Neutral Citation Number: [2022] EWHC 1625 (Comm)

Case No: CL-2019-000380

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2022

Before :

MR JUSTICE ANDREW BAKER

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Between :

(1) KYLA SHIPPING CO LTD	**Claimants**
(2) VEGA CARRIERS LTD	
- and -	
(1) FREIGHT TRADING LTD	**Defendants**
(2) C TRANSPORT PANAMAX LTD	
(3) C TRANSPORT MARITIME S.A.M.	
(4) LUIGI CAFIERO	

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Philippa Hopkins QC, Adam Turner and Henry Ashwell (instructed by **Watson Farley & Williams LLP**) for the **Claimants**
Charles Kimmins QC and Luke Pearce (instructed by **Schjødt LLP**) for the **First, Third and Fourth Defendants**
Timothy Hill QC and Alex Carless (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Hearing dates: 7, 8, 9, 10, 14, 15, 16, 17, 18, 23, 24 March 2022

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Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. Nikolaos ('Nick') Livanos ('NEL') is a cousin of Peter G. Livanos ('PGL'), the son of the late George P. Livanos ('GPL'). GPL was the principal of the Ceres Hellenic shipowning businesses, running Ceres Hellenic Shipping Enterprises Ltd, which was established in 1949 and was for many years the Livanos family's principal trading company.

2. NEL's father spent his career at sea, as a ship's captain employed in the Ceres Hellenic fleet. He died when NEL was only 18, and GPL became a father figure and business mentor to NEL. In the summer of 1980, NEL was 22 and had spent the previous 4 years or so gaining experience at sea working on board ships owned by the Stravelakis and Xylas families. On a visit to NEL's family home in Chios that summer, GPL invited NEL to come to work for the Livanos family businesses.

3. With financial assistance by way of an informal, interest-free loan from GPL, NEL studied business and management at Pace University in New York. He gained further seafaring experience by working on board Livanos ships during the summer holidays, and upon graduating from Pace, NEL joined Sea Group, the Livanos tanker management company.

4. I shall come back to this below, but in short NEL's career was then with Livanos companies until 2007, when he branched out fully on his own, although he continued to operate from the Ceres Hellenic building in Piraeus until June 2007, when he set up his own office in Athens.

5. Therefore, NEL was a long-standing and close member of the Livanos family, in business and by blood; and he continued to be treated as such in ways that matter to the present proceedings even after he had set up on his own and no longer held any position with the Ceres Shipping Group.

6. These proceedings concern 41 FFA trades ('the Kyla FFAs') documented by the third defendant ('CTM') as having been entered into between the first claimant ('Kyla') and the first defendant ('FTL').

7. It was common ground that the Kyla FFAs were null and void if, as Kyla claims for 31 of them ('the Disputed FFAs'), they were concluded by CTM purportedly for and on behalf of Kyla but acting in breach of fiduciary duty in one or more of the ways alleged by the claimants when doing so. For the sake of brevity, in this judgment I use language as I would of binding contracts to describe and analyse the Kyla FFAs and their purported effects without meaning by that to pre-judge whether they were any such thing. Thus, for example, where I refer to obligations under, or profits and losses made on, the Kyla FFAs, as if they were FFA trades binding upon Kyla, it should be borne in mind throughout that, save for the first 10 Kyla FFAs, the claim is that Kyla came under no such obligations and its losses are recoverable as having been paid by or on behalf of Kyla under an operative mistake as to whether there was any obligation to pay (with counter-restitution required for apparent profits received by or credited to Kyla).

8. All of the Kyla FFAs took positions on the Baltic Forward Assessment ('BFA') Index price for time charter routes for either Capesize, Supramax or Panamax bulk carriers. Those main time charter price Indices, familiar to anyone who knows the FFA market, are often referred to as 'Cape 4TC', 'Smx 6TC' and 'Pmx 4TC' to reflect the fact that the Index for Capesize bulkers, likewise the Index for Panamax bulkers, is intended to represent an average of daily charter hire rates for four standard time charters, whereas for Supramax bulkers the Index is built from six standard time charter rates. I shall refer simply to 'Cape', 'Smx' or 'Pmx' respectively, so that (for example) a Kyla 'Q1 08 Pmx' FFA is a forward purchase or sale by Kyla of the Pmx 4TC Index for the first quarter of 2008, at a strike price fixed when the trade was placed.

9. Market standard terms for FFAs, those of the Forward Freight Agreement Brokers' Association ('FFABA'), provided for monthly settlement. So a 'full' Q1 08 FFA would settle with monthly differences payable in early February 2008 (January 2008 Index against strike, multiplied by 31 days), early March 2008 (February 2008 Index against strike, multiplied by 29 days) and early April 2008 (March 2008 Index against strike, multiplied by 31 days). Thus, a 'full' contract on Q1 08 represented a 91-day exposure (contract volume). (I pass over what may be a complication that does not affect any of the issues I have to decide, namely a possible standardisation for cleared trades via the London Clearing House ('LCH') to notional 30-day months that some of the evidence suggests but which was not explored at trial.)

10. It was not uncommon to trade 'half' contracts, i.e. half a 'full' calendar period. Such a contract would still settle monthly, but at half the value of a full contract. So, for example, in early February 2008, there would be a first monthly settlement of January 2008 Index against strike, multiplied by 15.5, under a 'half' contract for Q1 08; and a 'half' contract on Q1 08 would be a 45.5-day exposure in all.

11. Most of the Kyla FFAs may be identified uniquely by the date on which they were placed, their direction (Kyla buying or Kyla selling), and the Index bought or sold (if that be necessary to distinguish the trade from another Kyla FFA placed on the same date). I shall take advantage of that when dealing with individual Kyla FFAs, using a format of 'Buyer/Seller DDMMYY'. Thus, the first Kyla FFA, placed on 7 February 2007, Kyla buying from FTL, is 'Kyla/FTL 070207'. It was a full Q2 07 Cape, but that does not need to be said to identify the trade as it was the only Kyla FFA placed on that date. On the other hand, two Kyla FFAs were placed on 11 July 2007, both purchases, so they need to be distinguished by Index, becoming Kyla/FTL 110707 Q3 07 Cape and Kyla/FTL 110707 Q4 07 Cape.

12. That labelling convention does not allow unique identification of four Kyla FFAs placed at the end of April 2008. Four sales by Kyla were placed on 29 April 2008 (although one was only documented the next day, 30 April 2008). Each was a half May/June 08 Cape position, the first three at US$147,500 per day, the fourth at US$148,000 per day. I shall refer to them as FTL/Kyla 290408(1) to FTL/Kyla 290408(4). Using that labelling convention, FTL/Kyla 290408(3) is a Kyla FFA confirmed at the time as a sale to the second defendant ('CTP') rather than a sale to FTL. In referring to that Kyla FFA as FTL/Kyla 290408(3), I do not mean to beg the question whether it was (purportedly) a trade with FTL rather than with CTP as confirmed to Kyla.

13. I shall also use from time to time an equivalent labelling convention in respect of 'second leg' trades (as to which, see below). So, for example, the 'second leg' trade for the first Kyla FFA was a full Q2 07 Cape purchase by FTL from Pioneer, on the same date, 7 February 2007. That FTL purchase could be referred to as FTL/Pioneer 070207.

14. Kyla's net loss on the Kyla FFAs was a little over US$31.1 million and its net loss on the Disputed FFAs was just shy of US$32 million. FTL made profit of US$8.4 million from the Kyla FFAs, of which a fraction over US$8 million came from the Disputed FFAs, treating as profit for FTL the margin between the Kyla FFA prices and the prices of the trades in the opposite direction with FFA market counterparties that FTL treated in its books as matched to the Kyla FFAs.

15. In a description that was used at trial, the Kyla FFAs were 'first leg' trades, and the trades with market counterparties to which they were matched in FTL's books were 'second leg' trades. On reflection, it would have been better, for discussing the claims I have to judge, to number the legs the other way round, so that a 'first leg' trade was a trade done by FTL in the market, and a 'second leg' trade was a trade with Kyla matched to a 'first leg' trade. However, I retain the parties' usage ('first leg' = Kyla; 'second leg' = market) to avoid confusion for them, given their familiarity with that usage.

16. The claimants' case is that CTM was Kyla's agent to trade FFAs, so that every 'first leg' trade, when placed, should have been matched to a 'second leg' trade. In practice, the individual at CTM said to have undertaken that agency role was the fourth defendant, Luigi Cafiero. The arrangement, according to the claimants, was that CTM (acting by Mr Cafiero) was to trade in the FFA market, at its discretion, *for* Kyla, using FTL to 'front' to the market for Kyla, for a fee of US$500 per day built in to the trades as a margin in favour of FTL. On the claimants' case, therefore, the 'second leg' trade was always the primary trade, or should have been anyway, generating when placed with the market, by reason that it was intended by Mr Cafiero to be for Kyla's account, a simultaneous 'first leg' trade on back-to-back terms save for that US$500 per day margin. That is to say, each Kyla FFA should have involved a single trading decision on Mr Cafiero's part, namely that a trade should be done for Kyla, to be implemented by: (i) trading with the market (the 'second leg'), trading in FTL's name but intending the trade to be for Kyla; (ii) documenting a matching trade (the 'first leg') between FTL and Kyla at a price US$500 per day higher (purchases) or lower (sales) than the price secured for Kyla from the market.

17. In 2007-2008, various practices were known in the FFA market by which an established participant (B) might 'front' an FFA trade with another (A) where the trade was intended by B to be for the ultimate account of a third party (C), facilitating an effective trade (assuming all remained solvent) between C and A, through B, where for one reason or another C was unable to trade directly with A. The claimants said that the Kyla-CTM relationship, of agency and FFA management on the part of CTM for and on behalf of Kyla, involved a standing arrangement for FTL to front in that way for Kyla on (what would then be documented as) the 'second leg' trades.

18. If the claimants are correct about the nature of the relationship between Kyla and CTM, and how it was supposed to work, the aggregate amount generated for FTL in

that way from the Disputed FFAs, at US$500 per day, should have been c.US$1.2 million rather than US$8 million odd.

19. The defendants say that CTM was not trading *for* Kyla but trading (as agent for FTL) *with* Kyla. They say that each of the Kyla FFAs was traded between NEL for Kyla and Mr Cafiero for CTM (as agent for FTL); and that for every Kyla FFA, the material terms of the trade, including the strike price, were agreed over the telephone between NEL and Mr Cafiero acting in those capacities.

20. Whether the relevant relationship, between Kyla and CTM, was as described by the claimants or as described by the defendants, was the principal issue at trial, aside from time bar. I find in favour of the claimants on it.

21. The Disputed FFAs were placed between early May 2007 and mid-November 2008. They followed the first 10 Kyla FFAs, which conformed closely enough to how, as I find, the FFA trading was supposed to work that no claim was maintained in respect of them by the claimants. Considered as a trading book of 41 trades, the Kyla FFAs represented:

    (1) 5 FFA positions put on during February-April 2007, each later closed out, which account between them for the first 10 Kyla FFAs in respect of which no claim was pursued;

    (2) 5 further FFA positions put on during May-August 2007, each again later closed out;

    (3) 5 positions put on during September-October 2007, one of which ran to settlement (a Q1 08 Pmx traded on 6 September 2007), one of which did so in part (the Q1 08 part of a full Q4 07 + Q1 08 Pmx traded on 12 September 2007), the other three of which were closed out;

    (4) 1 position taken on 17 January 2008 and closed on 18 January 2008 (44.5 days short Q1 08 Cape, part of 90 days traded, the balance of which closed out the last October 2007 trade);

    (5) 1 position taken on 18 January 2008 and closed on 6 March 2008 (45.5 days long Q2 08 Cape plus 1 day long Q1 08 Cape, part of 45.5 days long Q1 08 Cape the balance of which (44.5 days) was the close-out of the short taken the day before ((4) above));

    (6) 2 positions going long Q2 08 Cape, traded on 13 February and 11 March 2008, the April months of which ran to settlement and the May/June months of which were closed out on 29 April 2008;

    (7) 1 position taken on 5 June 2008 (Kyla/FTL 050608), going long Q3 + Q4 08 Cape, with Q3 and October running to settlement while the November/December balance was closed out by (part of) the final Kyla FFA, traded on 17 November 2008 (FTL/Kyla 171108). Kyla/FTL 050608 was a ruinously bad trade, Kyla losing c.US$21.6 million on it;

(8) 1 position taken on 18 September 2008 (Kyla/FTL 180908), going long Q4 08 Cape, with October running to settlement and the November/December balance being closed out by (the balance of) FTL/Kyla 171108.

22. 70% of Kyla's aggregate net loss on the Kyla FFAs, c.US$21.6 million out of c.US$31.1 million, was suffered on Kyla/FTL 050608. That trade amounted to a disastrous bet on the market rising, placed at the very peak of the overheated market of early summer 2008 and held until well after the global crash was precipitated by the collapse of Lehman Bros in mid-September 2008. I find that it was not traded by NEL on behalf of Kyla in a negotiation with Mr Cafiero on behalf of FTL. It was put on by Mr Cafiero purportedly for Kyla, but acting against its interests and by way of dishonest opportunism acting in the contrary interests of FTL so as to cause a significant loss he had incurred for FTL's own account the previous day to be shifted to Kyla.

23. Given the basic chronology, it was common ground that all of the claimants' various claims, as alleged, in respect of the Disputed FFAs are *prima facie* time barred, proceedings having been commenced in June 2019. The claimants say that they are not time barred, however, attempting to bring themselves within s.32 of the Limitation Act 1980. I find that the attempt fails.

24. My conclusions as to the facts follow from a consideration of all the evidence in the round, and all the parties' submissions on the evidence, even if I do not mention or summarise all of that evidence or all of those submissions. It is rarely possible to do full justice to the holistic, iterative, self-critical and cross-checking nature of the process of assessing a case on the evidence, in an essentially 'linear' written judgment. Thus, for example, my assessment of the factual witnesses was informed by the plausibility of their evidence, and its consistency or inconsistency with the documentary record, as well as by the ability "*which cross-examination afford[ed] to subject the documentary record to critical scrutiny and to gauge [the witnesses'] personality, motivations and working practices*" (*per* Leggatt J, as he was then, in *Gestmin SGPS S.A. v (1) Credit Suisse (UK) Ltd & (2) Credit Suisse Securities (Europe) Ltd* [2013] EWHC 3560 (Comm) at [22]); but at the same time, my final sense of the plausibility of rival accounts on disputed matters, bearing in mind what is or is not in the documentary record, was informed by the personalities involved (and their motivations and working practices), the most important of which I had an opportunity to gauge through the trial process.

The Parties

25. Kyla was formed in 2003 to own the m.v. *Kyla*, a 1982 Capesize bulk carrier. Kyla was co-owned between N&P Shipping Co ('N&P'), a company owned between NEL and his brother, which had 70% of Kyla, and YPA Associates Inc ('YPA'), which had the other 30%. YPA was owned by Yannis Haramis (the 'Y' in YPA), a senior executive in PGL's businesses, PGL himself (the 'P'), and Adamantios Lemos (the 'A'), another cousin of PGL, a shipowner and principal of Unisea Shipping SA.

26. The second claimant ('Vega') was also formed in 2003. NEL is Vega's sole beneficial owner. In June 2005, through Vega, NEL took a 25% stake in a joint venture company that owned a bulk carrier called the m.v. *Bulk Hong Kong*. PGL's side of the Livanos family was also involved through a corporate vehicle. In 2011, Vega's

indirect stake in the *Bulk Hong Kong* was translated into a stake in a broader joint venture by way of a shareholding in CBC Holding ('CBCH'), a company controlling a fleet of 10 ships (including the *Bulk Hong Kong*). That stake in CBCH was surrendered in May 2012 under a Termination Agreement that was part of the way in which Kyla's FFA liabilities were ultimately discharged.

27. The *Kyla* was purchased from a company associated with Paolo Clerici under whose ownership she was operating in the Coeclerici/Ceres Capesize Pool, under the technical management of Ceres Hellenic and the commercial management of CTM (then called CC Maritime SAM). Under NEL's (majority) ownership, the *Kyla* continued to operate in the Capesize Pool, with the same technical and commercial management.

28. In February 2004, NEL and his brother, indirectly through N&P, purchased another Clerici ship, a 1992 Capesize, which they renamed the m.v. *Captain Vangelis L*. Under NEL's ownership, the *Captain Vangelis L* rejoined the Coeclerici/Ceres Capesize Pool for two years following the purchase, so like *Kyla* she had Ceres Hellenic as technical managers and CTM as commercial managers.

29. In February 2005, NEL and his brother purchased, through an SPV called Northern Chios Holdings Inc ('Northern Chios'), a 2001 Panamax, which they named the m.v. *Kalliopi L*. Northern Chios was owned, like Kyla, 70% by N&P and 30% by YPA. The following year, again using an SPV owned by Northern Chios, another Panamax was acquired, a 2003 build which became the m.v. *Pantazis L*.

30. At the time of the events giving rise to the claims considered in this judgment, FTL, CTP and CTM were all companies within PGL's Ceres Shipping Group.

31. CTP was established in 1999 and operated until the end of 2007 as the corporate vehicle for the CTP Panamax Pool ('the CTP Pool'). On 1 January 2008, the CTP Pool ceased to exist, but CTP continued to provide services to shipowners, including members of the CTP Pool as it had been. There was a similar Capesize Pool operated by C Transport Cape Size Ltd ('CTC', operating the 'CTC Pool'), which was the successor in business to the Coeclerici/Ceres Capesize Pool to which I referred above.

32. C Transport Holding Ltd ('CTH') was the commercial manager for CTC and CTP, as pool companies until the end of 2007, and thereafter. CTH delegated the performance of its functions as commercial manager for CTC and CTP to CTM, established in Monaco in 2004.

33. Mr Gary Weston joined CTM as CEO in 2004, when it was still CC Maritime SAM and based in Genoa, before the move to Monaco later that year, after a 25 year career with H Clarkson & Co Ltd. He joined Clarkson as a trainee shipbroker in 1979, rising to become Executive Chairman in 1998. He worked as CEO of CTM until 2011, and was then Executive Chairman until he retired in 2015.

34. Mr Cafiero joined CTM on 1 November 2004 and worked for CTM until December 2010. For just over a year, from January 2007 to January 2008, Mr Cafiero's contract of employment was in fact with C Transport Maritime UK ('CTM UK'), but that was an internal matter as part of his relocation during that period to head up a London office for CTM, and in his dealings with others, including NEL/Kyla, he continued to

act for and represent CTM. He returned to Monaco in early 2008 when, without relinquishing his role running FTL, he took over from Mr Giacomo de Ferrari as the head of the CTM Panamax desk, so he was then effectively running CTP as well as FTL until he left CTM at the end of 2010.

35. One of CTM's functions, as delegated commercial manager for CTC and CTP, was the trading of FFAs for those companies and the management of FFA positions held by them, as hedging instruments in respect of their exposures as ship operators to movements in dry bulk freight markets. Mr Cafiero first became involved with FFAs in and after January 2005, as part of his work for CTM, under the supervision of Mr Henry Collot d'Escury, head of CTM's Capesize desk, for CTC, and Mr de Ferrari, head of CTM's Panamax desk, for CTP.

36. FTL was established in 2005 as a speculative FFA trading fund. It began trading in April 2005. FTL was run as a zero cash business whose financial results (positive or negative) were allocated entirely to the fund investors, who were well-known friends and contacts of CTM. The two initial investors (via corporate vehicles) were PGL and Petros Pappas of Oceanbulk. As FTL's activities became established, others joined as investors, including Mr Weston.

37. Mr Weston put Mr Cafiero in charge of FTL from the outset. As CEO of CTM and a Director of FTL, Mr Weston had an ultimate responsibility to FTL's investors for its performance, but apart from the Japanese business of the Ceres Group, with which Mr Weston had a close personal involvement, he was not involved in day-to-day operations which had to be delegated to others. He was heavily involved in setting up FTL, but not in its operations once it was up and running, although he did receive weekly reports on FTL's trading enabling him to write monthly reports on the performance of the fund for the investors. He asked Mr Cafiero to run FTL because he (Cafiero) had a bit of experience of FFA trading and had shown some aptitude for it.

The Factual Witnesses

38. On the pleadings and at trial, the rival cases as to the facts were completely at odds. Although the primary events occurred many years ago, it is difficult to envisage how there could be an honest misunderstanding or difference of recollection between NEL and Mr Cafiero as to how the Kyla FFA trades were placed and as to what CTM (acting by Mr Cafiero) was doing, or at least was supposed to be doing, in relation to them. Either Mr Cafiero was deciding what positions to buy and sell, when, at what price and on what other terms, all for Kyla, which can only sensibly be because the claimants are correct about the type of arrangement that had been set up and agreed, i.e. a generally unfettered discretionary trading mandate under which CTM (Mr Cafiero) was to look after Kyla's interests, using FTL to front for it to the market; or NEL was engaged in independent trading, for his own account, with Mr Cafiero of CTM (acting for FTL) his only counterparty, negotiating every trade and making his own decision every time on product, period, volume, price and direction.

39. The well-known remarks of Robert Goff J, as he then was, in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57, are apposite (but also bearing in mind what I said in paragraph 24 above):

"Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."

40. In this case, the documents almost all point in favour of the claimants' case. There are hardly any documents that support the defendants' case and instead, the defendants had to try to explain away damaging document after damaging document. The explanations, mostly proffered by Mr Cafiero in a bravura performance of brazen inventiveness in the witness box, were not at all convincing, either individually or (particularly) taken as a whole.

41. I considered NEL as a witness to be engaging, careful, compelling and honest. His account of the FFA trading was consistent, and he was content to admit matters which might be thought uncomfortable or damaging, for example that the 2008 Kyla financial statements included statements he knew at the time to be untrue.

42. The defendants contended that NEL would not have been so naïve or trusting as to leave the conduct of his FFA portfolio to a young, inexperienced trader like Mr Cafiero, employed by CTM. As to that:

    (1) firstly, whilst I agree that Mr Cafiero was unsuited to the role, he was asked by Mr Weston to run FTL and presented to the world, including to NEL, as suited. The underlying error of judgment, a serious one in my view, was not in NEL trusting to CTM (which in practice mostly meant trusting to Mr Cafiero, but was ultimately about trusting a family business led by Mr Weston), but in Mr Weston leaving Mr Cafiero essentially unsupervised to run FTL's book and to do as he saw fit with Kyla's FFA trading as one element of his activity;

    (2) secondly, the defendants' case depended upon a portrait they sought to paint of NEL as a financially sophisticated shipping investor with expert knowledge and understanding of FFAs and the trading thereof which in my view badly missed the mark. NEL was a very experienced shipping industry man, with a technical management and operations background in the tanker market, and expertise of that kind. He was not at the material time an expert shipping investor, even as regards the commercial management of the ships in which by 2007 he had built up a substantial indirect interest as owner, let alone as regards trading in FFAs as a speculative investment activity.

43. Fitting that true description of the man, NEL was something of a control freak in relation to matters of technical management and vessel operations, but not at all in relation to his business affairs more generally, whether as regards the FFAs or anything else. He was a touch chaotic and disorganised, reliant on others (especially Mr Thanopoulos (paragraph 69 below) generally (but not for FFAs), and CTM for the Vega and Kyla FFAs). From September 2007, that was exacerbated by his need to focus on difficult personal matters arising out of the breakdown of his marriage. The

idea that NEL considered, negotiated and agreed each FFA trade, and was all over Kyla's FFA book running it for himself as an independent investor trading with Mr Cafiero, as contended by the defendants, is unreal.

44. Mr Cafiero, I find with regret, was dishonest in his dealings and as a witness. In the latter regard, he was prepared to say whatever suited his case, even if it was contradicted by or very difficult to fit with the documents or the evidence of others. He was argumentative, inventive, and thoroughly unconvincing.

45. Mr Weston was also an unsatisfactory witness, keen to argue the case. His only relevant focus at the time was on FTL's bottom line, and in his evidence he seemed to me motivated primarily by a desire to persuade the court that whatever had occurred was not his fault rather than just to assist with the facts where he could, or admit, where this was the position, that he could not assist because he either did not remember or would not have known at the time, or both. I found Mr Pulcini (paragraph 68(1) below) aggressively argumentative, keen to speculate, and happy to give evasive answers rather than to assist the Court. Mr Weston and Mr Pulcini claimed in their trial witness statements to be in a position to testify to the untruth of the claimants' claim (and NEL's evidence) that Mr Cafiero was making the trading decisions (purportedly) on behalf of Kyla in respect of the FFAs, and that NEL was leaving that to him and trusting him with that. In my judgment, neither in fact had then or has now any knowledge of how Mr Cafiero operated the Kyla-CTM relationship, and neither provided at the time any meaningful supervision or audit of what Mr Cafiero was doing or had done in that regard.

46. Mr Haramis's evidence contributed very little to the matters in issue. It was concerned mostly with meetings and discussions relating to the rescheduling of Kyla's FFA debts, the facts relating to which were largely common ground. He had given in his written evidence a glowing description of NEL's expertise and experience in the shipping industry, but in fact had no basis for asserting (if this was his intention) that NEL was an FFA expert or was not (or would not have been) relying on CTM (Mr Cafiero) to build and run Kyla's FFA book for him. A telling piece of correspondence from him during the debt rescheduling period showed that at the time he appreciated, as I judge to have been the truth, that NEL would have been out of his depth trying to build and run an FFA book for Kyla.

47. Mr Mantero (paragraph 68(3) below) was very nervous and defensive in the witness box, but in my judgment he was essentially an honest witness. The claimants invited me to find that he was complicit in, and knowingly assisted with, dishonest trading for Kyla against its interests. I am not persuaded that the evidence justifies such a finding. Mr Mantero was reliant on the information given to him by Mr Cafiero concerning what trades to document as Kyla FFAs and did not attempt to interrogate or second-guess what he was told, or to subject it to any critical scrutiny of his own at the time. His task (as he saw it) was to document accurately the business Mr Cafiero told him had been done, and to report weekly to his superiors in Monaco on the effects as shown in FTL's books. Any decisions required or actions to be taken would have been decisions made by or actions directed by others.

48. Mr Chillo (paragraph 68(4) below) was an honest witness, as the claimants accepted after he had given his evidence. But he was not in a position at the time to have knowledge that might have assisted on any of the important issues in the case, even

leaving aside the passage of time and its impact on his ability to recall any of the material events.

49. Mr Thanopoulos' written evidence substantially supported the claimants' case, albeit he was not in a position to know, and did not know, whether NEL had been taking his own trading decisions in relation to FFAs or relying on CTM (Mr Cafiero). Under cross-examination, he became somewhat trenchant and argumentative, and I was left with the conclusion that he had worked himself up for the trial to try to support the defence position from the witness box rather than just tell it as it was in point of fact, to the extent that the facts had been within his knowledge and to the extent that he had any real recollection.

50. Mr Iliopoulos (paragraph 70 below) was a straightforward witness, but his evidence did not assist much on any of the issues that mattered.

The Expert Witnesses

51. I heard expert evidence from Philippe van den Abeele (called by the claimants), Ian Staples (called by FTL, CTM and Mr Cafiero) and Benjamin Goggin (called by CTP). All have expertise concerning the trading and/or the broking of trades in the FFA market, and all were in the market during the period of interest in this case.

52. Mr van den Abeele was knowledgeable and authoritative. He was independent and obviously had no axe to grind, with a wealth of FFA experience as trader and broker and a deep understanding of the dry bulk FFA market from all angles. His opinions withstood scrutiny, and I have no hesitation in accepting his evidence where it was properly expert evidence at all.

53. One of the major exercises undertaken through Mr van den Abeele's written reports, however, was little more than a collation and summary of the factual information available in the documentary materials obtained for the case as to the state of the market, trades done, prices reported and so on. It fed into an analysis, for example, of whether the Disputed Kyla FFAs had been placed at or about a prevailing market price that depended mostly upon the taking of a view that required no expertise, and is a matter for the court and not for the experts, on when a particular trade was done.

54. Mr van den Abeele's reports explained that the collation and summary of the factual material was not his, but was prepared for his use by the claimants' solicitors, Watson Farley & Williams LLP ('WFW'). It was clear throughout where that ended and Mr van den Abeele's commentary, analysis or opinion began. Even so, it would have been better (more balanced) for Mr van den Abeele to have expressed his views somewhat differently. Thus, for example, dealing with Kyla/FTL 050608 and the question "**How did the Contract Rate … compare to the prevailing market rates at the relevant time?**", he said this: "*The prevailing price at the relevant time, i.e. the time of execution at 6.23pm should be close to the BFA closing price on that day. The BFA closing price was $172,649/day and the executed Kyla price was $182,000/day. I cannot see any kind of plausible explanation for this kind of discrepancy between the Kyla price and the prevailing market price at the time of the trade.*"

55. In that example, the pertinent expert evidence Mr van den Abeele was in a position to give was limited to this, namely that the Kyla/FTL 050608 price of US$182,000 per

day was close to the very top of the market at the close of the day on 4 June 2008 and overnight into 5 June 2008, although on the high side even for that, but well off the market if the trade was done at anything other than the very start of the day on 5 June 2008. Even that would barely have been expert evidence, being apparent from the available records as to market activity that day as collated and summarised by WFW. The real value of the expert evidence was in explaining the different sources of information thus collated and summarised, and matters of good or normal broking practice affecting the timeliness of record production. What then to make of the material available was a matter for argument and determination by the court, informed by those explanations, not a matter for the experts.

56. With the benefit of hindsight, I consider the fault there lay in the way in which the issues on which the experts were asked to give an opinion were drafted. I did not consider that Mr van den Abeele was giving me other than his independent assessment and view upon the questions he was asked to address; and I had no difficulty identifying what was properly expert evidence within what he said and what was only an assessment of the facts that it was for the court to make on the evidence.

57. Mr Staples was not an FFA trader at the material time, and has had more limited experience than Mr van den Abeele in that regard generally. He was sullen, truculent, and combative in the witness box. I was unsure whether he was applying his mind independently to the questions he had been asked, and was being asked under cross-examination, or was seeking to argue a case for the defence. I did not find his evidence helpful.

58. Mr Goggin, like Mr van den Abeele, evidently provided an experienced and independent assessment. His main experience however has been in the tanker FFA market, and some of his conclusions were undermined by reliance on some irrelevant material. Where his ultimate views differed from those of Mr van den Abeele, I would prefer the latter.

The Facts

NEL and PGL

59. As already noted, NEL is the principal of the claimants, and they were, amongst other things, the vehicles he used for his involvement in the trading of FFAs from 2005. He has worked in the shipping industry since about 1976 and is the founder and CEO of Kyla Shipping & Trading Corp.

60. PGL is NEL's second cousin once removed, and a prominent figure in the shipping industry. At the time of NEL's FFA trading, PGL was President and Chairman of CTM, and beneficial owner of the Ceres Shipping Group, the Drylog group, CTM, CTP, CTC and FTL, and a shareholder in YPA. I was told that CTP is not now beneficially owned by PGL. That was said to be the reason why CTP was separately represented, although why the changed ownership of CTP meant that separate representation was necessary (if it was) was neither explained further nor evident, given the common cause made by all of the defendants on the disputed issues.

61. GPL supported NEL during the early stages of NEL's career, and after PGL took over the Ceres Shipping Group in 1997, PGL took on that role as well. As a result, for

many years, and throughout the period relevant to these proceedings, NEL had a very close relationship with the Group, including with CTM. In paragraph 3 above, I broke off my summary of NEL's career as he graduated from Pace and went to work for Sea Group. He worked there for 6 years in junior roles and during that period repaid the family loan he had been given to fund his business studies.

62. In 1990, NEL moved to Houston, Texas, to work for the chemical tanker division of the Group, Seachem Tankers Ltd. He was there for 7 years as general manager, reporting to PGL. In 1997, PGL asked NEL to return to Greece as operations manager for the Group. As I mentioned in the previous paragraph, that was also the year in which GPL died and PGL became the overall head of the Group.

63. In 2003, when NEL was 45 years old, he became the CEO of Ceres LNG Services Ltd, which was the predecessor to GasLog Ltd, a well-known listed ship management company within the Group. That made him the most senior individual at the Group other than PGL himself. In early 2005 NEL also acquired from PGL a company called Ceres Hellas Maritime Co, which was a technical ship-management company set up to be technical manager for a fleet of seven tankers.

64. Thus, while NEL had worked in the shipping industry for 30 years at the time of the FFA trades with which I am concerned, his experience and responsibilities had been in operations and technical management, and all with tankers. By contrast, his growing investments as a shipowner were all in dry bulkers. Though the defendants sought to challenge this, in my judgment NEL was accurate in his evidence about himself as of 2005: "*I was very green back then as a shipowner. I have to state – I have to state back on – now it is a different story, but then I was very green. I was … [an] operations manager, looking after the technical aspects of the family, running the fleet of the family. I … never had a commercial role, so all my activities, the commercial, were done by CTM*". Being a shipowner was the fulfilment of a dream, and NEL was immensely grateful to PGL for the assistance that being part of the Ceres Shipping business family gave him in realising that dream, but he remained relatively naïve as a shipowner-investor, relying on others for commercial management, and that was still the position at the time of the Kyla FFAs in 2007-2008.

65. NEL received numerous market reports, all the time, including FFA market reports. But he did not pay them any close attention. That was not unusual for a senior shipping executive who did not personally get involved in tracking the FFA markets or making FFA trading decisions. For example, Mr Iliopoulos said he received reports on the FFA market every day; and even Mr Weston spent much of his time trying to avoid market reports ("*I was copied in on so many emails that we used to have a policy of going through the system and cancelling them or trying to get people not to copy me, but including all the market reports, for instance, because otherwise it would just be a waste of time. There was nothing of any value to be identified*"). NEL did not have personal FFA expertise, or access to FFA expertise at Kyla, but relied on what he understood to be CTM's expertise, and Mr Cafiero as a trusted individual, and did not question or second-guess the prices in the Kyla FFA recaps or the trading decisions Mr Cafiero was making for Kyla (as NEL understood it). In my judgment, that will have been apparent to Mr Cafiero and came to be taken advantage of by him, instinctively (and correctly) assessing that that would not be detected.

66. In 2005, NEL had an indirect beneficial interest in the *Kyla*, the *Captain Vangelis L*, the *Kalliopi L*, and the *Bulk Hong Kong*. The first two were traded in the CTC Pool, which meant they were chartered to CTC with commercial operations managed by CTM. A commercial management agreement was in place in respect of at least the *Captain Vangelis L*, and possibly also in respect of the *Kyla*. NEL attended the CTC Pool meetings and received reports from CTM on the commercial management of the CTC Pool, but lent PGL his voting rights in respect of those ships. After acquisition, the *Kalliopi L* was placed on long-term charter to the CTP Pool and so was also managed by CTM.

67. In 2006, NEL acquired a fifth vessel, the *Pantazis L*, and there were other ship ownership investments too, including a newbuilding programme, such that, if I understood the relevant chronology correctly, NEL had had an involvement in the purchase or ordering of ships with a gross value of over US$400 million as of 2007-2008.

Other Individuals

68. I introduced Mr Weston and Mr Cafiero when identifying the parties, above. Many of the other individuals relevant to the proceedings worked at CTM in the relevant period:

    (1) Mr Luigi Pulcini: CFO of CTM and head of CTM's Risk Management team, as well as a Director / Secretary of FTL.

    (2) Mr Haramis: shareholder in, and a director of, YPA. Former CEO of DryLog Ltd from 2001 to 2005, before moving to set up and run PGL's private family office in 2005. President / Director of FTL from 2005, and CFO of the Ceres Shipping Group.

    (3) Mr Enrico Mantero: at the material time, a member of CTM's Risk Management team reporting to Mr Pulcini, with responsibility for FTL's portfolio of FFAs (from January 2007). He was said by the claimants to have been a party to the alleged dishonest disloyalty of CTM, having issued almost all the trade recaps for the Kyla FFAs and kept records by way of spreadsheets of the various trades.

    (4) Mr Pierantonio Chillo: another member of the CTM risk management team, reporting to Mr Pulcini, with responsibility for the CTC portfolio; he sometimes covered for Mr Mantero on the FTL portfolio. In the course of the trial, the claimants accepted that Mr Chillo was not privy to any dishonesty.

    (5) Mr de Ferrari: Head of CTM's Panamax commercial team, managing CTP's business, until early 2008, and subsequently CTM's Head of Panamax Morocco Project & Special Cargo Projects.

    (6) Mr d'Escury: Head of CTM's Capesize commercial team, managing CTC's business.

69. Mr Athanasios Thanopoulos was, in general, NEL's right hand man in business at the time of the FFA trading. He held various positions as Finance Manager / CFO within

the Kyla Group from 2005 to February 2014, when he moved to Ceres Shipping as CFO. He is now a Director and CEO of DryLog Ltd. He did not have a close involvement in the Kyla FFAs, which were dealt with personally by NEL, interacting directly with Mr Cafiero.

70. Mr Ilias Iliopoulos took over from Mr Haramis as CEO of DryLog Ltd in 2006, a position he held until 2015. He was also Managing Director of Ceres Monaco SAM and a director of CTP.

Setting up of FTL

71. As noted above, FTL was set up in 2005 as a vehicle for trading in the international freight derivative markets.

72. An offering memorandum in respect of investment in the FTL fund was produced on 17 March 2005. This recorded, *inter alia*, the following:

    (1) The investment objective of the fund was "*... to achieve capital appreciation by using freight and freight-related derivatives whether cleared or over the counter ("OTC"). The fund will trade in forward, futures and option contracts (including options on futures contract) in shipping freight and freight indices*". The "*Investment Policy*" was that trading would take place "*principally in off-exchange transactions such as freight OTC swaps contracts ("FFAs")*".

    (2) CTH, one of the higher companies in the group, was to act as Commercial Manager and be responsible for day to day decisions in respect of the fund, albeit this was in fact delegated to CTM (CTH's subsidiary), as permitted in the terms of the offering memorandum.

    (3) There would be "*Trading policies and restrictions*" as set out in Clause 4, which included very limited restrictions, namely that the Fund only invest in trades with sufficient liquidity to enable positions to be opened and closed without causing excessive price movements; that the fund would not borrow; that exposure to any one counterparty would be limited to 50% of the fund's value; and that the fund would adhere to a principle of 'risk spreading'. No other restrictions were stated.

    (4) The Commercial Manager would charge a monthly management fee of 0.15% calculated by reference to the net increase in the net value of the fund, together with an annual incentive fee subject to a hurdle, plus a cash management fee based on assets under management.

73. The establishment of FTL was noted in the minutes of the CTC Pool meeting in Monaco on 25 April 2005, which recorded that FTL had been incorporated in Bermuda, with CTH and their service providers CTM as the Commercial Managers for a monthly fee of 0.15% on the value of monies in the fund and an incentive fee of 20% of profits paid annually (with no reference to a hurdle as set out in the offering memorandum).

74. The Pool minutes noted that the two initial investors were DryLog (PGL's company) and Oceanbulk (Mr Pappas), that trading had started on 13 April 2005, and that

additional investors with a knowledge of the shipping markets would be invited in due course to join at the discretion of the Directors but the Commercial Managers had recommended that, for the time being, entry be restricted to the initial investors.

The Vega FFAs (2005 – 2006)

75. NEL became interested in gaining exposure to FFAs, with the assistance of CTM, around the same time as FTL was set up, in mid-2005. The way in which this came about, to whom at CTM NEL spoke about getting involved in FFAs, and the nature of those conversations, was in dispute.

76. NEL's written evidence was that, after speaking to another shipowner in the CTC Pool, he spoke to Mr Cafiero at one of the Pool meetings, who confirmed that CTM could trade FFAs for him through the Pool. The pleaded case was that Mr Cafiero encouraged NEL to trade FFAs, and NEL was receptive to that encouragement, which suggested that the initiative came from Mr Cafiero. NEL's oral evidence was that this was an error. He clarified that: Mr Cafiero had been encouraging of the idea; but he (NEL) was the one who brought it up. By contrast, Mr Cafiero's evidence was that NEL must have spoken to someone more senior at CTM, such as Mr d'Escury or Mr de Ferrari (who were not witnesses at trial), because at the time Mr Cafiero was a very junior (26 year old) trader on the CTM Panamax desk, who had only begun trading FFAs that year, and was only authorised to place trades once he had spoken to his seniors. As such, he would not have been speaking to someone as senior as in the Ceres group as NEL at all, he said.

77. In any event, between September 2005 and March 2006 CTP/CTC fronted for Vega on three long FFA positions, two of which were subsequently closed out, one of which ran to settlement. There were therefore five Vega FFAs in all. The CTP/CTC fronting was gratuitous and fully back-to-back. That is to say, positions were bought in the market for Vega's account, but not so that Vega was the counterparty with the (external) market counterparties (who were BHP Billiton, Seaarland and SK Shipping). Rather, CTP or CTC was counterparty to those market participants, and a simultaneous, back-to-back, trade between CTP or CTC and Vega was documented.

78. The trades were placed via well-known FFA brokers, who charged standard commissions to CTP/CTC which were re-charged to and paid by Vega. Only CTM dealt with, and gave instructions to, the brokers, on behalf of both CTP/CTC and Vega. The 'external' trades by CTP/CTC were described by a range of CTM personnel and on internal CTM descriptions as trades which were "*fronted*" or "*related*" or done "*on behalf of*" Vega/NEL. The brokers issued recaps for both the external ('second leg') trade and for the internal ('first leg') trade with Vega.

79. Vega lost c.US$750,000 on the Vega FFAs, including a loss of c.US$500,000 on closing out the second of the three positions taken. That position involved CTP buying a full Q1 06 Pmx from Seearland on 3 October 2005 at US$22,100 per day and closing the position on 9 January 2006 by selling to Glencore at US$16,500 per day, fronting for Vega, as described above, on both trades. The first position ran to maturity (long Q4 05 Pmx, CTP buying from BHP as front for Vega at US$21,500 on 28 September 2005) at a loss of c.US$200,000. The third position was a CTC front, not a CTP front. Vega went long a half quantity March 06 Cape Route 4 ('C4' for short), an FFA route traded on a freight in US$/m.t. with a full nominal contract

quantity of 150,000 m.t. so that Vega's half quantity was 75,000 m.t.; CTC bought from SK Shipping at US$13.50 per m.t. on 21 March 2006 and sold to BHP a week later, at US$12.85 per m.t., in each case fronting for Vega as described above, so Vega's loss was US$48,750 (US$0.65 per m.t. on 75,000 m.t.).

80. NEL appears not to have taken on board at the time that he had lost money on the Vega FFAs. Mr Thanopolous' evidence was that NEL had told him at the time, in relation to the Vega FFAs, that he (NEL) had done "*a couple of derivative trades with CTM and had managed to make some money*".

81. CTM (and, via CTM, CTP/CTC) did all this for NEL (through Vega) because NEL was not in a position to access the FFA market directly, since (so they all believed at the time) he/Vega did not have a sufficient asset base or market reputation to do so and would have been regarded by potential counterparties as presenting too great a credit risk. On Mr van den Abeele's evidence, that perception might not have been correct, i.e. it may be that NEL, through Vega, could have got FFA trades placed directly with the market via brokers, but I need make no firm finding on that. What matters for a consideration of the Vega (later Kyla) relationship with CTM is the joint understanding at the time of NEL and CTM.

82. That mutual belief as to how NEL/Vega would be viewed by the FFA market notwithstanding, given the family relationship between NEL and PGL, and NEL's connection to the Ceres Shipping Group, CTM was happy to assist by using CTP/CTC, and later FTL, to front FFA trades for NEL. One of the key features of the case, explaining NEL's FFA trading, was that CTM rightly trusted NEL to honour 'his' FFA obligations, and to ensure that CTP/CTC, and later FTL, would not suffer loss through fronting for him. Because of who NEL was, CTM (and CTP/CTC, later FTL) did not regard Vega/Kyla as any real credit risk, whether or not that is how FFA market participants like (say) Cargill or Glencore would have regarded them.

83. There was no written agreement setting out the basis for or terms of this fronting to the market for Vega. Nor was there any written agreement later setting out the basis for or terms of the arrangement with CTM/FTL generating the Kyla FFAs. There is a dispute between the parties as to the nature of the legal relationship behind the Vega FFAs, and in particular the extent to which NEL was involved in making decisions about the trades. The central factual issue in relation to the Vega FFAs is whether (as the defendants contended) the trades were entered into on behalf of Vega by NEL, who agreed the price (and other terms) each time, or whether (as the claimants contended) the trades were entered into on behalf of Vega by Mr Cafiero, who had a discretion to trade on Vega's behalf. No claim was made in relation to the Vega FFAs, but they are the material FFA trading history prior to the Kyla FFAs, so the basis on which the Vega FFAs were transacted is relevant.

84. NEL's evidence was that he needed CTM's assistance because he did not know anything about FFA trading himself, not only because (as he accepted was his perception at the time) he/his companies could not have traded in the market except by a fronting arrangement with established participants. He understood some of the functions of FFAs, for example for hedging exposure on the physical market as well as for speculative trading, but he did not understand how they worked. He thus relied on CTM, he said, for advice, and to use its discretion to decide for him which trades should be conducted. He also knew that Mr Weston was the top person at CTM, was

aware of his experience and reputation, and so he trusted in CTM's expertise, albeit his contact person was Mr Cafiero. For him, the relationship with CTM and Mr Cafiero was based on "*blind trust*". NEL and Mr Cafiero spoke on the phone about FFAs, and those conversations would include Mr Cafiero's ideas, suggestions and advice about what trades should be done, but NEL did not direct specific trades and never negotiated or fixed a price, because he did not have the relevant knowledge and CTM (Mr Cafiero) was supposed to be simply passing on whatever price it got from the market for the trades that Mr Cafiero placed for NEL/Vega. Thus, NEL left it to Mr Cafiero to make the trading decisions on his behalf.

85. By contrast, the defendants' position was that, although CTP or CTC was fronting for Vega, the trading decisions for Vega were taken by NEL alone; that each of the Vega FFAs was concluded orally between NEL and a representative of CTP/CTC, on the phone, with NEL making the final decisions; and that the representative in question would not have been Mr Cafiero. Mr Cafiero indeed denied in his evidence that he would have had any regular conversations with NEL at the time of the Vega trading, his role at the time, he said, being only to book trades under instruction from his seniors at CTM.

86. Documents referred to by the parties in this period included the following:

(1) On 24 November 2005, Mr Cafiero emailed NEL two FFA contracts: "*Please find attached the FFA contract we have done so far. Kindly sign them and send them back to me via fax…*"

(2) On 2 January 2006, Mr Cafiero emailed NEL wishing him a happy New Year and saying: "*Today markets are closed but i will revert tomorrow with an up date*."

(3) On 9 January 2006, Mr Cafiero emailed NEL to confirm: "*Following our teleconv today we managed to sell the Q1 for to to [sic] Glencore, with the usual fronting of CTP*". In my view, as Mr Cafiero accepted was likely, this was meant to be, "*… we managed to sell the Q1 for [you] to Glencore …*".

(4) On 14 March 2006, Mr Cafiero emailed Mr Weston saying: "*Nick Livanos called to do something on paper (c4 march) have told him he needs to speak with you.*"

(5) In an internal CTM document, the resulting FFA dated 21 March 2006 between CTC and SK Shipping, by which the third of Vega's long positions was put on, was described as having been "*done of [sic] behalf of Vega Carriers…*".

(6) On 7 November 2006 Mr Cafiero emailed NEL, not in relation to FFAs but in relation to the acquisition of the *Pantazis L* (previously named *Red Tulip*). In signing off his email, he stated "*We at CTM did our best to assist you in every possible way as usual*".

The Kyla FFAs

87. In early February 2007, just over 10 months after the last Vega FFA, NEL's FFA trading started up again. NEL's oral evidence was that everyone in the market was very optimistic that the 2007 market was promising, and so he wanted to get involved.

88. There were some differences in the way NEL's trading operated from 2007 that were common ground: the FFAs were traded through Kyla, rather than through Vega; and it was agreed that Kyla's counterparty was to be FTL, rather than CTP or CTC. The latter (FTL, not CTP or CTC) was implemented in practice for all 41 of the Kyla FFAs, subject only to the issue whether FTL/Kyla 290408(3) was a trade with CTP, not FTL.

89. The way in which the trading recommenced is disputed to a degree. The defendants' witness evidence was that, in early 2007, NEL indicated to CTM that he wished to conduct some further FFA trading and this time to build and run his own portfolio rather than conduct one-off trades. It was suggested to NEL that he should join the FTL fund, but NEL instead wanted to trade on his own behalf.

90. NEL disagreed with that account. His evidence was that he was never asked to join the FTL fund, and indeed was a little disappointed at the time not to have been asked.

91. In any event, NEL did not invest directly in the FTL fund, and the Kyla FFAs were entered into through a separate arrangement. Mr Weston's evidence was that this arrangement was made as a result of an informal discussion at a meeting or social event, at which PGL asked that CTM help NEL trade more FFAs; NEL did not recall that.

92. As to the use of Kyla, rather than Vega, NEL recalled being asked by Mr Pulcini if Kyla could be used as the vehicle for the FFA trading, but did not recall what reason was given, if any was given. The defendants' position was that this occurred because, whilst CTM was in principle content to assist NEL, it took the view that any further trading should be conducted through Kyla rather than Vega, since Kyla owned a vessel that would provide more security for the trades. Mr Haramis' evidence was that NEL spoke to him to obtain YPA's approval to use Kyla as the FFA vehicle, given YPA's minority stake in Kyla, and that YPA was indeed content with the proposal, so long as NEL promised to keep Kyla harmless. There was, accordingly, a change in the identity of the contracting entities involved, from 2007 onwards. NEL remembered speaking only to Mr Pulcini, and having the understanding that Mr Pulcini cleared the use of Kyla with Mr Haramis (for YPA). I prefer NEL's evidence as to that.

93. CTM also decided that any further trades should be placed with FTL, rather than CTP or CTC, since FTL had been set up specifically for speculative FFA trading, which the Kyla FFAs would be (as the Vega FFAs had been).

94. A further change in the trading relationship was that the trading was not done gratuitously by CTM in the way that the Vega FFAs had been handled:

    (1) The defendants' position was that it was agreed with NEL that FTL would seek to profit from the trading, by way of a margin between the price under the Kyla FFAs and the price of the back-to-back trades. Although they could not

remember details of conversations with NEL in this regard, both Mr Pulcini and Mr Weston claimed in evidence that these matters were discussed with NEL at one of the Pool meetings or other occasions when they were present, and that it was clear that Kyla would be treated like any other FTL counterparty. In short, CTM (acting on behalf of FTL) would be trading *with* NEL (acting on behalf of Kyla), not trading with the market *for* Kyla.

(2) The claimants' position was that it was agreed that there would be a fixed US$500 per day management or service fee, built into the trades. That is to say, CTM would trade with the market in the name of FTL, but intending the trade to be for Kyla's account; two trades would be documented, otherwise on back-to-back terms, with a price differential of US$500 per day in favour of FTL representing the CTM/FTL fee for acting on Kyla's behalf and managing the resulting portfolio. Thus, NEL's evidence, and the claimants' case, was that the nature of the relationship remained the same in 2007-2008 for the Kyla FFAs as it had been in 2005-2006 for the Vega FFAs: (i) CTM was to arrange FFAs as agent for NEL's company (Kyla); but (ii) CTM's associated company (CTP/CTC for Vega, FTL for Kyla) was to front those FFAs to the market, so the trading would generate 'first leg' and 'second leg' trades, not just a single trade between NEL's company and the external market counterparty. NEL's understanding was that CTM was Kyla's manager, in the person of Mr Cafiero. His mandate was to keep track of the FFA market for NEL/Kyla, to identify profitable trades, and then to conclude them on Kyla's behalf - opening and closing positions for Kyla in the market, using FTL as front for Kyla, on best available terms, passed on to Kyla plus (when buying) or minus (when selling) the management fee. FTL was to be market neutral, not trading against Kyla. This happened because NEL trusted both CTM and Mr Cafiero personally.

95. The Kyla FFAs then came to be placed between 7 February 2007 and 17 November 2008. The first 11 Kyla FFAs were placed at fairly regular intervals between 7 February and 4 May 2007. They were matched to FTL 'second leg' trades that gave FTL margins per day on the contract volume of US$500 (7 of the 11 trades), US$250 (the 3rd and 7th of the trades), US$750 (the 2nd trade), and US$600 (the 11th trade), for a weighted average margin of US$478.26 per day. NEL did not know at the time about the variation in the FTL margin.

96. On 5 of those first 11 FFAs, CTM re-charged to Kyla the broker's commission FTL was charged for the 'second leg' trade. Those instances aside, no brokers' commissions were re-charged to Kyla, and CTM did not itself charge commission (as distinct from building in a margin in favour of FTL). There was no witness evidence or documentary record speaking to any decision not to pass on brokerage the way it had been passed on for the Vega FFAs. In particular, there was no evidence of any discussion with Kyla/NEL about that.

97. The only explanation suggested (by the claimants) – and I consider it a highly plausible explanation – is that Mr Cafiero appreciated that if the brokerage being charged to FTL were re-charged to Kyla, given the customary rate in the market of 0.1%, someone at Kyla could work out the 'second leg' prices being obtained by CTM for FTL, which would reveal that more than a US$500 per day margin was being taken, as consistently it was from May 2007.

98. The 12th Kyla FFA was placed on 20 June 2007, by which Kyla bought from FTL a half Q4 07 Cape at US$91,000 per day, matched to a purchase by FTL from CTC at US$90,000 per day, an FTL margin of US$1,000 per day. The 13th Kyla FFA, placed on 29 June 2007, was a sale by Kyla to FTL of a half Q3 07 Cape 4TC at US$92,000, matched by FTL to a sale to Cargill placed the previous day at US$94,500, giving FTL a margin of US$2,500 per day. Thereafter, apart from one trade in September 2007 and one in September 2008 each giving FTL a margin of US$750 per day, the margin for FTL on the trades it treated as 'second leg' trades matched with Kyla FFAs was always at least US$1,000, often substantially more, with several in the region of US$4,000-US$5,000 per day, one (in March 2008) of US$7,750 per day and one (in June 2008) at a spectacular US$18,375 per day. NEL did not know at the time anything of these higher FTL margins, save that Mr Cafiero told him there would be a margin of US$1,000 per day on the final trade in November 2008, by which NEL closed out what was left of the disastrously loss-making June and September 2008 FFAs, giving NEL a special reason why, in the particular circumstances of that trade, a larger margin was sought.

99. The defendants' position was that NEL must have realised the margins that FTL was likely to be making because (they said) he was actively engaging with the market and actively trading with Mr Cafiero as counterparty, and was receiving a wealth of pricing / Index information from market reports from brokers, which must have made him aware of relevant market levels.

100. Over the course of the 41 Kyla FFAs, the total profits made by FTL (comprising the difference between the price of the Kyla trades and the trades that FTL treated as matched to them) was US$8,430,238, of which US$8,058,488 was generated (measured in that way) from the Disputed FFAs. If FTL's margin had been US$500 per day throughout, the profit for the 3,126 days bought and sold (in aggregate) by Kyla would have been US$1,563,000. The Disputed FFAs involved buying and selling (in aggregate) 2,337 days, the profit on which at a constant margin of US$500 per day would have been US$1,168,500. Allowing that NEL may properly be taken to have authorised the higher margin of US$1,000 per day on the final close-out trade, FTL/Kyla 171108, would add US$40,500 to bring that to US$1,209,000.

101. On the claimants' case, FTL thus made profit on the Disputed FFAs of c.US$6.85 million from Kyla in excess of anything that NEL authorised. The claim was not limited to that sum, however, since the claimants contended (and the defendants conceded at trial) that if CTM was supposed to have been trading *for* Kyla under a mandate entitling it (FTL/Kyla 171108 aside) to a margin of US$500 per day and no more, then the Kyla trades placed otherwise than in accordance with that mandate were unauthorised so as to be null and void. The claim therefore ran, in unjust enrichment or damages, to the full extent of the losses incurred on the Disputed FFAs.

102. The individual at CTM principally involved with NEL was Mr Cafiero. The two men would speak regularly on the telephone. All the Kyla FFAs and all 'second leg' trades were placed by Mr Cafiero. Mr Mantero was involved in almost all of them, recording the trades in the defendants' systems and drawing up recaps for the Kyla FFAs and sending them to NEL. Occasionally Mr Chillo drew up the recaps. The claimants' position for trial was that Mr Chillo was privy to the alleged wrongdoing against Kyla, but after he had given evidence they accepted they could not maintain that case and it was not pursued in closing.

103. The recommencement of the trading for NEL via Kyla approximately coincided, in early 2007, with Mr Cafiero and Mr Mantero being sent to London to open the new CTM office.

104. In a document circulated by email on 5 February 2007, CTM announced the opening of its "London office", listing Mr Cafiero and Mr Mantero as the contacts. CTM was described in the announcement as service agents for CTH as managers of CTC, CTP, DBCN Corporation, and FTL. There was no indication on the face of the document that the London office would or might be that of the separate corporate entity (CTM UK), with whom Mr Cafiero's employment contract was placed for his time in London.

105. From London, Mr Cafiero continued to run FTL's FFA business, with Mr Mantero assisting in a risk management capacity but also to some extent with the trading, including taking responsibility for issuing FFA confirmations to Kyla. Messrs Cafiero and Mantero were from that time geographically separated from the rest of the group, albeit occasionally visiting and working from Monaco, with their line management seniors, Mr Weston for Mr Cafiero and Mr Pulcini for Mr Mantero, remaining in Monaco.

106. Around the same time, on 20 February 2007, draft Risk Management Procedures for FTL were circulated internally within CTM by Mr Chillo. The document was headed "*Paper Trading*". It set out that trading authorities were given for CTP and FTL to Mr Cafiero, and for CTC to Mr d'Escury, with Mr Weston also being authorised in respect of all three entities. It provided that authorised traders were not permitted to trade from outside the Monaco and London offices without management approval; and that the trader had to approve all derivative trades, with a physical or digital signature required for the London office, a practice that appears on the evidence not to have been adhered to much if at all.

107. A process was specified for engaging with a new counterparty for the first time, requiring the completion of a detailed questionnaire and occasionally further proof as to creditworthiness, as well as for monitoring trades with existing counterparties (trades were to be within a 365-day time horizon, and when needed stress tests were to be circulated internally, and Risk were to be informed about the trades). There was reference to concluding an ISDA master agreement or a master netting agreement (i.e. an individually negotiated agreement rather than the deemed ISDA master agreement created by the FFABA Terms). The lengthiest section of the document dealt with the practicalities of the largely unused procedure for digital signatures (two of the three pages of the document).

108. These FTL Risk Management Procedures contained no limits of any kind upon Mr Cafiero's trading authority apart from the rule against purchasing more than a year forward. There was no trading policy concerning volume, no policy or strategy regarding risk or exposure, by market or by counterparty or at all, no stop loss or stop gain triggers, no limits on the types of FFAs that might be traded, and so on. It was the evidence of Mr Cafiero and Mr Weston that there was strategic oversight by Mr Weston, but I am clear that this was only in the loose sense that he maintained a general awareness of the broad shape of the FTL trading book that Mr Cafiero was running, he would discuss matters from time to time with him and occasionally he

would involve himself, or Mr Cafiero would ask him to be involved, in an individual trading play or other decision affecting the book.

109. There was, in short, no serious effort to supervise or control Mr Cafiero's FFA trading activity. He was essentially left to get on with it, trading FFAs as he saw fit, in the hope that he would do so successfully, i.e. so as to make money for FTL's investors. Mr Weston's background, experience and reputation in the industry will have lent FTL an air of professionalism and expertise, and I accept NEL's evidence that it influenced him into believing he was indeed being looked after by a professional and expert FFA trading outfit. But in reality FTL was being run on little more than Mr Cafiero's inexperienced, untrained, and untested enthusiasm for FFAs.

110. Kyla was not asked to fill in a new counterparty questionnaire or provide equivalent information in any other form, nor was it asked to enter into an ISDA master agreement or master netting agreement.

111. I should mention, before moving on, the record-keeping system at CTM.

112. As I have said, Mr Mantero was largely responsible for the record-keeping of FTL's trades. His evidence, and that of Mr Pulcini, was that CTM used an internal accounting system called Argo to record trades. The defendants' disclosure included spreadsheets generated from Argo, which showed details of the FFA trades conducted, with columns for various data points such as the contracting entity, a contract description, a general "description" (amounting to buy or sell), a "notes" column (which might include, for instance, an explanation that FTL was "sleeving" (but did not always do so)), contract dates and days, settlement price, and maturity price.

113. Mr Mantero also kept his own internal spreadsheets, which he stated were used for weekly reports that he produced in relation to FTL's book. These included an "exposure" sheet showing open contracts, with columns including the trade date, name, counterparty, broker (if relevant), route, maturity date, quantity, and price; with the contracts paired with their matching trade, where relevant. A separate sheet, entitled "Open & Close Dec OUT", showed the same open contracts side by side with trades against which they were matched, or a "MKT" (i.e. market) value against which they were being marked, giving individual and aggregate estimated outturn results based on the paired price differences. There were also various other tabs. The entries in the different sheets were occasionally inconsistent, and it may have been that Mr Mantero kept one part of the spreadsheet better updated than the other.

114. It is possible to see from the spreadsheets when they were last modified, which was referred to in considering when within a day some of the trades may have been placed. Mr Mantero's written evidence was that the last modified time gave no indication about when a trade was conducted, because he was only interested in record-keeping for the purpose of updating the weekly report (rather than keeping it up to date more regularly). However, he accepted in cross-examination that it was his general practice to include a trade in the spreadsheet as soon as FTL was bound to it, and if there was not then a matching trade, to include it as an open position.

115. These spreadsheets created trading records by contract month, so an individual FFA would typically generate more than one spreadsheet entry, as it would typically not be

for a single contract month. For example, if Kyla bought Q3 07 Cape, that would generate separate entries for July, August and September 2007.

116. When a trade was concluded, recaps of the Kyla trades were drawn up by CTM (usually by Mr Mantero) and sent to NEL (usually by Mr Cafiero, copying the Risk team). These showed, among other things, the date, the buyer and seller, quantity and route traded, the strike rate and term. The recaps did not show the difference between the contract rate and the rate from any matching trade (i.e. they did not reveal the margin being made by FTL on the trade), or indeed say anything at all about that 'second leg' trade.

117. There would also be a recap for the 'second leg' trade, sent to CTM by the relevant broker.

118. There was a dispute between the parties about whether the time that broker recaps were received or CTM recaps (for the Kyla FFAs) were created is indicative of the time that the trades were concluded. The defendants' position was that there was no real connection, as a recap might be sent many hours, or even a day, after a trade was in fact concluded. The claimants' position was that this was intrinsically improbable and would be very bad practice, since it was in all parties' interests swiftly to receive a recap after the trade was concluded to ensure that all details were correct. The position, I find, was that (a) of course there might on occasion be a delay, for any or no particular reason, such that a recap was not sent until substantially later than when a trade was placed, but nonetheless (b) the practice both of independent brokers recapping trades broked by them, and that of CTM (Mr Mantero or occasionally Mr Chillo) in relation to recapping the Kyla FFAs, was to issue and send out recaps promptly following the decision to trade, and so (c) in particular, therefore, the time at which any given Kyla FFA recap was created will generally be a reasonably reliable guide to the time of day at which the decision to conclude that trade was made.

119. During the early months of the Kyla trading, positions were opened and closed for Kyla with some regularity. The first 11 Kyla FFAs referred to above, placed between early February and early May 2007, represented 5 long positions each closed by the next trade (or in one case by the next trade after an intervening pair), and then a further long position (Kyla/FTL 040507) closed by the next trade but one (FTL/Kyla 290607). All 6 long positions were thus closed out before the first monthly settlement date, indeed in all but one case before the beginning of the first settlement month (the exception being Kyla/FTL 300307, a Q2 07 Pmx position closed by FTL/Kyla 180407).

120. The claimants' position was that, and I find that, the strategy adopted for Kyla in this period, of regularly opening and closing long positions on Q2 07, was consistent with the trading strategy CTM was executing for FTL's own account at that time, as recorded in CTM's monthly reports to the FTL investors.

121. Only the last of these first 11 Kyla FFAs is a Disputed FFA, and the claim on that 11th Kyla FFA is only that it was unauthorised because the FTL margin was US$600 per day rather than US$500 per day. The 11th Kyla FFA, Kyla/FTL 040507, was for half a Q3 07 Cape at US$97,000 per day, matched to FTL/SK Shipping 040507 at US$96,400 per day; and I agree with the suggestion put by Ms Hopkins QC to Mr Cafiero in cross-examination, namely that Mr Cafiero 'rounded up', when instructing

Mr Mantero as to the terms for the 'first leg' trade, so as to take US$600 per day rather than US$500 per day for FTL, a little casual disloyalty he would not expect to be discovered.

122. Although no claim was pursued in respect of the first 10 Kyla trades, certain documentary evidence arising at the time of them was referred to as evidencing the nature of the relationship between the parties and the approach to the Kyla trading, including the following:

(1) On 7 February 2007 Mr Cafiero emailed NEL saying "*Please give me a call when u can.*" Shortly afterwards, Mr Cafiero emailed NEL stating: "*With your Authority I've bought 63250 on the q2 capes. Your counterparty is Freight Trading Limited and the cost (already built in the rate) is Usd 500. A full recap will follow but kindly reply to this mail confirming your agreement.*" A recap was then drawn up and sent to NEL, who was asked to "*Kindly confirm all in order.*" Kyla therefore bought from FTL a 91-day Cape FFA for US$63,250, which FTL matched against a trade with Pioneer with a margin of US$500.

(2) On the same day, FTL bought an identical product for its own book from Navios. In the same email, Mr Cafiero said: "*I will follow the market for you and keep in touch in case there is anything to be done*".

(3) The following day, Mr Mantero emailed CTM's "FFA Settlements" email address attaching the recap and saying "*Broker's Commission to be re-invoiced to Kyla*".

(4) The Navios trade was then closed out by Mr Cafiero on 8 February 2007, when FTL sold an equivalent contract to TMT at a price of US$63,750, making a profit of US$1,000 per day.

(5) On that same day, Mr Cafiero sought to get in touch with NEL, sending emails: "*Pls call me when u can.*"*;* "*Pls call me*." The defendants' position was that it can be inferred that the reason why Mr Cafiero was calling NEL was to see whether he wanted to close out the 7 February 2007 trade, as Mr Cafiero had chosen to do for FTL. In the event, the 7 February 2007 Kyla FFA was not closed out on this day. The defendants say that the reason for this was likely to be either (a) that Mr Cafiero could not get through to NEL, and so did not have authority to close the trade, or (b) that Mr Cafiero did get through to NEL and was told not to close the trade. The trade was subsequently closed out on 21 February 2007 at a profit of US$182,000.

(6) On 21 February 2007, Mr Cafiero mentioned in an email to NEL about the *Kalliopi L*: "*Will keep you posted on the paper position*";

(7) On 22 February 2007, Mr Cafiero emailed NEL: "*Please find attached confirmation of trade. As said you will NOT pay any commission on this trade…*". NEL responded: "*Many thanks. But I want to pay commissions. I do not feel comfortable. Please understand.*" Mr Cafiero responded: "*Sorry but no commission on this trades. We have made you some money and that is what it counts, as it is our main aim to service in the best possible way our clients*

and friends. You know that we are not commission orientated and if we can trade something exclusively we treat it as if it was ours hence we try to save as much money as possible and get the best result...Hope you will keep using CTM in the future as your management company."

(8) On 8 March 2007, Mr Mantero said in an email to Risk and Planning at CTM: "*FTL is sleeving between SK Shipping Europe… and Kyla Shipping …*";

(9) On 21 March 2007, Mr Cafiero said to NEL: "*Whilst we thank you for entrusting us with your authority on the FFA trades, I would like to confirm that on the last trade [20 Mar 07] you will be paying Usd 500 pd to cover the management fees. All other commissions will be paid by FTL*";

(10) On the same day, NEL emailed Mr Cafiero: "*luigi many thanks as per discussion settlement of last trade is / net ie 77,000 - 500 US$*";

(11) On 23 March, Mr Cafiero confirmed to NEL: "*…Kyla has no more open positions. We will send you the recap of all trades concluded as soon as possible.*"

(12) Mr Cafiero then sent NEL a tabulated list of 6 FFAs and their results: "*Please find below a recap of details for all the trades we have done for you and final net result. Whilst we have charged our management fee on ALL the trades you will pay brokerage commission only one trade as agreed… We would like to thank you once more for your very kind support.*" Mr Cafiero also emailed Mr Pulcini: "*Please find below list of closed trades we have done for Kyla and the final result…*";

(13) On 30 March 2007, Mr Cafiero said to the Risk department: "*this trade will be passed on to Kyla at 41250…*" [i.e. less the US$500 margin];

(14) On 5 and 6 April 2007, Mr Cafiero reported: "*Market quiet today due to easter holidays but all index up…*"; and NEL responded: "*Luigi thank you very much For all you. Have done for Me…*";

(15) On 18 April, Mr Cafiero emailed NEL: "*Have tried to call you but I'm unable to reach you. As predicted last week the panaamax market has risen over the last few days and I have today closed your Panamax q2 position at Usd 42900… pls find details of all the trades I have concluded for you… Hope you are happy about the result*";

(16) On the same day, Mr Mantero emailed Risk attaching the relevant recaps and setting out the different legs of the transaction, in which PCL Ltd bought from CTP, CTP bought from FTL, and FTL bought from Kyla, and noting that "*The broker commission that FIS will invoice to FTL, it has to be reinvoiced to Kyla...*".

(17) On 25 April 2007, Mr Cafiero emailed Mr Weston: "*Market moving again. I have just closed the half cape I bought this morning for Nick at 110000 (110500 to Nick) at 115000 (114500 to Nick) with TMT. I will hold on another*

bit before closing our positions." Mr Weston replied: "*... well done for nick...*";

(18) Mr Cafiero also emailed NEL referring to a telephone conversation on that date: "*Following our teleconv pls find attached trade recap*.".

123. On 4 May 2007, Kyla/FTL 040507 matched to FTL/SK Shipping 040507 having been placed, Mr Cafiero wrote to NEL: "*Please find attached FFA recap as per our teleconv few mins ago…*" Mr Thanopoulos also wrote that day, to Ms Drago of CTM, in relation to an FFA invoice. He said: "*please note that the trading was between Nick Livanos and Luigi Cafiero. I do not know the exact amount due to us*…" Ms Drago replied: "*We know the amount due to you: we just needed to have the banking details*…"

124. On 10 May 2007, Mr Cafiero forwarded NEL the Baltic Indices for that day, saying "*Hope u have seen this… I think we are going up up up up*….": NEL replied: "*Bravisimo let it go up up up Luigi many. Thanks*"; Mr Cafiero replied "*Leave it with me!!!*"; NEL responded: "*...I suggest to keep it run I believe we will see real high Numbers However you know best Luigi*".

125. In June 2007, NEL moved Kyla's offices out of the Ceres building to his own premises.

126. On 18 June 2007, Mr Mantero emailed Mr Cafiero with a calculation of the break-even point on various FTL trades and a summary of the break-even points on Kyla trades.

127. On 19 June 2007, Mr Cafiero emailed NEL, saying: "*Market really pushing again ... on q3 we are now around 83,000 ...*"; NEL responded "*very good news many thanks...*".

128. The next trade took place the following day, Kyla/FTL 200607 at US$91,000 per day, with an FTL mark-up of US$1,000 per day from a 'second leg' purchase from CTC, CTC/FTL 200607 at US$90,000 per day. In the absence of evidence that CTC was fronting into the market for FTL on the 'second leg' trade, the natural inference is that CTC was hedging a Pool position. Thus, Mr Cafiero was putting Kyla on the opposite side of that Pool position, via FTL as front, for CTC's convenience. That is consistent with a contemporaneous CTC Pool report recording CTC's FFA as a purchase from FTL, without any suggestion that CTC was fronting for FTL for a purchase from an external market counterparty, and without mentioning the on-sale to Kyla.

129. Kyla then had two open half positions: it was 45 days long on Q3 07 Cape (Kyla/FTL 040507) and 45 days long on Q4 07 Cape (Kyla/FTL 200607). On 22 June 2007, Mr Cafiero emailed Mr Weston in relation to the physical market, but also telling him: "*.... paper not reacting for now… only thing that I will try and do is to close out the half position I have bought for Nick on the q4 (91000) at 100000 with nobu*" (a reference to the possibility of trading with TMT (Nobu Su)).

130. On 29 June 2007, Kyla sold to FTL a half Q3 07 Cape at US$92,000 per day. This was matched in FTL's books to a trade with Cargill at US$94,500 per day, concluded

the previous day. Cargill/FTL 280607 was not done with Kyla in mind. From the documentary record, I find that:

(1) Cargill/FTL 280607 was concluded before 3.37 pm on 28 June 2007;

(2) no recap was drawn up for FTL/Kyla 290607 until 2.14 pm on 29 June 2007, when it was drafted by Mr Chillo at a price of US$92,500, a mark-up for FTL against the Cargill trade of US$2,000 per day;

(3) within two minutes, that recap was re-drawn by Mr Chillo at US$92,000, a mark-up for FTL of US$2,500 per day, and that is what was confirmed to Kyla**.**

131. This trade closed out the long position on Cape Q3 07 created by Kyla/FTL 040507 at a loss to Kyla of US$230,000 whereas every previous Kyla close-out trade had locked in a profit for Kyla.

132. The claimants' interpretation of this trade was that, whilst it was not an offload by FTL of an out-of-the-money position on its own account, Mr Cafiero had traded Cargill/FTL 280607 for FTL's own account and, for whatever reason, decided the following day that he did not want to keep it as an FTL position and so re-allocated it to Kyla at a mark-up. That, I agree, is what the documentary record indicates.

133. In cross-examination, Mr Cafiero's evidence was that at the time he believed the market was falling, he would have advised NEL that that was his view, he also probably would have told NEL that FTL had sold the day before – he was "*absolutely transparent*" – but NEL must have taken a different view, in order then to place the opposite trade, so Mr Cafiero would have gone out and "*produced a price*" by seeing what was being offered in the market, because what FTL had on its own book was "*completely irrelevant*". Mr Cafiero also suggested that NEL would have had no interest in FTL's pre-existing position. I consider that evidence to have been invention in the guise of reconstruction, in an attempt to explain away the documentary record. In my view, in giving that evidence, Mr Cafiero appreciated that, back in 2007, NEL believed CTM was trading *for* Kyla, using FTL to front for Kyla, and so NEL would have assumed, when he saw it recapped to him, that FTL/Kyla 290607 at US$92,000 was generated from a 'second leg' fronting trade that day (29 June), FTL selling to a counterparty at US$92,500.

134. After 29 June 2007, Kyla was still 46 days long on Q4 07 Cape under Kyla/FTL 200607.

135. By the next trade, FTL/Kyla 030707, Kyla went short a half Q3 07 Cape at US$90,000 per day. This trade was matched with a Cargill/FTL trade of the same date, with an FTL margin of US$2,000 per day.

136. On 11 July 2007, two Kyla FFAs were placed:

(1) Kyla/FTL 110707 Q3 07 Cape closed Kyla's open Q3 07 position at a loss to Kyla of US$460,000. This trade was matched with FTL/Oceanbulk 110707, giving FTL a margin of US$1,000 per day. Mr Cafiero emailed the recap to NEL at 9.30 am on 11 July 2007. Mr Cafiero did not mention the loss, but

stated "*we are long q4 and feel we should wait and sell it at around 105 making Usd 4000 profit on the spread*". There was a dispute between the parties about whether this trade was in fact intended as a spread play, the claimants' position being that Mr Cafiero's email was an exercise in jargon-laden spin to distract from the loss.

(2) Kyla/FTL 110707 Q4 07 Cape doubled the size of the long position on Q4 07 Cape. A recap was sent to CTM risk management but no document has been identified sending the recap to NEL. The trade was matched with FTL/CTC 110707 for an FTL margin of US$1,000 per day.

137. Despite the US$230,000 loss crystallised on 29 June 2007 and the further loss of US$460,000 on 11 July 2007, Kyla's result on closed positions by the end of July 2007 was positive overall: US$182,000 + US$273,000 + US$91,000 + US$150,150 + US$124,000 - US$230,000 - US$460,000 = US$130,150.

138. Kyla was holding a 92-day long position on Cape Q4 07, bought at (an average of) US$97,500 per day, and markets surged through July 2007 and into August 2007, so that Kyla's position was in the money to a significant extent. In the first week of August 2007, the BFA closing price for Q4 07 Cape oscillated around a figure of US$106,000 per day. Marking Kyla's 92-day long to market at that level would have put it in the money to the tune of US$782,000.

139. In emails sent to NEL and to Mr Weston on 7 August 2007, Mr Cafiero and Mr Mantero highlighted Kyla's mark-to-market position at market levels ranging from US$104,000 per day (at worst) to US$110,000 per day (at best). Mr Cafiero emailed NEL a summary of the current trading position with anticipated returns: "*We have prepared following for you to highlight your present FFA situation and the various results basis different market levels. Hope you like it……*". On 9 August 2007, Mr Cafiero emailed Mr Weston: "*..... we managed to break the 1 mio net profit for Nick too ..... aren't we gooooooooooood!!!*".

140. In the days that followed, the market for Q4 07 Cape rose even further than Mr Cafiero had modelled to NEL as a best case. By 13 August 2007, the BFA closing price on Q4 07 Cape was US$115,000 per day. On that date, two Kyla FFAs were placed:

(1) Mr Cafiero sold Q4 07 Cape to Drybulk at US$115,500 per day (Drybulk/FTL 130807), but passed that through to Kyla at only US$110,500 per day (FTL/Kyla 130807), thus capturing a mighty margin of US$5,000 per day for FTL. The US$110,500 Kyla selling price was slightly higher than the best case indicated by Mr Cafiero to NEL at the end of the previous week (7 August 2007 was a Saturday), but is not credibly a price at which NEL would have agreed to sell if he was making his own trading decisions for Kyla based on his own view or information as to the market. By closing out the long position on Q4 07 Cape at US$110,500, Kyla locked in a large profit of US$1,196,000 million. If the FTL margin had been US$500 per day rather than US$5,000 per day, the profit to Kyla would have been US$1,610,000. In oral evidence, Mr Cafiero suggested that the size of the FTL margin might have been for a variety of reasons: because the counterparty Drybulk was not a particularly good one; because of the level of volatility at the time; because of the size of

the trade. I consider the truth to be as the claimants submitted, namely that it was as large as Mr Cafiero believed he could get away with, having given NEL a 'best case' scenario of US$110,000 that he would still be beating, and knowing that NEL was trusting him (Mr Cafiero), not judging FFA transaction pricing for himself.

(2) A further position was opened for Kyla, Kyla/FTL 130807, buying Q1 + Q2 08 Cape, matched with FTL/Cargill 130807, giving FTL a margin of US$1,000 per day. That margin itself tells the lie to Mr Cafiero's suggestion that the US$5,000 margin from the Drybulk trade was a function of market volatility at the time or the size of the trade. It may be that Drybulk would have been considered less 'blue chip' than Cargill as a counterparty, but I do not accept that Mr Cafiero would have charged Kyla, or at the time thought he was charging, a counterparty premium of US$4,000 per day for dealing with Drybulk as opposed to (the likes of) Cargill on that other trade. In my judgment, there has to be another explanation for this huge margin differential, and it is there in the correspondence, namely (as I have said already) that NEL had been given US$110,000 as a 'best case' close-out rate for his long Q4 07 Cape position, he was not second-guessing Mr Cafiero on the pricing of Kyla's FFAs, and Mr Cafiero took advantage of that for the benefit of FTL at the expense of Kyla.

141. That second 13 August 2007 trade was closed by a trade placed on 28 August 2007 locking in a profit for Kyla of US$728,000. The FTL margin on the close-out trade, matched by FTL as it was to a 'second leg' trade on that date with CTC, was US$3,000 per day. On the large volume of that position (a full Q1 + Q2 08 Cape, i.e. 182 days) FTL's profit from closing out Kyla's position was US$546,000 (rather than the US$91,000 that would have been earned if the FTL margin had been US$500 per day, in which case the profit for Kyla would have been US$1,183,000).

142. On that date, 28 August 2007, Mr Cafiero emailed Mr Weston: "*Spot market going insane. Have closed one more position for ares on the q1 and we are now left with 1 q1 only ... This afternoon I will sell also the last q1 for ftl. I have also locked in a massive profit for nick livanos (this afternoon will send you his exact profit since we started trading for him)*". He also emailed NEL: "*Pls find attached the recap of our today trade. Please note that you do not have anymore open positions. Below also find a recap of your profits. Hope "this makes your day"*". NEL forwarded that email to Mr Thanopolous later that evening, adding simply "*2,030,964 total*", which I take to be NEL's calculation of the total net profit then booked by Kyla from the Kyla FFAs to date. The total net close-out profit to the end of August 2007 was marginally greater, some US$2,054,150, but I envisage that NEL's calculation also took account of the broker's commissions re-charged by FTL to Kyla during the first few months of trading.

143. Following FTL/Kyla 280807, Kyla had no open positions.

144. On 3 September 2007, two identical half volume purchases, Kyla/FTL 030907, opened a new 92-day long position on Q4 07 Cape, matched with FTL/D'Amico Finance 030907 and FTL/CTC 030907, for an FTL margin of US$1,500 per day (US$1,000 from the D'Amico Finance trade and US$2,000 from the CTC trade). On 5

September, Mr Cafiero emailed Mr Weston, saying "*… This market is helping my mood a lot!!!! I am tr[y]ing to close out our and Nick cape at 135.000*". Then:

(1) On 6 September 2007, Kyla's position was closed out at a profit for Kyla of US$184,000. The matching trade was with Oldendorff, but fronted for FTL by CTC (so there were in fact two 'second leg' trades, Oldendorff/CTC 060907 and CTC/FTL 060907, on identical terms).

(2) Having profited by a margin of US$1,500 per day on the opening of the position, FTL took another US$2,000 per day on the close-out leg, for a total profit of US$322,000.

(3) When Mr Mantero sent Mr Chillo the draft recap for FTL/Kyla 060907, the only text in the covering email was this (in translation): "*Father I have sinned Can you convert me???*". The claimants' position for trial was that Mr Mantero was there joking about having skimmed excess profits from Kyla, acknowledging wrongdoing. No specific, innocent explanation of the joke was suggested prior to trial, but in his oral evidence Mr Mantero said that on re-reading the correspondence he had remembered that it was about his inability to convert documents into .pdf format. Despite emerging so late in the day, the explanation had the ring of truth, and Ms Hopkins QC fairly accepted as much in closing, having also accepted after Mr Chillo's evidence at trial that he was an honest witness who had never understood that CTM/FTL had done anything wrong.

145. Kyla/FTL 060907, a full Q1 08 Pmx purchase, was also placed on 6 September 2007. It ran to settlement, earning FTL a margin of US$1,000 per day (so a profit of US$91,000) and incurring for Kyla a loss on settlement of just over US$982,084. The opening of this long Q1 08 Pmx position for Kyla coincided with a point in time when CTM also opened – and held – a number of long positions on Q1 08 Pmx for FTL's own account.

146. On that same date, 6 September 2007, there were email exchanges between Mr Thanopoulos and individuals at CTM:

(1) Mr Thanopoulos emailed Mr Cafiero (copying the 'FFA Settlements' email address) raising a query about an invoice sent by FTL for the settlement month of August 2007, requesting "*some kind of statement*" in relation to the FFAs "*so that we can avoid similar issues*".

(2) Mr Pulcini emailed Mr Cafiero, saying "*since I don't know the portfolio you built for Nick in detail, can you answer…*".

(3) Mr Cafiero responded to Mr Thanopoulos: "*No not correct. There is still a loss to be paid this month. Fyg you will start getting money from october (we did a spread lost money on q3 and made more on q4)*" (referring to the 11 July trades I described above).

(4) Mr Pulcini emailed Mr Thanopoulos: "*I know Luigi Cafiero already answered you on this; you can relax, still on negative settlement and then positive results!*"

(5) Mr Thanpoulos responded: "*No problem. Just double checking because Nick trades over the phone and then I am struggling to keep track.*"

147. On 10 September 2007, FTL bought from Drybulk a large long position (183 days) on Q4 07 + Q1 08 Pmx at US$69,250 per day, for its own book. Two days later, on 12 September 2007, Kyla/FTL 120907 effectively passed that position on to Kyla, but at a price of US$70,000 per day, i.e. with a margin for FTL of US$750 per day. The Q4 07 Pmx portion was later closed out at a profit for Kyla, as I mention below; but the Q1 08 Pmx portion (which doubled Kyla's long position on Q1 08 Pmx created by Kyla/FTL 060907) ran to settlement at a loss to Kyla of US$1,027,584.

148. Between FTL/Drybulk 100907 and Kyla/FTL 120907, the market fell so that (a) FTL was out of the money on FTL/Drybulk 100907 and (b) US$70,000 per day for Kyla/FTL 120907 was a price well off the market on the trade date. The extent to which FTL was out of the money on the Drybulk trade when the Kyla FFA was placed depends on where exactly the market was at that time, which in turn depends on when in the day on 12 September 2007 the Kyla FFA was placed, but it was at least US$250,000 or so and in my judgment the probability is that the Kyla FFA was only placed later in the trading day when FTL was out of the money by over US$500,000.

149. The defendants said that was not a significant mark-to-market exposure, given FTL's then most recent trading figures estimating an overall net profit on its FFA book of c.US$10.5 million. I disagree. This was a large single-trade paper loss generated in very short order tempting Mr Cafiero to offload the position if he could, and that is what he did.

150. Mr Cafiero's written evidence was that FTL was not offloading unprofitable positions to Kyla. In cross-examination, he expanded on this, relying on his claim that FTL was trading independently with Kyla as an ordinary counterparty; therefore, he argued, it might well be that Kyla wanted to do a trade in which FTL wanted to take an opposite position (including selling an open position on its books); he did not consider this "offloading", in the sense that, he asserted, FTL was not going out and arranging to "offload" a position on Kyla, because NEL was the one who would be making the trading decisions for Kyla, not FTL. In relation to the 12 September trade itself, Mr Cafiero suggested that this would have come about because there would have been a phone call on the morning of 12 September in which he disclosed FTL's 10 September position to NEL, and NEL must have "*liked the idea of doing a similar trade or the same trade that we had done*". I do not accept any of that evidence, which I considered to be a forensic effort by Mr Cafiero to explain away his conduct. I am confident that there was no conversation in which NEL, conveniently and coincidentally, wanted to do an FFA trade that would take a large, recent, out-of-the-money trade off FTL's books, and, what is more, decided to do that trade at an off-market price to favour FTL.

151. NEL's evidence, as already outlined, was that he did not understand that Kyla was being traded with by Mr Cafiero like a regular counterparty; he understood Mr Cafiero to be trading for Kyla, not with Kyla; and he would not have been comfortable with an arrangement where he was negotiating with or dealing against a PGL company, as opposed to negotiating with and dealing against the outside market, Mr Cafiero doing that on his behalf so that FTL was fronting for Kyla.

152. From around September 2007 onwards, difficulties arising from the breakdown of NEL's marriage began to affect and substantially preoccupy him. I accept NEL's evidence about that. It is not necessary to rehearse the unhappy detail in this public judgment. It suffices to say that those difficulties meant NEL paid less attention to his business. This was at its worst between July 2008 and March 2009, during which period NEL was hardly ever in the office and spent extended periods of time in the US dealing with these difficult personal matters.

153. The claimants said, and I agree, that this meant there was no prospect of NEL giving careful consideration to each and every one of the FFAs, or taking trading decisions in relation to them, or negotiating prices with Mr Cafiero; CTM (Mr Cafiero) was trading for him, so far as he was concerned, and he trusted CTM to look after his interests.

154. On 19 September 2007, Mr Thanopoulos wrote to Mr Pulcini asking if CTM could provide "*some kind of statement regarding the FFA positions of Nick. It would be of great assistance to us and Nick since he is increasingly active in that area*."

155. In response, CTM began providing monthly reports, the first of which was sent to Kyla on 21 September 2007. The cover sheet said the report was prepared by "*CTM as manager for Kyla Shipping*", and described the report as a "*Portfolio Analysis*". The report included mark-to-market valuations of Kyla's open positions based on market data available to CTM. It was prepared each month with input from Mr Mantero, reviewed by Mr Cafiero, and was copied to Mr Weston and Mr Pulcini.

156. At about the same time, CTM also began sending regular BCI physical market reports to Kyla.

157. On 25 September 2007, the Q4 07 portion of Kyla/FTL 120907 was closed out by a sale of Q4 07 Pmx to FTL at US$77,000, locking in a profit to Kyla of US$644,000. The 'second leg' trade was a sale to Oldendorff, but fronted by CTP, so there were sales by FTL to CTP and by CTP to Oldendorff, on identical terms. FTL sold at US$78,000 per day, so its margin by reference to the price given to Kyla was US$1,000 per day.

158. During the morning of 3 October 2007, FTL sold Q1 08 Cape to Citigroup at US$134,000 per day, for FTL's own account. Two days later, FTL/Kyla 051007 was placed at US$133,000 per day and matched by FTL with Citigroup/FTL 031007, giving FTL a margin of US$1,000 per day and passing the open short position to Kyla. The market moved sharply against that position during that day, so that a rapidly developing paper loss on a sizeable trade was taken on by Kyla and avoided by FTL. The Kyla FFA appears to have been placed early on the morning of 5 October 2007, but I accept Mr van den Abeele's expert opinion, considering the available market data, that even for an early trade that day, a price below US$137,000 was well off the market.

159. In the event, the market for Q1 08 Cape rose by c.US$40,000 over the next two weeks and Kyla's short position was closed on 19 October 2007 at a loss to Kyla of US$3,731,000.

160. Mr Cafiero's oral evidence was that the opening and closing of Kyla's 91-day short position on Q1 08 Cape could not be regarded in isolation, but had to be regarded as part of a spread against Kyla's 182-day long position on Q1 08 PMX, opened by Kyla/FTL 060907 Q1 08 Pmx and extended by Kyla/FTL 120907.

161. On 15 October 2007, Mr Cafiero emailed NEL to say "*market moving our way as u might have seen from the index*". In another email he directed NEL's attention to the "*spread*" between the physical Capesize index and the physical Pmx index, and said, "*This should make you feel better.. As soon as the spread hits 1.85 pct i will close it...*" (to which NEL replied, "*Very good many many thanks*"). Mr Cafiero promised "*… I will keep you posted on the market*".

162. When the short position on Q1 08 Cape was closed out on 19 October 2007, no ratio to which Mr Cafiero might have been referring was at 1.85, and the long position on Q1 08 Pmx was in the money by c.US$3.5 million. If this had been a planned 'spread' play, understood as such by Mr Cafiero and/or NEL, I consider it would have been closed out for a net loss overall of US$250,000 or less. Instead, the long Pmx position ran to settlement, losing Kyla over US$2 million, so that the total loss on this supposed 'spread' play was c.US$5.75 million.

163. FTL had traded very profitably in the period February 2007 to October 2007. The short narrative reports prepared for FTL's investors gave the following headline overall net estimated profit figures for FTL's Fund II, which began trading in April 2007: US$2.8m as of 14 May 2007; something of a dip after a "*difficult week*" to US$448k as of 1 June 2007; a jump back up to US$2.6m as at 16 July 2007; an increase to US$4.6m as at 09 August 2007; and further increases thereafter, to US$6.7m as at 3 September 2007, US$8.7m as at 22 October 2007, and a high watermark as at 12 November 2007 of US$12.1m.

164. Thereafter, the position turned. In late 2007 Mr Cafiero opened, and held, four long positions on Q1 08 which would go on to make substantial losses.

165. The next Kyla trade, Kyla/FTL 291007, was also a new long position, Kyla buying a half Q1 08 Cape at US$174,500, which was held open until mid-January 2008. It was matched by FTL against a half Q1 08 Cape purchased by FTL from Castalia that day at US$173,500 for an FTL margin of US$1,000 per day.

166. The physical and forward markets fell dramatically in late December 2007 / early January 2008. FTL's paper losses, marking its four open long positions to market, ballooned, as did the (negative) mark-to-market value of Kyla's position. The 17 December 2007 report to FTL investors showed a US$3m drop in estimated profit, marking the book to market, to US$9.1m. That drop accelerated into January 2008.

167. Mr Cafiero denied in cross-examination that these developing losses made him uncomfortable. He noted that, whilst it was not ideal, in trading, "*you can't be successful all the time*", and FTL had been in this situation in the past – it was "*totally normal*". However, this was not just the ordinary ups and downs of trading life, but a major reversal of fortune for FTL caused by putting on and holding substantial long positions.

168. Between 7 and 16 January 2008, Mr Cafiero closed all four FTL positions, crystallising substantial losses for FTL totalling US$9,361,625:

(1) On 7 January, FTL closed its net long position against Castalia (the half not matched with Kyla/FTL 2910107) by a sale to CTC at US$148,250 per day, booking a loss of US$1,148,875 for FTL. The Kyla portion of this trade was not closed out at this time;

(2) On 14 January, FTL closed its long position against Oceanbulk at a loss of US$2,889,250;

(3) On 16 January, FTL closed its long position against CTP at a loss of US$2,320,500;

(4) Also on 16 January, FTL closed its long position against Agrenco at a loss of US$3,003,000.

169. The overall value of FTL's book, marked to market and reported internally at CTM on 14 January 2008, was (US$3,728,000), i.e. a net overall anticipated loss of that magnitude.

170. Between 11 am and noon on 17 January 2008, CTM opened a 90-day short position by two LCH trades on Q1 08 Cape, for FTL's own account, at an average price of US$84,250 per day. Mr Cafiero emailed Mr Weston noting "*market keeps falling…*"*;* Mr Weston responded at 12.07 pm: "*Can we do anything to take advantage of this for ctp or ftl [?]*"*; and* Mr Cafiero responded: "*I already sold another cape full at 84250. Index will be below that this am. FTL rules*!!!!"

171. However, following a huge fall in the physical index (published at 1 pm), the FFA market shot up, so that in the space of a few hours FTL was facing a new, and significant, paper loss on the positions Mr Cafiero had just congratulated himself for taking on. Mr Cafiero agreed in cross-examination that he had gone short in the expectation of a large index drop, and he would have known in the afternoon that his morning's positions were, instead, under water.

172. When recording the above trades, Mr Mantero inserted the two LCH/FTL 170108 trades in his spreadsheet sometime after their conclusion between 11 am and 12 noon; and by 2.47 pm he was showing those as an open position for FTL's account with a mark-to-market value of ($2,025,000), contributing to an overall net valuation of FTL's book of ($6,439,000) before brokers' commissions, (US$6,704,934) after commissions.

173. Mr Cafiero accepted in evidence, and I find, that even though he would not have seen Mr Mantero's spreadsheet at the time, he would have known from following the market closely as was his job that his trade was heavily out of the money in the afternoon. That was when FTL/Kyla 170108 was placed. It was almost a full Q1 08 Cape trade, because it was stated to be a 90-day contract whereas Q1 08 had 91 days, at US$80,000 per day. That closed Kyla/FTL 291007, which had been a half Q1 08 Cape purchase (45.5 days), locking in a loss to Kyla of US$4,299,750, and flipped Kyla to being short Q1 08 for the balance of the new trade (44.5 days).

174. For FTL, the effect of FTL/Kyla 170108 was to close out Mr Cafiero's heavily out-of-the-money short put on that morning via LCH, at a profit (FTL's margin by matching FTL/Kyla 170108, as it did, against the LCH trades) of US$4,250 per day. The FTL/Kyla price of US$80,000 was more than US$20,000 away from a market price that afternoon. Indeed, FTL placed four other trades on Q1 08 Cape that afternoon, for its own account, at prices in the range of US$100,000-US$105,000 per day.

175. The Kyla trade was not in Mr Mantero's spreadsheet when last modified at 2.47 pm and was only confirmed to Kyla at 4.03 pm.

176. Mr Cafiero claimed in oral evidence, conveniently, that a phone call with NEL must have occurred in the morning which would explain the position and the price, and indeed that they probably also spoke before then, including the day before, in relation to the trades being done by FTL, and that Mr Cafiero would have told NEL he was planning to sell given that the market was falling. The defendants contended that if the trade had been concluded at around 12 noon, the price would have been around US$84,500, and there would have been no mark-to-market loss it might be tempting to try to offload. Mr Mantero did not accept that the absence of the Kyla FFA from his spreadsheet at 2.47 pm meant that the trade had not been done by that point. He claimed, likewise conveniently, that although he had no specific recall, he thought he would have been prioritising the recording of LCH trades, to ensure those were cleared correctly, such that he might not have been recording other trades in the spreadsheet as they occurred.

177. I do not accept that claim, or Mr Cafiero's creative reconstruction. I do not regard it as credible that Mr Mantero would have entered up the LCH trades, marked them to market, and shown them as an open position, with a net negative exposure of over US$2 million for FTL, if in fact they had been covered by a trade with Kyla and, far from requiring to be marked to market, and shown as loss-making on paper, could be booked as profitable (to the tune of nearly US$400,000). I regret to say, but have no hesitation in concluding, that Mr Cafiero off-loaded FTL's exposure onto Kyla, taking advantage of the trust he knew NEL placed in him to trade for Kyla and look after its interests. The rapidity of the market movement in the afternoon is liable to have given him a sense that he would have a cover story if challenged by NEL (albeit he would not have expected any such challenge, as he knew NEL did not question his activities for Kyla), namely to pretend that it was a trading decision made in the morning before the market went the other way.

178. Kyla's new net 44.5-day short position on Q1 08 Cape was then held open for just one day, before being closed out and flipped to a long position on Q2 08 Cape by Kyla/FTL 180108, which was a half quantity Q1 + Q2 08 Cape at US$120,000 per day, that is to say it had a contract volume of 91 days, 45.5 days on each of Q1 08 and Q2 08. US$120,000 was well out of line with the market, possibly by as much as US$10,000 depending on when exactly the Kyla FFA was placed. The close-out in fact created a discrepancy of 1 day on Q1 08 Cape, i.e. Kyla became 1 day long on Q1 08. That 1-day discrepancy was resolved by FTL/Kyla 060308 1 Mar 08 Cape, i.e. a 1-day 'short' purportedly traded 5 days after the Index date traded, at US$120,000 so as to balance exactly the 1-day discrepancy created on 18 January. The closing out of the 44.5-day short at US$120,000 locked in a loss to Kyla of US$1,780,000.

179. Meanwhile, for FTL's book, CTM matched Kyla/FTL 180108 against FTL/Citigroup 100108 at US$116,325 (i.e. a trade from over a week earlier not intended when placed to have any connection to Kyla), giving FTL a margin of US$3,675 per day on the Q2 08 Cape portion, and FTL/D'Amico 180108 at US$115,000, giving FTL a margin of US$5,000 per day on the Q1 08 Cape portion. Further:

    (1) The Citigroup trade had been part of an FTL spread play (Cape vs. Pmx). It was being marked to market by Mr Mantero late on 17 January 2008 as out of the money to the tune of US$1.1 million. The Pmx leg of the spread was shown as in the money by US$530,000, and the Cape leg would not have been so far out of the money if marked to market on 18 January 2008; but though those factors may have reduced any sense of urgency about offloading the Cape leg, the fact remains that there was a temptation to do so to which in my judgment Mr Cafiero succumbed, benefiting FTL at Kyla's expense.

    (2) The D'Amico trade was concluded prior to a sharp fall in the Q1 08 Cape price in the mid-afternoon on 18 January 2008, to US$100,000 per day shortly before 4 pm, before it recovered to somewhere close to the FTL/D'Amico price by the close that day. The off-market price of Kyla/FTL 180108 insulated FTL against all of that.

180. In the event, Kyla's new 45.5-day long position on Q2 08 Cape was profitable. It was closed out by FTL/Kyla 060308 Q2 08 Cape at US$150,000 per day, a profit for Kyla of US$1,365,000. FTL matched that close-out with Augustea/FTL 060308 at US$152,000 per day, for an FTL margin of US$2,000 per day.

181. On 21 January 2008, Mr Cafiero provided NEL with a "*…report on your present open positions…*". The report did not show the 24-hour period for which Kyla was short Q1 08 Cape or the losses crystallised on 17 January 2008. NEL replied asking for "*the transactions of last week if possible*", and was sent just a list of trades.

182. Mr Weston's next monthly update to FTL investors reported on the FTL book as at 21 January 2008 and explained that: "*Regretfully the Market correction as reported in last months [sic] report was longer and deeper than we expected and we gave back some of the gains we made earlier in the year. We held our longs into January in anticipation of a strong Q1 we [sic] so far has not happened. We adjusted our position before the worst of the drop and although at one point we were Usd 4.10 million negative for 2008 we have regained some of this back and now stand at Usd 3.1 negative for 2008.*" The trading against Kyla's interests on 17/18 January 2008 will have been the major cause of that relative improvement, as Mr Cafiero will have known at the time. Mr Weston's evidence was that he was unaware that Kyla trades had helped out, which only serves to confirm my conclusion as to the absence of any real supervision of Mr Cafiero's activity.

183. Kyla/FTL 130208 (matched to FTL/Bunge 130208) extended Kyla's long position on Q2 08 Cape from 45.5 days to 136.5 days, with a margin taken by FTL of $1,500 per day. Mr Cafiero sent a trade recap to NEL saying "*following our teleconv*".

184. The next Kyla FFAs, placed on 6 March 2008, I have already described, above, in tracing through the aftermath of the 17/18 January trades.

185. Following those trades, still on 6 March 2008, Mr Pulcini emailed NEL a request for settlement, and included an update: "*As per attached, situation is improved after February, but this month is still heavy.*"

186. After 6 March 2008, Kyla's long position on Q2 08 Cape was 91 days. That was doubled by Kyla/FTL 110308, booked at US$145,000 per day against a trade with Deiulemar that day at US$137,250 per day for a whopping FTL margin of US$7,750 per day. The market fell heavily during 11 March 2008, and the documentary record indicates that both trades were done towards the end of the day, such that FTL got the late-day market price from Deiulemar but matched it against a price given to Kyla that would have been about right for a trade at the start of the day. Mr Cafiero's oral evidence was that the Kyla FFA must have been done in the morning, and he would have agreed the price with NEL. I do not accept that evidence. The price of the Kyla FFA was, as always, set by Mr Cafiero; and he had by now become accustomed to setting the price to suit FTL and not by reference to a price obtained in the market adjusted by the FTL margin authorised by NEL of US$500 per day.

187. Around this time, NEL began receiving market updates from additional sources. From February 2008 Mr Yannis Niotis began working as a commercial manager at Kyla, and sent NEL regular market updates. In addition, on 22 February 2008, Mr Duncan Dunn of the brokers SSY emailed NEL referring to a meeting and indicated "… *additionally I would like to introduce you to our Cape team wit[h] a view to one of them keeping you in touch with the market and perhaps helping to formulate a hedging strategy for your new Capes*." After this, NEL began to receive FFA market updates from SSY. This was in addition to reports sent through by other brokers such as Clarksons on a regular basis that he had received throughout.

188. As regards FTL's fund performance, Mr Weston's monthly reports to FTL's investors reported net overall estimated profit as at 4 February 2008 of US$540,000 and as at 3 March 2008 of US$3.3m although, in February 2008, substantial losses for CTP had also been reported to PGL.

189. In the March 2008 report, Mr Weston mentioned that there would be an investors' meeting and lunch on 16 April 2008. Either at that meeting or earlier but confirmed at the meeting (as Mr Weston said in his oral evidence that he recalled it), a decision to run off FTL Fund II was made, following which FTL eliminated its net long and short positions on Q2 08.

190. On 24 April 2008 at 2.37 pm, Mr de Benedictis emailed Mr Cafiero, with the subject "*Nick positions*", telling him the current bid prices on May/June 08 and Q2 08 and ending with: "*Send something to Nick. He is waiting for a msg*." At 2.51 pm**,** Mr Cafiero copied and pasted the substance of that email to NEL but reduced the prices in each case by US$2,000 per day, saying those were the prices "*u mite get*". I agree with the claimants that, as a result, those prices were dishonestly represented by Mr Cafiero to be his view of what was available from the market. Mr Cafiero's oral evidence was that this was an example of him offering special Kyla prices to NEL, which in a sense is true, i.e. that is what Mr Cafiero was doing (as he knew at the time). But it was not what NEL thought Mr Cafiero was doing, and in my judgment Mr Cafiero knew that too.

191. The (internal) FTL weekly report dated 28 April 2008 showed FTL having long positions on Q2 08 Pmx (91 days) and Cape (2 x 45 days). By the end of April 2008, these positions were eliminated, and in all remaining FTL Fund II reports the long/short position was reported to be neutral.

192. On 29 April 2008, the following Q2 08 Cape trades for Kyla remained open: (i) 91 days bought on 13 February 2008 at US$139,000 per day; and (ii) 91 days bought on 11 March 2008 at US$145,000 per day. Kyla was therefore long 182 days on Q2 08 Cape at US$142,000 per day. That position was closed out by FTL/Kyla 290408(1) to (4), sales on 29 April 2008 of 4 x 30.5 days on May/June 08 Cape, and by the April month running to settlement (for a small loss to Kyla of US$36,300, the April 08 Cape 4TC settlement having been at US$141,395 per day). Each of the closing trades for the May/June 08 Cape portion was matched with a 'second leg' trade:

(1) FTL/Kyla 290408(1) at US$147,500 per day was matched to CTC/FTL 290408 at US$150,000 per day (giving FTL a margin of US$2,500 per day), and a recap for the Kyla FFA was sent to NEL at 11.36 am;

(2) FTL/Kyla 290408(2) at US$147,500 per day was matched with Cargill/FTL 290408 at US$150,000 per day (an FTL margin of US$2,500 per day again), and a recap for the Kyla FFA was sent to NEL at 3.17 pm;

(3) FTL/Kyla 290408(3) at US$147,500 per day was matched with Morgan Stanley/CTP 290408 at US$151,000 per day (an FTL margin of US$3,500 per day). It will be recalled that this is the Kyla FFA confirmed as CTP/Kyla rather than FTL/Kyla. My reference to FTL having a margin, like my use of the FTL/Kyla 290408(3) label, is not intended to beg the issue arising of Kyla's true (purported) counterparty. CTP appears to have been involved on this trade because it had signed an ISDA master agreement with Morgan Stanley and FTL had not at this time. Mr de Benedictis was recorded by the broker (Clarkson) as having traded for CTP. The recap for the Morgan Stanley trade was sent to CTM by Clarkson at 3.06 pm, and at 3.13 pm Mr Mantero sent an email to NEL attaching a recap for the Kyla FFA, showing it as a trade between Kyla and CTP;

(4) Mr Cafiero emailed NEL at 4.25 pm on 29 April 2008, saying: "*Have tried calling you but cannot get through. Have done one more (half) at 147500. Kyla has now got only half position long.*"

(5) The final trade, FTL/Kyla 290408(4) at US$148,000 per day was matched with Louis Dreyfus/FTL 290408 at US$153,500 per day for an FTL margin of US$5,500 per day. The Louis Dreyfus trade was placed through brokers (GFI), who recapped it to CTM for FTL at 6.49 pm on 29 April 2008. At 9.15 pm, Mr Cafiero emailed Mr Weston: "*Got it done in the end….. nick is completely out of all positions.*", confirming that although not yet recapped to Kyla, this fourth external trade was indeed intended, when placed, as a 'second leg' trade to be passed through to Kyla (less FTL's margin). The corresponding Kyla FFA was in fact, however, only recapped to Kyla the following morning, 30 April 2008, by email sent at 10.32 am.

193. The four close-out trades for the May/June 08 part of the original Q2 08 long positions locked in profit for Kyla of (in aggregate) US$686,250, so that the overall outturn result on those original positions was a profit for Kyla of US$649,950 after deducting the small April settlement loss.

194. The parties differed as to the reason the Kyla positions were closed out. The claimants contended that this took place at CTM's instigation, in anticipation of the switchover from Fund II to Fund III by the end of April, in line with the rest of FTL's book. Both Mr Weston and Mr Cafiero denied in cross-examination that Mr Weston had instructed that the positions be closed to tidy up FTL's book. The defendants' position was that whether a position had been closed or not had no effect on FTL's books or the run-off of Fund II, and that it was NEL who would have decided to close the trades. The documentary record supported the claimants' case, and I have no real doubt that it is correct. NEL did not take any relevant trading decision; but rather CTM (Mr Cafiero, probably under instruction from Mr Weston) chose to close out Kyla's long position, did so, and reported having done so.

195. As regards the counterparty to FTL/Kyla 290408(3):

(1) As I have already noted, it was recapped to Kyla as a sale to CTP. There was no evidence of any agreement made on 29 April 2008 that CTP, in trading with Morgan Stanley, was merely fronting for FTL. There was no evidence at all from Mr de Benedictis explaining the trade, although his name appeared initially on the recaps. Mr Cafiero had authority to trade FFAs for CTP and by this time (April 2008) was running CTM's Panamax trading desk, i.e. for day-to-day purposes he was the personification of CTM as agent for CTP and not only as agent for FTL.

(2) On 30 April 2008 (last modified at 11.46 am), Mr Mantero updated his spreadsheet of FTL's portfolio to record 2 x Kyla FFAs on 29 April 2008 and 1 x Kyla FFA on 30 April 2008, i.e. (as I have labelled them, FTL/Kyla 290408(1), (2) and (4)). He did not include the trade I have labelled FTL/Kyla 290408(3) as an FTL trade in the "Exposure" tab. However, in the "Open & Close Dec OUT" tab, Mr Mantero made a narrative comment: "*CTP is paying to FTL US$106,750 [minus] US$9,150 [commission] [equals] US$97,600*").

(3) On 2 May 2008, Mr Mantero created a new spreadsheet, updated to take account of the April 2008 settlement. This version included the same treatment of the 29 April trades.

(4) On 7 May 2008, CTM Risk Management in Monaco circulated their weekly Counterparties' Exposure report, said to be "*as of May 5th 2008*". CTP was shown as having a 31-day long position against Kyla (rounded up from 30.5 days), and a short position against Morgan Stanley (215 days in total) of which Morgan Stanley/CTP 290408 would have formed part; and FTL was shown still 31 days short against Kyla (rounded up from 30.5 days).

(5) At 9.51 am that day, Mr Mantero sent two new recaps, one for FTL/Kyla 290408(3) but now showing FTL, not CTP, as the buyer, and one for a newly documented CTP/FTL 290408 on back-to-back terms with Morgan Stanley/CTP 290408, to Mr Spallone in "Planning", and described the new

FTL/Kyla recap as "*nothing more than the copy of the CTP/KYLA 290408 contract, with the contract name and the counterparty modified (FTL instead of CTP)*". No party now has any record of the new FTL/Kyla recap ever being sent to Kyla, although the defendants said it should be inferred that it probably was. I note that Mr Mantero's word was "*modified*" not "*corrected*".

(6) Mr Spallone drafted a monthly report for Kyla as of 7 May 2008 on the basis *inter alia* of that new recap (and thus on the basis that Kyla's counterparty on all four 29 April FFAs was FTL), which he sent to Mr Cafiero for approval at 11.37 am, saying, "'*I'm sending you the report at 30/04/2008 to send to Kyla. I'll be waiting for your confirmation*". No party now has any record of this being sent to Kyla. Again, the defendants suggest it would have been.

(7) At some point also on 7 May 2008, the Argo entries for 29 April 2008 were modified to reflect the newly re-drawn contractual chain, Kyla→FTL→CTP→Morgan Stanley.

(8) The next internal spreadsheet produced by Mr Mantero, on 15 May 2008, shows FTL/Kyla 290408(3) in the "Exposure" tab and the "Open & Close Dec Out" tab, and the note about a payment of US$106,750 less commission between FTL and CTP has been deleted.

196. The deemed ISDA master agreement created by trading on the FFABA 2007 Terms includes netting. On 4 June 2008, FTL issued to Kyla a Credit Note in respect of various trades including FTL/Kyla 290408(3), treating that as a trade with FTL, not a trade with CTP, and taking Kyla's loss on that trade into account in the calculation of the overall balance between Kyla and FTL. On 1 July 2008, FTL issued a further such Credit Note.

197. I agree, as to the facts, with the claimants' interpretation of all of the above. That is to say, Mr Cafiero and Mr Mantero procured CTP to sell a half order on May/June 2008 Cape to Morgan Stanley as part of a concerted effort directed by Mr Weston to close Kyla's long position by the end of April. They intended that to be, as documented, an FFA chain Kyla→CTP→Morgan Stanley, but because it was seen as really FTL's business, involving no risk for CTP, there would be a side-payment by CTP to FTL to transfer the profit on the trades, less broker's commission so it cost CTP nothing, to FTL. The Risk Management report a week later prompted them to restructure the transaction, now documenting it so that Morgan Stanley/CTP 290408 was a trade fronted for FTL, backing a sale by Kyla to FTL representing one quarter of the closing out of Kyla's long position, because the use of CTP and a side-payment meant that Kyla's liabilities to FTL could not be shown as fully netted off prior to the run-off of Fund II.

198. I do not accept the defendants' alternative version of events, under which FTL/Kyla 290408(3) was intended when placed to be a trade between Kyla and FTL, not CTP, but Mr Mantero made an error when drawing up the recap that made it look as if CTP was Kyla's counterparty. If the intention had been for FTL to be the counterparty, CTP fronting for FTL with Morgan Stanley, that is what Mr Mantero would have been told on the day, and that is what would have been documented (a) by Mr Mantero, as regards FTL/Kyla 290408(3), and (b) by the broker, as regards Morgan

Stanley/CTP 290408, i.e. there would have been a corresponding broker's recap for CTP/FTL 290408 to reflect the fronting by CTP for FTL.

199. I therefore resolve the factual dispute as to what was done, and why, in favour of the claimants. That does not mean that FTL/Kyla 290408(3) did not become a trade between Kyla and FTL, if it was a valid trade at all. The claimants' claims begin with, and require them to establish, a general FFA trading mandate on the part of CTM (Mr Cafiero) *for* Kyla. If CTM was given that mandate, as alleged by the claimants, then Mr Cafiero had ample authority from Kyla to adjust the FFA chain for FTL/Kyla 290408(3) as he did (subject, which is a different point and gives rise to the claimants' claims, to the complaint that the trade skimmed more than US$500 per day for FTL (originally CTP) so as to have been unauthorised). It matters not for that conclusion whether, as the defendants contended, Mr Cafiero had no authority to create FTL/Kyla 290408(3) as a trade with CTP, although in fact he did have full authority to trade for CTP at this time. That does not matter because on the claimants' case as to the facts, which I have accepted, Mr Cafiero was authorised to put the final version of the FFA chain together when the CTP vs FTL issue was identified (subject again to the different point about whether the resulting FTL/Kyla trade was null and void for skimming). The upshot is that whether or not there was originally a purported trade between CTP and Kyla on 29 April 2008, there was a trade between FTL and Kyla either on or (as I have found) as of 29 April 2008, which was either valid and binding or not, as the case may be, by reference to the charges of breach of fiduciary duty levelled at CTM by the claimants. The financial impact of FTL/Kyla 290408(3), treated at the time as having been valid, was all felt and given effect between FTL and Kyla / Vega, and did not involve CTP at all.

200. From 30 April 2008, Kyla had no open positions. No Kyla FFA was placed in May 2008. In the meantime, there were two main developments for FTL:

(1) First, the Cape 4TC dry bulk index, i.e. the underlying "physical" index against which Cape 4TC FFAs settle, climbed steadily towards its all-time peak of US$233,988 per day on 5 June 2008.

(2) Second, Mr Cafiero opened a number of short positions for FTL on Capes for Q3 and Q4 08: (i) BNP Paribas/FTL 090508 via LCH, a half Q4 08 at US$142,000 per day; (ii) Noble/FTL 160508, a half Q4 08 at US$164,000 per day; (iii) BNP Paribas/FTL 190508, via LCH, a half Q4 08 at US$167,800 per day; and (iv) Classic Maritime/FTL 200508, a full Q3 + Q4 08 at US$163,000 per day.

201. As the market rose dramatically towards and into early June 2008, FTL became more and more heavily out of the money. On 4 June 2008, Mr Cafiero decided to cut FTL's losses on all four shorts, closing them out at an aggregate loss to FTL of US$5,541,000.

202. Mr Cafiero's timing was unfortunate. The next day, 5 June 2008, the forward market fell back sharply, a fall that continued into the following day, 6 June 2008. If Mr Cafiero had held on for just two more days, FTL's paper (mark-to-market) losses on the shorts Mr Cafiero had opened in May would have been all but eliminated. Instead, he had bought the positions back at or near the very top of the market, locking in a

US$5.5 million loss for FTL, counteracting the steady improvements in the earlier part of the year.

203. At 2.36 pm on 5 June 2008, Mr Cafiero emailed NEL:

"*hi nick*
can u give me a ring when u can please"

204. There is no evidence to suggest that NEL solicited this message; or that he phoned Mr Cafiero in response to this email. Nor is there any evidence of any conversation between them at any time on 5 June 2008. Neither of them says he remembers any call, and I do not believe Mr Cafiero would have emailed in those terms if he had already spoken to NEL earlier that day. I find that he had not done so.

205. At some point during that day, Kyla/FTL 050608 was placed for Kyla, a full Q3 + Q4 08 Cape purchase. FTL thus reinstated the short position against Classic Maritime it had put on its own book on 20 May 2008 (paragraph 200(2)(iv) above) but had closed on 4 June 2008 at US$179,999 per day, for a loss of US$3,128,000, now charged to Kyla at US$182,000 per day.

206. US$182,000 per day was at the top of the top of the overheated Cape forward market and not a price at which anyone following the market might have bought on 5 June 2008 unless perhaps they had traded at the very start of the day, gambling that the price would rise even further. In fact, over the course of 5 June 2008, both the freight and FFA markets plummeted.

207. At 7.32 pm London time (8.32 pm in Monaco, 9.32 pm in Greece), well after ordinary trading hours, an FFA recap was emailed by Mr Mantero to NEL for Kyla/FTL 050608.

208. Mr Cafiero said in cross-examination that – very conveniently for him (as with other elaborations) – he must have had a phone call with NEL on the morning of 5 June 2008, before his email of 2.36 pm suggesting the opposite, and that this would account for the high price of Kyla/FTL 050608, close to the previous day's prices. He developed this to suggest that he thought at the time that the market was going to come off (so it would be wrong to be buying), but NEL was bullish and must have insisted on taking an opposite position. I consider none of that to be true and none of that evidence to have been honest.

209. I agree with the claimants, and find, that Kyla/FTL 050608 was placed late in the day on 5 June 2008, well off the market price at that time and after the market had begun its nosedive. Mr Cafiero had seen how badly his decision to close out FTL's May shorts the previous day had turned out, and documented a new short, selling to Kyla, at the very top of the market, as he could say it had been at the start of 5 June 2008, to repair a substantial part of the damage to FTL's book.

210. It was evident that Mr Cafiero had prepared well to address, when (inevitably) he would be challenged about it at trial, the extreme pricing anomaly on Kyla/FTL 050608, and had concluded that the only way for him to claim that the Kyla FFA was somewhere near a prevailing market price was to invent a telephone order placed with

him by NEL on the morning of 5 June 2008. There are at least six major problems with this:

(1) first, there was otherwise no evidence suggesting that NEL and Mr Cafiero spoke on the morning of 5 June 2008;

(2) second, it demands far too great a coincidence to suppose that NEL, who was at Posidonia, called Mr Cafiero on the morning of 5 June 2008, there having been no Kyla FFA since the end of April, wanting to take the opposite side of the precise position Mr Cafiero had closed for FTL the previous day (at a very large loss) and which Mr Cafiero was looking to re-instate for FTL at a higher price;

(3) third, it is impossible to imagine what would have been said on this phone call, given Mr Cafiero's insistence in cross-examination that he "*thought the market was going to come off*". It would have required that NEL, who believed that Mr Cafiero knew best, decided to put on his biggest ever bet, in the face of Mr Cafiero's warning that the market was going or about to go in the other direction. Mr Cafiero indeed did extend his invention to that highly implausible suggestion;

(4) fourth, the recap for Kyla/FTL 050608 was not sent to NEL until 7.32 pm, and there was no sensible explanation for why such a large delay would occur, on a trade of such consequence, when the market was falling heavily;

(5) fifth, the email Mr Cafiero sent NEL at 2.36 pm was a casual message looking to have a call, without any hint of concern or warning that, supposedly just as Mr Cafiero had advised NEL that morning was likely to happen, prices had tumbled from a price of US$182,000 traded between them in the morning such that Kyla was already facing a very large paper loss;

(6) sixth, the morning telephone order hypothesis was advanced for the first time at trial (it emerged as a previously unheralded suggestion put to NEL in cross-examination, enthusiastically adopted by Mr Cafiero when it was his turn in the witness box). It had not been mentioned in any of Mr Cafiero's three witness statements, and his evidence on it was transparently self-serving. It was, in my judgment, not an honest account at all.

211. There was no contemporaneous 'second leg' for Kyla/FTL 050608, although it was partially matched in FTL's books to a half purchase of Q4 08 Cape from Classic Maritime traded earlier on 5 June 2008 at US$170,000 (for a margin in FTL's favour of US$12,000 per day). The rest of the new short against Kyla (from FTL's perspective) was matched later by FTL/Global Maritime 090608, a half Q3 + Q4 08 Cape at US$164,570 per day (FTL margin US$17,250 per day) and FTL/Songa Bulk 110608, a half Q3 08 Cape at US$155,000 (FTL margin US$27,000 per day), locking in profit for FTL of US$3,381,000 in aggregate.

212. The identity of the trades matched by FTL in June 2008 to Kyla/FTL 050608 only emerged late in the litigation following a specific disclosure application. The defendants said this was the result of an accident in the original recap matching exercise to identify and produce the relevant trades conducted for the litigation by an

individual who was not a trial witness. I do not accept that explanation. An honest disclosure exercise focused upon providing to the solicitors the records of the transactions matched by FTL in its books at the time would have resulted in the true position being plain from the outset.

213. On 9 June 2008, Mr Weston reported to the FTL investors that, despite the heavily loss-making position of FTL Fund III at this point, the position had improved by about US$3 million over the past week. This had been achieved at Kyla's expense via Kyla/FTL 050608.

214. NEL received price data on 5 and 6 June 2008 which showed that the price had dropped dramatically (to around US$170,000, against the FTL/Kyla price of US$182,000), at which point he had lost US$3 million in one day on the trade. As with all of the Kyla FFAs, and the losses made by Kyla on them, NEL did not query the trade with Mr Cafiero, or anyone, at the time, or at all until many years later.

215. Through Q3 08 and into Q4 08, Kyla incurred huge losses under Kyla/FTL 050608 as it proceeded to settlement for July (at a loss of $869,834), August ($1,613,971), September ($3,358,096) and October ($5,036,981), an aggregate loss on settlement of US$10,878,882. The open balance of the position (Nov + Dec 08) was closed out by FTL/Kyla 171108, after the spectacular market crash of the early autumn of 2008, at US$6,000 per day, crystallising further loss of US$10,736,000.

216. Kyla/FTL 050608 was thus a US$3 million piece of dishonest opportunism by Mr Cafiero that cost Kyla just over US$21.6 million.

217. On 24 June 2008, Mr Thanopoulos sent NEL an e-mail effectively marking Kyla/FTL 050608 to market and noting that Kyla was out of the money by more than US$4 million. The BFA c.o.b. price that day for Q4 08 Cape was US$160,000 (on which measure Kyla was out of the money by US$22,000 per day on 184 days, which is US4,048,000).

218. By 17 September 2008, the BFA c.o.b. price for Cape Q4 08 had dropped to US$96,375 per day (Kyla out of the money by US$85,625 per day on 184 days, a mark-to-market loss of US$15,755,000). This was not the full extent of the crash, as it would transpire. The market had only fallen about half the distance it would finally fall (relative to its peak of US$180,000 per day). However, at the time some traders – including Mr Cafiero – were optimistic. Over the course of the summer and autumn of 2008, Mr Cafiero and Mr Mantero sent market updates to NEL, reporting positive news. For example:

    (1) On 2 July 2008, Mr Cafiero emailed NEL, saying "*As per teleconv pls find attached trading graph…*", forwarding a press release in relation to the iron ore market and attaching a graph showing projections for market rises. His email requested that NEL "*not disclose the info I gave you (our position etc) to anyone (incl. my people) as it is very very confidential and I am not supposed to tell anyone*."

    (2) On 22 July, Mr Mantero emailed NEL, saying "*Today there is much more activity than Yesterday, especially on q4… Q3 is flat. FYG, we are expecting to see a positive BCI index.*"

(3) On 28 July, Mr Mantero emailed another update, including: "*… Overall, the sentiment is remaining bullish… we heard some good news coming from the physical market.*."

(4) On 13 August 2008: "*…I am sure you saw the positive index today. FFA up sharply as well to 153000. Think tomorrow will be the same. Will keep u posted.*"; and another email saying "*the index will be up up up*".

(5) On 14 August, a further update, reporting "*we are still moving up…*"

219. This positive message represented the in-house view at CTM, demonstrated by documents sent to PGL between late August and mid-October 2008, that there would be a late-year bounce from which it would be possible to avoid, reduce or recoup losses:

(1) On 24 August 2008, an internal CTM email reported its in-house view that there would be a "*super spike*" in freight rates in Q4 08**.**

(2) A CTM report of results as at 30 September 2008 reported inter alia from the CTP trading desk that "*After recovering all of the Q1 losses over the Q2 as of the end of July we positioned our portfolio in a long position against and expect strong bounce over the Q4 (post Olympic period).*"

(3) Mr Cafiero agreed in cross-examination that, at this stage, the market believed there was just a summer lull, and that there would be a Q4 bounce.

220. During this period, NEL was also receiving market updates from Mr Niotis, giving a similar view, for example:

(1) On 14 August 2008, Mr Niotis wrote to NEL: "*three weeks and its party time hopefully but will keep you advised day by day. Time to buy the paper? Or maybe in a week or two …*".

(2) On the same day, Mr Niotis remarked to Braemar: "*Capt Livanos has asked that I try and provide him with some data … Think he is getting in the mood again*".

(3) On 8 September 2008 Mr Niotis wrote to NEL: "*General view is that Q4 will perform as has historically but concerns are at what level the market will spike*".

(4) On 10 September 2008 Mr Niotis wrote to NEL: "*think we are near the bottom but lets wait and see*".

(5) On 11 September 2008 Mr Niotis wrote to NEL: "*I quite like this [FFA update from Carriers.gr] … lets hope it a good omen*".

221. This was the period, however, when, as I mentioned above, NEL was most particularly preoccupied by his collapsed family life. In any event, Mr Niotis was a new employee seeking to appear knowledgeable and to curry favour with NEL. I accept NEL's evidence that he did not pay much, if any, attention to Mr Niotis' views

and suggestions; and I do not believe he would have done even if his mind had been less distracted by personal matters.

222. Over the course of September 2008, FTL's book value deteriorated. In the FTL Fund III report dated 16 September 2008, Mr Weston remarked: "*Our results deteriorated during the month and at their worst point were US$12.5 million negative*".

223. On 17 September 2008, Mr Cafiero opened a 30-day (2 x 15-day) long position for FTL on Q4 08 at US$97,250 per day (average). The next morning, the market fell rapidly. As Mr Mantero said in an internal FFA report circulated within CTM at the end of the trading day (5.15 pm) on 18 September:

> "*In the earliest morning banks started an aggressive selling on the q4 cape…… q4 cape did not find enough power on the bids to deny the rmr [rumour] of another wave of weakness coming on the physical market (i.e. BCI increased slower than yesterday). In the Afternoon it turns back to the level of 93 vs 95 but in the evening it slowly decreased and closed 88 [bid] vs. 90 [offer].*"

224. Mr Weston emailed Mr Cafiero at 1.10 pm on 18 September seeking confirmation that Mr Cafiero had sold the "*30 days on cape*". Mr Cafiero replied "*still working on it. We are selling at 98*."

225. At 1:43 pm, Mr Cafiero emailed NEL to say "*Market moving. Can u please call me*.", and at 2:09 pm Mr Cafiero reported to Mr Weston that he had now "*done the capes 98000*", Mr Weston replied, at 3.05 pm: "*Phew*".

226. As Mr Cafiero accepted in cross-examination, these email exchanges show that no Kyla FFA had been placed by 1.10 pm. The consequence, however, is that a price of US$98,000 fixed for Kyla as buyer was well off the market. When referred to evidence showing this, Mr Cafiero suggested that there would be a "constellation" of pricing information, that the market was opaque, that he would not necessarily know what prices were being done by others and that what he was seeing might be completely different from the records, such as they are, now available from brokers of traded prices. His evidence was that if, say, the market was, so far as he knew, at US$94,000, he would have told that to NEL, and NEL would have been happy to take a marked up price of US$98,000 for Kyla. I do not accept any of that. Mr Cafiero would have seen and known what Mr Mantero said on the day had been seen and experienced. There was no price negotiation. Mr Cafiero felt under pressure to do something about yet another loss-making position on FTL's books, and he did something about it by placing a trade with Kyla at a price that shifted FTL's problem onto Kyla's books.

227. In the event, Kyla/FTL 180908 ran to settlement for October 2008, at a loss to Kyla of US$784,833, and the Nov/Dec 08 balance was closed out by FTL/Kyla 171108 (by which the Nov/Dec 08 balance of Kyla/FTL 050608 was also closed out), at a loss of US$1,840,000. Thus, Mr Cafiero's further opportunistic use of Kyla to solve a problem he felt he had created on FTL's book cost Kyla US$2,624,000.

Settling Kyla's Debts

228. FTL's negative performance trend was maintained in October, and on 16 October 2008 Messrs Weston and Pulcini reported huge losses for CTP and CTC to PGL. When PGL read the most recent monthly report for FTL, having also just received the bad news about CTP/CTC, he stated "... *This is not what I expected in a trading operation*". The sense of 'trading operation' there is by way of contrast to 'positional (buy-and-hold) investor'. That is to say, PGL was complaining that FTL was supposed to be a nimble, active trader, not buying to hold so as to be exposed to major market movements, but trading in and out of positions to make money from the volatility. Mr Weston replied, defensively and at length. He was asked in cross-examination whether his lengthy response to PGL showed he was frightened by PGL's reaction. Mr Weston accepted he was "*concerned*" about the position.

229. One email of 10 November 2008 indicates that Mr Weston was required in the event personally to fund some of Kyla's debt. Mr Weston said he did not have a clear recollection about that. In the event, NEL ensured that Kyla paid all its apparent dues in full, albeit not all when they fell due, so any personal liability accepted by Mr Weston towards PGL/FTL did not have lasting consequence for him.

230. Reflecting the fact that the Kyla FFA trading was envisaged as being NEL's business and not that of his co-investors in Kyla, Kyla's apparent liabilities were throughout discharged by Vega on its behalf. Between February 2007 and October 2008, the net balance of payments made between Vega on behalf of Kyla and FTL was US$12,768,458.55 paid to FTL. With one exception (a blip when Vega on Kyla's behalf needed the cash from the sale of a ship to fund a large monthly settlement, which was therefore paid late), all payments were made on time as well as in full, up to that point.

231. However, from November 2008, Kyla was going to struggle to settle on time its apparent payment obligations under the extant Kyla FFAs (Kyla/FTL 050608 and Kyla/FTL 180908), and its overall net loss ultimately ran to US$31,163,033.

232. A process of re-scheduling and settlement of Kyla's liabilities commenced. A number of senior people became involved with the Kyla FFAs for the first time (Mr Haramis, Mr Iliopoulos, PGL), and a series of agreements dealt with Kyla's apparent liabilities. Throughout this process, from late 2008 until early 2012, the claimants, in the persons of NEL and Mr Thanopoulos, believed that Kyla was liable to make the payments to FTL apparently required by Kyla/FTL 050608 and Kyla/FTL 180908, and acted on that basis.

<u>The MOU</u>

233. One respect in which Kyla was fortunate was that the *Kyla* was on a period time charter to CTC until the end of 2010 at pre-crash rates. As a result of the collapse, CTC wanted to redeliver the vessel early. This was first discussed between Mr Radziwill of CTM and NEL on 29 September 2008.

234. On 7 November 2008, after ten days or so of negotiations involving Mr Haramis and Mr Iliopoulos on one side and Mr Thanopoulos and NEL on the other, a Memorandum of Understanding ('the MOU') was signed between Kyla, FTL, YPA

and CTC. As varied by an addendum entered into on or about 10 December 2008 (following direct discussions between NEL and PGL), the MOU:

(1) by clause 1, as amended, fixed the compensation to be paid by CTC to Kyla for the early termination of the *Kyla* time charter at US$10.25 million;

(2) by clause 2(a)-(b), stipulated that CTC was to pay that US$10.25 million directly to FTL on account of Kyla's liabilities under Kyla/FTL 050608 and Kyla/FTL 180908;

(3) made provision to account for YPA's indirect interest in the US$10.25 million, so as to preserve the business intention that the results on Kyla's FFA trading (good or bad) should be for NEL/Vega's account without any share for YPA.

235. After the MOU was signed, on 8 November 2008, Mr Haramis noted to Mr Weston: "*I still fail to understand how we ever allowed FTL to function with an internal system allowing the mtm to reach current levels with a counterparty such as Kyla shipping…*". The short answer, of course, was that NEL was family and was trusted, rightly, to ensure, one way or the other, that any exposure taken on by FTL for Kyla's account would be made good.

Kyla Close-Out (17 November 2008)

236. The MOU dealt with the October 2008 monthly settlement amount of US$5.8 million falling due to FTL on 7 November 2008. However, further settlement sums would be payable in early December 2008 and early January 2009, for the November and December 2008 FFA settlements, and Kyla's long position was still open, so it was impossible to know with precision what the final total liability would be.

237. On 14 November, NEL asked Mr Cafiero to close out the remaining open position, saying "*please close the position at best thanks*". Mr Cafiero replied to NEL the next day: "*First thing on monday we will do so*." Mr Cafiero indicated to NEL that FTL would charge US$1,000 per day for that last, closing-out trade. By not countermanding the instruction to 'close at best' in response, NEL thus on this exceptional occasion must be taken to have authorised a margin for FTL of US$1,000 per day.

238. In Mr Cafiero's email, he suggested that because FTL would be going into the market on a cleared basis, it would need to put up US$1.5 million of margin to do this close-out trade. That is more than twice, in fact close to three times, the full financial value of the trade. Mr Cafiero in his oral evidence was unable to explain how that figure was arrived at. He said he would have been given it by others at CTM (i.e. it would not have been his calculation).

239. Be that as it may, the closing trade was entered on 17 November (Kyla/FTL 171108 at US$6,000 per day), matched with BNP Paribas/FTL 141108 and LCH/FTL 171108. The trade crystallised loss of US$12.583 million, as noted above. The FTL margins were in fact US$1,250 per day from the BNP Paribas trade and US$1,000 per day from the LCH trade. (To complicate matters slightly, the open portions of Kyla/FTL 050608 and Kyla/FTL 180908 amounted to 81 days on Nov + Dec 08; the BNP Paribas trade was 30 days on Nov + Dec 08 at US$7,250 per day; and the LCH trade

was 61 days on Nov + Dec 08 at US$7,000 per day. The weighted average 'second leg' price therefore was US$7,082.42 per day, so the effective FTL margin against Kyla was US$1,082.42 per day on 81 days, which is US$87,675.)

The Settlement Agreement

240. From the end of 2008 a number of payments were made to FTL on account of Kyla's remaining apparent FFA liabilities by re-directing dividends that would otherwise have been paid to Vega under the Bulk Hong Kong joint venture. A total of US$1,750,000 was paid by Vega to FTL between 29 December 2008 and 7 April 2009, including US$750,000 in Vega joint venture dividends.

241. In December 2008, NEL wrote to Mr Cafiero saying: "*Many thanks all the very best for you and your family. Certainly we need a better 2009.*"

242. Kyla / Vega did not pay (because they could not pay) the FFA invoices rendered in respect of the November 2008 and December 2008 FFA settlements (c.US$12.6 million in all). This led to an agreement called the "Settlement Agreement", which was dated 6 January 2009 although not in fact executed until mid-May 2009.

243. It was common ground that, at the time it was negotiated, no question had been raised about the validity of the FFAs, and there was no dispute about Kyla's liability. The name was only applied because Kyla's payments were overdue and "*FTL, accordingly, have claims against KYLA under the Contracts [and] FTL, KYLA and VEGA now wish to settle all claims arising under the Contracts*" (recital B). In other words it was an agreement as to the way in which acknowledged and accepted payment obligations were to be settled (i.e. discharged / paid), not an agreement compromising any dispute concerning those obligations.

244. Thus, Kyla's missed payments were rescheduled with a *quid pro quo* of Vega making some of those payments and guaranteeing Kyla's liabilities.

245. It was agreed that the sum of US$1,397,000 would be paid by way of the assignment to FTL of dividends payable to Vega under the Bulk Hong Kong joint venture agreement, and that the sum of US$5,876,000 would be paid in instalments of US$500,000 per quarter.

246. In the event, the claimants did not maintain the agreed payment schedule, but between 23 June 2009 and 21 December 2011 payments of US$4,220,920 in all were made to FTL in connection with the Kyla FFAs, of which US$3,220,920 represented Vega joint venture dividends.

The Termination Agreement

247. In the three years after the Settlement Agreement, further payments were made to reduce the FFA liabilities. By early 2012, c.$2.4 million of FFA liabilities, as accepted and acknowledged throughout, remained unpaid. On 26 April 2012, FTL sent a letter to Kyla and Vega chasing settlement of the outstanding FFA debts and making demands on Vega.

248. The remaining debts were finally discharged through an agreement called the "Termination Agreement" dated 23 May 2012 entered into between Kyla, Vega, N&P, YPA and FTL, under which Kyla's remaining liabilities under the Kyla FFAs were settled by a transfer of shares in CBCH (the CBC joint venture vehicle) from Vega to FTL.

249. The Termination Agreement recorded (*inter alia*) that:

    (1) Vega had agreed to sell 105 shares in CBCH to FTL for consideration of US$2,409,836;

    (2) Vega had agreed to sell to YPA 139 shares in CBCH to YPA for consideration of US$3,190,164; and

    (3) YPA had agreed to sell to N&P shares in Northern Chios for consideration of US$1,400,000.

250. Pursuant to clauses 2 and 3, it was agreed that in consideration of the transfer of shares referred to above, the Settlement Agreement and the MOU would be terminated, and Kyla's liabilities to FTL and YPA thereunder would be discharged. Clause 3.3 provided that: "*With effect as from the Effective Date, the Parties hereby mutually release and discharge each other from all obligations under and in respect of anything done or omitted to be under or in connection with the Settlement Agreement and/or the MOU.*"

251. Thus, the agreement provided for Vega to make certain share transfers, for which it would be paid cash. However, as regards the shares to be transferred to FTL, rather than FTL pay Vega the share price in cash, since the price was set to match the outstanding balance of the Kyla FFA liabilities, that balance was offset against the share price payable by FTL and Vega only received cash for the remainder of its JV shares sold to YPA.

Investigation and Claim

252. In 2018, an unrelated dispute arose between NEL and YPA over recoveries made in 2017 relating to a collision suffered by the *Kyla*.

253. On 29 October 2018, Mr Haramis wrote two letters on YPA headed paper, one addressed to N&P (as majority shareholder in Kyla) and NEL, the other just to NEL personally.

254. NEL responded by writing to PGL directly on 15 November, raising a number of matters, including the fact that he had sustained heavy losses on the Kyla FFAs. He noted in relation to the FFAs that "*full authority was granted to your affiliated company to act on our behalf. From this venture losses amount to excess of US$31 million...*". He also noted that, whilst Kyla had paid those losses in full, the rest of the industry had been "*settling unsecured FFAs at a discount*" and FTL had not given Kyla an option to negotiate such a discount. There had been, he felt, "*abuse of the powers previously granted to you, as well as a complete failure to safeguard our interests*".

255. NEL's evidence was that whilst he made references to his losses on the FFAs, he was not aware that there was any issue with their pricing. However, he said, the nature and tone of YPA's correspondence caused him to look more closely at the FFAs, and to instruct solicitors to see whether there was anything about them that might provide ballast on his side of the argument over the claims made by YPA in relation to the unrelated collision matter.

256. NEL explained that, in advance of a meeting with those solicitors, Mr Charalampopoulos, then working for NEL but now with PGL's companies, went into Mr Thanopoulos' former Kyla e-mail account and forwarded documents relating to the FFAs on 26 November 2018. There was then a call with the solicitors on 27 November 2018.

257. Following that call, NEL decided to instruct an expert to look at the FFAs. He reached out to Duncan Dunn at SSY, who recommended Dr Phil Drew. On 30 November further documents were retrieved from Mr Thanopoulos' former Kyla email account. They were market reports for 5 June 2008, 18 September 2008 and 17 November 2008, obviously the dates of most immediate interest for any review of losses suffered under the Kyla FFAs or of the pricing of those FFAs.

258. Dr Drew was then instructed:

(1) On 4 December 2018, NEL sent him the recaps for Kyla/FTL 050608, Kyla/FTL 170908 and FTL/Kyla 181108. NEL accepted in oral evidence that his thinking at that stage was that "*something has gone wrong, and, in particular, something has gone wrong in relation to those [three]*". That is hardly surprising, since the aggregate loss generated by those three trades was c.US$24.2 million (c.78% of Kyla's overall total net loss on the Kyla FFAs).

(2) On 7 December 2018, Dr Drew sent a draft agreement to NEL, relating to "*the analysis of historically traded FFAs (principally three specific FFAs but perhaps within the context of others*)". The outline plan was to look at (a) the relationship between Kyla and FTL/CTM, (b) how the strike prices compared to market rates, and (c) whether Kyla had been badly advised.

(3) An introductory meeting between NEL and Ms Iliopoulou (his in-house lawyer) and Dr Drew took place on 13 December 2018. At that point, NEL came to realise that there might be something untoward with the pricing of the Kyla FFAs.

(4) On 31 December 2018, when Dr Drew's initial report was received, NEL's evidence was that it occurred to him for the first time that it might be possible to advance some fraud or dishonesty claim, albeit the full detail was not apparent to him and further extensive investigations were subsequently carried out.

259. The Claim Form was issued on 13 June 2019.

Motives

260. It is relevant to consider the question of motive, given the nature of the case against CTM (and Mr Cafiero personally). As to that, I consider that:

(1) Mr Cafiero's motive was to improve FTL's financial position and, latterly, to avoid blame for loss-making trading decisions (by shifting loss from FTL to Kyla). When FTL did well, as it did for most of 2007, FTL's profitability meant plaudits for Mr Cafiero from Mr Weston, an increased incentive fee payable by FTL to CTH, and in the long run – most likely – a better bonus for Mr Cafiero when bonus time came around. (The evidence was that Mr Cafiero received a bonus that was entirely discretionary, without performance targets or formula, and that it was capable in practice of doubling his salary.)

(2) While FTL (and Kyla/NEL) were making money from Mr Cafiero's trading decisions, everyone was happy, and no harm was seemingly done by FTL taking a greater margin than he had told NEL he would build in when trading for Kyla. When FTL began doing less well, the pressure and temptation upon Mr Cafiero was obvious. He was the trader, unwisely left to run the FTL book (and the Kyla trades) on his own, largely unsupervised. The decisions to open and close positions were his; he would have felt responsible for the losses. He had every incentive to try to repair the position. Inevitably, he would have considered his job at risk.

(3) I do not consider that Mr Mantero had any real motive to engage or participate in wrongdoing against Kyla, nor do I think he knew enough of the arrangement between CTM and Kyla or the degree to which Mr Cafiero was making the trading decisions for Kyla to identify that there might be wrongdoing and (perhaps) find himself conflicted between his loyalty to CTM/Mr Cafiero and doing the right thing by Kyla/NEL, which would have meant whistleblowing to Mr Weston or directly to NEL.

(4) I have already indicated, when summarising my assessment of him as a witness, that Mr Weston appears to me to have been motivated by FTL's performance, for which he was answerable to the FTL investors (principally PGL, who appears to have been a formidable personality and hard task-master). I consider that to have led him to distance himself from what happened (as regards how the Kyla trades were handled between CTM and Kyla), the detail of which was in any event outside his knowledge at the time. It should have occurred to him to question Mr Cafiero more closely about some of what he was doing or had done, but I do not believe he did so, and I do not consider that he stopped to consider whether what was being done matched what NEL was likely to believe was being done.

Kyla & CTM – Agency or Arms-Length Trading?

Vega FFAs

261. I find that CTP/CTC fronting FFAs for Vega was considered a minor matter that did not require much thought or any formality. As Mr Iliopoulos put it (referring specifically to CTP), "*A fronting trade for somebody like NEL, where the risks would be transferred to NEL, was not a significant matter in the context of the large number*

of hedging trades that CTP was doing. CTP would likely have done the same for any of the pool members if they asked CTP to front a trade for them."

262. Although Mr Cafiero denied that he would have made contact with NEL in relation to the Vega FFAs, and sought to minimise his involvement in those FFAs generally, NEL's evidence was clear and I accept it. It was Mr Cafiero who telephoned him and told him that he could trade FFAs for him through the Pool. Mr Cafiero would have had to check the position with someone more senior (and it was NEL's understanding that he had done so). It was then Mr Cafiero who was NEL's principal contact.

263. It is conceivable that NEL had some conversation with Mr d'Escury or Mr de Ferrari that he (NEL) does not now recall about the fact that some FFA trades were being done for Vega, but I accept the claimants' submission that Mr Cafiero was making the trading decisions (though it may be with supervision, unlike after his move to London) in relation to the Vega FFAs.

264. The Vega FFAs were all done as simple, fronted, trades, for no profit (margin) and no CTM brokerage, just a re-charge to Vega of the (external) brokerage charged to the fronting party. They were placed by CTM, acting by Mr Cafiero, via independent brokers. There was no specific direction or authorisation of those trades by NEL, whether at specific prices or at all. There was no negotiation of prices (or other terms) by NEL, with Mr Cafiero or otherwise. There is one email on one of the Vega FFAs in which Mr Cafiero expresses himself in a way that reads as if NEL was looking to do a specific C4 trade (see paragraph 86(4) above), but in my view that was spin. I accept NEL's evidence that while he spoke to Mr Cafiero about the Vega trades, those discussions were general in nature: he "*called Mr Cafiero, but not on the specific C4 trade … I called him for -- for trading. I called him to advise me what would be the best for me at the time, at the particular market, in terms of FFAs*". It would not have occurred to NEL to seek a position on the C4 Index in particular, nor did he have any interest in or particular knowledge of that Index.

265. On that trade, I agree with the claimants' analysis of the documents, which corroborates NEL's evidence that he "*never ever went into C4. I always left it to Mr Cafiero to trade on my behalf*" (the sense of 'went into' was 'involved myself with, took an interest in'; NEL was not denying that the Vega FFA in question was in fact an FFA on the C4 Index). The documents show that CTC (not CTP), which then became Vega's counterparty on the fronted trade, wanted a C4 half position as a hedge. It is highly improbable that NEL would by coincidence have asked to conclude an identical C4 half position on the same day and at the same time. It is far more likely that CTM (for CTC) was looking for but could not find a half position and therefore a decision was made to buy a full position that was available in the market, half for CTC's account and half for Vega's account, fronted by CTC, under the mandate CTM had from NEL.

266. The question might have arisen whether that was itself a breach of fiduciary duty. Hedging a physical position by concluding an FFA, as CTC was doing and Vega was not doing, is avoiding volatility. The FFA thus concluded might or might not have been a trade Mr Cafiero would have judged, on its own terms in isolation, to be a good play as a speculative investment. On the face of things, he should not have been allowing himself to be influenced by the interests of CTC's physical book in choosing an FFA trade for Vega's account. It is not necessary to reach a final conclusion as to

that, however, and it was not explored at trial, since no claim is made in respect of the Vega FFAs.

267. NEL was challenged to explain why, having made a loss on the Vega FFAs, he was happy to have CTM trade FFAs for him (for Kyla), as he had it, from early 2007. The answer is that:

(1) NEL knew and understood that FFAs were risky investments that can be loss-making; it did not occur to him to blame CTM for losses incurred.

(2) Furthermore, NEL had not taken on board at the time that the Vega FFAs had been loss-making. In Mr Thanopoulos's words, "*NEL told me that he had done a couple of derivative trades with CTM and had managed to make some money. I understand these initial trades to be the trades with Vega Carriers…*".

(3) In any event, NEL's evidence, which I accept, was that in his perception at the time everyone thought that 2007 would be a good market and a good year in which to get involved again in FFAs.

From Vega to Kyla

268. I am confident that there was some sort of discussion within CTM about the restarting of FFA trading for NEL. It is likely to have been of an informal nature, with no detailed instructions given by anyone senior to Mr Cafiero as to how NEL's trading would work. Mr Weston referred to "*an informal discussion around a meeting or social event, where I was present along with PGL, NEL and some others, at one of the private meeting and dining rooms that we used for our meetings, and started with PGL saying that he would like us to help NEL to trade some more FFAs if we could do so.*" NEL does not recall this meeting, and I could not find that he was privy to the specific discussion even if he was otherwise present.

269. What matters more is that the instruction from PGL was in loose and general terms, entirely apt to be interpreted, as I find that it was, as a request that CTM assist NEL by trading *for* Kyla. In practice, as everyone involved would have understood it, that would mean fronting for Kyla, not placing trades in the market in Kyla's name. I accept the claimants' contention that what probably happened (as Mr Weston and Mr Cafiero both came close to accepting in their oral evidence) is that Mr Cafiero was simply told he should trade FFAs for NEL's account, as an adjunct to his work running FTL's book.

270. NEL recalls, and I accept, that he had a conversation with Mr Pulcini in which Mr Pulcini said that Kyla rather than Vega should be used for this new FFA trading. NEL was content so long as YPA (as co-owner of Kyla) was content, and he understood (i.e. he understood at the time) that Mr Pulcini cleared that with Mr Haramis, the message coming back to NEL being that YPA was content so long as, if necessary, NEL/Vega would hold Kyla/YPA harmless, and that in turn was fine by NEL. Nothing was documented and no need to document the arrangement was perceived because of who NEL was and the long-standing trust within the Ceres Group business family within which the arrangement was being established and would operate.

271. The defendants' case was that it was specified to NEL that his FFA trading was to be subject to conditions, including that "*although FTL would, like CTC and CTP had done, generally seek to act in a fronting role in relation to any such trades (so that they would not be exposed to the risk of market movements in relation to the trades), it would only do so on the basis that it would seek to make a profit between the trade it concluded with Kyla and any corresponding trade (or trades) it concluded with the third party*". There was in substance no evidence to that effect.

272. I accept Mr Pulcini's evidence that there was a discussion *within CTM/FTL* that the Kyla trading was not to be done *gratis*. But I do not believe that was explained to NEL at all in the initial conversations confirming the basic arrangement. Rather, as the trading got going, it was made clear to NEL that CTM was expecting to build in a margin in favour of FTL by way of management fee, and that was set at US$500 per day on the price obtained from the market for Kyla. A management fee, charged in that way, therefore came to be part of the arrangement, but by addition to what was initially said and not as a term stipulated at the outset before trading began.

273. Consistent with the absence of the documentary evidence to the contrary that would be expected if the nature of the trading relationship had changed, the change from Vega to Kyla, and the add-on within it of a management fee, did not represent a sea change in the parties' arrangement. It was an evolution designed to give FTL a better counterparty (Kyla rather than Vega) in case that were ever a real consideration and a small fee for having some of CTM's time taken up looking after Kyla on the side of trading for FTL's own account.

274. So far as it matters, I find that NEL was *not* invited to join PGL (and others) as an investor in FTL. NEL was very clear about this, and recalled accepting it, albeit feeling slightly hurt by not being included. Some of the defendants' witnesses said they thought that NEL had been asked or must have been asked, but none gave evidence of asking him or witnessing him being asked. I agree with the claimants that a request to NEL to be a co-investor in FTL would have come from PGL himself, and no evidence was adduced from him. I also agree with them that the probability is that NEL's interest in FFAs was regarded as a bit of a side-show that it was convenient to do for him, as a favour, as an adjunct to the trading for FTL's own account.

No Written Agreement

275. Much was made by the defendants of the absence of a written agency or portfolio management contract, or other formal written mandate, between CTM and Kyla. The true position is that the absence of greater formality is (in the abstract) a greater curiosity, if it is a curiosity at all, on the defendants' case, on which the contract was akin to an execution-only broking service between ordinary, arms-length businesses, and that one would certainly expect to have been documented.

276. The explanation for the lack of any written agreement, in fact on either side's case, is that CTM and Kyla were *not* ordinary, arms-length counterparties. But though that means it cannot be decisive, the absence of formality favours the claimants' case. On the defendants' case, given my findings concerning the Vega FFAs, the change to the Kyla FFAs was more significant than the family business evolution I consider it to have been. Therefore, it would have been more likely to prompt someone to think that it should be more formally recorded.

CTM as FFA Manager for Kyla, Spring 2007

277. In one of NEL's trial witness statements, he summarised his recollection of what it had been agreed was to happen, and what (so far as he perceived things at the time) in fact happened, in these terms:

> *"… we still spoke on the phone sometimes, and [Mr Cafiero] would explain his thinking on the market, and which long/short position he proposed, but I was placing full faith in him, and I was trusting him to go away and trade the kind of long/short position he had mentioned at the best available price"*.

278. That describes CTM as Kyla's FFA agent and manager, with a mandate to follow the FFA market for Kyla (as vehicle for FFA trading for NEL), identify trades judged to be good plays, and place them in the market on Kyla's behalf, using FTL to front, creating a transaction between FTL and an external market counterparty (the 'second leg') that would determine a matching transaction to be documented between Kyla and FTL (the 'first leg'). The latter would be on back-to-back terms with the former, except for FTL's margin by way of the management fee (to which I turn below). It is the relationship plainly evidenced by the contemporaneous documentation that passed between the parties, and I accept NEL's evidence that it is what he had agreed was to happen, and was given to understand was happening, as reliable evidence of honest recollection supported by the documentary record.

279. It is striking, with hindsight, that Mr Cafiero was left by CTM to work out the detail of how Kyla's FFA trading was to be conducted, but no more striking than the decision to give the running of FTL over to Mr Cafiero generally, with no limits or parameters and minimal supervision. I am satisfied that is what happened, in both respects. It is by a clear margin the better explanation of the following, taken together:

    (1) The first Kyla FFA was confirmed by Mr Cafiero by email to NEL on 7 February 2007 by saying that "*With your authority, I've bought …*", which is exactly the claimants' case. The defendants relied on this email because it suggests that on the first trade (as is not surprising, on either side's case, and as is clear on the documents did occur from time to time) there may have been a call between Mr Cafiero and NEL shortly before Mr Cafiero traded. The major importance of the email, however, is not whether it evidences a call between them but its inconsistency with the defendants' case, on which Mr Cafiero had not *bought with NEL's authority* (which can only be a reference to the 'second leg' trade, and which says that it was done *for Kyla* – in truth it was the *only* real trade, documented as back-to-back trades with FTL in the middle only because FTL was being used as front to the market), but had *sold to NEL as counterparty* (and need not have bought from the market at all).

    (2) On the same date, Mr Cafiero confirmed, "*I will follow the market for you and keep in touch in case there is anything to be done*".

    (3) The evidence from the email correspondence generally that there was no need for Mr Cafiero and NEL to have spoken before a trade was placed (by Mr Cafiero), that to the extent potential conversations about trading opportunities were initiated, or at least solicited, by emails, it was Mr Cafiero making all the

running, and that Mr Cafiero was monitoring things *for* Kyla and advising NEL.

(4) Express confirmations of CTM's function as agent or manager, for example on 22 February 2007, "*Hope you will keep using CTM in the future as your management company*", on 21 March 2007, "*we thank you for entrusting us with your authority on the FFA trades…*", and a couple of days later, "*Please find below list of closed trades we have done for Kyla and the final result…*" and "*… recap of details for all the trades we have done for you and final net result…*". Such confirmations given to Kyla are strongly corroborated by Mr Mantero's contemporaneous habit of recording trades as "*sleeving*" for Kyla, acting "*OBO*" (on behalf of) Kyla, or the like.

(5) Mr Cafiero's report to NEL of his activity on 18 April 2007 for Kyla: "*Have tried to call you but I'm unable to reach you... I have today closed your panamax q2 position… pls find details of all the trades I have concluded for you… Hope you are happy about the result*". (To similar effect, internally a week later, Mr Cafiero's report to Mr Weston: "*… I have just closed the half cape I bought this morning for Nick…*").

The Authorised Margin – US$500 per day

280. All that was said by CTM's senior management to Mr Cafiero about fees and charges was summarised by Mr Cafiero in these terms: "*I do recall … being told by Gary before starting to trade with Kyla that FTL should make some money on these trades and that we should not be doing this for free, although we did not discuss how much money we should aim to make or what margin we should look to obtain … I also do not recall any conversation with anybody at CTM about how much money we should make on each trade.*"

281. In the correspondence, Mr Cafiero represented to NEL that what he was doing was passing through prices traded for Kyla with the market adjusted by a margin in favour of FTL of US$500 per day. I have already said that I do not consider this was explained to NEL except as part of the early trades, once trading got going. That explains why (a point relied on by the defendants) NEL could not point to a specific, express agreement on the point at the outset. But by the end of March 2007, the US$500 per day margin had been described by Mr Cafiero to NEL, and accepted by him, as "*the cost (already built in the rate)*", "*Usd 500 pd to cover the management fees*", and "*our management fee*", "*charged… on ALL the trades*". Hence, on 21 March 2007, when Mr Cafiero had confirmed to NEL that a trade had been placed for Kyla creating (in the terminology I am using) a 'first leg' sale to FTL at US$76,500, in a call between them, as NEL recorded in an email that day, Mr Cafiero confirmed that "*settlement of last trade is net ie 77,000 – 500 $*".

282. To similar effect, internally a month later on 25 April 2007, Mr Cafiero described what he had just done for NEL in an email to Mr Weston in this way: "*I have just closed the half cape I bought this morning for Nick at 110000 (110500 to Nick) at 115000 (114500 to Nick) with TMT*".

283. It was common ground that NEL was never asked to agree any different FTL margin and was never told that it was other than the US$500 per day he had thus been told, and agreed, would be charged (built in) on every Kyla FFA.

CTM as Kyla's FFA Manager, June 2007 Onwards

284. The key to what went wrong in this case is that:

(1) from June 2007, Mr Cafiero no longer traded as loyal agent for Kyla, buying or selling for NEL in the market because he saw a trade he thought was good for Kyla, using FTL as front and charging the agreed margin of US$500 per day;

(2) instead, Mr Cafiero routinely built in larger margins that had not been agreed, benefiting FTL at Kyla's expense;

(3) furthermore, from time to time, most starkly and disastrously on 5 June 2008 but not only on that occasion, Mr Cafiero purportedly concluded a trade between Kyla and FTL, not using FTL as a front to enable a trade to be done for Kyla with the market that Mr Cafiero thought was a good play for Kyla, but acting in FTL's interests, adversely to Kyla, purportedly trading for Kyla, but trading with himself acting for and entirely in the interests of FTL;

(4) all without anyone disclosing or even hinting to NEL that anything different from that which he had agreed and authorised was happening.

285. Far from revealing to NEL that anything had changed, the correspondence with him continued to reinforce the message that Mr Cafiero was trading for him, looking after Kyla's interests, and managing its FFAs. Thus, by way of example only:

(1) It was made clear to CTM that no one at Kyla was keeping track of the Kyla FFAs; it was expected that CTM was doing that for Kyla.

(2) On a rare occasion when NEL offered something of a view on what to do, saying in response to Mr Cafiero's invitation in respect of a position to "*... Leave it with me…*", "*…I suggest to keep it run I believe we will see real high Numbers*", even then he concluded, "*However you know best Luigi*", i.e. he did indeed leave matters with Mr Cafiero to manage.

(3) On 22 June 2007 (internally), Mr Cafiero reported to Mr Weston that: "*... only thing that I will try and do is to close out the half position I have bought for Nick…*"; (to NEL) on 7 August 2007, "*We have prepared following for you to high light your present FF A situation and the various results basis different market levels. Hope you like it……*"; and then (internally) two days later, "*... we managed to break the 1 mio net profit for Nick too ... aren't we gooooooooooood!!!".*

(4) In late August and early September 2007: (internally) "*I have also locked in a massive profit for nick livanos (this afternoon will send you his exact profit since we started trading for him)*"; (to NEL) "*Please note that you do not have anymore open positions. Below also find a recap of your profits. Hope "this*

makes your day'"; and (internally again), "*I am tring [sic] to close out our and Nick cape at 135 .000...*" and a reference to "*the portfolio you built for Nick*".

(5) Most starkly of all, and in truth sufficient on their own for the claimants' case absent strong countervailing evidence (which does not exist), the monthly reports for Kyla from September 2007, which were fashioned specially for Kyla, in a format chosen for the purpose by CTM (not using some pre-existing format without thinking), stated that they were prepared by CTM "*as manager for Kyla Shipping*", contained a portfolio analysis including mark-to-market valuation, and were prepared with input from Mr Mantero, reviewed and approved by Mr Cafiero, and copied to the senior Risk management (Mr Pulcini) and Mr Weston himself.

286. I agree with the claimants that, for the defendants, there is just no escaping the monthly reports. They are inconsistent in their terms, in their purpose, and in their spirit, with the defendants' case on the nature of the relationship, as established *inter partes*. None of the defendants' witnesses could give any sensible explanation for them. There was in truth no basis for the defendants' refusal, as tested at trial, to accept the claimants' case on the nature of the relationship between Kyla and CTM. It does the defendants no credit that they did not admit it. I infer that they refused to do so only because they were unwilling to accept that, time bar aside, CTM (at least) was liable as alleged by the claimants, but a finding of liability, subject only to time bar, was and is inevitable if the claimants were right about the nature of the relationship.

287. My conclusions are reinforced by the fact that at the outset of the contentious correspondence, in November 2018, NEL stated in terms, in his letter to PGL placing responsibility on CTM for Kyla's FFA losses, that "*full authority was granted to your affiliated company to act on our behalf. From this venture losses amount to excess of $31 million...*". His instruction of Dr Drew was also on the basis that, as NEL understood it, CTM had been trading for Kyla. Yet for the 18 months of correspondence and initial litigation steps that followed, before a Defence was served, that foundational allegation as to the nature of the business relationship was not denied. Indeed, in December 2019, after service of the Claim Form, the defendants' solicitors wrote in terms that not only did not contradict the assertion of agency, but asserted that there was a fronting relationship, not an independent trading relationship. The claim that CTM had not acted as any kind of agent or manager for Kyla, and that FTL was not obliged to front for Kyla (i.e. there did not need to be a 'second leg' trade), first emerged in the Defence served at the end of May 2020.

288. There is no material of any weight to support the case that NEL was trading independently, making his own trading decisions. A couple of emails from Mr Thanopoulos might perhaps be taken as suggesting that, if read superficially; but Mr Thanopoulos, although working for NEL at Kyla at the time, was a stranger to the Kyla FFAs, was not privy to any of the conversations initiating the relationship, and was not privy to any of NEL's regular conversations with Mr Cafiero. His emails did not provide a serious basis for disputing the claimants' case.

289. Mr Mantero's written evidence was that he and Mr Cafiero "*sat close to each other in the office so I could hear him on the telephone. Luigi and NEL spoke often but not every day and more in the beginning of 2007. I recall Luigi discussing what was*

happening in the physical and FFA markets with NEL…"; but there was never any suggestion that he was aware of Mr Cafiero identifying, negotiating or agreeing prices with NEL. At one point in his oral evidence, Mr Mantero seemed to be suggesting that he had heard discussions of that nature (though had he done so, that would surely have found its way into his trial witness statement), but when pressed the suggestion became instead that there were occasions when Mr Cafiero would tell Mr Mantero after he (Cafiero) had been on a call with NEL when giving him (Mantero) the terms to document for a new Kyla FFA. To the extent that Mr Mantero thus seemed to claim to remember hearing at the time, either directly or as reported by Mr Cafiero, that pricing or other terms had been agreed over the telephone between Mr Cafiero and NEL, I do not accept that evidence.

290. I prefer and accept NEL's evidence. He agreed that he and Mr Cafiero spoke – and spoke often – but he was clear that they did not negotiate or agree prices; "*Mr. Cafiero never offered me specific prices over the phone, and I never accepted any prices over the phone… The reason he told me his views on the market was that he was the one with the "know-how", looking after my portfolio, and he was the one proposing trades.*"; and "*I have seen* [the claim that] *CTM was not managing FFAs for Kyla, and that Mr. Cafiero was actually trading FFAs against Kyla, at prices which the two of us negotiated on phone calls. This is not true at all… we never negotiated or agreed the price of an FFA. We could not have "negotiated" the price, because the price would always depend on what Mr. Cafiero could obtain in the market when he went out and traded. Also, I would not have been comfortable with any arrangement where I was negotiating or dealing against a PGL company.*"

291. It was also striking that the defendants were unable to explain the differing FTL margins charged. General statements about volatility of the market and counterparty risk took matters nowhere much. Mr Cafiero could not recall why he charged different margins on different trades, or that margin/profit levels to charge/make were ever discussed with anyone else at CTM, for example (as might have been expected) Mr Weston. There was a pleaded case that Kyla was considered a "*particularly high counterparty credit risk*", but that was not borne out at all in the documentary or witness evidence. In truth, because Kyla was NEL and NEL was family, Kyla was not regarded by CTM/FTL, at any time, as a material credit risk. I consider it surprising that a contrary allegation came to be pleaded.

292. Mr Cafiero suggested in his written evidence that the margins he created for FTL were nothing out of the ordinary for the prevailing market conditions. That was untrue. The margins he took for FTL were extraordinary. Sleeving was common in 2007-2008, and the experts agreed that there was a prevailing range of sleeving fees of US$250-US$1,000 per day, with US$1,000 per day being unusual. Execution-only services offered by investment banks were or might be more expensive, but would form part of a wider investment banking relationship quite unlike the Kyla/CTM arrangement.

293. Overall, I have no hesitation in accepting the claimants' case that for the Kyla FFAs, trades and prices were <u>not</u> specifically negotiated, agreed or authorised by NEL over the telephone. The relationship, as initiated, agreed and evidenced by the correspondence from CTM and (after the first six months) by the monthly reporting by CTM, was a portfolio managerial relationship with a trading mandate that constituted CTM as agent of Kyla to trade for it. It was informal, in the sense that it

was not committed to a written portfolio management contract and mandate, because of the long-standing, trusting, family business relationships involved.

Liability (if not Time Barred)

CTM's Duties to and Authority for Kyla

294. The primary legal incidents of the Kyla-CTM relationship, on that basis, were not in dispute. In particular:

(1) CTM, as an agent with the power to bind Kyla to FFAs with FTL, so that FTL fronted for Kyla on trades with the market for Kyla's account, was a fiduciary and owed normal fiduciary duties to Kyla; and

(2) CTM's authority to bind Kyla to FFAs was limited by that mandate and was conditional upon CTM acting honestly in what it judged to be the best interests of Kyla.

295. On the first part of the latter aspect (the mandate as limit upon authority), in all other respects (for example Indices, volumes, prices, exposures, direction, period) the mandate was unlimited, because within the informal and trusting environment that existed between the parties it did not occur to NEL to impose any such limits. However:

(1) It was limited in the manner described by paragraph 294(1) above. It was a mandate to trade *with the market on behalf of Kyla*, FTL (acting in that respect also by CTM) fronting for Kyla. On every occasion the (single) trading decision was (or should have been) to place a trade *with the market* (not with FTL) *for* Kyla (but in the name of FTL), creating a 'second leg' trade, the terms of which would mandate the terms of a corresponding 'first leg' trade between Kyla and FTL (back-to-back apart from FTL's margin).

(2) The agreed and permitted margin for FTL was US$500 per day. That also limited the mandate, so that trades creating a larger margin for FTL were also unauthorised.

296. It follows that CTM owed Kyla the following fiduciary duties in particular:

(1) Good faith (perceived best interests): CTM was obliged to protect the interests of Kyla, particularly by recommending, opening and closing FFA positions assessed by CTM to be in Kyla's best interests and solely on terms, including as to price, which CTM believed to be the best available. Given paragraph 295 above, "*best available*" terms meant the terms available to FTL from the market for the trade being done for Kyla's account, which terms as between FTL and Kyla would be adjusted only so as to build in the disclosed and agreed margin for FTL by way of management fee or commission for the arrangement.

(2) No conflict: CTM was obliged not to assume any position, in relation to the Kyla FFAs, where its own interests or duties, or those of FTL for whom necessarily it was also acting in respect of any given Kyla FFA, conflicted

with Kyla's interests and thus the proper performance of CTM's functions as Kyla's agent, save insofar as Kyla gave express and informed consent. The saving for express and informed consent explains why there was no relevant conflict of interest in the fact that, if operated properly, the mandate for Kyla involved creating a contract between Kyla and FTL backing a contract between FTL and an external counterparty placed for Kyla's account, or in the fact that the price obtained from an external counterparty for Kyla's account would not be passed on exactly but would be adjusted by US$500 per day up (purchases) or down (sales).

(3) No profit: CTM was obliged not to profit from its fiduciary position, save insofar as Kyla gave express and informed consent to the same. That meant CTM itself was obliged not to profit *at all* from the Kyla FFAs, because the sole agreed reward (by way, effectively, of the management fee or commission raised by CTM) was that of the agreed margin of US$500 per day in favour of FTL.

297. None of that is affected by the fact that Kyla was not CTM's only principal. Throughout 2007-2008, CTM was also agent for CTH and thus sub-agent for FTL, CTP and CTC. It required honesty and care, on the part of Mr Cafiero, to keep separate (i) his trading for FTL's own account (or any trading for CTP or CTC), and (ii) his trading for Kyla's account (which under the agreed arrangement would result in back-to-back contracts, with FTL in the middle between Kyla and the counterparty with whom Mr Cafiero had decided to conclude a trade for Kyla). But as long as that separation was maintained, there could be no objection by Kyla, and there would have been no objection by NEL, to the fact that FTL, also acting by CTM, appeared on the opposite side of a transaction with Kyla.

298. The effect of an honestly placed, fronted trade for Kyla was that FTL adopted a gross position opposed to Kyla on the 'first leg', but a net neutral position because that 'first leg' would always be only a by-product of the 'second leg' placed in the market for Kyla's account, the only profit being the disclosed US$500 per day margin that would be built into the 'first leg' trade, i.e. the Kyla FFA, when it was backed onto the 'second leg' trade placed for its account in the market.

299. Conversely, if CTM purported to place FFAs between FTL and Kyla, acting for both, in order for FTL to skim profits, off-load losses or trade against Kyla, that would be objectionable. The objection would be created or compounded, not diluted, by the fact that CTM had assumed responsibilities to multiple principals. The clashing interests of those principals would have been created by CTM's actions, not because there was anything inherently difficult, if CTM acted honestly and carefully, about having multiple principals within its business.

300. This is because where an agent is involved in a transaction on behalf of multiple principals, the agent's overarching fiduciary duty of undivided loyalty to each principal is undiminished. The agent in such a case "*must serve each as faithfully and loyally as if he were his only principal*", as Millett LJ put it in *Bristol and West BS v Mothew* [1998] Ch 1 at 19).

301. The practical effect is that the agent is obliged to make full disclosure of all potential conflicts or profits and obtain the (or each) principal's express and informed consent

to the same before proceeding. If any question arises as to whether the requisite express and informed consent was obtained, the burden of proof is on the agent and the degree of disclosure required to be shown is high, because grants of consent by principals are to be "*watched with infinite and the most guarded jealousy*", *per* Eldon LC in *Ex p. Lacey* (1802) 6 Ves. 625 at 626.

302. It follows that, insofar as the Kyla FFAs were attended by skimming, off-loading, or simply trading against, not for, Kyla, they were not authorised by Kyla, and Kyla never owed any obligations under them. As I noted at the outset, this was common ground at trial. That is to say it was agreed that the Kyla FFAs, if concluded by CTM acting in breach of fiduciary duty as alleged by the claimants, were void.

Liability – CTM

303. Therefore, each of the Disputed FFAs was null and void, having purportedly been placed by CTM (Mr Cafiero) otherwise than as a 'first leg' trade backing a 'second leg' trade that had been concluded with the market with the intention that it be for Kyla's account but with the authorised and agreed adjustment of US$500 per day on the price. (There is a wrinkle on that for the final close-out trade, FTL/Kyla 171108, in that NEL must be taken to have authorised a margin of US$1,000 per day there.)

304. There may have been room for an interesting argument over whether the early FFAs were all authorised, given that there was no agreement prior to the first trade for a margin to be built in for FTL at all, and noting that the second trade, FTL/Kyla 210207, gave FTL a margin of US$750 per day. It is not clear to me that the 'balancing out' of that margin with a margin of only US$250 per day on the next trade, Kyla/FTL 260207, which happened to be for the same period (a full Q2 07 trade), though on a different Index, so that those two trades gave FTL on average a margin of US$500 per day, necessarily has anything to say as to CTM's liability (if any) in respect of FTL/Kyla 210207.

305. However, the claimants chose not to pursue any claim in respect of the first 10 Kyla FFAs, the last of which was FTL/Kyla 260407 closing the position opened by Kyla/FTL 250407; and I am clear that the agreement upon a margin of US$500 per day had been reached by then, so that on any view it was a term of the arrangement and a limit upon CTM's mandate prior to the first of the Disputed FFAs. On that FFA, Kyla/FTL 040507, the wrongdoing was very limited, *viz.* rounding up the 'second leg' price traded with SK Shipping of US$96,400 per day to a 'first leg' price of US$97,000 per day rather than US$96,900 per day. From such a tiny acorn of misconduct a mighty oak of wrongdoing would eventually grow.

306. For reasons that may have had more to do with the case on time bar than analytical necessity, the claimants were keen to describe as if they created a different or additional liability or type of liability the cases in which Mr Cafiero purported to bind Kyla to FFAs with FTL that not only skimmed a margin for FTL greater than the authorised US$500 per day, but were designed to offload positions traded for FTL's own book, not for Kyla's account, that were thought to have become disadvantageous to or undesirable for FTL, or in which Mr Cafiero simply traded for FTL against Kyla (most notably the disastrous Kyla/FTL 050608).

307. The wrongdoing and breach of mandate was the same in all cases, however, and was as I have stated it in paragraph 303 above. The nature, and in some cases the extremity, of the particular facts involved in some of those breaches of mandate, particularise that wrongdoing and breach, and may be relevant to questions of fault, up to and including dishonesty, on the part of Mr Cafiero or others at CTM. But the essential legal complaint is the same.

Liability – FTL / Mr Cafiero / CTP

308. In relation to each of the Disputed FFAs, the claimants also claimed against FTL and Mr Cafiero for alleged dishonest assistance in CTM's breaches of fiduciary duty; and they pursued such a claim against CTP, but on two of the Disputed FFAs only.

309. FTL was said to have assisted all of CTM's breaches of fiduciary duty by being Kyla's purported counterparty on the Disputed FFAs and by receiving the profits which resulted. This was said to be dishonest because it was done with knowledge through Mr Cafiero and/or Mr Mantero that CTM was acting in breach of its fiduciary duties owed to Kyla.

310. I do not find that Mr Mantero appreciated that Mr Cafiero was causing CTM to act in breach of mandate or otherwise in breach of its fiduciary duties owed to Kyla. Mr Cafiero, however, was aware, I find, since he knew he had told NEL of and received his approval for an FTL margin of US$500 per day, not any other margin, and since he was well aware, on those instances where this was the position, that he was offloading or simply trading against Kyla, whilst also being well aware that what he was supposed to be doing was trading *for* Kyla in the way I have described. His evidence for trial, claiming that he had been dealing with NEL at arm's length, as a counterparty, negotiating prices and all other material terms on every trade, was in my judgment fiction from start to finish.

311. The question arises whether Mr Cafiero's guilty knowledge is to be attributed to FTL. Exercises in attribution are sensitive to the context, and purposive: see e.g. *Bilta v Nazir (No.2)* [2016] AC 1, *per* Lord Mance JSC at [41]; *Meridian Global Funds Management v Securities Commission* [1995] 1 AC 500 (PC), *per* Lord Hoffmann at 507.

312. The claimants put their attribution case in two ways. First, they said that Mr Cafiero was the agent of FTL by whom it acted when assisting what were in fact CTM's breaches of fiduciary duty, having had responsibility delegated to him. Second, they said that Mr Cafiero was FTL, i.e. its directing mind and will, for the purpose of the Kyla FFAs and CTM's management thereof. The two strands of analysis are distinct.

313. It is not necessary to decide whether, as the claimants submitted, *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685 remains good law so that the claimants are not restricted to reliance upon ordinary principles of agency law. The claimants' submission in that regard was that *El Ajou* has not been superseded or altered by anything said in *Meridian Global Funds*, *supra*, and they noted that Hoffmann LJ (as he was then) was part of the court in *El Ajou* and, as Lord Hoffman, delivered the judgment in *Meridian Global Funds*; that the test of the directing mind and will in relation to the activity in question was applied in *Jafari-Fini v Skillglass Ltd* [2007]

EWCA Civ 261 at [96]-[101]; and that *El Ajou* was considered at some length but not doubted, indeed it was approved, in *Bilta, supra*.

314. Mr Cafiero had delegated to him the commercial function of FTL as fronting counterparty for FFA trading by CTM for Kyla's account, because it was an adjunct of the delegation to him of the running of FTL's business generally. Mr Cafiero was thus the person by whom FTL acted when entering (or purporting to enter) into each of the Disputed FFAs with Kyla. If an agency analysis is preferred (or is the only analysis available in law), CTM, acting by Mr Cafiero and with his knowledge, was the agent operating FTL's FFA book, one part of which was its participation in the Kyla FFAs.

315. CTP pleaded that material aspects of Mr Cafiero's knowledge – what was called his knowledge "*on the "Kyla side" of the transaction*" – should be attributed to Kyla and not to the other side of the trade. But since Kyla was the victim of Mr Cafiero's misconduct, his guilty knowledge is not to be attributed to Kyla for the purpose of considering the claimants' civil claims against Mr Cafiero and his (other) principal(s): see e.g. *Bilta, supra,* at [7], [41], [92], [181]; *Re Hampshire Land* [1896] 2 Ch 743; *Arab Bank v Zurich Insurance* [1999] 1 Lloyd's Rep 262, *per* Rix J (as he was then) at pp.280-283. As Rix J put it there, the non-attribution rule of *Re Hampshire Land* rule applies to "*any breach of duty which prevented the inference that the agent would communicate his knowledge to the principal*".

316. In the light of the above, in my judgment FTL *was* liable for dishonest assistance in CTM's breaches of fiduciary duty in respect of the Disputed FFAs.

317. So too was Mr Cafiero. The fact that his conduct, and guilty knowledge, is also the foundation for FTL's liability does not confer upon Mr Cafiero any protection in his personal capacity. He assisted CTM to breach its fiduciary duties owed to Kyla, indeed it was by his actions that those breaches were committed, knowing in doing so that CTM was acting thereby in breach of its duties owed to Kyla.

318. CTP's position is less straightforward. The claim was that, with the allegedly guilty knowledge of Messrs Cafiero and Mantero, CTP assisted CTM's breaches of fiduciary duty on two trades. I again reject the charge of guilty knowledge against Mr Mantero come what may. The two Kyla FFAs are:

    (1) FTL/Kyla 290408(3) (as I have labelled it), the 29 April 2008 trade initially (purportedly) concluded as a trade with CTP, and later re-ordered so as to be a trade with FTL, which in turn traded with CTP, so that CTP's original trade with Morgan Stanley came to be treated as fronted for FTL. FTL could not trade with Morgan Stanley, so that FTL/Kyla 290408(3), whether that (purported) trade was with FTL or with CTP, required CTP's involvement; and FTL/Kyla 290408(3) involved CTM in breaching its fiduciary duty owed to Kyla. Thus, CTP did assist CTM to breach its fiduciary duty, and the question is whether it did so dishonestly, i.e. with knowledge that CTM was acting in breach.

    (2) FTL/Kyla 250907, a Disputed Kyla FFA in respect of which the only breach of fiduciary duty by CTM was in skimming a margin of US$1,000 per day for FTL. The 'second leg' trade was CTP/FTL 250907, by which CTP was

> fronting for FTL with Oldendorff so there is a back-to-back trade Oldendorff/CTP 250907. There was a dispute at trial as to whether CTM (Mr Cafiero) *needed* CTP for that 'second leg' or could have placed it elsewhere that day. There was a dispute within that dispute as to whether it was open to the claimants on the pleadings (and if not whether they should now have permission to amend) to allege a positive case that indeed CTM (Mr Cafiero) could not have done FTL/Kyla 250907 without CTP's assistance on the 'second leg', fronting for FTL so FTL could trade with Oldendorff. It is unnecessary to resolve those disputes. FTL/Kyla 250907 as (purportedly) traded was in fact done on the back of CTP/FTL 250907, CTP fronting for FTL on a trade with Oldendorff, and so CTP did in fact assist in what was (whether or not this was known to CTP) a breach of fiduciary duty by CTM as against Kyla. Again, therefore, the only real question is knowledge.

319. The issue, then, is whether Mr Cafiero's guilty knowledge is to be attributed to CTP. Mr Cafiero had authority to trade FFAs for CTP throughout, and as regards FTL/Kyla 290408(3) he was by then running the CTP book, having taken over from Mr de Ferrari. I find that he took all the relevant trading decisions on both dates, 25 September 2007 and 29 April 2008. In my view, his knowledge is to be attributed to CTP that in assisting CTM/FTL as it did, CTP was assisting in breaches of CTM's fiduciary duty owed to Kyla.

320. CTP raised a defence asserting that it was also the victim of the fraud perpetrated on Kyla such that the dishonesty of Mr Cafiero ought not to be attributed to it. There is a difficult question whether the 'secondary victim' line of cases in the context of the rule in *Re Hampshire Land* survives *Bilta, supra* (see *Bilta* at [9]). But they would not avail CTP here. The acts of Mr Cafiero in binding or purporting to bind CTP to the 'second leg' trade on 25 September 2007 and to a 'first leg' and 'second leg' trade on 29 April 2008 were not targeted at CTP. It cannot be said that CTP was a secondary victim (see *Bilta* at [78]-[81]).

321. The claimants pointed out that no positive case had been advanced by the defendants as to any other person who should be treated as the directing mind and will of CTP for the purposes of the FFA trading in general and the Disputed FFAs in particular. In response, CTP suggested in its skeleton argument for trial that the individuals concerned were "*the relevant director(s) and/or senior manager(s) of Drylog, as the owner of CTP with formal and de facto control over the reasons why CTP entered into FFAs*", or Mr Weston. I reject that submission. There was no evidence that Drylog's directors or senior managers had or exercised any control at all over CTP's FFAs. The person who did, so far as material, was Mr Cafiero. As for Mr Weston, he was noticeably keen to distance himself from all trading decisions.

322. In my judgment, CTP *was* liable for dishonestly assisting CTM's breaches of fiduciary duty in respect of FTL/Kyla 250907 and FTL/Kyla 290408(3).

Liability – Conspiracy, Deceit and Remedies

323. The claimants claimed, against all the defendants, damages for an alleged conspiracy to use unlawful means (*viz.* CTM's breaches of fiduciary duty) to injure the claimants, and, against CTM and Mr Cafiero, damages for deceit. There were also various issues as to the remedies available to Kyla and/or Vega in respect of CTM's breaches of

duty, dishonest assistance by others, and/or conspiracy (if made out), including but not limited to whether FTL had a liability for knowing receipt in respect of the profits it made from the Kyla FFAs.

324. Those claims and issues do not matter, however, unless the claimants can overcome the fact that all their claims are *prima facie* time barred, proceedings having been commenced well beyond 6 years after all causes of action had accrued. It would not have done justice to the parties' investment in the proceedings, or to the trial that was conducted, to deal with limitation first, and other matters only if there was no time bar defence. However, I do not propose to lengthen this judgment by dealing with the additional contentious issues, as regards conspiracy, deceit and remedies, where my conclusion is that the claimants *are* time barred.

Time Bar

325. The defendants did not dispute that the claims made by the claimants, if and to the extent made out on the facts, would by nature fall within the scope of s.32(1) of the Limitation Act 1980, which provides, so far as material, that:

> "*... where in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *(a) the action is based upon the fraud of the defendant; or*
>
> *(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
>
> *(c) the action is for relief from the consequences of a mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.*
>
> *...*"

326. When applying s.32 to the facts of the present case, for both claimants the individual whose knowledge matters, and by whom any action would have to have been taken (or at least directed) that might have uncovered what had occurred, is NEL. Further, I find (not, I think, that this was disputed) that at all times until his engagement of Dr Drew and the advice that emerged from that at the end of 2018, NEL did not in fact appreciate that he had been mistaken in treating Kyla as bound to honour the Disputed FFAs, that CTM had acted disloyally towards Kyla, or that profits for FTL in excess of the agreed US$500 per day margin, offloading of positions onto Kyla, or trading against Kyla, had arisen and been concealed from him (and therefore from the claimants).

327. The question under s.32, therefore, is whether NEL "*could with reasonable diligence have discovered*" that mistake, disloyalty, or concealment, before 13 June 2013, the Claim Form having been issued on 13 June 2019.

328. A striking feature of the case is that though it was an unrelated trigger that caused NEL to start enquiring into what had happened, from first thinking to look carefully at

the Kyla FFAs to issuing a Claim Form alleging dishonest breach of fiduciary duty by CTM in the respects pursued and established at trial took only some 6 or 7 months. In my judgment, as I explain below, it required no more than a degree of serious interest in why Kyla had lost such a huge amount of money on its FFA positions for questions to be asked that could not have failed to lead to an appreciation that CTM had done wrong by Kyla in the manner (in substance) alleged and established at trial.

329. This is a case in which, therefore, the question is whether in NEL's position, acting with reasonable diligence involved taking at least a degree of serious interest in why Kyla had lost such a huge amount of money. In my judgment, again as I explain below, it did.

330. The law on the reasonable diligence rule of s.32 was summarised recently by Foxton J in *Hotel Portfolio II UK Ltd v Ruhan* [2022] EWHC 383 (Comm) at [315]. He identified the relevant principles as follows:

"*i) The claimant is not immediately presumed to be on enquiry as to the need to investigate potential wrongdoing. Rather there must be an event (referred to in the authorities as a "trigger") which, objectively, puts the claimant on notice as to the need to investigate a potential claim: DSG Retail v Mastercard [2020] Bus LR 1360, [65-66] and OT Computers Ltd v Infineon Technologies [2021] QB 1187, [35].*

ii) The issue is when the claimant could, not would, with reasonable diligence, have discovered sufficient facts to enable it properly to advance the claims brought, and the burden lies on the claimant to establish that it could not, acting with reasonable diligence, have made the relevant discovery: Paragon Finance plc v D B Thakerar & Co [1989] 1 All ER 400, 418.

iii) The test is objective, although "what reasonable diligence requires in any situation must depend on the circumstances" (Males LJ in [OT Computers v] Infineon, [29]).

iv) Discovery for this purpose occurs no later than when the claimant is able properly to plead the allegations: Allison v Horner [2014] EWCA Civ 117, [46] and Law Society v Sephton & Co [2005] QB 1013, [110]."

331. What reasonable diligence requires depends on the context in which the issue arises, and upon the circumstances of each case: *OT Computers v Infineon*, *supra*, *per* Males LJ at [30]. With that in mind, and as regards what has been referred to as the need for a 'trigger' (to investigate), Males LJ went on to say this, at [47], which I respectfully consider an important clarification:

"*... although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware*

(or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonable diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

332. Whether there has been a 'trigger', i.e. whether the circumstances are such that a claimant acting with reasonable diligence in his own interests might be expected to undertake some kind of investigation, may depend on the degree to which it is obvious that something has or may have gone wrong. To be clear, however, that does not mean that the s.32 concept of discoverability has in mind only situations in which the putative claimant acting with reasonable diligence may have been triggered to think they might have a legal claim. In *Granville Technology Group v Infineon Technologies AG* [2020] EWHC 415 (Comm), the decision of Foxton J upheld by the Court of Appeal in *OT Computers v Infineon*, the judge said this at [48], and I agree, namely that:

"*There will be many claims when it will be objectively apparent that something "has gone wrong" – where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind – which event ought itself to prompt the claimant to ask "why?" and investigate accordingly. However, where a claimant purchases goods on a market which has been rigged by a cartel, there may be nothing which ought reasonably to prompt the claimant to further enquiry. It is not necessary to explore what kinds of events might act as trigger in all such cases. …*"

333. To similar effect, Lord Hoffmann, sitting as a judge of the Hong Kong Court of Final Appeal, said this in *Peconic Industrial Development v Lay Kowk Fai* [2009] HKCFA 17 at [31]:

"*There can be no doubt, I think, that for the purposes of the inquiry into what the plaintiff could have done, he must be assumed to have suffered the loss which he actually suffered. In this case, one assumes the plaintiff to be a bank which has lost HK$400m. When it discovered (or could reasonably have discovered) the loss, it must be assumed to have displayed some curiosity about why this should have happened … .*"

334. I would add this clarification of my own. It is not unnatural to write of the 'requirement' of reasonable diligence, or of the claimant being treated as being or becoming aware of that which a reasonably diligent enquiry might have revealed. However, s.32 creates no duty upon a putative claimant, owed to the defendant or to anyone else, and a conclusion that s.32 has not saved a claim from being time barred is not a conclusion that the claimant should have done anything differently so as to have some responsibility (other than to itself) for not having done so. From a limitation perspective, a claimant is entitled, *vis a vis* the defendant or the court, to have done nothing. It is just that if by taking action that does not go beyond the action a reasonably diligent person might have taken in its situation, the claimant could have been aware of the claim long before it sued, it may find it is out of time to pursue it if it only does so long after the original fact.

335. Recalling again that the question is whether the claimant has shown that acting with reasonable diligence could not have led it to the necessary discovery, and that it is

addressed to a case in which the claimant had but did not know it had a cause of action based upon a fraud, or in respect of which a fact relevant to the right of action had been deliberately concealed, or which would give relief for the consequences of a mistake:

(1) the court in a s.32 case should be in a position to judge what it would have taken for that claimant to discover that fraud, concealment or mistake (as the case may be) earlier than it did (and, in particular, longer before proceedings were issued than the applicable limitation period); and

(2) the evaluation then required is whether that which it would have taken goes beyond, so that it would have been action over and above, the action a reasonably diligent person in the claimant's position might have taken.

336. There is a limit, possibly elusive to describe, to the extent to which the personal circumstances of the claimant may be taken into account, since reasonable diligence is an objective notion. However, "*it does not necessarily follow … that the claimant must be assumed to be someone or something which he is not*" (*OT Computers v Infineon* again, *per* Males LJ at [38]). It is the situation of the actual claimant, not the hypothetical claimant, that is relevant: *ibid*, at [48].

337. The key starting point on the facts in this case is NEL's evidence, which I accept, that, "*After the heavy losses were incurred on the FFA account in 2008, my only concern was to try to find ways to pay. There was no investigation to discover why so much had been lost. I always believed that the main reason was the exceptional market crash in 2008.*"

338. It is right that Kyla's losses became as very large as finally they did due to the market crash of Q4 08. That once-in-a-lifetime market mayhem affected Kyla/FTL 050608 (in part) and (all of) Kyla/FTL 180908, because they were long positions on Q3 + Q4 08 and Q4 08 respectively that were held by Kyla as the market plummeted between mid-September and mid-November 2008, with the June trade already heavily out of the money by mid-September. Kyla lost on those two trades alone, in aggregate, over US$24.2 million. Since Kyla/FTL 050608 would have been heavily loss-making even without the late year crash, and although a precise calculation would involve guesswork, it seems unlikely that without the crash Kyla's overall net loss from its FFAs would have been less than c.US$10 million.

339. For that reason, and in any event, the market crash could never be, or have been, a complete answer to the question why Kyla lost so much money on the FFA market. In my judgment, it assumes no more than having a care for the finances of a business for its officers and/or UBO to consider with a degree of diligence why huge losses have been incurred in the business or some branch of its activities. Indeed, as regards officers it would be a dereliction of their duties to the company to fail to do so. In the case of Kyla and Vega, I have no doubt that the position *de facto* was that if there was to be any such enquiry, it needed to be conducted by NEL, or at his request or direction. NEL's disinterest in finding out why will have been the reason the question was not asked. I take Kyla and Vega together because it was always the intention that the FFA trading by CTM for Kyla's account was ultimately for NEL's sole account. If NEL wished to stand by that, as honourably he did, in practice that was bound to

mean Vega being involved in clearing Kyla's FFA debts or helping to do so if they became as large as they did.

340. That it would have been no more than reasonable diligence to investigate why so much money had been lost would be my conclusion even if Kyla or Vega should not have been thinking there might be blame to assign to others with a view possibly to considering whether there might be rights of action by which to seek redress. Kyla and Vega as legal persons should have been keenly interested come what may to understand how exactly the losses had been so huge. The circumstances were of the kind contemplated by Foxton J's *dictum* in *Granville Technologies* or Lord Hoffmann's in *Peconic Industrial* (paragraphs 332 and 333 above, respectively). Kyla's FFA trading had gone so spectacularly badly as to prompt any reasonably interested person, as Foxton J put it, "*to ask "why?" and investigate accordingly*".

341. As it happens, however, in my view any reasonable company in Kyla or Vega's position *would* have wanted to investigate whether CTM's trading decisions made on Kyla's behalf had been careless or incompetent rather than merely unlucky as things turned out. *A fortiori* therefore, it is to posit no more than reasonable diligence to say that Kyla and Vega might be expected to have investigated, when the losses were so huge and they were being pressed to pay and having to find creative ways to bear them in full, why Kyla's FFA trading had gone so very badly.

342. From a limitation perspective, and as against the defendants, NEL was entitled to choose instead, as he did, to be disinterested. But that was not a reasonable choice that it was in Kyla's or Vega's interests to make. It is beyond the scope of this judgment to consider whether NEL, or anyone else, might have owed a legal duty to Kyla or Vega requiring a different choice to be made. For this judgment, all that matters is that s.32 of the Limitation Act 1980 does not give licence to choose to have no care for what went wrong when a company's business has been so badly hit and then rely on ignorance that having a care might have avoided when trying to pursue a *prima facie* stale claim. (I am not by that use of language adding a gloss. The limitation periods set by the 1980 Act represent Parliament's determination of when, *prima facie*, claims should be regarded as stale so as to liable to be dismissed if the defendant chooses to rely on time bar in defence.)

343. Even if no other investigation had been attempted, the questions that cried out to be asked, and pursued with a degree of diligence, included: (i) why and when precisely was Kyla/FTL 050608 traded (CTM having taken Kyla out of the market at the end of April 2008 and not traded for it again until that June 2008 trade that proved to be calamitous for Kyla); (ii) with whom and when precisely was the 'second leg' traded that generated Kyla/FTL 050608; (iii) what (if any) chance might there be for a negotiation with the seller from whom that 'second leg' position had been purchased for Kyla's account?

344. Those were minimum opening lines of enquiry for anyone having a care for Kyla's (or Vega's) finances because in NEL's understanding of the Kyla-CTM relationship, a correct understanding as I have held, Kyla/FTL 050608 should have been a 'first leg' created by and reflecting a 'second leg' trade by which Mr Cafiero had chosen on 5 June 2008 to open a long position for Kyla, buying Q3 + Q4 08 Cape at US$181,500 per day from the market in the name of FTL as Kyla's front (so that the selling price to Kyla was marked up to US$182,000 per day). It is to NEL's credit that he was

determined not to cause *FTL* to suffer loss on his account. However, that is an honourable by-product of the fact that, in his mind (rightly so, as I have held) FTL was supposed to be impartially in the middle of a trade that Kyla, CTM and FTL intended to be, in substance, between Kyla (acting by CTM) and FTL's 'second leg' counterparty (whoever that had been). It was not a reason for making no effort on Kyla's behalf to see if anything could be done to ameliorate the loss incurred, as against that counterparty. Moreover, as CTM's relevant principal, Kyla was entitled to see the details of the 'second leg' trade done in the market for its account and to understand the trading decision and timing involved. It could be expected, if acting with reasonable diligence, to be interested to have that information.

345. Minimum lines of enquiry that acting with reasonable diligence would have generated are thus rightly identified without the benefit of hindsight and the knowledge the court has now of what had actually gone on at CTM. What would or might have happened if those lines of enquiry had been raised and pursued with at least a modicum of diligence does fall to be judged with the benefit of hindsight and that knowledge, however. On that basis, it is evident that CTM had no way of dealing with those lines of enquiry that would not have opened up the can of worms of Mr Cafiero's disloyalty. I have found Mr Cafiero to have behaved dishonestly, but I do not believe he would have taken that to the lengths that would have been necessary to give an apparently satisfactory response. That would have required him to invent a 5 June 2008 'second leg' trade and either fabricate documents purportedly to evidence it or an excuse for being unable to provide any.

346. Ms Hopkins QC contended that Mr Cafiero would have sought to deflect, distract, or dodge, and I consider she is right about that. However, there was in my view no deflection, distraction, or dodge to be deployed that would not have created suspicion and, if any degree of diligence were being exercised in the investigation, the pressing of the enquiry. Unless CTM could produce a record of having traded the 'second leg' that Kyla/FTL 050608 implied, which it could not since it did not exist, the obvious conclusion to draw would have been, and I am confident NEL would have drawn it, that Kyla/FTL 050608 had not been the product of a proper operation of CTM's mandate for Kyla. What that meant no doubt might then have to be considered with the benefit of legal advice. But the cat would have been out of the bag that CTM had not limited itself to trading for Kyla, using FTL to front for Kyla to the market for a margin of US$500 per day on the trade, as it should have.

347. If the enquiry had got at least that far, it is impossible to envisage that a full review of the Kyla FFA history would not have followed, focusing upon the identification of matched 'second leg' trades. Exactly as Mr Buss of WFW said to the court when obtaining permission to serve the proceedings out of the jurisdiction, for each Kyla FFA, unless CTM had (a) placed a 'second leg' trade in the name of FTL but intended for Kyla's account, and (b) generated the Kyla FFA as a 'first leg' trade to match, on back-to-back terms save for a US$500 per day price adjustment in favour of FTL in the middle, then either CTM was generating unauthorised profits (for FTL) from its agency for Kyla, or FTL was "*using Kyla to hedge their exposure to other counterparties, for their own benefit, or else just betting speculatively in the opposite direction from Kyla*", which became the essential allegations pleaded and in due course pursued at trial.

348. The claimants in fact got there more indirectly. This echoes Ms Hopkins QC's observation in argument that the initial line of enquiry instigated by NEL in late 2018 was not how the Kyla FFAs had been matched to trades for FTL with external market counterparties, and was not triggered by a desire to investigate how it came about that the Kyla FFAs had been so hugely loss-making overall. That was part of a submission that the court should not proceed from the fact that the claimants moved from NEL's late 2018 curiosity to the issuance of proceedings alleging dishonest breach of fiduciary duty in 6 or 7 months to a conclusion that they could not bring themselves within s.32.

349. The essential logic of that submission is coherent. It can be illustrated by the example of an unlooked for whistleblower lifting the lid on some historic and hitherto hidden wrongdoing. That in such a case, depending on its individual facts, a claimant might move rapidly from a state of ignorance to the launch of proceedings is likely to say little or nothing of what the exercise of reasonable diligence might have uncovered. However, on the facts of this case, the submission misses its mark. The upshot of the differently focused line of enquiry initiated by NEL, with the input received from Dr Drew, was that from a comparison of Kyla FFA pricing and market data, subject to any uncertainties over the time within a day when a Kyla FFA was priced that might affect the analysis, a fair inference was drawn, the full truth of which emerged over time in the litigation, that CTM had not been operating the Kyla mandate properly.

350. That is what I meant by saying that the claimants got to the truth indirectly. They inferred, from an analysis suggesting a mis-match of pricing between at least some of the Kyla FFAs, one prominent example being Kyla/FTL 050608, and a market price for what was thought to be the date and time when the trades were placed, that CTM had strayed beyond trading in the market for Kyla, placing a 'second leg' trade whereby to generate a Kyla FFA as a matched 'first leg' trade, back-to-back save for a price adjustment of US$500 per day in FTL's favour. My conclusion is that reasonably diligent enquiry such as cried out to be made would, and on any view could, have led *directly* to an appreciation that that is what CTM had done, and the ability to make the very claims in fact made and pursued (successfully, subject to the question of time bar) at trial.

351. It is therefore true, as Ms Hopkins QC submitted, that given the trust NEL had reposed in CTM, he did not suspect that he had been the victim of dishonest disloyalty, back in 2009 (and following) as he dealt with Kyla's massive FFA losses. It is likewise true that the dispute with YPA that gave rise to an investigation that caused NEL so to suspect was an accident. It may be true as a result, as Ms Hopkins QC contended, that without the YPA dispute NEL would not have learned that CTM had been disloyal. However, that does not mean, as she submitted, that there was nothing to prompt NEL to investigate matters back in 2009 (and following).

352. The disaster for Kyla and Vega that the Kyla FFAs had proved to be was reason enough for anyone with a care for their interests, acting with reasonable diligence, to investigate what had happened. That NEL, on the hypothesis Ms Hopkins QC raised, may well never have learned the truth, is because he chose disinterest, as Kyla and Vega acting with reasonable diligence would not have chosen, over the making of an attempt to understand how the FFA trading for Kyla had turned out so badly.

353. In similar vein, I agree with Ms Hopkins QC's submission that the family connection between NEL and PGL, the long-standing relationship between NEL and PGL's group of companies, and the fact that PGL held an indirect stake in Kyla through YPA, would have made it seem unthinkable to NEL that CTM had been disloyal. I accept NEL's evidence that when Dr Drew's report at the end of December 2018 made that seem a real possibility, he was "*sick to my stomach*". However, that all rather misses the point. The question is not whether NEL should have suspected that he had been mistreated by disloyalty and investigated that possibility to see if there was a claim. The question, upon the whole of the particular circumstances of the case, is whether it would have required more than reasonable diligence in the conduct of Kyla's and Vega's affairs for CTM's disloyalty to be discovered much sooner than it was, knowing what the court now knows as to what CTM had done and what would have been needed for that to become apparent to Kyla and Vega.

354. In this part of the argument, Ms Hopkins QC also emphasised, as regards the facts as they were, that the full details of CTM's dishonest disloyalty were not appreciated when proceedings were commenced in June 2019. As she submitted, "*the claim as originally formulated was based, and based only, on the prices of the Kyla FFAs being "off market". Kyla did not know, because the defendants would not tell them, about the matched trades, until these were produced on 23 December 2019 and 4 February 2020, and even then their account was in part misleading and wrong (as to the 5 June 2008 FFA)*". She noted that the particularisation of the claims thereafter evolved as the claimants obtained a fuller and more accurate picture of exactly what had happened through disclosure.

355. However, that was a matter of better particularisation of the case brought, the essence of which was accurately constructed by Mr Buss from the premise that CTM had not been loyal to its mandate, that premise in turn having been inferred from a pricing analysis suggesting off market pricing within the Kyla FFA portfolio that was not consistent with chance. With the exercise of reasonable diligence, that premise could have been established years earlier, and certainly well before June 2013, not indirectly by reference to a pricing analysis against market data, but by the simple expedient of taking an interest to understand what had happened, the starting point of which was to ask CTM to show NEL the 'second leg' trades that (as ought to have been the position) had generated the Kyla FFAs. That is why it is also nothing to the point whether, as Ms Hopkins QC submitted, another expert, rather than Dr Drew, if engaged in late 2018, might have reached a different conclusion on whether there was off market pricing within the Kyla FFA portfolio.

356. For the reasons set out above, I am not satisfied that the claimants could not with reasonable diligence have discovered the substance of the dishonest breaches of fiduciary duty, concealment of the truth, and mistake, upon which their claims at trial were based, prior to 13 June 2013. Having a care for Kyla's and Vega's financial interests called for at least a basic investigation that, acting with reasonable diligence, Kyla and Vega would, and certainly could, have initiated in early 2009 at the latest, or at any time thereafter, that might well – in fact, I consider, would – have uncovered the essential truth of the claims in this case, namely that CTM had been disloyal in one or more, or all, of the ways Mr Buss surmised in 2019 when issuing these proceedings. Getting to that truth, by pursuing the matter with reasonable diligence, could not realistically have required more than a few months from asking CTM to

explain Kyla/FTL 050608, including the identity of the 'second leg' trade for it, placed by CTM so as to generate it, that should have existed but (unknown then to Kyla and Vega) did not exist.

357. It follows that the claimants' claims, substantially well-founded in fact and law though they were, must be dismissed as time barred.