IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 227 OF 2018 (IKJ)

BETWEEN:

FORTUNATE DRIFT LIMITED

Plaintiff

-and-

CANTERBURY SECURITIES, LTD.

Defendant

IN COURT

Appearances:

Mr Stephen Atherton KC instructed by Ms Katie Pearson, Claritas Legal Limited, for the Plaintiff ("FDL")

Mr Ben Tonner KC and Ms Sally Bowler, McGrath Tonner, for the Defendant ("CSL")

Before:	The Hon. Justice Kawaley
Heard:	5-14 June 2023
Written Closings:	10-11 July 2023
Draft Judgment Circulated:	9 August 2023
Judgment Delivered:	17 August 2023

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Brokerage agreement in relation to shares-plaintiff claims for breach of duty/breach of contract/conversion/unjust enrichment-defence and counterclaim based on illegality/unclean hands/contractual indemnity rights/unlawful means conspiracy/allowance in equity

JUDGMENT

Introductory

1. The present case entails two competing narratives about how what appeared on its face to be a comparatively straightforward brokerage and secured financing arrangement unravelled over an approximately 6-month period between July and December 2018. The Conclusion to the 'Plaintiff's Written Closings' (which run to more than 240 pages) summed up the case in the following manner:

> "*548. The reality of this case is that, despite an appearance of complexity, it is simple: CSL refused to return, upon lawful demand being made by FDL, property belonging to FDL worth (at the time) more than US$50 million. CSL proceeded to sell US$20m worth of that property without any lawful basis for doing so, kept the proceeds, and is continuing to hold on to the Proceeds of Sale and FDL's remaining YRIV shares.*"

2. The Introduction to the 'Defendant's Closing Submissions for Trial' sets out the following highlights of the Defendant's narrative:

> "*6. On the strength of the (false) information provided to it, which CSL relied upon (to its detriment) from both a commercial risk perspective, and in satisfaction of its statutory anti-money laundering obligations, CSL agreed to provide FDL with brokerage services. In this way, FDL deceived one of the CIMA regulated gatekeepers of the Cayman Islands financial system and secured for itself access to the secondary trading market. From the very inception of the relationship, FDL induced CSL to provide financial services to it on false pretences…*
>
> *8. It was only after the US$10m cash was received by FDL from PFS (circa 31 August 2018), that PFS and CSL began to understand the true nature of the persons they were*

dealing with. First, FDL revealed its true colours by seeking to transfer the Collateral Shares out of CSL's and PFS's control, before the ink was dry on the SPA. Second, investigative accounts started to be released (such as the Barron's reports) which reported on the allegedly dubious background, disclosures, filings and prospects of YRIV and its controllers and founders (which included Coleman and Sin)…"

3. Mr Tonner KC in his opening oral submissions suggested that the commercial context of this case was similar to the terrain covered by the documentary '*The China Hustle*', which exposed the way in which some Chinese companies listed on the US Stock Market fraudulently exploited the greed of Western investors hoping to make easy profits through investing in China. Putting fraud to one side, that allusion seems an apposite one. The present case very much revolves around shares in a Chinese-owned company with few real assets apart from highly uncertain plans for potentially lucrative infrastructure projects in China; shares which are both listed on a US Stock Exchange and being used to raise money from Western investors. However the commercial terrain which emerged through the evidence appeared to be not entirely transparent on all sides. On the 'Chinese' side, the 'game' appeared to entail, on one view, limiting the volume of publicly held shares to artificially sustain the share price of the listed company. On the 'Western' side, the 'game' seemed to entail, on one view, buying the shares while the value was high and profiting from 'shorting' them; betting on the price going down, and then deliberately driving the price down. At first blush it seemed easier to suspect than prove that either of these extreme narratives reflected objective reality.

4. Against this background it is easy to see why, as the dispute developed, FDL suspected CSL of facilitating a 'shorting' of the relevant shares and CSL suspected FDL of market manipulation. The somewhat hazy picture which emerged was a context in which all players kept their cards close to their chest and did not conduct business in what a stranger to this somewhat rough and tumble part of the financial world would consider to be an entirely straightforward manner. All parties were worldly-wise. There were no angels or choristers here. That said, CSL was obviously embedded in the mainstream financial services world. FDL, with legal links to the British Virgin Islands ("BVI") and commercial links to China and the USA, seemed somewhat like a travelling salesman whose true provenance and character were inevitably somewhat unclear. Before briefly considering the procedural history, the pleaded issues, the governing law and the evidence, an introduction to the main 'players' will first be given.

The main players

FDL

5. FDL was incorporated in the BVI in or about 2015. Its initial owner is said to have been Mr Chen Linyu ("Mr Chen"). Although this was not reflected in FDL's corporate records until near the end of that year, it is said that pursuant to a 31 January 2018 Share Swap Agreement, Mr Chen agreed to transfer the sole issued share in FDL to Mr He Jielin ("Mr He"). What the true beneficial ownership position was when FDL contracted with CSL in the summer of 2018 is controversial.

6. FDL's sole asset is said to be its shares in Yangtze River Development Ltd ("YRIV"). It is common ground that one of FDL's directors since 10 February 2018 has been Mr Dominic Sin.

Dominic Sin

7. Mr Sin is one of the Founding Investors in what became YRIV, together with Mr Hu Van Ling ("Mr Ling"), Mr Zhao Long ("Mr Long"), Mr James Coleman ("Mr Coleman"), Mr Chen and Mr Xiang Yao Liu ("Mr Liu"). Their focus was development projects in Wuhan City, the capital of Hubei Province in China. Mr Sin says the "Founding Investors" invested through Energetic Mind Limited ("EML"), a BVI company, and his own investment vehicle was Start Well International Limited and his stake a mere 3%. FDL's stake was just under 10%. Mr Sin claims to have been close friends and business partners with Mr Chen, Mr He and Mr Liu (and Mr Liu's wife) for more than 18 years.

8. Mr Sin says that he was asked to manage FDL in January 2018 before he was appointed a director because he spoke English, and Mr Chen and Mr He did not. He is the face of FDL in the present proceedings.

YRIV

9. YRIV was formed in the following way. In December 2015, EML effected a reverse merger with Kirin International Holdings Ltd ("Kirin"), the shares of which were traded in the US on the over-the-counter bulletin board with a view to obtaining a full NASDAQ listing. The Founding Investors exchanged shares in EML for shares in Kirin, which was renamed YRIV on 8 February 2018. Between August and early December 2018 when the damning Hindenburg Report was published, YRIV shares were trading at an average price in the region of US$11.60 per share. Soon after 6 December 2018 when CSL sold many of the YRIV shares it was holding, on terms which are not agreed, the share price collapsed and never recovered. YRIV was delisted by NASDAQ as of 20

August 2019, according to an 8-K filing YRIV made on 19 August 2019. It was warned by the NASDAQ Hearing Appeals Panel on 16 August 2019 that delisting would occur on this date after applicable appeal rights had been exhausted.

CSL

10. CSL is a Cayman Islands company. It has, since 2020, been a "registered person" under the Securities Investment Business Act (2020 Revision). Through a Corporate Account Opening Form completed by FDL on 9 May 2018, CSL agreed to hold stocks and shares for FDL ("Brokerage Contract"). In response to FDL's wish to raise US$10 million, a few months later CSL introduced FDL to PFS Management Limited ("PFS") which entered into a Stock Purchase Agreement with FDL dated 16 August 2018, but which actually took effect on 23 August 2018. PFS agreed to purchase 1,144,584 YRIV shares from FDL, subject to a Put Option exercisable by PFS within a three month long Put Period commencing on 23 November 2018. It became embroiled in a dispute with FDL after FDL purported to terminate the Brokerage Contract and complained that PFS had waived the Put Option.

Erin Winczura

11. Ms Erin Winczura is the CEO, owner and founder of CSL. Born and raised in Canada, she founded Canterbury in early 2015 and has worked in investment banking, trading and brokerage services and operations for over 15 years. She is also the majority owner of PFS. She was the individual with the primary interface between CSL and FDL and also between FDL and PFS. She is the face of CSL in the present proceedings but also owns PFS.

The Pleadings

The Amended Statement of Claim ("ASOC")

12. The main averments in the ASOC may be summarised as follows:

    (a) CSL agreed to provide FDL with a brokerage trading platform on the terms of the Brokerage Contract on or about 9 May 2018;

    (b) FDL transferred 6,000,000 YRIV shares to CSL on or about 3 August 2018 pursuant to the Brokerage Contract;

(c) as a matter of law or implication, CSL owed a fiduciary duty to FDL to (1) act in good faith in relation to its property and/or (2) not to use FDL's property for its own purposes;

(d) CSL was involved in negotiating the SPA between FDL and PFS and introduced PFS to FDL. As a result, CSL assumed the further fiduciary duties to FDL of (1) acting in good faith and (2) not placing itself in a position of conflict of interest;

(e) in early September 2018, FDL discovered that some of the Purchased Shares had been moved out of CSL. Some were sold by PFS and/or CSL, generating a profit for CSL;

(f) PFS waived its rights under the Put Option by removing the Purchased Shares from CSL (this is to be determined by the Nevada Court);

(g) on 19 September 2018, FDL rescinded its authorisation to CSL of 16 August 2018 and requested CSL to transfer all Shares other than the Purchased Shares to VStock Transfer, LLC ("Vstock"). CSL refused. On or about 3 October 2018 FDL discovered the previously undisclosed connection between CSL and PFS. On 26 October 2018, FDL terminated the Brokerage Contract and repeated its transfer instruction to CSL;

(h) on 9 November 2018, the 8th Judicial District Court in Clark County, Nevada (the "Nevada Court"), issued a Temporary Restraining Order ("TRO") restraining FDL from moving the Shares and requiring FDL to rescind its instructions to CSL to do so. FDL complied with the TRO 7 days after receiving a copy of it on 14 November 2018;

(i) in breach of its fiduciary and/or contractual duties, CSL failed to comply with FDLs instructions of 19 September 2018, 24 and 26 October 2018;

(j) in breach of its fiduciary duties, CSL failed to disclose the connection between CSL and Brian Johnston, its sole director, or that CSL's CEO was the shareholder of PFS;

(k) in breach of its fiduciary and/or contractual duties, CSL liquidated FDL's shares without authorisation or withdrew in excess of US$20 million from FDL's account. Alternatively, this amounted to wrongful interference with or conversion of FDL's property;

(l) unjust enrichment.

The Third Amended Defence and Counterclaim

13. The main averments by the Defendant may be summarised as follows:

(a) FDL has been a participant in a fraudulent scheme (the "Scheme") to artificially inflate the price of YRIV's publicly traded shares since in or about 2015 through making "*material misstatements and omissions regarding YRIV's assets, liabilities, business prospects and financial condition in public statements available to investors and to its United States regulator, the Financial Industry Regulatory Authority ('FINRA'), and the US Securities and Exchange Commission (the 'SEC')*";

(b) FDL's participation in the Scheme was contrary to the express prohibition on market manipulation in the Brokerage Contract;

(c) CSL was induced to enter into the Brokerage Contract by fraudulent misrepresentations by FDL about, *inter alia*, (1) its beneficial ownership (Mr Chen was said to be its beneficial owner in May 2018. In November 2018 Mr He was said to have been the beneficial owner since 1 February 2018), and (2) the fact that FDL's beneficial owner did not control 10% or more of a public company or control, indirectly or directly, 20% or more of a public company (in fact it is highly likely that Mr Chen owned or controlled 10% or 20%, respectively, of a public company, YRIV);

(d) it is denied that CSL owed FDL any fiduciary duties as, *inter alia*, CSL had no discretion to manage the Shares, FDL was a sophisticated investor and the terms of the Collateral Agreement expressly authorised CSL to act in its own interests by selling Collateral Shares to secure future payment of the Put Option;

(e) under Nevada law PFS had a perfected security interest in the Collateral Shares and FDL's securities account with CSL;

(f) CSL was authorised to liquidate the Collateral Shares both in the event of PFS exercising the Put Option "*and/or under the Hampton Securities terms or the JitneyTrade terms, as incorporated into the Brokerage Contract*";

(g) CSL is entitled to an allowance in equity for the care it took in liquidating the Collateral Shares to preserve their value;

(h) CSL is entitled to an indemnity at common law for the losses it has suffered from being fraudulently induced into being an unwitting participant in the Scheme "*such that FDL's claim against Canterbury fails for circuity of action; alternatively Canterbury is entitled to damages from FDL in an amount equivalent to any liability that FDL establishes against Canterbury*";

(i) under the Brokerage Contract, FDL is liable to indemnify CSL for (1) US$374,519.85 in relation to entering into the SPA, (2) legal costs and disbursements of at least US$75,00, (3) internal costs and losses of at least US$282,500 and (4) at least US$20 million in respect of lost business opportunities.

FDL's evidential case

Mr Dominic Sin

14. Mr Sin's main Witness Statement was dated 1 August 2022, and his reply evidence was in his Second Witness Statement dated 20 January 2023. He is a director of FDL and one of six 'Founding Investors' in a project in Wuhan Newport and Wuhan Renhe. The six all knew each other and their collaboration between 2010 and 2015 was not reflected in any formal documents. The other five were a Mr Ling, Mr Long, Mr Coleman, Mr Chen and Mr Liu. They did establish investment vehicles in 2015; FDL was Mr Chen's company while Mr Sin formed Start Well International Limited. The Founding Investors invested in EML with FDL acquiring 10% and Mr Sin's Start Well acquiring a 3% stake.

Impressions of witnesses' oral testimony

15. Mr Sin appeared to me to be, as he insisted, primarily the loyal servant of larger investors while he himself was a relatively minor investor in YRIV. Nonetheless it was apparent from the emotion that he often displayed while under cross-examination that the outcome of the present proceedings has considerable importance to him, whatever the precise nature his interest in FDL may be. He appeared to me to have an impressive recollection of points of detail. He was, understandably, occasionally unable to distinguish between advancing argument and factual assertions. On the first day of his evidence, for instance, he denied looking at what the trade press said about YRIV at all.

On the second day of his evidence, he somewhat ruefully admitted that of course he had read the Hindenburg story at the time.

16. He gave a potentially straightforward explanation of the KYC discrepancies about who the beneficial owner of FDL was although he always appeared to be reluctant to reveal much about the actions and motivations of Mr Chen and Mr He. He was passionate about defending the accuracy of YRIV's SEC filings. He seemed unrealistic and in denial about how tenuous the prospects of YRIV actually were at the material time. His attempts to minimize the extent to which FDL was interested in raising funds for YRIV were unconvincing. On the other hand, his admission that he was involved in attempts to limit the amount of trading in YRIV shares to protect share value was surprisingly frank. Of course, by his account this was a legitimate response to the inappropriate 'shorting' strategies of others.

17. In summary, Mr Sin was a credible witness in general terms but clearly one whose controversial evidence should be approached with care.

R Don Keysser

18. Dr Keysser produced an Expert Report dated 5 May 2023 and a Supplemental Expert Report dated 19 May 2023. He has worked in the securities industry for over 40 years and is currently Managing Principal of Hannover Consulting. He has also been an Adjunct Professor for over 15 years, currently teaching at the Carlson School of Management, University of Minnesota and at St Mary's University. He has an MAPA in Urban Economic Development, an MBA in Finance and a DBA in International Business and Finance. He has served as an expert witness in almost 50 cases in the United States.

19. In his Expert Report, he opines most significantly that:

(a) according to industry practice CSL was in a conflict of interest situation in relation to the dealings with FDL and PFS and ought to have disclosed its relationship with PFS;

(b) the SPA appeared to be in standard terms, and including the Put Option was not unusual but the terms of Section 3.16 (second paragraph) appeared to be specific to this particular transaction;

(c) the 16 August 2018 letter from FDL to CSL was not addressed to PFS and constituted instructions from a client to its broker. It could be unilaterally revoked by FDL;

(d) it appears that 71,000 YRIV shares were sold before the SPA was executed on 23 August 2018 and is unclear what authority CSL would have had to permit this;

(e) FDL could unilaterally terminate the Brokerage Contract: "*brokerage arrangements surely cannot make any business sense if CSL can refuse to return FDL's shares on demand*";

(f) as regards the liquidation of YRIV shares by CSL on 6-7 December 2018, "*the sale (or 'dumping') of so many shares on one day by CSL in my opinion likely contributed to the fall of the YRIV share price, and therefore the fluctuation in price looks more likely to have been the consequence of the 6 December sale rather than the 6 December sale having been a reaction to the fluctuation in price…Further, the 6 December sale alone raised substantially more proceeds than was needed to cover the Put Option…*"

Impressions of witness' oral testimony

20. Dr Keysser admitted under cross-examination he was not currently a licensed broker or trader and has focused on raising equity and mergers and acquisitions since 2000. However, he noted that he had been licensed by FINRA for 23 years as a supervisor and banker in which role he managed broker functions, although he was not currently licensed. He agreed that Mr Palzer, CSL's Expert, had more experience than him of secondary markets. As regards two of the main points addressed by him in his Reports, under cross-examination:

(a) he sensibly accepted that if the Put Option had not been waived, FDL could not withdraw the instructions contained in the Collateral Letter;

(b) he insisted that CSL "certainly" helped to precipitate the fall in the stock price in early December 2018.

21. Dr Keysser gave his evidence in a generally fair and balanced manner, and I found him to be an entirely credible and professional expert witness overall.

The Defendant's case

Erin Winczura

22. Ms Winczura is CEO of CSL which she founded some 8 years ago. She has worked in the finance sector for over 15 years, and has a BA in Economics and Political Science (Simon Fraser University, British Columbia, Canada) and a Bachelor's Degrees in International Business

(Tecnológico de Monterrey, Mexico) and Business Administration (Universitat Ramon Llull, Barcelona).

23. Her First Witness Statement was dated 1 August 2022. She describes how she was introduced to FDL in early April 2018. She learned from White Sands Securities ("White Sands"), which had a custody and execution account with CSL, that White Sands had been introduced to FDL by a Mr Sam Butero, who was assisting FDL to raise money. She met Mr Sin and Mr Coleman at the Hotel de Soleil in New York later that month. Following a KYC/AML review, she approved White Sands' application to open a sub-account for FDL. This account was closed at FDL's request a short time thereafter and FDL's account directly with CSL was then opened, again after CSL's Chief Compliance Officer had approved the AML/KYC documents submitted by FDL. Ms Winczura averred:

> "*The account was set up so that it provided FDL with 'margin' for trading purposes, i.e. credit, up to US $500,000. This was to allow FDL to trade, as FDL did not have cash on deposit with Canterbury at any time, so it had to use Canterbury's credit to complete its trades. On 10 May 2018, FDL deposited 500,000 shares in YRIV into its account.*"

24. She then avers that in around late July 2018 Mr Sin mentioned that FDL wished Canterbury to assist with raising $25 million to invest in YRIV. This would be an initial investment towards the YRIV port project which would be followed by a larger financing by YRIV itself (in May 2018 Mr Sin and Mr Coleman had stated that YRIV was seeking to raise $130 million). There was no market interest in US$25 million so Mr Sin suggested $10 million, with both he and Mr Coleman offering CSL the potential role of banker for the port project and introduction to contacts in China. These "visions of sugar plums", Ms Winczura implies, overcame her initial, more objective anxiety of the risks inherent in any deal involving YRIV shares. With Messrs Sin and Coleman expressing their urgent need to raise funds, the involvement of PFS emerged as a potential solution:

> "*37. As a last resort, I proposed using PFS Ltd (trading as PFS Management Ltd) ("PFS") to provide the finance. Mr Brian Johnston is a director of PFS and its investment manager. During an initial call, also attended by Mr Johnston, I told Mr Sin and Mr Coleman of the close relationship between Canterbury and PFS. For example, I told them that Mr Johnston had worked with me on many previous deals and that he was like a brother to me. I also told them both that I was the shareholder in PFS. Mr Sin was enthusiastic about the proposal to work with PFS. I understood that they believed that the pre-existing*

relationship would make it more likely that what FDL would be obtained in the short timeframe required. Mr Coleman made clear to me that the relationship between PFS and Canterbury was a positive factor.

In addition to the fact that I made the connections between Canterbury and PFS very clear to Mr Sin and Mr Coleman, I note the existence of the connection between Canterbury and PFS Ltd is readily identifiable from a Google search of my name and PFS; for Mr Johnston's name and PFS, or for PFS Management Ltd. Each of the searches calls up a corporationwiki.com link in which I am identified (incorrectly) as the manager of PFS; the searches that include either my name or that of Mr Johnston show, in addition, that we have a close business relationship and have companies in common."

25. Ms Winczura then describes the negotiation of the SPA and the Collateral Agreement, which was mainly conducted by telephone and email between Mr Sin and Mr Coleman, who constantly pressed for urgency, and Mr Johnston. Canterbury's overall role was "*to maintain the collateral so that PFS had sufficient security as well as to enforce FDL'[s] put option obligations if circumstances warranted*". She accordingly refused FDL's 24 August 2018 request to withdraw all of the Collateral Shares from CSL, and the 19 September 2018 instruction to transfer the Collateral Shares to VStock. CSL's CEO now believes the urgency manifested by FDL about raising the funds as soon as possible in the summer flowed from its agents' realisation that, in effect, the "gig would soon be up" and it would be known that the YRIV shares were worthless:

"*The Barron's article was published on 27 August 2018, under the title 'A Troubled Chinese Company Is Seeking a Lifeline from U.S. Investors', only 3 days after the SPA was signed (EW1/183-186). The article reported that YRIV, which it said had a market capitalisation of approximately US $2 billion, was attempting to exchange its primary asset, the port logistics centre and steel market it was developing in Wuhan, PRC, for another riverfront business appraised at only US $454 million, effectively leaving YRIV shareholders holding shares where the underlying assets only justified a price of approximately US $3.00 and when the shares were trading at US $11.53 per share. This was based on YRIV's public filings. Barron's then followed up on 6 September 2018 with another article titled 'Embattled U.S. – Listed Chinese Company's Key Deal Collapses', in which it reported that the port facility deal had fallen through.*"

26. It is then averred that after the publication of the Hindenburg Report on 6 December 2018 it was necessary to sell sufficient Collateral Shares to cover the Put Option which was likely to be exercised and the invoice which CSL issued on the same date. The pleaded amounts claimed by CSL under the indemnity are then explained. Finally, the conclusions to be drawn from the FINRA investigation and YRIV's delisting by the SEC are set out: in summary, FDL had been part of the fraudulent "Scheme" to artificially inflate the share price of YRIV and had made fraudulent misrepresentations to CSL in this regard.

Impressions of witness' oral testimony

27. Ms Winczura exhibited many of the traits commonly associated with business leaders, in her oral evidence, including both combativeness and charisma. She often seemed to find it difficult to distinguish between responding directly to factual questions and advancing her own view as to the factual merits of various issues. In relation to the question of whether FDL was told about CSL's connection to PFS at the time, it was difficult to avoid the initial impression that she had difficulty in distinguishing between what actually occurred and what she wished had occurred. Ms Winczura's obviously significant financial stake in the outcome, reflected in her argumentativeness and her occasional pejorative jibes about her opponents, requires a cautious approach to be taken in relation to the most controversial aspects of her generally credible evidence.

Brian Johnston

28. Mr Johnston is the sole director of PFS, Ltd, which trades as PFS Management Ltd.[1], and was appointed on 16 July 2018. He is licensed as an investment advisor, derivative advisor and is certified to serve as a director of brokerage firms. He has 20 years' experience in the investment business. His main trial Witness Statement was dated 1 August 2022 and his Second Witness Statement was dated 7 June 2023.

29. He avers that he has known and done business with Ms Winczura for more than 10 years. Their business connections were public knowledge. She approached him in July or August of 2018 about an opportunity for PFS to buy YRIV shares. He was personally involved in the negotiations which

[1] In answer to the Court at the end of his oral evidence, he explained that the trading name should have been simply "PFS Management", but he added the "Ltd" by mistake at an early stage and this carried through into all the documents in relation to the present case.

resulted in the SPA dated 16 August 2018 being consummated, communicating mainly with Mr Coleman, to whom he was introduced by Ms Winczura. His concerns about the volatility in the price of YRIV shares earlier that year prompted him to insist on the Put Option and the Collateral Agreement. He describes the resulting position as follows:

> "*29. After the transfer of the 1,144,584 YRIV shares to PFS pursuant to the SPA, FDL's account at Canterbury, which FDL had pledged to collateralize the put option as described in Mr. Coleman and Mr. Sin's 14 August 2018 emails and the Collateral Agreement, held 4,855,416 shares of YRIV ('Collateral Shares')*."

30. He and Ms Winczura, having rebuffed FDL's attempts to move the Collateral Shares, spoke to Mr Sin and Mr Coleman after the Barron's article was published and were reassured that YRIV had a back-up plan, now that the port project was no longer possible. They also responded jointly through lawyers to the "false" claim that PFS had been shorting YRIV shares. This claim was used by FDL to justify its position that the Put Option had been waived, prompting PFS to commence the Nevada Proceedings. Following the fall in the YRIV share price in the wake of the 6 December 2018 publication of the Hindenburg Report, Mr Johnston decided that PFS should exercise the Put Option on 20 December 2018.

31. Mr Johnston also sets out the claims asserted against FDL in the Nevada Proceedings, which broadly mirror those asserted herein by CSL in relation the Scheme.

Impressions of witness' oral testimony

32. Mr Johnston gave his evidence in a generally straightforward manner, consistent with the fact he was an employed director with no ownership interest in PFS. This was despite his admitted longstanding friendship and business relationship with Ms Winczura, who was seemingly the only PFS shareholder he had direct contact with. That said he made it clear that his job was to generate profits and so the present litigation, combined with the Nevada litigation, clearly has some importance to him. Some aspects of his evidence were difficult to accept on their face. Although I found him to be credible overall, I approach the most controversial aspects of his evidence with appropriate care.

Keith A. Palzer

33. Mr Palzer's 'Affirmative' and 'Rebuttal' Expert Reports were dated 6 May 2023 and 19 May 2023, respectively. He is Senior Managing Director of Ankura Consulting Group LLC and a US-licensed investment banker at an Ankura subsidiary. He holds a BA in Political Science from Binghampton University and a JD from Northwestern University School of Law. He is registered with FINRA in various capacities, including as a supervising principal and as a general securities representative. He has appeared more than 10 times as an expert in market trading cases since 2014. He made it clear that he was not in way advancing legal opinions.

34. The most significant conclusions Mr Palzer recorded were the following:

(a) he explained the regulatory risks to which CSL would be exposed if the alleged misrepresentations by FDL were proved;

(b) he opined that CSL was not obliged to disclose its relationship with PFS and that no fiduciary duties were owed by CSL to FDL in the relevant commercial context (under industry standards and practices) in light of the non-discretionary nature of the services provided to FDL by CSL. The risk of conflicts was obvious and FDL failed to mitigate it;

(c) CSL acted prudently in liquidating the Collateral Shares only when necessary, and achieved better returns than the market generally did during the relevant period after the Hindenburg Report was published. This effectively resolved any conflict of interest issues that might otherwise have existed;

(d) assuming the Nevada Court finds the Put Option was still operative, CSL's construction of it is to be preferred. CSL could, before the Put Option was exercised, liquidate sufficient shares to cover its potential exercise. The contrary argument is "*commercially irrational*".

35. In his Supplemental Report, he stood by his initial position on the above issues and rejected Dr Keysser's analysis of them. In addition, he firmly rejected the suggestion that CSL's alleged "dumping" of a large quantity of YRIV shares caused the price to fall. Further, he asserted that

CSL had reasonable grounds for being concerned about the security of the collateral and its own ability to recover an uncertain amount under its rights of indemnity. The $20 million estimate was reasonable in the circumstances.

Impressions of witness' oral testimony

36. Mr Palzer gave his evidence in a generally fair and balanced manner, and I found him to be an entirely credible and professional expert witness overall.

Findings: FDL's breach of fiduciary duty claims

Were fiduciary duties owed by CSL to FDL in relation to its duties in relation to the SPA and/or Collateral Agreement?

37. The competing positions may be summarised as follows:

(a) FDL contends that CSL assumed initial fiduciary duties under the Brokerage Contract and further specific fiduciary duties in relation to the Collateral Agreement;

(b) CSL contends that FDL's case is based on the Brokerage Contract alone and that agreement gave rise to no fiduciary duties.

38. The Amended Statement of Claim after addressing the position in relation to the Brokerage Contract provides:

> "*11. Canterbury was involved in negotiating a Stock Purchase Agreement (the SPA) entered into between FDL and PFS on or about, dated 16 August 2018, in which it was agreed that PFS would purchase 1,144,584 shares of the Shares (the Purchased Shares) for the sum of $10,000,000. The sale price included a 3.5% fee payable to Canterbury.*
>
> *12. By introducing PFS to FDL and, further or alternatively, through its involvement in the negotiation of the SPA, Canterbury assumed fiduciary duties towards FDL (in addition to those existing fiduciary duties as pleaded in paragraph 5 above). In the premises, those fiduciary duties require that:*
>
> *(1) Canterbury must act in good faith; and*
>
> *(2) Canterbury must not put itself in a position where its duty and its interest may conflict.*"

39. The only freestanding breach of fiduciary duty which is pleaded (at paragraph 40) relies on a breach of the duties pleaded in paragraph 12 of the Amended Statement of Claim. Paragraph 41 also alleges a breach of fiduciary duty in relation to the SPA relationship. The initial fiduciary duties grounded in the Brokerage Contract (and alleging a failure to follow instructions in September and October 2018) are pleaded as an alternative to a contractual claim and focus on the September-October "instructions":

> "*39. In breach of its fiduciary and/or contractual duties as set out in paragraph 5 and/or in breach of its express contractual duty to act on FDL's instructions as set out in paragraph 6 and/or in breach of its implied contractual duty to return FDL's property as set out in paragraph 8:*
>
> *(1) Canterbury failed to transfer FDL's shares to Vstock as instructed on 19 September 2018.*
>
> *(2) Canterbury failed to transfer FDL's shares to Vstock by 25 October 2018, as instructed on 24 October 2018.*
>
> *(3) Canterbury failed to transfer FDL's shares to Vstock as instructed on 26 October 2018.*"

40. In my judgment there is no coherent breach of fiduciary duty case pleaded in relation to the Brokerage Contract and/or the above non-compliance with instructions complaints. I accept CSL's case that, in this particular factual and legal matrix, no relevant fiduciary duties arose under the Brokerage Contract. It is not necessary to decide whether or not some other fiduciary duties may have arisen for CSL in circumstances where the only alleged breaches relate to a failure to follow what are asserted to have been contractually mandatory instructions. As Mr Palzer opined in relation to CSL's duties generally under the Brokerage Contract, these would not in normal market practice be viewed as being fiduciary in character.

41. But what of CSL's role as introducer of PFS and collateral holder under the Collateral Agreement? My own instinctive response to this factual and legal matrix is that it gave rise to fiduciary obligations on CSL's part. Building on paragraph 11 of the ASOC (set out above), the following further averments are made, essentially alleging that the liquidation of shares on 6 December 2018 constituted a breach of fiduciary duty out of the 23 August 2018 contractual arrangements:

> "*41. In breach of its fiduciary and/or contractual duties as set out in paragraph 5 and/or its contractual duties as set out in paragraph 7*:
>
> *(1) Without the prior authorisation of FDL, Canterbury liquidated, sold or otherwise dealt with FDL's shares, in purported satisfaction of claims made against FDL or otherwise.*
>
> *(2) Without the prior authorisation of FDL, Canterbury withdrew US$20,357,599.23, alternatively it withdrew approximately US$21,894,725.14, from FDL's account.*
>
> *(3) Canterbury failed to disclose to FDL that its CEO was also the shareholder of PFS (the Undisclosed Connection thereby remaining undisclosed) and failed to disclose the connection between Canterbury and Mr Brian Johnston, the sole director of PFS, to the effect that Mr Brian Johnston was also an officer and director of Canterbury Group Limited. Paragraph 11 hereof is repeated.*"

42. In my judgment, this is a somewhat inelegantly drafted plea that the shares were liquidated in December 2018 in breach of fiduciary duty and/or contract having regard to the duties assumed by CSL as pleaded in paragraphs 5 and/or 7 (in relation to the Brokerage Contract) and both paragraphs 11 and 12 (in relation to the SPA/Collateral Agreement). Paragraph 11 is a building block or introductory plea for paragraph 12, and cannot be sensibly understood in isolation from it. It has always been obvious that FDL's case has been that CSL was in a position of conflict (because of its connections to PFS) and breached its duty to have regard to FDL's interests as well as PFS' when considering whether or not to liquidate the shares.

43. Mr Palzer in his Affirmative Report opined as follows:

> *"36. In the trading industry generally, the term 'fiduciary' in a brokerage relationship arises only where the broker exercises investment discretion over a client's account as an "investment advisor," or where the broker undertakes a heightened duty of care and loyalty towards an investor due to a special relationship of trust or influence over the client in the context of a specific transaction or relationship.*
>
> *37. In my view, neither the Brokerage Agreement nor the Collateral Agreement are investment advisory relationships, because neither entails CSL providing either discretionary or non-discretionary investment advice to the Plaintiff for compensation…*
>
> *42. In short, neither the Brokerage Agreement nor the Collateral Agreement imposes any fiduciary duty on CSL to FDL. The duties of the Parties to each other are purely contractual and arms-length in nature. And the addition of PFS to the relationship by virtue of the SPA, while it injects an additional risk to the CSL-FDL relationship, does not convert the Transaction to a fiduciary relationship between CSL and FDL."*

44. These assertions are not entirely clear. They start with an opinion as to when the "*term 'fiduciary'…arises*" and so fall short of an opinion that in the present commercial context fiduciary duties have never been held to arise. Nonetheless, Mr Palzer stands by his initial position in his Rebuttal Report and clarifies that his view is based on the practice in the "*institutional third-party repo market*" in relation to arm's length transactions which should apply here. Dr Keysser was clear that there should have been disclosure of the relevant relationship under general standards of financial services practice. He disagreed with characterising the Put Option and collateral Agreement as a "repo" transaction but felt that even if it was fiduciary duties would be owed. In his Supplemental Report he opined:

> "… *A tri-party repo typically has three signatories, of which one is the seller, the second is the buyer and the third is the custodian. The custodian typically retains the asset which neither the seller nor the buyer can access during the term of the agreement, to ensure the security is maintained. The custodian will typically be an independent and neutral third party (and is usually a clearing bank). I would expect the stakeholder to owe fiduciary obligations to both participants, for example to disclose a conflict of interests or an existing relationship with one of them*…"

45. Clause 3.11 of the SPA provides:

> "Put Provision
> *The Purchaser shall have the right to Put any and up to all of the Shares in this transaction back to the Seller and the Seller shall have the obligation to purchase the Shares Put to the Seller from the Purchaser beginning on the day of the three month anniversary from the date of the Agreement up to and including the six month anniversary from the date of the Agreement ("Put Period") at a price of $11.26 per share for a total of $12,888,016 for all of the Shares.*
>
> *Until the end of the Put Period, the Shares shall be held by the Purchaser at Canterbury Securities and the Purchaser agrees not to use these Shares in any manner to either short YRIV or facilitate shorting of YRIV. In the event that the Shares are moved from Canterbury Securities or the Shares are used by the Purchaser in any manner shorting or facilitating the shorting YRIV stock, then the Put Provision is waived and the Seller has no obligation to repurchase the Shares.*"

46. The 'Collateral Agreement' was evidenced by FDL's 16 August 2018 letter to CSL which provided as follows:

> "*Fortunate Drift Limited agrees to leave their account at Canterbury Securities with sufficient shares to cover the Put Option issued for the sale of the YRIV stock transaction on August 13, 2018 for 1,144,584 shares.*
>
> *Further, Fortunate Drift Limited authorizes Canterbury Securities to liquidate sufficient positions in their account in the event the Put Option is exercised and in the event there is not enough cash to cover the Put Option. Fortunate Drift shall have 5 business days to provide sufficient cash to cover the Put Option exercise upon notice from Canterbury Securities prior to liquidating positions.*"

47. It is obvious, as Dr Keysser was forced to agree, that FDL had no right to unilaterally withdraw the authority conferred by this letter as long as the Put Option could still be exercised by PFS. In the present case, therefore, CSL:

(a) played a purportedly neutral role in introducing PFS to FDL and in facilitating the negotiation of the relevant agreements;

(b) agreed to hold the Collateral Shares for the purposes of the Collateral Agreement and the Put Option;

(c) implicitly assumed responsibility for ensuring that FDL's obligation to provide security for the Put Option in the SPA was complied with, and that PFS' obligation not to move any of the Purchased Shares from CSL (for the duration of the Put Option) was complied with.

48. Mr Johnston admitted that on 17 August 2018, the day after the SPA was originally intended to close but before it was formally signed by all parties on 23 August 2018 (and the sale proceeds were wired to FDL), PFS sold some of the Purchased Shares. He explained that only the terms of the Put Option remained to be finalised but this would not have impacted the sale itself and that PFS would have paid on the originally scheduled closing date. Mr Sin in a 13 September 2018

email to CSL recorded Mr Johnston as denying that any of the shares were being sold by PFS. Mr Johnston professed not to know if the shares sold were moved from CSL and insisted that if they were moved that would not affect the validity of the Put Option. He also admitted that by 6 December 2018 PFS had sold most of the Purchased Shares at a profit in the region of $2 million. This evidence illustrates the real-world commercial significance of the conflict-of-interest issue having regard to the particular role CSL performed as custodian in relation to the Put Option.

49. I have little difficulty in finding that CSL presented PFS to FDL as an unrelated third party in light of the unambiguous contemporaneous record and rejecting Ms Winczura's evidence on this issue. For example, in WhatsApp communications between Ms Winczura and Mr Coleman during the 11-12 August 2018 period of negotiations, CSL's CEO referred to PFS consistently as her "*client*" and forwarded an email from Mr Johnston to Mr Coleman in an edited form which did not reveal Mr Johnston's full name. As FDL's counsel submitted in his Opening Skeleton, it would have been easier to simply forward the full email. It was also pointed out that the name "PFS" is first documented as being mentioned by CSL in a CSL/FDL WhatsApp group chat on 16 August 2018 in the following terms:

> "*both fortunate drift Ltd and Brian - through his company PFS are both clients of Canterbury. Canterbury takes direction from both clients and has tried to do its best to get the negotiations completed in a favorable [sic] manner for both clients.*"

50. Mr Sin deposed in his First Witness Statement:

> "*127. On or about 3 October 2018, FDL discovered the undisclosed relationship that existed between CSL and PFS by way of searches conducted via the Internet. A copy of the searches is exhibited at page 904. FDL previously did not conduct any due diligence on PFS prior to entering into the SPA because it trusted Ms Winczura and believed the representations that had been made to it by her.*"

51. The veracity of this evidence was not undermined through cross-examination. The suggestion that the connection between "Brian" and CSL was disclosed in a telephone conversation on 13 August 2023 was firmly rejected by Mr Sin and is inconsistent with the contemporaneous documentary record. As just noted, three days later PFS was misleadingly described as (1) Brian's company and (2) a client of CSL like FDL.

52. The critical question is ultimately what legal principles govern the determination of when fiduciary duties arise in the context of a service provider which positively represents that they are playing an independent role. FDL's counsel submitted that this was a paradigm case for concluding that CSL owed the fiduciary duties FDL contended for because the custodianship duties assumed by CSL were analogous to the role of a trustee. The analogy is not at first blush a straightforward one, because an express trustee typically holds legal title to the beneficiary's assets. However, the mere fact that a party agrees to hold someone else's property for safekeeping or investment is suggestive of a potentially fiduciary relationship because the custodian is necessarily expected to have regard for the property rights of the client/owner particularly in the situation where the custodian is subject to conflicts of interest and has to by their own account take instructions from clients on opposing sides of the same transaction. Fiduciary duties would not arise on the part of a business providing cloakroom services because they would not be needed in the context of such a routine customer/client relationship. FDL pivotally submitted as follows in its Closing Submissions:

> "*416. Fiduciary relationships arise at law depending on the circumstances which justify the imposition of such duties: (see for example "Snell's Equity" (34th Edn.), [7-005]).*"

53. Through my own researches, I found further confirmation of this context-driven approach in *Forsta-AP-Fonden-v- Bank of New York Mellon* [2013] EWHC 3127 (Comm) where Blair J stated:

> "*173. A commercial banking relationship does not generally give rise to fiduciary duties (JP Morgan Chase Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm) at [573], Gloster J, Aff'd [2010] EWCA Civ 1221). But in relation to the duties of a global custodian, entrusted with the safekeeping of its clients' securities, and the duties of a securities lending agent, entrusted with the lending out of the clients' securities against suitable collateral, a bank may in my view be subject to fiduciary duties in respect of those activities (see generally Yates & Montagu, The Law of Global Custody, 4th ed, 2013). <u>These are the kind of activities in respect of which fiduciary duties are capable of arising by virtue of their nature</u>. In principle, therefore, I agree with AP that the relationship*

between it and BNYM was capable of giving rise to fiduciary duties on the bank's part."

[Emphasis added]

54. The Defendant's Skeleton for Trial did not address the creation of fiduciary duties other than in relation to the SPA. The Defendant's closing Written Submissions contended that a fiduciary relationship did not arise in relation to the Collateral Agreement and the Put Option because (1) no duty of loyalty was owed by CSL to FDL, and (2) no such duty could arise in any event, because it would be inconsistent with the terms of the relevant contract. I readily accept Mr Tonner KC's submission that fiduciary duties will only arise in a contractual context where they are not inconsistent with the terms of the governing contract: *Kelly v Cooper* [1993] AC 205 at 215A. However, it is far more difficult to readily accept the proposition that CSL's role was inconsistent with contractual arrangements which only explicitly bound FDL and PFS. One of the most cogent reasons for finding that fiduciary duties were assumed by CSL is that its contractual duties in relation to a bespoke commercial arrangement were not clearly defined.

55. What then is the appropriate test? Mr Atherton KC, in addition to drawing an analogy with the relationship of trustee and beneficiary, relied upon the following passages from cases which I found to be particularly helpful. Firstly, in *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 C.L.R. 41 at p.97 (High Court of Australia), Mason J described the critical features of a fiduciary relationship as being:

"*that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense… partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.*"

56. Secondly in *Hurstanger v Wilson* [2007] EWCA Civ 299, Tuckey LJ held:

"*34… The defendants retained the broker to act as their agent for a substantial fee. The contract of retainer contained the usual implied terms, but the relationship created was obviously a fiduciary one. As a fiduciary the agent was required to act loyally for the defendants and not put himself into a position where he had a conflict of interest. Yet he*

agreed that he would be paid a commission by the other party to the transaction which his clients had retained him to procure. By doing so he obviously put himself into a position where he had a conflict of interest. The defendants were entitled to expect him to get them the best possible deal, but the broker's interest in obtaining a further commission for himself from the lender gave him an incentive to look for the lender who would give him the biggest commission…

35 The broker could only have acted in this way if the defendants had consented to his doing so 'with full knowledge of all the material circumstances and of the nature and the extent of [his] interest' (see Bowstead and Reynolds on Agency (18th edn, 2006) art 44, para 6-055—duty to make full disclosure). An agent who receives commission without the informed consent of his principal will be in breach of fiduciary duty."

57. Nevertheless, CSL's counsel submitted in his Closing Submissions:

"*57. There is no dispute that FDL's account at CSL had no cash and no other securities than the YRIV shares at the relevant time. Thus, even before the exercise of the Put Option by PFS, CSL was enabled by the Collateral Agreement to exercise its own judgment, without consulting FDL, whether to liquidate enough YRIV shares in FDL's account to make sure there was enough cash available to cover PFS's Put Option. This too was for the benefit of PFS and adverse to FDL's interests.*

58. For these reasons, CSL did not owe a duty of single-minded loyalty to FDL and did not owe any fiduciary duty to FDL. It could not have done so given the terms of the Collateral Agreement, which entitled it to act in PFS's interest by liquidating some or all of FDL's shares in its account with CSL to preserve the value of the collateral in PFS's favour."

58. In effect, it was contended, fiduciary duties can never arise in dual agency situation. But, more narrowly, it was contended that the factual matrix of the Collateral Agreement was for the sole benefit of PFS. That is an unrealistically simplistic and incomplete analysis which ignores the Put Option itself which implicitly requires CSL not just to police the security interests of PFS but also the corresponding interests of FDL reflected in the provisions prohibiting shares leaving CSL. FDL's most obviously important rights included the right to recover its shares if either (a) the Put Option was waived or (b) the Put Option Period expired without the Put Option being exercised. It

is true that there are *dicta* in highly persuasive cases which make reference to undivided duties of loyalty; in my judgment those judicial observations are intended to be illustrative rather than to be construed as articulating a comprehensive set of essential indicia of circumstances which will give rise to fiduciary duties. Courts should generally resist invitations to rigidify equitable principles which are intended to be sufficiently fluid to fill gaps in the common law. No authority was cited for the surprising proposition that an intermediary acting for a single party may owe fiduciary duties but may not even potentially owe fiduciary duties when acting for both parties to a transaction.

59. There is in my judgment a heightened need for fiduciary duties when a party in the position of CSL is acting for two parties in the same transaction and it would result in standing the rationale for inferring fiduciary duties on its head to hold that such duties cannot be owed because they will be difficult to discharge. It is always possible, of course, to contract out of such duties as explicitly frequently occurs in commercial agreements. I am unable to accept the proposition that CSL advanced to the effect that no fiduciary duties could possibly arise because, in effect, it was agreed that it would have divided loyalties. It ought in principle to be possible for fiduciary obligations to arise in the context of dual agency depending on what the character of the services provided may be. In the present context, one of the most compelling reasons for imposing fiduciary duties on CSL in favour of FDL is the vulnerability FDL was unwittingly subjected to by virtue of CSL's non-disclosure of the connection between CSL and PFS. Another important reason, already briefly noted above, is the fact that CSL's own role in the bespoke SPA/Put Option/Collateral Agreement contract between FDL and PFS was not clearly defined.

60. My own researches confirm the conclusion I would have reached in any event based on the material placed before the Court: the mere existence of dual agency does not without more make the imposition of fiduciary duties legally impermissible. In *Watt-v-M'Pherson's Trustees* [1877] UKHL 208, Lord O-Hagan observed:

> "*As to the difficulty which seems to have pressed some of the learned Judges with reference to the dual agency, I concur with Lord Shand that a single agent may well advise, and often does advise, a buyer and a seller, although the duty is one of difficulty and delicacy, and I do not see that in discharging it he is relieved from the obligations as to each which confessedly he would owe to one of them if acting for one only.*"

61. Accepting entirely that there is a need for caution and restraint about importing equitable obligations into contractual commercial relationships, I find that CSL did owe fiduciary duties to

FDL which obliged it to disclose that PFS was a closely connected entity and act in good faith to FDL with a view to mitigating any relevant conflicts of interests for the following main reasons:

(a) CSL's custodianship duties were not comprehensively defined in any written instrument, but emerged out of an iterative evolution of its initial contractual relationship with FDL under the Brokerage Contract;

(b) CSL charged FDL a 3.5% fee in return for assisting FDL to raise the $10 million ($350,000). I reject FDL's suggestion that this was not due. Under cross-examination Ms Winczura agreed that normally buyer and seller would both pay a commission in relation to a stock purchase agreement[2];

(c) although it was obvious that CSL was to act for both FDL and PFS under the SPA and the Collateral Agreement, whether or not CSL was independent was a highly material commercial consideration from FDL's perspective as the events of 6 December 2018 exemplified;

(d) up until the original closing date when the terms of the SPA (but not the Put Option) were finally agreed, CSL gave the positive impression that it was a neutral actor in the transaction and made it impossible for FDL to identify any connection between CSL and the "third party" purchaser before it was committed to consummating the transaction;

(e) elementary principles of commercial fairness and equity required, in these particular circumstances, that the party charged with protecting the security interests of PFS and the interests of FDL in ensuring that all shares were kept at CSL and not used for shorting during the Put Option period should be either (1) independent, or (2) known by FDL not to be independent; accordingly

(f) CSL owed a fiduciary duty to FDL to (1) disclose the conflict of interest which existed between its obligation to act in good faith towards FDL and its own personal interests as a party closely connected to FDL's counterparty, PFS, and (2) act in good faith to mitigate the conflict when required to act in any circumstances where the commercial interests of PFS and FDL were opposed.

[2] Based on comments made on a draft of this Judgment, it appears Ms Winczura's evidence was that such a commission had been paid by PFS.

Did CSL breach its fiduciary duties?

62. The central allegations FDL makes are that CSL:

(a) had a duty not to place itself into a position where its own interests conflicted with those of FDL without disclosing the conflict; and

(b) breached that duty by (1) failing to disclose the fact that PFS, the counterparty to the SPA/Collateral Agreement transaction, was owned by Ms Winczura the principal of CSL and (2) liquidating FDL's shares without FDL's consent.

63. Based upon the findings recorded above on the disclosure and existence of fiduciary duties issues, it necessarily follows that CSL clearly breached its fiduciary duty by failing to disclose and failing to effectively mitigate the very significant conflicts of interest when it decided to liquidate the Collateral Shares in early December 2018. In the latter respect, CSL made no attempt to obtain FDL's consent for liquidating more shares than were reasonably required to meet PFS' valid security requirements or its own valid indemnity requirements in a situation in which the subsistence of PFS' security interest was vigorously disputed.

Findings: FDL's breach of contract claims

Failure to follow the 19 September 2018 and 24 and 26 October 2018 instructions

64. I summarily reject FDL's primary case that the Collateral Letter gave FDL the unilateral right to call for the return of the Collateral Shares, whether before or after terminating the Brokerage Contract. The correct analysis is framed by the fact that under the Put Option and Collateral Agreement, FDL agreed to provide security to PFS for a six-month period unless the Put Option was exercised or waived before then.

65. It is common ground that the waiver question is the only material consideration and that this issue will be determined by the Nevada Court. This Court can only find, so far as the Collateral Shares are concerned, that:

(a) if the Put Option was not waived, CSL was entitled on behalf of PFS to retain sufficient shares to cover the value of the Put Option; and

(b) if the Put Option was waived, FDL's security obligations fell away, and CSL was obliged to return the Collateral Shares (on this hypothesis held solely pursuant to the terms of the Brokerage Contract) to FDL. CSL breached its contractual obligations in failing to follow FDL's instructions.

66. It remains to consider FDL's said requests and how valid they were in practical terms as regards the YRIV shares, if any, which were clearly not caught by the relevant security obligations. While the Put Option price was fixed ("*a price of $11.26 per share for a total of $12,888,016*"), the share price was volatile. In abstract terms, FDL clearly had a right to get back its own property unless it was encumbered in some way.

67. The 19 September 2018 letter was written on behalf of FDL by New York lawyers Phillipson & Uretsky, LLP. The concluding paragraph accurately captures the basis of the FDL "instruction":

> "*The Put Provision of the SPA has been waived, and FDL's stock may no longer be used as collateral. Please arrange for the shares to be transferred back to VStock, our Transfer Agent, as soon as possible.*"

68. Unless the Put Option is found to have been waived, CSL was undoubtedly entitled to refuse to return <u>all</u> FDL's YRIV shares. The same applies to Mourant's 24 October 2018 letter, albeit that this was explicitly an instruction given under clause 2 of the Brokerage Contract which studiously ignored the Collateral Agreement and the Put Option. FDL's Cayman lawyers wrote, *inter alia*:

> "*…Please accept this letter as instructions that 4,855,416 shares of common stock of Yangtze River Development Corp be immediately transferred to our client's transfer agent V Stock Transfer DWAC Code 50236.*"

69. Assuming the Put Option had not been waived, FDL was only entitled to demand the return of such shares as were not subject to the relevant security obligations. Mourant's 26 October 2018 letter then dealt with the Collateral Agreement by characterising it as a unilateral instruction which FDL had validly withdrawn. It concluded by stating:

> "*… Accordingly, in light of your ongoing unlawful conduct, and the clear conflicts of interest you appear to be operating under, our client terminates, with immediate effect, the Brokerage Contract. Your client therefore has no lawful basis upon which to continue holding the Shares, such shares being beneficially owned by our client…*"

70. Assuming that FDL was still bound by the security obligations under the Put Option, on the hypothesis that it had not been waived, CSL was contractually obliged under the Brokerage Contract to return that portion of the Shares (if any) which was not subject to any security obligations.

71. Each of the three instructions was, assuming the existence of at least some unencumbered shares, a valid one to some extent. The proper response to an inflated demand may be illustrated through reference to the debtor and creditor position where the existence of the debt is not in dispute. The debtor will generally respond to an inflated payment demand by either (a) admitting a specific sum which is due or (b) asserting the need to adjudicate the issue of what sum is precisely due. The position of the proprietary claimant ought to be stronger in the absence of any genuine dispute as to their title. Accordingly, despite the fact that the demand FDL made was for the return of all its shares, the correct legal analysis is that CSL was in breach of its contractual obligations by, in effect, asserting the right to retain what was undisputedly FDL's property in both legal and beneficial terms. CSL ought to have acknowledged, by way of response to the September and October "instructions", its obligation to return those shares (if any) over which no security claim could validly be asserted.

72. In my judgment, it is clear that CSL held some shares owned by FDL which were not conceivably captured by any realistic PFS security claim or CSL indemnity claim. The key facts may be summarised as follows:

(a) CSL held 4,855,416 of FDL's YRIV shares;

(b) the repurchase price FDL had to secure was $12,888,016 at $11.26 per share;

(c) the SPA price was $10.72 (fixed in August 2018 on the basis of the 12-month Volume Weighted Average Price). The opening price on 6 December was $ 11.51 and the price fell dramatically without recovering the following day ending the year in the region of $4;

(d) one critical period is the time-frame within which the 19 September to 24 October demands were made by FDL for CSL to give them back their shares. During that period and for several weeks thereafter the share price was consistently above $11.26, or what Mr Palzer referred to as the "Strike Price of the Put Option". (Mr Palzer's Affirmative Report sets out a helpfully clear chart of the trading price and volatility history for the period 1 January 2018 to 15 February 2019);

(e) the second critical period is 6-7 December 2018 when by CSL's own account it was necessary to liquidate the Collateral Shares to generate cash to support the Put Option. We now know with the benefit of hindsight that CSL was able to conduct a controlled 'fire-sale' of 1.71 million YRIV shares. It achieved an average price of $10.04, according Mr Palzer, marginally below the market weighted average for the day, a cash return in excess of $17 million, comfortably over the nearly $13 million needed to secure the Put Option. Taking into account further sales on 7 December 2018, a total of 1,886,261 YRIV shares were sold for USD $19,959,397.18;

(f) Mr Palzer in his Affirmative Report describes these sales as having been made "*in order to preserve value to cover the invoice*", citing the evidence of Ms Winczura and the CSL pleading. It is therefore obvious that even in what was almost a fire-sale, all of the 4.8 million YRIV shares CSL was holding could not have been needed to secure FDL's obligations under the Put Option. Even if it was assumed in the autumn of 2018 that a fire-sale would achieve a return of only 50% of what was actually achieved (i.e. selling at $5 rather than $10), it would only have been necessary to retain at most perhaps 2.6 million of the 4.8 million parcel of YRIV shares;

(g) it might be said to be entering the realms of speculation to consider whether or not, if CSL applied its mind to the question of how much security would be needed to secure the Put Option in September and October when responding to FDL's "instructions", it might also have considered the need to secure its own indemnity obligations and rendered a hitherto unmentioned invoice in this regard. If required to make a finding on this issue I would conclude that there is simply no evidential basis for concluding that the need to secure CSL's indemnity obligations was considered even fleetingly before the Hindenburg Report sent the YRIV share price down in flames. (FDL's Expert accepted that the Report, at the very least, had a significant impact on the share

price collapsing while CSL's Expert accepted that CSL's large sales on 6 December contributed to the price fall to some extent.) However, I prefer to approach the question of CSL's indemnity rights from the standpoint of an objective analysis of whether CSL would have been entitled to assert indemnity rights and, if so, in what amount.

73. The $20 million loss of opportunity limb of the 6 December 2018 Invoice (which was not particularised in any way on the Invoice itself) seems to have been conjured out of thin air in almost magical terms. This head of claim appeared at first blush, at the *inter partes* injunction hearing in December 2018, to lack any solidity or reality. It restlessly haunted the pleadings until the trial when it gently drifted off the stage with little more than a whisper. The Projects said to have been lost to FDL appear in a list in one paragraph of the Defendant's Closing Submissions. FDL's counsel submitted that in addition to the legal objection that indemnities only cover losses which have actually already occurred:

> "*There is no (or at least no credible) evidence to support either the alleged "Fund Project", the "Belize Project" or "Project X", which losses are pleaded at paragraphs 59(c)-(d) of the Third Amended Defence and Counterclaim. Indeed, what evidence relates precisely to what "project" is unclear. The documents to which Ms Winczura was taken in cross-examination were mostly 'PowerPoint' presentations which do not make clear what loss is alleged to have been suffered, or how such loss might have been caused and how and to what extent any such loss may have been caused by FDL. What is more, they are so heavily redacted (the need for which redaction has not been explained) that they are of no use to the Court. 539. CSL did plead that, 'the precise calculation of [its] losses is a matter for expert evidence' (paragraph 59(b) (x) (3) of the Third Amended Defence and Counterclaim). However, Ms Winczura was constrained to accept that there was no such evidence before the Court. For that reason alone, the counterclaim for alleged losses must fail.*"

74. However other limbs of the Invoice were far more substantive and potentially had merit. The Invoice dated 6 December 2023 was expressed in the following terms:

> "*Sums due from Fortunate Drift Limited to Canterbury Securities:*
>
> *1) Outstanding Commission & Fees pursuant to clause 6 of the Account Agreement: USDS$ 374,539.85.*

2) Partial allocation of external legal costs and disbursements caused by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: USD$ 75,000.

3) Partial allocation of internal costs and loss caused to Canterbury Securities by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: USD$ 282,500.

4) Partial loss caused to Canterbury Securities by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: $20,000,000."

75. Without at this point formally considering their substantive merits, in my judgment CSL would potentially have been entitled to insist on security for the first three limbs of the Invoice. Items 1) and 3), certainly, had been canvassed in correspondence before 19 September 2018 and both of those limbs, although disputed, are relatively straightforward claims. In terms of the scale of this case, item 2) is a *de minimis* claim. However, CSL would in principle have been entitled to require some security for the sums it contended were due at the end of the Brokerage Contract arrangement.

76. For these reasons I find that FDL's claim for breach of contract in respect of CSL's refusal to return FDL's shares in September-October 2018 succeeds on the hypothesis that the Put Option had not been waived by PFS, to the following extent. I find that CSL was (at that stage in time) entitled to retain on a most generous view in the region of 55% of the shares as security for the Put Option and as security for its rights of indemnity under the Brokerage Contract. FDL's claim would succeed to this extent. These claims together would not have justified retaining more than between 7,500 to 15,000 more of FDL's shares in addition to the 1.3-2.6 million shares needed to secure the Put Option.

Did CSL breach its contractual duties to FDL by liquidating the shares it sold on 6-7 December 2018 after the publication of the Hindenburg Report without FDL's permission?

77. I would summarily conclude that if the Put Option had been waived, CSL breached its contractual duties only to deal with FDL's property according to its instructions. Assuming the three contractual indemnity claims are valid, CSL could have lawfully sold a small amount of shares to meet those modest claims.

78. Assuming the Put Option had not been waived I was provisionally inclined to conclude that CSL was at least potentially entitled to liquidate sufficient shares to cover the collateral obligations FDL undoubtedly owed to PFS and CSL was entitled to enforce, without FDL's permission. In the peculiar circumstances which appertained CSL was entitled to consider that the publication of the Hindenburg Report created a risk that the share price of the Collateral Shares would collapse. We now know that it did. By necessary implication, it seemed, CSL must have been contractually entitled as custodian to take steps to preserve the value of the collateral as it contended. This 'common sense' instinctive view does not survive more careful and objective scrutiny.

79. The main difficulties with CSL's position are that (a) it did not formally justify its 'fire-sale' on this basis at the time, (b) it inexplicably (in the sense of advancing no credible explanations) failed to make any attempt to obtain FDL's permission for liquidating the shares when the contract expressly required notice to be given and (c) the contractual right to liquidate was contingent upon both the Put Option being exercised (most fundamentally) and 5 days' notice being given to FDL to provide sufficient cash to cover the crystallized debt obligation. This was not the case of a custodian contractually obliged to keep share certificates at its offices hurriedly moving them to another location without notice to prevent them from being destroyed in a fire. Here, there was only a potential risk to security attached to a contingent payment obligation. CSL emailed FDL at its Hong Kong address at 1.15 pm Cayman time (2.15 am Hong Kong time, nearly four hours after the US market would have opened for trading) in the following terms:

> "*You are currently liable to Canterbury Securities for the sum of USD $20,732,019.08 as set out below. This sum is due and payable immediately. Upon delivery of this letter we will be move [sic] the current market value of the stock held in your account into the Canterbury Securities House Account and start to liquidate immediately.*"

80. There was no vaguely satisfactory reason for not contacting FDL earlier and/or through Mr Coleman who was in the Eastern Time zone and even symbolically seeking approval. Be that as it may, it would be understandable if Ms Winczura, alarmed by a dramatic market event and unable to rapidly obtain definitive legal advice on the implication of terms into a somewhat unusual contract, did not think of a somewhat esoteric justification for liquidating shares: an implied power to liquidate the shares under the Collateral Agreement. This power was invoked as an afterthought, and it was my (perhaps mistaken) impression that Mr Palzer faintly implied that this might be a situation where CSL was obliged to act irrespective of the strict contractual position:

"*Q. Having previously accepted that the collateral holder is bound by the terms upon 22 which it holds the collateral, it cannot simply abrogate to itself the right to liquidate the 24 shares or the collateral that it holds; that's fair, isn't it?*

A: I -- I mean, of -- what do you mean by 'cannot'? I mean, a contract is a contract. It might be in breach of its contractual obligations or in industry terms, the operative terms, but it doesn't mean it cannot do something; it just means it needs to answer in a court of law or whatever form you were going to hold them account to."

81. The relevant provisions of the Collateral Agreement stated:

"*Further, Fortunate Drift Limited authorizes Canterbury Securities to liquidate sufficient positions in their account in the event the Put Option is exercised and in the event there is not enough cash to cover the Put Option. Fortunate Drift shall have 5 business days to provide sufficient cash to cover the Put Option exercise upon notice from Canterbury Securities prior to liquidating positions.*"

82. Liquidating in the manner which occurred, detached from any purported exercise of the Put Option, was clearly contrary to the express terms of the Brokerage Contract and/or CSL's unwritten contractual obligations to implement the SPA/Collateral in both substantive and notice terms. How did CSL seek to legally justify what occurred? The first argument was an ambitious and surprising one:

"*69. The language of the Collateral Agreement makes clear that there are two events: - Event 1 – the Put Option is exercised; and - Event 2 – there is not enough cash [in FDL's account] to cover the Put Option.*

70. In either of those two cases, FDL authorised CSL in advance to liquidate sufficient positions in its account to address that event."

83. This is a desperate argument which betrays the weakness of CSL's legal position on this issue. The security agreement was clearly intended to become operative once the Put Option was exercised and FDL had a liquidated payment obligation. The word "and" between "*exercised*" and "*in the event there is not enough cash to cover the Put Option*" is clearly conjunctive. The parties would have had to use "or" to manifest the intention to enter into a highly unusual commercial bargain

that empowered the collateral agent to liquidate collateral before the secured obligation had even fallen due, particularly as (unlike in the case of a simple loan which would inevitably be repayable) there was no inevitability that the Put Option would ever be exercised.

84. In these circumstances it is perhaps unsurprising that CSL did not advance an alternative implied terms case. It would only have been straightforward to imply a term that short notice could be given to liquidate in response to a dramatic market event if the Put Option had been exercised. I accordingly am bound to find that, even assuming the Put Option could validly have been exercised at that juncture, CSL's actions on 6-7 December entailed a clear breach of the Collateral Agreement because it conferred no express or implied power to liquidate unless the Put Option had been exercised.

85. No matter that FDL appears to have benefitted from these sales overall, CSL selling to the extent that it did without FDL's permission breached FDL's proprietary contractual rights under the Brokerage Contract and the Collateral Agreement/Put Option. A bank can surely not exercise its foreclosure rights under a mortgage where the mortgagor is not in default at the beginning of a crash in the property market and justify the sale of the home on the grounds that (a) the mortgagee needed to protect its prospective foreclosure rights and (b) the customer's equity of redemption was preserved by the contractually unauthorised sale of their home.

86. This leaves CSL with one leg to stand on, its own indemnity claim. Clause 4 of the Brokerage Contract which was relied upon reads as follows:

> "*Indemnity and Limitation of Liability. THE COMPANY'S LIABILITY TO THE CLIENT IS LIMITED TO THE FEES PAID BY THE CLIENT TO THE COMPANY DURING THE PRIOR THREE MONTHS PRECEDING ANY CLAIM. IN NO CIRCUMSTANCES WILL THE COMPANY BE REQUIRED TO PAY A CLIENT IN RESPECT OF ANY CLAIM ANY AMOUNT GREATER THAN THREE MONTHS' FEES PRECEDING ANY CLAIM. THE CLIENT WILL INDEMNITY* [sic] *AND KEEP INDEMNIFIED THE COMPANY FROM AND AGAINST ANY AND ALL LIABILITIES, OBLIGATIONS, LOSSES, DAMAGES, PENALTIES, ACTIONS, JUDGMENTS, CLAIMS, DEMANDS, SUITS, COSTS EXPENSES OR DISBURSEMENTS OF ANY KIND OF NATURE IN CONNECTION WITH THE PROVISION OF THE SERVICES UNDER THIS AGREEMENT.*"

87. An initial reaction to the submission that this indemnity clause justified liquidating FDL's shares is that this could only possibly be valid in relation to existing liabilities which were almost undisputedly due to CSL from FDL. CSL held more than 4.8 million YRIV shares which, if even worth only 50 cents each, were more than enough to cover the liquidated claims identified in the Invoice. And this power would have to be implied, because there was no express power to liquidate client assets to secure the payment of obligations arising under the indemnity clause. It also seems impossible to sensibly construe clause 4 as limiting FDL's right to bring the present claims against CSL for, *inter alia*, breaching its contractual duties under either the Brokerage Contract or the Collateral Agreement/Put Option, for the reasons set out in FDL's Closing Submissions at paragraph 527, a point dealt with further below. What was CSL's case on clause 4 at trial?

88. CSL's Skeleton for Trial advances no positive submissions on the indemnity clause and the Invoice as a justification for the events of 6-7 December 2018. Clause 4 is merely referred to in Delphic terms which are not further elaborated upon:

> "*86. FDL having breached the Brokerage Agreement from inception, the indemnity and limitation of liability clause at T&C 4 was of immediate potential relevance to everything that happened thereafter…*"

89. CSL's Closing Submissions again relied primarily on a right to liquidate under the Collateral Agreement. It was then submitted:

> "*77…The Brokerage Contract also gave CSL the right to indemnification.*
>
> *78. Finally, CSL's financial markets expert, Mr. Keith Palzer, has opined that the liquidation of YRIV collateral was substantially supported by securities industry standards and practices to protect the parties and PFS as follows:*
>
> *(a) To protect FDL from market gyrations, which in fact the liquidation did;*
>
> *(b) to protect PFS from loss under the Transactions (in particular, by liquidating YRIV Collateral to secure obligations under the Put Option, which regardless of the outcome of the Nevada proceedings relating to the validity of the Transactions, at a minimum were considered by PFS in good faith on December 6th to be legal,*

valid, and binding documents, permitting such liquidations), which in fact the liquidation did; and

(c) *to secure CSL's indemnification rights against FDL under the terms of the Brokerage Contract (which include CSL's actions under the Collateral Agreement, as FDL itself admits by mischaracterizing the Collateral Agreement as a brokerage instruction) and from the costs of international regulatory investigations caused by FDL's misrepresentations under the Brokerage Contract, which have been clearly established at trial.*"

90. No positive submission is advanced to elucidate the precise process of contractual interpretation through which the Court is invited to conclude that CSL was empowered under the Brokerage Contract to liquidate its client's assets to secure actual or contingent and prospective claims for indemnification. Mr Palzer's views as to general market practice are not enough to enable CSL to overcome the twin hurdles of (a) no express contractual right to liquidate to satisfy claims under the indemnity and (b) the need to justify the implication of a term to fill the gap. An expert as to market practice can in appropriate cases give evidence of a relevant market custom or practice which potentially supports a judicial finding that a particular term was incorporated into a contract by necessary implication. Mr Palzer's evidence fell far short of this-in short, he did not advance any such proposition. In his Affirmative Report after citing the prohibitions on, *inter alia*, market manipulation in the Brokerage Contract, he opined as follows:

"*24. As these provisions of the Brokerage Agreement could reasonably be considered to have been breached or likely to have been breached on December 6, under trading market standards and practices, it is my opinion that CSL would have had a reasonable basis under T&C 4 of the Brokerage Agreement (Indemnity and Limitation of Liability) to liquidate assets of FDL at CSL held in the FDL account under the Collateral Agreement…*

25. In light of the serious and credible allegations in the Hindenburg report, it was reasonable for CSL to suspect that PFS and itself were victims of fraud. As such, it was also reasonable to worry that CSL and PFS would be enmeshed in multinational legal proceedings and possible investigations by multiple authorities. Therefore, collateral liquidation in excess of that required to satisfy the Put Option would have been reasonable under relevant industry standards to secure the indemnification right under the Collateral

Agreement, which covers both costs of litigating the Collateral Agreement (such as this proceeding), and costs of defending or responding to regulatory proceedings and investigations. In my view the exigencies of the circumstances and the exposure of CSL to the credit risk of FDL made CSL's actions reasonable under the circumstances."

91. This evidence on its face does not purport to support the implication of a right to liquidate client assets to enforce indemnity rights based on a market practice supporting the implication of a term to that effect. Instead, it seeks to support the case that the express terms of clause 4, in the unique circumstances which coalesced on 6 December 2018, justified what CSL did under both the indemnity and the Collateral Agreement. This was simply an expert attempting to turn straw into gold. It is entirely counterintuitive, in any event, to suggest that absent express contractual terms a custodian of any type may validly liquidate a client's assets to settle claims arising under an indemnity which have not yet even crystallised without their consent. Critically, the refusal to return the shares in September and October and the liquidation in early December were both ultimately justified wholly or predominantly by reference to FDL's obligations under entirely separate agreements to the Brokerage Contract.

92. For these reasons, FDL's claims for breach of contract succeed to the extent set out above on the alternative hypotheses of the Put Option having been either (a) waived or (b) not waived. The parties are agreed that which hypothesis applies will be determined by the Nevada Court.

93. FDL's case, beyond the narrow confines of its breach of contract claim, was that:

(a) CSL's "dumping" of 1.7 million YRIV shares on 6 December 2018 was the main cause of the price collapsing; and

(b) CSL and PFS wanted to benefit from shorting the shares so that they could, most crudely, buy shares at a rock bottom price and sell them back under the Put Option at a huge profit.

94. There are two main considerations which undermine these 'jury' points, which in fairness are relevant to whether CSL can claim an allowance in equity, a significant limb of its Counterclaim. Firstly, even FDL's own expert was forced to concede the obvious: the Hindenburg Report was a significant cause of the share price collapse. I accept Dr Keysser's opinion that the large number of shares sold by CSL contributed to some extent to the rapid drop which followed; even Mr Palzer

agreed. But I also ultimately agree with Mr Palzer's assessment that there was a real risk to the collateral and that CSL executed its crisis-sale strategy well. I am bound to find that the Hindenburg Report's publication was the predominant cause for the volatility which occurred. In short, there is no reliable evidence of the extent to which CSL selling 11% of all the YRIV shares sold on 6 December 2018 was a pivotal market factor. Mr Atherton KC did demonstrate grounds for doubting the particularities of CSL's account as to when it learned of the Report on 6 December and how it reacted, but I am unable to properly draw any adverse inferences from this.

95. Secondly, I do not doubt that CSL would have liked PFS to buy cheap and sell back to FDL at the higher Put Option price. Mr Johnston in his oral evidence admitted that doing this would be "*beneficial*". But the idea that this would have been a driving motivation for "dumping" shares makes no sense once one remembers that neither side could possibly know in December 2018 how the pivotal Put Option waiver issue would be resolved. If the Put Option was not available, PFS would have potentially been left with worthless shares. Prior to the Hindenburg Report, as Mr Johnston confirmed to Mr Tonner KC in re-examination, PFS had no interest in shorting the YRIV shares as doing so would depreciate the value of the Collateral.

96. Again, even assuming that the Put Option was indeed available, CSL had no contractual entitlement to sell more than was necessary to cover the Put Option and the modest liquidated indemnity claims. But in the final analysis I see no need to record any formal findings on these matters.

Findings: alternative conversion wrongful conversion claim

97. It is difficult to envisage how FDL's contractual claims could be found, contrary to my above findings, to be unmeritorious and its alternative tortious claims still found to be valid. The contractual and tortious claims cover the same evidential ground, viewed through a similar but distinct conceptual legal lens. In some cases, it is apparent why one cause of action as opposed to another is likely to affect the result in liability or compensatory terms. As this matter progressed to trial, I could discern no such distinctions here. I have dealt with the contractual claims first, because FDL's pleaded case primarily sought equitable compensation for breach of fiduciary duty, damages for breach of contract and lastly damages for conversion (in addition to declaratory relief). Mr Atherton KC, appearing for the 'final' having been uninvolved in the preliminary rounds, introduced in FDL's Opening Submissions (rather like a forensic party trick) the notion that the primary claim was in tort. This created the platform for the following introduction to the topic in FDL's Closing Submissions:

"*450. FDL's simplest and primary case is put in terms of the tort of conversion, a claim which CSL failed to deal with in its Skeleton Argument and failed (spectacularly given its prominence in FDL's Written Openings) to deal with in its oral opening submissions.*

451. The Amended Statement of Claim sets out FDL's case in conversion in respect of: (a) CSL's failure to transfer the Retained Shares to Vstock as instructed on 19 September 2018, 24 October 2018 and 26 October 2018; (b) CSL's liquidation of the Retained Shares; and (c) the withdrawal by CSL of the Proceeds of Sale from FDL's account (see paragraphs 39, 41(1) and (2) and 42).

452. It is trite law that the failure to return the property of another on demand amounts to conversion. It is also long established, on similar facts, that a share custodian who sells the shares of which it is the custodian and without the authority of the beneficial owner converts those shares to his own use and is liable to the principal in the tort of conversion. It is irrelevant whether the custodian achieves a better price than the beneficial owner might otherwise have done.

453. In Solloway and Another v McLaughlin [1938] A.C. 247, the Privy Council considered an appeal from Canada in which a stockbroker had sold shares belonging to their principal, believing they could achieve a good price, then buy back the shares in the market and return the 'new' shares to the principal without them being aware of the profit made by the broker. The principal discovered the scheme and brought proceedings against the broker. The principal was awarded damages amounting to the proceeds of sale received by the broker, less the value of the shares they had received back from the broker. Delivering the advice of the Board, Lord Atkin said at pp.257-258 (emphasis added): See for example 'Clerk & Lindsell on Torts' (23rd Edn.) at [16-23]. 196 'As to the deposited shares, in the circumstances of the case the [custodian broker] company never had any right to deal with them … Their disposal of the deposited shares amounted to nothing short of conversion, and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion … not knowing of the conversion, he received from the wrongdoer, and has retained, the very goods converted or their equivalent … the only effect

is that he must give credit for the value of what he has received at the time he received it, and … the damages are reduced by this amount.'

454. Lord Atkin continued at p.259 (emphasis added):

'It is objected that this will be to put him [the plaintiff] in a better position than if he had not been defrauded at all, and this appears to have influenced the decision of the majority of the Court of Appeal in Ontario. All that this amounts to is to recognize that fraudulent brokers have often sounder judgment than their clients as to the future course of markets. If the shares had been converted and not returned, there can be no question that the client would have been entitled to receive the proceeds of the conversion though he himself had planned to hold and thought he had succeeded in holding the shares until a time when the value was nothing. Fortunately for the commercial community the law has many effective forms of relief against dishonest agents, and no injustice is done if the principal benefits, as he occasionally may, by the superior astuteness of an unjust steward in carrying out a fraud.'"

98. CSL's Closing Submissions do not address the tortious conversion claim. They address the following topics:

"*2. This Defence written submission is structured as follows:*

A. Introduction

B. Brokerage Contract and fiduciary duties

C. SPA, Collateral Agreement and fiduciary duties

D. Breach of contract and the 6 December 2018 market event

E. Illegality (including market manipulation)

F. Clean hands

G. Unjust enrichment

H. Counterclaim

I. Conclusion."

99. In paragraph 48 of the Third Amended Defence and Counterclaim, CSL responds to the FDL pleaded conversion case as follows:

> "*(v) As to the alleged conversion of the Collateral Shares, such shares were fungible, such that FDL could now easily replace the Collateral Shares that were sold if it wished to do so. Accordingly, FDL has failed to mitigate its alleged loss of those of the Collateral Shares that were sold by Canterbury.*"

100. That was a threadbare plea which implicitly admitted liability, presumably on the basis that the outcome on liability would be no different to that of the contractual claim. FDL submitted that damages in conversion can be sought in relation to shares: *Solloway and Another v McLaughlin* [1938] A.C. 247 (PC) and *BBMB Finance (Hong Kong) Ltd. v Eda Holdings Ltd. And Others* [1990] 1 W.L.R. 409 (PC). I agree.

101. It appears that FDL's conversion claim must succeed based on my factual findings in relation to the fully contested breach of contract claims. It was perhaps given prominence by Mr Atherton KC because it sidesteps the need for more elaborate analysis as to precisely what CSL's contractual duties were on 6-7 December 2018. For the avoidance of doubt, I would afford CSL's counsel (who was also recently retained) a right to be heard on the conversion claim, if justice so requires, before formally entering judgment on this claim.

Findings: FDL's unjust enrichment claim

102. FDL submitted that it had made out a *prima facie* case of unjust enrichment to which CSL had failed to respond. In fact CSL relied upon its illegality and 'unclean hands' averments by way of response. Notwithstanding my findings on those answers to the unjust enrichment claim below, I defer a formal decision on this claim until my proposed separate consideration of the most important elements of the respective cases on quantum.

Summary of findings

103. Subject to an analysis of CSL's Defence and Counterclaim, FDL's claims for breach of fiduciary duty and breach of contract succeed to the extent explained above. Subject to hearing CSL's counsel

if required, FDL's claim in conversion (which did not appear to be opposed as to liability) succeeds. The claim for unjust enrichment will be dealt with at the relief stage.

Findings: CSL's Defence and Counterclaim

The Defence

104. The pleaded defences (as opposed to counterclaims) can be summarised as follows:

(a) it is denied that CSL owed FDL any fiduciary duties as, *inter alia*, CSL had no discretion to manage the Shares, FDL was a sophisticated investor and the terms of the Collateral Agreement expressly authorised CSL to act in its own interests by selling Collateral Shares to secure future payment of the Put Option;

(b) illegality and/or clean hands;

(c) under Nevada law PFS had a perfected security interest in the Collateral Shares and FDL's securities account with CSL;

(d) CSL was authorised to liquidate the Collateral Shares both in the event of PFS exercising the Put Option "*and/or under the Hampton Securities terms or the JitneyTrade terms, as incorporated into the Brokerage Contract*";

No fiduciary duties owed

105. This defence has already been considered and rejected for the reasons set out above.

Illegality and/or clean hands

106. In my Ruling dated 30 June 2023 herein refusing CSL's application for leave to adduce expert evidence in support of an essentially un-pleaded new case on fraud, I set out the following extracts from CSL's pleaded case in relation to the 'Scheme':

"*3A. In light of the evidence it has now obtained through its ongoing investigations Canterbury believes:*

a) YRIV has been engaged since about December 2015 in a fraudulent scheme to inflate the price of its publicly traded shares artificially ("the Scheme").

b) The Scheme has been driven by certain directors, officers and/or shareholders in YRIV and their respective directors and/or shareholders ("the Scheme Participants"), namely:

YRIV shareholder	***Director and/or shareholder***
Best Future Investment LLC	*James Coleman*
Crestlake Holdings Limited	*Hu Yan Ling*
FDL	*Dominic Sin, Chen Linyu and/or He Jielin*
Jasper Lake Holdings Limited	*Liu Xiangyao*
Majestic Symbol Limited	*Zhao Long*
Start Well International Limited	*Dominic Sin*

c) Alternatively the individuals identified above are nominees for other principals behind the Scheme.

d) In furtherance of the Scheme, YRIV has made material misstatements and omissions regarding YRIV's assets, liabilities, business prospects and financial condition in public statements available to investors and to its United States regulator, the Financial Industry Regulatory Authority ("FINRA"), and the US Securities and Exchange Commission ("the SEC")…

e) The result of YRIV's conduct was that the shares in YRIV that were pledged by FDL as security to PFS and deposited into FDL's account with Canterbury had negligible intrinsic value, notwithstanding their apparent trading price at the time of about US $12.00 per share.

<u>Reverse Merger and share exchange – YRIV and EML</u>

3E. As at 18 December 2015, Kirin International Holding Inc. was a publicly traded company on the OTCBB (over the counter bulletin board) and had 20,596,546 shares issued and outstanding.

3F. On 19 December 2015, Kirin International Holding Inc. executed a reverse takeover to acquire EML by way of a share exchange. As part of this transaction…

d) Kirin International Holding Inc. changed its name to Yangtze River Development Limited, which in turn subsequently changed its name to Yangtze River Port and Logistics Limited on 8 February 2018…

3G. In summary, FDL, which had been incorporated 3 months earlier with a single issued share of US $1.00, acquired a 9.64% ownership interest in YRIV purportedly worth US $166 million for nil or negligible outlay. In the premises, the transactions by which FDL obtained 10 shares in EML and then exchanged them for 16,600,000 shares in YRIV were not arms' length transactions.

YRIV's representations about its business operations

3H. The reverse takeover and distributions of shares among participants were a precursor to that part of the Scheme involving artificial inflation of YRIV stock price by means of false and misleading representation about its financial condition and prospects. Specifically, YRIV made material misrepresentations about: the existence of certain of its purported land use rights, material undisclosed adverse judgments, its status in China as an 'untrustworthy' debtor, and that as a result it was in no position to borrow the funds it claimed it needed to borrow to implement its business plan.

3I. Ultimately, when the market began to discover the true position as a result of press commentary on YRIV – particularly the Hindenburg Report published on 6 December 2018– its shares began a precipitous slide in price. During 2019, FINRA found that YRIV had participated in a scheme to artificially support its stock price; had made false and misleading statements in its press releases and to FINRA; and had failed to make any significant progress towards executing its business plan since its listing more than two years earlier. As a result, FINRA determined to delist YRIV. Further, as YRIV and FDL were both Scheme Participants, FDL knew of and participated in YRIV's misrepresentations…" [Emphasis added]

107. The central thesis is that FDL was involved in fraudulent market manipulation, artificially inflating the value of YRIV shares, through (together with other persons interested in YRIV) making false

public statements about the true state of YRIV's financial affairs. Reliance is also placed on the definition in clause 11 in the Brokerage Contract:

> "*Market manipulation is a deliberate attempt to interfere with the free and fair operation of the market and create artificial, false or misleading appearances with respect to the price of, or market for a security…Market manipulation is prohibited in the United States under the Securities Exchange Act of 1934 ('Act'), and in other countries. The Act defines market manipulation as transactions which create an artificial price or maintain an artificial price for a tradable security…*"

108. CSL's previous attorneys clearly did not consider that expert evidence was required to support these pleas. The Court can take judicial notice of the fact that market manipulation defined in this way is prohibited by the laws governing the world's leading markets. Further and in any event, the pleading alleged common law fraud. The Court does not require the assistance of experts to determine (a) whether or not statements about issues as the existence of a lease or disclosures about legal proceedings are false, (b) whether or not any such false statements would create or maintain an artificial share price, and/or (c) whether or not persons who deliberately make false statements as part of a market manipulation scheme are acting fraudulently. Further and in any event, FDL did not deny that if CSL's pleaded case was proved its own alleged conduct would constitute market manipulation.

109. My 30 June 2023 Ruling refusing leave to adduce expert evidence was delivered after the end of the part-heard trial because I had adjourned CSL's application made the month before the trial to adduce expert evidence to the trial. The application was heard on 22 May 2023 and the trial was due to commence on 5 June 2023, two weeks later, a date which had been fixed in or about September 2022. The aim of the adjournment was to place the Court in the best position to effectively and fairly evaluate the application in light of the evidence adduced at trial. CSL's application could properly have been refused on the grounds that it was inexcusably late. However, due in part to other judicial commitments at the time of the 22 May 2023 hearing, which was opposed in part through a less than straightforward and equally late strike-out application, I was simply unable to form a clear view of the nature and scope of the CSL case on market manipulation and the adequacy of its pleadings in the course of that hearing. I had formed a clearer view of both issues by 30 June 2023, and I noted in my Ruling of that date:

"*13. The most obvious question raised by the first limb of the market manipulation case is whether or not the pleaded allegations that YRIV made false representations about its financial position are capable of proof based on the admissible evidence before the Court. That is, however, an issue to be addressed by way of closing submissions…*

24. As foreshadowed above, I find that Third Amended Defence and Counterclaim adequately pleaded the following case on market manipulation:

(a) the Plaintiff as a shareholder of YRIV was an active member along with other shareholders in implementing the "Scheme";

(b) the "Scheme" centrally involved artificially inflating the value of YRIV's shares by making false filings and other public statements about YRIV's true financial position;

(c) the Scheme was fraudulent and constituted unlawful market manipulation as defined in the Brokerage Contract…

28. … it is pivotally alleged:

(a) an alleged lease at Chunfeng Village did not exist;

(b) its disclosure about litigation was materially false and misleading; and

(c) as a result YRIV had no realistic prospect of raising the US$1 billion it needed to progress its business plan…."

110. So my provisional view at the end of the trial was that CSL would have difficulty in establishing the falsity of the statements upon which it pivotally relied in support of its pleaded market manipulation/fraud/illegality case. This provisional view was fortified in an impressionistic sense by the fact that CSL's supplementary submissions, in support of its application to for leave to adduce expert evidence (in the form of a tendered report) in support of a case pleaded over three years ago, sought leave to adduce an entirely new expert report from an unidentified new expert witness in support of an entirely new and un-pleaded case on market manipulation. Against this background, it is possible to consider the merits of this Defence in a more economical way than might otherwise be required.

111. CSL adduced no direct evidence of its own, for instance, to prove that the critical lease did not exist or that the disclosures about the litigation against YRIV were false and misleading. It relied on YRIV's public regulatory filings and cross-examination of Mr Sin and the fact that allegations had been made in commercial publications that YRIV was engaged in market manipulation. It also relied on what were characterised as FINRA "findings", but it was accepted that because of the hearsay rule neither the media material nor the regulatory reports constituted evidence of the truth of any of the statements made. Properly analysed, there were no formal adverse regulatory findings of market manipulation at all. The evidence CSL relied upon supported at best reasonable grounds for suspecting that FDL and other YRIV-linked parties were engaged in market manipulation by grossly exaggerating YRIV's true financial position. This conclusion is supported by the following extract from NASDAQ's delisting decision which FDL commended to the Court:

> "*On this record, the Panel cannot determine whether the Company, its associates, its affiliates or other parties have engaged in stock manipulation or whether the allegations in the Hindenburg Report and the FINRA investigation will prove true*." [Emphasis added]

112. As far as the pivotal allegedly false statements are concerned, I find based on an assessment of Mr Sin's oral evidence viewed in light of the relevant YRIV filings that:

(a) the alleged lease did probably in fact exist. It was disclosed that its legal validity was potentially subject to challenge and that this would be a material adverse development. CSL failed to prove that any intentionally false statement was made by the Scheme participants in this respect;

(b) CSL has failed to prove that intentionally false statements were made in the disclosures about litigation pending against YRIV by FDL as one of the Scheme participants. Mr Sin gave a plausible account as to why certain outstanding judgments had not been disclosed in YRIV's financial statements. His evidence was not directly contradicted by any admissible evidence.

113. One of the documents which was referred to was YRIV's 10K filing which attached its 2015 Annual Report. At internal page 17 is reference to the lease of land at Chunfeng Village with the reference "*Land Lease No. HZ20150427*" and an expiry date of 26 April 2025. The relevant accounts were supported by an unqualified Auditor's Report. The 10K filing attaching YRIV's 2017 Annual

Report was referred to as well. This was also supported by an unqualified audit opinion. At internal page 19 the following disclosure is made in relation to the relevant lease:

> "*IF THE LEGALITY OR VALIDITY OF OUR LEASE OF THE COLLECTIVE-OWNED LAND USE RIGHTS IS CHALLENGED, THERE MAY BE DISRUPTION TO THE DEVELOPMENT OF THE LAND AND SUCH DISRUPTION COULD HAVE A MATERIALLY ADVERSE EFFECT ON OUR RESULTS OF OPERATIONS.*"

114. A fulsome account is then given about the status of the lease. YRIV expressly disclosed that it was possible that as a result of a legal challenge the lease might, in effect, be held not to exist. CSL further suggested that the general statement that there was no litigation which would have a material adverse effect was contradicted by various pieces of non-disclosed litigation. Bearing in mind that the auditors considered these statements to be fair, it is easy to accept Mr Sin's evidence that while certain judgments or pending litigation had not been disclosed, the financial impact of these matters was not as significant as CSL, by way of argument (as opposed to evidence), suggested that it was. The fact that YRIV had disclosed one legal challenge as being potentially material to its financial position demonstrated that some attempt at least had been made to fairly engage with the broad topic of material adverse developments. This was a world away from supporting a positive case of deliberately false averments being made in a company's financial statements.

115. The regulatory delisting decisions in 2019 admittedly provide reasonable grounds for suspecting that market manipulation in the pleaded sense may have occurred. But those decisions were far from formal judicial determinations; they were administrative decisions reached without any full inquiry with YRIV in one instance being criticised for not engaging with the regulatory process. Accordingly, the pleaded illegality defence fails.

116. For completeness, it seems appropriate to expand upon the reasons for my summary decision on 30 June 2023 to refuse CSL's application for leave to adduce expert evidence to advance an entirely new case on market manipulation. Firstly, it is important to dispel any impression that the Court has rejected this defence based purely on technical pleading rules and turned a blind eye to clear evidence of fraud. Considering whether there was other evidence of fraud is also potentially relevant to CSL's 'unclean hands' defence and evaluating whether FDL has in general terms disqualified itself from seeking any equitable relief.

117. There is no clear evidential basis for the proposition, which was not even formally advanced, that the alleged Scheme participants always knew that they would not obtain the port project. It seems possible that YRIV needed to raise $100 million but it is impossible to fairly assess by how far they fell short and what other fundraising attempts were being made apart from those of Mr Sin through Canterbury. However, I do not ignore the desperation of FDL's pleas to forward the $10 million in the period immediately preceding the Barron's stories, with no clear evidence advanced by FDL about how close to obtaining the port contract YRIV was. This potentially supports a finding that FDL must have known before the 23 August 2018 agreements with PFS were consummated that it would soon become public knowledge that the port project had been lost. Did Mr Sin know that the port project would be lost when he was chasing Ms Winczura about non-receipt the sale proceeds on 29 August 2018 via WhatsApp stating: "*Please, it is very important to tracking this today. Because of we suppose to be signed the final agreement with counter party*"?

118. The best available evidence in fact suggests that, as Mr Sin testified, YRIV did not formally discover it had lost the port project contract until the end of August or beginning of September. In the 27 August 2018 Barron's story, Mr Coleman was quoted as promising that a statement about the port project would be forthcoming in the following week. YRIV announced the unsuccessful bid on or about 4 September 2018, and Barrons reported on the announcement on 6 September 2018. This suggests that FDL did not positively know that the bid would be lost until after the SPA transaction had been consummated and they had received the $10 million. It is really only speculation to suggest that the Scheme participants always knew that their bid for the port project would fail and that YRIV would never amount to more than a 'hill of beans'. Only an exploration of the port project bid process would afford insights into the actual facts. There simply is no sufficient evidence to support positive findings that YRIV was operated as a fraudulent market manipulation scheme. Litigants may speculate, courts may not.

119. As regards the commercial context which gave rise to these proceedings, the position in broad outline was as follows. Any savvy investor would surely have known that investing in YRIV shares in the summer of 2018 was, more so than in the case of the typical investment, a bit like playing a guessing game. YRIV needed to raise capital to win the port project and potentially succeed. If it did not win that key contract, it had little underlying value. Hope springs eternal in every investor's breast. Despite the announcement that YRIV had lost the port project in late August, the market (perhaps in part due to light trading facilitated by YRIV's controllers) did not significantly react until the Hindenburg Report was published in early December 2018. PFS' risk was guaranteed by

the Put Option within the second half of a six-month window assuming it did not in the interim waive the right to exercise it.

120. The evidence broadly suggests that both parties were operating in something of a 'cut-throat' world. Mr Sin, for example, was keen to underplay the obvious fact that FDL's main motive in opening the CSL account was actually to raise money. Ms Winczura, on the other hand, was keen to underplay the obvious fact that she was keen to board what appeared to be, potentially at least, an YRIV gravy train. Why else would she arrange to buy the SPA shares through a company she controlled, and (through that company) eagerly start selling them at a profit before the sale had even been formally consummated? A dramatic presentation of this commercial tale could not fairly cast Ms Winczura as Little Red Riding Hood and Mr Sin as the 'Big Bad Wolf'.

121. As things turned out, the share price did not immediately tank in response to the Barron's Report of 6 September 2018 which reported on the loss of the pivotal port project, following up on the 27 August 2018 article suggesting YRIV was desperately in need of investor support. As FDL pointed out, PFS could have sold all of the SPA shares before December at a profit if it had been so obvious that YRIV had no prospects at all without the port project. No misrepresentation complaints were advanced against FDL in respect of the port project issue. So CSL is hardly a victim in the classic sense.

122. In the course of the trial, Mr Sin described attempts to "dry up" the market in YRIV shares during a battle with a short-seller. Was this market manipulation? CSL could have pleaded a case based on this alternative form of market manipulation before Mr Sin's oral admission of what had occurred in another litigious commercial relationship. CSL was aware of FDL's completely transparent concerns to limit the size of the public float based on a concern about short-selling due to a somewhat hysterical reaction to the discovery that the Purchased Shares were being sold. In evaluating the risks of buying the shares FDL sought to sell to raise money to invest in YRIV, Ms Winczura described in her Witness Statement (at paragraph 30 (b)) one of the following concerns:

> "*The volatility of YRIV's share price also made it an unattractive deal for a potential buyer of a large block of YRIV shares, in light of the relatively low trading volume. This was because it is generally difficult to sell a large block of thinly-traded shares at one time without having a negative effect on the share price as a result. A purchaser of a large block of such thinly-traded shares would therefore normally expect to have to sell the shares in*

small increments over an extended period in order to avoid depressing the price and suffering a loss as a result…"

123. More importantly than this, CSL acquiesced in the consummation of the Put Option which contained the following critical provisions:

"*Until the end of the Put Period, the Shares shall be held by the Purchaser at Canterbury Securities and the Purchaser agrees not to use these Shares in any manner to either short YRIV or facilitate shorting of YRIV. In the event that the Shares are moved from Canterbury Securities or the Shares are used by the Purchaser in any manner shorting or facilitating the shorting YRIV stock, then the Put Provision is waived and the Seller has no obligation to repurchase the Shares."*

124. It is impossible to make sense of FDL obliging PFS to keep the Purchased Shares with CSL unless FDL (a) wished to limit the number of shares entering the public market in an unrestricted way, and (b) expected CSL as an apparently neutral broker to ensure that PFS honoured its commitment not to allow the Shares to be used "*in any manner to either short YRIV or facilitate shorting of YRIV*." Neither CSL nor PFS raised any objections at the time to the principle of a purchaser of shares agreeing to restrict their use during a six-month long period, or such shorter period as the Put Option might be in force. An 8 August 2018 email from Mr Coleman appears to be the first documented record of the restriction:

"*Hi Erin,*

As per our conversation, here is the concept for marrying a put option to the $10 mm block trade that you have arranged. Fortunate Drift Limited (FDL) will sell the block of YRIV with a 10% discount from the current market price and a 3.5% fee for Canterbury. The net price per share will be around $10.10 per share. For 1 mm shares, this will be slightly over $10 mm. FDL will issue a 6 month put option to the buyer for the 1 mm shares with a $12/share strike price ($12 mm). The objective is that FDL will 'guarantee' that the Buyer will have at least a 20% profit on this transaction after 6 months. The conditions of the put are:

1. It can be exercised 6 months from the date of the purchase of the block.

2. FDL, which has already delivered 6 mm shares of stock into their account at Canterbury, will always maintain either sufficient stock or cash to cover the $12 mm as long as the put option is in place.

3. The Buyer agrees not to short YRIV or lend out the shares to any short trader for the duration of the put option or it becomes null and voided.

4. If the Buyer sells any stock prior to the 6 month hold period of the put option, the put for those shares is null and voided.

This structure allows the Buyer to participate in an upside movement of the stock after the S 3 A goes effective and if the price of the shares appreciates, without taking a market downside risk.

I trust that this accurately reflects the conversation that we had on this matter." [Emphasis added]

125. There was a bit of controversy when Mr Johnston later sought to excise those restrictions after the initially intended operative date, perhaps because PFS had already started selling the shares and he had anxieties as to whether that was permissible. Mr Coleman complained in a 20 August 2018 WhatsApp message:

> "*They changed the put option completely. It gives FDL absolutely no protection. Based on the new language, Brian can exercise the put 1 day after the transaction and force the liquidation of stock to cover it. He can also short the stock, transfer the positron away from Canterbury or have the position loaned out to facilitate the shorts. Everyone wants Brian to make a very good profit, but this has now become extremely risky for FDL…*"

126. After a conference call, the language FDL wanted was restored. CSL must be deemed to have known that PFS had passed the point of no return by starting to sell the shares it had not yet technically purchased by unilaterally treating a provisional closing date as an actual closing date some two weeks before FDL would eventually receive the purchase monies. It ought to have been obvious that FDL wished to protect the share price from being undermined by trading activities which shareholders would normally be free to engage in, yet neither CSL nor PFS suggested at that time that this constituted market manipulation. In early September after FDL discovered that some

of the Purchased Shares were being sold, it sought to have them transferred to a VStock account to make that impossible. CSL and/or PFS were entitled to object to this, in my judgment, because the Put Option did not in fact (as FDL may have hoped) prohibit selling of the shares. Whether or not the shares would remain at CSL as initially agreed, FDL was seeking to modify the operational terms of the agreement.

127. CSL first raised the proposition that the historic pattern of thin trading in YRIV shares apparently directed (or at least supported) by YRIV insiders might constitute unlawful market manipulation nearly 5 years after the commencement of this litigation, and at the very end of the trial. It was admittedly put to Mr Sin in cross-examination that the trading practice pattern in the second half of 2018 suggested that someone was controlling the price. But this pattern was readily apparent long before April 2020 when CSL re-amended its pleadings to advance the market manipulation case. CSL is not an initiate in this field and may fairly be viewed for present cases as a sophisticated commercial actor. The failure to advance a case based on this alternative form of market manipulation is therefore a strong indicator that FDL's relevant conduct was not fraudulent in any obvious or straightforward sense. This was a dispositive justification for not granting CSL leave to advance in 2023 (and potentially beyond) a case which it could in substance have advanced in 2019. It also provides a helpful starting point for considering the 'unclean hands' defence.

128. CSL's 'unclean hands' defence was summarised in its counsel's closing Submissions as follows:

> "*9. Put simply, CSL's position is that it would never have done business with FDL had it known that FDL and others were operating a fraud. CSL was deceived by FDL. It is the Defendant's case that FDL should be denied relief in view of the underlying illegal scheme upon which its claim is founded.*"

129. The 'unclean hands' defence fails insofar as it is based on the pleas that FDL was a participant in an unlawful market manipulation scheme because the pivotal allegation that FDL was engaged in the fraudulent Scheme has not been proven. The merits of the fraudulent misrepresentation counterclaim will be considered below.

Perfected security interest under Nevada law

130. This defence was not pursued at trial.

Findings: CSL's Counterclaims

Preliminary

131. It is CSL's case that it was induced to enter into the Brokerage Contract by fraudulent misrepresentations by FDL about, *inter alia* (1) its beneficial ownership (Mr Chen was said to be its beneficial owner in May 2018. In November 2018 Mr He was said to have been the beneficial owner since 1 February 2018), and (2) the fact that FDL's beneficial owner did not control 10% or more of a public company or control, indirectly or directly, 20% or more of a public company (in fact it is highly likely that Mr Chen owned or controlled 10% or 20%, respectively, of a public company, YRIV). It is averred:

> "54A. *By reason of FDL's fraudulent misrepresentations and/or breaches of the Brokerage Agreement pleaded at paragraph 4A1-4A4 above, Canterbury has become involved as an unwitting actor in the execution of the Scheme, and is now subject to the current claim by FDL. Canterbury is accordingly entitled to an indemnity from FDL at common law in respect of losses caused to Canterbury by FDL's involvement in the Scheme, such that FDL's claim against Canterbury fails for circuity of action; alternatively Canterbury is entitled to damages from FDL in an amount equivalent to any liability that FDL establishes against Canterbury.*"

132. CSL has failed to prove that FDL was involved in the alleged Scheme, so it remains to consider the two limbs of the misrepresentation claims. At first blush, there appears to be a significant disconnect between the decision to enter into the Brokerage Contract and the largely freestanding arrangements surrounding the SPA and which led to the present dispute. However, in general terms it is clearly fair to argue that had FDL not been taken on as a client in May 2018, the subsequent transactions would not have occurred.

Fraudulent misrepresentations as to FDL's beneficial ownership

133. CSL treated the Court to a 'trial run' of its case on beneficial ownership at the interlocutory stage. FDL's evidence was so unsatisfactory that I released CSL from its undertakings in place of the injunction granted in December 2018. It is important to appreciate at the outset that I had difficulty with accepting at the interlocutory stage that FDL's beneficial ownership had been changed from what it was in May 2018, not that the initial position represented to CSL was incredible. In

Fortunate Drift Limited -v- Canterbury Securities Limited [2020 (2) CILR 118], I concluded based on the evidence then available:

> *"59. However, the following important aspects of the case for non-compliance with the AML order by failing to credibly explain the beneficial ownership position are not diminished by the further documents:*
>
> *(a) the lack of evidence of an actual share purchase agreement pursuant to the swap which merely contemplated such a transaction and did not on its face purport to effect sale of the sole share in FDL;*
>
> *(b) the lack of evidence of an executed share transfer instrument (standing by itself perhaps merely an administrative matter);*
>
> *(c) the fact that Mr. Chen signed documents in May 2018 representing to Canterbury that he was the beneficial owner of FDL and a director at a time when Mr. Sin in these proceedings now swears that he was not;*
>
> *(d) the fact that Mr. Sin on behalf of Mr. Chen swore on May 2nd, 2018 when verifying the America 2030 complaint that Mr. Chen was then the chairman and chief executive officer of FDL when he now swears in these proceedings that Mr. Chen was not at that time still a director or a beneficial owner;*
>
> *(e) the fact that FDL equivocated about its ownership in the Stenergy proceedings on December 4th, 2018 only weeks after the ownership position was suppose*[dly regularised] *and*
>
> *(f) the strong overall impression that identifying who the beneficial owner is ought ordinarily to be a simple and straightforward proposition and that FDL has overall dealt with explaining the position in a wholly unconvincing and generally evasive manner."*

134. The corporate administrative confusion was summarised earlier in the same judgment as follows:

> "*12 The foundation for the March letter was said to be Canterbury's discovery of an apparent change in FDL's ultimate beneficial ownership. The relevant concerns may be summarized as follows:*
>
> *(a) FDL opened its account with Canterbury on the basis that, as confirmed by a copy of its register of members provided in August 2018, a Mr. Chen was the sole member. This was certified to be a true copy of the register on August 21st, 2018.*
>
> *(b) In response to the March letter, FDL provided a copy of its register of members certified as being a true copy on October 15th, 2018, which showed that the sole share in FDL had been transferred from Mr. Chen to a Mr. He on February 1st, 2018, three months before the account with Canterbury had been opened.*
>
> *(c) FDL pursuant to para. 1 of the AML order (and in respect of requests (a) and (l)) provided documents which did not resolve the ambiguities in the beneficial owner position. This was because, inter alia:*
>
> *(i) an agreement dated January 31st, 2018 contemplating Mr. Chen swapping his 100% ownership of FDL for an interest in a Chinese company owned by Mr. He and a Ms. Zhong ("the swap") on its face amounted to an agreement to agree, not a completed transaction. Corporate searches subsequently carried out suggest that Messrs. He and Chen have never been shareholders of the Chinese company in question;*
>
> *(ii) the second version of the register of members suggested that Mr. Chen transferred his sole share in FDL to Mr. He on February 1st, 2018;*
>
> *(iii) the second version of the register of directors suggested that Mr. Chen resigned as a director on February 1st, 2018 and that Mr. He was appointed, followed by Mr. Sin on February 10th, 2018.*

13 In response to this evidence, FDL produced written resolutions dated October 10th, 2018 purportedly formalizing these early 2018 changes in ownership and directorship terms ('written resolutions'). In the second affidavit of Eric Miller, he deposes that these documents themselves raise serious concerns, including:

(a) The written resolutions purport to be signed by Mr. Sin and Mr. He on October 10th, 2018 in their capacities as directors accepting Mr. He's resignation on February 1st, 2018 and appointing Mr. He as a director with effect from the same date.

(b) It appears that Mr. Sin was not validly appointed as a director by anybody. It was not resolved that Mr. He should be appointed a director until October 2018, so he could not have validly appointed Mr. Sin on February 10th, 2018.

(c) The written resolutions do not purport to ratify the appointment of Mr. Sin. Mr. He could not have validly and retrospectively appointed himself as a director with effect from February 1st, 2018.

(d) In proceedings against YRIV and FDL in the New York State Court commenced by Stenergy LLC ("the Stenergy proceedings"), para. 5 of the complaint alleged that FDL was incorporated in BVI, owned by Mr. Chen and that Mr. Sin was its US agent. The answer dated December 4th, 2018 stated:

'5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 5 of the Plaintiff's Complaint and on that basis denies the same.""

135. Round 1 to CSL. FDL sought to address these concerns through producing a copy of an actual share swap agreement between Mr Chen and Mr He and the trial evidence of Mr Sin. Sold and Bought Notes and an Instrument of Transfer, all dated 1 February 2018, were also placed before the Court. The main gap in FDL's defences was the absence of a single piece of contemporaneous evidence demonstrating instructions to FDL's registered office in the BVI about the change of directorship and legal and beneficial ownership prior to the autumn of 2018 and/or evidencing the creation of these documents in early 2018. Having averred that all the Corporate Documents had been created and signed on or about 1 February 2018, Mr Sin addressed the important matter of why they were

not reflected in the FDL registers until months later in his main Witness Statement in the following way:

> "*35. The Corporate Documents were returned by post to Sun Chiap on or around 1 February 2018 after they had been signed. FDL did not keep any record of proof of its postal submission of the Corporate Documents to Sun Chiap. FDL did not have any direct communications with Vistra as such communications were through Sun Chiap. When the ownership of FDL was transferred from Mr Chen to Mr He Jielin, FDL continued to use the same corporate governance structure as before: using Sun Chiap as the agent for communications between Vistra and FDL. FDL therefore relied on Sun Chiap to transmit the Corporate Documents onwards to Vistra. Mr Chen was the instructing party to Sun Chiap for the purposes of submitting the Corporate Documents to Vistra and recording the change in shareholding as a result of the Share Swap. I was not involved in the communications between Mr Chen and Sun Chiap at the relevant time but I believe that Mr Chen would not have informed Sun Chiap about the Share Swap Agreement. This belief is based on my experience and understanding when submitting documents to corporate secretarial firms to record certain transactions. The underlying documentation for the transaction itself is not typically requested or required by the firm providing the secretarial services. By way of example, in order to effect a share transfer, you would instruct the corporate secretarial firm who would then provide a standard set of corporate documents already prepared to reflect and effect the transaction (e.g. instrument of transfer and corporate resolutions for a share transfer) but further information in relation to the underlying transaction is typically not sought or required.*"

136. What is most problematic about this account is that it is entirely inconsistent with the documents that FDL provided to CSL in response to their March 2019 AML letter which suggested that incoherent, rushed attempts had been made in October 2018 to retrospectively document the changes of directorship said to have occurred on 1 February 2018. The new corporate documents which seek to clarify the past confusion can surely only have been created after my April 2020 AML Judgment. If the right documents had been carefully prepared in early 2018 and duly executed, why would such hapless attempts have been made in October 2018 to do it all over again? One would normally expect the registered office service provider to draft official corporate records, send them to the client to execute and return and then the service provider would promptly register them. Since Vistra is based in BVI, Mr Sin in Hong Kong and Mr Chen and Mr He in either Hong Kong or Mainland China, such communications would be expected to take place in part at least by email.

137. It makes little sense that Vistra should prepare important documents for execution on 1 February 2018, send them to the intermediary Sun Chiap and having received the signed resolution appointing Mr Sin then fail to chase up the more important documents relating to replacing Mr Chen with Mr He. A change of legal and beneficial ownership is unlikely to have been regarded as a minor detail by a prominent BVI registered office provider. There is not a jot of contemporaneous documentary evidence supporting the proposition that Mr He was held out to anyone anywhere in the world as being the FDL owner and a director before October 2018. It seems more plausible that Mr Sin, who was clearly held out to the world as a director in the first half of 2018, was in substance appointed in early 2018. It seems improbable that the change of beneficial ownership occurred in early February at all. This was the version of events Mr Sin was required to verify in his oral evidence.

138. Mr Sin started off his evidence through an interpreter but, as his confidence grew, he dispensed with her services and addressed the Court in English which I (unlike the stenographer) found easy to understand. At the beginning of his evidence, when concern was raised about my ability to see his face while he was responding to counsel, I noted that the modern judicial approach is to be reticent about over reliance on demeanour, especially in cross-cultural contexts. Lady Rose in a recent speech has confirmed this view, also noting that it is only completely dishonest witnesses who can give false evidence in an entirely convincing manner: '*The Art and Science of Judicial Fact Finding*' (Canadian Institute for Advanced Legal Studies/The Cambridge Lectures, Queens' College Cambridge, 14 July 2023) at paragraphs 46-50. As indicated earlier in this judgment, I found Mr Sin to be a generally credible witness. Such witnesses will on occasion be unable to avoid being economical with the truth, but they can rarely do so in an entirely convincing manner. Mr Sin was also a somewhat demonstrative man, who has studied in England, and so I ended up feeling that I could place some reliance on his demeanour.

139. He admitted under cross-examination that the CSL Account Opening Form he assisted Mr Chen to complete gave a misleading impression because Mr Chen had ceased to be a shareholder/director since 1 February 2018. His explanation was that because the corporate records had not yet been changed at the registered office and the only documents he could produce still showed Mr Chen's involvement, he and Mr Chen signed the Account Opening form on this basis. He had no credible explanation for the absence of contemporaneous documents such as emails relating to the change of ownership issue. He explained not inserting Mr He as beneficial owner by failing to understand at that time the concept of beneficial ownership.

140. My initial reaction to Mr Sin's evidence as he gave it was that it was plausible that he would feel compelled in the heat of the moment to rely on the existing formal corporate ownership and directorship issue when filling out the form as this would have been the best representation of the current legal and factual position. I also felt (it now seems somewhat naively) that it was plausible that Mr Sin did not at that juncture understand the difference between legal and beneficial ownership. On reflection this seems most improbable in light of his apparent sophistication and likely experience (as the only member of the Founding Investors to speak English) of dealing with AML requirements in the United States, not to mention the BVI. However, I remained deeply suspicious during his evidence, as I was when delivering my AML Judgment on 15 April 2020, about the truth of the assertion that these significant changes had actually happened in 1 February 2018 at all.

141. Mr Sin, perhaps seeing incredulity on my own face as he gave his evidence on this issue, attempted vainly to explain what occurred in a clear and straightforward manner. (This was one of the earliest points in his cross-examination when he felt he could do better than the interpreter by speaking in English). He was clear but unconvincing.

142. Try as I might, I find it impossible to believe that the change of ownership both occurred and was formally documented on 1 February 2018 as Mr Sin claims. Judges are encouraged to rely more heavily, when contemporaneous documentation is absent, on the inherent probabilities of controversial assertions than on demeanour. Judges are entitled to adopt the position of Alice in '*Through the Looking Glass*', that "*it's no use trying. One can't believe impossible things.*" Judges should forswear the approach of the Red Queen, who boasted by way of reply that with practice she was able to believe "*six impossible things before breakfast*". The only constraint on this common sense approach is where one is dealing with an unusual situation. As Maurice Kay LJ observed in *Prebb-v-Costa* [2010] EWCA Civ 717 (Rix LJ and Patten LJ concurring):

> "*46. Inherent probabilities or improbabilities often assist in determining the terms of an oral agreement. However, on any view the facts of this case are unusual. It is of little benefit to ask what normally happens in such situations because this was not a normal situation…*"

143. In my judgment inherent probabilities clearly assist when analysing matters which are almost invariably dealt with in a similar way such as changes of legal ownership in relation to shares. Paragraph 6.2 of the FDL Articles provides that no transfer of shares shall be effective until it is registered in the company's books. What happens as regards beneficial ownership alone is often opaque, with beneficial owners often seeking to remain hidden. When legal and beneficial ownership are transferred at the same time to a new owner, that change is ordinarily promptly recorded for both commercial and regulatory reasons. A person that assumes full ownership of a company ordinarily wishes to exercise their ownership rights. A person who has decided to relinquish legal and beneficial ownership of a company would ordinarily wish effect to be given to that relinquishment as soon as possible. Corporate service providers who are aware of a change of beneficial ownership and have prepared documents to give effect to such a change are likely to want to discharge their own AML obligations by registering the change as soon as possible. It is not in any way counterintuitive to find that FDL gave false evidence about its beneficial ownership position in a different way to that proposed by CSL. The beneficial ownership point was raised by CSL as part of a litigation strategy, and this in my judgment explains why the complaint was made (and subsequently pleaded) that FDL had falsely represented the beneficial ownership position at the beginning of the relationship rather than at the end. Misrepresentations made after the present dispute and the Nevada Proceedings were on foot are of marginal relevance to the merits of this dispute.

144. The admittedly circumstantial evidence all points inexorably to the following conclusions:

(a) Mr Chen decided to appoint Mr Sin as a director of FDL in early 2018 and held Mr Sin out as a director by permitting him to commence fundraising efforts in the US as evidenced by his meeting with CSL in April and entering into the Brokerage Contract in May 2018;

(b) in the heat of the fundraising battle, the corporate formalities relating to his appointment were overlooked;

(c) Mr Chen remained the beneficial owner of FDL both legally and beneficially. This is why Mr Sin continued to use Mr Chen's email address. This is inherently unlikely to have occurred if in reality Mr He had in substance become beneficial owner of FDL on 1 February 2018, regardless of what the corporate records showed;

(d) in or after October 2018, Mr Chen and Mr He decided that the latter should replace the former as legal and beneficial owner of FDL for reasons which are unclear but might well be connected with the onset of potentially embarrassing litigation. This potentially explains the equivocation about the beneficial ownership position by FDL in its pleadings in proceedings in the US in late 2018;

(e) FDL thereafter in response to CSL's March 2019 AML compliance letter falsely represented to CSL that a change of legal and beneficial ownership had actually occurred with effect from 1 February 2018 which was only formally documented several months later. In fact, a decision was made months after 1 February 2018 to retroactively document the change as having taken place on that earlier date.

145. I find that FDL did not induce CSL to enter into the Brokerage Contract by making fraudulent misrepresentations about its beneficial ownership. Any fraudulent misrepresentations which were made were made after the commencement of the present proceedings in response to a compliance letter sent out by CSL in March 2019. CSL's 'unclean hands' defence fails in this additional respect.

146. The administrative costs CSL incurred in exploring the AML position however (to the extent not already covered by the indemnity costs order-with costs to be taxable and payable forthwith- which I made against FDL for the reasons explained in my unreported 20 May 2020 costs Ruling) are *prima facie* recoverable under the indemnity provisions of the Brokerage Contract, however.

Findings: did FDL make fraudulent misrepresentations by failing to disclose its involvement in the Scheme?

147. CSL has failed to prove its case that FDL was engaged in a fraudulent market manipulation scheme. This limb of its misrepresentation Counterclaim accordingly fails.

Findings: did FDL make fraudulent misrepresentations about the size of Mr Chen's stake in a listed company?

148. In the Account Application form dated 9 May 2018, and signed by Mr Chen and Mr Sin as directors on behalf of FDL, the following questions were asked:

(a) "*Is the beneficial owner of the account or the spouse of the beneficial owner a director or senior officer of a public company that is listed on an exchange or the OTC, OR do you control 10% or more of the voting rights of a public company?*";

(b) "*Is the beneficial owner of the account or the spouse of the beneficial owner own, directly or indirectly, individually or in combination with other persons, 20% or more of the voting rights of a public company?*"

149. However, the boxes next to these questions were left unticked and blank in the signed version of the Account Application Form which was referred to at trial (Bundle E 1/678). This limb of the Counterclaim was not seemingly pursued by CSL in either its Opening or Closing Submissions. FDL observes in its Closing Submissions (at paragraph 506) that it appears based on its Submissions that CSL is not dealing with any part of its misrepresentation Counterclaim but still addresses CSL's pleaded case and makes a few technical legal points. In my judgment it is obvious that CSL was pursuing its fraudulent misrepresentation counterclaim based on the beneficial ownership, market manipulation and related 'Scheme' allegations which have been dealt with above. It is not clear on the face of the pleadings or otherwise what false representations are said to have been fraudulently made about the size of stake in a public company the beneficial owner held. Even in terms of evidence, Ms Winczura's Witness Statement (at paragraph 121) summarised the misrepresentation case as follows:

"*(d) FDL made material misstatements and omissions in connection with its entry into the Brokerage Contract with Canterbury, including:*

i) misrepresentations about FDL's true ownership and control, and particularly about the fact that it was at all relevant times controlled by participants in the Scheme;
ii) misrepresentations that it was not participating in activities that would constitute market manipulation; and
iii) *misrepresentations that the YRIV shares to be deposited with Canterbury were not being used in unlawful activities.*"

150. No positive averments are made in relation to this limb of the misrepresentation counterclaim which is accordingly summarily dismissed.

Findings: was CSL authorised to liquidate the Collateral Shares both in the event of PFS exercising the Put Option "*and/or under the Hampton Securities terms or the JitneyTrade terms, as incorporated into the Brokerage Contract*"?

151. This limb of the Counterclaim was not addressed by CSL in its Opening or Closing Submissions. The plea that CSL was entitled to liquidate the Collateral Shares in the event that the Put Option was exercised is difficult to understand in the context of a liquidation which occurred before the Put Option was exercised. The Put Option was in fact exercised at a time when there was no case for overriding FDL's right to be given notice and an opportunity to substitute cash for the remaining Collateral Shares.

152. FDL in its Closing Submissions advances an array of reasons as to why this alternative limb of CSL's Counterclaim is misconceived, including:

(a) the relevant rules relate to margin accounts and FDL never operated a margin account;

(b) there is no basis for incorporating the relevant rules into the Brokerage Contract or the agreement arising out of the SPA, the Put Option and the Collateral Agreement; and

(c) CSL never in any event made a margin call.

153. I would have accepted these submissions if it was not properly open to me to find that CSL has not ultimately pursued this claim at all. This limb of CSL's Counterclaim must accordingly be dismissed.

Findings: is FDL liable in damages for committing the tort of conspiracy to injure CSL by unlawful means?

154. Because CSL has failed to prove that FDL was involved in the alleged unlawful Scheme and/or committed fraudulent misrepresentations, CSL's case that Mr Sin, Mr Coleman and FDL conspired to use unlawful means to injure CSL must be analysed within a far narrower compass. It is however difficult to identify, critically, what the unlawful means were if the unlawful Scheme is no longer in play. This is best illustrated by setting out the following passage from CSL's Closing Submissions in full:

"*369. In the present case, CSL alleges that Mr Coleman, Mr Sin and FDL (at a minimum) entered into a combination, understanding or common design with each other as follows:*

(a) They conspired to generate profit for themselves or others using the publicly traded shares of YRIV controlled by FDL;

(b) They conspired to use unlawful means, including fraud, in order to achieve that goal;

(c) As part of their scheme, the co-conspirators needed the ability to deal in the shares of YRIV and they sought to use intermediaries such as broker dealers and other financial services professionals, like CSL, to facilitate their operations and to provide the necessary services for them to trade shares pursuant to their scheme;

(d) They induced CSL to enter into a Brokerage Contract with FDL by making fraudulent misrepresentations (per ADAC para 4A3) including information as to FDL's ownership, control and intentions;

(e) They further induced CSL to act as the holder of collateral pursuant to the Collateral Agreement and in aid of FDL's transaction with PFS with (a) no intention of abiding by the Collateral Agreement since they intended to transfer the shares away from PFS' control immediately thereafter and (b) knowing that the reason they had provided to PFS and CSL for raising the US$10 m was untrue;

(f) Although no doubt the primary in intention of FDL and its controllers was to make a profit for themselves or others, they knew or at least would have reasonably foreseen that the conspiracy would or might have injured CSL in the process;

(g) The conspiracy resulted in financial harm to CSL, which has already been outlined above, first, when the dispute arose between PFS and FDL as to the Collateral Shares and FDL threatened legal action including regulatory action and, secondly, when allegations of a broad ranging securities fraud, with which Coleman, Sin and FDL were involved, started to be exposed by Barron's then Hindenburg;

(h) In furtherance of the conspiracy, the co-conspirators pursued the current claim against CSL and sought an ex parte injunction limited to restraining CSL from: '... taking any steps to transfer, liquidate or otherwise deal with the shares of common stock of Yangtze River Port & Logistics Ltd owned by the Plaintiff which are held for and on its behalf by the Defendant.';

(i) In furtherance of the conspiracy, and with obvious harm to CSL, on 10 December 2018 FDL's US lawyers wrote on FDL's instructions to National Bank Financial Inc. ("NBFI"), the clearing house for Hampton Financial, a specialist broker used by CSL to carry out trades in thinly traded and illiquid securities, announcing that CSL had committed 'fraud, theft, conversion, and more' when not such claims were included on FDL's writ and nor have they been pleaded in its Statement of Claim;

(j) The falsity of the description of FDL's claim against CSL was or must have been known to FDL directly and/or through its US lawyers as its agents and must have been intentional. It is to be inferred from the above that the letter was sent by FDL (through its US lawyers as its agents) with the intent of injuring CSL by interfering with its business relationship with Hampton Financial and/or in order to try to pressure CSL into capitulating to FDL's claim in the current proceedings;

(k) Following complaints made to FDL by CSL's lawyers, on 12 December 2018 FDL (through its US lawyers as its agents) wrote to NBFI to retract the false statements that had been made on FDL's behalf. Notwithstanding that attempted retraction, Hampton Financial were extremely concerned by the allegations raised by FDL and, on 4 February 2019, Hampton Financial confirmed to CSL that it was no longer willing to continue to act as a broker for CSL;

(l) Despite its best endeavours, CSL was not able to engage an alternative specialist broker willing and able to trade thinly traded and illiquid securities (the other brokers with whom CSL has an existing trading relationship are not able to handle such trades) for over a year;

(m) As a result of Hampton Financial's termination of its role as CSL's broker for specialist trades: (i) CSL was forced to make alternative arrangements to raise capital of

US $5 million for a project that Hamilton Financial had been handling. CSL thereby: (a) lost commission; and (b) was obliged to devote its own funds to complete the project, thereby losing the use of such capital for other projects; (ii) Hampton Financial did not proceed with a capital raising of US $30 million for another real estate fund established by CSL. Similarly, CSL thereby: (a) lost commission; and (b) was obliged to devote its own funds to complete the project, thereby losing the use of such capital for other projects. (iii) CSL has lost the ability to earn profits on trades of thinly traded and illiquid securities that it would have carried out through its account Hampton Financial that it would have made had Hampton Financial not closed CSL's account;

CSL will seek the Court's indulgence to present a more precise calculation of those damages in due course, should the Court be minded to grant relief in principle." [Emphasis added]

155. The unlawful means relied upon are, understandably the alleged involvement in the Scheme and the alleged fraudulent misrepresentations. In my judgment this limb of the Counterclaim fails because, most simply, CSL has failed to prove any unlawful means. Had they been able to do so, conspiracy to injure would in any event have been difficult to make out. FDL in its Closing Submissions argued most pertinently:

"*529.2. …CSL has not pleaded or led a case at trial as to how and pursuant to what laws the pursuit of the claim, the obtaining of the Freezing Injunction and the related correspondence amount to unlawful acts. It would be highly surprising if obtaining a judicial remedy could be, in and of itself and in the absence of any plea in the tort of malicious prosecution, an unlawful act.*

529.3. …on analysis, the unlawful means conspiracy claim is based solely upon the fact of the letter sent by FDL's US attorneys to NBFI dated 10 December 2018, the content of which was almost immediately qualified and which allegations were withdrawn by letter dated 12 December 2018…"

156. This limb of CSL's Counterclaim is accordingly dismissed.

Findings: Limitation of Liability

157. Clause 4 of the Brokerage Contract provides as follows:

> "*THE COMPANY'S LIABILITY TO THE CLIENT IS LIMITED TO THE FEES PAID BY THE CLIENT TO THE COMPANY DURING THE PRIOR THREE MONTHS PRECEDING ANY CLAIM. IN NO CIRCUMSTANCES WILL THE COMPANY BE REQUIRED TO PAY A CLIENT IN RESPECT OF ANY CLAIM ANY AMOUNT GREATER THAN THREE MONTHS' FEES PRECEDING ANY CLAIM.*"

158. This must be read with the following words by which FDL agrees to indemnify CSL against, *inter alia*, "*ANY AND ALL LIABILITIES, OBLIGATIONS, LOSSES, DAMAGES, PENALTIES, ACTIONS, JUDGMENTS, CLAIMS, DEMANDS, SUITS, COSTS EXPENSES OR DISBURSEMENTS OF ANY KIND OF NATURE*". This limb of the Counterclaim was not addressed in CSL's Trial Submissions or Closing Submissions. At first blush it seems improbable that such a clause could operate so as to defeat the sort of claims which are advanced by FDL in the present proceedings. And which have little to do with the operation of the account opened pursuant to the Brokerage Contract. Mr Palzer referred to the indemnity provisions of the same clause but did not comment on the limitation of liability wording which precedes the indemnity provisions. Paragraph 48(c) of the Third Amended Defence averred as follows:

> "*Further and in any event, pursuant to the first and second sentences of clause 4 of the Brokerage Contract, Canterbury is entitled to limit its liability (if any, which is denied) to FDL to the fees paid by FDL to Canterbury in the prior three months preceding FDL's claim and hereby does so.*"

159. FDL responded to this plea as follows:

> "~~*i.*~~ *I.4.7.1 The first and second sentences of clause 4 of the Brokerage Contract are limited only to losses that may arise in connection with Canterbury's performance of its obligations under the Brokerage Agreement;*
>
> ~~*ii.*~~*I.4.7.2 Properly construed, the first and second sentences of clause 4 of the Brokerage Contract do not limit Canterbury's liability for breach of fiduciary duty; further, or*

alternatively, as a matter of law, liability and/or damages for breach of fiduciary duty cannot be limited or excluded as alleged by Canterbury herein;

~~*iii.*~~ *I.4.7.3 On any construction, the first and second sentences of clause 4 of the Brokerage Contract cannot and do not limit FDL's right to recover its property;*

~~*iv.*~~ *I.4.7.4 On any construction, the first and second sentences of clause 4 of the Brokerage Contract cannot and do not limit Canterbury's liability under a claim in conversion…*"

160. It appears to me that this limb of CSL's Defence or Counterclaim was not at the end of the day pursued seriously, or at all. FDL's claims clearly predominantly fall outside the parameters of the Brokerage Contract and there is no sufficient evidential basis for concluding that the parties expressly or impliedly agreed that the limitation clause in question should apply to any claims arising out of the $10 million fundraising transaction. FDL submitted in its Closing Submissions:

"*527. CSL's reliance on this clause to limit its liability to FDL is equally as misguided as its reliance on the indemnity provision:*

527.1. It is trite law that whether or not reliance can be placed on an exclusion or limitation of liability clause and the scope of that clause is a matter of construction, as to which the, 'general rule [is] that the more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the courts' approach should be in requiring that the exclusion or limit should be clearly and unambiguously expressed': BHP Petroleum Ltd v British Steel Plc [2000] 2 All ER (Comm) 133, [43] per Evans LJ.

527.2. As a matter of construction, which, in light of the manner in which CSL attempts to limit its liability, must be strict:

527.2.1. The limitation of liability only applies, if it can be said to apply at all, to claims arising under the Brokerage Contract as a consequence of the services provided to FDL under the terms thereof. None of the claims made by FDL represent claims for such losses. It follows that CSL cannot rely on clause 4 as it seeks to; and

527.2.2. If CSL could rely on clause 4 because FDL's claims arise out of services provided under the Brokerage Contract, the clause would not, as a matter of construction, apply to claims relating to the return of and/or CSL's conversion and/or interference with FDL's property…"

161. The limitation of liability clause is only commercially rational in the context of CSL providing a routine non-discretionary investment account facility in relation to which it merely follows FDL's investment instructions. Moreover, this is quintessentially the type of clause which has to be expressly incorporated into a contract, such as company articles or trust deeds. In the present case it is CSL's positive case that the commercial relationship it had with FDL was far more complicated and that it was not required to follow its client's instructions at all. I find that CSL is not entitled to rely upon the limitation of liability provisions in clause 4 of the Brokerage Contract by way of response to FDL's present claims. Those claims unarguably relate to what is obvious entirely or substantially a tangential legal and commercial arrangement.

Findings: is CSL entitled to recover the liquidated sums claimed under the indemnity provisions of the Brokerage Contract?

162. Because it is so common for service providers of various descriptions to claim a right to be indemnified in respect of their reasonable costs and expenses out of funds that they hold for their clients, the instinctive response to this limb of the Counterclaim is that it ought, on some legal basis, to be found to be valid. I have already found that these modest claims did not justify liquidating FDL's YRIV shares. This does not mean that CSL is not entitled to enforce a claim to be indemnified for outstanding costs incurred in relation to the Brokerage Contract and/or the subsequent transactions in which it provided services to FDL on the grounds that the right to an indemnity was incorporated by necessary implication into any subsequent contract. Because there were no oral closing submissions and I do not consider issues of quantum were canvassed fully at trial by either side, I only propose to set out my provisional views on this limb of CSL's Counterclaim. The relevant amounts (all of which Ms Winczura deposed she believed were due) and my provisional views as to the merits of each head of claim may be summarised as follows:

(a) "***Outstanding Commission & Fees pursuant to clause 6 of the Account Agreement: USD$ 374,539.85***": this item is not explained specifically in CSL's pleadings, submissions or written evidence, but it was clarified through Mr Tonner KC's cross-

examination of Mr Sin and by supporting documentation. On 7 August 2018, Ms Winczura emailed Mr Sin to explain that there would be a 3.5% placement fee. The following day Mr Coleman responded setting out a proposed deal structure and agreeing that CSL would get a 3.5% fee. On 18 September after relations had become frayed, Mr Sin suggested for the first time that FDL should not have been paying the 3.5% commission on top of the negotiated price. This suggestion is not, against this background, credible. In WhatsApp communications with CSL's Holly Morrison on 5 June 2018, Mr Sin apparently queried why 5% was being charged by both White Sands and CSL on the account, seemingly an amount of $124,000. It seemed obvious to me that this reflected a failure on Mr Sin's part to realise that the CSL account was a sub-account of a White Sands account, but he returned the initial shares he placed with CSL to VStock in protest. This amount does not appear to have been claimed in the Invoice and I am unable to identify what support there is in the evidence for the additional $24,539.85 on top of the $350,000. Subject hearing counsel in relation to the basis on which this specific sum is due, CSL is in my strong provisional view entitled to recover $350,000;

(b) "***Partial allocation of external legal costs and disbursements caused by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: USD$ 75,000***": the precise basis of this item does not appear to me to have been clearly explained in the trial materials. My provisional view is that Ms Winczura's bare support for the claim in her Witness Statement is not enough to support its validity. I will hear counsel as to whether there is material before the Court which further explains this item;

(c) "***Partial allocation of internal costs and loss caused to Canterbury Securities by Fortunate Drift Limited in connection with the provision of the services under the Account Agreement pursuant to clause 4 thereof: USD$ 282,500***: the precise basis of this item does not appear to me to have been clearly explained in the trial materials. My provisional view is that Ms Winczura's bare support for the claim in her Witness Statement is not enough to support its validity. I will hear counsel as to whether there is material before the Court which further explains this item.

Findings: is CSL entitled to an allowance in equity?

163. This limb of the Counterclaim was addressed by way of submissions but in a necessarily abstract manner as counsel were unable to divine what findings the Court would reach on liability and the extent of recoverable loss. In CSL's Closing Submissions, it was argued that:

> "*364. Further and/or alternatively, CSL claims an allowance in equity in recognition of the exceptional judgment it demonstrated in deciding to liquidate a portion of the Collateral Shares, and the impressive level of care and skill it demonstrated in executing that process on 6 and 7 December 2016.*
>
> *365. The claim for an allowance in equity is pleaded in the body of the counterclaim (ADAC para 60). A fiduciary who would otherwise be liable to account for profit may be granted an allowance in respect of their work in creating the profit. The test is whether it would be inequitable for the beneficiaries to take the benefit of the profits without paying for the work which had produced it. The assessment is fact specific and quantification of an equitable allowance will often not be a matter of mathematical calculation, as it involves an evaluative judgment akin to the exercise of a discretion (Recovery Partners GP Ltd and another v Rukhadze and others [2023] EWCA Civ 305 (21 March 2023).*" [Emphasis added]

164. FDL submitted in their Closing Submissions:

> "*531. The entitlement to an equitable allowance is a derogation from the otherwise 'stringent' rule that 'a fiduciary must not make an unauthorised profit from his fiduciary position', which stringent rule 'is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty': Recovery Partners GP Ltd v Ruhkhadze [2023] EWCA Civ 305, paragraph [34]. At paragraphs [116]-[117] of Recovery Partners, supra, the Court of Appeal, distilling the applicable principles from the authorities, said this (emphasis added):*
>
> *'116. A number of points emerge from this analysis. First, an equitable allowance will not be the usual order or one which the defaulting fiduciary can expect as of right. It is in this sense that the exercise of the jurisdiction is exceptional. Secondly the ultimate test, which*

was that applied by Wilberforce J in Phipps v Boardman, is whether it would be inequitable for the beneficiaries to step in and take the benefit of the profits made by the fiduciary without paying for the skill, labour and risk which has produced it. The taking of an account is an equitable remedy, as is the making of any allowance in favour of the defaulting fiduciary in the fashioning of the account. The assessment will be fact specific. As the High Court of Australia said in Warman International Ltd v Dwyer 182 CLR 544, 559, "It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts." Thirdly, it will not be inequitable for beneficiaries to take the profits without making an allowance for remuneration if and to the extent that such an allowance would be seen as encouraging fiduciaries to breach their fiduciary duties.

117. One consequence of the second and third points is that it will be relevant to consider the degree of culpability which is to be ascribed to the breach of fiduciary duty. It will be more inequitable to deprive a defaulting fiduciary of the profit resulting from his own skill and labour, without making an allowance, where his breach is honest and well intentioned than when it is dishonest or otherwise highly culpable; and the deterrent imperative is all the stronger in the case of dishonest breaches than it is for honest and well-intentioned ones.'..."

165. CSL's need to rely upon an allowance of equity depends upon what findings are ultimately made about what losses FDL proves were caused by CSL's breaches fiduciary, contractual or tortious duties and what profits (if any) CSL is *prima facie* required to disgorge. FDL's unjust enrichment claim and this limb of CSL's Counterclaim are closely connected. The present Judgment does not address what equitable relief FDL is entitled to. Further detailed submissions are required in light of the liability findings I have now made.

166. As regards CSL's intentions on 6 December 2018, FDL has at most raised doubts about whether CSL was well-intentioned, in particular through demonstrating that the failure to effectively communicate with FDL on 6 December 2018 pre-liquidation has not been satisfactorily explained. On balance I find that the decision to liquidate was probably made *in extremis* to preserve the value of the Shares rather than as part of a dastardly plan to harm FDL's commercial interests. I reach this conclusion based primarily on the commercial result of the liquidation process and accept to a limited extent Mr Palzer's opinion that some skill was deployed in the sales process. I do not ignore Dr Keysser's opinion that CSL ought to have retained (or to have access to) trading records which

would reveal more definitively what its liquidation strategy was. In addition, CSL's unsatisfactory lack of forthrightness about what happened to the proceeds of the sell-off (and non-compliance with this Court's Information Order made shortly after the trial) will have to be weighed in the scale when carrying out the evaluative assessment as to whether an allowance in equity is deserved. This limb of the Counterclaim is nonetheless potentially available to CSL in this case when the outstanding quantum issues are fully explored.

Summary

167. In summary, my findings on the 'liability' aspects of this case are as follows:

(a) FDLs claim for breach of fiduciary duty succeeds;

(b) FDL's claim for breach of contract in relation to CSL refusing to return the Collateral Shares pursuant to the three requests made in September and October 2018 only succeed in full on the hypothesis that the Put Option had previously been waived by PFS. However, FDL's claim succeeds in part on the alternative assumption that the Put Option had not been waived because CSL was only entitled to insist on retaining on a most generous view in the region of 55% of the YRIV shares it held for FDL. The waiver issue will be determined in the Nevada Proceedings;

(c) FDL's alternative conversion claim succeeds to an extent which broadly corresponds to the breach of contract claims, subject to hearing CSL's counsel if I am wrong that the claim was unopposed;

(d) although it appears that FDL has made out its claim for unjust enrichment, this claim is so closely connected with the relief and/or quantum questions that a I defer my decision on this claim until those issues are decided;

(e) CSL's defences and counterclaims have failed, save that it is entitled to be indemnified for its liquidated costs and expenses properly incurred pursuant to the Brokerage Contract and the subsequent SPA/Collateral Agreement (to an extent to be determined) and is potentially entitled to an allowance in equity.

168. All issues relating to what specific relief should be granted are adjourned with liberty to apply. Although no formal direction may have been made for a split trial, the way the trial unfolded makes such an approach the only sensible approach to adopt. Counsel are encouraged to seek to agree directions for this phase of the trial. I will hear counsel if required as to the terms of the Order, costs and any other matters arising from the present Judgment.

_____

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT