Neutral Citation Number: [2020] EWHC 238 (Ch)

Case No: HC-2016-001537

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 3/3/2020

Before:

MASTER CLARK

- -

Between:

LEE VICTOR ADDLESEE
and the others listed in the Schedule annexed to the Amended Claim Form — **Claimants**

- and -

DENTONS EUROPE LLP — **Defendant**

- -
- -

Thomas Munby (instructed by **Forsters LLP**) for the **Claimants**
William Flenley QC (instructed by **Clyde & Co**) for the **Defendant**

Hearing date: 27 January 2020

- -

Approved Judgment

This is the approved judgment handed down on the above date and is to be treated as authentic.

.....

Master Clark:

Issue for determination

1. This is my judgment on the issue (identified in the claimants' application notice dated 7 September 2018) of whether the so-called iniquity exception to privilege applies to the files held by the defendant for its former client, Anabus Holdings Limited ("Anabus").

2. The order that the claimants seek is that the defendant give disclosure and inspection, and the parties shall proceed for all purposes in this claim, on the footing that the relationship between the defendant and Anabus is not subject to legal professional privilege.

3. The defendant's stated position is that it is neutral in the application. Nonetheless, its counsel made submissions both as to the applicable law, and as to the inferences that could properly be drawn from the available documents.

Parties and the claim

4. The claimants are about 240 investors in an investment scheme operated by Anabus, under which investors were invited to invest in gold dust ("the scheme"). The scheme was promoted by Anabus to investors from spring 2010 through an "agent" and a network of "introducers". The scheme closed on 31 October 2010 and, despite later promises of payment, left the majority of the investors unpaid. The claimants say the scheme was fraudulent, and that they lost (collectively) over €6.5 million.

5. The defendant is an English LLP which previously operated as an SRA-regulated firm known as Salans LLP. It acted for Anabus during the life of the scheme.

6. The claim in summary (which is sufficient for present purposes) is that the defendant recklessly and/or negligently enabled the scheme, and induced many of the individual claimants to invest, by affording the scheme apparent respectability by endorsing it as Anabus' legal adviser. Particular reliance is placed on a letter on the defendant's notepaper dated 18 May 2010 addressed "To whom it may concern" ("the 18 May 2010 Letter").

Participants in the narrative

7. Anabus was incorporated under the laws of Cyprus on 2 September 2009. Its shareholders and directors were Craig Johnson and Sofoklis Georgiou. Mr Johnson is alleged to be Anabus' "driving force". It was dissolved on 11 June 2016.

8. LLPP Insure Limited ("LLPP") was an English company (incorporated on 11 January 2007) which held itself out as trading in ATE insurance. The *de jure* directors of LLPP were Tanya Kalugina and John Stephenson (they do not feature prominently in the correspondence before me). Its equal shareholders were Paul Ubsdell and Mark Britain. LLPP went into liquidation on 18 November 2013.

9. Mr Ubsdell was made bankrupt in 2005 and disqualified as acting as a director for 5 years from 3 November 2005. In February 2011, he pleaded guilty in the US District Court of New Hampshire to conspiring by fraudulent means (the "Canada MTNs" – see para 115 below) to obtain money and property from an investment

bank. On 24 January 2014 he was convicted of dishonesty offences in the Chelmsford Crown Court.

10. Both Anabus and LLPP were clients of the defendant. The persons who dealt with them at the defendant included:
    - Kevin Heath – a partner
    - Robert Courtneidge – a senior consultant
    - Jonathan Denton – a partner until November 2009, then later "legal counsel" at LLPP
    - Katerina Palickova – a senior associate

    LLPP's liquidators have waived privilege in respect of disclosable documents held by the defendant, and some of those documents were included in the evidence before me.

11. Mr Courtneidge was also a joint shareholder in and director of (together with a solicitor called Bobby Gill) a company called Gill & Courtneidge Wealth Limited.

12. The "agent" who acted on Anabus' behalf in promoting the scheme to "introducers" was My Assets Investments Limited ("MAI"), whose directors and sole shareholders were Chris Metalle and Chris Richards. One of the introducers was Credible Investments Limited ("Credible"), whose directors and sole shareholders (and through whom it acted) were Simon Ward and David Orrey.

The scheme

13. The scheme was promoted to investors by materials (produced in March and May 2010), including a brochure entitled "Gold commodity trading for the small investor" and a document entitled "Your Questions Answered" (together "the Brochures"). The key features relied upon by the claimants are set out below.

The process for trading in gold

14. The description of how Anabus traded in gold is in "Your Questions Answered":

> "The process is really very simple.
> 1. There are contracts with various mines, all of which have been thoroughly researched to protect against fraud and non-performance. The contracts generally extend to a minimum of one year to fix the price. The contract also stipulates the nature of the financial instrument the mine requires under the deal.
> 2. The gold is collected by Brinks, the security transportation company who provide insurance for the gold whilst in transit to the refinery.
> 3. Brinks deliver the gold to the specified refinery (one of three at present).
> 4. The refinery refines the Gold dust into bullion.
> 5. The bullion is sold directly from the refinery onto the interbank market.
> 6. The company is paid direct from the refinery and pays out to investors accordingly."

The "contracted mines" and refineries were not identified, but said to be respectively in Southern Africa and in Dubai/Belgium. It was said that

> "The Trading company constantly monitors the inter-bank price of Gold with the aim of maximising the return above the purchase price".

15. In "Your Questions Answered", the question "How large are individual trades currently" receives the answer

> "The company currently trades a minimum of 500kg of gold (up to 1,000kg) per trade. This will increase as more supply lines are added."

At the minimum likely price of $20,000 per kg for "good" gold dust, each trade would therefore have involved committing at least US$10-20 million.

Anabus' recent performance

16. The Brochures included a chart setting out trades completed by Anabus starting in December 2009. These numbered 8 by the end of March 2010 and 13 by mid-May 2010, each supposedly returning between 15% and 20% profit.

Level of Return

17. In "Your Questions Answered", the question "Based on the law of compounding (assuming 15% return), the initial amount invested should double every 5 trades, which effectively means it will quadruple after 10 trades. So £25k should become £100k within 4-5 months – is that correct?" was answered "Yes, you are correct. We have tables available showing this on varying investment amounts. …".

18. In addition, such returns were said to be available over an extended period. The question

> "What's the longevity of this investment? Obviously, it has to have a ceiling at some point and can't continue to roll over as the sums would be too high. What happens when you hit capacity?"

was answered

> "Our contracts with mines go up to 3 years, but unless the market falls apart or drops through the floor, we will continue, as we always are, looking (on the ground) for new supply and contracts. Rolling over is not a problem and you can just keep rolling.…"

Use of investors' money

19. It was explained that investors' money was not in fact to be expended. Rather,

> "A financial instrument similar to a letter of credit is used which guarantees payment to the mines. This means the investor's money does not get touched with payment for the AU only being made once it has been refined, because dust loses weight when being refined and payment is only made for Pure 999 AU. Therefore, there cannot be payment in advance.…".

20. In "Your Questions Answered", the question "I understand that investor monies are only used as a line of credit? If that's the case, how is the client protected?" was answered

> "The investor monies sit in the account and are used in some cases to help in providing additional proof of funding which is sometimes required by mines. This money in the accounts is used along with the company's larger investor (multi million dollars) to provide any form of Proof of Funds documentation that does not involve blocking funds".

Risks to investors

21. The investment was said to be essentially risk-free. It was said that gold prices would have to fall 50% (or $13,000 per kg) overnight for money to be lost on an individual trade. But even in this case there was said to be no risk to investors. The question

> "What protection is in place for the investor to ensure he/she won't lose money?"
>
> received the answer
>
> "The company has insurance against things going wrong – errors in the buying price or a substantial market crash (say, greater than 50%). If the company incurs a loss, then these insurances kick in to cover investors."

Similarly, the question "What happens if the company goes bust?" was answered

> "Should the company go into administration, the money in the clients' accounts is automatically returned to them. Client money is insured as outlined above".

22. The Brochures (in keeping with their title) were expressly targeted at the "smaller investor", with statements such as

> "These trades have been carried out for many years by top commodity firms in London and New York and they have been stripping large amounts of profits from these trades. What this company is doing is to lift the lid and offer this to "everyday" folk"
>
> and that
>
> "Technically speaking the returns are not massive. It is simply that historically the commodities traders in the City have been exceeding these returns for decades but hide them from the general investor…. What we have done is make the trading fairer."

23. The brochure itself was accompanied by a "Due Diligence pack" containing heavily redacted (and poor quality) copies of what were said to be a Ghanaian certificate of incorporation, export licence, statutory declaration and assay report.

24. The claimants allege (at para 24 of the PoC) that the scheme was fraudulent and that investors were procured to pay money to Anabus on a false basis. They rely upon

the falsity of the representations made in the Brochures and other misrepresentations made at later stages in the events concerned.

25. The defendant does not admit that the scheme was fraudulent: para 36 of the Defence. It does not however deny any of the primary facts as to the scheme alleged by the claimants. It only denies in certain limited instances the inferences that are to be drawn from those facts.

Evidence

26. The evidence in the application comprised:
    (1) the 3rd witness statement of Andrew Head dated 15 November 2019 on behalf of the claimants;
    (2) the 5th witness statement of Richard Harrison dated 20 December 2019 on behalf of the defendant;
    (3) the 5th witness statement of Andrew Head dated 20 January 2020 on behalf of the claimants;
    (4) parts of the 4th witness statement of Andrew Headed dated 20 January 2020 on behalf of the claimants (although that statement is principally addressed to another application);

    together with various documents handed up by the claimants' counsel in the course of the hearing.

27. Neither Mr Head nor Mr Harrison has any direct knowledge of the factual matters relating to the inception, implementation and demise of the scheme. Their witness statements consisted therefore of commentary on exhibited documents and argument. The evidential basis of the application is therefore entirely based on the documents disclosed in the disclosure process, which has been completed (or substantially so). Although the claimants anticipate obtaining additional documents as a result of their pending specific disclosure application – the documentary material before me is substantially that which will be before the trial judge. The defendant's directions questionnaire states that it anticipates calling one or more of Ms Palickova (now Main), Mr Courtneidge and Mr Heath "on all relevant factual issues, including the 18 May 2010 Letter, dealings with LLPP Insure Limited and dealings with potential investors in the Anabus investment scheme". It has not however adduced any evidence in this application from those persons, consistently with its pleaded position of non-admission of the fraudulent nature of the scheme.

Legal principles

28. There was a substantial measure of agreement as to the applicable legal principles. These can be summarised as follows.

29. Legal professional privilege does not attach to communications between lawyer and client if the lawyer is instructed for the purpose of furthering crime, fraud or iniquity ("the fraud exception"): *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 at 1166-1172; *Barclays Bank Plc v Eustice* [1995] 1 WLR at 1248D-1250D; *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* [2006] EWCA Civ 286 [2005] 1 WLR 2734 at [14]; *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) [2014] 2 CLC 263 at [68].

30. Instructions given for such a purpose fall outside the ordinary scope of a lawyer/client relationship, and are an abuse of that relationship: *JSC BTA Bank v Ablyazov* at [76]-[93].

31. The fraud exception may apply equally to communications after the wrongdoing itself, where the lawyer is still instructed for the purpose of furthering the wrongdoing, for example, by concealing the wrongdoing or its proceeds: *Thanki on The Law of Privilege* (3rd ed) at 4.56; *R v Central Criminal Court ex p Francis* [1989] AC 346 at 394A-B; *Derby & Co Ltd v Weldon (No 7)* at 1174D-H.

32. The fraud exception applies whether or not the solicitor is aware of the wrongful purpose: *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* at [14].

33. The fraud exception applies where the client is unaware of the wrongful purpose, if the client is being used as an unwitting tool or mechanism by a third party to further that third party's fraud. In relation to this, the question ultimately is one of fact and degree as to whether the nexus between wrongdoer and client took the lawyer/client relationship outside the ordinary scope of professional employment so that the relationship was not a confidential one: *R v Central Criminal Court ex p Francis* at 395H-397C; *Owners / demise charterers of the dredger Kamal XXVI and barge Kamal XXIV v Owners of ship Ariela* [2010] EWHC 2531 (Comm) [2011] 1 All ER (Comm) 477 at [32]; *Accident Exchange v McLean* [2018] EWHC 23 (Comm) at [38]-[42], [47]-[48].

34. In order for the court to order that disclosure and evidence should be given of otherwise privileged material on the basis of the fraud exception, it is not necessary for the alleged wrongdoing to be established by way of final determinations made on the balance of probabilities. What is required is sufficient *prima facie* evidence of the wrongdoing: *Derby & Co Ltd v Weldon* at 1172H-1173H; *Barclays Bank Plc v Eustice* at 1252E-G; *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* at [42].

35. Where the allegation of wrongdoing is not in issue in the claim, a lower quality of *prima facie* evidence may be sufficient: *Kuwait Airways Corpn v Iraqi Airways Co (No 6)* at [42].

Issues in the application

36. The issues identified by the parties for determination are:
    (1) whether the burden of proof on the party seeking disclosure is a strong prima facie case or a very strong prima facie case;
    (2) whether the court should be very slow to find, at an interlocutory stage of the case, that the fraud exception applies;
    (3) whether the fraud alleged by the claimants is "in issue in the claim"; and, if it is not, the effect of that on the burden of proof;
    (4) whether there is sufficient prima facie evidence that Anabus instructed the defendant for the purpose of furthering a fraud to which Anabus was a party;
    (5) whether, in the alternative, there is sufficient prima facie evidence that Anabus instructed the defendant for the purposes of furthering a fraud (or frauds) of LLP in respect of which Anabus was an unwitting tool

Standard of proof

37. I consider the first three issues together, because of their interrelationship.

38. The claimants' counsel accepted that there was a need for caution in applying the exception. He submitted that the standard was lower in this case than a strong prima facie case because the fraudulent nature of the scheme was not denied by the defendant, referring me to *Kuwait Airways* at [42]:

> "(3) where the issue of fraud is not one of the issues in the action, a prima facie case of fraud may be enough as in the *Hallinan* case [2005] 1 WLR 766"

39. I reject that submission. As is apparent from the agreed list of issues in the claim, the effect of the defendant's non-admission is that the claimants will be required to prove that the scheme was fraudulent. The standard of proof is therefore the higher one applicable where the fraud is an issue in the claim.

40. The defendants' counsel submitted that the burden of proof was a very strong prima facie case. He supported his submissions by reference to Passmore, *Privilege* (4th ed., 2020) at 8-002, 8-136, 8-149; Thanki, *The Law of Privilege* (3rd ed., 2017) at 4.43, 4.67 to 4.71; Hollander, *Documentary Evidence* (13th ed., 2013) at 25-13. However, the authority on which he placed primary reliance was *Kuwait Airways* at [42]:

> "the fraud exception …can only be used in cases in which the issue of fraud is one of the issues in the action where there is a strong (I would myself use the words "very strong") prima facie case of fraud, as there was in *Dubai Aluminium Co Ltd v Al-Alawi* [1999] 1 WLR 1964 and there was not in *Chandler v Church* 137 NLJ 451."
> (per Longmore LJ)

41. He submitted that there was a clear and strong policy in favour of maintaining privilege, relying upon the recent decision of the Court of Appeal in this claim: [2019] EWCA Civ 1600, [2019] 3 WLR 1255. There was, he said, the need for considerable care in determining whether the fraud exception applied. In *Kuwait Airways* itself, for instance, there had been a judicial finding of false evidence and forged documents.

42. In particular, he submitted that the interim nature of the application increased the burden on the applicant, referring to *Buttes Gas & Oil Co v Hammer (No.3)* [1981] 1 QB 223, per Lord Denning MR at 246G-H and Donaldson LJ at 252C-E; *Derby & Co Ltd v Weldon (No.7)* [1990] 1 WLR 1156 per Vinelott J at 1173E-G; and *C v C (Privilege)* [2006] EWHC 336 (Fam), [2008] 1 FLR 115 per Munby J at [44] – [46] and [62].

43. The defendant's counsel also submitted that the court should decline to determine the application, on the ground that the issue of whether the iniquity exception applied should be determined by the trial judge. In addition, he asked me to note that the claimants had not applied for summary judgment, suggesting that this undermined their submission of having a strong prima facie case.

44. I reject those submissions for the following reasons. First, so far as the fraudulence of the scheme is concerned, as noted above (para 27), I am in substantially the same

evidential position as the trial judge will be. Secondly, it is inherent in the test of "strong prima facie" case that it should be applied before the trial; and the iniquity exception has been held to apply at an interim stage in many of the reported decisions. The test sets a lower threshold than balance of probabilities; and, of course, lower than the summary judgment test of showing that the defendant has no real prospect of success – no significance therefore can be attached to the fact (even if it could be inferred from the claimants not having made a summary judgment application) that the claimants' case would not justify summary judgment.

45. My conclusions on that standard of proof applicable in this application are therefore as follows. First, the distinction between a strong and very strong prima facie case is not readily discernible in their practical application. Secondly, on the facts of *Kuwait Airways*, the higher test was satisfied (see [39]) so the passage at [42] is obiter, albeit of a very persuasive kind. Thirdly, in *Dubai Aluminium Co Ltd v Al-*Alawi [1999] 1 WLR 1964, the test applied was "strong prima facie case" – this decision was approved in *Kuwait Airways*, so disapproval of that test is not to be inferred from Longmore LJ's remarks.

46. Fourthly, and most importantly, *Kuwait Airways*, is not in my judgment, inconsistent with the analysis of Vinelott J in D*erby v Weldon* [1990] 1 WLR 1156 at 1173A-H:

> " In all the cases I have cited what is stressed is that every case must be judged on its own facts. In any given case, the court must weigh, on the one hand, the important considerations of public policy on which legal professional privilege is founded — the necessity that the citizen should be able to make a clean breast of it to his legal adviser (see *Anderson v. Bank of British Columbia* (1876) 2 Ch.D. 644 , 649 *per* Sir George Jessel M.R.) — and, on the other, the gravity of the charge of fraud or dishonesty that is made. There are many contexts in which the court similarly has to strike a balance between the need to do justice to the plaintiff, on the one hand, and, on the other, the extent to which interlocutory relief may result in an unjustified interference with the defendant's property and his right to privacy. The point at which the balance is struck must depend on the extent to which the relief sought may unjustifiably invade the defendant's rights.
> ...
> There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength of the case that the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances but it is, I think, too restrictive to say that the plaintiff's case must always be founded on an admission or supported by affidavit evidence or that the court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the court has no more than affidavit evidence.
>
> … no clear line can be drawn. All that can be said is that all the circumstances must be taken into account and that the court will be very slow to deprive a

defendant of the important protection of legal professional privilege on an interlocutory application."

47. Following these authorities, I take into account the exceptional nature of the fraud exception, and all the circumstances of this case, including that:
    (1) there has been no judicial determination of whether fraud has occurred, and the application is made at the interim stage of the claim;
    (2) nonetheless, as set out above, the material before me as to the fraudulent nature of the scheme is substantially identical to that which will be before the trial judge – this is not a case where significant further relevant material is likely to emerge at a later stage;
    (3) the defendant does not deny that the scheme was fraudulent; it only does not admit it;
    (4) the relevant fraud is not that of the defendant, but of Anabus, or, alternatively, LLPP;
    (5) Anabus has been dissolved in circumstances where it is highly unlikely that it will ever be restored to the register; thus, the notion of the invasion of its rights has a degree of artificiality.

48. In these circumstances, I conclude that the standard of proof which the claimants must satisfy in this application is a strong prima facie case.

Narrative of events

49. The claimants' counsel's skeleton argument includes a detailed narrative setting out the events and documents they rely upon. This includes LLPP for several reasons: first, the claimants rely upon a close "fundamentally symbiotic" relationship between LLPP and Anabus such that Anabus and the scheme are tainted by LLPP's fraudulent conduct; secondly, the Medium Term Notes ("MTNs") said to provide the financial backing for the scheme were in LLPP's name; and, thirdly, the claimants' alternative fallback submission is that if they are unable to show a sufficient prima facie case of fraud by Anabus, then they are entitled to rely upon Anabus being used by LLPP as a tool for its own fraud.

50. The defendant, consistently with its neutral stance, did not seek to challenge or contend for its own factual version of this narrative. It confined itself to challenging (to a limited degree) the inferences and conclusions sought to be drawn by the claimants. My account of the factual circumstances is therefore closely derived from the claimants' narrative.

LLPP's attempts to demonstrate financial standing in March 2010

51. LLPP's accounts as at 1 January 2009 showed it as having net current assets of £100.

52. On 3 March 2010, a Mr Webster of Connect Services emailed Mr Heath of the defendant (copying Mr Ubsdell) to ask various "due diligence" questions about LLPP. This email included a copy of an email from LLPP's accountant (Theodoulos Papanicola of Bond Group)

> "We have seen documentary evidence showing the company is about to receive EUR 1,250,000,000….".

The claimants ask the court to note that Mr Papanicola was made bankrupt in January 2012, and excluded from the Association of Chartered Certified Accountants for misconduct in May 2012. It is unclear what the significance of this is said to be. At most, it is evidence that his statement might not be true.

53. On 4 March 2010, Mr Heath provided Mr Ubsdell with the defendant's retainer letter in respect of a "legal opinion to Connect in connection with … LLPP's … capital resources" ; and over the following month, the defendant sought instructions from LLPP. However, when Mr Heath gave the opinion on 7 April 2010 in the form of a letter to Connect Services, all he could say about LLPP's capital adequacy was

> "we are unable to add to Bond Partners' e-mail …"

The claimants' counsel submitted that the inference to be drawn is that LLPP could produce no material to support an imminent receipt of €1.25 billion, which he says, was scarcely surprising given its history. I accept that submission.

54. The claimants also rely upon LLPP falsely holding itself out as an insurer underwritten by HSBC, resulting, on 25 March 2010, in a warning by the Law Society:

> "HSBC Insurance Brokers Limited have advised the Law Society that after the event insurance purportedly provided by LLPP Insure Limited is not in fact underwritten by HSBC plc in its policy documentation. They have also informed us that "HSBC plc" does not exist and no HSBC entity has underwritten this cover for LLPP."

The MTNs

55. The MTNs, and their authenticity, validity, and value are central to the scheme and to the claim.

56. They first feature in the narrative on 14 April 2010, when Mr Gill wrote (on behalf of Swiss Concept Group SA – a Panamanian company closely connected to LLPP) on Gill & Courtneidge Wealth letterhead to Needleman Treon Solicitors:

> "to confirm that we, GC Wealth, have been provided with evidence, satisfactory to us, of the allocation of a credit line for $1.3 billion (one billion and three hundred million US dollars) ("Credit Line"). The Credit Line has been allocated against the security represented by United Assurance Company MTN [i.e. medium term note] ISIN US909423AA33 CUSIP909423 AA3 that is backed with underlying collateral of US Treasury Notes: ISIN US912810FF04. We have also verified the backing of this MTN with these US Treasury Notes…."

57. That letter apparently being insufficient, Mr Courtneidge agreed with Mr Ubsdell, Mr Britain and Mr Bridgemohan (apparently of Swiss Concept) that he would – in Mr Ubsdell's phrase

"do a letter on Salans letterhead confirming the credit line of $1.3b, in order to initiate this he needs a letter from Swiss Concept or Middle East Finance emailed to his Salans email address to confirm the credit line is there and he can initiate it"

58. To generate this "confirmation" on the defendant's letterhead, a circular process was adopted. Mr Courtneidge drafted the exact form of confirmation which he would need to receive from Swiss Concept in respect of the credit line and provided it to Mr Ubsdell on 19 April 2010. Having done so, he sent Mr Bridgemohan of Swiss Concept an email asking for confirmation on 20 April 2010, and received back the confirmation which he had himself drafted.

59. On that basis Mr Courtneidge provided a comfort letter dated 20 April 2010 on the defendant's letterhead to LLPP (which could presumably then be shown to third parties) referring to the confirmation he had now received. As the claimants' counsel submitted, in substance, all this process achieved was to translate a supposed confirmation by Mr Bridgemohan into a more imposing comfort letter from the defendant.

60. The next stage was for LLPP to seek comfort letters from the defendant that LLPP had sums in excess of £1.25 billion on its balance sheet through the MTNs.

61. On 22 April 2010, Mr Ubsdell emailed PDF scans of the MTNs to Mr Courtneidge.

62. The MTNs were respectively for US$300,000,000 ("the first MTN") and US$1,000,000,000 ("the second MTN"). They were in the form of certificates which, other than the amounts shown, were identical, and on their faces:

(1) are headed "Schedule A" (as if originally scheduled to another document);
(2) are dated 25 June 2008;
(3) have an issue date of 26 March 2008 and maturity date of 15 March 2012;
(4) are issued by United Assurance Company Limited (a Montserrat company) ("UAC");
(5) have the same number UCA 1002;
(6) are apparently signed by a senior officer and secretary of UAC;
(7) identify LLPP as the owner;
(8) have CUSIP number 909423 AA3 and ISIN number US909423AA33 - these are respectively North American and international identification numbers for financial securities;
(9) provide on the reverse:

> "This Certificate and the Note represented hereby are backed by a segregated portion of a US Treasury Notes ISIN US912810FF04 and UCC 1 File 2007052656 for the Amount $9,376,996,000…
> This Certificate is not valid unless countersigned and registered by the Transfer Agent and Registrar …"

(10) are not countersigned by the Transfer Agent.

63. On their face therefore they are invalid, although it appears this is not a point which was raised at any stage by the defendant.

64. In his email of 22 April 2010, Mr Ubsdell wrote to Mr Courtneidge:

> "as you can see they are in our name and therefore sit on our balance sheet. What I need you to say is That [*sic*] you can confirm that in excess of £1.25billion is now on LLPP balance sheet. Can you also confirm the that underline [*sic*] Asset which is the ISIN on the back of the note is backed by US treasury and that the underline [*sic*] value of this is US$9billion that is also written on the back of the balance sheet. If you can put this on a letter head and address it to Tony Webster, Connect Mortgages… Thanks in advance".

65. On 23 April 2010, Mr Ubsdell provided screenshots and scans purporting to show:
(1) listing of the relevant variety of UAC medium term note on Deutsche Boerse;
(2) listing of the underlying US Treasury Notes on the trading platforms Bloomberg and Euroclear.
Although these corresponded in each case with the ISIN numbers stated in the MTNs, they did not show who owned either the MTNs or the US Treasury Notes.

66. Mr Courtneidge responded immediately that Ms Palickova would deal with it on Monday, and added

> "The other item you were going to supply was the purchase contract as that effectively closes the circle"

67. Mr Ubsdell replied later that evening:

> "I have the contract but we up it from 300m to 1b would be same contract but higher fees been agreed but not got new contract yet bur [*sic*] I fo [*sic*] have notes as sent will this contract be ok"

68. The effect of this email was that, despite having sent Mr Courtneidge the MTNs with an apparent total value of $1.3 billion on 22 April 2010, LLPP had only so far entered into a purchase contract for the US$300 million note, and was anticipating increasing the amount to $1 billion (not the $1.3 billion shown in the MTNs). This of itself casts doubt on the authenticity of the MTNs.

69. The "purchase contract" was provided by Mr Ubsdell the following day, 24 April 2010. It is dated 25 February 2010 and made between LLPP and Maxim Naviede ("the Naviede agreement"). Its recital states:

> "This Agreement provides for the LLPP to procure for the purpose of capitalising its underlying business activities a US$300,000,000 (US Dollars three hundred million) Medium Term Note issued by United Assurance Company Limited, West Indies ("the Insurance Company") in a format attached hereto at Schedule A'"

70. Schedule A is as follows:

> "Two Medium Term Note in the amounts of USD 50,000,000 and USD 250,000,000 issued by United Assurance Company Limited, West

Indies, in favour of Sigma Ventures PTE LTD, backed by US Treasury Notes, carrying CUSIP 909423 AA33 ISIN US 909423AA33 See attached examples"

The examples are materially identical to the MTNs, except in one important respect: the first medium term note is only for US$300,000 and not US$300 million.

71. Mr Naviede's primary obligations under the Naviede agreement are set out in clause 2:

> "**INVESTMENT RETURNS**
> In consideration of Maxim Naviede making US$15,000000.00 available under the terms of a Solicitors' Undertaking, as per the attached Schedule 'B' and the security of a Medium Term Note issued by the Insurance Company in the sum of 50 million USD … "

72. The draft Solicitors' Undertaking is in the following terms:

> "Kindly accept this letter as my confirmation that I act for LLPP Insure Ltd, and that I hereby undertake to you not to release the sum of USD 15,000,000 to be held by me on your behalf under the above referenced Agreement, until such time as I have satisfied myself that the following has been complied with, and that I am in a position to forward documentary evidence of same to you:
>
> 1. Receipt by this firm of the original US $50,000,000 medium term note issued by United Assurance Limited in favour of Sigma Ventures PTE. LTD:
>
> 2. United Assurance Company Limited's Transfer Agent to provide a paper copy of the US$250,000,000 medium term notes, together with written confirmation that the US$250,000,000 Note has been forwarded by courier to J.P. Morgan Chase.
>
> 3. United Assurance Company Limited to provide a certified or notarised copy of a Board Resolution conforming to the attached text in respect of each medium term note.
>
> 4. The insurance policy from LLPP Insure Ltd covering the principal and interest of US$15,000,000 and US$2,250,000 respectively has been issued in your favour, in the agreed verbiage and deposited with me.
>
> 5. Sigma Ventures PTE Ltd to provide written confirmation that the medium term note of US $50,000,000 is assigned to you and the original assignment is deposited with me."

73. The text of the Board Resolution by UAC referred to was attached. It sets out a resolution for the issue of a US$50,000,000 medium term note to Assured Capital

Management (BVI) Ltd ("ACM"), a company not otherwise mentioned in the Agreement.

74. The Naviede agreement itself is not a purchase contract. It is apparently a short term loan of US$15,000,000 by Mr Naviede to enable LLPP to obtain medium term notes to the value of US$300,000,000. Even so, its authenticity is undermined by the following features:

    (1) The transaction to which it apparently relates was one under which LLPP was to acquire separate notes of US$50m and US$250m from Sigma Ventures PTE Ltd ("Sigma") in February 2010;
    (2) The date of the agreement is nearly 2 years after the date of 25 June 2008 on the first MTN;
    (3) The draft board resolution indicates that the MTNs were to be issued to ACM, not LLPP;
    (4) Schedule A to the agreement did not annex an "example" of a note in the name of Sigma Ventures PTE Limited (as Appendix A seemed to envisage); but copies of two medium term notes already in LLPP's name;
    (5) Although the 2 medium term notes in Appendix A were in other respects similar to the MTNs (which Mr Ubsdell had sent to the defendant on 22 April 2010), as noted, the value of the smaller MTN was shown as US$300,000 rather than US$300,000,000.

75. On 26 April 2010, Ms Palickova commented in her email to Mr Courtneidge:

> "I am finding it difficult to understand the agreement dated 25th February between LLPP and Maxim Naviede. Further the documents provided do not really guarantee the ownership of any of the funds. Also, Paul [Ubsdell] has asked us to confirm that LLPP owns in excess of £1.25 billion on their balance sheet. At this stage, I cannot confirm that".

76. Nonetheless, the following day, 27 April 2010, Mr Courtneidge signed comfort letters on the defendant's letterhead to both Mr Webster of Connect Services and a Mr Ralevic of Specialist Cars BMW confirming that the documents reviewed by him

> "show LLPP owns the MTN1 and MTN2 in amount of US$1,000,000,000 and US$300,000 respectively and that the ownership of MTN1 and MTN2 create legal, valid and enforceable assets on LLPP's balance sheet."

    The only evidence of ownership set out in the letter as having been reviewed by Mr Courtneidge is the Naviede agreement.

LLPP's and Anabus' instruction of the defendant in May 2010 and the 18 May 2010 Letter

77. On 4 May 2010, Mr Ubsdell emailed Mr Courtneidge asking him to arrange a room at the defendant's offices for a meeting between himself, Mr Britain and Mr Johnson of Anabus. This is the earliest disclosed document evidencing a relationship between LLPP/Mr Ubsdell and Anabus/Mr Johnson. As the claimants submitted, the speed and the manner in which events subsequently developed give

rise to the inference that the relationship between Anabus and LLPP was already a close one.

78. By 6 May 2010, the defendant's involvement in the scheme had been communicated to Mr Ward of Credible. He asked (in an email to Mr Johnson that day) a number of questions directed at verifying the bona fides of the scheme, including:

> "14. What contract is Salans solicitor's drawing up for you (what does it cover?) and can we see a sanitised copy or certificate?"

79. By 10 May 2010, Mr Courtneidge was completing the defendant's know-your-client process in order to take on Anabus as a client. The terms of the email (copied to Mr Ubsdell of LLPP) make clear that the purpose of the retainer was to produce documents relating to the proposed use by Anabus of the MTNs: in the same email, Mr Courtneidge asked

> "can you tell me how much is needed in MTNs to cover your gold dust trades as I will need the figure for the agreement".

Mr Johnson replied that the figure was "100 million" and Mr Ubsdell agreed that this was €100 million (seemingly a typo for $).

80. Later that same evening (10 May 2010), although Anabus' know-your-client process was still not complete, Mr Courtneidge sent to Mr Johnson (copied to Mr Ubsdell) a

> "draft letter covering the US$100 million guarantee you need from LLPP to back your gold dust deal. If the parties are all happy with this then Paul will arrange for the MTN to be cut and full details will be inserted into the letter. Obviously you will also need to put in place the agreement between yourselves and LLPP Insure before they sort out the MTN and instruct us to produce the letter. Furthermore the African Mine Company may well want a letter addressed directly to them to enforce against LLPP Insure in the event of a failure of the transaction"

81. The draft letter attached by Mr Courtneidge was a template to be sent on the defendant's letterhead to "[African Mine Company]". It confirmed that LLPP owned a US$100,000,000 medium term note issued by United Assurance Company Limited (details still to be inserted) and that

> "In the event that Anabus Holdings Limited default on their agreement with you in respect of the [ ] (the value of the gold dust you are supplying to them) we are instructed that our client LLPP Insure undertakes to pay such amount to you, if necessary by encashment of the aforementioned MTN".

82. The apparent conflict of interest between LLPP and Anabus in respect of such a letter was dealt with casually in Mr Courtneidge's email:

> "Obviously we are acting for both yourselves and LLPP Insure on this matter and would therefore require an email from you and Paul confirming you are happy for us to act and that there is no conflict of interest".

Thus, despite being – notionally – principal and surety under a US$100 million guarantee arrangement, neither party appears to have considered that there was any need for separate legal advice. Indeed, Mr Ubsdell sent a one line confirmation later that day. The claimants' counsel submitted, and I accept, that this is evidence of a close and collusive relationship between them.

83. The following day, 11 May 2010, Mr Johnson answered Mr Ward's due diligence questions in respect of the scheme (see para 78 above). In response to the question about the "contract" supposedly being drawn up by the defendant, Mr Johnson said

> "It is a contract that is very important, it is a multi million dollar fund (XXX,000,000) that sits behind us with insurance as well for the company, so if i make an error in trading in anyway and a loss is incurred this loss is covered and ensures we continue, therefore it covers clients as well. This contract is NOT for public viewing at any time as you must understand I will not give every nut and bolt about the company especially in this industry. I will however sanitise the document and get a confirmation letter from the lawyers that authenticates everything. …"

84. This was the only point to which Mr Ward responded, saying later that afternoon:

> "I can say that when we receive the lawyer's letter confirming the insurance policy is in place and what it does, you'll have some very happy investors from us"

The claimants' counsel submitted that this exchange showed that the provision of a suitable letter by the defendant was the key for Mr Johnson to unlock access to Mr Ward's investors. I accept that the claimants have a strong prima facie case of establishing this.

85. On 13 May 2010, the defendant provided Anabus with a retainer letter. In an email on that date to Anabus and LLPP, Ms Palickova described the next steps as being

> "1. For LLPP Insure Ltd to agree and sign a contract with Anabus; and
>
> 2. For me to release the signed and letterheaded letters (as attached in a draft form) once I receive from you the missing details to be inserted in the letter (incl the MTN's number, etc)"

86. Mr Johnson addressed the first of those requirements by circulating a draft contract between LLPP and Anabus headed "Project Funding Agreement" ("the PFA").

87. The first two recitals set out that

> "THE PRINCIPLE [i.e. Anabus] and LLPP desire to enter into this agreement for the purpose of establishing a commodity transaction and their joint

participation in one or more Money/commodity Transactions, conducted by THE PRINCIPLE and supported by LLPP…"

and that

"LLPP will provide THE PRINCIPLE with sufficient MTNs [an undefined term] as security for the monies required for the agreed transactions conducted as well as any assistance that is agreed and acceptable to LLPP".

88. Clause 1 records that:

> "THE PRINCIPLE agrees to pay 20% of profits [an undefined term] earned from the Gold Dust contract [an undefined term] for a period of 12 months."

89. The key deficiency in the PFA was that it did not contain a clause requiring the provision of security by LLPP, either by means of the MTNs or at all. In addition, the absence of key definitions (identified above) rendered it meaningless on its face. As the claimants' counsel submitted, clauses 5, 6, 8 and 14 comprise nonsensical legal verbiage which appears to have been cut and pasted from other documents. He also submitted, and I accept, that the deficiencies and oddities were so obvious and prominent in a transaction of this size that it is strong prima facie evidence that Anabus and LLPP were in a collusive arrangement, and merely producing a piece of paper for the defendant.

90. Notwithstanding the deficiencies in the PFA, Ms Palickova circulated a revised draft letter. This was again addressed to "[African Mine Company]". It stated that the defendant had reviewed an MTN to the amount of US$300 million, and included its details, and that LLPP was its owner. It concluded by stating that if Anabus defaulted on its agreement, LLPP undertook to pay on its behalf by encashment of the US$100 million "portion" of the MTN.

91. On the same date, 13 May 2010, Mr Gill emailed Mr Ubsdell and Mr Britain (copying Mr Courtneidge) with a draft "Revenue Participation Agreement". The parties on the face of the draft agreement were Messrs Ubsdell and Britain on the one hand and Mr Gill on the other. It provided that they would pay Mr Gill prescribed shares of their "revenues" from various "clients". These clients included "Gold dust transaction and related deals from Anabus Holdings", with a prescribed percentage of 17.5%.

92. The covering email from Mr Gill says:

> "… as Robert will have discussed with you … Robert and I gave a lot of thought in the split and wanted to avoid any unnecessary to-ing and fro-ing – given the absolute size of returns made will be enormous for all and we all are playing a key part in making this happen! … Any issues – please don't hesitate to contact me or Robert!"

93. The claimants' counsel submitted that although Mr Courtneidge is not named as a party to the draft, this covering email makes plain that he was intended to benefit. He relied on the fact that the agreement refers to services provided by Mr Gill

"directly or indirectly". Accordingly, he said, it seems to have been envisaged that revenue received by LLPP from the scheme (and from other schemes in which LLPP was involved) would in turn be shared (via Mr Gill) with Mr Courtneidge personally.

94. The defendant's counsel submitted the claimants' case that Mr Courtneidge was involved in receiving money from Mr Ubsdell and Mr Britain (and therefore compromised) was one of inference only. It did not therefore, he said, satisfy the test of a strong prima facie case. I do not accept that a strong prima facie case cannot properly based on inference. As discussed below (at para 132), often a case of fraud can only be based on inference, because the victim has no direct knowledge of the fraudulent acts. In this instance, the terms of Mr Gill's email and the agreement itself give rise to a strong prima facie case (albeit one based on inference) that Mr Courtneidge was to benefit from the scheme.

95. The following day, 14 May 2010, the PFA appears to have been signed, without changes and without either party taking legal advice. The claimants' counsel submitted that this was a further indication of the close nature of their relationship. I agree for the reasons given above (in para 89).

96. On the same day, Mr Johnson told Ms Palickova in an email that

> "I have now sent the first purchase contract to the dust supplier, and realised it is better to attach the draft and await the further proof of product before I get you to issue the actual document to the supplier. The Mine is called GGS Limited and is based in Ghana, once I get the POP [i.e. proof of product] back I will then send you a further email to issue the aforementioned document for POF [i.e. proof of funds]"

97. Also on the same day, Mr Metalle of MAI emailed Mr Johnson re-emphasising the importance of the defendant's letter to obtain access to Mr Ward's investors:

> "Just spoken to Simon [Ward] and he says they have £200k+ ready for you! He is very keen to get the Salins [*sic*] letter done and for me to speak to the lawyer there once it's ready to confirm everything. This for him is the final tick to be put in the box before he let's [*sic*] his clients loose on us/you!"

Mr Johnson responded that "Monday will be the day".

98. On 18 May 2010 Ms Palickova signed the 18 May 2010 Letter (a simplified, shortened version of the previous draft of 17 May 2010, which referred in detail to the MTNs). I set it out the material parts in full:

> "**RE: Anabus Holdings Limited – gold dust deal**
>
> We are the legal advisors to Anabus Holdings Limited ("Anabus"). We have been asked to confirm certain specifics in relation to a gold dust deal in question (the "Deal").
>
> In relation to the Deal, we have examined copies of the following documents:

1. Executed Sale and Purchase Agreement for the purchase of part refined or unrefined AU metal and/or dust (the "Existing Agreement"); and
2. Sale and Purchase Agreement for the purchase of part refined or unrefined AU metal and / or dust (the "Sanitized Agreement") which you will be presented with.

The Sanitized Agreement has been redacted (when compared with the Existing Agreement) to protect the current business interests of Anabus. Based on the copies of the two above mentioned documents, we confirm that they are identical in substance.

In the event that Anabus defaults on its agreement with you in respect of the Deal, we are instructed by another of our client to confirm that it undertakes to pay US$100,000,000 if necessary."

Although the letter does not expressly refer to LLPP, the defendant accepts that "another of our client" refers to it.

99. On 19 May 2010, Ms Palickova emailed the letter to Mr Metalle of MAI stating

> "I am the legal advisor to Anabus Holdings Limited ("Anabus") and have been requested (for your due diligence purposes) to send you the following documents… I trust the above is all that is required for your purposes"

100. The emailed letter was accompanied by a redacted version of a purported "Sale and Purchase Agreement for the purchase of part refined or unrefined AU metal and or dust" ("the Gold SPA") between Anabus and an undisclosed counterparty.

101. The claimants' evidence includes an unredacted version of this agreement, which I was told by counsel was obtained by using electronic techniques on the redacted version. This explanation was not in evidence, but the defendant did not challenge the authenticity of the unredacted version.

102. The unredacted version reveals that the apparent counterparty was a company in Ghana identified as "Global Gold Scrap Limited" or "Global Gold Scrap Metal Limited" (the name in the title does not match that in the signature bloc), its apparent signatory was Johnson Anthony Ekow and the date of signature was 14 May 2010. It seems likely that this is the company which Mr Johnson was referring to as "GGS Ltd" (and the Gold SPA was "the first contract") in his email to Ms Palickova on 14 May 2010 (see para 94 above).

103. As the claimants' counsel submitted, this appears to be a bogus document for the following reasons. First, many of the spaces for identity details (seller's country of incorporation, signatory's passport details) were left blank. Secondly, some the claimants carried out investigations in 2011 which appear to have established that there was no such entity as "Global Gold Scrap Limited" at the address stated on the Gold SPA. In the 2011 claim (see para 129 below), it was expressly alleged that Global Gold Scrap did not exist – and there was no detailed denial of this by Mr Johnson in his Defence. Thirdly, the terms of the contract are commercially unusual and highly disadvantageous to the seller: the agreement provides for a fixed

price which can be reviewed if the market falls, but not if it rises, over a term of one year (extendable at the buyer's option to 3 years). It is difficult to see why any seller would enter into such a contract.

104. Furthermore, when challenged in March 2011 by an introducer called Alan Jenkins that

> "the [Gold SPA] was in fact signed by a notorious con man by the name of Johnson Anthony Ekow one of his many names",

Mr Johnson did not seek to defend the Gold SPA, stating

> "I did not have facility to check documents in relation to Mr Ekow at that time which is a long time ago now, and no contract was ever forthcoming with any supply, so this was left"

Subsequent events

The growth of the Anabus Scheme

105. The 18 May 2010 Letter was forwarded immediately by Mr Metalle to Mr Ward of Credible with the comment "Outstanding due diligence!".

106. Mr Ward responded just over an hour later:

> "We will get cracking!!! The email and letter from Salans was great, investors will want to see proof of some due diligence considering the amount of money involved. This will stop people trying to contact us, you, Craig, Katerina and Salans generally and save us all a lot of time and money – plus it shows we've gone above and beyond to put the investor's mind at ease, which is the whole point of our business model. … I'll give you a call tomorrow with lots of business hopefully"

107. From that time, until October 2010 Credible and other "introducers" engaged in widespread promotion of the Anabus Scheme, recruiting numerous investors. The claimants' case is that many of them were shown (and relied upon) the 18 May 2010 Letter, and that letter was directly or indirectly instrumental in bringing about all of their investments.

108. During that period, Anabus continued to provide updates on regular supposed trades, which apparently generated similarly impressive percentage returns: sample documents provided to investors were in evidence before me.

Correspondence between the defendant (acting on behalf of Anabus) and third parties

109. The claimants also rely on subsequent correspondence between the defendant (acting on behalf of Anabus) and various third parties.

110. The first category is correspondence with apparent sellers of gold in which, notwithstanding the defendant's comfort letters, Anabus was unable and/or unwilling to provide proof of funds: in May 2010 with a Mr Adjaho in Benin, and a business called Gemstec.

111. On 8 July 2010, the defendant sent a comfort letter to Dominion Metals Trading in West Africa in a variant of previous versions, now representing that a US$100,000,000 medium term note (with the same ISIN) had been "assigned to Anabus Holdings Limited for the purpose of guaranteeing and underwriting the purchase of this deal…". The defendant has not disclosed any such assignment, although if it existed, a copy would almost certainly have been in the defendant's possession or control when writing the letter. The strong prima facie inference is that there was no such assignment.

112. The second category of correspondence relied upon by the claimants is with prospective investors.

113. On 11 June 2010 the defendant sent a comfort letter to WBIG Capital Inc, confirming LLPP's ownership of the first MTN, and that US$100m would be "apportioned" from it to a "Deal" with Anabus and used (if necessary) to make good an undertaking by LLPP to pay for any default by Anabus. Again, LLPP and Anabus were unable/unwilling to allow proof of funds to be given with full banking authority.

114. Two variant comfort letters were then sent by the defendant on 26 July 2010 to Standard Chartered Bank in Tanzania and to Guaranty Trust Bank in Ghana, each confirming that a US$100 million portion of a medium term note with a different ISIN, CA90254PAA62, apparently issued by "UA Insurance Holding, Inc" of Canada had been assigned to Anabus for the purpose of guaranteeing a purchase of gold with Franklin Bello and Deborah Holand of "WA Chemical and Minning [*sic*] (Ghana) Limited".

115. On 25 August 2010, Mr Bello queried the validity of this latter medium term note, passing on a message which he had received from a banker at Credit Suisse that

> "From what I can find the ISIN and CUSIP have never been issued. This is a fraudulent screen shot"

The claimants rely upon the facts that the response to this was not concern or investigation on the part of Anabus or LLPP, but the threat of libel proceedings; and that Mr Ubsdell and Mr Britain were imprisoned by the US courts in 2011 for fraud (unrelated to this case) using the medium term note referred to in the letter of 26 July 2010 and other notes with the same identification numbers ("the Canada MTNs").

Correspondence between the defendant (acting on behalf of LLPP) and third parties

116. The claimants rely upon correspondence in which the defendant (albeit acting on behalf of LLPP and not Anabus) is said to have made various inconsistent statements about the ownership of the MTNs. However, this overlooks the fact that in each letter, the defendant's client is said to be "LLPP/Suisse Concept", and that composite entity is said to own the MTNs. These letters do not therefore, in my judgment, assert ownership of the MTNs which is inconsistent with LLPP's asserted ownership.

The KAR Oil claim

117. The claimants rely on evidence deployed in a claim in these courts by KAR Oil Refining Limited ("KAR") against LLPP, Mr Britain, Mr Ubsdell and a William Nocker. The Particulars of Claim in that claim (and an affidavit of Mr Brad Camp on behalf of KAR) describe a form of "advance fee fraud" practised by LLPP (represented throughout by the defendant) upon KAR, in which KAR was persuaded to make an "upfront payment" of US$10 million to LLPP, in return for a worthless promise by LLPP to arrange a loan of US$100 million to KAR.

118. That evidence includes:

    (1) In June 2010, Mr Camp informed the defendant that United Assurance Company Limited had no S&P or AM Best rating, had had its telephone numbers disconnected and had lost a claim against them for selling bonds without a licence and not returning premiums.
    (2) In response to Mr Camp's queries, LLPP provided a letter on UAC letterhead (signed by Charles Martin as CEO), which set out that the company had been the victim of identity theft, which had required a director named as Richard Rooks to give evidence in proceedings. Mr Head's evidence is that neither Mr Martin nor Mr Rooks list these roles on their LinkedIn pages.
    (3) On 30 June 2010, Mr Camp asked the defendant to provide the "full statement of the relative rights [etc] of the medium term notes" (which was said on the reverse of the MTNs to be available from UAC without charge). This was not provided by the defendant or LLPP.
    (4) On 22 July 2010, LLPP stopped putting forward the MTNs and instead put forward medium term notes issued by UA Insurance Holdings, Inc with ISIN number CA90254PAA62. These appear to be the Canada MTNs. Mr Ubsdell's explanation as to why this was done was that

        > "the name on the note is UAC holding company as due to demand in the notes they have issued more, the CUSIP and ISIN will be a new one but the underline [*sic*] securities are exactly the same.".

        As noted above (para 114), the Canada MTNs were being deployed at the same time on behalf of Anabus to Standard Chartered and Guaranty Bank; and Mr Ubsdell and Mr Britain were imprisoned in 2011 in the USA for fraud using the Canada MTNs.

Advice received by MAI as to the scheme and Mr Johnson's response to it

119. On 15 October 2010, solicitors acting for MAI (Harrison Clark) instructed counsel to advise whether the scheme was a "collective investment scheme" within the meaning of s.235 FSMA. Counsel's advice set out in Harrison Clark's letter to MAI dated 2 November 2010, was that:
    (1) he was "concerned that the scheme is a fraud", in light of it having "a lot of the characteristics of an advance fee fraud" and lacking proper regulatory approval in Cyprus; and
    (2) "even if it is not in fact a fraud, it is an unlawful [collective investment scheme] and on the face of it [MAI] is acting in breach of FSMA in promoting the scheme".

120. The characteristics of an advance fee fraud identified by counsel were

> "investors are offered returns that are too good to be true. Investors are initially lured into a scheme with small cash investments (all of which show good returns), which then entices the investor to invest larger and larger sums of cash."

121. These are of course features relied upon by the claimants. However, they also rely upon Mr Johnson's response when sent the letter by MAI:

> "Interesting, I would upon getting the discussed info within 48 hrs, go on the basis that legal advice was sought previously to me receiving the letter and that we have ceased all operations. It would be interesting to know what the counsel would think our punishment would be if we ceased everything now and just admitted there were only a few clients involved"

122. There is no attempt by Mr Johnson to justify the legitimacy of the scheme, or even to deny that it was fraudulent; his email is focussed on mitigating the consequences of its being so. The strong inference to be drawn is that Mr Johnson was well aware that the scheme was fraudulent.

Closure of the scheme

123. At around the same time, Mr Johnson circulated a memorandum to investors dated 31 October 2010, announcing the closure of the scheme:

> "We feel the need now to bring to your attention that due to circumstances beyond our control we are no longer able to accept any further transfers into our bank accounts. We are required to conduct a detailed legal review in relation to our business as well as supply review, it is essential that we carry out at this moment in time. As part of the above all accounts will now be reconciled and all client monies will be returned accordingly by the end of November"

Events after closure of the scheme

124. From then until around February 2011, Mr Johnson gave regular apparent updates in relation to the return of funds, offering a series of changing explanations for why (despite a few repayments) the majority of investors remained unpaid.

125. Throughout that period, the defendant continued to act for Anabus, and played a central role in its efforts to reassure investors. Mr Heath seems to have taken the lead in this work, sending numerous emails during the period. The central features of the picture put forward by Mr Heath on Anabus' behalf were that: payment would be made via an English solicitor acting as "fiduciary lawyer", payments from an unidentified bank to that lawyer were imminent or in progress and the delays were simply "global payment issues" caused by banks.

126. There was also an attempt to dissuade investors from taking action, with Mr Heath in an email on 24 December 2010 urging them not to "take legal action, or complain to regulatory authorities or the police" as that would "only serve to further

delay or prejudice the payment being made to you" as "there has simply been delay in the transfer of funds". It is difficult to see a proper basis for these assertions.

127. By 5 January 2011, the defendant considered it necessary to make a Suspicious Activity Report ("SAR") to the Serious Organised Crime Agency ("SOCA") under the Proceeds of Crime Act 2002 in relation to the situation. In the SAR, the defendant explained inter alia that it had been told by Anabus that:

(1) it was seeking to secure a loan from Tri-Star Bank in Cyprus (to be repaid with the proceeds of another unidentified "gold dust deal" by Mr Johnson in his personal capacity);

(2) the funds would be transferred

> "to a fiduciary lawyer, Mr Grenville Walker (who is a family lawyer in Dorset, but apparently known to the CEO of the bank). Mr Walker will then remit the funds to Anabus from where they will be paid out to investors"

(3) Anabus required that

> "the identity of the bank and the fiduciary lawyer must remain confidential from the investors and, upon querying this with the client, we have been told that the reason for this is to avoid them becoming involved in the dispute or creditors attempting to contact them directly";

(4) "there have already been delays in the release of funds from the bank, which should have arrived last week but did not, and the creditors are uneasy".

In that context, the defendant told SOCA that its concerns included:

> "1. It is unclear why the identity of the fiduciary lawyer and the bank must be concealed from the creditors, and unclear why Salans needs to be involved in addition to the fiduciary lawyer. We are not entirely satisfied by the client's explanation.
>
> …
>
> 5. A family solicitor in Dorset seems an odd choice to act as 'fiduciary lawyer' in this transaction.
>
> 6. Salans has not yet seen the loan agreement from the Bank, although we have been provided with a specimen copy of the underlying loan agreements against which the creditors initially advanced monies to Anabus. …"

128. Ultimately, of course, no funds arrived, and no payments were made to the majority of the investors.

Claim against Mr Johnson personally

129. In June 2011, a group of some 60 investors brought High Court proceedings (claim no: 1BM30351) in respect of the scheme against Mr Johnson personally, including

for fraud. Mr Johnson's Defence consisted of bare denials or non-admissions: again, there was no real attempt by him to defend the scheme. He later compromised the proceedings for the vast majority of the sum claimed: €1,525,714.78.

Discussion and conclusions

Fraudulence of the scheme

130. The starting point in considering whether there is a sufficient prima facie case that the scheme was fraudulent is the representations made by Anabus in its promotional material (set out at paras 14 to 22 above).

Insurance

131. There is no evidence that any formal insurance policy was ever in place. The nearest arrangements to insurance were:
    (1) the PFA – which, for the reasons given, fell well short of the required obligation on LLPP's part; and
    (2) the "undertaking" offered by the defendant on behalf of LLPP.

    In any event, both of these arrangements were dependent upon LLPP having the assets to meet its obligations. The claimants have, in my judgment, shown a strong prima facie case that the only apparent assets available to LLPP to fortify its undertaking (or any obligation under the PFA) were the MTNs, and that the MTNs were invalid and valueless.

132. As to the knowledge of Anabus/Mr Johnson of the above, unsurprisingly there is no direct evidence of this, and it is a matter of inference. This is often the case where fraud is involved: the defrauded claimants will normally have no direct knowledge of the fraudulent conduct nor, necessarily, the state of mind of the fraudsters. Any finding of fraud by the trial judge will therefore be based on inference from the available evidence. In this case:
    (1) it is difficult to see how even a non-lawyer could conclude that the PFA created an enforceable obligation on LLPP in Anabus' favour;
    (2) a close relationship between Anabus and LLPP can in my judgment be inferred from
        (i) LLPP's willingness apparently to guarantee payment by Anabus up to US $100 million, without the parties receiving separate legal advice; and
        (ii) the terms of the PFA, as discussed in para 89 above;
    (3) the defendant acting on Anabus' behalf told Dominion Metals Trading on 8 July 2010 that Anabus was the owner of the second MTN – see para 109 above;
    (4) Mr Johnson refused to provide proof of funds in respect of the first MTN to WBIG Capital – see para 113 above;
    (5) when the scheme got into difficulties, there seems to have been no attempt by Mr Johnson to make use of the "insurance mechanism".

Anabus' trading history and performance

133. The Gold SPA which is referred to in the 18 May 2010 Letter seems likely to have been that provided by Mr Johnson to Ms Palickova on 14 May 2010: the mine was said to be GGS Ltd and based in Ghana. He refers to it as "the first contract". The clear inference is that there had been no previous trading in gold by Anabus; and,

therefore, that the statement in the Brochures that "contracts with various mines" were already in place was (to Mr Johnson's knowledge) false.

134. Indeed, as discussed above (para 103), the Gold SPA itself appears to be a bogus document.

135. Thirdly, Mr Johnson told Mr Jenkins (see para 104 above) that no contract was in fact entered into.

136. As to the previous trades set out in the Brochures and in the various update documents provided to investors, these showed trades beginning in December 2009 (5 months before the mass recruitment of investors from May 2010) and carrying on until autumn 2010 with consistent returns of between 15 and 25%.

137. As the claimants submitted, such spectacular and consistent returns are inherently implausible:
    (1) As set out above, Anabus appears not to have had the necessary arrangements with gold suppliers to conduct such trades in respect of the period before May 2010 (as set out in the Brochures) or, indeed, after that date;
    (2) Anabus also appears to have lacked the necessary funding, since it was unable or unwilling to provide proof of it to prospective sellers of gold dust;
    (3) Before May 2010, Anabus does not appear to have had any investor behind it, let alone (in the words of the Brochures) any "big investor". The defendant's solicitor, Mr Harrison suggests that there may have been such an investor before LLPP came on the scene. However, I agree with the claimants that Anabus would plainly have experienced difficulties in recruiting a legitimate commercial investor (particularly to support the value of trading which it was supposedly undertaking). I also agree with the claimants that if there had been such an investor, it seems inevitable that copies of the contracts with (or at least some mention of) that investor would have been made at the time Anabus was dealing with LLPP and the defendant in May 2010; and that if Anabus had such an investor, it is unlikely that it would have turned to the opaque and unsatisfactory security offered by LLPP in the first place;
    (4) Even after May 2010, the available evidence suggests Anabus did not attract success with mining companies with LLPP as its apparent backer;
    (5) The dates claimed for many trades listed in Anabus' trading schedules are inconsistent with the timings in the Brochures for the gold to be transported from Africa to a refinery on another continent (5 days), refined and then sold (up to 72 hours in the Brochures);
    (6) Despite the consistently high returns claimed (and despite the references in the Brochures to "constantly monitor[ing] the inter-bank price of Gold with the aim of maximising the return above the purchase price"), the schedules appear to show trades being conducted on dates fixed in advance.

Protection of investors' money in client accounts

138. It is clear from events following the closure of the scheme that investors' money was not left in client accounts without being "touched" as promised in the Brochures. It was plainly not available for repayment from October 2010 onwards. The high returns which Anabus represented as accumulating trade by trade were also not available. As the claimants' counsel submitted, it is difficult to explain

why, if the scheme was a legitimate one, so many investors can have been left unpaid.

Due Diligence Pack

139. Doubts as to the authenticity of these documents arise from the following:
    (1) None are original or even copy documents; but distorted pictures of apparent documents pasted beneath Anabus' letterhead;
    (2) Even then, they are almost totally uninformative. All were redacted to remove the names of all parties, with the exception of one reference to "ANAVUS Group" [*sic*] in the purported Ghanaian statutory declaration (relating to a single sale for "2.000 kilograms" of gold);
    (3) Moreover, both the supposed Ghanaian assay report and statutory declaration are dated 14 May 2010; a date on which (on the trading schedule provided by Anabus to its investors for May 2010) the relevant gold had already arrived at the refinery outside Ghana, with the next shipment not due to leave the mine for some days.

140. When challenged by Mr Jenkins in 2011 (see para 104 above) that

> "the due diligence pack … was full of fake company documents"

Mr Johnson made no attempt to defend it.

141. I accept therefore that the claimants have shown a strong prima facie case that the due diligence pack was not authentic (to the knowledge of Mr Johnson).

Hallmarks of a fraudulent scheme

142. In addition to the specific fraudulent representations discussed above, I consider that the scheme has the classic hallmarks of a fraudulent scheme:
    (1) the promise of impossibly high returns (investments quadrupling within 4-5 months) at no risk to investors;
    (2) reliance on exotic investments and financial instruments;
    (3) use of easily forged (and highly redacted) documents, such as the Gold SPA, Due Diligence documents and the MTNs;
    (4) express appeal to the "smaller investor" and "everyday folks";
    (5) reliance on solicitors to produce comfort letters and provide plausibility (as is apparent from the circumstances of the defendant's instruction);
    (6) secrecy and deterrence of questioning, which was a feature of the scheme from the beginning to the end (causing the defendant to send its SAR to the Serious Organised Crime Agency, as set out at para 127 above); and
    (7) total lack of regulatory oversight by reason of Anabus being a Cypriot company.

143. These features may usefully be compared with the Law Society's Warning Notice in force at the relevant time:

> "Schemes are formulated by fraudsters to prey upon the wealthy, greedy or vulnerable. They often sound "too good to be true" and almost always are.

Warning signs

- The promise of unrealistically high returns
- Deals forming part of larger deals involving millions, or billions of pounds, dollars or other currencies
- Any advance fee payable to secure future lending or to buy into an "investment" process
- Trading in apparent banking instruments such as Promissory Notes or Standby Letters of Credit to provide returns for non-banking investors
- Confusing and complex transactions involving misleading descriptions or ill-defined terminology, such as "grand master collateral commitment"
- Vague reference to humanitarian or charitable aims
- The need for secrecy to protect the scheme, particularly to prevent proper checks
- Use of faxed or easily forged documents often from offshore companies or from financial institutions abroad"

144. I am satisfied therefore that the claimants have shown a strong prima facie case that the scheme was fraudulent. Indeed, I consider that they have shown a very strong and compelling case.

The claimants' alternative case: Anabus used as an instrument of fraud by LLPP

145. If I am wrong in my conclusion as to Anabus being the person responsible for the fraud, then I consider that the claimants have a sufficiently strong prima facie case that LLPP used Anabus as an unwitting tool or mechanism for its own fraud in the following circumstances:
    (1) LLPP seemingly initiated Anabus' instruction of the defendant (its own solicitors);
    (2) The purpose of that instruction was, from the outset, so that the defendant could produce comfort letters, to counterparties proposing to deal with Anabus, in reliance on LLPP's own fraudulent MTNs; and
    (3) The PFA was or was intended to be a profit sharing arrangement under which part of the fruits of that deceit would flow back to LLPP.

Conduct falling outside the normal lawyer/client relationship

146. Although the defendant's retainer letter dated 13 May 2010 was in the hearing bundle, the defendant's position is that it is privileged and disclosed in error; and the claimants do not rely upon it.

147. It is clear from the documents considered above (particularly the various letters and emails set out in paras 77-79, 81-83 and 94-97) that the defendant was instructed to and did produce numerous comfort letters for both Anabus and LLPP in respect of the MTNs and, in the 18 May 2010 Letter, LLPP's financial support of Anabus.

148. The purpose of those letters was to encourage, directly or indirectly (through MAI, Credible and other introducers), investment in the scheme: in the 18 May 2010 Letter, by providing reassurance that Anabus had a valid contract to purchase gold dust; and that investors were protected by LLPP's "undertaking" to pay US$100 million. This is a purpose which falls outside the normal lawyer/client relationship. I am satisfied that the claimants have a strong prima facie case (and again a very

strong and compelling case) that the defendant was instructed for the purpose of furthering the scheme; and, in particular, that the 18 May 2010 Letter was obtained from the defendant in order to implement the scheme.

Conclusions

149. For the reasons set out above therefore, in my judgment, the fraud exception applies to documents held by the defendant for Anabus which would otherwise be privileged.