**Neutral Citation Number: [2014] EWHC 3049 (Ch)**

Case No: HC11C03443

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2014

**Before** :

**THE HONOURABLE MR JUSTICE HILDYARD**

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**Between :**

**CF PARTNERS (UK) LLP** **Claimant**

**- and -**

**(1) BARCLAYS BANK PLC**
**(2) BRYGGPIPAN AB**
**(formerly known as TRICORONA AB)** **Defendants**

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**Tim Lord QC, Orlando Gledhill** and **Richard Eschwege** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
**Ewan McQuater QC, David Quest QC** and **Sandy Phipps** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing dates: 16-17 May, 20-24 May, 3-7 June, 17-21 June, 24-28 June, 1-5 July, 8-10 July, 23-26 July 2013

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# Judgment

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## INTRODUCTION

### *Nature of the claim*

1. By this claim, CF Partners (UK) LLP ("CFP") seeks compensation for the alleged breach of an exclusivity agreement, and the misuse of confidential information, in the context of the pursuit and acquisition by the first defendant, Barclays Bank PLC ("Barclays") of the second defendant, a body corporate called Bryggpipan AB (formerly known as Tricorona AB) ("Tricorona").

2. Put very shortly, CFP contends that Barclays used information that CFP presented to it as a client seeking lending facilities and M&A advice to take and exploit CFP's opportunity for its own profit by itself acquiring Tricorona.

3. Tricorona operated in the carbon credits market and had a large portfolio ("the Tricorona Portfolio") of tradable instruments known as Certified Emission Reductions ("CERs"). CERs essentially comprise rights to emit carbon. Controls and restrictions under international protocols or treaties in respect of the emission of carbon or greenhouse gases have in effect required emitters of such gases to acquire such rights in order to (as it were) "frank" their emissions.

4. CFP had identified the prospect of considerable fees and capital profit from the acquisition and monetisation of the Tricorona Portfolio. To realise this potential business opportunity CFP needed external finance and equity investment partners.

5. In 2008, and initially through a company called IVC International Limited ("IVC"), which had an established relationship with Barclays (which CFP had not), CFP approached Barclays with a view to obtaining from Barclays financial assistance (by way of debt financing) and also (probably) M&A advice to enable CFP to exploit the opportunity.

6. CFP code-named the opportunity "Project Arctic Fox"; and that is how it was and is known within CFP. Barclays' code-name for the same project was "Project Carbonara".

7. It is CFP's case that the valuable business opportunity known as "Project Arctic Fox" by CFP and "Project Carbonara" by Barclays was introduced by CFP to Barclays subject to a duty (contractual and/or equitable) of confidence, and subject also to a contractual obligation of exclusivity; and that Barclays then used that information, not to facilitate Project Arctic Fox, but to assist it to develop what it referred to as a "strategic partnership" with Tricorona which culminated in the acquisition of Tricorona by Barclays for its own account.

8. CFP contends that the continuum between Project Arctic Fox/Carbonara for the acquisition of Tricorona by CFP with financial assistance and advice from Barclays and the project for the acquisition of Tricorona by Barclays for its own account, cutting out CFP, is illustrated by Barclays' somewhat blatant code-name for that latter project: "Project Pomodoro".

9. Project Pomodoro was completed in July 2012. Barclays thereafter sold Tricorona, pursuant to a project code-named "Project Rose", for a substantial aggregate profit, with an additional payment due in certain defined events.

10. Put shortly, CFP contends that Barclays had determined to build a CER portfolio and establish itself in that line of business, and to that end, and only after CFP had revealed to Barclays the true potential or embedded value of the Tricorona Portfolio (often referred to at trial as "the mine") in Project Arctic Fox/Carbonara, took its own client's deal for its own account. Its pursuit and purchase of Tricorona pursuant to Project Pomodoro was in breach of its obligations of confidence and exclusivity (as well as any semblance of commercial propriety and morality). Barclays ultimately realised a considerable profit for itself pursuant to Project Rose, from which Tricorona's management also profited.

11. Further, this unusual (most of the witnesses thought unique) turn of events was all the more arresting because (as CFP subsequently discovered, but was not disclosed to it at the time) Barclays had had, before it was approached by CFP/IVC, a pre-existing relationship with Tricorona.

12. That was not a mere encounter: Barclays had previously contemplated acquiring Tricorona (or a substantial part of its portfolio). Barclays' code-name for this earlier approach was "Project Conifer". Barclays did not pursue Project Conifer because of its doubts as to the quality of Tricorona's management and the Tricorona Portfolio.

13. CFP contends that the test of the quality of the information it provided to Barclays is the fact that it so radically altered Barclays' perception of Tricorona. CFP's case is that Barclays' change of mind about Tricorona was caused by what it learned from information supplied to it by CFP in the course of Project Arctic Fox, and that in the preparation and pursuit of Project Pomodoro Barclays misused that information, and was in breach both of a duty of confidence and a contractual exclusivity provision agreed between Barclays and CFP.

14. To put it figuratively, CFP's case is that it provided the lens that revealed to Barclays the propensity for the frog to become the prince; and that it was this revelation, well before the expiry of any contractual or equitable duty of confidentiality, that eventually led to Barclays' acquisition of Tricorona pursuant to Project Pomodoro, albeit some time later (and after various excursions).

### *CFP's claims*

15. CFP claims compensation (either by way of an account of profits or damages) for Barclays' breaches of its equitable duty of confidence and its contractual obligations of exclusivity.

16. CFP contends that these breaches were the more egregious because Barclays fully recognised that it (a) would thereby, for its own advantage, deprive CFP of any recompense for the work it had done, and (b) should at least offer CFP proper recompense but (c) then neglected and refused to do so, dismissing CFP's complaints in terse correspondence without any or any proper consideration.

17. CFP claims further that Tricorona is jointly liable to it for Barclays' breaches of its obligations of confidence, and that similarly Barclays is jointly liable to it for Tricorona's breaches of its obligations of confidence.

18. Finally, CFP claims that Barclays is liable for inducing Tricorona to breach the confidentiality agreement between itself and Tricorona, and vice-versa.

19. It is to be noted, however, that CFP has never sought to contend that either Barclays or Tricorona was in a fiduciary relationship with it or owed it any fiduciary duty. As Counsel for Barclays and Tricorona (together "the Defendants") repeatedly emphasised, this means that neither Barclays nor Tricorona owed CFP any duty of loyalty, the core duty of a fiduciary, which requires that fiduciary to act in good faith, not to make a profit out of his trust, and not to place himself in a position where his duty and his interest may conflict (see *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18).

### *Barclays' defence*

20. It is Barclays' case that the opportunity presented to it "consisted of nothing more than a supposed arbitrage resulting from the difference between the market capitalisation of Tricorona and the value (as CFP perceived it) of Tricorona's portfolio". Barclays contends that the opportunity, and the information provided by

CFP in its presentation and support, lacked any vestige of the necessary quality of confidentiality about it.

21. Barclays further contends that, in any event, it never misused the information provided to it in any material way that damaged CFP; that at most the information provided to it may have re-awakened and galvanised its interest in Tricorona; but it did not misuse any confidential information in determining to acquire it or in any actionable way.

22. Barclays' case is epitomised by its principal witness, Ms Harshika Patel ("Ms Patel"), as follows:

> "So far as I was aware, in purchasing Tricorona Barclays was not exploiting any business opportunity identified to it by CF Partners during Project Carbonara. Rather…Barclays acquired Tricorona after it was unable to acquire EcoSecurities [the only larger carbon developer] and in furtherance of its strategic objective to expand into the primary market. So far as I am concerned, the identification and exploitation of this strategic objective had nothing to do with CF Partners or any confidential information provided to Barclays by CF Partners."

23. Barclays contends also that the opportunity was not only never confidential but in any event transitory, such that by 2009 it was long gone: the perceived arbitrage no longer existed by 2009 because of the unprecedented collapse of the global market in the global financial crisis.

24. Barclays further contends that it undertook no such obligation as to preclude its own acquisition of Tricorona, and that, in particular, any obligation of confidentiality was defined and confined by express contractual agreement, and had expired before that acquisition. Barclays further contends that the sting is drawn from the unusualness of it having sought to acquire for itself its client's opportunity by the fact that CFP agreed (pursuant to an agreement headed "Termination of Exclusivity" and dated 30 March 2009) that Barclays should be free to carry out such a transaction. More generally, Barclays maintains (as it was put in its Opening Submissions) that "the contractual regime creates an insurmountable obstacle for CF's case…".

***Tricorona's defence and counterclaim***

25. Tricorona's defence complements Barclays': unsurprisingly, since it has been directed by Barclays on the terms of a Side Agreement between them which was only disclosed in the course of the trial.

26. Tricorona's response to the claim against it for breach of obligations of confidence is that it owed no such obligations, and in any event did not use any information provided to it in the course of Arctic Fox otherwise than for the assistance of CFP in the course of Arctic Fox.

27. As to the inducement claim against it, Tricorona's case is that it did not knowingly seek to induce Barclays to break its obligations in any way; and Tricorona denies any

claim for joint liability, on the basis that neither Barclays nor Tricorona owed any duty of confidence, and even if they did, neither was in breach of any such duty.

28. For its part, Tricorona (again as directed by Barclays) has counterclaimed against CFP, alleging that CFP was in breach of obligations of confidentiality in the way it used confidential information provided to it by Tricorona.

29. Both Barclays and Tricorona also rely on the alleged breaches by CFP of obligations of confidence it owed to Tricorona as barring CFP's own equitable claims against them, on the ground that CFP does "not come to equity with clean hands". (The Defendants accept that this "unclean hands" defence cannot apply to CFP's common law claims.)

30. CFP rejects Tricorona's counterclaim as a sideshow. It accepts that it made very limited misuse of the information but contends that this gave rise to no, or alternatively nominal, damages. It rejects the suggestion that there is any basis for barring its equitable claims, making the point that the maxim could only assist Tricorona and not Barclays, and is in any event inapplicable in the circumstances.

## *Ambit of the hearing*

31. The case gives rise to a myriad of issues, both factual and legal. It has been hard fought: and it occupied the court for 34 sitting days (and some five more besides for reading the very considerable witness statements, documentation and skeleton arguments). I understand that Barclays' costs alone are in the region of £10 million: it is litigation on a grand scale.

32. The written openings of each side well exceeded 300 pages. Written closing submissions were exchanged, each of more than 400 pages. Further schedules were attached. Although within a comparatively short compass in point of time (in effect 2007 to 2010) the factual detail required to be examined has been very considerable.

33. 22 witnesses were cross-examined. Some 200 or so files were collated and presented. All the documents (some 38,000) were loaded onto computer software, but hard copies were also made available. Although this judgment is much delayed, which I regret, the availability of all the material in electronic form has been of immense assistance. I am extremely grateful for the first-class work of the transcribers and those involved in the maintenance of the electronic record.

34. I have been greatly assisted by the indefatigable efforts of Counsel and their respective teams: Tim Lord QC, Orlando Gledhill and Richard Eschwege, instructed by RPC, for CFP and Ewan McQuater QC, David Quest QC and Sandy Phipps, instructed by Freshfields Bruckhaus Deringer, for Barclays and Tricorona. Their assistance has been exemplary. As I mention later, I am also grateful for their patience, and that of their ultimate clients.

### *Overall summary of main issues*

35. An agreed summary of the factual background, in chronological sequence, is attached marked "Appendix A". This, together with a list of individuals referred to in it (attached marked "Appendix B"), provides a useful overview of the run of events.

36. The parties also agreed a list of issues, subject to caveats which included that they were always to be read subject to the parties' statements of case. The list is a useful aide-memoire and is attached to this judgment marked "Appendix C".

37. The main issues that it is necessary for me to determine can for present purposes be summarised as follows:

    (1) What were the nature and scope of the duties owed between the parties (a) in contract and (b) in equity?

    (2) Did CFP, in the context and for the purposes of Project Arctic Fox, provide to Barclays and/or Tricorona confidential information the misuse of which is actionable?

    (3) What was the scope and duration of any duty of confidence?

    (4) Did the Defendants misuse, i.e. make unauthorised use of, any of CFP's confidential information for the purposes of Project Pomodoro?

    (5) Did Barclays induce Tricorona to breach its contractual duty of confidence to CFP?

    (6) Are Barclays and Tricorona jointly liable for the other's equitable breaches of confidence?

    (7) Did Barclays agree with CFP not to acquire Tricorona or conflict itself in any way from acting on CFP's proposed acquisition?

    (8) Did Tricorona induce Barclays to breach its contractual agreement with CFP?

    (9) If actionable misuse by the Defendants of its confidential information is established, what are the appropriate remedies for CFP?

    (10) Is CFP liable to Tricorona on Tricorona's counterclaim, and if so, what remedies are appropriate?

    (11) Do the facts giving rise to Tricorona's counterclaim provide any defence to either Tricorona or Barclays in respect of CFP's claims against them?

38. Inevitably, these primary issues raise a number of sub-issues, as indeed is apparent from the Agreed List of Issues attached marked "Appendix C".

### *Factual background: carbon trading and the market*

39. Before addressing these issues, I first need to describe some of the features of the carbon market, which (since the case concerns an opportunity for the realisation of the value of the Tricorona Portfolio of CERs) is the context in which the dispute arises. By "carbon market" I mean greenhouse emission trading and the regulatory framework and markets for emissions trading developed to comply with the Kyoto Protocol to the United Nations Framework Convention on Climate Change ("UNFCCC").

40. The market background and a description of the regulatory framework is important to an understanding of CFP's case that information relating to that opportunity which it shared with Barclays and Tricorona was both confidential and valuable. It is also necessary to introduce and define the array of acronyms which are deployed in the market, though I also attach to this judgment, marked "Appendix D", a "Glossary of Key Terms" prepared by CFP (but which I do not understand to be controversial).

41. I take the description below, without further specific attribution, largely from the expert reports of Daniel Radov ("Mr Radov") (one of CFP's carbon trading experts) and Adriaan Korthuis ("Mr Korthuis") (the Defendants' carbon trading expert). I have also borrowed from the witness statement of Mr Jan-Willem Martens ("Mr Martens"). Mr Martens, though a factual witness for Barclays and not an expert witness, has substantial knowledge of schemes set up under or in conjunction with the Kyoto Protocol. I believe what follows in this section to be uncontroversial.

42. The UNFCCC was established in 1992 to begin to address the perceived problems presented by global warming and associated climate change. By 1995, in an effort to strengthen global co-operation on these matters, participating countries launched further negotiations, which ultimately led to the development of the Kyoto Protocol.[1]

43. The Kyoto Protocol was signed in 1997 and came into force in 2005, after a sufficient number of countries ratified it. The Kyoto Protocol is a legally binding international agreement in which most of the UNFCCC Annex I countries[2] (listed in Annex I of the UNFCCC) agreed to reduce their emissions of carbon dioxide and other greenhouse gases (GHGs) in the period from January 2008 to December 2012, also known as the First Commitment Period.[3] In November 2012, at the 18th Conference of the Parties to the Kyoto Protocol chaired by the UN in Doha, a Second Commitment Period running from January 2013 until December 2020 was discussed, with a smaller list of countries proposing targeted emissions reductions cuts, subject to final agreement/ratification.[4] Governments aim to agree to a new framework by 2015 involving all countries (removing the split between Annex I and non-Annex I countries) that is intended to then come into effect from 2021. However, the status of these latest commitments and the future international agreements remains uncertain.

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1 This was the conclusion of the "Berlin Mandate," which was the result of the first Conference of the Parties (or "COP") to the UNFCCC, held in early 1995.

2 The United States was the most significant developed country not to ratify the Protocol.

3 A significant distinction between the Protocol and the Convention is that while the Convention *encouraged* industrialised countries to stabilize GHG emissions, the Protocol *commits* them to do so.

4 Japan, Canada, New Zealand and Russia are Kyoto Protocol signatories that have refused binding emissions targets within the Second Commitment Period.

44. In ratifying the Protocol, industrialised countries listed in Annex B (which is nearly identical to the list under Annex I of the UNFCCC[5]) accepted target future emissions levels for the First Commitment Period, expressed in proportion to each country's "Base Year" emissions – in most cases, its emissions in 1990. Each country would then be allocated a certain quantity of carbon emission rights, called "Assigned Amount Units" ("AAUs").[6] Each AAU corresponds to one tonne of carbon dioxide equivalent. The number of AAUs assigned to each country is proportional to the country's historic emissions level, adjusted to reflect the level of reductions it accepted under the Protocol.

45. Thus, the overall "cap" on emissions, measured by a fixed number of emissions "allowances" that permit the holder to emit a given quantity of emissions – say, one tonne of carbon dioxide equivalent, or "tCO2e", is established by the national government; obligated parties are required to measure and report their emissions, and surrender an emissions allowance for each unit of emissions that they are responsible for releasing into the environment. If they fail to surrender allowances, they may face fines or other penalties.

46. However, as a means of ensuring that environmental targets are met with least impact on the economy, allowances are transferable, so emitters can buy and sell allowances. "Cap-and-trade" systems have developed to enable plants or other emitters covered by the policy more than their allocation to acquire additional allowances from others with an under-utilised allocation, though all within the confines of the overall or collective cap. This trade in allowances establishes a market price, and brokers, exchanges, and other intermediaries who are not themselves obligated parties[7] can participate in the market to facilitate trade.

47. In addition to this basic framework for a cap-and-trade system, many emissions trading systems also include rules that let obligated parties use instruments other than allowances to comply with their obligations. In particular, many systems recognise that it is often possible to reduce emissions from sources that are outside the regulatory scope of the trading system, and include provisions that make it possible to receive credit for reducing these external emissions.

48. The Kyoto Protocol made provision for this. Thus, having imposed an overall cap on Annex B country emissions and established each country's corresponding emission rights, it also established three "flexible mechanisms", which allow emissions trading to be used to facilitate global emissions reductions.

49. The first flexible mechanism, known simply as the "Emissions Trading" mechanism, allows Annex B countries to trade their AAUs. Countries that expect their emissions over the First Commitment Period to exceed their Assigned Amount may buy AAUs

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5 Annex I includes three countries not in Annex B – Belarus, Malta and Turkey. In addition, as noted, although listed in Annex B the United States never ratified the Kyoto Protocol.

6 The total volume of emissions that an Annex B country is permitted to emit is referred to as the country's "Assigned Amount".

7 An "obligated party" being a person obliged to acquire and surrender allowances for the emission of greenhouse gases. Their identification depends on the emissions trading system concerned. Under the Kyoto Protocol, selected countries are the obligated parties. Under the EU ETS, operators of plants or installations that directly emit greenhouse gases are the obligated parties. Under other trading systems, companies or even individual people or households must surrender allowances.

from countries that have a surplus. Trading can occur throughout the First Commitment Period, and also during a "true-up" period that lasts until mid-2015.[8]

50. The two other flexible mechanisms are based on the development of specific emissions reduction *projects* (or in some cases "programmes of activities") that generate emissions reduction *credits* from specific industrial plants or other economic activities.

51. The first such mechanism, Joint Implementation ("JI"), allows for two Annex I countries to co-operate in their efforts to reduce emissions, creating emissions reduction credits (called "Emissions Reduction Units", or "ERUs"). For each ERU that a country acquires from another country, the acquiring country's Assigned Amount is increased by one $tCO_2e$, and the transferring country's Assigned Amount is reduced, to ensure that the total number of emission rights within Annex I countries does not increase.[9]

52. The final flexible mechanism is the Clean Development Mechanism ("CDM"), which allows Annex I countries to invest in emissions reduction projects in *non*-Annex I countries (which are less developed, and which do not have fixed emissions targets under the Protocol) to generate credits (the CERs to which I have previously referred) that can be surrendered for compliance alongside AAUs. The Protocol specifies that the use of emissions trading mechanisms should be *supplementary* to investment in domestic emissions reductions. A combination of the three types of emission rights – that is, emission allowances (in the form of AAUs) or emissions credits (CERs and ERUs) – may be used by Annex B countries to comply with their targets. Thus, the Kyoto project mechanisms are the main route by which the private sector participates in emissions trading under the Kyoto Protocol.

53. The admissibility of ERUs and CERs requires control. Whereas AAUs are typically held only by governments,[10] CERs and ERUs may be awarded to private entities that have invested in emissions reduction projects. To ensure that the emissions reductions represented by CERs are credible, a set of procedures was established under the UNFCCC to regulate project development.

54. To this end, the governance of the CDM is managed by an Executive Board, answerable ultimately to the countries that have ratified the Kyoto Protocol. Among the Executive Board's responsibilities are approving project "Methodologies", which are detailed templates that are approved for use in determining project baselines, as well as approving specific projects as eligible and reviewing applications for the issuance of credits.

55. To oversee the CDM process nationally, each country producing or using CERs must assign responsibility for the oversight of the CDM within its jurisdiction to a

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[8] The Kyoto Protocol allows emission units from a commitment period to be traded into or out of a Party's national registry until the end of the "true-up" period associated with that commitment period. The "true-up" period is formally defined as extending to 100 days after the date agreed by the Parties for completing the reviews of Annex I Parties' emissions inventories for the 2012 calendar year. The "true-up" period associated with the First Commitment Period will extend until around mid-2015.

[9] Kyoto Protocol, Article 3, paragraphs 10 and 11.

[10] A notable exception is Japan, where various Japanese corporations have arranged to purchase AAUs from governments, as part of the Japanese government's strategy to comply with its Kyoto target.

"Designated National Authority" ("DNA"). Each country that is a signatory to the Kyoto Protocol appoints an office or ministry to be the DNA to review and approve the participation in CDM projects. The DNA may also be responsible for designing the national framework governing the development of CDM projects and the use of CERs for compliance purposes.

56. As to the generation of CERs, credits are awarded to CDM projects for the amount of greenhouse gas emissions they reduce relative to a baseline. Once the project is implemented, actual emissions (if any) are compared to the emissions that would have been expected under the baseline, and the difference is the volume of emissions reductions credited to the project.

57. A typical CDM project might begin, for example, with a plant owner in a developing country who is considering investing in more energy efficient technology at an existing plant, or in plant equipment that will capture and destroy greenhouse gases, or in a completely new power generation facility with low emissions. To receive CERs, some party must develop the analyses and secure the relevant authorisations to have the project approved as eligible to earn the carbon credits. This party could be the owner or developer of the physical project, or a consultant or team of consultants hired by the owner, or it could be a completely independent company whose main business is overseeing the process of securing CERs, and which takes ownership of them.

58. At a minimum a CDM project will have an owner registered in the Host Country who has been approved by the Host Country DNA. Generally, there will also be one or more buyers based in Annex I countries that will have entered into contracts to purchase the CERs.[11]

59. The term "Project Participant" is used to refer to a private or public entity that has been approved for involvement in the project by a country's DNA, including the owner and approved buyers. An approved Project Participant is bestowed with various rights within the CDM such as being able to communicate confidentially with the Executive Board, appoint and work with UN approved companies, and request activities from the Executive Board, including registration and issuance of credits. Project Participants therefore include the project owner (Host Country Project Participant) and others who have entered into contracts to purchase the expected emission reduction credits from a project (Annex I country Project Participants).

60. In addition, there are companies or consultancies that have been approved and appointed by the UNFCCC Executive Board that are responsible for the certification of project baselines and the emissions reductions associated with projects. These independent companies perform a kind of auditing role within the CDM process. These companies are referred to as Designated Operational Entities ("DOEs") and are charged with providing independent assessments of projects to ensure that they conform to the requirements set out by the CDM Executive Board.

61. Companies whose main business is to acquire emissions reduction credits are often referred to as "project originators". (In contexts where there is less concern about

[11] Projects seeking registration with no listed Annex I participants are referred to as "unilateral" CDM projects.

distinguishing originators from the owners of a physical plant, they may simply be referred to as CDM "project developers".)

62. Carbon credit firms also include carbon "accumulators" or "aggregators", whose activities overlap with originators, although the latter terms may be used more often to describe companies that are less directly involved with the projects themselves.

63. Project originators may be independent companies with no formal obligations under any emissions trading system, or they may themselves face commitments under such systems. There are many "compliance buyers" – among them companies, as well as governments – that have assumed the role of project originator to oversee the process of securing credits for their own compliance use.[12]

64. In general, the buyer of emissions credits contracts with the seller in the Host Country by agreeing an "Emissions Reduction Purchase Agreement" (known as an "ERPA"). An ERPA specifies the terms of the transaction, including the allocation of risk between the two parties. I discuss the particular structure of ERPAs in more depth later.

65. The process of having an emissions reduction project (for example, a hydro-electric dam in, say, China, or a wind farm in, say, India) certified by the CDM Executive Board so as to generate approved CERs is technical and lengthy. It is also uncertain, given potential environmental and social concerns, especially in the context of hydro projects. I provide an overview of the CDM project development process in the following paragraphs.

*Registration*

66. There are three key documents that must be submitted to the CDM Executive Board for review before a project can be registered:

    (1) Project Design Document ("PDD"): This is a comprehensive document describing the features of the proposed emission reduction project. Among other things, it provides detail on the project funding, sets out the timeframe for development, the officially approved Methodology used to determine the baseline emissions and the expected emissions reductions, and how reductions are to be monitored, and it describes how the project is "*additional*".[13] The PDD also describes the environmental impact of the project.

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[12] Compliance buyers are obligated parties: see fn 2 above.

[13] In essence, the *additionality* requirement refers to the need for emissions to be lower with the project than would have been the case without the project – typically as set out in the baseline scenario – and that the project would not have gone ahead without CDM participation (because it would not have been financially viable). Various methodologies for determining a baseline have been approved by the Executive Board, depending on technology type. Projects must set out their baseline and estimated emissions reductions according to one of the approved Methodologies, and these estimates must then be verified independently by a Designated Operational Entity. New methodologies must be submitted to the Executive Board for approval before they can be used in support of a project seeking registration.

The PDD is prepared by the project developer, originator or consultant. Upon completion, the rules of the CDM require that the PDD is made available for public consultation for 30 days on the UNFCCC website. This consultation is open to local stakeholders, Host Country and Annex I country DNAs, as well as UN-approved non-governmental organisations. All comments received must be considered by the DOE in its subsequent validation of the project.

(2) Validation report by a DOE: A document that confirms the project is eligible to be awarded credits under the CDM. Once the PDD has been finished and presented for public consultation, one of the Project Participants will appoint a DOE to verify the contents of the PDD and review any stakeholder comments.[14] The DOE assesses the detail of the baseline methodology, emissions monitoring plans, as well as the general context and development proposal for the project. The DOE is responsible for ensuring that the project conforms to the rules of the CDM.

(3) Host Country Letter of Approval ("LOA"): Among the responsibilities of the DNA appointed by non-Annex I Host Countries is to approve Project Participants from their country. In assessing the project and related Project Participant the Host Country DNA must confirm that the project meets the sustainable development criteria required by the CDM.

67. Initially, CDM rules required that *all* Project Participants – both those in host countries and those in buyer Annex I countries – received Letters of Approval from their respective DNAs prior to the registration of a project. However, a subsequent amendment to the rules was agreed by the Executive Board in February 2005, which meant Annex I country approval was no longer always required prior to registration: for this new class of so-called "unilateral" projects, Annex I approval was only necessary prior to the CDM Registry administrator *forwarding* CERs to the national account of the Annex I Project Participant (i.e. the buyer of the credits).

68. Consequently, projects may apply for registration at different stages of their physical commissioning and development, but only after they have completed the three key stages of the process described in paragraph [66] above and secured the required documentation. However, for various reasons, project developers or originators are likely to apply for registration relatively early in the process, before significant funds have been committed to making physical investments. (I should mention that there are also additional areas of complexity and uncertainty as to the requirements for Annex I approval in relation to "Large Hydro" projects: I return to these later.)

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[14] The extent to which the Host Country Project Participant or Annex I Project Participant(s) drives the project through the CDM process may depend upon what the respective parties have agreed about their roles in the project development. These roles may be established within the ERPA or via a separate agreement. An inexperienced Host Country project owner may leave the majority of the CDM approval work to a more experienced originator. Where this is the case, the originator is likely to be able to negotiate a lower price per CER that it contracts to pay.

*Monitoring, Verification and Certification*

69. After a project is successfully registered, before it can receive any CERs, its actual performance must be monitored, and emissions reductions verified against the baseline set out in the PDD. Monitoring begins as soon as a project is operational and must be carried out and recorded as agreed within the PDD (and approved at the validation stage). Project Participants decide when they wish to apply to the Executive Board for the issuance of CERs. To apply, Participants must first ask a DOE to assess the monitoring and verify the emissions reductions that have been recorded by the project.[15] To ensure the credibility of the project, under most circumstances the DOE that carries out the verification of emissions levels must not be the same company that carried out the validation prior to registration.[16] Following successful verification, the DOE then formally certifies the emission reductions of the project for the period during which emissions levels were monitored. This certification sets out the number of credits that the project is entitled to receive for the corresponding period.

*CER Issuance*

70. Once the DOE has verified the emissions reductions over the relevant period, and the verification has been submitted to the Executive Board, the Board may then issue the corresponding number of CERs to the project. The issuing of CERs is carried out by the CDM Registry administrator, on behalf of the Executive Board. At this point the CERs are created and issued, entering into the Executive Board's Pending Account within the CDM Registry.[17]

*Forwarding*

71. The final stage of the process is the forwarding of CERs from the Executive Board's Pending Account into the account of a "Project Participant" (i.e. the buyer or seller of the CERs) within their National Registry. In order for CERs to be forwarded, a request for forwarding must be made to the CDM Registry administrator by a Project Participant. The administrator will carry out various checks prior to forwarding the credits, including that Annex I approval for the relevant Project Participant(s) has been granted.

72. The verification and subsequent issuance process is repeated each time a Project Participant applies for a project to be issued additional CERs.

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15 Over the lifetime of the project, various monitoring periods may occur sequentially, following which the project can request that CERs are issued to the Project Participants. Project Participants vary in their preferences about when they submit their monitoring reports and requests for issuance.

16 Small-scale projects may be validated, verified and certified by the same DOE. In addition, large-scale projects may apply to the Executive Board to be excepted from this requirement, although I believe that this is uncommon.

17 The CDM Registry is an electronic database that facilitates the accounting of the issuance, holding and acquisition of CERs. CERs are initially held in the Executive Board's pending account before a request for forwarding is received.

73. Once a CER has been forwarded to an account in an Annex I country, it can be traded with other financial intermediaries or directly with compliance buyers. At this point, the credit becomes what is referred to as a "secondary CER".

74. In addition to the process for the certification of CERs and as noted above, JI allows Annex I countries to co-operate with each other to reduce emissions, producing ERUs that can be traded between the participating parties and that can be used for compliance with Kyoto targets. For a JI project to be eligible, it must provide "a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that may otherwise occur". Moreover, as for other forms of emissions trading allowed under the Protocol, use of JI is intended to be "supplemental" to domestic actions to reduce emissions.

75. Similar to CDM projects, before any ERUs may be issued to a JI project, the project must have the approval of the Host Party, and Project Participants[18] must be authorised to participate by an Annex I Party.

*EU ETS*

76. The largest emissions trading market is the EU Emissions Trading System, previously called the Emissions Trading Scheme ("EU ETS"). The EU ETS was established by the European Union in Directive 2003/87/EC (referred to as "the EU ETS Directive"), and its sophisticated cap-and-trade system came into effect in 2005.

77. The EU ETS Directive requires EU Member States to cap carbon emissions pursuant to the Kyoto protocol. The EU ETS is designed to work in conjunction with the system established by the Kyoto Protocol, but it is a separate trading system. It is a cap-and-trade system covering carbon dioxide and other greenhouse gas emissions from large industrial plants or "installations".

78. Emissions are licensed by the holding of tradable European Union Allowances ("EUAs") or other equivalent credits including CERs. The EU ETS did not at first permit the use of CERs or ERUs to meet commitments. However, by Directive 2004/101/EC ("the Linking Directive") the scheme was amended to allow them to be used (as well as EUAs), thus linking the EU ETS and Kyoto Protocol regimes.

79. Thus, subject to various limited restrictions, CERs from approved CDM projects may be used by participants to comply with the EU ETS. As to the restrictions, the EU ETS prohibits the use of CERs generated by nuclear facilities and from land use and forestry activities; and, of more direct relevance to the present case, it also requires Member States to ensure that specified criteria and guidelines are observed for CERs generated from hydro-electric power production activities, with special criteria for "large hydro CERs" derived from activities with a generating capacity of more than 20 MW.

80. With coverage of sources whose annual emissions total around 2 billion $tCO_2e$, the EU ETS applies to a significantly smaller volume of emissions than the Kyoto

[18] Legal entities that wish to participate in actions leading to the generation, transfer or acquisition of ERUs.

Protocol (which has a cap equivalent to emissions of nearly 15.4 billion $tCO_2e$ annually). However, despite the smaller volume of total emissions covered, the EU ETS accounts for the largest emissions trading market by both transaction volume and transaction value.

81. A wide range of companies and other organisations are involved in the market, either in trading the product (EUAs, CERs or ERUs) or facilitating, verifying and assuring transactions and compliance with the scheme's rules. In addition to the plant operators whose emissions are regulated by the EU ETS, stakeholders include major banks, trading houses, brokerages and hedge funds, as well as exchange platforms and legal and advisory services. Additionally, news, reporting and data management services have been developed to support the market, including for example Thomson Reuters Point Carbon (hereafter "Point Carbon") and Bloomberg New Energy Finance.

82. The simplest way of trading EUAs is to transfer them directly from one registry account to another. This kind of transfer can be agreed between the two parties, and can result in essentially immediate transfer between the two accounts. This is in effect a "spot" trade in EUAs, because it involves the immediate transfer of allowances from one account to another. In addition to direct spot trades, there are brokers and exchanges that will facilitate spot trade between two parties, potentially providing anonymity, ensuring creditworthiness, providing liquidity, etc.[19]

83. Beyond the simple spot trading of allowances, it is also possible to trade in EUA derivatives. The most common of these is a contract for future delivery of carbon credits on a pre-arranged date, with payment typically made around the future delivery date for a previously agreed price. Like spot trades, such forward contracts can be arranged for trade over-the-counter ("OTC") or via exchanges. (When forward contracts are traded over exchanges they are typically referred to as futures.) By far the most common forms of forward/ futures contract are those providing for delivery of EUAs in December of each year. There are, however, forward contracts for delivery of EUAs at different times of the year, and it is also possible to trade more complex derivatives, such as EUA options.

*Primary and secondary markets*

84. Of considerable importance in this case is the distinction usually made by analysts between two different markets for CERs and other emission reduction credits, the "primary" and the "secondary" markets.

85. Put shortly, the primary market refers to the development, purchase and trading of emission rights before their certification and issuance as CERs: in effect, the primary market trades in "expected" CERs, where there is at least some degree (and sometimes a high degree) of issuance risk. The secondary market refers to trading of CERs post-issuance by the CDM Executive Board, usually into and out of a project

[19] The timing of the finalisation of a spot transaction depends upon the specific contractual arrangements, but typically will be within a matter of a few days at most. For example, using the BlueNext exchange the trade is finalised within 15 minutes, however the EEX EUA spot market product can take between one and three days for the transaction to be finalised via the exchange.

participant's account. Trade in both the primary and secondary markets can include trades in derivatives, including futures and options.

86. Trade in secondary CERs is similar to trade in other commodities, with standardised contracts. Barclays developed a standard form contract in 2007 which was called the Standardised Certified Emission Reduction Forward Agreement or "SCERFA". Much of the trading is on exchanges, reducing transaction costs and minimising counterparty credit risks. Not all secondary CERs, however, can be traded on exchanges; and over-the-counter transactions can take place too.

87. The primary CER market ("pCERs") is not standardised and is much less liquid, reflecting the much more uncertain nature of a pCER. Primary Carbon credit originators purchase the rights to CERs from the project owner, in the 'primary market'. The rights are typically purchased at an early stage in the development of the project at a time when there is uncertainty as to how many (if any) CERs will eventually be issued and when.

88. Thus, participants in the primary CER market are dealing, not in approved and issued CERs, but in "expected" (sometimes more accurately "hoped for" pCERs), which may in the event never be approved or issued: pCERs are thus not entirely fungible; and the value of a pCER is lower than the value of a secondary CER ("sCER") because a variety of risks must be priced in leading to that discount.

89. That discount would typically reflect a number of factors, including:

    (a) the stage in the CDM administrative and approval process ("Registration Risk" and "Issuance Risk");

    (b) the stage in the development of the underlying project itself, and its size ("Project Risk");

    (c) the type of technology used, and possibly the CDM methodology used ("Performance Risk");

    (d) the Host country concerned ("Policy Risk");

    (e) the level of secondary CER prices ("Market Price Risk");

    (f) the experience of the relevant participating parties, and especially of the project originator since its expertise in shepherding projects through the CDM approvals process may well be vital; and

    (g) the financial reliability of the parties ("Counterparty Risk").

90. The risks are allocated under the terms of an ERPA. ERPAs are thus made to measure, often requiring detailed negotiation; their terms will affect and determine the price/risk ratio and are likely to influence also the types of onward sales agreements that the project originator will enter into with purchasers from it. For example, a buyer is likely to be willing to pay more for a contract that firmly commits the seller to deliver a fixed number of CERs than for a contract that only commits the seller to deliver as many CERs as are actually issued. In the former case, if the project fails to deliver, the seller is contractually obliged to find CERs to deliver to the buyer. In the

latter case, the seller is under no such obligation, so the buyer bears the volume risk. There is not the standardisation requisite for fungibility.

91. The terms of the ERPAs that a project originator has in place with project owners are also likely to influence the types of onward sales agreements that the originator will enter into with other parties seeking to purchase CERs from the project originator. All else being equal, a project originator might be more likely to enter into firm forward sales commitments the greater the security offered by the (collective) terms of its ERPAs with project owners. (Having ERPAs for a large portfolio of projects, spread across different project categories and geographies, also may help an originator to manage the risks of forward commitments, although some risks, such as delays associated with the CDM approvals process, may not be "diversifiable".) A project originator's willingness to make firm contractual forward commitments will also depend on the originator's overall business strategy and attitude towards risk.

92. The special risks inherent in the primary carbon market, and in dealings in pCERs (as distinct from sCERs), are of some considerable importance in this case. It is CFP's contention that it was its special experience and expertise in the assessment of those risks, and the further risks relating to Large Hydro pCERs, that enabled it both to identify the potential and also to develop a strategy for the realisation of Tricorona's unusual portfolio. Barclays, on the other hand, contends that it had such experience and expertise itself, and needed no guidance from CFP; and in any event what CFP provided was not confidential, nor was it of use to, or indeed ever used by, Barclays. I develop the competing arguments later.

*Large Hydro CERs*

93. Since (as I come shortly to explain) the Tricorona Portfolio largely comprised what are known as "Large Hydro CERs" it is also necessary to explain briefly their nature (and peculiarities).

94. Large Hydro projects are defined in the EU Linking Directive as hydro-electric power production projects with an electricity generating capacity in excess of 20 MW.

95. On the one hand, Large Hydro Projects are a considerable source of CERs, and since such projects use well established and reliable technology, buyers of Large Hydro pCERs can have relative confidence both in the physical development of the projects (and thus relatively low "Project Risk") and in the forecasting of emission reductions to be achieved.

96. On the other hand, in the context of environmental concerns about the construction of dams and their potentially grave effects (for example, in terms of the displacement of communities and/or the removal of water supply), the Linking Directive placed conditions for the approval of large hydro activities by EU Member State Annex I countries that were parties to the EU ETS to ensure compliance with the guidelines of the World Commission on Dams ("WCD"). Generally, to be used under the EU ETS, Large Hydro projects must have a further letter of approval, known as an "Annex I Letter of Approval" from an EU Member State which acknowledges that the project has been developed according to the WCD guidelines.

97. The additional criterion imposed on the approval of Large Hydro projects appears to have resulted in some market participants being especially apprehensive about them, and less willing to use them (or buy them) than other project types generating CERs. In particular, the provision allowing Member States to accept conforming CERs from operators within their jurisdictions led some market participants and observers to be concerned that individual countries might draw up specific requirements with respect to the CERs that they would accept for compliance purposes.

98. Mr Radov, having reviewed a variety of press reports and market and trade publications, identified two key areas of particular doubt. First, there was uncertainty about which Member States would be willing to approve Large Hydro projects at all. Second, there was uncertainty about whether, if one Member State issued a Letter of Approval for a Large Hydro Project, other Member States would be willing to accept (for EU ETS compliance) CERs from that project without having issued LOAs themselves.

99. In the context of this confusion and uncertainty, in October 2007 the major carbon trading exchanges (in particular, the European Climate Exchange ("ECX"), PowerNext (renamed BlueNext at the end of 2007) and NordPool) prohibited Large Hydro CERs from being traded across their platforms. Consequently, Large Hydro CERs could only be traded via OTC transactions agreed bilaterally or via an intermediary broker. This inevitably increased costs and the difficulty of finding counterparties.

100. In an effort to clarify when and under what conditions Large Hydro projects would qualify for acceptance EU Member States published a set of guidelines based on what was presented as a common interpretation of the WCD report and which were intended to harmonise the assessment within the EU of whether a Large Hydro project would conform and obtain approval. These were the "Guidelines on a common understanding of Article 11b(6) of Directive 2003/87/EC as amended by Directive 2004/101/EC" ("the 2009 Guidelines").

101. The 2009 Guidelines were agreed in January 2009. Implementation was to be in April but was delayed until 1 July 2009. The 2009 Guidelines provided recommendations as to how the WCD criteria should be used to screen Large Hydro projects, and included a standard template questionnaire to harmonise the assessment within the EU of whether a Large Hydro project conformed to the WCD report. The 2009 Guidelines stated that if a project had an Annex I LOA under the template, then all Member States agreed to accept CERs from that project.

102. However, although an obvious step forward in, as it were, bringing Large Hydro into the fold, the 2009 Guidelines left open to Member States the final decision, and may therefore not have answered satisfactorily the concerns of market participants, even though none of the experts had any knowledge or experience of any occasion on which any EU Member State had formally refused to accept for compliance a Large Hydro CER that had originated from a project approved by another Member State.

103. Undoubtedly, concerns remained. Thus, for example, the 2009 Guidelines:

(1) were only guidelines and were not mandatory;

(2) did not affect the position of projects that had already been approved so that all CERs that had already been issued from projects and all CERs yet to be issued from such projects remained vulnerable;

(3) were aimed at harmonising the process for EU Member State approval of Large Hydro projects as opposed to saying anything about the acceptance of Large Hydro CERs for compliance use;

(4) could not remove the taint potentially attaching to Large Hydro CERs arising from concerns in the market about their environmental impact.

104. Those concerns continued to blight the prospect of general market acceptance, despite legal commentary that (a) the uncertainty was misplaced and based on a misreading of the Linking Directive and (b) from a legal perspective, Large Hydro CERs, once actually issued, were fungible with those deriving from other project types. Diminishing concerns were then re-ignited in light of speculation that Large Hydro CERs might not be eligible within the CDM post-2012.

105. At all events, though Large Hydro CERs began to be accepted for trading on the GreenX exchange in February 2011, and the BlueNext exchange followed suit in May 2011, the other major exchanges (including ECX, Nordpool and EEX) continued to exclude Large Hydro CERs from their platforms. That in a sense is the litmus test demonstrating abiding, even if misplaced, concerns about this particular class of CERs even when issued. Further, their exclusion from such major exchanges continued to make Large Hydro CERs less convenient for players in the secondary market, such as the European trading houses and banks.

106. The experts disagreed, however, as to the level of demand for Large Hydro CERs overall (including OTC trades).

107. Barclays' expert, Mr Korthuis, expressed the opinion in his report that the appetite of utilities for the large numbers of (issued) sCERs at low cost of contract management and low delivery risk available from Large Hydro projects increased strongly after early 2008, and that more especially "it was well known in the market including during 2008-9 that European utilities were buying CERs from large hydro projects".

108. He added that his experience whilst working for Climate Focus B.V. ("Climate Focus"), an advisory firm in climate change policies specialising in the carbon market, was that they "were regularly approached by buyers, including mostly utility companies, if the CERs of these projects were already for sale". Thus, although the exclusion from major exchanges "made large hydro CERs less convenient for players in the secondary market, such as the European trading houses and banks… [who] preferred the convenience and transparency of trading exchange traded products", nevertheless this was counter-balanced by ever-increasing demand from "the big Chinese parastatal energy companies" and from Endesa and other European utilities.

109. Mr Korthuis illustrated this by making the point that in April 2008 Large Hydro projects made up 12.6% of the entire CDM pipeline (as derived from a UNEP RISOE CDM pipeline spreadsheet of 9 April 2008), whereas at the date of his report in February 2013 the figure had risen to 20.5% (using a like spreadsheet of 13 December 2012), making it the single largest CDM project category. This was disputed.

110. Mr Radov disagreed both with Mr Korthuis's general conclusion and his approach; he disagreed especially with Mr Korthuis's evidence that demand, especially from the largest and best known European utility companies, was not only strong but well known in the market to be so.

111. He rejected Mr Korthuis's attempt to extract support from the UNEP RISOE CDM pipeline spreadsheets, making the point that (a) not all persons listed as a project participant were buyers of CERs: they might be investors in the project for a number of reasons; (b) such persons might, even if buyers, not be buying for their own compliance use but onward sale; (c) Mr Korthuis's approach focused on numbers of projects, whereas the better test was volume, which resulted in a conclusion (opposite to that of Mr Korthuis) that EU ETS participants continued to prefer other types of CERs.

112. Most importantly perhaps (since it goes to the crucial question in the case as to whether CFP demonstrated a way of monetising the Tricorona Portfolio that others had not spotted), Mr Radov's opinion remained throughout that demand for Large Hydro CERs was increasing, but from a very low base (his figures, which Mr Korthuis did not gainsay when put to him in cross-examination, were 0.4% as at April 2009 rising to 2% in April 2010), and that given the slim market, it could be inferred that their profile in the market, and the demand for them, remained restricted, uncertain and opaque. Mr Bode, CFP's other expert, concurred.

113. Generally, I found Mr Radov to be the most reliable of the experts. He spoke with a wealth and variety of experience as well as calm assurance. Mr Korthuis was genial: and ready to qualify or correct his evidence when shown to have overstated the position. Although also well qualified, his experience was not as broad as Mr Radov's, and in my assessment he tended to extrapolate general views of the market, especially as regards the demand for Large Hydro CERs, from his firm's appointment by, and work for, the largest Spanish utility, Endesa, which I am not persuaded reflected the true general position. I was not persuaded by Mr Korthuis's efforts to "prove" widespread knowledge of demand, nor his attempt to depict Large Hydro as a major part of the market at the time. I also agree with Mr Radov that Mr Korthuis was not always clear whether he was talking about the primary or the secondary market, contracts for sCERs, or forward sales under ERPAs of pCERs.

114. This occasional failure to distinguish between the two markets may explain in part why he tended to overstate the development and transparency of the market for Large Hydro CERs, and why (to give an example which also illustrates his straightforwardness) he was constrained to accept under cross-examination the proposition put to him that in the period 2008 to 2010:

> "it was not a straightforward exercise to sell forward primary large hydro CERs in significant volumes."

115. All that said, I consider that Mr Radov did tend to overstate both the extent to which demand from utilities, actual and prospective, for Large Hydro CERs (both pCERs and sCERs) was developing in that period, and the extent to which that was unknown. I consider it likely that the fact of initially low level and hesitant, but increasingly substantial and concrete, demand for large Hydro sCERs from utilities is likely to have become known to at least some of those in the markets (both secondary and

primary) over the course of 2008 and subsequent years (especially from mid-2009). I cannot accept that this was a secret.

***Overview of applicable legal principles: (a) duty of confidence and (b) obligation of exclusivity***

116. Although there are various issues that need later amplification, and others (such as those relating to available remedies) which I shall for the present leave aside, the legal framework within which this case falls to be decided may I think be summarised as follows.

117. CFP relies on (and claims breach of) both, and the two are often inter-related: but it is necessary to distinguish between (a) a duty of confidence and (b) an obligation of exclusivity.

118. A duty of confidence relates to the protection of information which has the necessary quality of confidentiality. An obligation of exclusivity restricts the person bound in his dealings with others. The one does not necessarily connote or impose the other, although each may reinforce the other.

*Duty of confidence: law and equity*

119. The legal principles defining the duty of confidence are well established and there was a large measure of common ground both as to their content and as to their application.

120. Even in the absence of a contractual relationship and stipulation, and in the absence too of an initial confidential relationship, the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential: see *per* Lord Nicholls (dissenting on the result, but not on this issue) in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [14].

121. The subject matter must be "information", and that information must be clear and identifiable: see *Amway Corp v Eurway International Ltd* (1974) RPC 82 at 86-87.

122. To warrant equitable protection, the information must have the "necessary quality of confidence about it": *per* Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at 215.

123. Confidentiality does not attach to trivial or useless information: but the measure is not its commercial value; it is whether the preservation of its confidentiality is of substantial concern to the claimant, and the threshold in this regard is not a high one: *Force India Formula One Team Limited* [2012] ROC 29 at [223] in Arnold J's judgment at first instance.

124. The basic attribute or quality which must be shown to attach to the information for it to be treated as confidential is inaccessibility: the information cannot be treated as confidential if it is common knowledge or generally accessible and in the public

domain. Whether the information is so generally accessible is a question of degree depending on the particular case. It is not necessary for a claimant to show that no one else knew of or had access to the information.

125. A special collation and presentation of information, the individual components of which are not of themselves or individually confidential, may have the quality of confidence: for example, a customer list may be composed of particular names all of which are publicly available, but the list will nevertheless be confidential. In the *Saltman* case (*supra*) Lord Greene MR said:

> "…it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker on materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

Or as it is put in Gurry on Breach of Confidence (2nd ed., 2012) para 5.16:

> "Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the skill and ingenuity of the human brain. Novelty depends on the thing itself, and not upon the quality of its constituent parts. Indeed, often the more striking the novelty, the more commonplace its components…"

126. Further, and of particular potential relevance in this case, pieces of information which individually might appear to have limited value and marginal secrecy, in combination in particular hands, might have special composite value and confer on the recipient a considerable advantage: as was noted by the New Zealand Court of Appeal in the *Arklow* case when at that stage (see [1998] 3 NZLR 680 at 700 in the judgment of the majority which was affirmed by the Privy Council).

127. The parties may by contract agree and identify specified information that is, or is as between the parties to be treated as, confidential, or protected under the terms of their agreement; or they may simply agree that information may not be used whether or not otherwise it would have the quality of confidentiality.

128. Thus, in *Ministry of Defence v Griffin* [2008] EWHC 1542 Eady J observed:

> "A contract may embrace categories of information within the protection of confidentiality even if, without a contract, equity would not recognise such a duty."

129. However, that case concerned obligations to Government of a sensitive nature: and an attempt to restrain the use of information that is not confidential (e.g. because in the public domain) may risk being unenforceable on grounds of public policy as being in restraint of trade. Further, loss and damage might be impossible to establish.

130. Contractual obligations and equitable duties may co-exist: the one does not necessarily trump, exclude or extinguish the other: see *Robb v Green* [1895] 2 QB 315 and *Nichrotherm Electrical Company Ltd and others v Percy* [1957] RPC 207 (both in the Court of Appeal).

131. However, where the parties have specified the information to be treated as confidential and/or the extent and duration of the obligations in respect of it, the court will not ordinarily superimpose additional or more extensive equitable obligations: and see *per* Sales J in *Vercoe and Pratt v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch), who found in that case that the duty of confidence was confirmed and defined by the contract, and observed (at [329]):

> "Where parties to a contract have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence: see e.g. *Coco v Clark* at 419."

132. Nevertheless, that does not preclude wider equitable duties of confidence in circumstances that are not ordinary. For example, as it seems to me, a circumstance could arise where the obligations of the parties in respect of information with the quality of confidentiality are not clearly prescribed or governed by the contractual terms but where the use of certain information would plainly excite and offend a reasonable man's conscience. In such circumstances, as it seems to me, an equitable duty not to use the information having that quality would be recognised, even if that went further than the definition, duration or restraint prescribed by the contract.

133. Put another way, whilst it will not usually be unconscionable to use information in conformity with, or in a manner that does not offend, the terms consensually agreed, and the contract will shape the commitment, contract does not necessarily assuage conscience, and equity may yet give force to conscience: see *per* Simon Brown LJ (as he then was) in *R v Department of Health, Ex p Source Informatics Ltd* [2001] QB 424 at [31]; see also the emphasis on conscience as being the basis of both the duty and any action for its enforcement or vindication *per* Lord Neuberger of Abbotsbury PSC in *Vestergaard Fraudsen A/S v Bestnet Europe Ltd and others* [2013] UKSC 31; [2013] 1 WLR 1556.

134. Furthermore, and again by reference to the roots of the equitable duty in conscience, it seems to me that there may be equitable reasons for declining to regard the equitable obligation as confined by a contractual restriction. An example might be if it is shown that the restriction relied on by one party as confining its equitable obligations was agreed by the other party in ignorance of a fact which, had it been disclosed, would either have caused that other party to withdraw altogether or insist upon the removal, or at least fundamental recasting, of the restriction. (I return to this aspect when considering whether in this case Barclays was in a position of conflict which it failed to disclose when the IVC/Barclays Confidentiality Agreement was made: see especially paragraphs 417 to 467 below.)

135. It is not a defence to a claim for breach of the duty of confidence that the defendant could have obtained the information elsewhere, if he did not in fact do so: see *per*

Lewison LJ in *Force India Formula One Team Limited v Aerolab SRL and another* [2013] EWCA Civ 780.

136. The party complaining must be the person who is entitled to the confidence and to have it respected: *per* Lord Denning MR in *Fraser v Evans* [1969] 1 QB 349 at 361; and, as stated by HHJ Hodge QC (sitting as a Judge of the High Court) in *Robert Andrew Jones v IOS (RUK) Ltd (in members' voluntary liquidation) and another* [2012] EWHC 348 (Ch) at [40]:

> "that requires the claimant to show that he has a sufficient interest in the information to entitle him to maintain an action to restrain its unauthorised dissemination or use."

137. But the claimant does not have to demonstrate "title" or "ownership". To quote again from HHJ Hodge QC in the *IOS (RUK)* case (see [40]):

> "…the appropriate inquiry should be directed to considering whether the claimant has demonstrated that [it] made a sufficient contribution to the creation of the relevant confidential information, in the furtherance of its own commercial interests, to justify the imposition of a duty, recognised by the courts and owed to [the claimant], to keep that information secret, and entitling them to restrain its unauthorised use."

138. To found a claim, whether in law or equity, actual misuse adverse to the claimant of information which still retains the quality of confidentiality must be established or inferred. For example, where a defendant had knowledge of a rival bid, through a relationship and information which could have been confidential, it was not sufficient, without more, to show that the defendant was "galvanised" by that knowledge into acting more speedily to use information that had not the quality of confidentiality, where by the time of that use the claimant's rival bid was public knowledge, and was not shown to have been adversely affected by the defendant's use of that knowledge: see *Arklow Investments Ltd and Another v Maclean and Others* [2000] 1 WLR 594.

139. Similarly, as it seems to me, the fact that the recipient's perspective is changed by the confidential information he receives is not enough to constitute misuse, unless and until that change in perspective causes him actually to use that information otherwise than for the purposes for which it was provided to him.

140. Nevertheless, subconscious misuse will suffice: deliberate misuse does not have to be shown. But the confidant must have acquired the confidential information in circumstances where he has notice or is held to have agreed that the information is confidential: and see *Attorney-General v Observer Ltd and Others (Spycatcher)* [1990] 1 AC 109 at 281B *per* Lord Goff of Chieveley.

141. The obligation not to use confidential information attaches only to information which has (or which the parties have contractually agreed has) the necessary element of confidentiality; and it continues only so long as the information remains confidential: *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41.

142. Whether misuse is actionable without proof of detriment to the person to whom the duty of confidence is owed remains a point of debate (see *Coco v Clark* at 48); but it is a rare case in which proof is not plain and the point arises: and the detriment being plain, it does not do so, in my view, in this case.

*Obligation of exclusivity*

143. CFP's claim for breach of an obligation of exclusivity is analytically straightforward, but factually tortuous.

144. An obligation of exclusivity is a creature of contract. It is not based on conscience, or on the nature of the relationship between the parties outside or in parallel to the contract. It is a matter of contractual interpretation.

145. The difficulty in this case is identifying what was (if any) the contractual engagement between CFP and Barclays, and between CFP and Tricorona.

146. As to the latter, it is common ground that there was no contractual exclusivity agreement between CFP and Tricorona (although there was a confidentiality agreement, see paragraph 164 below). Tricorona felt itself free to canvass overtures and interest from others including Barclays, and did so. (Whether in doing so it used confidential information is, of course, an issue in the case.)

147. It is also common ground that there was no initial exclusivity agreement between CFP and Barclays. CFP approached Barclays through IVC; and, as elaborated later, all the initial arrangements were nominally between IVC and Barclays.

148. Thus, although a confidentiality agreement was made between IVC and Barclays which imposed exclusivity obligations for a period of 18 months after 3 September 2008 (when it was made), it is common ground that those provisions cannot be invoked by CFP nor relied on by Barclays. CFP was not expressed to be a party to that Confidentiality Agreement, and IVC is not a party in these proceedings. Although the Defendants had initially pleaded that CFP was bound to the IVC/Barclays Confidentiality Agreement as IVC's undisclosed principal, they did not pursue this at trial, and they formally abandoned it by amendment.

149. Accordingly, although those exclusivity provisions are an important part of the factual background or matrix, CFP bases its case on a promise that it submits was made in the course of, or is to be inferred from, a series of exchanges between CFP and Barclays in January and March 2009, leading to what was described as an Exclusivity Release Agreement made between Barclays, IVC and CFP on 30 March 2009.

150. The promise alleged by CFP as being in continuing effect at least from January 2009 onwards is that Barclays would not acquire Tricorona or otherwise conflict itself from acting on CFP's proposed acquisition; and that in the latter context Barclays would not without CFP's consent deal directly with Tricorona except in relation to day-to-day business. However, Barclays contest this; and there are disputes as to the effect of the exchanges between Barclays and CFP in January and March 2009, and as to the proper interpretation and application of the terms of the "Exclusivity Release".

151. These disputes have moved beyond issues of interpretation to disagreements as to what in fact was the substance of the parties' agreement, and to claims for rectification and alleging estoppel. CFP claims in the alternative that if (contrary to its case) the Exclusivity Release, on its true construction, released Barclays from its obligations entirely, then its terms should be rectified on grounds of common mistake to conform with the promise CFP contends was made and intended, or on the ground that CFP and IVC made a unilateral mistake. If in such circumstances rectification is denied, CFP relies on an estoppel; and its final alternative is that the Exclusivity Release should be rescinded.

152. I deal later with the factual disputes in this regard and with the claims that they have generated, which are in ambit considerable, and complicated by the fact that no record or transcripts of the oral exchanges are available.

153. So far as the principles of law relating to the issues as to the form and interpretation of the agreements alleged are concerned:

(1) what terms were agreed, as distinct from the interpretation of the terms agreed, is, of course, a matter of fact to be determined on the evidence;

(2) the proper interpretation of the terms is a matter of law to be decided in accordance with ordinary principles of contractual interpretation, and thus excluding from the material and factual matrix evidence of subjective intention and other inadmissible evidence;

(3) there is no longer an issue as to whether the effect of the Exclusivity Release was to release not only any exclusivity obligations but also any duty of confidentiality owed by Barclays to CFP; it is now common ground that it did not.

154. As to the legal principles applicable in respect of CFP's alternative claim for rectification of the Exclusivity Release:

(1) In *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] 1 AC 1101 at [48] Lord Hoffmann approved the requirements for rectification for common mistake as summarised by Peter Gibson L.J. in *Swainland Builders Ltd v. Freehold Properties Ltd* [2002] 2 EGLR 71 at [33]:

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

(2) The Court's approach is objective. Chitty (31st ed., 2012) para 5-118 states, based on *Chartbrook* at [59], that:

> "it is not necessary for rectification on the basis of common mistake that the parties were subjectively agreed on the same terms; it suffices for there to be an outward expression of common intention that on an objective view the parties appeared to be in agreement."

(3) But in this context, unlike in the process of interpretation, the antecedent negotiations are admissible and normally of central relevance; and subjective evidence of intention or understanding is not merely admissible but normally essential: and see *per* Lord Neuberger MR (at paras. 197 to 198) in *Daventry District Council v Daventry & District Housing Limited* [2011] EWCA Civ 1153 (in which the Court of Appeal followed, albeit with some reservations, the views (technically *obiter)* of Lord Hoffmann in *Chartbrook*).

(4) The Court must be provided with "convincing proof" (see *Joscelyne v Nissen* [1970] 2 QB 86 at 95-96 and 98) and persuaded to "a high degree of conviction" so that it can be "sure" (see *The Olympic Pride* [1980] 2 Lloyd's Rep 67 at 73) that the parties had a common understanding which by mistake the instrument did not reflect.

(5) If no common mistake can be established, the conditions for rectification on the ground of unilateral mistake are that (a) the party seeking rectification has made a mistake; (b) the other party actually knew that the mistake was being made; but (c) that other party consciously refrains from alerting the first party as to his mistake. As to (b), only actual knowledge or wilful blindness will suffice: and clear proof will be required: and see Chitty on Contracts 31st ed., vol. 1 at 5-123.

155. In the alternative to its claims based on a contractual promise of exclusivity, CFP contends that Barclays is estopped from relying on the Exclusivity Agreement as permitting it to approach Tricorona with a view to purchasing Tricorona for itself.

156. As to this:

(1) the form of estoppel relied on is promissory estoppel;

(2) as to the doctrine of promissory estoppel (rediscovered by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, applied by him in *Brikom Investments Ltd v Carr* [1979] 1 QB 467 and affirmed by the Court of Appeal in *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329), I can adopt the following passage from Snell's Equity, 32nd ed. at 12-009:

> "Where by his words or conduct one party to a transaction freely [that is, without duress] makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party relies upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise,

> the party making the promise or assurance will not be permitted to act inconsistently with it."

(3) thus, to raise such an estoppel the person relying on it (in this paragraph "C") must prove (a) the maker made an unequivocal promise or assurance (b) that it (the maker of the promise) would not enforce its strict legal rights and that (c) C relied upon it and ordered its affairs accordingly in a manner that (d) the maker of the promise anticipated or could and should have foreseen: see *ibid* at 12-010;

(4) C must also show that, judged on an objective basis, the promise was intended to affect the legal relationship between the parties (see *ibid* at 12-009);

(5) the principal issue (see again *ibid* at 12-009) is whether the promise or assurance had a sufficiently material influence on C's conduct to make it inequitable for the maker to depart from it;

(6) if it is shown that a mistaken assumption as to the content of a contract (or a failure to read it properly), rather than the promise alleged, was (as Barclays contend it can be shown in this case) the true operative reason for C (in this case, CFP) agreeing to the contract, the doctrine will not apply: or at least, the court is unlikely to be persuaded that it would be inequitable to permit C as the maker of the promise to depart from it: and see *Peekay Intermark Ltd and Another v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Ll Rep 511, at [52].

157. Lastly, CFP asserts and relies upon there having come into effect, in consequence of the exchanges and Barclays' promises in January and March 2009, a collateral contract such as to prevent Barclays relying on the Exclusivity Release.

158. The relevant legal principles in this regard were set out by Lightman J in *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Ll Rep 611 at [10] as follows:

> " (1) a pre-contractual statement will only be treated as having contractual effect if the evidence shows that parties intended this to be the case. Intention is a question of fact to be decided by looking at the totality of the evidence;
>
> (2) the test is the ordinary objective test for the formation of a contract: what is relevant is not the subjective thought of one party but what a reasonable outside observer would infer from all the circumstances;
>
> (3) in deciding the question of intention, one important consideration will be whether the statement is followed by further negotiations and a written contract not containing any term corresponding to the statement. In such a case, it will be harder to infer that the statement was intended to have contractual effect because the prima facie assumption will be that the written contract includes all the terms the parties wanted to be binding between them;

> (4) a further important factor will be the lapse of time between the statement and the making of the formal contract. The longer the interval, the greater the presumption must be that the parties did not intend the statement to have contractual effect in relation to a subsequent deal;
>
> (5) a representation of fact is much more likely intended to have contractual effect than a statement of future fact or a future forecast."

## THE PARTIES

### *CF Partners*

159. CFP (which was originally named Chelsea Financial Partners LLP) was established in December 2006 by Mr Jonathan Navon ("Mr Navon"), previously of Goldman Sachs (and before then Merrill Lynch and Deutsche Bank), as a boutique financial advisory and risk management firm.

160. Mr Navon was joined first (in September 2007) by Mr Thomas Rassmuson ("Mr Rassmuson"), a friend of Mr Navon, and then (in March 2008) by Mr Simon Glossop ("Mr Glossop"). Mr Navon and Mr Rassmuson both gave evidence and were cross-examined; Mr Glossop left CFP in December 2010 and did not give evidence.

161. Mr Navon describes CFP (which now has over 34 employees) as:

> "a specialised advisory, trading and investments firm active in the renewable, commodities and energy markets. It specialises in providing market participants with: advice as to how to access and risk manage carbon credit positions; carbon credit generation and portfolio management services; carbon emissions trading and brokerage services; trading of other energy commodities; and renewable financing…
>
> [It] has a significant presence in the carbon credit market…In addition to providing clients with advice and execution capabilities, CF Partners has developed its own CDM portfolio with around 47 projects…The firm is active in the voluntary carbon credit market, providing advice and carbon credits to corporates to offset their emissions on a voluntary basis….
>
> In 2011, we were ranked as the best dealer in primary and secondary CERs (ahead of all the major investment banks)…"

### *Tricorona*

162. Tricorona, a listed Swedish stock exchange company with a market capitalisation in 2007 of some US $100m, was the second largest carbon developer (only EcoSecurities was larger). It had accumulated a substantial CER portfolio, with an aggregate contracted CER volume, as at 29 August 2008, of some 91,865,794 CERs.

163. In a "Tricorona Business Overview" presented to its shareholders at its Annual General Meeting in April 2008 Tricorona described its business model as:

> "Acquiring Emission Credits from emission reduction projects under the 'Flexible Mechanisms' of the Kyoto Protocol and sell into Global compliance markets"

164. Mr Niels von Zweigbergk ("Mr von Zweigbergk"), who was Tricorona's Chief Executive Officer and who together with Mr John Christer Holmgren ("Mr Holmgren"), under the supervision of the main board, effectively comprised Tricorona's management team ("the Tricorona Management"). The Tricorona Management presented its strategy as being

> "to develop the projects, take it from the immature up to registration, and capture the margin between the primary market and the secondary market."

165. This was, however, easier said than done; and the Tricorona Management had been more successful at acquiring than selling. There were two material and unusual features of the Tricorona Portfolio of particular relevance to this case: first, the portfolio contained an unusually large proportion of Large Hydro CDM projects, amounting to around 40%; and secondly, and even more unusually, just 6.7% of the contracted volume had been forward sold. That latter figure compared with about 50% for its nearest competitor, EcoSecurities.

166. The Large Hydro CER proportion did not make Tricorona an attractive take-over target to the market in 2008. Further, as Mr Navon explained, "the relatively low level of forward sales was both unusual among the large CDM project accumulators and fundamental to the opportunity which we had identified", because to the extent that the portfolio was forward sold, there would no longer be an opportunity to extract additional value from it.

### *Barclays*

167. Barclays Bank needs no introduction. Further, it has never been disputed that Barclays was at all material times a leading bank in the secondary carbon market, with extensive experience in the business of buying and selling generic CERs (that is to say, issued CERs traded on the market and not linked to any particular project), either spot or forward.

168. However, although in their written Opening Submissions the Defendants depicted Barclays as a "market leader in carbon trading", over the course of the hearing, Barclays refined its position to disclaim both experience and ambition in the primary

market (in the sense of primary sales by project managers or carbon accumulators to compliance buyers of the kind that CFP was in the business of broking).

169. By the time of written Closing Submissions, its position was definitively that primary sales to compliance buyers (usually on the terms of an ERPA) was "a market that Barclays was not involved in, was not interested in and never became involved in".

170. However, although not interested in the business of primary sales by project managers to compliance buyers, it did become interested in a "CER origination business", which it described as purchasing primary CERs from project managers for securitisation or sale on the secondary markets (rather than directly to compliance buyers).

171. As Mr Louis Redshaw ("Mr Redshaw"), who had set up and ran the Emissions Trading Desk, and was Head of Environmental Markets, a team within the Commodities Department which was part of the Corporate and Investment Banking Division ("the IBD") of the Barclays Group, pithily put it:

> "I was looking to buy primary but not sell it.
>
> Q. So you were going to buy it from the project and then ultimately you would sell it in the secondary market?
>
> A. Correct."

## THE WITNESSES

### *CFP's factual witnesses*

172. CFP's principal factual witnesses were Messrs Navon and Rassmuson.

*Mr Navon*

173. Mr Navon was cross-examined over the course of four and a half longer than usual court days. He remained unruffled, and concise in his answers, throughout.

174. In my view, Mr Navon tended to over-play and over-sell the value of the confidential information provided by CFP to Barclays, and to assume too readily and too absolutely that such information and the overall "business opportunity" was what caused Barclays to acquire Tricorona. As I explain later, I consider that there were a number of other factors and changed circumstances also in operation. Mr Navon's flawed approach has led to a greatly exaggerated claim, in amounts which I consider disproportionate and unrealistic.

175. However, he and his colleagues plainly put considerable work and expertise into Project Arctic Fox, and opened Barclays' eyes to embedded value in Tricorona that Barclays had overlooked. Yet CFP's claim for recompense was treated with apparent contempt. Mr Navon plainly felt, and in my judgment, was justified in feeling, a strong sense of grievance against both Defendants.

176. I consider both credible and convincing his evidence that he would never have approached or confided in Barclays in relation to Tricorona had he known of the fact and ambit of their previous relationship.

177. I also accept his evidence that he did not know, was not told, and would never have agreed, that employees of Barclays who were privy to that information as members of the "deal team" should operate on both sides of a "Chinese Wall".

178. I address the question why he agreed the Exclusivity Release at length later. I accept his evidence, but not the effect sought.

*Mr Rassmuson*

179. Mr Rassmuson's evidence over the course of one day's cross-examination was calm, clear and careful.

180. He did not claim to be an expert on the CDM process; his experience was in trading and actually doing transactions. His strength was on what he called the "demand side", that is, in assessing the level of demand for the financial product (or, here, a CER), how to stimulate and elicit it, and how to bring about an actual transaction.

181. The fundamental gist of his evidence was to bring colour to the "value concept" that CFP presented: that of a leveraged buy-out linked to monetisation of the Tricorona Portfolio, his emphasis being that although a disparity between the apparent value of the CERs and the capitalised value of the company might be apparent from relatively little enquiry or from research, the issue and difficulty was in finding ways to unlock and extract that value by a monetisation programme. He further emphasised the composite nature and value of the package that CFP assembled and presented.

182. I found Mr Rassmuson to be an impressive, honest and, on the whole, reliable witness. The reservations I had chiefly centred on what I regard as his somewhat over-optimistic assessment as to the viability of Project Arctic Fox after (a) the financial shocks of late 2008 and (b) the breakdown in CFP's relationship with Tricorona's management. I elaborate on these matters later.

*Mr Nicholls*

183. Mr Nicholls (who joined CFP only nine months after finishing his university degree and after brief stints working as an intern at New Energy Finance and as an analyst for MF Global) was more than a "data monkey" (as he described his initial role) but was largely engaged in collecting data from the UN UNEP Risoe source for inclusion in spreadsheets prepared as part of the presentations for Project Arctic Fox, and in checking the information provided by the Tricorona Management (the "data dumps"). He had no direct contact with either of the Defendants.

*Mr Goldstein*

184. Mr Goldstein's evidence concerned whether or not IVC had ever made any real commitment in respect of an equity participation in Project Arctic Fox. Mr Goldstein struck me as obviously straightforward. He confirmed it had not. He also confirmed that (a) IVC had no experience in carbon markets; (b) he would probably have contemplated an equity participation, but the matter never really got beyond an early expression of interest; (c) he would probably have been uncomfortable with a hostile bid; and (d) after the original rather vague overtures, Mr Navon did not in 2009 or 2010 provide any materials or updates or suggest that Project Arctic Fox might continue.

***Tricorona's factual witnesses***

185. Both Mr von Zweigbergk and Mr Holmgren gave evidence, written and oral, on behalf of Tricorona.

*Mr von Zweigbergk*

186. Mr von Zweigbergk was ostensibly polite but unremittingly dismissive of CFP's efforts and expertise. His objectives appeared to be repeatedly to deny any useful input from CFP and to disparage any suggestion that "what CFP brought to Tricorona confidentially was a route to market". He ridiculed the notion that CFP provided confidential information: "it is like looking at the moon and saying 'It's mine'", he told me. He refused to see the other side of the story. I sensed that he and Mr Navon never got on.

187. Mr von Zweigbergk pretended considerable experience in the primary markets, which the evidence suggests he did not have. Further, my impression was that Mr von Zweigbergk was so fixed in his view that the way forward, and his mandate from his shareholders, was sales upon issuance of guaranteed or "delivered" CERs that he tended, if not to ignore, then to underestimate, the alternative strategies; and he was so focused on pursuing what he described as his "dream" of a MBO with the assistance of bank lending that he almost completely ignored the possibilities of forward sales to European compliance buyers until CFP presented that as the route forward.

188. He conveyed the strong impression that he always regarded Project Arctic Fox as a long shot, and that it was "a dead fox" by the end of December 2008 and thus within a couple of months of its presentation. He sought thereby to seek to justify the Tricorona Management's use of confidential information in seeking to interest lenders and finance providers (such as Daiwa) and its increasingly close engagement with Barclays thereafter.

189. I do not regard him as dishonest; but he was not candid. I consider to be unreliable his evidence as to what the Tricorona Management's plans were after he had pronounced the fox dead. However, he appears to have had less direct contact with Barclays than Mr Holmgren, whose developing understanding with Ms Patel and wish for "strategic partnership" with Barclays is the fulcrum of the case.

*Mr Holmgren*

190. Mr Holmgren operated as Chief Financial Officer of Tricorona (although it is only lately that he has been given the title). He was at all material times number two (to Mr von Zweigbergk) in the triumvirate which in effect managed Tricorona. He appears to have taken the lead in discussions with Barclays, and in particular with Ms Patel. Mr Lord, in his written closing submissions, described him as "a very mixed witness".

191. Mr Holmgren was both disarming and revealing in his frankness as to the Tricorona Management's almost complete indifference to CFP's interests. Thus, for example, he readily admitted that the Tricorona Management never revealed to CFP anything about their discussions with Barclays in July 2008, even though they envisaged monetisation of the Tricorona Portfolio, or at least the acquisition by Barclays of a "chunk" of it. Nor did he attempt to equivocate about the fact that he did not see fit to mention to CFP the Tricorona Management's overtures to EcoSecurities during the currency of Project Arctic Fox with a view to a merger with EcoSecurities in Project Meltwater/Clearwater. Asked whether it was right that he and Mr von Zweigbergk did not really have any genuine interest in Project Arctic Fox, and simply strung CFP along in case they provided some lead of interest, whilst still exploring other prospects, Mr Holmgren did not disagree.

192. He was also more straightforward than Mr von Zweigbergk in accepting that the Tricorona Management only ever focused, before the end of 2008 at least, on selling on a guaranteed basis, even to compliance buyers, and that he had no personal experience about the demand for pCERs in the market.

193. However, in my assessment, he was less than credible in his refusal to accept that what happened at the end of 2008, which impelled the Tricorona Management (in my view, prematurely) to declare Project Arctic Fox dead, was that (as it was put to him in cross-examination) his head "was turned by Ms Patel, by which I mean Ms Patel led you to believe that you could do better business with Ms Patel rather than going with CF Partners through Arctic Fox". His initial suggestion in his oral evidence that he reported to Ms Patel the demise of Arctic Fox (as he perceived it, from Tricorona's point of view) simply as "a matter of good manners" did not ring true: he wanted Ms Patel to see the green light to the expansion of the sort of business that they could undertake (as indeed he came close ultimately to admitting). It also seems clear that from January 2009 onwards he and Ms Patel not infrequently spoke on their mobiles rather than on a taped line: on at least one occasion when either or both were in the office with a landline.

194. Like Mr von Zweigbergk he was dismissive of CFP: he described them as "carbon cowboys".

***Barclays' witnesses***

*Ms Patel*

195. Barclays' first and principal witness, Ms Patel (whom I have already described as the central figure in the proceedings), was cross-examined over the course of many days. This was the more gruelling for her because she was due to give birth shortly (and, as I understand it, happily did so shortly after her days in the witness box).

196. Ms Patel, who was involved from beginning to end in the events under review, moved out of her Chief Operating Officer role in August 2007 to become "Head of Product and Business Development, Environmental Markets", which included responsibility for origination.

197. Ms Patel did not have any specific carbon market experience at that stage: she was chosen for the role, not for any carbon experience, but for her business management skills. She spent August "getting to grips and learning about the primary CDM market" and undertaking a trip to China with Mr Redshaw to learn about the market further and develop contacts.

198. There can be no doubt as to Ms Patel's enthusiasm in her new role as head of a team for which the objective was to "become the premier emissions trading house" and "to capture 10% of the global emissions wallet", with a focus including "buy-out investment in companies sourcing CERs/ERUs: established carbon credit investors, process consultants, developers and capital producers".

199. CFP's criticism of her, which was and remains severe, is that her enthusiasm was at least from the beginning of 2009 onwards entirely focused on the interests of Barclays and her own department within it: having understood the value of the "mine", she determined to acquire and work it for Barclays, regardless of both the interests of, and her obligations to, Barclays' client (CFP) and without any due or sufficient regard to Barclays' own system of controls, and basic proprieties.

200. CFP characterised her as a "deeply unsatisfactory witness", who repeatedly misled the court, and whose evidence should be rejected "wherever it is contradicted by the contemporaneous documents, CFP's evidence, or the evidence of other witnesses".

201. Ms Patel struck me as intelligent, engaging and determined to succeed. She undoubtedly charmed Mr Holmgren; but others (most obviously, Dr Swift) were wary of her. In my assessment, her determination to succeed was such that it caused her to over-step boundaries (whether in the form of a Chinese Wall or express directions from her superiors) if that was required to build up her own department.

202. One of the many recorded telephone conversations in the case made clear her principal motivation: she wanted her team to "come first" in order to safeguard its P&L, her bonus and her standing. In that regard, Mr Martens explained very frankly in answer to a question of mine at the end of his oral evidence:

> "MR JUSTICE HILDYARD: At the top of D47/126 Ms Patel said: "I don't give a shit about the rest because it is not our P&L

> okay?" Did each sort of team have a P&L account to show whether it had been doing well or badly?
>
> A. Yes, so every transaction you would be involved in, when you are on the sales side you would get sales credits and we had something like shadow credits which were basically a similar type of sales credits and you would keep a record on that and I'm not saying that the bonus structure within the bank like Barclays was transparent, but that was definitely an input, so as a director you would -- at least my understanding you would show your P&L had built up and you make sure -- I recall that towards certain periods in the year there would be very frantic bookkeeping so, you know, have I recorded all my P&L.
>
> MR JUSTICE HILDYARD: So that informed or might feed into the level of bonus?
>
> A. Yes.
>
> MR JUSTICE HILDYARD: Is that why, as you understood it, Ms Patel was fairly insistent, "Listen to me, our team comes first", at page D47/128?
>
> A. Yes, I think it was a bit of territory protection in terms of --
>
> MR JUSTICE HILDYARD: Yes, safeguarding the P&L.
>
> A. Yes, it is our P&L versus theirs."

203. All in all, whilst I admired her composure and acuteness, especially given her condition, I did not find her a reliable witness where she was seeking to explain conduct which might have benefited herself or her team but which objectively looked contrary to ordinary commercial standards.

204. It seems to me clear also that the late disclosure of transcripts of telephone conversations which, amongst other things, cast a different light on her intentions towards Tricorona and Project Arctic Fox in early 2009 discomfited her. It also caused her to put in two further witness statements that (for example) gave conflicting explanations about what she meant in urging Dr Swift to assist her to engage with Tricorona in January 2009 because (quoting a transcript of a telephone conversation between them on 21 January 2009) on the basis that "We know more about their portfolio than anyone else", as I explain later. This further undermined my confidence in her reliability as a witness.

205. Her disingenuous conduct, with Mr Martens, in Project Clearwater (in which she acted behind the scenes despite having expressly assured one of the parties to the project (a client, EcoSecurities) that neither she nor Mr Martens would be involved) also demonstrated a capacity, perhaps a tendency, for manipulative conduct and occasional indifference to propriety.

206. She was something of a law unto herself. An illustration of this is her conduct in January 2009 in ignoring entirely an express warning from Mr Zintl (by email dated 15 January 2009) not to make any contact with Tricorona during a period of 14 days whilst (after an update conversation between Dr Swift, Dr Zintl and CFP, when CFP reaffirmed its interest in pursuing Project Arctic Fox) CFP decided whether or not to mandate Barclays formally to proceed. Ms Patel had enquired of Mr Zintl whether there was any "chance of talking to Carbonara about other opportunities": he was clear that Ms Patel could not contact Tricorona for 14 days. Mr Zintl said this:

> "Q. So it looked as though in January 2009 you had thought that when CF Partners were not authorising contact between a deal team member and Tricorona, that was a restriction which the Barclays deal team ought to be respecting. That's what you are telling your deal team member there, aren't you?
>
> A. Correct, yes and the background to that is that I wanted to make crystal clear to the deal team members that we want to have a very clear channel of communication to the target and to CF Partners. We were clearly under the restrictions of the exclusivity agreement, standstill non-disclosure agreement. I said there should be no ambiguity, let's not talk to them."

207. Ms Patel, however, deliberately ignored the instruction and did contact Tricorona. In her oral evidence, she accepted that she had breached Mr Zintl's instructions. Mr Zintl was not aware that Ms Patel had done so. He professed in his oral evidence not to have been too concerned, since by then he thought the deal would not proceed (which offers an unattractive light on his own outlook): but the real point to emerge is Ms Patel's determination to advance her strategic partnership without delay and without all but the most formalistic regard for propriety.

208. The very fact that she is the central figure in all the events in question illustrates both her energy and determination and also her indifference to constraining constructs such as Chinese Walls.

209. In that context, her insistence that notwithstanding that for the purposes of Project Carbonara she was "wall-crossed" over the Chinese Wall from "the public side" (including the environmental markets team where she habitually worked) to the "private side" (including the investment banking division and leveraged finance, which had initiated and had primary responsibility for Project Carbonara), struck me as contrived. I do not accept Mr Holmgren's somewhat surprising description of her as a "Compliance Officer's dream".

*Mr Joe Allen Gold*

210. The most senior of Barclays' witnesses was Mr Gold. He was Head of Client Capital Management and Treasury Execution Services for the Corporate and Investment Banking Division ("IBD") of Barclays in New York. He worked in conjunction (as co-head of Global Commodities) with Mr Roger Jones who was based in London (which was the centre of Barclays' carbon space activities). He had previously

worked at Enron, running power and gas marketing in Europe. However, he had no real experience or expertise in trading carbon credits.

211. Mr Gold quibbled and qualified to an extent which undermined his credibility as a witness, especially when cross-examined about his understanding of Barclays' policies in relation to confidential information and conflicts of interest. He apparently regarded all compliance as essentially a guideline from which the exigencies of business life would often require departure, though he recommended reference to the Compliance Department in that event. He preferred to delineate no clear boundaries.

212. I agree with CFP that Mr Gold demonstrated, as did Ms Patel, that "institutional cleverness, taken with its edginess and a strong desire to win" which was identified as characteristic (and productive of "less than ideal outcomes") in a report by Mr Antony Salz ("the Salz Report") into Barclays' business practices[20].

213. Mr Gold affected vagueness but disclaimed carelessness about CFP's interests and any conflict between them and Barclays' activities in 2009 and 2010. He said he trusted Ms Patel to have checked to ensure no breach.

214. He was the only non-expert witness on behalf of the Defendants to address the issue of quantum and in particular the hypothetical negotiation as to the price to be paid for the release of confidentiality required to be undertaken by the *Wrotham Park* or "negotiations damages" approach. He was plainly uncomfortable with the process and especially with the notion that the hypothetical purchaser could not "simply walk away from the deal" rather than pay. His lack of experience in the carbon market, his failure to consult with others with more experience in the area, his reluctance to contemplate a negotiation which is required to end in agreement, and his refusal to give any real credence, even for hypothetical purposes, to what CFP contributed, mean that his evidence in this regard had, to my mind, little cogency.

*Mr Martens*

215. Mr Martens joined Barclays from EcoSecurities in autumn 2007 as an Associate Director in the Emissions Structuring group within the Commodities part of BarCap. He initially reported to Mr Leeds, and subsequently to Ms Patel.

216. He was brought into the Carbonara deal team at the inception of Project Arctic Fox for "CER emissions portfolio analysis". Dr Swift described his addition to the team as "extremely urgent": he explained that this was because "there wasn't really anyone else within Barclays who would be able to execute a detailed portfolio analysis". He joined Mr Zintl and Dr Swift in that team, as well as Reto Germann and Martin Gueldenberg (who play no part in the story). He was "wall-crossed" for that purpose. He stated in his witness statement that until then he had never heard of CFP (or IVC).

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20 The Salz Report, which was commissioned by the Board of Barclays in July 2012 "to determine how Barclays can rebuild trust and develop business practices which make it a leader…", concluded that, in a number of instances reviewed (but not, for the avoidance of doubt, any of the transactions in this case), "Barclays' behaviour fell below the standards it expected".

217. It was Mr Martens who introduced the analogy of a "mine" to convey the nature of the business undertaken by carbon funds (such as Tricorona or EcoSecurities): the analogy became part of the currency of the trial.

218. In its written Closing Submissions, CFP portrayed Mr Martens as sound and truthful in acknowledging the confidentiality of CFP's information and in his description of the application of Barclays' Chinese Wall policies, but as less reliable in other contexts: at fault in failing to mention in his witness statement Barclays' portfolio purchase strategy in 2007 and 2008, and its pre-Project Arctic Fox interest in Tricorona; misleading in seeking to downplay his role in Project Clearwater; and even untruthful in his denial of any involvement in Project Silverback.

219. With regret I have concluded that, like Ms Patel, Mr Martens proved himself capable of materially misleading evidence and conduct; Mr Redshaw (see below) told me that Mr Martens "was always very keen to be either promoted or to get a bonus and ideally both". I have approached with circumspection any disputed evidence he gave which is not corroborated by the documentation.

*Mr Redshaw*

220. Mr Redshaw joined Barclays from Enron in 2004 to set up and run the Emissions Trading Desk. He was at the relevant times the Head of Environmental Markets within the Commodities Team, which itself was part of the IBD of Barclays.

221. CFP invited me to treat Mr Redshaw as an unsatisfactory and, at times, untruthful witness who did his best to advocate Barclays' case. I do not think that is fair, and I would not regard him as untruthful, even if I consider some of his answers (especially concerning Barclays' outlook on Large Hydro) to have been unconvincing and possibly the product of subsequent thought.

222. Occasionally laconic, he was quite easily riled: and tended when riled to become rather argumentative and then didactic. He struck me as clever and also keen to demonstrate it: for example, Mr Lord's attempts to question him as to the value of Tricorona on the basis of multi-layered hypotheses developed into an interesting, but ultimately not very revealing, fencing-match. He had a tendency also to anticipate the next question and to accommodate or "contextualise" his anticipated response within an existing answer, not always convincingly: this tended to reduce the cogency of his evidence.

223. As one of the authors and prime-movers (with Ms Patel) of a strategic plan prepared for Mr de Vitry in the spring of 2007 mapping out Barclays' objectives in the "carbon space", Mr Redshaw's evidence was nevertheless valuable in assisting me towards an understanding of Barclays' position and objectives at that time and following.

224. He was straightforward about his views about confidentiality and Chinese Walls. If and when wall-crossed to receive confidential information, he could no longer be involved in trading:

> "So I would only be brought in ["taken over-the-wall"] as late as possible in case there was a risk that my trading activity would be compromised."

225. Mr Redshaw also gave evidence as to Barclays' management of Tricorona during its period of ownership in 2010 and as to the profits it made (largely from hedging). I have not had occasion to refer to this.

*Mr Zintl*

226. Mr Zintl was on the M&A side in the IBD, working partly in London and partly in Frankfurt. He was not in the environmental markets business nor was he a carbon expert. His line of communication with people within the carbon business was largely through Dr Swift.

227. As he saw it, the M&A aspect of Project Arctic Fox was relatively small: he envisaged charging Barclays' minimum M&A fee in Europe of €3 million. I consider he tended to downplay his enthusiasm for it: it was one of the first deals for his team, which had only been set up in September 2008, and the overall fee was to be £15 million, almost seven times the average for 2009.

228. Mr Zintl acknowledged that he and Dr Swift probably should have asked for more information before signing off on Barclays having no conflict in the context of the IVC/Barclays Confidentiality Agreement, and agreed that if Barclays had any ongoing relationship with Tricorona in relation to portfolio monetisation at that time, that would have represented a clear conflict of interest.

229. He took the clear and simple position that if Barclays was provided with information in confidence, it should keep it confidential. He regarded Project Arctic Fox as credible and feasible, even in the troubled financial circumstances of late 2008. He was also clear that for so long as CFP wanted to continue the project, Barclays was on the hook of exclusivity unless and until effectively released: it was not for Barclays to call its end.

230. However, and in agreement with the depiction of Mr Zintl's evidence put forward in CFP's Closing Submissions, I consider that his evidence in relation to the purpose of Chinese Walls in general, and Ms Patel's operations on both sides of the relevant wall in the particular case, was unconvincing, to the point of contrivance. I consider his oral evidence that Mr Navon expressly permitted Ms Patel to operate on both sides of the Chinese Wall, which Mr Zintl had never previously suggested and was never put to Mr Navon, to be an invention which does him no credit.

*Mr Lim*

231. Like Mr Zintl, Mr Lim was in the M&A department. He was there from about 2008 to 2012. Unlike Mr Zintl, he was in London full time.

232. His evidence exposed further frailties in the systems within Barclays for the protection of confidential information: for example, that confidential files from

several projects might be held on shared drives without any form of password-protection and could be accessed by anyone on the private side.

233. Mr Lim sought to sing a variation of Mr Zintl's song on the issue of Chinese Walls; but he accepted that any dealings by a wall-crossed person on the other side of the wall would at least have to be entirely transparent, agreed by the client and sanctioned by the Compliance Department.

234. Subject to my reservations as to the reliability of his evidence on Chinese Walls, Mr Lim struck me as straightforward and honest.

*Mr Manahilov*

235. Mr Manahilov was a Managing Director in the Commodities Group of BarCap in New York. He no longer works for Barclays. He was brought into Project Pomodoro by Mr Gold to advise as to possible capital structures for the deal and its financing in light of regulatory restrictions.

236. Mr Manahilov did not work on Project Carbonara. In his witness statements as originally served he said he had only become aware of CFP at the time of CFP's letter to Mr Diamond after hearing of Project Pomodoro in June 2010. He had to correct these at the outset of his oral evidence, to acknowledge that the name CFP or CF Partners did appear on a number of documents that he would have seen in his work on Project Pomodoro. He accepted also that he had used CFP's spreadsheets, though he did not know who had prepared them or for what purpose.

237. Mr Manahilov struck me as reliable and honest; but he was not central to the story.

*Mr McKay*

238. Mr McKay was (and is) a director in Barclays Corporate Development ("BCD"), part of Barclays. BCD is an internal M&A team within Barclays, responsible for all principal account M&A for Barclays (that is, acquisitions by Barclays itself).

239. He was not apparently aware of Project Carbonara (a client deal) before Project Pomodoro (a principal deal directed by BCD). His evidence focused on the process of Project Pomodoro and Project Rose.

240. He was evasive when questioned about how Barclays managed its risks in the acquisition. His evidence did not assist me.

*Mr Ord*

241. Mr Ord was (and is) a director in the M&A team in the IBD of Barclays, which he joined in August 2008. He thus worked with Mr Lim (whom he described as a "junior banker" who would provide a "senior banker" such as himself with background information and assistance, and did so in Project Pomodoro). His expertise was and is in public company takeovers.

242. Mr Ord's involvement was confined to Project Pomodoro. However, he was aware of Project Carbonara. In the course of Pomodoro he received emails and documents from Mr Lim, including an email link to the project folder in Barclays' electronic files of the M&A project and an attachment entitled "BarCap Transaction Details – Oct 08 (from client).pdf" extracted from Project Carbonara files. The latter related to Tricorona's debt capacity.

243. Mr Ord gave long answers or speeches. As was put to him by Mr Lord he sought to create a semblance of some separation between the two sauce-named deals; but his evidence was glib, added little, and did not dispel the impression that Pomodoro was a revival of Carbonara, and information and analysis assembled in Carbonara did have continuing relevance in the analysis of Pomodoro.

*Dr Rhian-Mari Thomas*

244. Dr Thomas was in the IBD from March 2007 until 2010, when she moved to become head of Group Products (a business development role which she described as focussing on cross-selling products from other bank divisions to the Corporate Bank client set). At the material times she was in the Barclays Leveraged Finance Team, whose role was to support the M&A team and to assess how much debt could be lent against Tricorona in order to assist CFP with its purchase and how it should be structured. Although initially nervous, Dr Thomas had quiet authority.

245. She described Project Carbonara, which she agreed was a confidential deal for the client, CFP, as "one of the very few transactions that I was working on" after the "credit crunch". She suggested it was given attention because of that: she thought it had little hope of success, primarily because Global Financial Risk Management ("GFRM") were becoming increasingly conservative (and the four-year bridging facility of up to €200 million sought by CFP was considerable). She nevertheless saw value in Barclays' relationship with Tricorona; for example, in an email in mid-June 2009 she noted its "strategic importance to our carbon trading team".

246. Dr Thomas appeared to me to apply somewhat flexible standards to Ms Patel's behaviour, especially in the context of Project Clearwater. But I consider that this is simply a further indication of lax institutional standards, not private dishonesty. She struck me as honest in her evidence.

*Mr William O'Malley*

247. Mr O'Malley was and is a Vice President in the IBD of BarCap.

248. He had very little involvement in any of the relevant events or matters, except that on 2 July 2009, at Dr Swift's request, Mr O'Malley sent her a revised Discounted Cash Flow Model (or DCF) based on the Carbonara valuation model, which was plainly confidential to CFP. He plainly should not have done so. He unconvincingly suggested that he was unclear whether the material was confidential, even though he knew it was sourced from a project file.

249. Again, Mr O'Malley struck me as honest and straightforward; and again, what he did, he in effect did on instructions, which once more reflects institutional laxity or indifference and not any departure from personal probity.

### *Missing persons*

250. Despite this long cast list, there were various notable absences.

251. Barclays did not call a number of individuals who were heavily involved at a senior level, such as Roger Jones, Brian Smith and Jonathan Whitehead, and it did not call anyone from the Compliance Department. This meant that there was no witness from the upper echelons of Barclays (save Mr Gold who was not involved until late) who could support Ms Patel and Mr Martens' version of events and outlook on Chinese Walls. As to the Compliance Department, the reason offered was that only at a late stage did CFP focus on the issue of conflicts and Chinese Walls. However that may be, it meant that the evidence of Barclays' witnesses, such as Mr Martens, who told me that they had had clearance to speak to Tricorona, was not corroborated.

#### *Dr Swift*

252. The most conspicuous absentee, however, was Dr Swift. Throughout Project Carbonara she shared the project management role with Mr Zintl. She, together with Ms Patel who reported to her, was a central participant for Barclays in Project Carbonara. Telephone transcripts of conversations between Dr Swift and Ms Patel, which were not originally disclosed (there having been apparently some difficulty in their retrieval), were a feature of the trial and of particular importance in providing an insight especially into Ms Patel's objectives and Dr Swift's reaction (and some were repeatedly played). The conversations related to some of the most contentious aspects of the case, as did a witness statement provided by Dr Swift after the telephone transcripts had been retrieved and disclosed (for which a hearsay notice was given on 2 May 2013). (No witness statement was provided for her when the parties exchanged their main evidence at the end of October 2012.)

253. Quite what the reasons were for her being unavailable is not clear: but at the PTR the court was informed that she had a condition such that "she ought not to give oral evidence".

254. CFP submitted that in the circumstances, and in view of the contentious matters that she addressed, the court should attach no weight to her witness statement wherever it contradicts CFP's evidence, the evidence of other witnesses or the contemporaneous documents. In the event, it has not been necessary to go that far; but I have ascribed little weight to her evidence when thus contradicted.

255. The principal consequence has been that I have had to form an unfavourable view as to Dr Swift which she might have been able to persuade me against. That view is of a cautious person, careful to emphasise legal and regulatory obligations, and concerned not to be seen to step over the correct lines; but in practice ready to turn a blind eye. For example, she was not above warning Ms Patel not to put anything in writing or

implicitly encouraging Ms Patel not to use a "taped line" in her conversations with Mr Holmgren.

256. I sense that Dr Swift was somewhat apprehensive in her dealings with Ms Patel, at once both admiring and wary of her dynamic and "go-getting" approach, and she resorted more than once to suggesting that Ms Patel should seek the advice of Mr Zintl as to what she could and could not do. In short, she tended to abdicate responsibility: she would warn, occasionally remonstrate, but then row back from any attempt to restrain. My overall impression is that Dr Swift was uncomfortable with the way matters in the event unfolded.

*Mr Moe Moe Oo*

257. One other "missing person" I should mention is an employee of Tricorona, Mr Moe Moe Oo ("Mr Oo"). Mr Oo was head of sales in Tricorona and the third of the triumvirate with Mr von Zweigbergk and Mr Holmgren that managed Tricorona. He did not give evidence, though he still works for Tricorona and gave evidence in entirely separate proceedings brought recently by a third party against Tricorona in Stockholm.

258. I can only assume this was for the same reasons as were offered on behalf of the Defendants for not including him as a disclosure custodian in the context of the disclosure process, that is that "he did not have a material role in the events the subject of these proceedings in relation to matters with which Mr von Zweigbergk or Mr Holmgren were not also involved".

259. This surprises me. Mr Oo was the one of the triumvirate most closely involved with the discussions between Tricorona and Barclays in July 2008 which led to the agreement of the NDA between them on 3 July 2008 in the context of (I accept) discussions for the acquisition by Barclays of a "chunk" of the Tricorona Portfolio. Further, according to Barclays' Closing Submissions, it was Mr Oo who (with Mr Larsgard, another employee of Tricorona) was involved in the subsequent dealings between Tricorona and Barclays in August-September 2008. His evidence might have assisted on the issue (also dealt with later) as to the extent to which Tricorona's and Barclays' relationship was still on-going when the question arose as to whether Barclays had a conflict of interest such as to preclude it acting in Project Arctic Fox, or at least require fair disclosure.

260. Mr Oo might also have assisted me in determining the substance of an important and disputed part of Mr von Zweigbergk's evidence (which CFP rejected) that Tricorona not only was fully aware of compliance buyers that might be interested in its portfolios but had itself approached them. Mr von Zweigbergk told me that it was Mr Oo and Mr Larsgard who would have prompted and participated in such discussions. In the absence of them both, and there being no written record of such approaches, there is no corroboration of Mr von Zweigbergk's evidence in this regard.

261. I suspect that Mr Oo might not have toed the line. However that may be, even in his absence, his emails cast an interesting light on an important area of the story that I elaborate later, which is the development of Barclays' relationship with the Tricorona Management in 2009. He wrote in an email to Mr von Zweigbergk dated 24 July 2009

(by which time Barclays and Tricorona were embarked upon their search for "strategic partnership") that:

> "Especially with Barclays, it's like he [Mr Holmgren] 'wags his tail every time they pat his head' so to speak. I hope you don't mind me being blunt about this."

262. That accords with my assessment, which I elaborate later, that from early 2009 to the conclusion of Project Pomodoro, Barclays and Tricorona were open to, and when the opportunity arose, worked towards ever closer association.

## THE PARTIES' EXPERIENCE IN THE CARBON SPACE

263. Central to the case is whether CFP had some insight into opportunities in what Ms Patel called "the carbon space" which neither Barclays nor Tricorona had appreciated before Project Arctic Fox. Before turning to the chronological sequence of events I should provide a little more detail as to the parties' respective track records and expertise in that regard.

*CFP's experience and expertise*

264. CFP's focus on and specialisation in marketing and brokering sales of CERs and pCERs came about largely accidentally. Mr Navon's original intention was that the firm would specialise in providing advisory and risk management services to corporate clients, with a focus on debt deals. This accorded with his previous experience (and that of Mr Rassmuson) at Merrill Lynch and Goldman Sachs.

265. In May 2007, CFP received its first major client mandate: this was from a South African renewable energy investment firm called Sterling Waterford, and CFP's role was to introduce debt investors to the project (the construction of bioethanol plants in the Republic of South Africa ("RSA")). The plants were to issue carbon credits. This awakened Mr Navon's interest in the carbon markets, and especially origination and primary markets.

266. That transaction did not, in the event, proceed; but it led to another instruction from Sterling Waterford in November 2007, this time in relation to a €100 million carbon-linked note, which was to be structured and issued by BNP Paribas, with the interest payments linked to CER prices (rising as CER prices increased).

267. CFP's mandate was to distribute the note to investors and corporates which were seeking to manage their exposure to the carbon markets. CFP targeted a wide range of potential buyers, mostly large financial institutions and money managers; but also some energy companies (such as Total).

268. Mr Navon relates in his (first) witness statement that it quickly became clear to him that hedge-fund and money managers with no existing exposure to the carbon markets had little interest either in the note or in investing in carbon-linked products more generally. He formed the impression that they had little understanding of the asset

class, and little appetite for it in the wake of a sharp drop in the price of carbon in 2006. The interest, he perceived, came from those with a direct exposure to carbon prices, and especially companies that were required to comply with the EU ETS by surrendering EUAs or CERs to match or frank their emissions.

269. It was this perception that caused him to shift the focus of CFP's marketing efforts for the note (and subsequently more generally) to utilities, energy companies and industrials which had a demand for carbon credits for compliance purposes, including major companies such as Shell, BP, ESB, RWE, Drax Power, Vattenfall (one of the largest European utility companies), Electrabel, E.ON and Enel.

270. More particularly, Mr Navon's and Mr Rassmuson's evidence, which I accept, was that CFP (and in particular, Mr Navon and Mr Rassmuson) developed both a number of contacts with utility and energy companies, and a detailed insight into their needs and the demand for carbon credits for compliance purposes. They identified the following features which presented, in their perception, a considerable potential opportunity:

    (1) there was considerable demand for large volumes of CERs, including pCERs;

    (2) many utilities with the need for large volumes of allowances nevertheless had no significant in-house or outsourced CER origination teams;

    (3) there was considerable interest in securing the large volumes available through large primary forward CER deals (provided that they offered a sufficient discount to secondary carbon prices); and

    (4) few, if any, of the large financial institutions and funds active in the secondary carbon markets had focused on the primary carbon markets: Barclays was an example of such an institution, influenced heavily by its credit analysts and lending criteria, which was sceptical, and had little experience, of the primary market.

271. Mr Navon's perception of an opportunity was matched by CFP's receipt of a number of mandates in early 2008 from the contacts he and Mr Rassmuson had made in seeking to market the Waterford/BNP Note. These contacts included Electrabel (a large Belgian power company); Enel (Italy's largest power company); Vattenfall and two other interested utilities, namely Kansai Electric Power Co and EnBW. According to Mr Navon, CFP also attracted interest from the utility Tokyo Electric Power Co, the project developer Carbon Resource Management and the steel companies, Nippon Steel and Mittal Steel.

272. The point stressed on behalf of CFP, however, is not so much its success in matching seller and purchaser, but its growing experience and expertise in the niche and complex context of the primary carbon market, and especially Large Hydro pCERs. Its mandates, of which the above are merely examples, occasioned discussions with (so Mr Navon estimates) over 300 compliance buyers and 50 financial institutions; and many of these discussions focused on issues of considerable complexity including due diligence concerning the underlying CDM projects (to assess Project Risk), the projection of volumes likely to be issued as a proportion of the project's contracted

volumes ("risk adjusting") and thus the likely allocation of issued CERs, delays in issuance and allocation of actual CERs, and counterparty credit risk.

273. This experience and expertise in evaluating a pCER source of portfolio, including volume, price, credit, political, operational, commissioning and reputational risk, and in the demand for large volume pCERs (especially Large Hydro pCERs) attracted a growing number of further mandates over the course of 2008 and 2009. It was recognised by (for example) Vattenfall, which, following a competitive tender process, commissioned it (in June 2009) to prepare a report for it on carbon market participants and to design a CER procurement strategy for Vattenfall.

274. To develop its expertise and gear up to fulfil its mandates, CFP grew its team of professionals: as indicated above, Simon Glossop joined in March 2008, as did Richard Nicholls (who had previously worked as an analyst for "New Energy Finance" (which I am informed was and is a leading industry publication) and for a brokerage firm also with expertise in the CER markets).

275. Mr Navon, in paragraph 40 of his first witness statement (on which he was not challenged in cross-examination), identified the following factors as setting CFP apart:

> "40.1 Our approach to arranging primary CER deals, which I mention above, involved presenting a book of interest (rather than just the highest or lowest price) to sellers or buyers so that they could understand the range of demand or supply. We also provided detailed feedback to clients participating in the sale so that they could understand their position in the bidding process.
>
> 40.2 Connected to the first point above, we also spent a lot of time speaking to our clients in an effort to understand their needs, and, as a result, the types of deals which would interest them and how those deals would need to be structured. Our focus was on targeting corporate clients as opposed to financial institutions or traders.
>
> 40.3 As a result of the Large Hydro CER deals which we arranged and structured, the thorough, book-building approach we adopted to arranging such deals and by targeting compliance buyers, we had a better understanding than anyone else in the market as to who would buy and sell primary Large Hydro CERs, and the volumes and prices they would trade at. This information was highly confidential to CF Partners and very valuable.
>
> 40.4 Although I considered that Large Hydro CERs had become our particular specialism, we also had market-leading expertise in arranging primary deals and the distribution of CERs generally, and in-depth knowledge of the demand that existed in the market.

> 40.5 As a result of our understanding of the demand and pricing of primary CERs, we were in a unique position accurately to price and value primary CER portfolios, in particular those including Large Hydro CERs.
>
> 40.6 Because of our background in the more developed and sophisticated fixed income markets and from our discussions with CER compliance buyers, we were uniquely positioned to structure and risk-manage large primary CER portfolios."

276. Mr Navon explained more specifically that, building on mandates to sell 1.4 million CERs from a Chinese Large Hydro CDM project which the firm received from Electrabel (the large Belgian power company) in March 2008, and another mandate from Enel (Italy's largest power company) in June 2008 for the forward sale of 6.5 million Large Hydro CERs, CFP developed considerable insight into and expertise in relation to primary CER transactions and other carbon advisory services, focusing especially on Large Hydro CERs.

277. According to Mr Navon (whose evidence was not challenged in this regard), by July 2008 CFP had marketed and found potential buyers for a total of 20 million Large Hydro CERs to be sold on a primary forward basis, and had developed an understanding of the particular concerns, risks and difficulties associated with such transactions, and of the demand base for them.

278. The Defendants, a substantial part of whose evidence was devoted to disputing that they had ever had anything to learn from CFP, disputed that CFP had developed any substantial expertise by the time of Project Arctic Fox. In their written opening they suggested that CFP had by then "had little experience of the carbon business" and had "done no real business of any kind". One of Tricorona's witnesses, Mr Holmgren, described CFP in an email and in the course of his evidence as "carbon cowboys", though it is notable that Tricorona's management appeared content to work with them.

279. Mr Navon was constrained under cross-examination to accept that by the end of April/early May 2008 when CFP approached Tricorona, CFP had not yet arranged any completed CER sales at all. Nevertheless, I have been persuaded that CFP had, by April/May 2008, already engaged sufficiently in the process preparatory to an actual CER sale, in speaking to utilities, researching CDM projects and their originators, sourcing CERs, and building a book of interest, to have developed an insight into the development, purchase and trade of, and demand for, CERs (or more accurately "expected CERs" or "pCERs"), and especially the demand base for Large Hydro pCERs.

*Tricorona's experience and expertise*

280. Tricorona had developed considerable experience on the origination side, in identifying suitable CDM projects and in assisting them to achieve registration and certification. It had pursued a policy of stockpiling large volumes of CERs with a view to their sale in guaranteed volumes at guaranteed prices.

281. The difficulty with the strategy was that the volumes of CERs which will result from projects are of their nature uncertain and unreliable; commitments to sell guaranteed volumes at guaranteed prices from an uncertain and unreliable source carried delivery risks which could only prudently be undertaken with capital backing, or as Mr von Zweigbergk put it in his oral evidence "if you would be owned by someone who had a balance sheet…". Tricorona did not have the requisite capital backing for guaranteed sales to the secondary market.

282. The accumulation of primary CERs without any forward or other hedging arrangements in place obviously represented a risk (as well as an opportunity in the eyes of CFP). Mr von Zweigbergk told me that the risks were mitigated under the terms of Tricorona's ERPAs, which reserved to Tricorona considerable flexibility as to delivery dates and (again, as he put it) "to walk away from the project…". But that only mitigated the risk of being called for payment; it did not address the problem of the assets not performing.

283. Under pressure from its main board and the shareholders (including its predominant shareholder, Volati, which also controlled the board), the Tricorona Management did begin to change its business model in 2008/9, given its exposure in difficult times and its need to show some returns: and it began to contemplate non-guaranteed sales. But the Tricorona Management had limited experience in the market for large scale non-guaranteed sales, and favoured the higher margins for guaranteed sales. As to the latter, although Mr von Zweigbergk did not accept this, I saw nothing to suggest that either he or Mr Holmgren had any real grasp of that part of the market or the demand for non-guaranteed delivery of CERs.

284. Barclays itself was aware of these difficulties. As mentioned in the introduction to this judgment, one of the many arresting facts in the case is that, some time before CFP presented to Barclays the proposal that CFP contends revealed the true (but unappreciated) value of Tricorona and reawakened Barclays' interest in it, Barclays had (in March/April 2007) itself considered acquiring it pursuant to its Project Conifer, but had rejected the notion, having met its management and considered its portfolio.

285. The quality of Tricorona's management is another matter in dispute, since it bears on the central question whether it was CFP's experience and its collation, presentation and provision of information relating to the Tricorona Portfolio that identified a gem and the way to polish it and realise its true value.

286. Suffice it for the present to note, first, that when Barclays initially (in April 2007) considered acquiring Tricorona and rejected the idea, it was scathing about the Tricorona Management. It described them in a note in April 2007 as "opportunistic and lucky rather than brilliant". It also noted disquiet at the quality of the Tricorona Portfolio, the apparent lack of any underlying due diligence and the failure in its risk management. Secondly, Barclays was so unimpressed that it declined even to contemplate making available credit facilities. Thirdly, although throughout 2008 (after its rebuff from Barclays) the Tricorona Management approached a number of financial institutions to discuss forward sales of its portfolio, none of these approaches succeeded.

*Barclays' experience and ambitions in the "Carbon Space"*

287. As indicated above, at the beginning of 2007 Barclays' focus and experience were almost exclusively in the secondary market. Thus for example, and alone among its principal competitors in the "carbon space", Barclays had no team of "dedicated originators": it had a "dedicated trading team only" of just three people (compared for example to BNP Paribas and EDF Trading, each of which was described as having "significant origination capability").

288. Barclays' focus on the secondary market and its scepticism about and neglect of the primary market had been partly the consequence of its preference for commodities trading (which is in effect the secondary market) over carbon project investment (which is in effect what the primary market entails) and partly the product of its perception that:

(1) Barclays had been able to purchase secondary CERs for not much more than pCERs: the small margin or spread did not justify the considerably increased uncertainties inherent in purchasing pCERs;

(2) the uncertainties were such that it was risky, in its perception, to sit on unhedged positions in pCERs: but it had encountered considerable difficulties in coming up with hedging strategies for primary CERs: and it had next to no experience of forward selling pCERs.

289. As to the latter point, Mr Redshaw accepted that neither he personally, nor his team at the time, had any material knowledge or experience of forward selling primary CERs. His evidence to me was as follows:

> "Q. So at this stage Barclays were not in the business of forward selling primary CERs, were they?
>
> A. No, definitely not.
>
> Q. And that would include large hydro primary CERs, wouldn't it?
>
> A. Well, they are all CERs so absolutely.
>
> Q. That's a yes, isn't it, that would include large hydro primary CERs?
>
> A. Well, it would include all CERs, yes."

290. In March/April 2007, and at a time when the spread between pCER and CER prices appeared to be widening as pCER prices dropped, Mr Redshaw and Mr Richard Lewis (who had been Mr Redshaw's boss when he first joined Barclays and was then head of BarCap Principal Investments) began to contemplate expansion into the primary market by buying a Project Developer (such as EcoSecurities and Tricorona).

***Barclays' ambitions in primary market***

291. On 15 March 2007, Mr Redshaw sent an email entitled "Let's buy something …" and asking whether Mr Lewis had run a slide rule over the "various listed CER funds". Mr Redshaw suggested that Barclays might acquire EcoSecurities or take a "chunk" of Point Carbon, saying that in most price scenarios Barclays should make a reasonable return and would "really benefit from the flow" (meaning, most likely, the flow of CERs through Mr Redshaw's emissions trading desk). Mr Lewis was interested in the idea and met with Mr Redshaw to discuss it.

292. At around the same time, Mr Redshaw, at the request of higher management (Mr Jerry del Missier and Mr Benoit de Vitry) was drafting a "strategic plan" for Barclays' emissions (or "Environmental Markets") business ("the Strategic Business Plan"). In this task Mr Redshaw was assisted by Ms Patel, then the Head of EMEA Commodities Structured origination within the IBD.

293. In an email dated 10 April 2007 to Mr Paul Dawson in the Commodities team, circulated to (amongst others) Mr Redshaw, and attaching a first draft (which Mr Redshaw had previously circulated to Mr de Vitry), Ms Patel described the project's objectives as follows:

> "Think big
>
> Outside of the box & blue sky
>
> Therefore the plan presupposes no restraints. Assume we are Barclays and not just Barcap and therefore what we would do as a bank. Reason I say that is because Benoit wants to share this document with senior management and therefore I think we should be as encapsulating as possible…"

294. In a draft of the Strategic Business Plan completed in March 2007, there was an assessment of the competition to Barclays under the heading "Competitor Business Models" as follows:

> "Most other banks are gearing up to catch up with Barclays in the EUA market so there is not a great deal we can do in this space beyond improving our customer flow…and continuing to innovate.
>
> In CERs the other banks are generally ahead of us. All of the banks in the competitor comparison table have taken long term (up to 7 years) long positions in CERs by contracting directly with CDM projects in developing countries or investing in funds and buying stakes in CER (and ERU) developing companies…
>
> Our view to date has been that the reward does not justify the risk…

> Our appetite at current low EUA prices (Euro 15.00) for primary, project sourced CERs is now stronger because for the first time in 2 years there is more chance of upside than downside (provided that we can pick up medium risk CERs for Euro 8-9)."

295. As to the proposed business model, Mr Redshaw described the available opportunities under three headings:

(1) under the heading "What do we need more of?" he identified in particular (a) "Phase 2 customer flow (we have next to none)" and (b) "CER dealing in Europe" and (c) "CER origination – we need a big CER portfolio – when we judge that the time is right";

(2) under the heading "What are the upcoming big opportunities in the emissions market?" he instanced (a) Options (b) "CER dealings in Japan" and "Equity plays – long/short/options on listed funds and/or companies highly leveraged on carbon"; and

(3) under the heading "What else should we be keeping an eye on?" he instanced "Actively seek out customers (internal and external) that have indirect exposure to carbon".

296. One of the strategy ideas discussed in the draft plan was for Barclays to move into the origination field by doing a "big deal" in the primary market. In this regard Mr Redshaw stated (under the main heading "Strategy" and the sub-heading "We need to do a big deal"):

> "An analysis of our competitors reveals that they have all entered into sizeable CER transactions and our closest competitors in regular commodities markets have made strategic investments in carbon funds, consultancies and projects. We need to:
>
> l. Acquire a large portfolio of CER investments
>
> and/or
>
> 2. Make a large ERU investment
>
> and/or
>
> 3. Working with Principal Investments, look for opportunities to take an equity stake in a carbon focussed company
>
> and/or
>
> 4. Create a strategic partnership (not JV) with a large CER/ERU seller (fund or preferably producer, e.g. UES of Russia)"

297. On 5 April 2007, Ms Patel sent a further draft of the Strategic Business Plan to Mr de Vitry, Mr Jones and Mr Redshaw. Under the heading "What do we need to do more of?" this draft of the plan included: "CER origination — we need a [*sic*] build big CER portfolio — when we judge that the time is right". The section from Mr Redshaw's original draft quoted above was retained; but the heading to the section was re-named: "CER elephant deal hunting".

298. The objective, as explained in a presentation in July 2007 made to Mr del Missier by a team including Mr de Vitry, Mr Jones, Mr Redshaw and Ms Patel, was to lay out a "framework for building a £150m global Emissions business by 2010".

299. Among the strategies outlined in the presentation was the "establishment of an emissions structuring team (9 structurers / originators) which will be responsible for emission product development, and sourcing of origination opportunities through the Barclays group wide sales force". The presentation went on to explain that the proposed new "origination / structuring team" would, among other things, be responsible for new product development and the origination of credits. In full, the envisaged role for the team was as follows:

> "– New product development for corporate and institutional clients, covering EU ETS, CERs, NOx, cross-product, etc
>
> – Identify and source emission credits (origination)
>
> – Act as execution team for more complex origination opportunities
>
> – Education of global sales force/bankers on market, developments & new ideas
>
> – Participation in trade bodies, lobbying etc
>
> – Development & implementation of Barcap Green branding & product strategy
>
> – Assisting Group with Green product development"

300. The presentation further recommended that, additionally to the recruitment of the proposed new team, Barclays' principal investments would "complete our presence in the emissions value chain" by looking to invest in "carbon projects, carbon funds or exchanges". This was to include considering a "[b]uy-out investment in companies sourcing CERs / ERUs: established carbon credit investors, process consultants, developers and capital producers" with a view to increasing Barclays' "access to primary credits and companies participating in the CDM / ERU market". The proposed new origination and structuring team was to work together with principal investments on this strategy, "focussing on pure play projects yielding carbon credits".

301. The dedicated carbon structuring and origination team thus established comprised principally Mr Redshaw (who headed carbon trading), Mr Leeds (emission sales) and Ms Patel (who, though she was not a primary market expert, was brought in as head

of Environmental Markets Origination in September 2007, with primary responsibility for structuring and origination).

302. As part of the same initiative, Barclays hired a team of specialists in autumn 2007 to try to grow its primary business organically. The EcoSecurities team was hired "to assist the bank to build a portfolio of carbon credits". Mr Martens, who was one of the team, said that it was only at this point that Barclays "took [origination] seriously"; his evidence was that before then, Barclays did not really have any expertise in the primary CDM market.

303. The team of specialists all came from EcoSecurities. They were CDM project experts. They plainly had experience on the origination side: and the Defendants, by way of reinforcing their case that they had no need of CFP's help, given their in-house expertise, described them as an 'unrivalled primary team'.

304. However, CFP made the point (which I accept) that there is no evidence that they had any substantial experience on the primary demand side and in forward selling primary CERs in large volumes.

***Barclays' approach to Tricorona in 2007***

305. Although the Strategic Business Plan made no reference to Tricorona, work on the plan was taking place at the same time as Mr Lewis, Mr Owens and Mr Redshaw were evaluating Tricorona and meeting with the Tricorona Management in Stockholm. It seems to me to be plain that Barclays' interest in Tricorona in 2007 was part of its "CER elephant deal hunting".

306. In their Closing Submissions, the Defendants examined in detail and at very considerable length the history of this hunt, especially as it related to Tricorona, dividing the sequence of events over the course of 2007 and 2008 into four phases.

307. I agree that the history is of some importance because it is relevant to three central issues in the case: (a) whether Barclays had an interest which conflicted with CFP from the inception of their relationship; (b) whether Barclays was on the look-out for elephant deals throughout, but rejected Tricorona as a suitable quarry until CFP revealed its true potential; and (c) whether in the course of activities Barclays built up its own fund of knowledge of the primary market or whether its source of knowledge and the changes in its perception were in reality primarily or entirely based on what it learned from Project Arctic Fox/Carbonara.

308. However (and although I elaborate later on the nature of the relationship as it stood between Barclays and Tricorona when CFP/IVC presented Project Arctic Fox to Barclays in September 2008), I do not think it is necessary to rehearse that history here to any greater extent than summarising those phases, as follows.

309. From early 2007, Barclays developed the "Environmental Products" strategic business plan, to which I have previously referred. This included the possible acquisition of a carbon portfolio or project developer at a convenient time and whilst CER prices seemed low. Mr Redshaw recommended the strategy to Mr Richard Lewis of Barclays' principal investment department saying that in most price scenarios

Barclays should make a reasonable return and "would really benefit from the flow" (meaning, it was suggested to me and as seems likely, the flow of CERs through Mr Redshaw's emissions trading desk). Barclays' initial targets were identified as the acquisition of EcoSecurities or to take a "chunk" of Point Carbon.

310. Tricorona was not on Barclays' initial list: it was identified as being a potential candidate, having been introduced to Mr Redshaw by an Icelandic bank which had a stake in it that it was looking to sell.

311. The Tricorona material provided to assist Barclays in its assessment was not impressive: Mr Lewis described it as "amateurish to say the least". However, he decided that he needed to talk to Tricorona to see if they "sounded better than they looked".

312. In April 2007, three Barclays representatives (including both Mr Redshaw and Mr Lewis) had a meeting with the Tricorona Management in Stockholm to explore a potential acquisition of Tricorona by Barclays under the code-name "Project Conifer".

313. Mr Redshaw and Mr Lewis were again not impressed, either by Tricorona's management team or by the materials they provided, which Mr Lewis stated, in a note of the meeting, appeared to reflect little or no "dd on the underlying projects" and "no attempt to differentiate from one project's probability of delivery and another". He noted also: "The CEO even said they signed some ERPAs without reading the full contract. Doesn't bode well for the quality of the pipeline". Mr Lewis characterised the Tricorona Management as appearing to him to have been "opportunistic and lucky rather than brilliant" and citing their carelessness as another reason why Barclays "needed to look at other developers". A colleague of Mr Redshaw's in IBD (Mr Gareth Owen) stated in an email after the meeting (which he also attended) that he was "astonished" that Tricorona did not, in his view, have a "decent grip" on the quality of its pipeline and what could be sold from it.

314. Project Conifer was not pursued; and, for example, in a list of possible primary origination partners made by Barclays in July 2007, Ms Patel recorded "Tricorona (no go)".

315. Tricorona re-appeared in August 2007 as a "tier 2" potential partner in a further review of potential carbon partners undertaken in August 2007. In August Tricorona was promoted to tier one, even though it had scored only 2.5 out of 5 on an internal Barclays scoring system. It is not clear why.

316. Although Barclays had a look at others, the strategy of bolting on an established carbon credits accumulator as a source of CERs was relegated in late 2007 in favour of seeking to build, through its newly hired team of origination specialists, Barclays' own "organically grown" origination business.

317. Through 2007 and 2008, there was only sporadic contact between (in particular) Mr Garcia of Barclays and Mr Frank Larsgard of Tricorona, with a view to developing a trading relationship. This too went nowhere. On Barclays' side the principal issue seems to have been an unwillingness on the bank's part to take any credit risk on Tricorona, and on Tricorona's side there appears to have been insufficient attention

paid to the finalisation of the legal arrangements (an ISDA form of agreement) under which trading would take place.

318. By about spring 2008, it was becoming clear that the "organic growth" strategy was not succeeding; and around Easter 2008, Barclays reverted to its earlier strategy of purchasing CER portfolios or parts of portfolios in order to supplement its own origination efforts. An illustration of the Credit Department's and Mr Jones's lack of regard for Tricorona is that when Mr Garcia applied for a USD 25 million line the application was not only rejected for reasons of "credit risk" but the refusal was accompanied by a blunt rejection from Mr Jones: "We had the ex CEO in last week saying the company had been loosing [*sic*] money for the last few years. You REALLY want a 25 MM line??? Please send me an email justifying this line size." Mr Garcia, chastened, responded with a request for a much-reduced line in order to facilitate spot trading:

> "Roger
>
> I agree with you that my initial credit line was not adequate for this company — please accept my apologies.
>
> Having spoken with the client we may however be able to buy between 200k and 400k CER on a spot basis (during 2007) which would require very little or no credit. With this idea in mind I have entered a new request in AOS for a 1 month line of 400kusd - this is my estimate of how much PFE we would need for 400k CERs with delivery 2 days after the trade date. Moreover, we may push for same day delivery and the client is willing to post a letter of credit if needs be.
>
> The CER business with Tricorona is interesting for us because they have focused on "high quality" or "gold standard" projects i.e. projects perceived to be of the cleaner type such as biomass and renewable energy. We have seen increased demand for these type of CERs coming particularly from our Japanese clients and new clients from the carbon offsetting business. Hence I would expect to make between €0.30 and €0.40 per CER so between 80kusd and 200kusd for 2007 depending on the volume.
>
> Please find below the link to the sign off for this new credit limit request.
>
> Thank you"

319. However, obtaining even that much-reduced credit line still proved difficult for Mr Garcia. Mr Jones eventually signed off on a Tricorona credit line on 21 May 2007, but only for a tiny USD 4,000 with a one-month tenor. The consequence of this failure to obtain any significant credit line, coupled with the delay in dealing with draft contract documentation, was that Barclays and Tricorona did not conclude any actual transactions in the period at all.

320. On 14 April 2008, Ms Patel and Mr Martens circulated a "Portfolio Purchases & Securitisations" plan, "outlining our portfolio purchase and securitisation strategy". The plan set out ways for Barclays to access the primary CER market, so that Barclays could marry up its presence in the secondary market with the primary source of credits. As Ms Patel explained:

> "...the purchase goes hand in hand with the securitisation. Portfolio purchase means you get access to a portfolio of CDM credits and securitisation is then offloading the risk associated with buying the portfolio of credits..."

321. Tricorona was once more identified as a portfolio purchase target. The plan set out steps of a draft structure whereby Barclays would buy the primary credits, "warehouse" the risk, and build up the portfolio, and then securitise the portfolio to its clients.

322. The general plan (not focused on Tricorona) was "fleshed out" on 16 April 2008. It was a "roadmap" that set out all the detailed ways in which Barclays could carry out a portfolio purchase. The objective was simple: "Target structures to purchase portfolios ... [Barclays] to purchase portfolio outright from originators".

323. Principally through Mr Garcia (whose usual contacts at Tricorona were Mr Larsgard and Mr Oo), Barclays discussed a variety of possible transactions with Tricorona in the first half of 2008. These included possible CER forward transactions, spot trades, and trades under the umbrella of an ISDA (on which, remarkably (and indicatively of the curious lack of expertise within Tricorona), Mr Larsgard needed "legal help" because he was not familiar with the form).

324. They also included discussions about portfolio monetisation: or, as Mr Leeds put it in an email to Mr Larsgard and Mr Oo after a Carbon Expo event in May 2008, "the idea of buying a chunk of your portfolio directly and possible prepayment structures" (in which Mr Larsgard expressed interest).

325. However, and although in July 2008 Barclays and Tricorona did agree a standard-form NDA to cover the portfolio monetisation and forward selling discussions that (as Mr von Zweigbergk confirmed to me) Barclays and Tricorona were having, discussions were never translated into any actual transaction except for one small off-exchange spot trade between them in October 2008: and there is no evidence that any confidential information was passed between the parties.

326. The importation in November 2007 of the team of specialists (including Mr Martens) recruited by Barclays to grow its origination business, and the appointment of Mr Leeds as "Head of Environmental Sales" (to focus on sales to corporate clients and to clients looking to purchase CERs for use in the EU ETS) and Ms Patel as "Head of Product and Business Development, Environmental Markets" (to focus on origination), led to renewed assessment of the potential for collaboration with or acquisition of carbon developers, including EcoSecurities, Camco and also Tricorona, and renewed sales efforts to European clients.

327. Barclays' Credit Department throughout continued to regard Tricorona as a poor credit risk. More generally, Barclays' Credit Department tended to be sceptical about

carbon developers in general. In about May 2008, Ms Patel sought to correct this and arranged a presentation to address "misperceptions". Reporting to her team by email on 21 May 2008 Ms Patel wrote:

> "All
>
> I had a meeting with Credit Department today (Head of Funds – Rhys Kiff), Milo Carver & Nick Pace to discuss business we are looking to do with carbon funds & project developers given their lack of credit appetite to date. Main objectives of today's meeting were:
>
> Education about market
> What carbon funds/developers are
> Role of carbon funds
> Financial structure of these companies
>
> Try and get a dedicated carbon funds/developers Credit Sanctioner (currently our coverage has been a combination of funds and corporate coverage people)
>
> The common misperception amongst Credit was that these funds were like hedge funds and therefore there has been little appetite to do much with them.
>
> Structure types we talked about included:
>
> Back to back structures
> Standard Secondary market transactions (with thresholds which are competitive to what market are offering – currently little appetite to do anything without zero threshold)
> Portfolio purchase transactions with an element of prepayment (taking underlying ERPAs or some other as collateral)
>
> Feedback from meeting
>
> Rhys and Milo agreed that these companies were more akin to a corporate with Commodities exposure as opposed to hedge funds and therefore acknowledged that they had been looking at some of these companies incorrectly
> Agreed that we needed dedicated coverage for this client base probably from corporate side of the organisation
> Agreed that anything we would do with these companies would represent "right way risk"
> We talked them through some of the portfolio purchase structures we want to do with them & how we would get security on any prepayments. They said that whilst we would need to full reviews of each deal – our ideas were potentially achievable from their perspective and therefore there was no problem pitching the ideas to clients.

> Next Steps
>
> Take them through some specific deals we are looking. We did start talking them through TEP today. (Follow up in two weeks)
> Rhys and Milo to revert on coverage model from Credit (Follow up in two weeks)
>
> The meeting was very productive and therefore with more education of the asset class and our business model, Credit have certainly demonstrated that they will try and support us with our objectives of tapping more opportunities with this client base."

328. That email is of interest also because it led to an email exchange with Mr Garcia as follows:

(a) from Mr Garcia at 13:51:

"Wonderful stuff…thank you"

(b) from Ms Patel at 13:52:

"Let's try and do deals with Tricorona"

329. Although under cross-examination Ms Patel presented this swift encouragement to Mr Garcia as simply directed to provision of credit for dealings with Tricorona on a forward basis, these emails and Ms Patel's presentation need to be set in context.

330. This context included, in particular, that although Barclays had not abandoned its strategy of organic growth, increases in the price of carbon credits and competition in the market had, from March 2008 onwards, caused a re-orientation once more towards portfolio acquisition. This was further accentuated by a perception of a widening market. A note of a meeting of the sales and emissions teams in March 2008 summarised this as follows:

> "**Market situation, observations by the team:**
>
> - Margins between primary and secondary are getting smaller
> - People are paying more and more for primary (13.50 for wind in China)
> - Market is widening. More competitors in the market. In terms of banks; CS (China), Goldman (China), BNP (Me, Africa), ABN (LATAM), ML (China), Dresdner (Eastern Europe), Fortis (Un Fund), Deutsche (China/ Eastern Europe), Standard bank, Worldbank. In terms of carbon

funds/aggregators; CCC, ECF, EEA, CAMCO, Natsource, Syndicatum. Also increased activity by technology providers.

- Corporates are building their own origination teams; Statoil, Arcelor, Enel, EnBW, CEZ, Dong, Thyssen Krupp, RWE, EON, EDF, Endessa, Essent, Lafarge, Holcim, Shell.

- UN process of approving project is slow. Projects are delayed a lot.

- Validators not available till beginning of August (DNV no until August 1st)

- Significantly more tenders

- Typical deal size getting smaller but on the same hand more bundling taking place; 1 bundle 1 ERPA but also 1 bundle several ERPAS.

What makes you win a primary deal; price (pre pay, financing), price (pre paying on PDD costs), credit.

**Barcap situation:**

Strengths:

- Balance sheet

- Name in the market

- Client network

- European sales team

- Our team

- Global presence

- Structured products

- Trading franchise (liq. provider)

- Risk management capabilities (e.g. Rabo can be our client for this)

Weaknesses:

- Pricing – sales credits

- Contacts of sales force

- Working relationship IBD
- Risk warehousing

Internal champions on sales side in terms of origination:

- ABSA
- Vikas
- Will
- Maria

Barcap have come to the market fairly late. Building a portfolio from scratch might not be that realistic

Rather we should focus on;

1) buying a portfolio,

2) acting as a conduit (e.g. EEA) being the distributor of choice,

3) co-originating.

White labelling candidates:

- ABSA
- Expobank
- Egypt – business banking

Additional actions: to develop top 10 client list for each country/region."

331. Although Ms Patel (supported by Mr Martens) denied a move back to the objective described by Mr Redshaw back in the spring of 2007 as "CER elephant deal hunting", a further meeting of the sales and emissions team returned to consider potential "partnerships".

332. An email note of the meeting sent the same day by Mr Martens recorded that 62 "initiatives" had been reduced to three shortlists, namely "Following up with brokers", "Co-origination" and "Portfolio buy-out". The note said further that two people had been assigned to each partnership "to make sure we always have a backup", and in relation to the last of the three shortlists said:

"Portfolio buy-out:

– EEA HP / CL

– TriCorona: VH / CL"

333. A minute of a meeting of the emissions structuring and sales teams in June 2008 noted, under the heading "Securitisation and portfolio procurement":

"Meetings arranged with target portfolios

…Tricorona VH/CL – identify portfolio opportunities

ESI: VH/HP dormant"

334. The note of a further "team meeting" held on 30 June 2008 records in the entry for Tricorona, "NDA sent. Awaiting response". On 3 July 2008 Mr Oo signed a copy of the draft NDA and returned it to Mr Leeds. Mr Leeds sent it on to the legal department for execution. It was sent back duly executed to Tricorona on 28 July 2008 (after Mr Leeds had had to chase the legal department).

335. Mr Redshaw acknowledged that the execution of the agreement indicated that the emissions team must have thought that there was something worthwhile advancing with Tricorona in relation to the possible portfolio procurement.

336. A curiosity much dwelt on by CFP at trial was that there are no minutes disclosed of any emissions team meetings after 28 July 2008, although according to Mr Martens these continued more or less weekly. It is indeed an oddity in a large organisation such as Barclays. It may be that Ms Patel discontinued the practice of proper minuting when she took over the team, together with "responsibility for all primary CDM origination" and also "work on other origination opportunities on the sale side, such as securitisation and project portfolio purchases". Ms Patel was unclear, stating in her oral evidence that she did not know why the notes had stopped, despite having apparently told Freshfields (according to Mr McQuater QC) that it was not her practice to make or ask for them. She preferred WIP reports: but these did not start until February 2009, and the WIP spreadsheet for 16 February 2009 contains no reference anywhere to Tricorona.

337. In the absence of any minutes or other record, no Barclays witness could recall what the status of Barclays' interest in Tricorona was at the end of August 2008, or what happened after July 2008 to Barclays' portfolio purchase strategy in relation to Tricorona.

338. Mr Martens, who was at the heart of the strategy, could not assist beyond noting that "the trail has gone dead" and reflecting (as already quoted, and revealingly) that, in the event, the opportunity re-emerged in the context of Project Arctic Fox. Mr Redshaw had no recollection. Mr Gold was not involved and so was unable to assist. Ms Patel could "not actually remember…on the basis that I wasn't covering the client. So I can't actually remember". All she could say was that perhaps Mr Leeds or Mr Helfferich could explain what happened with the NDA: neither was called by the Defendants. The best she could do was speculate: either Tricorona was removed from the carbon team because of Arctic Fox/Carbonara or the discussions fell away.

339. Mr von Zweigbergk of Tricorona could not remember either; but he said this:

> "Q. So you can't actually help with what became of that project, the project we see described in the NDA?
>
> A. It is nothing that was stopped, I think it was an ongoing discussion and the idea with the NDA and the relation was to be able to transact when opportunities came.
>
> Q. Yes, so the idea was to maintain a sort of ongoing relationship really in that respect?
>
> A. Yes, like many other parties in the market.
>
> Q. In the context of portfolio monetisation?
>
> A. In the context of selling CERs in different ways. The banks and others they were naming those things and I think the main point to CF Partners as well on their difference, they were labelling trades so they should look like much more than they were, and banks and Barclays did the same. But it was a different kind of transaction, selling projects or selling CERs.
>
> Q. If we have D14/176 again, it is right, isn't it, that there was a difference between spot trading CERs and buying a chunk of a portfolio? Those were different things, weren't they?
>
> A. Yes.
>
> Q. And it is right, isn't it, that what prompted Barclays to get in touch in 2008 was buying a chunk of the portfolio?
>
> A. Yes, that was most of the attempts that we got. And again, as I explained before, at that time our portfolio was developing, so they wanted to come in early to be able to take a bigger part of the margin.
>
> Q. So as far as you were concerned, let's say in July/August 2008, you had an ongoing relationship with Barclays in relation to the portfolio monetisation ideas that had been raised in May 2008?
>
> A. Yes."

340. It was submitted on behalf of the Defendants that the reliance placed by CFP on Mr von Zweigbergk's evidence is misplaced or cannot bear any substantial weight, on the basis that he was not in fact involved in any discussions himself. The Defendants also rely on evidence from Mr Holmgren that he was not aware of any such discussions. He said:

> "To me the discussions with Barclays was something handled by the trading desk. I had seen an NDA and I had a draft ISDA on my desk which I did not have time at the time to work on, so to me there was no real discussions going on with Barclays at the time."

341. The state of the evidence is incomplete, in some instances contradictory, and accordingly somewhat unsatisfactory. But the question whether there was ever any, or

any sufficient, substance in the dealings or relationship between Barclays and Tricorona prior to September 2008 to give rise to any real conflict (whether actual or prospective) which Barclays should have disclosed to CFP before proceeding together in Project Arctic Fox, or alternatively, whether Barclays had so entirely abandoned any idea of pursuing the acquisition of that target as at September 2008 (whatever may have been its intentions in April 2008) as to negate any such conflict is plainly an important one. It bears especially on the issue whether Barclays had and should have disclosed a conflict of interest before proceeding with Project Arctic Fox, which in turn bears on the issue as to the relevance of the contractual arrangements to the scope of any equitable obligations.

342. Barclays' case is stated as follows:

> "In summary, the portfolio purchase discussions between Barclays and Tricorona, such as they were, do not appear to have been progressed beyond the initial call on 18 June 2008 and the execution of the NDA. Once again, therefore, these events could not have created an actual or potential conflict for Barclays in August-September 2008."

343. I do not accept Barclays' case in that regard.

344. Without otherwise attempting to resolve, and notwithstanding, the abiding mystery as to the lack of any documentary record of any relevant discussions between Tricorona and Barclays after the execution of the NDA, and the equally remarkable lack of recollection on the part of any of the Defendants' witnesses, I consider that the position as regards the relationship between Barclays and Tricorona as it had developed prior to the presentation of Project Arctic Fox can be summarised as follows:

(1) Barclays remained interested in substantial portfolio purchases.

(2) There were few carbon developers with large portfolios: Tricorona kept on popping up on Barclays' list of possible targets not because Barclays perceived quality but because there was so little choice.

(3) Whenever Barclays had another look at Tricorona they decided against any substantial relationship.

(4) This appears to have been largely because the Credit Department had such a low regard for the quality of its portfolio in terms of debt capacity (which it appears to have regarded as near zero).

(5) If the Credit Department could be shown and persuaded that the portfolio comprised CERs capable of ready sale or securitisation (or as Ms Patel put it, "sell the associated credits as when they transpire to an end client base"), Tricorona would have been reinstated as a viable proposition.

(6) I am satisfied that Barclays' appetite for an elephant deal remained; and that although in 2007-8 it did not consider Tricorona suitable quarry, it kept its options open.

345. In such circumstances, I am not persuaded that the "trail went cold" or that Barclays' interest in substantial portfolio purchases from Tricorona "died away". That interest had subsisted, even though with varying degrees of enthusiasm, since 2007; it had become in 2008 a primary target; and Ms Patel's enthusiasm and encouragement to Mr Garcia to try to do deals with Tricorona is obvious. The problem was that its portfolios appeared to be unsuitable.

346. The general tenor of the oral evidence, as it struck me, was that those concerned accepted that, though (as it were) on the back-burner, the relationship continued, in case opportunities arose, especially for monetisation of the Tricorona Portfolio.

347. Thus, according to Mr von Zweigbergk, the relationship was ongoing. (See his cross-examination quoted at paragraph [339] above.)

348. Mr Martens, who as an Associate Director in Emissions Structuring within the Commodities group at Barclays Capital was in a position to know, told me:

> "Q. But you remember, do you, actively discussing Tricorona at that time?"
>
> A. No, I don't remember. I do remember that Mr Helfferich and Mr Leeds were responsible for it, but at some point it died out and then it came back to us via Carbonara and I remember feeling okay about it because it wasn't one of the other names where we were actively in discussions with, because then I would have felt compromised if it would have been one of those names.
>
> Q. So it died out but it came back via Carbonara?
>
> A. Yes.
>
> Q. Yes. So what came back, Mr Martens, what effectively came back -- the Tricorona portfolio purchase opportunity presented itself at the end of August 2008 in the form of Project Carbonara, didn't it?
>
> A. Yes. No, not in that way. Tricorona as a client presented itself as a ...
>
> Q. But what happened, Mr Martens, you just said, what happened was that Barclays' interest in the Tricorona portfolio gave way to Project Carbonara which was all about CF Partners trying to buy the portfolio, wasn't it?
>
> A. I think our interest, as in a potential client being Tricorona, with whom we are eager to discuss purchasing a part of their portfolio, which had died away for unclear -- you know, I think Mr Leeds himself may not have gone on the right entrance there, it died out, and fortunately it came back as another potential business opportunity.

Q. For Barclays?

A. For Barclays."

349. I return later to discuss at greater length whether these prior engagements and future possibilities with Tricorona put Barclays in a position of conflict and if so what are the consequences; but in summary, as it seems to me, both their past relationship and Barclays' openness to reconsider Tricorona in view of the slim competition were facts such as would plainly have been of interest to CFP before passing to Barclays confidential information as to the potential of Tricorona under Project Arctic Fox.

## ARCTIC FOX: SEQUENCE OF EVENTS

*CFP's identification of Tricorona's potential*

350. CFP's focus on Tricorona was, in part at least, accidental. Mr Navon describes in his first witness statement how, in December 2007, he met a close friend of his brother-in-law, Mr Goldstein, namely Mr Lennart Perlhagen ("Mr Perlhagen"), whose son ran Volati, a small private equity firm which had recently made a substantial investment in Tricorona. Mr Perlhagen, knowing of Mr Navon's involvement in the carbon sector, suggested that CFP might be interested in Tricorona and its portfolios.

351. CFP's initial interest was with a view to buying or selling CERs as a broker on its behalf. Mr Rassmuson initiated contact in April 2008: he telephoned Mr von Zweigbergk (a fellow Swede) and followed up by email dated 25 April 2008, describing CFP as "a specialist financial advisory platform focusing on carbon trading and risk management based in London" and on providing

> "market participants with best execution in the carbon markets. This includes a variety of products such as sourcing and distributing carbon credits (e.g. EUAs, CERs and JIs on a guaranteed and non-guaranteed basis) and providing innovative risk management tools. Our approach is to work on specific mandates on behalf of our clients to acquire or sell projects or portfolio of projects with the minimum size of 1 million tone [*sic*] over the strip…"

(I note that he was careful to describe himself and Mr Navon as "former Merrill Lynch and Goldman Sachs employees": I assume because CFP had as yet a low profile; Mr von Zweigbergk had never heard of them: indeed it seems that Mr Rassmuson's email went first to Tricorona's spam filter.)

352. They agreed to meet at the Carbon Expo event in Cologne between 7 and 9 May 2008. Ahead of that meeting, Mr Navon and Mr Rassmuson reviewed Tricorona's website and information about Tricorona which was publicly available on the web. This research was not in-depth. However, from it Mr Rassmuson established that Tricorona had a portfolio of close to 200 million carbon credits. Without claiming any detailed analysis, Mr Rassmuson put it this way under cross-examination:

> "What happened was I looked at this information on the website. I could see that they had a portfolio of close to 200 million carbon credits. I could see just estimating that assume they got 50 million of these credits out of the portfolio times a price of 13, if I did my maths correctly we end up around 650 million euros worth of a carbon portfolio for a company that has a market cap of 140, 130 million. That to me sends some signals that there was something here that could be of interest. It wasn't a detailed analysis. We never claimed to make a detailed analysis. It was a quick and dirty analysis, we call it in the financial market, and it was just looking at the portfolio and seeing the opportunity there.
>
> At this stage I would have discussed this internally and that's how we left it."

353. Mr Navon's evidence in his first witness statement was to the effect that even despite the limitations of this exercise, it was apparent to them that the intrinsic value of Tricorona's CER portfolio alone (disregarding the other parts of its business) was substantially greater than its market capitalisation (then in the region of €140 million). It struck both Mr Navon and Mr Rassmuson that, albeit on that crude analysis, Tricorona might offer a very attractive acquisition prospect or arbitrage opportunity.

354. Mr Navon described his perspective in his main witness statement as follows:

> "46. It was difficult for investors to see the value in Tricorona's business because, by early 2008, it had produced little revenue and was a loss-making business. Few of the CDM projects in its portfolio had started issuing CERs, but significant costs associated with acquiring the CDM projects and getting them registered with the UNFCCC were incurred up-front, and so it would potentially take time before the projects would produce any revenue for Tricorona. Tricorona also had (so far as we were aware) no equity research coverage.
>
> 47. CF Partners also noticed that Tricorona's CDM portfolio had a number of particular features, some of which were apparent to us from the outset and others which we only discovered once CF Partners had commenced discussions with the Tricorona management. These features were unlikely to make the company an attractive target for many players in the market, but we were of the view that we had identified a valuable opportunity. I recall that there were broadly four features of Tricorona's CDM portfolio which were of interest to us.
>
> **Large Hydro CDM projects**

48. We were aware from publicly available information at the outset that Tricorona's portfolio had a large proportion of Large Hydro CDM projects. We felt that the difference between the market capitalisation and portfolio value was likely due to the market's concerns and misunderstanding of the eligibility and value of Large Hydro CERs.

49. Large hydroelectric power production projects (some with reservoirs and dams) can sometimes cause the displacement of local people and negative environmental impact. Such projects had therefore been the subject of criticism from some environmental and development groups.

50. Because of the environmental concerns, in addition to a Large Hydro project meeting UNFCCC requirements, most Annex I countries and compliance buyers require a Large Hydro CDM project to comply with environmental and development criteria specified by the WCD (World Commission on Dams). Annex I countries in the EU require compliance with the WCD criteria in order for Large Hydro CERs to be eligible for compliance purposes within the EU ETS. If the project is approved and compliant, the host country of the project or the Annex I country issues an LOA (Letter of Approval) in respect of the project. Annex I countries may also have their own separate requirements for Large Hydro. A Large Hydro project without a WCD report could still be used outside the EU ETS, by, for example, Japanese buyers.

51. Unlike other CERs, Large Hydro CERs were not traded on the major exchanges, because the exchanges were not in a position to confirm the necessary WCD compliance. But Large Hydro CERs could still be traded over the counter ("OTC") (i.e. directly between counterparties) and they remained eligible for compliance purposes, including within the EU ETS, if issued by a WCD-compliant project.

52. Although the inability to trade Large Hydro CERs on exchange may not in practice have been an issue for compliance buyers (since they required the credits to surrender for compliance), the fact that they were not exchange-traded or exchange-tradeable did affect how they were perceived by financial institutions and other market intermediaries and, indeed, most compliance buyers. A financial institution will typically want to hedge any exposure to the CER price through an exchange-based trade of some sort. Because they were

> not easy to trade and could not be delivered into futures contracts, financial institutions tended to trade them little and consequently had less knowledge of the buyers that would in practice purchase this type of CER.
>
> 53. As I explain at paragraph 26-40 above, because of CF Partners' involvement in the primary markets, including through the structuring of deals like the large Vattenfall/Enel Large Hydro CER sale, we had developed good relationships with a number of large utilities which had an interest in purchasing Large Hydro CERs. This was not just a matter of knowing which utilities would purchase Large Hydro CERs, but also having a relationship with the key personnel within the compliance departments of those utilities. Through these relationships, CF Partners was, unlike other market participants, able to recognise the demand for, and hence the true value of, the Large Hydro CDM projects in Tricorona's portfolio. Without this understanding, it would have been difficult both to see the acquisition opportunity and to execute the deal."

355. There was a dispute as to whether it was Mr Rassmuson who first mentioned that Tricorona was undervalued, or whether it was Mr von Zweigbergk. I accept Mr Lord QC's submission that it is inherently unlikely that it would have been Mr von Zweigbergk, whose own evidence was that he thought CFP were only interested as brokers (and thus not as, or acting on behalf of, acquirers); conversely, I would not think it unlikely for Mr Rassmuson to make the point, with a view to encouraging Tricorona that CFP might be a good channel for realising best value.

356. But I also accept Mr Lord's submission that it does not ultimately really matter: for though the gap between market capital value and the "headline" value of the CERs was obvious as well as arresting, the key was in understanding that the factors tending to discount the value of the portfolio could be overcome, and the portfolio actually monetised, via a leveraged buy-out, without the discounts or difficulty that others (including the stock market and even Tricorona's own management) had assumed.

357. At all events, that first meeting went well, and very shortly after Carbon Expo, on Sunday 11 May 2008, Mr Holmgren emailed Mr Rassmuson, thanking him for "a profitable meeting" and suggesting a conference call on the following Tuesday morning (13 May 2008). I accept CFP's submission that the warmth and swiftness of this response is inconsistent with Tricorona's efforts at trial to disparage CFP and its proposals, and reveal the level of the Tricorona Management's initial interest, especially as to how a buy-out (from which they too might profit, and which Mr von Zweigbergk described as his "dream") could be structured.

358. However, I accept Mr Holmgren's evidence (which indeed was not contested) that the Tricorona Management had other options, and was already exploring a management buy-out with a company called Greenko under a project code-named "Project Golf", and also a proposed merger of Tricorona with EcoSecurities under "Project Meltwater".

359. I also accept that Mr Holmgren and Mr von Zweigbergk had had a previous experience of a covert "raider" (named Trustor) and from the outset tended to be wary of CFP and to suspect that they were trying a take-over rather than a buy-out.

360. Thirdly, I accept that the correspondence between CFP and the Tricorona Management following their meeting developed a bad dynamic as each jockeyed for a larger equity stake after a buy-out. CFP gave the impression that it thought little of the Tricorona Management beyond marvelling at its fortune in accumulating a large portfolio, and that only it had a key to unlock its value. Tricorona's management, on the other hand, fancied themselves as carbon market experts, resented CFP's condescending attitude, and conveyed the impression that they regarded CFP merely as a "transaction vehicle" to be parked as soon as the funds were raised.

361. Thus, for example, in a letter of 30 June 2008 to Mr von Zweigbergk, Mr Navon stressed that CFP offered not only crucial skills in "efficiently arranging leverage and optimising the capital structure" but also would "bring value to grow the overall business in the future". The following extract from a draft letter prepared by Mr von Zweigbergk (always the more combative of the management team) which he planned to send (but in the event did not) in response to a letter from CFP betrays his irritation:

> "The plain true [*sic*] is that it does take a good organisation to extract the value from the portfolio, which we will take care of. And we do think we are slightly more than a plain procurement company."

362. In short, after initial enthusiasm, CFP and the Tricorona Management never really gelled: it was an engagement of convenience, which never progressed beyond vague "understandings"; and the Tricorona Management kept an eye out for other suitors, and the more so once they had concluded that CFP could not "deliver" Volati, whose agreement was needed to realise the "dream".

*CFP/Tricorona Confidentiality Agreement*

363. Nevertheless, on 15 July 2008 CFP and Tricorona agreed a confidentiality agreement ("the CFP/Tricorona Confidentiality Agreement"). This provided (by clause 3) for mutual protection of any "Confidential Information" disclosed by one to the other, subject to limited exceptions (set out in clause 4), and was clearly intended to protect both. The agreement had a term of two years.

364. At the same time, CFP also negotiated with the Tricorona Management an incentive structure setting out their respective shares in the available equity if the buy-out was completed. After difficult discussions, and some initial reluctance on the part of Tricorona's management to contemplate CFP having an equity stake of more than 20%, they executed a Memorandum of Understanding on 22 July 2008. This provided for a 54:46 equity split between the Tricorona Management and CFP after the allocation of equity to any other equity participants. It was agreed that CFP should put together the deal structure for the leveraged buy-out, and it was also envisaged that CFP would have seats on the board.

365. This understanding, which gave CFP more than Mr von Zweigbergk had originally contemplated, reflected the reality that the Tricorona Management did not have a strong hand, and its shareholders (and especially Volati) were restless. By early 2008 Tricorona and its management were little regarded in the market: the main component of its portfolio (Large Hydro pCERs) was not appreciated by the market; the business had produced little revenue; it was loss-making; and its management's efforts to arrange forward sales of a portion of its portfolio had come to nothing. Tricorona's management very much wanted to achieve a leveraged buy-out: CFP offered a possible route.

366. In that context, and in parallel with their discussions with the Tricorona Management, CFP opened discussions with a number of potential participants to provide debt finance. One of them was Citibank, which indicated interest.

367. On the equity side, Mr Navon commenced discussions with Daiwa SMBC Principal Investments ("Daiwa"), Daiwa being CFP's preferred institutional investor if further external capital was required.

368. CFP also had discussions with Asian Development Bank ("ADB"), SE Banken ("SEB") and Calyon. CFP established confidentiality agreements with each.

369. These potential participants inevitably required further more detailed information than the publicly available material to which CFP was restricted until after the Confidentiality Agreement was made. When that had been signed, on 28 July 2008, Mr Navon sent to Messrs von Zweigbergk and Holmgren a detailed request for information under the heading "Due Diligence Questions". These included requests for more detailed information about Tricorona's CDM portfolio, the terms of its ERPAs and its financial position.

*The excel data dump*

370. By email of the same date, Mr Holmgren sent Mr Navon an "excel/data dump" of the Tricorona Portfolio, to enable CFP to assess it and determine how best to present it to the market and financial institutions professionally and credibly. This was followed (on 30 July) by what Mr Holmgren described as "a more complete excel dump" which included details of individual project registration, commissioning dates and project references.

371. The information provided details of Tricorona's CDM projects, and especially the Tricorona Management's assessment of the risk of some shortfall in the ultimate volume of CERs to be derived from each project in the portfolio (a process known as "risk adjustment").

372. The process of risk adjustment is, obviously, vital to the assessment of the true value of the portfolio. The information provided by Tricorona revealed that its management risk adjustment process resulted in a total adjusted portfolio volume of (in aggregate) just 31,640,397 CERs, based on deep discounts on the headline portfolio volumes.

373. After review and analysis of the information provided, CFP did not share this conservative evaluation. There were, in the perception of Mr Navon and his

colleagues, important features of the Tricorona Portfolio which were not reflected. In his first witness statement he described these as follows:

> "117.1 Tricorona was the sole focal point for all the projects in its portfolio. This meant that all CERs issued to the projects would be delivered directly from the UNFCCC to Tricorona. This removed a potential source of delivery risk and credit risk (for example, the risk of an intermediary refusing or being unable to deliver the credits in accordance with its obligations under the ERPA). This information could not be obtained from public sources.
>
> 117.2 None of the projects in Tricorona's portfolio had been refused registration by the UNFCCC. This was a very important point. In late 2006, many CDM portfolios looked promising on paper and appeared to have the potential to issue large volumes of CERs, generating large future cash flows. However, some CDM portfolios would remain stagnant, with projects being rejected for registration or subject to such long delays that they would never actually issue any CERs. The fact that none of Tricorona's projects had been rejected was an important indicator that this was not the case for Tricorona's portfolio and that the rest of the CDM projects in the portfolio were likely to be registered in due course. When this was combined with other information of which I was already aware, such as that Tricorona's portfolio had a historical issuance rate of around 92% of contracted CER volumes (according to UNEP Risoe), it suggested that a sizeable proportion of the projected volumes would actually be issued.
>
> 117.3 We were already aware that Tricorona's average ERPA acquisition cost was in the region of €8/CER. However, the second *"data dump"* provided a detailed breakdown of the costs on a project-by-project basis, including consultants' and other fees. The accurate CER costs were fundamental to an accurate projection of the future profits from the portfolio. It was highly confidential information which could not be obtained from public sources.
>
> 118. The key commercial terms of the sample Tricorona ERPAs which Christer provided were also important. Although much of the wording was market standard, as well as the obligation to purchase CERs issued up to 2012, the ERPAs also granted Tricorona an option to purchase CERs post-

> 2012 and post-2020. Although, as I have mentioned, the materials that we had reviewed when we first started looking at Tricorona and its portfolio had suggested that Tricorona had some form of interest in post-2012 CERs, it was important to see the language used in Tricorona's ERPAs, because of the various forms this purchase could take and which were seen in the market. For example, an ERPA might contain an option to bid, a right of first refusal, a 'last look' right to buy, or a specific contract to buy the post-2012 CERs, all of which would affect the valuation of the post-2012 CERs."

374. Furthermore, it emerged in conversations between Mr Navon and Mr Holmgren that Tricorona's approach to risk management had been determined for the purposes of projecting the maximum volume that it would be willing to commit to sell from each project on a guaranteed basis. That was understandable and prudent in the context of commitments to sell on that basis: but the approach seemed to Mr Navon inappropriate in the very different context of an acquisition where (as he put it):

> "the company should be valued on the number of CERs expected to be issued from the CDM projects as opposed to the number of CERs that it would be prudent to guarantee to deliver to a third party."

375. By contrast with this conservative approach to valuation, the Tricorona Management's failure to protect the value of its portfolio from adverse risk and movements in the CER price, through, for example, forward sales, was a point of vulnerability and concern: indeed, Mr Navon's evidence was that by 13 August 2008 it was clear to him and his colleagues at CFP that the ability to forward sell a sizeable proportion of the Tricorona Portfolio was fundamental to the successful execution of the transaction: only in that way could the requisite leverage be developed.

376. That was particularly so in light of a CER cost base which Mr Navon described in an email to Mr Rassmuson and Mr Glossop of 22 July as "higher than anticipated", such that the deal was "not a no-brainer". This is further reflected in his email to Mr Rassmuson and Mr Glossop dated 13 August 2008 as follows:

> "Unless I have made some huge error, the deal is not obvious. I think it is unlikely that any bank that has no carbon experience will lend. The only way to get them on board will be to pre-sale around 20m tons and show them that they will be taken-out [*sic*] right away…"

377. To assess the viability of the deal, present an attractive but not inaccurate picture of Tricorona's prospects, and to attract both the lending and the investment without which it could not succeed, it fell to CFP to develop a composite presentation of the Tricorona Portfolio and its potential.

*CFP's Spreadsheets*

378. Working with information obtained from the Tricorona Management by means of the "data dump", CFP worked on an iterative process of compiling a portfolio spreadsheet based on that data which was passed between them over the course of 7 September to 7 November 2008. This process enabled development of successive versions of the spreadsheet with increasing detail and accuracy.

379. The objectives of the various iterations of the spreadsheets were:

(1) to develop a valuation model for the Tricorona Portfolio, taking into account projections and assumptions as to future CER prices, overheads, volumes of future sales and tax, in order to determine its net present value: unusually, no such model or valuation had (so it seems) been built up and none was ever provided by the Tricorona Management;

(2) to identify opportunities for forward sales out of the portfolio and in particular potential forward purchasers, whereby to develop cash flows to support borrowings and incentivise equity investors: as noted above, the Tricorona Management had done very little forward selling and had done very little to generate any cash or the prospect of cash flows, which almost certainly explained its own failure to raise funding;

(3) to devise risk adjustment techniques more suitable to the purposes for which, in the context of a proposed leveraged buy-out, they would be required and adapted to the particular profile of the portfolio: also as noted above, the Tricorona Management had risk adjusted its portfolio only for the purpose of determining the volumes it could contract to sell on a guaranteed basis;

(4) to present the Tricorona Portfolio professionally, as an attractive and well researched blend, show how it might be monetised, and in particular, to educate lenders and potential equity participants about the underestimation of the potential in Large Hydro pCERs: whereas Mr Navon depicted the approach of Tricorona's management as being typified by its choice of a "data dump" to answer CFP's due diligence inquiries, and the disorganised way in which it presented material to CFP;

(5) generally, to reveal and highlight embedded and prospective value in Tricorona which the market, and lenders, had apparently missed: CFP's developing perception that Tricorona had a track record of attempting, but failing, to interest third parties (as CFP came to know from parties it too approached such as Macquarie Bank and Unicredit), seems to be borne out by a number of failed attempts with lenders, and its low valuation in the market.

*Expressions of Interest*

380. Before turning to describe the circumstances in which CFP introduced Project Arctic Fox to Barclays I should also mention another aspect of CFP's preparatory work: its efforts over the course of August and September 2008, to solicit "Expressions of Interest" from some of its own clients to demonstrate demand for large volumes of CERs, including Large Hydro CERs (being both the biggest single element of Tricorona's overall portfolio, and also the most problematic).

381. A fundamental part of what was envisaged by the Arctic Fox proposal, and the route to the leveraged buy-out which it proposed, was the forward sale of a significant proportion of Tricorona's largely unhedged portfolio, in order (1) to lock in margins on the sale of CERs in the future and reduce Tricorona's unusually marked exposure to a fall in CER prices, and (2) to ensure Tricorona's ability to repay the acquisition facility and service the interest payments under that facility.

382. To persuade Barclays, or any other lender or finance provider, CFP recognised from the inception that it would have to show how that could be done, and the realistic prospect of it actually being done.

383. The Expressions of Interest were intended to vouch for real interest from compliance buyers to buy on a forward basis very substantial numbers of primary CERs, in the millions, as Mr von Zweigbergk acknowledged. They were intended to evidence actual or potential demand, the order of magnitude of which could potentially finance a leveraged buy-out. Mr von Zweigbergk agreed that if the Expressions of Interest could be converted into an actual forward sale, the forward sales would be very valuable.

384. Each document apparently confirming an Expression of Interest was informal: and each was drafted by Mr Navon himself, leaving space for further clarification or delineation of particular interest or need by the person completing the document (and thereby expressing particular interest). The Expressions of Interest relied on by CFP had been sent out as attachments to emails to a number of organisations, all in similar form. Both the form and substance of what was said came in for criticism by the Defendants, who depicted them as unreliable, if not worthless.

385. The covering email from CFP to Shell is illustrative; it reads:

> "As discussed, CF Partners is currently working on the opportunity to sell Certified Emission Reductions from a well diversified portfolio of carbon reduction projects. The project portfolio consists of emissions reductions projects located in a Non-Annex I Country, which have or will be registered by the Executive Board under the Clean Development Mechanism (CDM), established and defined under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change.
>
> …

> We'd be grateful if you could review and return the document as a mark of interest."

386. The email attached a pro-forma expression of interest, in the form below:

***STRICTLY PRIVATE & CONFIDENTIAL***

THE FOLLOWING IS NOT AN OFFER TO PURCHASE CERTIFIED EMISSION REDUCTION CREDITS FROM CF PARTNERS (UK) LLP ("CF PARTNERS"). THE INFORMATION BELOW AND THE INDICATIVE PROPOSAL ARE FOR DISCUSSION PURPOSES ONLY AND SUBJECT TO FINAL TERMS AND CONDITIONS BETWEEN CF PARTNERS AND THE SELLER. CF PARTNERS MAKES NO REPRESENTATION AND HAS GIVEN YOU NO ADVICE CONCERNING THE APPROPRIATENESS OF THE PROPOSED TRANSACTION OR ADVICE CONCERNING ACCOUNTING, LEGAL, TAX, COMPLIANCE OR REGULATORY MATTERS.

**LARGE CER PORTFOLIO SALE**

**EXPRESSION OF INTEREST**

**PROJECT PORTFOLIO**

CF Partners is currently working on the opportunity to sell Certified Emission Reductions from a well diversified portfolio of carbon reduction projects.

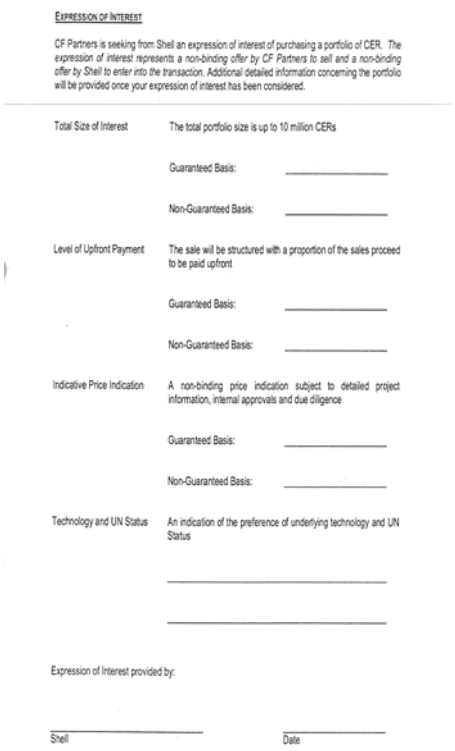
The project portfolio consists of emissions reductions projects located in a Non-Annex I Country, which will be registered by the Executive Board under the Clean Development Mechanism (CDM), established and defined under Article 12 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change.

The sale may be structured on either a guaranteed or non-guaranteed basis with a proportion of the sales proceed to be paid upfront.

**SUMMARY BREAKDOWN OF PORTFOLIO SALE**

Following is a breakdown of the underlying projects supporting the portfolio sale. CF Partners will provide detailed information concerning the projects once the level of demand for the portfolio sale has been determined.

| | |
|---|---|
| Total Portfolio Amount | up to 10 million CERs |
| Structure | Guaranteed and/or Non-Guaranteed sale |
| Geographic Distribution | Predominately China and India |
| Underlying Technology | Large Hydro*<br>Small Hydro<br>Wind<br>Waster Heat Recovery<br>**All the Large Hydro reports have or are in the process or receiving a World Commission on Dams report* |
| UN Status | From PDD to Registered |



EXPRESSION OF INTEREST

CF Partners is seeking from Shell an expression of interest of purchasing a portfolio of CER. *The expression of interest represents a non-binding offer by CF Partners to sell and a non-binding offer by Shell to enter into the transaction.* Additional detailed information concerning the portfolio will be provided once your expression of interest has been considered.

| | | |
|---|---|---|
| Total Size of Interest | The total portfolio size is up to 10 million CERs | |
| | Guaranteed Basis: | _____ |
| | Non-Guaranteed Basis: | _____ |
| Level of Upfront Payment | The sale will be structured with a proportion of the sales proceed to be paid upfront | |
| | Guaranteed Basis: | _____ |
| | Non-Guaranteed Basis: | _____ |
| Indicative Price Indication | A non-binding price indication subject to detailed project information, internal approvals and due diligence | |
| | Guaranteed Basis: | _____ |
| | Non-Guaranteed Basis: | _____ |
| Technology and UN Status | An indication of the preference of underlying technology and UN Status | |
| | _____ | |
| | _____ | |

Expression of Interest provided by:

_____ _____

Shell Date

387. CFP received back Expressions of Interest filled in (with a varying degree of apparent care) from what it described as its key clients: namely, Shell, Vattenfall, Electrabel, ADB, and E.ON.

388. As to each completed Expression of Interest:

(1) Shell initially indicated that, though in principle interested, "the volume, price and upfront payment levels would ultimately depend mainly on the counterparty and also on the project info (including distribution of volume by technology). In particular, the proportion coming from large hydro", and it sought details of the counterparty and projects.

Mr Rassmuson replied on the same day with a breakdown showing that 36% of the portfolio was in Large Hydro. He resisted giving details of the counterparty:

> "The client prefers to get indications first and based on this the next stage will be to move the process forward disclosing counterparty risk etc."

As noted by the Defendants, that was somewhat disingenuous because the "client", Tricorona, did not know anything about the offer of its portfolio.

On 2 September 2008, having not heard back from Shell, Mr Rassmuson emailed again, saying:

> "Things are progressing on the large portfolio trade. If you want to be able to look and decide later if you participate in this opportunity, we need the non binding signed expression of interest to move it to the next level."

On 4 September 2008, Shell sent back the expression of interest. Its preference was *away from* Large Hydro. It was interested in buying:

> "estimated 6.4 million *excluding Large Hydros* proportion (36%). Shell may be interested in only a small proportion of Large Hydros.
>
> …
>
> Shell has a preference for all the technologies *except for the Large Hydros* (although Shell may be interested in a small proportion of Large Hydros)"

Although CFP's expert, Mr Bode, commented that Shell "opened the door" for Large Hydro CERs, that is to my mind a somewhat optimistic assessment.

(2) When Vattenfall received the request for an expression of interest it said it would have some questions about it. Mr Navon replied on 1 September:

> "The Seller has asked for some feedback by the end of the week. This is a non-binding expression of interest, and as such does not commit Vattenfall to any terms."

As Mr Navon acknowledged under cross-examination, the first sentence was not true: Tricorona knew nothing about the approach.

It appears that there was a telephone call between CFP and Vattenfall on 1 September during which Vattenfall expressed some concerns. Mr Navon sought to allay them in an email on 2 September:

> "Thanks for calling yesterday and we appreciate your concerns on signing the expression of interest at this point in time.
>
> As mentioned on our call, we can confirm that we have the exclusive mandate to sell this portfolio on behalf of the Seller. You will not see this portfolio sale from anyone else. The Seller has asked for a signed expression of interest in order to determine which parties to pursue in the sale. The expression of interest is not intended to create a bidding situation and is understood to be a non-binding offer. We have only shown this idea to a couple of clients and thus by signing the EoI you enable us to provide you will further information concerning the transaction.

> As discussed, we have filled out the expression of interest based on your feedback which hopefully reflects what was discussed yesterday. We would be grateful if you could review and sign back to us as the Seller is looking for feedback at the end of the week."

It was not the case that CFP had the exclusive mandate, or any mandate, to sell the portfolio. It was not the case that Tricorona had asked for a signed expression of interest. It was not the case either that Tricorona was looking for feedback. Tricorona did not know anything about the offer. Mr Navon cavilled at the suggestion that he had been telling lies; but he acknowledged that what he said was contrived in order to elicit a response from Vattenfall.

Vattenfall's expression of interest was couched as follows:

> "Vattenfall would be interested in a portfolio sale of up to 10 million CERs, subject to type of technology, due diligence and all necessary internal approvals…
>
> Vattenfall has a preference for a well diversified portfolio of technologies *with a preference away from Large Hydro*"

On receipt of the signed expression of interest, Mr Navon replied to Vattenfall:

> "We will forward the EoI to the Seller. We appreciate the sensitivity to signing the letter at this point in time. "

However, he did not forward the expression of interest to Tricorona, then or at any time.

Mr Bode said:

> "What you can see from this document is that it is a portfolio that includes large hydro, that in terms of volumes of the portfolio it is 10 million CERs and that Vattenfall's expressed an interest in the full 10 million CERs. Given the fact that large hydro projects by definition are large you would expect that to be a significant percentage of the 10 million CERs to be large hydro."

(3) Electrabel expressed interest in buying between 3 and 5 million CERs. It stated:

> "With regard to the underlying technology, we do not really have a preference as long as there is diversification and as long as the projects can be used in the EU-ETS system (for large hydro projects. This means they have to comply with the WCD criteria)."

Mr Bode expected that Electrabel would have taken between 1 and 2 million Large Hydro CERs. But this was largely conjecture.

(4) ADB did not complete the expression of interest form but emailed CFP on 2 September 2008 expressing interest in a minimum of 2.8m CERs (700,000 a year over 4 years), excluding only hydro projects in excess of 100MW.

ADB did not say anything about any preference for Large Hydros (the portfolio having been presented as well diversified). It does contain certain conditions on projects to be included. All projects had to be registered and fully commissioned at the date of any advance – only about 25% of Tricorona's Large Hydro projects (by volume) fulfilled this condition by the time of the 7 November spreadsheet.

(5) E.ON expressed interest but only in getting further information on the total portfolio size of up to 10 million CERs.

E.ON left the "Expression of Interest" document blank.

However, it was signed by a senior E.ON representative.

389. CFP's case is that these Expressions of Interest (a) were collated in order to, and did, reveal the identity of the small group of potential purchasers for large volumes of Large Hydro pCERs, (b) were equivalent to CFP's client list which had been built up over the course of its work in the primary markets, and (c) were both highly confidential to CFP and extremely valuable.

390. On the other hand, the Defendants were dismissive of the value of these Expressions of Interest, which they described as "mail shots". They emphasised also that:

(1) CFP had no mandate to sell any part of Tricorona's portfolio, and had not asked for one;

(2) CFP never showed or circulated to Tricorona either its email or the "Expressions of Interest" in response;

(3) "the purpose of the mailshot was not in reality to sell the portfolio at all but simply to support the presentation";

(4) the replies or expressions of interest were expressed in the most tentative way;

(5) such interest as was expressed was referable largely to CERs other than Large Hydro CER;

(6) their purely passing interest (at best) was both illustrated and emphasised by the casual manner in which CFP presented them to Barclays.

391. There is some force in these criticisms. As to their genesis, it is the fact that Tricorona did not know anything about the offer of its portfolio, nor about the resultant Expressions of Interest: nor, just as strikingly, did CFP ever show any of the

Expressions of Interest to Tricorona. CFP did not have Tricorona's authority to hawk its portfolio around: and, in suggesting that Tricorona was itself seeking the expressions of interest, the documents were incorrect, as Mr Navon was constrained to accept. However, I do not accept the Defendants' harsher criticisms, and their depiction of this as dishonest: it committed Tricorona to nothing, and the pretence of authority in this exploratory exercise was a means of facilitating an objective that Tricorona shared.

392. As to their status, the Expressions of Interest do appear rather scrappy. I must admit that initially at least, these "Expressions of Interest" struck me as too informal, and too general (or, perhaps more accurately, unspecific) and carelessly completed, to be given credence and weight as indications of substantive demand. Further, of course, an indication of interest requires no outlay, nor any commitment.

393. I consider that CFP went too far insofar as it sometimes appeared to be claiming that the Expressions of Interest demonstrated an unqualified appetite amongst compliance buyers previously unknown to Barclays for Large Hydro pCERs; but the Defendants went too far in suggesting there was a bias against Large Hydro CERs from buyers of which they were already well aware.

394. In my assessment the Expressions of Interest, despite their frailties, did indicate (a) volume demand from a source that, though in a sense obvious, Barclays had not explored, and (b) a willingness, in order to achieve really substantial volumes, to consider a class of CERs that Barclays and other financial institutions had effectively classed as untradeable.

395. Barclays' note of the 7 October meeting, quoted in paragraph [545] below, captures the essential message, which did register with Barclays, of a greater source for asset sales than Barclays had originally perceived to a segment of the market (compliance buyers of primary CERs) which it had not itself explored and of which it was therefore surprisingly ignorant. As Ms Patel accepted under cross-examination, Dr Swift's report (see paragraph [545]) "implies that there was interest by other players to procure some of the credits". That was the essential message of Project Arctic Fox, the central plank of CFP's justification for the very considerable loan finance that it was seeking.

396. I note also that Mr Bode gave this as his expert evidence:

> "My experience with expressions of interest is that they are -- even though they are non-legally binding they are notoriously difficult to get signed, 1; 2, my experience with expressions of interest is that I had a 100 per cent conversion rate from expressions of interest going into legally binding transactions, so based on that I would be very hesitant to trivialise any of these EOIs based on that fact."

Similarly he said:

> " ... in my experience an expression of interest from a serious counterparty is not signed lightly and in my experience the conversion from expression of interest to a deal has been

> extremely high, in my specific case 100 per cent. That's why based on my experience I conclude that these expressions of interest could indeed provide comfort."

397. I do not take much from Mr Bode's evidence of his own 100% conversion rate of expressions of interest to actual sales (since it is difficult to extrapolate from such general evidence any reliable proposition). However, I do attach weight to his other uncontradicted evidence that in the market, the signature on behalf of a compliance buyer of such expressions of interest, and the identification of their needs, is significant of real potential demand. After all, a slip in the Lloyd's market is often merely a bit of paper: its consequences are greater than its form might suggest: in other words, it is a question of market practice, and, except as regards the issue raised by the Defendants that by the time they were of any potential relevance they had become stale, I have no real basis for rejecting Mr Bode's evidence in that regard.

398. The Defendants relied on the fact that Shell and Vattenfall needed further persuasion to sign, and indeed CFP persuaded Shell by telling it that it should sign "if you want to be able to look and decide later if you participate", and Vattenfall was induced to sign by CFP falsely representing (1) that there was urgency because the seller wanted feedback within days and (2) CFP had the exclusive mandate for the portfolio and Vattenfall would not see it anywhere else. However, whilst taking those inaccuracies into account, in some ways the fact that such compliance buyers needed persuasion seems to me to add some credence to Mr Bode's evidence that, in the particular market, prospective buyers deliberate with some care before completing and returning a signed expression of interest.

399. Thus, even though the interest expressed was tentative and apparently informal, and the Expressions of Interest were requested on the express basis that they would be non-binding and that further information about the portfolio would only be provided if the documents were signed, the reluctance of, in particular, Shell and Vattenfall to sign them seems to me to offer some support to Mr Bode's evidence that such expressions were signed with more care than their format might at first blush suggest.

400. In summary, as it seems to me, the Expressions of Interest (allowing for their frailties) provided a snapshot of (a) substantial compliance demand for CERs and pCERs within both Europe and the EU ETS from (b) well known and financially secure compliance buyers who (c) were primarily interested in non-guaranteed CERs and the lower prices for volume amounts they represented and (d) although preferring diversity, nevertheless (e) were prepared to accept a proportion of any sale being of Large Hydro pCERs which, given the large overall volumes in which they were interested, (f) represented substantial potential overall demand in the millions of tons such as (g) could potentially finance a leveraged buy-out (as Mr von Zweigbergk agreed).

401. I shall return to the obviously important crucial issues as to whether the Expressions of Interest had any real effect on either Tricorona or Barclays; whether, even if initially confidential, they remained so; and whether (and if so, when) they were "used" by the Defendants. I note, however, that it is common ground that neither Barclays nor Tricorona ever followed up any of the Expressions of Interest with a view to contracting.

***Presentation of Project Arctic Fox to Barclays***

402. In the meantime, I turn to consider the circumstances in which Project Arctic Fox was presented to Barclays with a view to obtaining debt finance and the arrangements subsequently agreed between the parties in relation to it. I then address more particularly the systems and structures within Barclays for the protection of confidential information.

403. Having worked on the information supplied by Tricorona over the course of May 2008 (following their meeting in Cologne to which I have referred in paragraph [350] above) through to August 2008, CFP identified and decided to approach Barclays as a potential source of debt finance.

404. As at August 2008 CFP had no past or existing business relationship with Barclays. Mr Navon arranged for its proposal to be introduced to Barclays by IVC (an asset management group founded by Mr Goldstein and Mr Vipin Sareen, to which I have already made reference) which had an existing relationship with the bank.

405. Messrs Goldstein (who is Mr Navon's brother-in-law), Sareen and Navon had also been discussing with CFP the possibility of IVC making an equity investment in Project Arctic Fox, in the region of €20-40 million (though the discussions were informal and never got to the point of fixing on a precise amount).

406. Mr Navon resolutely refused at trial to accept that he was using IVC in effect to "front" the transaction for CFP: he maintained that IVC was not CFP's agent, and he insisted that IVC was only used to introduce CFP to Barclays. He emphasised that:

> "from the first meeting that we had with Barclays it was myself and IVC in the meeting and I did most of the talking…"

407. However, it appears plain that at least at the outset IVC was presented to Barclays as being its potential client, and that is what Barclays initially assumed.

*The structure of the contractual arrangements between CFP, IVC and Barclays*

408. The use of IVC, however it is to be characterised, necessitated back-to-back confidentiality agreements between CFP and IVC and between IVC and Barclays. These comprised:

(1) a Confidentiality Agreement between CFP and IVC dated 22 August 2008 ("the CFP/IVC Confidentiality Agreement");

(2) a Confidentiality Agreement between IVC and Barclays dated 3 September 2008 ("the IVC/Barclays Confidentiality Agreement", sometimes referred to, especially by Mr Navon, as "the NDA" (Non-Disclosure Agreement)).

409. The CFP/IVC Confidentiality Agreement is simple and unremarkable, reflecting the close pre-existing relationship of trust between them. However, CFP stressed that even in the context of that close relationship, CFP considered information about

Project Arctic Fox to be so confidential and valuable that it did not provide any of it to IVC until after the conclusion of that agreement. Clause 6 may be noted:

> "You hereby acknowledge that the Confidential Information is being furnished to you, in consideration of your agreement that you will not, directly or indirectly, for a period of 24 months from the date hereof, approach directly or indirectly the CC Owner with a view to execute any transaction with the CC Owner whose purpose is the financing of the CC Portfolio unless the Company has consented in writing in advance to such execution; for the avoidance of doubt, we agree that if the Possible Transaction and/or CC Portfolio do not constitute or stop constituting Confidential Information in accordance with the terms of this letter, other than by a breach by you of the terms of this letter, IVC shall no longer be bound by the obligations set out in this paragraph."

410. The IVC/Barclays Confidentiality Agreement was more strenuously negotiated, with Mr Navon back-seat driving Mr Sareen of IVC. Negotiations focused principally on the issue as to the duration of the duty of confidence. That was, I accept and find, a matter of importance to Barclays: inherently, and also because of its "Global Policy on Confidential Information", which (though not disclosed to IVC at the time) drove the legal department negotiating on behalf of Barclays.

411. This provided as follows:

> "No confidentiality agreement should be entered into without having been reviewed and approved by the Legal department. A copy of the signed agreement should be forwarded to the Legal department who maintain a database of the firm's obligations of confidentiality for use by both themselves and the Compliance Control Room.
>
> It is important to note that it is not unusual for confidentiality agreements to contain provisions that were the firm to accept them, would have the effect of unduly restricting the firm's ability to undertake business. Examples of such provisions would include:
>
> *(i) Confidentiality agreements of unlimited duration;*
>
> (ii) Obligations to return or destroy confidential information without being given notice or without the ability to retain a copy of such information;
>
> (iii) Provisions precluding the firm from working with a competitor of such client (i.e. exclusivity agreements);
>
> (iv) Provisions preventing Barclays Capital from trading in the securities of such client (i.e. standstill agreements); and

(v) Agreements binding the Barclays Group as whole.

Any decision to accept one or more of the above provisions will only be taken after careful consideration of the impact of such provision on Barclays Capital on a case by case basis."

412. As to the relevant terms of the IVC/Barclays Confidentiality Agreement itself , clauses 6 to 11 provided as follows:

"6. You hereby acknowledge that the Confidential Information is being furnished to you, in consideration of your agreement that, subject to your internal conflicts clearance process, you will not, directly or indirectly, for a period of 18 months from the date hereof, approach directly or indirectly the CC Owner with a view to executing any transaction with the CC Owner the purpose of which is the financing of the CC Portfolio or the purchase of the CC Owner, unless the Company has consented in writing in advance to you doing so (which consent shall not be unreasonably withheld or delayed); provided that, we agree that if the Possible Transaction and/or CC Portfolio do not constitute or stop constituting Confidential Information in accordance with the terms of this letter; or (ii) we decide not to pursue the Possible Transaction or negotiations between us and the CC Owner or its shareholders with respect to the Possible Transaction come to an end (and we agree, in each case, to notify you as soon as possible after either such event occurs), you shall no longer be bound by the obligations set out in this paragraph.

7. Notwithstanding paragraph 6 above, nothing in this agreement shall prevent or restrict (i) your ordinary course client order facilitation (execution only) sales and trading activities that, as required by applicable rules and regulation, operate behind a "Chinese Wall" from your investment banking business or (ii) Barclays Private Equity, which manages third party private equity funds behind physical separation and information barriers from your investment banking business.

8. References to the parties include references to our respective successors, including, without limitation, an entity which assumes the rights and obligations of the relevant party by operation of the law of the jurisdiction of incorporation or domicile of such party.

9. This letter sets out the full extent of your obligations of confidentiality owed to the Company in relation to the information the subject of this letter. The terms of this

> letter and your obligations under this letter may only be amended or modified by written agreement between us.
>
> 10. A person not a party to this letter may not enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999.
>
> 11. The obligations in this letter shall cease 12 months after the date hereof."

413. A number of points may be noted:

(1) The contractual restriction on Barclays (in clause 6) not to approach Tricorona ("the CC Owner") for the purpose of the purchase of Tricorona or "the financing of [its] Portfolio" was limited in time to 18 months, and fell away earlier if either CFP decided not to pursue Project Arctic Fox or its negotiations with Tricorona or its shareholders came to an end.

(2) The "exclusivity" restriction which clause 6 comprised is qualified by clause 7 so that it should not prevent or restrict Barclays' "ordinary course client order facilitation (execution only) sales and trading activities": but the qualification (as in the case of another qualification in the same clause relating to private equity management business) is subject to any such business operating "behind a 'Chinese Wall' from your investment banking business".

(3) The duty of confidentiality was agreed to cease 12 months after the date of the agreement (clause 11).

*Barclays' Global Confidential Information and Chinese Walls Policy*

414. These contractual provisions must also be set in the context of the "applicable rules and regulation" to which they refer. In that regard**,** Barclays' "Global Confidential Information and Chinese Walls Policy", as revised in July 2007, first describes the nature of the information to be protected and the continuing nature of the obligation, even if the transaction does not proceed.

415. As to the "nature of the information to be protected":

> "The requirements of this policy, as described below, apply to all information of a confidential nature. It is important to note that the firm may be deemed to be under a legal obligation of confidentiality concerning information provided to it by a third party irrespective of whether it entered into any agreement to that effect. Accordingly, employees are required to treat all information of a non-public nature provided by a third party as confidential (including, but not limited to, price sensitive information) and are therefore required to abide [by] the terms of this policy with respect to all such information."

416. As to the "continuing nature of obligations of confidentiality":

> "It is important to note that obligations of confidentiality are continuing obligations, and therefore the occurrence of events such as the completion of a transaction, or a decision on the part of a client not to proceed with a particular transaction, or to engage the services of another institution, will not, of themselves, act to bring the firm's obligations of confidentiality to an end. Typically, obligations of confidentiality will only cease with respect to a particular piece of information in the following circumstances:
>
> (i) The information in question comes into the public domain;
>
> (ii) The information ceases to be relevant by becoming stale (i.e. where information has ceased to be relevant or reliable over the passage of time); or
>
> (iii) A set of events occurs that, under the terms of any confidentiality agreement entered into by the firm, results in the firm's obligations of confidentiality towards such information coming to an end."

417. In relation to Chinese Walls, the policy sets out a number of provisions:

(1) Paragraph 4.10 first sets out the procedure for wall-crossing public side individuals. It says:

> "[a]lmost invariably, the act of bringing an individual over the Chinese wall will have a detrimental impact on the ability of that individual to continue their day-to-day activity."

(2) Paragraph 4.11 describes the restrictions that an individual is under once he has been wall-crossed:

> "Once the receiving party is brought over the wall, then save where advised to the contrary by the Compliance Department, the receiving party will be prohibited from undertaking their usual activities with respect to those entities or instruments about which the confidential information relates or otherwise affects."

(3) Paragraph 4.12 further describes the obligations that a wall-crossed individual is under:

> "Any public side employee who has crossed the wall must maintain the confidentiality of the inside information received. They may use it only for the business purposes for which it was disclosed, and must comply with the

> terms of any applicable confidentiality agreement or undertaking."

(4) Paragraph 4.13 provides for the resumption of "normal activities" by the public side employee. It says:

> "It is important to note that the duration of any prohibitions on the activities of a receiving party will continue until all of the confidential information received either comes into the public domain or ceases to be material (i.e. becomes "stale").
>
> Once the confidential information has come into the public domain or become stale, then the receiving party must, prior to resuming their normal business activities, inform the Control Room, in writing, that the information has ceased to be confidential/material and that they are intending to resume their normal activities. The receiving party will only become authorised to resume their normal activities upon receipt of written clearance from the Compliance Control Room."

418. These provisions of general applicability were then supplemented by more particular "wall crossing" memoranda, to which I shall return. Their importance in enabling Barclays to fulfil its duties to its client whilst being able to conduct its other business is obvious.

## WAS BARCLAYS IN A POSITION OF CONFLICT WHICH IT WAS OBLIGED BUT FAILED TO DISCLOSE?

419. It will be recalled that clause 6 of the IVC/Barclays Confidentiality Agreement expressly referred to, and was expressed to be subject to, "your [Barclays'] internal conflicts clearance process". It will also be recalled that CFP considered and IVC presented the Arctic Fox proposal to Barclays as being so sensitive and confidential that it was not willing even to reveal the name of the target without a commitment on the part of Barclays to keep the information confidential and not to use it.

420. Mr Navon's evidence that CFP was not willing to provide any confidential information to Barclays (other than the name of the target) before Barclays conducted a conflicts check with negative results was not disputed, and is reflected in the structure of the IVC/Barclays Confidentiality Agreement.

421. Mr Navon also said (in paragraph 185 of his first witness statement) that he:

> "expected that Barclays' conflict check would involve checking whether anyone within the bank was working on, or had worked on, any transaction with or involving Tricorona and, if there were any transaction, that those involved would be asked whether or not it could potentially conflict with an acquisition of Tricorona."

422. Barclays denies that it had any conflict; but it also contends that even if it was in a position of conflict at the outset of Project Arctic Fox (whether because of its prior overtures to Tricorona or for any other reason which a conflicts check should have revealed), it did not owe a duty to CFP to avoid or disclose that conflict.

423. Barclays' case on this is a stark one. It is that CFP's contention that Barclays was obliged to reveal that conflict is legally misconceived, because

> "where there is no fiduciary relationship, the law on conflicts of interest does not and cannot apply…If there is no duty of loyalty then there cannot be a conflict of interest, because in all other cases parties are entitled (and in some cases obliged) to act in their own interests and prefer them to the interest of other parties."

424. Whilst Barclays concede that there may be cases where a non-fiduciary has conflicting interests, such as to be in what Mr McQuater characterised as a "commercial conflict", the non-fiduciary is not obliged to disclose the conflict to either client, and he may advance his own interests as he sees fit.

425. As previously foreshadowed, a duty of confidence (that is, a duty to respect confidential information) is not to be confused with the duty of loyalty (including to put the interests of the person to whom it is owed paramount, which is the characteristic duty of a fiduciary): and see *Arklow Investments Ltd and Another v Maclean and Others* [2000]1 WLR 594 at 600A-E (PC).

426. It is also, to my mind, important to distinguish between (a) a duty to disclose conflicting or competing interests and (b) a duty to prefer the interests of another party over one's own. In my view, only a fiduciary relationship gives rise to or is constituted by the latter duty: non-fiduciaries may pursue their own interests even to the disadvantage of others, unless restricted by a contractual term or regulatory provision.

427. However, whether in other circumstances than the present a non-fiduciary ordinarily owes a duty to disclose a conflicting or competing interest is not necessary for me to consider: for in this case, the fact is that Barclays, after undertaking (to the knowledge and with the encouragement of CFP) what was meant to be a comprehensive conflicts search, gave an express assurance to IVC that it had no conflict, and CFP's case is simply that it was entitled to and did rely on those assurances.

428. The real question in this case in this context is not whether Barclays had a duty to disclose a conflict of interest: it is whether its assurance that it had no such conflict (or perhaps more accurately, none such as to prevent it being willing and able to proceed) was correct.

429. That raises three different legal questions, which are (i) whether Barclays' prior contacts with Tricorona or any then existing plans for the future (whether bilateral with Tricorona, or unilateral or in-house) were of relevance and materiality such as would reasonably be taken to be matters such as to falsify the assurance given; (ii) what steps were taken within Barclays to check whether it was conflicted; and (iii) whether, in any event, Barclays' commitment to exclusivity negated any potential

conflict or the effect of it not having been disclosed. There then arises a further question as to (iv) the consequences and effect of any failure to disclose that which was required to be disclosed.

*Was Barclays conflicted by its previous relationship with Tricorona?*

430. I address first the question whether the fact and nature of Barclays' relationship with Tricorona was such as to give rise to a conflict of interest, actual or prospective, and if so whether it was of such materiality as to require disclosure.

431. I have set out previously a description of Barclays' dealings with Tricorona over the course of 2007 and 2008, and the reasons for my conclusion that Barclays continued to keep open the possibility of further dealings, although I consider that Barclays should in any event have disclosed those prior dealings and the subsistence of its interest. But, especially since Barclays has argued that had the past been disclosed it would not really have been likely to cause CFP not to present Project Arctic Fox to it, I need to address how serious a conflict there was in terms of the potential for Barclays' interest, as it was in September 2008 (so not taking into account what it learned from Project Arctic Fox), conflicting in the future with Project Arctic Fox.

432. Although Barclays' various witnesses sought to advance the notion, which became something of a refrain that was later echoed in the context of Barclays' defence against the claim that it breached its exclusivity obligations, that Barclays' interest was confined to "portfolio structuring strategies" (limited to valuing the portfolio, funding, and hedging in the secondary market) and did not (at least in 2008) extend to any "portfolio purchase strategy", I do not find this persuasive. Mr Martens himself conceded that structuring "might have involved a purchase".

433. Mr Zintl accepted under cross-examination that the context of Barclays' NDA with Tricorona in April 2008 was Barclays' identification of Tricorona as a "potential target". Mr Zintl also agreed that if Barclays had any active interest in the Tricorona Portfolio as at the beginning of September 2008, that would have represented an actual conflict of interest.

434. Mr Zintl suggested a refinement to the argument: this was to suggest that there was a distinction between, on the one hand, occasional work in selling or purchasing CERs on behalf of or from Tricorona, and, on the other hand, monetising its portfolio (that is, selling its carbon credits, such as Project Arctic Fox envisaged). The first, he suggested, would not give rise to a conflict with the second. He accepted that the boundaries between the two were unclear: "a grey area".

435. I cannot accept this refinement: first, because such distinctions are difficult to draw in practice and undermine the rationale of requiring conflicts of interest to be identified; and secondly, because the fact, as I see and find it to be, is that Barclays' interest in Tricorona was not so confined. I consider that in view of his sketchy knowledge of it, it was implausible for Mr Zintl to have suggested that he did not perceive there to be a conflict.

436. Ms Patel was characteristically bullish. She disagreed that Barclays had (at that time) any strategy or plan that would conflict with Project Arctic Fox. But she was unable

to give any first-hand evidence on the point and could only rely on "assumptions". She did acknowledge that if Barclays was looking at the Tricorona Portfolio to acquire it at the same time as it signed the IVC/Barclays Confidentiality Agreement or some other strategy that potentially cut across CFP's deal, that would be a conflict.

437. Mr Whitehead and Mr Jones were not called to give evidence. If Mr Whitehead had been aware of the portfolio purchase strategy that included Tricorona as a target, he would not have been able to say that there was no conflict.

438. The truth, as I see it, is that Barclays' relationship with Tricorona was material and did put Barclays in a position of conflict: it should have disclosed its identification of Tricorona as a "potential target client to discuss portfolio hedging or acquisition" of some, or all, of the portfolio.

*What steps did Barclays take to determine whether it was conflicted?*

439. Barclays' Conflict of Interest Procedure Manual provided (in relevant part for present purposes) as follows:

> "A. Conflict Check
>
> The principal mechanism through which potential conflicts of interest are identified on a transaction by transaction basis is through the conflict clearance process, which is managed by the Compliance Department's Control Room. The Control Room operates on a global basis, and, in addition to all private side transactions notified to it through the conflict clearance process, it has information concerning all of the Firm's trading activity and details of the activities of the Firm's staff that may give rise to a potential conflict of interest. Therefore, it is essential that the Control Room is notified of potential transactions at the earliest opportunity.
>
> *When to contact the Compliance Control Room*
>
> In order to consider and assess potential conflicts of interest at the earliest possible stages of a transaction, it is recommended that Private Side personnel notify the Compliance Control Room of any pitches to be made in order that a conflict check can be performed. Similarly in the event that the Firm enters into any meetings or substantive dialogue outside of any pitch process which is viewed as likely to give rise to Barclays Capital's involvement in a transaction, the Control Room should be duly notified.
>
> Ultimately, the decision of when to contact the Control Room rests with the deal team members, as they are in the best position to determine the likelihood and timing of a contemplated transaction. However, please bear in mind that the sooner the Control Room is notified about a potential

> transaction, the easier the conflict clearance process will be to manage and the less likely that there will be adverse consequences for a transaction.
>
> *Notwithstanding the above, a conflict check must be performed prior to:*
>
> - accepting material, non-public information;
> - entering into a confidentiality agreement;
> - committing to a client on a project; or
> - adding a company to the Firm's Watch List or Restricted List.
>
> In the event a potential conflict is identified, the Control Room will discuss the most appropriate course of action with the deal team and/or Senior Management."

440. Barclays recognised that taking on Project Arctic Fox might limit its other activities. Under the process agreed, Barclays was not obliged to take on the project if its conflict checks proved negative.

441. Dr Swift noted in a call with Mr Zintl and Mr Oliver Cox of the Compliance Department on 1 September 2008, that if clearance was given then Barclays would be "foregoing any acquisition financing or procurement of carbon portfolios". Dr Swift's email of 2 September 2008 set out the position:

> "Upon clearance conflict check with the company name, Roger [Jones] will be able to decide whether to forego on any business with this entity as we are quite active in funding discussions/portfolio purchase with small carbon credit companies."

442. Mr Zintl and Dr Swift had a conversation the same day that recognised the importance of the conflicts check. Further to that, Mr Zintl and Dr Swift drew up a briefing note for Compliance.

443. On 4 September 2008, Mr Zintl submitted a "request for exclusivity regarding Tricorona ..." which explained the basis of the transaction and the reasons why Barclays should accept exclusivity, including the "very significant revenue potential from financing and monetisation of carbon credits". It noted (erroneously) that:

> "The environmental markets business have had no prior contact or knowledge of Tricorona and we are unlikely to have alternative opportunities on this opportunity."

444. On 4 September 2008, Barclays' Compliance Department circulated Mr Zintl's memorandum to various heads of departments, all of whom agreed to proceed.

445. On 5 September 2008, Mr Zintl informed IVC that Barclays had no conflict of interest.

446. Barclays' Compliance Department had forgotten, however, to send the memorandum to Roger Jones, head of the emissions business, and Co-Head of Commodities. Mr Jones had given clearance in principle on signing the IVC/Barclays Confidentiality Agreement, as he understood that Barclays would have the chance at conflicts clearance to decide whether to forgo business with the target.

447. Dr Swift realised that there was a "potential issue". The most likely issue was Barclays' interest in the Tricorona Portfolio; Mr Zintl did not know and could give no other explanation. Dr Swift appears to have spoken to Mr Jones.[21] When Mr Zintl's memorandum was sent to Mr Jones, he said:

> "We have had some senior contact with Tricorona in the past that led us to believe the quality of their CER portfolio may be very questionable.
>
> I think we need a very high standard of DD on this one ... . My concerns were so great I refused to authorise a line with the C[ounter]P[arty] last year."[22]

The senior contact in the past seems to be a reference to the meeting with Tricorona in April 2007. Nevertheless, Mr Jones was "fine" with the proposal and gave his approval for Barclays to go ahead.

448. After Mr Jones had given the go-ahead, the memo was sent to Mr Whitehead to see if there were "any further issues". During the trial, a further email dated 5 September 2008 from Mr Whitehead to Dr Swift was disclosed. It read:

> "Have received from compliance. There is no conflict at all. We do know them but have no significant dealings with them.
>
> I would question the revenue opportunities though (at least until we know what the portfolio looks like)
>
> I would also advise that there is no way we will give anything other than an indicative number by Tuesday. Not even firm subject to dd. In addition, louis redshaw is out next week."

449. However, Mr Whitehead would only have been able to answer in respect of Commodities Sales.

450. In that regard, and in response to my questions at the conclusion of his evidence at trial, Mr Gold told me the following:

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21 "Roger is fine so that issue resolved".

22 Mr Gold commented "I assumed that [Mr Jones] wouldn't have written it down if he didn't have that belief at that point in time". Mr Jones appears to have reiterated his desire for Barclays to carry out "thorough DD" on 16 October 2008.

"MR JUSTICE HILDYARD: Just a couple, Mr Gold, I'm sorry to detain you further. One arises out of a document you have just been shown in re-examination, which has caused me some puzzlement. It is the one at {H1/753} from Mr Jonathan Whitehead, who you confirmed was the head of commodities sales.

A. Correct.

MR JUSTICE HILDYARD: Now, he presumably is -- and say if you can't really answer this, but he would only really be able to answer in respect of commodities sales aspects, not other aspects?

A. Correct. The way that the compliance control room works is that they will contact the relevant groups, so they would have either -- either they or somebody on the private side would have then asked and said, "Do you in commodities have any reason that this is causing a conflict?", they gather the information and the control room then assesses it. So he would have just been responding for commodities.

MR JUSTICE HILDYARD: His answer appears to be confined to whether there have been any significant dealings in terms of commodities sales between Barclays on the one hand and Tricorona.

A. Yes, that's what I believe this says.

MR JUSTICE HILDYARD: And it may follow from that that he is not turning his mind and may not know whether there have been any other sort of interest or dealings between Tricorona and Barclays in the past, is that right?

A. I believe he could speak to commodities sales, at least for the period in time in which he was managing the group, which I think covers the period that we are discussing. I think it would be limited to the interactions of commodities sales.

MR JUSTICE HILDYARD: Yes. So if, for example, in another department Barclays had earlier expressed interest in Tricorona which ultimately was not pursued, he would not necessarily know about that?

A. It is possible if he was involved, but it is not necessary, whereas he has -- you know, he has regular meetings with his sales staff, the others, you know, there was no guarantee that he would have known.

MR JUSTICE HILDYARD: Yes, one can't really tell.

> A. Yes.
>
> MR JUSTICE HILDYARD: So I felt possibly, but I would like you to comment, that you went a bit far in saying in answer to Mr McQuater, who asked: "Question: In view of what he says there did it appear to you appropriate or inappropriate for Barclays to give conflicts clearance in relation to this deal?" And you said: "Answer: It would seem to be appropriate." That seems to go further than that response from Mr Whitehead could justify, doesn't it?
>
> A. I agree with that. I'm reading this because there is a formal control room inquiry which I'm assuming that's what this email is about, and again I'm making an assumption there, that the control room would have been inquiring to others and they would have cleared it. The most likely conflict would have been commodities and so if he cleared it most likely it would have been cleared, but I am making assumptions."

451. It is common ground that Mr Zintl's reference to the Environmental Markets team[23] having had no previous contact was wrong: Ms Patel accepted that it was "clearly not correct". (Mr Zintl could not recall the basis on which that statement had been made to Compliance; he assumed it came from discussion with Dr Swift. Mr Zintl assumed that Dr Swift would have spoken to that team, but he did not know. Dr Swift gives no evidence on the point. It remains a mystery.[24])

452. In short:

(1) for whatever reason, it does not appear that anyone within Barclays informed the Compliance Department of the previous contact with Tricorona, or its nature; and

(2) the conflict checks Barclays made were thus deficient.

*Did Barclays' commitment to exclusivity negate any duty to reveal any conflict?*

453. However, and even if Barclays was in a position of conflict that its checks should have but failed to reveal and which was not therefore disclosed, the Defendants contend that "the relevant effect of [the agreement for exclusivity] was that, even if Barclays was somehow in a position of conflict when it was approached by IVC, that conflict was negated".

454. CFP rejects this contention, principally on the basis that (i) the conflicts check was required to be and was undertaken after the agreement containing the exclusivity provision had been agreed: there would be no point in having to check conflicts if the agreement eliminated their relevance; (ii) the provision of exclusivity cannot excuse or justify the incorrect statement as to Barclays having no conflict, and Barclays'

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[23] i.e. Mr Leeds, Ms Patel, Mr Martens and Mr Helfferich.

[24] Mr Zintl acknowledged that he and Dr Swift "probably should have asked more".

reliance on it is "unattractive"; and (iii) exclusivity would only govern the future, and was not of itself sufficient assurance, as Mr Rassmuson explained:

> "I think if we knew that they had looked at acquiring Tricorona we would never have given that much information to them and provided them with all the different things. I can assure you that we would not have gone into this detailed discussion with them."

455. I am not persuaded by CFP's point (i): it is not disputed that Barclays was undertaking conflicts checks at least in part for its own benefit and so that it could be satisfied that in committing to Arctic Fox it did not undermine its own greater business interests, activities and plans: Barclays had reserved the right not to proceed if its checks revealed these.

456. Point (ii) begs the question whether the promise of exclusivity meant that the confirmation of no conflict was not incorrect, because looking only to the future.

457. It is CFP's last point (iii) which seems to me to be crucial. In my view, the essential questions in this context are whether CFP reasonably understood Barclays' confirmation that it had no conflict to be separate and additional to its promise of exclusivity, which it was entitled to and did rely on in proceeding to pursue Project Arctic Fox with Barclays and in providing confidential information to Barclays in that context which otherwise it would not have provided; and whether (and if so, how) that affects the confidentiality and exclusivity provisions contained in the IVC/Barclays Confidentiality Agreement.

458. The promise of exclusivity it made to IVC did not discharge that obligation: for that gave control of the situation to Barclays, whereas CFP should have been provided with the information to which it was entitled in order to let it decide whether to proceed at all.

459. In my judgment, the express promise (by Barclays to IVC) of exclusivity was additional to Barclays' implied promise that it was not conflicted; the one did not disarm or negate the other.

*Relevance of Barclays' failure to disclose its conflict of interest*

460. Except in one respect, Barclays sought to minimise the importance of this non-disclosure as not ultimately assisting in the determination of the really crucial questions as to whether the information provided by CFP had the requisite quality of confidentiality about it, and if so whether any actionable misuse occurred. The only issue to which Barclays accepted that the matter went was to whether the failure to disclose undermined Barclays' argument that the terms of the IVC/Barclays Confidentiality Agreement, though not enforceable by CFP, nevertheless defined the ambit of any parallel equitable duty, including as to its maximum duration.

461. Plainly it does go to that issue; as it seems to me, however, the failure to disclose its conflict also heightened the need for Barclays to ensure that those involved in its previous relationship with Tricorona (which gave rise to the conflict) should be

prevented from deepening the conflict by advancing both interests in tandem and ultimately in competition.

462. That in turn puts sharper focus on the systems adopted to that end, and in particular the "Chinese Walls" that Barclays was obliged to set up, not only by the terms of the IVC/Confidentiality Agreement and inferentially by its parallel obligations to CFP in equity, but also by its own internal policies.

*Is it relevant that CFP never was formally a client of Barclays?*

463. Before addressing the issue, which developed considerable heat in argument, as to the purpose and effectiveness of the Chinese Walls that were established by Barclays, I digress briefly to consider a point that floated in and out of the evidence as to whether CFP was treated as Barclays' client and whether it matters.

464. It is common ground that CFP never formally became a client of Barclays: although an engagement letter was prepared (at the end of November 2008), with CFP as its addressee, it was never signed.

465. There was some debate in the evidence as to whether, nevertheless, Barclays treated (or was obliged to treat) CFP as a client: but I accept the Defendants' submission that the point was moot. Indeed, I think it became common ground that it was not relevant: the duty of confidentiality and the obligation of exclusivity relied upon was not dependent on CFP being or being treated as a client, and no duties or obligations beyond that were prayed in aid.

*Content of duties: were Chinese Walls required?*

466. CFP also contends that Barclays' failure to disclose its conflict of interest, and the result that CFP shared with Barclays confidential information in a way and on terms that it would never have agreed to had the conflict been disclosed, was compounded by the fact that Barclays continued to deal with Tricorona for its own benefit through (amongst others) individuals with knowledge of CFP's confidential information, such as Ms Patel and Mr Martens, who should have been prevented from so dealing by a proper and effective system of information barriers and Chinese Walls.

467. Although not originally pleaded, there was considerable dispute between the parties as to whether Barclays was obliged to erect and maintain Chinese Walls to maintain confidentiality, whether it did so, and if it did not (or did not effectively) what are the legal consequences. The parties had very different starting points and perspectives, although it was common ground that a breach of an internal compliance policy, including one prescribing Chinese Walls, does not of itself give rise to a cause of action.

468. CFP contends that, as in the case of its reliance on the negative conflict clearance, it shared with Barclays information that it considered highly confidential on a false factual premise that there would be sufficient and effective Chinese Walls to protect the information; it contends that it would not otherwise have shared the information; and that without it Barclays would not have pursued Tricorona as a takeover prospect

because the revelation of Tricorona's true value and the means of realising it would have been confined to those on CFP's side of the Chinese Wall.

469. CFP further contends that Barclays' failure to establish and maintain appropriate Chinese Walls, in breach of its internal policies, is a further reason why any contractual limitations in point of time on its obligations of confidentiality should not be applicable.

470. Perhaps most important of all, however, may be the point that it was the failure to enforce its own procedures for Chinese Walls and the protection of confidential information which provided the opportunity for Ms Patel to develop the relationship with a mind "saturated" with confidential information derived from CFP in the course of Project Carbonara; and it is precisely because key personnel such as Ms Patel and Mr Martens were not prevented from dealing on both sides of the wall that Barclays is in effect incapable of rebutting the presumption that in everything they did in relation to Tricorona on their own account they were informed by what they had learned from CFP, and thereby misused that information.

471. On all these bases, CFP presents the issue of Chinese Walls (and Barclays' failures in that context) as being "at the heart of this case, and is what allowed Barclays to take its client's deal for itself".

472. Barclays, on the other hand, maintain that there was no such premise, nor any representation made by it (whether to IVC or CFP) that it would maintain Chinese Walls effective to protect the information shared with it.

473. Again, Barclays dismisses as legally incoherent any suggestion that its failure (even if established), after the conclusion of the Barclays/IVC Confidentiality Agreement, to maintain Chinese Walls can result in any of the terms of that agreement becoming ineffective to define and confine the duties of confidentiality there prescribed. Barclays accepts that its failure, if established, means that it cannot rely on its Chinese Walls as a defence to any allegation of misuse of confidential information; but it repeatedly emphasised that this was not how it put its case.

474. Barclays concluded that "the question whether Barclays' internal policies were breached does not advance the ultimate inquiry of whether Barclays breached any duty of confidence to CF Partners".

475. The Defendants sought to dismiss this as a "red herring" in their Closing Submissions, on the basis (in summary) that it can only relate to the claim in respect of breach of confidence, and the only real question in that regard is whether there was in fact a breach, and not whether Barclays should have had more restrictive procedures (such as Chinese Walls) established.

476. I address the factual issues later; but as to legal principle:

    (1) Barclays' own internal procedures are not, of course, enforceable directly by any third party, even if that third party is a client (which in point of factual detail CFP was not).

(2) If by contract Barclays promised that such procedures would be implemented properly and abided by, the contracting party could be entitled to damages for breach of the contract: but no such claim is made.

(3) Conscious or reckless breach of internal procedure may affect the measure and basis of damages or compensation.

(4) The content of Barclays' internal procedures may also be relevant to (a) whether or not Barclays did regard or should have regarded information provided by CFP as confidential (since if the criteria for the adoption of procedures designed to ensure protection of confidentiality are satisfied, the inference is that Barclays did accept its confidential quality); and (b) whether or not the information was in fact misused: as Mr McQuater QC accepted in opening:

> "…if [we] were to have failed to comply with [our] internal Chinese Walls policy then that would be potentially evidentially relevant to the question of whether there was an actual misuse of information. It goes to whether there was a misuse and it can be said that it supports an inference of misuse if you should have set up a certain Chinese Wall, policed it properly [and did not]".

(5) To my mind, and perhaps putting the same thing a different way, the purpose of Chinese Walls is to enable an entity to conduct business which it would not otherwise be permitted to undertake lest it breach an obligation of confidence or other duty: the breach of an internal regulatory requirement to set up and observe effective Chinese Walls raises a strong inference that such information influenced all those having it in their attitude towards and their dealings with Tricorona: such is the human mind that anyone having information relevant to its dealings with another will be influenced by it in those dealings. Chinese Walls provide insulation to enable those on one side to deal without having the information available to those on the other side: insulation provides protection, the lack of it exposes the institution to the risk of having to demonstrate that there has been no misuse.

(6) Furthermore, the very fact of a Chinese Wall will serve as a reminder that information obtained on the private side may not legitimately be used on the public side, and that given the indivisibility of the human mind, the same individuals should not operate on both sides of the wall.

*Scope of Chinese Wall policy: is it restricted to preventing insider dealing?*

477. In this context, I should note a suggestion made by some of Barclays' witnesses (including Ms Patel, Mr Zintl and Mr Gold, with a somewhat discordant chorus from Dr Thomas) to the effect that the restriction only applies to dealing with the "listed securities" of the entity about which the confidential information relates, the policy being (so, as I understood it, the suggestion went) aimed at preventing insider dealing rather than the protection of confidential information. Mr Zintl did later qualify this

by accepting that a Chinese Wall was intended to apply in the context of dealings that cross what he described as a "sort of grey line where day-to-day trading activity stops and sort of monetising the entire portfolio begins".

478. In its Closing Submissions Barclays sought to support this suggestion by pointing to a number of references in the Chinese Walls policy that appear to demonstrate a particular emphasis on price-sensitive information.

479. Thus, clause 4.4 provides:

> "The departments described as comprising the "private side" of the Chinese wall are so-called because they routinely have access to confidential client information which is price sensitive and yet to be brought into the public domain."

480. Clause 4.7 ("Effect of the Chinese wall") provides:

> "No communication of price sensitive confidential information is permitted to take place between individuals on opposing sides of the Chinese wall, unless such communication is undertaken in accordance with this Policy. This also applies with respect to the communication of confidential information between personnel located on the same side of the Chinese wall but separated by an information barrier (e.g. between, IBD and Private Equity)."

481. Clause 4.9 provides:

> "The purpose behind the operation of Chinese walls is to ensure that those departments that routinely deal with material non-public price sensitive information (the private side) are appropriately segregated from those departments for whom access to such information would have the effect of precluding them from conducting their day-to-day activity (the public side)."

482. Barclays built on this to submit that although the protection of confidential information is always required and expected (Ms Patel described it as "part of my day-to-day job"*)*, a "Chinese wall is only required where there is a particular risk of misuse, that is, where the information is price-sensitive in one way or another in that it affects the relevant market".

483. Barclays characterised a Chinese Wall as essentially facilitative rather than restrictive: in its written closing it stated (at para 1046):

> "…on the understanding of individuals like Ms Patel, Mr Zintl and Mr Gold, what the Chinese wall adds is to permit the unrestricted trading of securities by individuals on the other side of the Chinese wall (which it achieves by preventing the risk of price-sensitive information being disseminated beyond the wall). As Commodities does not, as a general rule, trade in

> securities or other instruments in relation to which information can be price-sensitive, these issues are only rarely directly applicable to it."

484. Barclays sought also to present this interpretation as that in fact adopted within Barclays, and relied on the evidence of Ms Patel and Mr Gold to that broad effect.

485. Ms Patel was, again characteristically, stubborn in her insistence that the ordinary Policy did not apply to limit activities which she personally considered permissible to undertake: this is illustrated in the following passage from her cross-examination:

> "Q. Ms Patel, I suggest to you that in a claim for breach of confidence where it is alleged that you have breached confidence in relation to a particular M&A deal, it is clearly a relevant part of that dispute, clearly relevant whether you have crossed a Chinese wall. The Chinese wall was put in place to safeguard the confidentiality of the deal information, wasn't it?
>
> A. So, my Lord, to that particular question, in my day-to-day I receive confidential information from a client and there isn't a Chinese wall, or clients specifically give me confidential information and a Chinese wall isn't set up, so I deal with confidential information every day and either I'm -- and basically I have my ethics and my FSA supervisory approval to take into account to manage that confidential information, so hence I don't mention the Chinese wall because protecting confidential information is part of my day-to-day job."

486. Mr Gold was a little more circumspect. But he told me, for example, that the policy would not ordinarily apply in the context of commodities dealing, since it would be rare for any of their dealings to be in listed securities. He added (somewhat delphically, to my mind) that:

> "during my time in commodities we had many conversations with compliance about trying to get the nuances of the commodities market expressed in the policies. However the compliance department's opinion was to take the securities' interpretation and broadly apply it."

487. Nevertheless, although Mr Gold preferred to equate the policy, at least in its application to commodities or what he termed "unrestricted activities", to a "benchmark", the application of which he felt was open to case-by-case "clarification", he eventually accepted in answers to my questions at the end of his oral examination, as follows:

> "MR JUSTICE HILDYARD: The thought was this, that I think you answered yesterday in relation to, in particular, Chinese wall arrangements -- which I think you felt slightly uncomfortable with in their application to commodities dealing as opposed to in their application to securities dealing.

> A. I think to clarify and just because I would like the opportunity to clarify anyway, the Chinese wall policy that we have covers a number of things. It covers client confidentiality and conflicts issues, it covers insider dealing and regulatory requirements and it covers a need to know kind of an attempt to -- independent of either of those keep things restricted. I felt yesterday I was uncomfortable because frequently the restrictions for insider dealing were being applied to something that didn't have insider dealing and I was trying to keep them very separate because the client confidentiality conflicts part is in commodities, the insider dealings part is different, so somebody in the securities business will have both and somebody in the commodities business doesn't necessarily have to have both because the insider dealing approach is for securities and frequently the question of materiality is considered in commodities which is a different threshold.
>
> MR JUSTICE HILDYARD: Yes. And I can understand that and that's helpful, but as a matter of fact the conflicts policy issued by Barclays does not on its wording discriminate in that way, does it?
>
> A. That's correct, it does not.
>
> MR JUSTICE HILDYARD: And that must be Barclays' policy, therefore, whatever reservations you may have about its exact replication in the commodities field?
>
> A. Correct..."

488. Of course, notwithstanding Mr Gold's seniority, that view is not an admissible aid to construction. I quote it because his outlook, and indeed the views expressed by Barclays' witnesses more generally, may offer insights as to the importance (or lack of it) accorded by Barclays to information imparted in confidence, as well as on the quality of, or justification for, Barclays' conduct in failing to maintain any effective Chinese Wall in the circumstances of this case.

489. For the avoidance of doubt, as to the point of construction, I do not consider that the references in the Policy to the particular case of price-sensitive information override the statement in clause 3.1 that it applies "to all information of a confidential nature". I accept CFP's case that, on the contrary, the restriction is expressed in the widest terms and intended to apply to usual activities "with respect to those entities or instruments" about which the confidential information relates.

490. The following has particularly weighed with me in reaching that interpretation of the Policy:

(1) its heading: "Global Confidential Information and Chinese Walls";

(2) its executive summary, which makes plain that it applies across its entire "multifaceted business" and to the rules to be adhered to in respect of all

confidential information, even condescending to "clean desk policy and security considerations";

(3) its audience: all BarCap employees;

(4) its express application, as previously noted, to "all information of a confidential nature…(including, but not limited to, price sensitive information)…";

(5) its express recognition that even parts of the business which would "predominantly only have access to information that was publicly available to the markets" (see clause 4.5) may become aware of confidential information, and will likewise be bound by the Policy;

(6) its careful identification of limited exceptions: such as disclosure to support functions on a "need to know" basis (see clause 4.9), and not including commodities (for example);

(7) its detailed provisions as to the procedure and effects of "wall crossing";

(8) generally, the presumption that Chinese Walls are an established systemic method of protecting confidential information of all kinds, and not limited to market price-sensitive information, or departments routinely dealing in listed securities.

491. I also note that in addition to Mr Gold's somewhat reluctant acceptance of this interpretation, all of Barclays' witnesses, except initially Ms Patel and Dr Zintl, recognised the application of the Policy to all confidential information. Thus:

(1) Mr Martens has never been a trader in securities or on an exchange. It would not have mattered to him to be wall-crossed if the restrictions only applied to activities which he never performed. Yet Mr Martens considered that wall-crossing was an "important thing" and not something that anyone would agree to lightly.

(2) Mr Redshaw's job was to run the emissions trading desk. He was clear that if he was wall-crossed, his trading activities would be restricted, not that he would only be prevented from trading in a company's shares:

> "...if a project has a codename, which this one does, Carbonara, and it is behind a Chinese wall, which this one was, then people may approach me with generic questions, but I would only be taken over-the-wall to receive confidential information at an appropriate time when the project was sufficiently advanced that I would be able to be of use whilst potentially compromising my ability to trade. So I would only be brought in as late as possible in case there was a risk that my trading activity would be compromised."

(3) Dr Swift was of the view that once a public side individual was wall-crossed, he could not continue his day-to-day trading activities with the target. On 26 August 2008, Dr Swift emailed Mr Smith and Mr Martens. She said:

> "Barcap is proposing the following language below in the Confidentiality Agreement, that will preclude personnel working the Deal Team from active discussions with the Target company in relation to Carbon Portfolio financing or outright acquisition. In the event that you are approached by the Target as part of normal business, in this regard, you will not be able to participate in these discussions, as you have had confidential information disclosed to you. Other members of your team (in particular, the Emissions origination team) not party to the Confidential information, will have to lead this business activity."

She informed Mr Smith and Mr Martens of what she understood the restrictions to be; if they were to come into the deal team they would have to give up certain business with the target. Mr Martens had concerns about the "wall-crossing" because of his existing business activities; he would not have had them if he would have been able to carry on those activities and needed only to worry about trading in listed securities.

(4) When on 23 June 2009 there was a proposal to wall-cross Mr Whitehead into Clearwater, he resisted strongly: "there may well be some structured transactions in emissions that come out of this deal, and I do not want to have any restrictions on my ability to get involved in those...". Mr Whitehead made no reference to insider dealing or listed securities. Ms Patel said that Mr Whitehead's "reading of the policy [was] incorrect". It may be thought unlikely that the Head of EMEA Commodities Sales would not have understood the compliance policy. Indeed, Barclays Compliance's view was that once Mr Whitehead had even been approached about the deal, he was "tainted". Mr Whitehead was therefore wall-crossed.

492. In short, it is clear that the activities of a wall-crossed individual are restricted once the individual crosses the Chinese Wall. That is why it is a decision that has a detrimental impact on his day-to-day activity (see paragraph 4.10 of the Policy). Unless the Compliance Department advises otherwise, the restriction is total. There is no warrant for restricting the application of the Global Chinese Walls Policy to the context of dealings in securities; it means what it says; in all aspects of business where a Chinese Wall is erected:

> "the receiving party <u>will</u> be prohibited from undertaking their usual activities with respect to those entities <u>or</u> instruments about which the confidential information relates or otherwise affects." (paragraph 4.11, emphasis added)

493. As to that last point, I should also perhaps note clause 7 of the IVC/Barclays Confidentiality Agreement, which provided as follows:

> "Notwithstanding paragraph 6 above, nothing in this agreement shall prevent or restrict… your ordinary course client order facilitation (execution only) sales and trading activities that, as required by applicable rules and regulations, operate behind a "Chinese Wall" from your investment banking business…"

*Had Ms Patel any special exemption or permission?*

494. Both Ms Patel and Mr Zintl suggested under cross-examination that this provision constituted a permission to an individual such as Ms Patel to engage in such execution-only activities with Tricorona, and indeed that Mr Navon later (in January 2009) personally confirmed that this was so. I do not accept either that interpretation or that evidence.

495. As to that interpretation:

(1) Clause 7 addresses what Barclays as an entity may do: it does not give permission to any particular individual within Barclays to do anything, and there is nothing in it to release an individual from any personal restriction.

(2) The only exception provided by clause 7 is such as to enable day-to-day trading between Tricorona and Barclays as an entity behind a Chinese Wall, such as to ensure that such trading is not influenced by any confidential information made available by CFP on the "private side" of the wall, and (to the same end) no individual on the "private side" is involved in such trading.

496. As to Mr Zintl's later evidence, I deal with that in chronological sequence later: suffice it to say for the present that I cannot accept it.

*The Over-the-Wall memos*

497. The restrictions intended to be imposed by the Chinese Wall Policy described above were further fortified by the provision of an "Over-the-Wall memo" to every wall-crossed individual. This typically provided (in relevant part) as follows:

(1) There was a general paragraph about price-sensitive information. It included the following:

> "Barclays Capital operates a system of both permanent and transaction specific Chinese Walls which are set up for the purpose of restricting the flow of confidential information held with Barclays Capital and dealing with internal conflicts of interest. If correctly implemented, these Chinese Wall arrangements should prevent the inappropriate dissemination of confidential and sensitive client or transaction information."

(2) The actual restrictions were set out in six numbered paragraphs in bold:

"1. By receipt of this information you are crossing the permanent Chinese Wall that exists between the Firm's Research, Sales and Trading businesses, and the Investment Banking Division, and therefore it is essential that you:

Do not distribute commentaries or any other correspondence referencing the entities involved or on other securities that could be affected by this transaction;

Do not make trading decisions or advise clients on the securities or instruments of the entities involved or other securities that could be affected by this transaction;

Do not alert clients of the impending transaction or any specific details thereof; and

Do not share information arising from your involvement in this transaction with others within the Research, Sales and Trading or other business within or outside the Firm.

...

4. Treat all information with care and discretion and use client information solely for the purposes that the client intended. Where sensitive transactions details are entered on the OneView system, the "mark as sensitive" function should be used and access to the information should be restricted to members of the project team. Entries of transaction details into other database systems need to be made on a project name basis and details entered only if information is kept confidential.

5. Disseminate deal information on a need to know basis only. Unauthorised or careless distribution of inside information may lead to serious regulatory, legal and reputational consequences for Barclays Capital.

6. Where the deal requires you to share confidential information with Barclays Capital employees outside the project team, you must pre-clear any such contact with the project team leader and the Compliance Department. Failure to do so may lead to a serious breach of the Chinese Wall or may taint other areas of the business with the information, thus restricting their freedom to act.

The restrictions imposed by your involvement in this transaction will remain in place until the price sensitive, or potentially material non-public information you have received has either been publicly announced or has become stale and the restriction has been formally rescinded by the Compliance Department."

*Effect of the Policy and the memo*

498. In my view, and as submitted by CFP:

(1) The Policy and the memo must be read together (I should have thought that to be common ground).

(2) Clear words in the memo would be required to derogate or soften the prohibitions in the Policy.

(3) The Policy prohibits all usual activities save where the Compliance Department expressly advised to the contrary. The memo did not advise members of the Emissions team that they could carry on their usual activities with the target.

(4) On the contrary, the memo's restrictions went far beyond trading in Tricorona's securities or instruments. It expressly told members of the Emissions team not to "make trading decisions … on the securities or instruments of the entities involved" and not to "share information arising from [their] involvement in this transaction with others within the Research, Sales and Trading or other businesses within or outside the Firm". In addition, it also told them not to trade in Carbonara's listed securities.

(5) Paragraph numbered 4 of the memo emphasised expressly that the recipients were to "Treat all information with care and discretion and use client information solely for the purposes that the client intended".

## REACTION TO AND PROGRESS OF PROJECT ARCTIC FOX AFTER ITS INTRODUCTION TO BARCLAYS

499. I return to the chronology and more particularly to consider the response of Barclays to the introduction and presentation of Project Arctic Fox, and to the facts as they developed thereafter.

*Exchange of information between CFP and Barclays*

500. Once the IVC/Barclays Confidentiality Agreement (which was signed on 3 September 2008) was in place, and Barclays had through Mr Zintl on 5 September 2008 confirmed (in fact wrongly) that it had no conflict of interest such as to preclude it from acting or wishing to act, CFP began the process of providing and explaining the information and material comprising Project Arctic Fox to Barclays and engaging with Barclays and Tricorona on the iterative process of its further refinement and development.

501. IVC set up a meeting with Barclays on 9 September 2008 at IVC's offices. CFP also attended. IVC and CFP told Barclays that they were looking for a facility of up to €200m, structured as a short-term bridge loan to cover the initial acquisition and thereafter to be refinanced, in part by the sale of CERs from the portfolio and the

balance by a syndicated or club term loan. It was envisaged that Barclays would be co-leaders with SEB.

502. CFP had already spoken to SEB and SEB had (on 1 September 2008) produced draft non-binding indicative terms for a potential €175m 12-month bridge facility. However, that offer was indicative only: the terms were of course subject to "all approvals within [SEB], further due diligence and satisfactory documentation". The portfolio was to be part of the security and one of the conditions precedent was that there would be "pre-sale and hedging agreements relating to the CER portfolio satisfactory to [SEB]". SEB had already told CFP that it had a major concern related to "the open price risk on the part of the portfolio that would not be pre-sold… it will be vital to have pre-sale arrangements in place asap". SEB was also intending to discount Large Hydro CERs by 50% in the eligible security.

503. By this time, the credit crunch had been worsening for a year, culminating in the insolvency of Lehman Brothers in September 2008. The credit markets were seizing up; there was little or no appetite for leveraged debt; and most of Barclays' leveraged finance team had been laid off. Barclays submitted that, on the other hand, the lack of other work for the (much reduced) leveraged finance team meant that CFP's proposal received rather more attention than it might have done in busier times. The carbon market experts on Barclays' team were Ms Patel and, in particular, Mr Martens.

*How Barclays originally assessed Project Arctic Fox/Carbonara*

504. As was of course likely, given the role it was to play, it seems clear that Barclays looked at the project, initially at least, in terms of credit risk. Its focus was on projected cash flows of Tricorona post-acquisition. That meant assessing the portfolio of CERs to project what cash might be generated from them. **(**It will be recalled, however, that by now Ms Patel had sought to educate the Credit Department as to carbon accumulators such as Tricorona being more akin to a corporate with Commodities exposure as opposed to hedge funds (see paragraph [327] above)**.)**

505. Initially the channel for the provision of information to Barclays was IVC, reflecting the structure of the contractual arrangements. In reality, IVC's sole involvement (after effecting CFP's introduction) was to send on information which CFP had provided to it. It is not disputed that fairly soon this circuity was abandoned, in the wake of the distracting crisis following the collapse of Lehman Brothers in September 2008 and the following financial storm: IVC was, it seems, simply too heavily engaged to act as a postbox in a transaction in which, despite the contractual appearances, it was always on the peripheries. It was not disputed that at, and at all times after, the 9 September 2008 meeting CFP took the lead in the project, rather than IVC.

506. Prior to the 9 September meeting (on 5 September 2008) CFP sent (via IVC) the then version of its Spreadsheets analysing the Tricorona Portfolio; but not the Expressions of Interest. Mr Martens used that information to carry out an initial analysis of the portfolio over the weekend of 6/7 September 2008. Mr Lim of Barclays, who assisted Mr Zintl and Dr Swift, then used Mr Martens' work to create a discounted cash flow (DCF) model, which formed the basis for Barclays' lending review. Mr Martens had not at that stage been given Tricorona's internal volume risk adjustments but used risk

adjustments based on research into market information which he had been carrying out with Barclays' quantitative analysts since 2007.

507. The results of Mr Martens' initial analysis formed the basis of two initial discussion documents prepared by Barclays:

(1) "Project Carbonara Discussion materials" dated 9 September 2008, which set out Barclays' initial thoughts on the portfolio and on financing and M&A process considerations; and

(2) "Project Carbonara Follow up materials" dated 11 September 2008, which gave an indicative valuation of the portfolio of €298m (net present value), including €49m in respect of unhedged Large Hydros. That valuation was also informed by information about Tricorona's CER costs provided by IVC in an updated spreadsheet on 9 September 2008 and by details of Tricorona's forward sales provided by IVC on 10 September 2008.

508. That indicative total portfolio value of €298m (NPV) suggested by Mr Martens contrasted with CFP's estimate of €385m including the post-2012 portfolio and €315m excluding the post-2012 portfolio. Mr Navon dictated an email for IVC to send, arguing that Barclays had underestimated the value of the assets and that IVC disagreed with Barclays' views as to CER prices, NPV discount rate, and the discount applied to Large Hydros. IVC duly sent the email in exactly those terms to Barclays.

*Barclays' (incorrect) perception of Large Hydro prior to Project Arctic Fox*

509. Barclays, primarily Dr Swift and Mr Martens, prepared a pitch-book presentation for the meeting, entitled "Project Carbonara Discussions Materials September 2008". This assigned no value to Large Hydro CERs,[25] and set out Barclays' thinking on Large Hydro CERs:

> "Large Hydro are not eligible CER for EU compliance so this portfolio will be treated separately."

510. Barclays' presentation further stated that "Pricing of Large Hydro CER projects is based on client demand and cannot be projected", and eligible buyers were Australasian and Japanese corporates (not Europeans). Barclays was focused on "Eligible CERs (Large Hydro route to market provided as service post acquisition)". The risk management hedging strategy involved purchasing CER options on exchange, but this could not be a hedging strategy directly relevant to Large Hydro CERs.

511. Mr Navon gave the following account of the presentation at the meeting:

> "The position clearly from the presentation was that they said that large hydro CDM envisaged projects are not eligible under

[25] Tricorona's Large Hydro CERs were not included in Mr Martens' risk adjusted CER projections and given no risk pricing.

> the EU ETS and in fact the only buyers that they know that can purchase these type of credits are, if I remember correctly, Japanese, Australian clients and sovereigns and not European corporates and pretty much the entire -- the remaining part of the meeting was to explain to them that that view was fundamentally wrong and that you can sell large hydro CDM projects for compliance reasons under the EU ETS to European corporates."

512. What is most interesting about these statements and this record of Barclays' presentation is not so much that they were wrong (as indeed Mr Korthuis and all the experts agreed they were); it is that this was not only Barclays' apparent mindset as at the time, but it seems to have been the outlook of its carbon experts, and, in particular, Mr Martens.

513. In that regard, Mr Martens, who was at pains to stress that when at EcoSecurities he was a director of consultancy and one of his areas was EU ETS advisory services, was, with Dr Swift who had no experience in the area, the author of the report. He sought (under cross-examination) to gloss this by saying that it was an "unfortunate error" which failed to make clear that they might be eligible if certain criteria were fulfilled. He accepted that it was he (and not Dr Swift) who prepared the slides for the presentation. His explanation for the error was that he had been very busy.

514. I have puzzled over this. Mr Martens had and has considerable experience and expertise in the carbon markets: it is difficult to ascribe his mis-statement as based on ignorance, but difficult also to be content with the explanation of hurried carelessness. I have concluded that, even if Mr Martens knew that under certain conditions Large Hydro CERs could be eligible for EU ETS trading, his overall perception was that the difficulties were such that as a practical matter (and for credit capacity assessment purposes) they should be treated as if they were not.

515. This may have formed, but in any event was consistent with, Barclays' outlook at the time; and, for example, in an internal email dated 10 September 2008, replying to Dr Swift's report of a meeting with CFP which had pressed for the recognition of some value for Large Hydro CERs, Mr Roger Jones (the head man on commodities, it will be recalled) stated:

> "We must massively caveat any valuation…Nicholas [Zintl] knows my views.
>
> As regards the 'large-hydro' component, I would not touch this and the notion that it sells easily to Japan or to the acquirers [CFP's] European utility contacts is diametrically opposed to our experience."

516. Further, Barclays appears to have been generally sceptical about the asset class. Mr Garcia described Large Hydro CERs in an email to Frank Lasgard at Tricorona as being on Barclays' "Black List"; and Barclays' attitude is encapsulated by an email exchange on 2 September 2008 between Mr Martens and Ms Patel with regard to a Hydropower station project:

> "Ms Patel: do we want to look at large hydro or not bother?
>
> Mr Martens: Conclusion: not bother."

517. That mindset was also reflected in Barclays' lack of experience or interest in trading Large Hydro CERs and pCERs generally. Its head of Emissions Trading (from 2004 to 2013), Mr Redshaw, had no experience at all of forward selling primary CERs. He told me frankly that he had "never taken risk in primary and then forward sold primary, no". He recollected that someone else had been involved, once, in a deal between Anhui Conch and the Kingdom of Norway ("the Conch deal") in 2008, but apart from that, he did not believe anyone else in the team had any experience of forward selling primary CERs either: "It would have been impossible", he said.

518. A corollary of this perception was, as Mr Navon agreed with Mr McQuater in cross-examination, that Large Hydro pCERs were heavily discounted for market evaluation and the more so for all lending purposes. Barclays, in common with most other lenders, refused to recognise any substantial value in them for lending purposes (other than, as Barclays itself described them in a paper on "Project Carbonara Financing Considerations" dated 16 September 2008, "buffer for debt service considerations") unless hedged (that is, already forward-sold).

519. Barclays' approach thus attached a hugely discounted value to the Tricorona Portfolio, which was largely comprised of Large Hydro CERs (which Barclays thought ineligible) and was almost entirely unhedged (and Barclays thought therefore of no utility as security). All this seems to echo the pessimistic views of Tricorona that it had always reverted to in its own earlier overtures in 2007 (both in and preceding Project Conifer).

520. It was suggested to Mr Navon in cross-examination that he did not take up the issue in the meeting because he sensed that it was a mistake on Mr Martens' part which he would swiftly have sought to correct. But this makes no sense except with the inverted vision of hindsight. Mr Navon would have wanted Barclays to share CFP's rosier view at the time, as indeed it thereafter sought to encourage it. I accept therefore, CFP's submission that there was no basis for the Defendants to question Mr Navon on the hypothetical basis of the "factual likelihood" of what Mr Martens would have said: Mr Martens gave no written evidence on what he did say, let alone what he would have said, at the meeting. Indeed, Mr Zintl recalled that Mr Martens "said that we are uncomfortable including large hydro and that Jonathan Navon argued against that in some shape or form ..." In his oral evidence, Mr Martens could not recall the precise nature of the discussions, but he did say:

> "What I do recall is discussing large hydro during the meeting and to what extent they could be eligible for our collateral credits, and to me that was the key to the criteria. I was only having in the back of my mind: we are going to face a credit committee, we will have to convince them with a CDM portfolio we are confident about."

521. I accept that what CFP reasonably took away from the meeting was as described by Mr Navon:

> "It was very clear in the discussions that we had with Barclays that they did not understand that large hydro is eligible under the EU ETS subject to certain conditions. That was the focus of the meeting, that was – the main takeaway we got from that is that Barclays is struggling to understand the eligibility of large hydro CERs in this market."

522. Dr Swift's contemporaneous note of the meeting provides a record of what happened, and it substantiates CFP's account. Her note repeats the mistakes in the presentation.

> "A portion of the CER portfolio (i.e. approx. 1/3) is in the form of large hydro projects which are not eligible CERs for compliance purposes within EU ETS. They are therefore targeted at compliance buyers in Japan/Australasia so correspondingly trade at a discount to eligible primary CERs."

523. Dr Swift's note is revealing of Barclays' knowledge at the time. It identified buyers for Large Hydro CERs in Japan and Australasia but not within the EU ETS. Mr Navon explained the relevance of such identification:

> "effectively all you are saying is that you can only sell large hydro credits to a small number of corporates around the world. Japan is a voluntary market, so they don't actually need to buy credits for compliance reasons. The only compliance market that was available at that time was the EU ETS, which often meant that prices that you achieve in the compliance market is higher than what it is in the voluntary market. So it is excluding first of all a significant demand base for the credits, being all of Europe, and it is also not valuing them correctly because of that demand base."

524. No Barclays' individual corrected Dr Swift's note. As Mr Martens accepted, at least some members of the Barclays' deal team did not appreciate that there was EU ETS compliance demand for Large Hydro CERs. He never corrected the position. Ms Patel suggested that the error was a "terminology thing", but it was far more than that. Ms Patel said that the "exact statement [Dr Swift] should have used was [Large Hydro CERs] were eligible but with a lot of conditionality"; that would be the opposite of what Dr Swift wrote.

525. Following the 9 September 2008 meeting, Mr Sareen of IVC sent Barclays a revised version of the Tricorona Portfolio spreadsheet, which included the ERPA cost for each project, as requested by Barclays at the meeting. The ERPA cost was critical to any valuation of the Tricorona Portfolio. Mr Navon also sent the Tricorona template ERPA to Barclays. In addition, information about Tricorona's forward sales was sent to Mr Zintl. There is no real dispute that these items of information were confidential.

526. I have already quoted above (see paragraph [515]) the sceptical response of Mr Jones (the Global Co-Head of Commodities) to Dr Swift's note of 9 September. Mr Martens agreed that Mr Jones would not touch Large Hydro with a barge pole.

527. In her evidence, Ms Patel said that Mr Jones took a "much stricter stance" towards Large Hydro than she said she would have taken. But she explained that all she meant was that "if I could have found a buyer on the other side" that would have satisfied her – which seems to be a statement of the obvious. She accepted that she "wouldn't take outright risk on large hydro…".

528. Her own scepticism as at September 2008 is illustrated in an email she sent to Mr Jones dated 10 September 2008 (circulated also to her team, including Mr Martens):

> "Valuation – Jan-Willem ran some prelim nos on the portfolio (excl large hydro) and valuation came out to approx Euros 200m. I have looked at the assumptions and they look reasonable versus what we are seeing in the market. This is not far off the market cap and hence at first sight it is difficult to see where the potential buyer sees the value – the buyer's numbers suggest a much higher valuation which at this stage we don't have the background to. Obviously there is also large hydro to be included but can't see how that can make it so lucrative..."

529. Indeed, Ms Patel admitted that she "didn't think there was any untapped value in the portfolio". Dr Swift took a similar view; she was interested in (in the sense of dubious about) where CFP saw the "incremental value".

*Changing perceptions of value*

530. On 11 September 2008, Barclays sent CFP "Follow up materials" which contained an indicative valuation of the portfolio. It excluded altogether Large Hydro CERs from the "EU eligible CER portfolio", thus repeating the same mistake about eligibility.

531. Mr Martens could not explain in his cross-examination why the mistake was made again: "I don't know. I can't explain". The incorrect but revealing demarcation between "EU eligible CERs" and "Large Hydro" was repeated throughout the document. Once again, it seems, Barclays continued for whatever reason to overlook the same omission and resulting error.

532. In its revised valuation Barclays attributed a value of €189 million to the "EU Eligible CER Portfolio" and €298 million to the "Total Portfolio" (which excluded post-2012 CERs). The "Total Portfolio" figure was thus not far away by now from CFP's valuation of c. €315 million excluding the post-2012 portfolio, and €385 million including it. However, for lending purposes Barclays still refused to attribute any value to non-eligible elements of the portfolio (i.e. Large Hydro): any value attributed to Large Hydro was discounted altogether when it came to lending, and excluded from Barclays' analysis. In Mr Navon's words,

> "the whole value in Arctic Fox is unlocking that large hydro value, so I understood [Barclays'] position, but their position was wrong and we are educating them to understand that their position is wrong to unlock the value that ultimately became – was central to Arctic Fox."

533. In response, therefore, Mr Sareen emailed Barclays some text prepared by Mr Navon:

> "Our initial response is that your indication provides a conservative valuation of the portfolio which underestimates the intrinsic value of the assets and is not consistent with the overall objectives of the proposed acquisition…In particular, we have different views on your methodology concerning
>
> - The CER Price Curve Discount for various technologies and maturities
> - The Large Hydro discount
> - The discount ratio used for the NPV analysis…"

534. As a result of CFP's queries, Mr Martens' initial valuation came under the spotlight within Barclays. On 12 September 2008 he told Dr Swift that his valuation was "certainly not conservative". Dr Swift thought that there was something "fundamentally different". The difference lay in the appreciation of the value of Large Hydro; as Mr Smith noted on 3 November 2008, the "key issue remains treatment of large hydro...".

535. Mr Martens' explanation for Barclays' valuation exercise and its differences with CFP's was that Barclays had to focus on the question of what would be acceptable collateral:

> "what did we think we could get -- convince a lending committee, credit committee, as an acceptable collateral package. That was the key question in our heads..."

He said this:

> "... I really remember we were having a lot of discussions about large hydro and eligibility of large hydro was of course a key point in our consideration of this portfolio, but the key essence of the eligibility is the eligibility of large hydro credits as part of the Barclays collateral package. That was where we were concerned about. If we wanted to proceed with a transaction of this nature, we were convinced that we had to treat large hydro credits differently and the reason why -- I agree it is not correctly formulated, but the point is we had to treat them differently. If we want to convince any Barclays credit committee or lending committee to provide lending against this portfolio or for me to purchase the credits, whatever structure we would choose to engage in this transaction, we would have to treat large hydro differently and I think that's the key point which we were trying to make and I think whether it refers to ETS or not is a small point."

536. In particular, Mr Martens suggested that Barclays' carbon team would need to convince the credit committee: the deal team was not prepared to follow CFP's

guidance on Large Hydro CERs because "we know that our standing with the credit committee, we would be shot down".

537. But there would have been no reason for the credit committee to reject CFP's proposed valuation unless it did not understand the rules governing Large Hydro eligibility and the demand for Large Hydro CERs. The committee relied on the carbon team to make its decisions:

> "MR JUSTICE HILDYARD: And who informs the credit committee about the eligibility and value of large hydros?
>
> A. [Mr Martens] Well, that's a good question, but in the end they would comprise of senior Barclays management I would think.
>
> MR JUSTICE HILDYARD: We have seen nothing about that and I wondered whether the credit committee might rely on someone like you for that purpose?
>
> A. Well, it would rely on the various staff and I think definitely – so I think if we had a conviction that there was a good case to say, "Look, large hydro can be used, we know you have outdated views on it because there was illiquidity but things have moved on, we disagree with that", then we would have to substantiate our case and make an effort to do that. So in that sense -- and I think when I say we were not able to convince the credit committee I mean we were not able to prepare an argument that we would currently convince them with that, that okay we haven't been using large hydro until so far but now you can use it for this project, you can actually do it because X, Y, Z.
>
> MR JUSTICE HILDYARD: So they might have been influenced by your view as to the eligibility and value of large hydro if you pushed it, is that what you are saying?
>
> A. If we pushed -- yes, if we had good arguments for it, yes."

538. In its written Closing Submissions, CFP described in detail and at substantial length the various steps which, as CFP would have it, demonstrate the gradual education of Barclays by CFP as to the available arguments and their robustness. In their much shorter treatment of the exchanges and presentations between CFP and Barclays, the Defendants sought to dismiss any suggestion that Barclays' position changed.

539. It is, in my view, plain that over the course of September 2008, Barclays did gradually become convinced of the argument, pressed by CFP largely through dogged repetition, that Large Hydro CERs were eligible for the EU ETS and were potentially an asset class to which value as collateral could be attributed in assessing the overall value of Tricorona's portfolios for lending purposes.

540. I accept that this was a change of perception and attitude on Barclays' behalf which was predominantly brought about by CFP's material, as well as its perseverance.

541. I do not think it is necessary to chronicle, as CFP did, each document relied upon as demonstrating the change. I think it sufficient to summarise the evolution of Barclays' attitude as follows:

(1) As noted above, in its 9 September 2008 presentation, Barclays had completely excluded Large Hydro CERs from its analysis on the basis of their assumption of ineligibility for the EU ETS.

(2) On that basis, and at that stage, none of the Barclays' personnel closely involved in the project (including Mr Jones, Dr Swift, Ms Patel, Mr Redshaw, Mr Martens and Mr Lim) could see either any untapped value in the portfolio, nor any basis for credit in the amounts required.

(3) Mr Martens sought to present his decision to strip out Large Hydro as dictated by his focus on what would be acceptable in a collateral package rather than any more general view of the eligibility of Large Hydro, and his description of Large Hydro as being ineligible as "not entirely correct", "not complete" "shorthand" and "an unfortunate error". But I accept that for whatever reason this was his mindset and it was he who caused the credit committee to share it, rather than vice-versa.

(4) The first demonstration of a change of perception on Barclays' part was its revised valuation of 16 September 2008. Whereas previously all Large Hydro CERs were excluded, that valuation attributed value to the extent that existing hedges were in place. Unhedged large Hydro CERs continued to be attributed no value, except as a "buffer".

(5) CFP's insistence that there was demand for Large Hydro CERs, that they were eligible, so that it could secure new hedges, and a gradual dawning within Barclays that this was justified, led to a further revision of Barclays' indicative valuation and its terms for a bridge facility: it assigned €130 million to Eligible CER portfolio and hedges and also "Incremental €50 million assigned to Large Hydro Assets with associated new hedges secured by Acquirer".

(6) Throughout, Barclays appears to have relied on CFP's ability to hedge Large Hydro CERs by forward sales to compliance buyers, and not its own. Although Ms Patel suggested that Barclays "had a very big client base who comprised carbon clients, ie the utilities, so we knew who we could call in the event we were sellers of large hydro", the fact is that there is no sign of any awareness within Barclays of specific demand. Rather, the signs are that its assumption was that eligibility problems had made it too uncertain to foster. Thus, for example, Large Hydro CERs were not included in the definition of eligible CERs in Barclays' own SCERFA. I accept CFP's case that Barclays had little experience in the primary market and little knowledge of compliance user demand, especially in relation to this asset class. Mr Lim accepted this in cross-examination:

> "Q. It is right, isn't it, from that last answer but one of yours that at no stage did Mr Martens suggest to you that Barclays had its own independent ability to arrange the forward selling of Tricorona's credits?
>
> A. As far as I understood they were only willing to hedge the -- well, the tradeable, the exchange tradeable CERs.
>
> Q. Yes and that would exclude large hydro, wouldn't it?
>
> A. That's correct."

542. Further comfort that there existed EU ETS compliance demand for Large Hydro CERs, which CFP had identified and could tap, was provided to Barclays by reference to the Expressions of Interest at meetings on 7 and 27 October 2008.

*Expressions of Interest confirm potential demand*

543. CFP showed (but did not supply copies of) the Expressions of Interest to Barclays at a meeting on 7 October 2008 further to a presentation outlining the project in more detail, including draft key terms of the proposed debt package, and explaining CFP's refinancing strategy, including forward sales to key compliance buyer clients of CFP.

544. That presentation included the following statement about demand from compliance buyers:

> "In order to address the lender's concerns on liquidity, volume and price risk, we have approached four clients (targeted approach due to the sensitive nature of this transaction) to establish the interest to acquire 10 million CER portfolio of the Target portfolio
>
> Within a week, we have been able to secure over 33-35 million CERs in interest in portfolio sales from compliance buyers for a total notional amount of €440 million plus. This highlights the high level of liquidity of the Target Portfolio
>
> • Utility: c. 10 million CERs
>
> - Up to 50% guaranteed @ CERs * 85% to 92% and/or €17-19/CER
>
> - Unguaranteed @ CERs * 80%, and/or €13.5-14.5/CER
>
> • Major oil company: up to 10 million CERs
>
> - Up to 3.6 million in Large Hydro
>
> - Non-registered @ €9-13/CER and @ Registered at €14-18/CER

• Utility: up to 10 million CERs

- Will provide additional terms once project information is disclosed

• Industrial group: Interest up to 3-5 million CERs

- Will provide additional terms once project information is disclosed"

545. Dr Swift's report of the 7 October meeting, in a "Call Report" which was substantially amended by Mr Zintl, includes the following and confirms the centrality of the Expressions of Interest to the way CFP presented the project's potential:

> "They see the window of opportunity for closing the deal as 3-6 months…
>
> CF are considering a bid at approx 35% premium. If current market turmoil persists and Target's share price continues to slide, the premium could be higher…The Target's market cap has dropped from about EUR175 m levels to EUR150m this week…
>
> They perceive the undervaluation of the Target to be partly from not being covered by Equity research; from the fact that the company is in a transition form a mining background; and given the opaque nature of the carbon market…
>
> …
>
> They have a diversified set of take-out options:
>
> 1. They have received written interest from Asian Development Bank for 6MM contracted tonnes of Large Hydro (for which we shall ascribe limited collateral value), with pre-payment upfront of the value of these assets (i.e. CER price less ERPA cost), on 3MM tonnes and payment on delivery for the balance;
>
> 2. They have received interest for term financing from the following banks…that could constitute a key building block of a syndication strategy…
>
> 3. …
>
> 4. A signed letter of intent from a top tier utility for 10MM tonnes, with level of CER upfront payment based on DD and with 25% on guaranteed basis and 75% on non-guaranteed basis.

> 5. They also displayed letters from 3 other un-named compliance buyers which showed interest in up to 35-40MM tonnes which could also be considered as a source of assets sales of portfolio (and alternative for re-financing loan in situation where cash flow generation delivers less than expected)…"

546. At a further meeting on 27 October 2008 CFP produced a presentation entitled "Arctic Fox Barclays Transaction Details". This explained in more detail the envisaged role for Barclays in the transaction, which included (a) an M&A role jointly with SEB, a leading Nordic M&A bank; (b) joint Acquisition Facility arranger; (c) participation in long-term debt facility; and (d) carbon risk management and derivatives, and also identified the names of those from whom CFP had secured written Expressions of Interest (Vattenfall, Shell, E.ON and Electrabel).

547. The presentation, under the heading "Strong Demand for the Target's Carbon Portfolio", included the following statement:

> "CF Partners has been able to secure over 33-35 million CERs in interest in portfolio sales from a select group of core clients. Most of the pre-sales will be executed on a fixed basis to further reduce the market risk of the portfolio. This interest was based on an issued CER price of Euros 19/CER. While prices may adjust to recent developments, levels from compliance buyers has [*sic*] been inelastic."

548. Whether it was at the first or second of these meetings is unclear, but, as Mr Zintl acknowledged (it having initially been disputed by Barclays), at least three of the Expressions of Interest were produced for Barclays' inspection. However, it is common ground that CFP did not provide copies: it was sight only.

549. Since it retained no copies, I accept that it may well be that Barclays did not thereafter expressly refer to them; but in my assessment their presentation did affect Barclays' thinking there and then, as part of the overall package that CFP had assembled and presented.

550. I have already addressed the nature of the Expressions of Interest, and noted their provisional terms and scrappy feel. As indicated previously, Barclays denied that the Expressions of Interest had any impact, lasting or at all: it contended in its written Closing Submissions that, after their presentation, "there is no evidence that anyone thought about them again".

551. However, my overall assessment is that the fact that CFP had secured the Expressions of Interest from reputable sources did weigh with Barclays. For all Barclays' belittling of them, they provided general support for CFP's general line that there was steady demand for volume CERs and that the Large Hydro CERs in the Tricorona Portfolio, which Barclays had (because of its institutional confusion about their eligibility) almost entirely dismissed, offered more than Barclays had originally supposed. I do not think Barclays treated them as important documents in themselves: they were part of the overall mix. But they were not an inconsiderable part.

*Exchange and development of information*

552. Side by side with the Spreadsheets and the Expressions of Interest, CFP and Barclays (and Tricorona) continued, through October and November 2008, to exchange and update information. The Spreadsheets were repeatedly updated and revised to take into account information published on the UNFCCC website (which was continuously evolving as new projects were uploaded and others were terminated).

553. The Defendants sought to minimise this, depicting it as essentially derivative and mechanical, rather than special and unique. They also sought to emphasise the input of Tricorona, and especially Mr Holmgren, who (I accept) did considerable work on risk adjustment, using Tricorona's own information.

554. Although indeed some of what CFP did in this period was presentational, and derived from publicly available material, it also included additional confidential material obtained from Tricorona but processed and presented by CFP. The work done appears to have been intensive on all sides.

555. For example, and in addition to (a) the continuous process of updating the Spreadsheet with ever-increasing levels of information (especially as to risk adjustment methodology and details as to the status of CDM projects), (b) the meetings in October mentioned above, and (c) negotiations with SEB and CFP's parallel efforts to bring Volati on-side as an equity participant, Mr Rassmuson continued to work on demonstrating projected levels of forward sales and the prices to be expected.

556. Thus, as Mr Navon recounted in his witness statement, on 31 October 2008, following a request from Barclays, Mr Rassmuson sent Barclays a table giving details of the guaranteed forward sales and off-take agreements for the years 2008 to 2013, detailing in digestible format the levels of forward sales, the prices at which those forward sales were made and whether that price was fixed or floating.

557. All this was both confidential and important for Barclays in enabling it to calculate an accurate valuation of the portfolio and to assess with increasing accuracy the financing that could be secured. Further, I accept Mr Navon's evidence that the process was time-consuming, the presentation of changing information required care and skill, and the product itself, although largely accessed from public sources, was bespoke and unique.

*Barclays' gradual acceptance in stages of value of Large Hydro for debt purposes*

558. At all events, the combined effect of what CFP made available to Barclays in the course of this period (September to early November 2008), and the discussions between them and the Tricorona Management in developing and assessing the proposals, was that by early November 2008 Barclays had materially changed its perception of Large Hydro CERs.

559. In particular, from excluding or discounting Large Hydro pCERs altogether from its valuation of Tricorona's assets for debt capacity purposes, Barclays first moved to

attributing value where there were existing hedges in place (which was the smaller step), and then (after CFP had informed Barclays of the potential demand from compliance buyers) to the larger step of recognising potential value if and to the extent that CFP could demonstrate the potential for forward sales to compliance buyers.

560. By 3 November 2008, Barclays had become prepared to attribute potential values for debt capacity purposes to Large Hydro CER which were not yet hedged but in respect of which CFP considered that forward sales would be achievable. One of the slides from a presentation document of that date, entitled "Project Carbonara Analysis Assumptions" and prepared by Mr Lim, contained the following explanation:

> "We have assumed a Large Hydro CER price of EUR13 per CER to-be-hedged which might be fairly aggressive. Company [that is, CFP] to provide guidance on actually achievable prices (taking into account recent price declines in the CER market)."

561. CFP had provided the indicative figure of €13/CER. Whilst the deteriorating price was no doubt of concern, the readiness of Barclays to ascribe value where previously it had denied any is striking; and as Mr Navon stated in his witness statement:

> "It was striking to me at this time that Barclays sought guidance from CF Partners on achievable forward sale prices for the Large Hydro CERs. This seemed to me to confirm Barclays' underlying lack of familiarity both with the primary markets and with Large Hydro CERs in particular, and why therefore Barclays was reliant on CF Partners' expertise in the primary markets and in relation to Large Hydro CERs. From our experience, we understood to a high level of detail the prices that could be achieved."

562. Further, another slide from the same presentation appeared to envisage the possibility of a third step forward in Barclays' approach:

> "The Large Hydro projects without Annex 1 LOA are currently not included. To the extent that the smaller projects are able to be hedged (either via swaptions or offtake agreements), it might be possible to lend against these projects. For the big Large Hydro plants without Annex I LoA, it is unlikely that these will be able to be hedged until they receive a LoA from a Host Annex I country and have therefore not been included in the analysis."

563. That fifth step, of persuading Barclays to recognise discounted value to Large Hydro CDM projects which had been commissioned and for which, though no LoA had yet been issued, obtaining it was the last step before registration, remained difficult; but it was to this that CFP next turned, seeking to persuade Barclays of Tricorona's strong track record (which was not disputed) of its CDM projects achieving registration and Annex LoA certification.

564. Thus, again as an example of the fairly relentless (but painstaking) approach adopted by CFP in seeking (as it saw it) to educate Barclays about Tricorona's portfolio, on 7 November 2008 Mr Navon also sent a pack of documentation in relation to Tricorona's procedures for obtaining Annex I LoA for Large Hydro CDM projects, including a checklist which Tricorona had developed to ensure compliance with WCD criteria.

*Tricorona Management's contribution*

565. It will be apparent also that in all this there was a steady flow of confidential information from Tricorona to CFP on the terms of the Confidentiality Agreement between them. Less apparent, however, is that in what I have described as the iterative process between them, centred around the development of the Spreadsheet. The evidence before me suggested that Tricorona's management, though strong on the origination side, had little experience or expertise in forward selling, especially of Large Hydro CERs. Its experience appears to have been limited to dealings with Japanese customers outside the EU ETS.

566. The Tricorona Management's experience was in origination; and it is striking that (a) its portfolio remained in large part unhedged; (b) all management's (mostly unsuccessful) discussions about selling the portfolio were with financial institutions who (as Mr von Zweigbergk conceded) would be likely to offer low prices rather than utilities; and (c) there is practically no evidence of any attempt by the Tricorona Management to forward sell to European compliance buyers in 2008 or 2009.

567. Tricorona's customer list as at January 2009 showed that all the large forward sales were to Japanese customers; and although there was one recorded forward sale to a German industrial customer it was not a Large Hydro sale. None of the utilities that CFP introduced as potential buyers was on the list: Vattenfall, E.ON, Electrabel, ADB.

568. Mr Holmgren's claim that "we knew that there was demand for primary CERs and where to get it" was undermined by the documentary evidence above; and also by his own acknowledgment, upon being challenged as to what primary prices were available in 2008, that "I'm not sure we investigated any primary sales". He also accepted that he had no personal experience of the demand for primary credits; and although he suggested at one time that the trading desk would have that experience, he soon acknowledged that their focus was almost exclusively on guaranteed sales in the secondary markets.

569. Thus, and surprising though I initially found it, I accept CFP's submission that, as with Barclays, the Tricorona Management's understanding of demand for Large Hydro CERs was very limited; and I do not feel able to accept such protestation to the contrary as Mr von Zweigbergk and Mr Holmgren tried to advance.

570. Before returning to the broad chronological sequence (the next event being a meeting in Singapore, orchestrated by CFP, between Barclays and the Tricorona Management), I turn to deal briefly with my impression of the reaction to Project Arctic Fox/Carbonara within Barclays.

*Reaction to Project Arctic Fox within Barclays when introduced*

571. In the Defendants' Closing Submissions (as in their Opening) Barclays sought to depict CFP's presentation of Project Arctic Fox to Barclays as from the outset "ambitious given the then prevailing economic environment" and the seizing up of credit markets in the wake of Lehman Brothers' insolvency in September 2008, and soon demonstrated to be unrealistic in the light of a collapse of the carbon credit market at the end of 2008.

572. Indeed, the Defendants at trial disparaged Project Arctic Fox as in effect something Barclays played around with because it had nothing better to do. As they put it in their Closing Submissions, "the lack of other work for the (much reduced) leveraged finance team meant that CF Partners' proposal received rather more attention that [*sic*] it might have done in busier times (and probably more than it deserved)".

573. CFP rejected this, and submitted that, on the contrary, "the contemporaneous evidence… demonstrates that notwithstanding the deterioration in market conditions in late 2008, throughout this period Barclays considered that Arctic Fox was a credible, realistic deal, and it was eager to pursue it. Any scepticism on the part of Barclays' witnesses is at best a product of hindsight". CFP contended further that "throughout autumn 2008 Barclays viewed Arctic Fox and its prospect of success like any other M&A deal".

574. Certainly Barclays was keen to expand its role beyond responding to the debt proposal into actively providing M&A and transaction-structuring advice, partly no doubt to justify its proposed fee of £15 million. Indeed, Barclays made clear at a meeting on 29 October 2008 that access to debt would be conditional on the provision of other revenue for Barclays, through M&A advice and also work with CFP on carbon risk management.

575. Contemporaneous documentation (provided as part of late disclosure) revealed that Project Arctic Fox was in fact one of Barclays' M&A department's first deals, and was regarded as both exciting and potentially lucrative by that department.

576. However, I would accept that the Deal Team's work on Project Arctic Fox was always more opportunistic than it was committed, whatever other superficial impression it sought to give CFP at the time.

577. I formed the clear impression from the evidence of Mr Martens and Mr Zintl that:

(1) Mr Martens was at best doubtful, at least in autumn 2008, that the credit committee would ever be convinced to lend against the value of Tricorona's portfolio, and he never felt that the deal was progressing towards agreement of a "financial package".

(2) Indeed he told me that he was working on Arctic Fox at weekends, would rather not have had to do so, and considered it a waste of his time: "I wanted to work on other things".

(3) Certainly by the beginning of 2009, Mr Martens considered that the deal was no longer economically feasible.

(4) Although Mr Zintl (who was in M&A) confirmed that Barclays did progress the deal over the months of September through November 2008 despite the post-Lehman turmoil, and continued to express to Mr Navon, even in December 2008, guarded optimism about doing the deal "so long as it is hedgeable and monetisable", the overall impression he gave me was that Barclays were happy to kick the deal along the road in case something turned up to make it possible, and to Barclays' advantage, but he did not expect it to progress, at least until market conditions changed.

(5) Mr Zintl's evidence to me was also helpful in explaining that, although the M&A department were excited by the deal, as it was amongst their first, Barclays did not expect to make much of a profit on the "relatively small M&A fee"; the profit for Barclays would be in the monetisation of the portfolio, which was expected to generate "a number that was very high in relation to the size of the transaction…and made the deal attractive. Otherwise it may not have been attractive for us".

(6) Mr Zintl's concern to put in place an engagement letter in late November 2008 to confirm that Barclays were clearly mandated to act was partly the product of habit ("At that point in time we had operated for effectively three/four months without a clear engagement letter, which frankly I have never done in my career, before or after"), partly to ensure CFP's commitment to Barclays against perceived competition from SEB and partly to reassure CFP that the deal was still on; but my clear impression from Mr Zintl was that it was a means of keeping the deal safe in cold storage in case it might, ultimately and against the odds, proceed for Barclays' benefit. It did not signify optimism on his part: Mr Zintl swiftly corrected Mr Lord when he suggested otherwise.

578. In summary, the view I have formed from the evidence was that Barclays (a) was content to work on the buy-out/M&A deal but (b) did not anticipate it progressing at least until markets changed, and (c) was primarily interested in preserving the opportunity of "mining" or monetising the Tricorona Portfolio, again until carbon credit prices and/or the margin between pCER and CERs increased. Barclays had no solid commitment to Project Arctic Fox or to CFP.

## CHRONOLOGY: NOVEMBER 2008 TO APRIL 2009

579. I turn to the broad sequence of events between November 2008 (when, with CFP's encouragement, Ms Patel met Messrs von Zweigbergk and Holmgren at the Carbon Asia Forum in Singapore) and April 2009 (when Barclays and CFP (for itself and IVC) agreed terms for the "Termination of Exclusivity" (referred to at trial, at least by the Defendants, as the Exclusivity Release)).

*The Singapore meeting and events between November 2008 and January 2009*

580. Although it was CFP who (unknown to Ms Patel in advance) encouraged the Tricorona Management to meet with Barclays at the Carbon Asia Forum in Singapore

on 12-13 November 2008, CFP now traces back to that meeting the rebuilding of Barclays' interest in some form of relationship with Tricorona independently of CFP, and its corollary in the effective decline and ultimate termination of the relationship between CFP and Tricorona.

581. On 12 November 2008, Mr Navon emailed Mr von Zweigbergk and Mr Holmgren:

> "Please track down Harshika Patel and Jan-Willem Martens from Barcap. They should be in Singapore as well … . The main issue to discuss is Large Hydro. They currently assign no value for Large Hydro without LoA Member State approval. This obviously has a big effect on the risk-adjusted volumes they are assuming to support the debt levels. You need to explain to them that this is way too conservative. In addition, they have concerns about the legal robustness of your ERPAs. So explaining your relationship with the government will be useful. Finally, please walk them through again the due diligence monitoring process you have on board, that the portfolio is updated on a weekly basis and that there have been no rejections by the UN…The key is to get them to increase the risk-adjusted volumes closer to our estimates and to Point Carbon's."

582. The context for the meeting was thus CFP's perception that, though it had educated Barclays as to demand from compliance buyers for Large Hydro pCERs, it remained unpersuaded that any value could be attributed where the project had not received LoA status (what I have earlier described as the fifth step in changing Barclays' approach). Mr Holmgren said as follows:

> "Q. ... I just want to ask you to confirm, Mr Holmgren, that as far as you were concerned you had no reason to doubt that Mr Navon was correctly assessing Barclays' view of large hydro which he sets out here?
>
> A. No. I think it is right. Barclays at this case did not assign any value to large hydro without member state LoA. It has not been confirmed, but I trust it is correct and it sounds plausible.
>
> Q. Yes. Large hydro without LoA member state approval did have value, didn't it, at that time?
>
> A. Of course.
>
> Q. So if Barclays had not assigned any value that would have been wrongly to undervalue that particular asset, wouldn't it?
>
> A. Yes."

583. Ms Patel emailed the Carbonara team after the meeting:

> "Hello deal team

> Just to let you know that we have been in Singapore at a Carbon conference this week. Carbonara had a stand which we avoided like the plague until we were approached by the CEO (Nielsen) and his number two.
>
> They came and sat with us for about an hour and straight off the bat asked if we were the two that were on the call with them when we discussed their portfolio and approach to DD etc.
>
> We indicated that we were and really spent the rest of the conversation focusing on the market and a bank's approach to CDM. We did not mention any deal at all nor any names. They brought up large hydro but once again we talked about it in a market context.
>
> However as a parting note they did say that if we had any questions going forwards we could call them directly whereby we just politely nodded and did not say anything.
>
> By all accounts they very much want this deal to happen. They were very nice people and we both got a good vibe.
>
> We really should talk about how if we don't get this deal how we can start a dialogue with them (through CF if required) to discuss hedging solutions.
>
> Jan-willem is in tomorrow (as I am still here) so he can give you more colour."

584. It was suggested to Ms Patel that this email was "somewhat mannered" and "back-covering", with the writer "clearly at pains to emphasise how little contact you have had"; but that the penultimate sentence "gave the game away" that Ms Patel had discussed or encouraged future discussions with Tricorona about hedging opportunities, inconsistently with Project Arctic Fox.

585. Ms Patel firmly denied this, emphasising that she and Mr Martens had been especially careful, knowing CFP's sensitivity about Barclays discussing Project Arctic Fox with anyone else. This had recently been demonstrated to Ms Patel by concerns expressed by CFP (of sufficient seriousness to warrant an internal report to compliance) after Ms Patel had met with Asia Development Bank ("ADB") at lunch, when Tricorona was mentioned (albeit, apparently, very briefly).

586. Mr Martens did not recall the details of the meeting but said he did not doubt Ms Patel's account. He was adamant that they had not discussed Project Arctic Fox, and had confined themselves to generalities about the market, and some brief discussion of Large Hydro. The evidence of Mr Holmgren and Mr von Zweigbergk was to the like effect.

587. Especially given (a) the brief that Mr Navon had given Tricorona's management as to the purpose of meeting up with Barclays in Singapore, (b) the inherent likelihood that discussion over an hour would progress to more focused matters and (c) a later email

dated a week after the Singapore meeting in which Ms Patel asked Mr Holmgren "What are your views on what is going at the moment in the market?" (which would strike me as odd if they had a week earlier had an hour's discussion on it), it seems to me to be likely that the meeting between Ms Patel and Mr Martens (for Barclays) and Mr von Zweigbergk and Mr Holmgren (for Tricorona) in Singapore did include at least some discussion of general relevance and inferential application to the Tricorona Portfolio and its potential interest to Barclays.

588. Further, I think that whatever its substance, the discussions were a catalyst for Barclays and Tricorona to contemplate dealings or trades between them "through CF if required", and that this encouraged further dialogue and (I suspect) a growing appreciation of the basic fact that unless CFP could quickly engineer a buy-out with Volati's agreement, Tricorona had more to gain from dealing with Barclays than with CFP.

589. I doubt, however, that there was any more specific discussion. Even allowing for the possibility that the email did not convey the whole story, the evidence does not suggest to me (and I do not accept) that either had any intention, at that time, of doing anything immediately contrary to Project Arctic Fox. I accept Mr Holmgren's evidence that it was not the intention of the Tricorona Management at that stage to "cross the agreement that we had with CF Partners", even if the effect of the rapport between them at the meeting in Singapore was to galvanise the Tricorona Management and Barclays once more to the possibility of profitable dealings between them.

590. Accordingly, I do not accept CFP's claim (by amendment to its Particulars of Claim) that the intention of their discussions in Singapore was "to prejudice Arctic Fox and/or any portfolio discussions CF Partners might otherwise have had with Tricorona and/or to benefit Barclays and Tricorona at the expense or to the detriment of CF Partners".

591. But I do accept that the impression successfully conveyed by Ms Patel to Messrs von Zweigbergk and Holmgren was that, at least if Barclays "don't get this deal", Barclays would be very interested in exploring all possibilities with the Tricorona Management. As indicated previously, I consider that Barclays had little loyalty to CFP, did not have high expectations for implementation of Project Arctic Fox, but in the course of it had already learned much that was favourable about the potential of Tricorona's portfolio and working its mine: it would not take much for them to decide to jump ship.

*Barclays and Tricorona exchanges after the Singapore meeting*

592. There is no real doubt, and I find, that after the Singapore meeting Ms Patel was keen, and looked for ways how, to build a relationship with Tricorona with a view to risk management and other activities if Project Arctic Fox/Carbonara did not proceed, and that this objective soon displaced whatever enthusiasm there was within Barclays or Tricorona for Project Arctic Fox.

593. Ms Patel accepted under cross-examination:

> "…in November 2008, following my meeting with Christer and Niels, I clearly had suggested to the deal team that if Carbonara was not going to work out I would be very keen to take our risk management dialogue with Tricorona to the next level, hence I have written -- I clearly have spoken to Bruno to get some background on what sort of ideas he hashed over in the past, acknowledging that he had not had much luck with credit to get credit lines to trade with them extensively…"

594. The exchanges barely mentioned Project Arctic Fox, except as an impediment to closer engagement; and they illustrate increasing focus on, and enthusiasm for, doing business thereafter. Although Mr Holmgren forwarded to Mr Navon one innocuous exchange on 20 November 2008 containing Barclays' research, Mr Navon was not copied in on any further emails, nor made aware of any of the discussions about opportunities. Barclays' contention that Ms Patel did not consider that she was doing anything of which CFP might legitimately complain is not assisted by the fact (which was not disputed) that Barclays' exchanges after the Singapore meeting took place behind CFP's back.

595. As to these exchanges:

(1) On 20 November 2008 Mr Holmgren emailed Ms Patel to strike up a discussion. She replied and encouraged him to maintain the dialogue. When he struck up his dialogue with Ms Patel, Mr Holmgren knew the sorts of business that Ms Patel would be interested in discussing.

(2) He said as follows:

> "From my point of view I could talk to her about day-to-day business, spot trades, forward hedging, cash management proposals, risk management proposals. From my point of view I did not -- I could not see why I could not talk to her about these things. Then I was also aware that she had in fact -- or Barclays had in fact some kind of agreement with CF Partners that may have restricted them to engage in these types of discussions, but it didn't really worry me because I trusted that if my discussions led into areas where she was not allowed to go, she would let me know."

(3) On 21 November 2008, Mr Holmgren told Ms Patel: "you need to keep your cool and think about how you can benefit from this". Ms Patel replied: "it is definitely worth exploring opportunities which come out of this market ... Look forward to speaking soon".

(4) Mr Holmgren assumed that by opportunities Ms Patel was referring to portfolios and the possibilities for Barclays to acquire them as a result of market volatility. He explained:

> "... I think when the market is going through a period of large swings, the volatility in the market, there will be

> potential opportunities if you are a buyer, as well as the opportunities if you want to sell."
>
> Q. Yes.
>
> A. Volatility is not always bad.
>
> Q. And you knew that Ms Patel was in the market to buy portfolios?
>
> A. I didn't know, but I understood from their engagement in the -- or attempt to engage in the primary markets that naturally they would be interested.
>
> Q. So you would assume in this dialogue that Ms Patel might be interested in acquiring a primary portfolio?
>
> A. Yes. I mean she would be. Barclays would be. That would be rational.
>
> Q. And you would assume that Ms Patel did have that interest herself?
>
> A. I'm sure she did."

(5) In re-examination, Mr Holmgren gave further evidence about the context of his discussions with Ms Patel:

> "Q. ... You comment there on what you thought Ms Patel had in her mind in November 2008. Could you clarify what you were basing that view on, the view expressed then?
>
> A. As Barclays were engaging in the primary markets and we had seen them and we had also seen that they hadn't been very successful so far and so I would assume -- I did assume at the time that Barclays must be interested in looking at portfolios already put together instead of building their own portfolio, and I'm not exactly sure what you mean, but when asked if Ms Patel had that interest herself, I obviously thought of her as being a Barclays representative."

(6) The truth, as I see it, is that Mr Holmgren had picked up on Ms Patel's interest in doing deals with Tricorona, and her willingness to discuss the possibilities (under guise no doubt of "the opportunities of the market"). In the Tricorona Management's opinion, there was nothing to stop it: "We were free to talk to anyone in our view". Mr von Zweigbergk was frank:

> "Q. And you were free to talk to Barclays and Ms Patel about any sort of monetisation opportunities, weren't you?

> A. Yes, trading and monetisation is -- two things are the same and we were trading and selling our CERs and our projects when we could."

596. On the same day as Ms Patel was referring to opportunities with Tricorona in the context of portfolio purchase, Mr Lim was circulating revised analysis on Project Carbonara within the deal team.

597. There was no suggestion that Barclays by that stage had any "green light" from CFP, or that Carbonara was not progressing. Ms Patel did not deny her objective, only what business she had in mind:

> "'Q. Aren't you really here just striking up a bit of a rapport with Tricorona so that you can start to do some business with them? Isn't that the idea?
>
> A. Oh, I mean absolutely. As I said earlier, I wanted to leave a good impression in their mind.'

598. Mr Martens was not copied into the exchanges between Ms Patel and Mr Holmgren in the aftermath of the Singapore meeting, nor was Mr Lim. Mr Martens could not recall whether Ms Patel mentioned any of the exchanges to him at the time, but he did not know anything about the emails. His evidence was as follows:

> "Q. ... It would have been wrong, wouldn't it, for Ms Patel to be trying to engineer any sort of subsequent catching up with the target at a time when she was wall-crossed into the deal team? That's right, isn't it, Mr Martens; you accepted that this morning and I think yesterday morning?
>
> A. Yes. She should be cautious --
>
> Q. No, Mr Martens, not cautious --
>
> A. -- but it is not up to me to tell who is wrong or not, right? It is my indication of what I thought was relevant to me.
>
> Q. No, Mr Martens, your evidence was that a Barclays member of the deal team who had been wall-crossed from the carbon desk should not be having any normal business contact with the target. Now, that would apply to Ms Patel as much as you at that time, wouldn't it, Mr Martens?
>
> A. Yes, sure."

599. On 27 November 2008, only a few days after her email exchange with Mr Holmgren, and in response to Ms Patel's request, Mr Garcia emailed Ms Patel his proposals to Tricorona in April 2008 for a route to market 'structure'. This, as Ms Patel agreed, was not for the purpose of pursuing Project Carbonara:

> "Q. Two days later, so six days after your email exchange we have just gone to and two days after this business case that

Barclays prepared, it looks as though you have asked Mr Garcia to send you some route to market analysis for Tricorona that he had been working on and given to Tricorona back in April 2008. Can you see that?

A. That is correct, yes I can.

Q. And you have just signed off with Mr Holmgren saying, "It is definitely worth exploring business opportunities", you have said that and then only a few days later we see you asking Mr Garcia for some particular types of business ideas for Tricorona, don't we?

A. Yes.

Q. And you wouldn't be doing that, Ms Patel, would you, for the purposes of Project Carbonara?

A. No, so as I stated, my Lord, when I came back from the Asia Carbon Forum, to my colleagues, that it is definitely a client that I would like to explore hedging opportunities with, taking into account the existence of Carbonara and the NDA and I just want to get some previous history from Bruno on what sort of ideas he has spoken about with them in the past. So I have clearly spoken about that to him and he has forwarded me that email as one of the ideas he has shown. But it is certainly not something I then take to Tricorona straight away.

Q. That's a different point, Ms Patel. But the point I'm making is you would only be asking for this information if you had in your mind at that point the idea of potentially doing this sort of business with Tricorona, that's right, isn't it?

A. That is correct and I admitted that to my colleagues in the summary of my note of my discussion with Niels and Christer. I was very upfront about that.

Q. I'm suggesting that it would be odd to ask for that information if you had no intention of trying to advance matters in this respect with Tricorona. It would be a very strange thing for you to do, to just get it in the abstract. You are getting it at this time because you have now seen this is an attractive carbon portfolio and you are now thinking about ways in which you can close in on it. That's what I'm suggesting to you.

A. That is not correct, my Lord. It has got nothing to do with the portfolio. I clearly would like to target Tricorona as a potential hedging client. I have just met them in Singapore. I have alluded the same around risk management with my colleagues and all I'm trying to do, prior to getting any green light because I'm wholly aware of the non-disclosure

> arrangement, I'm just trying to get from Bruno a flavour of the sort of things and ideas he has shown them in the past."

600. Barclays' previous ideas included, indeed focused on, a structure for a portfolio purchase of Tricorona. Ms Patel must have recollected this: as explained previously, she had worked on (and was in charge of) a portfolio purchase strategy or "roadmap" in March and April 2008. Ms Patel confirmed in her oral evidence that she only asked for such information because she had in mind doing such business with Tricorona.

601. However, as appears from the extract of her cross-examination quoted above, she was insistent that this had got "nothing to do with the portfolio" and in their written Closing Submissions, the Defendants sought to downplay these exchanges, and to present them as intended by Ms Patel simply to foster and maintain a good personal relationship with potential business contacts, it being public knowledge that Tricorona had a large unhedged CER portfolio.

602. The Defendants submitted that "the exchanges do not evidence any overtures by Barclays or Tricorona to embark on any particular business, and certainly not on any business which might cut across CFP's plans or which might undermine their relationship with Tricorona management…Ms Patel's hopes of arranging some hedging or risk management business in the future was not directed at Large Hydro, or indeed at anything in particular".

603. In my view (and I so find):

(1) However generally, the exchanges explored what business Barclays and Tricorona could do together, with the intimation of an extensive business relationship: I cannot accept the Defendants' suggestion that all it amounted to was an exchange of "periodic pleasantries", nor that any boundaries on such discussions were ever imposed.

(2) Even if not expressly stated, the impression in fact successfully transmitted by Ms Patel to Mr Holmgren was that such business might extend to Tricorona's "portfolios already put together" and certainly to monetisation of the portfolio, hedging and forward selling.

(3) Implicit in Ms Patel's continuation of the exchanges was the message that (i) "the market" and Barclays' enthusiasm were moving against Project Arctic Fox and the prospect of a management buy-out via that route (which was the real attraction for the Tricorona Management of Project Arctic Fox) and that (ii) Barclays was waiting in the wings to pursue these opportunities with Tricorona.

(4) It is obvious from the exchanges that Ms Patel was already looking beyond Project Carbonara: and she confirmed in the course of cross-examination that after her meeting with the Tricorona Management in November 2008 she was already considering what business they could do "if Carbonara was not going to work out".

(5) Ms Patel's request for information from Mr Garcia was indeed because she had in mind the possibility of resurrecting that old proposal, which she had herself worked on, and which, though previously Barclays had rejected it, appeared to

have been re-validated as a suitable proposition by what she had learned and done in the context of Project Arctic Fox/Carbonara, and the good working relationship she was establishing with Messrs von Zweigbergk and Holmgren.

604. Further, in my assessment:

(1) Ms Patel's overtures did poison the waters: the developing relationship between Ms Patel and the Tricorona Management was matched by the deterioration in the relationship between CFP and the Tricorona Management, illustrated by tetchy email exchanges from Mr von Zweigbergk to Mr Rassmuson in mid to late December 2008, and encouraged by the Tricorona Management's perception that Barclays could offer Tricorona more than could CFP.

(2) Although Mr Holmgren denied this, and although it is fair to take into account other factors such as the Tricorona Management's perception that no buy-out would be possible because of (i) market conditions and (ii) CFP's failure to persuade the major shareholder, Volati, to sell, and (iii) personal strain between Mr von Zweigbergk and Mr Rassmuson, I do not accept that the coincidence is merely one of time.

(3) My sense is also that Ms Patel quickly came to appreciate that in the minds of Mr von Zweigbergk and Mr Holmgren (especially the former) Project Arctic Fox was always something of a long shot, and (so far as they were concerned) the relationship between CFP and the Tricorona Management was one of temporary convenience, established in the context of the Tricorona Management's long-held ambition of achieving a MBO and a hope that CFP might bring Volati on board for this.

(4) Tricorona's management, which was never entirely straightforward with CFP (for example, they did not reveal either their ongoing discussions in August and September 2008 with a view to a merger with EcoSecurities pursuant to Project Meltwater, nor the nature of their previous engagement with Barclays), had no real interest in CFP once they had concluded that no swift deal with Volati could be secured and that Barclays offered a safer haven.

(5) By late November 2008, but unknown at that stage to CFP, the Tricorona Management had all but abandoned Project Arctic Fox and, in reality, Barclays and Ms Patel were looking not to its fruition but to what business they could do after its failure. Tricorona's management could not wait to pronounce the fox to be dead and sought to move forward as if it were. Barclays needed greater certainty.

*Talk turns to termination of the relationship between CFP and the Tricorona Management*

605. There is a dispute between the parties as to whether it was agreed (informally) between CFP and the Tricorona Management in December 2008 that Project Arctic Fox would be terminated.

606. In his oral evidence Mr Holmgren maintained (though this was not in his witness statement) that such termination was expressly agreed between CFP and himself:

> "I think it was a conference call on 18 December….that Arctic Fox was terminated".

607. Mr Rassmuson disputed this. He told me:

> "I think it is important to highlight that on the 20th – around – December they were trying to terminate Arctic Fox. We did not agree to that. We said we could terminate the MOU but we want to continue to work on this transaction."

608. I accept the evidence of Mr Rassmuson on this point, but in reality I think the difference between the parties is less stark than might initially appear. The fact is, as I see it, that Tricorona's management considered that their support was essential for the success of Project Arctic Fox, and that once they had withdrawn that support, and given that CFP could not deliver Volati either, Project Arctic Fox was "dead".

609. In other words, in the minds of the Tricorona Management, termination of any understanding of management co-operation meant the end for Arctic Fox; whereas in the minds of CFP, the deal was made more difficult without the co-operation of the Tricorona Management, but, if and when the markets changed, still achievable (especially if their "dream" of an MBO re-surfaced, management and Volati might well come back on board). For the one, the fox was dead; for the other, it was in hibernation.

610. The conduct of CFP and the Tricorona Management in late December 2008 and through January and February 2009 is consistent with this. CFP continued to work to secure the participation of (for example) SEB, Vattenfall, E.ON and Climate Change Capital, and to seek to put in place the necessary elements for the transaction so that it could proceed once market conditions improved. In contrast, Tricorona's management turned increasingly towards Barclays. Barclays (and especially Ms Patel) turned their attention to ways of extracting value from the mine and shoring up its emissions business in the light of a difficult year.

***January 2009: the beginnings of Barclays' strategic partnership with Tricorona***

611. An email from Ms Patel to Dr Swift dated 6 January 2009, before Barclays had been informed by the Tricorona Management that, so far as they were concerned, Arctic Fox had ended, captures Ms Patel's outlook at the beginning of the new year:

> "…In these market conditions we need to be clever about how we can do some business with Carbonara but compensate CF accordingly to appease them".

612. Ms Patel agreed under cross-examination that by "we" she meant her carbon team at Barclays, which she accepted was on the other side of the wall from her, that is, the public side. She apparently saw nothing wrong in her, as part of the Project Carbonara deal team, discussing with the head of the deal team (Dr Swift) doing trading with the

target: she told me that she considered that she was perfectly able to do that under the terms of her "Over the Wall" memo, as long as she was not trading in the target's listed securities.

613. She sought to explain her reference to compensating CFP as reflecting her appreciation that there was an exclusivity arrangement in place (though she said she was not an "active member of the deal team and she did not actually know what the terms were"). She told me:

> "…I was just flagging to my colleagues that I know it exists and if I want to do business with Tricorona I want to make sure that we are mindful of the provisions of that exclusivity arrangement…."

614. Ms Patel's oral evidence was that the only business with Tricorona she had in mind was "risk management…in very volatile conditions for the carbon market".

615. She sought to pass off her reference to the need to be "clever" as anticipating the need for Barclays to persuade the Credit Department to extend credit lines to facilitate this, which she anticipated would be very difficult given that (a) Tricorona was not well capitalised and (b) the collapse of carbon prices reduced security.

616. She thus presented the email of 6 January 2009 as signifying no more than a wish on her behalf to take advantage of volatile conditions, and what she perceived to be the particular exposure of Tricorona and its susceptibility to an approach, to engage in limited risk management business with Tricorona, offering to compensate CFP for any breach of exclusivity.

617. I have to say that I found Ms Patel's evidence in this regard, though given with apparent (and characteristic) composure, almost entirely unconvincing. I think it is further undermined by other documentation and evidence, and by inconsistencies in her witness statements. This was especially so in seeking to explain records of telephone transcripts that had not come to light at the time of her first and main witness statement.

618. First, it will be apparent that I do not accept that Ms Patel can really have thought it permissible for her personally to instigate and pursue trading with the target, especially given her understanding of the contractual obligation of exclusivity at the time.

619. Secondly, the impression she sought to create that she and Dr Swift considered that day-to-day hedging was acceptable is anachronistic: it was not what she really thought at the time, and the gloss that the exclusivity obligation permitted it is borrowed from later clarification to that effect (albeit I accept only a few days later). The reality of the matter is that at the time her understanding of the exclusivity obligation (which it was her evidence she had not seen) was that it precluded Barclays from entertaining any business with Tricorona, including hedging business.

620. As to that, in her first witness statement she recognised that; and she sought to excuse the contemplation of such trading on the basis that Mr Holmgren had repeatedly contacted her to engage in hedging discussions: but in her second witness statement,

which she acknowledged in her oral evidence was made necessary to explain the telephone transcripts that had lately been disclosed, she had to retract that and accept that the impetus came from her side.

621. Thirdly, and flowing from that, I do not accept Ms Patel's explanation of what she meant by having to be "clever". This had nothing much (if anything) to do with difficulties in obtaining credit lines (though there may have been such difficulties). I consider and find that she saw the need to be "clever" because what she was really proposing were transactions which were in breach of both (a) the exclusivity obligations that, as she then understood the position, bound Barclays, and (b) the Chinese Wall, which was there to ensure that the confidential information about Tricorona's portfolios she had received as a member of the deal team in Carbonara did not influence or affect her conduct on the public side. What she anticipated was Barclays having to compensate CFP to appease it for what she perceived would inevitably be a breach of Barclays' obligations, if discovered. She had, I sense, convinced herself that the risk was small, because the project was doomed soon to fail.

622. Fourthly, in her first witness statement, she sought to justify this on the grounds that (a) Tricorona was simply "one of various project developers we wanted to target for hedging business" and (b) "as market condition had declined, [she] had formed the view that CF Partners simply did not have and could not secure the equity to support their proposed transaction". But Tricorona was not simply another potential client: it was out of bounds for those purposes, and that was so even if she regarded Project Carbonara as doomed anyway: and in my view Ms Patel knew it. Her evidence under cross-examination in this regard was uncharacteristically confused, and unconvincing.

623. Fifthly, the very fact that she wanted personally to be involved is revealing. In her oral evidence she emphasised that she "was very clear in my mind that Bruno [Garcia] could have hedging conversations with Tricorona"; but she acknowledged that the question whether she could was more difficult and needed "double-checking". Yet if all that was contemplated was a little day-to-day hedging for risk management purposes in troubled times, as she suggested, there was no need for her personal involvement at all. Her personal involvement was only necessary if she had broader objectives, such as portfolio purchases on a substantial scale.

624. As it seems to me, these were, by now, Ms Patel's objectives, even if they could not immediately be implemented: her sights were on a much more substantial relationship than the odd day-to-day hedging transaction. (That may be part of the explanation for the curiosity that, in the event, no such trades were put in place.) I consider, and find, that even by this early stage (the beginning of 2009) Ms Patel had fixed on Tricorona as a potential source of carbon credits in volumes far greater than would be the stuff of, or legitimately described as, ordinary day-to-day trading, not only for fee generation, but as a resource whereby to achieve the objectives set for the Emissions Team which in 2008 it had plainly failed to achieve.

625. I think it is also relevant to note, following up on the point touched upon in the preceding paragraph, that the Tricorona Management conceived its business model, and the instructions of the Board and shareholders, as being to generate profits from the acquisition of pCERs under ERPAs and the sale of the same in the secondary market of guaranteed CERs. They were not much interested in forward hedging; for

example when, in December 2008, CFP offered a forward hedging transaction with Vattenfall as a means of covering increasing volatility and a negative outlook for CER prices, Tricorona's management dismissed the proposal out of hand. The truth seems to me that Tricorona was not much interested in hedging; and that suggests some other motive on both Barclays' and Tricorona's part than small and sporadic business that might or might not eventuate.

626. By January 2009, as it seems to me, her conduct was dictated by what she perceived to be the interests of Barclays and the survival and development of her department, regardless of the interests of CFP or whether what she wanted to do was inimical to Project Arctic Fox/Carbonara.

627. She was under pressure to show success. Ms Patel knew that 2009 would be a "make or break" year for Barclays' efforts to build a presence in the primary carbon market, the "space" that she was tasked to develop (as head of Environmental Markets Origination). 2008 had not gone well for Barclays in the primary emissions space; and Ms Patel, in particular, was under considerable pressure to prove that the business was worth pursuing. Tricorona was a possible salvation.

628. Albeit that it was circulated after her email of 6 January 2009, an insight into the pressures on her team is provided by a Barclays in-house presentation from EMEA Commodities Sales dated 13 January 2009, which was disclosed by Barclays on the weekend before Ms Patel gave evidence. This set out an agenda for the year ahead for the different teams. The presentation's outlook for the emissions team in 2009 was as follows:

> "Opportunities
>
> ...
>
> - Route to market for compliance players, carbon aggregators, governments and Japanese Corporates in EU ETS + CDM
>
> ...
>
> Trends
>
> - Portfolio purchase opportunities as carbon players see increased need for risk management due to price volatility.
>
> - Recession based concerns are putting significant pressure on carbon prices and therefore many EUA and CER longs are seeking to come into the market to offload their length.
>
> ...
>
> Competition
>
> ...

- Significant competition leading to reduction in primary CER opportunities..."

629. The imperative for determined and urgent action for the team is expressed in the presentation. Under the heading "What worked well in 2008…" it is stated under the sub-heading "Emissions": "Production up 180% in secondary markets, but the business needs reinventing (again!)"; and a little further on, under a sub-heading "The business is much more diversified", it is stated "which is fortunate given the lack of elephant deals". The presentation then identifies the following as objectives under the heading "…and what will be a challenge in 2009?" and sub-heading "Emissions": "Fill or Kill Primary Emissions business".

630. Mr Redshaw explained to me that it was plain by the end of 2008 that the portfolio procurement strategy through organic growth had not succeeded. Ms Patel (though she did not agree with them) accepted that the view of Barclays' senior personnel was that it was "make or break" for Emissions Sales activities in the primary market; or as Mr Gold put it, "decision time".

631. In his oral evidence, Mr Gold sought to soften the words "Fill or Kill" and to suggest that they should not be read as connoting that if unsuccessful in 2009 the business would be brought to an end; he suggested that in the trading desk context with which he is familiar it simply means that the trader must either fulfil the order or the trade will go elsewhere; but even on that basis the phrase still connoted that unless progress was made the adventure into primary emissions would be stopped. (I note also that the standard meaning given of a "fill or kill order" in the NASDAQ glossary is an order that if not executed in its entirety is to be cancelled.)

632. The particular prospect Tricorona offered was the prospect of a "mine" of unhedged primary CERs, of which it is accepted by Barclays that it had received a detailed breakdown through Project Arctic Fox/Carbonara. As CFP's work had shown, portfolio purchase or monetisation of that mine (which incidentally Mr Zintl in his oral evidence equated with "crossing the grey line" between "day-to-day" business and other business since it would or could involve "substantially buying all the portfolio") offered considerable potential return. As I have previously indicated, my impression of Ms Patel as a highly ambitious and energetic operator, who was determined both to increase Barclays' presence in "the carbon space" and make it the "go-to bank" in that area of business and to increase the performance of her team (and thus to increase her bonus) fits with CFP's depiction of her intentions. She had the opportunity to be "clever"; and she took it without qualms as to the false description of what truly she had in mind.

633. Mr McQuater urged on me in his oral Closing Submissions that neither Dr Swift nor Ms Patel intended anything "surreptitious or cunning", nor did they plan to go behind CFP's backs. "Surreptitious" may not be the right word; but Ms Patel, with Dr Swift taking care as usual to warn and urging caution and advice from Mr Zintl but not in any sense taking control of the situation, certainly was not open in her objectives, or straightforward and open with CFP in seeking to implement them.

634. It is also interesting to note that the Tricorona Management did not understand Ms Patel's interest to be confined to day-to-day trading, or at all. Mr Holmgren was frank

in this regard; he told me (when referred to an email he had sent on 21 January 2008 to Ms Patel advising her that the process with CFP had been terminated):

> "Q. ….Ms Patel understands that you want to talk to her about "CDM stuff", can you see that?
>
> A. Yes.
>
> Q. CDM stuff could include stuff like monetisation of the portfolio, wouldn't it?
>
> A. It would mean selling CERs, yes.
>
> Q. And it would include forward selling of CERs, wouldn't it?
>
> A. Yes.
>
> Q. And it would include selling substantial quantities of --
>
> A. It would include anything from 1 to any number.
>
> Q. So it could include any sort of that CER business?
>
> A. Yes.
>
> Q. Without any limits at all?
>
> A. Within -- it would come down to whatever we agreed in the ISDA, what the collateral requirements would be.
>
> Q. But as far as Ms Patel seemed to understand you, you and she were able to talk about any sort of carbon business whatsoever?
>
> A Yes."

## The development of the 'strategic relationship' between Barclays and Tricorona

### *First phase: January 2009*

635. The first phase in the development of what was termed "the strategic relationship", covers the period between 7 January 2009 and 27 January 2009. It was during this phase that Barclays obtained clarification that it could undertake "day-to-day hedging" without falling foul of any obligation of exclusivity, and Ms Patel and Mr Holmgren first sounded each other out and then worked together to seek to remove any impediment to the development of their relationship.

636. Following Ms Patel's request to Dr Swift, Dr Swift emailed Mr Zintl on 8 January 2009 saying:

> "I haven't heard anything from CFP and spoke with Harshika today who would like to be in position to engage bilaterally with Carbonara. I would suggest that we arrange a meeting with them on Monday/Tuesday to find out whether they are serious enough to sign mandate and otherwise, gauge reaction on asking to be released from exclusivity clause."

637. Dr Swift also emailed CFP to set up a meeting, explaining to them:

> "Given our current exclusivity clause that restricts transacting with this target, we would be keen to clarify the M&A mandate situation as soon as possible."

In a follow-up email to Mr Glossop of CFP pressing for an early meeting, she said:

> "Thank you Simon - any thoughts at your end re: meeting date, as we would be keen to clarify the position earliest in relation to either mandate or release from exclusivity."

638. The conference call between Barclays and CFP took place on 14 January 2009. No transcript of the call was available; but there was a contemporaneous note made by Mr Zintl:

> "Key points:
>
> - They stated that the deal is definitely still on
>
> - They have spent a lot of time negotiating/discussing with Volati. The recent equity market volatility and moves in Carbonara share price and CER price have delayed decision process
>
> - Recent development is that Volati wants to exit Carbonara altogether, hence they would want CF Partners to place a bid. CF Partners will thus require more equity from another partner
>
> - Volati's price expectation in a sale of their shares appears to be reasonable, although we do not know details
>
> - CF Partners have entered discussions with two other potential equity partners
>
> - Discussions with one partner have been quite fruitful and CF is confident that this party will make up their mind in due course
>
> - We do not know the identity of the institution, but our best guess would be Vattenfall (could well be wrong)
>
> - We gave them the message that we would like to get clarity on whether the deal will go ahead or not, preferably within the next 14 days

> - If feedback from partner were positive we would expect to be mandated in due course"

639. There is a dispute whether in the course of the meeting Mr Zintl told Mr Navon during the call that Ms Patel had had some contacts with Tricorona and that she wished to engage in hedging discussions with Tricorona, and that Mr Navon said he was "generally okay" with that. It became a theme of Mr Zintl's oral evidence that he had told Mr Navon that it was Ms Patel who would personally be having such discussions.

640. Mr Zintl's note suggests no such thing. He had not suggested this in his witness statement. It was not suggested in opening; and it was never put to Mr Navon. I reject the suggestion accordingly. In fact, at this stage, the evidence suggests to me that Barclays remained of the understanding that under the IVC/Barclays Confidentiality Agreement it was prevented from doing any business direct with Tricorona, even routine day-to-day business. It appears, however, from a subsequent follow-up email from Mr Navon to Dr Swift and Mr Zintl that Mr Navon indicated that CFP would not object to day-to-day business of that nature, provided it was not such as to be in conflict with, or conflict Barclays from participating in, Project Arctic Fox. It seems to have been left that CFP would confirm what it wanted to do within 14 days.

641. Those points were recorded in Mr Zintl's email to Ms Patel on 15 January:

> "… For the next 14 days we should not be in contact with the target. CF Partner [*sic*] stated that they are generally ok to release us, but do not want us to conflict ourselves in any way."

642. Mr Zintl instructed the deal team that they should not be in contact with Tricorona at all during that period while they were waiting for CFP's response. That was for what Mr Zintl called "deal hygiene":

> "Q. … Why did you say to Ms Patel that there should not be any contact with Tricorona? Why didn't you say to her, "Well, it would be okay for you to do ordinary hedging stuff so long as you don't deal in listed securities"?
>
> A. No, I wanted -- point 1, I wanted to be crystal clear that there is no contact whatsoever for tactical reasons; point 2, we have a standstill agreement although it is not focused on hedging and what not, that we wanted to get clarity on and release from our counterparty.
>
> Q. But if your evidence is really that you thought Ms Patel could be contacting the target to do normal day-to-day activity, and if you have told Mr Navon about this and he is fine about it, why would you tell Ms Patel not to have any contact with the target for 14 days?
>
> A. Just pure sort of deal hygiene I might say. We had told our client, "Give us two weeks or we give you two weeks to decide

> how you want to proceed. Either we want to be released, or we will go ahead with the hedging".”

643. On 21 January 2009, Mr Holmgren emailed Ms Patel to query a bid he had seen Barclays make for CERs at €12 (which, given a fall of about €3 since December, would have been very high). In the course of a brief email exchange, Mr Holmgren volunteered the information that “the process with CF Partners [has] been terminated”. As Mr Holmgren accepted in his oral evidence:

> “in a way [he] was also letting her know that [he] would like to talk to her about other things.”

644. Ms Patel emailed Dr Swift to discuss the opportunity that she immediately appreciated was on offer. The email in relevant part read as follows:

> “I just had an email from Christer (CFO of Carbonara) to say that the process with CFP has been terminated. Therefore can we get out of the confi please? I get the feeling that the client is emailing me as they want to talk to us about CDM stuff.”

645. The following extract conveys the substance of the ensuing telephone conversation between them on 21 January 2009:

> “AS: Yeah. I mean, are they not going to start getting into - instead of having a carbon asset portfolio, they're going to have a carbon liability portfolio?
>
> HP: Yeah, that's what I mean. That's why the opportunity's there and I just get the feeling, you know, since he emailed me before Christmas, after Christmas and then - he didn't have to offer this information up to me and so I just get the feeling -
>
> AS: But are they not potentially bankrupt in this space, environment?
>
> HP: Well, no because our other clients aren't because their portfolio purchase price is much less but this is why the opportunity is there now, like right now.
>
> AS: Yeah. Okay, because these are on the borderline of sitting on a liability on their ERPAs.
>
> HP: Well, I don't think they're (overspeaking) sitting on liabilities but that's why --
>
> AS: Because the prices were around about nine, were they not?
>
> HP: Yeah, that's right.

> AS: The purchase price? Eight, nine and they're at nine, so it's like close to being –
>
> HP: Well, that's why I want to get in there now-
>
> AS: - running losses.
>
> HP: - to see what we can do.
>
> AS: Running losses. Okay, let me speak to Nicolas just to make sure.
>
> HP: (overspeaking) similar clients like them everywhere -
>
> AS: Yeah, I know.
>
> HP: -- and yet these are one of the higher ones. We know more about their portfolio than anyone else.
>
> AS: I know. Well, look, let's just see what we have to do because we have to come out of an exclusivity. I want Reto German to be involved because he's managing this on the relationship side and then we'll work out how to speak to them. Okay.
>
> …
>
> HP: Angela, let's try and close something with Carbonara themselves.
>
> AS: I know.
>
> HP: Yeah, and like I said I think the opportunity is there right now and that's why, sorry to be an utter pain.
>
> AS: No, no, no. I mean, we've given them the deadline; I've got it in my diary deadline next week: release or mandate."

646. The transcript illustrates well both Ms Patel's energy and eye to a chance and Dr Swift's mixture of hesitation and concern, yielding to Ms Patel's enthusiasm with a resort to talking to Mr Zintl as a means of not being obstructive.

647. On 22 January 2009, Ms Patel emailed Dr Swift:

> "Any chance of following up with CFP please today following your chat yesterday - we are seeing some good opportunities from others like them so don't want to miss the boat?"

648. Ms Patel did not wait for a reply. She immediately contacted Mr Holmgren; she gave this explanation in her first witness statement: "I am a salesperson, and in sales you never want to ignore a client". This was contrary to Mr Zintl's express instructions

and his stipulation of the need for "deal hygiene" as referred to above. It appears likely that Ms Patel had talked to Mr Smith (her superior) who had suggested direct contact to see if Tricorona would formally confirm termination: but it does not appear that Brian Smith was aware of Mr Zintl's direction. Mr Smith did not give evidence, and the matter was not clarified. Overall the impression I have is that Ms Patel knew who and when to ask in order to do as she wanted.

649. The Defendants submitted that the discussion was innocuous, and that neither Ms Patel nor Mr Holmgren evinced any intention to engage in anything underhand or behind CFP's back. However, the transcript of the conversation which followed between Ms Patel and Mr Holmgren (which was replayed in court) left me in no doubt that Ms Patel encouraged Mr Holmgren to do whatever he could to clear the way for further discussion by obtaining from CFP some confirmation of what Mr Holmgren had stated was their indication that "the process" had terminated.

650. During the course of the call, Mr Holmgren suggested that Tricorona should get "something in writing" to certify that Tricorona had terminated discussions; Ms Patel agreed that this would be "ideal". She envisaged that once available she could thereafter "send it to them, then you know it formally gives us the green light", to which Mr Holmgren later in the call responded saying that once he has got it in writing "you can easily take that and let them know". It is interesting that as it happened only Mr Holmgren dealt with CFP in seeking termination; Ms Patel kept well out of it: she was, after all, required and understood by CFP still to be working to promote and protect Project Arctic Fox/Carbonara.

651. As to what was envisaged by the two of them (Ms Patel and Mr Holmgren) once the "green light", as they saw it, had been obtained, Ms Patel said that she wished to "talk a bit more strategically… about risk management and financing ideas"; but she did not give any further details. I agree with the Defendants' submission that vague terms like that could of course mean all sorts of things, and that (as Mr Holmgren said in his oral evidence) "strategic is something that's used by a lot of sales people".

652. But I do not agree with their conclusion that neither Ms Patel nor Mr Holmgren had in mind any kind of portfolio purchase or anything similar to, or inconsistent with, Project Arctic Fox. I do not accept, either, Mr Holmgren's evidence that he did not have anything really in mind at that early stage other than the possibility of putting in place an ISDA. My strong impression from the transcript and the evidence is that, though neither defined what they had in mind, equally they understood from each other that nothing would be excluded either. Mr Holmgren accepted under cross-examination that "risk management" could extend to "the bank buying a chunk of the developer's portfolio", including a "substantial part" (though perhaps not the whole of it); and when pressed to say whether "strategic partnership" might include, as a real possibility, Barclays acquiring Tricorona or its portfolio, Mr Martens told me:

> "A. Well, I wasn't thinking in those terms in those days, but I wouldn't have consciously excluded it, just that I think it was only after the financial markets crash. I think the -- March 2009 was when I think a number of the markets bottomed, that certain carbon developers looked cheap and (inaudible) played an interest in purchasing EcoSecurities. That triggered more the buying. Prior to that I don't think that was among our

> discussions. We wouldn't exclude it, it wasn't something we would not [do] ....”

653. Seven minutes after her call with Mr Holmgren, Ms Patel spoke to Dr Swift. Dr Swift warned her against speaking on a “taped line” and said that she should not “put anything in writing” to Mr Holmgren. Dr Swift, whom she had not asked, was extremely concerned about the contact. The transcript of her conversation with Ms Patel after the latter’s first call to Mr Holmgren reverberated (when played in court) with her agitation. The following extract is illustrative:

> “HP: … Anyway, just to let you know, I quickly – I phoned Carbonara and basically they said what they’re going to do is just get it in writing from CF that things have been terminated. So it’s official –
>
> AS: Okay.
>
> HP: -- in writing and then it’s -- everything from their side.
>
> AS: Yes. But it’s not because you forget it is at their discretion to release us.
>
> HP: No, that’s fine. That’s fine.
>
> …
>
> AS: But I would be very clear we’re not advising the target, we’re advising – we have – we have a confidential relationship with the advisor, with the acquirer. Not with the target. So should we be having any correspondence on this matter? I don’t know, that’s why I suggest before doing anything like that you consult with Nicolas.
>
> HP: Okay, well –
>
> AS: Are we in breach; I don’t know, we could be.
>
> HP: Okay, well you might want to speak about it with Brian then.
>
> AS: All I’m saying is if we don’t know – I just wouldn’t – you know, if you think that this deal is going to be done in a day, that why I wanted to say –
>
> HP: No, no, not at all.
>
> AS: Then let’s not bruise things up, it’s a legal agreement.
>
> HP: Well, shall I just send Christer an email then?
>
> AS: No.

HP: No, fine, leave it.

AS: Leave it.

HP: Okay, that's fine.

AS: I wouldn't put anything in writing.

HP: No, no, no, and that's – by the way – that's why I spoke to him and I did not email him.

AS: I know, I know but that's fine but it's still on a taped line. So I would just be – to be honest, I would be very careful, I would be very careful.

…

AS: Okay, well I'll speak to Brian. Brian, as I say – we have to -- let's just play by the rules otherwise we can get into trouble.

HP: That's fine. But I didn't actually mention on the tape line even the transaction, what it was or anything like that.

AS: Yes, but you shouldn't be speaking to them.

HP: But having said that, they came and spoke to us in Singapore and they're writing to me.

AS: No, no, no, I know. But you know, and you've behaved in an appropriate way and that discussion I think, I think I'm just careful because you can get sued – so let's just understand what our situation – Nicolas is the best person to provide guidance on that and also let's not – let's not piss off people that we are going to be asking for exclusivity from. If they are difficult, you know, if we ask for it then you know we can work on it but not before.

…

AS: Can you do me a favour; could you just drop a couple of lines to Nicolas to tell him what you've done so he's aware of it?

HP: Okay, yeah. I'm going to wait for Brian to come back though because I've done what he's told me to do.

AS: No, I don't – just I would let Nicolas know what you've done.

HP: Okay.

AS: Okay?

HP: Well, I'll probably – I'll just give Nicolas a call.

AS: And just put it in writing probably.

HP: Well, I'd rather call him, Angela.

AS: Fine, call him. But you know, again, caution, caution, caution is my message.

HP: Okay.

AS: Okay, and then when we hear from them hopefully, about this, let me know. I'm very keen to do business with the target -- I'm just trying –

HP: I know but I'm quite pissed off actually because I wasn't actually going to do anything –

AS: No, I know.

HP: (several inaudible words)

AS: I know.

HP: But now I feel like an idiot, you're making me feel quite bad now.

AS: The thing is, I don't actually know what the situation is for our -- I actually don't know if we're in breach of our contract and that's why I'm just -- I would always err on the side of caution when we're under contract.

HP: Yes, which is why I've tried to sort it out today.

AS: I know, I know, and as I say I don't know why Brian is telling you for the matter of a couple of days, it's fine. You just never speak to the target."

654. Dr Swift was clear: Ms Patel "shouldn't be speaking to [Tricorona]". Dr Swift was obviously very concerned about Ms Patel's contact with the target. Mr Zintl agreed with Dr Swift that it was for CFP to determine whether to release Barclays from the exclusivity arrangements.

655. Just over an hour after Mr Holmgren's conversation with Ms Patel,[26] Mr Holmgren emailed Mr Navon requesting confirmation from CFP of the "termination of the Arctic Fox project". The inference which I draw is that Mr Holmgren considered it

[26] The conversation with Ms Patel ended at 13.09; the email was sent at 14.13.

important and indeed necessary to have the death of the fox confirmed before engaging in the "risk management" and "financing" which he had discussed with Ms Patel.

656. Further contact in the day followed between Ms Patel and Mr Holmgren. At Ms Patel's request and encouragement (as Mr Holmgren agreed), Mr Holmgren sought formally to end Arctic Fox, and by email dated 22 January 2009 to Mr Navon he stated that:

> "Further to our conversation at the end of last year, we would like CF Partners to confirm the termination of the Arctic Fox project – an email should be fine…"

657. Mr Navon's reply accepted the termination of the understanding for equity shares they had recorded in the Memorandum of Understanding (which was not legally binding). It does seem to me clear that by 22 January 2009 at least CFP's negotiations with Tricorona's management had come to an end. The following extracts from their oral evidence demonstrate that both Mr Navon and Mr Rassmuson accepted that the exchange marked the end of negotiations with management premised on their participation in the transaction:

> Mr Navon
>
> "Q. Well, it is obviously terminated as far as management is concerned, isn't it?
>
> A. Their involvement in the deal, yes.
>
> Q. And that would have been obvious to Mr Holmgren on receiving your email?
>
> A. Correct.
>
> Q. That negotiations with management had come to an end in relation to Arctic Fox?
>
> A. Correct."
>
> Mr Rassmuson
>
> "Q. That exchange of emails -- we can go to it if you like -- obviously signalled the end of Arctic Fox as far as management's participation in it was concerned, didn't it?
>
> A. That is correct.
>
> Q. Yes. You may have intended to carry on with Arctic Fox without them, but they were out of it at that point?
>
> A. Yes. …"

658. Even so, CFP was not prepared to call the end of Project Arctic Fox. Mr Navon made it clear by email dated 22 January 2009 that Project Arctic Fox transaction discussions would continue:

> "We can confirm that the Memorandum of Understanding dated July 2008 has been terminated. We would like to continue discussions with you on this type of transaction or on individual project sales or hedges.
>
> As discussed on our call with you, we have in place non-circumvent agreements with all the counterparties that we have introduced to the potential transaction (e.g. SEB, Barclays, Daiwa & Vattenfall, etc). This was to protect all our interests in the deal. These non-circumvent agreements are still in effect and will preclude these counterparties from participating in a transaction away from us."

That was misleading, as Mr Navon conceded in his oral evidence: there were no non-circumvent agreements at all with some of those counterparties, nor with Tricorona. Further, under the IVC/Barclays Confidentiality Agreement, IVC was obliged to notify Barclays as soon as possible:

> "if … we decide not to pursue the Possible Transaction or negotiations between us and [Tricorona] or its shareholders with respect to the Possible Transaction come to an end"

whereupon the exclusivity obligations would end. I return to the contractual and equitable effect of this later.

659. Ms Patel, despite knowing that, though Tricorona's management had confirmed the termination of their discussions with CFP, nevertheless CFP was still working on Project Arctic Fox, chose not to inform Mr Holmgren of that. Mr Holmgren said this:

> "Q. … I'm asking you to agree that the status of Arctic Fox as far as Barclays and CF Partners were concerned was relevant, wasn't it, to what she could discuss with you at this time?
>
> A. Yes. If Barclays believed and they were still working on Arctic Fox, if CF Partners had told Barclays that they were working on Arctic Fox, that project would still be ongoing in the minds of Barclays.
>
> Q. Yes and I suggest you are probably a bit surprised to see that Arctic Fox continued as far as Barclays were concerned at this time, aren't you?
>
> A. Yes, I am surprised because I thought it was terminated.
>
> Q. I understand, Mr Holmgren. That's very fair. I suggest that you were led to believe by Ms Patel at this time that Project Arctic Fox was over as far as Barclays was concerned.

> A. That could be an interpretation, if she knew that it was continuing.
>
> Q. And you would have expected Ms Patel to tell you at this time, wouldn't you, if Barclays was still engaged upon Arctic Fox?
>
> A. Yes, the same way that I had told Ms Patel.
>
> Q. She ought to have told you how things stood at Barclays' e[nd], shouldn't she?
>
> A. Yes, I would have expected that."

660. After Mr Navon's email of 22 January 2009, but still at a time before she had received any confirmation of any relaxation or clarification of the exclusivity obligations as she at that time perceived them, and notwithstanding (or in one sense perhaps because of) Dr Swift's warnings, on 23 January Ms Patel telephoned Mr Holmgren from her office (where there was of course a taped landline) on her Blackberry (which was not a taped line). In her first witness statement she had denied such contact; she only apparently remembered the call after being shown her mobile account records, as she explained in her third witness statement served just before she was called to the witness box. Such a lapse of memory is understandable. However, I did not find her reasons for using a mobile or her account of the call convincing: and her demeanour when cross-examined reinforced my doubts.

661. The relevant call lasted just under eight minutes. Ms Patel was unable to recall what they had discussed but was definite that their conversation was general ("what traders in the market were doing") and did not relate to specifics, still less to portfolio purchase or monetisation. She reasoned that (a) she knew she could not properly discuss specifics and would have told him so and (b) it as it were stood to reason, because "anyone who had even contemplated a portfolio monetisation structure in 2008 when the market was significantly higher had put all those conversations on hold at the beginning of 2009".

662. It is not possible to know quite what was discussed; but I infer from (a) her choice of an untaped line (a form of communication she had implicitly indicated to Dr Swift she would use to avoid difficulties, to which Dr Swift raised no objection), (b) the length of the call, (c) her uncharacteristic reluctance to say what had been discussed contrasted with the emphatic insistence on what she had not discussed, (d) her tendency to disregard restrictions when it suited her and there was no record of her conduct and (e) the inherent probabilities given the timing of the call and what had preceded it, that their conversation did extend to discussion of what sort of business relationship might be possible now that the fox was, in Mr Holmgren's perception, formally pronounced dead.

*CFP clarifies that its understanding is that "day-to-day hedging" is permissible*

663. On 27 January 2009, Mr Navon emailed Dr Swift and Mr Zintl to follow up on the conversation between them on 14 January 2009 (see paragraph [638] above) when

Barclays had asked CFP either for a signed mandate or a release from any obligation of exclusivity in order to enable it to discuss day-to-day business with Tricorona (which, as indicated above, it had perceived it could not under the terms of the IVC/Barclays Confidentiality Agreement). Mr Navon made clear that CFP wanted to continue to pursue Project Arctic Fox. Though he did not commit to signing a mandate, he did confirm some flexibility as regards the ambit of the exclusivity restriction. His email (which he sent to Dr Swift and Mr Zintl (and not Ms Patel, though Mr Zintl forwarded it to her)) read (in material part) as follows:

> "We are making good progress on project Carbonara. We have important meeting this week and next week regarding equity commitments from leading market participants. We will provide you with feedback post these meetings and remain confident that a deal is there to be done.
>
> We understand that Tricorona has approached Barclays in order to initiate discussions on hedging the company's carbon exposure. As discussed on our call, we have no objection for you to have direct contact with Tricorona on their hedging requirements. The intention of the NDA is not to conflict you on conducting day-to-day business with the Company.
>
> The only consideration is that we continue to work on project Carbonara and want to avoid the situation that you, as a result of the hedging discussions, become conflicted.
>
> We will continue to provide you with complete transparency on where we stand so that you can make an informed decision on the level of contact with Tricorona.
>
> We have spoken to Vipin at IV Capital who agrees with the above position."

664. On the same day, Mr Rassmuson reassured Mr von Zweigbergk that nothing prevented Tricorona from day-to-day hedging with these counterparties:

> "… we can confirm that there is nothing in the NDAs that would prohibit the counterparties in entering into discussions with Tricorona on transactions that are not subject of the NDA, for instance day-to-day hedging requirements. In any event that is something for the counterparty to determine."

665. Mr Zintl responded by email on 29 January 2009 (which I note he did circulate to Ms Patel as well also as Mr Smith) thanking Mr Navon for the clarification and confirming that Barclays "will not conflict themselves in any way from working with you…".

666. Neither Mr Navon nor Mr Rassmuson explained at the time exactly what he meant by "day-to-day hedging requirements" or at what point such discussions might lead to Barclays becoming "conflicted" from working on Project Carbonara. However, there was general agreement in the evidence of Mr Zintl and Mr Navon that the gist of the

restriction was that hedging or forward sales which were in line with previous day-to-day trading to safeguard rather than monetise the portfolio were acceptable in principle, but that CFP did not want the Tricorona Portfolio to be hedged or bought to such an extent as to strip out value from the portfolio or undermine the arbitrage opportunity that Project Arctic Fox was designed to exploit.

667. Also on about 27 January 2009, an event of considerable longer-term significance occurred: Ms Patel took over from Mr Garcia the responsibility within Barclays for its relationship with Tricorona. Mr Garcia had been left with that responsibility after Ms Patel had been wall-crossed. Ms Patel remained wall-crossed, and under Barclays' procedure would remain so unless and until formally re-crossed. That Ms Patel should thus contrive to, and in fact did, operate on both sides of the wall was quite extraordinary, unless of course permitted.

668. As to that, and as foreshadowed earlier, Barclays' case in this regard came to rely almost entirely on Mr Zintl's oral evidence, during the course of his cross-examination (he had made no mention of it previously), that Mr Navon was aware that Ms Patel would be involved in "day-to-day" hedging discussions, and gave his consent. His evidence was:

> "Q. Is it your position that it was up to Harshika Patel to decide whether something was or wasn't conflicting with CF Partners' interest in the deal?
>
> A. Yes, that was my view.
>
> Q. And you didn't think that Barclays should have consulted with CF Partners as to whether they thought there was a conflict of interest in that respect?
>
> A. We did consult with CF Partners in that period of time where we -- I don't know who was pushing for this, where we called them and said, "We have had contact with the target, they really want to hedge with us. Harshika has received an email from God knows whom, or has been called and she really wants to hedge."
>
> …
>
> Q. The fact that Mr Navon is saying you can do day-to-day hedging or business, what he has in mind there is that people in Barclays carbon team on the public side that know nothing about Carbonara deal because it is the other side of the wall, they can do day-to-day business with Tricorona because by definition they are not going to be infected with any of the deal information; that's what he is saying there, isn't he?
>
> A. I have no idea what he meant by that, but this email came in response of a discussion I had, multiple discussions with Jonathan Navon where I said "Harshika Patel has been approached by the company, they want to hedge. She would

> like to hedge with them." So the way you interpret this, sort of somebody else from the public side needs to do this sort of trading, I don't know.
>
> ...
>
> A. No and I have not said that now and in fact this discussion about should that be anybody from the public side, or Harshika Patel, we never had any discussion like that because from my understanding and I assume also from CF Partners' understanding, it was clear that these transactions would be carried out by Harshika Patel, because they would ultimately be in the interests of CF Partners.
>
> MR JUSTICE HILDYARD: I'm sorry, Mr Zintl, but you said -- and I would like to be clear about this -- you said that in your multiple discussions -- I thought you said you only had four --
>
> A. Meetings I said.
>
> MR JUSTICE HILDYARD: Meetings, right. "Harshika Patel has been approached by the company, they want to hedge. She would like to hedge with them." Is it your evidence that you said to Mr Navon that Ms Patel personally would want to hedge with Tricorona?
>
> A. That's my memory, yes."

669. Mr Zintl had not suggested any of this in his witness statement. Its potential importance is obvious. It was urged by the Defendants that there is no reason not to accept this evidence. Mr Zintl left Barclays in February 2009, more than four years ago and before Project Pomodoro. They reason that he had no reason to give false evidence and no reason to wish to assist Barclays, and there is no reason to doubt his recollection. Mr Zintl knew that Ms Patel had been in touch with Mr Holmgren and knew that it was Ms Patel who was pressing for the release so that she could contact Tricorona. He did not himself see anything objectionable in her involvement. The Defendants submitted that it is inherently likely therefore that Ms Patel's name would have been mentioned in one or both of the conversations between Mr Zintl and Mr Navon on 14 and 27 January 2009. The latter call was noted at the time as a long one.

670. CFP rejected that. It was submitted on its behalf that it is quite plain from his evidence as a whole that Mr Zintl did not say to Mr Navon that Ms Patel wanted personally to be the individual having the hedging discussions with Tricorona. CFP pointed out that the allegation had not appeared in either of Mr Zintl's two witness statements, the second of which was specifically concerned with the scope of the Exclusivity Release. Ms Patel did not suggest any such permission in any of her witness statements: in her first witness statement she states that "CF Partners had no objection to Barclays having direct contact with Tricorona on their hedging requirements" [my emphasis]: had the permission been personal she would surely have said so. Further, it was never put to Mr Navon in cross-examination that Mr

Zintl told him Ms Patel herself would be carrying out the day-to-day hedging, suggesting that this evidence came out of the blue.

671. I was not persuaded by Mr Zintl's evidence in this respect. Whatever he may have come to believe, I do not think it credible that he told Mr Navon that Carbonara deal members, in particular Ms Patel, would be carrying out "day-to-day" hedging with the target on the other side of the information barrier or Chinese Wall.

672. I think that the key lies in Mr Zintl's answer that what was said depended on the way Mr Navon interpreted it, as to which he said "I don't know". I think that the truth is that, though Mr Zintl may have told Mr Navon that Tricorona's point of contact was Ms Patel, and that she was keen for Tricorona and Barclays to do some day-to-day hedging, he never spelt out to Mr Navon that it was envisaged that she (or some other individual in the deal team) would personally be involved in those dealings. I so find.

673. I accept CFP's contention that, as explained above, it had not even agreed to individuals within the Carbonara deal team pursuing "day-to-day" hedging activities with the target, let alone the strategic partnership upon which Ms Patel embarked.

674. Furthermore, and as indicated above, I find that in any event, and though the immediate urgency might have been to explore hedging, Ms Patel and Mr Holmgren had no intention by this stage of limiting their discussions and objectives to day-to-day hedging requirements such as Mr Garcia might have been left to undertake. That Ms Patel chose this time to replace Mr Garcia is not a coincidence: in my view, it is consistent with, and reinforces, my conclusion that Barclays and the Tricorona Management were by now looking to explore much more extensive transactions than Mr Garcia as a day-to-day trader would have been charged with. I shall return to this later also.

675. I should note also that it was common ground that in sanctioning day-to-day dealings of a limited nature, CFP was not thereby releasing Barclays from, or diluting, its confidentiality obligations.

676. One other aspect of this phase that I should record is the position as between CFP and Volati. By early January 2009, Mr Navon and Mr Rassmuson had concluded that they should assume that Volati was "out" as a potential equity participant: email exchanges between them on 7 January 2009 make that clear. However, both of them were adamant that this did not mean that their negotiations were over: only that from then on CFP was looking for equity from others, and to buy Volati out.

677. Barclays made the point that this would have increased by some £25 million the equity required and would have altered the shape of the deal considerably. Barclays also pointed out that there is no sign of CFP seeking to negotiate an exit price with Volati after that date. I would accept that CFP's negotiations with Volati hung by a thread; but not that they were over so completely as to trigger the obligation to notify imposed by clause 6; and I note that even after Mr Perlhagen had made clear (as he did in December 2008) that Volati would not want to participate in the equity, he did not exclude further negotiation and expressly stated in an email to Mr Rassmuson that he hoped "you still will be able to move on with your plans". Volati wanted out: but Project Arctic Fox still held some prospect of the exit premium it now sought.

*Summary of position at end of January 2009*

678. I would summarise the state between the parties as at 29 January 2009 as follows:

(1) Tricorona's management considered the fox to be dead;

(2) CFP was not prepared to declare it so, and was continuing to work on the project even though it agreed to the termination of the Memorandum of Understanding and recognised that Tricorona's management would no longer be seeking to participate in the deal;

(3) Volati did not wish to participate in the equity of any new venture or LBO vehicle either, and were looking to exit at a premium;

(4) Barclays had no belief in or attachment to the project but recognised it could not unilaterally withdraw: it had, however, secured CFP's clarification that it could have direct contact with Tricorona as to its day-to-day hedging requirements, provided that nothing should be done to undermine the rationale or implementation of Project Arctic Fox;

(5) CFP had not been asked for and had not given its approval to Ms Patel or any other member of the deal team being the point of contact with Tricorona for that purpose;

(6) Ms Patel and Mr Holmgren had established the joint wish and foundations for a strategic relationship; and they had fixed upon a formula which ostensibly permitted its development under the banner of day-to-day hedging pending any more final termination of the project;

(7) Ms Patel had arranged to take over the direct trading relationship herself, replacing Mr Garcia, in preparation for the extension of that relationship beyond ordinary day-to-day trading.

*Hedging discussions between Barclays and Tricorona: end of January to March 2009*

679. The next phase of the relationship between Barclays and Tricorona focuses on the hedging discussions between Barclays and Tricorona from the beginning of February 2009 until March 2009. There is a sharp contrast between CFP's depiction and the Defendants' depiction of the relevant events.

680. CFP contended that Ms Patel almost immediately sought to engage Tricorona in a broader strategic partnership under the guise of "day-to-day hedging"; the Defendants contend that she had no such plans and entered into no such broader discussions.

681. As to this phase: Ms Patel was personally and directly involved from the outset; engaging and energetic, she quickly forged a good relationship with the Tricorona Management as their "favourite person from Barclays".

682. Having obtained clearance from Mr Zintl, she immediately contacted Mr Holmgren to arrange a meeting in Stockholm to discuss "risk management opportunities": she

suggested bringing "our head of carbon research…so he can maybe give you, and a couple of the other team members, if you'd like, an update on what we see is going on in the commodities and the carbon spectrum more broadly…then we can sit down and discuss more risk management opportunities".

683. On 4 February 2009 Ms Patel emailed Mr Holmgren with some specific "trade ideas": these involved (a) spot trading of issued CERs and (b) trading on the difference between the spot and forward price by selling spot and buying back forward (to take advantage of unusual market conditions, where the forward price is lower than the expected spot price); this was consistent with day-to-day hedging and did not involve "taking raisins from the cake" (the raisins being the hidden value in pCERs) and no primary sales or purchases were mentioned.

684. On 11 February 2009 Tricorona entered into a spot sale to Barclays of a total of 190,000 issued CERs in three batches. There is no suggestion that that was anything other than a day-to-day trade and no other complaint about it. As it turned out, that was the sole executed transaction between Tricorona and Barclays between 29 January and 7 April 2009, reinforcing my sense that the true agenda was to develop a relationship rather than establish (relatively) small transactions.

685. On 10 February 2009, Ms Patel, Mr Martens and Mr Sikorski (a Director in Barclays' Carbon Market Research) went to Stockholm to visit Tricorona. Barclays did not inform CFP of the visit, either before or after it, for which no excuse was suggested, nor seems available.

686. According to Ms Patel, they discussed 'entering into an ISDA Master Agreement so that we could engage in foreign exchange hedging and forward selling', but this does not assist the Defendants: as Mr Redshaw said, the fact that an ISDA and credit support annex are put in place says nothing about the regularity of the trading. An ISDA facilitates transactions; it says nothing about the scale of the transactions.

687. Ms Patel's evidence was that "all Tricorona acknowledged in that meeting is: we are underhedged, we need to do a lot more. We have got board permission to do a lot more".

688. On 11 February 2009, the day after the Stockholm meeting, Mr Holmgren appears to have revealed the scope of the possibilities discussed in an email Ms Patel:

> "Under normal circumstances we would have up to 30-40% of our expected volume hedged (up to 50% of any individual year). Currently only 7 million CERs are hedged."

689. The Defendants submitted that Mr Holmgren was not saying that he wanted to forward sell 30% to 40% of Tricorona's portfolio in one transaction or even immediately (which would plainly not have been day-to-day business) but wanted sales over a few years at Tricorona's normal annual forward selling rate of about 1.5 million CERs. I accept that: but the taster or teaser element is clear.

690. Mr Holmgren suggested to Ms Patel that Tricorona would potentially be interested in selling 20-25 million CERs, equivalent to the entire risk adjusted portfolio.[27] CFP contend that even if he was only indicating to Ms Patel the maximum figures, the fact he did so shows the scale of Ms Patel's (and his own) ambitions; although the Defendants dismiss this on the basis that all he was doing was to indicate a target to be achieved over a number of years and dependent on market conditions, again I accept that the figures were put forward to whet Ms Patel's appetite as they had whetted Mr Holmgren's own.

691. On 12 February, Mr Oo sent an email to Mr Long (who was working with Ms Patel and Mr Martens), copied to Ms Patel, that appears to confirm that the discussions in Stockholm did extend to broader possibilities than day-to-day trading. He noted that:

> "As we are trying to explore more long term and strategic business with Barclays, we are happy to allow you the time to evaluate our projects and go through the necessary internal procedures you may have.
>
> What would be useful for me would be to have your initial thoughts on the projects presented and your timeline for a decision."

692. Ms Patel sought to depict this under cross-examination as simply referring to "setting out all the options for them on risk management for their CERs…", and the reference to more extensive strategic business as indicating only that "should we do a very good job….Tricorona will view us as a go-to bank for these services"; this struck me as resourceful, but not compelling; my impression was reinforced by Mr Martens' apparent embarrassment, and not dispelled by Mr Holmgren either; and I accept CFP's characterisation of Mr Oo's email record, as indeed did Mr Redshaw.

693. Mr Holmgren also attached to his email a research report by a well-known Swedish investment bank called Carnegie Securities ("the Carnegie report"), suggesting that the market had considerably undervalued Tricorona. CFP suggested that the obvious reason he sent it was to suggest that there was an arbitrage opportunity in relation to Tricorona, there being no reason to send an equity analyst's report if all that was contemplated was day-to-day hedging. Mr Holmgren, when cross-examined about this, explained that he sent it to provide a useful summary of information about Tricorona, largely for the benefit of Barclays' Credit Department and in order to "kick-start the ISDA". More likely, to my mind, is that it was supplied as being of general background relevance however the relationship between Tricorona and Barclays developed.

694. On 13 February 2009, Ms Patel informed Mr Holmgren of the discussion with GFRM and said that "[a]t this stage" she had mentioned foreign exchange and CER hedging. She set out the strategy agreed with GFRM. The email sets out a strategy that goes beyond day-to-day activity. To take one example, Ms Patel was interested in how much primary CER price exposure Tricorona would hedge through the secondary

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[27] Mr Holmgren said in re-examination that in the email he was "saying that there is some flexibility here and I'm giving [Ms Patel] a range of what we may want to hedge in the future", but that he would "never sell our entire portfolio": but the point was that the sorts of figures that he was discussing with Ms Patel were far in excess of any volumes of forward sales that Tricorona had done previously.

markets. Mr Holmgren replied: the discussion focused on hedging tens of millions of tonnes of CERs.

695. On 16 February 2009, Ms Patel and Mr Holmgren discussed further Tricorona raising money by Barclays lending against the CER portfolio.

696. On 17 February 2009, Barclays and Tricorona had a conference call. The agenda was:

> "Background to conference call (Harshika)
>
> Overview of transaction opportunities between Barclays + Tricorona (Harshika)
>
> Tricorona business + financial update and feedback on credit questions (Christer)
>
> Transaction idea brainstorm – FX and Emissions (All)
>
> Next steps..."

697. The questions asked by GFRM of Tricorona went far beyond enquiries about day-to-day activities. In his evidence, Mr Martens did not recall what "transaction opportunities" meant. The reality is that nothing was off limits for discussions with Tricorona as far as Barclays was concerned.[28] The range of longer strategic ideas proposed by Ms Patel, including guaranteed volume hedges, was set out in an email she sent in advance of the call. Mr Holmgren agreed that as far as Tricorona was concerned "anything was permissible" for discussion, including emissions structuring and matters well beyond day-to-day trading.

698. Following the call, Ms Patel sent a summary of next steps, including:

> "... Novation of guaranteed volume hedges
>
> Christer to send Harshika an overview of the trades and counterparty credit ratings so we can explore the novation of the hedges to Barclays. Thus trade would crystallise the P&L for Tricorona."

She would come up with the structure and pricing. These financing transactions were prohibited by clause 6 of the IVC/Barclays Confidentiality Agreement. Some idea of the scale of the trades envisaged by Ms Patel at this time may be gleaned from review of her discussions with Credit. For example, on 25 February 2009, Ms Patel discussed the topic of "Tricorona credit" with GFRM. The trades concerned significant volumes of CERs (amounting to millions of tonnes), and had potential future credit exposure (or PFE) for Barclays of tens of millions of US dollars.

699. Also at about the same time, Barclays (again by email from Ms Patel) put forward a proposal to novate Tricorona's three forward hedge contracts with certain Japanese counterparties (each of which was back-to-back with an ERPA under which Tricorona had purchased the relevant pCERs). The fall in the carbon price meant that these sale

[28] Mr Martens could not recall what the restrictions were.

contracts were significantly in-the-money to Tricorona. The idea was to crystallise their value and thereby raise cash "for purchases, margin for hedging as required etc". As Mr Martens explained in an email to Mr Holmgren, the effect would be to leave the ERPA unhedged, and thus increase the size of Tricorona's unhedged portfolio (which came to be referred to as "the raisins in the cake"). Since it did not result in taking raisins from the Tricorona cake, the Defendants portrayed this as entirely consistent with the objectives of Project Arctic Fox. CFP, on the other hand, characterised the proposed sales as involving the monetisation of the Tricorona Portfolio, and thus as "off bounds" (as Ms Patel agreed they would be if that was their proper characterisation). Ms Patel drew a distinction, however, between monetisation of Tricorona's CDM portfolio and the realisation of value in Tricorona's hedged contracts. I think there is a distinction; but not a relevant one in the context: for I accept CFP's submission that the proposal was not, or at least went beyond any reasonable interpretation of, "day-to-day hedging": it involved buying and selling, or monetising, a substantial part of Tricorona's portfolio.

700. Further, on 27 February 2009, Ms Patel spoke again to Mr Holmgren, to explain further the sorts of monetisation ideas she had in mind:

> "... there are two ways that we do business with people like you, right. Number one, we cash collateralise...Number two, we give you a credit line based on a portfolio of CDM transactions that you've done ... . It's the idea that we talked about when we came to see you, which you've already contemplated, which is novating ...."

701. CFP contended that Ms Patel's conversation was not limited to the novation of the Japanese contracts, but encompassed far wider monetisation plans, which involved Tricorona's portfolio and depicted this as a further indication of an ever-increasing proposed programme going well beyond day-to-day hedging. The Defendants rejected this and emphasised that the proposal was confined to the three Japanese forward hedge contracts. No other similar contracts were suggested; and although I think the proposal seemed more open-ended I do not think that of itself it represents any further expansion of Barclays' objectives. Further, at this time the Tricorona Management was also engaged in a project for a management buy-out of Tricorona known within Tricorona as Project Icebreaker (as to which see further below, including in paragraphs 1026 and 1027).

*Summary of position as at end of February 2009*

702. In summary, as at the end of February 2009:

i) Ms Patel and the Tricorona Management had built on the engagement established in January to forge a close business relationship.

ii) The Tricorona Management's understanding was that Project Arctic Fox was not proceeding, and did not consider that there were any restrictions upon Tricorona as to what they could talk to Barclays about.

iii) No deals or transactions other than spot trades had been undertaken; but Ms Patel had put forward a number of proposals that went beyond in size or nature ordinary "day-to-day hedging": her ultimate objective was the "raisins".

***The path to termination of exclusivity***

703. In CFP's Closing Submissions it is stated as follows:

> "Cross-examination has exposed the deliberate and cynical attempt by Barclays and Tricorona in spring 2009 to work together to cut out CF Partners so that Barclays could pursue its strategic partnership with Tricorona.
>
> This partnership was a conscious attempt by Barclays to extract value from Tricorona's CER portfolio based on confidential information provided by CFP in Arctic Fox. The labels used by the Defendants to explain away these activities, such as 'potential carbon markets hedging business' or 'potential hedging transactions' do not fairly reflect the extent of the relationship that Ms Patel had developed with Tricorona to take advantage of the opportunity that was there 'right now'."

704. The Defendants reject this. They deny that they engaged in any transactions or discussions prior to April 2009 and the Exclusivity Release which did not fall within the permitted "day-to-day hedging transactions" and that Barclays eventually obtained termination of any exclusive commitment to CFP for the simple reason that Arctic Fox was by then no longer capable of being implemented. As Mr Holmgren put it in his oral evidence:

> "Q. Isn't the reality, Mr Holmgren, that CF Partners did not appreciate the strategic dialogue which you and Ms Patel had by this stage struck up? Isn't that the explanation, that CF Partners continued to work on Project Arctic Fox because they didn't realise that you and Ms Patel by this stage had plans to cut them out? That's right, isn't it?
>
> A. There was no such plan of cutting them out of anything. They had been cut out by Tricorona management when they confirmed that the Arctic Fox project was terminated."

705. As to this third phase:

(1) Ms Patel and Mr Holmgren continued to correspond during March 2009 about the currency hedging that Tricorona wanted to do and about the finalisation of the ISDA documentation.

(2) As the Defendants stressed, and I accept, Barclays proposed only one specific portfolio sale in the course of this phase, which was a forward sale of 2.5m CERs in December 2009. Given that Mr Martens described a

proposed purchase by Barclays of 1m CERs in 2007 as a "very big trade" and accepted in evidence that a trade of 1m CERs in 2009 "would have been a considerable deal", I do not accept the Defendants' description of this as "modest", though it is right to record that in the event the proposal was not pursued.

(3) It is also right to record that actual trading between Barclays and Tricorona remained at minimal levels; and there is no evidence that any of Barclays' trade proposals involved Vattenfall, Eon, Electrabel, Shell, ADB or any other identified client of CFP.

(4) However, Ms Patel maintained frequent contact with both Mr Holmgren and Mr Oo, and I accept the inference that these discussions confirmed and conveyed, albeit still in only general terms, Ms Patel's enthusiasm for developing a "strategic relationship".

(5) Ms Patel expressed to Mr Holmgren her frustration in this connection that "the M&A advisory guys" who signed the IVC/Barclays Confidentiality Agreement "didn't actually realise that me and the carbon team here were looking to try and build up more of a, you know, business with you".

(6) Ms Patel's conversations with Dr Swift betray, to my mind, that Ms Patel had no intention of paying more than lip service to any restrictions in that agreement. Although typically more cautious, and still anxious that Barclays "should not burn our bridges" (unlike Ms Patel, who said to Dr Swift that she found the notion that Carbonara could be made to work as "frankly hilarious"), she was not yet able to treat Project Arctic Fox as at an end. It appears that Dr Swift went along with the charade. The following extract from their telephone conversation on 9 March 2009, in which they discussed the issue of exclusivity, seems to me to illustrate this:

> "AS: …we have to be careful via our exclusivity, but I think there's an understanding.
>
> HP: Risk management, we haven't talked about anything – don't say anything – there you go.
>
> AS: OK, well, look – keep me informed. Keep me informed on that one."

(7) That they both understood that Ms Patel was acting impermissibly, or at least dangerously, both in the sense of conducting business on both sides of the wall and in the nature of the business she was undertaking, seems to be given further confirmation by an exchange on the telephone with Dr Swift on 11 March 2009:

> "AS: What opportunities do Target [Tricorona] see then?
>
> HP: Apparently they want us to loop us in to some discussions they're having.

AS: On?

HP: Like I said –

AS: Buying?

HP: - I couldn't – well I was on a taped line. I didn't want to say anything –

AS: Okay, okay.

HP: - for obvious reasons, Angela.

AS: Okay, understood. Very wise, prudent, prudent.

HP: Do you know what I mean?

AS: Absolutely.

HP: I said "You know what right now I can talk to you about risk management. I can't talk to you about the transaction."

AS: Okay.

HP: But like, yeah, he said, "We – there are other transactions that they're looking at."

AS: Okay. So let me just reply all.

HP: Yeah, there might be some work in there for Nicolas [Zintl] and his team after all.

AS: Yeah, no. Nicolas has left the company…"

(8) It seems to me likely that amongst the transactions, or possibly the transaction, which the Tricorona Management wanted to involve Barclays in was Tricorona's plan, having failed to agree a merger in Meltwater, to acquire EcoSecurities in Project Clearwater. Project Clearwater required, for its implementation, substantial borrowings (EcoSecurities being larger than Tricorona). Tricorona's plan was to raise money by monetising the Tricorona Portfolio: that being the basic idea, of course, of Project Arctic Fox. Project Clearwater was inimical to Project Arctic Fox.

(9) Although Mr Holmgren did not initially disclose the target (EcoSecurities) to Barclays, in the conversation with Ms Patel on 11 March 2009, he did not disguise its derivative nature. He described the plan to Ms Patel as something that "may tie into some of the stuff that we discussed very early on", and under cross-examination he admitted that he was referring back to what Barclays had learned in the course of Project Arctic Fox:

> "Q. Yes. She says "Yeah" and you say: " ... it may tie into some of the stuff that we discussed very early on." Can you see that?
>
> A. Yes.
>
> Q. And you are about to discuss with her, aren't you, Clearwater?
>
> A. Correct.
>
> Q. When you say "it ties into the stuff we discussed very early on", what did you mean by "very early on"?
>
> A. This relates to the Arctic Fox process whereby they had looked at our portfolio and I knew then that since they have looked at our portfolio and they were willing to lend against portfolios, this would potentially be something they will be interested in to do."

(10) In response to Ms Patel's enquiry, he told her that the Arctic Fox transaction was not going ahead in a structure that involved CFP. Ms Patel explicitly raised whether Barclays should "get out of that – non compete with them because you'd like to talk to us about other stuff?". Mr Holmgren assumed that Barclays would have an interest in dealing with Tricorona "since you were interested ... in the beginning", again a reference back to the interest Barclays had derived from Arctic Fox: Ms Patel said "absolutely".

(11) The involvement called for would not be capable of being disguised by broad descriptions such as "forward hedging": it would require any exclusivity obligation to be clearly released: and that became the focus of Ms Patel's efforts.

*Summary of prospects for Project Arctic Fox by April 2009*

706. Before turning to the history of the negotiations with respect to the Exclusivity Release and the legal questions to which they have given rise, it may be helpful (both for the purpose of putting the Exclusivity Release in context and for the purpose of understanding the activities of Barclays and Tricorona in the period from April to September 2009 which eventually culminated in Project Pomodoro) to pause to summarise what were the prospects for Project Arctic Fox at the time of the Exclusivity Release.

707. The summary is also of relevance in considering whether the business opportunity that Project Arctic Fox comprised (in essence to take Tricorona private and over time monetise its portfolio, whilst at the same time retaining a long term investment to build a full carbon markets business) retained any commercial value.

708. Mr Rassmuson observed in his first witness statement that Project Arctic Fox "had many moving parts because of its complexity" but "the deal's basic components remained the same throughout". Perhaps the clearest way of assessing its prospects by April 2009 is by reference to the components he identified.

709. As to those components:

(1) Although it might have been justified (because of the value of the arbitrage opportunity) and accomplished even as a contested take-over, CFP's much preferred route of an amicable LBO required the co-operation of the Tricorona Management. That was the origin and purpose of the Memorandum of Understanding (July 2008). There is no doubt that by April 2009, and indeed by January 2009, a consensual or friendly LBO was no longer on the cards: first, because their personal relationships (especially between Mr Navon and Mr von Zweigbergk) had badly deteriorated; and secondly, because the Tricorona Management viewed the prospects for Project Arctic Fox, and the utility of any association with CFP, as dependent on CFP being able to persuade the majority shareholder Volati to participate in the transaction (whether retaining its shareholding or its sale). Once it seemed clear that CFP had no traction with Volati and that Volati would not participate, Tricorona's management considered that "the fox was dead".

(2) By early January 2009 at the latest, and in Mr Navon's own words, Volati was "out": Volati was not interested in participating in Tricorona after an acquisition by CFP, and its price for sale would have to be offered to all shareholders and thus be likely to diminish or destroy the arbitrage and undermine the economics of the deal as a whole. Further, even if Volati could be persuaded to sell, that would increase the level of equity participation to replace their interest.

(3) Mr Rassmuson recognised that CFP needed to secure a very large amount of money in order to leverage the acquisition in what evolved into a very difficult lending environment after the collapse of Lehman Brothers on 15 September 2008; and that this was always going to be the hardest and most challenging part of the deal, especially given scepticism about, and poor understanding in bank credit departments of, the asset class available for security. It was always clear that the pool of banks interested in this market sector was very small, and by the end of 2008 it was evident that, of two possible candidates, SEB had put the deal on hold and Barclays' Credit Department remained extremely sceptical. Given that Barclays did eventually proceed itself, however, it would, I consider, be wrong to dismiss altogether the prospects of finance; but Barclays could fund the acquisition itself, which is a very different proposition.

(4) Finding equity investors was always also bound to be a challenge, especially if Volati were not prepared to continue as equity participants: CFP did not itself have sufficient resources. IVC was a possibility, and its founding director (with Mr Vipin Sareen), Mr Ramy Goldstein, is married to Mr Navon's sister and a close friend of his. Perhaps in part because of this close relationship, Mr Navon never presented a complete proposal; further, IVC had no experience in the carbon markets, so that the investment would have

been in a market sector in which it did not operate; so it is not easy to assess the prospect of its equity involvement, though it was of course more likely if markets improved. As to other potential equity providers, Mr Navon approached Daiwa, but they were not interested; Marubeni, who were initially positive, but whose interest waned with the declining markets; CCC, to whom Mr Navon made an investment pitch in January 2009 which did not come to anything; and E.ON who signed an NDA with CFP at the end of March 2009, but whose initial interest came to nought.

(5) Although CFP had procured Expressions of Interest from a number of potential purchasers, these were on the premise of (a) having authority from Tricorona to sell and (b) availability of full, accurate and up-to-date information being provided. Once CFP had lost the support of the Tricorona Management, the premise could not be satisfied.

(6) Lastly, any arbitrage prospect is vulnerable to changes in the market. At the end of 2008, declining carbon markets had eroded the opportunity. At the end of April 2009, Mr Navon's view was still that "the npv doesn't work" and Mr Glossop regarded Project Arctic Fox as CFP's lowest priority, to be pursued only if nothing else was available. During mid-2008, Mr Navon developed and regularly ran his Project Arctic Fox internal model. However, the last iteration of that model ever produced, so far as can be seen from the parties' disclosure, is that attached to CFP's email to Marubeni on 24 November 2008. That iteration showed the NPV of Tricorona's portfolio, on CFP's valuation, at €145m, only just above the likely acquisition price of €141m. CFP never dusted off and re-ran their valuation model after that. Nor has CFP put forward any case (beyond the assertion that it could well have become viable) as to when and in what circumstances the Arctic Fox transaction ever became economic or potentially profitable again.

(7) In short, by April 2009, the prospects for implementing Project Arctic Fox were slim if not negligible, at least if the carbon markets did not materially improve. Mr Navon's attitude is apparent from an exchange of emails between Mr Navon and Mr Rassmuson on 24 April 2009. Mr Rassmuson wrote:

> "Guys…this trade could make sense again of carbon markets rally…."

Mr Navon replied:

> "Sounds great on paper. Hard to implement. We don't have updated portfolio…the npv doesn't work and even if we could organise I think Karl and Niels would block.
>
> This trade only works if friendly…Ideally we need either Karl or Niels to want our involvement. You could call Karl but think it won't go anywhere."

***The negotiations with respect to the Exclusivity Release and its agreed terms: 21 March 2009 to 2 April 2009***

710. I turn to the negotiations preceding the Exclusivity Release, the history of which can I think be summarised as follows.

711. On 24 March 2009, Barclays (Ms Patel, Mr Lim and Dr Swift) and CFP (Mr Navon, Mr Rassmuson and Mr Glossop) had a conference call, described by Barclays as a "wrap-up" call.

712. The witness evidence in relation to the call can be summarised as follows:

(1) Mr Navon, not surprisingly, could not recall the precise words used, though he said that "what Barclays said was in line with the assurances given in Nicolas Zintl's email of 29 January. The agreement was very much that CF Partners was continuing to do the deal and Barclays was able to approach Tricorona to do day-to-day business, but not Arctic Fox type business."

I have to say that that evidence conveyed to me the impression of tenuous memory elaborated by reconstruction; and that impression, and my sense that his recollection had been coloured by wishful thinking fed by regret that he had not been more careful at the time, was not dispelled, but rather reinforced, by his oral evidence under cross-examination.

(2) Mr Rassmuson could "not recall the detail"; and although (and presumably for that reason) he was not cross-examined on his evidence that "I do remember that throughout our discussions in this period, Barclays stressed that it did not consider that day-to-day trading would conflict it from working with us on the Arctic Fox deal in the future and that it would continue to ensure that it would not conflict us in any way from working with us on Arctic Fox", that evidence is too general to demonstrate the engagement or commitment that CFP has to prove; and I note that in its Closing Submissions CFP did not refer to it.

(3) Ms Patel was silent on the call and said that she had no independent recollection of it. I accept CFP's contention that her silence was uncharacteristic of her (at least as far as my impression of her is concerned) and odd (since it was her conversations with Mr Holmgren that had focused Barclays' efforts for release of any obligation of exclusivity). It may be (as CFP also contended) that this was for fear of letting slip the dealings with Tricorona already commenced or envisaged. But her evidence does not take the matter forward materially.

(4) Mr Glossop did not give evidence. I do not think that raises or justifies any inferences one way or the other.

(5) Dr Swift's witness statement was expressed forcefully to the effect that "At no point during this call did we discuss Barclays and CF Partners entering into…any agreement imposing any further or new exclusivity obligations on Barclays…What in fact happened on the call…was that we asked to be released and CF Partners agreed, albeit reluctantly, to grant us a release". But

the weight to be attached to that is limited: she did not attend and could not be cross-examined.

(6) Mr Lim could only recall the discussion "in general terms". His cross-examination demonstrated that in reality his evidence was simply a reconstruction of the note he took.

713. That note, however, together with the confirmation subsequently sought by Mr Navon and provided in exactly the terms requested by Barclays, are, in my view, the firmest guide to what was agreed.

714. Mr Lim's note records:

> "We proposed terminating our exclusivity agreement with CFP.
>
> Client was reluctant to terminate and suggested they have found additional partners, although acknowledged that there wasn't going to be any transactions in the near term given market conditions.
>
> Client was concerned with us working for another party; we confirmed this was not the case.
>
> We stressed that we would be happy to re-engage should there appear to be a possible transaction.
>
> Client proposed a two weeks notice period; we compromised with a one week notice period.
>
> Discussion ended amicably; CFP would be interested to re-engage when markets improve."

715. In cross-examination, Mr Navon initially agreed that each of the bullet points in Mr Lim's note were accurate, including the statements that Barclays had proposed terminating exclusivity and that CFP had agreed a one-week notice period. He then sought to qualify this:

> "Q. So let's go to the penultimate bullet: "Client proposed ..." By client I think he means CFP: " ... proposed a two weeks notice period; we compromised with a one week notice period." So CFP proposed a two week notice period to terminate exclusivity and a compromise was reached on a one week notice period and that's what happened on the call, isn't it?
>
> A. That is correct.
>
> Q. So Barclays would give one week's notice to terminate exclusivity?
>
> A. That's correct. (Pause). Sorry, the one week notice was actually in relation to the mandate letter, sorry. We are talking about the mandate letter. So Barclays says to us, "We would

> like now to have a clear indication on whether or not you are going to sign the mandate letter or not", and we wanted a little bit more time because we felt that we could still do the deal. Barclays suggested one week, so we agreed to the one week."

716. I do not accept this explanation. The subject matter of the conversation, as Mr Navon accepted, was the termination of exclusivity. The mandate letter was still in draft and there was nothing to terminate. I agree with the Defendants' submission that the one-week notice period only makes sense if understood as giving CFP a week either to mandate Barclays or to release them. If in that period CFP did not mandate Barclays then Barclays' involvement would be at an end and exclusivity could be released.

717. This is also consistent with the fact that on 24 March 2009, barely three hours after the conference call with CFP, Ms Patel spoke to Mr Holmgren to convey the good news that unless the "clients" (i.e. CFP) said otherwise, "we are basically off the hook". She went on:

> "Like I said, I was actually on the call, I didn't say anything, number 1, and number 2 and I haven't spoken about any of our discussions, so obviously keeping everything confidential on both sides."

718. On the same day she emailed Mr Whitehead with an updated WIP list, noting that Mr Martens was assisting her to target opportunities. The email said:

> "I have gone through all the target areas in the bank we want to cover off with Jan-Willem to ensure we maximise opportunity here. I have asked Jan-Willem to send a list on email of the targets."

Her list said:[29]

> "Strategic Pipeline (Non flow deals & pitches which have been sent to Emissions Structuring clients)"
>
> ...
>
> Tricorona - Strategic Partnership e.g. novations, hedging strategy - FX, CER, EUA etc"

719. About a week after the call, Mr Lim emailed Mr Sareen and Mr Navon a letter headed "Termination of exclusivity", signed by Mr Hargreaves. Mr Navon looked at the letter quickly and nine minutes later forwarded it to Mr Sareen. Mr Navon informed Mr Sareen of his views and proposed approach, with which Mr Sareen agreed.

720. On 2 April 2009, Mr Navon sent a signed copy of the Exclusivity Release to Barclays. His email said:

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[29] For the further relevant documents in late March 2009, see CF Partners' Written Opening Submissions, para. 318(21).

> "For clarification and as discussed on our call, we are signing the Exclusivity Termination on the understanding that Barclays is not actively working on acquiring the CC Owner on its behalf or on the behalf of any third party as of the date of this Termination of Exclusivity agreement."

721. Mr Navon did not, however, refer to any understanding that the release would be limited to day-to-day business or that Barclays would not conflict itself from acting for CFP.

722. When Mr Navon's clarification was forwarded to Ms Patel, she immediately asked Mr Lim in an email of 2 April 2009:

> "What happens if carbonara do want to talk about another transaction?"

723. Mr Lim replied to Ms Patel by return, copying Dr Swift, and in terms that seem to me also indicate that Mr Lim well understood, without her spelling it out, that Ms Patel had in mind by this stage discussions about some form of MBO or LBO of Tricorona:

> "The exclusivity agreement precludes us advising specifically on the acquisition of CC Owner and financing of the portfolio. While the release technically removes such a prohibition, suspect it wouldn't go down too well with compliance or legal if we tried to advise on a transaction to buy CC owner (either on behalf of current mgmt or third party). Besides we did state to CFP that we were not."

724. Dr Swift added:

> "For the record, we are not currently discussing any situation with the Target at this date, so please relay to Jonathan in response that we are not currently working on any such activity on this Termination date. When Target reveals what they would like to discuss, we can assess with legal/compliance, as agreed."

725. On the basis discussed with Dr Swift, Barclays gave the confirmation precisely in the terms sought by Mr Navon in an email dated 6 April 2009:

> "We also confirm that Barclays Capital is not actively working on acquiring the CC Owner on its behalf or on the behalf of any third party as of the date of this Termination of Exclusivity agreement."

726. Ms Patel was then away out of the country on business in China and subsequently on holiday for a while, returning after Easter on 14 April 2009. She emailed Mr Holmgren:

> "Just to let you know that we have now received formal notification from CF Partners about the status of the transaction

> and therefore release of the exclusivity. However, per the terms of the release they have granted us we are not allowed to work with you [*sic*] another similar transaction without prior consent from them (but that consent cannot be unreasonably withheld) Therefore I have spoken to our Compliance department and if there is anything you would like to talk to us about in a similar regard - please let me know and we can discuss. The steps I have agreed with Compliance would be to get the background from you and then brief our Compliance department to assess how it fits with our release letter so that we can then secure the relevant extra release if it is relevant.
>
> Does that work for you? CF were unwilling in their release to agree a blanket release so we have to live with the above strategy unfortunately."

727. Ms Patel said that, looking back at this email and what went before it, she must have been mistaken in her recollection at the time of what had been agreed.

> "Q. And in this email that was sent to Mr Holmgren only some two or three weeks later you appear to be confirming that CF Partners were unwilling to agree a blanket release; that's right, isn't it?
>
> A. My Lord, that's exactly what the email would imply. However, having gone through my email audit trail between 24 March when the call happened and this I'm actually very clear on what we have agreed after the call, ie that it was a full release subject to us not working at that point in time on us being an acquirer or working on behalf of somebody else, but in-between that time I have gone to China on a big client trip, I have then gone on holiday and I have come back and in a rush, not -- forgotten what we had agreed and got my facts incorrect."

728. It was suggested in the Defendants' Closing Submissions that Ms Patel was simply, but understandably, mistaken, and over the course of her break away from work had probably "elevated [Mr Lim's] warning in her mind into a prohibition against engaging in such a project without CF Partners' consent". I accept that explanation, but with the reservation that I suspect that Ms Patel felt instinctively that it would not be commercially prudent or risk-free, either in terms of compliance or the law to prefer the words (which she may have forgotten) to the warning (which still resonated).

***The Exclusivity Release: the dispute as to its terms, intended meaning and effect***

729. The Exclusivity Release was dated 30 March 2009 and signed on behalf of CFP on 2 April 2009. Barclays originally contended otherwise: but it is now common ground that the agreement did not release Barclays from any duty of confidence that as at that

date continued to be owed by Barclays to CFP. The extent to which Barclays was otherwise permitted thereafter to deal with Tricorona is disputed.

730. That depends upon the terms of the release. I turn to consider the issue that arises as to the interpretation of the Exclusivity Release, and according to the resolution of that, CFP's alternative claims for its rectification, failing which, rescission.

731. Barclays contend that the terms of the letter dated 2 April 2009, which was headed "Termination of Exclusivity", was sent to CFP and signed by Mr Navon on its behalf (as well as on behalf of IVC), and which comprises the Exclusivity Release, admits of no equivocation. In particular, after referring to the IVC/Barclays Confidentiality Agreement and defining it as "the Agreement", its second to fifth paragraphs read as follows:

> "Paragraph 6 of the Agreement provides that Barcap will not, directly or indirectly, for a period of 18 months from the date of the Agreement, approach directly or indirectly the CC owner with a view to executing any transaction with the CC Owner the purpose of which is the financing of the CC Portfolio or the purchase of the CC Owner, unless IVC has consented in writing in advance to Barcap doing so (which consent shall not be unreasonably withheld or delayed). Paragraph 6 further sets out that should IVC decide not to pursue the Possible Transactions or negotiations between IVC and the CC Owner or its shareholders with respect to the Possible Transaction come to an end, then Barcap shall no longer be bound by the terms…of paragraph 6 of the Agreement.
>
> By signing below a copy of this letter agreement IVC and [CF Partners] hereby acknowledge and agree that i) IVC has consented in writing in accordance with the terms of paragraph 6 of the Agreement to releasing Barcap from the exclusivity terms therein and ii) Barcap shall no longer be bound by the obligations set out in paragraph 6 of the Agreement.
>
> IVC and [CF Partners] further acknowledge and agree, for the avoidance of doubt, that Barcap is no longer engaged by or providing any advice or assistance to IVC or [CF Partners] in connection with the Possible Transaction and, without prejudice to Barcap's obligations of confidentiality under and subject to the terms of the Agreement, that there are no duties (whether contractual, equitable or fiduciary) owed by Barcap to IVC or [CF Partners] that would prevent or restrict any part of Barcap or the wider Barclays group from carrying on any activity, including providing advisory, financing or any other investment banking services to any person (including [Tricorona]), or for its own account, in connection with the Possible Transaction or any other transaction involving [Tricorona], [its portfolio] or any other party.

> Without prejudice to the above, should IVC or CFP decide to renew their interest in the Possible Transaction or contemplate any other transaction, we would welcome the opportunity to discuss with you the possibility of our assisting you in such transaction, subject of course to Barcap's customary internal approvals at the relevant time."

732. As to the confirmation provided to Mr Navon (at his request) by Barclays on 6 April 2009 (see paragraph [725] above), Barclays insists that it is to be given no wider meaning than its words, strictly construed, convey: it is a statement of a position at that time, neither conveying nor implying any commitment for the future.

733. Barclays contends that that clarification (which was in exactly the form requested by Mr Navon) was "accurate, literally and in substance. Barclays was not working on acquiring Tricorona's portfolio, or any part of it, either by a share acquisition or directly. The discussions between Tricorona and Barclays at that stage were confined to FX hedging and EUA/CER swaps, with the possibility of unwinding and novating the Japanese forward sales in the future. There were no discussions about portfolio purchases."

734. More generally, Barclays contends that the agreement contended for by CFP and on which they rely as precluding Barclays from undertaking anything more than day-to-day hedging transactions of a size and nature such as not to impinge on Project Arctic Fox is "quite implausible". As it was put in paragraph 829 of the Defendants' Closing Submissions:

> "Barclays already had CF Partners' and IVC's written confirmation (by email) for day-to-day hedging discussions with Tricorona (which in any event was not prohibited by the IVC/Barclays Confidentiality Agreement). Barclays had been engaged in those discussions since the end of January 2009 and no one had suggested that there was any need for the confirmation to be formalised (which there was not). The objective of the 24 March 2009 call was to obtain a complete release from exclusivity from IVC so that Barclays could pursue an as yet unidentified project with Tricorona. If Mr Navon is right, then not only did Barclays fail to achieve that objective, but instead it took on a more onerous exclusivity obligation to a new party, CF Partners (in addition to IVC), of indefinite duration, that Barclays would never do any business with Tricorona that was not day-to-day business. Putting it another way, Barclays agreed to rule itself out from working on the Tricorona project when its wish to do so was the whole purpose of the call. That is absurd."

735. These points are all inter-linked; but in determining these disputed issues it is necessary to sort them into legal categories; I deal with them as follows:

(1) the substance and effect in law of the collateral exchanges between the parties;

(2) the proper interpretation of the Exclusivity Release (as presently formed);

(3) whether the Exclusivity Release failed to record fully and accurately the true agreement between the parties (taking into account their various exchanges), and if so whether and how it should be rectified;

(4) whether, alternatively, Barclays are estopped from relying on the Exclusivity Release as permitting it to approach Tricorona with a view to purchasing Tricorona on its own account;

(5) whether in the further alternative the Exclusivity Release is liable to be rescinded.

*(1) Substance and effect of collateral exchanges*

736. The essential questions as regards the collateral exchanges, as it seems to me, are:

(a) whether it was conveyed to CFP and was relied upon by it as an undertaking on the part of Barclays, as a condition of the release of clause 6 of the Exclusivity Agreement, that Barclays did not and would not interpret or rely on the Exclusivity Release as permitting it to work on acquiring Tricorona, whether for its own benefit or that of a third party (as Mr Navon stated was his understanding in his first Witness Statement);

(b) whether and if so to what effect the exchanges are admissible to and do inform the interpretation of the Exclusivity Release (and if so, with what effect); alternatively

(c) whether the exchanges give rise to a collateral contract, or an estoppel, or the right to rescind the Exclusivity Agreement.

737. CFP made quite clear the importance they attached to the exchanges. Mr Navon emphasised that he would "not have agreed to sign any release had I thought CF Partners or IVC would thereby be releasing Barclays to participate in an acquisition of Tricorona without involving CF Partners…".

738. However, whatever may be Mr Navon's perception now of what he understood then to have been the upshot of the discussions, I do not consider that either the discussions or the formal confirmation he requested of and was given by Barclays amounted to the clear engagement or undertaking that CFP now alleges.

739. I do not think there can safely be spelt out from either any engagement or commitment on the part of Barclays to restrict its relationship with Tricorona to day-to-day trading in the hope that Arctic Fox might be resuscitated. Furthermore, I consider it unlikely that Barclays would have agreed to the same restrictions as it had perceived itself to be subject to previously.

740. In short, I consider and find that even if the background discussions informed the Exclusivity Release they do not materially affect its interpretation, especially given the absence (as I see it) of ambiguity in the wording of the release.

*(2) Interpretation of Exclusivity Release (as presently formed)*

741. In my judgment, and in agreement with the position as put forward on behalf of the Defendants, the Exclusivity Release as presently formed is clear and unambiguous.

742. It (a) expressly released Barclays from the exclusivity terms imposed by the IVC/Barclays Confidentiality Agreement; (b) confirmed (for the avoidance of doubt) that BarCap was no longer being engaged by CFP (or IVC) in connection with Project Arctic Fox and owed CFP no duties (whether contractual, equitable or fiduciary) such as to restrict it in carrying on any activity, including providing its advisory, financing or other investment banking services to any person (including Tricorona); and (c) made clear that its release extended to activities "for its own account".

743. That last express release, enabling Barclays to carry on any activity with Tricorona for its own account, is, to my mind at least, in some ways a surprising one; and I have considered carefully whether there is anything in the words of the Exclusivity Release to restrict it (for example, to preclude Barclays doing the very transaction contemplated by Project Arctic Fox).

744. However, not only are the words of the operative paragraphs (3 and 4) clear; but also the express recital of the previous restriction in terms of precluding (without consent) Barclays seeking to purchase the CC Owner confirms (to my mind) that it was indeed the effect of the Exclusivity Release as drafted to permit such a purchase, even by Barclays on its own account.

745. I raised a question in the course of oral closing submissions, which I have further considered, whether the words acknowledging and agreeing, "for the avoidance of doubt", that Barclays is not to be prevented or restricted from "carrying on any activity, including providing advisory, financing or any other investment banking services to any person (including the CC Owner), or for its own account, in connection with the Possible Transaction or any other transaction involving the CC Owner, the CC Portfolio or any other party" extend to an activity involving nothing like an advisory, financing or other banking service. In other words, as Mr McQuater put it: whether any *ejusdem generis* argument might be tenable. I have concluded that no such argument is available: in my judgment, the words "for its own account" and the context preclude any such argument.

746. I have considered also whether the explicit recognition in the fifth paragraph of the Exclusivity Release of the possibility of CFP renewing its interest in pursuing the project or any other transaction, and of Barclays assisting it in that regard, signifies or constitutes an implied or implicit term that Barclays would not do anything of its own motion to negate that possibility (for example, by itself completing the project on its own account).

747. The classic formulation of such an implied term is that of Cockburn CJ in *Stirling v Maitland* (1864) 5 B & S 841:

> "I look on the law to be that if a party enters into an arrangement which can only take effect by reason of the continuance of a certain state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone that arrangement can be operative."

748. Though of antiquity, the formulation remains live; but it of course must yield to particular contexts and circumstances (see *Schindler v Northern Raincoat Co Ltd* [1960] 1 WLR 1038). I do not consider that in the present context and circumstances it has any application: the statement in the fifth paragraph of the Exclusivity Release cannot fairly be read as importing such an open-ended commitment or engagement. I read it as an expression of goodwill and the hope of future friendship, rather than a promise of marriage such as to prevent engagement to another.

749. Further, I have considered carefully whether, looking beyond the words (though they seem clear to me), the discussions which preceded the Exclusivity Release (which constitute part of the factual matrix in which the Release was concluded and are thus, in my view, admissible and relevant factors in its interpretation) support or compel any different interpretation.

750. In my view, they do not: if such exchanges are to alter the effect of what the parties agreed it can only, in my judgment, be by way of collateral contract, rectification or estoppel: and not by a process of interpretation.

*(3) Was the Exclusivity Agreement the product of common or unilateral mistake?*

751. The essence of CFP's argument in favour of rectification is that the Exclusivity Agreement was agreed on the mistaken assumption that it gave full effect to the January and March 2009 discussions and agreements. The premise of that argument, therefore, is that the effect of those discussions and agreements was to prohibit or preclude Barclays from working on acquiring Tricorona, whether for its own benefit or that of a third party.

752. For the reasons I have already identified, I do not accept that premise. In my judgment, CFP's alternative claim for rectification must fail accordingly.

*(4) Is Barclays estopped from relying on the Exclusivity Release as permitting its acquisition of Tricorona on its own account?*

753. Again, it seems to me that the premise of CFP's estoppel case is of an unequivocal promise made by Barclays to the effect that it would not without CFP's consent discuss or engage in business, other than day-to-day business, or do anything that might compromise or prevent Barclays' potential involvement in the transaction proposed in Project Arctic Fox. CFP contends that it relied on Barclays' promise in entering into the Exclusivity Release and would not have entered into it otherwise.

754. Again, I do not accept the premise, and though I do consider that Barclays was much less than frank and open, I must reject CFP's alternative case based on estoppel accordingly.

*(5) Is the Exclusivity Release liable to be rescinded?*

755. For the same basic reasons – that the Exclusivity Release is not liable to be rectified – I do not consider that it may be rescinded on grounds of mistake.

756. That, as I read the statements of case, is the only pleaded ground of rescission. In the course of opening and cross-examination, Mr Lord floated the suggestion that Barclays should have disclosed (whether to CFP or IVC is unclear) that it had had earlier dealings with Tricorona which were in breach of its exclusivity obligation, or that it had planned or was planning to purchase Tricorona's portfolio. However, no allegation to that effect is pleaded in any of the iterations of CFP's case.

757. I have considered whether it can reasonably be taken to be part of CFP's case that, if Barclays was actually planning the acquisition of Tricorona when it gave the confirmation sought by Mr Navon that it was not actively working on acquiring Tricorona (or by implication its portfolio), that would provide a ground of misrepresentation such as to make the Exclusivity Agreement liable to be rescinded. I note in that regard that Barclays expressly accepted (obviously correctly) in their written Closing Submissions that this "would have been wrong"; and that both Mr Lim and Ms Patel (likewise correctly) agreed the same in the course of their cross-examination.

758. On the pleadings as they presently stand I do not think the point is open to CFP; and although the Defendants addressed the substance of the point in their Closing Submissions, they did so with the caveat that "there is no allegation in the particulars of claim, even after its most recent re-amendment, that the Exclusivity Agreement can be or has been rescinded for non-disclosure…".

759. As to its merits, not for the first or last time in my assessment of the conduct of Barclays in relation to Project Arctic Fox and its aftermath, I have consistently had to remind myself of the difference between commercial morality and legal requirement.

760. As to commercial morality, I have been unable to escape the feeling that (a) Barclays should from the outset have disclosed its previous interest in Tricorona, (b) Ms Patel (and thus Barclays) was by April 2009 up for anything Mr Holmgren and the Tricorona Management had to offer in the carbon space, and indeed at the very time of the Exclusivity Release was preparing for some proposal from Mr Holmgren (as it turned out, Project Clearwater, as to which see further below), (c) the careful repetition of the exact words suggested by Mr Navon, as it happened, were strictly accurate but did not provide a complete picture, and (d) a more complete and candid disclosure might have resulted in a different outcome.

761. However, I accept that Barclays did not in law owe CFP a duty of disclosure in the context of the Exclusivity Release. Further, although I think Ms Patel would have had it in mind to pursue any opportunity that developed, and would have wished to be free

to do so, I do not think that either she or anyone else at Barclays had an acquisition of Tricorona or its entire portfolio in actual contemplation at that time (April 2009).

762. I do not therefore think that this claim could succeed, even if treated as open to CFP, and treated as part of its case.

*Conclusion on exclusivity*

763. It follows from all the above that, in my judgment, CFP never became a party to a contractual arrangement entitling it to exclusivity; and insofar as CFP might have been able to assert some claim deriving from the IVC/Barclays Confidentiality Agreement or any subsequent discussions in January 2009, the Exclusivity Release was true to its title: in other words, it did what it said on the tin.

## CHRONOLOGY: APRIL TO AUGUST 2009

764. To return to the chronological narrative, the long saga, which had commenced in 2007, of Barclays' efforts to agree the terms and put in place an ISDA Master Agreement with Tricorona eventually resulted, after considerable further work on it over April and May 2009, in the execution of the ISDA Master Agreement on 25 May 2009 (though it was dated 6 June 2008).

765. However, although this formalised the arrangements between Barclays and Tricorona for purchases of pCERs, it was not followed by transactions. Tricorona was by this time immersed in Project Clearwater, in the context of which it had (as previously indicated) sought Barclays' assistance and participation.

766. Project Clearwater is, to my mind, of some importance in these proceedings, principally for the light that it casts on Ms Patel's apparent indifference to the fact that her personal involvement in Project Clearwater was inevitably influenced by the confidential information she was privy to as a member of the Project Carbonara deal team, and more generally on the attitude within Barclays to the observance of proper procedures designed for the protection of its clients in circumstances where its own interests were or might be at variance.

*Project Clearwater*

767. As indicated above, Project Clearwater encouraged (at the beginning of March 2009) the Tricorona Management to sound out Barclays on the question of its release from any prior ties to CFP. In the event, after the release had been agreed, Mr Holmgren did not get back to Ms Patel for nearly a month with details of the new project, and she did not chase him.

768. On 19 May 2009, Mr Holmgren called Ms Patel and raised with her the possibility that Tricorona might want to purchase a portfolio and asked whether Barclays might be able to provide finance. Mr Holmgren's target was EcoSecurities, although he did not reveal the name at that time, and did not do so until 28 May 2009.

769. Ms Patel suggested that Mr Holmgren should talk to Dr Rhian-Mari Thomas ("Dr Thomas", then a director in Barclays' leveraged finance department) because "she had worked with me on similar deals that you outlined"; these deals included Project Arctic Fox/Carbonara. Ms Patel in that context appreciated, and advised Mr Holmgren by email dated 19 May 2009, that a Chinese Wall should be set up "so that whoever works on any advice to you is bound by confidentiality".

770. From the outset, Ms Patel took a close interest in Project Clearwater, and angled for her team's participation in it. Although she was supposedly on the public side as regards Project Clearwater, she said to Dr Thomas "if there is a transaction here, I can move myself onto the private side". Ms Patel was already thinking of what she described as the "hedging opportunities" (a broad category, in her lexicon) for Barclays if the deal was pulled off.

771. Although it did not ultimately proceed, Project Clearwater occupied Ms Patel and Mr Martens, in conjunction with Dr Thomas, over the course of the end of May to the end of July 2009 (although only sporadically).

772. Two arresting points arise about the involvement of Ms Patel and Mr Marten. First, given the genesis of Tricorona's plans for the leveraged acquisition of EcoSecurities secured by monetisation of EcoSecurities' portfolio, and the similarities (in broad terms) of those two companies' businesses, it was entirely inappropriate and indeed, in my judgment, improper, for any member of the Carbonara deal team to work on Project Clearwater without the express and informed consent of CFP as well as Tricorona.

773. Second, from its own point of view, EcoSecurities had made quite plain to Barclays, and to Ms Patel personally, that it did not think it appropriate for either Ms Patel or Mr Martens to be involved: EcoSecurities was a client of Barclays and Ms Patel had responsibility for Barclays' relationship with it. Its concern was that Ms Patel and Mr Martens, who had also acted for it, both had too much information about EcoSecurities for them to advise Tricorona on the deal. As Ms Patel put it to Mr Martens in a telephone conversation on 19 June 2009:

> "They just feel that they've shared way too much information with me in the past which means that I would be compromised…"

774. The Barclays' Compliance log for 18 June 2009 records:

> "Eco responded and said they categorically do not want any carbon desk employees who deal with them to be on the team."

775. Ms Patel accepted that it was categorically the case that neither she nor Mr Martens could be on the deal in any capacity at all. So did Dr Thomas, who was well aware that EcoSecurities objected to Ms Patel's involvement. Even so:

(1) Dr Thomas, who was on the private side for the purposes of Project Clearwater, and accepted that she should not be talking to anyone on the public side, continued to talk to Ms Patel, who was on the public side and

whose participation she knew to have been expressly and specifically barred. Dr Thomas was asked about this:

> "Q. But the purpose for your speaking to Ms Patel was to garner up information for the purposes of the Project Clearwater?
>
> A. It was to further my understanding of how I would assess the transaction, yes."

(2) Notwithstanding that Ms Patel herself accepted that neither she nor Mr Martens could be on the deal, she attempted to be involved behind the scenes, stating "…all we need is a front person" (she suggested Dr Swift because she had worked on Arctic Fox/Carbonara).

(3) Ms Patel sought to depict this in oral evidence as signifying only that she thought that, given the proposal from Tricorona that Barclays be involved both as a lender and in giving M&A advice, a front person from commodities was needed to assist banking: but this rang very hollow, and was belied by the transcript of a telephone conversation between Ms Patel and Mr Martens, and Ms Patel's somewhat brazen reference that all that was needed to get over the obstacle "is a front person".

(4) Ms Patel's motivation is plain. She wanted her team to "come firs"' in order to safeguard its P&L and her bonus. Ms Patel was never approved to be involved in Project Clearwater in any capacity, but she tried to control the deal for the benefit of her team. Along those lines, she emailed Mr Whitehead:

> "You know who could assist – Angela Swift as she worked with us on Carbonara – she can then make specific requests of us re information to give Rhian Mari. Then with Novation of Tricorona trade - we can price that up anyway <u>without being exposed</u>." (emphasis added)

(5) Dr Thomas played along. On 26 June 2009, she sent Ms Patel an email entitled "portfolio evaluation" attaching a copy of the EcoSecurities portfolio and asked her to start analysing likely cashflows.

(6) Ms Patel passed it on to Mr Martens, and he then worked on it. Mr Martens also knew that he was not allowed to be involved in Project Clearwater, but he too ignored the restriction.

(7) The Defendants contend that this was unobjectionable and consistent with Barclays' compliance policy on the basis that Dr Thomas was not providing to, or seeking from, Ms Patel any information, but (so Dr Thomas told me) "merely using their product expertise…to turn a portfolio of CERs into cashflows"; but this over-simplifies the task which Ms Patel was asked to undertake and does not explain or excuse the involvement of key persons

whom EcoSecurities had especially required Barclays to ensure were not involved.

(8) The fact is, as it appears to me, that Dr Thomas, Ms Patel and Mr Martens paid lip service to the express requirement of Barclays' client EcoSecurities, in order to secure more business for Barclays and, in the case of Ms Patel, ramp up her team's performance and bonus prospects.

(9) It is of further interest and concern that both Ms Patel and Mr Martens were so coy about their involvement in Project Clearwater: the more so since Mr Martens' witness statement, in which he said that he could not recall whether he knew that it involved Tricorona seeking to purchase EcoSecurities, had been prepared before the transcripts showing the extent of his knowledge had been disclosed.

(10) All this illustrates and confirms, to my mind, the propensity of Ms Patel and others at Barclays to pursue their own agenda and interests without regard to the interests and express commitments given to their clients. It is also relevant to my assessment of the reliability and credibility of Ms Patel and Mr Martens.

776. The Defendants contend that the events and circumstances of Project Clearwater "provide no evidential basis for any finding of breach of confidence by Barclays or Tricorona". They say that:

(1) Mr Holmgren approached Barclays in part because he knew from Project Carbonara that it had considered lending against Tricorona's portfolio: however, there was nothing confidential about that; in any case, CFP had (by the Exclusivity Release) expressly permitted an approach; and

(2) although the Project Carbonara model was briefly accessed in Project Clearwater, there was no use of any of the Tricorona portfolio information within it, which was the only information even arguably confidential to CFP (although it was in fact Tricorona's information). Had there been any need to use portfolio information, Barclays had at hand (having requested it from Tricorona) comprehensive and up-to-date information sent directly by Tricorona.

777. CFP contends that, on the contrary, Barclays, through Ms Patel and Mr Martens, not only kept up and strengthened their association with the Tricorona Management, but also frequently accessed the Project Carbonara material containing CFP's confidential information to assist in their analysis for Project Clearwater. They rely on the following examples:

(1) On 22 June 2009, Dr Swift told Dr Thomas that she assumed that they could "piggy-back off the model that you prepared for Tricorona (and update)..." i.e. the Carbonara model (prepared using CFP's confidential information). Dr Swift told the Tricorona Management that she would be asking "our carbon team (Harshika Patel, Jan Willem Martens) to run the carbon portfolio analysis, with due consideration for the confidentiality of this potential transaction". As Lars Alm reported to Mr Holmgren, Dr Swift had

"very good information about us, as she had been involved and 'done the sums' on us on a previous occasion", i.e. on Project Carbonara.

(2) On 23 June 2009, Michael Phillips, a member of the Barclays Leveraged Finance group who reported to Dr Thomas, asked whether people within Barclays had "work[ed] on the above prospective deal last year, or know who did". Mr Lim sent Mr Phillips the Project Carbonara DCF model, and sent it to Dr Swift. According to Mr Lim he assumed that he had been asked to dig out the DCF model "as a reference or precedent". Dr Swift used the model and updated it. Mr O'Malley sent her a revised model based on the Carbonara valuation model.

(3) On 26 June 2009, Mr Martens spoke to Dr Swift to obtain the password for the Project Carbonara documents (which included CFP's spreadsheets) so that he could access and use them for the purposes of Clearwater.

(4) While Ms Patel was working with Tricorona on Project Clearwater, she also maintained her contacts with Mr Holmgren, explaining matters such as the novation and options. She was interested in exploring ways in which Tricorona might "optimis[e] [its] current hedges". Dr Swift told Mr Holmgren that he should "contact Harshika Patel on the novation", which Mr Holmgren did.

778. I return later to the question as to the extent and consequences of the misuse of confidential information by Barclays in the context of Project Clearwater. (I also consider whether Tricorona misused confidential information in the same context.)

*Project Silverback*

779. Project Silverback (which was originally code-named Project Bison) was an unsuccessful attempt by Barclays itself to acquire EcoSecurities in September 2009. The transaction did not involve CFP; and it involved Tricorona only very briefly at the end, when Barclays considered joining with Tricorona to make a joint bid for EcoSecurities.

780. The transaction received little attention at trial. The following points may be noticed:

(1) CFP points to Ms Patel's direct involvement as the head of the deal team for the project as a further example of her (and her colleagues') disregard for proper differentiation between the public and private side, as well as for the express wishes and interests of their clients: the Defendants never offered any convincing explanation how it was that Ms Patel, to whose involvement in Project Clearwater EcoSecurities had emphatically objected, was nevertheless able to take up that role; nor was any justification offered for Mr Martens, who had not been wall-crossed, having been her designated assistant on the project (as so listed in the WIP list for 18 September 2009), given EcoSecurities' similar objections to his involvement in Project Silverback.

(2) Mr Lord sought to portray Project Silverback as having the same genesis (especially on the part of Ms Patel): however, the Defendants' evidence that in fact the proposal did not originate with Ms Patel but through a suggestion received in August 2009 by Mr Marcus Agius, then Barclays' Chairman, from a former colleague of his from the investment bank Lazard, Mr Peter Warner (who had indicated to Mr Agius that the EcoSecurities board might welcome a potential transaction with Barclays), was not contradicted.

(3) Mr Lord also sought to portray Project Silverback as being, in essence, a precursor to Project Pomodoro, and as "the rolling out" of a "strategic relationship" that had its roots in Project Carbonara. He relied on (a) the fact that in its later stages the project envisaged the acquisition by Barclays of a 40% interest in Tricorona and a joint bid by Barclays and Tricorona, and (b) Ms Patel's references to them (in a transcript of a telephone conversation between her and Mr Holmgren on 23 September 2009) exploring, if Silverback did not proceed, "something else between Barclays and Tricorona".

(4) However, without dismissing altogether the suggestion that Project Silverback developed in a way that brought Barclays and Tricorona closer together, and eventually prompted (more by its failure (in consequence of EcoSecurities being instead acquired by JP Morgan) than anything else) the subsequent Project Pomodoro, I do not think it right to ascribe to Ms Patel or Barclays such a grand plan.

(5) Rather, I consider that Barclays' prospective investment in Tricorona in the context of Project Silverback, and the proposed joint bid by them both through a jointly-owned Bidco, was conceived as a means to an end (acquiring EcoSecurities) and not an end in itself. It was calculated to enable Barclays to get round certain regulatory restrictions or compliance issues in the way of its own outright acquisition of EcoSecurities.

781. CFP portrayed Project Silverback as inspired and informed by the same confidential information supplied by CFP as Barclays had misused in Project Clearwater, and as being part of a continuum of events leading eventually to Project Pomodoro.

782. Barclays, on the other hand, relies on the fact that, at the impetus of senior employees with no involvement in Project Carbonara, it sought to acquire another project developer before turning its attention to Tricorona, as strongly supporting Barclays' defence that its acquisition of Tricorona was driven principally by strategic considerations relating to the carbon market generally and entirely unrelated to any information received during Project Arctic Fox/Carbonara.

783. Barclays goes further and suggests it is "impossible to reconcile" CFP's case that Barclays was educated about the true value of Tricorona's portfolio during Arctic Fox/Carbonara and then sought to profit from that knowledge by acquiring Tricorona with the fact that, prior to engaging with Tricorona in relation to what would become the acquisition transaction (Project Pomodoro), Barclays seriously pursued EcoSecurities and only ceased doing so when, as will be seen below, it formed the view that the need to keep up with a more advanced rival bid meant that it had

insufficient time to carry out (what it then considered to be) the necessary due diligence on the target.

784. In my view, the position is not as binary as either suggests. Barclays was influenced by what CFP had provided; and that influence was considerable even if not such as immediately to impel it to seek to acquire Tricorona. It is not inconsistent with this that Barclays also pursued other avenues and opportunities, and learned along the way matters that also influenced its view of Tricorona. That is so even if it is accepted (as I do accept) that it is at the least unlikely that Barclays would have pursued Tricorona further had it succeeded in Project Silverback.

785. However, I accept the point made by Barclays that insofar as CFP's case is based on the premise that the value and confidentiality of the information it provided to Barclays is demonstrated by Barclays' re-evaluation of Tricorona, that premise is too simplistic. Not only was the market view of Large Hydro pCERs changing; but also, for example, there was a changing perception of the potential value of post-2012 CERs, of which EcoSecurities had substantial volumes, but which had not been the focus of CFP's detailed assessment, nor (for example) of the excel dump.

786. Barclays' related point is also well made: that during Arctic Fox/Carbonara, all the valuations discussed were of the pre-2012 portfolio only. Although Tricorona's "Business Overview" in early May 2008 revealed that Tricorona's portfolio had post-2012 and post-2020 volumes of 83.8 million and 49.6 million CERs respectively, and Mr Navon suggested that this was one of the four features of the Tricorona Portfolio that were of particular interest to Barclays, this was not a feature that appears to have been brought out in the spreadsheets; and of course the Expressions of Interest were confined to pre-2012 CERs.

787. There is, so far as I am aware, no evidence that CFP provided these figures to Barclays as part of the information said to be confidential in the context of Project Arctic Fox; and the "Business Overview" was a public document. I do not think Mr McQuater was correct in submitting that "Tricorona never provided figures during Project Carbonara for a post-2012 portfolio and it was never valued on that basis". For example, Barclays' "Project Carbonara Overview" expressly mentioned that Tricorona had "approximately 90m post-2012 contracted volumes…for which no value is being assigned in this transaction for collateral purposes…[but which] could assume significant value". But I did not understand anyone to contend that this information was confidential.

788. As to Project Silverback, it was EcoSecurities' post-2012 portfolio which principally interested, for example, Mr Gold; and as Ms Patel said in her evidence:

> "Through senior management looking at Silverback, EcoSecurities whetted the appetite of senior management to think about a post Kyoto environment and what opportunities that would bring for the bank because a post Kyoto framework, post 2012 carbon market could have potentially been very big."

789. Similarly, the growing appreciation of the value of post-2012 CERs was also a driver for Project Pomodoro which owed little, if anything, to the material and insight that CFP provided to the Defendants.

***Project Pomodoro***

790. There is a dispute between the parties as to when Barclays first became interested in acquiring Tricorona (in the sense of purchasing its entire share capital).

791. Barclays contends that until late March 2010 it was seeking to devise a debt-based structure which would allow it to invest at the asset level and acquire an interest in the future performance of Tricorona, and that it was only when the structure devised by Barclays was rejected by Volati in March 2010 that the bank switched to an acquisition strategy.

792. CFP contends against this that in fact, although Barclays explored other structures initially, these were simply different ways of structuring and financing what was in truth its objective from October 2009 onwards, which was to acquire Tricorona, its business and/or the "mine" by whatever means possible and efficient.

793. Though in the Defendants' written Closing Submissions it was contended that little, if anything, turns on the point, Barclays expended considerable resource in its elaboration. I suspect this was, at least in part (no doubt), to distinguish the two pasta-based code-named projects from each other; whereas CFP put some emphasis on it as demonstrating a continuum in Barclays' true objectives, inspired by the revelation of the true worth of the "mine" which it is CFP's case its confidential information and insights had revealed.

794. It is undoubtedly true that Barclays spent a considerable time investigating and modelling other ways of acquiring economic ownership of Tricorona: for example, in December 2009 Mr Gold brought in an expert in developing capital and business structures, Mr George Iantchev Manahilov ("Mr Manahilov"), who was at that time Managing Director in the Commodities group of BarCap in New York, to advise how (to quote from Mr Manahilov's witness statement):

> "we could achieve the Commodities team's strategic goals but, in light of the EcoSecurities experience, without having to acquire Tricorona outright through launching a public take over."

795. The "EcoSecurities" experience had not only resulted in Barclays losing out to JP Morgan: it had thrown up risk and compliance issues (mostly originating from the target's operations in emerging markets under the CDM regime), and the potentiality in that context for unknown and unquantifiable historical liabilities (including anti-bribery and anti-money laundering sanctions), as well as structural problems (especially in that the target would after acquisition be forced to adopt procedures made necessary by the heavy regulation of financial institutions, particularly after the Lehman crash).

796. However, I consider and find that these efforts were designed to achieve the same objective by another route; the objective being the acquisition of the economic value of Tricorona's portfolio and business. I do not think that, on analysis, Mr Manahilov disputed that; Mr Stuart Ord (a director in the BarCap EMEA M&A Advisory team, who was giving advice from an M&A advisory perspective) stressed that there were many options considered, but he too conceded that these were different means to the

same economic end, and that one of the options throughout was outright acquisition; to the extent that Mr Gold tried to maintain the line that it was not, I found him unconvincing; and Ms Patel was clear:

> "strategy number one is ... buy the damn company." [30]

797. I am in no real doubt that, following its failure to acquire EcoSecurities, and conversely the success of JP Morgan in acquiring the largest carbon developer, Barclays was determined to acquire Tricorona or its business by whatever way was most appropriate. By then Tricorona was the only major independent carbon developer left.

798. As Mr Holmgren told me in his oral evidence:

> "Q. What you would have understood Barclays to be interested in, I suggest, was in effect finding a commercial way of Barclays acquiring Tricorona just as JP Morgan had acquired EcoSecurities?
>
> A. In one or other way, it would have acquired Tricorona or set up a separate vehicle to perform carbon business in some sort.
>
> Q. I understand that. There would be different ways of commercially structuring it, but the commercial objective would be the same, namely to add Tricorona to Barclays basically.
>
> A. Somehow in some way Barclays at this point wanted to get into the carbon business, especially the primary side of things."

799. It is clear that at least from that time onwards Barclays pursued that objective not only without regard to any interest that CFP had in pursuing its own acquisition of Tricorona (which would not of itself found a valid complaint, given my conclusions as to the Exclusivity Release), but also without apparent regard to whether it owed duties of confidentiality.

800. It is also clear that the Tricorona Management welcomed Barclays, and were determined to avoid any engagements that might diminish Barclays' interest or the value it might perceive in Tricorona's portfolio.

801. Their rejection of a proposal by CFP in early October 2009 of a forward sale of 15 million CERs to a compliance buyer (Vattenfall), despite its Board's standing instruction to forward sell when possible, illustrates the Tricorona Management's determination. As Mr Holmgren explained to Mr von Zweigbergk in an email dated 20 October 2009:

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[30] Ms Patel noted in her call on 14 January 2010 that she and Mr Manahilov were "just thrashing out the different options for undertaking the form of strategic alliance that we want to do, all the way from option A, buying the damn thing...."

> "…all else being equal, the portfolio is more attractive to Barclays unhedged. They believe that everything a utility can do, they can also offer in terms of portfolio sales. The more raisins in the cake, the better…"

802. Mr Holmgren explained in his oral evidence:

> "Q. "The more raisins in the cake, the better ..." You were therefore referring to the fact that Ms Patel had led you to believe that Barclays wanted an unhedged portfolio so that they could make money out of the hedging or forward selling of it. That's what you are talking about, isn't it?
>
> A. Yes, an unhedged portfolio would create the flows that enable the bank to make money on it. That's what I interpreted from keeping it unhedged."

803. The roles were thus reversed: CFP had made the same point as to Barclays' proposed "hedging" in 2008 and early 2009, during the active stage of Project Arctic Fox: hedging the portfolio would reduce the risk, but it would also reduce both its maximum potential value and its potential for transaction fee generation. This anxiety to preserve the "raisins" is a further demonstration, as it seems to me, that Ms Patel's more liberal interpretation of "day-to-day hedging" was inimical to the full realisation of the objectives of Project Carbonara, as Barclays in effect recognised eating the raisins to be the full realisation of the objectives of Project Pomodoro.

804. The narrative of the events culminating in the success of Project Pomodoro is not, of itself, instructive. All that I think it is necessary to note is as follows:

(1) The search for some "balance sheet" alternative to an acquisition continued through to March 2010 but eventually foundered at least in part because Volati opposed it, and was quickly abandoned because of the emergence of competitive bidders in the shape of a company called Opcon, and then EDF and Morgan Stanley.

(2) The disadvantages of an acquisition by purchase of shares was mitigated by a diminution in concerns about unknown liabilities and clarification from Barclays' anti-money laundering experts that, contrary to original expectation, "Know your Client" procedures and other regulatory burdens could be simplified in their application to Tricorona.

(3) Barclays made its first indicative offer (of SEK 8.00 to 8.25 per share) on 30 March 2010, which was submitted to the Board of Tricorona on 8 April 2010, and was subsequently increased to SEK 8.70 (inclusive of a SEK 0.70 per share dividend).

(4) On 6 April 2010, the presentation prepared by the deal team to obtain the first of these approvals was sent to Barclays Executive committee ("ExCo"). The presentation stated the rationale of the transaction to be as follows:

> " * Establish Barclays as a leading global emissions origination and trading house.
>
> * Gain access to the growth potential arising from the anticipated introduction of post-2012 carbon markets in large economies such as US and Japan, in addition to the existing EU Emissions Trading Scheme The Company has significant optionality on a post-2012 CER stream, which could be very valuable in the event of a successful post-2012 CER market, which we believe has a strong chance of success given the current international momentum for carbon cap and trade schemes
>
> * Key competitors are already well-positioned for primary origination
>
> * Tricorona has a very strong management team with good commercial skills and good track record of delivering profitability when their peers have been less successful
>
> * Through this transaction Barclays is essentially paying for the pre-2012 portfolio value, plus a small premium to gain access to the potential post-2012 value stream which could be significant with the advent of a post-Kyoto international markets [*sic*] or new emissions trading sectors in the large economies
>
> * Allows Barclays to purchase post-2012 optionality at a low pricing point given the market uncertainty around the post-2012 regulatory environment"

(5) Barclays and Tricorona entered into a Memorandum of Understanding on 7 April 2010 under which Tricorona granted Barclays exclusivity until 31 December 2010 and the Tricorona Management undertook to co-operate in relation to the offer, "any management buy-out of the Target or any transfer of any securities…or material assets…"

(6) Barclays was granted access to Tricorona's data room on 23 April and due diligence was completed in just over four weeks.

(7) On 24 May 2010, the deal team received the approval of ExCo to proceed with the transaction, and ExCo delegated authority for giving final approval to three members of Barclays' senior management. The short presentation prepared for ExCo described the transaction rationale to be that "[c]arbon markets are forecasted to be the largest traded commodity market by 2020 at $2 trillion" and that "Tricorona gives Barclays a platform to originate carbon credits and to expand its share of the growing carbon market".

(8) Final approval for an offer to be made was sought from senior management on 31 May 2010. Approval was received the following day (1 June 2010) and the offer was announced on 2 June 2010.

(9) On 7 July 2010, pursuant to an Investment Agreement (amended on 26 July 2010) between Barclays, Barclays Carbon (UK) Limited, TAV AB, Strofosene Limited, and the Tricorona Management, Barclays and the Tricorona Management subscribed for shares in Barclays Carbon (UK) Limited, the holding company of the acquisition vehicle. The split between Barclays and the Tricorona Management was 85:15.

(10) The transaction was completed on 27 July 2010.

805. The contrast between the Tricorona Management's solicitude for Barclays' concerns in this regard when Barclays seemed to be on the brink of a welcomed bid or joint venture proposal, and both the Tricorona Management's and Barclays' indifference to CFP's concerns in the context of Project Arctic Fox, is striking. It is in a way the measure of both the Tricorona Management's enthusiasm for the one and lukewarm approach to the other, and of Barclays' readiness to perceive and pursue its own interests at the expense of CFP, its *de facto* client.

*Close co-operation between Barclays and the Tricorona Management in Project Pomodoro and the pretence that only public information was exchanged*

806. The evidence left me in no doubt as to the strength and shared objectives of the relationship between Ms Patel and her team and Tricorona's management which they had built up since (on my view of the facts) the beginning of 2009: their work together in achieving the implementation of Project Pomodoro illustrates not only closeness and co-operation but also collusion in strong-arming the Tricorona Board, and in the public presentation of the project.

807. A vivid illustration of such collusion appears from the transcript of a telephone conversation between Ms Patel and Mr Martens on 24 March 2010 (which I also quote from later in a different context), in which they discussed how the deal was to be achieved, and in particular the necessity of obtaining the Tricorona Board's agreement to open access to Tricorona's books for the purpose of the envisaged MBO. The following is an extract from their discussion when they turned to the possibility of the Tricorona Board not co-operating:

> "HP: Okay? If the board tells us, "No, get lost. We're not interested in the price you have to pay", then, this is for your ears only, never to be repeated again, management may look just to leave en masse and set up a NewCo with us.
>
> JWM: Okay.
>
> HP: Okay? That's one strategy. If then – and that's why – you know when this discussion happens with the board there will be an implication of threatening behaviour by

> the management team, i.e. "Listen to our proposal carefully otherwise you have got a big threat that we might all leave en mass *[sic]*. You know, Suzanne, all of them. Okay?
>
> JWM: Yeah.
>
> HP: So then that's that. And then if they say, "Yes, happy days, we like your price, blah, blah, blah", that's when they open up the books for due diligence…"

808. I appreciate that in a proposed MBO, management buyers and bidder are allied: and strong-arm tactics may not be uncommon in the tough world of takeovers. But it does seem to me to illustrate an unusual degree of closeness and coordination as well as a commonality of purpose which is at the very least consistent with the picture I have formed of a relationship built up since the beginning of January 2009.

809. As to lack of candour, it also appears from the evidence from this period (in fact, a little earlier, at the beginning of March 2010) that Barclays and Tricorona's management were less than forthcoming in what they disclosed to the public and to Tricorona's shareholders. For on 3 March 2010, Ms Patel told Mr McKay that Barclays had used "only public info to date".

810. This was not true. Ms Patel could not give a sensible answer on this point. She first suggested that she was "under the impression" that Barclays had only received public information. Quite plainly Barclays would not have been in a position to produce a valuation without, for example, confidential non-public ERPA costs. Ms Patel had been sent updated spreadsheets by Mr Holmgren. She next shifted her answer to say "from my point of view Tricorona had given us portfolio information which I felt was public. I didn't appreciate that they had disclosed a price ERPA by ERPA …". This is very hard to accept. She also tried to divert attention from herself by suggesting that she expected Mr Holmgren to be comfortable with what he sent Barclays, notwithstanding the absence of a confidentiality agreement. This was unattractive, but in keeping with my general impression of Ms Patel, that (at least in those days) she tended to place her objectives (in that case, the success of the takeover) before candour and a rigid adherence to the whole truth.

811. The Tricorona Board also appears to have been told that Barclays had only considered public information about Tricorona. In April 2010, Barclays prepared a "script" for Mr von Zweigbergk's approach to the Tricorona Board,[31] in the form of a draft question and answer exchange. It made no mention of the discussions between the Tricorona Management and Barclays from (even on the Defendants' case) autumn 2009 onwards, but suggested that the first discussion was not until 3 March 2010. In particular, the script provided:

> "**Question 5**
>
> Has senior management provided you with information on the business? If so, what?

[31] Mr Ord was one of the authors.

> **Response:**
>
> Our proposal is based on public information and Barclays' assumptions thereon. Our commodities team is in receipt of certain pieces of information on Pomodoro, which were received in ordinary course of business."

812. This suggested response was misleading. Barclays was in receipt of a mass of confidential information about Tricorona's portfolio from Carbonara and from the updated information it received on 18 December 2009. Mr Ord could only offer: "I think it rests on the interpretation". The analysis that Barclays had done could not on any view be described as having been based on information received in the ordinary course of business.[32] Mr von Zweigbergk seemed to suggest that the Board knew that non-public information about Tricorona's portfolio had been passed to Barclays, but he also said that he did not tell the Board about this. The Tricorona Management did not inform the Board of its NDA with Barclays in relation to the acquisition. As the script stated, "n.b. NDA with management is probably not helpful to volunteer": in Mr Ord's words, it would not have been a "particularly positive thing to dwell on".

813. The Tricorona press release dated 2 June 2010 read:

> "On the request of Barclays, the Tricorona Board has permitted Barclays to perform a limited due diligence review of confirmatory nature prior to the announcement of the Offer. Barclays has not received any price sensitive information through this review."

This appeared in Barclays' offer document.

814. Tricorona's Board would have received information about the takeover from the Management. The non-public information that Barclays used included price-sensitive information going to the valuation of Tricorona. The point of the press release was to confirm that no confidential information about Tricorona or its portfolio had been given to Barclays. In view of the information that Barclays had received before the formal offer to Tricorona, through Arctic Fox and by way of update from Tricorona at the end of December 2009, that statement was untrue.

815. The truth appears to be that Barclays and the Tricorona Management did not want Tricorona's Board and shareholders to know that non-public confidential information about the portfolio had been shared between them; and they resolved and took action to prevent them becoming aware of that.

816. I do not think this affects the quality or quantification of the breaches established as between the parties; but it casts unflattering further light on the loose commercial standards apparently thought permissible, and on the reliability of those concerned. It further confirms me in my view, reached with hesitation and regret, that the competition for business even within the bank (since it affected bonuses and promotion) and the "institutional cleverness" identified in the Salz Report was

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[32] In Mr Ord's words, "Barclays and the management had been talking over a period of time in relation to any number of different possible things across the spectrum ...".

corrosive and led to an indifference to duties and obligations which resulted in their breach.

*Post-Pomodoro*

817. There seems to be little doubt that once Project Pomodoro was complete and public, Barclays anticipated complaint from CFP.

818. Thus:

(1) On 2 June 2010, Mr Smith emailed Dr Swift the news announcement and said "Just wondered whether we will get a call from you know who", being (it was not disputed) a reference to CFP.

(2) On 3 June 2010, Ms Patel spoke to Dr Swift. Ms Patel expressed surprise that Barclays had not heard from CFP. Dr Swift stated that it "did cross my mind…", and though she did not finish the thought, Ms Patel did: "Oh no, we're well out of that confidentiality. That's the first thing…". My strong impression is of abiding concern on their part that CFP would complain.

(3) On 7 June 2010, Ms Patel spoke to Mr Holmgren. They discussed CFP's reaction to the news. My sense of the conversation was that Ms Patel, repeatedly characterising CFP as "bastards" and protesting that "There's nothing improper about anything we've done…Full termination agreement", was blustering and by no means confident about her own efforts to reassure both Mr Holmgren and herself. (A certain jumpiness about inquires being made as to whether management had got their shares on the cheap is also apparent from the transcript, but this was not pressed and I take it no further.)

> "JCH: Is there any risk of them [CF Partners] being successful in anything?
>
> HP: Well, I hope not.
>
> JCH: I mean –
>
> HP: We've written a very short – not me personally but senior people within the bank have written them a very short email back.
>
> JCH: Okay.
>
> HP: Although legally, by the way legally –
>
> JCH: Yeah.
>
> HP: – there's no risk at all.
>
> JCH: That's what I meant, that's what I meant.

> HP: Oh, no, no, sorry, sorry, Christer. We did all that checking at the beginning.
>
> JCH: Yes.
>
> HP: (a) our original exclusivity expired March 2010 but then do you remember when you and I decided that we wanted to start that business together? We got that termination agreement in place.
>
> JCH: Yes, yes, yes." (emphasis added)

819. Mr Holmgren told me that his understanding of "that business" was Project Clearwater (in respect of which Tricorona's management had it in mind to approach Barclays for finance), and when invited by Mr Lord to accept that this signified "building up a strategic relationship" made the ostensibly fair point that

> "I don't think bankers or industry leaders or CFOs in other industries would regard a bank loan as an alliance with a bank."

820. However, Project Clearwater (the ambitious plan for Tricorona to acquire EcoSecurities) was always going to involve much more co-operation than a bank loan; and of course it subsequently transmogrified into Project Silverback (the plan in autumn 2009 for Barclays to take over EcoSecurities). Under further cross-examination Mr Holmgren accepted that

> "For us, Tricorona, it would mean a huge strategic step and whoever we partner with would be a strategic partner."

821. Although I found Mr Holmgren's answers clear and impressive, I do not accept that he provided the whole story. Tricorona's management had never approached Barclays for funding before. They had not, by that stage, approached any of their usual lenders, or indeed any other bank. He accepted that he went to Barclays because he "felt comfortable" with Ms Patel by this time and also because he had come to know that "fundamentally they were interested in these type of transactions". This does not demonstrate, but it does support my view of, a much closer business relationship between Barclays and Tricorona's management, and especially between Ms Patel and Mr Holmgren, than either he was prepared to admit or the Defendants were prepared to acknowledge.

### *Aftermath of Project Pomodoro, the commencement of proceedings and Project Rose*

822. I must briefly describe the final two chapters of the facts: (a) the commencement of the litigation and the Defendants' reaction and (b) Project Rose.

*CFP rebuffed and commence proceedings*

823. On 3 June 2010, the day following the announcement of Barclay's all-stock cash offer of approximately £98 million for Tricorona (through its wholly owned Swedish subsidiary, TAV AB) Mr Navon, Mr Rassmuson and Mr Glossop wrote to Mr Bob Diamond as Chief Executive Officer of BarCap (cc Simon Hargreaves, Dr Swift and Michael Reynolds, all of BarCap) setting out their concern and disappointment (1) that CFP had "introduced the opportunity to Barclays in good faith as an advisor, and then Barclays ended up executing the transaction on a principal basis and (2) that the proposed transaction represents poor economics for ordinary shareholders".

824. Somewhat surprisingly in view of the exceptional circumstances (which whatever the legal repercussions and consequences, suggested a departure from expected standards of fair commercial conduct), Mr Diamond did not reply personally. Instead, but not expressly on his behalf, a senior lead director in Barclays Corporate Development did respond by letter dated 7 June 2010, with the same circulation list (but not including Mr Diamond).

825. That response (of seven lines in all) (a) noted that "the exclusivity provisions contained in the confidentiality agreement between IVC…and Barclays Capital was terminated by both IVC and CF Partners on 30 March 2009" and (b) expressed the belief that "the TAV offer to Tricorona shareholders is fair, having been recommended by the Board of Directors of Tricorona, which also has the support of an independent fairness opinion in providing the recommendation".

826. Mr Rassmuson described this in his witness statement as follows:

> "…We did not take this step lightly, but we hoped that by writing to Bob Diamond we would spur action to be taken against what we felt was a rogue team, acting not merely against us but also flouting accepted market practice of not stealing a client's deal. However, far from taking this letter seriously, Barclays replied a few days later, brushing our complaints off.
>
> Because Barclays had failed to take our complaint seriously, on 10 August we emailed Barclays an invoice for Euro 96,833,602.74: this represented what we regarded as an industry standard fee for the sale of a portfolio of CERs to Barclays, calculated by reference to Tricorona's portfolio of CERs.
>
> Despite the costs and the heavy time commitment, we decided subsequently to take legal action to challenge Barclays' actions. We were not prepared to allow Barclays to cut us out of our own deal."

*Project Rose*

827. By a share purchase agreement dated 3 May 2012, Barclays sold Tricorona back to Strofosene Limited, a vehicle for the Management. The reorganisation of Tricorona's assets is seen in an internal Barclays' presentation dated 1 May 2012.[33]

828. The short point is that two of Tricorona's subsidiaries, holding the mining concession, and the Singaporean subsidiary Tricorona Carbon Asset Management ("TCAM"), were transferred to Barclays Carbon (UK) Holdings Limited.[34] The shares in Barclays Carbon (UK) Holdings Limited were transferred to Strofosene.

829. As a result, Tricorona no longer owns SVAB and has, it appears, been stripped of its valuable assets. Mr Holmgren said that its balance sheet was close to zero, and that there would be no assets to meet any judgment made against it: "there is no money".

830. SVAB was treated as having no value in Tricorona's books. But once Barclays acquired Tricorona, the very same month, July 2010, an application was made for an environmental permit needed to develop the mine.

831. Mr McKay was frank on why, from Barclays' perspective, SVAB had been taken out of Tricorona:

> " ... in order to maximise the price in our exit in Project Rose we wanted to make sure we grabbed as much value as we could in the negotiation with the management and in order to secure some mitigation around credit risk we moved Svenska Vanadin up in the organisation chart so that we could take a direct share pledge over that company.
>
> Q. So you could grab as much value out of this deal as possible?
>
> A. So that we could grab as much value out of the exit as possible. Obviously as a bank we are always looking to maximise value."

It was implausible for Mr McKay to suggest that 'we continued to think that this asset was worthless'.

832. Under the terms of a Share Purchase Agreement dated 3 May 2012, Barclays and the Tricorona Management have agreed to share 50:50 the proceeds of any sale of SVAB.

833. It is unclear why the proceeds of the sale of SVAB have been agreed to be shared 50:50 between Barclays and the Management when the shareholding in the Tricorona acquisition structure was divided 85:15. The value of SVAB depends upon whether certain mining licences are obtained: if they are, SVAB could potentially be very valuable indeed: on an unrisked basis potentially perhaps as much as $155.8 million. However, no profit has yet been realised in this regard.

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33 This document was prepared with the involvement of Ms Patel and Mr McKay.

34 As the notes explain, Tricorona sold its shares in TCAM and SVAB for €496,402 and nil respectively.

834. CFP contends that, excluding any additional profits that might have accrued to Barclays from its ownership of Tricorona such as mark-to-market profits on trading with Tricorona, synergies and savings, interest since May 2012 and any profits from macro hedging, and not bringing into account any deferred consideration arising on the sale of SVAB, Barclays' profit on the sale of Tricorona was at least €50 million.

835. Barclays contends that this is exaggerated, and that in reality its total gains from its ownership of Tricorona, having paid €24 million for its shareholding, did not exceed €45 million, of which its gross capital profit on the sale of its shareholding, before any deduction for investment funding, was €34.7 million. Barclays contends that this was in fact derived entirely from the unwinding of forward trades entered into during Barclays' ownership of Tricorona. Barclays still denies that any value is to be attributed to SVAB (which is carried in Tricorona's books with zero value). I address the complex issues of compensation and quantification under the heading 'Remedies' in paragraphs 1166 *et seq.* below.

## APPLICATION OF THE LAW TO THE FACTS AND CLAIMS

### *Were the Defendants in breach of obligations of (a) exclusivity (b) confidence?*

836. Having set out the factual background and the legal principles I turn now to discuss whether the Defendants acted in breach of their obligations of exclusivity and confidence. I deal separately with:

(1) whether Barclays was in breach of any continuing obligation of exclusivity in pursuing Project Pomodoro;

(2) whether, if so, Tricorona is liable for having induced such a breach by Barclays;

(3) whether Barclays owed and was in breach of a duty of confidence to CFP not to disclose or use, for a purpose other than the purpose for which it was provided, confidential information made available to it by CFP;

(4) whether Tricorona owed and was in breach of a duty of confidence owed to CFP not to use, for a purpose other than the purpose for which it was provided, confidential information made available to it by CFP;

(5) whether, if so, Barclays induced Tricorona's breach of its duty of confidence to CFP;

(6) whether there was a common design between Barclays and Tricorona to do acts amounting to a breach of such duty of confidence such that they are jointly liable to CFP.

837. I address these questions in turn.

***Breach of exclusivity?***

*Claim against Barclays*

838. It is important to note that although at the time the parties did not distinguish so rigorously (or in reality at all) between obligations owed to IVC and those owed to CFP, CFP was never party to any contractual exclusivity agreement unless (contrary to my conclusion) the Exclusivity Release should be interpreted or reformed so as to impose an exclusivity restriction. CFP has not maintained that the discussions in January and March 2009 established any fresh obligation on the part of Barclays to it; only that such conversations confirmed and clarified the existing obligations in respect of exclusivity which in law subsisted between Barclays and IVC, and not between Barclays and CFP.

839. CFP's pleaded claim (by amendment) against Barclays for breach of a contractual obligation of exclusivity is thus limited to a claim pursuant to its interpretation of the Exclusivity Release, and is restricted to Barclays' engagement "from…about 22 September 2009, alternatively shortly thereafter…in direct discussions with Tricorona, and/or a significant equity stake in Tricorona, and/or executing a transaction that would achieve a similar economic effect or some other strategic alliance with Tricorona".

840. These discussions, CFP further pleads, "went far beyond discussions of day-to-day business…They compromised and/or prevented Barclays from acting as lender, financial adviser and/or M&A adviser in CF Partners' acquisition of Tricorona…Those discussions and associated works were known within Barclays as Project Pomodoro…Those discussions were a continuing breach of Barclays' obligations of exclusivity owed to CF Partners….Barclays' offer for Tricorona on 2 June 2010 also breached those obligations of exclusivity."

841. The focus is thus on Project Pomodoro. Barclays accepts that it "is obvious that if, contrary to its case, Barclays did continue to owe exclusivity obligations to CFP, Project Pomodoro involved a breach of those obligations".

842. The issue, therefore, is whether there was any contractual restriction (and concomitant obligation upon Barclays) as at about 22 September 2009, and if so what was the nature of its breach.

843. For the reasons I have previously sought to set out, I have concluded that pursuant to the Exclusivity Release, any obligation of exclusivity that Barclays may have owed to CFP further to their exchanges in two telephone calls on 14 and 27 January 2009, their exchange of emails dated 27 and 29 January 2009 and an oral agreement allegedly made on the 24 March 2009 call, had been discharged well before September 2009.

844. On that basis, CFP's pleaded claim for breach of any obligations of exclusivity must fail.

845. If it is later found that I am wrong in rejecting CFP's claims to rectification or reformation of its terms on some other basis, and in concluding that the Exclusivity

Release took effect in accordance with its terms to release any then continuing obligations of exclusivity, I confirm that I consider that Barclays' activities thereafter would have been in breach of such obligations. For the avoidance of doubt, I do not accept Barclays' case that it only engaged in permissible "day-to-day hedging"; and in any event, its engagement with Tricorona from September 2009 would plainly have been in breach of any continuing obligations of exclusivity.

846. Before leaving the exclusivity claim I should address a related but slightly different point, which was not much argued before me, but which I think necessarily follows from the cases as put forward. Although I have found that (a) there was no contractual obligation ever established between CFP and Barclays and (b) the Exclusivity Release had the effect that title implies as regards the obligations owed by Barclays to IVC, the fact remains that as at the beginning of 2009 Barclays continued, subject to an argument touched on but not elaborated earlier, to owe a contractual obligation of exclusivity to IVC, and CFP was in reality the party behind IVC for these purposes. Accordingly, although CFP never itself had any contractual claim based on exclusivity, the obligation to IVC bound Barclays – and, for example, Barclays would have had to seek its release (as well as a confidentiality release) if it wished to pursue Tricorona (or at least, if it wished to pursue Tricorona for anything more than "day-to-day hedging").

847. The caveat or argument I touched on earlier is that (as Barclays contended) the exclusivity obligation had in fact lapsed under the terms of the IVC/Barclays Confidentiality Agreement by January 2009. That is because, Barclays argued, negotiations between IVC and Tricorona or its shareholders with respect to Project Arctic Fox had come to an end by then; and by the terms of clause 6 (as to which see paragraph [409] above) it was incumbent upon IVC so to notify Barclays, whereupon that same clause provided that Barclays should no longer be bound by the obligation of exclusivity. Barclays' argument on the facts was that such negotiations had indeed ended, and CFP should not be entitled to rely on IVC's (or its own) failure to notify Barclays.

848. In my judgment, although Project Arctic Fox hung by a thread, the position that I have set out above was not such as to require notification by IVC of a decision not to pursue Project Arctic Fox. I do not accept, therefore, Barclays' argument that any form of exclusivity had ended, and that IVC/CFP were guilty of non-disclosure. Moreover, as to the latter, it seems clear that Barclays was well aware of the state of things with Management and Volati: and it never suggested at the time that exclusivity had terminated.

849. It follows also that in any negotiation prior to the Exclusivity Release, the legal fact of the exclusivity obligation owed by Barclays to IVC should be taken into account. I return to this when discussing the difficult issue of remedies.

### *Claim against Tricorona for inducing breach by Barclays of exclusivity*

850. CFP's claim against Tricorona for inducing a breach of Barclays' alleged obligations of exclusivity is based only on the discussions between Barclays and Tricorona post-dating the Exclusivity Release made in March 2009.

851. The claim as pleaded is that Mr von Zweigbergk and Mr Holmgren "entered into discussions with Barclays" from about 22 September 2009 or shortly thereafter with a view to Barclays "acquiring Tricorona and/or a significant equity stake in Tricorona and/or executing a transaction that would achieve a similar economic effect or some other strategic alliance with Tricorona" (Re-Amended Particulars of Claim, para 95A.3).

852. It is difficult to see that this claim has any additional value even if it could be established: it depends upon establishing breach of an obligation by Barclays, and if that could be established there would be no need for it: Barclays would be good for any loss. It does seem to be a superfluous claim.

853. As it is, it follows also from my conclusion that any legally enforceable obligation of exclusivity on the part of Barclays had been released by the Exclusivity Release that this claim must fail also.

854. Although the claim seems to me to be superfluous, in case it is subsequently held that I am wrong in the sense that either (a) the obligations that CFP contends were established by the exchanges in January and March 2009 and/or (b) the obligations that CFP contends were intended to be imposed by the Exclusivity Release, continued in force, I should briefly consider whether such a claim could succeed.

855. The principle as to what constitutes inducement is stated in *Halsbury's Law of England,* Volume 97 (2010) 5th Edition, para 617 as follows:

> "There is an inducement if the breaking of the contract is fairly attributable to influence by way of pressure, persuasion or procuration brought to bear on the mind of the contract breaker by the defendant."

856. But inducement is not the only ingredient: it would also have to be shown that (a) the Tricorona Management knew of, or was reckless as to the existence of, contractual obligations of exclusivity which prevented Barclays discussing with them or entering into transactions other than day-to-day transactions, and (b) Tricorona acted with the intention of inducing Barclays to breach its contract, or recklessly not caring whether it did so.

857. The principle as to what level of knowledge of the contract an inducer must have, and with what intention he must act, was stated by Arnold J in *Force India* at para 244, citing *OBG Ltd v Allan* [2008] 1 AC 1 at paras 39-41 (Lord Hoffman), to be as follows:

> "[t]o be liable for inducing a breach of contract, the accessory party must know that he is inducing a breach of contract. It is not enough that he knows he is procuring an act which, as a matter of law or construction of the contract, is a breach. He must actually realise that it will have that effect. Turning a blind eye is sufficient for this purpose, but negligence is not. "

858. CFP has not pleaded its case on persuasion or procurement with any particularity. It seems to be based on the Tricorona Management's encouraging reaction to Barclays'

expressions of a desire for a strategic relationship, and more especially perhaps (given the focus of the pleaded case on September 2009) the brief discussions at the end of Project Silverback on 22 to 24 September 2009 in relation to a potential joint bid for EcoSecurities by Barclays and Tricorona, followed by discussions beginning in November 2009 regarding the transaction which later became Project Pomodoro.

859. Throughout, in my view, the Tricorona Management made clear its susceptibility to any proposals for a strategic relationship with Barclays, especially any proposals that might result in the fruition of their "dream" of an MBO. Although Tricorona's management were passive rather than active, in the sense that they almost invariably responded rather than proposed, in my judgment their passive encouragement, if they knew that Barclays was proposing things contrary to its contractual obligations, would be sufficient to amount to inducement; and see *per* Jenkins LJ in *D.C. Thomson & Co Ltd v Deakin* [1952] 1 Ch 646 at 694:

> "But the contract breaker may himself be a willing party to the breach, without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference…"

860. The crucial issue would thus be Tricorona's state of mind. As to Tricorona's knowledge of the alleged exclusivity obligations, the Defendants accept that, in January 2009 Mr von Zweigbergk and Mr Holmgren were told in broad terms in calls and emails with both CFP and Barclays that Barclays owed some sort of exclusivity obligation to CFP. This was confirmed by Mr von Zweigbergk in his oral evidence:

> "Q. And it is clear, isn't it, Mr von Zweigbergk, from what Mr Holmgren says on 23 January in that email that by that time at the latest Mr Holmgren is aware that there is a contract in place involving Barclays which precludes certain sorts of discussions between Barclays and Tricorona. That's what Mr Holmgren means, isn't it, when he says: "Is there anything we can talk about without getting you into trouble ..?"
>
> A. My Lord, I think and I believe that we thought there was an NDA in place with Barclays, but we hadn't seen it and we didn't get any confirmation until a couple of days later."

861. Mr von Zweigbergk nevertheless did not know and had never seen the actual terms of any agreement between Barclays and CFP**:**

> "Q. Moving subject again, Mr von Zweigbergk, you were asked at one point whether you were aware in February of 2009 that Barclays had not obtained what Mr Lord called an exclusivity release from CF Partners. Now, just to be clear, in February of 2009 what did you know about the contractual relations between Barclays and CF Partners at that time, the status of those contractual relations?

> A. The only thing I knew was from the email from CF Partners saying there was an NDA in place with Barclays and CF Partners. I haven't seen it and I have no -- I didn't know for how long it would last."

862. Mr Holmgren's oral evidence was to like effect. He said that after the end of Project Arctic Fox, he understood that Barclays owed some sort of exclusivity obligation to CFP, and while he did not know its precise terms, he understood it would not impede day-to-day hedging business**:**

> "Q. And that means that you knew at this point in time that Barclays remained under some sort of exclusivity restriction in relation to Arctic Fox, didn't you?
>
> A. I had assumed so from the very beginning.
>
> Q. But you obviously know so because you are talking about the agreement?
>
> A. Absolutely.
>
> Q. You are aware that's the case.
>
> A. After we had terminated the agreement with CF Partners, they let us know -- both over the phone and in the emails -- that they did have in place non-circumvent agreement with Barclays, but it would not limit Barclays to discuss day-to-day hedging business with us. So I knew that there was a non-circumvent. What I didn't know was what the terms of it were and if Barclays were allowed under that agreement to discuss any financing of portfolios with us or not."

863. In their witness statements, both Mr von Zweigbergk and Mr Holmgren say that they were never made aware of the alleged January and March 2009 oral agreements and this evidence was not challenged in cross-examination. When Mr von Zweigbergk asked Mr Rassmuson what non-circumvent agreements were in place he (Mr Rassmuson) refused to give details.

864. I accept that Tricorona's knowledge of the terms of any exclusivity restrictions was imperfect, and unspecific: "scant", in the word of more than one authority. Nevertheless, it is clear that both Mr Holmgren and Mr von Zweigbergk knew enough to understand that Barclays was restricted in what it could discuss with them. What is not clear is whether they understood that Ms Patel and Mr Martens should not be dealing with them at all on matters other than the advancement of Project Arctic Fox.

865. Mr Holmgren, in particular, seemed to me to accept that his understanding was that Barclays was not at liberty to pursue an acquisition of Tricorona without the informed consent of CFP, even if in fact that understanding may have been too cautious. Thus, when Mr Holmgren was cross-examined about an email dated 7 December 2009 which Ms Patel had sent to him stating that "if we proceed further we will need to request a waiver from CF" his evidence was as follows:

> "Q. And you would have understood the December 2009 email as meaning Ms Patel, Barclays, needed CF Partners' consent before Barclays could acquire Tricorona?
>
> A. In any form.
>
> Q. In any form.
>
> A. Yes."

866. There was no evidence that either Mr von Zweigbergk or Mr Holmgren were ever told or believed that CFP's consent to the pursuit and acquisition of Tricorona had been given. Indeed, it seems from the extract from his cross-examination quoted in paragraph [865] above that Mr Holmgren may well have been aware that no such consent had been given.

867. Even so, in my view, the knowledge or understanding of Mr von Zweigbergk and Mr Holmgren was incomplete to the point of being negligible in terms of any precision as to the ambit of what legitimately Barclays could and could not do; and they had been encouraged to leave it to Barclays to observe any relevant boundaries.

868. Especially in light of the flimsiness of the contractual arrangements themselves and their feet in an oral agreement on the telephone, I do not consider that CFP could have established knowledge sufficient to satisfy that part of the test.

869. That leads on to the question of intention. As to that, the principle is that the alleged inducer must not only act with the knowledge of the existence of the contractual obligation, but with the intention to interfere with its performance; knowledge and intention are a "two-fold requirement". Although they are intimately connected, and where knowledge is proved on the part of a defendant who induces one party to break it intention will readily be inferred, both must be proved: see *Clerk & Lindsell on Torts*, 20th Edition, para 24-15.

870. CFP submitted that Messrs Holmgren and von Zweigbergk, with the requisite knowledge of the obligation, acted with the intention to induce Barclays to breach its obligations or "did not care whether it did so". That latter submission was based on the evidence of both Mr Holmgren and Mr von Zweigbergk that it was for Barclays to determine what it could and could not do consistently with its obligations to CFP, and not for them to query or second-guess it. Thus, for example, Mr von Zweigbergk told me this under cross examination:

> "Q. You must have attempted at that time, Mr von Zweigbergk, to get to the bottom of the situation, mustn't you? You must have sought to establish with Mr Holmgren and Ms Patel what these constraints were that seemed to prevent Barclays talking to Tricorona?
>
> A. My Lord, we didn't -- weren't that concerned about the constraints Barclays had because we thought that that was Barclays' business if they had any constraints, so for us that was never a big question.

> Q. So it would be fair to say that you didn't really care too much about that, whether or not there were restrictions, legal restrictions on what Barclays could talk to Tricorona about? You didn't really worry about that?
>
> A. In January 2009 I thought that that was Barclays' responsibility if there was anything between them and CF Partners.
>
> Q. And so not your concern, not for Tricorona to worry about at all?
>
> A. It was not something that Tricorona was signing to, no."

871. This part of Mr von Zweigbergk's evidence seems to me both candid and accurate. The question is whether, given his and Mr Holmgren's appreciation that, even though they regarded the fox as dead, Barclays was still restricted and, further, CFP's consent was required but had not been given for any discussion about Barclays acquiring Tricorona, this attitude amounts to recklessness sufficient to raise an inference of intention.

872. In that regard, the Defendants stressed that this attitude of Mr Holmgren and Mr von Zweigbergk was not their own retreat, but had been expressly encouraged by CFP. Mr Rassmuson, in his email dated 27 January 2009 clarifying that there was there was "nothing in the NDAs that would prohibit the counterparties in entering into discussions with Tricorona on transactions that are not subject of the NDA, for instance day-to-day hedging requirements", had added: "In any event, this is something for the counterparties to determine".

873. I accept that was not intended to give carte blanche for any discussions, of whatever kind, with any individual, provided only that Barclays was prepared so to engage. At most, as it seems to me, it related to a judgement concerning the ambit of "day-to-day hedging requirements".

874. Further, I consider that from early 2009 onward, after the fox was in their view (though without checking with CFP) dead, Mr Holmgren and Mr von Zweigbergk were happy to take it that there remained no restrictions on Barclays. They worked hard not only to formalise the end of Project Carbonara but also to encourage and develop a relationship with Barclays well beyond day-to-day trading and soon including projects (Clearwater, Silverback and then Pomodoro) which were quite inconsistent with and inimical to any furtherance or revival of Project Arctic Fox/Carbonara.

875. Nevertheless I do not consider that CFP would be able to demonstrate the clear recklessness that would be the equal of actual intention. I consider that there were too many other factors operating on the minds of Tricorona's management to infer such intention. These include (a) poor personal chemistry especially between Mr Navon and Mr Von Zweigbergk, (b) CFP's failure to persuade Volati to commit to retain an equity investment and to support Project Arctic Fox, and (c) real doubts as to the sustainability of any such proposal in the market conditions prevailing.

876. Accordingly, if I am wrong in my view that the Exclusivity Release as a matter of law had released any such restriction, I would not have found in favour of CFP on its inducement claim against Tricorona.

## CLAIMS BASED ON ABUSE OF CONFIDENTIAL INFORMATION

877. I have already sought to set out my understanding of the legal principles defining the duty of confidence.

878. My conclusion that CFP did, in circumstances that gave rise to a duty of confidence in respect of its use, provide to Barclays (and to Tricorona) some valuable information, having the necessary quality of confidence about it, which influenced Barclays in its perception of Tricorona and which Barclays used for purposes other than those for which the confidential information had been provided to it, may already be apparent.

879. However, it is necessary for me to explain in more detail why I have so concluded, what effect the information had on Barclays, and whether CFP has established an actionable claim of misuse of that information.

880. I propose to address the questions that seem to me to arise under the following headings:

(1) What was the source, scope and duration of any duty of confidence owed by Barclays to CFP? Given that CFP was not a party, directly or indirectly, to the IVC/Barclays Confidentiality Agreement, are the terms of that agreement nevertheless definitive of any such duty?

(2) Did the information provided by CFP to Barclays have the necessary quality of confidentiality about it?

(3) Did that information cause Barclays to re-evaluate Tricorona?

(4) Did Barclays misuse that information and if so in what respect, when, for what purpose, and with what effect? Was there the "continuum" of misuse linking Project Arctic Fox and Project Pomodoro which CFP asserts?

*Source, scope and duration of equitable duty*

881. Barclays had initially pleaded that IVC entered into the IVC/Barclays Confidentiality Agreement as an agent for CFP as its undisclosed principal, so as to bind CFP to its terms; but it abandoned that plea during the course of the trial.

882. CFP never contended that it was a party to the IVC/Barclays Confidentiality Agreement, whether as an undisclosed principal or otherwise; CFP's claims for breach of Barclays' duties of confidence have been pursued in equity and not pursuant to contract.

883. Thus, it became common ground that the case concerned an equitable duty of confidentiality, not a contractual one; the principal dispute being as to the extent to which the one was informed and restricted by the other.

884. As to that, Barclays' modified contention was that the contractual relationship between IVC and Barclays, established at CFP's request, shaped (and restricted) any equitable obligations of confidence owed by Barclays to CFP. This was of particular interest to Barclays in the context of determining the duration of any equitable duty.

885. Given the fact and its modified reliance on the IVC/Barclays Confidentiality Agreement, Barclays did not strenuously dispute that the circumstances were such as to give rise to such an equitable duty; the real issue was recognised to be whether the information had the quality of confidentiality. However, briefly to summarise the circumstances in which the duty arose:

(1) Barclays knew that the information that it was to receive in relation to Project Arctic Fox/Carbonara came from CFP via IVC and that both CFP and IVC considered it to be so confidential that they refused to pass over any information until a contractual agreement was in place:

(a) Barclays knew from the IVC/Barclays Confidentiality Agreement that IVC received the information, which it supplied to Barclays, in confidence from CFP. Clause 3 of that agreement made it clear that the information provided by IVC to Barclays was subject to a confidentiality agreement between IVC and CFP. By the time the agreement was signed, Mr Zintl "knew that [CFP] would also be involved in some way".

(b) The Compliance summary (drafted by Mr Zintl and Dr Swift) circulated within Barclays made clear that:

> "The information we receive post conflicts clearance on the company and its carbon credit portfolio will be highly confidential."

(2) Barclays set up a Chinese Wall to protect the information it received from CFP during Project Carbonara because it knew that the information was perceived by CFP to have the necessary quality of confidence and needed to be protected; and the IVC/Barclays Confidentiality Agreement required it. Individuals within Barclays who worked on the Carbonara team were "wall crossed" and received a deal memo explaining the confidentiality obligations.

(3) Barclays dealt with CFP during the course of Project Carbonara and knew from early on that it was CFP (and not IVC) that was leading the deal. CFP was treated as Barclays' client. Indeed, it was because "it became clear that CFP was driving this process and not IVC" that Barclays undertook a conflicts clearance for its "client", CFP. CFP was marked as the client for Carbonara in Barclays' M&A opportunities spreadsheet. Dr Swift correctly described the relationship to Ms Patel as follows:

> "I would be very clear we're not advising the target, we're advising – we have – we have a confidential relationship with the adviser, with the acquirer. Not with the target."

(4) The information that Barclays received from CFP in written form was marked "Strictly Private and Confidential". Although a marking of "confidential" will not of itself confer confidentiality, because a description is not definitive of the inherent quality of the document, a "confidential" marking will help establish that the recipient of a document is affected by an obligation of confidence.

886. Turning to the relevance of the contractual arrangements (though not invoked as such) in my view (and subject to the caveats that follow), the existence of the IVC/Barclays Confidentiality Agreement, the fact of the receipt by Barclays of information which was stated by Mr Navon to be "highly proprietary", and the emphasis placed by both Mr Navon and Mr Rassmuson before and when presenting Project Arctic Fox as to the sensitivity of the material, are not irrelevant in considering whether that information should be treated as confidential as between CFP and Barclays.

887. As elaborated below, equity ultimately depends on conscience, and the circumstances of Barclays' receipt, including the particular circumstance of its contractual engagement, are, in my view, part of the context that should be taken to have affected its conscience. As in the *Vercoe* case (see [2010 EWHC 424 at [330]), the IVC/Barclays Confidentiality Agreement was

> "part of the circumstances in which [Barclays] came to have the confidential information and colours the extent of the obligation of confidence properly found to have arisen in respect of each of them."

888. My view that the contractual arrangements do colour the issue of confidentiality is in general terms fortified by the fact that (as also previously explained) Barclays themselves have relied on terms of the IVC/Barclays Confidentiality Agreement as defining the period of confidentiality and the circumstances under which any obligation may lapse. By parity of reasoning, as it seems to me, Barclays should be predisposed to accept that information falling within the scope of the definition of confidential information falls to be treated as confidential as between CFP and Barclays also. That seems to me to be reinforced by the provisions of its clause 3.

889. It also seems to me that the definition of "Confidential Information" in the IVC/Barclays Confidentiality Agreement was of broad scope, such as to extend to all the disputed information in this case except to the extent demonstrated by Barclays to have already been in its possession, or available to it on a non-confidential basis from a source other than IVC or its affiliates or advisors.

890. I consider that in such circumstances it is at least arguable that there is a rebuttable presumption of confidentiality in respect of information that would have fallen within the scope of the contractual definition. However, although that further confirms me in my ultimate conclusion, I have proceeded on the basis that it is necessary for me to be satisfied that the information does indeed have the requisite quality of confidence about it in accordance with the well-known equitable test.

891. As to that test, and as previously set out, it is well established, and this was not in dispute between the parties either, that one of the conditions of a claim for breach of confidence is that the relevant information must, objectively, have "the necessary quality of confidence about it": see, for example, *per* Megarry J in *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41 at 47.

892. Turning from the questions of source and scope to the issue as to the duration of any duty of confidence, as indicated previously, it was Barclays' contention that the provisions (in clauses 9 and 11) in the IVC/Barclays Confidentiality Agreement limiting the duration of confidentiality to the period of 12 months after that agreement (so that Barclays was, on that basis, free to use the information after 3 September 2009, the anniversary of the IVC/Barclays Confidentiality Agreement) would, in the ordinary course inform and colour also the equitable obligation. Put another way, since CFP had provided the information to IVC expressly permitting (or directing) IVC to pass on that information to Barclays with knowledge and acceptance of that term, CFP should be taken to have consented to Barclays using the information after the expiry of that period of 12 months.

893. That would of course be of considerable importance if I had been persuaded by Barclays that the relevant "misuse" of confidential information all post-dated 3 September 2009 and that, in any event, insofar as CFP may have been able to prove earlier misuses it would not be able to establish material loss to CFP or gain to Barclays since (1) Barclays would have been free to use the information as from 3 September 2009; and (2) there is no evidence that Barclays gave any consideration to acquiring Tricorona before (at the very earliest) the end of September 2009.

894. Subject to paragraphs [895] and [896] below, I would ordinarily have been inclined to agree with Barclays that the duration of contractual confidentiality provided for by clauses 9 and 11 of the IVC/ Barclays Confidentiality Agreement is the surest guide in determining the duration of the equitable duty.

895. However, that is a guide not a prescription: the scope and content of equitable obligations are informed, but neither exclusively nor conclusively defined, by a contract, even in the case (*a fortiori* in comparison to this case) of a contract between exactly the same parties.

896. Furthermore, in this case, and despite its rejection by Barclays as lacking any coherent legal analysis or basis, I have been persuaded by the argument that CFP's consent should be treated as (in terms of its equitable effect) vitiated by the failure of Barclays to reveal, before confirming that it was free to proceed, a conflict of interest by reason of its earlier dealings with Tricorona (and their scope, which included portfolio purchase). I refer to my previous conclusions in relation to Barclays' failure to disclose its conflict of interest in paragraphs [419] to [469] above.

897. I should add also that, in the event, I have concluded that the misuse largely pre-dated that anniversary.

*Did CFP provide to Barclays information having the quality of confidentiality?*

898. The Claimant's case as to what attached to information provided by CFP in the course of Project Arctic Fox the necessary quality of confidence was stated in its Re-Amended Particulars of Claim as follows (the separation into separate alphabetised points being my addition):

> "8. CF Partners provided Barclays with a single, composite piece of confidential information, namely the fact that Tricorona was an (a) attractive and (b) available takeover/purchase prospect; (c) the aggregate bundle of information provided by CF Partners to Barclays essentially presented Barclays with the "trade" that the purchase of Tricorona represented, allowing Barclays to see (ultimately for itself) the disparity between the value of Tricorona's portfolio of carbon credits, and the potential purchase price of the entire issued share capital of Tricorona (namely the market capitalisation of the company by reference to its share price, plus the customary premium to such market capitalisation required to obtain shareholder approval, referred to herein for convenience as 'the Market Price').
>
> 9. Further or alternatively, CF Partners provided Barclays with a great number of pieces of confidential information (which, taken together, form the single, composite, piece of confidential information identified above). Such confidential information is identified and detailed below."

899. CFP also alleged that it had provided special insight into the views, intentions, motivations and preferences of Tricorona's management and Volati: but this aspect of the information identified as being confidential was not hard-pressed; and in my judgment could not be sustained.

900. Although otherwise anxious to stress that "it is important to appreciate that the business opportunity comprised the parts as a whole", CFP identified two questions to be decided in determining whether the information provided by CFP/IVC had the required quality of confidentiality/confidence:

(1) Was the business opportunity presented to Barclays information confidential to CFP? Mr McQuater described this memorably for forensic purposes as "the Big Idea".

(2) Were the individual pieces of information provided to Barclays and Tricorona information confidential to CFP?

*The "Big Idea"*

901. CFP's claim (as expressed by both Mr Navon and Mr Rassmuson) that part of the confidential composite business opportunity that CFP presented to Barclays was the identification of Tricorona as an attractive (arbitrage) opportunity needs unpacking.

902. At first blush, the claim would appear to be based on the confidential identification by CFP, and its revelation to Barclays, of (a) an overlooked or unidentified acquisition target (b) which had been undervalued because of some mis-appreciation in the market of the difference between its market capitalisation and the total intrinsic value of its portfolio of CERs and pCERs. Barclays sought to put that up as "the root of the business opportunity" and to knock both elements down with apparent ease. I do not think such a case would be viable or realistic: but I do not think that was, on fair analysis, CFP's case.

903. There are at least three reasons why, in my view, that case would be unrealistic:

(1) first, Tricorona's shares were publicly listed, its Board and management had made no secret of their interest in participating in some form of suitable buy-out, and indeed Barclays itself had already considered acquiring it in 2007: its availability as an acquisition target was inherent and obvious;

(2) secondly, the difference between market capitalisation and the apparent value of Tricorona's portfolio could easily be discerned from publicly available information: and indeed, Mr Navon and Mr Rassmuson accepted this;

(3) thirdly, by October 2008 at latest, the fact of the difference and its approximate size had been publicised in the Carnegie report, which was made available on the internet, and which the Defendants leaped on in opening as having "well and truly [let the cat] out of the bag".

904. As to (1), CFP accepted from the outset (on the first day of trial) that the fact that Tricorona might be an available acquisition target was not, of itself, confidential information: a target may well be pursued, and the work done in the pursuit may be undertaken, in secret; but the identification of the target is not thereby, or necessarily, confidential.

905. Although in this context (amongst others) Mr Lord placed reliance on Sales J's decision in *Vercoe and others v Rutland Fund Management Limited and others* [2010] EWHC 424 (Ch) ("the *Vercoe* case"), that was a rather different case.

906. The target in that case, a pawnbroking company called Harvey & Thompson Limited ("H&T"), was a private company closely held (and I think wholly owned) by a US corporation called Cash America. The business opportunity in that case lay in the fact that Cash America did not see H&T as a core part of its business, which lay in the USA and for which it had expansion plans, and tended to leave H&T to its own devices, providing only limited capital for its support. The opportunity was (a) the special insight, not generally known in the market, that it might suit Cash America to sell if offered a good price and (b) H&T had been underfunded and with new management and capital might well be made more profitable. (The analogy may be

imperfect: but an analogy might be an owner of a house with unrealised planning potential, who has not made known or evident any intention to sell, but whose personal priorities, once understood, might persuade him to do so.)

907. As to (2), Mr Navon himself explained in his first witness statement [at para 45] how he and Mr Rassmuson first noticed the difference:

> "…We saw from the company's "Business Overview", prepared for its AGM on 24 April 20008, that the contracted volume of Tricorona's CER portfolio at the end of Phase II of EU ETS (in 2012) was 68.5 million CERs. Despite its very large portfolio, Tricorona's market capitalisation was, at that time [2008], in the region of only Euros 140 million. It struck us that there was a gap between these figures, which gave Tricorona the potential to be a very attractive acquisition prospect. For example, assuming (1) a then current CER price of Euros 13, and (2) a then current Chinese floor price of Euros 8 (i.e. the minimum price for CERs from Chinese projects imposed by China's trade agency, the NDRC), the portfolio was, on a crude analysis, worth c. Euros 342.5 million prior to any adjustments for CER delivery yields and without taking into account any value for the portfolio post-2012."

908. As to (3), the Carnegie report, based on analysis of publicly available information, also identified the significant apparent "gap" between the apparent value of Tricorona's portfolio and its market capitalisation. Carnegie conducted detailed discounted cashflow valuations of Tricorona showing a massive 270% upside, with a base case comparison giving a reduced but nevertheless huge upside of 145.6%. As the Defendants put it:

> "the report was saying loud and clear that Tricorona's market capitalisation did not reflect the value of its portfolio, as Mr Navon recognised and he accepted that it was a serious and credible piece of research."

909. Mr Navon stated in an email dated 23 October 2009 to Dr Swift (which he circulated to, amongst others, Mr Zintl), that the Carnegie report also removed one of the assumed reasons for market undervaluation of Tricorona, "the lack of research coverage", and he commended it as providing "additional evidence for the opportunity set".

910. In short: Mr Navon accepted that the Carnegie report was useful corroboration of value; but his point was that it provided no insight as to its realisation; and its effect, after its first publication, when Tricorona's share price marginally rose, was negligible: indeed Tricorona's share price soon fell back.

911. In a sense, it is the very obviousness of the "gap", the ease with which it could be ascertained, the fact that it was confirmed by more detailed equity research, and the fact that such research was openly published and available in and to the market, begs the question as to why it was that the market did not itself respond, and mark up the shares and thus market capitalisation of Tricorona (which it is common ground that it

did not). It is that question and its answer which seem to me to reveal the true shape and nature of CFP's case in this regard, which is more layered than the pastiche of it that the Defendants sought to present.

912. Put simply, the market still doubted Large Hydro pCERs and did not believe that anything like the apparent value of the portfolio, much of it embedded in Large Hydro pCERs, could in fact be realised: it was like a mine too deep to work. I assume that Barclays, after it had pursued Tricorona in 2007, had reached the same conclusion.

913. On CFP's case, "the opportunity set" that it supplied (and for which, as Mr Navon was much questioned on, it sought to charge Barclays a fee of €96 million) was not only the fact of deep deposits in the mine, but the means and method of extracting them to release the mine's true and intrinsic value.

914. It was CFP's case that none of this was publicly available, whether in the Carnegie report (dated October 2008) or otherwise; nor did Barclays understand it until CFP showed it what could be done, and how.

915. Mr Navon explained this, under cross-examination by Mr McQuater, as follows in a passage which seems to me to encapsulate CFP's case as to what it provided that Barclays and the market had been unable to see:

> "Q. I just want you to explain this to me, Mr Navon: when Barclays acquired Tricorona you sent them a bill for 96 million euros, yes?
>
> A. That is correct.
>
> Q. Can you tell me after 17 October 2008 and the Carnegie report why was it worth 96 million euros for you to tell Barclays the same thing that is in the Carnegie report?
>
> A. What the Carnegie report doesn't do is first of all talk about how you unlock that value. So this Carnegie report is a research report, it is a very lengthy one, but it doesn't actually highlight any of the major business risks that large hydro may have on the company. The share price -- I believe the share price went up about 1 euro after the release of this research report. It was there for about a week and then after that week the share price actually never recovered to the same price as the week before for about a year. So clearly this report actually didn't influence the share price. If the company was so undervalued you would have expected a significant increase in the share price. It went up for the first week and then all the subsequent weeks for about a year it was lower than where it was before. So clearly this report didn't actually influence the market that much.
>
> Q. Anything else that was worth 96 million euros for Barclays to know after this point?

A. The 96 million was a fee that we derived by applying our brokerage fees against the UNEP numbers, contracted numbers that we had. That's how we got to that number.

Q. I'm trying to work out what value Barclays is getting for that, since it can read the Carnegie report on the internet. What you have said so far is that the Carnegie report doesn't explain the business risk related to large hydro.

A. It doesn't explain how to sell -- if this report would have said, "Well, you can sell large hydro credits to compliance buyers", then that might be a slightly different story, but it didn't. In this document, which is 70 pages long, if you do a word search there isn't a single reference to the single biggest risk that Tricorona faced, which is large hydro CERs. I would suggest that this is a typical equity analyst taking his kind of standard way of looking at a company, a DCF model, applying it to Tricorona's business and coming out with numbers. I don't know his background in the carbon markets, so I don't know how familiar he was, but maybe that would explain the difference that we are having in viewing this report.

Q. So it is worth 96 million euros to tell Barclays that you can in principle sell large hydro to compliance buyers?

A. That's not what we are talking about. We were talking about the opportunity for CF Partners to acquire Tricorona which eventually Barclays did behind our backs.

Q. I'm trying to work out what it is they don't know after the Carnegie report points out the opportunity. You seem to be saying that what you brought to Barclays, in addition to Carnegie, was that you told them you could sell large hydro to compliance buyers.

A. We told them about the opportunity to acquire Tricorona before October 2008 --

Q. I understand, but I am dealing --

A. So in September.

Q. Sorry, I didn't mean to interrupt. I'm dealing with the position once the report is out there. What in addition, that's not in the Carnegie report, are you telling Barclays?

A. The ability to value large hydro CERs.

Q. And what is it that you have told them about that? Is it the expressions of interest?

A. That they are EU eligible and that you should lend against them and we disagreed with them that it needed to be hedged.

Q. So they are EU eligible, that you should lend against them and that they needed to be hedged.

A. Right, we gave them the tools to be able to acquire the company itself and therefore we sent them that invoice for that amount of money.

Q. So if Mr Jan-Willem Martens on the methodology panel were to come to this court and explain that he actually knew exactly the eligibility position of large hydro and that Barclays already knew that, you wouldn't be telling them anything new about eligibility, would you?

A. At the time he presented the first presentation to us in September 2008 he seemed not to know that position.

Q. The eligibility rules are a matter of -- they are public knowledge, they are publicly available information as to what the eligibility rules are for large hydro, aren't they?

A. Correct, but the market interpretation of those rules is something that was not well understood or known.

Q. Market interpretation.

A. Correct, whether or not a European compliance buyer would buy a large hydro CER.

Q. So it comes down to whether compliance buyers will buy large hydros?

A. Yes.

Q. So it comes down to your expressions of interest?

A. Not to the expressions -- that was -- the expressions of interest were there to prove our point to Barclays.

Q. But they are proving a point that you assert to them that you can sell these things to compliance buyers and the expressions of interest are what you produce as proof?

A. As evidence of that fact, yes.

Q. And you don't produce anything further beyond the expressions of interest. What I mean by that is you don't show them term sheets that Vattenfall or others have agreed, it doesn't go any further; all you do is you show them a number of expressions of interest in a meeting and you say some things

> about the expressions of interest in your slides and it doesn't go further than that?
>
> A. Absolutely, because we have to manage expectations on both sides, so as I'm doing everything that I can to get this deal organised and completed, at the same time I need to manage the relationships with our very good customers such as Vattenfall, such as Electrabel, such as Enel and there is a risk that if you ask too much from them and then they can't -- and then you don't deliver the product, the end product to them, that you will lose credibility in front of your clients. What we are trying to do with the expressions of interest is to provide enough information and confirmation of the position without -- excusing the kind of business slang -- winding them up."

916. In other words, CFP's case is that it (a) identified value in Tricorona's portfolio of unhedged Large Hydro CERs (and ERPAs) which the market had not perceived and its market capitalisation thus did not reflect; (b) developed and demonstrated a route for the realisation of that value which the market had previously not investigated or understood; and (c) in that context and to that end, provided to Barclays particular pieces of confidential information, principally in the form of spreadsheets analysing the profile and potential of Tricorona's unbalanced and largely unhedged portfolio and evidence of demand for what it comprised (and especially the demand for and marketability of Large Hydro pCERs) supporting the above.

917. Under close and effective cross-examination by Mr McQuater, Mr Rassmuson put it this way:

> "What we, my Lord, provided to the transaction was that we could show that there was value to large hydro and we could hedge it and unlock it because we know that Citibank, other banks had issues with hedging the risk of this portfolio. There is nothing about hedging in this portfolio, you have to have all the pieces together. That is the crucial point.
>
> Q. So it is all about hedging large hydros.
>
> A. It is one of the important components. You have to have all the pieces together because if you are missing one piece you are not going to get the transaction done.
>
> Q. What other pieces do you, CF Partners, bring to the transaction that the banks can't get from knowing the share price or getting a 40,000 euros independent valuation?
>
> A. Again, we (a) established that there was an undervalued company and once we have established that it was undervalued we then showed how to unlock that value through hedging, we had lined up some other major compliance buyers who were interested in buying these credits, so it was all the pieces

> together that made this transaction happen and that was the crucial point.
>
> Q. So it is about lining up compliance buyers to hedge CERs?
>
> A. First of all, when we went to Barclays initially or SE Banken they didn't see any value in this company at all, okay? So the first level analysis we had so say "Here, look at this opportunity, it is undervalued". Then they said "Okay but you have a lot of pricing risk so how do you take care of that because you cannot trade large hydro on the exchanges", we agree on that, right? So then at that stage we had to bring out the compliance buyers and that's why the expression of interest is so important, to show to the banks that you can actually hedge this risk and you should be comfortable lending, to such an extent that you might want to buy this company, right.
>
> Q. So what CF Partners are really bringing to the table is the expressions of interest?
>
> A. No, we are bringing all these different pieces, which is that it is undervalued, it can be hedged, here is a strategy, we bring all the motivations, we bring the financial models, we bring all the due diligence. It is a lot of work. It is seven months of work that's gone into this.
>
> Q. So just to be clear, apart from bringing hedging strategy in relation to the CERs, what else is CF Partners bringing?
>
> A. Let's go back on that because I think it is an important point for the court. The starting point with most these banks was there was no value for large hydro at all, okay? You cannot use large hydro. The fact that we bring signed letters from some of the biggest corporates in Europe saying, "You know what, we are willing to buy some of this", and all the work and all the relationships around that, that is very important. Because if you don't believe there is any value, suddenly you see there is value and by the way here is how you can hedge this out. These are two crucial points."

918. Later he added:

> "Q. You have said the expressions of interest. What else is CF Partners bringing to the table apart from that?
>
> A. Well, we had identified that Tricorona was an attractive opportunity. We had identified how to hedge out the risk. We had established that large hydro had a value. We had developed a financial model. We had done the risk adjustments. We have gotten expressions of interest from some large compliance buyers. We had worked out the motivation of management,

> shareholders, we had come up with a whole plan, all these pieces fed into the overall trade which was how to acquire and extract value of Tricorona."

919. I would accept that by no means all of the individual components of this package were inaccessible, novel or inherently confidential. For example, in my view, whether in principle Large Hydro CERs could be eligible on the EU ETS is a matter of technical and legal analysis, rather than proprietary confidential information: opinions differed in the market, and persuading a person of one or other view would not of itself constitute passing over confidential information.

920. However, insight and information about demand, present or future, actual or prospective, is plainly capable of constituting proprietary confidential information of considerable value. If not previously understood by Barclays and Tricorona, but demonstrated to them in the context of Project Carbonara, such demand opened the way to a very different perception of the value of, in particular, Tricorona's large portfolio of unhedged Large Hydro CERs, and to the prospect of forward selling that part of the portfolio at much less (if any) discount in comparison to other forms of CER. And as the extracts from their oral evidence have seemed to me to illustrate, Mr Navon and Mr Rassmuson always emphasised the package: it is not necessary for it to be demonstrated that its individual contents were each confidential; it is the perspective the whole provides which really counts.

921. Further, and as previously outlined, CFP sought to bring more detail to this "Big Idea" in two more concrete ways:

(1) by its careful assessment, in the spreadsheets mentioned above, of the true profile and potential of Tricorona's somewhat unusual (and, very rarely, for the most part unhedged) portfolio; and

(2) evidence of the demand it had identified exemplified in the Expressions of Interest (also referred to above).

*Had the spreadsheets the quality of confidence?*

922. It was disputed between the parties whether the work done by CFP on, and in presenting, the spreadsheets was substantial and original, or presentational and derivative.

923. The Defendants sought to downplay the work and expertise involved in these tasks, and to break down the constituent elements of the spreadsheets as a means of showing that none was truly confidential.

924. In their Closing Submissions the Defendants accepted that there may have been "some benefit to having a more neatly presented document". But they then instanced, for forensic effect, minor presentational details, such as that

> "(i) the CFP spreadsheet had the columns in a different order, with different titles and grouped in categories; (ii) the column titles were shaded in dark blue rather than grey; (iii) the figures

> in the spreadsheets were formatted more neatly; (iv) the CFP spreadsheet contained the additional text 'CF Partners (UK) LLP – Project AF Detailed Portfolio – Strictly Private & Confidential' at the top."

925. They then wrote off the work done on the formatting of the CFP spreadsheet as "of a kind that any competent personal assistant or junior consultant could do and cannot in itself be regarded as involving the use of confidential or proprietary information or expertise or as making the entire spreadsheet and its contents confidential to CF Partners".

926. Less disparagingly and more convincingly, the Defendants' Closing Submissions contained an analysis of the spreadsheet and Mr Navon's evidence in respect of its development, distinguishing between data which was (a) public (much information being available from the UNFCCC or UNEP Risoe websites), (b) a simple calculation, (c) taken directly from the "data dump" and (d) data which was further categorised by reference to (i) project groupings (divided into four categories of project, that is, registered, validated, host country approved, PDD and preparation) and (ii) associated volume risk adjustments.

927. That analysis demonstrated that the only aspects of, or columns in, the spreadsheet that were not based on public information, simple calculation or derived directly from the "data dump" were the columns relating to project grouping and risk adjustment. Mr Navon accepted this analysis under cross-examination:

> "Q. So we have seen a lot of information in here from Tricorona, yes?
>
> A. That is correct.
>
> Q. A lot of information from the UN website?
>
> A. That is correct.
>
> Q. We have seen some arithmetic and error checking input from CF Partners?
>
> A. That is correct.
>
> Q. You carry out an exercise of collecting information from the UN website?
>
> A. Yes.
>
> Q. And the only element that you can point to where you say you have had some input is in the "Risk adjust" column [AE] beside "Groupings" [AD]?
>
> A. That is correct."

928. Mr Navon continued to insist, however, that CFP's work on risk adjustments was the product of its own expertise, skill and labour, and of crucial significance, constituting (even on its own) a material change in the overall analysis.

929. Certainly, the risk adjustment figures changed very substantially; and in CFP's Closing Submissions this was stated as follows:

> "There was a material change in the analysis of the portfolio. The simple point is that whereas Tricorona's original risk adjusted volume for its portfolio was approximately 32 million CERs, after the application of CF Partners' risk adjustments, the risk adjusted value was 52.8 million CERs. Mr Holmgren accepted the change."

930. That, to my mind, is too simplistic: the real point is whether, in recalculating risk adjustments, CFP brought new insights and techniques; or whether, as the Defendants argued,

> "CF Partners did no more than encourage Tricorona to come up with more aggressive numbers with a view to getting more finance."

931. That argument reflected Mr Holmgren's evidence under cross-examination to the following effect:

> "Q. Can I ask you about the risk adjustments please. You can see that in this email, 17 August 2008, you are sending through the portfolio back to CF Partners. Can you see that? You have said: "We have gone through the portfolio on a 'project by project' basis ..." Can you see that?
>
> A. Yes.
>
> Q. The portfolio analysis that you were sending back contained risk adjustments which reflected the discussions that you had been having with CF Partners as to those matters, didn't they?
>
> A. No, those risk adjustments I came up with myself.
>
> Q. But you had been discussing the appropriate risk adjustment to put in this document with CF Partners, hadn't you?
>
> A. No, that's not correct.
>
> Q. You had no risk adjustment discussion with CF Partners?
>
> A. The discussions we had revolved around CF Partners misunderstanding our internal risk model and they felt that the risk model for valuation purposes was not accurate, which we of course knew. They wanted us to come up with a risk adjusted portfolio which showed a significantly higher value.

> Q. But there had been a change, hadn't there, Mr Holmgren, between the risk adjustments that you had originally in your value at risk model; that's right, isn't it?
>
> A. Mmm.
>
> Q. The portfolio spreadsheet which Mr Navon was working on and which he was using to take to banks like Barclays, that had risk adjustments that had altered from those that you had originally had in your own internal model; that's right, isn't it?
>
> A. I produced four different sets of risk adjustments during the course of dealing with these spreadsheets and this is the autumn of 2008.
>
> Q. Mr Holmgren, you may ultimately have put those figures in, but the process that you are describing was done with involvement from and discussion with CF Partners, wasn't it?
>
> A. I disagree with that. The discussion I had with Mr Navon was that we need to come up with risk adjustments that will produce a higher risk-weighted number for the total portfolio. That was the level of discussions that I had with Mr Navon."

932. According to the Defendants, even where the spreadsheets contained a column headed "CF Partners delivery adjustments", the figures came from Mr Holmgren, and CFP just changed the heading:

> "Q. Then there is a heading, isn't there, to the right,"CF Partners delivery adjustments", can you see that?
>
> A. Yes.
>
> Q. It is right, isn't it, that in the course of Arctic Fox CF Partners fed in their own adjustments to things like the risk adjustments, didn't they?
>
> A. That's not correct. These risk adjustments, in a previous Excel spreadsheet, I called internal risk adjustments which later when CF Partners received that spreadsheet, changed that heading and called it "CFP risk weighting"."

933. The truth, as it seems to me, lies somewhere in between. No doubt the revision of risk adjustment was in part driven by the need to put forward the best justifiable figures; and no doubt also the process of revision was iterative, with CFP and Tricorona co-operating together to seek to justify lower adjustments and higher figures for presentation to third party lenders and investors. But the figures were not simply plumped up: the impression given by the Defendants that the spreadsheets and the revised risk adjustments provided by CFP were at best derivative and at worst bogus is, in my view, unfair.

934. CFP's work and experience enabled a considerably more robust assessment of the present value of the projects in Tricorona's portfolio than was possible from the data dump or the UNEP Risoe website. CFP provided details of actual ERPA dates; the standard terms on which the ERPAs were concluded; risk-adjusted expectations of eventual CERs to be generated; and greater accuracy as to the dates on which the projects could reasonably be expected to be validated and commissioned, and on which Host Country Approval and then registration might be completed. This greater insight reduced the uncertainty which was the main reason for the level of discount.

935. Moreover, I consider that CFP brought a perspective that was new to Tricorona, even if not entirely novel: the perception that adjustments should not be calibrated by reference to guaranteed delivery amounts, but by reference to what compliance buyers would be likely to accept as the basis of a contract for forward sale of deliverable CERs and the further (linked) perception that Large Hydro pCERs could be sold to compliance buyers on a non-guaranteed basis and should not be discounted to 0% but to 50%.

936. I also accept that the production of the final spreadsheet involved skill in the assessment of variables in respect of a difficult asset class in a new and developing market. It was time-consuming and laborious, and was needed in order to present the relevant information (whatever its derivation) in technically robust and reliable, digestible and logical form for the purposes of its assessment by financial institutions and potential purchasers of pCERs.

937. Last but not least, and looking ahead in the chronology of the case, I consider that Mr Martens' admitted subsequent use of the spreadsheets in the context of Projects Clearwater, Silverback and Pomodoro confirms their utility; and Mr Martens accepted under cross-examination that the spreadsheets:

    (1) did contain information including assessment and valuation of Tricorona's CDM portfolio, and the contracted volumes and ERPA prices, which he agreed was "highly confidential"; and

    (2) were, taken as a whole, in themselves confidential.

938. For all these reasons, in my judgment, the spreadsheets had the quality of confidence about them, and were potentially of considerable value both in terms of their content and in terms of the way that such content was presented.

*The confidentiality of the Expressions of Interest*

939. I have described the Expressions of Interest obtained by CFP as part of the presentation package for Project Arctic Fox and the importance that CFP attached to them.

940. In their written Opening Submissions, the Defendants accused CFP of having "grossly exaggerated [the] value and significance" of the Expressions of Interest. Their objective was both (a) to minimise the importance of the Expressions of Interest and (b) nevertheless also to promote the Expressions of Interest as the litmus test of CFP's case, whereby to demonstrate its lack of substance.

941. There are real questions as to whether the Expressions of Interest (a) even if confidential in the sense of not being available to the public, had sufficient substance to have the requisite quality of confidentiality about them; (b) had any real influence; and (c) even if initially confidential, remained so when (if ever) they were "used" by Barclays. I return to (b) and (c) later.

942. As to (a), I was left unclear (and I think, unguided) as to whether compliance buyers would themselves regard their Expressions of Interest as confidential. None of the forms I was shown was marked confidential; but I did not understand it to be contested by the Defendants that the Expressions of Interest were confidential: it was their value and the duration of it that were really in issue.

943. Of themselves, it seems to me that the Expressions of Interest would not have been of great value: I described them earlier as tentative, scrappy and frail. No copy of them was provided to Barclays; and it seems that CFP never even showed them to Tricorona. They identified household names, whose interest in CERs can hardly have been a secret, as potential but not definite buyers. Mr McQuater brought out their weaknesses well; and was to some degree successful in encouraging CFP to appear to put preponderant weight on them as the standard bearers of its case which, in my view, they could not bear. Mr Navon's description of them as "extremely valuable" and "highly confidential" was, to my mind, overblown.

944. Taking all that into account, however, I do not think that the Expressions of Interest can be discounted as being on their own entirely valueless, or lacking any quality of confidentiality because constituting little if anything more than a statement of the obvious or general.

945. In my judgment, the identification of named potential compliance buyers of volume CERs with a potential (even if in at least one case, qualified) interest in taking a proportion of Large Hydro CERs was confidential, and the more so in the context of a package intended to demonstrate "the Big Idea". I have no doubt that Barclays would have regarded them as such at the time, and would have treated them (in my view plainly correctly) as falling squarely within the description of confidential material in the IVC/Barclays Confidentiality Agreement.

*Conclusions as to the confidentiality of the overall package presented by CFP*

946. The overall package that CFP presented and developed in Project Arctic Fox, based on CFP's insight that there was increasing demand for Large Hydro CERs both in and outside the Far East, especially from compliance buyers willing to engage in off-market, over the counter deals and (with increasing enthusiasm) to take the risk (for the sake of the volumes available) in relation to restrictions on Large Hydro CERs, was, in my assessment, a special insight shared in conditions of confidentiality. That part at least of the Big Idea did, in my judgment, have a quality of confidentiality.

947. The individual pieces of information that CFP presented and developed in support of the Big Idea comprised a package which enabled a materially more acute perception of the value of Tricorona as a whole from the particular angle of the potentiality of its oddly balanced portfolio.

948. I confirm that in reaching that conclusion I have taken into account and indeed accepted Barclays' argument that much of the information on which the "pieces of the puzzle" (as Mr Navon described the component pieces that CFP provided) were based were (or were capable of being) derived from public sources. In particular:

(1) The fact that the market capitalisation of the company was significantly lower than the value of the portfolio was apparent from a "quick and dirty analysis" based on publicly available information (as both Mr Navon and Mr Rassmuson agreed in the course of their cross-examinations).

(2) Considerable detail about the Tricorona Portfolio was available from the "UNEP Risoe pipeline spreadsheet", which was updated about every two months and which gathered together all the public information about CDM projects. Mr Nicholls (of CFP) explained in his witness statement and oral evidence how information could be culled from that source; once the projects had been identified (which he confirmed was not a difficult process), it was then easy to see from the data the project's host country, methodology, status in the UNFCCC registration process, average contracted CER volume per year and the participants in a project (though not, I was told, the active buyer).

949. However, a number of details about Tricorona's portfolio could not be derived from public sources. These, as the Defendants fairly acknowledged, included (a) information about early stage projects for which no PDD had yet been issued and which did not appear in the UNEP Risoe pipeline; (b) the price paid by Tricorona under its ERPAs; and (c) Tricorona's own projections of contracted and risked delivery volumes (being each confidential to Tricorona and of commercial value). A fully detailed and fully up-to-date description of all the projects in the portfolio could only be obtained from Tricorona's own records.

950. The Defendants' witnesses tended to dismiss the information as without real value; but on the whole they did not contend that it was not, for its little worth as they perceived it, confidential. Thus, for example, Mr Martens accepted that:

(a) elements of the information and analysis presented in the spreadsheets prepared by CFP were confidential, as were the spreadsheets themselves;

(b) it is very difficult to separate out confidential elements from other elements in a general presentation of information;

(c) it did not feel right to him to use information obtained in working on the deal (Project Carbonara) for any other purpose, although in point of fact he did use such information (including documentation which he could only access using a Project Carbonara code word) for the purposes of other transactions including Project Clearwater and thereafter Project Pomodoro;

(d) the confidential information included assessment and valuation of Tricorona's CDM portfolio, and the contracted volumes and ERPA prices, which he agreed were "highly confidential";

(e) amongst the uses made, the modelling he did in both those transactions drew from confidential information provided by CFP;

(f) his initial valuations of Tricorona for the purposes of Project Pomodoro used information (including estimates of forward sales) and cash flow analyses compiled in and for the purposes of Project Arctic Fox.

951. As previously indicated, I do not think that contemporaneous market reports, and in particular the Carnegie report and reports from the external consultants Point Carbon and Climate Focus, show either that the information that CFP provided was generally available or that the Big Idea was "out of the bag" by the end of 2008 (as Barclays sought to contend). I have explained my reasoning as to this in relation to the Carnegie report. What Point Carbon were asked and were able to do was to measure Tricorona's portfolio in a more detailed and expert way than might generally be the approach in the market; but they took Tricorona's portfolio as it was, rather than what could be made of it.

952. As Mr Rassmuson observed, Point Carbon and external consultants like them were good at analysing data; but their brief was not to consider or devise ways of identifying and unlocking unappreciated value. What CFP brought, he insisted (as did Mr Navon) was special insight, based on bringing "all the pieces together", as to how to hedge out the risk of an unhedged portfolio and monetise its value: that was not public knowledge, and the discrepancy between the true value of the mine and the public perception of its value proved it.

953. Although to my mind he sometimes tended to be somewhat partisan, I accept Mr Bode's evidence in this regard that (a) pCERs were a relatively new asset class in the period under consideration (2008 to 2010), (b) hedging Large Hydro pCERs presented particular difficulties for all the reasons previously discussed, and was "particularly challenging in 2008 and 2009", and (c) notwithstanding their indicative and provisional (rather than definite and binding) nature, the Expressions of Interest and CFP's analyses did demonstrate a route to market.

954. As Mr Bode stated in his expert report:

> " …in my view the combination of the relevant elements of the deal, such as the Expressions of Interest to purchase primary Large Hydro CERs, specific data about Tricorona projects that was not in the public domain, post 2012 and other wording in the ERPAs, with the information on hedged volume and price was not something that any consultant with whom I have worked, could have put together…"

955. I also note that under cross-examination Mr Korthuis accepted that much of the information was confidential and would have continued to be useful even up to November 2009, especially (a) forward sales information (including volume and pricing), and (b) cost price of the projects in the portfolio.

956. As to whether the Expressions of Interest had any more than passing value, Barclays pointed out that they had been solicited initially to support CFP's presentation to SEB

for finance in early September 2008 and submitted that they were out of date and stale by the time that Barclays learned of them.

957. I accept that at one level the commercial value of an expression of interest is necessarily time-limited. A buyer expresses interest in transacting at a particular time and price; if the transaction is not pursued then he may buy elsewhere or otherwise lose interest. Mr Gold made that, perhaps obvious, point:

> "Q. Now, looking at the dates of those documents, if you were considering the commercial value of those documents for a transaction in late 2009 or into 2010, do the dates have any bearing on the commercial value of these documents?
>
> A. They have significant bearing.
>
> Q. Can you explain what it is and why that is?
>
> A. Expression of interest is effectively a term sheet that people exchange to qualify their relative level of interest about pursuing something. If it hasn't been pursued in a few weeks, that is to start to develop the transaction where you start to narrow down the price term and quantity, then it is generally assumed it has been abandoned, because it is meant on a point in time your trading operation is either long or short at different points in time and the price changes on a regular basis so it becomes stale very quickly and that length of time would be very stale."

958. The Expressions of Interest were all given at the beginning of September when the CER price was about €20. Barclays was not shown them until a month later and was not told who the buyers were until the end of October. In the meantime there had been a financial cataclysm in the collapse of Lehman Brothers. That had badly affected the carbon market: the price had dropped 25% to €15. CFP had not gone back to the relevant counterparties to gauge their continued interest. The Defendants contended that it is, therefore, fanciful to suggest that the fact that certain buyers had expressed a very tentative interest in a primary sale by an unspecified counterparty of unspecified CERs would have had any commercial value to Barclays or anyone else in early, and still less in late, 2009.

959. All that is probably true; but, in my view, the fact that the Expressions of Interest may have been out of date as regards price and specific interest from a particular buyer misses the point. The point at issue is whether the Expressions of Interest opened the Defendants' eyes to a source of reliable demand. The Expressions of Interest were and remained an (albeit somewhat equivocal) indication of European compliance demand for Large Hydro CERs that Barclays had not appreciated. The demonstration of this demand, and of a far greater degree of actual and potential liquidity than had been supposed, was a central plank of the project and of CFP's presentation of it. The Expressions of Interest remained a part of the demonstration.

*How influential and valuable was the material? What was it that caused Barclays to re-evaluate Tricorona?*

960. Perhaps the litmus test both of the confidentiality of the information and its value is whether it changed Barclays' perception of Tricorona's portfolio. If it was that information which caused Barclays, with all its standing and experience, to change its mind, that suggests that there was something of special insight and value provided to it.

961. CFP's case is that the confidential information and insight it provided caused Barclays (and Ms Patel in particular) to re-evaluate Tricorona and then to set about trying by whatever means available to extract value from it.

962. Barclays rejects all this, on the basis that "Barclays' growing comfort with Large Hydro during 2009 was entirely unconnected with CF Partners".

963. I have explained previously my view that Barclays' rejection of Large Hydro CERs as having any value for debt capacity purposes was not a one-off mistake by Mr Martens but an institutional mindset. I have no doubt that something changed Barclays' mind.

964. Paradoxically, perhaps, a real difficulty in determining whether it was CFP's information or changes in the market that affected Barclays' perception of the value of Tricorona's portfolio arises from the fact that over the course of 2009 far greater clarity than previously was brought to the treatment of Large Hydro CERs for the purposes of the EU ETS.

965. Mr Martens accepted that Barclays did change its approach to Large Hydro CERs over the course of the year, but denied that that was because of Project Carbonara. Mr Martens said this:

> "It is because in parallel over the course of this year we did get further clarity from the EU on how to treat large hydro. During the course of that year we saw also in our trading desk transactions with large hydro on secondary markets, secondary large hydro transactions picking up. We saw the CER spread -- discount which was paid for large hydro being reduced and then that got us comfortable about large hydro."

966. Barclays portrayed the lack of clarity as to whether Large Hydro pCERs would be accepted to be compliant with the WCD criteria as the "central problem", and the 2009 Guidelines as the solution which led to a change in the perceptions of the market, and to Barclays altering its view on the asset class.

967. The Defendants painted a picture of "growing market comfort with Large Hydro", manifested by (a) supply of Large Hydro expanding quickly, (b) use of Large Hydro growing more rapidly than other CER types, so that Large Hydro pCERs became the fastest growing category of CERs used for compliance purposes, (c) a considerable increase in the number of Member States actually accepting Large Hydro CERs (from 6 to 20 over the period 2008 to 2009), and (d) a significant reduction in the Large Hydro discount by 2009, indicating that the market was increasingly treating Large Hydro as equivalent to other CERs in terms of achievable price.

968. In February 2009, Mr Sikorski reported on "progress being made in harmonising approach to large hydro". He said:

> "One aspect of the legislation is that it is not mandatory, as with a Directive, but is voluntary and individual Member States are still be free to refuse to accept large hydro CERs. However, the large majority of Member States expect to follow the new set of procedures, with only France and Belgium needing to ensure that the guidelines are in line with other national legislation on hydro projects.
>
> In terms of the potential effect on the market, there are about 360 Mt of 2012 CERs expected from 415 large hydro projects in the CDM pipeline. Of these, 81 projects are registered and are expected to deliver 68 Mt of CERs by 2012. The majority of the projects are in China, which accounts for 70% of the total pipeline and 60% of total registered projects expected 2012 CER volume. The potential value of this pipeline, at current CDM prices, exceeds 3.5 €/bn."

969. At the same time, Ms Patel and Mr Martens were taking a more optimistic view about Large Hydro as they saw the market changing. On 8 April 2009, Mr Martens sent an internal email entitled "large hydro update" saying:

> "We have done some investigation on guaranteed delivery of large hydro CERs. CF Partners, First climate and EcoSec are buyers. CF partners indicated 10% discount, First climate hinted at 2-4% discount. It seems that the large hydro discount is rapidly disappearing. It's waiting for ECX to change it terms and allow EU approved large hydro CERs to be traded. Rachel is investigating this with ECX."

970. On 15 April 2009, a broker emailed Ms Patel saying that they had a buyer looking for up to 1m tons of CERs from Large Hydro projects. So, as one might expect given Barclays' position in the market, buyers would come to Barclays bidding for Large Hydro.

971. On 20 April 2009, Ms Patel emailed Mr Whitehead and said:

> "Had a quick catch up with Roger on large hydro and he is happy for us to proceed with these deals on the basis that we only commit ourselves once the new guidelines are formally approved."

972. On 30 April 2009, Barclays sought and obtained comfort from the UK Government (the Department of Energy and Climate Change) in relation to the use of Large Hydro CERs for EU ETS compliance. The UK Government had first issued guidance in relation to Large Hydro in November 2008 and had given its first Large Hydro LoA in August 2008. By 1 April 2009 the UK had its own Annex D compliance report for assessing Large Hydro projects.

973. In May 2009, Ms Patel negotiated a Large Hydro sale with Corus, the steel company. She reported on that transaction to her colleagues:

> "Just to let you know that we executed a large hydro CER deal with Corus on Friday whereby we delivered large hydro CERs into an EUA/CER swap. We sourced large hydro CERs from a carbon developer as part of a back to back deal.
>
> Large hydro are trading at a slight discount to other CERs given historic issues around acceptability and hence this was an attractive trade to Corus.
>
> The UK DNA is happy to accept large hydro CERs from any installation for compliance as long as they are pre approved by another EC DNA. This is their stance even prior to the EC harmonisation rules on large hydro being signed off (expected July).
>
> Clearly we had to show Corus all the relevant docs from the UK DNA to get them comfortable with the trade.
>
> Therefore please bear this in mind with other UK clients. If there is any interest please let us know as we may be able to source the large hydro from a carbon fund client as we did here and just back to back the trade.
>
> This is a good opportunity as many are unaware of the rules of large hydro and think that until the EC harmonisation rules come in - they are not allowed which is not the case for UK and select other countries..."

974. Mr Sikorski gave the following report on the state of the market in August 2009:

> "After a couple of weeks away basking in the sun, it was good to come back to news that there has been some progress on large hydro (>20 MW) with Denmark having approved the use of CERs from an 81 MW Chinese hydro power project for compliance under the EU ETS. The Danish approval is notable for two reasons. First, Denmark was one of the countries most reluctant to approve the use of CERs from large hydro under the EU ETS. Second, it represents the first approval given under the harmonised guidelines introduced on 1 July 2009, which means that all states following the guidelines should be willing to accept CERs from this project. From a pricing perspective, the news does not change the wider market balance - as CERs from large hydro plants always qualified for sovereign compliance under the Kyoto Protocol.
>
> However, the guidance does widen the pool of CERs available for EU ETS compliance participants and since the latter is an important driver of the secondary market, sufficient approvals

> of large hydro projects may in time be bearish for that price. To put large hydro into context, there are 192 projects either registered, or in registration, that have a potential to generate 134 million CERs by the end of 2012. Against total market forecasts of just over 1,400 million CERs in this period, this is a significant market segment that at least some proportion of will now open up to EU ETS compliance buyers. The news is also important for project developers with large hydro CERs as these become easier to monetise at the prevailing market price. Such CERs have not been accepted by exchanges for physical settlement of CERs and EU ETS buyers have shied away from such credits as their EU ETS compliance status was in doubt. This meant such CERs would tend to trade at a discount to the secondary market price. While the exchanges are still deciding how they are going to treat such large hydro CERs, EU ETS buyers should now be happy to buy CERs on the OTC market from any large hydro plant projects that are approved by at least one Member State. As such, the discount to the secondary markets applied to approved projects should narrow to zero - which is certainly good news for those long in such credits."

975. The shift in attitude within Barclays to Large Hydro CERs as a result of CFP's analysis is illustrated by comparing the GFRM presentation dated 25 November 2008 and the "Background Tricorona" presentation prepared by Mr Martens on 13 November 2009 for the purposes of Project Pomodoro. Of particular note:

(a) The 2008 slide separated out from the notional volumes Large Hydro CERs and Large Hydro CERs without LoA. The same 2008 GFRM slide appears in the Carbonara analysis circulated by Mr Lim on 18 November 2008; Mr Lim's evidence was: "I think this was prepared by the whole team...". The key members of the team, namely Ms Patel, Mr Martens, Dr Swift, and Mr Zintl, would have approved the analysis.

(b) By the time of Pomodoro the same slide did not make any distinction for Large Hydro CERs in the notional volumes.

976. The Defendants relied on all this to support their thesis that Barclays' growing comfort with Large Hydro pCERs was not the result of anything said or presented by CFP but market change. They submitted that:

> "It is apparent that Barclays' growing comfort with Large Hydro during 2009 was entirely unconnected with CF Partners. Barclays had become entirely comfortable with Large Hydro by August 2009 at the latest. Even if CF Partners were ahead of Barclays in 2008 in their optimistic view of Large Hydro, by August 2009 Barclays agreed – not because they were educated by CF Partners but because in the intervening period market perceptions had changed very significantly."

977. It is I think clear, and I accept, that over the course especially of 2009, the 2009 Guidelines reassured an already more open-minded market, and removed much of the stigma to which Large Hydro pCERs had been subject.

978. I accept also, therefore, that even if there was a radical change in Barclays' perception of Large Hydro pCERs as an asset class (and as I say, I think that was more a matter of Barclays moving to looking at the value of the "mine" rather than discounting the asset class as readily realisable security), that change was in part the product of changing market perception, and steps forward such as the 2009 Guidelines.

979. However, in my judgment and taking all that into account, CFP's work and its presentations did bring a new perspective in the course of September 2008 to the beginning of January 2009, and thus before the changes above described. This was a catalyst for Barclays becoming more receptive to Large Hydro pCERs as an asset class and to the value of a portfolio of unhedged Large Hydro pCERs as a potentially relevant "mine" for both sales and fees. The later clarification confirmed the correctness of this change of outlook; but it was instigated earlier, as shown (for example) by the steps in Barclays' reassessment of the value of the Tricorona Portfolio for lending purposes and the gradual and tutored recognition of marketability implicit in Barclays' shift towards accepting (in principle at least) CFP's figures and outlook.

980. It is another matter whether Barclays would actually have proceeded without the further comfort of the 2009 Guidelines and obviously changing market conditions; but I think that, having initially seen no real potential (as she put it in her oral evidence, she "didn't think there was any untapped value in the portfolio"), Ms Patel's enthusiasm was rekindled and enhanced by CFP's insight and confidential information, and that, even before the 2009 Guidelines had been formally agreed and promulgated, she was keen to work the "mine" as the means of building the department of which she had become head, using her good (and rapidly developing) relationship with the Tricorona Management.

*Did Barclays misuse the confidential information, and if so, how and when?*

981. That brings me to the issue whether (and if so in what way and when) Barclays misused the information it received from CFP for purposes other than those for which it had received it.

982. Misuse must be demonstrated: it is not enough to show that the recipient has been influenced by the confidential information. A change of outlook is not sufficient: acting upon it must be shown. It is proof of misuse which constitutes the breach.

983. However, subconscious use may constitute misuse; and I do not consider that it was or is necessary for CFP to show what influence individual pieces of information had on Ms Patel and Barclays, nor that specific pieces of information suggested and resulted in some particular form of approach or activity.

984. Misuse may be inferred from the fact that a defendant, having obtained confidential information, is influenced by it (whilst it retains the quality of confidentiality) in

determining and then embarking on a course of conduct otherwise than for the purposes for which it was provided.

985. Adapting the language of the IVC/Barclays Confidentiality Agreement, the question is whether Barclays, consciously or subconsciously, used any part of the confidential information it received from CFP otherwise than solely for the purpose of evaluating the "Possible Transaction" involving the takeover by IVC/CFP of Tricorona as owner of a portfolio of CERs.

986. In that language, that becomes (borrowing from clause 6) disclosure otherwise than for the purpose of conducting the necessary discussions in respect of the "Project", being (and this is a distillation of the agreements between them) the sharing between them of information concerning greenhouse gas emission reduction projects, allowances and credits and its evaluation for their mutual benefit in evaluating the possibility of the acquisition of Tricorona by CFP or a Newco established between them.

987. In my view, once (a) the continuing confidentiality of the relevant information, (b) its provision to the defendant, (c) its relevance in whole or part to an assessment by that defendant of a transaction or a counterparty, (d) the likelihood of it or some part of it having influenced the approach of the defendant in its dealings in that transaction or with that counterparty within the period or currency of confidentiality, and (e) dealings likely to have been so influenced are demonstrated, use is likely to be inferred and breach established.

988. I address the allegations of misuse by (a) Barclays and (b) Tricorona separately.

989. CFP originally put its case in terms of the misuse by Barclays as being:

> "in purchasing Tricorona itself and for its own benefit, and in its dealings with Tricorona for such purpose, and in such connection."

990. CFP now alleges, in the latest iteration of its case, that Barclays misused CFP's confidential information:

> "in seeking to extract and/or in extracting significant value from and/or seeking to monetise and/or monetising the Tricorona portfolio as part of a strategic partnership with Tricorona and/or in purchasing Tricorona itself and for its own benefit, and in its dealings with Tricorona for such purposes, and in such connection".

991. That latest iteration of its case extends the time-frame of the alleged misuse considerably: Barclays' misuse of the "composite" confidential information is now traced, according to CFP's case, all the way back to December 2008.

992. In Appendix 2 of CFP's Re-Amended Particulars of Claim, CFP pleads as follows:

> "From at least December 2008, individuals in Barclays, including but not limited to Ms Patel, were interested in

> pursuing "opportunities" with Tricorona. It is to be inferred that these opportunities included an acquisition of Tricorona, or substantial parts of its portfolio, by Barclays on its own account. In particular, from late 2008 or early 2009, Barclays, in possession of the knowledge of Tricorona and the Tricorona portfolio derived from CF Partners' confidential information supplied to Barclays in Project Arctic Fox, pursued a strategic partnership with Tricorona, and/or sought to extract significant value from and/or monetise the Tricorona portfolio to the unfair advantage of Barclays. They did so behind CF Partners' back and without making any or any sufficient attempt to inform CF Partners fully and frankly that they were doing so in order to ascertain whether CF Partners (a client of Barclays for whom Barclays was working on Project Carbonara) objected to the same. Individuals at Barclays (principally Ms Patel and Mr Martens) who were in receipt of CF Partners' confidential information about Tricorona and who had been 'wall-crossed' into the Barclays private-side Carbonara deal team, were permitted to discuss and carry on public-side trading activities with Tricorona. These were described by Barclays as 'strategic' and/or 'hedging' and/or risk management and/or financing discussions and/or activities. Such discussions and/or activities, because of the reliance by the Barclays' individuals involved on CF Partners' confidential information for purposes other than Arctic Fox, constituted misuse of that information. In particular:
>
> (1) Such Barclays' individuals could not have put out of their minds the confidential information derived from CF Partners as a result of Project Carbonara even if they had tried to do so, which they did not…"

993. That last part of CFP's pleading captures the point that information may so saturate a person's mind that it becomes virtually impossible to say of any given action whether he or she was influenced by it. This is of particular relevance to Ms Patel, and I return to it later.

994. As to the composite information (the "Big Idea"), CFP's case as to misuse is that (a) Barclays determined on seeking, and worked to establish, a strategic partnership with Tricorona in early 2009; (b) that strategic partnership was not finite in its objectives: both Barclays and Tricorona contemplated at the least that Barclays would acquire very large volumes of CERs from Tricorona and undertake hedging and other operations on a scale far greater than "day-to-day" hedging; (c) Barclays' pursuit of such a partnership from early 2009 onwards ultimately led to Project Pomodoro and its acquisition of Tricorona in 2010; (d) in seeking such a partnership, and in ultimately acquiring Tricorona, Barclays was materially influenced by the "single composite piece of confidential information" (the "Big Idea") it obtained from CFP in the context of Project Arctic Fox/Carbonara; and (e) in pursuing and implementing Project Pomodoro, Barclays made use of component confidential parts of the composite whole.

995. As to the misuse of individual pieces of information also, CFP relies on, in particular:

(1) the involvement of Ms Patel and Mr Martens "behind the scenes" in Project Clearwater, their disregard of any Chinese Wall or other embargo, and their indiscriminate use, conscious and subconscious, of information acquired in the context of Project Arctic Fox, as illustrated by an email dated 23 June 2009 from Mr Lars Alm to Mr von Zweigbergk (both of Tricorona) stating:

> "The meeting yesterday went OK. But it was just an hour long. Angela [Swift], however, did have very good information about us, as she has been involved and 'done the sums' on us on a previous occasion."

(2) The supply by Barclays to Tricorona, and the use by Tricorona in the context of Project Clearwater, of specific material provided by CFP to Barclays in Project Arctic Fox, including:

(a) in June 2009, the Barclays' DCF model for Project Carbonara, which contained and relied on such information;

(b) in July 2009, revised valuation models which contained and relied on CFP's confidential information.

(3) The indiscriminate use internally within Barclays over the course of June to September 2009, in the context of Projects Clearwater, Silverback/Bison and latterly Pomodoro, of electronic links to folders of documents created in the context of Project Carbonara (as illustrated by emails to fellow Barclays employees from Mr Lim on 11 June 2009 and 17 September 2009).

(4) The use within Barclays of CFP's confidential information in preparing presentations for the assessment of Project Pomodoro by, for example, Mr Gold, including a valuation spreadsheet "Tric share price final 13-11-2009", material parts of which were derived from or based upon information provided to Mr Martens by CFP in 2008, including (a) the purchase price for the CERs in Tricorona's portfolio, (b) CFP's hedge price and adjusted volume calculations, and (c) CFP's calculations of net revenues on forward sales, total revenues and expected profit.

(5) The circulation and use within Barclays, especially for the purpose of structuring Project Pomodoro, of (a) a document entitled "Project Carbonara GFRM discussions materials 25 November 2008", (b) cash flow and revenue analyses in respect of Tricorona based on CFP's confidential information, and (c) various presentations prepared by CFP with regard to Tricorona, including a presentation sent by Mr Navon to Dr Swift on 27 October 2008 entitled "Arctic Fox Barclays Transaction Details October 2008" which contained, amongst other things, details of CFP's clients and the demand for Large Hydro CERs, and (d) (in January 2010) a data review and four spreadsheets entitled "Tricorona cap structure (Jan 10) MS1", "Tricorona cap structure (Jan 10) MS2", "Tricorona cap structure (Jan 10) MS3" and "Tricorona cap structure (Jan 10) MS", all of which drew on information provided by CFP, especially on the debt capacity of Tricorona.

996. On CFP's case as now put forward, the initial misuse of the composite whole was at the commencement of 2009 and thus well before the information misused had lost its confidentiality (and well before the contractual period of confidentiality under the IVC/Barclays Confidentiality Agreement, if relevant, expired); and the component parts retained the quality of confidentiality throughout.

997. CFP's case as to the extent of the misuse and its consequences (and thus the compensation due) relies on a continuum between receipt by Barclays from CFP of confidential information in the context of Project Arctic Fox/Carbonara, its influence on and use by Barclays in building a platform with Tricorona for future business, and the fact that in the end Barclays did pursue and purchase Tricorona.

998. CFP's case focuses particularly on the role of Ms Patel. It depicts her as the central figure on Barclays' side: once she "had come to see the true potential value of Tricorona's portfolio, she set about trying to extract value from it. CF Partners' confidential information provided the trigger for those activities…" It is she who represents and provides the continuum from dismissal through the sequence to revelation, pursuit and acquisition, the last simply being the final stage of a strategic objective to work the "mine".

999. In its written closing CFP's case was summarised in this way:

> "Before Arctic Fox, Barclays had rejected Tricorona as an attractive proposition, both as an acquisition target and as a trading partner; Barclays did not even consider that it should give Tricorona a credit line. The bank made no subsequent analysis before CF Partners presented the Arctic Fox opportunity to it. Arctic Fox showed Barclays the true value of the Tricorona CER portfolio. Barclays thereafter, and using the knowledge it had as a result of Carbonara, embarked on a series of opportunities with the 'target', which at root were all concerned with the monetisation of the Tricorona portfolio, and which conflicted with the rationale of Arctic Fox…
>
> …the Court should ask what had changed so that in early 2009 Barclays, and more particularly Ms Patel, suddenly became so keen on a 'strategic partnership' and exploration of other 'opportunities' with Tricorona. The Defendants have provided no answer throughout the 2 month trial."

1000. Barclays' case, on the other hand, is that it had formed no intention of acquiring Tricorona until well after the expiry of Barclays' duty (if any) of confidentiality; and that it was changes in the market, and not CFP, that transformed its perception of Tricorona.

1001. Barclays dismissed as far-fetched CFP's notion of some great strategic plan hatched at the Singapore meeting (see paragraphs [580] to [591] above) and culminating in the implementation of Project Pomodoro. It contends, and I have accepted (see paragraph [589] above), that none of the evidence about the meeting supports CFP's case that it marked the beginning of a plot between Barclays and Tricorona or, as CFP now pleads it, a discussion "the intention and/or effect of which was to prejudice Project

Arctic Fox and/or any portfolio monetisation discussions CF Partners might otherwise have had with Tricorona and/or to benefit Barclays and Tricorona at the expense or to the detriment of CF Partners".

1002. Barclays makes the further point that there is really no basis to reject the four witnesses' evidence and Ms Patel's contemporaneous email as an accurate account of what happened at the meeting. In particular, there is no reason why Ms Patel would have created a false record of the meeting. Again, subject to my caveat in that paragraph, I agree.

1003. In Barclays' depiction, Ms Patel, though an important player, is not the central figure, nor does she follow any grand or strategic plan. There is no continuum between the discussions between CFP and Barclays in 2008 and the acquisition of Tricorona by Barclays in 2010. The trades undertaken between Barclays and Tricorona in that period are limited and occasional, and no more (in fact or in objective) than the day-to-day trading that CFP had confirmed at the beginning of 2009 was permitted; and Project Pomodoro was neither based on any confidential information provided by CFP nor was its rationale (primary forward sales being no part of it and the "play" in effect being, so Mr McQuater described it, "a bet on the post-2012 market") at all similar to that of Project Arctic Fox.

1004. Barclays' primary case in relation to the use of the allegedly confidential information in Project Pomodoro is that any duty of confidence it owed to CFP had expired prior to the start of the transaction (the contractual end date of 3 September 2009 being an appropriate one in equity as well), and that, consequently, none of the information it obtained during Arctic Fox/Carbonara remained confidential to CFP (if it ever was) and Barclays could use the information in whatever way it saw fit.

1005. Barclays submits that CFP's opportunity did not (indeed cannot) have existed in 2009 or 2010: for "in order to constitute 'confidential information', the opportunity (to the extent there was one) was necessarily limited to (defined by) a particular point or period in time". Barclays submits that the passage of time and changed market circumstances since mid-2008, meant that

> "CF Partners' arbitrage opportunity had gone the way of the dodo: other flightless birds might in the future evolve, but that one had 'vanished forever' by late 2009 to mid-2010."

1006. Further, Barclays submits that there is no evidence to suggest that any of the allegedly confidential information used during Project Pomodoro was used by Barclays as a basis upon which to make its final decision to undertake the transaction. It maintains that, since it had ready access to up-to-date information from Tricorona, it is simply not plausible that, despite this, the Project Pomodoro deal team or anyone else at Barclays reached back and relied at anything other than a preliminary stage on old information obtained during Project Arctic Fox/Carbonara. Barclays emphasises that CFP's own carbon market expert, Mr Bode, agreed that an acquirer would always have required up-to-date information once beyond the initial stages of considering a deal.

1007. Barclays contends that this point holds even if Barclays always intended to acquire Tricorona from the end of Project Silverback. The first contact between Barclays and

Tricorona in that respect was on 22 September 2009, which was still after the expiry of Barclays' contractual duty of confidence (on 3 September 2009).

1008. I can summarise my views as to these contested issues as follows.

1009. First, and as previously indicated, I agree with Barclays that there is no support for CFP's hypothesis of a plot at the Singapore meeting, and it is inherently unlikely: the hypothesis is far-fetched. I consider it likely that all the attendees were wary.

1010. However, as stated in paragraph [585] above, I do consider that from the Singapore meeting onwards, Ms Patel and Barclays, and the Tricorona Management, who never had any great attachment to Project Arctic Fox/Carbonara, had their eyes on the future once it failed.

1011. Over the course of October 2008 to the beginning of January 2009, Ms Patel and Barclays were provided with a considerable amount of material that gave them a very clear insight into Tricorona's portfolio and its potential. CFP's painstaking approach had, I accept and find, opened Barclays' eyes to materially greater potential as a "mine" than it had identified in the course of Project Conifer and its aftermath in 2007-2008, or assumed before it became involved in Project Arctic Fox.

1012. More particularly, my sense is that the material CFP provided and the confidential iterative process undertaken enabled Ms Patel and Mr Martens, for the first time, to persuade Barclays' Credit Department to attribute substantial debt capacity to Tricorona, including (eventually) in respect of Large Hydro CERs. The Credit Department's almost contemptuous dismissal of any credit line of any substance had destroyed Mr Garcia's efforts to build business in 2007-2008. Notwithstanding Ms Patel's efforts in May 2008 (as to which see paragraphs [327] to [328] above) to re-educate the Credit Department, old perspectives remained.

1013. I accept and find that the conversation between Ms Patel and Dr Swift on 21 January 2009, already quoted in paragraph [645] above, in the course of which Ms Patel (by now, at her own instigation, operating on both sides of the 'wall') urged that Barclays should "get in there now" to exploit the opportunity "which is there right now" to "close something with Carbonara themselves" from a position of knowing "more about their portfolio than anyone else" (and see paragraph [642] above), indicates firmly that by then Ms Patel had determined to do as much business as she could with Tricorona. That was inimical to Project Carbonara, and (as I also find) she knew it.

1014. In the latter context, Ms Patel realised that she had to tread carefully, and that overt discussion about portfolio financing and monetisation whilst Project Arctic Fox remained on foot was a step too far; but she wanted to keep Tricorona's management interested. For their part they had already themselves determined that "the fox was dead" and were more than receptive. As noted above, they did not feel bound by any restrictions themselves.

1015. I am quite satisfied that the unique knowledge to which Ms Patel referred in her telephone conversation with Dr Swift was derived principally from the material provided by, and discussions with, CFP. The fact that the primary and major source of that knowledge was Project Arctic Fox/Carbonara was unequivocally accepted by Mr Martens in the course of his oral evidence. No other sources were suggested.

1016. Ms Patel was less straightforward about it, and repeatedly changed her evidence. Her inconsistent attempts, over the course of three witness statements and under cross-examination, to explain what she meant were unconvincing. It was obvious from the transcript of the call, as from the words themselves, that her focus was on the unrivalled extent of Barclays' knowledge of Tricorona, not on the comparative issue of whether its knowledge of Tricorona was greater than its knowledge of other portfolios as in one version she sought to suggest; and it was always far-fetched for Ms Patel ever to have suggested that from its desultory contact and public information, Barclays could possibly have known more about the Tricorona Portfolio than about the portfolios of other developers.

1017. I consider that Ms Patel's contortions in this context were the product of her appreciating, once the transcript of the telephone conversation with Dr Swift was made available (it had not been so at the time of her first witness statement) that her remark to Dr Swift did, at least to some extent, give the game away. I consider and find that Ms Patel was well aware at that time and thereafter that she had information obtained under a duty of confidence, and that using it would assist her to accomplish her objectives as regards Tricorona. Hence her further remarks to Dr Swift about wishing to "close something with Carbonara themselves…the opportunity is there right now…". Her knowledge of the Tricorona Portfolio was what prompted the urgency of her request to proceed: that is in effect what she was saying, as recorded.

1018. I consider that Ms Patel well understood that her statement to Dr Swift did indeed reveal that the information and insights that had been conveyed to her in Project Arctic Fox had not only opened her eyes to the value of the raisins, but placed her and Barclays at a competitive advantage as compared with other potential suitors which could be a platform to considerable future business and a "strategic relationship". I regret also to say that I found Ms Patel's efforts to justify these inconsistencies in her evidence and to escape from this to be contrived to the point of untruthfulness.

1019. In such circumstances, I do not feel able to accept Ms Patel's evidence that "the portfolio in itself was not information that was relevant for me personally in having any discussions about risk management". Nor do I feel able to accept her explanation that "I wasn't talking about [Tricorona's] portfolio ... I was talking to [Tricorona] about risk management". Neither her knowledge nor her use of it can in reality have been so compartmentalised; and even if her immediate objectives might have been hedging transactions in times of volatility, they were not, as I see it and find, so restricted.

1020. CFP had given Barclays a considerable advantage and an early perspective as to the potential for Large Hydro CERs which the market had not factored in and which was soon confirmed. Ms Patel's mind was saturated with this information; she was determined and in a hurry to use it; and she replaced Mr Garcia to ensure that she could implement its use.

1021. I consider her decision in January 2009 personally to take over from Mr Garcia the responsibility within Barclays for looking after the relationship with Tricorona to be an important indication of her true objectives. Mr Garcia, it will be recalled, worked in the utilities team of Commodity Sales: Ms Patel described him in her oral evidence as "a general sales person" (although at one point she, entirely unconvincingly, affected not to know "whether he sat in the utilities team or not") and Mr Zintl could

not recall who he was. It seems that Mr Garcia operated at a level where he might be trusted with the odd spot sale or day-to-day trade, but not with a more important on-going strategic relationship; and furthermore, his "take" on Tricorona was the one that Barclays had formed at the outset, that it did not offer anything for Barclays, and that the largest proportion of its portfolio (Large Hydro) was not acceptable to Barclays for any purpose. In thus replacing Mr Garcia, Ms Patel represented, and positioned herself to bring to fruition, the new outlook on Tricorona[35].

1022. In the same time period, the troubles in the world economies, matched by a serious deterioration in the CER price, increased the opportunity for purchasers such as Barclays, and the predicament of sellers such as Tricorona. The truth, in my judgment, is that Ms Patel was interested, in volatile markets that offered what she perceived to be opportunities, in doing as much business as she could with Tricorona, both for immediate trading profit and the potential of a closer and more extensive partnership, whilst being "clever about how…".

1023. Also of note is the flurry of activity (of which CFP was kept unaware) that followed Ms Patel's replacement of Mr Garcia. This included her visit (with Mr Martens and Mr Sikorski) to Stockholm on 10 February 2009, which was immediately followed by emails from Mr Holmgren signifying (so I read them) readiness on the part of the Tricorona Management to enlist Barclays to "hedge" up to 40% or more of its portfolio (albeit over the course of an unspecified time period), and seeking to entice Barclays by reminding it of the arbitrage opportunity indicated in the Carnegie report. That in turn led to Ms Patel's response in urgently exploring both CER hedging and lending against the portfolio (prohibited, of course, by the IVC/Barclays Confidentiality Agreement). All this further supports the conclusion that that event presaged a substantive change in the relationship between Barclays and the Tricorona Management: day-to-day trades were not the objective; a strategic relationship was.

1024. It is true that actual trades were few and far between, as Barclays emphasised in support of its submission that there was no actual "use". But in a sense that further confirms that what was really happening was an increasingly close alignment, with wider horizons than spot trades. By 13 March 2009 Ms Patel was describing Tricorona as a "very special client". In Mr Holmgren's words, Barclays was at this point "responsive to any of the needs that we put across to them". Tricorona had gone from being a "no go" in July 2007 to being a very special client.[36] In the intervening period the only thing that had happened to influence Barclays' view of Tricorona was that Barclays had been provided with confidential information about Tricorona and its portfolio by CFP.

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[35] I note in passing that Ms Patel's assumption of responsibility for Barclays' relationship with Tricorona was entirely inimical to any pretence of confidentiality, made a nonsense of any Chinese Wall, flatly contradicted Mr Zintl's assurance to Mr Navon that Barclays would "not conflict ourselves in any way from working with you", and should never have been countenanced.

[36] Ms Patel said "it has gone from no go as an acquisition target to an 'I want this to be a risk management client of mine'. That's my mandate, not for me to buy companies but for me to do risk management with them, and these were one of a number of clients who we wanted to do more risk management with."

1025. In summary, I consider that by "strategic partnership" Ms Patel initially (in December 2008 and early January 2009) had in mind Barclays becoming Tricorona's preferred bank for fee-earning transactions such as arranging hedging and forward sales. Even at that stage she had in mind much more than the odd hedge or spot trade such as might have come Barclays' way in the ordinary course. Soon, and increasingly over the course of 2009, she sought a longer term relationship which would afford Barclays the opportunity to take on chunks of Tricorona's portfolio and the "raisins in the cake", with the open-ended possibility (and enticement to the Tricorona Management whose "dream" it was) of some form of buy-out, described in broad terms (albeit not until October 2009) by Mr Holmgren as "our idea of combining banking plus utility plus potential financial player plus management in a buy-out".

1026. The Tricorona Management's involvement in Project Icebreaker suggests that as at the end of February 2009 they were still keeping their options open; they plainly did not regard themselves as committed to an exclusive relationship even if engagement was on the cards. As the Defendants emphasised in their Closing Submissions (both written and oral), Tricorona's management did not approach or even inform Barclays of the project; and though Mr von Zweigbergk denied that it was an MBO he accepted that it was "the same target to take Tricorona private" as Project Arctic Fox and its successful implementation might well have brought an end to any developing relationship with Barclays. However, the fact is that Project Icebreaker collapsed. Even if it is another example of a certain fickleness, opportunism and lack of candour on the part of Tricorona's management, it does not seem to me to tell strongly (if at all) against my conclusion that Ms Patel and Tricorona's management, Project Arctic Fox now consigned to the past, were working together to establish a platform for the future, prompted and assisted by confidential material that CFP had provided.

*But no causal link or continuum*

1027. Project Icebreaker, and the other projects in which Tricorona did seek to involve Barclays, do however, seem to me to tell against CFP's theory of a continuum between Ms Patel's strategic partnership and Project Pomodoro asserted by CFP. One thing may have led to another; but I do not accept that Ms Patel had in mind the acquisition of Tricorona until considerably later (perhaps as late as September 2009, though I suspect that she might earlier have had it in mind if Project Silverback failed).

1028. The essential twin pillars of CFP's argument that there was a continuum of use between Barclays' strategy of seeking a "strategic partnership" with Tricorona in early 2009 and its acquisition of Tricorona in 2010, and that it was the information and insight provided by CFP to Barclays that informed both, are:

(1) that, as the somewhat provocative selection by Barclays of a code-name likewise based on a spaghetti sauce might suggest, Project Pomodoro was a variant of the same basic meal as Project Carbonara (though this time it was Barclays not CFP which was going to devour Tricorona); and

(2) that Barclays' strategy and its implementation was at all times guided by Ms Patel, who (as previously explained) operated, as she chose to operate, on both sides of a Chinese Wall, so that it is impossible for Barclays to contend

that Barclays' strategy was not informed by information provided to it in confidence.

1029. There are powerful objective factors against this suggestion of such a "continuum". These include (a) its dependence on an unusual (the Defendants said "fantastical") degree of pre-ordination; (b) the lapse of time between the receipt of the information and the event it is said to have informed; (c) intervening events, and especially Barclays' concerted efforts in the meantime to acquire EcoSecurities which, had they been successful, would likely have dissuaded Barclays from any pursuit of another carbon developer such as Tricorona; and (d) differences in the business case for (i) Project Arctic Fox and (ii) Project Pomodoro (the Defendants' case being that the latter was not based on any arbitrage opportunity, but on gaining access to the potentially very lucrative post-2012 market).

1030. Furthermore, Barclays have advanced a telling case in favour of the conclusion that it was not any such "continuum" that led to its acquisition of Tricorona but, on the contrary, (a) material changes in the market which, without any need for or reliance on the insight provided by CFP (if any), removed the market's doubts and revolutionised its (and the market's) approach to Large Hydro pCERs (and, of course, removed any real potential for arbitrage by reference to market uncertainty) and (b) the simple fact that, as matters turned out, Tricorona was by then (and once Barclays had lost out to JP Morgan) the only carbon developer left in a market which Barclays had set out and still sought to dominate.

1031. There is considerable force in each of the points advanced by Barclays as summarised in the preceding two paragraphs. I am persuaded that, as so often, what eventually happened (in this case, the acquisition of Tricorona by Barclays) was not initially planned; and a number of factors contributed to the eventual result, including (for example) Barclays' perception (according to Mr Gold, at least) that the contest for EcoSecurities had demonstrated that "the industry was undervalued".

1032. Further, I accept that it was obviously not the effect of the provision to it by CFP of the "Big Idea" (or the individual pieces of confidential information) that Barclays formed an intention or resolved there and then to acquire Tricorona.

1033. For all these reasons, I cannot accept that there was a true causal link between Ms Patel's strategic plan and Project Pomodoro. Adopting by analogy only the language of causation, any such link was broken well before Project Pomodoro.

1034. But I do accept that before the expiry of the agreed period of confidentiality, Barclays had been educated, by the information confidentially presented to it, to an understanding of the embedded value of the "mine" or "raisins" which caused it quickly to cultivate a strategic relationship with Tricorona with a view to its realisation.

1035. Their strategic relationship and co-operation did in fact, albeit after the failure of the earlier projects, eventually culminate in the acquisition of the largest remaining portfolio through the acquisition of all the shares in Tricorona pursuant to Project Pomodoro, with the assistance of Tricorona's management in an agreed bid.

1036. At all times, Ms Patel (under the direction of Mr Gold in the case of Projects Silverback and Pomodoro) was closely involved. It was she who suggested that Barclays should explore "something else between Barclays and Tricorona" when Project Silverback failed. Project Pomodoro was what Ms Patel in her oral evidence described as a "totally natural" development when Tricorona became the only means left for Barclays ("fill or kill" time) to achieve the portfolio procurement strategy that Ms Patel had championed as the means of establishing Barclays in the primary market. Indeed, to a greater or lesser extent all the projects, including Pomodoro, constituted a means of implementing the portfolio procurement strategy which she (with Mr Martens) had always championed.

1037. The link was represented and fostered by Ms Patel. Not only were her eyes opened by Project Arctic Fox to the value of the "mine", and her conduct thereafter informed by what she learned, as a member of the deal team from CFP's presentation of the opportunity it represented; as Head of Environmental Markets Origination, she encouraged, or at least countenanced, the use of that confidential information, not to assist Project Arctic Fox but to develop, all the time keeping CFP in the dark, a strategic relationship between Barclays and Tricorona.

1038. I also accept CFP's submission that given Ms Patel's involvement, indeed pivotal role, in the Project Carbonara deal team, she had and could not help but be informed by information provided confidentially by CFP to Barclays under the supposed protection of the IVC/Barclays Confidentiality Agreement.

1039. In that context, I do not accept Ms Patel's attempted justification of her conduct on the basis that the information she had been given as part of the deal team was not relevant to her dealings with Tricorona, and did not inform her conduct. Such a compartmentalisation of knowledge and conduct is entirely unrealistic: her interest in Tricorona was informed by that information and her assessment of how to proceed was (at least in part) guided by it. Mr McQuater sought to relegate the relevance of the effect on her as akin to "an idea in the bath" which led to no actual misuse; but I do not agree. Ms Patel was a doer not a thinker; and in what she did she was assisted and galvanised by knowing from Project Arctic Fox a lot more than anyone else did about Tricorona's portfolio and how to monetise it.

1040. In using the word "galvanise" I have in mind *Arklow*, and the Privy Council and the New Zealand Court of Appeal's warning that being galvanised by confidential material is not, of itself, actionable misuse. However, in *Arklow*, as I read the advice of the Privy Council (and having also read the judgment in the Court of Appeal) the claimants could not show either that the information in question (as to the development potential of certain land) was confidential nor (even if it was) that the defendant had made any use of it in doing what it in fact did (which was to acquire forestry interests in the land without any plans for, or even interest in, the land's development). The information might have been a stimulus to get going: but it did not bear on what in fact was intended to be done. That contrasts with this case, as I see it: here, the information did not only stimulate or galvanise: it led to Ms Patel pursuing and achieving a "strategic relationship" which was inconsistent with Project Arctic Fox and ultimately inimical to it.

1041. In terms of the development of the relationship, Barclays' engagement with Tricorona after the Exclusivity Release was initially focused on Projects Clearwater and

Silverback: but after their failure it returned more exclusively to the prospect which (as I find) Ms Patel and Mr Martens had had in mind since early 2009, of profiting from the Tricorona raisins (or, to use the other analogy deployed in the hearing, the unhedged content of Tricorona's unusual "mine").

1042. It is notable that from September 2009 onwards Barclays' expressed objective was to ensure that as many raisins were kept in the cake as possible: the embedded value revealed in Project Carbonara became the objective of Project Pomodoro; the one did not occasion or cause the other, but the rationale of both was the same, and that rationale had originally been provided subject to a duty of confidentiality.

1043. As to the individual pieces of confidential information provided to support the Big Idea, there is no doubt that Barclays, after the Exclusivity Release, helped itself to the Carbonara files, which (it will be remembered) required no password for their access.

1044. Internal emails within Barclays confirm that Ms Patel and Mr Martens, and also Mr Lim, drew on the information provided by CFP in Project Arctic Fox without limitation and regardless of any obligation owed to CFP.

1045. I have previously mentioned the emails sent by Mr Lim in June 2009 with attachments derived from Project Carbonara files. Mr Lim and others (including Mr Martens) continued to extract and use information from the unprotected Project Carbonara files through June and July 2009 and subsequently. I have already mentioned that Mr Lim, in July 2009 sent a link for all the documents in such files. Unauthorised use of such information continued thereafter. Thus, for example, on 18 December 2009 Ms Patel stated in an email to Mr Manahilov (which she circulated to Messrs Martens and Gold):

> "…Jan-Willem has reviewed the data before when we looked at another transaction for Tric – he will therefore re-run the portfolio numbers to feed into the valuations…"

That was, I accept, a reference to a data review that Mr Martens had done on Project Carbonara. It contained confidential information, not least the confidential ERPA price/costs (which Ms Patel was, after much equivocation, constrained under cross-examination to accept were confidential, as were Mr Martens and Mr Gold).

1046. Whether this strategic relationship, the opportunity which was both its rationale and its consequence, and the information gained in Project Carbonara were material factors in the eventual acquisition of Tricorona are matters to be taken into account in determining what value should be attributed to that information. I deal with that under the heading "Remedies" below.

*Perception within Barclays of Pomodoro; and its alleged misuse of 'individual pieces of information'*

1047. Before doing so, I should mention the perception within Barclays of the connection between Projects Carbonara and Pomodoro.

1048. I accept CFP's contention that within Barclays Project Pomodoro was regarded as quite plainly a continuation of the Carbonara deal, a re-emergence of an opportunity which had been thought to have passed. Ms Patel was open in explaining its genesis to her team; and her team appear to have treated information derived from one as available and relevant for the purposes of the other.

1049. On 17 December 2009, Ms Patel spoke to Mr Lim. She wanted to discuss "a transaction that you're very very familiar with but now it's in the context of us … Do you remember Carbonara?"

1050. Mr Lim did not accept, in his evidence, that he understood Project Pomodoro to be a "revival" of Project Carbonara; but his evidence was hesitant; he was bound to accept that the target was the same, and he accepted as being a "fair statement to make" that he should have been but was not "on sort of red alert to make sure [he] didn't misuse any Project Carbonara information" if still subject to confidentiality.

1051. Instead, he emailed Ms Patel to arrange a discussion with Mr Ord, subject "Carbonara call", the following day, and then proceeded to email a host of documents to Mr Ord, all of which contained Carbonara information provided by CFP:

(1) He emailed Mr Ord a link to the Carbonara folder containing the confidential Carbonara presentation and spreadsheets. He directed Mr Ord to confidential materials received by Barclays for Carbonara, but now to be used for the purposes of Pomodoro. He did not bother to check the position with CFP.

(2) Mr Lim also emailed Mr Ord the Arctic Fox presentation from October 2008, which was a "good summary of the previous transaction". Mr Lim accepted that this was clearly confidential to CFP: "Certainly, yes, yes". Mr Lim did not know whether the information was still valuable to CFP. In his oral evidence, he went on at considerable length to try to justify his actions, saying that he had sent it to Mr Ord only for him to understand Barclays' M&A role, and that the information was otherwise irrelevant. But in his witness statement he could not recall why he had sent the emails or the circumstances which led him to do so: "thinking back, the reason why I might have done so is just to give [Mr Ord] an idea on what we did on Carbonara before".

(3) He sent Mr Ord Barclays' "business case from the previous transaction" containing details of the fees that Barclays had hoped to make and the draft engagement letter.

(4) Mr Lim also informed Mr Ord that he had updated Mr Reynolds, who had been "previously involved with the project as well".

(5) Around this time, Mr Lim also accessed Barclays' Project Carbonara discussion materials from October 2008.

1052. Mr Ord revealed in his witness statement that normally in a M&A deal he would be sent a "public information book" which contained public information about the target. The reason for this is obvious: until compliance checks have been completed, there should only be access to material that is publicly available. On general principles he should only ever have been sent publicly available material. He admitted: "I should

not have been allowed access to the CF Partners material at that stage". Thus, "the general principle stands that I shouldn't have received that information as not being a deal team member." In re-examination, Mr McQuater reminded him of the potential time limits on confidentiality; but Mr Ord's point that he "shouldn't receive a folder that contains confidential information in relation to a deal that I'm not on the deal team for" seems to me to capture the point of principle, even if confidentiality had expired.

1053. In the meantime, Mr Martens continued to work on the valuation of Tricorona, which used and relied on CFP's confidential information. On 18 December 2009, Ms Patel emailed Mr Manahilov to say that she had spoken to Mr Holmgren about Tricorona's valuation, and that Mr Martens "has reviewed the data before when we looked at another transaction for Tric – he will therefore re-run the portfolio numbers to feed into the valuations". That was a reference to a data review that Mr Martens had done on Project Carbonara, which Ms Patel expected would benefit Project Pomodoro.

1054. Mr Lim's draft email of 11 January 2010, sent by Mr Ord on 15 January 2010 with the subject line "Tricorona: Summary of opportunity and business case", further confirms Barclays' mindset that Project Pomodoro was a revival of Project Carbonara. It said that Barclays' commodities team had contacted the M&A department to "discuss an opportunity we had previously worked on".

1055. In Mr Lim's words, the "current opportunity" had "resurfaced in a slightly different form" in which this time Barclays would act as principal in the acquisition. That was the only difference from Carbonara. Mr Lim obviously had a better idea of Carbonara than Mr Ord. In his evidence, Mr Ord suggested that beyond Tricorona being the object of both Carbonara and Pomodoro, there was not much more to associate the two projects. This was not correct. The similarities are obvious. The Carbonara business case was attached to the email because the rationale was the advantages for Barclays' Commodities Department. Mr Ord (eventually) agreed that the salient features of both Projects, Carbonara and Pomodoro, had to be depicted together in order for an assessment to be made of the business case.

1056. Into 2010, Barclays continued to use information derived from Project Arctic Fox. Barclays prepared a number of valuation analyses, using the valuation information in Mr Martens' spreadsheets, which continued to refer back to Carbonara information. For example:

(1) On 10 and 12 January 2010, Mr Martens emailed Ms Patel and Mr Manahilov a Project Pomodoro presentation and four spreadsheets containing valuations of Tricorona. As Mr Manahilov said in his witness statement, "some information which Barclays had originally received in the course of Project Carbonara was, in the course of Project Pomodoro, used in work that I relied upon in completing my own work". Mr Manahilov admitted his continued use of the Carbonara analysis. He said he was not aware of the information's (continuing) confidentiality. If he had been, he would not have used it: "Absolutely not. Confidential information shouldn't be shared with me".

(2) Ms Patel continued to work on the Pomodoro presentation that contained CFP's confidential information. On 16 February 2010, Ms Patel emailed Mr

Long a presentation with the file name "Project Silverback v6eo", but which was in fact entitled "Project Pomodoro". Her email said "This is project pomodoro so don[']t mention to a sole [*sic*]". The presentation noted Project Carbonara as the background to Barclays' relationship with Tricorona, and contained information about Tricorona's cost and forward hedge prices based on information derived from the Project Arctic Fox files. By contrast to the presentations which Barclays prepared during Project Carbonara, the presentation did not refer to any additional risks associated with Large Hydro CERs. Ms Patel asked Mr Long to speak to Mr Martens about his valuation work on Tricorona. Mr Long emailed Ms Patel, subject "Look at Scenario 1 sheet", the "Tricorona cap structure (Jan 10) MS4" spreadsheet. The Scenario 1 sheet contained and relied on CFP's confidential information. Later that day, Ms Patel forwarded the email and spreadsheet to Mr Manahilov.

(3) During February 2010, Mr Manahilov and Anne-Gabrielle Laboureau worked on a valuation of Tricorona using spreadsheets which contained CFP's confidential information. Both contained CFP's confidential information. Both were used by Ms Patel and Mr Manahilov in respect of Pomodoro, as further catalogued in Appendix 2 to CFP's Re-Amended Particulars of Claim.

1057. Mr Martens left Barclays' employment at the end of January 2010, but was retained on a consultancy basis by Barclays to work on its projects because of his experience, which included the experience he had gained during Carbonara. In his oral evidence, Mr Martens suggested that "what information was bubbling in my head it would have been all Pomodoro information", but I cannot accept this. Mr Martens himself conceded the position under cross-examination:

> "Q. ... you said what was bubbling in your mind was all your Pomodoro work and what you meant by that was, what you said in terms in the last two minutes, was that you didn't take any account of Project Carbonara information because you had done all your new analysis. So that's why I asked you, on oath for his Lordship, did you, Mr Martens, make any use of any of your Project Carbonara work for the purposes of what we know became Project Pomodoro?
>
> A. So referring to my witness statement, you know, I think I used in the spreadsheets we call preliminary valuation, that's where I refer to Carbonara data.
>
> Q. So you did make use of Project Carbonara information for the purposes of Project Pomodoro, didn't you, Mr Martens?
>
> A. Yes, I was referring to data.
>
> Q. The answer is yes?
>
> A. Yes.'

1058. During March 2010, Project Carbonara continued to be relevant to Barclays' Pomodoro activities, and Barclays continued to use information it had obtained in Project Arctic Fox. For example:

(1) On 9 March 2010, Mr Lim emailed Mr Ord a link to documents created in the context of Project Carbonara, directing him to all the presentations. As Mr Lim acknowledged in cross-examination, this permitted access to all Carbonara material and presentations and spreadsheets confidential to CFP. Mr Lim said the interest was in the "general approach on how we approach debt capacity", but that approach relied on and contained CFP's confidential information, as Mr Lim accepted. If the information was of no use, Mr Lim would not have consciously accessed the database. The reason he bothered was because Carbonara information was materially useful for the purposes of Pomodoro: Mr Ord accepted the point. He conceded that he should not have received it.

(2) It may be that resort was had to the information in the Carbonara file simply as a matter of saving time. It was at this time that Barclays was concerned that there would be a bidding war for Tricorona. Mr Ord said of Mr Lim's actions, "I think he may have been trying to shortcut some analysis. Any information which Barclays had at the time would have assisted it". Mr Lim sent the Carbonara analysis to Mr Ord to save time and effort in what was looking like a bidding war for Tricorona.

(3) On 15 March 2010, Mr Martens suggested that he use the "Carbonara database", i.e. the information about the Tricorona Portfolio provided to Barclays by CFP, to help his analysis of the Tricorona Portfolio. Mr Martens suggested that he was interested in information that was publicly available, but (as CFP submitted) if the information was available publicly, then Mr Martens should have gone to the public sources. Instead, he was prepared to access the confidential Carbonara information from a password-protected database for the purposes of Pomodoro, and that could only have been because the information remained relevant. He agreed that he should not have referred to it.

(4) On 18 March 2010, Mr Lim accessed the Project Carbonara presentation dated 9 September 2008.

(5) On 19 March 2010, Mr Lim emailed Mr James Colburn ("Mr Colburn", a Vice-President in Barclays' M&A Advisory department) the link to the Carbonara "previous materials from last year".

(6) On 23 March 2010, he accessed the "Project Carbonara Discussion Materials October 2008".

(7) On 24 March 2010, Ms Patel reported in a conversation to Mr Martens what Mr Lim had said to her, "hopefully all that work on Carbonara will pay off eventually ...". Mr Martens agreed: "... exactly. That's a nice thing to get

this".[37] Mr Martens agreed that the work he had done previously on Carbonara was helpful in the later context of Pomodoro:

> "A. You see Harshika saying that, I think it is a nice thing to get us work, but what I remember from that -- so I'm happy that we get finally to the point. I mean all the work on Carbonara will pay-off eventually.
>
> MR JUSTICE HILDYARD: But all your experience is bound to pay-off eventually. Why is it you specify Carbonara is I think the point being put to you.
>
> A. Yeah, so and I acknowledge that it includes Carbonara. For me it has been more than that. I think that was the ...
>
> MR LORD: It may be more than that, Mr Martens, but it does include the Project Carbonara -
>
> A. Yes, as I said, yes."

Mr Lim likewise fairly acknowledged that if he made the statement he did, "clearly I think that would be work that would be relevant this time round for Pomodoro".

1059. Barclays' defence to all this was three-fold. First, that it denied that the information had the necessary quality of confidentiality; secondly, that even if it did continue to owe a duty of confidence to CFP during Project Pomodoro, then it made only minor and inconsequential use of any of the allegedly confidential information it had been given; and thirdly, that the information used was raw data obtained by CFP from Tricorona and simply passed to Barclays, containing no "analysis" undertaken by CFP at all.

1060. I have already addressed the question whether the individual pieces of information had the necessary quality of confidentiality: although not of great value individually, I have concluded that they had.

1061. As to the perception of the relationship between Projects Carbonara and Pomodoro within Barclays and the use of information derived from CFP in the latter, Barclays sought to depict the obvious discomfort of members of the Project Pomodoro deal team, most particularly Mr Ord and Mr Lim, in having admittedly used information obtained in the course of Project Carbonara in Project Pomodoro, as simply reflecting an untutored, almost commendable, unease on their part which did not indicate legal breach.

1062. For example, while Mr Ord learned of the expiry of Barclays' contractual duty as part of the Project Pomodoro compliance clearance process in January 2010, he

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[37] On 6 April 2012, Mr Lim emailed Ms Patel and Mr Martens the Carbonara due diligence checklists because Mr Martens wanted to use them as a template for his due diligence work on Pomodoro. Mr Lim says that he "cannot remember" why he provided Mr Ord and Mr Colburn with access to the Project Carbonara material, but "expect[s] [he] did so to provide a reference point for approaches and analysis the Bank had taken previously".

nevertheless took the view that he should not have been sent Arctic Fox/Carbonara material during Project Pomodoro. Similarly, Mr Lim frankly volunteered in his oral evidence that he ought to have locked down the Project Carbonara shared drive at the outset of Project Carbonara.

1063. Barclays contends that the only evidence of actual use relates to the Preliminary Valuation prepared by Mr Martens in advance of the meeting with the Tricorona Management in Stockholm in November 2009. The valuation in that document was based on a spreadsheet entitled "Tric share price final 13-11-2009.xls" which contained a calculation of the NPV of Tricorona's future cashflows and which Mr Martens believes may have included figures taken from Project Carbonara materials in two respects:

(1) The figures he used for the forward sale prices likely to be achieved by Tricorona were taken from the list of such prices sent to Barclays during Project Carbonara (i.e. item 18 on CFP's schedule), which he then rounded up in the "Hedge price calculation" section of the spreadsheet.

(2) The figure he used for the cost per CER of €9 was based on his general recollection of the approximate level of costs in the portfolio spreadsheets sent during Project Carbonara (items 8 and 20 on the schedule). [38] He does not believe that he took this from any Project Carbonara information because it is a round figure rather than an exact figure.

1064. Mr Martens was cross-examined about this, and admitted the use. However, Barclays submit that:

(1) The figures formed part of Barclays' work product only for a short period before they were superseded by the information sent to Ms Patel by Mr Holmgren on 18 December 2009 and later forwarded to Mr Martens by Ms Patel (see above). That information included an updated portfolio spreadsheet containing current — and therefore much more useful and accurate — data on CER costs and forward sales. Once he had that updated information, Mr Martens no longer needed the historical figures taken from Project Carbonara, and they ceased to appear in any of the valuation documents after 23 February 2010.

(2) Mr Navon expressly accepted in his oral evidence that "information about the detail of a portfolio which was, say, a year old wouldn't be of that much use".

(3) Even in November 2009, the data used by Mr Martens was already available to Barclays from non-Carbonara sources, and Mr Martens could perfectly well have used those sources instead, had he wished to ensure that he was insulated from Arctic Fox/Carbonara. As part of their negotiations about hedging transactions, Tricorona had told Barclays on 17 February 2009 that its average cost per CER was €8.75. And as part of Project Clearwater, Tricorona had provided Barclays on 28 June 2009 with a complete list of its

[38] A purchase price per CER of EUR 9.00 is not, for example, reflected on the spreadsheet sent to Barclays by CFP on 7 November 2008.

projects, including the cost per CER for each project, and forward sales, including volumes and prices.

(4) This meant that under clause 1(b) of the IVC/Barclays Confidentiality Agreement this information had ceased to be confidential information within the ambit of that agreement. Barclays had obtained it from another source (which was in fact the original source), with permission to use it for Project Pomodoro.

1065. As to the other email exchanges referred to above, Barclays dismisses these on the basis that "no or no material use was made of any allegedly confidential information in the documents". Barclays rejects any suggestion of any material use by reference in turn to each category of allegedly confidential information:

(1) *The availability of Tricorona as an acquisition target* was not confidential information; the fact that Tricorona could be acquired was "plain for all to see", as CFP said in oral Opening Submissions. Moreover, even if Tricorona's availability to be bought was not public information at the time of Arctic Fox/Carbonara (notwithstanding that it was a publicly listed company), it most certainly was by the time of Project Pomodoro. The Opcon offer in February 2010 put Tricorona very publicly in play, as Mr Navon acknowledged in his oral evidence. Mr Bode when at OneCarbon in 2008 had looked at Tricorona as a takeover prospect.

(2) *The position of Volati* was not confidential. Again, even if confidential information was given to Barclays during Arctic Fox/ Carbonara regarding the intentions, preferences and motivations of Volati (if any such information was given, or given truthfully, at all) the information had ceased to be confidential and was long out of date by the time of Project Pomodoro. It was public knowledge that Volati was the largest shareholder in Tricorona and, as addressed above, Barclays went to see Volati in March 2010 and learned – rather bluntly – from that meeting exactly what Volati's intentions, preferences and motivations in relation to Tricorona were. Indeed, Volati's negative reaction to Barclays' proposed transaction structure was the original impetus towards Barclays changing to an acquisition approach. Barclays therefore legitimately obtained the information from another source, depriving any existing information of any confidential character it may have had. Moreover, even if any information in relation to Volati obtained by Barclays during Arctic Fox/Carbonara somehow did remain confidential by Project Pomodoro, the information would have been of no use whatsoever to Barclays. In the 12 to 18 months between Arctic Fox/Carbonara and Project Pomodoro the carbon price had experienced severe volatility, the world economy had sunk into recession following the 2008 financial crisis, and the Copenhagen conference in 2009 had failed to produce a successor to the Kyoto Protocol. In these circumstances, any views expressed by Volati in 2008 about its intentions, motivations and preferences in relation to Tricorona would have been merely historical and of no remaining relevance in late 2009 to mid-2010.

(3) *As to the perception of an arbitrage opportunity between share price and portfolio valuation,* the rationale of Project Pomodoro was not based on any

perceived arbitrage opportunity between Tricorona's share price and the value of its pre-2012 CER portfolio, let alone CFP's opinion that an arbitrage opportunity in relation to Tricorona existed in mid-2008 because of the hidden value of the Large Hydro in Tricorona's portfolio. As confirmed in a presentation in April 2010 to Exco on the rationale and risks of Project Pomodoro set out in the April 2010 ExCo presentation (as to which see paragraph [804] above), the business opportunity Barclays was seeking to exploit in acquiring Tricorona was primarily strategic; to consolidate Barclays' position as a leading carbon bank and to gain access to what it had come to perceive to be a potentially very lucrative post-2012 market. There was also a value component to the opportunity, but it was not an arbitrage value component. To the contrary, Barclays paid what it believed to be the value of the pre-2012 portfolio, and then a modest premium to gain access to the post-2012 portfolio.

(4) *As to the Large Hydro aspect* of the arbitrage opportunity, Barclays' case is that its different treatment of Large Hydro in Project Pomodoro was unrelated to any information it obtained in Arctic Fox/Carbonara. By the time of Project Pomodoro, Barclays had come to treat Large Hydro in much the same way as other CER types, and in Project Pomodoro Barclays was not being asked to lend against Large Hydro CERs as security. Large Hydro was not much of an issue in Project Pomodoro at all; and Barclays is adamant that the presence of Large Hydro in Tricorona's portfolio or any "hidden value" in those assets was certainly not a reason for Barclays' acquisition.

1066. However, in my judgment, none of this use-focused defence either addresses properly or excuses the use by Barclays of Carbonara files which should have been kept confidential and which had been provided to it only for the purposes of Project Carbonara and not for the purposes of Project Pomodoro.

1067. Further, the lack of any real or effective barrier in relation to the use of information acquired in Project Carbonara for the purposes of Project Pomodoro not only assisted the latter, but also muddied the waters as to the source of the information being deployed.

1068. I do not think it is necessary for CFP to demonstrate any identity in terms of rationale between Project Arctic Fox and Project Pomodoro to be entitled to the use of its material, which it shared in confidence and included material I have found to have the quality of confidence, being confined to the purpose for which it was so shared. Indeed the indiscriminate use of such documents, even if not confidential, seems to me at the very least commercially unsatisfactory for a banker (*cf* the description in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 at 472-473 of the duties owed in a banking relationship, which continue until a ground for disclosure exists). (In the usual course I suppose these matters would be regulated by the retainer letter, though none was signed in this case.)

1069. Even if it were necessary to show some identity and rationale (which I consider to be part of, but not the same as, the "continuum" argument, since the continuum argument requires the further ingredient of what by analogy I have likened to causation) in my view CFP can do so. To take three examples:

(a) Mr Lim's expressed view that the Carbonara "transaction… resurfaced in slightly different form" in Pomodoro speaks to as it were general perception;

(b) Barclays' presentation document of February 2010 summarises the opportunity offered by Project Pomodoro as that a "strategic alliance with Tricorona would provide Barclays with sourcing good quality offsets for global commodity client base", which again correlates with the essence of Project Arctic Fox; and

(c) Mr Gold's description (in a two-page executive summary in March 2010) of one of the bullet point aims of Project Pomodoro being to "monetise pre-2012 portfolio through a prepayment structure" ties in neatly with a principal feature of Project Arctic Fox. I note also in passing that Mr Gold (in the same summary) gave as the context of Project Pomodoro that "Barclays has not been able to successfully build a CDM origination business…due to cultural and process reasons".

1070. I have been more troubled by the question whether any confidentiality had expired. As mentioned above, Mr Navon conceded that "information about the detail of a portfolio which was, say, a year old wouldn't be of that much use". That the information was useful for both purposes can be inferred from its use in both projects. However, although the first may be a necessary ingredient of the second, utility and confidentiality should not be confused: and the fact that Barclays did make use of material in the Carbonara files initially supplied in confidence does not necessarily signify that it continued to be confidential.

1071. However, in light of (a) the indiscriminate use of material (some of which, at least, is likely to have retained confidentiality), (b) my conclusion that in the circumstances the IVC/Barclays Confidentiality Agreement is not definitive of the equitable duty owed by Barclays to CFP, (c) the two-year period of confidentiality in the CFP/Tricorona Confidentiality Agreement (being a useful test), (d) the untutored reaction of Barclays' personnel such as Mr Lim and Mr Ord that they should not have used the material, and (e) my overall assessment that the "dictionary" as a whole continued to be confidential, I have concluded that confidentiality should not be taken as having expired in respect of these individual items of information.

1072. However, I should enter an important caveat. As it seems to me, it is necessary in addressing these defences to distinguish between those individual pieces of information and the "Big Idea".

1073. As to the "Big Idea", any actionable breach must be restricted to the subsistence or duration of its confidentiality. I have concluded that confidentiality subsisted when it was exploited to build the "strategic relationship" or what I have called the "platform". But I have also concluded that such were the changes in the market as regards the eligibility of Large Hydro CERs and the compliance demand for them that by September 2009 the insight it provided into the undiscovered embedded value of the potentiality of Tricorona's portfolio was no longer inaccessible: it had become, in effect, a general perception.

1074. That, together with my earlier conclusion against the "continuum" theory, carries with it, to my mind, that any actionable claim must be restricted in terms of its

quantification to the consequence of the breach in January to March 2009 in building "the platform".

## CLAIM AGAINST TRICORONA

*Claim by CFP against Tricorona based on misuse of confidential information*

1075. CFP's claim against Tricorona for breach of a duty of confidence that Tricorona owed to it pursuant to the CFP/Tricorona Confidentiality Agreement (see paragraph [361] above) is based on the alleged misuse by Tricorona of "a great deal" of specific items of confidential information, comprising in summary (according to CFP's pleaded case):

(1) information and/or knowledge and know-how as to the risk assessment and adjustment of its own portfolio, and how to attribute value to the projects in its portfolio (and in particular the Large Hydro projects) accurately;

(2) "concrete" information as to actual sales of, and expressions of interest in relation to the purchase of, quantities of CERs (and in particular Large Hydro CERs) by large compliance buyers and associated information "that CF Partners had accumulated as a result of its extensive activity in the market";

(3) information as to what was required for Tricorona successfully to raise debt financing from financial institutions secured against its portfolio of carbon credits;

(4) access to Barclays and the information that Barclays was a financial institution which (in contrast to others) was prepared to lend against the entirety of Tricorona's portfolio, and as such an interested and available counterparty and/or purchaser.

1076. All that information is alleged by CFP to (a) have constituted Confidential Information within the meaning of that term in the CFP/Tricorona Confidentiality Agreement, and (b) have the requisite quality of confidentiality about it in any event.

1077. As to (a) and the terms of the CFP/Tricorona Confidentiality Agreement, that provided, *inter alia*, as follows:

> "**Taking into consideration**
>
> A The Parties have expressed their non-binding interest to share information concerning greenhouse gas emission reduction projects, allowances and credits (hereinafter called the **"Project"**)
>
> B The Parties expect to disclose to each other, orally or in a visual or written (including electronic, graphic or any other) form, certain proprietary confidential business,

technical or know-how information or data, as well as other kind of confidential information relating to the Project. The Parties desire to protect the Confidential Information from unauthorized use and disclosure by entering into this confidential agreement (the **"Agreement"**)

…

**Agree as follows**

Confidential Information

1. For the purposes of the Agreement **"Confidential Information"** includes all information and material of whatever nature, whether orally or in a visual or written (including electronic, graphic or any other) form, relating to the Project, including the information that has already been exchanged between the Parties in view of the discussions in respect thereof, which is provided by one Party (the **"Disclosing Party"**) to the other Party (the **"Receiving Party"**). Each Party can be the Disclosing and/or Receiving Party.

…

Non-disclosure

3. The Receiving Party acknowledges that the Confidential Information it has received and will receive, directly or indirectly, from the Disclosing Party, including the information that has already been exchanged between the Parties in view of the discussions in respect thereof, will be kept strictly confidential and the Receiving Party will protect the Confidential Information from unauthorized use and disclosure to any third party in any manner whatsoever without the Disclosing Party's prior written consent, except as provided for in clause 4, 5, 6, and 7 below.

…

Term

12. This Agreement shall terminate automatically on the date the Parties enter into a further agreement which contains provisions covering the confidentiality of information relating to the Project. Unless earlier terminated under the preceding sentence, the confidentiality obligations set forth in this Agreement shall terminate two (2) years after the effective date of this Agreement, unless otherwise

> agreed in writing between the Parties. The effective date of this Agreement shall be the date both parties have signed this Agreement [15 July 2008].
>
> …
>
> Governing Law and Jurisdiction
>
> 14. This Agreement shall be governed by and construed in accordance with English Law and each Party hereby agrees to submit to the exclusive jurisdiction of the English Courts as regard any claim or matter arising under this Agreement.
>
> …
>
> Full and Complete
>
> 18. This Agreement comprises the full and complete agreement of the Parties hereto with respect to with respect to the disclosure of Confidential Information and supersedes and cancels all prior communications, understandings and agreements between the Parties hereto, whether written or oral, express or implied."

1078. The CFP/Tricorona Confidentiality Agreement did not contain any exclusivity provision.

1079. As to (b), I have already described, in the context of CFP's claim against Barclays, the quality of confidentiality to be established to give rise to an equitable duty of confidence.

1080. However, unlike CFP's claim for breach of duty of confidentiality against Barclays, which is in equity only, its primary claim against Tricorona is in contract: CFP not IVC was a contracting party with Tricorona. CFP also asserts a claim in equity; but there appear to be no reasons for considering any equitable duties to be wider than the contractual ones that the parties agreed: the contract defines both: and see *Vercoe.*

1081. This part of the case was not addressed at any great length by either party; and the assistance that I was given in understanding how it fits in with the other claims was, by comparison at least with other aspects of the matters before me, slender.

1082. In point of pleading, CFP claims that Tricorona misused this information by "arranging and/or participating in Barclays' efforts to develop a strategic partnership with Tricorona and/or in exploring and developing more long term and strategic business and/or seeking to monetise its portfolio with Barclays and/or in its takeover by Barclays and/or in its dealings with Barclays for such purpose and in such connection".

1083. Mr Navon describes the value to Tricorona and the use it made of the work done by CFP more restrictively in his first witness statement, before the further embroidery by amendment as set out above. He put it as follows:

> "Our work was crucial in terms of Tricorona presenting itself to potential equity investors and debt lenders in a credible and well thought out business case."

1084. In essence it seems to me that CFP claims as against Tricorona that what the "Big Idea" and the individual pieces of confidential information enabled Tricorona to do was to demonstrate to the market and increase its prospect of realising its true value.

1085. As to that, Mr von Zweigbergk thought that there was about €300 million of untapped value in Tricorona as at mid-2009. Mr von Zweigbergk appears to have calculated that figure on the basis that (a) Barclays estimated that the Tricorona Portfolio had an upside of approximately €150 million; and (b) disclosure concerning SVAB, on a bull case, gave the mine a value of €155 million. CFP seeks negotiation/*Wrotham Park* damages against Tricorona for these alleged breaches by reference to those figures. I return to that later.

1086. The premise of CFP's claim as pleaded against Tricorona is an arresting one: that Tricorona (and in particular, the Tricorona Management) had assembled a large portfolio but lacked itself (quoting again from CFP's pleaded case) "the information, knowledge, experience and expertise to risk manage and/or value and/or present its own portfolio for the purposes of raising debt/ leverage": in short, Tricorona did not understand how to manage, present and realise for value its own assets, and needed CFP's material to show it the way. CFP do not appear to make a distinction in this regard between Large Hydro pCERs (at one end of the scale of difficulty) and ordinary CERs (at the easier end).

1087. For reasons and in circumstances that I have already sought to identify, this is not altogether unfounded: Tricorona's management had surprisingly little knowledge or experience of the primary market and the demand for primary credits, especially in relation to Large Hydro pCERs. Yet Large Hydro comprised some 40% of its portfolio. Further, the Tricorona Management had conspicuously failed to hedge against volatility in the market over a considerable period of time.

1088. Of some reassurance to me in reaching that view as to the Tricorona Management's lack of expertise is the fact that Barclays came to the same conclusion when appraising Tricorona in April 2007.

1089. In such circumstances I would be minded to accept CFP's submissions that:

(1) The information as it was presented by CFP helped show Tricorona a route to market for its primary CERs.

(2) Tricorona used or at least factored in CFP's risk adjustments to gain a better understanding of the real value of the portfolio, resulting in a material change in the risk adjusted volume of the portfolio from 32 to over 50 million CERs.

(3) CFP's information assisted Tricorona to identify financial market participants and other investors which would be genuinely interested in Tricorona's portfolio, and its monetisation and/or financing, e.g. equity investors like Daiwa and IVC; and debt providers like SEB and Barclays. As

is admitted by Tricorona, CFP provided Tricorona with confidential information about financial institutions interested in the Tricorona portfolio as a result of Arctic Fox.

1090. However, although Mr Holmgren knew of interest having been expressed by Vattenfall, there was no evidence to support CFP's assertion that Tricorona benefitted from the Expressions of Interest: there is indeed no evidence that it was ever shown these at all.

1091. As to Tricorona's misuse, I accept that:

(1) In January 2009, the Tricorona Management used CFP's confidential information to identify and pursue Daiwa behind CFP's back and in order to explore other avenues than Project Arctic Fox, without any thought as to its confidentiality and for the purposes not of Project Arctic Fox but the ambitions of the Tricorona Management to arrange an MBO in accordance with a long-outstanding ambition of theirs to own and run their own ship.

(2) Mr von Zweigbergk tried again to interest Daiwa in October 2009 in the context of what became Project Pomodoro.

(3) Whether consciously or not, the Tricorona Management used confidential information again in the context of Project Icebreaker, as demonstrated by a marked similarity in the language used in their presentations which in certain instances copied word for word CFP's own earlier presentations.

(4) Most significantly in terms of both (a) the correlation between the claims against Barclays and its claims against Tricorona and (b) the approach to and quantification of loss and damage, I accept that the Tricorona Management were informed by the material and perceptions provided to them by CFP in confidence in their dealings with Barclays from early 2009 onwards, and in particular, in seeking to interest and encourage Barclays in pursuing a strategic partnership with Barclays which (subject to my views as to the lack of true "continuum") led ultimately to Project Pomodoro.

1092. However, I am not persuaded that, even if the insight provided by CFP to Tricorona was confidential and of value, and was misused by Tricorona to the extent indicated above, CFP could establish any substantial enhancement to the value of its claims already established as against Barclays.

1093. In essence, that is because I consider that the misuse was in setting up the platform for a developing strategic relationship with Barclays. The commonality of their purpose and their combination in seeking its achievement, save in respect of Project Icebreaker, seems to me to mean that it is most unlikely that CFP could show that Tricorona should pay some separate or additional amount by way of negotiation damages. And as regards Project Icebreaker, any fee for freedom for Tricorona to use CFP's material would either be negligible or either "franked" or exhausted by the fee payable by Barclays.

1094. An alternative way of looking at it would be that if Barclays had the idea and used it to acquire Tricorona or substantial parts of its portfolio, that destroyed any

confidentiality and exhausted its value. If, conversely, I am to assume that Barclays did not use the "Big Idea", then CFP would have no claim in that regard. I would be disposed to reject any separate claim against Tricorona for damages based on the "Big Idea". I am not sure what more either could have sought in a negotiation by reference to the need for some separate licence.

1095. Indeed it is my understanding that Mr Lord substantially accepted this result, even if not my reasoning. In his oral closing he said this:

> "Strictly speaking one could have a Wrotham Park compensation paid by each defendant and that wouldn't be double counting because each of those defendants must secure their release. It is not quite the same thing as you are looking exactly at the same loss, you are really looking at two different defendants each of whom are under duties of confidence, each of whom have to pay for their release, but we accept that in practice the Wrotham Park negotiation might fairly take into account that all these three parties would be sitting round the table and that therefore the overall pot, as it were, would reflect the fact that it would be chipped into by both Tricorona and Barclays in circumstances where Barclays and Tricorona for these purposes have forged a strategic partnership, misusing our information, our business opportunity information, that one might expect contribution from both those pots in order to get up to what would be an overall fair value for CF Partners. My Lord, I am not sure I have any more submissions to make on the quantification approach."

1096. The right course, I agree, is to envisage Tricorona as a further participant in the hypothetical *Wrotham Park* negotiation with similar arguments by and against it.

***Claim that Barclays induced Tricorona to breach confidentiality***

1097. CFP also claims that Barclays is liable for having induced Tricorona to breach the contractual obligations of confidence it owed to CFP under and pursuant to the CFP/Tricorona Confidentiality Agreement.

1098. As noted in the Defendants' written Closing Submissions, it is difficult to see that this claim (or, indeed, the claim for joint liability) adds anything to the case, given that I have found against each of them for breach of confidence. I shall, therefore, deal with this claim relatively shortly.

1099. The essence of the claim as pleaded is that Tricorona was not permitted to disclose to Barclays, absence CFP's prior written consent, any information relating to CDM projects, allowances and credits provided by CFP except in circumstances set out in clause 4 of the CFP/Tricorona Confidentiality Agreement but did so in December 2009 and for the purposes of Project Pomodoro. The basis of the allegation that it did so is primarily an email from Ms Patel to Mr Holmgren dated 7 December 2009:

> "Good to talk to you earlier. As discussed I just wanted to send you an email confirming that you are ok for me to disclose the information which we have collected on Tricorona (since we worked on the CF deal) with one of the teams who work directly with Joe Gold in the US…"

1100. The point made is that the information collated included information which was confidential when provided by CFP which Tricorona was not authorised by CFP to disclose. It is then alleged that thereby Barclays procured Tricorona's breach of its contractual duty of confidentiality, and CFP has in consequence suffered loss and damage to be assessed on a 'negotiation' or *Wrotham Park* basis.

1101. I have already outlined the legal principles applicable to inducement claims in paragraphs [855] to [859] above, in the context of discussing CFP's other such claim (against Tricorona for allegedly inducing Barclays to breach its obligations of exclusivity).

1102. In accordance with those principles, CFP must show (in addition to the underlying breach of contract, which I have held in paragraphs [1076] to [1092] above that it has established) that:

(1) Tricorona's breaches of its contractual obligation to CFP of confidentiality were induced by Barclays.

(2) Barclays (a) knew that Tricorona was bound by duties to CFP of confidentiality and that it was by carrying out such acts inducing Tricorona to act in breach of contract and (b) intended Tricorona to do so.

1103. As to (1) above, the Defendants submitted that the question is whether Tricorona's breaches of its contractual duty are fairly attributable to influence by way of pressure, persuasion or procuration brought to bear upon it by Barclays. They contended that acts of pressure, persuasion or procuration had to be demonstrated. CFP, on the other hand, did not rely on direct pressure, persuasion or procuration: it relied on the following in the judgment of Jenkins LJ in *D.C Thomson & Co Ltd v Deakin* [1952] Ch 646 at 694 (which was approved by Lord Millett in *Twinsectra Ltd v Yardley and others* [2002] 2 AC 164 at [128]):

> "But the contract breaker may himself be a willing party to the breach without any persuasion by the third party, and there seems to be no doubt that if a third party, with knowledge of a contract between the contract breaker and another, has dealings with the contract breaker which the third party knows to be inconsistent with the contract he has committed an actionable interference…"

1104. That places the focus sharply on knowledge. As to that and (2) above, it is not necessary to show knowledge of the actual terms; but knowledge of the existence of a contractual obligation such as would or might prohibit the act encouraged or procured must be proved; and for that purpose turning a blind eye is sufficient, but negligence is not.

1105. Mr Navon was adamant in his witness statements that at or around the time of a meeting on 7 October 2008 (attended by Dr Swift, Ms Patel, Mr Smith and Mr Zintl), "we expressly informed Barclays that we had a confidentiality agreement in place with Tricorona after they had queried how it was that we had non-public information relating to Tricorona and its portfolio". He was not challenged on this in cross-examination, beyond Mr McQuater putting to him that it was "puzzling".

1106. None of the witnesses for Barclays recalled that Mr Navon had told them this. However, all seemed to assume that some such arrangement would have been put in place. Ms Patel said that she could "well understand that there could be [a confidentiality agreement between CFP and Tricorona] and there should have been one...". She did not seriously dispute Mr Navon's evidence. Mr Martens also assumed that there would have been a confidentiality agreement between CFP and Tricorona, but said he did not know. Mr Zintl could not recall, but also did not dispute Mr Navon's evidence.

1107. However, it ws not suggested by CFP, and there is nothing to suggest, that anyone at Barclays knew the terms of the CFP/Tricorona Confidentiality Agreement, or (for example) the duration of confidentiality prescribed (by clause 12, two years), but subject to "permitted disclosure" as adumbrated in its clause 4.

1108. There was little if any extended argument on this aspect of the case, and to some extent the parties' written closings did not engage. However, I am not persuaded that Barclays had sufficient knowledge that any contract between CFP and Tricorona that it might have assumed to be in place (a) protected information which either belonged to Tricorona or had been disclosed by CFP to Barclays and (b) prohibited the release by Tricorona of information derived from CFP which by December 2009 by Barclays was by now free to disclose.

1109. As to intention, Ms Patel was adamant:

> "Q. I'm going to suggest to you that in your direct dealings with Tricorona in 2009 you intended Tricorona to breach their confidentiality obligations, didn't you?
>
> A. Absolutely not, my Lord. I would never do such a thing. Why would I spend all that time making sure that Barclays is doing the necessary conflicts checking and being watertight on its legal arrangements and yet at the same time trying to induce a client to breach its obligations, which I didn't even know about?"

1110. I have not accepted that Ms Patel was as punctilious as she was suggesting in that answer. However, I do doubt that she did actually intend Tricorona to act contrary to its contractual obligations. As it seems to me, she would have assumed that (a) Tricorona was not impeded in any way in using its own confidential information; (b) Barclays already had from CFP any other confidential information (in respect of which Barclays had its own obligations); and (c) any contractual confidentiality period would have expired. I do not think it likely that any other of those involved within Barclays would have had the requisite intention either.

1111. But even if I am wrong about knowledge and intention, it seems to me that the claim can in any event not yield any material additional damages or basis of compensation, and is redundant. On the view I have taken of the facts, the negotiation in early 2009 would have resulted in the release of all such obligations, including those binding Tricorona.

1112. Accordingly, although I take the value of the release of Tricorona's covenant into account, I do not think this claim provides any separate head of substantial loss, nor (even if I am wrong in finding against CFP on the issue of intention) any basis for materially altering the overall result in the hypothetical negotiations in January.

## JOINT LIABILITY CLAIM

1113. Lastly, CFP alleges that Barclays is jointly liable for breaches by Tricorona of its alleged equitable duty of confidence and, conversely, that Tricorona is jointly liable for breaches by Barclays of its alleged equitable duty of confidence.

1114. In this regard, CFP asserts, principally by reference to the discussions between Barclays and Tricorona in early 2009, that there was a common design in which Tricorona participated that Barclays would breach its equitable duty of confidence. Tricorona, in particular Mr Holmgren, was closely involved in discussions with Ms Patel in spring 2009, which they both knew were in breach of Barclays' obligations of confidence to CFP.

1115. CFP relies on the following passage from Arnold J's judgment in *Force India* at first instance (at [245]):

> "an accessory who participates in a common design with the principal to act in breach of the principal's equitable obligation of confidence is jointly liable with the principal, and that for this purpose the principles laid down in the joint tortfeasance cases such as *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 at 608–609 are applicable. In that context, it is well established that it is not necessary to show that there is a common design to commit the tort: it is sufficient if the parties combine to secure the doing of acts which in the event prove to be torts."

1116. Since I have found that (a) Barclays and Tricorona each owed an equitable duty of confidence to CFP (although Tricorona had a parallel and co-extensive duty in contract) and (b) that each was in breach of such duty, the question left is whether Barclays and Tricorna carried out acts in furtherance of a common design to breach their equitable duties.

1117. In my judgment, they both did share the same objective and both, knowing that they had received information from CFP under conditions of confidentiality, acted in concert towards a common end ("strategic partnership" as explained above).

1118. I would be disposed, therefore, to conclude that this claim is established. However, I received scant submissions on this aspect of the case; and I am not sure for what purpose, given the relationship between Tricorona and Barclays, the claim is made. It

may be that I have missed or misunderstood something in this context. Alternatively, it may not be a claim of any real separate substance or utility. This can be addressed at a further hearing if necessary and required by either party.

## UNCLEAN HANDS

1119. Barclays relies on this doctrine as a defence to the entirety of CFP's breach of confidence claim against it. Tricorona relies on this doctrine, separately from its counterclaim, as a defence to CFP's alternative claim against it for the breach of an alleged equitable duty of confidence.

1120. It is accepted by them both that the unclean hands defence does not apply to CFP's common law claims against either of the Defendants.

1121. It is common ground, although for different reasons, that the principal relevance of the defence is to the claim against Barclays. CFP says that this is because there has been a "clear breach of Tricorona's contractual duty of confidence arising on the same facts", whereas the Defendants say that it is because CFP has little or no prospect of establishing that Tricorona owed, let alone breached, an equitable duty of confidence.

1122. The principles underlying the clean hands doctrine were examined by Andrew Smith J in *Fiona Trust & Holding Corp v Privalov* [2008] EWHC 1748 at paras 17 to 20, and can be summarised as follows:

(1) The party relying on the doctrine must show that the party seeking the relief has been guilty of or responsible for some misconduct which is "sufficiently closely connected" with the equitable relief sought (citing Lord Scott in *Grobelaar v News Group Newspapers* [2002] 1 WLR 3024 at para 90).

(2) Whether the misconduct is sufficiently closely connected to the relief sought depends on the facts of each case, but the test commonly cited is that it must have an "immediate and necessary relation to the equity sued for" (citing Eyre CB in *Dering v Earl of Winchelsea* [1775-1802] All ER Rep 140; ER Vol 29).

(3) The misconduct must be "in some way immoral and deliberate" and not trivial. However, "the court will assess the gravity and effect of misconduct cumulatively, so that, while the elements of misconduct taken individually might be too trivial for the maxim to be applied, they might be sufficient taken together".

1123. As recently stated by the Court of Appeal in *The Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at para 158 (Aikens LJ), a case concerning dishonest evidence given by the claimant during trial:

> "Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."

1124. However, cases in which equitable relief has been refused seem almost invariably to involve misconduct by way of deception in the course of the same litigation and directed to securing equitable relief; and in *RBS v Highland Financial Partners* Aikens LJ (without expressly approving it) cited Spry: 'Principles of Equitable Remedies' which suggests that it must be shown that the claimant is seeking "to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief".

1125. Subject to that, the defence has been applied to cases involving breaches of equitable duties of confidence: Toulson and Phipps, Confidentiality, 3rd Edition, para 6-076. An example is the decision of the Court of Appeal in *Hubbard v Vosper* [1972] 2 QB 84, in which it was held that the Scientology cult was not entitled to seek the court's protection of its confidential information because of the "deplorable means" by which the cult protected its information (by the application of what was effectively its own criminal code).

1126. The Defendants (or at least Barclays) contend that CFP's misuse of Tricorona's confidential information, aggravated by the way in which this misuse has emerged during the course of this case, constitutes misconduct which attracts the application of the unclean hands defence.

1127. It is their contention that it has become clear that on many separate occasions in 2008 and 2009 CFP deliberately took information confidential to Tricorona and used it for their own business purposes. It is submitted that it did so:

(1) knowing that the information it was using was confidential to Tricorona;

(2) deliberately proceeding regardless and, thereby, deliberately breaching its duty of confidence to Tricorona;

(3) on occasion, by misleading third parties to the effect that CFP had produced the Tricorona ERPA and that it was "our standard ERPA agreement";

(4) using Tricorona's information to assist CFP's own development of a carbon origination business in China in direct competition with Tricorona's own core business in that market; whilst

(5) at the same time pursuing a transaction involving Tricorona on which, it is its case, it never gave up.

1128. The Defendants submitted further that the seriousness of CFP's misconduct is aggravated by the fact that its misuses of Tricorona's information were carried out to assist its development of a carbon origination business in China in direct competition with Tricorona's own business in that market. In short, CFP used information it had obtained from Tricorona in confidence to get a leg up in Tricorona's core market.

1129. The Defendants cited two instances as being the most egregious. One (stated to be the most egregious) involved the use by CFP of the Tricorona ERPA in an attempt to better its position in a competitive transaction in which, as CFP well knew at the time, Tricorona was a rival bidder. This is elaborated in Tricorona's counterclaim: see paragraphs [1134] *et seq* below.

1130. The second took place shortly before that, and concerned the misuse in relation to the Vattenfall Report, the essence being that CFP, in a section of that report, used figures taken from the Project Arctic Fox spreadsheets which stated average cost prices for Tricorona's projects (stating separately an average price in relation to the Large Hydro component). Though not in the counterclaim as pleaded, this was elaborated in the Defendants' written Closing Submissions.

1131. CFP's position was that the breaches were limited and minor. However, the Defendants submit that, consistently with Andrew Smith J in *Fiona Trust*, the gravity and effect of their misconduct must be assessed cumulatively. From this perspective, CFP's breaches of duty comprise a pattern of deliberate, conscious and serial misconduct driven by a propensity on CFP's part to disregard its obligations of confidence to Tricorona whenever they thought fit, and constituting serious misconduct accordingly.

1132. The Defendants submit that this serious cumulative misconduct bears an immediate and necessary relationship to CFP's equitable claims on the basis that:

(1) CFP's misconduct concerns the same information on which it relies in its claim. Much of the material misused by CFP forms part of the information which it alleges in its claim to be confidential to it and misused by Barclays. Had Tricorona known this, it is said it would probably have withdrawn CFP's authority to use that information.

(2) CFP has committed wrongs identical in legal character to those for which they claim: that is, the misuse of information provided by Tricorona during Arctic Fox/Carbonara; and they depict CFP's claim accordingly as founded on hypocrisy and double standards.

(3) In the above circumstances, and where (a) there is such a close connection between the misuse in one and that in another and (b) all the matters complained of directly concern Barclays, the fact that the matters complained of are alleged breaches of duties owed by CFP to Tricorona alone should not preclude the operation of the defence.

(4) CFP has not come clean about its misconduct. Instead it is said that it has responded dismissively to the discovery of its wrongdoing and has adopted contrived forensic positions in an attempt to minimise the resulting damage to its case.

1133. In my judgment, though this defence was elaborated with great thoroughness, it cannot avail the Defendants and I reject it:

(1) On the basis of my view of the facts, the information the confidentiality of which CFP seeks to vindicate by its claim is of very considerably greater overall scope and quality than the information it misused. Further, given the advantage which on that view Tricorona sought to achieve in common and co-operation with CFP, I do not accept that Tricorona would have withdrawn CFP's authority to use it.

(2) Likewise, the same legal label disguises a very considerable difference in the respective wrongs complained of in terms of degree, real substance, and value. Even on their own estimate, Tricorona's counterclaim (including the unpleaded claim in respect of use in the Vattenfall presentation) is measured at less than £100,000. Money may not be a measure of "depravity"; but by neither standard is this close to a situation where the maxim might proportionately be engaged, the misuse falling far short in term of gravity than that required.

(3) There is a connection such that the fact that the defence is in effect raised against a different party may not, of itself, be fatal: I do not need to decide the point, because the maxim is not fairly or properly applicable.

(4) It might well have been better and appropriate for CFP to have confessed and sought to avoid earlier; but then CFP would say the same of the Defendants. The maxim does not, in my view, enforce manners, or require apology; it is reserved for exceptional cases where those seeking to invoke it have put themselves beyond the pale by reason of serious immoral and deliberate misconduct such that the overall result of equitable intervention would not be an exercise but a denial of equity.

## TRICORONA'S COUNTERCLAIM

1134. By its counterclaim Tricorona seeks a declaration that CFP breached its duty of confidence under the CFP/Tricorona Confidentiality Agreement and "negotiation damages" calculated on the *Wrotham Park* measure (on the basis that it cannot demonstrate that it suffered actual loss).

1135. As will be apparent from my consideration of the Defendants' "unclean hands defence", the breaches relied upon relate to:

(1) the unauthorised use of anonymised historical Tricorona price and technical information for a pitch by CFP for business with project developers in China (including a project known as the "Madushan project");

(2) the unauthorised use of anonymised historical Tricorona price information in a report on procurement strategy prepared by CFP for Vattenfall;

(3) the unauthorised use by CFP of the Tricorona ERPA.

1136. The first and third are pleaded; the second, which is an adjunct to the first, is not (and is said only to have been discovered by Tricorona shortly before trial). I address each in turn.

*Use of price and technical information in the Madushan Project*

1137. I can take the facts asserted by Tricorona substantially from the Defendants' written Closing Submissions. These are as follows.

1138. In November 2008, CFP was seeking to arrange a purchase of CERs from the owners of two Chinese Large Hydro CDM projects, the Madushan Hydropower Project in Yunnan Province and the Xiangshui Hydropower Expansion Project in Guizhou Province. To do so, CFP engaged a consultant based in China, Mr Lincoln Lau, to conduct the face-to-face negotiations with the project owners.

1139. That was business unrelated to Project Arctic Fox and potentially in competition with Tricorona, which sourced most of its CERs in the Chinese CDM market.

1140. CFP had agreed a price with the Chinese project owners but decided that they wanted to renegotiate it downwards to reflect the falling carbon market. In order to give Mr Lau some ammunition in negotiations with the owners, Mr Navon therefore provided him with detailed information about the price that Tricorona was paying for similar Large Hydro projects. He emailed Mr Lau on 25 November 2008 saying:

> "Here is the detail on the Large Hydro portfolio. This will give you great transparency when dealing with Haohua.
>
> DO NOT CIRCULATE THIS INFORMATION EXTERNALLY.
>
> We have included volumes (2008-2012), price, consultant fees and total fees for 35 large hydro projects. The average and weighted average all-in price is lower than what I previously indicated since I included non large hydro projects in the analysis.
>
> The average and weighted average all-in price is €7.95 and €8.09, respectively, including consultant fees.
>
> This is why we feel the €9.00 and €0.80 is high. We don't mind paying him his fee to secure the deal, but we should try to source the deal at a lower price."

1141. The email attached a spreadsheet setting out Tricorona's costs for each of the relevant projects. Mr Navon had prepared and tailored the spreadsheet especially for Mr Lau using data taken from Tricorona's portfolio spreadsheet. He then sent the information to Mr Lau intending him to use it in negotiations on CFP's behalf in Tricorona's core market.

1142. Tricorona contended that Mr Navon's instruction "DO NOT CIRCULATE THIS INFORMATION EXTERNALLY" "speaks for itself" to the effect that the misuse was deliberate.

1143. In cross-examination, Mr Navon accepted that he was aware of the Tricorona Confidentiality Agreement and had read it carefully when it was signed and that he understood that information provided by Tricorona to CFP during Project Arctic Fox was subject to its terms**.** He accepted that the use was for a purpose other than Project Arctic Fox and thus wrongful.

1144. Mr Navon did not accept, however, the inference suggested from the words of warning as quoted in paragraph [1142] above. He explained that all he intended by those words was to ensure that there was no risk of the spreadsheet being circulated more widely. There is no evidence of further circulation.

1145. Further, he explained that he was careful to anonymise the information so that Mr Lau would not be aware that it was Tricorona's portfolio and so that it was in a format "that would be of no direct value in negotiations with Haohua or to a third party".

1146. Mr Navon also emphasised that

(1) the Tricorona prices played no part in CFP's initially agreeing a price with Haohua on 5 November 2008;

(2) on 24 November 2008, CFP was seeking to renegotiate the price in light of falling CER exchange prices;

(3) his only purpose in supplying the information was to demonstrate other prices in the market;

(4) the floating price structure eventually agreed on the Madushan and Xiangshui projects bore no resemblance to the fixed price structure entered into by Tricorona on all its projects.

1147. There is no evidence from Mr Lau, although he still works for CFP; the reason given by Mr Navon for the lack of evidence from him is that he is "tied up with some personal matters in Asia". It would have been of assistance to have heard from Mr Lau, especially on the issue of use. However, that does not of itself give rise to the inference of further use.

1148. Tricorona seeks a declaration but (as I understand it) not compensation in respect of this misuse. I am not persuaded that there is any need for declaratory relief. I will hear further from Counsel if they disagree when matters ancillary to this judgment fall to be determined.

*Alleged misuse in Vattenfall Report*

1149. Again, I take this description of the contention (which has not been pleaded) from the Defendants' written Closing Submissions.

1150. In August 2009, well after Project Arctic Fox had ground to a halt, CFP produced a report for Vattenfall described as a "Market Intelligence Survey" which set out, as stated in Mr Navon's covering email, "a summary of the key developments affecting the CDM and JI markets" (the "Vattenfall Report").

1151. The Vattenfall Report contained a section on Tricorona (under the name of its subsidiary, Carbon Asset Management), which gave an average cost price for Tricorona's projects of €8.90 and, in relation to the Large Hydro component, of €7.90. In cross-examination, Mr Navon admitted that these figures were again taken from the

Project Arctic Fox spreadsheets. This instance of misuse appears only to have been discovered by Tricorona shortly before trial.

1152. Mr Navon disputed that this constituted a breach of the CFP/Tricorona Confidentiality Agreement; while he said that the Vattenfall Report was not, as such, an "Arctic Fox document", he nevertheless maintained that "the process of this document was related to Arctic Fox". His point was that it was part of a Vattenfall procurement strategy that CFP was developing that would have "been very supportive of an Arctic Fox deal". The information had in any event previously been supplied to Vattenfall in the context of Arctic Fox.

1153. I did not find Mr Navon's justification for this use of material convincing. I accept that it was a piece of work carried out by CFP for its own benefit and with a view to encouraging Vattenfall to undertake a purchase transaction from which CFP hoped to earn a brokerage fee. By this time (August 2009) there was little if any prospect that Project Arctic Fox would proceed. I accept Tricorona's submissions that the Vattenfall Report was part of a piece of business which was entirely separate from Project Arctic Fox, and its elaboration and substantiation of that as follows:

(1) The Vattenfall Report covered the whole of the market and contained information on a large number of project developers. Vattenfall could have chosen to target any of these developers as part of any portfolio procurement strategy it was pursuing.

(2) Project Arctic Fox is not mentioned in the report, as Mr Navon admitted.

(3) The production of the report was a paid piece of work by CFP. CFP's revenue records account for it as a piece of advisory business and record a fee received of €85,000.

(4) If Vattenfall decided to purchase a portfolio from any of the potential targets identified in the report, then CFP was expecting to be mandated on the transaction and paid a fee. It said so in terms in an email dated 3 July 2009.

(5) In any case, pursuant to clauses 3 and 7 of the CFP/Tricorona Confidentiality Agreement, confidential information could only be disclosed to third parties if (among other things) both parties approved the disclosure and the third party was made aware of the agreement. The first of these conditions was not met and there is no evidence in relation to the second.

1154. Tricorona proposed that in this context too the appropriate course would be a negotiation on the *Wrotham Park* basis. Tricorona contended that:

(1) A reasonable party in Tricorona's position could fairly require the payment of a fee in relation to the use of pricing information in the Vattenfall Report and a reasonable party in CFP's position would agree to pay a fee.

(2) Here, the dominant commercial consideration bearing on the parties would be the fact that CFP was due to be (and was) paid an advisory fee for the report. CFP would want still to obtain this fee and Tricorona would want to

obtain a share of it, and the parties, acting reasonably, would reach an agreement.

(3) An appropriate resolution would be that the agreed share to Tricorona would be in the order of half CFP's fee, reflecting on the one hand the fact that Tricorona's pricing information is only one part of the Vattenfall Report but on the other the fact that CFP was using this to try to enhance their own commercially profitable relationship with Vattenfall and making its own separate fee in the process.

1155. I doubt that such a high proportion would have been justifiable in respect of this misuse, especially given that no pleading was put forward and in any event the misuse appears to have been minimal. Indeed the proportion would be so small as not in my judgment to warrant separate assessment, and I simply bear it in mind when assessing the net *Wrotham Park* figure at the end of the day.

*Use of Tricorona ERPAs*

1156. CFP admitted the misuse of Tricorona's ERPA. However, this was limited in practical terms to its use as a template for a further draft: Mr Navon's evidence was that CFP never contracted on the terms of the Tricorona ERPA[39]: and Mr Navon was not challenged on that.

1157. The use made was that CFP sent the Tricorona ERPA to Baker & McKenzie for that firm to redraft it for CFP's use. The version as redrafted was markedly changed as regards its key commercial terms.

1158. Mr Bode, in his first expert report, compared the Tricorona ERPA to standard forms and to the drafts eventually produced by Baker & McKenzie (a firm he described as the then "leading climate change law firm", whose drafts had "great influence on, or assisted in the production of, the many ERPAs that were available in the market").

1159. I found his evidence on this point useful in identifying for me both (a) key commercial terms in any ERPA and (b) what he described as "a number of important differences between the main commercial terms set out in the standard-form Tricorona ERPA and those set out in CFP's ERPA as drafted by Baker & McKenzie. There was no challenge to any of Mr Bode's evidence as regards the key commercial differences. Mr Korthuis did not address the question of whether there was anything special about the Tricorona ERPA in either of his reports.

1160. I do not think it necessary to recite all the differences. Suffice it to say that:

(1) According to Mr Holmgren, the Tricorona ERPA was itself based on the IETA template, into which Mr Bode explained Baker & McKenzie had had drafting input, and which was publicly available at no cost.

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[39] CFP has disclosed its ERPAs executed within the terms of the confidentiality obligation.

(2) The particular form of the Tricorona ERPA was bespoke and confidential; and CFP should plainly not have used the Tricorona ERPA to save itself comparatively small legal fees (as Mr Navon stated was his intention).

(3) There is no evidence that it did: "the end result actually ended up being about the same cost".

(4) However, as Mr Bode confirmed without challenge, for the most part the Tricorona ERPA contained market standard provisions, as also did CFP's.

(5) The actual ERPA produced for CFP by Baker & McKenzie was substantially different in a number of important commercial respects, including as regards (a) agreed price or price formula; (b) more options for withdrawal based on project progress; (c) different governing law and jurisdiction; (d) different optionality for post-2012 purchases (CFP's wording was considerably more complex and provided optionality to buy individual vintages); (e) different provisions for cost recoupment; and (f) different validation and verification processes and rights for the buyer and the seller.

(6) Mr Bode estimated the legal costs as between around €10,000 to €30,000 for something particularly sophisticated.

(7) Baker & McKenzie charged CFP GBP 3,000 to produce the Adapted Tricorona ERPA: but the Defendants contend that that is not a reliable proxy because "it included a discount in the expectation of future business from CFP".

1161. Tricorona nevertheless pressed for an award of substantial "negotiation" or *Wrotham Park* damages. A detailed possible exchange in the hypothetical negotiation was put forward in Tricorona's Closing Submissions. The result, Tricorona contended, was that in the end, the parties, acting reasonably, would probably settle on a fee determined by reference to what it would cost CFP to have a lawyer produce - so far as possible - an ERPA like the Tricorona ERPA which they could then take and use in the same way in which they used the Tricorona ERPA (including by giving it to Baker & McKenzie to adapt into a more complex document).

1162. Tricorona submitted further that the parties would probably also have agreed a premium to that fee to reflect (1) the time and effort put into the Tricorona ERPA by Tricorona down the years; (2) the fact that the Tricorona ERPA was tried and tested in the market; and (3) the fact that CFP would be using the Adapted Tricorona ERPA to enter into potentially lucrative contracts with project owners.

1163. On that basis, Tricorona invited the court to "select the high point of that range to reflect Tricorona's time, expertise and effort in developing the ERPA, which could be partially but not wholly reflected in a lawyer's bare draft, and the fact that, unlike a lawyer's draft, the Tricorona ERPA had been tried and tested in its intended market".

1164. Given the figures involved in CFP's main claim, and the inevitably broad brush that has to be deployed in that context, I must admit to feeling that there is something rather unrealistic in the Defendants seeking to identify these comparatively small sums as separately payable.

1165. Again, although a single negotiation in January 2009 would not strictly have been possible (since some of the misuse of the ERPAs occurred after that time, though not long after), I propose to take the figures claimed by Tricorona into account in determining the net amount payable, but weighted to the lower end of the scale (€10,000) since (a) no evidence was provided as to any costs saving, (b) there is nothing to suggest that the Tricorona ERPAs were particularly sophisticated, even though they had the merit apparently of being "user-friendly", and (c) I consider in the round that Tricorona's bargaining position would have been weak.

## REMEDIES

### *Remedies: as between CFP and Barclays*

1166. Having concluded that Barclays was in breach of its obligation of confidence to CFP I turn next to the difficult question as to the appropriate remedies between them.

1167. CFP claims, in the alternative, either damages for their loss or an account of Barclays' profit. There are complexities in each. The first question is to determine which of the alternatives is appropriate. It is clear that this is not a matter of election for CFP; whether to offer the choice is in the discretion of the court: see *Walsh v Shanahan* [2013] EWCA Civ 411, approving *Vercoe* in this regard.

*Account of profits or damages?*

1168. In exercising that discretion, the court will seek to identify the "appropriate remedy for the circumstances of the wrongdoing – to make the remedy fit the tort" (see *Walsh v Shanahan*).

1169. Usually the court is concerned only to compensate the claimant for his loss rather than strip the defendant of his profit. But that may still (indeed usually will) reserve some benefit to the defendant: the benefit to him may exceed the wrong done to the claimant. In some circumstances that may be offensive, and fail to recognise the true extent of the claimant's interest in performance of the obligation in question (again, whether contractual or equitable) whilst rewarding the defendant for his indifference or a self-interested and calculated breach.

1170. In those more exceptional circumstances, the "just response to the wrong in question" may make it only just and equitable that the defendant should retain no benefit from his breach, and should account for it accordingly: see *Attorney-General v Blake* [2001] 1 AC 268 at 282 (Lord Nicholls) and Sales J's helpful analysis of its application in the context of breach of confidence in *Vercoe* at paragraphs 339 to 340.

1171. As explained by the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc and another* [2003] EWCA Civ 323 [2003] 1 All ER (Comm) 830, and as elaborated by Sales J in *Vercoe,* exceptional circumstances must be demonstrated to warrant an account of profits.

1172. The choice is likely to depend on whether the rights of the claimant are of a particularly powerful kind and/or such that his interest in full performance is particularly strong; and on whether those rights are asserted in an ordinary commercial context ("where a degree of self-seeking and ruthless behaviour is expected and accepted to a degree") or in the context of a relationship of special trust, such as was the case on *Blake* itself or such as in a fiduciary relationship (where "self-seeking behaviour is required to be reined in on the grounds that special obligations…have been assumed…", and there is an enhanced importance of deterring abusive behaviour).

1173. As Sales J stated at [341]:

> "where one is not dealing with infringement of a right which is clearly proprietary in nature (such as intellectual property in the form of a patent, as in *Siddell v Vickers*) and that there is nothing exceptional to indicate that the defendant should not be entitled to adopt a commercial approach in deciding how to behave in relation to that right, the appropriate remedy is likely to be an award of damages…rather than an account of profits."

1174. On behalf of CFP it has been urged that in light of Barclays' conduct, and in particular its failure to reveal a conflict, its failure to police its Chinese Walls, its part in the killing of Arctic Fox and its breaches of its duty of confidence for its own profit and advantage, this is an exceptional case and an account of profits would be appropriate. I have considered these failures carefully. I have also taken into account the conduct on the part of CFP of which the Defendants complain.

1175. Although I consider that Barclays embarked upon Project Pomodoro with indifference to the interests of CFP and contrary to expected standards of commercial behaviour, I do not consider that in this case there are such exceptional factors, either as regards the nature of the information or the nature of the parties' relationship or conduct, as to signify that an account of profits would be the appropriate remedy.

1176. As was the case in *Vercoe*:

(1) there was no fiduciary relationship between CFP and Barclays;

(2) the information provided was not in the nature of or analogous to a secret design or process or other form of intellectual property.

1177. It is true that in *Vercoe* the parties were in an enforceable contractual relationship, and though the claim to an account of profits was put forward in respect of the parallel equitable duty (necessarily, since a claim in contract does not support such a claim), that equitable duty was found to be co-extensive with the contractual obligation. In this case, the claim for breach of the duty of confidence is made exclusively in the "equitable channel" (as Mr Lord put it); and I have found that there was non-disclosure in respect of the IVC/Barclays Confidentiality Agreement. This does distinguish this case.

1178. Nevertheless, whereas in the past an account of profits was the usual remedy unless the breach was unintentional, and might well more readily have been available in a

case such as this, the matter has always been discretionary. The firm trend recently has been away from that in favour of what Sales J in *Vercoe* (by reference to Lord Nicholls's analysis in *Attonery-General v Blake* ) described as a "more principled examination". This has recently been demonstrated by the decision of the Court of Appeal in *Walsh v Shanahan and Others* [2013] EWCA Civ 411. There, in respect of the defendants' breach of an equitable duty of confidence, the court held that an account of profits would not be what Sales J described in *Vercoe* as a "just response to the wrong in question".

1179. I am further fortified in my conclusion that an account of profits would not be a just response by a further distinguishing feature of this case. In contrast to *Vercoe*, this is not a veto case, and the confidential information was not the sole key to the opportunity. In the absence of a fiduciary relationship and in a commercial context I think an account of profits would seldom, if ever, be likely to be a just response in such circumstances.

1180. In all the circumstances, I do not think there is sufficient reason for departing from what appears to me to have become the usual or default approach where there is no fiduciary relationship, which is to restrict the claimant to a claim in damages.

1181. Accordingly, I decline to order an account of profits. That does not, of course, preclude an assessment of damages on a basis which may be juridically similar to a gain-based remedy, as is in part at least the *Wrotham Park* "negotiation damages" approach (and see *Devenish Nutrition Ltd v Sanofi-Aventis SA and others* [2008] EWCA Civ 1086).

### *Assessment of damages*

1182. The basic approach in the assessment of damages for any breach, whether the obligation of confidentiality is contractual or equitable, is to ascertain the value of the information which the defendant took: *Seager v Copydex (No.2)* [1969] 1 WLR 809 at 813. That leads to another issue of complexity: the basis of valuing what the defendant took. There are various ways of doing this; and what is appropriate is likely to depend on the quality of the information taken and whether its value is susceptible to measurement by analogy to a market standard or not.

1183. Unlike the position reached in *Vercoe,* where to limit the complexities of the case and the evidence and argument required to resolve it, the parties ultimately adopted a common position as to the basis on which damages should be assessed (see paragraph 289), CFP and Barclays have established very little common ground in terms of approach: and they are hugely apart in terms of quantification.

1184. In *Seager v Copydex (No. 2),* the Court of Appeal also suggested that the basis of calculating that value might depend on the degree of "specialness". Thus (a) information which has nothing very special about it in that it could be obtained from another source might be valued at the price that a consultant would charge for obtaining it; (b) information which was "something special" involving something unusual such as could not be obtained by just going to a consultant might be valued at the price a willing buyer would pay a willing seller; (c) information which was "very special indeed" (for example, involving some inventive step which would be expected

to command a royalty) might be valued on the basis of a capitalised royalty: see *per* Lord Denning MR *ibid.*

1185. Those are guides, not rules; but they usefully illustrate and capture the fact that there is a broad spectrum of information which has the necessary quality of confidentiality but may range from the easily available to the innovatory and unique.

1186. I have already indicated that I do not consider that Project Arctic Fox consisted or included information in the third and most special category: I do not think it was or realistically could be argued that it did.

1187. As to the first category, the Court of Appeal has recently accepted in *Force India Formula One Team Limited v Aerolab SRL and Another* [2013] EWCA Civ 780 (*"Force India"*) that whilst it is

> "clearly not a defence that the person in breach of confidence could have obtained the information elsewhere if he did not in fact do so",

if there is an alternative means of obtaining an equivalent benefit from another source,

> "the cost of engaging a consultant can be an appropriate measure of compensation for misuse of confidential information."

1188. Barclays submit that to the extent that there was ever any quality of confidentiality about it at all, the confidential information in this case can barely have scraped into the first category, and its station there was even more tenuous after the publication of the Carnegie report (in October 2008) and the Mirabaud report (in August 2008).

1189. As it was put in the written Closing Submissions on its behalf:

(1) CFP's contribution in terms of the spreadsheet was, at the very highest, "the sort … which could be obtained by employing any competent consultant" (echoing Lord Denning MR in *Seager v Copydex (No 2)* [1969] 1 WLR 809 at 813A.

(2) The non-binding expressions of interest had little or no commercial value at the time and they certainly had none by late 2009 when Barclays began to consider Tricorona as a target. Moreover they were never used by Barclays and formed no part of the Project Pomodoro transaction or its rationale. They were not even shown to Tricorona.

(3) "As for the business opportunity, although it was pitched by CF Partners' as an innovative concept, when properly analysed it consisted of nothing more than a supposed arbitrage resulting from the difference between the market capitalisation of Tricorona and the value (as CF Partners perceived it) of Tricorona's portfolio. But the valuation was simply CF Partners' opinion, at a given point in time, in a market where everyone had his own opinion. Notably, Carnegie, the Swedish investment bank, published a research report in October 2008 making the same point as CF Partners that Tricorona's

> shares were massively undervalued. Mirabaud published a report on other major carbon developers making the same point. The only matters that CF Partners can point to as showing that their opinion was based on confidential knowledge or special expertise are the risk adjustments and the expressions of interest, which take them nowhere."

1190. I do not accept this. I consider that the best test is the effect that the overall package comprised in Project Arctic Fox had on Barclays' perception of what Tricorona's portfolio had to offer in terms of its embedded value and the means of realizing it, with particular reference to the sale of Large Hydro CERs (including pCERs) to compliance buyers in the over-the-counter market.

1191. It is, to my mind, clear that CFP's presentations and the confidential information in the way it was presented were material in altering Barclays' perception of Tricorona, and in encouraging it to regard Tricorona's portfolio of Large Hydro pCERs, which was largely unhedged, as an opportunity both in terms of fee-generation (for hedging transactions) and in terms of building a position in the primary market.

1192. I do not consider that the "Big Idea" as a package nor the overall insight or revised perception it provided and encouraged would have been available from a consultant.

1193. I accept that valuation expertise could be bought in from a number of external consultants such as Point Carbon and Climate Focus and that, with the benefit of those sources, a fairly sophisticated valuation of Tricorona's portfolio and risk factors could be achieved by experts in the field. Indeed, Point Carbon actually provided to Mr von Zweigbergk a proposal for such a valuation (which he circulated to Messrs Navon, Glossop and Rassmuson) at a cost of €37,500 (which never happened).

1194. I consider that in this case the information in question fell within the second category. I acknowledge and take into account that his view was largely based on his assessment of the value of the Expressions of Interest, on which views could differ; but Mr Bode's unchallenged evidence was that the information which CFP "provided to Barclays and Tricorona was not something that, in my experience, could have been acquired from a consultant for a fee."[40]

1195. Accordingly, in my judgment, this is a case where the value of what the defendant (Barclays) took (from CFP) is to be determined by reference to what Lord Denning described in *Seager v Copydex (No 2)* as "the value as between a willing seller and a willing buyer", a process which has been elaborated latterly in the well-known decision of Brightman J in *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 ("*Wrotham Park*"), and further explained in *Blake, Experience Hendrix LLC v PPX Enterprises Inc.* [2003] EWCA Civ 323 ("*Experience Hendrix*"), *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45; [2011] 1 WLR 2370 ("*Pell Frischmann*") and, of course *Vercoe* and *Force India.* That became CFP's primary basis of claim.

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[40] Mr Navon's evidence that CFP's information was "not the sort of input that [Barclays and Tricorona] could have obtained from, for example, consultants for a consultancy fee", was also unchallenged.

***Wrotham Park approach***

*Nature of the exercise*

1196. Under this approach the objective is to establish what sum of money might, in a hypothetical negotiation between them, reasonably have been demanded by the claimant from the defendant as a *quid pro quo* for "the release of the relevant contractual obligation"; or, as Sales J put it in *Vercoe* at [292], "the fair price for release or relaxation of the relevant negative condition".

1197. Here, of course, the obligation was equitable: and it amounted to a negative condition that confidential information provided to Barclays by CFP would not be used by Barclays for any purpose other than the purpose for which it was provided, which was defined in the IVC/Barclays Confidentiality Agreement as being the evaluation of Project Arctic Fox/Carbonara. In my judgment, the definition of the permitted purpose is apt for the equitable duty or obligation as for the contractual stipulation or covenant.

1198. So the purpose of the hypothetical negotiation posited by the *Wrotham Park* approach is to seek to fix what consideration might reasonably have been demanded by the claimant (CFP) from the defendant (Barclays) as a *quid pro quo* for permitting the use (past and future) of the confidential information for some other purpose than the evaluation and implementation of Project Arctic Fox/Carbonara.

1199. The exercise is artificial; and, despite the apparent precision of the figures and calculations deployed typically (and necessarily) on each side, it necessarily involves a question of impression. As is accepted in CFP's Closing Submissions, it is to some considerable extent a "broad brush". That is especially so in a case such as this where the gap between the parties is so considerable and the canvas to be covered is so large: the spread is between CFP's assessment of the appropriate sum (no less than €45 million plus interest, with a maximum claim of about double that) and Barclays' assessment (if not nominal, then a maximum of €740,000). The Defendants' low figure, though unhelpful, is more understandable since their position throughout has been that the information was not confidential and had no value accordingly. CFP's initial demand, and its continuing insistence on these huge sums, is less so: they have struck me from the outset as disproportionate.

1200. Such an enormous disparity in the parties' respective views as to what would have been their negotiating positions makes the already difficult, ultimately subjective, exercise contemplated and required by the *Wrotham Park* approach even more so than usual. In such a context the parameters suggested by the parties' factual witnesses are so wide apart that they are of little real assistance; and the negotiation posited is all the harder to envision. The parties are so far apart that it makes it difficult to envisage any reasonable discussion between them.

1201. Thus, whilst CFP's view as to what might reasonably have been agreed was made unreliable principally because of its unrealistic starting point and Mr Navon's belief (stated in his first witness statement) that "it was impossible for them to do the deal without using CF Partners' confidential information", Mr Gold, who was Barclays' lead witness as to its likely negotiating stance, seemed unwilling to play the role of a

willing buyer of confidential information at all. He stuck to the line that the information was not confidential and that he would have offered nothing, and walked away from the deal if CFP had sought any substantial payment. This did not assist me.

1202. The experts on each side provided copious analysis; but what might be called "the science of valuation" cannot yield a certain figure, or determine what form any consideration might take. The reams of figures and factors explained assist in generating parameters and possibilities: but the actual figures and form of the consideration are a matter of judgment.

1203. In *Vercoe*, Sales J described the exercise as follows (see [292]:

> "On my reading of the authorities, where damages are to be awarded on a *Wrotham Park* type basis, what is required from the court is an assessment of a fair price for release or relaxation of the relevant negative covenant having regard to (i) the likely parameters given by ordinary commercial considerations bearing on each of the parties (it would not usually be fair for the court to make an award of damages on this basis by reference to a hypothetical agreement outside the bounds of realistic commercial acceptability assessed on an objective basis with reference to the position in which each party is placed, and see *Pell Frischmann Engineering Ltd* at [53]); (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties (see Brightman J's reference to the conduct of the beneficiary of the restrictive covenant in *Wrotham Park* at 815H-816B as a factor tending to moderate the award of damages in its favour and the reference of the Privy Council in *Pell Frischmann Engineering Ltd* at [54] to the relevance of extraordinary and unexplained delay by the claimant); and (iii) the court's overriding obligation to ensure that an award of damages for breach of contract – which falls to be assessed in light of events which have now moved beyond the time the breach of contract occurred and which may have worked themselves out in a way which affects the balance of justice between the parties – does not provide relief out of proportion to the real extent of the claimant's interest in proper performance judged on an objective basis by reference to the situation which presents itself to the court (see the discussion in *Experience Hendrix* at [27]-[30] of the special nature of the interest of the claimant which justified the award of damages in *Blake* equivalent to the profits which Blake had made in publishing his book about his treachery; the general discussion by Lord Nicholls in *Blake* at 282A-285H; and also compare *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344)."

1204. This statement by Arnold J in *Force India* at first instance at [386] of the established principles for the assessment of such damages also seems to me to be helpful in adumbrating the various principles:

(1) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Hendrix v PPX* at [26] (Mance LJ, as he then was) and *WWF v World Wrestling* at [56] (Chadwick LJ).

(2) The primary basis for the assessment is to consider what sum would have been arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *PPX v Hendrix* at [45], *WWF v World Wrestling* at [55], *Lunn v Liverpool* at [25] and *Pell Frischmann v Bow* at [48]-[49], [51] (Lord Walker of Gestingthorpe).

(3) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell Frischmann v Bow* at [49].

(4) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly* at [29] and *Pell Frischmann v Bow* at [50].

(5) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome, and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell Frischmann v Bow* at [51].

(6) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights: see *Pell Frischmann v Bow* at [54].

1205. The assessment is ultimately an objective one, albeit that the hypothetical negotiation may be informed by evidence as to what factors and negotiating arguments the parties say (subjectively) they would have advanced.

*Relevance of the parties' evidence as to their likely negotiating position*

1206. In its Closing Submissions CFP made much of the fact that Mr Navon's evidence as to the factors which CFP would have taken into account for the purposes of the hypothetical negotiation was not challenged. However, though the recitation of factors is of assistance to the court in assessing what would have been advanced by a seller, the reasonableness of the factors and what weight is to be accorded to them is, of course, a matter for the court.

1207. The court is at liberty, as I see it, to assess the validity of the points made, the likelihood or degree to which a reasonable seller would have persisted in them, and the likely responses of a reasonable buyer in determining what in its (the court's) view would have been the upshot of the hypothetical conversations.

1208. I do not accept, therefore, CFP's submission that since the Defendants did not challenge Mr Navon's evidence on quantum, "it follows that the Court must give full weight to it, which involves accepting that CF Partners' negotiating position would

reasonably comprise Mr Navon's approach. In other words, the Defendants must necessarily accept that the 'willing' seller's position would be that advanced by CF Partners". That goes too far, principally because the issue of reasonableness, including the arguments that a "willing seller/willing buyer", acting reasonably, would raise, is not to be determined by the parties themselves, but by the court. This is an aspect of a more general principle that the behaviour of the reasonable man is not established by the evidence of witnesses, but by the application of a legal standard by the court: and see, for a recent reaffirmation of this, the Supreme Court decision on 30 July 2014 in *Healthcare at Home Limited v The Common Services Agency for the Scottish Health Service* [2014] UKSC 49.

1209. For similar reasons, the evidence offered on behalf of Barclays by Mr Gold in seeking to depict how he would have handled the hypothetical negotiation on its behalf is of some use in informing the court as to the points that might have been advanced by Barclays; but imperfections in his presentation of the factual circumstances, which were the subject of much criticism by CFP, are largely beside the point, and are to a large extent corrected by their identification. Again, it is for the court to decide what the shape and result of the hypothetical negotiation between the imaginary willing sellers and purchasers would have been.

1210. As to the expert evidence, that is plainly of assistance in directing the court as to how, by reference to the facts as would likely have been known to those negotiating, the potentiality and risks of the subject-matter to which access is sought by release of the negative condition might be measured, and even as to what sort of returns might be expected; however, the resolution is not for expert opinion but overall judicial assessment.

*The subject-matter of the negotiation*

1211. In undertaking that assessment, I accept the Defendants' admonition that it is necessary to have continually in mind what is the subject-matter of the hypothetical negotiation, as well as the context in which the negotiation is imagined to take place.

1212. As to that, the Defendants contend that the subject-matter is the information actually found to have been misused, and that the object of the exercise is to establish by the hypothetical process of negotiation the fee payable for such misuse. Mr McQuater referred me in that regard to the decision of HHJ David Hodge QC in *Jones v IOS (RUK) Limited* [2012] EWHC 348 (Ch) at [98].

1213. Mr Lord defined the relevant information for which fair payment is to be made more broadly as comprising the whole corpus of the confidential information provided and intended to be freed from restriction by payment of the agreed fee.

1214. I agree with Mr Lord and consider Mr McQuater's formulation by reference to *Jones v IOS (RUK) Limited* too restrictive, especially where the confidential information concerned is a composite idea, or (to borrow from the example mentioned by Lewison LJ in *Force India v Aerolab* [2013] EWCA Civ. 780 at [96]) a dictionary:

> "Whether Aerolab's aerodynamicists and CAD draftsmen regarded themselves as free to use the CAD files as they

> thought fit is essentially a question of fact, which turns on the state of mind of the people in question. We were not shown any evidence about that, nor any questions put to the witnesses about their state of mind. In those circumstances I do not consider that we are in a position to make a finding of fact that the judge did not make. That said, if the judge had made that finding, then it seems to me that compensation should have been assessed on the basis of the value to Aerolab of the whole corpus of information. After all, if A wrongfully retains B's dictionary, it does not matter that he only looked up a few definitions."

1215. Further, I consider that it is not only the past misuse which is to be 'franked': what has to be assessed, once misuse is established, is the price that the parties would be likely, in the hypothetical negotiation, to agree should be paid by the restricted person for the release of the other party's rights.

1216. Amongst the matters relevant to such an assessment in this case are:

(1) the nature and extent of the rights to be bought out;

(2) when the hypothetical negotiation is to be treated as taking place;

(3) what would have been the form of compensation most likely to have been sought by the seller and agreed by the purchaser, assuming both to be acting reasonably? In other words, the question is whether the parties would have been likely to agree on (a) a cash payment (b) some form of equity stake (c) a brokerage payment (or proxy for it); or (d) some blend of the foregoing;

(4) what would have been the principal factors, arguments or "drivers" in the course of the hypothetical negotiation, which will include:

(a) whether CFP would itself have been able to use or generate any value from the confidential information before expiry of its validity, and whether there are any other factors that might tend to erode the bargaining position of CFP as the person from whom release is sought;

(b) whether there are any other factors, including special urgency, indirect further advantage to the purchaser (such as marriage value or market access), rarity of the information to which confidentiality attaches or otherwise (including, it is contended by CFP, reputational issues), which might tend to enhance the bargaining position of the person from whom release is sought;

(5) whether overall the proposed consideration for the release of confidentiality is (a) within the likely parameters given by ordinary commercial considerations bearing on each of the parties and (b) just and equitable and proportionate to the real extent of the claimant's interest in proper observance of confidentiality, judged on an objective basis by reference to the circumstances of the case in the round.

*Nature and extent of the rights to be bought out*

1217. As to the first of these points, the Defendants advanced what they described as one of "three overarching points". This was to the effect that in relation to the breach of confidence case, it would be quite wrong to approach the *Wrotham Park* issue on the basis that CFP had any kind of veto over Barclays' acquisition of Tricorona, so that Barclays would have to buy them out to have any chance of proceeding with the transaction. That would be to treat Barclays' duty of confidence as equivalent to, or "elevate" it into, an obligation of exclusivity by which Barclays would be precluded absolutely from the transaction. If CFP's confidential information (whether as to the arbitrage, the value of Large Hydro, expressions of interest, portfolio details or any other aspect of the business opportunity) was used by Barclays in Project Pomodoro, it only played a part – and Barclays would say a very small part – in their considerations. Barclays stressed its point that the present case is not like *Vercoe*, where the defendant was wholly dependent on the information from the claimant in order to acquire the target company, since he would otherwise simply not have known that an acquisition was possible. That being so, *Wrotham Park* damages should be assessed by reference to the extent to which there was misuse. The court should look at the value that any information misused had to the acquisition, not simply at the value of the acquisition itself.

1218. I agree that this is not a case like *Vercoe*, where the confidential information conferred the entire opportunity, in the sense that it identified a target not thought to be available, and the information that the target's shareholder was looking to sell. In this case, the opportunity was more restricted. It shone new light on an old prospect, illuminating qualities and potentialities not previously recognised.

1219. As to the issue of a veto, which Mr Navon tended to presume CFP had, I should record an important concession on the part of Mr Lord: this is that although, as at January 2009, Barclays was still subject to an obligation of exclusivity *vis-à-vis* IVC, he did not seek to rely on the release of that obligation, nor on any collateral obligation of exclusivity, as part of the subject-matter of the *Wrotham Park* negotiation. He told me in closing:

> "There obviously is a veto in terms of the contractual claim for breach of exclusivity and as far as the breach of confidence claim is concerned, we acknowledge that damages are not calculated as if we have a veto, but the strength of our hand has to be properly reflected and we seek to do that by reference to the competition and the market demand for our information."

1220. That concession distinguishes this case from *Pell Frischmann*, where the negotiation concerned both a duty of confidentiality and an express contractual obligation of exclusivity, and it was thus clear that the price was required to reflect the fact that if the negative rights of the claimant were not bought out the project could not proceed at all: see *Pell Frischmann* at [53].

1221. I have not found it easy to determine where the boundaries are between an effective right of veto on the one hand, and the need for a release to enable the transaction to take place.

1222. As it seems to me, it may be that where that purpose would not have been identified at all without the confidential information, the entire value of its achievement would be referable to that information (as in *Vercoe*). But where (as in this case) a variety of factors have shaped the identification and pursuit of the purpose, then only that proportion of the value of its achievement is fairly attributable to the confidential information and thus to the fair price for the release or relaxation of restrictions on its use (unless there is also an exclusivity obligation as in *Pell Frischmann*).

1223. But the information and its presentation were of importance nonetheless. Barclays' assessment, which had been so dismissive, was radically altered: it never looked at Tricorona in the same way again.

1224. Having seen the true value of Tricorona as a mine in consequence of the confidential information provided to them pursuant to Project Arctic Fox, Barclays, in January 2009 and still without any formal mandate from CFP, determined to use it for their own advantage, regardless of the restrictions on their doing so. They determined to and did begin, then, to establish a "strategic relationship" with Tricorona's management which would enable them to access the opportunity and work the mine. In early 2009 they were not sure how that relationship would develop, but I do not consider that they had in mind or intended to observe any restrictions as to where it might lead. In so proceeding, the Defendants thereby used and sought to continue to use the information entrusted confidentially to them for purposes other than the purposes for which it was so entrusted.

1225. Barclays should pay for the retrospective freedom from the restrictions which they were obliged to observe, but did not. The price they should pay for that freedom should reflect the fact that the confidential information was not the only influence or piece of information which identified the opportunity and caused Barclays to pursue it, but it was of considerable influence and importance: without it, I consider and find that it is unlikely that Barclays would have seen the opportunity in January 2009.

*Timing of hypothetical negotiation*

1226. The competing suggested dates for any hypothetical negotiation for *Wrotham Park* purposes were (a) January 2009 (when Barclays and the Tricorona Management first discussed termination (and, CFP maintains, embarked on ensuring the demise) of Arctic Fox with a view to establishing a "strategic partnership" with Tricorona), (b) November 2009 (at the outset of Project Pomodoro), and (c) June 2010 (when Barclays made its offer to acquire Tricorona).

1227. The usual rule is that the hypothetical negotiation should be treated as taking place at the date of breach; and that events after that date should not usually be taken into consideration. As confirmed by the Privy Council in *Pell Frischmann* at [50], citing earlier Court of Appeal authority in *Lunn Poly:*

> "Another issue is how far the court is entitled, in its assessment of *Wrotham Park* damages, to take account of events occurring after the time at which the hypothetical negotiation takes place (and in particular, to take account of how profitable the outcome has been for the contract-breaker). This issue

> sometimes tends to get confused with the wider issue of whether the court is awarding compensatory or restitutionary damages. Their Lordships consider that the right approach is that of the Court of Appeal in *Lunn Poly* [2006] 2 EGLR 29 in which Neuberger LJ observed, at paras 27-29, after citing the judgment of Mr Anthony Mann QC in *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* [2001] 1 EGLR 81, paras 11-13:
>
> > '27. It is obviously unwise to try to lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events that have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts. Further, the point before us today was not before Brightman J or before Lord Nicholls in the cases referred to by Mr Mann.
> >
> > 28. Accordingly, although I see the force of what Mr Mann said, in para 13 of his judgment, it should not, in my opinion, be treated as being generally applicable to events after the date of breach where the court decides to award damages in lieu on a negotiating basis as at the date of breach. After all, once the court has decided on a particular valuation date for assessing negotiating damages, consistency, fairness and principle can be said to suggest that a judge should be careful before agreeing that a factor that existed at that date should be ignored, or that a factor that occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which they would arrive.
> >
> > 29. In my view, the proper analysis is as follows. Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant. However, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account.' "

1228. To some extent, the parties themselves had conflicting interests. On the one hand, CFP's interest was in placing the date as early as possible so that the information should be as "fresh" as possible (and so that the negotiation should also pre-date the Exclusivity Release). On the other hand, it had an interest in putting back the timing, so as to make clearer a link between the use of the information and the acquisition of Tricorona or its portfolio, and to capture (as being part of the negotiating matrix of

fact) helpful material such as the emergence of a threat of a bidding war in March 2010.

1229. Similarly, Barclays had an interest in deferring the date, to bolster its case that the information was "stale"; but also an opposing interest in placing the meeting in (say) November 2009 when any transaction beyond day-to-day hedging was a notion (or at most a prospect), and not a reality.

1230. Mr Lord, after some prevarication and at least a feint in CFP's pleadings towards November 2009, eventually (in his oral Closing Submissions) plumped for January 2009. That was a date covered by CFP's experts, though not specifically by the Defendants' experts.

1231. Put shortly, CFP contends that the misuse of confidential information on which CFP relies started then, and informed Barclays from then on in acting as they did (including eventually acquiring Tricorona).

1232. CFP maintains that the misuse of such information at this early stage is apparent or may be inferred from the facts that (1) Ms Patel undoubtedly had it, (2) it was plainly relevant to an appreciation of the potential of Tricorona, (3) the conditions were right for its exploitation, and (4) there was considerable pressure on Ms Patel, as the person with responsibility for primary emissions markets within Barclays, to find a source of CERs and associated primary business, the more so given that at the beginning of January Barclays' EMEA Commodities Sales presentation (as to which see also paragraph [626] above) made clear that it was "fill or kill" time for Barclays' efforts to build a position (what Ms Patel described to Dr Thomas in an email in mid-June as a "strong footing") in the primary market.

1233. CFP also point to the following:

(1) the collapse of prices in late 2008 and early 2009, which provided an opportunity for purchases of portfolios at competitive prices;

(2) Ms Patel taking over from Mr Garcia the responsibility for Barclays' relationship with CFP and Tricorona, and her work on both the public and the private side to establish ever closer ties with Tricorona with a view to exploiting its "mine";

(3) Ms Patel's obvious enthusiasm in her conversations with Dr Swift to make use of the fact that Barclays know more about Tricorona than anyone else; and

(4) from January onwards, her encouragement of Tricorona's Management to terminate any continuing relationship with CFP under the Memorandum of Understanding or otherwise.

1234. Barclays dismissed the notion of an early 2009 valuation date as a "nonsense", primarily on the basis that no misuse of confidential information by that time had been established, but also on the basis that the choice of that early date was inconsistent with CFP's primary claim that the value of its confidential information

should be calculated by reference to the value to Barclays of its acquisition of Tricorona.

1235. As Mr McQuater put it, "claiming measures of damages which are premised on Barclays actually acquiring Tricorona, then it is only when Project Pomodoro is reached that CF Partners' theory of damages becomes relevant". Since no such acquisition was contemplated at that time (January 2009) or indeed until (at the earliest) late September 2009 in the context of Project Silverback, the requisite nexus between misuse and the event by reference to which negotiation is to be hypothesised was, he reasoned, simply not there.

1236. Barclays contended that (i) discussions between Barclays (especially Ms Patel) and the Tricorona Management (primarily Mr Holmgren) had been sporadic and limited; (ii) even if Project Arctic Fox had galvanised Ms Patel into seeking a closer relationship with the Tricorona Management (cf *Arklow*), that did not constitute misuse, and no evidence of misuse at or prior to that time had been established; and (iii) Barclays had not formed any intention to acquire Tricorona by then, Ms Patel's interest being limited to the possibility of day-to-day hedging.

1237. In my judgment, and on the basis of my previous findings, early 2009 is indeed the most logical date to take as the date of the hypothetical negotiation for *Wrotham Park* purposes; and that is so, notwithstanding that the selection of that date in many ways complicates the process of determining what factors should be taken into account in the context of that hypothetical negotiation.

1238. In my judgment, the suggestion that Barclays had by the end of January 2009/early February 2009 made no use of information that it had acquired confidentially pursuant to Project Arctic Fox cannot be sustained in light of my conclusions and especially in light of Ms Patel's own justification for immediate pursuit of business with Tricorona at that time (that "we know more about their portfolio than anyone else") and her (and the Defendants') inability to put forward any source for that knowledge other than what she obtained from CFP and in the course of the Singapore meeting. In my assessment, the misuse started in January and continued thereafter.

1239. Throughout, from January 2009 onwards, in my judgment, Ms Patel's objectives were to realise as much from the "mine" as possible in whatever way available; and to facilitate that, she was at one with the Tricorona Management in working towards bringing a settled end to Project Arctic Fox such that neither could be bound or impeded by any continuing relationship.

*Context of hypothetical negotiation*

1240. As mentioned above, the conclusion that the date of the hypothetical negotiation should be taken to be January 2009 complicates the assessment of what should be taken as the mindset of, and the information available to, the parties to the hypothetical negotiation as at January 2009. In particular: should the fact that, more than 12 months later, Barclays acquired Tricorona be taken into account, or should that possibility be excluded as unforeseen at the time, or discounted as too remote to be of materiality?

1241. Neither CFP nor the Defendants was precise as to when and in what context the negotiation should be imagined to take place, and both tended to be somewhat inconsistent in their assumptions as to what their mindset should be taken to be at the relevant time.

1242. The area of most dispute was whether the eventual acquisition of Tricorona by Barclays in Project Pomodoro should be taken into account.

1243. CFP contends (1) that the eventual acquisition of Tricorona by Barclays was an entirely foreseeable outcome of the misuse of information in January and thereafter, and (2) that in any event, and especially given the repeated use of confidential information thereafter to the same end, the *Wrotham Park* hypothetical negotiation should take into account, in assessing the value of the information which is the subject of that negotiation, the use in fact ultimately made of it, whether predictable or not, unless perhaps entirely unforeseeable.

1244. As to (1), CFP contends that the focus should not be on the form of the ultimate transaction (the acquisition of shares) but the intent of the original misuse (the exploitation of the value of the mine, however achievable). As to (2), Mr Lord submitted in his oral closing that

> "So either one has *Wrotham Park* on a number of different dates to make sure that one captures the full misuse, or, as we suggest, you have it on the first occasion of breach, but you have in mind the subsequent history so you can see the sorts of exploitations and uses to which your information will be made so that you can gauge what the misuse is…in order to license that subsequent history of use…you are effectively licensing any subsequent use that would otherwise be a misuse, whether it is something that the licensee particularly wants to do in the short-term or not…
>
> the victim, in other words, CF Partners, is entitled to be fully compensated…irrespective of the use the wrongdoer ultimately makes of it and at what point in time."

1245. On the other hand, Mr McQuater on behalf of Barclays submitted that a nexus had to be established between the misuse and the acquisition, and could not be. He depicted Ms Patel's efforts to cultivate closer business relations with the Tricorona Management in January 2009 as being concerned only with paving the way to undertaking hedging transactions for or with Tricorona, and as being entirely unconnected with the later acquisition of Tricrona by Barclays in June 2010. He emphasised the lapse of time between these events, and the fact of Barclays' efforts in the intervening period to acquire EcoSecurities, which if successful would probably have satiated Barclays' appetite for acquiring carbon developers. He put it this way in his closing speech:

> "If Ms Patel were to have used confidential information for hedging purposes and that was entirely her intention then there is no connection and you are not taking any preparatory step towards the acquisition that you eventually do. If she had used

> confidential information, or thought of using it, for hedging purposes then there might be a *Wrotham Park* negotiation over hedging, use for hedging purposes, but if she doesn't have it in her mind at that point to acquire Tricorona there is no connection."

1246. In answer to a question from me supposing Ms Patel did not know quite where it would all lead, Mr McQuater responded that such an unspecific possibility would be "incapable…of being a sufficient nexus with what then happens". On that basis, the "price" to be struck for the release of confidentiality should be calibrated only by reference to its value in any prospective hedging negotiations, and not by reference to the value of the later, unconnected, acquisition.

1247. For reasons previously stated I have concluded that there was no causal link between the "strategic partnership" sought and established by Ms Patel in early 2009 and the (much) later acquisition of Tricorona. In my view, and in light of my conclusions that there was no strict "continuum" (see paragraphs 1027 and following above) the just course in the circumstances is to treat the negotiation as concerned to establish the fee or price to be paid to enable the exploitation of the opportunity free of restrictions and with an open mind (and some uncertainty) as to where that might lead.

1248. But as also explained, even if the later acquisition was not actually foreseen it should be taken as being the sort of opportunity thrown open, which Barclays would have wanted to preserve and, if and when available, have the unrestricted freedom to pursue: an opportunity which chimed with Barclays' general objective of portfolio purchases to bring it into the premier league of the primary carbon space ("fill or kill").

1249. In addition, as it seems to me, I should assume for the purposes of the hypothetical negotiation both honesty and the correction of any previous serious misunderstandings: in my view, I should take it that Barclays would have disclosed its previous relationship with Tricorona, and its inclusion as a possible acquisition target in the past. This, in my view, would have introduced into the negotiating room the real possibility of a resurrection of that objective.

1250. The negotiations should also be presumed to proceed on the basis of a true understanding of the significance of the confidential information provided as I have earlier described it.

1251. Accordingly, I would answer my own question to Mr McQuater differently. Although the actual transaction was not envisaged at the time, and it would be wrong to value the confidential information as if it was that which provided the key, Ms Patel and Barclays should be taken as having as part of their purpose in building their strategic partnership any transaction that might advance the achievement of (a) the Tricorona Management's "dream" of an MBO and (b) Barclays' ambitions in the carbon space, and its urgent agenda to acquire portfolios ("fill or kill"). Such a purpose or agenda should be taken not as excluding, but as potentially including, the acquisition of Tricorona or its entire portfolio if the opportunity arose.

1252. For the avoidance of doubt that does not, however, mean that the value of release should be taken to be some proportion of the values eventually realised in the later

acquisition. Even if the "strategic partnership" in the end helped Barclays achieve that particular transaction (for example, because it was favoured by Tricorona's management), by then there were many other factors at work, including (again for example) the failure of Barclays to acquire EcoSecurities and its concerns that other financial institutions such as JP Morgan would steal ahead of it. By the time of Pomodoro, the knowledge that Barclays had obtained from CFP was a very much attenuated influence, and Pomodoro's "drivers" and rationale by then included many other factors.

*Strengths and weaknesses*

1253. Although Mr Navon tended only to see and stress the strength of CFP's position, it would in reality have been subject to a number of weaknesses.

1254. As to his perception of the strength of his hand, Mr Navon relied especially on what he perceived to be the underlying robustness of CFP's proposition, including (a) its contacts with compliance buyer clients such as Vattenfall and BP plc, (b) the interest shown by IVC as a potential equity provider, (c) interest also from Daiwa "and others" in participating also in an equity investment, (d) the potential for some other debt provider (such as SEB) to replace Barclays as a lender and (e) CFP's own work on Tricorona's portfolio and in particular its ability to hedge Tricorona's exposure to CER price risk shortly after any acquisition by forward selling at fixed prices and locking in as profit the margin of the sale.

1255. His weaknesses, however, were various.

1256. First, although I do not think that CFP had by January 2009 given up on Project Arctic Fox, and indeed continued some work on it thereafter, in negotiating terms any card in its hand as to its own ability to implement Project Arctic Fox was a weak one. Although I do not accept the Defendants' case that CFP had, by January 2009, no prospect of acquiring Tricorona itself, it seems to me unlikely that it could have done much to reinvigorate the fox by then or thereafter. Understandably, CFP argued that even though (as it conceded) "at times during the period 2009-2010 the acquisition would not have made economic sense", nevertheless "any negotiation would have proceeded on the footing that the acquisition would be completed at a time when it did make economic sense (as turned out to be the case)". But this was capable of being countered as being more in hope than substance. Further, CFP needed equity participants; and:

    (1) Although Mr Goldstein's evidence that IVC would have had the ability to provide the necessary equity funding in the order of €20-40 million was not challenged, my impression was that Mr Goldstein's evidence was in his own perception going to the issue of whether IVC could afford such an investment, and not whether it would commit to it: and as to the latter Mr Goldstein made plain that IVC had no experience in, and very little understanding of, the carbon markets, and he fairly accepted that IVC's involvement in a potential transaction for Tricorona never got beyond a very early and general expression of interest.

(2) Interest from Daiwa "and others" struck me as at best indicative rather than reliable and committed, and might well not have appeared likely to be sustained as the market deteriorated.

(3) SEB had put Arctic Fox "on hold" in September 2008: and although CFP had some further sporadic contact with SEB after that, no progress of any substance was made towards the terms of a debt finance package. CFP never obtained a revised term sheet from SEB, never got to the point of introducing SEB to Barclays and was never even able to meet SEB's original indicative terms. It never obtained the required forward sale agreements; it never obtained a satisfactory independent portfolio valuation, which was regarded by SEB as "vital"; it never obtained the required evidence of equity commitments and never resolved the issue over SEB's proposed 50% discount on Large Hydro volumes. Indeed there is no evidence of *any* contact between SEB and CFP after 20 November 2008.

1257. Secondly, for substantially the same reasons I do not consider that CFP would have been able to persuade Barclays or a reasonable negotiator that it could have sold the confidential information to an unrelated third party so as to enable that third party to execute the transaction for its own benefit.

1258. Thirdly, the 2009 Guidelines, though not yet implemented, were a sign of increasing impetus towards finding a solution to issues of eligibility that had undermined the market and market confidence. CFP was, and helped to place Barclays and Tricorona, ahead of the game, in terms of not only understanding eligibility but in perceiving, and supporting its perception, of a route to market. But, although Ms Patel's and thus Barclays' mind was already saturated and their conduct informed by that information, so that it is right that they should pay for its use, others might be expected to follow suit if and when CFP's perception came to be commonly held. Furthermore, looking to future potential, as demand from compliance buyers for large volume Large Hydro pCERs developed and became more evident, so the spread between that asset class and other CERs would be on a reducing curve.

1259. Fourthly, wherever the "blame" may lie, CFP's relationship with Tricorona's management was poisoned beyond real or even likely prospect of recuperation by early 2009; and the truth also, as I see it, is that CFP never really gained traction with Volati either. Mr Navon accepted in his email of 24 April 2009: "the trade only works if friendly". Although Mr Lord latched on to the Defendants' acceptance in their written Closing Submissions, at paragraph 778, that CFP "could have proceeded without the co-operation of Mr Holmgren and Mr von Zweigbergk", I agree with them that lack of their support would have made the deal much more difficult, especially in Sweden (the evidence being that hostile takeovers are not generally supported by the markets). If anything, I consider that the difficulties were underestimated.

1260. So in my view, CFP would have had difficulty in establishing any other use for the information. Though under the *Wrotham Park* approach the negotiation must be reasonable and must conclude with deemed agreement, this is obviously a discounting factor to be taken into account; and it places the focus fairly and squarely on what a reasonable person would consider to be the inherent qualities and value to Barclays of the "Big Idea" and its supporting presentation and documentation. Indeed the

difficulty for CFP in demonstrating actual loss or its prospect is perhaps the strongest reason for adopting a "negotiated damages" or *Wrotham Park* approach in the first place.

1261. I turn, therefore, to consider the likely shape and outcome of the hypothetical negotiations between CFP and Barclays in that regard.

*Drivers in the negotiation*

1262. As to the factual context, I proceed on the basis that:

(1) CFP had invested their expertise and considerable time in identifying the opportunity and devising and presenting the structure of Project Arctic Fox (Mr Rassmuson was not contradicted when he said they had worked for six months).

(2) At least so far as CFP was concerned, by late January 2009 Project Arctic Fox was in abeyance and CFP's prospects of implementing it were slim; but it was not "dead": as at January 2009 it was not aware that the Tricorona Management considered it to be so.

(3) The "strategic partnership" (a phrase which could cover almost anything, but which even on Ms Patel's description of it in WIP lists as immediately including "novations, hedging strategy, FX, CER, EUA etc."[41]) was of substantial prospective value to CFP, both in capital terms and in business development terms. It offered CFP the prospect of long-term synergies (including gaining access to a large CER portfolio) with its sales and trading business.

(4) In the context of Project Arctic Fox, Barclays had initially (in October 2008) envisaged "very significant revenue potential on CER hedging (up to €20m) plus currency hedging and financing fees" (which Mr Zintl described in his oral evidence as "at some point estimated at 20 million, at some point estimated at 10 – it is not something I could judge, but clearly a number that was very high in relation to the size of the transaction").

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[41] I should record that in response to my request, when circulating to the parties a draft of this judgment, for them to draw to my attention any mistakes of material fact or any omission to address substantive issues (in accordance with the notes to CPR 40.2, and especially 40.2.1.0.3), Barclays' solicitors, entirely properly, suggested that in addressing the question of the hypothetical *Wrotham Park* negotiation I had not addressed the WIP lists, and more particularly, might not have taken into account Ms Patel's estimates of potential profits from such activities. In the February 2009 WIP list, Ms Patel estimated profits of €1.6 million on an estimated volume of 8 million and a probability of realisation of 60%. In the March 2009 WIP list, she downgraded this to €1.2 million, based on estimated volumes of 3 million. They also reminded me that it was Ms Patel's evidence that these volume estimates were based on potential trading over a number of years, rather than in one transaction or even in one year (though that evidence was not accepted by CFP). I confirm that in reaching my conclusion as to the likely outcome of the hypothetical negotiations required, I have taken into account the limited profit potential apparently estimated by Ms Patel from what she chose to describe as "day to day hedging". As I seek to explain in my judgment, and in particular in paragraphs 1247 to 1249 above, I have not thought it right to limit the hypothetical negotiation to the fee to be paid for the potential profit of limited hedging operations, but to be extended to achieving for Barclays an opportunity free of restrictions such as "day to day hedging" to enable exploitation of the "entire value chain" in Tricorona, albeit with some uncertainties in that regard. Accordingly, although grateful for the reminder, and the opportunity to reconsider the evidence and the parties' submissions on the point, I have not thought it right to modify my conclusions.

(5) Although slightly later than the hypothetical negotiations date, I think I can fairly take into account that Mr von Zweigbergk thought in mid-2009 that there was €300 million of untapped value in Tricorona, and Barclays thought that no one understood the company better than he did.

(6) As Mr Navon explained, one of the key attractions identified by CFP in Project Arctic Fox was that:

> "unlike in many leveraged buy-outs, in which achieving profitability is highly dependent on restructuring the business and/or fulfilling future business objectives, profits in the Arctic Fox transaction could be locked in on Day 1 of the acquisition if completed according to CF Partners' execution strategy. We had explained to Barclays that the deal made sense purely in terms of the hedging part of the CERs in Tricorona's portfolio and they clearly saw this."

(7) Barclays' objective of building a £150 million global emissions business by 2010 (see paragraph [296] above) needed big "elephant deals" (see paragraphs 296 and 298 above) and in a competitive market (with major banks increasingly becoming interested) was under considerable pressure. Its "organic strategy" had failed: it was "fill or kill" time. Ms Patel and her department urgently needed the "mine".

(8) It is admitted in the Defendants' pleadings that as at 27 October 2008 Barclays proposed to charge fees of around £15 million were it to participate in Project Carbonara as both a debt provider and an M&A advisor to CFP. Of course, in late 2008, in the midst of the banking crisis, finance was hard to come by and very expensive. But that Barclays saw fit to propose and CFP was apparently minded to agree (though the figure was never formally agreed, and the draft engagement letter proposed a lesser fee of in aggregate some €8 million) is a contemporaneous indication that both parties thought that the transaction was (at least as initially perceived on the figures provided by CFP) of a value that could withstand such a fee. Mr Navon said this was because

> "the transaction was in our view so valuable. This was additional to the interest charges on the debt facility and was a fee significantly higher than standard market fees but one that Barclays felt appropriate given the expected value in the deal. SEB asked for an M&A fee representing around £1 million. Barclays' fee was a small fraction of the amount that I expected CF Partners to make for its more involved role in the acquisition."

(9) In early January 2009 the question of post-2012 carbon trading under any successor to the Kyoto Protocol can only have been beginning to surface in any assessment of future value; but the possibility of incremental value was there. Subject to the reservations I express below, I accept that this may have been one of the reasons why Barclays was interested in Tricorona and in receiving its standard ERPA to assess what rights Tricorona had to post-2012 CERs under

their contracts (which indeed Barclays say became the fundamental rationale of Project Pomodoro).

(10) Lastly in this list, I accept Mr Navon's point that in terms of negotiating dynamics, (a) the need to prevent leaks that might affect Tricorona's listed share price would have put a premium on speedy resolution and (b) the prospect of disagreement and a competing bid which would increase transaction costs would have pulled in the same direction of a speedy resolution.

1263. On the other hand, I am also satisfied that the material and analysis provided by CFP was by no means the only factor in causing Barclays to revise its view of Tricorona and its management. Barclays could and would legitimately have made the point that even if the information and insight provided by CFP was of value, other factors had influenced it considerably. Furthermore, it was only a question of time before it could pursue Tricorona without any serious suggestion that it was materially influenced by CFP's confidential information.

1264. For example, (a) Ms Patel herself formed a different and much more positive view of the Tricorona Management than Barclays had taken in 2007: and I consider that this was not in consequence of any information provided by CFP, even if the opportunity to meet with them was pursuant to Project Arctic Fox; (b) the relationship she built up with the Tricorona Management developed a momentum which further fed a positive perception, which enthused Ms Patel, and through her Barclays, and ultimately made Tricorona a natural target for Barclays; (c) as indicated previously, there was already an increasing recognition of the need for constructive guidance on the Linking Directive and the eligibility of Large Hydro in the EU ETS and the possibility of clarificatory change (quite apart from CFP's own assessment); and (d) Barclays' perception of value in post-2012 pCERs was to a considerable extent (I consider) its own: although it was suggested on behalf of CFP that this was one of the features of Tricorona's portfolio which especially interested CFP as being potentially of considerable value, it does not appear that CFP provided any confidential information or perception that was not available from public sources, and (for example) all the valuations discussed during Project Arctic Fox/Carbonara were of the pre-2012 portfolio only.

1265. Further, it is notable (as was emphasised by Barclays) that (i) CFP's calculations of the apparent undervalue of Tricorona during Project Arctic Fox were based only on valuations of the pre-2012 portfolio, (ii) Tricorona never provided to either CFP or Barclays during Project Arctic Fox any volume estimates for post-2012 CERs, and (iii) the "excel dump" did not contain any such information (nor did anyone suggest that it should at the time).

1266. In summary, in assessing the value to Barclays of the "strategic partnership" and the platform and opportunity that it gave, CFP would have struggled to show that it had alternatives; Barclays would have been able to point to a variety of uncertainties from its point of view, but would have been forced to concede the potential value to it, given its ambitions in the "carbon space" and the pressures to which it was subject.

1267. The key point is that CFP had revealed, in confidence, the true worth of the mine, and although there were other factors also (as I have described) the opportunity revealed

was then and there of real value for which a reasonable negotiator would have recognised Barclays would have to pay.

*Form of compensation*

1268. The court's assessment as to what would be likely to have been agreed to be the appropriate form of consideration must be undertaken on the basis of the facts as they existed at the time of the hypothetical process of negotiation.

1269. Even if substantial damages are to be awarded by reference to the hypothesised price for release of CFP's rights, Barclays rejected any suggestion that consideration in the form of an equity stake in Tricorona would have been agreed: Project Pomodoro was more than a year away, and (so Barclays contends) "there is no possible basis for concluding that a hypothetical negotiation in January 2009 over the fee payable by Barclays to use CF Partners' (assumed) confidential information in (assumed) "monetisation" discussions with Tricorona would result in Barclays agreeing to give CF Partners the value of an equity stake in Tricorona or a brokerage fee for selling the whole portfolio".

1270. CFP pressed for consideration in the form of an equity stake. As to the size of the equity stake Mr Navon did not hold back: approximately 40%, possibly reduced to 33%. He justified these very substantial shares by reference principally to (a) the more generous share (46%) negotiated in the Memorandum of Understanding with the Tricorona Management, (b) the split envisaged when negotiating with Daiwa about its possible participation in the deal (approximately 30%), and (c) a 26% equity stake in a leveraged buy-out (based on the Management's expected stake in Project Golf). Mr Navon considered and dismissed an equity stake worth at least £15 million as insufficient.

1271. Mr Navon made clear that an equity stake would have been CFP's preferred result:

> "the starting point for us would have been an equity stake after the acquisition of Tricorona. We expected the acquisition to be very profitable and would therefore have wanted to realise this profit by taking an equity stake as part of the acquisition. We would have been keen on the provision of equity because it would have recognised our interest to be an equity owner of the business with a view to supporting and developing the long-term growth of the company….
>
> We were very aware of the synergies that an equity stake in Tricorona would have provided to CF Partners, and the benefits that involvement in Tricorona could have offered to our growing business, not least in providing access to a pool of CERs…
>
> The provision of equity, rather than a cash payment, would have been consistent with our approach to business…

> Financially, we had no need to negotiate a cash payment in preference to equity…
>
> To give CF Partners an equity stake would also have made commercial sense for Barclays and Tricorona…"

1272. In my judgment, and in this I agree with Mr McQuater, the flaw in this approach, apart from the (in my view) exaggerated suggested size of share, is that Mr Navon is clearly adopting hindsight; the presumption on which it is based being that the acquisition of Tricorona by Barclays is treated as certain in January 2009: and it was not.

1273. As I have explained previously, it is my view that such an acquisition was within the scope of reasonable possibilities, and CFP may have thought such a development on the cards if and when informed of Barclays' previous overtures to Tricorona; but even though it may be that Barclays would not have fought hard against it at that time, I doubt that CFP, without the benefit of hindsight, would have confined itself to compensation in that form.

1274. Although persuaded that I may take into account the eventual result (of an acquisition) in cross-checking the correct amount of consideration, it is, to my mind, a different matter to translate that into a form of consideration which at the time no one knew could be available.

1275. Put into the context of a hypothetical negotiation, I have concluded that CFP's argument based upon what it considers would have been a fair equity share based upon the success of Project Arctic Fox could and would easily have been dispatched: I accept Barclays' point that CFP was not in a position either to implement Project Arctic Fox or to veto its acquisition by Barclays.

1276. I should add perhaps that even if I am wrong in that conclusion, I would not expect acceptance of CFP's argument that it should have a percentage share such as Tricorona expected for itself in the leveraged buy-out contemplated by Project Golf (26%) or by reference to the Memorandum of Understanding or its negotiations with Daiwa.

1277. They were very different contexts. Each concerned a leveraged buy-out in which CFP was assumed to be able (a) to "deliver" the other shareholders to enable the transaction, (b) to provide all necessary investigation and due diligence, (c) to arrange or enable the provision of the requisite secured financing, and (d) to commit to work and to provide added value in the future. In my judgment, the release of a right and obligation of confidentiality does not achieve and is not to be equated with any of those contributions.

1278. Mr Navon also sought to pray in aid the fact that in the actual acquisition of Tricorona by Barclays in Project Pomodoro, the Tricorona Management was given an equity stake of 15%, with an entitlement to an equity uplift depending on equity return, and further recompense under an Employee Profit Scheme. Mr Navon suggested that 15% was far too low and that CFP

> "would certainly not have been willing to accept an equity stake as low as 15%, given our role of putting the deal together and creating value for all parties involved, and in my view could not reasonably have been expected to have done so."

1279. In fact (as Mr Navon did mention in passing) the Tricorona Management's equity stake of 15% included their existing stake of 7% rolled into this. I consider that Mr Navon's demand for more than 15% would have reasonably and convincingly been rejected. I think it highly unlikely that a negotiated equity share would have exceeded 8%, and I think that in all probability a lower figure would have resulted from negotiations. That may be a further reason for my conclusion that in a hypothetical negotiation the parties would not have agreed an equity stake.

*Alternative basis: some form of brokerage fee*

1280. I consider the greater likelihood to be that, even if CFP might have sought to negotiate a small equity stake in addition (see below), it would have focused on a form of consideration which more clearly and certainly tied into that which I have been satisfied was plainly in contemplation: considerable hedging or forward selling of chunks of Tricorona's unhedged portfolio of CERs.

1281. I consider that the most obvious and probably least objectionable form of consideration would have been some share in respect of forward sales. As it seems to me, some form of brokerage fee, split between an upfront fee and a fee contingent on delivery of the CERs, would provide this, or at least a reasonably satisfactory proxy for it. A percentage formula would probably have been the solution to the problem (stressed by Mr Gold) of paying brokerage on deals not yet done.

1282. My assessment that this would have been the most likely form of the consideration seems to me to gain some support from the fact that CFP's first reaction to the sale of Tricorona was not to seek some share of the profit of the sale but to demand sums justified by reference to anticipated brokerage fees.

1283. I have taken into account Mr Gold's very definite opposition to any such result, and the reflection of that opposition in the Defendants' written Closing Submissions. Their gist was that a brokerage fee is an "an entirely inappropriate basis upon which to value release fee that would have been negotiated between the parties" since "the services for which brokerage fees are ordinarily paid (intermediation) bear no resemblance to what CF Partners would have been selling in the hypothetical negotiation (information)". More particularly, I appreciate Mr Gold's point that brokerage fees would usually only be agreed in respect of an "immediately transactable" deal; and I appreciate too that there is little connection between brokerage fees as such and the "sale" of information as such.

1284. However, as I see it, what the court is required to do is to seek to measure in some way the market value of the advantage which the information was perceived to provide. Looked at in that way, I am persuaded that, albeit imperfectly, a brokerage fee basis provides a proxy measurement. That is, in my view, especially so because it can be tied to particular elements of Tricorona's portfolio which it was the purpose of Project Arctic Fox to illuminate as having an embedded value which had not been

appreciated and which could be realised (and counted in for debt capacity purposes even though unhedged).

1285. Further, it also seems to me that a split of the overall fee so as to require payment of the greater part on actual delivery (€0.25) rather than upfront (€0.10), adopting for illustration the rates suggested by Mr Bode, would go some way to addressing the point made forcefully by Mr Redshaw as to Barclays' likely reluctance to agree a lump sum of cash upfront.

1286. As indicated above, I have considered whether CFP might also reasonably have sought some form of equity participation, not least as a hedge against the possibility of Barclays seeking to minimise sales with a view to maximising the raisins in the cake.

1287. However, I have in the end concluded that the best way of measuring that would be by determining the share needed to compensate for the lack of transactional fees; and that in any event, given that the Project Pomodoro and Project Rose values are known, the better, simpler and more realistic course is simply to adopt the brokerage fee basis as the overall proxy and apply at the end an overall cross-check by reference to those values.

*Share of upside on portfolio sales: brokerage fee proxy*

1288. That leads on to an assessment of what might have been agreed as the brokerage fee, and the size and nature of the portfolio (measured by the volume of CERs) to which such fees should be agreed to be applied in determining the overall consideration.

1289. The constituent elements are reasonably clear and include:

(1) the valuation date;

(2) the rates of brokerage fee and terms applicable to their payment;

(3) the overall volumes of CERs to which it is assumed that brokerage fee might be applicable as at that date, taking into account three components: CER inventories, future expected deliveries of CERs from CDM projects (calculated after adjustment to take into account the probability of some shortfalls in actual CERs delivered and other risks), and forward sales;

(4) discounting factors to reflect other uncertainties as to the volume available to be sold or their value (for example, the uncertainty as to any value in post-2012 CERs, or expected pCERs from Large Hydro projects which have not obtained Annex I LOA);

(5) the parts or proportions of the portfolios to be taken as the cohort to be treated as sold under the hypothetical brokerage arrangements.

1290. These components are more easily identified than quantified. The experts were again some way apart; and in any event both (1) and (5) are matters of (ultimately subjective) judgment, not expert evidence.

1291. As to (2) and (4) I think there would have been considerable negotiation, reflecting the differences between the experts. In particular:

(a) As to (2), the room for reasonable debate and negotiation was relatively narrow, both as to the appropriate brokerage fees and as to the split between the upfront and the delivery payment. Mr Navon considered an overall fee of €0.35/CER to be broadly in line, and indeed slightly less, than CFP's historical experience in charging for similar transactions; and as to the split, he proposed a fee of €0.25/CER on the volume of contracted credits paid upfront and €0.10 on each CER delivered over time. Mr Bode (instructed on behalf of CFP) considered that there was pressure on brokerage fees over the period between 2008 and 2011, with a lower end of €0.25/CER; he considered Mr Navon's suggestion to be in line with the range; but he would have expected a split the other way round (€0.10 upfront and 0.25 on delivery). Mr Korthuis (instructed on behalf of Barclays) broadly agreed with Mr Bode.

(b) The room for debate as to the figure to be adopted for CER volumes was much greater. There was also, to my mind, some opaqueness in CFP's approach in this regard since (as indeed Mr Good, who was instructed on behalf of Barclays, noted) its calculations appeared to assume a portfolio size of 235 million, but without clarity as to date or derivation. In any event, there was always room for negotiation as to a number of factors which would make very significant differences, including especially (i) whether post-2012 CERs should be included (Mr Radov thought they should, Mr Korthuis thought not), (ii) whether post-2020 CERs should be included, (iii) what risk adjustment factors in respect of registration, performance, commissioning and issuance risks should be adopted in determining a risk-adjusted CER portfolio volume, and (iv) what NPV discount rates on estimated brokerage fees from the "on delivery" portion of the fees (suggested to vary between 5% and 13%) should be adopted. Of these, the question as to the inclusion or not of post-2012 and pre-2020 CERs made the biggest difference to values: a drop from Mr Radov's January 2009 figure of €328.5 to €201.3 million (some 40%).

(c) Similarly, though not with such a range of differences, there could have been reasonable discussion and disagreement as to whether Large Hydro pCERs without Annex I LOAs should be counted in at all (Mr Radov thought they should, Mr Korthuis that they should not).

1292. The above are merely examples of debate and disagreement between the experts which could legitimately have been reflected in negotiations. There is no scientific answer: only unusually broad parameters.

1293. However, I consider that I should adopt the following parameters and values derived from a combination of the experts' reports (though I have preferred Mr Radov's analysis, he being, in my judgment, by some way the most reliable of the experts) and my previous recitation of the fact and conclusions:

(1) a valuation date of January 2009;

(2) brokerage fees (which according to Mr Bode had softened by 2009) of €0.10/CER upfront and €0.25/CER on delivery (in accordance with Mr Bode's evidence, with which Mr Korthuis did not materially disagree);

(3) overall values (based on adjusted volumes) as at that date of brokerage fees, not including post-2020 CERs and based on a discount rate of 8% on the "on-delivery portion" in respect of all pre-2020 CERs: €36.7 million (in accordance with Mr Radov's evidence);

(4) treat 40% of the overall adjusted brokerage fee values of the pre-2013 vintage CERs calculated in accordance with Mr Bode's approach and set out in tabular form in Mr Radov's third expert report as payable; that 40% broadly equating to the proportion of the portfolios referable to Large Hydro CERs, which was the source of embedded value principally illuminated for Barclays under Project Arctic Fox (as well as being broadly consistent with the proportion of overall portfolios that might be expected to be hedged or forward sold): €7.72 million;

(5) treat 20% of the overall adjusted brokerage fee values of the post-2013 vintage CERs calculated in accordance with Mr Bode's approach and set out in tabular form in Mr Radov's third expert report as payable, on the basis that the parties might reasonably have agreed some fee in respect of those later vintages, but a discounted one, since the opportunity was some time in the future and was not identified specifically by Project Arctic Fox: €3.46 million (resulting in an aggregate across the portfolios of €11.2 million).

1294. Further discussions and negotiations in respect of these parameters and values might reasonably have included:

(1) issues as to the reliability of estimates of brokerage fees on post-2012 CER values (valued by Mr Radov on the same basis as above at €17.3 million), given that in January 2009 it was by no means clear what if anything would take the place of the Kyoto arrangements, and post-2013 CERs were not the subject of the confidential assessments (see above);

(2) issues as to the potential value of brokerage fees on post-2020 CERs (valued by Mr Radov as up to €9.6 million under the "Bode" fee assumptions);

(3) particular issues as to Large Hydro adjustment factors;

(4) the 40% and 20% figures taken as the 'pool' of CERs to which brokerage fees are applied, it being predictable that CFP would have contended that the entire pool should be included to make the "proxy" fair, but that Barclays would have countered that a much smaller proportion should be assumed.

1295. I have taken these issues into account and sought to weigh them: I have also sought to attach some weighting to the strengths and weaknesses I have identified in the negotiating positions of the parties: but in the end I am left with only a broad brush with which to paint my impressions.

1296. I consider that Barclays would have had a strong argument that post-2012 CERs were not the opportunity identified by Project Arctic Fox, nor (more particularly) was their value illuminated by what the package comprised. I also consider that it would have been reasonable for Barclays to bring into the argument that its own highest estimate of revenue potential was €20 million, and that was at the very highest point, and Mr Zintl indicated that this slipped to about €10 million. Against that I would expect a reasonable negotiator in the position of CFP to have maintained strongly that Barclays should not seek to pay a lower fee for CFP's valuable work that Barclays had sought, given that it should be assumed that both parties thought that the "upside" would easily justify such a fee.

1297. I have considered whether also to take into account what CFP described as reputational issues. Mr Gold told me that Barclays take that factor into account in all that they do. No doubt the Defendants would have sought in that context to counter by drawing attention to CFP's own misuse of Tricorona material. In my view, however, reputation is not properly part of the equation.

1298. The agglomeration of potential factors, arguments and valuation uncertainties makes, as I have said before, any precision impossible. In my assessment, which included my own feeling as to the proportionate figure in all the circumstances, I think that these negotiations on further issues would in very broad terms have resulted in an ultimately agreed figure of (rounding up) €10 million.

*Cross-checks*

1299. Barclays had initially quoted a fee of £15 million. The proposed engagement letter reduced this to some €8 million, though nothing was ever agreed. It would have been in difficulty in any negotiations contending that a commitment to pay such a sum would be at a level that could not reasonably be absorbed, having regard to the expected benefits of the transaction and in assessing the overall costs/benefit analysis. Further, the figure was never itself calculated otherwise than by reference to what Barclays and CFP considered that the transaction could bear: it was out of all proportion to a standard fee, whether on a time or other basis. In each case it was a figure which indicates a contemporaneous assessment by both CFP and Barclays of what in their estimation could be absorbed within the price and still make the prize attractive.

1300. I should acknowledge in that context that Mr Good nevertheless considered that a sum of, or equity share equivalent to, such an amount would have upset the economics of the transaction and could not reasonably have been agreed. He sought to identify what equity share Barclays says it could have afforded to pay CFP in Project Pomodoro without making an acquisition uneconomic. His approach was:

> "to take the difference between what Barclays was willing to pay for Tricorona (as shown by contemporaneous documents)

> and the price which Barclays in fact paid for its acquisition. Assuming the former figure represented the price beyond which Barclays would have ceased pursuing an acquisition, the difference between that figure and the amount paid would represent the most it could afford to pay CF Partners without making an acquisition uneconomic."

1301. His conclusions, on his stated assumptions that (a) Barclays would not have been prepared to pay more than SEK 8.05 per share (which was a premium of some 40% over the market price of Tricorona's shares, and which Barclays, after an evaluation at the time, had concluded was the maximum it was prepared to pay) and that (b) the capital structure of the acquisition is fixed at €28 million (being the total equity of the vehicle through which Barclays did in fact acquire Tricorona, namely, Barclays Carbon Holdings UK Limited) and that (c) of that, €4 million would have been funded by and allocated to the Tricorona Management (as in fact it was), were that Barclays would not have been prepared to offer more than a share of Barclays' own equity in Tricorona of 3.1%, equating to a share of 2.6% of total equity. According to Mr Good, that equity share of 3.1% would have been worth €1.8 million at the date on which Barclays exited from Tricorona, based on the balance of the consideration for the onward sale, after repayment of the debt, of €58.9 million.

1302. I do not accept this analysis, which also depends on matters post-dating by some time the hypothetical negotiation date, primarily because I do not accept that Barclays would have had the upper limit or ceiling that Mr Good assumes. It is also inconsistent with Barclays' own contemporaneous appreciation of what the deal could absorb, as previously explained. The fact is, as Mr Redshaw acknowledged, Tricorona was a "very valuable opportunity to anybody", with a potential upside subsequently (in Project Pomodoro) measured by Barclays (again according to Mr Redshaw) as over €150 million. Indeed, the "Project Pomodoro Potential Acquisition" presentation referred to "Total Potential Value" of €194 million.

1303. Conversely, I have also rejected CFP's contention that €45 million should be the "minimum [which] would be reasonable in all the circumstances". CFP reached that figure by assuming an upside in line with Mr von Zweigbergk's assessment of €300 million and 15% interest. But I do not accept either the measurement (which might have been trailed as a negotiating figure, but which realistically would not have been likely to be accepted) or the minimum equity share (which I doubt would have been negotiated in excess of 10%). As in all its assessments, it seems to me that CFP tended to fall back on assuming that its information was the sole key without which the treasure could not be unlocked, as if it had a right of veto: and that is not the hypothetical basis to be adopted.

1304. As a final comparator or cross-check I have also considered what profit Barclays realised further to Projects Pomodoro and Rose. Mr Good calculated these profits as being approximately €34.9 million, taking his method of the cost of funding that acquisition. CFP put the figure higher (at some €49.7 million). Whichever of those figures is taken, I am satisfied that the assessment I have made is within the parameters of what in the hypothetical negotiation posited by the *Wrotham Park* approach might reasonably have been negotiated by persons in the position of the parties, acting reasonably and as a proper price for the release of CFP's rights in

favour of both Barclays and Tricorona; and I am reinforced in my conclusion that CFP's bases of claims are considerably exaggerated.

1305. Lastly, and as should already be evident, I confirm that I have not taken into account any value for Svenska Vanadin. I do not think that would be appropriate or proportionate: it was no part of the value revealed by the confidential information.

### *Loss of a chance*

1306. In opening, CFP sought in the alternative calculation of its damages on the basis of a loss of its chance to acquire Tricorona. Given (a) the valuation date, (b) the preferability in my judgment of the *Wrotham Park* approach and, last but not least, (c) its absence as a basis of calculation from CFP's Closing Submissions, I propose to say no more about it.

## CONCLUSION

1307. I have throughout the trial and the long process of preparing a judgment in this difficult case had to be careful to remind myself that the issue is not whether Barclays's conduct was unusual, or its employees' occasional indifference to internal controls the subject of concern, but whether Barclays (and Tricorona) were in breach of obligations of confidentiality or exclusivity. I have found that they were in breach of the former but not of the latter.

1308. In conclusion, and by reference to the issues identified for determination in paragraph [37] above, in my judgment:

(1) Both Barclays and Tricorona owed to CFP duties of confidence. In the case of Barclays, its duties were informed but not defined by the IVC/Barclays Confidentiality Agreement. In the case of Tricorona its equitable duties were parallel to but co-extensive with its contractual duties under the CFP/Tricorona Confidentiality Agreement.

(2) CFP did provide to both Barclays and Tricorona, in the context of and for the purposes of Project Arctic Fox, confidential material and is entitled to compensation for its misuse.

(3) Those duties could only subsist for so long as the information thus provided retained its quality of confidentiality. I do not consider that the period of one year stipulated in the IVC/Barclays Confidentiality Agreement applies. The two-year period in the CFP/Tricorona Confidentiality Agreement is applicable in theory, but in practice neither contractual stipulation has any application on my view of the facts.

(4) Both Defendants misused CFP's confidential information for the purpose of establishing a "strategic partnership" between them which did not at the time envisage Project Pomodoro but the object of which was to pave the way for any transaction that might advance the achievement of (a) the Tricorona Management's "dream" of an MBO, and (b) Barclays' ambitions in the

carbon space, and its urgent agenda to acquire large 'elephant deal' portfolios ("fill or kill").

(5) I do not consider that Barclays intentionally induced Tricorona to breach the duty of confidence it owed to CFP; but in any event, I do not consider that the damages for such a breach would change or upset the overall figure I have reached.

(6) Although I am prepared to receive further submissions on the point, Barclays and Tricorona appear to be jointly liable for each other's breaches of equitable duty.

(7) There never was any contractual exclusivity agreement between CFP and Barclays; and any such restriction was in any event released as between IVC, CFP and Barclays by the Exclusivity Agreement, which is effective in accordance with its terms and cannot be rectified, set aside or otherwise prevented from having full application.

(8) Even if I am wrong, and there was a contractual obligation of exclusivity owed by Barclays to CFP, I would not have held Tricorona liable for inducing Barclays to breach any such obligation.

(9) The appropriate remedy for CFP is compensation assessed on a *Wrotham Park*/negotiations damages basis.

(10) CFP did misuse Tricorona's confidential information; but any loss or damage is too small to be separately assessed and quantified: it is best taken into account in quantifying the net claims as a whole.

(11) The Defendants cannot rely on any defence of estoppel or unclean hands.

1309. As to quantification of the proper compensation, the gap between the parties was so wide that a more than usually broad brush has been required in determining what would be the result of a hypothetical negotiation between them. But standing back to look at the case as a whole, and with the benefit now of information that would not have been available to those hypothetically negotiating in January 2009 in accordance with the *Wrotham Park* approach, I am satisfied that the figure of €10 million I have reached to compensate CFP in the round is justified and proportionate.

1310. There will, inevitably, be other consequential matters to be dealt with in due course (including questions as to exchange and interest rates), on which I shall certainly continue to need the assistance of Counsel, for which (and the patience of the parties) I am most grateful.

# APPENDIX A

## Agreed Statement of Facts

*Without prejudice to the parties' pleaded cases and their factual witness evidence at trial, the parties agreed the following statement of facts.*

**Discussions between Barclays and Tricorona in 2007 and 2008**

*2007*

1. On 27 March 2007, Barclays (Mr Garcia) began to discuss (with Mr Larsgard) buying CERs from Tricorona.
2. In or about April 2007, Barclays drew up an Environmental Products strategic business plan.
3. On 10 April 2007, Barclays (Mr Redshaw, Mr Lewis, and Mr Owen) met Tricorona (Mr von Zweigbergk, Mr Holmgren and Mr Oo) in Stockholm to discuss the potential acquisition of Tricorona by Barclays. These discussions were later allocated the project name of 'Project Conifer' by Barclays. The Defendants say, however, that the discussions did not extend beyond the 10 April 2007 meeting and were concluded before the project name was allocated to them.
4. In August 2007, Barclays sent Tricorona a draft ISDA agreement for trading between them.
5. By September 2007, Barclays shortlisted a number of companies, including Tricorona, as potential partners.

*2008*

6. On 28 March 2008, Barclays (Mr Garcia) emailed Tricorona (Mr Larsgard) a revised draft ISDA schedule.
7. The Defendants say that, beginning in April 2008, there were further discussions between Barclays and Tricorona concerning 'potential transactions in CERs'. In June 2008, Barclays sent Tricorona a draft ISDA master agreement. It was not signed.
8. On 30 June 2008, Barclays (Mr Leeds) sent Tricorona (Mr von Zweigbergk, Mr Larsgard and Mr Oo) a draft confidentiality agreement. On 3 July 2008, Barclays and Tricorona (Mr Oo) entered into a confidentiality agreement relating to the Tricorona portfolio, described as 'Project'. The Defendants say that this confidentiality agreement was unrelated to CF Partners' Project Arctic Fox. Barclays did not make CF Partners aware of this agreement before CF Partners began discussions with it about Project Arctic Fox.

**Project Arctic Fox**

*The Cologne meeting*

9. On 25 April 2008, following an introduction by Mr Lennart Perlhagen, CF Partners' Mr Rassmuson spoke to Tricorona's Mr von Zweigbergk to discuss ways in which Tricorona and CF Partners could work together. They arranged to meet at the forthcoming Carbon Expo event in Cologne.
10. In advance of the Carbon Expo event, CF Partners says that it commenced work on Project Arctic Fox, its codename for CF Partners' proposed acquisition of Tricorona.
11. The Carbon Expo took place in Cologne between 7 and 9 May 2008. Mr Rassmuson met Mr von Zweigbergk, Mr Holmgren and Mr Oo.

*CF Partners' initial discussions with Tricorona*

12. On 16 June 2008, CF Partners (Mr Navon, Mr Rassmuson, and Mr Glossop) prepared a presentation for Project Arctic Fox, and met the Management (Mr von Zweigbergk, Mr Holmgren, and Mr Oo) in Stockholm to discuss the proposed transaction.
13. On 15 July 2008, CF Partners and Tricorona entered into a confidentiality agreement (the Tricorona Confidentiality Agreement).
14. On 22 July 2008, CF Partners executed a Memorandum of Understanding with the Management (Mr von Zweigbergk, Mr Holmgren and Mr Oo). The Memorandum envisaged a 54:46 equity split between the Management and CF Partners on the successful completion of the envisaged acquisition after the allocation of equity to any other equity deal participants. The Memorandum was not legally binding.
15. On 28 July 2008, Mr Holmgren sent 'an Excel dump' of the Tricorona portfolio, sample ERPAs and Tricorona's template ERPA to CF Partners. On 30 July 2008, Mr Holmgren sent a 'more complete' data set of the Tricorona portfolio to CF Partners.
16. At or about this time CF Partners says that it opened discussions with a number of potential participants to assist in the finance of the transaction, including Citibank, Daiwa, Asian Development Bank ("ADB") and SE Banken ("SEB").
17. On 6 August 2008, Tricorona (Mr Oo) sent the Memorandum of Understanding, executed by the Management, to CF Partners.
18. On 15 August 2008, Mr Navon emailed Mr Holmgren a revised version of the Tricorona spreadsheet portfolio. There were several iterations of CF Partners' version of the portfolio over the subsequent weeks.

*The approach to Barclays*

19. In August 2008, CF Partners says that it discussed with IVC the possibility of IVC making an equity investment in Tricorona. On or about 14 August 2008, IVC approached Barclays to investigate setting up a meeting with Barclays.
20. On 22 August 2008, CF Partners entered into a confidentiality agreement with IVC (the CFP/IVC Confidentiality Agreement).
21. On 3 September 2008, IVC entered into a confidentiality agreement with Barclays (the IVC/Barclays Confidentiality Agreement). The terms of this agreement were negotiated between Barclays and IVC with, so far as Barclays was concerned, no involvement of CF Partners.

## Project Meltwater

22. While the Management were discussing the Arctic Fox project with CF Partners, from at least 18 July 2008, the Management commenced discussions with EcoSecurities about a possible merger of the two companies. This was known within Tricorona as Project Meltwater.

## Project Carbonara

*September 2008*

23. On 5 September 2008, Barclays (Mr Zintl) informed IVC that Barclays had (allegedly) no conflicts of interest. Following this confirmation, Mr Navon sent Mr Sareen the CF Partners' Arctic Fox spreadsheet of the Tricorona portfolio for him to forward to Barclays. IVC, in response to the (alleged) conflicts clearance, sent the CF Partners spreadsheet of the Tricorona portfolio to Barclays without copying Mr Navon. CF Partners says that, without the (alleged) conflicts clearance, it would not have provided any information to Barclays.

24. At around this time, Barclays assigned the project name 'Project Carbonara' to CF Partners' acquisition of Tricorona. On 9 September 2008, a meeting was held at IVC's offices in London. At that meeting, representatives of CF Partners (Mr Navon, Mr Rassmuson) and IVC (Mr Sareen and Mr Goldstein) met representatives of Barclays (Mr Germann, Dr Swift, Mr Lim, Mr Zintl, and Dr Martens) and Barclays gave a presentation entitled 'Project Carbonara Discussion Materials September 2008'.
25. Following the meeting, on 9 September 2008, IVC sent Barclays a revised version of the Tricorona portfolio spreadsheet. This spreadsheet included the ERPA cost for each project. Mr Navon also sent the Tricorona template ERPA to Barclays.
26. On 11 September 2008, Mr Lim emailed IVC Barclays' indicative valuation of the Tricorona portfolio, and included a presentation entitled 'Project Carbonara Follow up materials'. IVC forwarded the material to Mr Navon.
27. On 16 September 2008, Dr Swift of Barclays emailed IVC a presentation entitled 'Project Carbonara Financing Considerations'. A conference call followed between Barclays (Mr Germann, Mr Lim, Dr Martens, Ms Patel, Mr Smith, Dr Swift, and Mr Zintl), CF Partners (Mr Navon and Mr Rassmuson) and IVC (Mr Sareen and Mr Goldstein).
28. In addition to Barclays, CF Partners says that it approached other institutions to assist with the financing of the transaction. Between 19 and 20 September 2008, CF Partners travelled to Stockholm. Mr Navon and Mr Rassmuson met SEB on 19 September 2008, and Daiwa and the Management on 20 September 2008.
29. On 24 September 2008, Dr Swift emailed to CF Partners a presentation entitled 'Project Carbonara Financing Structure and Due Diligence Considerations'.

*7 October 2008 meeting*

30. On 7 October 2008, CF Partners met Barclays (Dr Swift, Mr Smith, Ms Patel, Mr Zintl) at Barclays' offices in London. CF Partners gave a presentation to Barclays. Dr Swift updated CF Partners on Barclays' position on 11 October 2008.

*28 October 2008 meeting*

31. On 27 October 2008, CF Partners had a further meeting at Barclays' offices in London. CF Partners produced a presentation for this meeting entitled 'Arctic Fox Barclays Transaction Details'.
32. On 31 October 2008, Mr Rassmuson sent Dr Swift forward sales information about the Tricorona portfolio.
33. On 3 November 2008, Mr Lim sent Mr Navon a Barclays presentation entitled 'Project Carbonara Analysis Assumptions'.

*CF Partners' discussions with Volati*

34. On 6 November 2008, CF Partners (Mr Navon, Mr Rassmuson, and Mr Glossop) met Mr Karl Perlhagen of Volati in Stockholm.
35. On 14 November 2008, CF Partners (Mr Rassmuson) emailed Volati a presentation outlining the Arctic Fox deal. Mr Rassmuson sent the email to the Management on 17 November 2008.
36. On 24 November 2008, CF Partners (Mr Rassmuson) sent Volati a further presentation, entitled 'Volati – Follow-up Information'. Mr Navon forwarded this to the Management on 26 November 2008.

*7 November 2008 spreadsheets*

37. On 7 November 2008, Mr Navon sent Barclays an updated version of the Tricorona portfolio spreadsheet, and a copy of a Point Carbon volumetric analysis of Tricorona's

portfolio prepared on behalf of CF Partners. Later that day, he sent a further spreadsheet concerning the development of the Tricorona portfolio. Mr Navon's third email contained documentation relating to Tricorona's procedures for obtaining Annex 1 LoA for Large Hydro CDM projects.

*Barclays and Tricorona meeting in Singapore*

38. The Carbon Forum Asia event took place in Singapore on 12 and 13 November 2008. At the event, at CF Partners' request, Mr von Zweigbergk and Mr Holmgren met Ms Patel and Mr Martens.

*26 November 2008 meeting*

39. On 19 November 2008, Mr Lim sent Mr Navon a Barclays' presentation entitled 'Updated analysis on CDM portfolio'.
40. On 26 November 2008, CF Partners (Mr Navon, Mr Rassmuson, and Mr Glossop) met Barclays (Dr Swift, Mr Smith and Mr Lim) at Barclays' offices in London. Barclays produced a presentation entitled 'Project Carbonara Discussion Materials 26 November 2008'. This was the last meeting between Barclays and CF Partners (or IVC) in relation to Project Arctic Fox / Project Carbonara. There were further telephone calls and discussions between Barclays and CF Partners in relation to Project Arctic Fox / Project Carbonara.
41. Following the meeting, Barclays produced a draft engagement letter for CF Partners to review. It was never executed. Barclays proposed to charge fees of around £15 million as debt provider and M&A advisor to CF Partners.

*December 2008*

42. On 15 December 2008, CF Partners (Mr Navon, Mr Rassmuson and Mr Glossop) had a conference call with Barclays (Dr Swift, Mr Zintl, Mr Smith and Mr Germann) to discuss progress on Project Arctic Fox.
43. On 16 December 2008, CF Partners (Mr Navon, Mr Rassmuson, and Mr Glossop) discussed with Tricorona (Mr von Zweigbergk and Mr Holmgren) an opportunity to hedge part of the Tricorona portfolio. From Tricorona's perspective, these discussions were separate from Project Arctic Fox.
44. On 19 December 2008, Tricorona declined to proceed with the hedging opportunity.
45. On 22 December 2008, CF Partners and Tricorona discussed Arctic Fox. Mr Rassmuson later emailed Dr Swift to say that there were 'no major developments'.

## Early 2009

*January 2009*

46. On 5 January 2009, Dr Swift emailed CF Partners (Mr Navon, Mr Rassmuson and Mr Glossop) to 'catch-up on the status of [the] Carbonara transaction'. She asked CF Partners for a catch-up meeting in an email of 8 January 2009.
47. On 14 January 2009, CF Partners (Mr Navon, Mr Rassmuson, Mr Glossop) had the conference call with Barclays (Dr Swift, Mr Zintl, Mr Reynolds) requested by Dr Swift. Barclays asked whether the deal would go ahead or not; CF Partners informed Barclays that the deal was still proceeding.
48. At about this time, in January 2009, Ms Patel and Mr Holmgren wished to have discussions about direct business opportunities between Barclays and Tricorona. The Defendants say that these business opportunities related to potential hedging transactions between Barclays and Tricorona and were unrelated to CF Partners' attempted transaction.

49. On 21 January 2009, Mr Holmgren emailed Ms Patel, saying that 'By the way, the process with CF Partners have [sic] been terminated'.
50. On 22 January 2009, Ms Patel had a telephone conversation with Dr Swift. Mr Holmgren emailed Mr Navon requesting confirmation from CF Partners of the termination of the Arctic Fox project. Mr Navon replied in an email that the Memorandum of Understanding was terminated.
51. On 27 January 2009, Mr Navon of CF Partners and Mr Zintl of Barclays had a telephone call following which Mr Navon emailed Dr Swift and Mr Zintl. In relation to discussions between Tricorona and Barclays, Mr Navon's email said:

> 'We understand that Tricorona has approached Barclays in order to initiate discussions on hedging the company's carbon exposure. As discussed on our call, we have no objection for you to have direct contact with Tricorona on their hedging requirements. The intention of the NDA is not to conflict you on conducting day-to-day business with the Company.
> The only consideration is that we continue to work on project Carbonara and want to avoid the situation that you, as a result of the hedging discussions, become conflicted.'

52. The same day, 27 January 2009, Mr von Zweigbergk asked Mr Rassmuson for the names of all parties that had non-circumvent agreements in place with CF Partners which prevented such parties from transacting with Tricorona. Mr Rassmuson declined to provide the information.
53. On 29 January 2009, Mr Zintl responded to Mr Navon's email of 27 January 2009, saying:
> 'Thanks for the message and for agreeing to us reverting to the target and to us potentially entering into hedging arrangements with them. We will not conflict ourselves in any way from working with you and wish you the best of luck for your meetings…'.

54. On 10 February 2009, Ms Patel met Tricorona in Stockholm.

*Project Icebreaker*

55. In about February 2009, the Management considered a management buy-out of Tricorona known within Tricorona as Project Icebreaker.

*The Exclusivity Release*

56. On 11 March 2009, Dr Swift emailed CF Partners to request what she described as a 'wrap-up call' in relation to the acquisition of Tricorona.
57. On 24 March 2009, Barclays (Dr Swift, Ms Patel, and Mr Lim) and CF Partners (Mr Navon and Mr Rassmuson) had a conference call. The content of the discussion on this call is disputed but it is agreed that it concerned a request by Barclays to be released from exclusivity.
58. On 30 March 2009, Mr Lim emailed Mr Sareen and Mr Navon a letter headed Termination of exclusivity. The letter was signed by Mr Simon Hargreaves, a managing director of Barclays.
59. Also on 30 March 2009, Mr Navon sent an email to Mr Sareen of IVC. Mr Navon's email read: 'Barcap contacted us late last week to terminate the exclusivity agreement with them. We would like to keep them "locked-in" but given current carbon prices and limited transparency with Karl at Volati, this is hard to do. Our view is to terminate the exclusivity agreement and re-engage if and when necessary.' CF Partners says that it was its understanding that Barclays would not do anything to conflict itself from being involved in a CF Partners' acquisition of Tricorona in the future.
60. On 2 April 2009, Mr Navon sent a copy of the Exclusivity Release to Barclays. His email said:

> 'For clarification and as discussed on our call, we are signing the Exclusivity Termination on the understanding that Barclays is not actively working on acquiring the CC Owner [meaning Tricorona] on its behalf or on the behalf of any third party as of the date of this Termination of Exclusivity agreement'.

61. The same day, 2 April 2009, Ms Patel, Dr Martens and Mr Holmgren had lunch in Beijing.
62. On 16 April 2009, Ms Patel emailed Mr Holmgren informing him that Barclays had received 'formal notification from CF Partners about the status of the transaction and therefore release of the exclusivity…'.
63. On 25 May 2009, Tricorona entered into an ISDA master agreement with Barclays to facilitate hedging transactions between them.

**Project Clearwater**

64. In May 2009 and subsequently, Barclays discussed with Tricorona the provision of finance to Tricorona to make an acquisition bid for EcoSecurities. Tricorona called this potential transaction Project Clearwater.
65. On 28 May 2009, Barclays and Tricorona entered into a confidentiality agreement for the proposed transaction involving EcoSecurities.
66. On 12 August 2009, Tricorona held a board meeting to discuss Project Clearwater.
67. On 25 August 2009, Tricorona sent a letter to the EcoSecurities board containing a non-binding indicative offer.
68. On 3 September 2009, Tricorona announced that it would not be pursuing a bid for EcoSecurities.

**Project Bison/Silverback**

69. On or about 11 August 2009, Barclays (Mr Whitehead, Mr Gold, and Ms Patel) discussed an acquisition of EcoSecurities by Barclays. The potential acquisition was known within Barclays as Project Bison/Silverback.
70. On 4 September 2009, Barclays' contractual duty of confidence under the IVC/Barclays confidentiality agreement came to an end in accordance with clause 9.
71. On 14 September 2009, JP Morgan made a bid for EcoSecurities.
72. On or about 22 September 2009, Ms Patel approached the Management to discuss 'indicative structures' involving a joint Barclays/Tricorona bid for EcoSecurities.

**Project Pomodoro**

73. On 1 October 2009, Ms Patel emailed Mr Holmgren to discuss further 'opportunities' between Barclays and Tricorona. Through October and November 2009, Ms Patel had further discussions with Mr Holmgren.
74. The Defendants say that preliminary discussions between Barclays and Tricorona took place from November 2009 that led to the acquisition of Tricorona by Barclays. On 12 November 2009, Ms Patel emailed Mr Martens, asking him to put together a presentation on Tricorona for Mr Gold. On or about 13 November 2009, Mr Martens prepared a presentation entitled 'Background Tricorona 13 November 2009', and a valuation of Tricorona.
75. On 17 November 2009, in advance of the meeting with Tricorona, Ms Patel emailed Mr Whitehead and Mr Gold the 'Background Tricorona' presentation.
76. On 19 November 2009, Barclays (Mr Whitehead, Mr Gold, and Ms Patel) met Tricorona (Mr von Zweigbergk, Mr Holmgren, and Ms Haefeli-Hestvik) in Stockholm.

77. On 7 December 2009, Mr Martens emailed Ms Patel a presentation entitled 'Project Carbonara GFRM discussions materials 25 November 2008'. Ms Patel spoke to Mr Holmgren. She later emailed him, saying

> 'Good to talk to you earlier. As discussed, I just wanted to send you an email confirming that you are ok for me to disclose the information which we have collected on Tricorona (since we worked on the CF deal) with one of team who work directly with Joe Gold in the US…'.

78. The same day, 7 December 2009, Ms Patel subsequently emailed Mr George Manahilov a number of documents containing Project Carbonara information.
79. On 13 December 2009, Mr Manahilov emailed Ms Patel a 'Tricorona cap structure' presentation which contained a valuation of Tricorona. On 15 December 2009, Ms Patel emailed this presentation to Mr Whitehead.
80. On 17 December 2009, Barclays (Mr Ord, Mr Lim, and Ms Patel) had a call to discuss the acquisition of Tricorona. Mr Lim emailed Mr Ord a link to the Project Carbonara files and sent him the CF Partners' presentation given to Barclays on 27 October 2008.
81. On 18 December 2009, Mr Holmgren emailed Ms Patel a spreadsheet of the Tricorona portfolio.

*Early 2010*

82. On 10 and 12 January 2010, Mr Martens emailed Ms Patel and Mr Manahilov a Project Pomodoro presentation and 4 spreadsheets containing valuations of Tricorona.
83. On 9 and 10 February 2010, Barclays (Ms Patel and Mr Manahilov) met the Management (Mr von Zweigbergk and Mr Holmgren) in Stockholm.
84. On 10 February 2010, Opcon made a bid for Tricorona.
85. On 3 March 2010, Barclays (Ms Patel, Mr Manahilov, and Mr Ord) met the Management (Mr Holmgren and Mr von Zweigbergk) and Volati in Stockholm.
86. On 16 March 2010, the Management entered into a confidentiality agreement with Barclays.
87. On 29 March 2010, the Tricorona board recommended to the company's shareholders that they reject the Opcon bid.
88. On 7 April 2010, Barclays and the Management entered into a memorandum of understanding.
89. On 25 May 2010, Deloitte sent its final due diligence report on Project Pomodoro to Barclays.

*Acquisition of Tricorona by Barclays*

90. On 2 June 2010, Barclays announced that it was acquiring an 85.7% stake in Tricorona for the sum of £98 million or €118 million. The Tricorona press release read:

> 'On the request of Barclays, the Tricorona Board has permitted Barclays to perform a limited due diligence review of confirmatory nature prior to the announcement of the Offer. Barclays has not received any price sensitive information through this review.'

91. On 3 June 2010, CF Partners wrote to Barclays setting out its concerns about the deal. Barclays replied on 7 June 2010.
92. On 7 July 2010, pursuant to an Investment Agreement between Barclays, Barclays Carbon (UK) Limited, TAV AB, Strofosene Limited, and the Managers, Barclays and the Management subscribed for shares in Barclays Carbon (UK) Limited. The agreement was amended on 26 July 2010. On 27 July 2010, the acquisition of Tricorona by Barclays was completed.
93. On 9 August 2010, CF Partners sent Barclays an invoice in relation to the acquisition of Tricorona.

94. On 11 October 2010, Ernst & Young produced for Barclays a valuation report on the Tricorona portfolio as at 26 July 2010.
95. On 19 November 2010, there was a risk committee meeting of Barclays Carbon (UK) Holdings Limited to determine the hedging strategy in relation to Tricorona's portfolio.

**Commencement of proceedings**

96. On 24 December 2010, CF Partners sent its letter before action to Barclays. On 5 August 2011, it sent what it considered to be (but which the Defendants do not) a letter before action to Tricorona.
97. On 5 October 2011, CF Partners filed and served its Particulars of Claim.
98. On 23 January 2012, Barclays and Tricorona served their Defence.

**Project Rose**

99. In or about early 2012, Barclays began the process of disposing of Tricorona. This was known within Barclays as Project Rose. A presentation entitled 'Project Rose: Materials for Discussion' was prepared for the Barclays' ExCo in April 2012. On 1 May 2012, Barclays produced a pre-completion reorganisation structure for Project Rose.
100. On 3 May 2012, a share purchase agreement was entered into between Barclays and Strofosene Limited for the sale of Tricorona by Barclays to the Management.
101. On 13 and 14 June 2012, a CMC took place before Henderson J.
102. On 24 July 2012, Barclays publicly announced the sale of Tricorona to the Management.

**Tricorona's Counterclaim**

103. On 25 November 2008, Mr Navon sent information regarding the prices at which Tricorona had acquired CERs from Large Hydro projects to an individual engaged on a consultancy basis to be CF Partners' Head of Asian operations, Mr Lincoln Lau. Mr Navon's covering email stated: *'DO NOT CIRCULATE THIS INFORMATION EXTERNALLY.'* CF Partners admits that this was a breach of the Tricorona Confidentiality Agreement.
104. On 3 December 2008, Mr Navon sent an ERPA which was 'very substantially based on' (CF Partners' wording) or 'a near identical copy of' (the Defendants' wording) to Mr Lau in connection with a transaction Mr Lau was negotiating on CF Partners' behalf. Nr Navon's covering email stated that *'this is what the full ERPA agreement will most likely look like.'*
105. On 12 March 2009, Mr Navon sent an ERPA which was very substantially based on / a near identical copy of Tricorona's template ERPA to Baker & McKenzie, with a view to Baker & McKenzie using the ERPA as a base document to produce an ERPA to be used for CF Partners' own business purposes (the Baker & McKenzie ERPA). CF Partners admits that this was a breach of the Tricorona Confidentiality Agreement.
106. Also on 12 March 2009, Mr Navon sent a draft ERPA which was very substantially based on / a near identical copy of the Tricorona ERPA to a consultant engaged by CF Partners. Mr Navon's covering email described the document as *'our standard ERPA agreement.'* CF Partners admits that this was a breach of the Tricorona Confidentiality Agreement.
107. On 19 March 2009, Mr Navon sent a draft ERPA which was very substantially based on / a near identical copy of the Tricorona ERPA to colleagues at CF Partners including

Thomas Rassmuson and Simon Glossop. Mr Navon's covering email stated that the attachment was '*based on the AF* [i.e. meaning 'Arctic Fox'] *template.'*

108. On other dates in March 2009, CF Partners sent a draft ERPA which was very substantially based on / a near identical copy of the Tricorona ERPA to other third parties (the law firm Norton Rose and the trust company Volaw).
109. On 17 April 2009, Mr Rassmuson sent an email to Mr Navon and Mr Glossop, forwarding an email originally sent by Mr Holmgren on 26 September 2008 and attaching documents provided by Tricorona to CF Partners during Project Arctic Fox. Mr Rassmuson's email read: '*[t]here are probably some good things that we can take from these clowns* [i.e. Tricorona] *and use to develop our DDQ process ... '*.
110. On 19 May 2009, CF Partners used the Baker & McKenzie ERPA to enter into an agreement with a Chinese CDM owner.
111. On 1 September 2009, Mr Navon sent the Tricorona template ERPA to Mr Lau. Mr Navon's covering email stated: '*[h]ere is Tricorona's ERPA. Be careful on who* [sic.] *and how you send it out.....'*.
112. After receiving Mr Navon's email, later on 1 September 2009 Mr Lau sent an email to another consultant engaged by CF Partners regarding the negotiations with the CDM project owner. Mr Lau's email stated that the Tricorona ERPA was *"a very lousy legal contract"*.

# APPENDIX B

## Dramatis Personae

| NAME | POSITION/ROLE (witness in bold) |
|---|---|
| | ***CF Partners*** |
| Simon GLOSSOP | Partner. Left CF Partners in 2009 |
| Lincoln LAU | Consultant (Hong Kong) |
| **Jonathan NAVON** | Partner |
| **Richard NICHOLLS** | Associate |
| **Thomas RASSMUSON** | Partner |
| | ***Barclays Bank Plc*** |
| Iain ABRAHAMS | Head of Risk, Liquidity and Capital Markets |
| Marcus AGIUS | Barclays Group Chairman |
| Milo CARVER | Global Financial Risk Management |
| James COLBURN | Vice-President, M&A Advisory |
| Oliver COX | Director, Compliance – Origination and Financing |
| John DENNIS | Associate Director, Senior Corporate Development Advisor, Barclays Corporate Development |
| Bob DIAMOND | Barclays Group President and CEO |
| Bruno GARCIA | Trader, Commodities Sales |
| Reto GERMANN | Director, EU Structured Product |
| Martin GUELDENBERG | Managing Director, Corporate Risk Advising |
| **Joe GOLD** | Managing Director, Global Co-Head of Commodities |
| **Simon HARGREAVES** | Managing Director, M&A Advisory |
| Richard HAWORTH | Chief of Staff to Bob Diamond |
| Vincent HELFFERICH | Analyst, Environmental Markets |
| Roger JONES | Managing Director, Global Co-Head of Commodities |
| Laura KIMMEL | Manager, Leveraged Finance |
| Anne-Gabrielle LABOUREAU | Assistant Vice-President, Commodities (New York) |
| Chris LEEDS | Director, Head of Environmental Markets Sales 2007 -2009. Director, Commodities Sales 2009-2011 |
| Richard LEWIS | Managing Director, Principal Investments |
| **Ivan LIM** | Associate, M&A Advisory |
| Chen LONG | Analyst, EU Commodities Sales |
| **Chris LUCAS** | Finance Director, Executive Group |
| **George MANAHILOV** | Managing Director, US Commodities Sales |
| **Jan-Willem MARTENS** | Associate Director, Emission Structuring |
| **Darren MCKAY** | Director, Barclays Corporate Development |
| Jerry del MESSIER | President, Barclays Capital |
| Laure MOATY | Manager, Barclays Corporate Development |
| **William O'MALLEY** | Vice-President, Corporate and Investment Banking |
| **Stuart ORD** | Director, M&A Advisory |
| Ed ORLEBAR | Vice-President, Commodities |
| Gareth OWEN | Vice-President, Principal Investments |

| | |
|---|---|
| **Harshika PATEL** | Director, Commodities – Head of Environmental Markets Sales<br>Currently, Head of EMEA Commodities Structured Origination |
| **Louis REDSHAW** | Head of Environmental Markets, Commodities |
| Michael REYNOLDS | Associate Director, M&A Advisory |
| Trevor SIKORSKI | Director, Carbon Market Research |
| Brian SMITH | Director, Commodities Corporate Structuring |
| **Angela SWIFT**[42] | Director, Commodities |
| Jo Lyn TAN | Associate, M&A Advisory |
| **Rhian-Mari THOMAS** | Director, Leveraged Finance |
| Benoit de VITRY | Global Head of Commodities and Emerging Markets |
| Jonathan WHITEHEAD | Head of European Commodities Sales (Ms Patel's line manager) |
| **Nicolas ZINTL** | Director, M&A Advisory. Left Barclays in mid-2009 |
| ***Tricorona AB*** | |
| Lars ALM | Financial Controller |
| Susanne HAEFELI-HESTVIK | Vice-President, Tricorona Carbon Asset Management<br>Director, Technical Department |
| **Christer HOLMGREN** | Director, Vice-President of Tricorona Carbon Asset Management<br>Currently, Chief Financial Officer |
| Frank LARSGARD | Senior Trader and Director, Emissions Markets |
| Moe Moe OO | Vice-President, Tricorona Carbon Asset Management<br>Head of Sales |
| **Niels von ZWEIGBERGK** | President and CEO of Tricorona Carbon Asset Management |
| ***Asian Development Bank – potential participant in Arctic Fox*** | |
| Josh CARMODY | Fund Manager |
| ***Daiwa Securities – potential participant in Arctic Fox*** | |
| Nobuhiko KIMURA | Managing Director |
| Kunihiro NISHIKAWA | Deputy General Manager |
| ***IVC – potential participant in Arctic Fox*** | |
| **Ramy GOLDSTEIN** | Partner |
| Vipin SAREEN | Partner |
| ***Point Carbon – carbon consultancy firm*** | |
| Tom ERICHSEN | Senior Analyst |
| Anders SKOGEN | Senior Analyst |
| ***SEB Enskilda – potential debt provider and M&A adviser in Arctic Fox*** | |
| Carl MONTALVO | Head of Corporate Finance |
| | |

[42] whose evidence was by witness statement admitted pursuant to notice under the Civil Evidence Act but who did not attend for cross-examination

| | |
|---|---|
| ***Volati – major shareholder in Tricorona and potential participant in Arctic Fox*** | |
| Lennart PERLHAGEN | Father of Karl Perlhagen |
| Karl PERLHAGEN | Chairman |
| Patrik WAHLEN | CEO and board member. Also board member of Tricorona. |
| ***Carbon Expert Witnesses*** | |
| **Jan-Willem BODE** | Director, J W Bode Ltd; Partner, Planet B Ventures BV; and Director, Planet Swapsee SL |
| **Adriaan KORTHUIS** | Partner, Climate Focus |
| **Daniel RADOV** | Associate Director, NERA Economic Consulting |
| ***Accountant Expert Witnesses*** | |
| **Nicholas GOOD** | Partner, KPMG |
| **Douglas HALL** | Head of Forensics, Smith & Williamson |

# APPENDIX C

## Agreed List of Issues

*The parties agreed the following broad list of issues prior to trial.*

### 1. CF PARTNERS' CLAIM

### (A) The parties' activities in and knowledge of the primary carbon credit market

1. As at and prior to August 2008, what was the knowledge, experience, expertise or skill of each of the parties in the primary carbon credit market?
2. What knowledge or business relationship did Barclays have of or with Tricorona and CF Partners prior to August 2008?
3. Prior to its contact with CF Partners in May 2008, what was Tricorona's knowledge, experience, expertise or skill in seeking to raise debt against the security of its portfolio or to monetise its portfolio?
4. What were the parties' respective views as to the valuation of Tricorona's portfolio at the material times? In particular, prior to August 2008 what was Barclays' knowledge or awareness of Tricorona's portfolio and the value of that portfolio?

### (B) Alleged duties of confidence owed by Barclays and Tricorona to CF Partners

*Barclays*

5. Did Barclays owe an equitable duty of confidence to CF Partners?
6. If so, what was the scope of Barclays' duty of confidence to CF Partners?
7. Also if so, what was the duration of Barclays' duty of confidence owed to CF Partners?

*Tricorona*

8. On the true construction of the Tricorona Confidentiality Agreement, what was the scope and duration of Tricorona's and CF Partners' contractual duties of confidence? (It is common ground that such duties existed.)
9. Did Tricorona owe a non-contractual duty of confidence to CF Partners in like terms to its duty under Tricorona Confidentiality Agreement in respect of the confidential information provided to Tricorona by CF Partners?

### (C) Alleged confidential information provided to Barclays and Tricorona by CF Partners

*Barclays*

10. What, if any, information was provided by CF Partners to Barclays in relation to which Barclays owed a duty of confidence to CF Partners? In particular:

    (1) Did CF Partners provide to Barclays a single, composite piece of confidential information, namely the fact that Tricorona was an attractive and available takeover and/or purchase prospect and/or provided to Barclays a package of information that constituted the 'trade' that the purchase of Tricorona represented?
    (2) Further or alternatively, did CF Partners provide to Barclays a number of pieces of confidential information; and if so, did such confidential information comprise the information as set out in particular in paragraphs 78 and 78.1-78.3 of the

Amended Particulars of Claim, and in CF Partners' Response dated 27 July 2012 to the Defendants' Request for Further Information?

*Tricorona*

11. What information was provided by CF Partners to Tricorona in relation to which Tricorona owed a duty of confidence to CF Partners? In particular:

    (1) Did CF Partners provide to Tricorona the confidential information set out in paragraphs 10, 33.2 and 90 of the Amended Particulars of Claim?
    (2) Was the confidential information provided to Tricorona limited to that set out in paragraph 58 of the Amended Defence and Counterclaim?

**(D) Alleged breaches of any duties of confidence owed by Barclays and Tricorona to CF Partners**

12. Did Barclays misuse any information in relation to which it owed a duty of confidence to CF Partners in purchasing Tricorona and in its dealings with Tricorona for such purpose and in such connection, including as set out in Appendix 2 to the Amended Particulars of Claim? (It is accepted by Barclays that Barclays subsequently made what it says was a limited use of limited information provided to it during Project Carbonara by CF Partners or IVC.)
13. Did Tricorona misuse any information in relation to which it owed a duty of confidence to CF Partners in its dealings with Barclays and/or in arranging and/or participating in its takeover by Barclays?

**(E) Barclays' alleged inducement of breach of contract**

14. Is Barclays tortiously liable to CF Partners for having induced Tricorona to breach its contractual obligations of confidence owed to CF Partners (if any such breaches occurred)?

**(F) Alleged joint liability**

15. Are Barclays and Tricorona jointly liable to CF Partners for the other's breaches of its non-contractual duty of confidence to CF Partners (if any such duties were owed and breached)?

**(G) Barclays' alleged breach of contract**

16. Did Barclays agree with CF Partners not to conflict itself from acting on CF Partners' proposed acquisition? In particular:

    (1) Did Barclays agree with CF Partners in January 2009 in the terms alleged in paragraph 67F of the Amended Particulars of Claim?
    (2) Did Barclays agree with CF Partners on 24 March 2009 in the terms alleged in paragraph 67H of the Amended Particulars of Claim?

17. If Barclays did enter into the agreements in paragraph 16 above, did it breach those agreements, and if so in what respects?
18. Did Barclays' obligations under clause 6 of the IVC / Barclays Confidentiality Agreement remain in effect in January 2009, alternatively March 2009?
19. Did the Exclusivity Release release Barclays from any obligations of exclusivity or confidence as alleged by the Defendants?
20. If so:

(1) Did the Exclusivity Release reflect the parties' prior understanding and agreement as to its effect, and if not, should it be rectified?
(2) Did CF Partners enter the Exclusivity Release as a result of a mistake known to Barclays, and if so should it be rectified?
(3) Was Barclays estopped and/or precluded from relying on the Exclusivity Release to approach Tricorona with a view to purchasing Tricorona?
(4) Did a collateral contract between Barclays and CF Partners come into existence at the time of the signing of the Exclusivity Release which prevented Barclays from relying on the Exclusivity Release?

**(H) Tricorona's alleged inducement of breach of confidence**

21. Is Tricorona tortiously liable to CF Partners for having induced Barclays to breach any contractual obligations owed to CF Partners?

**(I) Remedies**

22. Should CF Partners be denied any equitable relief as against Barclays or Tricorona on the ground that it does not come to equity with clean hands?

**Breach of confidence**

***(i)*** **As against Barclays**

*Account of profits*

23. If Barclays has breached any duty of confidence owed to CF Partners, is CF Partners entitled to an account of Barclays' profits flowing from its purchase of Tricorona, and what are those profits?

*Loss and damage*

24. If Barclays has breached any duty of confidence owed to CF Partners, what if any is the loss and damage suffered by CF Partners as a result of such breach?
25. If CF Partners is entitled to claim damages, what is the quantum of its loss? In particular, are damages to be assessed by reference to the value of a notional reasonable commercial agreement to buy Barclays' release from its duty of confidence owed to CF Partners?
26. If damages are to be assessed by reference to the value of such a notional reasonable commercial agreement, how is that value to be assessed and what was that value? In particular:-

(1) Would the notional agreement have been valued by reference to an allocation of equity in Tricorona?
(2) If so, what would have been the value of such an equity stake (in particular would it have been between 33% - 40%) and what would the damages be as an equivalent of such an equity stake?
(3) If not, would the notional agreement have been valued by reference to a brokerage fee charged by CF Partners to Barclays for the transfer of a portfolio the size of Tricorona's?
(4) If so, what would have been the value of such a brokerage fee?

**(ii) As against Tricorona**

*Loss and damage*

27. If Tricorona has breached any duty of confidence owed to CF Partners, what if any is the loss and damage suffered by CF Partners as a result of such breach?
28. If CF Partners is entitled to claim damages, what is the quantum of its loss?

**Barclays' alleged breach of contract**

29. If Barclays has breached any contractual obligations owed to CF Partners, what if any is the loss and damage suffered by CF Partners as a result of such breach, and what is the quantum of any such loss? Is CF Partners entitled to damages on the basis that it lost the chance of acquiring Tricorona?
30. Should the Exclusivity Release be rectified and/or rescinded?

**Inducing breach of contract**

31. If Barclays is liable to CF Partners for inducement of breach of contract by Tricorona, and/or if Tricorona is liable to CF Partners for inducement of breach of contract by Barclays, what if any is the loss and damage suffered by CF Partners as a result?
32. If CF Partners is entitled to claim damages, what is the quantum of its loss?

**Joint liability**

33. If Barclays and Tricorona are jointly liable to CF Partners for the other's breach of duty of confidence, what if any is the loss and damage suffered by CF Partners as a result of such breaches?
34. If CF Partners is entitled to claim damages, what is the quantum of its loss?

**Interest**

35. Is CF Partners entitled to interest on any sums awarded to it and, if, so, in what amount?

## 2. TRICORONA'S COUNTERCLAIM

36. Did CF Partners breach the Tricorona Confidentiality Agreement, and if so in what respects? (It is common ground that some breaches did occur.)
37. If CF Partners did breach the Tricorona Confidentiality Agreement, what if any is the loss and damage suffered by Tricorona as a result of such breach, and what is the quantum of any such loss?
38. Is Tricorona entitled to interest on any sums awarded to it and, if, so, in what amount?

# APPENDIX D

## Glossary of Key Terms

| | |
|---|---|
| AAUs | "Assigned Amount Units", tradable carbon credit units representing an allowance assigned under the Kyoto protocol to emit greenhouse gases. One unit is equivalent to one metric tonne of carbon dioxide equivalent. |
| Annex I Country | A country listed on Annex I to the UNFCCC, which sets out a list of developed country Parties and economies-in-transition Parties that commit themselves under Article 4 to achieve certain quantified emission limitation and reduction objectives. If they have ratified the Kyoto Protocol, these Parties can authorise the participation of entities in CDM projects, but are not eligible to be host Parties. |
| CDM | "Clean Development Mechanism", the mechanism to generate carbon credits referred to in Article 12 of the Kyoto Protocol. |
| CERs | "Certified Emissions Reductions", a type of emissions unit (or carbon credit) issued by the CDM Executive Board pursuant to Article 12 of the Kyoto Protocol and decision 3/CMP.1 of the Conference of the Parties ("COP") to the UNFCCC and/ or the Meeting of the Parties ("MOP") to the UNFCCC, as amended from time to time, which may be used for compliance purposes in accordance with Article 11a(3)(a) and (b) of the Directive. |
| Directive | Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC, as amended by Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004, and as may be amended from time to time. |
| DNA | "Designated National Authority",a national CDM authority that has been formally designated and registered by a signatory to the UNFCCC with the Secretariat as is required by the International Rules (i.e. the authority within each country that has signed up to the Kyoto Protocol that can approve CDM projects). |
| DOE | "Designated Operational Entity", an entity designated by the COP/MOP based on the recommendation by the Executive Board, as qualified to Validate proposed CDM project activities or to verify and certify greenhouse gas reductions. |
| ERPA | "Emissions Reduction Purchase Agreement", agreements used to buy/sell CERs which will in the future be issued in respect of particular project(s). |
| EU Allowance or EUA | A European Union allowance defined under the Directive. |
| EU ETS | The European Union greenhouse gas emission allowance trading scheme established by the Directive. |
| Global Stakeholder Process or GSP | The public display of, and receiving of comments on, the project design document (PDD) of a CDM project activity conducted by displaying the PDD on the website of the UNFCCC or designated operational entity for a period of 30 days, during which time Parties, stakeholders and UNFCCC accredited observers may make comments. |
| GFRM | Global Financial Risk Management: a department of Barclays investment bank. |
| ISDA Master Agreement | "International Swaps and Derivatives Association" master service agreement for over the counter derivative transactions. |

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| Issuance | The issuance of CERs by the CDM Registry administrator of a specified volume of CERs into the pending account of the Executive Board, upon being instructed to do so by the CDM Executive Board. |
| JI | "Joint Implementation", which is the mechanism to generate carbon credits defined as such in Article 6 of the Kyoto Protocol, predominantly from Eastern European countries. |
| Kyoto Protocol | The optional protocol to the UNFCCC adopted at the third conference of the parties to the UNFCCC in Kyoto, Japan on December 11, 1997. |
| Large Hydro | Hydropower projects with a generation capacity exceeding 20 MW. |
| LoA | "Letter of Approval", the letter through which the Host Country (where the project is located) or an Annex I country (with respect to the Buyer), *inter alia*, approves the project for the purposes of Article 12 of the Kyoto Protocol. |
| Linking Directive | Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC, in respect of the Kyoto Protocol's project mechanisms. |
| OTC | "Over the Counter" or "off-exchange" is trading done directly between two parties, without supervision of an exchange and is one method of trading CERs in the secondary market. |
| PDD | "Project Design Document", a description of the CDM project submitted, or to be submitted, for Validation in accordance with the Kyoto Protocol. This document details the project information including the calculation of the amount of CERs expected to be issued from the project. |
| Sole Focal Point | The project participant(s) notified to the executive board of the CDM as the only project participant(s) responsible for communicating with the executive board of the CDM with respect to a project. |
| UNFCC | The United Nations Framework Convention for Climate Change adopted in New York on 9 May 1992. |
| Validate or Validation | Validation refers to the process of independent evaluation of the project by an appointed DOE against the requirements of the CDM as set out in decision 17/CP.7, its annexes and relevant decisions of the COP/MOP. |
| WCD | "World Commission on Dams" and "WCD Report" means "World Commission on Dams Compliance Declaration" which is a declaration from a DOE that the project meets the relevant criteria and guidelines contained in the World Commission on Dams' Guidelines (the guidelines contained in the 2000 report prepared by the World Commission on Dams titled "Dams and Development: A New Framework for Decision Making", as may be amended or adapted from time to time). |