts to work within the expanded limits currently in place until the alternative was ready for deployment. It was agreed that progress would be reviewed at the next board meeting."

(It is unclear why the LLP's e-mail service arrangements were to be treated as a matter for the LLP Board in this way, since sorting out the LLP's IT requirements was, according to clause 17.1, and in particular clause 17.1.1, of the Agreement, to be a matter for the ManCom, and clause 18.1 defining the role of the Board did not assign this task to the Board.)

544. Mr Ribeiro was outraged that Mr Barthelemy's intervention had broken the agreement arrived at before the meeting and had undermined the emollient approach he had wanted to adopt to resolve the issue. He e-mailed the Defendants the next day under the heading, "Why???????", to protest in strong terms at what Mr Barthelemy had done, to say that he had left him with no option but to adopt a much more formal approach and to indicate that at the next LLP Board meeting he would need to table two additional points: the e-mail system and the conduct of Mr Barthelemy in his dealings with different areas within F&C. (In fact, at the next LLP Board meeting few consequences seem to have flowed from this).

545. The LLP completed quarterly reports designed to alert its management to operational risks associated with its business, to prompt them to consider action to mitigate such risks (so-called "Turnbull reports", named after the author of the report which had

recommended the adoption of such a practice in light of the failure of Barings Bank in the 1990s). In the LLP's Q4 2007 Turnbull report, produced in February 2008, the problems with the F&C e-mail system blocking the ability of LLP personnel to send e-mails was noted as a business risk for the LLP which could cause adverse relationship issues with clients and underlying hedge fund managers, and it was stated that the LLP Board would consider adoption of an alternative e-mail system during the first quarter of 2008. In April 2008, the matter was noted as "still ongoing" and "under review" in the LLP's Q1 2008 Turnbull report.

546. At an LLP Board meeting on 13 February 2008 it was noted that the LLP continued to operate within the e-mail limits set by F&C IT while continuing to review alternative solutions. Trials with two possible alternative providers had been unsuccessful because they did not provide an adequate archiving facility.

547. At an LLP Board meeting on 21 April 2008 it was noted that no suitable solution to the archiving of e-mails by an external provider had been identified and that the issue of external e-mail provision would continue to be a work in progress to return to the Board for consideration once a workable solution had been identified.

548. In the LLP's Q2 2008 Turnbull report, dated 18 July 2008, it was again noted that the LLP Board would consider an alternative e-mail system during 2008, though the matter remained under review.

549. In about early September 2008, Mr Pennington requested F&C IT to unblock access to an external website as part of the continuing project to find an external e-mail provider for the LLP. Graeme Smith of F&C IT e-mailed him to ask for all documentation for the project, as he would be asked to carry out a security review on behalf of the GISC. Mr Pennington forwarded the request to Mr Culligan with the comment, "project documentation (as if)!". By this he meant that the LLP was a small organisation run on informal lines, where decisions to carry forward projects of this kind would be unlikely to be documented in any very elaborate way (unlike the more bureaucratic approach required elsewhere in the F&C Group, in view of its size).

550. On 4 September 2008 Mr Pennington responded to Graeme Smith to make this point. He said the project had been authorised orally by Mr Culligan and that the only written references would be in LLP minutes, which would provide little information; he asked Graeme Smith what he needed to know for the security review. It is likely that there was some further discussion between them in which Mr Pennington explained the LLP's position.

551. In the market turbulence from mid-September 2008 the Defendants were having to travel to fight fires on various fronts and had an urgent need for a facility to have remote access to their office computers, as Mr Pennington informed Graeme Smith by e-mail dated 7 October 2008. Mr Pennington asked Graeme Smith to unblock two sites linked to the "GoToMyPC" remote access solution provided by a reputable third party supplier called Citrix, pending finalisation of a robust, long-term remote access solution which F&C IT was then working on.

552. The same day, Mr Culligan e-mailed Mr Leclercq to ask for his support for this application of the LLP. Shortly afterwards Graeme Smith responded to Mr

Pennington and Mr Culligan to say the request would require the approval of the GISC, because it could open up the F&C IT network to security risks, and asking for information to enable him to make an assessment to put to the GISC (he also alerted Mr Mackay to the request, without telling the Defendants).

553. On 8 October 2008, Mr Pennington e-mailed Graeme Smith with the further information required about the proposal and Graeme Smith undertook to refer it to the next meeting of the GISC. It was less than satisfactory from the LLP's point of view that this meeting was only due to take place on 30 October. The Defendants not unreasonably regarded this as a further instance (along with the mailbox issue) of a lack of responsiveness by F&C IT to the business requirements of the LLP.

554. Meanwhile, Graeme Smith had made some preliminary enquiries and indicated to Mr Mackay that he would recommend to the GISC that the LLP's application should be dismissed on grounds that it could undermine the security of F&C's IT network (such a recommendation was likely to be decisive for the GISC). Neither Graeme Smith nor Mr Mackay told the LLP that this was the position.

555. In my view, by this stage F&C IT was displaying a degree of hostility to the LLP which increasingly took the form of a measure of uncooperativeness in responding to the LLP's requests. F&C IT thought that the LLP was making annoying and unreasonable requests for special treatment, whereas in F&C IT's opinion the LLP was simply part of the F&C IT network with no special status.

556. On about 13 October 2008, Mr Culligan and Mr Pennington had a discussion with Graeme Smith to try to persuade him to allow them to proceed with their remote access proposal, but an impasse was reached. Mr Culligan suggested use of another remote access solution called "Net Support Manager", which was already used by the Helpdesk within F&C IT. In response, Graeme Smith sent him an F&C IT report on the risks associated with external remote access solutions and explained the action being taken by F&C IT to develop its own remote access solution. The problem for the LLP was that that solution was not yet ready for use.

557. By 21 October 2008, however, F&C IT was indicating that it should be available shortly. A meeting was held that day between Mr Culligan, Mr Pennington, Graeme Smith and other F&C IT personnel to discuss the issue, after which Mr Culligan drew up a report (agreed with F&C IT) for the GISC. The report explained the LLP's pressing business need for its personnel to have remote access to their office computers, the solutions which had been considered and the meeting's preferred option of bringing forward a version of the F&C IT remote access solution to have it implemented "immediately" for the LLP. This solution was to include allowing remote access to LLP office computers from non-F&C hardware such as home computers or hotel business centres (an important point for Mr Culligan, as he emphasised to F&C IT), subject to certain security measures. The meeting represented a good faith effort on both sides to find a way through the impasse.

558. However, even though the other members of F&C IT at the meeting were happy with the proposal, Graeme Smith had left Mr Pennington and Mr Culligan feeling some uncertainty whether he would recommend the proposed solution to the GISC. So, on 23 October, Mr Pennington e-mailed him to check on his position. Graeme Smith now replied to say that there was a problem, since the proposal did not say that the

LLP personnel would be arranging for remote access using only F&C corporate laptops, as had been a requirement for all other dispensations for remote access previously granted by the GISC. This represented a reversal by Graeme Smith for F&C IT of the position which had been agreed by it at the meeting on 21 October. Understandably, Mr Culligan felt aggrieved by this; the reversal by F&C IT of its position undermined the sense of trust between the LLP and F&C IT which the meeting of 21 October had gone some way to rebuilding.

559. Mr Culligan e-mailed Graeme Smith to ask him how he proposed the aspect of the LLP's request to be able to have remote access from non-F&C computers should be accommodated. It does not appear that Graeme Smith replied to this. Instead, he prepared a report for the GISC on the LLP's application in which he stated that the computer used for remote access "must be an F&C device" and that there could be absolutely no use of a public computer; he added that if these requirements could not be met by the LLP, it would be required to wait until F&C IT's full remote access solution was ready at the end of November (in the event, it was not ready until June 2009). Graeme Smith knew that his recommendation as to the immediate way forward would not meet the LLP's requirements and that requiring the LLP to wait some time for F&C IT's full solution failed to respond to what the LLP maintained was the pressing nature of its business needs. He did not seek to explain his withdrawal from the position agreed at the meeting on 21 October before sending his report to the GISC, which would defeat the proposal which had been discussed and agreed at the meeting that day. Nor does it appear that he showed Mr Culligan or Mr Pennington his report to the GISC.

560. The Defendants had good grounds to find the behaviour of Graeme Smith for F&C IT very frustrating at this point. It affected later events, since it tended to confirm the view within the LLP that it could not expect a sympathetic response from F&C IT in reacting to its genuine business needs.

561. At an LLP Board meeting on 28 October 2008, Mr Tilson complained about the lack of progress within F&C IT in sorting out the mailbox limits problem. The Defendants reiterated that a solution needed to be found and asked Mr Ribeiro to raise the issue with Mr Leclercq.

562. At the end of October an incident occurred which strongly reinforced the Defendants' sense that the LLP was being let down badly in the service it was receiving from F&C IT. On 29 October, just as the Defendants were leaving for meetings in Berlin with the Boards of the Balanced and Select Funds the next day, they received notice of a letter from Credit Suisse to the Board of the Select Fund regarding a request Credit Suisse had made to unwind its leverage arrangements with the LLP and its clients. This letter represented an attempt by Credit Suisse to go over the heads of the Defendants, with whom it had been negotiating, and represented something of an ambush. The Defendants urgently needed to be in a position on 30 October to brief the Board of the Select Fund and its lawyers so as to be able to respond to Credit Suisse. Time was considered to be of the essence.

563. It was at this point, however, that the absence of a remote access facility had the effect of disabling them from obtaining speedy access to all the underlying contractual documentation held on their office computers, which was a significant impediment to being able to deal with Credit Suisse's gambit effectively. As a result of this, the

Defendants became convinced that the LLP was going to have to find a new way of satisfying its IT needs, a feeling reinforced by a message from Graeme Smith the next day that the GISC had not met at the scheduled time due to a lack of members attending and so did not even consider the LLP's request for a remote access solution. F&C appeared not to be giving any priority to what the LLP saw as acute business pressures upon it.

564. Following on from this incident, on 7 November 2008 Mr Culligan e-mailed Mr Mackay, in his capacity as head of the GISC, to complain forcefully about F&C's failure to provide the LLP with a remote access solution despite it having been raised as a critical business requirement of the LLP on 7 October. He referred to the discussions with F&C IT about their proposed solution (while also being dismissive of the reasons given by them for rejecting the LLP's preferred solutions), set out his understanding that it had been discussed at the GISC and approved (which reflected the way in which F&C IT had kept him in the dark about what was really happening) and complained that Mr Pennington had run up against a "surly jobsworth attitude" on the part of F&C IT in having the solution implemented. He emphasised the business risks to the LLP, as illustrated by what had happened in Berlin. He wrote:

> "Unless we can resolve this issue speedily, I don't think I will have any choice but to move F&C Partners to a BCP configuration where we can address these issues directly."

The significance of Mr Culligan's reference to "a BCP configuration" was that he was seeking to indicate that there could be a stand-alone IT configuration for the LLP separate from the F&C Group IT network, in the same way that the LLP would set up its own separate IT network as part of its yearly BCP test.

565. On about 10 November 2008, the GISC issued its decision on the LLP's request for a dispensation from F&C's general IT policies to allow remote access to the LLP's office computers. The GISC indicated a partial dispensation and set out three alternatives which it would allow the LLP to follow:

i) remote access using F&C corporate laptops only, with no use of a public computer (i.e. the position Graeme Smith had recommended in his report);

ii) the LLP could take part in a pilot test of the F&C IT remote access solution being worked on, which would allow the LLP personnel to use non-corporate devices to connect to their office computers (but the GISC noted that, as a pilot system, it would be subject to problems until the project was completed, which was then said to be by the end of November 2008); or

iii) the LLP could do nothing and simply wait for completion of the F&C IT project at the end of November 2008.

As set out in the GISC's decision, none of these options was very attractive for the LLP. Although option (ii) was similar to what had been discussed at the meeting on 21 October, it appeared markedly less satisfactory than it had done at the meeting because of the warning that it would be unreliable and subject to problems (with the implied suggestion that dealing with such problems might not be regarded as a priority by F&C IT).

566. In mid-November 2008, the LLP redoubled its efforts to find an alternative e-mail service provider.

567. On 17 November 2008, Mr Tilson e-mailed Mr Culligan and Mr Pennington with a draft BCP test programme for a BCP test to be carried out later in the year. The draft programme followed the model of the programme for the LLP's BCP test in 2007. It contemplated an exercise on a single date, in line with usual BCP testing practice.

568. On 18 November 2008, Mr Culligan e-mailed Mr Ribeiro to ask for his help in resolving the issues of the limits to the ability of LLP personnel to send e-mails (related to mailbox size limits) and remote access. He made a strong complaint about F&C IT, referred to planning for the LLP's annual BCP test at a different location and said:

> "It occurred to me that we should seriously consider using such a location on a temporary basis as a means of addressing this risk [i.e. the business risk for the LLP arising from F&C IT's service]."

569. However, there was no progress to address the LLP's concerns.

(ii) The LLP sets up a new IT infrastructure to arrange for external e-mail and remote access services without interference from F&C IT

570. On 2 December 2008, Mr Pennington asked F&C Legal to change the MX record configuration for the "fandcpartners.com" domain which had previously been registered for the LLP, so as to allow for use of an external e-mail service using addresses in that domain (the "Active Office" external e-mail and archive system). The LLP did not conceal from F&C the steps it was taking to change its e-mail service provider.

571. Mr Pennington also put in a request to F&C IT for a separate ADSL line to be fitted for the LLP, to enable internet access for the LLP using non-F&C corporate computers. However, Graeme Smith indicated that it was unlikely the GISC would give approval for this, so the request was withdrawn.

572. Having been blocked by F&C IT in this way, Mr Culligan and Mr Pennington turned to more inventive ways to meet what they regarded as the pressing IT needs of the LLP, and were not open with F&C IT about what they were doing for fear that it would seek to obstruct them in some way.

573. On 9 December 2008, Mr Pennington pulled out of F&C IT's remote access pilot group. This reflected steps taken at about this time by Mr Culligan and Mr Pennington to set up an independent IT infrastructure for the LLP, running separately from the F&C IT system and under the LLP's sole control. This move was taken in parallel with finally setting up and activating for all LLP personnel an externally-provided e-mail service with adequate archiving function (Active Office), using "fandcpartners.com" standard addresses alongside (in practice, in place of)

"fandc.com" e-mail addresses, and an effective externally-hosted remote access solution.

574. On 11 December 2008, Mr Pennington requested that the dedicated server for the LLP be moved from a rack under the control of F&C IT to the LLP's office. Ashley Smith e-mailed to ask him to explain. Mr Pennington replied in a way intended to conceal from F&C IT what was really going on, namely that the LLP was in the process of constructing its own IT infrastructure. He wrote:

> "F&C Partners intends to stage its annual mini BCP test on Monday and I intend to use our server for the purposes of this test.
>
> I believe I understand the risks associated with moving the server and using it for a time outside of the Server room and Anthony [Culligan] is happy with this.
>
> If you need to hear it from a higher authority than myself, of course you should feel free to contact him directly."

This gave the false impression that the server was required for the purposes of an ordinary BCP test lasting about a day, whereas the LLP actually required it because it was now setting up an independent IT infrastructure which was intended to last for a good deal longer than one day.

575. Ashley Smith was mystified by the response (since, if there were a major disaster affecting the office, the LLP would not be able to get access to the server) and asked Mr Pennington further questions, including whether the plan was to put the server back the next day. Mr Culligan drafted an e-mail for Mr Pennington to send in reply, as follows:

> "Ashley,
>
> Each year we test a slightly different scenario. This year we are simulating an office rebuild with domain based database security. This requires a configured and loaded dataserver. In a real DR [disaster recovery situation] I guess we would have to build it from scratch. We will require the machine from 8am on Monday and will return it when the BCP is complete."

Although this e-mail also had a tendency to mislead Ashley Smith, since it seemed to imply that what was in contemplation was an ordinary BCP test lasting for a short period, it was not suggested to Mr Culligan in cross-examination that he had drafted this in order deliberately to deceive him. Mr Pennington adopted the draft and sent it on to Ashley Smith with minor, non-material changes; Ashley Smith then agreed to the relocation of the server.

576. By this stage, Mr Culligan and Mr Pennington had decided that the line they would adopt with F&C IT whenever pressed was that the LLP was carrying out an extended BCP test to check that it could maintain a robust, discrete IT network and IT services apart from F&C. So far as Mr Culligan was concerned, he sought to exploit a certain

vagueness about what a BCP test might involve in order to deflect F&C IT from probing in more detail into what the LLP was doing. Mr Pennington did not regard the setting up of the LLP's own IT infrastructure as a normal BCP test, but felt that he was acting properly in what he did because Mr Culligan designated it as such.

577. On 2 December 2008, Mr Pennington e-mailed F&C IT to say that, as part of the LLP's BCP exercise, it would "probably want to try forwarding e-mails for some or all of the [LLP] staff" and requesting F&C IT to set up global contact entries in the F&C internal e-mail address-book with the "fandcpartners.com" address. F&C IT did this.

578. On 12 January 2009, Mr Culligan e-mailed Mr Tilson as follows:

> "We need a doc[ument] which sets out objectives for the current BCP test. It should be framed as a test of our ability to run our systems independently of the F&C infrastructure for an extended period of time. We should open an issues log so that we can record issues as they arise and log solutions."

579. Mr Tilson prepared a revised BCP test plan to reflect this and a draft issue log, which he forwarded on 13 January to Mr Pennington to ask for his assistance in filling it out. Mr Pennington added some comments on particular issues, reflecting work done on developing the LLP's own new IT infrastructure. As originally set up by him, the LLP's new IT infrastructure had been detached from its connections to the general F&C IT system and Mr Pennington had installed a wireless router to provide internet access for the LLP's IT system. These arrangements had, however, caused problems for the LLP and led to corrective action being taken. It is very probable that the corrective action was taken with the knowledge and authorisation of Mr Culligan.

580. The problems and the relevant corrective actions were noted by Mr Pennington in the issue log. He noted that the original Vodafone 3G wireless connection to the internet had been found to be unreliable on occasion, affecting e-mails and remote access; accordingly, it had been replaced with a different 3G router with greater capacity. It is relevant to observe that both these wireless routers contained ordinary commercial firewall technology of a sophistication and robustness substantially below that of the dual firewalls around F&C's IT network.

581. Mr Pennington also noted that there had been an issue regarding absence of connectivity to the F&C IT network and that that had now been addressed by arranging for three computers in the LLP's office to remain linked to the F&C network. These computers were on the new LLP IT network but configured to link to the F&C network as well ("the dual-homed computers"). This had been done to allow the LLP to have the benefit of electronic data relayed into its office from Bloomberg and Pertrac via the high capacity robust F&C link to the internet (the LLP's own wireless routers having inadequate capacity to allow for this in a reliable way) and to allow Mr Tilson to be able to connect to his computer in the LLP's office from a computer in F&C's office in Dublin.

(iii) F&C's complaints in the Cross-Petition regarding the creation of the LLP's new IT infrastructure

582. The configuration of the three dual-homed computers to join them to both the LLP's IT network (with its new wireless router connecting its network to the internet) and to F&C's IT network created a link between those networks which created the potential for a breach in F&C's firewall security - if malicious software could be introduced into the LLP's network by smuggling it past the relatively weak firewalls on the LLP's wireless router connection to the internet, it might then be passed step by step through computers on the LLP's network to the dual-homed computers and then introduced by them into F&C's network without being scrutinised by F&C's own more rigorous and effective firewall technology. The linkage of the new LLP IT network to the internet via the LLP's wireless router, combined with the linkage of the LLP and F&C networks via the dual homed-computers, constituted a potential back door into the F&C network, bypassing F&C's firewall protection.

583. At trial, F&C was very critical of Mr Culligan for authorising this IT configuration and putting its own IT security in jeopardy in this way. His response was to point out that, unlike the F&C network, the LLP IT network was not configured to allow it to receive unsolicited electronic messages from the internet. Therefore, he said, the LLP did not need such sophisticated firewall protection as F&C. The ordinary firewall protection in the LLP's wireless router was sufficient for the LLP's business and there was no significant risk for the F&C network via the LLP network. Mr Pennington supported Mr Culligan in this assessment.

584. In my judgment, this does not constitute a good answer to F&C's criticism. As the expert evidence on IT matters showed, the mere fact that the LLP network was not configured to received unsolicited messages did not provide full protection from malicious software getting onto the system. It is a technique of hackers to try to induce someone to open a website or a specific item on a general website such as Facebook, so as to create a link to that person's computer, by means of which electronic messages containing malicious software can be passed. Such messages would not be unsolicited, but would have been invited onto the network by contact initiated from the network. The principal protection against that possible line of attack on a computer network would be to install appropriate firewall protections for the network. Another possibility might be to use very strict operating protocols to forbid computer users connecting to potentially harmful addresses, but these would always be likely to be vulnerable to human error and, in any event, the LLP did not put in place such protocols. Also relevant to protecting against virus attack is the installation of anti-virus software on computers (all F&C and LLP computers were equipped with such software), but if they are able to introduce a virus onto a computer sophisticated hackers may be able to bypass and defeat this sort of protective measure.

585. The level of computer security required for a business is a matter of business judgment for that business, taking account of the attractiveness of the business's computer network as a target for hackers, the extent of the business's vulnerability to attack, the potential harm which might be caused to the business by an attack (e.g. through loss of data or diversion of funds) and the cost (both in terms of price and in terms of barriers to maximum business efficiency) of introducing any particular set of protective measures. In this regard, the position in relation to the LLP IT network and

the position in relation to the F&C Group IT network were distinct and need to be assessed separately.

586. Within the LLP, decisions regarding the computer system, e-mail arrangements and the like had throughout been treated as matters for Mr Culligan to decide as Managing Partner, with assistance from Mr Pennington. This inevitably involved Mr Culligan in making the relevant decisions about the level of risk of various kinds which would be acceptable for the LLP to accept in relation to its IT arrangements. He would report IT developments in very summary detail at ManCom and LLP Board meetings, but the ManCom and the Board did not require more detailed reports or make any attempt to decide such matters themselves. This approach to decision-making in relation to this aspect of the LLP's business was in accordance with the terms of the Agreement: the ManCom, not the Board, had responsibility for such matters (clause 17.1, especially at clause 17.1.7), and could delegate to Mr Culligan as it did (clause 17.1.8). I therefore accept the contention of the Defendants that issues regarding the appropriate IT arrangements for the LLP were within the authority of Mr Culligan to decide.

587. Mr Culligan and Mr Pennington both thought that the security arrangements in place for the LLP IT network – comprising a basic level of firewall protection built into the LLP's wireless router (which was advertised as suitable for a small business) and a business-standard level of anti-virus software installed on its computers - were sufficient for its purposes. I consider that that was a judgment they could reasonably make, having regard to the probable limited attractiveness of the LLP as a stand-alone target, the limited level of investment transactions it undertook and financial information it had to maintain (which tended to limit its vulnerability to attack) and the relative imperviousness of the LLP network to messages from the internet. I reach that conclusion even though, taking the LLP network on a stand-alone basis, the type of risks posed by hackers referred to above could not be fully discounted and I think it would have been preferable (a matter of best practice) if Mr Culligan had commissioned a specialist IT security review of the LLP's network (notwithstanding that he and Mr Pennington were very knowledgeable about computers, they were not trained in or especially knowledgeable about IT security matters).

588. However, even though Mr Culligan and Mr Pennington formed a view which was reasonably open to them about the security for the LLP network taken on its own, I consider that they moved too swiftly from that judgment to a conclusion that the risk which the linkage of the LLP's network to F&C's network via the dual-homed computers created for F&C's network was also at an acceptable level. In my opinion, that conclusion (which was their genuine view) was not justified. On this part of the case I accept the main thrust of the evidence of Mr Pearce, the IT expert called by F&C, criticising Mr Culligan for taking steps which unduly compromised the security of the F&C IT network (he said comparatively little bearing directly on the question whether Mr Culligan unduly compromised the security of the LLP's own IT network, the topic considered above).

589. The risk profile for the F&C Group was different from that for the LLP. It was a bigger, more attractive, more vulnerable target for malicious hackers. In relation to F&C's network, the risk posed by the potential for its firewall defences to be bypassed by electronic messages passing through the back door created by the dual-homed computers on the LLP's IT network was significantly greater than for the LLP.

Mr Culligan and Mr Pennington did not arrive at a fully informed risk assessment having regard to that wider risk to F&C.

590. Moreover, as I have found, they decided not to inform F&C IT about the details of the set-up of the LLP's IT network and the dual-homed computers because they feared that F&C IT would be unreasonably obstructive in opposing the new arrangement. This was a view based on their previous experience of F&C IT. Mr Culligan and Mr Pennington did not want to lose the convenience of having the secure Bloomberg and Pertrac data flows provided through linkage to F&C's IT network and internet connections via the dual-homed computers. Although their experience of F&C IT did give them legitimate grounds for concern about its reaction, it did not in my view provide sufficient justification for their failure to inform F&C IT about the new arrangements which they had put in place.

591. By proceeding in the way they did, Mr Culligan and Mr Pennington deprived F&C of the opportunity of deciding for itself the extent of the risk which it was prepared to accept for its own IT system, as created by the linkage between the LLP's IT network and F&C's IT network, and of the opportunity of deciding on the security measures which it might think necessary to put in place in light of that risk. In all probability, this conduct by Mr Culligan and Mr Pennington placed the LLP in breach of its obligations under Article 3.1 of the Service Agreement (involving a failure to observe proper standards of market conduct or a failure to take reasonable care in organising and controlling the LLP's affairs and responsibilities in relation to F&C), although they were not conscious that what they did constituted such a breach.

592. The question arises, did Mr Culligan's conduct in this respect constitute unfair prejudice to the interest of Holdings as Corporate Member of the LLP for the purposes of section 994? In my view, having regard to the points set out in the following paragraphs, it did not.

593. Mr Culligan acted to promote what he genuinely thought were the best interests of the LLP. The risk he created for the LLP's IT system was, in my judgment, within reasonable bounds and fell within the scope of the authority which was his to exercise. It was a business judgment he could properly make. It is not for this court, on an unfair prejudice application under section 994, to second guess such a business judgment: see para. [254] above.

594. The risk created for the F&C IT system was not within acceptable bounds so far as F&C was concerned, but that is a matter falling outside the scope of the protection afforded by section 994 to Holdings as Corporate Member, in respect of its partnership interest in the LLP. The one qualification to this general observation is that, in appropriate circumstances, I think it would be possible to conclude that the affairs of a company or limited liability partnership had been run in a way unfairly prejudicial to its members if those having relevant control of its affairs caused it to act in such a way as to create serious legal liabilities on the part of that entity to third parties, without adequate or proper business justification for doing so. This might constitute a form of mismanagement of the affairs of such an entity which could potentially fall within the category of situation considered by Arden J in the *Macro-Ipswich* case: see para. [254] above.

595. Might it be said here that Mr Culligan, by causing the LLP to act in breach of article 3.1 of the Service Agreement vis-à-vis F&C, acted in a way unfairly prejudicial to the interests of Holdings in its capacity as Corporate Member of the LLP? In my judgment, the answer is "No". It is not the case that all conduct which has the effect of putting a company or limited liability partnership in breach of an obligation owed by it to a third party will constitute unfairly prejudicial behaviour for the purposes of section 994. Businesses often undertake activity which they know is, or may be, in breach of obligation where the managers assess in good faith that it is to the business's overall commercial advantage to do so. A minority shareholder or interest holder cannot simply rely upon the breach, or possible breach, of obligation and consequent potential exposure of the entity to complaint or legal action as sufficient foundation for an unfair prejudice petition. Something more would be required, such as showing that the relevant managers acted to place the entity in possible breach of obligation without having any regard to its commercial interests or acted in a seriously incompetent way with the result that the business suffered substantial detriment. In my judgment, the circumstances of the present case are a good distance away from those sorts of case.

596. Mr Culligan acted so as to address the LLP's pressing IT requirements in circumstances where, after extended attempts to arrange for F&C IT to meet them adequately, he had found the service it was prepared to provide to the LLP to be deficient and unresponsive to its needs. There were reasonable grounds on which Mr Culligan could conclude that, from the point of view of the LLP, F&C IT was not taking proper action to meet its IT needs. He did not consciously seek to place the LLP in breach of its obligations to F&C under the Service Agreement; nor from the point of view of the LLP did he act in a negligent or seriously incompetent way as a manager in taking the action he did; nor, in taking the action he did, did he in fact expose the LLP to substantial detriment.

597. Although F&C had legitimate reason to complain about the risk to which Mr Culligan's actions had exposed its IT network, F&C in fact suffered no detriment as a result. Once the position was fully understood by F&C, it was a simple matter for the situation to be rectified.

598. In any event, Mr Culligan's actions did not expose the LLP to a significant damages claim by F&C - by reason of article 3.5 of the Service Agreement, the LLP was not liable to any damages claim on the part of the F&C in relation to any breach of article 3.1. If F&C withdrew its IT support for the LLP, as it would be entitled to do under the terms of the Service Agreement, that would not have been a significant detriment for the LLP. The LLP had already taken steps to put in place alternative provision for its IT needs, and it would be a relatively straightforward matter for the LLP to establish its own more robust connection to the internet to receive the Bloomberg and Pertrac data feeds by setting up its own ADSL line independently of F&C.

(iv) Knowledge within the LLP of its new IT infrastructure, e-mail and remote access arrangements

599. From about early January 2009, e-mails from LLP personnel presenting themselves as coming from e-mail addresses at "fandcpartners.com" rather than "fandc.com" reflected the change by the LLP to its now externally-provided e-mail service. I do

not think that Mr Ribeiro immediately appreciated the significance of this change, although F&C IT personnel probably did.

600. On 13 January 2009, Mr Tilson compiled an operations report for the LLP Board for consideration at the next Board meeting. This included the following reference to the new LLP IT infrastructure which Mr Culligan and Mr Pennington had set up:

> "1.2 Business Continuity
>
> Historically, F&C Partners has performed business continuity tests independent of F&C. The objective set for the latest test was to assess the ability of F&C Partners to run its systems independently of the F&C infrastructure for an extended period of time. Testing commenced in December 2008. Progress so far has been positive. A log is being maintained as a record of issues raised and solutions implemented. It is intended to run this test for a number of months in order to demonstrate the robustness of the independent infrastructure."

601. F&C have criticised Mr Culligan for calling the new separate IT infrastructure for the LLP a BCP test, whereas in truth it was intended to run as a substantive separate IT network for the LLP. There is force in this criticism. Once the LLP moved its operations on to the new network, with its own e-mail and remote access provided by external IT companies, it did not continue to run its software and maintain its records on the F&C network in parallel. The new IT network at the LLP replaced the LLP's reliance on F&C's IT network. This, combined with the fact that the new network was intended to run for months rather than a day or two, indicates that it was not properly characterised as a BCP test as that term is commonly understood. If the LLP's new IT network failed, the LLP would need some distinct business continuity plan as a back-up for that network.

602. In practice, Mr Culligan was seeking to use the idea of a BCP test as cover to explain why the LLP had set up its own independent IT network without provoking a complete break with F&C in relation to provision of IT services, which might well have been inflammatory in the strained circumstances at that time and potentially detrimental to the LLP. At this stage, Mr Culligan believed that the LLP's own IT network would only have to operate as a stop-gap until such time as he felt F&C IT had improved the services it could provide to the LLP so that they met the LLP's business needs.

603. However, notwithstanding the misplaced use of the business continuity label, this section in the operations report gave a reasonably clear picture of what was going on (albeit it did not explain the details of the arrangements, including such technical matters as the use of a wireless router and the set-up of the dual-homed computers), sufficient to alert members of the ManCom and the LLP Board that significant changes had been made to the LLP's IT infrastructure, should they wish to go into this in any detail. The report was drafted by Mr Tilson, who certainly was not a party to any attempt to cover up activities by Mr Culligan (but rather was, by this stage, engaged in providing information covertly to Mr Ribeiro), and he clearly felt that

what was said in this section gave a sufficiently clear indication to LLP Board members that the LLP had moved to its own distinct IT infrastructure and intended to continue with it for an extended period. I therefore conclude that the substance of the arrangement was not concealed from the LLP Board.

604. All employees of the LLP were aware of the broad nature of the changes in IT arrangements, which were openly discussed in the LLP's office (albeit, again, probably not at the level of technical detail involving an explanation of the wireless router and the dual-homed computers - but these were technical details which would have been of little concern to those other than Mr Culligan and Mr Pennington, who had always dealt on their own with the technical side of the LLP's IT arrangements). There was no attempt internally to conceal what had been done. Mr Ribeiro was informed of the substance of the new IT infrastructure arrangement when he received the operations report and he was given a still more explicit and full account of the IT changes privately by Mr Tilson on 19 January: see para. [631] below. Thus, all members of the LLP's ManCom were aware of the relevant changes at a level of detail which was in line with the usual way in which the LLP carried on its affairs.

605. Arranging to put in place the new IT arrangements was action undertaken by Mr Culligan in what he genuinely regarded as the best interests of the LLP; it was action within his area of responsibility; and it occurred with sufficient notice to the LLP ManCom should any member of it have wished to have the matter withdrawn from Mr Culligan and restored to the ManCom for decision under clause 17 of the Agreement. No-one asked for that to happen. None of the ManCom members suggested that there was any need to have an explicit discussion about this at a ManCom meeting; all of them were content to acquiesce in what had been done. This is further support for my conclusion that none of Mr Culligan's actions in this regard constituted conduct unfairly prejudicial to Holdings as Corporate Member of the LLP.

January and February 2009: the First Put Option Notices

606. After hearing Mr Ribeiro's cryptic threats at the meeting on 17 December 2008, the Defendants took legal advice regarding their position under the Agreement.

607. In early January 2009, the Defendants worked together to draft a written statement to the LLP Board, addressing what they regarded as the conflict between them and F&C; referring to what they said Mr Ribeiro had told them, that Execom had already decided to close the LLP, and that three LLP staff members (Mr Reynolds, Mr O'Hara and Ms Rattigan) were to be made redundant; and complaining that Mr Ribeiro had not asked their views about required staffing levels and profitability and that his proposals were detrimental to the business. The draft paper accused Mr Ribeiro and F&C of "conspiring to destroy" the LLP's value "by making rash and irrational decisions" from the point of view of the LLP, in order to give effect to F&C's decision to close it without paying the price of first acquiring the Defendants' interests in it by exercising its call option under the Fourth Schedule. The draft paper stated that the Defendants believed this was a criminal offence; that they would seek immediate injunctive relief should F&C take any decision to damage the franchise of the LLP (they referred, in particular, to the obligation of utmost good faith in clause 13.6 of the Agreement); and they called for a discussion with a senior F&C executive other than Mr Ribeiro, whose role they described as "conflicted".

608. Having slept on the draft paper, however, they decided not to deploy it at the LLP Board meeting the next day. Mr Culligan, in particular, thought that it went too far and that to deploy it would be too inflammatory in terms of the relationship with F&C. The document did nonetheless accurately reflect the Defendants' suspicion of F&C, and of Mr Ribeiro in particular. The complaint they made regarding Mr Ribeiro's simple announcement that redundancies would be made was a fair one – Mr Ribeiro could have done more to debate the position with them rather than present it almost as a *fait accompli*. However, there was a genuine difference of views on the issue and the matter was going to have to be ventilated and brought to a head at some point; so, although the manner in which Mr Ribeiro raised the point was clumsy and involved veiled threats, he did not breach any obligation in bringing it up as he did. Although the Defendants' suspicions about Mr Ribeiro's motives and desire to destroy, or devalue, the LLP were perhaps understandable in the circumstances, they were misplaced.

609. F&C, for its part, pointed at trial to the reference in the draft paper to possible legal proceedings, in order to suggest that at about this time the Defendants decided upon their own counter-strategy, to provoke F&C into some breach of the Agreement, or to wait to see if F&C would trip up in its handling of the situation involving it in breaching the Agreement, so that the Defendants could exercise their Put Options with the preferential price formula contained in paragraph 1.7 of the Fourth Schedule. F&C's suggestion at trial was that the Defendants decided that they now wished to exit from the business and thereafter were simply waiting for a good opportunity to do so at maximum benefit for themselves and in clear disregard for the interests of the LLP and of Holdings as Corporate Member.

610. I reject these contentions. The Defendants did not wish to leave the LLP. They wanted its business to continue, pursuing policies which they favoured, with F&C (through Mr Ribeiro) abiding by the rules of the Agreement and not seeking to impose what they regarded as improper business decisions on the LLP. If F&C wanted to withdraw from the LLP, the Defendants wanted it to buy out their interests either by exercising its call option under paragraphs 1.9 and 1.10 of the Fourth Schedule or by some suitable commercial deal such as had been mooted in the Defendants' Strategic Options Paper.

611. The Defendants did not wish to go to law over any of this. Contrary to F&C's suggestion, setting up the opportunity for a legal dispute was very far from their wishes. Any such dispute would have the potential to be very costly and it would involve enormous risks for them. Pitched as individuals against a large, well-funded corporate group such as F&C, they viewed the prospect of litigation as a possible last resort, undesired by them, and (they thought) unlikely to arise in practice.

612. On 6 January 2009, the next LLP Board meeting took place, attended by Mr Ribeiro, the Defendants, Mr Cole and Mr Johns and Mr Tilson for the first part of it, with Mr Tonkin attending by telephone. Mr Barthelemy gave an update on the LLP's business, stressing that the Balanced Fund had performed well by comparison with the CSFB Tremont index and its closest peers. Mr Johns said investment into the hedge fund industry generally was unlikely in 2009, but against this the Defendants suggested that some potential clients would see the depressed market as an investment opportunity. Mr Tilson reported on the AUM position and presented the draft budget

for 2009, showing a loss for the year (with costs of about £900,000 and net revenue of about £670,000, assuming no new AUM), before leaving the meeting.

613. The Board then discussed the business outlook for the LLP. Mr Ribeiro's view was that new investment from the existing client base was unlikely and that the LLP would face a serious survival issue in 2009. (He had overlooked the obligation of Holdings/F&C, under clause 8.3 of the Agreement, to make payments to maintain the regulatory capital of the LLP should it suffer losses, or perhaps thought that the LLP Board could be prevailed upon never to make a request for a capital payment as contemplated by that provision; similarly, the Defendants did not refer to clause 8.3 or maintain in light of it that the LLP did not face a "serious survival issue in 2009" as Mr Ribeiro said; in line with the view I have expressed at para. [238] above, both sides implicitly recognized that clause 8.3 could not simply be treated as a blank cheque which enabled the LLP to spend whatever it liked, no matter what losses it might sustain).

614. The Defendants stated their belief that there would be opportunities to grow AUM in 2009 from new clients and Mr Culligan maintained that the LLP was in a good competitive position. The Board members broadly agreed that a balance had to be struck to adjust the LLP's cost base for 2009 and still allow the LLP to be positioned in manner to enable it to take advantage of opportunities referred to by the Defendants. Mr Ribeiro asked the Defendants how they proposed to close the gap between projected costs and revenues. Mr Barthelemy said that the LLP's gross projected revenue of about £1.2 million would cover its costs if one left out payment of the marketing fee to F&C, but Mr Ribeiro stated that this was a cost of the LLP and could not be left out of account. Mr Ribeiro proposed that Mr Reynolds (the due diligence analyst) and one of the two administrative staff should be made redundant. (In view of the resistance he had encountered in December, Mr Ribeiro seems to have fallen back to proposing only two rather than three redundancies at the LLP, in line with what he had undertaken to Execom he would seek to deliver).

615. The Defendants strongly resisted this proposal, on the grounds that it would undermine the viability of the business and its ability to attract new clients. Mr Culligan proposed that other cost-savings should be identified and said that he was sure all employees would be prepared to cut their salaries to avoid redundancies.

616. Mr Johns asked whether the Defendants would be prepared to see their advance profits drawings cut, to which Mr Barthelemy responded that they were open to discussing any changes to the Agreement provided all aspects of it were up for discussion. This was a fair response, particularly in light of Mr Ribeiro's statement earlier in the meeting to the effect that F&C would not be prepared to waive any part of the marketing fee due to it under the Agreement (it was by means of the marketing fee that F&C obtained its own form of prioritised revenue stream from the LLP). The F&C representatives had no appetite to open up the whole of the Agreement for discussion and the suggestion was not pursued any further.

617. Mr Cole said that efforts to cut costs were having to be made across the whole F&C Group and that F&C generally was seeking to reduce its headcount so it could sub-let part of its office space to solicitors in the same office block who wanted to expand. This triggered Mr Culligan's interest. He said that there were real potential cost benefits in the LLP moving out of F&C's offices. In due course, this embryonic

suggestion developed into another area of controversy, but at this stage the F&C representatives did not raise immediate objections to the idea.

618. Instead, it was agreed the Defendants should provide Mr Ribeiro with a paper setting out the actions they proposed to take to lower the LLP's cost base; that the Defendants should examine all reasonable opportunities to increase revenues outside the current client base, including those which involved business ideas related to but distinct from the LLP's current FoHF business (so-called "adjacent business models"); and that they should produce a summary of such ideas ahead of F&C's Execom meeting to be held the following week. Mr Ribeiro undertook to inform the Defendants of the decision taken by the Execom.

619. On 9 January 2009, the Defendants met Mr Grisay and outlined to him the four strategic options they had put to Mr Ribeiro on 17 December. Mr Grisay was non-committal.

620. At about this time, Mr Ribeiro directed F&C HR to proceed with arrangements for making Ms Ross redundant, but told them to hold fire "for the time being" in relation to any possible redundancies in the LLP. I consider that this is an indication that Mr Ribeiro was keeping an open mind about what the Defendants might propose as an alternative to redundancies in the LLP and is further support for the view that there had been no decision taken to close down the LLP.

621. In preparation for the next LLP Board meeting the Defendants researched the availability of alternative, cheaper office premises in the vicinity. They also drew up a paper for the LLP Board entitled "F&C Partners looking forward to 2009", which analysed the business position of the LLP and set out their proposals for cutting costs to produce a break-even budget while avoiding redundancies so as to retain the integrity of the workforce. They proposed to economise substantially on travel and client expenditure (entertaining and the like), to move to cheaper office space and to bring IT and accounting functions in-house (and so reduce payments to F&C under the Service Agreement for those functions). Their paper acknowledged that their drawings of £150,000 each for 2009 would be debited against Holdings' capital account in the LLP, but stated that they would be recovered through priority drawing by Holdings in future years (a summary of the effect of clauses 9 and 11 of the Agreement).

622. The paper identified revenue opportunities in very general non-specific terms, referring to possibilities of picking up accounts from stressed FoHFs and picking up hedge fund holdings cheaply from distressed sales, and to a possible new model providing managed accounts for clients (i.e. a more tailored fiduciary service for clients). The paper did not identify revenue figures from these activities.

623. On 13 January 2009, Mr Tilson e-mailed Mr Ribeiro (not copied to the Defendants) to ask whether he wished to have a risk related to the viability of the LLP's business included in the LLP's Q4 2007 Turnbull report, to the effect that unless the LLP's lower revenues from its reduced AUM for 2009 were compensated in some other way, revenues for 2010 would imply that the business would "no longer be viable". I do not think it likely that Mr Tilson discussed this insertion with the Defendants, as he should have done.

624. Mr Ribeiro replied to say that text along those lines should be included in the Turnbull report. I think it likely that Mr Ribeiro appreciated in this exchange that Mr Tilson was acting without reference to the Defendants, and he did not seek to correct this behaviour. However, it was also clear that the draft report including this text would fall to be discussed with the Defendants at the next LLP Board meeting.

625. On 14 January 2009 the Defendants also circulated a paper entitled "F&C Partners Strategic Options" for consideration by F&C's Execom, as they had promised Mr Ribeiro they would do (it was also circulated to the LLP Board in advance of its meeting on 21 January). This paper again maintained that costs could be cut sufficiently without firing staff and emphasised the Defendants' view that it was critical to maintain current staffing levels in the LLP. The paper made very generalised and vague references to alternative revenue opportunities for the LLP. It then rehearsed the same four strategic options which the Defendants had set out in their Strategic Options Paper for Mr Ribeiro and had outlined to Mr Grisay on 9 January.

626. The Execom met on 15 January 2009. Mr Ribeiro presented the four strategic options put forward by the Defendants and there was discussion about them. Execom were not persuaded by them. Mr Ribeiro said he awaited a revised break-even budget submission from the Defendants. Execom agreed that the decision on the appropriate course of action would be for Mr Ribeiro. The Defendants' attempt to bypass Mr Ribeiro by going to Mr Grisay on 9 January had failed.

627. Also on 15 January, Mr Ribeiro e-mailed the Defendants in relation to work being undertaken by Ms Ross on the CTA project, which the Defendants had told Ms Ross they would like to extend. Mr Ribeiro informed the Defendants that such a project, if pursued, would be outside the scope of the LLP and that the Defendants should avoid involvement in it.

628. Mr Culligan reverted to this topic in an e-mail of 20 January 2009 (para. [636] below). In the event, Ms Ross was given notice of redundancy and, having been unable to persuade F&C to pursue the CTA project (paras. [343]-[351] above), finally left F&C in April 2009.

629. On 16 January 2009, Mr Culligan sent Mr Ribeiro his proposed budget for 2009, showing total costs of £673,558 (as compared with costs of £812,720 shown by Mr Tilson in the version of the draft budget he had prepared at that stage). On these figures, the LLP would broadly break even in 2009.

630. On 19 January 2009, after being prompted by F&C's Finance Department, Mr Ribeiro e-mailed Mr Tilson (not copied to the Defendants) to say that he had agreed to cancel the AAF report for the LLP for 2009 "and would like you to bring this to the attention of the Board for ratification". Mr Ribeiro had not previously discussed the possible cancellation of the AAF report with the Defendants. His action was high-handed and again reflected an attitude that he thought he could in practice decide what should happen in setting the LLP's budget. But he did not in fact bypass the proper decision-making procedures in the LLP. The final decision on the costs saving in relation to the AAF report would be a matter for the LLP Board, as part of its consideration of the budget for the LLP for 2009 (under clause 18.1.2 of the Agreement), as Mr Ribeiro recognised in his e-mail, and he recognised that the decision he had taken could be

reversed if the Board so decided. So, in practice, Mr Ribeiro had not removed this matter from the Board's control and, whilst high-handed, his action did not constitute material unfair prejudice to the interests of the Defendants in the LLP.

631. On 19 January 2009 there was also a secret e-mail exchange between Mr Ribeiro and Mr Tilson regarding IT issues at the LLP. Mr Ribeiro forwarded to Mr Tilson Mr Culligan's e-mail of 18 November 2008 (para. [568] above) and asked him whether there had been further developments and "how right or wrong are the technical arguments?". Mr Tilson responded as follows:

> "Yes. Rather than pursue the idea of moving to an external site, Anthony [Culligan] asked that this year's [Business Continuity] test be conducted with the objective of testing F&C Partners' ability to operate independently of F&C IT infrastructure. I have included a reference to this in my operations report to the LLP board.
>
> Implications: since mid Dec08, the team has been operating independently of F&C IT infrastructure,
>
> From a <u>business perspective</u> there has been minimal disruption and we have been able to function as before with the added benefit of not having the problems Anthony has previously referred to (on this point, Anthony does, in my opinion, have a valid argument that the constraints imposed on the business by IT are unreasonable and unnecessary).
>
> From an <u>IT perspective</u> the situation is obviously materially different. For example, we have new e-mail addresses, our files are no longer stored on F&C's servers, etc. I am not sufficiently knowledgeable to comment on the robustness of his alternative infrastructure. F&C IT Dept could no doubt provide an opinion but I believe such an opinion would not be impartial and therefore would not be helpful. Clearly Anthony would prefer to make the current infrastructure the default position.
>
> Can I suggest you e-mail Anthony and ask him the same question (& ask him to respond before the LLP board so that you are fully briefed)."

632. This gave Mr Ribeiro a reasonably clear picture (absent the full technical details, with which he would not usually be concerned) of what had happened in relation to the shift by the LLP to its own independent IT network. Mr Tilson's response supports my assessment that Mr Culligan's actions in setting up alternative IT arrangements for the LLP were taken in good faith in the interests of the LLP, because of the business constraints experienced by the LLP, as imposed by F&C IT. Mr Ribeiro did not draw these matters to the attention of F&C IT, so it appears he thought there was force in the point made by Mr Tilson that F&C IT could not be entirely trusted to produce a neutral evaluation of the LLP's new system. Nor did Mr Ribeiro think it necessary to

raise any issue about this with Mr Culligan or the LLP Board or ManCom, to press for further information or for testing of the robustness of the LLP's new IT arrangements. This sits uneasily with the complaint now made by F&C in the Cross-Petition that in setting up those arrangements Mr Culligan acted in a manner unfairly prejudicial to the interests of Holdings and also sits uneasily with the investigation and report by Mr Mackay criticising Mr Culligan for what he had done. Similar comments may be made in relation to a series of occasions on which information about the LLP's new external e-mail services and IT infrastructure was provided to Mr Ribeiro and the F&C representatives on the LLP Board or they had an opportunity to raise questions about the position, but did not take it up: see in particular paras. [662], [710] and [867] below.

633. The same day (19 January), Mr Redeker of the F&C Netherlands distribution team sent an e-mail to Mr Tilson and Mr Barthelemy regarding a conference call to be held with an ex-PVF client, in relation to the decision to redeem its investments in the Select Fund. Mr Redeker confessed that he had failed to forward the 1 December 2008 letter (offering the option to switch to the Balanced Fund) to the client before confirming redemptions on its behalf. This was not, in my view, a very serious omission, since Mr Redeker, as account manager for this ex-PVF client, had authority to make the relevant decision on its behalf and also explained that once he realised his mistake he had discussed the issue with the client who had endorsed what had been done. However, the Defendants considered that this was evidence that F&C had not in fact been marketing the Balanced Fund by reference to the 1 December 2008 letter as it should have been under clause 13.7 of the Agreement, and determined to bring this up at the forthcoming LLP Board meeting on 21 January. (In my judgment, Mr Redeker's e-mail did not show that there had been any failure to comply with clause 13.7, since what he had done fell within the scope of the discretion reserved to F&C under that provision).

634. Mr Redeker's e-mail also included a complaint about the losses suffered by the client in relation to the Select Fund, which was supposed to be absolute return in nature "and therefore low/medium risk" in line with the client's responsibilities as a pension fund. The Defendants sought to point to this comment to support their contention that F&C Netherlands had mis-sold, or thought that it might have mis-sold, the LLP's products to its clients at the outset as essentially risk free. I do not think that this statement by Mr Redeker does support that contention (it refers in terms to there being an element of risk), and it is in any event far outweighed by the other evidence on this issue reviewed above: see paras. [275]-[334].

635. On 20 January 2009, there was an e-mail exchange between Mr Ribeiro and Mr Culligan regarding the forthcoming redundancy of Ms Ross and the CTA project. Mr Ribeiro reminded Mr Culligan that Ms Ross was to be made redundant "given the 2008 fund performance" (he also wrote that given that performance and the state of the market, the LLP "had no product to sell") and she would not be replaced, and told him to beware of creating false expectations for Ms Ross in relation to the CTA project which was under assessment. He also said:

> "Additionally, no single strategy fund will be launched by F&C Partners, which leaves the decision outside the remit of the partnership."

636. Mr Culligan responded to say that F&C was required to market the products and services of the LLP, that if Ms Ross was leaving, F&C would have to meet that requirement in some other way, and asking what F&C proposed. He emphatically disputed the proposition that the LLP had "no product to sell", maintaining that the performance of the Balanced Fund had been exemplary in the circumstances and represented a good investment for F&C's core clients going forward. On the topic of the CTA, he wrote:

> "…I should point out that there is nothing in our agreement which precludes the partnership from considering a single fund strategy. In these challenging times, I think it is incumbent on the board to consider all reasonable options for increasing revenue and the partners should all be working towards this aim. CTA strategies are particularly suited to the current environment which is being driven by broad trends resulting from global monetary and fiscal policy shifts. The partnership has the skills and the know-how to implement a CTA strategy and has expressions of interest from potential clients. Francois and I understand that you may want to base the strategy outside of the partnership and will be supportive if that is what you want to do. …"

637. F&C sought to suggest that the last sentence in this extract showed that the Defendants accepted that there was an understanding that the LLP could not expand its business outside the FoHF field. I reject that contention. The Defendants always thought that clause 4.1 of the Agreement would enable the LLP to expand its areas of business so long as the LLP Board accepted it was in its interests to do so. The CTA idea and software had been developed by Mr Sparks as an employee of the LLP and so, in intellectual property terms, belonged to the LLP. In a world where business ideas and software can be very valuable and in circumstances where the Defendants did not feel they owed F&C any favours, it is not plausible to read this e-mail as suggesting that the LLP was willing simply to make a gift of this project to F&C and I do not think Mr Ribeiro understood it in that way. In the e-mail, Mr Culligan was indicating, rather, that the LLP would be willing to enter a commercial negotiation to allow F&C to develop this CTA project outside the LLP in return for some *quid pro quo* for the LLP (i.e. in effect to sell the project to F&C if F&C thought it was valuable and wanted to develop it elsewhere in the F&C Group).

638. Mr Culligan's e-mail made Mr Ribeiro still more annoyed with the Defendants.

639. At about this time, the pack of materials for an LLP Board meeting scheduled for 21 January was distributed. It included the Defendants' budget proposals, the operations report dated 13 January and the Q4 2008 Turnbull report by Mr Mackay, based on text supplied by the LLP management. The Turnbull report incorporated the statement proposed by Mr Tilson questioning the viability of the business in 2010 (para. [623] above) and identified the following as a high risk for the business:

> "IT (Email system)
>
> F&C Partners often receive large amounts of information via e-mail (e.g. presentations). Inboxes can get very full and whilst emails can still be received, they cannot be sent – this is very frustrating when attempting to communicate with clients, especially when travelling abroad. The inability to respond to queries via e-mail could cause adverse relationship issues with clients/underlying managers."

The report referred to efforts by F&C IT to ameliorate the situation but still identified the risk as not acceptable and set out this comment:

> "The management of F&C Partners continues to have this situation under review and it is expected to recommend an alternative e-mail system to the LLP Board in due course."

640. At trial, F&C was critical of this comment on the grounds that it did not disclose the way in which the LLP had already moved to using externally-provided e-mail and archive services. Mr Culligan defended the comment on the basis that the LLP was still testing the capacity and robustness of its new services and had not yet reached a final decision about them. At this stage he envisaged that the arrangements would only need to last a couple of months while F&C IT improved the services it could provide, and if F&C IT did that to the satisfaction of the LLP, the LLP could go back to using them and these arrangements need not be pursued. If that did not happen, and the LLP was happy with the external e-mail services it had begun to use and had found them to be reliable over an extended period, it would make the change in services permanent and bring the matter back to the attention of the Board for endorsement (as I have noted previously, strictly this was unnecessary, since the arrangements in relation to IT were not a matter reserved for the decision of the LLP Board).

641. It is clear that by now all the members of the ManCom knew that the LLP was in fact using an alternative e-mail system and no-one had suggested that there was any objection to that. On the LLP Board, Mr Johns and Mr Cole were not aware of that fact. There had not been a specific audit review and sign-off of the arrangements as had been contemplated at the LLP Board meeting long before, on 24 October 2007 (para. [543] above); but by late 2008/early 2009 I do not think that anyone recalled that that had been said. There was no reason for anyone to check back through the LLP Board minutes for details such as this. In any event, Mr Culligan did not regard the use of the external e-mail system as constituting the final migration of the LLP away from the F&C system and to the new system. In practice, as Mr Culligan had good grounds to believe, F&C IT was on notice that the LLP was now using external e-mail services and it had not suggested that that should be stopped. In these circumstances there is, in my view, no significant criticism which can be made regarding Mr Culligan's actions in arranging for the LLP to use an external e-mail service in the way he did.

642. On 21 January 2009 the scheduled LLP Board meeting took place, attended by Mr Ribeiro, the Defendants, Mr Cole, Mr Johns, Mr Tilson, Mr Mackay and Mr Sparks for part of the time, and Mr Tonkin, as the LLP's secretary, by telephone. This was a difficult and confrontational meeting. Mr Ribeiro and Mr Tilson reported that the question of e-mail limits had been raised with Mr Leclercq but that no solution had been proposed. It was agreed that this item would be treated as an open matter. Neither Mr Ribeiro nor Mr Tilson thought it necessary to go into the current e-mail arrangements then in place at the LLP and nor did Mr Culligan; I think this was probably on the footing that all three of them regarded them as a temporary solution to the LLP's e-mail needs pending finalisation of an improved service by F&C IT.

643. Mr Tilson and Mr Mackay presented the Q4 2007 Turnbull report and there was an angry discussion about the text in relation to the viability of the LLP in 2010 which Mr Tilson and Mr Ribeiro had arranged to include in the report (para. [623] above). The Defendants strongly objected to this wording and persuaded the Board to direct Mr Mackay to reissue the report with softened language in substitution for that text, as follows:

> "Even more importantly, if not compensated in some other manner, revenues for 2010 imply that the business will make a loss."

644. Mr Ribeiro said that the issue of charging fees on the leverage element in the Select Fund was likely to be raised by the Boards of the Funds (on which he sat) and asked for this to be treated as an agenda item for the next LLP Board meeting.

645. Mr Tilson presented the current draft of the LLP's accounts for 2008 and drew attention to the charge of the full amount of the Credit Alpha Fund launch costs to the LLP's accounts for that year, according to Mr Ribeiro's instruction. There was a heated debate about this, with Mr Ribeiro pressing the view that a charge of the full amount of those costs should be taken in 2008. In particular, he said that it would be disadvantageous to the Corporate Member if the charge was spread out across subsequent years when the LLP was less likely to be in profit. Mr Culligan objected to the proposed treatment, and in particular to the reason given by Mr Ribeiro (which appeared to be based solely on what would be in the interests of F&C, rather than any proper accounting view). He asked Mr Tilson what the normal accounting treatment would be, and Mr Tilson reported it would be normal to spread the charge over the relevant five-year period. Mr Ribeiro stated he would not sign the 2008 accounts without appropriate recognition of the full amount of the liability. However, in the end it was left to Mr Tilson and Mr Tonkin to check on the proper accounting treatment with F&C's Finance Department. In my view, this was an appropriate outcome.

646. However, the dispute which flared up over this issue was symptomatic of the increased distrust on each side by this stage and of their respective anxieties that the other party to the Agreement was now trying to steal a march on them in lobbying for financial advantage in relation to the operation of the Agreement. Each side was by this stage particularly alert to seek to ensure that – now that the LLP was operating in

straitened financial circumstances – they enjoyed their full entitlements and benefits under the Agreement.

647. On this particular issue, some limited criticism can be made of Mr Ribeiro in the way in which he tried to manoeuvre for tactical advantage in the debate with the Defendants, both in originally arranging to have the full Credit Alpha Fund launch costs included in the draft accounts for 2008 without first discussing it with the Defendants and in appearing to say he might not sign the LLP's 2008 accounts if he did not get his way (this was probably intended to be a reference to Holdings' rights under clause 19.1.5 of the Agreement, though he did not explain that). But in the event he backed down from that stance and properly left it as a technical accounting matter to be investigated with expert advice.

648. The Board then turned to consider Mr Culligan's budget proposals for reducing the 2009 costs of the LLP to break even level at about £670,000, whilst avoiding redundancies of LLP employees. The proposals included moving the LLP to cheaper offices and reducing the services it received from F&C, so as to save on the rent and service payments which would otherwise be made to F&C. The Defendants did not at this (or any) stage present any detailed assessment or evidence regarding the feasibility of and costs associated with a relocation of the LLP's offices. So far as the other Board members were concerned, the proposal appeared vague and unsubstantiated. In light of the proposals, Mr Ribeiro said he would need to check with Mr Logan before those proposals could be approved (I think that this was Mr Ribeiro's intention and belief at the time, although in the event he never did refer these points to Mr Logan). The Board asked the Defendants to provide additional assurance that in achieving the proposed savings, the control environment for the LLP's business would not be compromised.

649. There was then an argument about the cancellation of the AAF report. Mr Ribeiro said that in view of current business conditions and the level of client redemptions it was not in the interests of the LLP to commission an expensive AAF report. The Defendants maintained that it was an essential marketing tool to give comfort to existing and prospective clients about controls at a time when hedge funds were under great scrutiny (in particular, because of the Madoff scandal in the USA). This item was left unresolved, with Mr Ribeiro asking Mr Tilson to provide a list of recipients of the AAF report in the previous year, presumably to test the Defendants' claims about how important such a report really was as a marketing tool.

650. There was then further heated debate about the future of the LLP. Mr Barthelemy updated the Board about discussions being held with a number of institutions that had expressed interest in engaging the LLP on an advisory basis. Mr Ribeiro asked for a written report on this for the next Board meeting (in the event, the Defendants decided that this was not, after all, a good idea and quietly dropped it, with the result that no such report was prepared: see para. [352] above).

651. Mr Ribeiro and Mr Tonkin reported on the discussion within Execom on the Defendants' Strategic Options Paper setting out four options (para. [514] above). Mr Tonkin said Execom had not reached a final conclusion, but had delegated the ultimate decision to be taken by Mr Ribeiro. Mr Ribeiro gave his views on the paper, stressing that he did so as an Execom member (i.e. from the perspective of F&C rather than the LLP). He said he considered options (c) and (d) in the Paper as

unacceptable and option (b) as unlikely, so that option (a) (the LLP to continue its business) was the only viable option.

652. At trial, the Defendants were critical of the stance adopted by Mr Ribeiro, since they maintained that he should have assessed the proposals in the Strategic Options Paper from the point of view of what was in the best interests of the LLP, rather than from the point of view of F&C. I reject that criticism.

653. The Defendants had prepared their Strategic Options Paper for Execom to consider, as commercial proposals put by them to F&C rather than as proposals for how the LLP should be run as an internal matter, and the form of the proposals themselves made it clear that that was the case - e.g. the suggestions that the LLP should be sold (option (b)) or that F&C should buy another FoHF business (option (c)). Mr Ribeiro was a member of Execom and had the authority delegated from Execom to react on behalf of F&C to these proposals by the Defendants. It was right and proper that he did so at this meeting, since F&C's reaction to the proposals could affect the context in which the LLP Board had to make assessments how the LLP's business should now be conducted. It was also right and proper that Mr Ribeiro should have emphasised, as he did, that he was responding to the proposals wearing his F&C hat.

654. The Defendants expressed their disappointment at F&C's reaction to their proposals. Mr Culligan maintained that the LLP had the skills to open new sources of revenue in the alternative investment field and referred, in particular, to the CTA project. He proposed that the Board give consideration to the LLP pursuing such opportunities (meaning, now, that the Board should consider whether to expand the LLP's field of activities by a vote under clause 4.1 of the Agreement, albeit there was no proposed resolution to that effect before the Board). Mr Ribeiro stated that he categorically would not allow the LLP to move into new areas such as single strategy hedge fund management (such as the CTA project). Mr Barthelemy said that it was unacceptable for Mr Ribeiro to dismiss an option (the CTA project) which was in the best interests of the LLP. The amended version of the minutes then record this statement by Mr Ribeiro:

> "The Chairman, in re-iterating his earlier comment he had reviewed the options as an Execom member, recorded that he was not prepared to support an option that, whilst it may be in the best interests of the partnership, was potentially in competition with F&C Group as a whole. The Board continued their discussion on the strategic options until the Chairman brought the discussions to a close by recording that it was clear that agreement could not be reached and instructed Mr Tonkin to convene and issue notice of a Members Meeting to take place and resolve this and a number of other matters where Board opinions were divided. Messrs Cole and Johns requested that Mr Tonkin give consideration as to whether they should attend the Members Meeting."

655. By this point in the meeting Mr Ribeiro had become emotional and angry and I think was now rather confusing his F&C and LLP hats because Mr Culligan and Mr

Barthelemy had switched, without warning, from discussion of the Strategic Options Paper they had put to F&C's Execom to discussing what activities the LLP itself might expand into. There was no distinct agenda item for the Board to consider an expansion of the LLP's activities under clause 4.1 of the Agreement in this way and the materials about other possible ventures for the LLP thus far provided to the LLP Board by the Defendants were only in very outline and hazy terms and did not distinctly mention the CTA project. Moreover, the Defendants themselves had no firm or viable plan for a CTA project to be carried forward by the LLP by itself. If such a project were to be set up, it would require seed capital and the LLP had no money available to fund this or proposals to raise such funding itself. (In the event, when Mr Sparks and Ms Ross pitched the CTA project to Ms Hall and Mr Mendez de Vigo, it was on the basis that they were seeking to persuade F&C to invest its money in the project; but F&C was completely unpersuaded of the commercial merits of taking it forward: see paras. [340]-[351] above).

656. The Defendants were rightly critical of Mr Ribeiro's categorical statement at the meeting that he would not allow the LLP to move into single strategy hedge fund management and of his comment that he would not support an option which, even if in the interests of the LLP, might conflict with F&C's interests (i.e. by competing with F&C's own single strategy hedge fund division headed by Ms Hall). This suggested that he would not consider any such proposal, if one were brought forward, on its merits having regard to the interests of the LLP rather than the interests of F&C.

657. However, these comments were delivered in the heat of the moment in a rather confused discussion and I do not consider that they represented a settled and irrevocable position of Mr Ribeiro which he would have maintained, whatever the circumstances and advice he received about his obligations and duties to the LLP, once he had calmed down and had time for reflection. It cannot be inferred from these comments that Mr Ribeiro had now determined to ignore his fiduciary obligations to act in the best interests of the LLP. In fact, he himself made the arrangements for Mr Sparks and Ms Ross to have an opportunity to pitch the CTA idea to senior F&C management, Mr Mendez de Vigo and Ms Hall, and left the decision on its merits to them. Nor do I think that Mr Johns and Mr Cole acted in breach of any fiduciary duty at this meeting, as alleged by the Defendants. They were not a party to Mr Ribeiro's thinking, and in the absence of any agenda item or Board papers explaining the CTA project they could not be expected to vote on any proposal that the LLP should embark upon such a project. Events happened very quickly at the meeting, and in a confused way, so I do not think that they can be criticised for failing immediately to intervene when Mr Ribeiro made his comments or when he indicated that a Members' meeting should be called.

658. Furthermore, these comments by Mr Ribeiro led nowhere in the overall context of the dispute. The Defendants never did return to the LLP Board with a firm proposal that the Board should consider an extension of the LLP's business under clause 4.1 of the Agreement to launch a CTA (or any other) product. In my view, this was because the Defendants knew that launching such a product was outside the financial capacity of the LLP. To be able to derive value from the CTA project, the LLP was in reality dependent on F&C finding it an attractive project to take on itself, so that the LLP might be able to extract a price from F&C, as Mr Culligan had hinted in his e-mail of 20 January 2009 (para. [636] above).

659. Nonetheless, the ill-advised comments by Mr Ribeiro at the meeting on 21 January greatly and understandably fuelled the suspicions of the Defendants that Mr Ribeiro was determined to promote the interests of F&C, in what they thought was clear disregard of the interests of the LLP, and to ride rough-shod over their interests in relation to the LLP so as to get what F&C wanted. This seemed to them to be underlined by the way in which Mr Ribeiro brought discussion on these points to a close and abruptly announced that a Members' meeting would be convened to resolve this and other points of dispute. They rightly surmised that Mr Ribeiro had devised some strategy aimed at trying to put pressure on them by referring matters to a Members' meeting, where F&C's 60% voting interest in the LLP could be deployed against their 40% voting interest.

660. However, conscious as they were of the limitations upon the powers of a Members' meeting according to the provisions of the Agreement, they were unsure what exactly Mr Ribeiro had in mind to do - though they were fairly sure he meant to harm or subvert their interests in some way. Mr Culligan's evidence, which I accept, was that the Defendants did not know what detailed plan Mr Ribeiro had in mind; they thought that perhaps it was to try to get a vote at the Members' meeting which could then be deployed in some way to try to persuade a majority on the LLP Board to back him against the Defendants on the points then in dispute; and they believed that their best course (since they could not prevent the summoning of a Members' meeting) was simply to wait and see how Mr Ribeiro's strategy played out.

661. I therefore reject F&C's contention that, at this stage and at the Members' meeting on 18 February 2009, the Defendants realised that Mr Ribeiro had overplayed his hand and had made a mistake about the extent of the powers of the Members' meeting and that they deliberately kept quiet to see if Mr Ribeiro would proceed to make a mistake upon which they could fasten as a breach of the Agreement, in order to realise an ambition which (according to F&C's argument) they had to be able to exit from the LLP with the enhanced Put Option price for which paragraph 1.7 of the Fourth Schedule provided.

662. After Mr Ribeiro's sudden call for a Members' meeting, the Board meeting was in something of a state of shock and the operations report, investment report and Turnbull report were all passed over as "noted" items, but without further substantive discussion. At this point, Mr Ribeiro left the meeting in a state of some agitation to try to calm down a bit outside the meeting room. This meant that the LLP Board did not discuss in detail the IT matters to which their attention had been drawn in the operations report and the Turnbull report. Mr Culligan was, I think, entitled to assume that the other Board members had read these materials and had no objection which they wished to raise in relation to the IT arrangements set out in them. In particular, in light of the explicit statement in the operations report that the LLP was now running its own IT infrastructure, he was entitled to think that the Board (and indeed F&C) was content with that.

663. Mr Ribeiro rejoined the meeting after a short while. Mr Culligan said he wanted to record that due to Mr Ribeiro's comments at the meeting and as evidenced by some actions taken outside the meeting, he considered that the Corporate Member was not operating in a manner that was in the best interests of the LLP as a whole. Mr Cole and Mr Johns asked him to articulate his concerns (this is one incident which shows, in my view, that they genuinely sought to carry out their responsibilities as

independent Board members, rather than simply pursue F&C's interests or side with Mr Ribeiro).

664. Mr Culligan now took the opportunity to outline three areas of concern. The amended version of the minutes of the meeting record the discussion as follows:

> "10.3.1 Mr Culligan reported that he considered there to have been inadequate consultation with the partnership in relation to the decision to place the dedicated marketing executive assigned to the partnership at risk of redundancy. Mr Culligan added that he had yet to receive clarification as to how F&C intended to provide this important service. He referred to the haste which seemed to have been applied to the decision and how Fiona Ross' departure would prejudice the partnership's ability to both generate new sales of existing products and also the partnership's ability to pursue the opportunity outlined in the discussion of strategic options. He noted that the corporate partner had a responsibility in the partnership agreement to provide marketing support.
>
> 10.3.2 Mr Culligan then drew the Board's attention to a client related matter where a client redemption had occurred without the client relationship manager presenting the formal restructuring plan proposed by the board of the fund which gave the client the option to rollover into an alternative product offered by the partnership [see para. [633] above]. Mr Johns reported that he failed to see how such an action could be perceived as the responsibility of the Corporate Partner rather than an oversight of the client services manager. When asked, Mr Culligan expressed the view that he considered that this oversight could represent an action undermining the partnership and could be indicative of a broader failure to consult with clients on the decision to give notice of redemption of the fund and the subsequent 'client' decisions not to opt for transfer to the F&C Balanced fund. He observed that if the client had not been consulted, then the form outlining the options, in this case, must have been completed by F&C based on their own decision, not that of the client. He noted that to the extent that F&C Balanced had performed well in excess of the majority of other F&C products such a decision was not logical. The chairman noted that most clients had been invested in the F&C Select fund which had not performed as well.
>
> 10.3.3 Mr Culligan's final example related to the comments expressed by the Corporate Member about the partnership's ability to sell product in 2009 despite the relative strength in the unleveraged product offering to the peer group benchmark and the vast majority of products in the F&C group. He noted that the Chairman had made the assertion that the partnership did not have a product to sell and that this was not supportable in the light of the performance facts.

> 10.4 The Chairman responded by recording formally that he did not recognise any validity in Mr Culligan's comments and reminded the Board of the significant support he personally had provided to the partnership both at the time of the initial launch and on numerous occasions since launch, having been personally involved in gathering a significant part of the AUM's the partnership had reached at their peak. Mr Culligan accepted the Chairman's comments but recorded that the actions of the Corporate Partner extended beyond those of the Chairman.
>
> The Board acknowledged that Mr Culligan's concerns and the response from the Chairman were likely to be considered further at the Members' meeting."

665. It is common ground between the parties that all trust and confidence between the LLP partners had gone by the time this meeting closed (with the parties also suggesting it had gone at different points some time before this). Each side blames the other for bringing this state of affairs about. F&C seeks to rely on this loss of trust and confidence to say that an equitable foundation for the LLP's existence had now disappeared so that it was entitled to treat the partnership as at an end without activating the put or call option arrangements under the Fourth Schedule. I have already held that there was no such additional equitable foundation for the LLP outside the terms of the Agreement (see e.g. para. [21] above), so I dismiss this contention.

666. The Defendants, on the other hand, argue that the breakdown in trust and confidence was the fault of the Corporate Member (representing F&C), acting in particular by Mr Ribeiro, and that the actions attributable to the Corporate Member and F&C plc which created this state of affairs themselves amount to unfairly prejudicial conduct for the purposes of a claim under section 994, which caused substantial prejudice to their interests in respect of the LLP in that – as in any business, they said – once the controllers of the business had fallen out and no longer trusted each other, the business could no longer realistically be carried on effectively by them.

667. I do not accept this case either. The breakdown in trust between the parties was based on a number of factors and F&C and Mr Ribeiro were not responsible for all of them. In my assessment of the evidence overall (and having regard, in particular, to a private document compiled by Mr Culligan on 4 February 2009 listing "Actions taken by Corporate Partner to reduce the value of the partnership"), the main contributory factors to the breakdown in trust were:

    i) Profound disagreements about commercial decisions for the LLP in difficult times (in particular, the dispute about whether redundancies should be made to save costs). Both sides bear responsibility for this, since their growing distrust was based on an unwillingness or inability to see the other side's point of view and to debate matters with an open mind, rather than moving quickly to adopt entrenched positions;

ii) The statement that the Defendants attributed to Mr Ribeiro at the meeting on 17 December 2008 that Execom had decided to close the LLP. But I find that Mr Ribeiro did not say this. He made proper comments that he was coming under pressure from Execom members, to give fair warning about the position to the Defendants. The Defendants themselves were responsible for exaggerating the effect of what he said and interpreting it as something more determinate and final than it really was. The Defendants' misreading of the situation tended to poison their interpretation of actions taken by Mr Ribeiro and F&C;

iii) The Defendants' anger and suspicion at what they perceived as a lack of proper marketing support by F&C for the LLP's products, and action by F&C Netherlands to put in redemption requests on behalf of clients, both of which they interpreted as part of a campaign by F&C to close down the LLP. But F&C's actions in relation to marketing and advising its clients in respect of the LLP's products and putting in redemption requests were justified by the current poor performance of the LLP's funds (especially as compared with their absolute return objective), the general state of the market and sentiment amongst investors, and fell within the scope of the marketing discretion reserved to F&C by clause 13.7 of the Agreement;

iv) The actions of Mr Ribeiro leading up to the Board meeting on 21 January, in cancelling the AAF report and in having the full Credit Alpha Fund launch costs brought into account as a charge against the LLP's profits in the LLP's draft accounts for 2008, and his comments at the meeting. But although Mr Ribeiro acted in a high-handed way in relation to the AAF report and the accounts, he left the issues for further research and future determination as was proper. Certain of his comments at the meeting were ill-advised, but they were explicable as statements in a heated and rather confused debate which had not been thought through and I think the Defendants attached excessive weight to them, partly because they took them as confirming their other grounds for suspicion of F&C, referred to at sub-paragraphs (i) to (iii) above. Mr Ribeiro's call for a Members' meeting at the end of the Board meeting was clearly hostile, but was something which everyone accepted it was within his rights to do.

668. In my view, the breakdown in trust and confidence by 21 January 2009 was due to fault, exaggeration and error on both sides. In a hard-nosed business environment, such as that in which the LLP operated, a significant degree of robustness is properly to be expected when participating in debate about collective business decisions and in sometimes acrimonious discussions about such decisions, which may particularly be expected where conflicting interests and factors have to be taken into account and reconciled. In this context, I think it would require particularly strong and clearly unacceptable behaviour, with a clear preponderance of fault on one side, before a court would find that a breakdown in trust and confidence was attributable to unfairly prejudicial conduct in the form merely of the way in which one side within the management of a company or limited partnership conducts itself in discussions with the other side (as distinct from analysing actions which are taken which determine how the business is run and how practical power is exercised within the entity): cf *Rackind v Gross* [2004] EWCA Civ 815 at [16]. In my view, the way both Mr

Ribeiro and the Defendants conducted themselves in relation to each other fell a long way short of providing a foundation to make out an unfair prejudice complaint on this type of basis.

669. I would also add that, although there had indeed in a certain sense been a breakdown in trust and confidence between the parties at this stage, it was not so complete as to prevent them continuing to try to work together in any way at all. Both sides did in fact continue to try to carry on the business of the LLP in what they respectively regarded as sensible ways, debating with the other side about how to proceed (albeit with a high degree of wariness and a strong element of distrust on each side).

670. On 22 January 2009, Mr Tonkin e-mailed Mr Ribeiro and the Defendants to ask for any agenda items or resolutions they would wish to include in the notice to be circulated to call the Members' meeting. The Defendants' stance at this stage was to wait to see how Mr Ribeiro's strategy developed and they made no proposals. No criticism can be made of them for this. Mr Ribeiro arranged for himself to be appointed as the representative of the Corporate Member for the Members' meeting. He made a number of suggestions and drafts of the notice passed between him and Mr Tonkin.

671. On 26 January 2009, Mr Ribeiro sent Mr Tonkin a draft under cover of this e-mail:

> "try this version, though still work in progress.
>
> please verify Terms of Agreement, especially sections that require unanimous decisions. Check with Fergus [Mr McDonald] that he is comfortable without advanced profits and how to account for the Credit Fund set up costs.
>
> I plan to take this to the Thursday [Execom]."

672. It is probable Mr Ribeiro made a similar request to Mr Tilson to check the terms of the Agreement, since on 27 January he sent Mr Ribeiro a private e-mail with information about relevant clauses in the Agreement, as follows:

> "clauses that I paid particular attention included
>
> 8.10 governing withdrawals from capital [accounts]
>
> 18.4.4 – a unanimous decision is required if you want members profits to be retained in the LLP
>
> 18.4.11 a unanimous decision is required to alter the monthly drawings
>
> 27.2 there is reference to the non entitlement of drawings for a withdrawing party

> 11.4 the board may prevent members withdrawing from their distribution a/c (but 18.4.4 requires a unanimous board approval)"

Mr Ribeiro was taking in-house legal advice on these points too. F&C did not waive privilege in relation to this advice. I comment on the significance of this at paras. [701]-[704] below.

673. On 27 January 2009, Mr Ribeiro took Mr Tilson and Mr Sparks out to dinner and the business of the LLP was discussed. The Defendants maintain that at the dinner Mr Ribeiro made disparaging remarks about them, and that this constituted a breach of clause 15.2 of the Agreement. I do not find that this case has been made out by the Defendants. Mr Sparks was not called to give evidence about the discussion and Mr Ribeiro was not cross-examined to suggest that he had made improper disparaging remarks at the dinner. I would add that I do not consider that Mr Ribeiro making comments, while discussing the affairs of the LLP with two of its managers, to the effect that there were strong disagreements between Mr Ribeiro and the Defendants about the steps the LLP should take in the difficult circumstances it found itself in and that Mr Ribeiro thought he was right and they were wrong (which is what I think probably happened) would constitute disparagement contrary to clause 15.2. That much was probably already known to Mr Tilson and Mr Sparks, and in any event there was a legitimate reason for Mr Ribeiro to inform them about this, since it was relevant to their roles within the LLP that they should understand the tensions that existed between the Members. It is very probable that the Defendants informed them about their contrary views from time to time when dealing with Mr Tilson and Mr Sparks in the course of their day-to-day conduct of the LLP's business, and Mr Ribeiro was entitled to put his side of the picture to them. It seems that at the dinner Mr Ribeiro made some vague reference to a "nuclear option", and that this filtered back to the Defendants via Mr Sparks. Coming after the Board meeting of 21 January, this comment added further fuel to the Defendants' suspicions about Mr Ribeiro's intentions.

674. On 29 January 2009, Mr Ribeiro outlined to Execom the resolutions to be put to the LLP Members' meeting, which were calculated to put pressure on the Defendants by seeking to block their drawings from the LLP and also sought to resolve in F&C's favour the various matters in dispute between the Members. Execom was content to allow Mr Ribeiro to proceed with this strategy.

675. On 3 February 2009, Mr Tonkin sent out the final version of the notice for the Members' meeting, which was summoned to take place on 18 February. He also asked Mr Johns and Mr Cole to attend. The notice set out ten resolutions (some of them more in the nature of agenda items for discussion) as follows:

> "Resolution 1 – No advanced profits to be drawn in relation to the year ended 31 December 2008.
>
> Resolution 2 – With effect from 1st February 2009 no advance drawings to be taken in respect of 2009.
>
> Resolution 3 – Payout ratio to be amended to retain profits for anticipated or current liabilities in 2009.

> Resolution 4 – F&C Partners LLP Business Plan to continue to focus solely on Fund of Hedge Funds or advisory services to Fund of Hedge Funds. For the avoidance of doubt no Single Strategy Hedge Fund nor a Fund of Long-only Funds approach to be developed within the partnership.
>
> Resolution 5 – Agree that an accounting provision or contingent liability be created within the accounts of F&C Partners LLP for the launch costs relating to the F&C Credit [Alpha] Fund.
>
> Resolution 6 – KPMG to be instructed not to conduct any testing in respect of 2008 for the purposes of producing an AAF Report for the partnership.
>
> Resolution 7 – Discuss and decide on the IT infrastructure of F&C Partners LLP
>
> Resolution 8 – Discuss and decide on the relocation of F&C Partners LLP premises.
>
> Resolution 9 – Discuss and decide on proposals related to the 2009 Staff Costs
>
> Resolution 10 – Discuss and decide the future of F&C Partners LLP."

I comment on the significance of these resolutions in paras. [688]ff below.

676. Meanwhile, in the latter part of January 2009, Mr Tilson began using his personal "gmail.com" e-mail account on his home computer for his private communications with Mr Ribeiro. This was because he had been informed by Mr Sparks that when he used his work computer in F&C's Dublin office, it was possible for the screen display also to show on the screen of his computer in the LLP's office in London.

677. On 23 January 2009, there were meetings of the Boards of the Balanced and Select Funds in Amsterdam at which Mr Barthelemy was also present. Mr Ribeiro and Mr Tilson attended by telephone. There had been a mix-up in informing the Boards about a letter from ABN Amro regarding leverage arrangements and the Boards were annoyed. Questions arose about who was responsible for omitting to pass on the letter in good time to the Boards.

678. After the meetings, Mr Ribeiro asked Mr Tilson for his notes of the meetings and Mr Tilson sent him an e-mail that evening from his home computer, setting out his comments. He suggested that Mr Barthelemy was responsible for the non-provision of the ABN Amro letter, had failed to apologise for this and that he failed to show the directors of the Funds due respect. He then added the following:

> "The following ideas may be relevan[t] in some shape or form in the coming days.

- the impact of Balanced and Select serving notice on the LLP [i.e. to remove it as manager of the Funds] (it could perhaps even be served on the basis that it may be revoked subject to certain factors materializing for example).

- This would mean that the business will only be left with Pushkin which is finished anyway. Note F&C Mgt has subcontracted to the LLP for Event Driven and this could easily be changed.

- You could enquire with Compliance about changing the FSA registration status (I believe FSA registration is a condition of the partnership – would having no clients impact the status for example).

- If the partnership stops being a going concern you may well find that this will change the basis on which the 2008 accounts are to be prepared (remember they must be prepared under UK GAAP). Would need validation by Fergus [Mr McDonald]. This could mean making provision for termination costs in the 2008 accounts, and writing off any outstanding liabilities (redundancies could be a cost perhaps).

- Drawings. Status quo to be amended.

- I am not privy to the specific arrangements in place regarding staff but I know a number of us are effectively seconded. If there were redundancies, the founding members [the Defendants] would try to avoid such costs. There may well be insufficient documents in place to deal with this and I would expect issues to arise here. On balance the LLP should pay a pro rata cost (yrs of service in LLP over total years service of an employee). Again, such costs may well end up in 2008 accounts."

This was a catalogue of ideas for Mr Ribeiro to use against the Defendants in his dispute with them about the way forward for the LLP (including ideas which were directed to harming the LLP's business and status as a going concern) and for minimising any payments which otherwise might have to be paid to the Defendants or by F&C. For an employee of the LLP and member of ManCom effectively to urge F&C to contemplate following such courses of action was to breach his duty of loyalty to the LLP and his fiduciary duty.

679. An issue arises whether Mr Ribeiro had pressed Mr Tilson to provide these ideas. Both Mr Ribeiro and Mr Tilson denied this. Mr Tilson said he sent Mr Ribeiro this catalogue of ideas on this own initiative, because he thought the impasse between F&C (acting by Mr Ribeiro) and the Defendants was harming the LLP and he wanted to help Mr Ribeiro resolve it (obviously, from the tenor of his suggestions, by helping F&C to defeat the Defendants). In my assessment, this evidence of Mr Ribeiro and Mr Tilson is accurate. Mr Tilson knew that the dispute between Mr Ribeiro and the

Defendants was becoming more acute and that that (and the LLP's poor performance as a business) might jeopardize the future of the LLP, and I think he wanted to curry favour with Mr Ribeiro so that F&C would look kindly upon him if it turned out that he needed a new job.

680. The same is true, in my view, in relation to a follow-up e-mail Mr Tilson sent Mr Ribeiro a short time later that day, as follows:

> "Fernando
>
> Another point to consider… I sent you an e-mail recently regarding the IT changes that Anthony [Culligan] had implemented as part of the latest BC [Business Continuity] test [a reference to the e-mail set out at para. [631] above]. We are now running independent of F&C (just check recent emails from any team member… they read e.g. brian.tilson@fandcpartners.com (also, our files are no longer stored on the F&C network). I did allude to this in the Operations report in the LLP board papers [para. [600] above] but there was little time to discuss it. It could therefore be claimed that the board is now informed via the papers (albeit not fully informed).
>
> You could ask him to briefly explain what changes were implemented as part of the recent BC test (I do not believe they should have been done without board – or at least management committee – approval). If you were to instruct him to revert to the BAU [business as usual] arrangement it would be a major disappointment for Anthony."

681. Since Mr Tilson himself thought that the operational effectiveness of the LLP was improved by the IT changes Mr Culligan had introduced (see his e-mail of 19 January 2009, para. [631] above), the making by Mr Tilson of this further suggestion to block those arrangements was also a breach of his duty of loyalty to the LLP, his employer, and a breach of his fiduciary duty as a member of ManCom.

682. Although Mr Ribeiro did not solicit these proposals and ideas from Mr Tilson, he did nothing to discourage Mr Tilson from behaving in this disloyal way.

683. Mr Tilson's e-mail led Mr Ribeiro to send an e-mail on 26 January 2009 to Mr Leclercq and Mr Mackay, copied to Mr Cole and Mr Tonkin (but not the Defendants), to ask about the "fandcpartners.com" e-mail addresses and whether F&C IT had been involved in setting them up. Mr Ribeiro by now regarded himself as in dispute with the Defendants and distrusted them, so he did not simply ask Mr Culligan what was going on. (He did eventually send Mr Culligan, Mr Pennington and Mr Tilson an e-mail dated 16 February to ask about this, to which none of them replied: Mr Culligan did not reply because it was overtaken by the Members' meeting on 18 February and its aftermath; Mr Ribeiro did not seek to chase for an answer until he brought it up at the LLP Board meeting on 27 July 2009).

684. On 3 February 2009, Mr Ribeiro replied to Mr Culligan's complaining e-mail of 20 January (para. [636] above) in strong terms ("It seems now obvious you [have] decided to follow a path that is inconsistent with reality"). He pointed out that most of the LLP's AUM were raised before Ms Ross was assigned to assist and that marketing was a matter for F&C to decide. He adhered to his view that the LLP's products were not marketable, stating that even Ms Ross had told him that the existing products did not have a sellable record. He again told Mr Culligan not to take action which might create expectations on the part of Ms Ross in circumstances where she was being made redundant.

685. On 5 February 2009, Mr Culligan e-mailed Mr Ribeiro to say that he had reviewed the presentation by Ms Ross and Mr Sparks to establish a CTA fund, which he found compelling. It was to be a topic for discussion at the Members' meeting and he said it was likely to be the Defendants' recommendation that the LLP proceed with the project, but adding again that the Defendants would not be averse to F&C taking it forward as a project outside the LLP. In the event, the Defendants had no firm proposal to put forward before, at, or after the Members' meeting for the LLP to launch a CTA product.

686. From this point, in light of the Defendants' distrust of F&C, Mr Barthelemy sought to take detailed notes of meetings rather than just relying on the formal minutes to be drafted, in the first instance, by Mr Tonkin. In examining what transpired at the Members' meeting on 18 February and at subsequent meetings, I was taken to Mr Barthelemy's and Mr Tonkin's manuscript notes as well as the type-written draft formal minutes.

687. The Members' meeting on 18 February 2009 was attended by Mr Ribeiro, as representative of Holdings, the Defendants, Mr Tonkin, Mr Cole and Mr Johns. The meeting moved swiftly to consider the ten resolutions in the notice. There was next to no discussion of Resolutions 1 to 6. In each case, Mr Ribeiro introduced the resolution and cast Holdings' votes in favour of it, while the Defendants voted against it. Mr Ribeiro clearly did not intend there to be significant discussion of these matters. He was seeking to use Holdings' superior voting power simply to carry them through. In relation to Resolution 3 (payout ratio), Mr Ribeiro said that he envisaged that the final payment ratio would be determined and agreed at the LLP Board meeting which approved its annual accounts.

688. Resolution 1 (no advanced profits for 2008) represented a declaration that F&C would not agree to accelerated payment of the balance of the profits drawings which would be due to the Defendants in respect of 2008, unlike a concession that had been made to them in relation to the profits for 2007 to assist them in meeting their personal tax liabilities. There was no obligation on F&C to agree to such accelerated payment, so in itself this resolution was not directed to achieving any specific practical result contrary to the rights or interests of the Defendants. But it has signifance as part of the overall picture presented by the notice of 3 February and the package of resolutions it contained. I think that this resolution was intended to operate as a reminder to the Defendants that they could come under personal financial pressure (i.e. to meet tax liabilities) and that they could not expect assistance from F&C as a matter of goodwill if they continued to oppose its will regarding the future conduct of the affairs of the LLP.

689. Resolution 2 (no advance drawings for 2009) did purport to affect the rights of the Defendants under clause 11.1 to receive their monthly advance drawings of profits of £12,500 each per month in 2009. The legal effect of passing such a resolution, having regard to the protective provision in clause 18.4.11 of the Agreement, was not debated at the meeting (in fact, the Members' meeting had no power to change the Defendants' rights under clause 11.1). On any view, the resolution appeared to be a hostile declaration that Holdings believed that the Defendants' monthly income should be stopped, with the implication that Holdings thought that this would serve to put them under personal financial pressure to agree to accept its proposals in relation to the conduct of the affairs of the LLP.

690. Resolution 3 (payout ratio) also purported to affect the rights of the Defendants under the Agreement to receive payment of the balance of income profits allocated to them for 2008 once the LLP's 2008 accounts were finalised. Again, the legal effect of passing such a resolution, having regard to clause 11.4 and the protective provision in clause18.4.4 of the Agreement, was not debated (in fact, the Members' meeting had no power to change the Defendants' rights in this way). Again, on any view, the resolution appeared to be a hostile declaration that Holdings believed that the Defendants should not receive the full income from the LLP which was otherwise shortly to be due to be paid to them. It falls to be read alongside resolutions 1 and 2 as an overall declaration by Holdings that the Defendants' income from the LLP should be stopped or constrained, both to put financial pressure on them and also to try to bring home to them that, as Mr Ribeiro and F&C believed, they ought to be sharing in the financial consequences of the severe down-turn in the fortunes of the LLP .

691. Resolution 4 (exclusive focus on FoHF business) purported to resolve in F&C's favour the question raised at the LLP Board meeting on 21 January whether the LLP should consider diversifying its business so as to carry forward the CTA proposal itself. The legal effect of passing such a resolution, in light of clause 4 of the Agreement and the limited terms of clause 22 regarding the powers and functions of a Members' meeting, was not debated. (In fact, a resolution of a Members' meeting could not govern decisions about the ambit of the LLP's business, which was a matter reserved to the LLP Board under the Agreement).

692. Resolution 5 (the accounting treatment of the Credit Alpha Fund launch costs) purported to resolve this issue in F&C's favour. Again, the legal effect of passing this resolution, in light of the distribution of functions between the LLP Board and the Members' meeting under the Agreement, was not debated. (In fact, a resolution of a Members' meeting could not govern the way in which the LLP's accounts were drawn up: under clause 6.3 of the Agreement that was a decision for the Board to take, with the benefit of appropriate accountancy advice).

693. Resolution 6 (cancellation of the AAF report) purported to resolve this issue in F&C's favour. Once more, the legal effect of passing this resolution, in light of the distribution of functions between the LLP Board and the Members' meeting under the Agreement, was not debated. (In fact, a resolution of a Members' meeting could not govern the way in which the LLP's annual budget was set: under clause 18.1.2 of the Agreement that was a decision for the Board to take).

694. Resolutions 7 to 10 were directed to providing an agenda for discussion of particular issues in the forum of a Members' meeting where F&C had 60% of the voting rights,

and did not set out the terms of specific resolutions to be voted on. There was some discussion at the meeting under Resolution 7 (IT infrastructure of the LLP). Mr Culligan rehearsed his complaints that F&C IT had failed to resolve the business risks relating to the issues of restricted e-mail capacity and remote access and stated that the LLP needed a robust IT infrastructure that dealt with these problems. Mr Ribeiro said words to the effect that since 2008 the LLP had been testing an alternative solution (which Mr Culligan also referred to) and asked if there was any concrete (i.e. final) proposal to be made. The typed draft minutes recorded the following discussion:

> "It was noted that F&C Partners were continuing to investigate solutions to the IT Infrastructure but at this stage no firm proposal was being presented by any member."

It is clear from the discussion at this meeting that all the LLP Board members were on notice that the LLP was testing its ability to operate with externally provided e-mail and remote access IT services and with its own IT infrastructure. This was not concealed from the Board members. Mr Culligan did not put the arrangements forward as a final solution for the LLP because it was still hoped that F&C IT would eventually resolve the problems which had been experienced by the LLP.

695. Under Resolution 8 (office relocation), Mr Ribeiro said he considered the proposal, which would reduce the costs for the LLP at the expense of F&C, did not represent an equitable solution in the best interests of all Members. He put forward a resolution that any relocation of the LLP's offices should be rejected, and promptly voted in favour of that resolution and carried it against the votes of the Defendants. Again, there was no debate about the legal effect of such a resolution (in fact, the question of re-location of office was a matter reserved to the LLP Board by clause 18.1.10 of the Agreement, and the Members' meeting had no powers in respect of it; in relation to F&C, the renting by the LLP of its office from F&C was governed by Schedule 4 to the Service Agreement, and under article 6.3 of that agreement and article 6.1 of Schedule 4 the arrangement could be terminated on the giving of 30 days' notice).

696. Under Resolution 9 (staff costs), Mr Ribeiro said that costs had to be reduced in other ways than as proposed by the Defendants and this meant redundancies. He proposed that Mr Reynolds, Mr O'Hara and Ms Rattigan should be made redundant. (He had reverted to his original suggestion of three rather than two redundancies of LLP employees, presumably because he now felt that at the Members' meeting matters had moved beyond negotiation and he was going to use Holdings' vote to carry his proposal forward). He noted that the Defendants said this would have an adverse impact on the business, and Mr Culligan again emphasised this point, but Mr Ribeiro gave his view that the senior members of staff left in place at the LLP (including the Defendants) would be capable of managing the business with its much reduced AUM. Mr Ribeiro therefore put a resolution that the three identified staff members should be made redundant and used the votes of Holdings to carry it against the opposition of the Defendants. Again, the effect of such a resolution was not debated (in fact, under clause 18.1.2 of the Agreement this aspect of setting the budget for the LLP was reserved to the LLP Board, and the Members' meeting had no powers in relation to it).

697. Under Resolution 10 (future of the LLP), Mr Ribeiro said that F&C continued to be committed to the FoHF business but wished to record its concern about the viability of the LLP if new business could not be brought in. He referred to the fact that the vast majority of the LLP's AUM had been sourced by F&C from its client base. Mr Culligan asked Mr Ribeiro to clarify a comment he had previously made referring to the "nuclear option". Mr Ribeiro said he thought the LLP had reached a point where it was difficult to resolve issues at Board meetings but would not be drawn further on the point. Mr Ribeiro stated that comments from both sides provided ample evidence that the future of the LLP would be put in question if things did not return to smooth running as before. Mr Barthelemy asked, "Is that a threat?" Mr Ribeiro responded that it was not a threat. Mr Culligan said the Defendants had made a number of sensible proposals towards improving the prospects of the LLP, avoiding the disruption redundancies would cause, and that he was not sure there was anything else the Defendants could do. He recorded that he saw no commercial logic in the adoption of the resolutions put forward by Mr Ribeiro. The meeting was then brought to a close with Mr Ribeiro asking Mr Tonkin to ensure the minutes were finalised and that the LLP Board members were formally notified of the resolutions.

698. In my view, the summoning of the Members' meeting and the use of it to try to employ Holdings' majority voting rights as a Member to put financial pressure on the Defendants and to resolve the outstanding areas of dispute in relation to matters such as the areas of business of the LLP, the finalisation of its 2008 accounts and the areas where savings should be made in order to set its budget for 2009 constituted an illegitimate and improper attempt by Holdings (acting in particular by Mr Ribeiro, and with the knowledge and consent of F&C plc) to remove the relevant decisions to be made from the LLP Board to the Members' meeting. For decisions at Board level, Mr Ribeiro would have to seek to win the arguments on their business merits in order to attract majority – or, depending on the nature of the decision, unanimous - support from the Board members. By contrast, for decisions at the level of a Members' meeting, Mr Ribeiro did not have to engage in argument, but could simply exercise Holdings' majority voting rights to get the result he and F&C desired.

699. In acting in this way Holdings proceeded in clear disregard of the distribution of decision-making powers under the Agreement, as explained above. It also acted in a way which it calculated and hoped would, by passing resolutions 2 and 3, undermine the specific rights of the Defendants defined in the Agreement to receive income from the LLP. Although Mr Ribeiro and F&C believed very strongly that the Defendants, as part owners of the LLP, should share the financial pain with F&C (as the other part owner) when the LLP's business prospects were in jeopardy, that afforded no justification for trying to defeat the rights which F&C had agreed the Defendants should have under the Agreement, in particular to receive monthly advance drawings in a manner akin to receipt of salary.

700. At trial, F&C suggested that Mr Ribeiro's strategy to try to remove the relevant decisions from LLP Board level to the Members' meeting was somehow justified because the Board had always proceeded to take decisions on a consensual basis (i.e. by unanimous consent), and that way of proceeding was now blocked because of the differences of view on the Board. In my judgment there is no merit whatever in this suggestion. There had never been any agreement or understanding that decisions by the LLP Board should be taken by any procedure other than those specified by the

parties with great care in the Agreement (sometimes by majority vote, sometimes by unanimous vote). In fact, the majority voting mechanism had been invoked by the F&C representatives on the LLP Board previously where there was a difference of view between Board members (see para. [404] above). Although it was desirable for the Board to try to reach a consensus, where that was not possible it was obvious that the mechanism of voting on the Board according to the particular requirements set out in the Agreement should be employed so that the Board could fulfil the role given to it under the Agreement. There was no provision in the Agreement or other agreement that a Members' meeting could take decisions reserved to the Board, even if there was deadlock on the Board. In any event, in early 2009 the Board was not deadlocked - by cutting short discussion at the LLP Board meeting on 21 January 2009 and putting these resolutions to the Members' meeting on 18 February, Mr Ribeiro sought to avoid having to have a vote of the LLP Board on the various points which were then in dispute.

701. The question arises why Mr Ribeiro proceeded in this way, when the provisions of the Agreement were so clear and (in particular) the requirement for unanimity of Board members under clause 18.4.11 to change the advance drawings of the Defendants had been drawn to his attention by Mr Tilson (para. [672] above). F&C submitted that I should find that Mr Ribeiro had been given mistaken in-house legal advice and acted in reliance on that, believing (wrongly) that the Members' meeting had power to pass resolutions which had the legal effects they purported to have. This paragraph of F&C's written closing submissions gives the thrust of this argument:

> "Mr Ribeiro also sought legal advice as to the resolutions being put to the meeting from Ben Apfel, the F&C Group Head of Legal by e-mail on 29 January 2009. The advice given was sent by e-mail to Mr Ribeiro and copied to Mr Tonkin. [F&C] claims privilege over the content of that e-mail and the advice given by Mr Apfel. Relying on it, Mr Tonkin and Mr Ribeiro believed that the resolutions which Mr Ribeiro proposed to put forward at the members meeting were capable of being passed and implemented without breaching the terms of the LLP Agreement."

702. The fact that F&C did not waive privilege in relation to the advice given by Mr Apfel creates a difficulty for this submission. Mr Thompson objected to F&C attempting to put its case in this way. I observed to Miss Newman that in her written submission she appeared to be seeking positively to suggest, in particular by the words "Relying on it", that legal advice had been given to Mr Ribeiro that the resolutions put to the Members' meeting could be passed and implemented without breaching the terms of the Agreement. I suggested that since F&C had not waived privilege in relation to the advice given by Mr Apfel it was not permissible for her now to maintain a positive case about the content of that advice. She accepted this, and sought to address the difficulty by deleting the words "Relying on it".

703. I do not think that that narrow amendment to her submission meets Mr Thompson's objection. Even after deleting those words, the thrust of F&C's argument remained to suggest that Mr Ribeiro had made a mistake based on legal advice he received, but

without enabling the Defendants or the court to test or assess that proposition by reference to the instructions provided to Mr Apfel or the legal advice actually given by him. By operation of the rules on legal professional privilege I do not have before me evidence about those matters. I am required to make my assessment of Mr Ribeiro's state of mind by reference to the evidence which *is* before the court.

704. On the basis of that evidence, I find that Mr Ribeiro did not make a mistake about the powers of the Members' meeting. He is a careful man, and it is very probable that by this stage he had studied the terms of the Agreement himself with care. The Agreement is tolerably clear in explaining the respective decision-making powers of the LLP ManCom, Board and Members' meeting. In these proceedings, its true effect in this regard has not been disputed by F&C. In particular, the Agreement is clear about the requirement for a unanimous decision of the Board to change the Defendants' rights in respect of advance drawings under clause 18.4.11. Mr Tilson had had no difficulty in identifying that provision as the governing provision in relation to any such decision and had drawn it expressly to the attention of Mr Ribeiro. It would have been commercially nonsensical for the parties to have agreed that there should be that protection for the Defendants, but at the same time to have agreed that the protection could be bypassed by F&C by the simple expedient of calling a Members' meeting where Holdings could out-vote the Defendants to remove or reduce their right to such drawings, and on the evidence before me I do not consider that Mr Ribeiro made the mistake of thinking that that nonsensical result was intended. His evidence regarding his state of mind at the time was vague, imprecise and unimpressive. He did not distinctly suggest that he did think that this nonsensical position was truly a feature of the Agreement.

705. In my view, Mr Ribeiro's objective in calling the Members' meeting and putting the resolutions to it was to test out the Defendants' stomach for a fight with F&C over these issues and to try to cow them into submission. He intended that the resolutions should be put into effect. Even though he appreciated that F&C's legal arguments that this was a permissible course under the Agreement were in all probability ill-founded, I consider that he thought that if F&C proceeded in this way the Defendants might be intimidated by the sheer enormity of the task of taking on the might of F&C to challenge what had been done and would feel themselves constrained in practice to accept that the resolutions of the Members' meeting should be treated as binding and effective. I think he calculated that there was just enough doubt surrounding the powers of the Members' meeting that the Defendants would think that the risk of challenging F&C over this (and possibly losing, at great financial cost to themselves) would simply be too great for them to bear; and if they allowed the resolutions to stand and be implemented over time, F&C would be furnished with arguments that whatever the rights and wrongs of what had been done the Defendants had acquiesced in it and could not seek to challenge it later on.

706. After the Members' meeting, the Defendants still did not know what use Mr Ribeiro intended to make of the resolutions that had been passed. They were aware of the limited powers of the Members' meeting including, for example, that the Members' meeting had no power to block payment of advance drawings to them. They were aware that Mr Ribeiro had asked for the resolutions to be formally notified to the LLP Board members and that an LLP Board meeting was to be called. They continued to assume that Mr Ribeiro would seek to deploy the resolutions passed by the Members'

meeting to try to persuade the LLP Board (including them) at its next meeting to see the strength of feeling on the part of F&C about the business strategy for the LLP (and, in particular, the need for redundancies), so as to persuade the Board members to accept that that was the best way forward.

707. On 24 February 2009, Mr Tonkin e-mailed Mr Ribeiro and the Defendants to say that he would like to organise a short follow-up LLP Board meeting the following week "to consider the required actions". This e-mail tended to reinforce the Defendants' interpretation of Mr Ribeiro's likely intentions as to how the resolutions were to be used.

708. The same day, Mr Culligan replied to all to say that as all LLP Board members had been present and the meeting was a follow-on from discussions at prior Board meetings, the Defendants would not object to the resolutions voted on by the Members' meeting (Resolutions 1 to 6, 8 and 9) being put to the LLP Board by e-mail for the sake of convenience. Mr Culligan concluded:

> "If the board are in favour of this approach, please record my vote as opposed to all the resolutions."

It is clear from this that the Defendants envisaged that there would be a further process required at the level of the LLP Board, as the Agreement contemplated, before effect could be given to the resolutions.

709. However, that was not Mr Ribeiro's intention. The next due date for payment of the Defendants' monthly advance drawings under clause 11.1 of the Agreement was 25 February 2009. But Mr Ribeiro now moved to carry Resolution 2 into effect by blocking that payment. He gave instructions to the payroll team in F&C's Finance Department, who were responsible (by operation of the Service Agreement) for making such payments, not to make any payments to the Defendants without express prior instruction from himself or Mr Logan. The Defendants were not told of this. In taking this action, Mr Ribeiro acted as agent of Holdings for the purpose of analysis of relations between the Members under the Agreement (this is so even if it might be said that, in relation to F&C's Finance Department, Mr Ribeiro also purported to act as agent for the LLP, with its ostensible authority, in giving his instruction). He acted in his general capacity as agent for Holdings in conducting its relations with the LLP and the Defendants, to implement the resolution passed by Holdings at the Members' meeting as part of a scheme by Holdings to apply pressure to the Defendants regarding the management of the LLP.

710. On the morning of 25 February, Mr Tilson sent Mr Ribeiro another private e-mail on the subject of the LLP's IT infrastructure, following on his e-mail of 19 January 2009 (para. [631] above), to ask if he wanted him to refer this to the LLP Board. Mr Ribeiro replied to tell him to add it to the agenda of the LLP Board meeting scheduled for 21 April, but that that would be confirmed closer to the date (i.e. Mr Tilson was to wait rather than immediately informing the LLP Board about the matters set out in his e-mail of 19 January). Mr Ribeiro did not regard this as something requiring the immediate attention of the Board.

711. In accordance with the instruction they had received, on 25 February 2009 F&C's Finance Department made no payment of the Defendants' advance drawings to their

bank accounts. In the course of the afternoon Mr Culligan checked his account to see whether he had been paid. By about 5.00 pm, after bank closing, it was clear that he had not. Mr Barthelemy checked his account too and discovered he had not been paid. This came as a major shock to both of them. They had not thought that Mr Ribeiro would block the payments to them in such clear breach of the Agreement.

712. So far as the Defendants were concerned, the non-payment of their monthly drawings gave a completely new complexion and significance to the Members' meeting and the resolutions passed at it. It now appeared that F&C was adopting the position that the fact that the resolutions had been carried at the Members' meeting by exercise of Holdings' 60% vote was a sufficient basis to allow F&C to act in accordance with those resolutions, and to arrange for the LLP to act in accordance with those resolutions. The Defendants knew that Mr Ribeiro had been examining the Agreement carefully (he had told them as much at the meeting on 17 December 2008). They also correctly assumed that Mr Ribeiro had taken legal advice, and the shift of the forum for discussion from the LLP Board meeting on 21 January to the Members' meeting on 18 February gave every appearance that Mr Ribeiro had got a carefully worked out strategy in mind (though at that stage they could only speculate what it might be). When the Defendants learned that F&C had stopped payment of their monthly drawings in accordance with Resolution 2 passed at the Members' meeting, they were entitled to think, and did think, that F&C was now executing a settled, fully thought-out plan of its own devising. Moreover, when they spoke to Mr Ribeiro that evening, he confirmed that he was aware that the payments had been blocked and it was clear that this was not the result of some administrative error.

713. The Defendants therefore now had objective grounds to think that, for reasons to do with putting pressure on them, F&C - by cutting short the LLP Board meeting of 21 January, calling the Members' meeting of 18 February and passing the resolutions at it and then (on 25 February) proceeding to begin to implement those decisions - had indicated a settled determination not to treat itself as bound by the terms of the Agreement relating to payments due to the Defendants and the decision-making procedures according to which the business differences between the Defendants and F&C in relation to the LLP ought to be resolved. In my judgment, this amounted to what, in the language of general contract law, would be regarded as a repudiatory breach of contract.

714. Once they learned that their advance drawings had been stopped, the Defendants hurriedly conferred with their solicitor and drew up a Put Option Notice dated 25 February 2009 for each of them, whereby they purported to exercise their Put Option rights under paragraph 1.7 of the Fourth Schedule, specifying as the relevant breaches of the Agreement:

a) that the Corporate Member had procured that the drawings due under clause 11.1 of the Agreement on the payment date of 25 February 2009 were not paid; and

b) that the Corporate Member had acted, and continued to act, contrary to clause 13.6 of the Agreement by actively engaging "in a process of diminishing the commercial health, viability and value of the partnership's business for your [F&C's] own purposes."

715. I accept the Defendants' evidence that they did not expect F&C to stop their drawings and that they had not drawn up their Put Option Notices in readiness to take advantage of that. Their evidence on that point was corroborated by grammatical errors in their Notices ("you as the Corporate Member has procured… has acted…"), which indicated that they had been drawn up in a hurry on the evening of 25 February, as the Defendants testified. It is true that the Defendants acted very quickly in putting in their Put Option Notices but, in my view, that is explained by the fact that there had been an acrimonious build up to this event and they were not prepared to put up with the treatment they were receiving any longer. It was also a way of demonstrating to F&C how strongly they felt about what had happened.

716. At about 6.30 pm, the Defendants signed their Notices and then took them to Mr Ribeiro's office to hand them to him in person. Before doing so, Mr Barthelemy asked Mr Ribeiro if he was aware that the drawings were supposed to be paid, but had not been. Mr Ribeiro confirmed that he was and that it had been done on his instruction. Mr Barthelemy asked Mr Ribeiro if he understood that it was a breach of the Agreement. Mr Ribeiro replied that he did not believe it was in breach of the Agreement and that he had taken advice on the matter. He offered to show the Defendants the advice but said it would take some time to find it and provide it to them (in the event, the advice was not disclosed; I have already assessed Mr Ribeiro's actual state of mind on the evidence before me).

717. Mr Ribeiro's stance indicated that F&C had formed a definitive view that they were entitled to proceed in this way and that he was not prepared to suspend action pending a debate about the legal position. The Defendants reiterated that they regarded the stoppage of drawings as a breach of the Agreement and handed over their Notices. They asked Mr Ribeiro to sign a receipt, which he did (timed at 6.52 pm). There was an awkward conversation as the Defendants left his office, during which Mr Culligan said words to the effect that he congratulated F&C on their owning the LLP. In his evidence, Mr Ribeiro described the Defendants as "smug", "cheerful" and "victorious", but whatever impression he took away from the meeting, in my view that is far from the true position. In fact, despite the momentousness of what they had done, the Defendants turned up for work the next day in the usual way. I think they regarded the service of the Put Option Notices as the start of a potentially long and difficult period of negotiation with F&C about the way forward, rather than a trap that they had successfully sprung (as F&C sought to suggest).

718. About an hour later, Mr Ribeiro e-mailed the Defendants (as a courtesy, as he put it) to say that he was thinking of giving their Put Option Notice letters to Mr Apfel and Schulte Roth (the LLP's lawyers). In the event, however, F&C turned to Norton Rose for advice.

719. In the course of 26 February 2009, F&C's Finance Department did, belatedly, make payment of the Defendants' advance drawings. This was obviously done on the basis of a change in the instructions given by Mr Ribeiro.

720. On the evening of that day Mr Ribeiro, on behalf of Holdings, wrote to each of the Defendants in these terms:

> "We refer to your letter of 25 February 2009.

> Please note that payment of the Drawing Amount due under clause 11.1 of the Agreement has been made to you today. We acknowledge that this payment was overdue by one day and can only apologise for this error. We are, and remain, fully committed to compliance with all of our obligations under the Agreement.
>
> In the circumstances, we are both astonished and disappointed that you appear in your letter to be purporting to exercise the Put Option pursuant to the Agreement which is clearly not valid. That said, we will respond to the matters raised by you in writing in due course."

The validity of the First Put Option Notices and the legal position as at the end of February 2009

721. A number of issues arise under this heading.

(i) Is there any defence based on mistake by Mr Ribeiro and Holdings?

722. First, F&C submit that the Defendants were aware when Mr Ribeiro called a Members' meeting and put forward the resolutions to be considered at it that he was making a mistake as to the powers of such a meeting (especially regarding the non-payment of advance drawings), and that by keeping quiet about this they sought unfairly and contrary to their obligations under the Agreement to take advantage of that mistake, so that they were not entitled to treat the non-payment of their advance drawings on 25 February 2009 as a serious breach of the Agreement of a nature falling within paragraph 1.7 of the Fourth Schedule.

723. I reject this submission on the facts. The Defendants were not aware that Mr Ribeiro was making any mistake. It appeared to them that he was putting into execution a carefully planned strategy, albeit that at first they were not sure what that strategy was and it was only when he stopped the payment of their advance drawings on 25 February that they appreciated that he and F&C intended to put the resolutions passed at the meeting on 18 February into effect without further ado and in breach of the Agreement: see paras. [659]-[661], [706] and [712]-[713] above. So far as the Defendants could see, there was no legal impediment against the Members' meeting passing the resolutions put to it by Mr Ribeiro, and in my view they were correct in this. Once he had armed himself with these resolutions, the Defendants had to wait to see what use he would try to make of them. Moreover, Mr Ribeiro had not made any mistake about the powers of the Members' meeting. He was acting not on the basis of any such mistake but rather because he thought that proceeding by way of such a meeting was a good way to create uncertainty for the Defendants and to put pressure on them to agree to F&C's plans for the LLP's business: see para. [705] above.

(ii) Is Holdings' change of position after 25 February relevant?

724. The validity of the First Put Option Notices has to be judged at the time they were served. It is nothing to the point that F&C changed its stance and attempted to put

matters right shortly after it received the First Put Option Notices. Paragraph 1.7 of the Fourth Schedule defines a right for the Defendants to exercise a Put Option in certain circumstances, and the language of the provision and its commercial context both indicate that the existence or otherwise of their right to act has to be judged when they purport to exercise it. It is in the interests of commercial certainty that the parties should know precisely by reference to what time the validity of a legal action of such importance in defining their future rights and obligations as the exercise of a put option is to be judged. If the put option notice is valid at the time it is served, the right to be paid the price under it springs up immediately and fully; it is not a right which is defeasible or contingent upon how events develop after the time of service.

(iii) The relevant breaches of the Agreement

725. In my judgment, the First Put Option Notices were validly served on the basis of the first ground set out in them (non-payment of drawings), but not on the second (deliberate damage to the LLP's business). As to the first ground, Holdings (acting by Mr Ribeiro) was in breach of clause 11.1 of the Agreement, alternatively in breach of an implied term that it would not prevent compliance by the LLP with its obligation under clause 11.1 to pay the advance drawings: see paras. [260]-[274] above. So far as the second specified ground is concerned, I consider that the various business disagreements to which that ground referred were as a result of legitimate and genuine differences of view and were not part of a scheme by F&C to damage the value of the LLP's business for its own purposes.

726. A further question arises, whether the Defendants are also entitled to seek to rely, in support of the validity of the Notices, upon further breaches of the Agreement, not specified by them in the Notices. In my view, the extent of the breach of the Agreement constituted by the calling of the Members' meeting, the presentation of the various resolutions and the vote by Holdings in favour of them and the intention to carry those resolutions into effect in disregard of the terms of the Agreement, as manifested by the stoppage of the Defendants' advance drawings without further reference to them or the LLP Board, was wider than simply a breach of clause 11.1 or an implied term not to prevent performance under that provision. As the Defendants submitted, Holdings' actions were part of a single course of conduct and were closely related. This set of actions on the part of Holdings gave the objective appearance that Holdings (acting by Mr Ribeiro) had decided to shift the effective management of the LLP from the LLP ManCom and Board to the level of the Members' meeting (where Holdings intended to dictate policy and take decisions by virtue of its 60% majority voting rights). This involved a subversion of the intended operation of the Agreement in a fundamental way, since it undermined the distribution of decision-making powers under clauses 17, 18 and 22. Holdings had evinced an intention not to comply with the basic decision-making framework of the Agreement, but rather to seek to act in a way intended to defeat that framework. In ordinary contract parlance, Holdings had repudiated the Agreement: para. [713] above.

727. Further, in my opinion Holdings' actions constituted a breach of its duty of utmost good faith to the LLP under clause 13.6 of the Agreement. The attempt to distort the distribution of decision-making powers in relation to the LLP's business was intended to have the effect that Holdings alone could decide how the LLP's affairs should be carried on, thereby depriving the LLP of having the benefit of the collective judgment of particular individuals brought to bear at the level of the ManCom and LLP Board

to decide how the LLP should best proceed. Since the Agreement itself defined the LLP's relevant interests in respect of the decision-making procedures which should operate when deciding what it should do, I consider that the actions of Holdings to subvert those procedures (and hence to undermine the proper interest of the LLP in having those procedures applied for its benefit) was in breach of Holdings' duty to the LLP under clause 13.6. This is illustrated particularly clearly by the first three resolutions voted on at the Members' meeting on 18 February, the cumulative object of which was to apply illegitimate financial pressure to the Defendants to seek to compel them to endorse Mr Ribeiro's and F&C's judgments about how the LLP's affairs should be carried on, contrary to the Defendants' own considered judgment regarding what was in the best interests of the LLP.

728. In ordinary circumstances, an innocent party who purports to accept a repudiatory breach and rescinds the contract is entitled thereafter to justify his conduct by reference to matters amounting to serious breach of the contract which were not referred to by him at the time he rescinded the contract (see e.g. *Boston Deep Sea Fishing & Ice Co. v Ansell* (1888) 39 Ch D 339, 352, 364; *Chitty on Contracts*, 30th ed., Vol. 1, para. 24-014). I do not consider that there is any language in paragraph 1.7 of the Fourth Schedule sufficient to displace this ordinary rule. Although the paragraph refers to a right to exercise the Put Option within a period of three months "following a discovery … that the Corporate Member is in breach of any provision", the object of that is to lay down a time limit within which matters have to be brought to a head by service of a notice in respect of any discovered breach of the Agreement, not to displace the usual rule that once matters are brought to a head by notice to terminate an agreement it is open to the terminating party to seek to justify the termination by reference to any breaches of the agreement which have occurred up to that point and which have the requisite character (as repudiatory breaches or, in this case, as breaches which satisfy the criteria of seriousness set out in paragraph 1.7).

729. It is therefore open to the Defendants, in contending that the First Put Option Notices were valid, also to rely upon the repudiation of the Agreement (in particular, clauses 13.6, 17, 18 and 22) constituted by Holdings' determined effort to remove issues of the management of the LLP's business so that they could be decided at the level of the Members' meeting rather than in accordance with the decision-making procedures stipulated in the Agreement (and according to F&C's judgment rather than by reference to the free judgment of the LLP ManCom and Board members). The attempt by Holdings to subvert the proper management processes for the LLP in an effort improperly to impose its will in the conduct of the LLP's affairs, including as one element in that the stoppage of payment of the advance drawings of the Defendants, is also relevant to the Defendants' claim under section 994, considered at paras. [1094]ff below. (By similar reasoning, it would also be open to the Defendants to seek to rely on the breach by Holdings of clause 13.6 consisting in its failure to inform the LLP about the decision taken on 20 August 2008 to move to "open architecture" advisory arrangements with clients: paras. [255]-[259] above; but since in my view that breach arose out of an understandable degree of confusion about the precise ambit of Holdings' obligations to provide information to the LLP and since the decision would have been disclosed at any point when it became of particular relevance for the LLP, the breach did not constitute "gross misconduct" or "gross negligence" within the meaning of paragraph 1.7 of the Fourth Schedule and it is not necessary to examine it further).

(iv) "Gross misconduct", "Gross negligence" and "materially adverse effect"

730. In my judgment, the First Put Option Notices were valid on the basis of the first ground set out in them, relating to clause 11.1 of the Agreement and the non-payment of the advance drawings due to the Defendants on 25 February 2009. Holdings (acting by Mr Ribeiro) breached clause 11.1 or the associated implied term in a manner amounting to "gross misconduct" and the breach had a "materially adverse effect" upon the Defendants for the purposes of paragraph 1.7 of the Fourth Schedule. The breach did not arise from administrative error. The validity of the Notice on this first ground is sufficient for the Defendants to succeed in the Part 7 proceedings.

731. A range of authorities was cited to me bearing on the meaning of the terms "gross negligence" and "gross misconduct" in a range of contexts. I found these of limited assistance, since the meaning of these terms in the Fourth Schedule has to be assessed in the specific context of the Agreement and their application depends upon the particular facts of the case. It is sufficient for present purposes to refer to the "gross misconduct" limb of paragraph 1.7 of the Fourth Schedule.

732. In my view, the primary focus of the requirement of "gross misconduct" is upon the nature of the breach in question and the manner in which it occurred, judged on an objective basis by reference to circumstances known to both parties as at the time a put option notice is served. This accords with the usual objective approach applied in determining the content of contractual obligations and assessing whether they have been breached. It also accords with the strong desirability, in the specific context of a put option agreement, that the parties should be able to know with reasonable clarity at the time a put option is exercised whether there is a proper basis for its exercise or not.

733. There is, however, one qualification I would add to that basic approach. I think that it would be relevant to answering in the affirmative the question whether a breach of the Agreement had occurred in a manner amounting to "gross misconduct" if it were established at trial that a particular breach had been committed in deliberate way, with the party in breach knowing that it was so acting or being reckless as to that fact – that is to say, if the party in breach had acted in conscious disregard of the rights of the other party under the Agreement. So, for example, in a marginal case the innocent party may purport to exercise put option rights under paragraph 1.7 of the Fourth Schedule thinking that that is justified by reference to objective circumstances, but if the court disagrees, or in order to bolster his case on "gross misconduct", that party may also seek to show at trial that the party in breach acted deliberately in a knowing or reckless way. This qualification to a simple objective approach still allows the party in breach to know at the time a put option notice is served whether it is valid, since if that party has acted in conscious disregard of the rights of the other party it will know that and therefore will be in a position to assess the risks of refusing to recognise the validity of the notice in question. (I do not think that the converse would apply: if, judged on an objective basis, the Agreement had been breached in a manner amounting to gross misconduct, it would not be open to the party in breach to seek to defend itself by saying that it had acted on the basis of a subjective mistake of which the innocent party had had no notice – in that situation the innocent party cannot know whether its action in serving a notice might later be proved to be invalid by reference to the subjective state of mind of the party in breach which he has had no

fair opportunity of assessing at the time he has to decide whether to serve a notice or not).

734. This is in line with the qualification to the basic approach already referred to above (*Boston Deep Sea Fishing and Ice Co. v Ansell* and para. [728]) regarding the possibility of justifying a put option notice by reference to matters of which the innocent party was unaware, or may only have suspected, at the time of serving the notice. It also, I think, properly reflects the focus of the language of "gross misconduct" upon the gravity of what the party in breach has done when judged in the context of how the contract was supposed to operate, with a basic level of loyalty to its terms on each side. This is a point of particular force when interpreting a contract such as the Agreement, which was intended to govern a close business relationship over an extended period of time.

735. In the end, on the facts I have found, the result in this case does not depend upon assessment of Holdings' (Mr Ribeiro's) subjective state of mind, because the context in which Holdings stopped payment of the advance drawings due to the Defendants meant that, judged on an objective basis, it had indicated an intention to repudiate the proper operation of the Agreement in a fundamental way, which clearly amounted to gross misconduct for the purposes of paragraph 1.7 of the Fourth Schedule. The Defendants were deliberately deprived by Holdings of monies which, according to the terms of the Agreement, they should have been paid, on the basis of a settled determination on the part of Holdings (objectively manifested) to stop the payments to them as part of a scheme by F&C to exert illegitimate pressure upon them to agree to F&C's proposals for the way forward for the LLP's business and for F&C to gain practical management control of the LLP. I would, however, add that reference to Holdings' subjective state of mind (i.e. by reference to the state of mind of its agent, Mr Ribeiro) reinforces that conclusion, since in my view he acted with the knowledge that Holdings had no right under the Agreement to subvert the intended decision-making processes of the LLP as it sought to do and in reckless disregard of the rights of the Defendants under the Agreement: paras. [704]-[705] above. Similar reasoning also leads to the conclusion that the other breaches of the Agreement identified at paras. [726]-[727] above amounted to "gross misconduct". Given my conclusion in relation to "gross misconduct", it is not necessary to refer to the alternative basis of "gross negligence" relied on by the Defendants.

736. The breach of the Agreement involved in the non-payment of the advance drawings on 25 February 2009 was a breach which had "a materially adverse effect" both upon the LLP and upon the Defendants for the purposes of paragraph 1.7. So far as concerns the effect upon the LLP, two points may be made. Holdings' conduct in acting in clear breach of the Agreement in this way as the culmination of the disputes from the 21 January LLP Board meeting and the 18 February Members' meeting was bound to be highly detrimental to the co-operative working relationship between the Defendants and F&C and its representatives, which was an important foundation for the success of the LLP. Also, it was action taken as part of a scheme by Holdings to exert illegitimate pressure on the Defendants to accept F&C's plans for the business, contrary to their own judgment, so undermining the interest of the LLP to have the benefit of the full and uninhibited expression of views on the LLP Board before decisions were taken, after full and informed debate, how the LLP should proceed (if necessary by taking a vote if disagreements persisted). Similar reasoning also leads to

the conclusion that the breaches of the Agreement identified at paras. [726]-[727] above had a materially adverse effect on the LLP.

737. As regards the effect upon the Defendants, the breach of the Agreement had a direct materially adverse effect upon them, in that they were deprived of monies which they ought to have received (and as a result of a deliberate decision, rather than a mere administrative error, so that at the time the First Put Option Notices were served there appeared to be no prospect that the monies would be paid shortly thereafter). It is no answer for F&C to say that the monies were in fact paid the next day. Since, as set out above, the parties intended that they should be able to assess the validity of a put option notice at the time it is served, the test of material adverse effect under paragraph 1.7 falls to be applied at that time, and not by reference to how events might transpire later on. This interpretation is supported by the language of the provision, which defines an entitlement for the Defendants to serve a put option notice by reference to a breach which "has a materially adverse effect" (present tense). Accordingly, in the context of the Agreement, the material adverse effect requirement has to be assessed by reference to the circumstances applying at the time the notice is served and their character, whether they are by their nature adverse or calculated to have an adverse effect (to adopt the formulation of Lightman J in *Evans v SMG Television* [2003] EWHC 1423 (Ch); [2003] All ER (D) 348 (Jun), at [274], interpreting a contractual provision which, in this respect, was analogous).

738. I also consider that the breach had a materially adverse effect upon the Defendants for reasons similar to those applicable to the LLP in para. [736] above. Moreover, similar reasoning leads to the conclusion that the breaches of the Agreement identified at paras. [726]-[727] above had a materially adverse effect on the Defendants. Since the LLP was intended to be a vehicle to serve the interests of the Defendants (as well as F&C) and to operate to that end by means of the decision-making procedures involving the Defendants as set out in the Agreement, the damage done by Holdings to co-operative working relationships within the LLP and the way in which it sought to undermine those decision-making procedures by stopping payment of the Defendants' advance drawings and removing management decisions to the Members' meeting also constituted materially adverse effects upon the Defendants.

(v) Conclusion as to the validity of the First Put Option Notices

739. For the reasons given above, I conclude that the First Put Option Notices served by the Defendants were valid. Accordingly, Holdings is obliged to buy out the Defendants' interests in the LLP on the terms set out in para. 1.7 of the Fourth Schedule.

The period to the Second Put Option Notices: 27 February to 22 May 2009

740. On 27 February 2009, there was a meeting of the Pushkin Fund Board attended by the Defendants and, for part of the time, by Mr Tilson. At the meeting, the Defendants said that the Pushkin Fund would unwind its interest in the Select Fund by taking an *in specie* distribution of shares in underlying hedge funds held by the Balanced Fund (i.e. option (iii) in the 1 December 2008 letter rather than option (ii) as chosen by other investors).

741. After the meeting, Mr Tilson e-mailed the Defendants to question this and whether the directors of the Pushkin Fund were fully informed about the other options open to them which might be more in the interests of the Fund. In fact, on other occasions the Defendants had explained, as I accept, the available options to the Pushkin Fund directors. This step by Mr Tilson, virtually questioning the honesty of the Defendants, set alarm bells ringing for them regarding Mr Tilson's loyalty, since it appeared to manifest a new attitude towards them.

742. On Monday, 2 March 2009 Mr Logan wrote further letters on behalf of Holdings to each of the Defendants to expand upon what Mr Ribeiro had said in his letter of 26 February, to argue that Holdings had not breached the Agreement and that the Defendants' purported exercise of their Put Options was ineffective. The thrust of the letter was that there had been a mutual mistake, made in good faith, to the effect that the Members' meeting had authority to decide to block the drawings for the Defendants. Mr Logan said that as a result of the Defendants' Put Option Notices, Holdings had taken advice and, "We now appreciate that the Members' meeting had no authority to decide these matters for the LLP". (He did not refer to the advice which had been taken before the Members' meeting strategy was decided upon or explain how it differed, if it did, from the further advice received). Mr Logan accused the Defendants of becoming aware of the mistake soon after the meeting and of choosing to keep quiet about it (these accusations were misplaced, as I have found above). Mr Logan also rejected the Defendants' claims that F&C had acted in breach of clause 13.6 of the Agreement and proposed that the forthcoming Board meeting should be used to discuss the issues about the way forward which had been the topic of resolutions at the Members' meeting.

743. Also on 2 March, Mr Tilson sent Mr Ribeiro a private e-mail to warn that Mr Culligan was pushing for Mr Tilson to prepare an early draft of the LLP's 2008 accounts (on the grounds that F&C's Finance Department would not produce them until the end of March, as Mr Tilson had told Mr Culligan) to be ready for the LLP Board meeting; to say that, in fact, Mr Tilson had spoken to the Finance Department and they were now aiming to produce the draft accounts themselves by the end of the week, but he had not informed Mr Culligan of this; and to suggest a strategy for Mr Ribeiro to challenge the Tilson draft accounts at the Board meeting, if Mr Culligan tried to produce them there.

744. Whilst it was legitimate for Mr Tilson to inform Mr Ribeiro about the state of preparation of the LLP's accounts, it was not legitimate to do so in this secret manner, concealed from Mr Culligan, or to suggest a strategy for Mr Ribeiro to obstruct consideration of draft accounts for the LLP. It was also a clear breach of Mr Tilson's duty as an employee of the LLP not to correct his own statement to Mr Culligan about when the F&C Finance Department could produce the draft accounts. By this stage, Mr Tilson could see that the Defendants and Mr Ribeiro were locked in dispute and had decided to support Mr Ribeiro and F&C by covert and illegitimate means if necessary. Again, Mr Ribeiro did nothing to discourage him, but rather thanked him and treated him as a useful source of private information.

745. On 3 March 2009 there was a meeting of the Compensation Committee attended by Mr Cole, Mr Ribeiro, the Defendants and Mr Blomerius of F&C HR, who took the minutes. The Defendants presented their proposals to award LLP staff sharply reduced bonuses for 2008. This became another point of controversy with the F&C

representatives. Staff had bonus arrangements in addition to basic salary, divided into three parts: a discretionary bonus, a contractual entitlement to a bonus calculated by reference to the investment performance of the LLP's funds in the relevant year and a contractual entitlement to a bonus calculated by reference to the LLP's profits in the relevant year.

746. In relation to the first of these parts, where there was a discretionary element of assessment, the Defendants stated that times were hard, with significant lay-offs across the financial services industry, and that market data showed that staff remuneration packages were generally lower than previously; accordingly, they argued that the LLP could afford to pay its staff smaller discretionary bonuses without fear of losing them. As a sweetener, the Defendants also suggested that they should increase the basic salaries payable to the staff in 2009 by 5%. They argued that this rebalancing of the staff's remuneration packages from bonus to salary would be in line with recommendations for the financial industry to shift the balance between basic salary and bonus elements of remuneration packages more towards the salary element.

747. There was some force in these arguments, but it should also be observed that their practical effect would have been to reduce staff costs for the LLP for 2008 (so boosting the LLP's profits for that year), while increasing the LLP's costs for 2009. In the circumstances in early 2009, particularly following the Defendants' exercise of their Put Options, this would be to the financial advantage of the Defendants. This is because the formula for the Put Option price in paragraph 1.2 of the Fourth Schedule would operate by reference to an average of the profits of the LLP in its two most profitable years out of the year in which the option was exercised (2009), the two preceding years (2007 and 2008) and the one following year (2010).

748. In my judgment, despite the protestations of the Defendants at trial that the LLP's profits in 2009 and 2010 could have exceeded those for 2007 and 2008 if F&C had acted properly, none of F&C's representatives nor the Defendants actually thought, in late 2008 and early 2009, that there was any realistic hope that that would be the case. These were dark times from the point of view of the LLP. The FoHF industry generally, and the LLP's business in particular, were doing very badly by comparison with the preceding period and any guesses as to improvement would be pure speculation. Moreover, any improvement which might come would be likely to take some considerable time to be achieved. I consider that F&C and the Defendants all thought that 2009 and 2010 were almost bound to be worse, in terms of profits for the LLP, than 2007 and 2008.

749. In that situation, therefore, it was in the Defendants' personal financial interest for the remuneration costs to be lowered for 2008 with some shift of such costs into 2009 as a sweetener if necessary. Mr Ribeiro and Mr Cole were understandably sceptical about the motivation for the Defendants' remuneration proposals at this time. Their scepticism was also reinforced by the weakness of the rationale given by Mr Barthelemy for the proposals at the meeting. The Remuneration Committee minutes record him as explaining:

> "… that the rationale for these proposals was to reduce bonuses significantly in order to provide some support for the cost base

> in 2009 so as to secure continued employment for the employees."

It was difficult to see how a reduction in the bonuses chargeable against 2008 would assist the cost base of the LLP for 2009, whereas an increase in the basic salary level in 2009 would in fact be detrimental for that cost base.

750. Mr Cole objected to the proposals as being inconsistent with F&C Group policy (another example of an F&C representative tending to think of the LLP as an ordinary part of the F&C Group whereas, in fact, the LLP was not bound by group policy on remuneration matters); that the proposed overall reduction in bonuses was significantly greater than the reduction in profit by the LLP year on year, which employees might find difficult to understand; and that the increase in salaries for 2009 represented a material increase in operating costs in 2009 in an environment of sharply reduced prospective revenues and profitability across the industry. These latter points had considerable force. Mr Ribeiro asked for more information and the meeting broke off without a decision being taken.

751. The next LLP Board meeting took place on 4 March 2009, attended by Mr Ribeiro, the Defendants, Mr Cole, Mr Johns and Mr Tonkin. The Defendants attended (as part of a pattern of conduct in which they remained involved in running the LLP after 25 February 2009, without prejudice to their contention that the First Put Option notices were valid) because Holdings, by its letters of 26 February and 2 March, had created significant doubt in their minds about the legal position.

752. Mr Ribeiro now adopted an emollient approach, saying that the Members' meeting had not been effective and so all issues remained up for discussion. Mr Ribeiro pressed the Defendants for their cost-cutting proposals to bridge the gap between anticipated revenues and costs in 2009. He took care to say that proposals to widen the business of the LLP beyond FoHF activity would be considered on their merits, provided that they were properly detailed (a reference to clause 4.1 of the Agreement), thereby taking care to draw back from his heated comments at the meeting on 21 January and from Resolution 4 passed at the Members' meeting. He also emphasised that any resolutions put forward to the LLP Board should be considered in accordance with Board members' fiduciary duties to act in the best interests of the LLP.

753. However, the meeting soon descended again into arguments. Mr Culligan pointed out that the Agreement contained provision for the Corporate Member to take full control of the LLP if it wanted to take action detrimental to the interests of the Defendants (i.e. the Call Option provisions in paragraphs 1.9 and 1.10 of the Fourth Schedule), reaffirmed the Defendants' view that Holdings had wilfully and deliberately acted in breach of the Agreement by withholding payment of the advance drawings and said that the Defendants considered they had validly sold their interests to the Corporate Member by exercise of their Put Options and that their actions were without prejudice to that position. There was argument about this, in the course of which Mr Culligan not unreasonably focused on the tendentious assertion by Mr Ribeiro in his letter of 26 February that the Defendants had been paid one day late due to an "error".

754. Mr Cole asked what it would take to convince the Defendants that the Corporate Member was genuinely committed to the LLP. Mr Culligan said he thought the

meeting should proceed with the business on the agenda, thereby intimating that the Defendants would judge F&C's commitment and good faith by reference to its actions on the points of dispute. Mr Ribeiro proposed that they all start afresh. Mr Johns asked whether the Defendants saw their future as being part of the partnership and whether they were prepared to draw a line under what had happened and build a growing business based on trust and mutual commitment. Mr Culligan again said he would like to go through the items on the agenda and also stated that he and Mr Barthelemy were always open to commercial discussions. The Defendants expressed doubts about the good faith of the Corporate Member.

755. Mr Culligan drew attention to Resolution 1 from the Members' meeting that no advanced profits for 2008 were to be drawn, and said that the intention of the resolution was to place the Defendants under personal financial strain, given that their individual tax liabilities in relation to the profits of the LLP for 2008 fell due at the end of January. He referred to the usual timetable for finalising year-end accounts for the LLP and determining its distributable profits, which had now slipped. He then tabled the draft accounts prepared by Mr Tilson and asked to have them finalised and audited as soon as possible so that the final distributable profits for 2008 could be paid out.

756. Mr Ribeiro fairly pointed out that there had been disputes about items which could affect the 2008 accounts and that this had held up their finalisation; and that in the previous year he had arranged for early payment of advanced profits in response to requests by the Defendants to help them meet their tax liabilities but that no such request had been made this year. Disingenuously (in light of the forewarning he had had from Mr Tilson), Mr Ribeiro expressed surprise that he had not been given prior knowledge of the document prepared by Mr Tilson, while also (fairly) making the point that Mr Culligan should have given formal notification of his intention to table the draft accounts. However, he agreed to use his influence to get F&C's Finance Department to issue the LLP's accounts for 2008 as soon as possible. Mr Culligan proposed a resolution that 100% of the LLP's profits for 2008 be distributed to the Members, and (subject to an amendment by Mr Ribeiro to make it clear that the reference was to the profits contained in the final, audited accounts for 2008) the resolution was unanimously approved. (On about 14 April 2009 it was agreed that since the amount of the LLP's profits for 2008 was known, subject only to a few items of dispute, about 90% of the profits would be paid to the Members in advance of the accounts being finalised, and that was done: Mr Ribeiro had retreated from his tactic of trying to place the Defendants under personal financial pressure).

757. Mr Ribeiro pointed out that one key matter to be resolved before the 2008 accounts could be finalised was the amount of employee bonuses for 2008. This was now urgent to prevent upsetting the LLP employees, since F&C Group bonuses were about to be announced. Mr Cole said he thought it should be possible for agreement to be reached and bonuses announced in line with the timetable for announcing bonuses throughout the group.

758. At this stage Mr Ribeiro said he had to leave in order to get to an important business meeting, and Mr Culligan asked that the accounting treatment for the Credit Alpha Fund launch costs be considered before he left, since that was another item which would affect finalisation of the LLP's 2008 accounts. Mr Culligan expressed his view that these should be amortised over five years (i.e. not all taken into account in 2008,

thereby depressing the LLP's profits for 2008 – a point of significance for both sides because of the operation of the Put Option price formula: see paras. [747]-[749] above), and said that the only inference that he could draw from F&C's insistence that they all be accounted for in 2008 was that F&C was deliberately trying to depress the LLP's profits for 2008 and hence the available profit distribution in respect of that year.

759. Mr Ribeiro, as a proof of F&C's good intentions, proposed that the LLP Board request the auditors of the LLP and the F&C Group, KPMG, to give their view of the appropriate accounting treatment. Mr Culligan said he thought KPMG would ask for management's views whether there was a future for the Credit Alpha Fund (so that outside investors could be expected to be attracted into it and to bear some of the launch costs, so affecting any provision to be made in the LLP's accounts). Mr Ribeiro said he would not be prepared to mislead anyone about questions whether the Credit Alpha Fund was a going concern and that all LLP Board members should adopt the same approach. It was agreed that Mr Tilson, F&C's Finance Department and KPMG should consider the matter together.

760. At this point Mr Ribeiro had to leave the meeting and other topics on the agenda (the AAF report, a possible office relocation for the LLP and the LLP's IT infrastructure) were adjourned to a further LLP Board meeting to be held the following week.

761. On 6 March 2009, in an e-mail to the Defendants (this time copied to Mr Ribeiro and Mr Sparks) Mr Tilson raised further concerns about the position of the Pushkin Fund and whether it could be considered to be a going concern. The Defendants were angry at this attempt by Mr Tilson to go to others to put pressure on them about his concerns. Mr Culligan accused him of angling to have the Pushkin Fund closed down and said he should have discussed the matters in the e-mail with the Defendants before sending it out. The Defendants considered Mr Tilson's actions were again suspicious, and thought that he might be conspiring with Mr Ribeiro to damage the LLP.

762. Mr Tilson was shaken by their reaction. On this matter he had genuine concerns about the propriety of the LLP's behaviour towards the Pushkin Fund and felt the Defendants had not reacted properly to those concerns when put forward in his e-mail of 27 February (para. [741] above), so that he felt justified in copying his e-mail more widely to Mr Ribeiro and Mr Sparks. He sent a private e-mail to Mr Ribeiro to give his account of events and explain his actions; to inform Mr Ribeiro that he believed Mr Culligan had lost confidence in him (Mr Tilson); and to complain that he felt that he had been scolded by Mr Culligan "like a naughty schoolboy", which he interpreted as a form of intimidation.

763. Although Mr Tilson felt a genuine sense of grievance, I think the Defendants were justified in reprimanding him. His e-mail of 27 February 2009 did not alert them to the detailed concerns set out in his e-mail to them, Mr Ribeiro and Mr Sparks on 6 March. Since the Defendants were the persons with primary responsibility for handling the LLP's relationship with the Pushkin Fund, I think the proper course for Mr Tilson should have been to seek the Defendants' views on the detailed points he wished to raise to see if there was a good explanation, before seeking to refer their behaviour to others as he did. Accordingly, I do not think the Defendants' treatment of him on this issue can fairly be described as "intimidation".

764. Mr Culligan replied to Mr Tilson's e-mail to say that the issues raised by him had been fully discussed with the directors of the Pushkin Fund, who had made an informed choice how to proceed. Nonetheless, on 8 March 2009 Mr Ribeiro joined in the e-mail correspondence to complain that he had always said that the Defendants should never have been members of the Pushkin Fund Board (so as to avoid any conflicts of interest) and to say that he had called for Mr Tilson's e-mail to be tabled for discussion at the next ManCom meeting. This tended to reinforce the Defendants' suspicion that Mr Tilson and Mr Ribeiro were co-ordinating their actions in some way. It seems that Mr Ribeiro also passed Mr Tilson's complaint on to Mr Cole as a human resources matter, leading to Mr Tilson giving a report to Mr Ribeiro and Mr Cole by e-mail on 10 March.

765. Late in the afternoon of 6 March 2009 Mr Culligan spoke further to Mr Tilson about the Pushkin Fund. Mr Culligan was in a calmer mood and asked Mr Tilson to seek legal advice about the options and to explore ways to reduce costs for the Fund.

766. Also on 6 March, the Defendants had a meeting with Mr Grisay to see if there could be some commercial settlement of the dispute. Since the Defendants appeared to be in direct conflict with Mr Ribeiro, Mr Grisay suggested that they speak to Mr Johns instead. This they did, but their early discussions with him were inconclusive and quickly overtaken by events, at which point Mr Johns, in an e-mail of 18 March, started to ask for more detailed proposals from them. I think (in line with the Defendants' assessment of the position) that he did this as a way of pulling back from the more general form of discussion which Mr Grisay had proposed.

767. The same day (6 March 2009), F&C issued a claim form to commence the Part 7 proceedings against the Defendants, but without serving this on the Defendants or notifying them that this had been done.

768. The LLP Board meeting adjourned from 4 March resumed on 9 March 2009 with the same individuals attending (Mr Cole, Mr Johns and Mr Tonkin attended by telephone). As on 4 March, Mr Johns and Mr Cole both played an active role in the discussion and brought their own best judgment to bear, having regard to what they believed to be in the interests of the LLP. The Defendants and Mr Ribeiro each formally reiterated that their discussion at the meeting was without prejudice to their respective positions in relation to the validity of the Put Option Notices of 25 February. Technical accountancy advice on the Credit Alpha Fund launch costs had not yet been received. Mr Culligan said the LLP Board should consider the budget he had presented at the Board meeting on 21 January and Mr Ribeiro undertook to discuss each item with Mr Tilson and report back ahead of the next Board meeting.

769. Mr Ribeiro and Mr Johns asked for a more detailed explanation by Mr Barthelemy of the possible expansion of the LLP's business into performing fiduciary hedge fund selection or due diligence activities on behalf of third parties (in the event, the Defendants did not pursue this idea). There was discussion whether an AAF report should be commissioned. The Defendants argued that it was an important marketing tool; Mr Ribeiro argued that it was not so important in the circumstances in which the LLP found itself as to be worth the £25,000 cost. It was decided that a decision on this item should be postponed until a general review of the proposed budget took place. The Board agreed that other items on the agenda should also be postponed

until that review. These items included discussion of the LLP's IT infrastructure. The F&C representatives did not regard this as a matter of particular significance.

770. On 9 March 2009, Mr Culligan e-mailed Mr Tilson and F&C's Finance Department in relation to the Credit Alpha Fund launch costs to say that KPMG should be instructed to give technical advice on the footing that the Fund "is an ongoing fund and that the LLP intends to market the fund actively going forward". Mr Culligan was then involved in providing KPMG with full instructions and discussing the issue with them. He also took informal advice on the issue from another firm of accountants. In the end, in late March KPMG advised that the full likely liability of LLP to the Balanced Fund in respect of the launch costs should be recognised in the LLP's 2008 accounts (i.e. not spread over a five year period as Mr Culligan had wanted), but the actual amount to be included should be determined based on management's view of the likelihood that and extent to which new investors would come into the Fund and bear a proportion of the launch costs costs. Accordingly, the question of the effect of this item on the LLP's 2008 accounts was to turn on the views of the LLP's Board.

771. Also on 9 March, the Compensation Committee had another meeting (with Mr Blomerius again in attendance to take minutes). The arguments about the different proposed approaches to bonuses and salaries were resumed. Mr Cole objected that the Defendants' proposals would involve a mis-match between the sharp reduction proposed by the Defendants for bonuses for 2008 and the actual performance of the LLP in 2008 in terms of profitability; the Defendants' proposals would, for example, mean a reduction in the total bonus for Mr Sparks of 68% by comparison with his bonus for 2007 whereas profits for the LLP were down by only 20% from 2007. The Defendants continued to press for their proposed approach, saying that it was more suited to the different market environment which now existed, particularly for hedge funds, and that it was appropriate to shift the balance between the bonus and salary elements in the employees' remuneration packages. Mr Ribeiro objected to such a change being applied retrospectively and disagreed with a 5% increase in salary for employees in 2009, on the grounds that it was inappropriate to increase the fixed costs of the LLP in that way at such a difficult time. I consider that there was considerable force in the points made by Mr Ribeiro and Mr Cole.

772. However, although I think that the strength of the Defendants' resistance to changing their proposals was linked to a consciousness of their own financial interests under the Agreement, I consider that each side in this debate put forward genuine and legitimate views regarding what they saw as being in the best interests of the LLP. The Compensation Committee voted on the Defendants' proposals, with the Defendants voting for them and Mr Ribeiro and Mr Cole voting against them. Mr Cole asked for information on the full implications of both the contending approaches and for there to be a further meeting of the Compensation Committee to try to reach agreement.

773. The same day, Mr Tilson had further discussions with Mr Culligan about the Pushkin Fund and again reiterated that he had the impression that the Pushkin Fund directors were not aware of all the options open to them. Mr Culligan and Mr Barthelemy called him back later in the day. Mr Barthelemy was less restrained than Mr Culligan had been. He was very annoyed. He shouted at Mr Tilson words to the effect that he should stop pursuing his agenda to question the Defendants' actions in relation to the Pushkin Fund and accused him of having an ulterior motive to harm the LLP. Mr Tilson reported this in a private e-mail to Mr Cole and Mr Ribeiro on 10 March.

774. Under cover of letters dated 12 March 2009 from Mr Ribeiro, for Holdings, to each of the Defendants (handed to them by Mr Ribeiro at a meeting at F&C's offices also attended by Mr Apfel) they were given copies of F&C's claim form under CPR Part 7 seeking a declaration to the effect that the Defendants' exercise of the Put Option on 25 February 2009 was ineffective. In the letters, Mr Ribeiro stated that the question whether the Put Option had been validly exercised had to be determined as soon as possible to enable each side to know where they stood. He asserted that F&C would continue to make efforts to resolve disputes at LLP Board level; he also mentioned that F&C had been approached by the Financial Times asking for information about the legal claim and asked to discuss with the Defendants urgently what response should be made. Mr Ribeiro suggested that each side should simply offer no comment to the press.

775. The issuing of proceedings by F&C was a hostile act which took the Defendants by surprise. F&C had been underhand in issuing the proceedings on 6 March without telling the Defendants and this tended to reinforce their feeling that Mr Ribeiro and F&C were not being straight in their dealings with them. With legal proceedings being issued, the chances of there being a prompt negotiated resolution of the dispute had obviously receded. The existence of a dispute in which the Defendants accused Holdings of gross misconduct and in relation to which Holding had commenced legal proceedings was bound to be very unattractive to clients and prospective investors in the LLP's products.

776. On 13 March 2009, Mr Tilson circulated the legal advice he had obtained in relation to the Pushkin Fund under cover of an e-mail to the Defendants, Mr Ribeiro and Mr Sparks, in which he again raised the issue whether the LLP (acting by the Defendants) had given adequate advice to the Pushkin Fund directors.

777. Also on that day, at Mr Ribeiro's request, Mr Tilson circulated details of the AUM and cash assets of the LLP available for repayment against redemptions. His expectation was that unwinding the Select Fund according to option (ii) in the 1 December 2008 letter could extend into about August 2009, with part payments along the way.

778. On 18 March 2009, there was a LLP ManCom meeting attended by Mr Ribeiro, the Defendants, Mr Tilson and Mr Sparks. This was the first ManCom meeting convened by Mr Ribeiro since 9 December 2008 (there had been an unduly long delay in summoning the meeting: clause 17.4 of the Agreement provided that the ManCom "shall meet regularly as determined by the Chairman and in any event at least once every two months"). The situation of the Pushkin Fund was considered and it was decided that the LLP should send a letter to its directors to cover the LLP's position in relation to advice to them about their options. The AUM and redemptions were discussed. It was agreed that the Balanced Fund should arrange for an *in specie* transfer of underlying hedge fund shares in its managed portfolio as a method of allowing the Select Fund to redeem its investment in shares in the Balanced Fund (with the intention that those hedge fund shares would then be redeemed or sold to realise cash for the investors in the Select Fund who had given notice of redemptions from that Fund). After that transfer to the Select Fund had been processed on 1 April 2009, the remaining funds actively managed by the LLP would be some $63 million in the Balanced Fund (including its holding in the Credit Alpha Fund) held on behalf of two remaining investors – Friends Provident and Millennium BCP Fortis.

779. Mr Ribeiro raised the question whether these two remaining investors in the Balanced Fund should be informed that they were the last remaining investors in that Fund, on the basis that there might be a requirement for Friends Provident to consolidate the accounts of the Balanced Fund with its consolidated group accounts now that Friends Provident was to be the majority investor in the Fund. Mr Barthelemy set out a number of reasons why he believed consolidation of the Balanced Fund accounts in Friends Provident's group accounts would not be required. Mr Ribeiro proposed that they get legal advice to check on the position.

780. Mr Ribeiro said that F&C was prepared to waive the marketing fee due to it under the Agreement in relation to the Select Fund during the period in which it was wound down as it met redemptions requested by clients invested in it, on condition that the benefit of that waiver accrued to the clients (i.e. that the LLP would pass on the commercial benefit of the waiver of the fee to those clients by reducing the management fees payable by them while the Fund was wound down). The point of this was to try to gain goodwill with clients by granting them a reduction in fees during the gradual winding down of the Select Fund. Mr Ribeiro pointed out that F&C could achieve the same commercial result by itself rebating to the clients the marketing fee it received from the LLP, but gave his view that it would be better for the LLP to do it directly (i.e. so that the goodwill would accrue to the LLP, which might help it when trying to build its client base in future). This was a genuine and generous offer by Mr Ribeiro which again indicates that he was not thinking in terms of damaging the LLP, but rather was looking for ways to safeguard its reputation and goodwill with clients against a time in the future when its performance and market circumstances had improved and it would be possible to rebuild its business.

781. The Defendants said that they wished to think about this proposal and that they would revert shortly with their response. In the event, they turned Mr Ribeiro's offer down, leaving it to F&C to rebate the clients itself. The reason they gave for this attitude was that to achieve the result proposed by Mr Ribeiro, an amendment to the Agreement would be required and they did not wish to re-open debate on its terms at a point when they were in legal dispute with F&C about it.

782. On 23 March 2009 there was an e-mail exchange between Mr Tilson and Mr Culligan regarding the draft Turnbull report for Q1 2009. Mr Culligan asked Mr Tilson to include the following comment in relation to IT matters:

> "F&C Partners has deployed an external e-mail provider in parallel with the F&C system during Q1 as part of its ongoing IT review. The purpose of exploring this option is to protect the business from the disruption caused by shortfalls in the service provided by the F&C's internal provider. In addition, F&C Partners continues to test an independent network infrastructure as part of its ongoing BCP test."

He also asked Mr Tilson to include the following comment in relation to risk to the LLP's business:

> "Support for the business withdrawn by the Corporate Partner. Measures taken to reduce business and restrict growth in the future. Such actions amounted to a breach of the partnership

> agreement. Investment performance for 2008 finished ahead of indices, competitors and the majority of F&C products."

783. Also on 23 March, the Compensation Committee reconvened to debate salaries and bonuses for the LLP. Mr Cole presented detailed counter-proposals, to reduce performance bonus awards in line with LLP profits or alternatively in line with F&C Group profits and to allow for salary increases in 2009 of only 3%, limited to the two employees earning salary less than £50,000. The effect of the counter-proposals, therefore, was that there should be a larger bonus payment attributable to 2008 than the Defendants proposed and a much smaller ongoing salary cost in 2009.

784. The Defendants argued forcefully that there was no valid comparison to be made with bonus arrangements in the F&C Group (which included complex deferred bonus arrangements), while Mr Cole (who, as F&C Group Director of Human Resources, had a wider F&C perspective in mind) argued that the LLP should be consistent with the group in relation to salaries and bonuses. Mr Ribeiro made the stronger point that the Defendants' proposals were a departure from how they had dealt with bonuses in previous years, to which Mr Culligan replied that this was because 2008 was financially a very different year. Mr Barthelemy accused F&C of trying to hurt the Defendants by their proposals because of the legal position (for the logic of this comment see paras. [747]-[749] above); Mr Ribeiro vehemently denied this; Mr Cole said that the F&C proposals were fair to the employees and took account of the financial position of the LLP – the bonuses for 2008 should be in line with the profits generated in 2008 and the fixed salary element for 2009 should be kept under control. Mr Barthelemy referred to recent FSA proposed guidelines on rebalancing salary and bonuses in support of the Defendants' position; Mr Cole denied there was any inconsistency between his proposals and those guidelines.

785. Mr Ribeiro and Mr Cole emphasised that a decision on bonuses for 2008 had to be taken, since the LLP had a contractual obligation to the employees to decide on and pay their bonuses. Mr Barthelemy accused Mr Ribeiro of adopting "his usual tactic of not listening" and there was a heated exchange between the two of them. Mr Cole maintained that it was important the employees had confidence that the bonuses awarded were related to the profitability of the business and that it would be damaging to the LLP to be seen to pay the least it thought it could get away with in any one year. Mr Culligan's riposte was that he and Mr Barthelemy understood the requirements of the business better than Mr Cole. Mr Ribeiro and Mr Barthelemy each accused the other of disregarding the interests of the LLP in seeking to pursue Holdings' or their own individual interests respectively.

786. Mr Cole intervened to call for a vote on the proposals. The Defendants voted for their proposals. Mr Ribeiro and Mr Cole voted for the variant of their counter-proposals which provided for a bonus pool for 2008 reduced in line with F&C Group profits rather than LLP profits (which gave a somewhat lower bonus pool figure and could therefore be regarded as something of a gesture of compromise towards the far lower bonus pool which the Defendants wanted). Mr Cole then exercised his casting vote as Chairman of the Committee in favour of the F&C proposal.

787. Despite the accusations hurled about on each side, I am again satisfied that each member of the Compensation Committee voted in accordance with what he genuinely believed was in the best interests of the LLP. This was an example of a *bona fide* difference of business judgment, resolved through the proper constitutional mechanism within the LLP as set out in the Agreement. The debate did, however, deepen the sense of distrust on each side.

788. On 24 March 2009, at 4.15 pm, Mr Ribeiro e-mailed the Defendants, following up from their debate at the ManCom meeting on 18 March, to say that it was now his firm belief "based on legal advice" that the LLP had an obligation to notify Friends Provident and Millennium BCP Fortis that, as from 1 April 2009, they would be the only remaining investors in the Balanced Fund. He said that this obligation arose from the LLP's obligation to treat its clients fairly (this was an additional line of argument as compared with what he had said on 18 March). He also referred to the fact that Friends Provident would have a majority holding in the Balanced Fund, which might trigger accounting consolidation issues which would need to be addressed by them from 1 April (the accounting issue which he *had* raised on 18 March). Mr Ribeiro said he was disappointed that the Defendants had not come back to him with a definitive agreement to notify the investors of their position and asked for their agreement for Mr Ribeiro to inform them.

789. Mr Culligan promptly asked Mr Ribeiro to forward the legal advice as a matter of urgency. Mr Ribeiro responded by e-mail at about 7.30 pm to say the legal advice was taken orally and he had nothing to forward on. Mr Ribeiro said he failed to see why the Defendants did not acknowledge that the LLP had an obligation to inform the two clients and said he believed he had no choice other than to inform them both immediately, both in his capacity as Chairman of the LLP and as the member of F&C's Execom responsible for those two client relationships.

790. Mr Culligan did not reply during working hours the next day, 25 March. He only reverted at about 7.30 pm that day, to point out that at the ManCom meeting it was agreed that the issue should be considered fully with the benefit of legal advice, and asked for a conference call with whoever had given Mr Ribeiro the advice. He said that if Mr Ribeiro was going to make an announcement to the LLP's clients, the Defendants (as the executive managers) should review it first. However, within the hour Mr Ribeiro replied to say that his letters to the two investors were already in the post.

791. The letters informed the two investors that there had been a significant flow of redemption requests in respect of the Select Fund, which meant that Select Fund investments in the Balanced Fund were to be withdrawn and that they would be one of two remaining investors in the Balanced Fund (which would have total AUM of about $62 million, of which about $13 million represented the investment by Millennium BCP Fortis and about $49 million the investment by Friends Provident). The letters stated:

> "I fully understand of course that you may wish to re-assess your position together with your professional advisers as a significant shareholder [in the letter to Friends Provident, the word "largest" was used in place of "significant] in the

> Balanced Fund in the light of the developments set out in this letter."

792. At trial, the Defendants accused Mr Ribeiro of writing in this manner as a deliberate attempt to try to induce these two investors to redeem their investments as the investors in the Select Fund had done, so as to close down the Balanced Fund. I reject that suggestion. In my view, Mr Ribeiro wrote in neutral terms to fulfil what he genuinely felt was an obligation to inform the two investors of the factual position. The advice (given by Mr Apfel) to the effect that the two remaining clients should be informed of their position was, in my view, sought and given in good faith and could be regarded as supported by the regulatory requirements applicable to the LLP requiring it to treat clients fairly (para. [94] above). The information the letters contained was not good news for them (since as the last two investors they would probably have to bear a higher burden of costs associated with the Fund) and the sentence quoted above was in neutral terms in recognition of the likely reality that they might wish to re-assess their position. Mr Ribeiro did not have the intention of inducing the two investors to redeem and the letters were not framed to achieve that result.

793. However, there is force in other criticisms by the Defendants of Mr Ribeiro's conduct in relation to the sending of these letters. The question whether the obligation of the LLP to treat its clients fairly meant that these two clients had to be informed that they were the last remaining clients did not lead to an obvious, single answer. It is not usually the position that clients in a mutual fund such as the Balanced Fund have to be given a running account of the proportionate extent of their involvement in the fund, and at the ManCom meeting on 18 March Mr Ribeiro did not put forward such an argument. The advice received by Mr Ribeiro had been obtained (at least in part) in order to inform the LLP what to do, yet Mr Ribeiro failed to share the details of it with the LLP so that the ManCom could consider it and decide how the LLP should proceed in the light of it, as had been contemplated should happen at the ManCom meeting on 18 March and as required by clause 17 of the Agreement. The ManCom had not delegated its authority to Mr Ribeiro to deal with the issue. Also, there did not appear to be any urgently pressing need (such as might have justified Mr Ribeiro in acting in the unilateral way he did) to inform Friends Provident about the position so that it could consider consolidation of accounts – there were no Friends Provident group accounts referable to 1 April 2009 which were about to be drawn up or signed off in the immediate future. His peremptory demand that the Defendants agree to him informing the clients was not justified; nor did he have any authority or justification to send the letters without giving the ManCom or the Defendants any opportunity to review them first.

794. Although Mr Ribeiro in fact wrote the letters to the two investors in good faith, to try to ensure that the LLP could not later be criticised by them, the Defendants interpreted the letters and the fact that Mr Ribeiro sent them out without showing them to the Defendants first as part of the scheme they believed Mr Ribeiro had embarked upon to damage the LLP.

795. Early on 26 March 2009, Mr Ribeiro e-mailed Mr Culligan, Mr Barthelemy and Mr Sparks, enclosing the letters to the investors, and explained that "given the urgent

need in my mind to inform our clients" and the absence of a response from Mr Culligan during the course of the working day on 25 March, he had written and sent the letters. He said that when the two investors had been notified, he "would strongly advise the Investment Committee of the LLP not to undertake any further investments on behalf of the F&C Balanced Alpha Fund [the Balanced Fund] in anything other than the most liquid securities" until the investors had had a reasonable period of time to digest the information, or the Board of the Fund decided, on behalf of investors, that further investment was appropriate. He also said he would inform the Board of the Balanced Fund about the letters "in the interests of transparency". In my view, Mr Ribeiro's advice to the Investment Committee was legitimate and sensible, since there was a distinct possibility that the two investors might wish to redeem their investments, in which case the Balanced Fund should not be taking action (pending clarification of their position) which might hinder them in doing that. In the atmosphere of mistrust at this time, however, the Defendants again assumed that this was a hostile action by Mr Ribeiro, amounting in effect to a direction to Mr Sparks (who sat on the LLP's Investment Committee and had a veto in relation to its decisions) to prevent the Defendants making other investment decisions for the Balanced Fund.

796. Mr Culligan responded to say that he noted that Mr Ribeiro understood the likely impact of the letters on the clients (i.e. that they would redeem, hence the need for liquidity for them to be paid) and, as a member of the LLP Board, asked for full details of the advice Mr Ribeiro had taken. This was a reasonable request.

797. Also on 26 March, Mr Tilson submitted the draft Turnbull report for consideration by F&C's ARC department. He had not substituted the text on risk to the business from the legal claim by F&C proposed by Mr Culligan (para. [782] above), so the report was in a form the Defendants did not agree. It included the statement:

> "In respect of 2009 the business is at risk of making a loss unless costs are reduced. The LLP board continues to review the cost base of the business."

798. Mr Tilson justified his sending the draft in this form to F&C's ARC Department by saying that three of the five members of the ManCom agreed the contents, meaning Mr Ribeiro, Mr Tilson and Mr Sparks (Mr Tilson had presumably run his draft past Mr Sparks). He did not explain to the Defendants that he proposed to pass the report to the ARC Department in this way, or seek their consent for adopting that course. This was not a proper approach. Since there were differences between members of the ManCom as to what the report should say (as Mr Tilson was aware), he should have sought the Defendants' consent to his proceeding in this way or should have asked for a meeting of the ManCom to be convened for the ManCom to debate the matter together and take a collective decision (if necessary, by taking a vote). This was a further incident of Mr Tilson taking improper unilateral action to undermine the Defendants' position in the LLP which deepened the Defendants' suspicion of him.

799. Mr Ribeiro had meetings on 26 March with Mr Pennington, Mr Sparks and Mr Tilson to apologise for the delay in announcing their bonuses. He reported on these in a private e-mail to Mr Cole not copied to the Defendants. Mr Sparks pressed him on

the possibilities for the CTA project and Mr Ribeiro emphasised the problem with finding seed funding. (Meanwhile, Mr Ribeiro told Mr Mendez de Vigo and Ms Hall not to engage with Mr Sparks to tell him of the negative outcome of their review of the CTA project, since he wished to handle the announcement to Mr Sparks lest it become a further matter of contention with the Defendants).

800. Mr Culligan also had meetings with all the LLP staff. Contrary to the impression gained by Mr Ribeiro in his meetings, Mr Culligan felt the staff were very pleased with the bonuses paid, which he thought confirmed the correctness of his view that they were pitched too high to the detriment of the LLP (as he informed Mr Ribeiro and Mr Cole by e-mail on 26 March).

801. Meanwhile, having obtained KPMG's advice on the accounting treatment for the Credit Alpha Fund launch costs, on 26 March Mr Culligan e-mailed Mr McDonald, who was drawing up the LLP's accounts for 2008, to say that the amount of the overall liability of the LLP to the Balanced Fund for those costs should be based on the LLP Board's view "as it was on 31 December 2008" (the balance sheet date) with any material adverse change in the view after that date being the subject of a note to the accountants. Mr McDonald replied to say that this approach was agreed in principle, but that in reality, given the small amount involved, he would be surprised if the directors "opted for disclosure" (i.e. thought it necessary to put in a note to the accounts).

802. On 27 March 2009, Mr Culligan e-mailed Mr Ribeiro about this to say that in December 2008 all the LLP Board members thought that the Credit Alpha Fund "was a growing and viable product and had every expectation that a healthy flow of new investors would subscribe to the product" and that the payment due to the Balanced Fund from the LLP in respect of the launch costs would be minimal. He proposed, therefore, that one fifth of the launch costs should be treated as a provision in the LLP's 2008 accounts with nothing for the remaining years.

803. Mr Ribeiro responded on 3 April to say that he was happy for the draft accounts to be prepared on this basis to enable the LLP Board to consider them as soon as possible (but without committing himself to accept that accounting treatment). Mr McDonald did this, and on 6 April sent out a set of draft 2008 accounts for the LLP together with a note for consideration by the LLP Board on the subject of the Credit Alpha Fund launch costs. He rehearsed the advice from KPMG that the key question for the Board:

> "…is to determine the appropriate liability at 31 December 2008, having regard to the new fund raising which is expected to take place and thereby reduce or eliminate the quantum of any launch costs ultimately borne by F&C Partners…"

804. Meanwhile, on 27 March 2009, Mr Ribeiro e-mailed Mr Sparks (copied to Ms Ross, the Defendants and Mr Pennington) to say that F&C would not take forward the CTA project on the grounds of an absence of seed funding and also given the continued need for the LLP to retain Mr Sparks' services as investment manager in its FoHF

business. In my judgment, these were genuine and reasonable grounds for F&C to take this decision (see also paras. [340]-[351] above).

805. On 31 March 2009, a further ManCom meeting took place attended by Mr Ribeiro, the Defendants, Mr Tilson and Mr Sparks. Mr Ribeiro pressed the Defendants for detailed information on actual and potential activities of the LLP with associated revenues and costs. The Defendants objected that they could not produce that sort of information without being able to meet the client base or having input from F&C Distribution in order to assess the potential market for their proposed new products. They therefore asked Mr Ribeiro to arrange meetings for them with F&C's clients and with Mr Mendez de Vigo. Mr Ribeiro said he would check within F&C whether it would be feasible to arrange such meetings. Mr Barthelemy pressed for a promise that such meetings would be arranged, but Mr Ribeiro said he could not promise as it was not fully in his control. This tension between Mr Ribeiro and F&C on the one hand (who were now pressing for detailed financial projections, including estimates of revenues in relation to the LLP's proposed products) and the Defendants on the other (who maintained that they needed assistance from F&C Distribution to produce such projections) represented a new area of dispute between the parties.

806. F&C's case at trial was that the Defendants had produced a detailed business plan with financial forecasts when they first approached F&C in 2004 with their proposal to set up the LLP and should have been able to do the same for the LLP's business at this stage, including setting out a persuasive case for any new products they wished the LLP to launch. F&C maintained that the impasse which arose in relation to this - where the Defendants did not provide the further detailed information which the F&C representatives on the LLP Board required to make decisions about potential new business projects for the LLP - was therefore the fault of the Defendants in failing to produce any detailed business plan for the LLP Board to consider.

807. The Defendants' response was that since the LLP was part of the F&C Group and the marketing of its products (including any new products) was the responsibility of F&C Distribution (with the Defendants having only very limited contact themselves with F&C's clients), the input of F&C Distribution was essential to provide an assessment of potential client appetite for such products and hence an assessment of possible revenue to be derived from such products. They said that in fact they had had the benefit of input from F&C Distribution when they worked on their original business case for the LLP in order to turn it (with help from Mr Ribeiro and his assistants within F&C) into a full business plan for Mr Ribeiro to put to the Execom and Board of F&C plc. They said that it was usual for entities within the F&C Group to be able to draw on the resources of F&C Distribution to assist in providing an assessment of client interest and revenue forecasts when compiling business plans for new products for consideration. They maintained that this was an obvious approach, since it was F&C Distribution which had the most extensive contacts with clients and was best placed to assess how easily and in what volume some new product might be capable of being sold to them. These points had considerable force. They were further supported by the form of detailed business plan with which Mr Mendez de Vigo eventually provided them as a model to follow, in which the assessments of potential client interest used as the basis for revenue forecasts had been supplied by F&C Distribution personnel.

808. The Defendants complained that not only did Mr Mendez de Vigo refuse to meet them to discuss client interest and production of revenue forecasts in conjunction with F&C Distribution, as the foundation for a business plan, (since he refused to meet them *before* the Defendants provided him with a fully worked out business plan including such forecasts – a position the Defendants characterised, with considerable justice, as a "Catch-22" situation), but Mr Ribeiro also forbade them to have direct contact with clients (see e.g. paras. [443]-[444] below). This disabled them from researching client interest amongst F&C's client base for themselves in order to produce the sort of fully worked out business plan with revenue forecasts which Mr Mendez de Vigo was demanding from them. Mr Ribeiro's stance regarding contact with clients was assumed by him for legitimate reasons (in view of the importance for F&C of conducting its overall relationships with clients in a coherent way), but created difficulties for the Defendants. The Defendants therefore blamed F&C for the impasse in relation to production of a business plan for products (both its existing products and any new products) which could be taken further by the LLP.

809. The sense of frustration felt by the Defendants in relation to this is understandable. If they were not to be given access to the F&C client base themselves, then the production of a detailed business plan by the Defendants for new and existing products would depend upon them having assistance from F&C Distribution, which was not forthcoming.

810. However, there was no specific obligation upon F&C, under the Agreement or otherwise, to provide the Defendants or the LLP with access to F&C's client base or for F&C Distribution to furnish them with information or assistance for the purpose of drawing up business plans for LLP products. The question of providing access to clients and the provision of such assistance fell within the obligation of the Corporate Member in clause 13.7 of the Agreement to provide "general marketing support" for "the activities of the LLP" (including within that phrase the activity of seeking to explore and develop new products). But that obligation was qualified by the right of F&C to use its discretion as to what support should be provided.

811. So far as Mr Ribeiro's direction that the Defendants should not themselves approach F&C clients is concerned, I consider that amounted to a legitimate exercise by F&C of its discretion under clause 13.7 in relation to the conduct of marketing activities. At this stage F&C was struggling to contain client dissatisfaction with its performance across a wide range of products. It was entitled to assess that – particularly in those circumstances – its relations with and marketing to its clients should be conducted through single, unified points of contact at F&C Distribution, who could best assess and respond appropriately to the clients' overall needs and concerns. F&C was entitled to assess that this would be preferable to allowing a chaotic free-for-all involving individual F&C product managers approaching clients to try to canvass their views about or to persuade them to buy their particular products.

812. I also think that the refusal of F&C Distribution to dedicate resources to help the LLP at this stage was a legitimate exercise of discretion by F&C under clause 13.7. F&C Distribution's resources for marketing were not unlimited. F&C Distribution was subject to many demands for marketing support from across the group, and it had to decide how to prioritise those demands in light of the resources available to it. Moreover, the extent to which F&C Distribution could trespass upon the goodwill and patience of clients to canvass possible new products and to make updated assessments

of the prospects for existing products was limited and required careful judgment. In the legitimate exercise of its discretion under clause 13.7, F&C was entitled to expect to be persuaded by the Defendants for the LLP at a preliminary level that it was worthwhile for F&C Distribution devote its resources and to use its stock of goodwill with clients to research and assist in developing proposals for new business ideas which might be pursued by the LLP and to work up detailed proposals for the development of its business in relation to its existing products.

813. In my judgment, whereas it would have been a breach of the obligation in clause 13.7 for F&C maliciously to withhold support in order to damage the LLP, that was not what occurred. Even though there was a degree of unfriendliness and a lack of helpfulness in Mr Mendez de Vigo's attitude in relation to this issue (reflecting the way in which the Defendants' previous dealings with him had eroded his sense of goodwill towards them), F&C Distribution was entitled to withhold the assistance sought by the Defendants for two particular reasons. First, aside from the CTA proposal (which was considered in detail by Mr Mendez de Vigo and Ms Hall and rejected by them on its business merits and for which, in any event, the Defendants did not propose that it should be funded by the LLP: see paras. [340]-[351] above) and the QFII proposal (which was carried forward by Mr Mendez de Vigo until the point at which the Defendants could not provide a reasonable level of assurance about the likelihood of investor support from among their contacts: see paras. [356]-[361] above), the Defendants did not make any business proposals which were sufficiently concrete or specific, even at a level well short of a full business plan, to provide any good basis to persuade F&C Distribution that they merited effort by F&C Distribution to assist in developing them further.

814. Secondly, the existence of the dispute, which was now reflected in the litigation on foot between F&C and the Defendants, meant that it was not realistic to expect that any new product to be managed by the LLP could be introduced into the market with any credibility or expectation of success. As the Defendants themselves emphasised from time to time, the main attraction of LLP-managed products was their skill and expertise. So, for example, if the LLP had offered a fiduciary management service or due diligence service to third parties, the basis on which it would have been sold would have had to be the skill and expertise of the Defendants in selecting hedge fund investments. But according to their First Put Option Notices served on 25 February, they were leaving the business; and there was no obvious prospect of finding suitably experienced and credible replacements for them. Also, the fact that there was a serious dispute between them and F&C would be expected to operate as a major distraction for them in the effective management of the LLP's investment products, even if they somehow remained in position within the management of the LLP. Therefore, from about early March 2009, when it became clear there would be no prompt resolution of the dispute and that litigation was on foot, there were very strong reasons why F&C Distribution was entitled to conclude that its resources and client goodwill should not be expended as the Defendants would wish.

815. Mr Mendez de Vigo can, I think, be criticised for appearing at times to demand too much from the Defendants in terms of their providing a fully detailed business plan before he would agree to meet with them (see paras. [887]-[888] and [910] below), but the criticism leads nowhere in the overall context of the dispute. It was open to the Defendants to seek to put pressure on him to meet them to discuss the LLP's products,

by providing the fullest and most detailed business case that they could compile by themselves in the circumstances and then contending that it would be unreasonable for him to demand more and continue to refuse to meet them. This would have been a sensible way for them to proceed, but they did not seek to do this. Moreover, there was in my view nothing that the Defendants could have said at this stage which could or would have persuaded F&C Distribution that they had any good answer to the difficulty referred to at para. [814] above. Because of that difficulty, Mr Mendex de Vigo would still have been unpersuaded that there was any merit in him meeting them or in devoting the resources of F&C Distribution to working up a detailed business plan for the LLP at that stage.

816. Returning to the ManCom meeting on 31 March, there was further discussion of the position in relation to the Pushkin Fund, with Mr Culligan and Mr Barthelemy explaining once more that they had fully briefed the investors on the options available to them. Regarding Friends Provident, Mr Culligan said there was nothing to discuss since Mr Ribeiro had now sent his letter of 25 March to them. The Defendants referred to Mr Ribeiro's offer of a rebate of F&C's marketing fee at the previous ManCom meeting and turned it down.

817. The ManCom discussed the draft Q1 2009 Turnbull Report Mr Tilson had submitted to the F&C ARC Department (para. [797] above). The Defendants protested that he had left out of the report the biggest risk to the business, being the legal claim between Members of the LLP. There was considerable merit in this observation: see para. [814] above. The return for the Q1 2009 Turnbull Report submitted by Mr Tilson also included the following statement regarding the outlook for 2009, which the Defendants objected to:

> "Q1 2009: Sentiment remains negative. Risk of business being loss making in 2009."

818. In relation to the risks identified previously concerning "IT (Email system)", the comment had been expanded from the Q4 2008 report (para. [639] above) with the following sentence:

> "As part of this review, F&C Partners have been using external e-mail services during Q1 2009."

819. On 2 April 2009, Mr Ribeiro responded angrily to Mr Culligan's e-mail of 26 March regarding disclosure to the two remaining investors in the Balanced Fund (para. [796] above). He accused Mr Culligan of being determined to frustrate the day-to-day activities of the business (a reference, I think, to the fact that Mr Culligan let a day go by before responding to Mr Ribeiro's request of 24 March for an urgent response) to the detriment of the LLP and its clients. Mr Ribeiro was critical of Mr Culligan's response to his request:

> "Your response is to send the e-mail … making demands which are plainly driven by a desire to seek to improve your personal

> legal position rather than address the business needs of the LLP and its clients. I will not engage in these games with you. Rather I will continue to focus my efforts on putting the interests of the LLP and its clients first and not allow the litigation between yourselves and F&C Alternative Investments (Holdings) Limited to undermine that. I would urge you to do likewise. If you continue to fail to do so the position of the LLP will be irreparably damaged and untenable."

820. Mr Culligan replied on 3 April to dispute Mr Ribeiro's allegations; to suggest that Mr Ribeiro's withholding the details of the legal advice to the LLP regarding notification to the two remaining investors represented a breach of Mr Ribeiro's duty of good faith to the LLP; to say that the Defendants had not opposed informing Friends Provident and BCP Fortis Millennium of anything; and to complain that although his own response to Mr Ribeiro about this had been prompt, nonetheless Mr Ribeiro had acted without consulting the Defendants.

821. It was on about 3 April 2009 that Mr Culligan commenced his covert review of Mr Tilson's and Mr Sparks' e-mails. In my judgment, by this stage there were sufficient grounds for Mr Culligan to have a legitimate concern that Mr Ribeiro was seeking secretly to co-ordinate actions with Mr Tilson and that Mr Tilson was acting with him to take steps damaging to the LLP; that Mr Ribeiro might in this way be subverting the proper structures of authority in the LLP; and that Mr Ribeiro might also be doing so by communications with other senior members of staff, including in particular Mr Sparks.

822. I have already concluded (paras. [126]-[128] above) that the relevant policy document, read as appropriate in the specific context of the LLP, authorised Mr Culligan to undertake such covert monitoring of staff e-mails if there were a sufficiently serious business reason to warrant such an investigation. In my view, the steps taken by Mr Tilson to by-pass the ordinary processes of government within the LLP (see paras. [741], [761]-[764], [773], [776] and [797]-[798] above), the appearance of a degree of co-ordination with Mr Ribeiro, other steps taken by Mr Ribeiro by-passing the ordinary governance structures of the LLP (in particular, in unilaterally sending out his letters of 25 March to the two remaining investors in the Balanced Fund: paras. [790]-[791] above), all read against the background of sharply conflicting interests of the Defendants and F&C in the context of the dispute, combined together to produce an adequate justification of the step taken by Mr Culligan. Since he had legitimate objective grounds to be concerned that Mr Ribeiro might be seeking to by-pass proper governance of the LLP by contact with Mr Tilson, he also, in my view, had legitimate objective grounds for concern that he might also be seeking to do so by contact with Mr Sparks. I therefore find that Mr Culligan's covert investigation of e-mails of staff of the LLP was authorised by the LLP under its relevant policy and was justified on the facts which presented themselves to Mr Culligan at the time.

823. In conducting electronic searches for e-mails between relevant parties or using search terms for particular topics, the searches threw up a large number of e-mails, some of which were plainly purely personal in nature (such as certain e-mails between Mr

Tilson and his wife). I accept Mr Culligan's evidence that as soon as he discerned that an e-mail was personal or did not concern possible improper activity, he did not open it or scrutinise it further. Therefore, in my view, his search was confined within reasonable bounds proportionate to the legitimate objects of his investigation (improper subversion of the governance structures of the LLP). Accordingly, in my opinion, Mr Culligan's covert access to e-mails stored in the LLP e-mail archive was lawfully within his authority as Managing Partner of the LLP.

824. This is also the answer to F&C's allegation against him that he committed a criminal offence contrary to section 1(1) of the Computer Misuse Act 1990 (set out at para. [79] above). The access to the e-mails which Mr Culligan intended to secure was authorised, hence the ingredient of the offence set out in section 1(1)(b) was not fulfilled. Further and in any event, Mr Culligan believed that his access to the e-mails was authorised, hence the ingredient of the offence set out in section 1(1)(c) was not fulfilled. The same points apply in relation to Mr Barthelemy.

825. The same analysis applies in relation to F&C's complaint about Mr Culligan's actions under section 55 of the Data Protection Act 1998 (set out at para. [80] above). Applying the statutory definition in section 1(1) of the Act, the "data controller" for the relevant e-mail archive was the LLP. Mr Culligan was authorised by the LLP, the data controller, to conduct his investigation (so the element of the offence defined in section 55(1)(a) was not satisfied in relation to his gaining access to the e-mails). Certainly he believed that was the case (so he had a defence under section 55(2)(b) in relation to his gaining access to the e-mails). As regards his disclosure of the e-mails to JGR in the course of the conduct of the dispute, he had a reasonable belief that he had the right to disclose them to obtain advice on his position and to defend himself and the LLP in the dispute and the litigation (and hence had a defence under section 55(2)(b)). The same points apply in relation to Mr Barthelemy.

826. In the course of his investigation, Mr Culligan came across part of the private correspondence between Mr Tilson and Mr Ribeiro which tended to reinforce his concerns (in particular, Mr Tilson's e-mail of 19 January 2009: para. [631] above). He did not find any similar pattern of behaviour involving Mr Ribeiro and Mr Sparks. He did not, of course, see certain other significant exchanges between Mr Ribeiro and Mr Tilson which took place via Mr Tilson's personal "gmail.com" e-mail account, rather than via his work e-mail account (e.g. Mr Tilson's e-mails of 23 January 2009, paras. [678] and [680] above); nor did he see the October 2006 confidential note (para. [378] above). These further e-mails emerged on disclosure during the proceedings. Mr Culligan continued his covert investigation of, in particular, Mr Tilson's e-mails until about early July 2009.

827. Meanwhile, on 7 April 2009, there was e-mail correspondence regarding the production of more detailed business proposals by the Defendants. The Defendants objected that they were not able to produce the revenue part of the business plan for the ManCom and LLP Board unless they could meet with Mr Mendez de Vigo or the F&C sales teams (see paras. [805]-[815] above). Mr Ribeiro e-mailed the Defendants and other members of ManCom to say that, further to the ManCom meeting of 30 March, he had spoken to Mr Mendez de Vigo about a possible meeting with the Defendants:

> "As discussed at our ManCom meeting, I called Cristobal [Mr Mendez de Vigo] today, despite both of us being on holiday. His view is that he would welcome such a meeting when you come up with something more substantial, in the form of a draft business plan even if it requires additional change or fine tuning due to the input from the business. Cristobal mentioned this has been his approach when other areas of F&C come up with meeting requests or business ideas."

Mr Ribeiro got Mr Mendez de Vigo to confirm that this was the position.

828. On 12 April 2009, there was a brief press report in *The Mail on Sunday* about the litigation between F&C and the Defendants. Before this, it was already inevitable that the existence of the dispute and the litigation would probably deter potential clients from investing with the LLP, since it was very probable any such investor would specifically ask about litigation affecting the LLP and would have to be told; and in any event, fairness and transparency in taking in investment monies would require disclosure of such an important matter. The fact that information about the dispute had got into the mainstream press simply reinforced this effect.

829. On 15 April 2009, there was a further ManCom meeting attended by Mr Ribeiro, the Defendants and Mr Tilson. Mr Culligan said, in line with the previous e-mail correspondence, that there was nothing further to report on the Defendants providing a business model review because they could not produce anything until such time as the F&C new business and asset allocation teams in F&C Distribution and F&C Strategy submitted to the Defendants their numbers in respect of allocating assets to FoHF. Mr Culligan said that he wanted to get a better understanding of the F&C asset allocation process, but Mr Ribeiro objected that he should already know that - the process had not changed. Mr Ribeiro said that fund performance was of key importance. Nonetheless, Mr Ribeiro offered to facilitate a meeting between the Defendants and Mr Niven to discuss the allocation process.

830. Mr Culligan said that the CTA project should be considered, but Mr Ribeiro pointed out that this was a matter for the LLP Board (i.e. under clause 4.1 of the Agreement), not the ManCom. Mr Culligan also referred to a potential new type of product aimed at replicating FoHF returns using investment in futures which was attracting attention in the market, which the LLP might seek to develop (see para. [355] above). Mr Ribeiro urged the Defendants to produce a plan for such a product and then engage with the allocation and distribution teams. Mr Ribeiro did not specify what level of detail such a plan should contain but, in context, I think it was tolerably clear that he was pressing the Defendants to do the best they could with the information and ideas they had and then seek to use that as a platform for debate with Mr Mendez de Vigo, Mr Niven and their teams (i.e. he was proposing that they should follow the course referred to in para [815] above, but the Defendants did not proceed in that way).

831. The Defendants now sought to press F&C Distribution themselves to try to get some sort of helpful response. On 18 April 2009, by way of a follow-up to an e-mail Mr Lyne had sent Ms Ross and Mr Barthelemy after their meeting on 10 September 2008 (i.e. some seven months previously, para. [456] above), Mr Barthelemy e-mailed Mr Lyne to suggest that there had been a significant change in the FoHF industry and to propose that the topic of investment in the LLP's products might be made the subject

of a fresh round of visits to independent consultants. Mr Lyne regarded this as utterly unrealistic in light of the press coverage of the dispute – investment consultants would be alive to the LLP's internal problems and would not recommend their clients to invest (see para. [814] above).

832. Mr Barthelemy's re-engagement with Mr Lyne led to another peripheral area of factual dispute at trial. Mr Lyne asked for a document containing the LLP's product details; Mr Barthelemy maintained that such a document had, in fact, been provided at their previous meeting in September 2008 (para. [456] above). Mr Lyne denied this. Having regard to the oral evidence and the contemporaneous documentation, I think Mr Lyne is more likely to be right about this. Despite the Defendants' criticism of him, I do not consider Mr Lyne acted in breach of any obligation to the LLP in omitting to take more vigorous action to press its products with investment consultants from September 2008 or again from mid-April 2009.

833. On 19 April 2009, when Mr Ribeiro eventually responded to Mr Culligan's e-mail of 3 April (para. [820] above), he said that he would not respond to unfounded allegations of bad faith, but nonetheless gave an account of the advice he had received in relation to writing to the last two remaining investors in the Balanced Fund. He said that the advice had been oral advice from Mr Apfel, obtained prior to the ManCom meeting on 18 March, to the effect that the LLP had fiduciary and regulatory duties to inform the two investors about their position in the Balanced Fund. He continued:

> "I do not see any point in providing a "detailed account" of the advice given; the conclusion was as stated and acted upon in the best interests of the LLP. That is the end of the matter. … "

This was not, in my view, a satisfactory account of the advice which had been given for the benefit of the LLP. The Defendants, as members of the LLP ManCom and Board, were entitled to be given a more detailed explanation of what the advice was, in terms of the source and precise content of the obligations referred to. It may be noted, for example, that on this account the advice did not relate to any question regarding any need for Friends Provident to produce consolidated group accounts, although Mr Ribeiro had at other times suggested that that was a relevant matter.

834. Meanwhile, Mr Culligan and Mr Ribeiro carried on a bickering e-mail correspondence relating to the instructions to be given to new accountants for advice on the Credit Alpha Fund launch costs issue. They did not reach agreement on the precise formulation of questions to be put to them.

835. An agenda for the forthcoming LLP Board meeting on 21 April was circulated with the relevant papers for the Board. The agenda included, as item 11, "IT infrastructure at F&C Partners", which Mr Ribeiro had particularly asked to be included. The attached papers included the Turnbull Report for Q1 2009: see paras. [817] and [818] above. It informed all LLP Board members that the LLP was using an external e-mail service. It also highlighted the risks attached to the low AUM for the LLP.

836. All the LLP Board members attended the Board meeting on 21 April 2009, along with Mr Tonkin and Mr Tilson. Mr Mackay attended for the early part of the meeting. Mr Sparks attended for part of the meeting to present the risk report. At the outset, Mr Culligan and Mr Ribeiro both stated that attendance at the meeting was without

prejudice to arguments relating to the validity or otherwise of the Defendants' First Put Option Notices.

837. Mr Tilson referred to his e-mail to F&C's ARC Department regarding the difference of views regarding the risk to the business (paras. [797]-[798] above). He also referred to the low level of AUM. Mr Culligan said that he considered investor sentiment in relation to hedge funds was turning and that there was some evidence of flows back into the industry. Mr Tilson informed the Board that the LLP's 2008 accounts were due to be filed with the FSA by 27 April 2009 and that in the absence of an approved budget for 2009, the best estimate of costs for that year was the level of costs for 2008 (about £900,000). Mr Tilson tabled the latest draft of the LLP's 2008 accounts, indicating that their approval by KPMG was conditional, in particular, on disclosure of the Defendants' service of their Put Option Notices and confirmation from the Board that the LLP was a going concern. Mr Tilson was asked to discuss the first of these further with KPMG. The Board members then discussed the question whether the LLP was a going concern. Mr Culligan said that, in his view, the LLP was a going concern and Mr Cole agreed with him (despite suggestions by Mr Ribeiro that the matter needed to be considered further – another indication, it may be observed, that Mr Cole did indeed approach his role as Board member with an independent attitude). After some discussion, the Board concluded that the LLP was a going concern.

838. The Board then discussed the issues arising in relation to the draft accounts for 2008, being the treatment of the Credit Alpha Fund launch costs and the question of disclosure in notes to the accounts of the AUM position after the year end and of the dispute between the members. On the accounting treatment of the Credit Alpha Fund launch costs, Mr Ribeiro, Mr Johns and Mr Cole asked for further accounting advice on the grounds that Mr Culligan had questioned the independence of KPMG and the other accountancy advice he had obtained had been informal. Unfortunately, by an oversight, Mr Tilson had not sent Mr McDonald's note of 6 April 2009 (para. [803] above) to Mr Johns and Mr Cole. The Defendants pressed for a vote on a resolution that the costs should continue to be amortised over five years in the LLP's accounts. In light of the disagreements on the questions to be put to the accountancy advisers, Mr Ribeiro said the Board would have to vote on the questions. In the event, it was left that Mr Johns would try to find a satisfactory formulation of questions for further accounting advice. (After the meeting he suggested an approach to Ernst & Young, but Mr McDonald ruled that out as impermissible "opinion shopping"). Mr Culligan again proposed that a vote be taken on the Defendants' resolution for amortisation of the costs, but Mr Johns proposed an adjournment and Mr Cole and Mr Ribeiro agreed with him. The meeting was adjourned and Mr Tonkin was asked to arrange a follow-up meeting.

839. On 22 April 2009, the Defendants filed their Defence and Counterclaim in the Part 7 proceedings, which included detailed contentions that F&C, in particular by Mr Ribeiro, had taken actions in breach of the Agreement designed to close down the LLP which amounted to gross misconduct or gross negligence.

840. Also on 22 April, Mr Moir e-mailed Mr Ribeiro with a late outstanding query in relation to Project Fitness, as follows:

> "Retain / close F&C Partners capability…

> Possibility that partnership may be dissolved. Awaiting board meeting and remuneration [compensation] committee decisions.
>
> Ongoing monitoring"

Mr Moir sent this as part of an exercise to follow up and conclude on any outstanding queries he had from his notes for Project Fitness, to bring the project finally to an end. The query did not reflect any significant further information provided to Mr Moir.

841. On 23 April 2009, Mr Moir circulated to Execom an updated Project Fitness report. In a section entitled "Risks", there was a note: "Significant delay to dissolution of F&C Partners", with "2009 impact" identified as -£150,000 (i.e. a sum to reverse the headcount savings of £148,400 which had been identified in relation to the LLP the previous December: para. [512] above). Again, the reference to "dissolution" of the LLP simply reflected the label that had been given to this item by Mr Moir at the outset of phase 2 of the Project Fitness exercise in November 2008, which had been retained for continuity and ease of reference across the various iterations of the report (see para. [512] above) - it did not indicate that he had been told that any decision had been taken to dissolve the LLP. This latest Project Fitness report provides further support for this finding, since it shows a reversal, by reason of "delay", of about the same figure for a reduction in staff costs as had been taken as a saving in the earlier figures for Project Fitness – i.e. Mr Moir and Ms Bomba were never told that there would be greater savings, as would have been expected if the decision had been that the LLP should simply be closed.

842. At the same time, Mr Moir circulated to Execom members an "Initiatives Progress Report". This contained an entry, "F&C Partners cost savings … negotiations in progress". This may be contrasted with another entry: "retain / close Tourmaline capability". For the LLP, unlike for Tourmaline, closure was not under active consideration and all F&C was looking for was "cost savings".

843. At this point it is convenient to comment on a further submission by the Defendants, namely that the fact that as 2009 went on Mr Ribeiro did not persist in his demands that LLP staff be made redundant showed that he had never really thought there was a genuine basis for making them redundant. This (the Defendants said) was a further indication that there had indeed been a scheme by Mr Ribeiro and F&C to try to impose changes on the LLP simply in order to damage its business and close it down. In that regard, the Defendants also emphasised that when F&C expelled them from management of the LLP's business in late 2009 and took control itself, it did not make any of the staff redundant.

844. I reject this part of the Defendants' submissions. Mr Ribeiro's proposals from late 2008 that members of LLP staff should be made redundant were put forward on a genuine and legitimate basis. He persisted in pressing for redundancies during the disputes with the Defendants about the LLP's budget for 2009 until about the middle of that year, but as time went by without any agreement on that issue the argument became less acute, since the LLP was in fact having to bear the costs of their employment as the year went on and the extent of the costs savings possible in that year diminished. The dispute had got worse and a good deal more complex than it had been at the start of 2009, and for Mr Ribeiro and F&C to press the Defendants harder

on the issue of staff redundancies would have been inflammatory and made the arguments between them even harder to resolve. Furthermore, as the dispute deepened in the course of the year, the chances (as perceived by F&C) that the Defendants would end up leaving the business increased, and conversely the importance of retaining the other staff in the business grew, if the business was to be kept going (as F&C intended it should be). By the time F&C took control of the management of the LLP in late 2009 circumstances had changed radically from late 2008, and it had good reason to have changed its mind about whether LLP staff should be dismissed.

845. In late April 2009, F&C received an invitation to tender for a FoHF investment from a company called bfinance Limited ("bfinance") in a window between 24 April and 20 May 2009. Mr Hunt in F&C Distribution forwarded this to Ms Ross to ask whether the performance of the Balanced Fund had improved sufficiently to merit making a bid for this business. She, of course, had left F&C by this stage, but it seems that no automatic reply had been set up by the LLP on her "fandcpartners.com" e-mail address to give out that information. It was not until much later that the information reached Mr Barthelemy. This was no doubt irritating for the Defendants, but was the result of an unfortunate mix-up rather than any breach of duty (let alone any deliberate scheme to damage the LLP).

846. On 28 April 2009, the Defendants e-mailed Mr Mendez de Vigo to say that it was "critical" to arrange a meeting "to progress any plan to market and develop our products" and complaining that they had been without marketing support for some time. Mr Mendez de Vigo replied on 30 April to say:

> "…I am happy to discuss your product ideas provided they are supported by a written in depth business plan where you detail:
>
> - product idea and competitive advantage of F&C Partners
> - market opportunity
> - seeding targets and list of institutions to be approached
>
> It is at this point where a discussion makes sense, as it will be based on tangibles. We can then follow due process in relation to the product's development as with all other products to be distributed by F&C and decide upon appropriate marketing support to be provided."

847. Also on 28 April, Mr Barthelemy chased Mr Lyne for a response to his e-mail of 18 April (para. [831] above). Mr Lyne replied the same day to say that the market had gone quiet on demand for FoHFs for a while, but referring to the first RFP in that area received for some time (namely, the one received from bfinance) and stating that he would forward it for information. He added that he no longer seemed to be getting information on the Balanced Fund's performance and asked for the latest product and performance information. Mr Lyne did not take up Mr Barthelemy's proposal for a round of visits to investors – in terms of the Agreement, he was not obliged to, since that was a matter for F&C's discretion under clause 13.7.

848. On 28 April 2009 there was also a ManCom meeting attended by all the ManCom members apart from Mr Barthelemy. The meeting addressed the CTA proposal. Mr Culligan said he was unable to progress this as it was dependent on a decision by the LLP Board to approve the initiative. Mr Ribeiro said it had not been included in the agendas for the LLP Board and invited him to arrange for that, which Mr Culligan agreed to do.

849. In early May 2009, F&C Netherlands requested explanatory information from Mr Barthelemy about the LLP's products to relay to an important client, WRI, at a forthcoming meeting. Mr Barthelemy offered to attend a meeting with the client, but he failed to provide the specific information required, despite chasing e-mails. Eventually, in some desperation, F&C Netherlands spoke to Mr Tilson by telephone on 13 May. He promptly sent a response by e-mail, copying it to Mr Ribeiro amongst others. Mr Ribeiro e-mailed Mr Barthelemy to protest at his failure to answer the questions and to point out that this did not build confidence with F&C Netherlands. Mr Barthelemy again e-mailed F&C Netherlands to offer to attend a meeting with WRI, but F&C Netherlands replied that it would not be necessary. There was nothing untoward in this. There was no obligation on F&C to arrange for such a meeting - under the discretion allowed F&C under clause 13.7 of the Agreement, it was entitled to proceed without Mr Barthelemy in attendance.

850. On 14 May 2009, Ashley Smith, as a follow-up from discussions in late 2008, e-mailed Mr Pennington to offer the LLP an F&C IT remote access solution. Mr Pennington sent a response drafted by Mr Culligan in these terms:

> "I can confirm that the proposed remote access solution was never delivered. We are interested in pursuing a corporate wide remote access solution with you provided it meets our needs. They are that it should be accessible in a secure manner from public computers such as non-corporate laptops/desktops and hotel business centres. In addition we require the ability to control the size of our own e-mail accounts and an assurance that outgoing mails will not be intentionally blocked.
>
> Please let us know if you can meet these requirements."

851. On 19 May 2009, Mr Barthelemy sent Mr Lyne an up-to-date performance sheet for the Balanced Fund and asked him to forward the RFP. He also asked Mr Lyne for meetings with significant consultants to introduce the LLP's products. Mr Lyne sent only a brief response to say he would arrange for the RFP to be forwarded to Mr Barthelemy, which it was at about 8.00 am the next day (the deadline for a bid to go in). This exchange left both Mr Barthelemy and F&C Distribution with too little time to complete the application.

852. On 20 May 2009, there was a further meeting of the LLP Board, also attended by Mr Tonkin and Mr Tilson. There was again argument between the Defendants and the F&C representatives across a range of topics. Discussion was resumed regarding the accounting treatment of the Credit Alpha Fund launch costs. This time Mr McDonald's note of 6 April was available to everyone and he telephoned in to the

meeting to explain the position and the technical accounting advice given by KPMG. In terms of the amount of the LLP's liability, he said it depended on the view of the Board (i.e. as to the prospects for the Credit Alpha Fund's business and its ability to attract in investors to help bear the launch costs) and stated that that view should be as at 31 December 2008, with the possibility of adding a note to the accounts to reflect any change after that date (although he also advised that the sums in question were so small that they were not material to the 2008 accounts and therefore might not even merit a post-balance sheet note). The size of the Credit Alpha Fund had been greatly reduced after the year-end as redemptions from the Select Fund (and therefore, in due course, from the Balanced Fund and the Credit Alpha Fund) took effect.

853. Mr Culligan continued to question the independence of KPMG's accounting advice. Mr Ribeiro objected to this criticism of KPMG, but added he would prefer to obtain further advice (i.e. to lay the matter to rest). Mr McDonald again advised that going to a third party auditor would be unethical and said that the Board simply had to reach its own view in light of the advice given. KPMG would be likely to find any decision it made acceptable. Mr Cole and Mr Johns objected to Mr Ribeiro's proposal that further advice be obtained as involving unnecessary delay (again indicating their willingness to exercise their own judgment independently of him).

854. Mr Ribeiro and the Defendants argued about the significance, in this context, of redemption notices in respect of the Select Fund which had been received before 31 December 2008. Mr Culligan argued that what he termed "the strong performance" of the Credit Alpha Fund (as part of the Balanced Fund) in 2008 and proper marketing efforts by F&C could still at that date have led to increased investment in the fund. Mr Johns said that investor appetite had not returned for hedge fund products and asked Mr Culligan for evidence to support his comments. Mr Barthelemy referred to the bfinance RFP just received (although this had arrived some time after 31 December 2008). Mr Culligan reiterated his complaints about F&C's marketing efforts.

855. In the end, the resolution previously proposed by the Defendants that the Credit Alpha Fund launch costs (beyond the 20% already reflected in the LLP's draft 2008 accounts) should be excluded from those accounts was put to the meeting. The Defendants voted for the resolution. Mr Ribeiro, Mr Johns and Mr Cole voted against it. Mr Ribeiro then proposed that the full remaining launch costs be included in the 2008 accounts. The Defendants voted against that resolution. Mr Ribeiro, Mr Johns and Mr Cole voted for it and it was carried. In my assessment, those votes reflected legitimate differences of view between the LLP Board members about the future prospects of the Credit Alpha Fund at the relevant date, particularly in light of the redemption notices in relation to the Select Fund which had been received and confirmed before 31 December 2008.

856. The meeting also discussed a short three-page document prepared by the Defendants entitled "F&C Partners Business Model Review 20/05/09" ("the Business Model Review"), which Mr Barthelemy tabled at the meeting. He had not circulated the document in advance. The Business Model Review set out the Defendants' proposals for new products to be developed by the LLP which were stated to be integral to the FoHF business model and necessary to maintain the LLP's competitive edge against its peers. In his main witness statement, Mr Barthelemy emphasised that the Defendants were determined to put forward genuine proposals for attractive new

business propositions for the LLP, in part as a way of testing F&C's attitude to the LLP. F&C suggested that, contrary to this evidence, the Defendants were simply trying to catch F&C out with insincere proposals designed to provoke reactions from F&C so as to bolster their claims in the litigation.

857. Although the Defendants can fairly be criticised for failing to circulate the Business Model Review to LLP Board members in advance of the meeting (which did tend to give the impression that the Defendants were trying to catch the F&C representatives out in some way), I do not accept this suggestion. In my view, the Defendants at this stage were genuinely trying to persuade the LLP Board members, and beyond them F&C, of the desirability of pursuing these proposals. However, the Business Model Review was thin and the arguments it set out were far from compelling. It is revealing that this was the best that the Defendants were able to do. It is not surprising that F&C's representatives on the LLP Board were unpersuaded by it.

858. The Business Model Review addressed five proposed new products:

i) A CTA fund along the lines offered by some of the LLP's competitors, which incorporated funds either run or seeded by themselves. The Review gave only a very summary explanation of this proposal. It did not contain any concrete explanation how such a fund was to be seeded, as would be necessary to get it off the ground. The paper set out no concrete proposal for the LLP to seed such a fund itself. The budget figures previously prepared by Mr Culligan for 2009, which allowed for no such investment, were not revised to show how the LLP could seed it – indeed, at the meeting Mr Culligan said that the proposed products initiatives would not have any impact on the LLP's costs or require any change to its budget. If the CTA fund were not seeded by the LLP, it would need to be seeded by F&C or its clients (but F&C was unpersuaded of the merits of the proposal and had no obligation to tax its clients with requests for funding) or by third parties (but the Defendants did not identify any whom they or F&C had approached, or might conceivably approach, with any realistic prospects of obtaining funding). The Review also did not explain how a LLP CTA fund might be effectively promoted to clients in circumstances where the LLP's management was at war with itself (see para. [814] above);

ii) A fiduciary product – to seek to use the LLP's skills in selecting hedge fund managers and undertaking due diligence more broadly across a wider range of manager types. A comparison with the practice of Goldman Sachs' FoHF group was offered. Again, this was a weak proposal. No-one within the LLP, including the Defendants, had sound marketable experience for selecting investment managers outside the hedge fund arena. The analogy with what Goldman Sachs – one of the biggest investment banks in the world – could do was far from convincing. Again, there was an absence of any suggestion about whom this proposal might appeal to (let alone any concrete detail of which investors might be targeted and how) and an absence of any recognition of the difficulties created by the dispute. The proposal was speculative in the extreme;

iii) A UCITS FoHF product. The Review stated that the demand for this sort of product came from:

> "… both traditional investors in hedge funds who want the liquidity of a UCITS product and who also like the extra layer of regulation, and also from a large group of potential investors who are restricted or naturally inclined only to invest in UCITS funds."

The attractiveness of such a product would, however, be dependent on the track record of the underlying FoHF portfolio, which the F&C representatives considered, on legitimate grounds, to be very poor (despite the protestations of the Defendants to the contrary). Again, there was no explanation how the problem of investor perception arising from the existence of the dispute could be overcome;

iv) A hedge fund replication product – based on analysis of aggregate performance of a group of hedge funds, to be matched with a basket of futures to replicate that performance. The Review claimed that the LLP had tested the product successfully over a period of nine months, but there was no supporting paper or documentation to explain what had been done. It was impossible to know from the brief summary in the Review whether there might be any commercial merit in this.

v) A QFII product – the Review referred to the previous QFII proposal in 2008 (paras. [356]-[361] above) which:

> "… did not present a viable marketing opportunity due to the significant market disruption."

The Review continued:

> "2009 is turning out to be a reasonably good year for China and we are also witnessing a flow of capital back into hedge funds. We intend to review the demand for the product."

This item did not yet represent a proposed venture, since the Defendants had not yet carried out any review of demand for the product from their hedge fund contacts. It too was highly speculative, especially against a background where the Defendants had failed to drum up sufficient support previously and where the Review did not set out any detailed evidence to support the assertion that capital was flowing back into hedge funds or with what strength. Again the paper failed to address the difficulties of marketing such a product in light of the business uncertainty created by the dispute.

The Business Model Review concluded with brief notes on the marketing strategy the Defendants would wish to see in place – essentially a plea for F&C to devote more resources, time and effort to marketing LLP products or proposed products.

859. At the meeting, Mr Barthelemy pressed the Defendants' case by saying that insurance and pension funds would reconsider hedge funds as an attractive asset class and again referred to the bfinance RFP as a sign of an upturn in the market. He outlined the benefits of the proposed new products and said that he would like interaction with F&C, which he considered to have been difficult recently (indicating that he

understood that the success of any of these products would depend on significant input from F&C, either by way of provision of capital or marketing effort).

860. Mr Ribeiro protested that the Business Model Review had not been circulated in advance of the meeting and pointed out that only the CTA product had previously been discussed at ManCom meetings. Mr Culligan expressed his frustration at what he said was a lack of co-operation and said that the Defendants were only seeking the approval of the Board to move ahead with the development of these products. Mr Johns said that he thought there were some exciting product opportunities but repeated an earlier request to see a business plan supported by numbers. Mr Barthelemy protested that he could not produce this without sitting down with the F&C Distribution team. Mr Ribeiro stated that the Defendants had to rebuild their relationship with the distribution team and said he was happy to try to facilitate a meeting with them. Mr Johns asked whether any of the products conflicted with other products in the Group, but Mr Ribeiro stressed that this was not the issue: the Board members had to discuss matters having regard to the interests of the LLP. I consider that Mr Ribeiro was sincere in adopting this approach at the meeting. Mr Ribeiro said:

> "that he was not willing to consider a list of activities that represented a significant departure from the current business model of the partnership without due notice being given and a fuller paper presented."

This was a legitimate and proper position for him to adopt.

861. Mr Culligan objected, however, and accused the F&C representatives of being obstructive. He pressed for the Board to agree to pursue the list of activities set out in the Business Model Review. The F&C representatives protested at Mr Culligan's accusation and complained (with justification) that the Business Model Review was completely inadequate to form any reasonable judgment on it. That led back to the argument of the Defendants that they could not produce a full business plan with detailed numbers without assistance from F&C Distribution; and F&C Distribution would not meet with them without first having a detailed paper equivalent to a full business plan (see paras. [805]-[815] above).

862. The Defendants asked Mr Johns what he would like to see them produce as a basis for consideration by the Board. He said he would like to see some numbers and discussion of the risks entailed, the proposed scale of the operation and its likely profitability. I consider that it was reasonable for Mr Johns to ask for more detail on these points, even if what the Defendants could produce might fall short of a fully worked-up business plan. At that stage in the meeting the Defendants did not suggest, in answer to Mr Johns, that the production of a more detailed document, addressing at least some of these issues, would be beyond them.

863. In my view, the appropriate way forward would have been a middle course along these lines, with the Defendants providing much fuller detail about their proposals, so far as they could (along with an explanation of the gaps which would need to be filled in in future with assistance from F&C Distribution) and in good time before any meeting either with the LLP Board (which would consider dedication of the LLP's resources to the new business activities proposed) or with F&C Distribution (which

would consider dedication of their marketing and research resources to developing those activities): see para. [815] above. The Defendants and the LLP were capable of giving greater detail of the proposals than was contained in the Business Model Review, as the detailed proposal for the CTA product previously prepared by Mr Sparks and Ms Ross indicated. Only with a proposal developed at that level of detail would the LLP Board and F&C Distribution have a fair opportunity to assess the proposals and whether they had sufficient merit to be worth pursuing, without exaggerated demands being made of the Defendants in terms of the document to be produced.

864. Since F&C had no obligation to devote more resources (e.g. seeding capital) to develop these products and no obligation (because of the discretion in clause 13.7 of the Agreement) to devote marketing resources to them, the burden of persuasion lay on the Defendants. The Defendants were dependent on persuading F&C and its representatives on the LLP Board of the merits of proceeding with these proposed products. They failed to discharge that burden. The Business Model Review did not give sufficient detail, by reference to material the Defendants could be expected to know and provide, as to require the LLP Board to agree that there should be further investigation of the new proposed ventures on the basis of it or an expansion of the LLP's business activities under Article 4.1 of the Agreement. Nor did the Review set out any explanation, let alone a convincing explanation, how the proposed new activities could be carried on and marketed effectively, notwithstanding the existence of the dispute.

865. In the absence of a realistic prospect of persuading F&C of the merits of the new proposals and that it should devote resources to develop them, it did not make commercial sense for the LLP to use up its internal resources in working on them. The F&C representatives were entitled to think that this would involve a waste of the LLP's own resources and would serve as a distraction from carrying on its core FoHF business. They were certainly entitled to support adjourning discussion of the Defendants' new proposals until a later occasion, as they did.

866. The net effect of the meeting was that discussion of the proposed new activities was adjourned. Mr Culligan asked for the CTA proposal, at least, to be discussed, but Mr Ribeiro fairly pointed out that the meeting did not have available to it the detailed business proposal previously compiled by Mr Sparks and Ms Ross and that it would not be appropriate to take a decision simply on the basis of the cursory description in the Business Model Review.

867. The Board meeting closed without discussion of the agenda item relating to the LLP's IT infrastructure, despite Mr Ribeiro's and Mr Tilson's knowledge of the underlying position. Neither of them, nor the other F&C representatives, regarded it as a pressing point of business.

868. The Defendants were very unhappy with what had happened at the meeting. On 22 May 2009 they served their Second Put Option Notices under paragraph 1.7 of the Fourth Schedule, indicating that this was done without prejudice to their contention that the First Put Option Notices had been validly served.

The validity of the Second Put Option Notices

869. In the new Notices, in addition to breach of clause 11.1 of the Agreement (non-payment of drawings on 25 February 2009), the Defendants again complained of breach of clause 13.6 of the Agreement and added allegations of breaches of other clauses, as follows:

> "(3) Clauses 6.1 and/or 6.3 (books of account showing a true and fair view of the affairs of the LLP and accounts prepared in accordance with generally accepted accounting principles);
>
> (4) Clause 13.7 (provision of general marketing support by Holdings)."

870. Item (3) related to the accounting treatment of the Credit Alpha Fund launch costs resolved upon at the LLP Board meeting on 20 May. I have already indicated that the treatment of those costs resolved upon at that meeting by the F&C majority on the Board was based on a legitimate and genuine commercial view. The accounting treatment in light of that view reflected proper accounting advice. Accordingly, the 2008 accounts of the LLP showed a true and fair view of its affairs and had been prepared in accordance with generally accepted accounting principles. Therefore, I do not accept this aspect of the Defendants' complaints.

871. Item (4) concerned the Defendants' complaints regarding the removal of Ms Ross as part of the marketing support for the LLP; the application of a policy by F&C Netherlands not to allow direct meetings with the Defendants with Dutch clients of the F&C Group; the refusal by Mr Mendez de Vigo, on about 22 May, to allow Mr Lyne to contact investment consultants to review the LLP's standing amongst them (see para. [881] below); and the refusal of Mr Mendez de Vigo to meet the Defendants until they produced a written business plan.

872. I reject each of these complaints as well. None of them involved a breach of clause 13.7 of the Agreement. F&C was entitled to make Ms Ross redundant and not replace her. It was entitled to adopt a policy to channel marketing efforts through its dedicated Distribution teams without involving the Defendants in direct meetings with clients. It was entitled, in exercise of its discretion under clause 13.7 of the Agreement, to decide not to use up goodwill with independent investment consultants by conducting a review of the LLP's standing amongst them.

873. Finally, so far as concerns Mr Mendez de Vigo's refusal to meet the Defendants to discuss a marketing strategy unless they first produced a business plan, I do not consider that this constituted a breach of clause 13.7 of the Agreement either. Mr Mendez de Vigo's position did not involve any withdrawal from the LLP of the basic marketing support which clause 13.7 obliged F&C to provide (see paras. [325]-[330] above). Beyond that, decisions as to marketing resources (including Mr Mendez de Vigo's time) to be provided to the LLP were a matter for the discretion of F&C. It was not suggested to Mr Mendez de Vigo in cross-examination that his insistence on having a business plan before being prepared to meet the Defendants was arrived at in deliberate bad faith, intending to introduce an impossible condition which the Defendants could never fulfil. Up to this point, Mr Mendez de Vigo's request to see a business plan had not been pitched at an unreasonable level (see paras. [827] and

[846] above). Although it is of concern that, when later asked by the Defendants for an example of what he required, he provided a fully worked-up business plan (which included sales and revenue projections produced with the assistance of his own Distribution department) and did not explain that he would be prepared to accept something less from the Defendants as the best they could do in the circumstances (see paras. [887]-[888] below), his actions were not intended to destroy any opportunity for the Defendants to enlist the support of F&C Distribution to develop and promote the LLP's products if they had commercial merit. In my view, the burden of persuasion lay on the Defendants to show Mr Mendez de Vigo that they had proposals to which it would be worthwhile F&C Distribution devoting time and effort and it was legitimate for Mr Mendez de Vigo to call for something more detailed than, for example, the Defendants' Business Model Review as a condition to persuade him that it would be worthwhile to meet and not just an empty discussion leading nowhere. He knew that the LLP was capable of producing much more detailed work when it was serious about a proposal, as it had done for the CTA project, and he was entitled to press the Defendants for more details along those lines and for an explanation how their position could be explained to clients (para. [814] above) before agreeing to meet them and before making arrangements for F&C Distribution to divert resources to engage with them to work up a detailed business plan for new products which could be taken forward for full consideration by F&C.

874. The principal alleged breaches of clause 13.6 of the Agreement relied on at this stage are that Mr Ribeiro and the F&C representatives, in voting as they did, were acting once again with a view to destroying or damaging the LLP's business. I reject that contention.

875. However, the Defendants also sought to rely on breach of clause 13.6 based on Holdings' course of conduct up to the service of the First Put Option Notices and as continued after those Notices. This is a more difficult submission to analyse, partly because of my conclusions in relation to the validity of those Notices. The basis on which the present submission would become relevant is not altogether clear. I think it would be unreal to ignore what had happened up to 25 February and to ignore my previous conclusions regarding breaches of the Agreement as at that date, when analysing the position on 22 May. What I have done is consider whether there was a significant change in Holdings' approach to the conduct of its relations with the Defendants and the LLP after 25 February which somehow changed matters so that, when judging the position at 22 May, it could be said that Holdings no longer gave an appearance of trying to subvert the operation of the Agreement and hence could not be said to be in breach of its relevant obligations when judged at that time.

876. Holdings did try to put matters right and restore relations after the Defendants called its bluff by serving the First Put Option Notices. Mr Ribeiro, for Holdings, arranged for the Defendants' advance drawings to be paid on 26 February. He then made a clear effort in early March to show that he and Holdings had ceased to try to rely on the resolutions passed at the Members' meeting on 18 February as a basis for determining how the affairs of the LLP should be conducted, and generally sought to adopt a stance where relevant decisions would be taken by the LLP Board or ManCom, in line with the terms of the Agreement. So far as concerns the conduct of Mr Ribeiro, Mr Cole and Mr Johns in carrying out their respective functions as members of the LLP Board, ManCom and Compensation Committee, they

approached the questions they had to decide or vote on in a proper and lawful way, as set out above. Did all this sufficiently change things, so that by 22 May the Defendants could no longer complain about Holdings' approach to the management of the LLP's affairs being in breach of the Agreement?

877. I have come to the conclusion that, although the changes I have referred to were adopted, there were also other matters which the Defendants are entitled to bring into account as indicating that there had not been a genuine and wholehearted change of position by Mr Ribeiro and Holdings to ensure that the affairs of the LLP were run in accordance with the proper distribution of authority and decision-making powers within the partnership. Seen against the background of the serious misconduct by Mr Ribeiro and Holdings up to 25 February in trying to undermine that distribution of authority and power within the LLP, the following matters (albeit perhaps of less weight in themselves) continued to give an objective impression that Holdings (acting in particular by Mr Ribeiro) could not be trusted to afford genuine and due respect to the proper running of the LLP and the proper operation of the Agreement:

i) Mr Ribeiro acquiesced in, and implicitly encouraged, Mr Tilson to act in a manner which was in breach of his duty of loyalty to the LLP and which undermined the ability of the Defendants (Mr Culligan in particular), as the senior executive managers of the LLP and members of ManCom and the LLP Board, to control its affairs as contemplated by the Agreement and as required by the regulatory regime. Mr Ribeiro concealed this pattern of conduct by Mr Tilson and himself from the Defendants and the LLP. The Defendants were aware of part of this pattern of conduct, as a result of Mr Culligan's covert review of Mr Tilson's e-mails; they are also entitled to rely upon further illustrations of this pattern which came to light after 22 May 2009 (see paras. [728]-[729] above), of which the e-mail exchange between Mr Ribeiro and Mr Tilson on 23 January 2009 is an example (paras. [678]-[682]). Mr Ribeiro did not bring any of this into the open after 25 February, but continued to conceal contacts he had had with Mr Tilson and to engage in the same pattern of private contact with him;

ii) The letter of 26 February written by Mr Ribeiro on behalf of Holdings (para. [720] above) was very unsatisfactory, in that he attempted – in writing for the record – to suggest that he had made some kind of administrative error in stopping payment of the Defendants' advance drawings on 25 February, when that was not the case. The Defendants had good reason to regard that as a deceptive description of what had occurred, and were entitled to assess the sincerity of his and F&C's actions in relation to carrying on the affairs of the LLP thereafter in the light of that. The Defendants also had good reason to regard Mr Logan's letter of 2 March (para. [742]), asserting that there had been a mutual mistake regarding the powers of the Members' meeting, as less than frank and tendentious. These letters called the good faith of F&C into question;

iii) The point at (ii) above is reinforced by the conduct of F&C, Mr Ribeiro and Mr Grisay in early March in relation to commencing legal proceedings against the Defendants on 6 March. This was done without giving the Defendants any prior notice, and they were not told that it had been done until 12 March. Even then, it appeared that F&C only informed the Defendants because their hands

were forced by a forthcoming disclosure in the press (see para. [774] above). This added to the impression which the Defendants formed that F&C and Mr Ribeiro were prepared to be two-faced and could not readily be trusted. The Defendants were entitled to think that the actions of Mr Ribeiro after 25 February in purported compliance with the Agreement could not simply be taken at face value;

iv) On and up to 24 March 2009, Mr Ribeiro failed to share fully with the Defendants or the ManCom legal advice he had obtained on behalf of the LLP regarding the treatment it was required to give to the two remaining investors in the Balanced Fund (see paras. [788]-[789] above), even though he later explained he had obtained the advice in question prior to the ManCom meeting on 18 March (see para. [833] above). On 25 March, he wrote to the two investors on behalf of Holdings, without giving any or any proper opportunity to the Defendants and the ManCom to consider how to proceed, as he should have done (paras. [790]-[793] above). He also failed later on to give an adequate or proper account of the advice he had received to the Defendants and the LLP (para. [833] above). He thereby appeared to demonstrate a continued willingness and determination to subvert the proper decision-making procedures within the LLP.

878. For these reasons, judging matters on an objective basis as at 22 May 2009, I consider that Holdings remained in breach of clause 13.6 of the Agreement and continued to act in ways indicating that it repudiated the Agreement in fundamental respects.

879. In my view, assessing Holdings' conduct as a whole in the light of the history of events and the particular factual circumstances which existed at 22 May 2009, the breach of clause 13.6 and the repudiation of the Agreement again constituted gross misconduct by Holdings and which (for reasons similar to those explained at paras. [736]-[738] above) had a materially adverse effect both upon the LLP and upon the Defendants.

880. In addition, although not specified in the Second Put Option Notices, the Defendants sought rely on an alleged breach of clause 15.2 of the Agreement (non-disparagement of partners) at the dinner on 27 January 2009, attended by Mr Ribeiro, Mr Tilson and Mr Sparks. I find that there was no breach of clause 15.2: see para. [673] above.

Events from 22 May 2009 to December 2009: The Third Put Option Notices

881. Later in the evening of 22 May, Mr Mendez de Vigo e-mailed Mr Barthelemy to respond to a request by Mr Barthelemy to Mr Lyne that he (Mr Barthelemy) should be introduced to key independent investment consultants to explain the LLP's products (para. [851] above). Mr Mendez de Vigo wrote as follows:

> "The Distribution team is always happy to support our key capabilities if we believe they are credible, robust, competitive and sustainable. We also need to prioritise among the capabilities on offer to ensure resources are directed to those where we see the biggest likelihood of success.

> You correctly point out that we have made progress with consultants in the last 12 months. We are very excited about this progress and we are working hard to keeping it that way. As you know, asset consultants are bombarded with offerings and F&C needs to be focused and consistent in its approach to them.
>
> I have mentioned to you previously that before deciding on how to market your expertise, I need to see a business plan that outlines clearly the details of the product you want to offer, where you want to distribute it (and what proof statements of demand do you have), how does it compare versus competitors, track record in similar strategies and seed investors to get it up and running. This is the same I ask for any product to be launched through the PDC [Product Development Committee of F&C]. If needed, I am happy to send you some samples. Once we have this information and are convinced by it, we can discuss with you timing of sales activities/consultant visits. This is the process in place and we need to keep it that way.
>
> In terms of robustness, I have my doubts over the existing offering in your area, even though the numbers of April are encouraging. Let us hope we can follow with a few more months of good numbers to ensure the remaining investors can recover some of the absolute results lost beforehand. However, I am happy to be convinced of the contrary or re-visit it in a few months if performance picks up consistently.
>
> I have also mentioned sustainability of the offering as a key element in deciding what strategy to push. As a member of Execom I am aware of the current proceedings between F&C Alternative Investments Holdings and Anthony [Culligan] and yourself. I need clarity from Anthony and yourself as to your intentions and longevity with F&C before risking the firm's reputation with the key asset consultants, which would be severely compromised if we use our contacts with them for investment professionals that thereafter leave F&C. I am sure you understand and agree that this matter needs to be clear as anything else would be tantamount to negligence on my part.
>
> Therefore, I suggest you interact with me going forward if you want to explore any of the above further."

882. Mr Mendez de Vigo thus rehearsed the same basic position of F&C Distribution as before. In my view, subject to being prepared to be reasonable in terms of the detail of what the Defendants could be expected to provide by way of information about client demand, he and F&C were entitled to adopt this position: see paras. [805]-[815] above.

883. Shortly after the LLP Board meeting on 20 May, Mr Culligan asked Mr Tilson to prepare a further version of the LLP's 2009 budget for him, but Mr Tilson refused. He sent Mr Culligan an e-mail on 22 May to explain that he thought the request was unfair to him in the circumstances of dispute between the LLP Board members and where he was not persuaded by Mr Culligan's figures and did not want to take sides. He did, however, provide Mr Culligan with an analysis of the cost figures to assist him.

884. Mr Culligan responded to ask why his request was unfair. Mr Tilson replied to say:

> "Knowing that there is a version of the budget under consideration and asking me to prepare another one."

885. In my view, Mr Tilson's reaction to Mr Culligan's request was justified at this stage. The proper position under the Agreement, particularly now that it was clear that there was a dispute which was unlikely to be easily resolved, was for the ManCom to consider and propose (if necessary, by taking a vote) an annual budget for the consideration of the LLP Board (clause 17.1.3 of the Agreement) and then for the Board to consider and set the annual budget (if necessary, by taking a vote) (clause 18.1.2 of the Agreement). Mr Culligan had already got Mr Tilson to prepare a version of the budget which he had deployed without sufficient warning to the LLP ManCom and Board at the Board meeting on 4 March 2009, and I think Mr Tilson was entitled to be cautious about lending further support to Mr Culligan now that the Board was already seised of a particular budget proposal.

886. By letter dated 26 May 2008, Norton Rose requested copies of the documents referred to in the Defendants' pleadings. Copies were provided under cover of a letter dated 2 June 2009 from JGR. They included copies of e-mails between Mr Ribeiro and Mr Tilson. At this stage, therefore, F&C was alerted to the possibility that the Defendants had been conducting a covert investigation of e-mails on the LLP's system. F&C checked with Mr Tilson whether he had given consent for these e-mails to be looked at and he informed them that he had not.

887. On 29 May 2009, Mr Barthelemy responded to Mr Mendez de Vigo's e-mail of 22 May to ask him to send examples of the sort of paper he wished to see from the Defendants. Mr Mendez de Vigo arranged for an example of a business plan to be sent by one of his colleagues. This was a fully worked-up, very lengthy business plan, including a marketing plan and AUM and revenue forecasts compiled with the assistance of F&C Distribution. It was not realistic to expect the Defendants to produce such a detailed plan with those elements without similar assistance which Mr Mendez de Vigo was not offering to provide. Mr Barthelemy asked for further examples of what Mr Mendez de Vigo required but he refused to supply any more.

888. This posed a difficulty for the Defendants in knowing how to proceed, and Mr Mendez de Vigo can fairly be criticised for not being more careful in explaining what was required from the Defendants and ensuring that it was set at a reasonable level of information which the Defendants could be expected to be in a position to provide. However, it remained open to them to do considerably more than they did to try to persuade him to engage with them, and I do not consider that Mr Mendez de Vigo's

position at this stage involved any breach of obligation by F&C: see paras. [805]-[815] above.

889. On 5 June 2009 the Defendants served their Amended Defence and Counterclaim, followed by service of their Petition on 10 June. In the Petition, the Defendants sought relief in the form of an order for Holdings and F&C plc to buy out their interest in the LLP.

890. On 8 and 9 June 2009 there was a further e-mail exchange between Mr Barthelemy and Mr Mendez de Vigo. The Defendants were to go on a research trip to Asia and asked to be put in touch with F&C's new distribution partners in China. Mr Mendez de Vigo replied to say that F&C did not yet have an appropriate distribution partner available in China. He also repeated the point that he needed to understand the Defendants' intentions as to their future involvement in the LLP's business, as he did not wish to risk F&C's reputation with distribution partners by introducing them to a business where the managers might be leaving. This was a sensible and legitimate position for F&C to adopt.

891. On 10 June 2009 there was a meeting of the LLP ManCom. Mr Culligan stated that further development of the Business Model Review was on hold until Mr Ribeiro arranged for the Defendants to have meetings with F&C Distribution to discuss sales figures and protested that Mr Mendez de Vigo was refusing to meet them unless they produced a full business plan, which was not feasible. He also sought to raise arguments about the draft minutes from previous meetings. Mr Ribeiro accused him of being disruptive, by trying to bring disputes between the members at Board level into a ManCom meeting. Despite these rancorous arguments, the meeting managed to address the business before it.

892. Mr Culligan pointed out that the 2009 budget for the LLP had not yet been agreed and proposed that the ManCom should propose a budget to the Board. It was agreed that Mr Tilson should prepare a paper on the budget with various versions to be considered. The Defendants again pressed their argument that the performance of the Balanced Fund was good compared to the CSFB Tremont index and other F&C funds and suggested that the press should be contacted. Mr Ribeiro objected to this, since the Defendants had no good account of how the dispute between the Members would be explained (see para. [814] above).

893. On 12 June 2009, Mr Barthelemy e-mailed Mr Mendez de Vigo to impress upon him the good performance of the Balanced Fund, as a robust and marketable product, to provide some evidence of reviving market interest in investing in hedge funds and to press again for the LLP to be put in front of prospective clients and consultants. He referred to Mr Mendez de Vigo's concerns about the impact of the dispute and said:

> "We are committed to this business and it seems to us that the best way forward would be to meet and discuss your concerns and what we can do together."

894. Mr Mendez de Vigo responded on 15 June to argue that the evidence did not show a clear trend of a rise in demand for hedge fund investments. He reiterated his point

that whilst the performance of the Balanced Fund might have picked up, the investors in it had incurred absolute losses and it remained necessary for the fund to build up a sustainable track record over the coming months in order to be marketable. He also asked to receive a detailed business plan for how the LLP would wish to market the Balanced Fund to new clients, to include in-depth coverage of the investment/operational process within the LLP and the fund's unique selling proposition, and referred to requests made since September 2008 by Mr Lyne (repeated in an e-mail from Mr Lyne to Mr Barthelemy, also dated 15 June) to see the LLP's written sales presentation, which had not been provided to him. (This is the topic on which there was a conflict of evidence between Mr Lyne and Mr Barthelemy, on which I preferred the evidence of Mr Lyne: para. [832] above; in the event, on 24 June, Mr Barthelemy sent Mr Lyne an updated version of the presentation). Mr Mendez de Vigo pressed Mr Barthelemy to improve the LLP's interaction with F&C Distribution by provision of information, if F&C Distribution was to be able to provide effective marketing support.

895. It may be noted that this request for information by Mr Mendez de Vigo (and the reference to Mr Lyne's request to see the LLP's written sales presentation) was for detailed material which it was in the power of the Defendants to provide. In my view, as put in this e-mail, Mr Mendez de Vigo was making a reasonable request for a document from the LLP (referred to as "a detailed business plan for how the LLP would wish to market [the Fund] …"), rather different from the full-scale business plan with AUM and revenue forecasts of the kind provided as an example in relation the Defendants' proposed new products. It was a document in line with what I consider should have been provided by the Defendants (see para. [815] above).

896. Mr Mendez de Vigo concluded by again raising the critical problem of marketing the Balanced Fund in light of the dispute, where now two Put Option Notices had been issued by the Defendants and the Defendants had served their Petition seeking relief in the form of an order that F&C buy out their interests in the LLP (see para. [814] above). He wrote:

> "You state in your mail that Anthony [Culligan] and you remain committed to the business of the LLP. I would be grateful if you could provide me with an explanation of how such a statement squares up with the current circumstances.
>
> Without receipt of a convincing written explanation as requested above, you will understand that I cannot reasonably risk placing Balanced Alpha and the LLP into the institutional investor marketplace and in particular before investment consultants in circumstances where relevant key investment professionals seem to want to extricate themselves from the LLP."

897. In my view, the position adopted by Mr Mendez de Vigo in this e-mail was a reasonable one. He raised legitimate commercial concerns regarding the marketing of the Balanced Fund. He was entitled to ask the Defendants for a written explanation of how they proposed to square the circle of demanding to be bought out of the LLP

while at the same time wanting F&C to devote resources actively to marketing LLP products which depended upon the exercise of their skills and abilities. The Defendants never provided a suitable or convincing statement to reconcile these points. Decisions as to when and what steps to take in marketing the Balanced Fund were properly matters for Mr Mendez de Vigo's judgment, under the marketing discretion reserved to F&C under clause 13.7 of the Agreement.

898. Mr Barthelemy replied on 24 June simply to say, "Let's meet to discuss" and asking him to suggest a time. This was not a satisfactory response, as Mr Mendez de Vigo pointed out in an e-mail of 25 June (para. [910] below).

899. On 17 June 2009, Mr Lyne spoke to Mr Rob Howie, a representative of one of the independent consultants he dealt with, called Mercer Investment Consulting. In their conversation, Mr Howie touched on a lack of unique selling point for the LLP's products and a lack of resources within the LLP. At trial, the Defendants sought to suggest that Mr Lyne deliberately canvassed remarks hostile to the LLP and the Defendants in order to promote F&C's position in the litigation. I reject that suggestion. I find that Mr Lyne's discussion with Mr Howie was entirely proper and involved straightforward intelligence gathering by Mr Lyne about the perception of F&C branded products in the market place.

900. On 19 June 2009, in line with the instructions given to him at the ManCom meeting, Mr Tilson produced a set of budget variants with notes to explain the differences between them. The variants for May 2009 (version 3) and June 2009 (version 4) showed, respectively, Mr Tilson's view of what was most realistic as compared with Mr Culligan's latest preferred budget. By this stage, the staff costs for 2009 were in an agreed amount, as was the LLP's net revenue. Version 3 of the budget showed an operating loss of £62,561. Version 4 of the budget showed an operating profit of £14,202. The differences between the two versions were that Mr Tilson had budgeted for director fees of £10,000 for Mr Johns (Mr Culligan budgeted nil for this item) and service charge fees of £119,000 due to F&C (as compared to £52,237 budgeted by Mr Culligan, the figure being reduced on the basis that the LLP should relocate its office and no longer use F&C resources for certain of its functions such as IT and accounting).

901. On 23 June 2009, there was another argument between Mr Culligan and Mr Tilson, this time concerning fact sheets for the Balanced Fund for April 2009 sent out by Mr Tilson to clients that day. Mr Tilson had sent out fact sheets for the euro and sterling versions of the Balanced Fund, but not for the US dollars version because there were no investors with dollar holdings in the Fund. At first Mr Culligan told Mr Tilson that he should have sent out only a US dollar fact sheet, but a little later he changed his position and said it was fine to send out euro and sterling fact sheets but that a US dollar fact sheet should also be sent out. This proposal made Mr Tilson nervous in case it misled investors, and he said he would only distribute such a fact sheet if that was approved by the F&C's ARC Department. Mr Culligan said there was no need for such approval. However, on 24 June Mr Culligan told Mr Tilson the US dollar fact sheet had, in fact, been approved by F&C's ARC Department and told him to distribute it. Mr Tilson remained unsure of his position and delayed a few days, but then sent it out on 29 June.

902. Also on 23 June, Mr Ribeiro e-mailed Mr Tilson with the text of a notification to be sent to the liquidator of the Event Driven Fund to explain the outline of the dispute and the legal proceedings then on foot. The notification stated that the dispute:

> "is having an impact on the ability of the LLP to function effectively from a governance perspective."

Mr Ribeiro did not copy this to the Defendants or the ManCom or seek their agreement on the text. Mr Tilson promptly sent the notification out. He also asked Mr Ribeiro whether he wished it also to be sent to the directors of the Pushkin Fund, but Mr Ribeiro told him not to send it to them, on the basis that he had never had dealings with them.

903. On 24 June 2009 Mr Culligan e-mailed Mr Ribeiro to protest that he had not discussed the notification with the Defendants before instructing Mr Tilson to send it. This was a legitimate complaint. The sending of the notice was a significant action taken on behalf of Holdings and affecting its relations with outsiders, so in my view Mr Ribeiro should first have discussed it at least with the Defendants (as the senior executive managers of the LLP's business) and probably also with the ManCom (the body responsible for the management of the LLP's affairs under clause 17 of the Agreement).

904. At this stage, BCP Millennium Fortis served a redemption notice in respect of its investment in the Balanced Fund, to take effect on 1 October 2009. From that date Friends Provident would be the sole remaining investor in the Fund. On 24 June, Mr Tilson sent a notice of this event to the Board of the Balanced Fund.

905. Shortly afterwards, Mr Culligan e-mailed Mr Tilson (copied to Mr Ribeiro) with an instruction that he should clear with the Defendants any communication with clients, Boards or other material counterparties of the LLP prior to sending it out. In turn, Mr Ribeiro asked Mr Culligan to explain the rationale for that instruction, to which Mr Culligan replied that he wanted to be aware of and approve such communications. Mr Ribeiro responded to object to the instruction as a departure from past practice and something which would prevent Mr Tilson carrying out his role – which up to this point had involved him in a range of communications with parties external to the LLP using his own judgment. Mr Tilson also objected to Mr Culligan's instruction and raised the matter with Mr Cole as a human resources issue. On 25 June, Mr Culligan e-mailed Mr Cole to say he was puzzled why this was a human resources issue and to ask what was discussed.

906. Meanwhile, on 23 June 2009, Mr Barthelemy e-mailed Mr Ribeiro to ask where things stood in relation to Achmea's request for an audit of the Select Fund. Mr Barthelemy said he was thinking of getting in touch with them directly.

907. On 24 June 2009 there was a meeting of the LLP Investment Committee. At this meeting Mr Tilson revealed that, unbeknownst to the Defendants, he had been doing work at Mr Ribeiro's request in preparation to provide information to Achmea and had, in fact, sent material to Achmea. The Defendants were concerned to learn this. It later emerged that Mr Tilson had received an e-mail dated 16 June 2009 from F&C Netherlands to inform him that Mr Ribeiro had agreed that Achmea could do an audit of the LLP fees and about the scope of the meeting (attaching an e-mail from Achmea

saying, "We have the duty to our stakeholders that we have reassured ourselves from the fact that no fraud issues have occurred"). Mr Tilson did not pass this on to the Defendants until 29 June 2009, after he had sent material to Achmea.

908. It is difficult to see how Mr Tilson's failure to inform the Defendants promptly about what was going on could be justified. The Defendants were right to be angry and concerned when they found out what he had done. This was a matter of particular sensitivity to the Defendants (and the LLP), because of the criticism of the LLP's charging of fees implicit in Achmea's unusual demand for an audit of the Select Fund fees (the implied criticism seemed to amount, in effect, to a query whether the LLP had been fraudulent). The Defendants were understandably upset that Mr Ribeiro had agreed to an audit of the LLP's fees by Achmea and had instructed Mr Tilson to carry out work on a response to Achmea on such a matter, and without informing them. This was a further incident of Mr Ribeiro seeking to run the business of the LLP without reference to them and behind their backs. In my view, these were matters which Mr Ribeiro ought to have discussed with the Defendants and the ManCom, in accordance with clause 17 of the Agreement, before any action was taken on behalf of the LLP.

909. On 24 June 2009, F&C Distribution received a further RFP for a £40 million FoHF investment for Flintshire County Council, who were advised by bfinance. This was passed on promptly by Mr Hunt to Mr Barthelemy and Mr Sparks for the LLP. Mr Barthelemy replied that they should make a bid for this business and Mr Hunt took steps to obtain the RFP details.

910. On 25 June 2009, Mr Mendez de Vigo e-mailed in response to Mr Barthelemy's latest suggestion of a meeting to reiterate again what he required from the Defendants before he was prepared to meet, namely a written explanation of the sustainability of the Balanced Fund in light of the dispute and proceedings, and:

> "- a detailed business plan for how the LLP would wish to market Balanced Alpha to new prospects taking into account that the fact that the fund I believe only has one investor now, Friends Provident, who have not submitted any redemption request."

He then again referred, unhelpfully, to the business plan example (in a very full and detailed form) which he had previously arranged to be provided to the Defendants (para. [887] above).

911. Mr Mendez de Vigo also referred to the presentation for the LLP which Mr Barthelemy had just sent to Mr Lyne, to say:

> "In relation to your presentation circulated recently to Julian [Lyne], I remind you that in an earlier e-mail to you I requested that you liaise directly with me in relation to the provision of marketing support and any related matters rather than with both Julian and me. The approaches you have made to each of us separately in the past 2 months relating to business and marketing support are both dependent on the provision of information about your business proposals and it is therefore

> sensible that I act as central point of contact going forward. You may consider this e-mail a response to your earlier e-mail to Julian."

The implicit complaint in this e-mail about the provision of the sales presentation to Mr Lyne was unfair, since Mr Lyne had asked for it to be sent to him.

912. Mr Barthelemy responded the same day to say the dispute was being dealt with through the appropriate channel, "which does not involve you"; to protest at Mr Mendez de Vigo's requirements for written information ahead of a meeting; and to level the accusation "that by refusing to meet up you are merely inventing a procedural matter to fail to meet your responsibilities".

913. Although I consider Mr Mendez de Vigo had given grounds for Mr Barthelemy to feel aggrieved at what seemed to be his unreasonable insistence that before any meeting the Defendants should produce a complete business plan (in the form of the sample provided, which included detailed AUM and revenue forecasts which could only be provided with the assistance of F&C Distribution), I have concluded that this criticism by Mr Barthelemy of Mr Mendez de Vigo is not borne out on the evidence before me. I consider that Mr Mendez de Vigo paid insufficient attention to the detail of what he was asking the Defendants to provide to him by reference to the sample which was sent to them, which was ill-advised (since he gave Mr Barthelemy ammunition for a complaint by failing to explain in reasonable terms what was required), and that his behaviour at this point was high-handed (particularly since he does not seem to have studied the sales presentation provided by Mr Barthelemy with much attention and his implicit complaint that it should not have been sent to Mr Lyne was unjustified); but his conduct was not intended to be destructive of the ability of the Defendants to engage with F&C Distribution. In particular, Mr Mendez de Vigo's request for a written explanation of the Defendants' position in relation to the dispute to inform marketing judgments in respect of the LLP's products was reasonable (see para. [814] above). The Defendants' failure to address this legitimate concern in writing at this stage, despite repeated requests by Mr Mendez de Vigo, meant that Mr Mendez de Vigo's refusal to meet them was justified.

914. Mr Mendez de Vigo responded by e-mail on 26 June, again to explain and defend his position. As to the requirement for a detailed business plan, he wrote:

> "…in order for my team to provide you with effective support, it is simple logic that you must first show you have thought through the nature of the product that you wish to market. I have now explained to you the process repeatedly and have given you assistance (e.g. provided you with a sample) to ensure you can start work. This is current business practice as you are well aware."

He reiterated his willingness to meet the Defendants if the written items he had requested were received, but in the interim he declined to debate the matter further in e-mails, concluding:

> "Your emails are unhelpful and deliberately crafted to try to read into this situation an obstructive attitude which does not exist."

I do not think that this criticism of Mr Barthelemy was justified. His e-mails were not "deliberately crafted" as Mr Mendez de Vigo suggested. Mr Mendez de Vigo had, by his resumed insistence that the Defendants provide a full business plan with a level of detail which it was not reasonable to expect them to achieve, himself given some grounds for Mr Barthelemy to complain about his attitude.

915. On 26 June 2009, Mr Culligan e-mailed Mr Ribeiro in relation to his instruction to Mr Tilson regarding communications with third parties, to explain and justify the instruction and to accuse Mr Ribeiro of "compromising the governance of the LLP" by instructing Mr Tilson directly to undertake work without reference to the Defendants (i.e. the work for the Achmea audit) and to communicate with third parties without discussing it with the Defendants in advance, as he had done previously. He wrote:

> "I should like to remind you that Brian [Tilson] reports to me and I am LLP's Chief Executive and Managing Partner. I am registered with the FSA as the approved person responsible for dealing with the apportionment of responsibilities and for overseeing the establishment and maintenance of systems and controls. It is a legal requirement that controlled functions are the responsibility of approved persons only. Neither you nor Brian are approved persons for the partnership. In so far as Brian carries out important communication with clients, boards or counterparties, he is doing so under my supervision and ultimately I am responsible for the form and content of that communication. To this end, it is vitally important that I understand and approve of such communications before they happen. This has been the case in the past and must be the case going forward.
>
> You are not an approved person for the LLP and cannot undertake any controlled function on behalf of the LLP. This includes anything to do with the day to day control and running of the business and the apportionment of duties to individuals within the LLP. It seems to me that, of late, you are overstepping your role by instructing staff directly without proper discussion with me or Francois [Barthelemy]. This is not only undermining the governance of the partnership but is potentially against the law. …"

Mr Culligan's complaint about the role which Mr Ribeiro was now taking in the affairs of the LLP was justified. He also complained in an e-mail dated 24 June to Mr Mackay, copied to Mr Ribeiro, about the more active role which Mr Ribeiro had assumed without having FSA authorisation.

916. On 29 June 2009, there was a LLP ManCom meeting. Mr Culligan raised his complaint about the way in which Mr Tilson had done work on the Achmea audit at

Mr Ribeiro's request and sent material to Achmea without informing the Defendants about any of this. He asked Mr Tilson for a copy of the material which Mr Tilson provided. Under questioning from Mr Culligan, Mr Tilson denied that Mr Ribeiro had instructed him not to inform the Defendants (there was little investigation at trial of the circumstances in which Mr Tilson acted in this regard). In my view, Mr Culligan was justified in his criticism of Mr Tilson at the meeting for failing to inform the Defendants about what he was doing on such a potentially serious matter. Mr Culligan was right to emphasise at the meeting that he was the responsible Chief Executive and that Mr Ribeiro had no authority to instruct Mr Tilson to carry out specific tasks on behalf of the LLP business. Mr Ribeiro said he failed to see why Mr Culligan was so upset (though I think it must have been obvious).

917. On 29 June 2009, Ms Bomba e-mailed Mr Tilson to announce that F&C IT was launching its new remote access solution and asking who within the LLP should be provided with it. Mr Tilson passed the query to Mr Pennington, who replied to point out that the operation of the solution depended on computers running the F&C corporate desktop package, which the LLP did not use. Hence the solution would not work for the LLP. F&C IT made no alternative proposals for a remote access solution for the LLP.

918. On 29 June 2009, Achmea asked F&C Netherlands to set up meetings to audit the fees paid in relation to the Select Fund with the benefit of the information provided by Mr Tilson. Mr Tilson asked Mr Ribeiro how he would like him to proceed and this seems to have led to disclosure of Achmea's request and e-mails to the Defendants (para. [907] above). The next day, Mr Culligan asked Mr Tilson to pull together relevant information to help Mr Culligan prepare for any questions Achmea might have.

919. On 30 June 2009, there was a presentation by F&C Distribution (including Mr Mendez de Vigo and Mr Lyne) to the desks running the various F&C investment products to give an overview of the state of the market. Mr Barthelemy attended for the LLP. At trial, the Defendants sought to suggest that statements made by Mr Mendez de Vigo and Mr Lyne in the presentation were inconsistent with F&C's case about the state of the market and how F&C Distribution could be expected to deal with the LLP. I do not accept that suggestion. In my view, there was no such inconsistency. Although Mr Mendez de Vigo stated that F&C Distribution was now hoping for a reasonably good 2009, taken overall, he also emphasised "we need to pick our battles" (i.e. F&C Distribution needed to make judgments about focusing its active marketing efforts on those products where they thought there was a good prospect of attracting investors).

920. The next LLP Board meeting took place on 1 July 2009, again also attended by Mr Tonkin and Mr Tilson. The LLP's accounts for 2008 were adopted by resolution by a majority (the F&C representatives voting in favour, the Defendants voting against on grounds of their objection to the treatment of the Credit Alpha Fund launch costs). At KPMG's insistence, the accounts included a note referring to the litigation between the Partners. It was confirmed that the balance of profits for 2008 should be paid out to the LLP Members.

921. Mr Tilson presented the different versions of the budget to the LLP Board (see para. [900] above). Mr Culligan explained how he thought the LLP could make savings by relocating its office and insourcing certain activities (para. [900] above). He

confirmed that he had supporting documentation for this, although he did not present any of it to the Board (although they were challenged on this in giving their evidence, I am satisfied that the Defendants had taken steps to identify possible alternative offices in the vicinity). The Board decided to include allowance of £10,000 for fees for Mr Johns' services and then debated which version of the budget to adopt. Mr Ribeiro pressed for version 3 (i.e. that the LLP should remain located in F&C's offices and use its services, albeit that would result in a loss) on the grounds that he took comfort from the control environment under the umbrella of F&C within which the LLP operated. The Defendants pressed for version 4. Mr Johns and Mr Cole voted with Mr Ribeiro for version 3, which they regarded as more prudent, so version 3 of the budget was carried by a majority. I consider that the different views on each side of this debate again represented genuine legitimate differences of opinion about what was in the best interests of the LLP.

922. There was then discussion about the business prospects for the LLP. Mr Barthelemy stated that the hedge fund sector was well on its way to recovery and pressed for the LLP to develop its business in line with the Defendants' Business Model Review. The Defendants expressed frustration at the lack of engagement with F&C Distribution and Mr Mendez de Vigo. Mr Ribeiro said he could not force Mr Mendez de Vigo to meet the Defendants and generally defended Mr Mendez de Vigo's position. The meeting closed on this rather inconclusive note. Once again, Mr Ribeiro, Mr Tilson and the other F&C representatives did not take the opportunity to raise the question of the LLP's IT infrastructure.

923. On 3 July 2009, Mr Mackay e-mailed Mr Culligan in response to his queries of 24 June about the absence of FSA authorisation for Mr Ribeiro's increasingly active role in the LLP's business. Mr Mackay confirmed that Mr Ribeiro had no approved controlled function of his own for the purposes of the LLP, but added:

> "However, the Corporate Member does have approved person status and Fernando acts as its agent."

Mr Mackay said he saw no reason to review the apportionment of responsibilities within the LLP on the basis of Mr Culligan's complaints. In Mr Mackay's view, Mr Ribeiro's liaison role with clients did not require FSA authorisation nor did his interaction with the LLP's staff "in order to enable him to fulfil his duties".

924. Mr Mackay's response failed to engage properly with the points being made by Mr Culligan, since I do not think that FSA authorisation of Holdings as a CF4 could be regarded as covering the new intrusion by Mr Ribeiro into the detailed management of the affairs of the LLP in breach of clause 17 of the Agreement and absent allocation to him of responsibility for such matters by the CEO with CF3 authorisation (i.e. Mr Culligan). However, I consider that Mr Mackay's comment that Mr Ribeiro acted as agent for Holdings in his dealings with the LLP reflected the general understanding and arrangements made within the F&C Group as to how Holdings' relations with the LLP were to be conducted.

925. By e-mail of 6 July 2009, Mr Ribeiro replied in particular to Mr Culligan's e-mail of 26 June (para. [915] above). He defended the authority of Mr Tilson to communicate information to LLP clients and counterparties and disputed Mr Culligan's claim that he needed to control Mr Tilson's activities in light of his responsibility as the FSA

approved CEO of the LLP. As to his own position, Mr Ribeiro, like Mr Mackay, asserted that:

> "…in my role as Chairman of the LLP I do operate as the agent of F&C Alternative Investments (Holdings) Limited, which is approved as a member of the LLP."

He accepted that he had, on occasion, in his role as Chairman of the LLP, requested Mr Tilson to carry out certain tasks for the LLP but claimed he had never instructed him not to liaise with the Defendants, leaving it to Mr Tilson to exercise his discretion in that regard. Finally, Mr Ribeiro accused Mr Culligan of being confused over regulatory obligations within the LLP and asked him to produce a new list of functions within the LLP for discussion.

926. The comments in para. [924] above apply equally to Mr Ribeiro's e-mail. It was not Mr Culligan who was confused about the regulatory requirements but Mr Mackay and Mr Ribeiro (it is also worth noting that they were in error in so far as they suggested that Mr Ribeiro, when participating in the affairs of the LLP as a member of the Board, ManCom or Compensation Committee, acted as agent of Holdings: see paras. [204]-[206] above). Mr Culligan's concerns regarding the regulatory position were legitimate. I also think that Mr Ribeiro's comment that he had not given an instruction to Mr Tilson not to inform the Defendants about the Achmea audit, but to leave it to Mr Tilson's discretion, was disingenuous: by this stage Mr Ribeiro knew that Mr Tilson was prepared to be disloyal to the Defendants and to act as Mr Ribeiro's private assistant without informing the Defendants about what he was doing, and he probably recognised that there was a good chance (to put it no higher) that Mr Tilson would not inform them about the further private instructions he had received from Mr Ribeiro and the work he did pursuant to those instructions.

927. On 8 July 2009, Mr Ribeiro e-mailed the Defendants to explain why he had agreed to consent to Achmea's request to audit the LLP's fees. He stated his "strong preference" that Mr Tilson be permitted to continue to act as the liaison point between the LLP and Achmea.

928. Also on 8 July, an important new chapter began. Mr Mackay formally commenced an investigation into:

i) the establishment of a bespoke e-mail server for the LLP without LLP Board approval (which later broadened into an investigation of the setting up of the LLP's own IT infrastructure and network in December 2008 and January 2009); and

ii) covert access to Mr Tilson's e-mail account.

929. The capacity in which Mr Mackay commenced his investigation was rather opaque. He wrote a formal letter to Mr Pennington dated 8 July on headed notepaper of F&C Management Limited (a subsidiary of F&C plc), setting out the allegations (which were said to involve breaches of the F&C Group information security policy); requiring Mr Pennington to preserve relevant information; and instructing him to report only to Mr Mackay, "as the Compliance Officer for the F&C Group". That letter was also sent to the Defendants under cover of letters from Mr Mackay on F&C

Management Limited notepaper, instructing them not to interfere with material relevant to Mr Mackay's investigation and warning them that he might need to conduct interviews with them.

930. Mr Culligan replied on 9 July to protest that this investigation was not appropriate; that there was nothing unknown or improper in the Defendants' actions; and that the investigation appeared to be a fishing expedition to try to find something to assist F&C in the dispute. At trial, the Defendants pursued this line and questioned the good faith and independence of Mr Mackay in commencing and pursuing his investigation and in allowing it to be used by F&C for tactical advantage in the dispute.

931. In my judgment, Mr Mackay commenced and carried on his investigation into these matters in good faith. He genuinely believed it was right to do so and there was a case for the Defendants to answer. However, his conduct of the investigation was poor and fell well below the standards one would expect in an investigation with such potentially serious consequences for the livelihood of those subject to it - a possible outcome of the investigation, as Mr Mackay appreciated from the outset, was that a report would be made to the FSA to remove the authorisations for the Defendants to work in the financial services industry. He also reached conclusions regarding wrongdoing by the Defendants which were incorrect.

932. On 8 and 13 July 2009, Mr Mackay interviewed Mr Pennington to obtain information about the LLP's IT arrangements, e-mail archiving facilities and so forth and about how Mr Culligan had gained access to Mr Tilson's LLP e-mail account. At Mr Mackay's request, Mr Pennington obtained a copy of the contract terms under which the "Active Office" e-mail and archiving service now being used by the LLP was provided.

933. On 13 July 2009, Norton Rose wrote with reference to the e-mails which Mr Culligan appeared to have reviewed, now being investigated by Mr Mackay, to assert that "on the face of it" there appeared to have been a breach of F&C's IT security policies and the commission of a criminal offence under the Computer Misuse Act 1990. They asked JGR to answer a series of questions about those e-mails and any others which might have been accessed by Mr Culligan.

934. On 17 July 2009, JGR replied in relation F&C's complaint about the setting up of a bespoke e-mail server for the LLP. They asserted that the complaint was baseless and that all members of LLP's ManCom were aware of what was done and acquiesced in it (this was correct, subject to the point that, apart from Mr Culligan and Mr Pennington, the members of the ManCom did not know the full technical details about the way internet access operated for the LLP and about the linkage of the LLP's system to F&C's system via the dual-homed computers; but the members of ManCom would not expect to be provided with information about such matters, having been happy since 2004 to leave the technical details of the LLP's IT arrangements in the hands of Mr Culligan and Mr Pennington as the LLP's resident computer experts). As regards access to e-mails, JGR referred to legal authority (*Conway v Petronius* [1978] 1 WLR 72) regarding the right of a director to have access to all company information for the purposes of discharging his duties, including to investigate possible wrongdoing by another officer, and referred to the Defendants' belief that Holdings, acting in particular by Mr Ribeiro, had committed breaches of obligation to

the LLP which justified the investigation of e-mails by Mr Culligan (I agree with the basic point made by JGR, that there was a sufficient basis of reasonable suspicion to justify Mr Culligan in conducting the covert review of e-mails which he did: see para. [822] above). JGR disputed the allegation that a criminal offence under the Computer Misuse Act 1990 had been committed, on the grounds that the access to staff e-mails was not unauthorised and was not considered by the Defendants to be unauthorised (in this, again, JGR were correct: see para. [824] above). Norton Rose replied by letter of 23 July to dispute the points made by JGR and to assert the applicability to the LLP of F&C Group IT policies.

935. On 21 July 2009, Mr Mackay interviewed Mr Culligan. Mr Mackay wanted to ask him on what authority he set up the e-mail system and gained access to the LLP's archived e-mails, but at the outset of the meeting Mr Culligan asked him whom he was acting for, F&C or the LLP. At trial, F&C accused Mr Culligan of deliberately hijacking the meeting in order to avoid answering awkward questions. I reject that accusation. Mr Culligan was deeply suspicious about the independence of Mr Mackay in conducting his investigation, fearing that it was, in reality, a tactical ploy by F&C to put pressure on the Defendants in the dispute. There were objective grounds on which he could reasonably entertain such a suspicion – the fact that the setting up of the LLP's external e-mail service and IT infrastructure had been made known to the LLP ManCom and Board, and in particular Mr Ribeiro, long before and had not previously been raised as a controversial issue (see e.g. paras. [600], [631], [710], [769], [867] and [922] above); the failure of anyone within the governance structure of the LLP (whether at Board level or ManCom level) to ask Mr Culligan for an explanation regarding the matters being investigated by Mackay before the investigation was commenced and the absence of any discussion within that structure whether an investigation by the Compliance Officer was called for; and the appearance given by Mr Mackay at the outset that he was acting on behalf of F&C Group rather than the LLP (para. [929] above).

936. Mr Culligan did not consider he had done anything wrong or had anything to hide. So far as he was concerned, there was no secret within the LLP about its new IT infrastructure and e-mail arrangements and e-mails of Mr Tilson he had reviewed in the course of his own investigation had been freely and openly deployed in the Defendants' Defence and Counterclaim and Petition. Mr Culligan believed he had had authority for his investigation under the relevant IT security policy (reading it with modifications appropriate for the context of the LLP). In my view, Mr Culligan's conduct at the meeting with Mr Mackay was genuinely to explore whether his grounds of concern about Mr Mackay's independence from F&C and from F&C's interests in fighting the Defendants in the dispute were well grounded or not. If Mr Mackay was not genuinely independent, Mr Culligan did not wish to dignify what seemed to him to be trumped up charges and a process designed to prejudice his rights in the dispute by co-operating with Mr Mackay's investigation and thereby appearing to accept its validity.

937. Unfortunately, Mr Mackay's answers to Mr Culligan's questions fuelled Mr Culligan's suspicions rather than allaying them. When asked whom he was acting for, Mr Mackay said he was acting as Compliance Officer for both the F&C Group and the LLP and that he did not differentiate between them. I think it is fair to say that Mr Mackay had not given very careful thought to exactly what role he was

undertaking before stepping into what was in fact a minefield constituted by the LLP Members' fierce opposition in the dispute.

938. Mr Culligan then asked whether, in light of its legalistic tone and content, Norton Rose had drafted the letter of 8 July to Mr Pennington containing the charges against Mr Culligan (para. [929] above). Mr Mackay conceded that it had been drafted by Norton Rose's litigation team working on the dispute, then amended by him. He said he had had both face-to-face meetings and telephone conversations with Norton Rose. This appeared to confirm Mr Culligan's worst fears. He promptly challenged Mr Mackay's authority to carry out his investigation and accused him of acting in concert with Norton Rose and F&C to promote F&C's interests in the dispute.

939. Mr Culligan also asked Mr Mackay whether he had discussed the investigation with Mr Ribeiro. Mr Mackay accepted he had, though only to inform him about it. He said he had started the investigation on his own initiative after being given information by Norton Rose. Mr Culligan charged Mr Mackay with conducting an investigation orchestrated by Norton Rose in the interests of F&C and told him to address all his questions through the Defendants' lawyers. In the particular context of this meeting, I do not think this was an unreasonable position for Mr Culligan to adopt.

940. Thereafter, Mr Mackay took no significant steps to try to allay Mr Culligan's concerns about his lack of independence from F&C. He did not attempt to address questions to Mr Culligan through JGR, as he had been invited to do; he did not attempt to interview or question Mr Barthelemy. All this further tended to give the impression that he was not conducting a genuine investigation designed to get at the truth.

941. After the meeting, Mr Culligan typed up his note of the meeting and sent it to Mr Mackay. Mr Mackay replied to say, "This is not an accurate record of our meeting", but did not specify in what way it was inaccurate. Mr Culligan asked for details of the inaccuracies but Mr Mackay did not specify what they were. In fact, there appears to be a broad correspondence between Mr Culligan's note and the notes Mr Mackay made, and I find that Mr Culligan's note was broadly accurate. Mr Mackay's unhelpful reply and failure to set out his own note of the meeting or to explain where Mr Culligan's note was wrong again tended to reinforce the impression he had given that he was not acting in a genuinely independent and disinterested way.

942. On 23 July 2009, the agenda for the forthcoming LLP Board meeting scheduled for 27 July was circulated. The item regarding the LLP's IT infrastructure, which Mr Ribeiro had been concerned to include in previous agendas for the Board, was not included in this one. The Q2 2009 Turnbull Report, sent with the agenda, now made reference to the negative effect of the dispute on the business of the LLP; it contained the same comment as before on "IT (Email system)" (para. [818] above).

943. The Board meeting on 27 July (again also attended by Mr Tilson and Mr Tonkin, and also by Mr Mackay for the first part) was once more an acrimonious event. Mr Mackay gave a report on compliance matters. The LLP's 2008 accounts had been filed with the FSA. He also reported that the FSA had been advised of the dispute between the Members out of a concern that the FSA might read about it in the press without pre-notification. Mr Culligan asked for the minutes or notes of the meeting at which the FSA was advised of the dispute. Mr Mackay said there were none. (This

was a fair query by Mr Culligan - one would expect the CEO of a business to be informed of significant notifications being given to its regulator, and it was remiss of Mr Mackay not to have kept a note and not to have informed Mr Culligan before taking that step). Mr Mackay referred to the e-mail system item in the Turnbull Report and said that an alternative system had been set up but had not been approved by the LLP Board "as previously agreed". Mr Mackay emphasised that his review was incomplete, but his preliminary findings in relation to the security and archiving facilities within the new system indicated that it was fit for purpose.

944. Mr Mackay referred to his investigation and complained that Mr Culligan was unwilling to co-operate (this was something of an overstatement, since Mr Culligan had said that questions should be passed through his lawyers). Mr Mackay recommended that the back-up for the LLP's e-mail system be moved back to F&C and that Mr Culligan's access rights to others' mailboxes should be removed.

945. Mr Culligan disagreed with this proposal. He maintained that, as CEO of the LLP, he should be able to access all the LLP's systems; he denied that there had been any unauthorised access to employee mailboxes, arguing that employees had consented to management having such access where they had concerns on matters of conduct within the business, which concerns had been confirmed in this case by his review of Mr Tilson's e-mails. Mr Culligan denied there had been any wrongdoing. He objected to Mr Mackay's investigation and questioned the involvement of Norton Rose in setting it in motion. He said he considered it no more than an element of the dispute dressed up as a compliance matter. He said he refused to speak to Mr Mackay after finding out that Norton Rose (who were not the LLP's lawyers) were advising him and that this was a matter to be dealt with in writing between the legal advisers in the dispute. Mr Culligan said that Mr Mackay was not responsible for IT matters within the LLP.

946. In answer to a question from Mr Cole, Mr Mackay said that Mr Culligan could have access to LLP mailboxes in certain circumstances but the approval process in the F&C Group IT security policy had to be followed. Mr Culligan denied that that policy applied to the LLP and said that this was not a matter for F&C (I consider he was right about this: see paras. [115]-[146] above, in particular at para. [126(iv)]). He said the allegations were a storm in a teacup cooked up by F&C. Mr Mackay then left the meeting.

947. Mr Tilson presented the financial report, the operations report and an annual manager questionnaire to be filled in for the benefit of the Balanced Fund's auditors (there was argument about the text of this which was resolved by a majority vote, the F&C representatives voting against the Defendants).

948. There was then debate about the Q2 2009 Turnbull Report (which was introduced by Mr Tilson, who then left the meeting). Mr Cole asked when the last BCP test had been performed by the LLP. Mr Culligan reported that a test since December 2008 was currently under way. Mr Ribeiro asked a question about this and Mr Culligan replied along the lines that, as Mr Ribeiro knew, the LLP had set up a separate IT infrastructure after reporting on concerns about IT issues to the Board. Those concerns had not been resolved by F&C IT, so the LLP had moved to a BCP configuration and had been using that for some time.

949. Mr Johns asked whether the LLP Board had approved this. Mr Culligan replied (correctly) that it was a matter for the ManCom. Mr Ribeiro objected that it was a matter for the Board, complained that he had had no reply to his e-mail dated 16 February about this (para. [683] above) and also said that it had not been discussed at a ManCom meeting. Mr Barthelemy replied that Mr Ribeiro had cancelled all meetings of the ManCom in early 2009 (see para. [778] above) and the Defendants both stated that all members of the ManCom knew of the new system (this was correct). Mr Barthelemy also pointed out that this topic had been on the agenda for various Board meetings but that the F&C representatives had adjourned or terminated those meetings before it could be discussed. Mr Culligan asked Mr Ribeiro whether he was saying that he had never been appraised of the new system and Mr Ribeiro said he refused to answer that question (thereby leaving the impression that he had been appraised of it – as indeed he had, by Mr Tilson).

950. Mr Johns and Mr Cole indicated they felt this should have been brought to the Board's attention (in fact it had been, in the operations report dated 13 January 2009 – para. [600] above: it is unclear whether Mr Johns and Mr Cole had read that at the time, as they should have done; if they had, I think they had probably forgotten about it by this stage). Mr Culligan, however, pointed out (correctly) that under the Agreement, the LLP's IT arrangements were a matter for the ManCom (see clause 17.1 and 17.1.7 of the Agreement).

951. Mr Ribeiro stated that he considered Mr Culligan to have created and used the new system without the consent of the LLP's Board or ManCom and complained that he had refused to co-operate with Mr Mackay, as the group Compliance Officer. Mr Culligan objected that in that capacity Mr Mackay had no authority to investigate; he then questioned Mr Ribeiro whether he had instructed Norton Rose to contact Mr Mackay about this issue, which Mr Ribeiro denied. Mr Ribeiro, in turn, said he regarded it as unacceptable for Mr Culligan to gain access to employee e-mails, accused him of accessing them for reasons of his own self-interest in the litigation, and proposed that control of the e-mail system should be passed back to F&C IT. Mr Culligan objected to this and again asserted his right to have access to the e-mail system. He maintained (truthfully, as I find) that in accessing the e-mails, he had acted not for his own purposes but in what he believed was the best interests of the LLP. Mr Ribeiro concluded the discussion on this topic by again saying that the new system had gone beyond a test environment and that the LLP Board should have been given the opportunity to consider the matter.

952. In late July, Mr Tilson complained to F&C HR about Mr Culligan's conduct in instructing him to clear all communications with third parties with the Defendants prior to sending them out. On 29 July, Mr Ribeiro e-mailed the Defendants to reiterate that Mr Tilson should be allowed to communicate with third parties, in particular Achmea, without first obtaining clearance from the Defendants and to demand that the instruction from Mr Culligan to the contrary be withdrawn. Mr Culligan responded to clarify that his instruction was intended only to cover important and non-routine communications and decisions; he made it clear that Achmea's approach for an audit, raising the possible question of fraud, was "of the most important nature" which needed to be addressed with the utmost rigour and diligence; it was an approach in relation to which it was imperative that communications on

behalf of the LLP should be from the LLP's most senior managers. In my view, the position adopted by Mr Culligan was reasonable and justified.

953. Mr Ribeiro replied on 3 August 2009 to argue that Mr Tilson was the appropriate LLP officer, as CFO, to deal with queries from Achmea, but to say that important communications to Achmea would be notified to Mr Culligan in advance. On 20 August, however, Mr Culligan e-mailed Mr Ribeiro to say that the Defendants wished to deal directly with Achmea on the audit.

954. On 4 August 2009, the LLP Board met again to vote once more on the text of the asset manager questionnaire to be sent to the auditors of the Balanced Fund, which referred to the impact of the continued existence of the dispute on the functioning of the LLP. Mr Culligan objected to this text (which had been drafted by Norton Rose) and stated that, under the Agreement, this was not a matter within the remit of the Board (I think he was right about this: it was properly a matter for the ManCom under clause 17, and was not reserved to the Board under clause 18). The F&C representatives passed a resolution, however, to include this text.

955. On 6 August 2009, JGR wrote letters to Norton Rose and to Schulte Roth for the LLP (copied to Norton Rose) to give an account of the circumstances in which the LLP's e-mail system had been set up and regarding the searches of e-mails on that system. JGR stated that Mr Ribeiro was clearly aware of the establishment of the external system, as shown by his e-mail correspondence with Mr Tilson on 19 January 2009 (para. [631] above). JGR gave a detailed account of the circumstances in which the LLP had set up its external e-mail service and commenced its extended BCP test and of the circumstances in which and procedure by which Mr Culligan had searched staff e-mails. JGR maintained that Mr Culligan initiated the search because of his concerns that there was a risk to the LLP and said that he had the necessary authority to carry it out. A detailed list of the e-mails to which he had had access was enclosed.

956. Also on 6 August, Mr Barthelemy called to ask Mr Hunt in F&C Distribution about what had happened in relation to making a bid under the Flintshire County Council RFP. Mr Hunt replied that Mr Mendez de Vigo had said that he should leave the matter with him and the deadline had now passed. Mr Barthelemy e-mailed Mr Hunt to complain and Mr Mendez de Vigo replied by e-mail dated 7 August. Mr Mendez de Vigo again stated that, "given the LLP's particular circumstances", Mr Barthelemy should make a request for marketing support to Mr Mendez de Vigo rather than other members of his team (I think Mr Mendez de Vigo was justified in requesting this: relations within the LLP and between the LLP and F&C was very complicated and fraught, and it made sense for F&C Distribution to ensure that there was one point of contact who would understand the background). He said that if Mr Barthelemy was really set on putting together an RFP proposal, he should have contacted Mr Mendez de Vigo promptly rather than leaving it for a month before getting back to Mr Hunt and that he should have complied with Mr Mendez de Vigo's previous request to supply a detailed business plan and written statement regarding the legal proceedings. In the absence of this information, the RFP had not been pursued. I consider that this was a decision which was properly open to F&C Distribution in the exercise of the discretion in relation to marketing contained in clause 13.7 of the Agreement.

957. On 20 August 2009, Mr Culligan e-mailed Mr Ribeiro to decline his suggestion that Mr Tilson should be the LLP's liaison contact for Achmea in relation to the proposed

audit and to state that he and Mr Barthelemy wished to handle that directly themselves. This was a reasonable position for the Defendants, as the senior executive managers of the LLP, to adopt. Mr Ribeiro replied on 24 August, however, to say that his position on this remained unaltered.

958. Mr van den Heuvel of Achmea was due to attend meetings for the audit in late August, but they were postponed. Mr Barthelemy informed him that Mr Culligan would not be available in late August, but arranged for the Defendants to meet him in the Netherlands on 1 September 2009. Mr van den Heuvel then decided to cancel the meetings with F&C personnel arranged for late August. Clearly he thought it would be most helpful for him to speak directly to the senior managers of the LLP. It was Mr van den Heuvel's choice to cancel his other meetings with F&C – the Defendants did not press him to do that.

959. On 27 August 2009, Ms Bomba e-mailed Mr Barthelemy to complain about the change of arrangements for the meetings. She stated:

> "… as a rule, a member of the client team is present in all meetings with investment professionals…"

and she said that the F&C Netherlands Achmea account managers should attend the meeting. Ms Bomba sent a further e-mail to similar effect the same day, and on 28 August Mr Ribeiro e-mailed Mr Culligan on the topic. He also pressed for a representative of the F&C Netherlands client account team to attend the meeting to ensure consistency of approach, and he warned the Defendants that they should not try to brief Achmea about the dispute or try to market future products of the LLP to them.

960. In my view, these were reasonable requests, even though F&C had itself shown no similar willingness to ensure sensible co-ordination when it first scheduled meetings without reference to the availability of Mr Culligan. However, relations between the parties were so strained at this point that Mr Culligan replied to say that the meeting would proceed attended just by Achmea and the Defendants, which Mr Culligan said was the course which he considered to be in the LLP's best interests.

961. The meeting between the Defendants and Achmea proceeded to take place on 6 September, despite further protests by Mr Ribeiro. The Defendants were successful in allaying Achmea's concerns about the fees charged by the LLP.

962. On 27 August 2009, Mr Sparks e-mailed Mr Ribeiro and Mr Mendez de Vigo to report that paper trading using his CTA algorithm had been pursued with positive results. He did this to try to interest them once again in the CTA idea. They remained unpersuaded of its commercial merits.

963. On 2 September 2009, Mr Mackay interviewed Mr Pennington again to gain a better understanding of the set-up of the LLP's IT network. Mr Pennington explained that the LLP had a wireless router connected to the internet. Armed with this information, Ashley Smith contacted Mr Pennington to arrange for F&C IT to check that the LLP's IT network did not pose a risk to F&C's network. As Ashley Smith put it in an e-mail, the aim was to allow the LLP to operate with its current network, but to ensure full separation from the F&C network.

964. Also on 2 September, the Defendants had a meeting with Mr Tilson. Mr Tilson had asked for a meeting with Mr Culligan to discuss concerns he wished to raise. He was not willing to do that with Mr Barthelemy present (whereas Mr Culligan wanted a witness for the meeting) and said instead he would put his concerns in writing. Later that evening, Mr Tilson sent an e-mail to Mr Blomerius in F&C HR to complain about Mr Culligan. He did not copy it to the Defendants. In his e-mail Mr Tilson complained, in particular, about what he called Mr Culligan's censorship order of June 2009 (para. [905] above); about Mr Culligan's covert review of his LLP e-mail account – demanding assurances that Mr Culligan would no longer have access to his account and that if access were required, he (Mr Tilson) would be informed; and regarding Mr Tilson's concern that Mr Culligan was responsible for his annual appraisal. Mr Tilson informed Mr Blomerius that his complaint required his immediate attention. Mr Blomerius treated this as a complaint under F&C's grievance procedures.

965. On 4 September 2009, a Mr Sophos of F&C IT had a meeting with Mr Pennington to be taken through the set-up of the LLP IT network. Mr Sophos learned about the three dual-homed computers in the LLP's office. He reported back to F&C IT that "in essence [the LLP] have a network on our network". Mr Sophos drew up a diagram of the LLP network, showing the LLP's wireless router connection (to the internet and the LLP's externally-hosted e-mail service) and the three dual-homed computers (including those using Pertrac and Bloomberg feeds via F&C's internet connection) which linked the LLP's network and F&C's network. He confirmed the essentials of this diagram with Mr Pennington. There was no defensiveness on Mr Pennington's part about any of this – neither he nor Mr Culligan considered that the IT arrangements posed any relevant threat to the LLP or F&C.

966. On 9 September 2009, when he had digested the information obtained by Mr Sophos, Ashley Smith e-mailed Mr Leclercq to say that the combination of the LLP's own wireless router connection to the internet and the three dual-homed computers was a high security risk for the F&C network. In my view, focusing as it did on the F&C network, this was an accurate assessment: see paras. [582]-[598] above.

967. At trial, the Defendants sought to suggest that Ashley Smith and F&C had exaggerated the degree of the risk. In support of this, they pointed to the fact that F&C IT did not take immediate steps to disable the connection. I do not agree with this suggestion by the Defendants. I am satisfied that Ashley Smith and F&C IT were genuinely alarmed at the connection between the LLP network and F&C's network and did indeed regard it as a high security risk from F&C's point of view. The reason F&C IT did not immediately intervene was, in essence, explained in Ashley Smith's e-mail: disconnecting the dual- homed computers from F&C's network would leave the LLP without the Pertrac and Bloomberg data streams, and this would have been likely to provide ammunition to the Defendants for their complaints in the litigation that F&C was deliberately seeking to undermine the LLP's business.

968. Instead, Ashley Smith proposed to try to find another solution which would allow the LLP to continue to use their current IT system and e-mail services while also using F&C's internet connection for electronic streams of market data to LLP computers without those computers being connected to the LLP IT network in a dangerous way.

969. F&C IT did work on proposals along these lines, but they proved not to be attractive to Mr Culligan and Mr Pennington, since they would have involved subjecting the LLP's own discretion in choosing to link to internet sites to approval by Graeme Smith and the GISC, which had been a source of problems for the LLP previously. Therefore, Mr Culligan did not agree to F&C IT's proposals. He, in turn, on 14 September, suggested that the LLP would be happy to have its own fixed line connection to the internet to receive Pertrac and Bloomberg data, which would allow the LLP to disconnect entirely from F&C's network.

970. In view of F&C's concerns about Mr Culligan's access to staff e-mails, Ashley Smith also sought to take steps to replace Mr Culligan, as administrator on the LLP's e-mail system, with a representative from F&C IT. Mr Mackay contacted Mr Culligan to ask for confirmation that this would be done. Mr Culligan replied that he saw no need to make the changes, and when Mr Mackay sought to insist on them, demanded an explanation of his reasons. Mr Mackay responded that they had been provided already (and referred to the minutes of the LLP Board meeting on 27 July, although these had not yet been circulated). In substance, Mr Mackay's point appeared to be that F&C Group IT policies applied and Mr Culligan had acted in breach of them in accessing staff e-mails. Since Mr Culligan did not accept that they applied to the LLP and did not believe he had done anything wrong, he maintained his position that Mr Mackay had not shown any good reason why he should be replaced as administrator on the LLP's e-mail system. Mr Mackay, in fact, had no authority simply to instruct Mr Culligan to withdraw as administrator (under clause 17 of the Agreement, a matter such as this should have been brought to the ManCom for a decision).

971. Meanwhile, F&C IT set about finding IT security consultants who could produce a speedy report about the security risk to the F&C network posed by the dual-homed computers on the LLP network. One consultant approached produced a report which Ashley Smith regarded as too thin, so F&C IT approached another consultancy called Commissum Associates Limited ("Commissum") who, in mid September, were instructed to conduct a speedy review.

972. On 14 September 2009, Mr Barthelemy e-mailed Mr Mendez de Vigo to say that hedge funds were now doing well and the LLP was seeing demand firming up for the QFII project. He asked for a meeting to discuss a timetable to launch it. He did not suggest the Defendants would provide the kind of written materials in advance which Mr Mendez de Vigo had repeatedly asked for previously, or indeed any materials. On 25 September, Mr Mendez de Vigo replied to reiterate the need for the Defendants to provide such materials in advance of any meeting and to emphasise that they would be particularly important in relation to any QFII proposal because of the sensitivities involved in dealing with the Chinese regulatory authorities. Mr Mendez de Vigo's stance was reasonable and involved no breach of duty on the part of him or F&C. The Defendants never provided such materials.

973. On 16 September 2009, the Defendants attended a meeting with Mr Tilson and Mr Blomerius (acting as human resources manager for the LLP under the Service Agreement), to address Mr Tilson's complaints under the grievance procedure. After the meeting, Mr Culligan sent Mr Tilson an e-mail to respond to his complaints in light of the discussion at the meeting. On the "censorship" issue, he clarified that the requirement to clear in advance with the Defendants communications with third parties was limited to important communications and was not intended to apply to

day-to-day routine communications (i.e. the same clarification he had provided to Mr Ribeiro).

974. In relation to his access to Mr Tilson's e-mails, Mr Culligan said that documents on the LLP's e-mail system belonged to the LLP, that as CEO he had a duty to act in the interests of the LLP and that this could include examining documents. He explained his action had been motivated solely by a concern that Mr Ribeiro was seeking to instruct him directly without consulting him (Mr Culligan), even though he was the CEO of the LLP and Mr Tilson's direct manager; it was not related to any suspicion in respect of Mr Tilson's behaviour "of which there was none" (this was not candid: see para. [822] above; but since this was a document which would presumably go on Mr Tilson's personnel file and in light of Mr Tilson's concerns about his forthcoming appraisal, it was perhaps fair that Mr Culligan did not seek to set out the concerns he had about Mr Tilson's conduct). Mr Culligan wrote that it would not be consistent with his duty to the LLP to undertake to obtain Mr Tilson's prior consent before he could examine any LLP documents; however, to address Mr Tilson's concerns, he undertook that Mr Cole's agreement, as a member of the LLP Board, would be required in future before Mr Tilson's e-mails would be scrutinised, leaving it to Mr Cole's discretion whether Mr Tilson should be told. In my view, this was a reasonable proposal by Mr Culligan.

975. As regards Mr Tilson's concern about their ongoing working relationship and his appraisal, Mr Culligan confirmed that he had performed his duties exceptionally well in 2009 in difficult circumstances. Mr Culligan concluded that he understood from the meeting that Mr Tilson agreed that the points set out in the e-mail fully resolved his grievance (Mr Tilson had given that impression at the meeting).

976. Mr Tilson responded the next day to say that he believed Mr Culligan's e-mail addressed his concerns and that his objective was to have his grievance closed, but he needed to be assured that the remedial actions were acceptable to F&C before he could treat his grievance as resolved (presumably he had in mind, for example, that Mr Cole should accept the role proposed for him). He asked Mr Blomerius to confirm that F&C had no objections to the remedial steps proposed. Mr Culligan also e-mailed Mr Blomerius to ask him to confirm that the grievance had been resolved.

977. On 22 September 2009, Mr Blomerius replied to say, after referring to Mr Mackay's investigation, that F&C could not agree to what Mr Culligan had proposed regarding access to e-mails (even though he had not suggested at the grievance meeting that there was any problem with Mr Culligan's proposal), so Mr Tilson's grievance could not be regarded as closed. He wrote:

> "We will await Eric Mackay's report before determining how best to proceed unless, of course, you are willing to provide an unconditional undertaking not to access, unless he authorises you to do so, Brian's emails. …"

and he pressed Mr Culligan to "provide the unconditional assurances" Mr Tilson sought.

978. At trial, F&C were critical of Mr Culligan for failing to give the unconditional undertaking sought by Mr Blomerius, but I consider that his refusal to do so was

correct and the criticism is not justified. In my view, the requests by Mr Blomerius were not reasonable when set against the fair point Mr Culligan had made, that there might be circumstances in which his duty to the LLP required him to conduct an investigation of LLP e-mails without prior consent of the staff concerned (and, indeed, at the grievance meeting Mr Tilson himself had said, "I don't think I've the right to refuse and I've never claimed I do").

979. In his e-mail, Mr Blomerius stated that he might have to seek legal advice or consult with Mr Mackay, as Group Compliance Officer, and therefore declined Mr Culligan's request that he should consult him before passing information about the grievance outside the LLP. Mr Culligan called Mr Blomerius to discuss the e-mail and Mr Blomerius told him that he had referred matters to Mr Cole, who had taken the decision to refer to Norton Rose for advice on the drafting of the e-mail. Against the background of the dispute, Mr Culligan regarded this step as highly suspicious, and he e-mailed Mr Blomerius to protest at what they had done. Mr Culligan suggested that Mr Blomerius and Mr Cole had not acted in the interests of the LLP, but so as to keep Mr Tilson's grievance alive because it suited F&C, as an element of their tactics in the litigation. I do not think that this was the case, but against the background of the litigation (with the deep suspicion on both sides which that engendered) and the threat to Mr Culligan posed by Mr Mackay's investigation of his review of Mr Tilson's e-mails, I think it can fairly be said that it was perhaps unwise for Mr Cole to have involved Norton Rose as he did.

980. On 18 September 2009, Robert Jansson, a consultant from Commissum, attended a meeting with F&C IT personnel at their offices in Edinburgh to review such information as they could provide about the set-up of the LLP's IT network. He did not visit the LLP's office to review the network on site because it was felt that that would be too awkward to arrange, given the poor state of relations with the Defendants. Also, the Defendants were not informed that Commissum had been instructed to do a report on the security risks to the F&C network and I think F&C IT did not wish to alert Mr Pennington or the Defendants to what was being done.

981. Mr Jansson produced the final version of his report on 24 September 2009 ("the Commissum Report"). The report stated that it had been provided for the sole use of F&C plc. It stated that Commissum considered that the F&C plc and LLP network infrastructure was "exposed to issues we have assessed as high risk" and recommended that remedial action should be promptly taken to ensure that F&C plc data were protected. The focus of the report, therefore, appeared to be primarily the security risk to the F&C Group (no mention was made about ensuring the protection of LLP data, although the report also said that the risk was "from the perspective of the Group and LLP"). The recommendation section in the report included the following:

> "The dual-homed hosts on the F&C Asset Management Plc network pose a serious security risk to the company. In the current configuration, Commissum considers the F&C Asset Management Plc network exposed to issues considered as high risk taking into consideration the highly sensitive nature of the data including fund management, client, corporate and financial information. Hence it is recommended that remedial action (i.e. disconnecting the hosts from the F&C Asset Management

> Plc network) is promptly undertaken to ensure the confidentiality, integrity and availability of F&C Asset Management Plc data/information."

No distinct points were made about risk to the LLP's network or measures required to address security on that network. This reinforces the impression that the Commissum Report was focused on the security threat to the F&C network.

982. The IT experts who gave evidence were agreed that the Commissum Report was a poor piece of work (I should record that Mr Jansson was not called as a witness and therefore was not given the opportunity to defend what he had done). I do not consider that this was evident to the people within F&C who had to consider the report, in particular Mr Mackay. He was entitled to regard it as a competent report by a respectable IT consultancy. Moreover, Mr Pearce, the IT expert called by F&C, stated that he thought the basic thrust of the report that the dual-homed computers represented a serious security threat to the F&C network was correct. I agree with this (see paras. [582]-[598] above).

983. Meanwhile, Mr Mackay continued work on his investigation, which he now expanded to cover the setting up of the link between the F&C network and the LLP network via the dual-homed computers in the LLP office and the security risk posed to the F&C network. In particular, he reviewed LLP Board minutes and the Commissum Report. However, there were a number of gaps in the investigatory steps he took:

i) He did not attempt to ask detailed questions of Mr Culligan through his lawyers, as Mr Culligan had invited him to do;

ii) He did not inform the Defendants that his enquiry had been expanded beyond the terms of his letter of 8 July 2009 to Mr Pennington, so as now to cover the IT security threat to the F&C network posed by the link between that network and the LLP network. Therefore, Mr Pennington and the Defendants were not given fair notice of the scope and focus of the enquiry as it changed, nor any opportunity to comment on this;

iii) He did not attempt to interview or obtain comments from Mr Barthelemy;

iv) Although on notice from JGR's letters of 6 August 2009 (para. [955] above) that the Defendants maintained that the LLP Board members and ManCom members (in particular Mr Ribeiro) were aware of and acquiesced in the use of the new e-mail system, and that in that regard the Defendants relied in particular on Mr Tilson's e-mail to Mr Ribeiro of 19 January (para. [631] above), Mr Mackay did not read that e-mail;

v) Mr Mackay did not seek to interview or obtain comments from Mr Ribeiro, Mr Tilson, Mr Johns or Mr Cole in the light of that e-mail or the operations report of 13 January 2009 (para. [600] above). Indeed, he did not interview or seek to obtain comments from Mr Ribeiro, Mr Johns or Mr Cole at all. He did not, for example, ask them for their accounts of what happened at LLP Board and ManCom meetings, but relied instead on minutes which were often only in draft. Nor did he seek to obtain their comments on the Defendants' case, as set out in detail in JGR's letters of 6 August. He did not interview or seek any

comments at all from them, even though he was considering drafting a report which would conclude that they had been "deliberately misled" by the Defendants (language already being used by Mr Mackay in a draft of his report prepared in early September 2009). This is a very strong conclusion for a Compliance Officer to reach, and if that was the conclusion he came to it was one which Mr Mackay must have appreciated would be bound to be passed to the FSA and one which could have profound implications for the ability of the Defendants to continue to work in the financial markets. Fairness to them required that any investigation leading to such a conclusion should be meticulous and careful. I regret to say that Mr Mackay's investigation fell far short of that;

vi) Mr Mackay did interview Mr Tilson, but at a superficial level. Mr Tilson told him that he had informed Mr Ribeiro in January 2009 that Mr Culligan had introduced a new e-mail system and was using an on-going BCP test to assess it and to test the new LLP IT infrastructure to see if the LLP could operate completely independently of the F&C IT infrastructure, and suggested that he check the operations report of 13 January 2009. Mr Mackay did not follow up these points further with either Mr Ribeiro or Mr Tilson, even though they were of obvious potential relevance to the question of the extent to which Mr Ribeiro had or had not been misled about what was going on;

vii) Mr Mackay did not give Mr Culligan any or any adequate warning that (as set out in the draft report he was working on) he was treating the case he was considering as including a case that Mr Culligan:

> "1. Deliberately misled the Board, the Members Meeting and the Management Committee as to the IT arrangements within F&C Partners.
>
> 2. Refused to co-operate with the designated Compliance Officer of F&C Partners and the wider Group.
>
> 3. Continued [to refuse] to move the IT infrastructure back onto the F&C Group hosted infrastructure creating and continuing to run significant IT Security risk as confirmed by the independently produced [Commissum Report] …"

984. In this regard, it is significant that Mr Mackay was conducting an investigation to establish the facts of the case in order to report those facts to the LLP Board so that the Board could consider what to do in the light of them. There was never any expectation on Mr Mackay's or F&C's part that the LLP Board, or anyone else, would consider the detailed underlying evidence in order to arrive at their own conclusions on the facts.

985. In my opinion, Mr Mackay did not take his duty to be fair to the Defendants sufficiently seriously, in light of what his report was supposed to achieve. The roles of prosecutor and judge were mixed up in his approach. He should have been far more careful than he was to bear in mind that, for all practical purposes, he was being

asked to act as a judge in making findings of fact. Taking that into account, he should have sought to ensure that he maintained high standards of fairness and carefulness in conducting his investigation and writing his report on it. The ordinary obligation of fairness to be expected from a compliance officer in carrying out an investigation into alleged misconduct in a context such as this was reinforced by Rule SUP 15.6.1 of the FSA Handbook (para. [107] above), which required that information to be supplied to the FSA should be "factually accurate" (implying that there should be a proper investigation adequate to get at the truth of the facts to be reported) and, in relation to the judgments to be made by Mr Mackay and the LLP, "fairly and properly based after appropriate enquiries have been made by the firm".

986. Another aspect of the drafting of Mr Mackay's report of which the Defendants were critical was that he provided drafts of it to others (in particular, Mr Apfel and Mr Tonkin) to comment on. I was not impressed by this particular criticism. I do not think it was improper for Mr Mackay to seek such assistance (particularly technical, legal and regulatory assistance such as could be provided by Mr Apfel and Mr Tonkin) in reviewing and checking his draft, provided always that he ensured that if he decided to adopt any of their drafting proposals he first reviewed them carefully to satisfy himself, as the final signatory on the report, that they accurately stated his own views and findings. In my view, Mr Mackay only accepted their proposed changes where he honestly believed it was right to do so.

987. On 2 October 2009, F&C gave disclosure of their documents in the litigation. Included in their list were certain e-mails between Mr Tilson and Mr Ribeiro, of which the Defendants had previously been unaware, including in particular Mr Tilson's private e-mails to Mr Ribeiro of 23 and 27 January 2009 (paras. [678], [680] and [672] above). This material, once digested, increased the Defendants' sense that they were the victims of a conspiracy by F&C involving Mr Tilson as a sort of F&C spy in the heart of the LLP, acting in breach of his fiduciary duty to the LLP. JGR duly made these points in a letter dated 8 December 2009, stating that Mr Culligan, as CEO of the LLP, had asked Mr Barthelemy, as Senior Partner, to investigate the actions of Mr Ribeiro and Mr Tilson and report to the ManCom and Board. This investigation never got under way. It was overtaken by events, as the Defendants were excluded from the LLP.

988. On 8 October 2009, Mr Mackay e-mailed the Defendants his draft report (the "Mackay Draft Report") and invited them to comment on it in writing by 23 October (with the possibility of a discussion thereafter at a meeting), before he finalised it and provided it to the LLP's ManCom and Board. Mr Mackay wrote:

> "While some of the information in the draft report has come to my attention as a result of the dispute currently running between yourselves and F&C Investment Holdings Ltd, this matter is completely separate from the dispute and the draft has been prepared by me in my capacity as Compliance Officer for the F&C Group and F&C Partners LLP and also as Chairman of the F&C Group Information Security Committee. In order to ensure that the process relating to the finalisation, publication and distribution of the report is fair to all parties, Michael Blair QC has been engaged by F&C and it may be that

> he will be present at any meeting that you might wish to have, after you have sent me your response to the draft."

989. Mr Blair QC is Counsel with an expertise in FSA regulatory matters. He had been instructed by Mr Apfel and Norton Rose only on 6 October 2009, not to advise on the Mackay Draft Report itself, but in relation to dealing with any responses by the Defendants to it.

990. The Mackay Draft Report was the product of Mr Mackay's investigation and represented his views on the underlying facts. Although in his e-mail Mr Mackay invited the Defendants to comment on it, the Draft Report was not couched in terms which suggested that there was any realistic prospect that their comments could have any significant effect upon the conclusions already expressed in it. The Draft Report gave an appearance of great unfairness by Mr Mackay in dealing with the investigation, particularly having regard to the apparently final way in which it was expressed notwithstanding the deficiencies in the investigatory steps taken by Mr Mackay in reaching his conclusions (see para. [983] above).

991. The Defendants reasonably regarded his invitation to them to make comments on the Draft Report as hollow. The form of the Draft Report and the way in which it had been drawn up appeared to bear out their worst fears, that Mr Mackay's investigation was being used as a tactical device to put pressure on them in the litigation and dispute rather than a fair and impartial attempt to get at the truth.

992. Each page of the Mackay Draft Report was stamped "Final Draft", which did not give the impression that there was in reality any significant scope to make changes to it. One gets a flavour of the Draft Report from the following illustrative passages.

    i) Under the heading "Set up of externally hosted e-mail system and bespoke IT infrastructure", the Draft Report included the following:

    > "It is now clear that Anthony Culligan and Francois Barthelemy arranged to have set up an alternative, outsourced, e-mail solution without the knowledge or authorisation of any of the Board of F&C Partners, ARC or the F&C Partners Management Committee. As ARC had not had the opportunity to review the system in line with the Board's instruction, this gave rise to three concerns, firstly around the security of the new e-mail system, secondly around its ability to provide FSA compliant archiving functionality and thirdly, why the Board instruction was not followed. Therefore it became clear that a review would need to be performed, exploring both the security and archiving functionality of the system and also understanding what residual security concerns this may have raised. This would also ensure a full understanding of why the correct sign-off process was not followed and determining the significance of this from an FSA systems and control perspective."

A factual conclusion expressed in such uncompromising terms ("it is now clear that [etc]") seemed to rule out any significant prospect for the Defendants to be able to affect the conclusions which Mr Mackay already appeared to have drawn (it is worth noting here that Mr Culligan had in fact checked with Mr Mackay what the regulatory requirements in relation to archiving would be, and that the LLP's search for an external e-mail system had taken his advice in that regard into account: para. [539] above; Mr Culligan and Mr Pennington were capable of assessing the robustness of external e-mail service providers and did so effectively, in line with Rule SYSC 8.1.1 of the FSA Handbook, para. [101] above – Mr Mackay did not in fact identify any problems so far as that or the archiving function was concerned: see para. [943] above);

ii) A few pages further on, Mr Mackay wrote:

> "The creation of the bespoke e-mail solution and IT infrastructure is in breach of the F&C Partners Board agreed action on 24th October 2007 and also in breach of the F&C Group Information Security Policy and contrary to the communication sent by the Group Information Security Committee in November 2008 entitled 'Remote Access Dispensation for F&C Partners'. As part of the F&C Group, F&C Partners must abide by the Group Information Security Policies. …
>
> It is now clear, particularly given Anthony Culligan's repeated refusal to move back to the F&C hosted infrastructure, that there was never an intention to do this. Therefore, I would conclude that it is also clear that the (10 month duration and still running) Disaster Recovery test has been used as a smokescreen to allow Anthony Culligan to take control of the IT aspects of the partnership without Board knowledge or approval and without the Management Committee or the Board being able to give due consideration to the arrangements. In doing this, not only have Anthony Culligan and Francois Barthelemy been less than transparent with the Board of the Partnership, Members Meeting and Management Committee, they have deliberately misled the Board and Members meeting as to the IT arrangements within F&C Partners on a significant number of occasions."

Again in this passage, conclusions of the most serious kind were set out in uncompromising, non-provisional terms. The Defendants could with justification, on reading this, think that they would not get a fair, open-minded hearing from Mr Mackay if they did try to engage with him;

iii) Mr Mackay went on to refer to the Commissum Report, saying that Commissum had assessed the IT arrangements introduced within the LLP:

> "… as posing threats and creating vulnerabilities 'high risk' in nature, not just to F&C Partners but also to the wider F&C Group given the architecture in place."

In my view, this overstated Commissum's assessment which, on a full and fair reading of their report, was focused on risk to the F&C IT network rather than the LLP's network (para. [981] above). Moreover, the Defendants had not previously even been shown the report, let alone invited to comment on it. Mr Mackay's use and characterisation of the report left an impression that he was seeking to marshal the case for the prosecution rather than reach a dispassionate and fair overall assessment of the facts;

iv) In the next paragraph, he wrote:

> "Given the security risk that the amended IT arrangements introduced, not just to F&C Partners but to the entire F&C Group as whole, there is no question that Anthony Culligan's motives and decision making must be called into question. It is clear that the decisions made by Anthony Culligan and the lack of transparency displayed by both Anthony Culligan and Francois Barthelemy about the IT arrangements show a complete breakdown of trust between Anthony Culligan and Francois Barthelemy and the Partnership Board. These actions have also introduced a level of security risk to both the Partnership and the F&C Group which is unacceptable."

Again, the tone of the statements in this paragraph was final and non-provisional (see, in particular, the use of the phrase, "there is no question…"). Such language indicated that Mr Mackay had already made his mind up and appeared to rule out any genuine possibility of the Defendants being able to persuade Mr Mackay to take a different view;

v) The conclusion in this section of the Draft Report, on the following page, was in similarly non-provisional terms. For example, Mr Mackay wrote:

> "Anthony Culligan has argued that his actions have, in all cases, been undertaken by him 'in the best interests of the LLP'.
>
> I would conclude however that by creating security risk (the exact nature of which is clearly illustrated by the attached Commissum report) which threatens not only the LLP but also the F&C Group of which it is a part and undermines the systems and controls of the LLP from an FSA perspective is clearly, by any standard, not in the interests of the LLP. Therefore, it would appear that the only explanation can be that these decisions were made, not in the best interests of the LLP, or clients of the LLP, but in the context of the dispute between the partners. …"

The conduct of each of Mr Culligan and Mr Barthelemy that he set out to be referred to the Board and ManCom included the following:

> "Deliberately misled the Board, the Members Meeting and the Management Committee as to the IT arrangements within F&C Partners. …"

This did not leave the impression that there was any realistic prospect that Mr Mackay might come to a different view;

vi) Under the heading of the next section of the Mackay Draft Report, "Access to individuals' e-mail accounts within the new system", Mr Mackay stated:

> "There are no separate IT policies in place within the LLP that have been drawn to the attention of LLP staff. Moreover, Anthony Culligan has signed an annual declaration in 2007 and 2008 confirming his adherence to amongst other things the F&C Group's Code of Ethics and Information Security Policies…"

He had at no stage invited Mr Culligan's comments on the annual declarations which, on their true interpretation, did not involve an acceptance by him that F&C Group IT policies applied without modification to the LLP (see paras. [133]-[138] above). Mr Mackay appeared to give no weight to the Defendants' case, expressed to him at the LLP Board meeting on 27 July 2009, that the F&C Group IT policies did not apply to the LLP. I consider that Mr Mackay's bald assertion that the Group policies did apply to the LLP was wrong: see paras. [115]-[146] above;

vii) In his conclusion, Mr Mackay stated:

> "Anthony Culligan had neither authorisation nor articulated just cause to access Brian Tilson's e-mail system. …
>
> It has been established that the access of Brian Tilson's e-mails by Anthony Culligan described above is a clear breach of the F&C Group Information Security Policy as set out in Appendix 2 and a violation of Brian's right to privacy. …
>
> Given that Anthony Culligan's access of Brian Tilson's e-mails was unauthorised, this raises concerns regarding this action by Anthony Culligan in respect of the Computer Misuse Act 1990, Data Protection Act 1998 and associated codes of practice and FSA Approved Persons regime. …"

Again the language ("it has been established…", "given that…") gave the impression that Mr Mackay did not have a mind which was open to persuasion on these topics. His suggestion in this section that Mr Culligan should be reported to the FSA and that further consideration should be given to whether he had committed criminal offences could also reasonably be taken as an

indication that Mr Mackay had already satisfied himself that these very serious steps should be taken to the detriment of Mr Culligan.

993. On 13 October 2009, there was an LLP Board meeting held by means of a telephone conference. Mr Ribeiro stated that he considered the operation of the LLP's ManCom to be ineffective (and objected to accusations that he had pressurised Mr Sparks and Mr Tilson). He therefore said that he had asked Mr Johns to join the ManCom. Mr Culligan, in response, stated that the ManCom operated effectively except when Mr Ribeiro cancelled its meetings. Mr Culligan objected that Mr Johns would be part-time and did not have sufficient knowledge of the day-to-day business of the LLP or the wider hedge fund world; if there had to be another member of the ManCom, he would propose Mr Pennington. Mr Culligan stated that he regarded Mr Ribeiro's proposal as a manoeuvre to control the LLP for the purposes of carrying on the dispute. Mr Ribeiro and Mr Cole voted in favour of the proposal to appoint Mr Johns; the Defendants voted against it; Mr Ribeiro exercised his casting vote to carry the resolution, with Mr Johns' appointment to take effect on 13 November 2009. By the same votes, Mr Culligan's proposal to appoint Mr Pennington was defeated.

994. In my view, although Mr Ribeiro's comments that the ManCom was not operating effectively were somewhat overdone, he could fairly consider that there was considerable scope for argument about the LLP's business within the ManCom and that it would be in the interests of the LLP to have a ManCom in place which could take decisions with greater clarity and decisiveness. The LLP Board was entitled to appoint members to the ManCom (clause 17.3), and Mr Johns was properly appointed by a resolution of the Board.

995. Also on 13 October, Mr Culligan sent Mr Barthelemy the first draft of a report on the LLP's IT systems prepared by himself. This laid the foundation for a more detailed report which Mr Barthelemy, Mr Pennington and Mr Sparks eventually issued on 6 November 2009 ("the 6 November IT Report"). There was an issue at trial about who was responsible for drafting the 6 November IT Report, since Mr Culligan presented it as the work of others. In my view, the report as issued was primarily the work of Mr Pennington and Mr Sparks, with some changes made by Mr Barthelemy (who drew on Mr Culligan's early report only to a very limited extent).

996. On 14 October 2009, Mr Ribeiro e-mailed the Defendants to say that the Board of the Balanced Fund had resolved to inform Friends Provident that it would remain the sole investor in the fund as a result of the redemption by BCP Millennium Fortis, and also to instruct the Defendants to ensure that Ms Bomba should be involved in any communication with Friends Provident, as the person having responsibility for the relationship with that client. Ms Bomba made a request to the same effect.

997. Mr Culligan replied to Mr Ribeiro to ask to be informed of any agreement between Friends Provident and F&C covering Friends Provident's investment in the Balanced Fund, so that the Defendants could be fully informed about the LLP's position vis-à-vis Friends Provident. This gave rise to an exchange of e-mails between Mr Culligan (pressing for information) and Mr Ribeiro (who gave cagey answers, which left the impression that there was more that might be said on the subject than he was giving away). On 29 October, Mr Barthelemy e-mailed Mr Ribeiro to say that he and Mr Culligan were meeting Friends Provident, as a client of the LLP; Ms Bomba would not be allowed to attend; and Mr Ribeiro should not try to interfere with the meeting

since the Defendants believed that he was seeking to advance F&C's interests in the dispute and harm the LLP.

998. On 21 October 2009, Mr Barthelemy e-mailed Mr Mackay in response to his e-mail and Draft Report of 8 October, to say that he and Mr Culligan were taking advice and would not be in a position to decide how to respond to the Draft Report before 13 November. This point was reiterated in a further e-mail from Mr Barthelemy dated 6 November. On 9 November, Mr Mackay allowed an extension of time for a response until 13 November.

999. On 29 October 2009, Mr Ribeiro e-mailed Mr Barthelemy to protest at the exclusion of Ms Bomba from the Defendants' meeting with Friends Provident and to accuse the Defendants of pursuing their own personal interests. Nonetheless, the meeting went ahead without Ms Bomba. Mr Ribeiro then pressed the Defendants in a series of e-mails to provide a note of the meeting (a reasonable request, since F&C had to handle the overall relationship with Friends Provident and needed to know what was said). Mr Barthelemy, however, said only that he would report back at the next LLP ManCom meeting.

1000. On 6 November 2009, Mr Sparks e-mailed the 6 November IT Report to ManCom members to be tabled at the next ManCom meeting, scheduled for 10 November. The document set out the Defendants' defence, with the support of Mr Sparks and Mr Pennington, regarding the changes effected in relation to the LLP's e-mail services and IT infrastructure. In the Executive Summary, Mr Barthelemy, Mr Sparks and Mr Pennington stated:

> "We concluded that:
>
> - The solutions offered by F&C IT department were inadequate, unreliable and presented significant business risks that F&C IT department was not prepared to address.
> - The BCP test conducted since December 2008 has proved the new proposed infrastructure environment to be stable, robust, and presenting significantly better user satisfaction than the previous solution.
> - The LLP development environment is significantly more stable, reliable and cost effective than any other solution.
> - The large volume of data and e-mail traffic requires that the LLP continues with its own network.
>
> We recommend that:
>
> - The infrastructure and systems used under the BCP test be made permanent.
> - The LLP network be enhanced through the addition of a fixed line internet connection and all connections with the F&C network be removed."

1001. The report set out in considerable detail the background of the LLP's complaints about the IT services provided by F&C IT, including restrictions on use of e-mail as a result of limited e-mail inbox size, inadequacies in F&C's e-mail archiving services, the problems in arranging for effective remote access to the LLP's computers, certain security issues relating to use of F&C's IT network and the intrusive imposition by F&C IT of F&C Group IT policies and F&C Group decisions on the LLP (so as to withdraw IT services or restrict functionality of IT systems for the LLP without warning or consultation). The report gave a reasonable and fair account of these issues as seen from the perspective of the LLP (later on, in December 2009, Ashley Smith provided a report in which he gave a detailed commentary on the 6 November IT Report from the perspective of F&C IT).

1002. The 6 November IT Report then described what it called the "BCP test conducted since December 2008". It said:

> "Since December 2008, we have been running on an extended BCP status. The purpose of this test was to both ensure, as with every BCP test, that the LLP could operate its technical infrastructure independently of F&C. In particular, the five year service agreement with F&C finishes at the end of 2009 and, given the various difficulties described above it is by no means certain that it will be renewed. It was therefore essential to be sure that the LLP could operate for an extended period of time (or even indefinitely) independently of F&C."

The description of the IT arrangements which had been set up as a "BCP test" was inappropriate (see paras. [601]-[605] above), but apart from using that label the report gave a full and fair account of what the LLP had done in adjusting its IT arrangements.

1003. The report said that the new LLP network had been found to be reliable, but recommended the addition of a direct fixed line service to the LLP so that the dual-homed computers could be removed from the F&C network. As regards IT security, the report focused on the security of the LLP network, without distinct consideration of potential impact on the F&C network, as follows:

> "2.4.4 Security
>
> The F&C Partners network is protected both by physical security and by applying standard password conventions similar to those imposed by F&C IT.
>
> The internet connection allows no incoming requests, thus avoiding many common forms of network attack. All workstations run F&C standard e-mail scanning, antivirus and adware protection software."

(Para. 5.2.2 of the report also referred to the IT security of the LLP).

1004. The report reviewed three options open to the LLP and recommended retention of the existing IT infrastructure with the addition of fixed line internet access (in preference to switching back to the old arrangements run by F&C IT or running a separately configured network segment on the F&C IT system – which would still have left the LLP unable to determine its own internet access policy and hence at the mercy of F&C IT, which was thought to be unacceptable).

1005. On 9 November 2009, Mr Ribeiro cancelled the ManCom meeting due to take place the next day, and asked for it to be rescheduled after 13 November (when Mr Johns' appointment to the Committee would take effect) and also to allow for Mr Mackay to finalise his report and for F&C IT to respond to the 6 November IT Report, so that all the materials bearing on the LLP's IT arrangements could be considered by the ManCom at one time. This action again illustrated F&C's willingness to wait before intervening to sort out any threat to its IT network arising from the dual-homed computers on the LLP network. Notwithstanding this, I am satisfied that F&C IT was genuinely alarmed about this risk. At this stage, despite the risk to F&C, Mr Ribeiro was willing to prioritise the taking of measures to assist him in the handling of the ever more difficult internal relationships within the LLP.

1006. On 13 November 2009, Mr Culligan e-mailed Mr Mackay with his comments on the Mackay Draft Report (also endorsed by Mr Barthelemy). He objected that the report:

> "does not represent a balanced, complete or accurate assessment of the events you are purporting to investigate."

As set out above, I think that Mr Culligan was justified in saying this. Mr Culligan's e-mail went on to explain his position that F&C Group IT policies did not apply to the LLP; that the nature of "the long-term BCP test" had been reported to the LLP Board; that in setting up "the long-term BCP configuration" he was acting in the interests of the LLP and not as a step in the dispute; that the report from Commissum was of poor quality and inaccurate; that Mr Mackay's assessment that his review of Mr Tilson's e-mails was improper was unrealistic in circumstances where Mr Culligan had reason to believe the Corporate Member was instructing staff directly and in a manner which was damaging to the LLP; that disclosure in the proceedings showed that Mr Ribeiro and Mr Tilson, in breach of their fiduciary duties, "…were discussing ways of harming the LLP as early as January 2009 as part of a business strategy being followed by F&C" (a reference to Mr Tilson's e-mail of 23 January 2009: para. [631] above); and that Mr Mackay – as an employee of F&C, with whom the Defendants were in dispute – was subject to a conflict of interest and was not in a position to come to unbiased conclusions. Mr Culligan said that Mr Mackay should not distribute the Mackay Draft Report and that to do so would involve a breach of his personal fiduciary duty to the LLP and a breach of the Agreement on the part of Holdings. He concluded:

> "Given your conflicts and the obvious way in which you have constructed the report to support F&C's commercial interests, we have no confidence that our comments would be accurately or fairly reflected in your final draft. Therefore, should you issue the report, you should make clear that it is not with our input or comment and that we would make our response directly to the Board and the Management Committee in a

> separate report on the entire set of issues surrounding the need for the investigation of Brian Tilson's email and the dispute. For this, we will retain Counsel."

1007. In the circumstances which then existed, and having regard to the tone and language of the Mackay Draft Report and the way in which it had been compiled, I consider this was a reasonable and legitimate stance for the Defendants to adopt. Mr Mackay by his conduct had led them to believe that they would not get a fair hearing from him and that to try to engage with him by making representations would simply clothe what they regarded as a deeply unfair and biased investigation with a spurious air of legitimacy. In short, they proposed to treat the Mackay Draft Report as the case for the prosecution and to answer it in a separate report of their own, setting out their defence with the benefit of legal advice, for consideration by the LLP Board and ManCom.

1008. Mr Mackay replied by e-mail dated 20 November. He made it clear that he would finalise his report, making some amendments in light of the points made by Mr Culligan, and would issue his report to the LLP's ManCom and Board (and possibly also to F&C) since he regarded it as his duty, as Compliance Officer for the F&C Group, to do so. He repeated his offer to meet the Defendants to discuss the report before he issued it (they reasonably declined to take up that offer). He also stated that he would be taking advice from Mr Blair QC with a view to ensuring that the finalisation and distribution of his report would be fair and appropriate. I do not, however, consider there was anything Mr Blair QC could say that would put right the flaws in Mr Mackay's investigation which had already occurred by that stage.

1009. The position was a difficult one. Mr Mackay had effectively disabled himself from fulfilling the usual function of a Compliance Officer to try to be an impartial fact-finding investigator in a case of alleged misconduct. There may have been other possible ways forward but, in my view, the way forward proposed by the Defendants was the most obvious and sensible solution in the circumstances. It was certainly a reasonable position for the Defendants to adopt. If the Defendants were truly guilty of material wrongdoing, the unfortunate position into which Mr Mackay had got himself could not mean that the relevant governance structures within the LLP, and beyond them the FSA, were to be disabled from taking action in respect of it. But on the other hand, the Defendants needed to be afforded a fair opportunity to answer the case against them. That meant in practice, in the circumstances that had arisen, that the ManCom and the LLP Board would have to look at both sides of the argument and examine the underlying facts for themselves, before they decided how to proceed. (A little later, Mr Barthelemy took a rather different line from Mr Culligan, arguing that it should be the FSA which should be the fact-finding tribunal: para. [1029] below; however, I think that this ignored the importance of the LLP ManCom and Board retaining control of the LLP's affairs and making decisions how its business should be conducted).

1010. On 4 December 2009, Ashley Smith issued a report on behalf of F&C IT to respond to the 6 November IT Report ("the F&C IT Response"). In the Response, Ashley Smith complained that the LLP had not followed F&C Group IT policies as they should have done (I do not accept his suggestion that the LLP was subject to Group IT

policies: see paras. [115]-[146] above); he questioned the characterisation of the LLP's IT configuration as a BCP test (this was fair comment: see paras. [601]-[605] above); and he stated that the LLP had "seriously compromised the security of the F&C Group network" by linking the LLP network (with its internet connection) to the F&C network via the dual-homed computers (this also was a justified complaint: see paras. [582]-[598] above).

1011. At paragraph 5 of the Executive Summary of the F&C IT Response, Ashley Smith stated:

> "5. Had the LLP obtained necessary authorisation through its Management Committee and Board, Group IT would have been happy to engage with the LLP to design a new IT infrastructure which was wholly independent from the F&C Corporate network and customised it to suit the particular needs of the LLP, whilst ensuring that it meets with the F&C Group IT security and regulatory requirements. Group IT did exactly the same with F&C REIT. Unfortunately on the majority of occasions, staff within the LLP have never shared their plans for the development of IT infrastructure and instead have chosen to act unilaterally to put in place their own arrangements."

I have to say that it is by no means clear that F&C IT would have been open to such a proposal as Ashley Smith now suggested, had it been made. However, his comments that it was unfortunate that the LLP was not open in sharing its plans for the development of the LLP IT infrastructure with F&C IT were justified. (What should have happened was that the LLP, acting particularly by Mr Culligan and Mr Pennington, should have used the escalation provisions in the Service Agreement to withdraw fully from the IT service provided by F&C IT and then established a fully independent IT network for the LLP with its own fixed line access to the internet; the way the LLP proceeded, making changes which had an impact on the F&C IT network without consulting F&C IT, involved a breach of the terms of the Service Agreement: see paras. [591]-[598] above).

1012. Also on 4 December 2009, Mr Mackay issued his report in final form ("the Mackay Final Report"). He sent it to the members of ManCom, suggesting that it should be tabled for discussion at the next ManCom meeting. The report was finalised for issue in circumstances where a mediation between F&C and the Defendants had been scheduled for 9 December. This again made the Defendants very suspicious that Mr Mackay was acting in concert with F&C to put pressure on them for the purposes of the dispute. However, although a consciousness on the part of Mr Mackay that a mediation had been scheduled was probably a subsidiary factor in making him think it would be desirable to finalise his report at this stage, I find that the predominant reason was that the Defendants had made it clear that they would not provide further comments to him and he genuinely considered it to be his duty, as Compliance Officer, to finalise his report promptly so that the LLP's ManCom and Board could consider it (and, as necessary, steps could be taken by the LLP to inform the FSA about what he believed he had discovered).

1013. The Mackay Final Report closely followed the Mackay Draft Report with some relatively minor changes. In preparing his Final Report Mr Mackay had failed to carry out further interviews and again failed to look at Mr Tilson's e-mail to Mr Ribeiro of 19 January 2009, describing the LLP's IT arrangements. These failures undermined, for example, his statement in the Final Report:

> "It is now clear that Anthony Culligan and Francois Barthelemy arranged to have set up an alternative outsourced, e-mail solution without the knowledge or authorisation of any of the Board of F&C Partners, ARC or the F&C Partners Management Committee."

He had not obtained a copy of Mr Tilson's private e-mail to Mr Ribeiro dated 23 January 2009 (para. [631] above) to consider how it might affect the position, despite Mr Culligan's reference to it in his e-mail of 13 November (para. [1006] above).

1014. This is all the more surprising, because that e-mail was specifically identified as part of the material which was alluded to in instructions dated 18 November sent by Mr Apfel to Mr Blair QC on behalf of Mr Mackay, seeking advice concerning the drafting of Mr Mackay's e-mail reply to Mr Culligan of 20 November and the finalisation of Mr Mackay's report. In cross-examination, Mr Mackay accepted that he must have read these instructions, but he did not take the trouble to acquaint himself with that 23 January e-mail. This demonstrated a troubling lack of care on Mr Mackay's part in carrying out his responsibilities in relation to his investigation.

1015. In giving his evidence, Mr Mackay suggested that the e-mail of 23 January would have made little or no difference to the substance of his report. I do not think that this is likely. If Mr Mackay had by this stage still retained an open mind, I think it would have been quite possible that consideration of Mr Tilson's e-mail of 23 January could have affected his assessment whether there were sufficient objective grounds to justify Mr Culligan's decision to conduct a covert review of Mr Tilson's e-mails. The e-mail of 23 January showed that, in fact, Mr Tilson was acting in a manner disloyal to the Defendants and the LLP. It was at least capable of providing background information supporting Mr Culligan's case that Mr Tilson appeared to him, in early 2009, to be acting in a way which was out of the usual and out of character, so as to reinforce Mr Culligan's assessment, based on such behaviour, that he might be conspiring with Mr Ribeiro in some way which harmed the LLP.

1016. On any view, I think it was incumbent on Mr Mackay (who was supposed to be conducting a careful investigation with proper regard to the interests of the Defendants which were at stake) to review this e-mail in the course of his investigation, but he did not. When taxed with this in cross-examination, he had no good explanation why he did not.

1017. The weakness of his general approach to his investigation and reliance on draft minutes of LLP Board meetings which had not been finally agreed, rather than interviewing people who had attended the meetings (para. [983] above), also affected the text of his Final Report. For example, his description in the report of what Mr Culligan told the Board meeting on 27 July 2009 about the currency of the BCP test commenced in December 2008 (see para. [948] above) incorrectly gave the impression, on pages 9 and 10 of the Mackay Final Report, that Mr Culligan had said,

falsely, that there were two different tests. Mr Mackay's report also contained a material inaccuracy in relation to the e-mail sent by Mr Ribeiro on 16 February 2009 asking questions about the e-mail system (para. [683] above), saying it had been sent to Mr Pennington, Mr Culligan and Mr Barthelemy, whereas it had in fact been sent to Mr Tilson (not Mr Barthelemy) and Mr Tilson had already provided answers to it in his private e-mail to Mr Ribeiro of 19 January (para. [631] above).

1018. The conclusions in the Mackay Final Report were very much in line with those in the Mackay Draft Report. Under the heading "Set up of externally hosted e-mail system and bespoke IT infrastructure", Mr Mackay said that Mr Culligan had acted without the knowledge or approval of the LLP Board or ManCom in introducing a significant security risk to both the LLP and the wider F&C Group, so displaying a complete disregard for the governance arrangements in place within the LLP and the F&C Group and "a deeply concerning lack of judgment", also displayed by Mr Barthelemy in not drawing the arrangements to the attention of the ManCom or Board; Mr Culligan's actions could not have been undertaken in the best interests of the LLP so "the only explanation" was that they were undertaken "in the context of the increasing tensions between the partners in the latter part of 2008" (I find the reasoning here rather hard to follow – Mr Mackay appears to suggest that Mr Culligan acted for improper personal motives in changing the LLP's IT arrangements in the way he did, but it is unclear what those personal motives might have been); the positions of both Mr Culligan and Mr Barthelemy on the LLP should be reconsidered by the LLP ManCom and Board; and consideration should be given to whether notice should be given to the FSA to withdraw their Approved Person status.

1019. In this section, Mr Mackay added a new point, which had not been raised with the Defendants previously, to the effect that they had chosen not to use the escalation process under article 11 of the Service Agreement, which had been put in place "to ensure issues of this nature were resolved in the best interests of the LLP". Again, it was, in my view, unfair for Mr Mackay to introduce a new point of this nature into his Final Report without having given the Defendants any opportunity to address it.

1020. His recommendations included that Mr Culligan's right of access to the LLP e-mail system should be removed, the LLP ManCom and Board should consider disciplinary action against the Defendants and the LLP network should be dismantled immediately.

1021. Under the heading "Access to individuals' e-mail accounts within the new system", the Mackay Final Report again broadly followed the Mackay Draft Report, but with additional text (e.g. to discuss JGR's letter dated 6 August 2009 to Schulte Roth – although, despite the reference in that letter to Mr Tilson's e-mail to Mr Ribeiro of 19 January 2009, Mr Mackay still did not trouble to look at that e-mail).

1022. Mr Mackay concluded that F&C Group IT security policies applied to the LLP and that Mr Culligan did not have authority, by virtue of his role as Managing Partner of the LLP, to conduct a covert review of Mr Tilson's e-mails. Mr Mackay also said that the circumstances relied on by Mr Culligan, as described in the JGR letter, could not have justified his review of the e-mails under those Group policies. Mr Mackay stated that Mr Culligan's "failure to co-operate" with the Compliance Officer of the LLP was "an extremely serious issue".

1023. Mr Mackay recommended that Mr Culligan's access to the LLP's e-mail archives should be removed with immediate effect, that the ManCom and the LLP Board should consider disciplinary action against Mr Culligan and that a report should be made to the FSA regarding Mr Culligan's unauthorised accessing of Mr Tilson's e-mails, and that further consideration should be given as to possible criminal offences committed by Mr Culligan under the Computer Misuse Act 1990 and the Data Protection Act 1998.

1024. It will be clear from this judgment that I consider that the Mackay Final Report was prepared in an unsatisfactory and unfair way; that it contained material factual inaccuracies; and that I disagree with a substantial part of the analysis set out in it.

1025. On 8 December 2009, JGR wrote to Norton Rose referring to the private e-mails between Mr Tilson and Mr Ribeiro revealed in the course of disclosure; stating that, given the seriousness of the allegations made against the Defendants in the Mackay Final Report, they wished to write to the FSA (and other regulators) to explain their actions in conducting the review of Mr Tilson's e-mails; and asking for F&C's agreement, as required under CPR Part 31.22, that the documents obtained through disclosure could be released to the FSA and other regulators to assist the Defendants in explaining their actions. In my view, this was an entirely reasonable request for the Defendants to make.

1026. The response, however, was that:

   i) Norton Rose accused JGR of acting improperly in deploying the e-mails reviewed by Mr Culligan in the pleadings in the litigation (in my view, there was no substance in this complaint; Norton Rose did, in fact, refer it in early February 2010 as a formal complaint to the solicitors' regulatory authority and it was rejected); and

   ii) By letter from Norton Rose dated 16 December 2009, F&C refused to give permission for the Defendants to refer to documents disclosed by F&C in the course of the litigation when mounting a defence of their actions with the FSA and other regulators against the allegations made in the Mackay Final Report. F&C maintained that they would not facilitate what Norton Rose described as the "improper attempt" to divert attention from the conclusions in the Mackay Final Report (that is, F&C would not allow the Defendants to seek to defend themselves against the allegations against them in that report) by authorising disclosure of the requested documents. Norton Rose said that the Defendants could liaise with the FSA to try to persuade the FSA to ask for this material, and that F&C would "co-operate [with the FSA] in the usual way".

1027. In my judgment, this stance adopted by F&C was very unfair to the Defendants. Had F&C had any proper sense of an obligation to act fairly in relation to the Defendants when making allegations against them to the FSA, they would have agreed to allow the Defendants to seek to defend themselves by reference to the material revealed on disclosure. It was not satisfactory to leave the Defendants to try to interest the FSA in asking for material, as to which the FSA had no idea what it was or whether it might be of assistance or relevance.

1028. The mediation between the parties on 9 December was unsuccessful.

1029. On 10 December 2009 the ManCom met. Mr Mackay presented his Final Report. The Defendants registered their strong objections to his report and said they would produce their own report in answer. The Defendants said that they had asked F&C for approval to use the documents disclosed by F&C in the litigation in their own report, which they estimated would take one to two months to prepare with Counsel and which would also be provided to the FSA. Mr Barthelemy said that the subject of the Mackay Final Report was now a matter for the dispute so the Defendants would not agree to pursue it in the form of the ManCom. Mr Barthelemy said at a number of points that the correct forum to debate the issues in contention was now the FSA (see para. [1009] above). Culligan adopted a rather different approach, maintaining that the Defendants should have the opportunity of presenting their own considered case to the ManCom and Board.

1030. Mr Ribeiro said he would propose each of the recommendations in the Mackay Final Report. Mr Culligan objected that this was a sham process; Mr Mackay's report was one-sided and he would respond in due course with the benefit of legal advice. In my view, Mr Culligan's stance was justified. The best course would have been to try to arrive at some interim holding position, taking due account of the fact that Mr Mackay had raised issues as *de facto* prosecutor which potentially reflected seriously on the Defendants' positions but which, in fairness, called for them to be given the full opportunity which the Defendants were asking for to put in their response before any final decision was made. (I have in mind here, as a broad analogy, the sort of balance of convenience approach the courts seek to follow when interim relief is sought in advance of a trial at which the relevant facts will be examined and determined after a full hearing).

1031. However, this was not a proposal put forward by either side. In particular, Mr Ribeiro and Mr Johns were determined to press forward on the basis of the Mackay Final Report, treating it, in effect, as the final word so far as detailed fact-finding about the Defendants' actions was concerned. In my assessment, relations between the parties had reached such a low point at this meeting that Mr Ribeiro and Mr Johns were effectively incapable of standing back from the dispute with the Defendants and making a dispassionate assessment whether the Defendants were in fact being treated unfairly (as, in my view, they clearly were). Mr Ribeiro and Mr Johns were convinced of the rightness of Mr Mackay's and F&C's position; they thought that the Defendants were only trying to obfuscate and delay matters for improper reasons; and so they were determined to press on with action against the Defendants on the basis of the Mackay Final Report. Mr Tilson regarded the Defendants as enemies by this stage. Mr Sparks was a more junior employee caught in the crossfire of the dispute and not well placed to stand up to the others.

1032. Mr Ribeiro proposed that Mr Culligan's rights of access to the LLP's e-mail system should be removed. The Defendants declined to vote, registering their objections to the process. Mr Ribeiro, Mr Johns, Mr Tilson and Mr Sparks voted in favour of the resolution. Mr Ribeiro objected to Mr Culligan commissioning an investigation by Mr Barthelemy (para. [987] above) and there was a bitter argument, with Mr Culligan (with considerable justification) accusing F&C of suppressing evidence from the FSA (i.e. the private e-mails between Mr Tilson and Mr Ribeiro which had been revealed on disclosure).

1033. In line with Mr Mackay's recommendations, Mr Ribeiro proposed that the F&C Legal Department be asked to review the contractual arrangements with the LLP's third party e-mail service providers (cf F&C Group policy at paras. [130]-[131] above). In fact, there was no particular reason to think there was anything unusual or untoward in the arrangements, which were on the standard terms of well-known providers (and the absence of substance in this point was borne out by the fact that Mr Ribeiro had consistently put off consideration of IT matters even when they were included in the series of agendas for the Board – see paras. [632], [710], [769], [867] and [922] above). On the other hand, there was probably no harm in F&C's Legal Department reviewing the contracts. But by this stage the Defendants regarded the Head of F&C Legal, Mr Apfel, as deeply compromised and hostile to them because of his involvement in the dispute; so they regarded Mr Ribeiro's proposal as another step in F&C's conduct of the dispute. The debate between them was again heated and acrimonious. The resolution was carried by four votes, with the Defendants abstaining.

1034. Mr Ribeiro proposed that the LLP IT infrastructure and e-mail arrangements be unwound. He voted in favour, together with Mr Johns and Mr Tilson. Mr Sparks spoke up in relation to this. He referred to problems the LLP had suffered when its e-mail services were provided by F&C IT and stated that he did not have sufficient information to make a judgment on this proposal, so he abstained with the Defendants.

1035. Mr Ribeiro then proposed that the ManCom recommend to the LLP Board that Mr Barthelemy be stripped of his portfolio management responsibilities and that Mr Mackay be instructed to submit to the FSA a qualified withdrawal of Mr Barthelemy's Approved Person status (i.e. to terminate that status so that he could no longer fulfil portfolio management responsibilities in the LLP). Mr Sparks emphasised the seriousness of the matter, said the Committee should proceed with the utmost care and diligence and said that he was loath to take any steps along these lines. These were wise and fair words, but Mr Ribeiro was determined to press ahead. He tried to persuade Mr Sparks to support the resolution, but Mr Sparks abstained. Mr Ribeiro and Mr Johns voted in favour of the resolution, as did Mr Tilson, who stated that he thought it would be a failure of duty for him not to act upon the report of the Compliance Officer and (according to the minutes of the meeting, which he drafted) "implored" Mr Barthelemy to respond to this serious matter. Mr Barthelemy said he would respond to the FSA. Mr Culligan said he would respond in due course with the benefit of legal advice.

1036. Mr Ribeiro then proposed that the ManCom recommend to the LLP Board that Mr Culligan be stripped of his portfolio management and Managing Partner responsibilities and that Mr Mackay be instructed to submit to the FSA a qualified withdrawal of Mr Culligan's Approved Person status. This resolution was carried by the same votes as in relation to the proposal regarding Mr Barthelemy.

1037. Mr Ribeiro proposed that the ManCom recommend that the LLP Board censure Mr Culligan for his conduct in disregarding the F&C Group Information Security Policy and in failing to co-operate with the LLP's Compliance Officer. This again was carried by Mr Ribeiro, Mr Johns and Mr Tilson voting in favour, with Mr Sparks abstaining.

1038. Mr Ribeiro proposed that the ManCom recommend to the LLP Board that consideration should be given to whether to report Mr Culligan's conduct in accessing LLP staff e-mails to the police as a possible criminal offence under the Computer Misuse Act 1990 and the Data Protection Act 1998. Mr Culligan challenged both Mr Ribeiro and Mr Johns on this, as to whether they really thought the Mackay Final Report showed that he had committed criminal offences. Mr Johns replied that there were serious allegations that had to be put to the Board. Mr Ribeiro, Mr Johns and Mr Tilson voted in favour of the resolution; Mr Sparks abstained.

1039. Mr Ribeiro proposed that the reporting lines of Mr Sparks, Mr Tilson and Mr Pennington be changed from Mr Culligan to Mr Ribeiro with immediate effect, pending ratification by the LLP Board. Mr Tilson referred to his grievance complaint against Mr Culligan. Mr Ribeiro, Mr Johns and Mr Tilson voted in favour of the resolution; Mr Sparks again abstained.

1040. Mr Ribeiro then called for a prompt meeting of the LLP Board to be convened. The ManCom then invited Mr Pennington to join it and reviewed the 6 November IT Report and the F&C IT Response. Mr Ribeiro maintained that the change in the LLP's IT network had been done without the authority of the ManCom and LLP Board. Mr Culligan said he would respond to this accusation when he responded to the Mackay Final Report. At this point Mr Culligan had to leave the meeting, which continued to discuss other more routine business.

1041. On 11 December 2009, Mr Ribeiro called for an LLP Board meeting to be fixed for 15 December to consider the matters referred to it by the ManCom meeting. He circulated the Mackay Final Report, the 6 November IT Report and the F&C IT Response for consideration at that meeting.

1042. On 14 December 2009, Mr Culligan e-mailed Mr Ribeiro, copied to the LLP Board members, to protest that Mr Mackay had a conflict of interest in the circumstances of the dispute in carrying out his investigation and maintaining that it was reasonable for him and Mr Barthelemy not to participate in the process but to reserve their right to make full representations to the LLP. He protested that Mr Ribeiro had not allowed the Defendants to make such representations to the ManCom and in light of that presumed "he would wish matters fully considered at the next Board meeting". Therefore, Mr Culligan said, the Defendants would prepare their response with the aid of Counsel and circulate that to all LLP Board members prior to the next meeting. However, he wrote:

> "…before taking advice on these matters, we will need F&C's permission to use documents disclosed in the litigation. I trust that will be forthcoming so as not to delay matters unnecessarily. As soon as we have received this permission, we will provide you with a date by which we expect to be ready to make a response and when, after having made that response when we will be available for a Board Meeting.
>
> In the meantime, should the business of the LLP require any immediate attention we are both ready and willing to consider any matter in writing or by e-mail and to vote on any such matter in accordance with the terms of the LLP agreement."

1043. The stance adopted by the Defendants was, in my view, justified and correct in the circumstances. Their request for permission to use the disclosure documents for the purposes of preparing their response was reasonable (they required such permission, by virtue of the operation of the CPR). Their proposals regarding how to deal with matters regarding the operation of the business were fair and reasonable.

1044. On 15 December 2009, Mr Ribeiro, Mr Cole and Mr Johns, in their capacity as members of the LLP Board, held a meeting by telephone in the absence of the Defendants. Mr Tonkin advised that since the Defendants would not attend, the meeting was not quorate and could not proceed. Mr Ribeiro said that a further ManCom meeting would therefore be convened to consider the recommendations in the Mackay Final Report.

1045. Also on 15 December, Mr Ribeiro replied to Mr Culligan to defend Mr Mackay's role and investigation; to say that the Defendants had been afforded ample opportunities to respond to the matters in the investigation; and to state that he considered there was no reason to afford the Defendants further time to prepare a written response with their Counsel. He said that Mr Mackay, in consultation with Mr Blair QC, was confident that due process had been sufficiently followed to date (as appears from this judgment, I do not agree with this view).

1046. Since the Defendants did not attend the Board meeting, so leaving it inquorate, Mr Ribeiro proposed to call a further ManCom meeting to consider and approve in final form the recommendations considered on 10 December. The ManCom, including Mr Culligan (but not Mr Barthelemy, who instead gave Mr Culligan authorisation as his proxy), assembled again on 16 December 2009 with Mr Mackay in attendance. Mr Ribeiro referred to the failed Board meeting and said that in the circumstances it was appropriate for the ManCom to decide on the course to take.

1047. Of the matters left outstanding from the ManCom meeting on 10 December, Mr Ribeiro proposed that the LLP IT network be dismantled and F&C Group systems be re-introduced (the resolution was approved by four votes to two, with the Defendants voting against). He proposed that the Defendants be stripped of their responsibilities within the LLP and that Mr Mackay be instructed to submit to the FSA a qualified withdrawal for each of them of their FSA Approved Person status (the resolution was carried by three votes to two, against Mr Culligan's protests, with Mr Sparks abstaining).

1048. Mr Culligan again said that he and Mr Barthelemy wished to submit a response with assistance from Counsel and needed the release of disclosure documents to do that, after which preparation of a response would take three to four weeks. Mr Ribeiro said that, given the seriousness of the issues, there could be no further delays. Mr Mackay gave advice that there were no hard and fast rules about when the FSA should be approached. Mr Culligan appealed for him and Mr Barthelemy to be treated fairly. Mr Mackay and Mr Culligan argued about whether they had been so treated. Mr Mackay said he had an obligation as Compliance Officer to finalise the report and there was a regulatory hazard for the LLP involved in extending the period before he took matters to the FSA. Mr Culligan protested that the LLP should not go to the FSA with only one side of the story.

1049. In my view, whilst there would be a need for the LLP to inform the FSA if it came to the conclusion that the Defendants had acted as alleged by Mr Mackay, there would also be a regulatory expectation that matters of the kind Mr Mackay was investigating would only be reported to the FSA after a careful and fair fact-finding procedure within the firm in question. Rule SUP 15.6.1 in the FSA Handbook (para. [107] above) requires a firm to take reasonable steps to ensure that information which it gives to the FSA is factually accurate and "fairly and properly based after appropriate enquiries have been made by the firm". Mr Mackay, as Compliance Officer, did not think it incumbent on him or the LLP to disclose their suspicions or the Mackay Draft Report to the FSA, presumably on the basis that his investigation was still continuing at that stage. I therefore think that Mr Culligan's proposal, based on the fact that he maintained (correctly) that there had not been a fair and proper investigation, was fair and reasonable in the circumstances. Three to four weeks' delay for the Defendants to have a proper opportunity to prepare their defence would not amount to a substantial period of additional time or add significantly to the regulatory risk to which the LLP was subject.

1050. Mr Ribeiro proposed that Mr Culligan be censured for his conduct (the resolution was carried by four votes to two). Mr Ribeiro proposed, over Mr Culligan's strenuous objections, that Mr Mackay should investigate whether Mr Culligan's conduct in accessing staff e-mails should be reported to the police. Mr Culligan said that the lack of merit in the suggestion that he had committed a criminal offence should be exposed by Mr Mackay proceeding speedily to take such advice. Mr Ribeiro said that Mr Culligan's request to Mr Barthelemy to investigate the conduct of Mr Ribeiro and Mr Tilson was without authority and should be ignored – the correct process was to refer such a matter to the Compliance Officer. Mr Ribeiro's proposal was carried by three votes to two, with Mr Sparks abstaining.

1051. Mr Ribeiro said that Mr Mackay should obtain CF3 Approved Person status for him as (now) Executive Chairman of the LLP (this proposal was carried by four votes to two). Mr Ribeiro proposed that the change in reporting lines be approved (this was carried by four votes to two). Mr Ribeiro proposed that the Defendants should no longer be able to participate as members of the Investment Committee and Risk Committee (this was carried by four votes to two). Mr Ribeiro proposed that third parties dealing with the LLP should be informed that there had been these changes in management (this also was carried by four votes to two).

1052. On 16 December 2009, Mr Culligan e-mailed Mr Ribeiro, copied to the LLP Board and ManCom members, Mr Mackay and Mr Tonkin, in response to Mr Ribeiro's e-mail of 15 December. He reiterated that the Defendants wished to respond to the Mackay Final Report, but that to do that fully they needed F&C's permission to use the disclosed documents. He said that they should be allowed to make their response before any further action was taken.

1053. Mr Ribeiro replied the same day to defend the role and conduct of Mr Mackay and to indicate that there was no change in his position and that he intended to proceed to call a further ManCom meeting that evening, at which the reassignment of roles within the LLP would be voted on. Mr Culligan responded to protest at the refusal to give permission for use of the disclosed documents in responding to the Mackay Final Report to the ManCom, LLP Board and regulators and to accuse Mr Ribeiro of trying to suppress material relevant to show his own wrongdoing. Mr Ribeiro's riposte was

to say that Mr Culligan's concerns about his conduct should be raised with Mr Mackay, as the LLP's Compliance Officer, and to say that if the FSA asked for documents, F&C would co-operate with them (an unsatisfactory position for F&C to adopt: see paras. [1025]-[1027] above).

1054. On 17 December 2009, Mr Mackay lodged a notice with the FSA setting out the background to the removal of the Defendants' management responsibilities within the LLP on the basis of the Mackay Final Report (which he asserted "was fair to all parties") and to require the FSA to remove their names from the list of those with FSA approved status. On 18 December, he e-mailed Mr Culligan with this information.

1055. In the light of this, the Defendants wrote to Ms Margaret Cole, Head of Enforcement at the FSA, to put their side of the story; to refer to covert diversion of reporting lines within the LLP by F&C; and to complain about the unfairness of Mr Mackay's investigation and the refusal by F&C to allow the Defendants to use the disclosed material to defend themselves. They pointed out that the issues relating to their own removal from the business were to be the subject of a trial.

1056. The effect of the FSA receiving allegations and counter-allegations from the parties, against a background of ongoing litigation, was that the FSA took the view that this was a matter for the parties to settle or have resolved in the courts and that the FSA would not become involved to seek to resolve the dispute.

1057. On 21 December 2009, Mr Mackay arranged for the exclusion of the Defendants from the LLP's offices. They were only to be admitted to attend meetings. Mr Culligan responded to dispute Mr Mackay's and the ManCom's authority to do that (in particular, Mr Culligan disputed the validity of Mr Johns' appointment as a member of the ManCom, claiming that such an appointment required unanimity by virtue of clause 18.4 of the Agreement – an erroneous contention). Mr Ribeiro replied to assert Mr Mackay's authority as Compliance Officer for the LLP and F&C Group to exclude the Defendants from the LLP's offices.

1058. On 24 December 2009, the Defendants served their Third Put Option Notices under paragraph 1.7 of the Fourth Schedule. These Notices were stated to be served without prejudice to the Defendants' claims that the First and Second Put Option Notices were valid. The Third Put Option Notices referred to the notification sent by the LLP to the FSA together with the Mackay Final Report to remove the Defendants' FSA approved status. The Notices claimed that the Mackay Final Report had been procured and used by Holdings and its agents as a means of placing unfair pressure on the Defendants to settle the legal proceedings. The Notices continued (quoting from the one served by Mr Barthelemy):

> "the report fails to disclose the longstanding disputes between F&C and Mr Culligan and me concerning your attempts to close down the LLP and divert its business elsewhere in breach of fiduciary duty and the terms of the Agreement and by ignoring the context is a partial and incomplete account of the disputes concerning the setting up of an independent e-mail and server system for the LLP and our conduct of an investigation

> into the e-mail of LLP employees without seeking the prior authorisation of F&C."

1059. In the Notices, the Defendants also complained that they had been removed from the management of the LLP and barred from its offices and that they had been denied any proper opportunity to comment on the Mackay Final Report before it was submitted to the FSA. They maintained that these steps involved breaches of clause 13.6 of the Agreement (Holdings' obligation of utmost good faith to the LLP) and clause 15 of the Agreement (Holdings' obligation not to disparage the Defendants). This was the case in relation to the Third Put Option Notice which the Defendants maintained at trial.

The validity of the Third Put Option Notices

1060. In my judgment, although there is force in the Defendants' complaints that the Mackay Final Report contained a partial and incomplete account and that they had been denied a proper opportunity to comment on it before it was referred to the FSA, the matters relied upon in the Third Put Option Notice did not involve any breach by Holdings of its obligations under the Agreement. Even if those matters did involve a breach of the Agreement, that breach did not have the character of "gross negligence" or "gross misconduct" as required by paragraph 1.7 of the Fourth Schedule.

1061. I reject the suggestion in the Third Put Option Notices that the Mackay Final Report was procured by Holdings and its agents to put the Defendants under unfair pressure to settle the legal proceedings. The decision that the LLP should send a qualified withdrawal form and the Mackay Final Report to the FSA was a decision taken by ManCom, by means of votes by its members how to proceed. Those votes were not procured by Holdings, but reflected the judgment of ManCom members voting in their capacity as such and for reasons which they genuinely believed to be in accordance with the interests and responsibilities of the LLP.

1062. Although I consider that there were serious defects in Mr Mackay's investigation and report, I find that Mr Ribeiro, Mr Johns, Mr Tilson and Mr Sparks all genuinely believed that the investigation and report were proper. The Mackay Final Report appeared to raise serious matters affecting the ability of the Defendants to continue in their executive management roles at the LLP and whether they could be regarded as fit and proper persons for the purposes of FSA approval. Although Mr Mackay left the decision what to do to the ManCom, it was clear to the members of ManCom that it was his view as Compliance Officer that the report should be sent to the FSA. In the light of all this, the members of the ManCom who voted to pass the report to the FSA did so believing that they had a personal responsibility to make sure the the LLP behaved properly in relation to the FSA, in accordance with its general regulatory obligation to be open with the FSA and to bring to the FSA's attention matters potentially affecting the regulatory standing of managers of a regulated firm (see, e.g., the obligations in the FSA Handbook set out at paras. [94] (Principle 11), [105] and [106] above). In taking that decision, they did not act as agents of Holdings, and in any event did not act in breach of any obligation of utmost good faith to the LLP.

1063. As to whether there was a breach of clause 15.2 of the Agreement (see para. [48] above) on the part of Holdings arising from the LLP passing the Mackay Final Report to the FSA, I think that the LLP is probably to be regarded as an "entity in the F&C Group" for the purposes of that provision, i.e. as an entity on behalf of which Holdings had assumed the obligation set out in it. However, clause 15.2 cannot reasonably be construed as preventing communication on important matters with the LLP's regulator, the FSA. In my view, on proper construction of clause 15.2, communication by the LLP with the FSA on issues which the LLP (acting by its ManCom, and on the advice of its Compliance Officer) believes in good faith it should draw to the attention of the LLP does not qualify as "disparagement" within the sense of that term as used in clause 15.2. Therefore, I do not consider that any breach of clause 15.2 occurred when the ManCom caused the LLP to supply the Mackay Final Report and qualified withdrawal notices to the FSA.

1064. Even if I were wrong about that, any breach of the Agreement in that regard would have been technical in character so far as Holdings was concerned. Any such breach would have arisen from action taken in good faith and for what could reasonably be regarded by ManCom members as good reasons, seeking to do what they genuinely believed it was the responsibility of the LLP to do under the regulatory regime and hence genuinely believing it was in the best interests of the LLP to act as it did. In these circumstances, Holdings could not be said to have been in breach of the Agreement "in a manner that amounts to gross negligence or gross misconduct" (paragraph 1.7 of the Fourth Schedule).

1065. Therefore, if (contrary to my judgment above) the Defendants' counter-claim in the Part 7 proceedings had turned upon the validity of the Third Put Option Notices, it would have been unsuccessful. Their claim in the Petition, based on section 994, has a wider basis, however. I address that in paras. [1094]ff below.

Events in 2010

1066. On 12 January 2010, a further meeting of the ManCom took place. The Defendants attended (under the Agreement they could not be removed as members of the ManCom without their agreement: clause 18.4.7). The ManCom reviewed the various steps against the Defendants which had been resolved upon at previous meetings. Mr Mackay reported that he proposed to instruct Counsel to advise whether Mr Culligan's conduct in accessing staff e-mails constituted a criminal offence and should be reported to the police. There was argument about steps being taken to manage the business in the absence of the Defendants.

1067. On 15 January 2010, Mr Mackay sent instructions to Mr Terence Bergin, Counsel with relevant expertise in criminal law matters, to advise whether Mr Culligan had committed offences under section 1 of the Computer Misuse Act 1990 or section 55 of the Data Protection Act 1998. The instructions referred to Mr Mackay's investigation and stated:

> "This investigation determined that a new bespoke e-mail solution and IT infrastructure was set up without appropriate authorisation being obtained by the Individual Partners. It also concluded that [Mr Culligan] had neither authorisation nor just cause to access the e-mail accounts of LLP staff members.

> Both these actions were in breach of relevant F&C Group policies applicable to the LLP."

The Mackay Final Report and certain other documents, including JGR's letter of 6 August 2009 to Schulte Roth, were enclosed with the instructions.

1068. On 21 January 2010, Mr Bergin advised Mr Mackay and Mr Apfel in conference. He advised that Mr Culligan had committed an offence under section 1 of the Computer Misuse Act 1990. The advice reflected the instructions he had been given by Mr Mackay to the effect that F&C Group IT policies applied to the LLP and that Mr Culligan was not authorised under them to conduct his review of staff e-mails. Mr Bergin also felt that Mr Culligan may technically have committed an offence under section 55 of the Data Protection Act 1998, though he was less definitive about that. He did not think the material provided to him indicated that Mr Barthelemy had committed an offence.

1069. After the conference, Mr Mackay sent Mr Bergin copies of the F&C Group policy on monitoring (para. [126(iv)] above). In an e-mail exchange, Mr Bergin pointed out that this permitted covert monitoring of staff e-mails "with the authorisation of a member of the Management Committee or Board", which was not what he had been informed at the conference and which might affect his opinion. Mr Mackay told him that these were references to the Management Committee (now Execom) of the F&C Group and to the Board of F&C plc.

1070. On 26 January 2010, Mr Bergin provided a full written opinion ("the Bergin Opinion"). He concluded that the conduct of Mr Culligan in covertly reviewing staff e-mails, as set out in JGR's letter of 6 August 2009 to Schulte Roth, constituted an offence under section 1 of the Computer Misuse Act 1990. In that regard, he referred to the Employment Practices Code issued by the Information Commissioner under the Data Protection Act 1998, which stated that covert monitoring of employees' e-mails would rarely be justified and should normally be authorised by senior management, who "should satisfy themselves that there are grounds for suspecting criminal activity or equivalent malpractice and that notifying the individuals about the monitoring would prejudice its prevention or detection". In Mr Bergin's opinion, Mr Culligan's suspicions "fell far below the sorts of suspicion which would have justified covert monitoring" (I disagree: see paras. [126]-[128] and [821]-[825] above); his conduct was not a focused and proportionate response to his suspicions (I disagree: see paras. [128] and [821]-[825] above); and the F&C Group IT policies applied to the LLP (I disagree: see paras. [115]-[146] above).

1071. As regards section 55 of the Data Protection Act 1998, Mr Bergin was instructed that the registered data controller of the LLP was F&C Management Limited, operating at group level. Since Mr Culligan had not attempted to get the consent of F&C Management Limited as the data controller, Mr Bergin concluded that Mr Culligan had committed a breach of that provision so far as concerned his deliberate obtaining of access to personal data. According to Mr Bergin, Mr Culligan could not rely on any defence under section 55(2)(b) or (c), since he had no authority to conduct the review and he could not have thought that the Group Management Committee (to which, Mr Bergin noted, the Group IT policy made reference) or the data controller (who, he was instructed, was F&C Management Limited) would have permitted such monitoring of staff e-mails had Mr Culligan referred the matter to them.

1072. I do not agree with this aspect of Mr Bergin's opinion either. In my view, the LLP (not F&C Management Limited) was in law the data controller in relation to the e-mails held in the LLP's archiving system, and Mr Culligan was authorised by it or could reasonably believe he was authorised by it to conduct his investigation: see paras. [821]-[825] above.

1073. Mr Bergin concluded that there was insufficient information available to him to allow him to conclude that Mr Barthelemy had committed any criminal offence.

1074. The Bergin Opinion was provided to the members of the ManCom. Mr Culligan e-mailed Mr Ribeiro to say that he would be taking advice in respect of the opinion sought from Mr Bergin and intended to reply to it. He wrote:

> "You may wish to see that response before you decide upon any further action."

1075. On 3 February 2010, Jonathan Ball of Norton Rose (who was not part of the Norton Rose litigation team) advised Mr Mackay and the LLP that there was no legal obligation to report matters canvassed in the Bergin Opinion to the police; under the Agreement this was a matter for decision by the ManCom; and the ManCom should take a decision based on what it saw as being in the best interests of the LLP.

1076. On 8 February 2010, Mr Tonkin circulated the agenda for an LLP Board meeting to be held on 11 February, containing one item: "Conduct of Anthony Culligan and Francois Barthelemy (see attached paper)". The paper referred to was prepared on behalf of Holdings and was unsigned. None of F&C's witnesses identified who drafted it. At paragraph 5 the paper said:

> "Having reviewed the Report of Eric Mackay and the Opinion of Terry Bergin, the Board is asked to consider whether in the circumstances Anthony Culligan and Francois Barthelemy should each be served with a Notice of Removal under the terms of the Partnership Agreement dated 3 December 2004 ("the Partnership Agreement") on the basis that:
>
> (a) Contrary to clause 26.1.2 of the Partnership Agreement, both Anthony Culligan and Francois Barthelemy have seriously prejudiced the interests of the Business of F&C Partners LLP by reason of the conduct set out in the Report of Eric Mackay and the Opinion of Terry Bergin, and by their failure (by omission) to prevent any of the relevant matters there set out;
>
> (b) Contrary to clauses 26.1.4 and 26.1.9 of the Partnership Agreement, both Anthony Culligan (in respect of the matters referred to in paragraphs 4(a) to (c) above and paragraph 5(e) below) and Francois Barthelemy (in respect of the matters referred to in paragraphs 4(a) to (c) above) have failed to comply with the Statement of Principle 1 (copy attached) of Principle and Codes of Practice for Approved Persons of the

> Financial Services Authority, being an appropriate regulatory organisation to whose requirements F&C Partners LLP is for the time being subject;
>
> (c) Contrary to clause 26.1.5 of the Partnership Agreement, both Anthony Culligan and Francois Barthelemy have ceased to be approved by the Financial Services Authority as persons who can undertake any controlled function;
>
> (d) Contrary to clause 26.1.7 of the Partnership Agreement, Anthony Culligan has committed serious breaches of F&C Partners LLP's compliance and procedures manual and policies as identified in the attached Report of Eric Mackay;
>
> (e) In the Opinion of independent Counsel, Anthony Culligan's conduct falls within the definition of the criminal offences set out in Section 1 of the Computer Misuse Act 1990 and Section 55 of the Data Protection Act 1998. This conduct falls within clause 26.1.10, being acts on the part of Anthony Culligan in contravention of the any [sic] law relating to the conduct by F&C Partners LLP of its Business which has a materially adverse or prejudicial impact on the affairs or prospects of the Business or the reputation of F&C Partners LLP."

1077. In the face of this proposal that the LLP Board meeting should consider action against the Defendants to remove them as members of the LLP on the basis of the Mackay Final Report and the Bergin Opinion (both of which the Defendants reasonably regarded as flawed documents), the Defendants declined to attend the meeting, thereby preventing it from being quorate (clause 18.3 of the Agreement) and disabling it from taking the proposed actions against them on the basis of those materials.

1078. In my judgment, in the particular circumstances which had arisen, this was a legitimate action of self-defence by the Defendants. In particular, they were concerned (as pointed out in a letter dated 10 February 2010 from JGR) that by proposing such actions against them, Holdings was attempting to deprive the Defendants of their standing in the unfair prejudice proceedings (since, on the face of the legislation, to be able to proceed with such proceedings the Defendants would have to be members of the LLP).

1079. At about this time, the Defendants became concerned that F&C had forwarded the Bergin Opinion to the FSA. In fact they had not, but because of this concern on 22 February 2010 the Defendants again wrote to the FSA as a defensive measure, referring to the Bergin Opinion, saying it was denied, referring to the legal proceedings which would be likely to determine a great deal of the substance of F&C's complaints about the Defendants, and stating that they remained available to discuss matters with the FSA if required. The FSA did not find it necessary to ask for such a discussion or take any action pending the outcome of these proceedings.

1080. On 19 February 2010 Mr Tonkin circulated papers for an LLP Board meeting scheduled for 24 February. This time the agenda included eleven points dealing with

routine business matters and only at item 12 appeared, "Conduct of Messrs Barthelemy and Culligan (papers previously circulated)".

1081. On 23 February 2010, there was a LLP ManCom meeting which both the Defendants and Mr Mackay attended. Mr Ribeiro introduced the Bergin Opinion. Mr Mackay had waived privilege in relation to it, so Mr Culligan proceeded to ask him questions about how the instructions to Mr Bergin had been compiled. Mr Ribeiro stopped this process, told Mr Culligan that he could pursue his questioning of Mr Mackay outside the ManCom meeting and said that it was proposed that the LLP Board meeting was the right place to ask questions.

1082. There was then an acrimonious discussion of general business and management issues affecting the LLP. Mr Culligan questioned what he said was a lack of marketing services being provided to the LLP (F&C's actions were, in fact, within the scope of the discretion reserved to it under clause 13.7 of the Agreement; and Mr Ribeiro made reference to the problems of marketing LLP products against the background of the dispute – see para. [814] above) and about a lack of effort to replace the Defendants in the day-to-day management of the business, where neither Mr Ribeiro nor Mr Johns were devoting themselves full time to the business. However, in my view, the management resources were appropriate given the state of the LLP's business against the background of the dispute at that stage, and where the LLP was effectively marking time until the dispute was resolved. It was not incumbent on F&C, the LLP or F&C's representatives in the LLP to go to the considerable expense of trying to replace the Defendants with full-time managers at this point.

1083. The Defendants contend that the behaviour of Mr Ribeiro and Mr Johns in responding to Mr Culligan's questions at the meeting showed a willingness or desire on their part and by F&C to see the business of the LLP decline and close. I reject that contention. I consider that Mr Ribeiro's and Mr Johns' decisions and reactions were genuinely motivated by what they believed to be in the best interests of the LLP at that stage in the highly unusual circumstances in which it found itself. F&C has, in fact, continued to inject capital into the LLP as necessary and has not sought to close it.

1084. On 24 February 2010, Mr Mackay was not available to meet Mr Culligan before the LLP Board meeting, but said he had asked Mr Ribeiro to allow some time for Mr Culligan to ask him questions at the meeting. At the Board meeting that day, Mr Ribeiro, without discussion, indicated that item 12 (concerning action to be taken against the Defendants) would be taken as the first item of business. The Defendants objected, saying they would prefer to deal with the ordinary business items in the order indicated on the agenda. However, Mr Ribeiro insisted on taking item 12 first and summoned Mr Mackay into the meeting.

1085. Mr Culligan asked if he could resume his questioning of Mr Mackay about the process of instructing Mr Bergin and Mr Ribeiro allowed him to do so. Mr Culligan asked Mr Mackay about the involvement of Mr Apfel and Mr Ball at Norton Rose. Mr Culligan criticised Mr Mackay for instructing Norton Rose on this matter and proceeded in effect to cross-examine Mr Mackay about the instructions to, and advice given by, Mr Bergin. Mr Ribeiro intervened to stop the cross-examination, to which Mr Culligan replied (reasonably, in my view) that these were questions of substance because Mr Bergin's opinion depended on the instructions he had been given and Mr Bergin had been asked to assume certain facts (it should be noted that Mr Culligan

had been blocked from other avenues of asking these questions of Mr Mackay). Mr Culligan was allowed to continue a little longer, but then Mr Ribeiro brought the questioning to a halt and said that these matters would be dealt with in the High Court. He asked Mr Mackay what his recommendations were. Mr Culligan objected that Mr Ribeiro was obstructing the due process of the meeting. Mr Barthelemy said he would not be involved in a kangaroo court. Both of them left the meeting, which thereupon ceased to be quorate.

1086. Once again, I consider that this action by the Defendants was a legitimate reaction to the conduct of Mr Ribeiro at the meeting and a legitimate measure of self-defence in the circumstances.

1087. Also in February 2010, F&C abandoned the idea of setting up a separate ADSL line to the internet for the LLP. F&C IT arranged for the LLP's IT system to be fully integrated once again into the F&C IT system.

1088. In March 2010, F&C sought to arrange another LLP Board meeting. The Defendants indicated they would attend to conduct the LLP's business but not if Mr Ribeiro attempted to ambush them with items of business affecting the litigation, as he had at the meeting on 24 February. In my view, this was a reasonable approach for the Defendants to adopt – they indicated that they would participate in Board meetings to the extent necessary to allow the LLP's ordinary business to be conducted while legitimately defending themselves against steps being taken which might prejudice their right to claim standing to proceed with their unfair prejudice petition.

1089. On 1 April 2010, Mr Ribeiro e-mailed:

> "I can confirm that the resolution for the issue of a notice of removal will not appear on the agenda for the forthcoming board meeting. However, what will be on the agenda will be consideration of whether any further steps are required to be taken with regard to reporting to the authorities. The Management Committee have asked that a decision be taken by the Board on this matter."

1090. On 24 March 2010, JGR wrote to Mr Mackay to ask him a series of questions about the process by which Mr Bergin was instructed and about whether he had told the FSA about the Bergin Opinion. Mr Mackay declined to answer the bulk of these questions although, on 4 May, he gave advance notice that he intended to supply the Bergin Opinion to the FSA on 20 May. There was then an argument between JGR and Mr Mackay, advised by Mr Ball at Norton Rose, about the extent to which Mr Mackay had waived privilege in relation to his dealings with Mr Bergin.

1091. On 14 May 2010, JGR wrote to Mr Mackay to object to his proposal to send the Bergin Opinion to the FSA. Mr Mackay was unpersuaded, however, and on 8 June 2010 sent the Bergin Opinion to the FSA. In my view, he did so in good faith and for legitimate reasons, feeling that it was his and the LLP's obligation under the regulatory regime to do so, in light of the fact that he had already sent the Mackay Final Report to the FSA: see paras. [94] (Principle 11) and [105]-[107]).

1092. On 14 June 2010, the trial commenced before me.

1093. On 17 June 2010, the FSA wrote to Mr Culligan to affirm that its previous position not to become involved in seeking to resolve the dispute would continue.

The Petition: the Defendants' unfair prejudice claim

1094. The Defendants' claim under section 994 is brought against both Holdings and F&C plc. It was common ground between the parties that in order to make out a claim under section 994 that the affairs of a company or limited liability partnership have been conducted in a way which is unfairly prejudicial to the interests of members in the entity, it is not necessary to show that the conduct was carried out by agents of the person or persons against who the claim is brought. It was also common ground that there is jurisdiction in appropriate cases to grant a remedy under section 996 against non-members in a company or limited liability partnership (see, e.g., *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420, 429; *Re a company (No. 005287 of 1985)* [1986] BCLC 68). But the parties were not in agreement as to what the relevant test of attribution of unfairly prejudicial conduct to a defendant in a section 994 claim should be. In particular, Miss Newman submitted that, if I were of the view that the F&C representatives had conducted the affairs of the LLP in a manner which was unfairly prejudicial to the Defendants, I should limit any liability and remedy under sections 994 to 996 to Holdings, and should find that F&C plc is not liable in respect of that conduct. Mr Thompson submitted that both Holdings and F&C plc should be found liable under section 994 and that relief should be granted against both of them under section 996.

1095. Where relevant conduct is carried out by a person himself or by his agent, there is no difficulty of attribution of responsibility for that conduct for the purposes of section 994, since the ordinary (and strict) standards of attribution of responsibility applicable under the general law will have been satisfied. At certain points (in particular, at the LLP Board meeting on 21 January 2009, the Members' meeting on 18 February 2009 and in stopping payment of the advance drawings of the Defendants on 25 February 2009) Mr Ribeiro engaged in conduct prejudicial to the interests of the Defendants in the LLP in circumstances where he acted as agent of Holdings. The analysis above relating to breach of clause 13.6 of the Agreement by Holdings in relation to such conduct is also applicable to support the conclusion that such conduct was unfairly prejudicial to the interests of Defendants for the purposes of their unfair prejudice claim.

1096. What is the relevant test of attribution of responsibility beyond the narrow class of case where an agency relationship exists? In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him.

1097. I turn to consider the extent of the unfairly prejudicial conduct for which, in my judgment, Holdings may be held responsible:

i) Although the Defendants complained that F&C sought to undermine or destroy the business of the LLP by actions such as causing clients to redeem their investments in the LLP's funds, imposing improper cuts on the LLP and improperly blocking the development of its business, I have rejected these complaints. I have also rejected a range of other complaints made by the Defendants. However, I have accepted other significant complaints by them, in particular as summarised below;

ii) Holdings is responsible for the attempt by Mr Ribeiro in January and February 2009 to shift decision-making for the LLP from the proper organs of the LLP Board and ManCom to the Members' meeting, where Holdings could dictate policy. This did constitute unfairly prejudicial conduct. In early March 2009, however, well before the Petition was issued, Mr Ribeiro sought to reverse that approach. Can these earlier matters therefore be ignored, on the grounds that by the time the Petition was issued they had been rectified? I do not consider that they can be ignored. These actions of Mr Ribeiro and Holdings had a lasting prejudicial effect upon the Defendants' interests in the LLP, since they severely undermined trust between those involved in the management of the LLP in a way which was unlikely to be, and in fact was not, restored thereafter, and hence severely undermined the ability of the LLP to operate effectively as a business facing the severe challenges it faced in 2009. The actions of Mr Ribeiro and Holdings also, as a reasonable and legitimate reaction by the Defendants, caused them to serve the First Put Option Notices and led to the litigation between the Members. That had a major and lasting detrimental effect on the business of the LLP (see, in particular, para. [814] above). The letters of 26 February and 2 March 2009 written by Mr Ribeiro and Mr Logan, respectively, on behalf of Holdings (paras. [720] and [742] above) were not straightforward and gave grounds for the Defendants to think that they had not really undergone a complete change of heart. The way in which F&C secretly commenced the Part 7 proceedings (para. [767] above) reinforced that impression. Moreover, the change of approach by Mr Ribeiro from March 2009 was not complete, and his actions in January and February 2009 provide an important context for evaluating his conduct after that time, as referred to below. His actions in early 2009 therefore continue to be relevant, weighty matters to be taken into account in evaluating the Defendants' claims under section 994. From March 2009 Mr Ribeiro continued to take action which unfairly removed control of important aspects of the LLP's affairs from the Defendants and the LLP's organs of government, as follows;

iii) In about mid-March 2009, Mr Ribeiro took legal advice regarding the obligations of the LLP to write to the two remaining investors in the Balanced Fund, but failed to share or discuss that advice with the Defendants or ManCom as he should have done. He then wrote to those investors on behalf of the LLP on 25 March 2009 without giving the Defendants or ManCom a fair opportunity to discuss or comment on what he was doing, as he should have done. In effect, he took this important matter relating to the conduct of the LLP's affairs out of the hands of the executive management of the LLP

without proper justification: see paras. [788]ff above. When called upon later to give an account of the legal advice he had received on behalf of the LLP, he again failed to give a proper account: para. [833] above;

iv) Both before and after February 2009 Mr Ribeiro acquiesced in, and implicitly encouraged, acts of disloyalty by Mr Tilson which tended to undermine the ability of the Defendants (as the senior executive managers of the LLP) and the ManCom to run its affairs: see e.g. para. [678] above;

v) On 23 June 2009, Mr Ribeiro caused Mr Tilson to send out a notice regarding the dispute on behalf of the LLP to the Event Driven Fund on his own initiative, without first discussing it with the Defendants or ManCom: paras. [902]-[903] above;

vi) On about 16 June 2009 Mr Ribeiro agreed on behalf of the LLP, again without reference to the Defendants or ManCom, to Achmea's very unusual and commercially sensitive request that it should conduct an audit of the fees charged by the LLP and he privately gave instructions to Mr Tilson to provide LLP information to Achmea: paras. [907]-[908]. When the Defendants found out about this, Mr Ribeiro continued to try to limit their ability (as the senior executive managers) to control the handling of this difficult situation: paras. [952]-[953] and [957];

vii) F&C attempted unilaterally to remove Mr Culligan as the IT administrator for the LLP, without attempting to address the question by going through the proper channel of the ManCom under clause 17 of the Agreement: para. [970];

viii) On 4 August 2009, Mr Ribeiro caused the LLP (acting by a majority vote by the F&C representatives on LLP Board) to send information about the dispute to the auditors of the Balanced Fund, whereas that should have been a decision for the ManCom: para. [954] above;

ix) On 27 July 2009, Mr Mackay informed the FSA about the dispute without reference to the Defendants or ManCom and without keeping a good record of what was said: para. [943] above. Mr Ribeiro and the F&C representatives did not seek to reprimand him or call him to account in any way;

x) The Defendants were subjected to undue pressure in their roles in the day-to-day management of the affairs of the LLP on the basis of the Mackay Draft Report and then improperly removed from those roles on the basis of the Mackay Final Report (both of which reports were produced as the result of an unfair and inadequate investigation), and without being afforded a fair opportunity to respond to the allegations contained in them. The F&C representatives on the LLP Board and ManCom were on notice about the defects in the investigation and reports but nonetheless used the reports as a lever with which to oust the Defendants from their proper involvement in the management of the LLP's business;

xi) The Mackay investigation and reports were predicated on a view, strongly urged by Mr Ribeiro and F&C, that F&C Group policies bound the LLP, which contention and the investigation and reports by Mr Mackay to enforce

that view in turn involved the illegitimate application of pressure on the Defendants for the benefit of F&C, and improperly undermined the management powers of the Defendants and the ManCom in running the business of the LLP: see paras. [115]-[146] above;

xii) All the matters at (ii) to (xi) above are properly to be regarded as part of a pattern of conduct by F&C, the F&C representatives and Mr Mackay (acting at least in part for the F&C Group as its compliance officer) which continuously over an extended period of time undermined the position of the Defendants in the LLP, where there is a sufficient connection between what was done and Holdings such that it is fair to conclude that Holdings should be regarded as responsible under section 994 for such unfairly prejudicial conduct. In acting as they did, the various individuals referred to did not sufficiently respect the terms of the Agreement and the rights of the Defendants in relation to the management of the LLP. This occurred in the context of an overarching dispute between F&C and the Defendants, where to disregard the Defendants' rights involved favouring F&C in that dispute. They acted as they did at least in part because they thought it was in the interests of F&C to take the various steps referred to (e.g. in order to protect its relations with its clients) and with a consciousness that F&C did not like or trust the business judgment of the Defendants and had a strong interest (which they did little or nothing to resist when it came for them to take action) to try to undermine the Defendants' influence on the conduct of the business.

1098. In the light of this pattern of behaviour, I have no hesitation in concluding that Holdings should be held liable under section 994 for unfairly prejudicial conduct of the affairs of the LLP.

1099. Although F&C plc may perhaps be said to be at one further remove from the active conduct of the affairs of the LLP (in that it was not a party to the Agreement), I also have no hesitation in concluding that it also should be held liable under section 994 for the same pattern of unfairly prejudicial conduct of the affairs of the LLP.

1100. In truth, there is no clear distinction to be drawn between Holdings and F&C plc in this regard. Holdings was in reality a cipher for the F&C Group, and F&C plc in particular. There were no Board meetings of Holdings. Mr Ribeiro was authorised by its directors (Mr Grisay and F&C plc) to conduct its affairs, reporting back to Mr Grisay and F&C plc as he thought appropriate. F&C plc, acting by Execom, was informed about Mr Ribeiro's strategy of trying to remove decision-making in the LLP to the Members' meeting and in substance endorsed his approach and authorised him to proceed: see, in particular, para. [674] above. Thereafter, F&C plc continued to be happy to leave Mr Ribeiro to handle the detailed conduct of the dispute, trusting him to promote F&C's interests, without making any attempt to intervene to control his actions. There was thus, in a broad sense, authorisation from F&C plc to Mr Ribeiro and the F&C representatives to proceed in acting as they did; and see para. [200] above.

1101. In addition, the same points as in para. [1097(x) to (xii)] above apply with equal force in relation to F&C plc as in relation to Holdings. Indeed, in my view, they apply with greater force, since (because of the cipher-like nature of Holdings) when thinking about the interests of F&C and in understanding how they might be advanced by

action against the interests of the Defendants, the individuals concerned tended in reality to think about F&C plc (and the F&C Group, of which F&C plc was the head company) rather than Holdings. The practical benefits for F&C derived from the pattern of unfairly prejudicial conduct also flowed, in reality, to F&C plc, which (rather than Holdings) had the ultimate commercial interest in controlling the LLP's affairs.

1102. On this issue, my view as to the responsibility of F&C plc for the unfairly prejudicial conduct of the LLP's affairs is also, I think, supported by *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324. That case concerned section 210 of the Companies Act 1948, which was held to require the court to look at "the business realities of a situation" rather than taking a narrow legalistic view (p. 343). I consider that the same is true of what is now section 994. In the present case, F&C plc assigned Mr Ribeiro to formulate strategy and tactics for the F&C Group in dealing with the dispute with the Defendants and endorsed his approach. F&C plc looked to take the benefit from that approach. As a matter of business reality, F&C plc did not stand aloof from the conduct of the affairs of the LLP, but actively intervened in them. Although the involvement of F&C plc was achieved at some points in a different way from the involvement of the appellant society in *Scottish Co-operative Wholesale Society* in the affairs of its subsidiary, it was all of a character with sufficient similarities to the conduct in that case as to indicate that it is fair to hold F&C plc responsible for it for the purposes of section 994. In *Scottish Co-operative Wholesale Society* the appellant society stood behind the nominee directors, who were supine in the face of the policy of the society to destroy the company so that it was appropriate, when looking at the business reality, to hold the society responsible to a material degree for the conduct of the business of the company (see in particular [1959] AC at 341-342, per Viscount Simonds, 362-363, per Lord Keith of Avonholm, and 366, per Lord Denning). In the present case, F&C plc's interests were promoted by Mr Ribeiro seeking to divert material parts of the conduct of the LLP's affairs outside the proper governance structures of the LLP. This was involvement by F&C plc in the conduct of the affairs of the LLP which was at least as direct as in *Scottish Co-operative Wholesale Society* – indeed, it was, in a certain sense, more direct, in that the implementation of F&C plc's policy did not depend upon passive inaction and breach of fiduciary duty by the F&C representatives on the LLP Board and ManCom, but often operated by means of by-passing the executive managers of the LLP and the LLP Board and ManCom altogether in important respects.

1103. So far as concerns the Defendants' complaints under section 994 regarding the investigation and reports by Mr Mackay, culminating in their removal from executive management of the LLP's business, I consider that the legal standards of fairness to be observed by a Compliance Officer when conducting an investigation of the kind in question in these proceedings supply a sufficiently concrete and determinate standard of just behaviour to fall within the guidance given by Lord Hoffmann in *O'Neill v Phillips* (para. [77] above). Where someone in the position of Compliance Officer or equivalent (e.g. a disciplinary tribunal within a firm dealing with a complaint against an employee) acts in accordance with what they believe in good faith to be their duty, it will be rare for an unfair prejudice case based on their conduct to be made out: cf *Hawkes v Cuddy* [2009] EWCA Civ 291; [2009] 2 BCLC 427 at [54] (a director may take action which is prejudicial to a claimant, but it will not be *unfairly* prejudicial if taken in the genuine belief it is in the company's interests). However, as with a

situation where a director conducts the business of a company in a manner which departs in a serious way from the standards of reasonable management to be expected of him (*Re Macro (Ipswich) Ltd*, para. [254] above), in a case of a serious departure from the relevant standards of fairness to be expected in a particular context, where removal from involvement in the executive management of the business is a foreseen result, the relevant breach of the applicable standards of fairness will be capable of constituting unfairly prejudicial conduct for the purposes of section 994. In my judgment, that is the position in relation to Mr Mackay's investigation and report, and the LLP's actions taken on the basis of his report, in the present case.

1104. I consider that there is a sufficient connection with Holdings and F&C plc to justify the grant of relief against them in relation to this aspect of the case, arising from the fact that Mr Mackay maintained that he acted in his capacity as Compliance Officer for the F&C Group as well as for the LLP (in which capacity his services were also provided by F&C to the LLP under the terms of the Service Agreement); the fact that his investigation and reports sought to enforce F&C Group policies which did not apply to the LLP; and also from the fact that the F&C representatives on the ManCom who took action on the Mackay Final Report (though acting in good faith) were on notice of its defects and ought in fairness to have postponed action on it until the Defendants had had a proper opportunity to answer it - but pressed on, partly out of a concern to limit the prejudice to Holdings and F&C plc arising out of the dispute and the conflict within the LLP.

1105. However, I emphasise that I would still have found Holdings and F&C plc liable to the Defendants under section 994 even if one left the issues in relation to the Mackay investigation and reports to one side.

1106. I should also mention that as part of its case under section 994, F&C sought to rely on certain observations by me in *Fisher v Cadman* [2005] EWHC 377 (Ch); [2006] 1 BCLC 499 at [90]-[93], regarding the relevance of acquiescence by a party complaining under section 994 in informality or non-compliance with the articles of association in the way in which the affairs of a company (or, as the case may be, a limited liability partnership) have been run. Such acquiescence may be material to the question whether conduct involving running the affairs of the company in breach of the articles is to be regarded as unfairly prejudicial conduct for the purposes of the statute.

1107. In my judgment, this part of the judgment in *Fisher v Cadman* falls to be distinguished on the facts of the present case. The LLP was not run on informal lines, nor with regular departures from the terms of the Agreement on the part of F&C and its representatives, acquiesced in by the Defendants. In any event, by late 2008, when the parties appreciated that they had different views about the way forward for the business, it was clear that their differences would have to be addressed by reference to the terms of the Agreement (this is illustrated, for example, by the way in which Mr Ribeiro warned the Defendants at their meeting on 17 December 2008 that they should read the Agreement carefully: para. [518] above).

The Cross-Petition

1108. The main issues raised in the Cross-Petition are that:

i) the Agreement was qualified by certain understandings and was to operate on the basis of a relationship of mutual trust and confidence. I reject these contentions;

ii) the LLP and the Defendants were required to comply fully with F&C Group policies, including by abdicating particular decisions to F&C entities in accordance with the literal terms of those policies. I also reject these contentions;

iii) from about late 2008 or early 2009, the Defendants changed their approach to the affairs of the LLP and, without justification, became antagonistic and confrontational towards F&C and its representatives. I reject these contentions. The Defendants' attitude to F&C and its representatives was conditioned by, and changed in reaction to, their behaviour. Over this period, the Defendants did become more confrontational, but they had good reason to do so because of the way in which they were treated by F&C and Mr Ribeiro;

iv) from December 2008, Mr Culligan (with Mr Barthelemy's knowledge and consent) arranged an external e-mail service for the LLP and created a new IT infrastructure for the LLP which created a serious security risk for both F&C and the LLP, without proper authority by the LLP and in breach of F&C Group policies. I address this complaint in more detail in paras. [1109]-[1111] below, where I conclude that it falls to be rejected;

v) the Defendants were aware that the resolutions which Holdings proposed at the Members' meeting of 18 February 2009 were put forward, voted on and then were sought to be implemented by Mr Ribeiro and Holdings on the basis of a mistake by Mr Ribeiro and Holdings about the powers of that meeting, and then sought to exploit that mistake by serving their First Put Option Notices. I reject these contentions;

vi) the Defendants' service of their Second Put Option Notices was unjustified and their pleaded case presented at about the same time was extravagant and unjustified. I reject these contentions. I have found that the Defendants had justification in serving the Second Put Option Notices and that those notices were valid. I have rejected some, but not all, of the Defendants' pleaded complaints against F&C. Even in relation to the complaints I have rejected (see e.g. para. [1097(i)] above), I consider that there was a sufficient basis for the complaints to be put forward by the Defendants in their pleaded case (and later, in their witness statements) and that their acting in that way cannot properly be characterised as unfairly prejudicial conduct;

vii) Mr Culligan's covert review of LLP staff e-mails was unauthorised, constituted criminal offences contrary to section 1 of the Computer Misuse Act 1990 and section 55 of the Data Protection Act 1998 and was taken to promote the private interests of the Defendants in the litigation. I reject these contentions;

viii) the Defendants acted in an intimidating and inappropriate manner towards Mr Tilson. I reject the substance of these contentions;

ix) the Defendants have refused to accept that the withdrawal of their FSA approved person status pursuant to Mr Mackay's investigation and reports was valid and in good faith. I do not consider that the behaviour of the Defendants in relation to Mr Mackay's investigation and reports and the steps taken by the ManCom in reliance upon those reports is open to criticism under section 994. The Defendants had valid reasons for considering that they had been treated unfairly and for reacting accordingly;

x) by January 2010, there were grounds for removing the Defendants as members of the LLP Board and the only proper course for members of the LLP Board, including as appropriate the Defendants, was to vote in favour of removal of the Defendants, but the Defendants improperly avoided and obstructed the calling of any Board meeting which would be able to vote upon a resolution to that effect. I reject these contentions. The Defendants had good grounds to object to their removal from the LLP Board and were justified in taking defensive action to prevent Holdings and the F&C representatives from harassing them with attempts to vote on such a resolution.

1109. I say a few more words here about F&C's complaints in relation to the setting up by Mr Culligan and Mr Pennington of an external e-mail system for the LLP and of a new IT system for the LLP. So far as the external e-mail system is concerned, this was action taken by Mr Culligan with authority from the relevant organ within the LLP (the ManCom, under clause 17 of the Agreement) and with the actual knowledge of all the ManCom members. It was action taken by Mr Culligan in the genuine belief (shared by all the other ManCom members involved in the day-to-day running of the LLP, including Mr Tilson and Mr Sparks) that it was in the best interests of the LLP. In the circumstances, I do not consider that this is conduct which can be characterised as unfairly prejudicial conduct for the purposes of section 994.

1110. As I have made clear in the judgment, the setting up of the LLP's IT system, with its link to the F&C IT system via the dual-homed computers, is a matter of greater concern. But here, also, I reject F&C's submission that it or Mr Culligan's behaviour in relation to it constitute unfairly prejudicial conduct by Mr Culligan of the LLP's affairs, contrary to section 994:

i) The ManCom had authorised Mr Culligan and Mr Pennington over many years to deal with the technical aspects of the LLP's IT arrangements without having to explain them in detail to the ManCom or get clearance from the ManCom when implementing any changes. The measures taken by Mr Culligan and Mr Pennington in creating the LLP's new IT network in December 2008 and January 2009 were in line with and covered by that authorisation;

ii) That Mr Culligan and Mr Pennington had set up a new IT network for the LLP was known to all the LLP's ManCom members in January 2009; none of them questioned this at the time or sought to bring the matter before the ManCom to ask them to give a detailed technical account of what had been done. So far as its internal management was concerned, this was in line with the way in which the LLP had always run its affairs. Mr Culligan did not, and did not seek to, subvert the LLP's management structures set out in the Agreement in proceeding as he did;

iii) The setting up of the new IT network was action taken by Mr Culligan in the genuine belief (shared by Mr Pennington and – certainly so far as Mr Culligan could see - all the other ManCom members involved in the day-to-day running of the LLP, including Mr Tilson and Mr Sparks) that it was in the best interests of the LLP;

iv) So far as the LLP's own electronic data was concerned, Mr Culligan was entitled to assess that the new IT system did not create any unjustified risk for the LLP: paras. [585]-[587] above. That was his genuine view, shared by Mr Pennington;

v) So far as F&C's IT network was concerned, the creation of the LLP IT network with the dual-homed computers linking to the F&C network did give rise to an unjustified risk to F&C's system and electronic data. The creation of this unjustified risk was inadvertent on the part of Mr Culligan and Mr Pennington, and in any event did not constitute unfairly prejudical conduct of the affairs of the LLP in a manner which could justify the grant of relief under sections 994 to 996: see paras. [588]-[598] above. It did not expose the LLP to any significant business risk: para. [598] above;

vi) The omission of Mr Culligan to tell the ManCom or LLP Board about the dual-homed computers and the creation of a risk for the F&C IT network also did not constitute unfairly prejudicial conduct of the affairs of the LLP, since he acted in line with the usual approach of not referring detailed technical matters (such as the use of a wireless router and dual-homed computers) to the ManCom or Board (see (i) and (ii) above) and he had not and did not think that he had done anything which created any unusual or potentially unacceptable risk for the LLP which might call for a report to the ManCom or Board (a view shared by Mr Pennington);

vii) Mr Culligan's description of the new IT system as part of a continuing BCP test stretched that notion very far and was inappropriate, but – in relation to the management of the LLP's affairs - the members of the ManCom were all aware from January 2009 that in substance the LLP was operating with its own stand-alone IT network. Mr Culligan did not deceive the ManCom or the LLP Board, nor did he subvert, or seek to subvert, the proper ability of the ManCom to control the IT arrangements of the LLP in the normal way;

viii) The new IT system was the LLP's primary IT system. The LLP did not keep its data and run its operating systems in parallel on the F&C IT system. Accordingly, the LLP did not have a back-up system in operation which would take over if the LLP's IT system were affected by some disaster. However, this was a relatively minor matter. If the IT infrastructure at the LLP's office were knocked out, Mr Culligan and Mr Pennington would readily have been able to set up a new back-up system at another location, with access to the LLP's data stored on the archives provided by its external IT service providers. This was the same sort of BCP arrangement which the LLP relied on at other times. The proper functioning of its business was not put in jeopardy to any significant degree.

1111. Mr Barthelemy was not involved in setting up the LLP's IT system and had no awareness of any of the security or technical ramifications of this, or of the use of the dual-homed computers. Accordingly, the case against him under section 994 in relation to this particular issue is unfounded.

1112. Finally, in relation to the Cross-Petition, I would add that even if some part of F&C's complaints against the Defendants had been established, so that it would be necessary to weigh up the competing unfair prejudice claims of F&C and the Defendants to see who should succeed overall under section 994, I would have had no hesitation in concluding that by far the most unfairly prejudicial conduct of the LLP's affairs was by F&C and that the greatest responsibility for the damage to the LLP's business arising out of the dispute lies with F&C.

Conclusions

1113. For the reasons set out at length in this judgment, I conclude as follows:

i) The First Put Option Notices were validly served. Pursuant to those Notices, the Defendants are entitled to insist that Holdings purchases their interests in the LLP in accordance with the price formula under paragraph 1.7 of the Fourth Schedule. (F&C plc has guaranteed performance of Holdings' obligations in this regard);

ii) The Second Put Option Notices were also validly served;

iii) The Third Put Option Notices were not validly served, and add nothing to the Defendants' claims. But in view of the conclusion at (i) above, they do not need to rely on them;

iv) The Defendants succeed in their unfair prejudice claim under section 994;

v) F&C's unfair prejudice claim contained in the Cross-Petition is dismissed.

1114. The parties should now seek to agree the issues to be considered by the Court at the next stage of the liability hearing and the terms of any order to be made. Where there is disagreement, they should seek to identify clearly for the Court the points in contention and the respective positions adopted by them on those points.