Neutral Citation Number: [2018] EWHC 3285 (QB)

Case No: HQ15X00246

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 7th December 2018

Before :

DAVID EDWARDS, QC
(SITTING AS A DEPUTY HIGH COURT JUDGE)

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Between :

INTERNATIONAL MEDIA ADVERTISING LIMITED	**Claimant**
- and -	
MINISTRY OF CULTURE AND TOURISM OF THE REPUBLIC OF TURKEY	**Defendant**
- and -	
SOHAN SINGH	**Third Party**

- -
- -

Mr Thomas Robinson (instructed by **DAC Beachcroft LLP**) for the **Claimant** and **Third Party**
Mr Ivan Krolick (instructed by **Stephen Fidler & Co**) for the **Defendant**

Hearing dates: 10-13 July and 20 September 2018

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Judgment Approved

David Edwards, QC (sitting as a Deputy High Court Judge) :

A. The Parties

1. The Claimant, International Media Advertising Limited ("IMA"), is an English company that buys advertising space for its clients across a range of

different media. The Third Party, Mr Sohan Singh, is its principal shareholder and its sole director. IMA is a small company, operating with no more than a handful of staff.

2. The Defendant ("the Ministry") is, as its name suggests, the government ministry of the Republic of Turkey responsible for culture and tourism. The Ministry's principal office is in Ankara, Turkey, but it operates in, and is represented by, the Culture and Tourism Office of the Turkish Embassy in London ("the Ministry's London Office"). All of IMA's dealings with the Ministry were with staff at the Ministry's London Office.

B. The Proceedings

1. IMA's Claim

3. IMA's claim concerns invoices rendered to the Ministry for media purchases made by IMA as part of a 2011 United Kingdom and Republic of Ireland advertising campaign aimed at promoting Turkey as a tourist destination ("the 2011 Campaign"). There are 33 invoices (26 in respect of the UK campaign and 7 in respect of the Irish campaign) which it is accepted remain unpaid. The total amount claimed is £250,700.02 and €170,450.00.

4. IMA's claim is made in debt or in damages under or for breach of the terms of an advertising contract entered into between IMA, the Ministry and another party, DDF International Limited ("DDF"), on 24 December 2010 and effective from 1 January 2011 ("the 2011 Advertising Contract"). IMA claims the same sums, in the alternative, in agency, in restitution, by way of quantum meruit and/or for unjust enrichment.

5. There is a dispute between IMA and the Ministry as to whether the 2011 Advertising Contract permitted IMA to charge more than the media buying costs that IMA incurred itself under the contracts concluded by IMA (as principal) with third party media providers. The Ministry says that it does not, and the Ministry does not admit that IMA has incurred and paid the sums that it has invoiced to the Ministry which remain unpaid.

2. The Ministry's Counterclaim and the Third Party Claim

6. The Ministry complains that IMA has billed more than it was entitled to not just in respect of the 2011 Campaign but also in respect of the earlier 2009 and 2010 United Kingdom and Republic of Ireland advertising campaigns ("the 2009 and 2010 Campaigns"). Each of those campaigns, I was told, was the subject of a materially identical advertising contract ("the 2009 and 2010 Advertising Contracts").

7. The Ministry's case, as set out in paragraph 5 above, is that under the terms of the relevant advertising contract, IMA was entitled to charge the Ministry no more than the amount which IMA was obliged to pay itself to the relevant media provider. IMA was also required, it says, to accompany its own invoices to the Ministry with true copies of the invoices issued to IMA by the relevant media providers.

8. The Ministry claims damages against IMA for deceit and for breach of contract.[1]

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[1] The Re-Amended Defence and Counterclaim also included, in paragraph 1 of the Prayer, a declaration that the 2011 Advertising Contract "is repudiated" and a claim for an account. These heads of relief were not pursued before me; so far as the first is concerned, the pleading

9. So far as the claim in deceit is concerned, this is put in two different ways, one of which applies only to the 2011 Campaign and the other of which applies to the 2009, 2010 and 2011 Campaigns.

10. The first aspect of the deceit claim concerns IMA's preparation and presentation of the annual media plans. This aspect is limited to the 2011 Campaign.[2]

i) Each advertising campaign was preceded by a media plan drawn up by IMA and agreed with the Ministry detailing with whom, in what format and quantity, and at what "net cost" or "negotiated cost" advertising was to be placed. Copies of draft and final media plans for the 2009, 2010 and 2011 Campaigns filled the whole of one of the five trial bundles; a number were referred to in submissions or in cross-examination.

ii) It is the Ministry's case (see paragraph 51B of its Re-Amended Defence and Counterclaim ("RADC")) that it was represented by IMA, and that the Ministry understood, that the figures included in the media plans reflected "proposed cost items ... provided to IMA by the individual media suppliers", i.e., that they reflected the costs or quotations provided to IMA by the media providers.

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contained no allegation that the breaches of contract that were alleged were repudiatory or that any such repudiatory breach had been accepted.

2 It is plain that the Ministry's case is that the conduct complained of had also occurred in 2009 and 2010; however, the only pleaded complaint related to the 2011 media plan and, whilst this may have been an oversight, no application was made to amend the Counterclaim to complain about prior media plans.

iii) This representation is alleged to have been false and to have been made fraudulently. The Ministry says that, in order to obtain an unauthorised profit or margin for itself, IMA inserted figures in the media plans which were inflated in the sense that they included an uplift on whatever costs or quotations had been provided by the media providers to IMA. The Ministry was induced to agree the 2011 media plan, it says, in the belief that the costs stated in it had been provided by the media providers when, in fact, they had not.

11. The second aspect of the Ministry's deceit claim concerns the process of invoicing and payment which took place pursuant to the terms of each of the Advertising Contracts after the media plan had been agreed for each year and the advertising campaign was underway. As indicated in paragraph 9 above, this aspect concerns the 2009, 2010 and 2011 Campaigns.

i) It is common ground that the Advertising Contracts required that, in order to be reimbursed by the Ministry for any media spend, IMA had to render an invoice of its own accompanied by supporting material showing that the relevant advertising activity had actually taken place, including the invoice from the relevant media provider (see article 9 D) 3 of the 2011 Advertising Contract set out below).

ii) IMA's own invoices were always consistent with the figures contained in the media plans. The Ministry alleges, however, (see paragraphs 20, 21 and 51A of RADC) that, in order to disguise the fact that the media plan figures were inflated and that IMA was charging more than it was obliged to pay the media providers, IMA manipulated media provider

invoices, providing the Ministry with invoices which purported to be original media provider invoices (or copies of original media provider invoices) but which had, in fact, been altered so as to match IMA's own invoices and to show greater amounts than IMA was liable to pay.

iii) The Ministry says that, by submitting manipulated invoices, IMA falsely and fraudulently represented that it had incurred liabilities to media providers in amounts greater than it in fact had, representations which the Ministry says were made in order to induce the Ministry to pay more than the amounts to which IMA was contractually entitled, which the Ministry says it did.

12. The conduct relied upon in relation to the second aspect of the deceit claim, namely the rendering of altered invoices and the charging of amounts greater than those to which IMA was entitled under the Advertising Contracts, is the basis for the Ministry's breach of contract claim.

13. The Ministry also makes a claim against Mr Singh personally. Mr Singh is said to be liable to the Ministry in tort for procuring IMA to breach its contracts (the Advertising Contracts) with the Ministry. He is also said to be personally liable for deceit, the fraudulent misrepresentations referred to in paragraphs 10 and 11 above, according to the Ministry, having been made, instigated or authorised by Mr Singh personally.

3. IMA's and Mr Singh's Response

14. IMA and Mr Singh say that there has been no breach of contract and no fraud. Mr Singh further rejects the suggestion that he is under any personal liability.

15. The essence of IMA's and Mr Singh's defence is that the 2009, 2010 and 2011 Advertising Contracts, they say, permitted – either under their original written terms or because they were varied so as to accord with an understanding and practice allegedly agreed between IMA and the Ministry's London Office – IMA to make a margin on the media purchases it made by charging the Ministry more than it was itself obliged to pay to the media providers.

16. IMA's obligation and entitlement, as Mr Thomas Robinson, who appeared for IMA and Mr Singh, repeatedly put it, was to "bill to the media plan", i.e., to bill the Ministry exactly those amounts shown in the media plan, no more and no less. If IMA was able to make a margin by securing media at lower prices than those set out in the media plan, that was acceptable. Sometimes, Mr Robinson said, the amount IMA charged the Ministry was, in fact, less than it had paid.

17. As for the manipulation of the media provider invoices which accompanied IMA's own invoices, Mr Singh admitted that some of the invoices supplied to the Ministry were altered by employees of IMA (though he denied that he had ever effected the physical alteration of an invoice himself), either by deleting and replacing text, or by obtaining and completing a blank invoice from the media supplier to show a different amount than that actually charged, or possibly by other means.

18. But, Mr Singh and IMA say, these alterations were requested or required by the Ministry's London Office so that the documents accompanying IMA's own invoices matched the relevant media plan, and the practice of altering media supplier invoices was known about and agreed. There was, they assert,

no fraud, either in the creation and submission of the media plans or in the submission of their own or the media provider invoices; they say, further, that the Ministry's London Office, which represented the Ministry, was not deceived.

4. Damages

19. So far as damages are concerned, Mr Krolick, who appeared for the Ministry, submitted in paragraph 58 of his written closing submissions that, whilst there were different tests for the assessment of damages in contract and in tort, in the present case the outcome was the same. The Ministry, he said, was entitled to recover the expenditure that it had made which it would not have made if the forged invoices had not been submitted.

20. Mr Krolick went on to explain in paragraph 59 that, because of the contractual requirement that IMA invoices should be supported by (genuine) media provider invoices, the Ministry was arguably entitled to recover the gross amounts that it had paid in response to bogus invoices without deducting the value of the genuine media provider invoices (what he described as "the strict interpretation"). Mr Krolick went on, however, to say:

> "59. [...] However, this head of damage has not been pleaded, and, at this stage in the proceedings, it would not be appropriate to seek permission to amend.
>
> 60. Therefore damages should be assessed on the difference between the sums to which IMA would have been entitled had they acted lawfully, and what was actually paid. In the Damages Schedule this is referred to as the 'Overpaid Balance'."

21. These paragraphs in Mr Krolick's submissions most obviously relate to the claim that IMA has overcharged the Ministry by manipulating media provider

invoices to support its own invoices. They are less obviously concerned with the deceit alleged in relation to the creation of the 2011 media plan. Mr Robinson submitted that that no loss was specifically claimed by the Ministry in relation to the media plan allegation, and that it really just fed into the deceit allegation in relation to invoicing.

22. There is some force in this point, but the reality is that the loss being claimed by the Ministry is essentially the same in relation to both aspects of the fraud claim.

i) The Ministry says that it was falsely represented in the 2011 media plan that the costs figures included were those that had been provided by the relevant media providers, which were all that IMA was entitled to charge, and that the media plan was agreed on that basis. Had the true figures been included, IMA would not have been able to charge, and the Ministry would not have paid, the inflated amounts it did.

ii) Though the deceit is different and comes at an earlier stage, the loss flowing from it is represented by the disparity between the figures given by the relevant media provider and the inflated figures included by IMA in the 2011 media plan. To the extent that the figures provided by the media provider were represented by the invoices it ultimately issued to IMA, the calculation of the Ministry's loss again involves the calculation of the Overpaid Balance, albeit just for 2011. No argument was pursued by the Ministry at trial that it was entitled to recover against IMA in relation to this aspect of the deceit claim on some broader basis.

23. The total amount alleged by the Ministry to have been overpaid for all three campaigns, the 2009, 2010 and 2011 Campaigns, was put in paragraph 52 of RADC at £911,460.73. A comparison with the amounts for each year in paragraph 21.1 of the same pleading suggests a mathematical error has crept in and that the true figure may be somewhat higher. Paragraph 21.1 also identifies an overpaid amount in Euros of €17,526.32 which was not included in paragraph 52 but which appeared in the prayer.

24. In addition, because the Ministry was required under article 8 of the Advertising Contracts (set out below) to pay a 5% commission to DDF on the amount of the net media spend, IMA's alleged overcharging was said to have caused the Ministry to pay too much by way of commission. This was put in paragraph 52 of RADC at £45,573.00.

5. The Counterclaim Schedule

25. The figure of £911,460.73, representing the difference between the amounts invoiced to and paid by the Ministry and the amounts IMA had paid itself, was purportedly explained in an A3 schedule exhibited to the witness statement of Ms Fatos Sahin (bundle 4, pages 1252 to 1259) although, as she explained in her oral evidence, the document had, in fact, been prepared by the Ministry's former solicitors, IBB.

26. This schedule was referred to by the parties as "the Counterclaim Schedule" and for convenience I will use the same name. The schedule sought to compare across 12 columns for each of some 63 named media providers (each dealt with in a separate row in the schedule) by date or year of invoice, invoice number and amount:

i) The media provider's original (i.e., genuine, unaltered) invoices;

ii) The IMA invoices rendered to the Ministry in relation to that media provider; and

iii) The (allegedly manipulated) media provider invoices sent by IMA to the Ministry along with IMA's own invoice.

27. There were problems with this schedule, as I shall in due course explain. In his written closing submissions, Mr Krolick colourfully described it as having been prepared "by someone with sense neither of chronological order nor alphabetic" and by a person who he suspected "must spend his leisure hours constructing jigsaws". Mr Krolick ultimately sought to rely on only a subset of the information within it, contending or accepting that discrepancies or gaps in the information made other parts of the document unreliable.

28. The total Overpaid Balance the Ministry ultimately sought to recover by its Counterclaim, as set out in a Damages Schedule accompanying Mr Krolick's written closing submissions, was £572,766.54 and €15,861.62, to which there fell to be added the sums of £28,638.33 and €7,930.08 in respect of overpaid commission allegedly paid to DDF.

C. The Trial

29. This action was commenced in January 2015. It was originally listed for trial on 17 January 2017, but the date was vacated in December 2016 shortly after the Ministry added Mr Singh as a third party.

1. Disclosure

30. I will not lengthen this judgment by explaining why this case took as long to get to trial as it did. It is, however, necessary to say something about disclosure.

31. The dispute between the parties first arose in early 2012 as a result of issues arising from advertisements placed on taxis as part of the 2011 Campaign. A booking was supposed to have been made for 150 fully liveried taxis[3] but only 85 were booked. In an email sent on 24 February 2012 the Ministry complained about the invoices raised, making the point that IMA was only entitled to charge for what it had paid to the media provider.

32. In November 2012 a suggestion was made by the Ministry of a joint audit of IMA's billings by an independent accountant. This suggestion was not taken up, but, in a letter from the Ministry's then solicitors, IMA was asked for confirmation that invoices received by IMA from media providers and invoices submitted by IMA to the Ministry would be preserved pending the outcome of any audit or court proceedings.

33. The Ministry was not satisfied by IMA's response and so, on 1 May 2013, in a separate action commenced by the Ministry, an order was made by Master Eastman under section 33(2) of the Senior Courts Act 1981 requiring IMA to disclose invoices and copy invoices received by it from media providers and submitted to the Ministry relating to advertising and services carried out for the Ministry during 2009, 2010 and 2011.

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[3] Fully-liveried taxis have complete, wrap-around, advertising. Super-side taxis have advertising just on the sides.

34. Mr Singh explained what had been located in response to Master Eastman's order in his first witness statement dated 24 May 2013. He said that it was not IMA's policy to retain documents for a lengthy period of time, and that, although IMA did not destroy all invoices immediately after payment, he thought it likely that some had been lost or destroyed in the normal course of business. Nonetheless, he explained, some IMA and media provider invoices and copy invoices had been located and were being disclosed.

35. In the course of responding to the witness statement made by the Ministry's solicitors in support of the application, Mr Singh dealt with the dispute that had arisen between the parties, including the issue in relation to the taxi advertisements and an issue concerning cinema advertising through Pearl & Dean. By way of background, Mr Singh first explained what he said was an accepted process relating to the alteration of invoices.

> "14. […] The media plan for each year confirmed in detail what advertising would be done on a month by month basis. It itemised the cost of each category of media buying (such as Outdoor, TV and Sports, for example) based on quotes IMA obtained from providers, and it then included an overall figure for media spend. […]
>
> […]
>
> 16. Inevitably, details of the media purchased changed somewhat throughout each year. For example, certain campaigns may be carried out earlier or later than envisaged, or the cost of the campaign might change. However, the Ministry insisted that any invoices submitted to it (both IMA's own invoices and those received by IMA from third parties) must match the media plan exactly. If IMA submitted invoices which did not match the detail of the media plan, the Ministry would ask us to amend the invoices regardless of the reality of the campaign in question. This would sometimes involve changing the date of an invoice, or perhaps the amount invoiced (either increasing or decreasing it), or consolidating two or more invoices into one document. [...]

> 17. When the Ministry asked IMA to provide amended third party invoices I would approach the third party and ask them to send an amended third party invoice. If they could not do so, I would ask them if they consented to IMA amending their original invoice (for example from a blank template invoice). After any amendments had been made to the relevant invoices IMA would simply destroy the original, unamended invoices because they were no longer necessary.
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> 18. The Ministry knew that this was IMA's practice and, in fact, it required us to act in this way. It simply would not accept, or pay, invoices which did not match the media plan and it positively requested them to be changed."

36. The most pertinent part of these paragraphs so far as disclosure is concerned is the explanation given as to the fate of the original, unaltered invoices received by IMA from media providers. Paragraph 17 of Mr Singh's first witness statement says that, once an alteration had been made, the original invoice would be destroyed.

37. The statement that the original invoices were "no longer necessary" is, however, not easy to understand.

i) The original invoices (and any receipts) would be relevant as a record of the amounts billed to IMA by the media providers (and the amounts paid by IMA), even if the amounts billed by IMA to the Ministry and the manipulated media provider invoices accompanying IMA's own invoices were different.

ii) It was common ground that, whereas invoices rendered by media providers to IMA would include VAT, IMA's invoices to the Ministry would not since the Ministry was not required to pay VAT. IMA would, however, have to include the amount of VAT it had paid in its

> own VAT return and it might have been thought that invoices and any receipts would be kept for that purpose.

38. Given IMA's acceptance in these proceedings, that IMA sometimes invoiced the Ministry for amounts greater than those which IMA paid itself to the relevant media providers and that IMA altered media provider invoices so as to be consistent with its own invoiced amounts, the content of Mr Singh's first witness statement is, however, striking.

39. The statement explains (see paragraph 16 quoted above) that invoices might be altered, but it suggests that the context in which these alterations would be made were changes in the advertising campaign as against that contemplated by the agreed media plan. There is no mention whatsoever of the fact that IMA billed the Ministry more than it paid media providers in order to make a profit or margin for itself.

40. Having addressed the Ministry's concerns about invoices relating to taxi advertising and Pearl & Dean, paragraph 30 of Mr Singh's first witness statement said this:

> "30. If the Ministry approaches other third party media providers and asks for copies of the invoices initially sent [by] them, they are likely to find that those invoices do not always match the invoices that were received by IMA. This is because the Ministry often requested that invoices were amended to comply with the media plan. Dates may have been changed, or amounts consolidated into single invoices, for example. This was in the knowledge of, and at the request of, the Ministry."

This comment was true, though something of an understatement; as the Counterclaim Schedule indicates, very many media provider invoices were changed. Once again, however, no mention was made by Mr Singh of the fact that invoices rendered by media providers to IMA might be different because

IMA had increased the amount charged by the media provider in order to make a margin for itself.

41. The Ministry did indeed approach third party media providers for copies of invoices rendered by them to IMA, but a number declined to provide them citing data protection concerns. On 4 August 2014, however, Master Eastman made an order under section 34 of the Senior Courts Act 1981 for various named media providers to disclose invoices and copy invoices submitted by them to IMA confirming the amounts they had charged.

42. The material obtained by the Ministry from IMA and from media providers, in the latter case either voluntarily or pursuant to Master Eastman's 4 August 2014 order, was seemingly used by IBB to prepare the Counterclaim Schedule to which I have already referred, which purported to identify discrepancies between the genuine invoices rendered to IMA by the media providers and the media provider invoices sent by IMA to the Ministry.[4]

43. So far as disclosure in the present action is concerned, an order for standard disclosure was made by Master Eastman on 23 December 2015. Lists of Documents served by the parties dated 10 March 2016 (IMA) and 3 May and 14 October 2016 (the Ministry) were included in my bundles.

44. There were, nonetheless, a number of obvious, admitted or suggested gaps in the material before the court.

    i) IMA's primary claim was for payment of the amount of its outstanding invoices; however, it sought in the alternative to recover the amounts it

[4] Schedule 1, Sections A, B and C to Master Eastman's 4 August 2014 order give numerical references for the various media providers which are identical to those in the Counterclaim Schedule which suggests that the Counterclaim Schedule was under preparation at that time.

had paid the relevant media providers.[5] But not only were the media provider invoices not available, but IMA had not (as one might have expected it to do in its own interests) produced its bank records which ought to show what it had paid.

ii) So far as this is concerned, Mr Singh was asked in cross-examination whether, when IMA paid a media provider, it got a receipt. His answer was, not in all cases, but that in some cases they did and in other cases IMA was asked to pre-pay by credit card and would have received a credit card receipt. No receipts or credit card statements were produced to show the amounts that IMA had paid. Given that the dispute between the parties arose in January 2012, fairly shortly after the end of the 2011 Campaign, it is surprising that very few documents in relation to that campaign have been disclosed by IMA.

iii) As for the counterclaim, it became apparent during the course of the trial (and certainly by the time of written closing submissions, as Mr Krolick's Damages Schedule accepted) that there were significant gaps in the Counterclaim Schedule where details of genuine and/or altered media provider invoices and/or of IMA invoices were, for one reason or another, not available.

iv) IMA also suggested that there had been a failure on the part of the Ministry to make disclosure: among the missing documents, it said, were documents that had been sent to the Ministry's Head Office in Ankara; Mr Onal's file in relation to his 2013 investigation and the

[5] See paragraph 19.2 of IMA's Particulars of Claim.

invoices he had seen; and signed (IMA) invoices sent to Ankara by the Ministry's London Office.

45. I was ultimately left with the impression that there were complaints about disclosure that could legitimately be made by both sides. Whilst it is, of course, important to ensure that disclosure is kept within reasonable bounds and that the costs incurred are proportionate, it is surprising that some at least of these various matters were not taken up by way of applications for specific disclosure before trial.

46. Insofar as there were gaps in the documentation, however, it was in my judgment the almost complete absence of documents showing IMA's negotiations with media providers, the costs those media providers quoted or agreed, and the amounts that IMA was invoiced and paid that was most remarkable. All these matters concerned dealings between IMA and the media providers, and these documents would most obviously be in IMA's hands.

2. The Evidence

47. Ultimately, the action was tried before me over four days in July 2018 with a further day for oral closing submissions (after written closing submissions had been served) on 20 September 2018.

48. The trial had been scheduled to finish within the original four-day listing, but substantial technical difficulties encountered in hearing the evidence of one witness, Mr Irfan Onal, by video-link from Turkey meant that this ultimately proved impossible. Indeed, the breakdown in the video-link meant that Mr Onal's oral evidence had to be heard in part on the second day and in part on

the third day of the trial with the evidence of another witness interposed in between.

49. I heard oral evidence from four witnesses at trial.[6]

50. IMA called Mr Singh, who also gave evidence on his own behalf. Mr Singh had made two witness statements, the first on 24 May 2013 in relation to the Ministry's application for pre-action disclosure as I have explained in paragraphs 34 to 40 above, and a second statement made on 6 July 2016 in the proceedings themselves. He was cross-examined by Mr Krolick for around a day.

51. The Ministry called three witnesses.

i) Mr Onal who had been in charge of the Ministry's London Office in 2009 and 2010; by the time of the trial, he was General Director of Promotions for the Turkish Government based in Ankara. Mr Onal had also carried out the first official investigation in relation to IMA's billing practices in May 2012. He gave his evidence by video-link.

ii) Mr Tolga Tuyluoglu. Mr Tuyluoglu had been the Director of the Ministry's London Office before 2009 and he then took over from Mr Onal at the end of 2010 remaining in post until July 2013. He had also been a Director of the Turkish government's General Directorate of Revolving Funds (known as DOSIM). He was in charge in London

[6] My bundles also included a witness statement from Georgia Martin, a paralegal with the Ministry's present solicitors, Stephen Fidler & Co, made in support of an application to add the claim against Mr Singh. Ms Martin was not called to give oral evidence and was not cross-examined, but occasional references to her statement were made in cross-examination and in written submissions without objection.

when the Ministry says it discovered the issue in relation to IMA's overcharging.

iii) Ms Fatos Sahin (previously known as Ms Ulus). Ms Sahin has been employed by the Ministry for some 17 years and works in the Ministry's London Office; her current title is Information Officer. One of her responsibilities is checking invoices to ensure that they are ready for payment by the Director out of the London Office's budget.

Their witness statements had all been made on 8 July 2016.

52. I shall have more to say about the detail of the evidence given by these witnesses in due course.

53. In general terms, however, the Ministry's witnesses gave their evidence in a straightforward manner, taking into account occasional language difficulties,[7] and I am satisfied that each of them was doing his or her best to give the court their honest recollection of events, recognising that the 2011 and predecessor campaigns took place more than seven years ago.

54. It is right to record that Mr Onal was indignant and somewhat combative at times but, given the nature of the allegations being put to him, namely that he had knowingly (and without the knowledge of the Ministry's Head Office) allowed IMA to bill in a manner different to that which the Advertising Contracts required, that was unsurprising. Ms Sahin was initially hesitant in some of her answers, but I regard that as unremarkable.

[7] The Ministry's witnesses all made statements in English and they all gave their oral evidence predominantly in English, though a Turkish interpreter was sworn and gave assistance where required (more so in the case of Mr Onal than in the case of the two other witnesses).

55. I regret that I cannot say the same for Mr Singh. He was defensive and at times evasive, and his evidence in relation to his discussions with the Ministry's London Office, and how much he had told the staff at the Ministry's London Office about IMA's practice of charging a margin and altering invoices, was contradictory. Most notably:

i) Whilst Mr Singh admitted at trial that IMA had charged the Ministry more than it had paid media providers in order to make a margin for itself and had altered third party invoices so as to be consistent with IMA's own invoices, there was no mention of that as a reason for the alterations in either of his two witness statements;

ii) Mr Singh sought to distance himself in his oral evidence from the physical process of altering media provider invoices. But paragraph 17 of his first witness statement, quoted in paragraph 35 above (although it did not give a proper account of why this was done) indicated his own personal involvement, and, as I explain below, it is plain to me that, even if the physical change might have been made by his staff, he must have known, approved and directed that it should be done.

56. The real problem for Mr Singh, though – and a problem of which I sensed he became increasingly aware during his cross-examination – was that there were simply no plausible, helpful (to him and to IMA) answers to some of the questions he was asked. Save where it is consistent with the evidence of other witnesses or corroborated by documents, I do not consider it safe to rely upon Mr Singh's evidence.

57. Occasionally, Mr Singh's answers were revealing.

i) Whilst the proper interpretation of the Advertising Contracts is obviously not a matter for him, Mr Singh said that he read the 2011 Advertising Contract before he signed it, that he was aware that the only provision for payment by the Ministry was the 5 percent commission payable to DDF, and that under the contract whatever benefit IMA obtained would have to come from DDF.

ii) When asked why he didn't take up the fact that the contract provided for no remuneration for IMA with Mr Onal, Mr Singh said that he didn't think it was necessary and that he knew that it would be an academic conversation because neither he nor Mr Onal could change the contract because it had come from Ankara. Mr Singh said that the practice of amending invoices to make a margin had been agreed outside the contract.

iii) In the context of an email from Mr Onal dated 5 February 2009 where Mr Onal said:

> "I understand invoicing method and its OK"

Mr Singh was asked whether he was not troubled that the practice he was describing was dishonest. He did not answer the question directly but said that it was a practice which the Ministry's London office knew of, had condoned, and which had happened for years before. He confirmed that, as far as he knew, the Ministry's Head Office in Ankara was not aware of the practice, and that under the terms of the contract it would assume the Ministry was getting the services of DDF and IMA for the 5 percent commission. I was left in little doubt that Mr Singh understood that the practice he described meant that the Ministry's Head Office in Ankara at least was being deceived.

58. In assessing the evidence of all the witnesses, I have had well in mind that in this case, as in so many cases, where the relevant events are some years in the

past, the contemporaneous documents and the probabilities are a much surer guide to what occurred than individual recollections: see, in relation to the unreliability of memory, *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) at [15]-[22] (Leggatt J).

59. I was reminded by Mr Robinson of, and have also had regard to, the well-known passage in the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyd's LR 1 at 57 (referred to by Lord Goff in his own later speech in *Grace Shipping Inc. v C.F. Sharp & Co (Malaya) Pte. Ltd.* [1987] 1 Lloyd's Rep. 207 at 215-6) concerning the assessment of witness evidence in cases of fraud:

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

D. The Advertising Contracts

60. At the heart of this case are the billing and reimbursement arrangements agreed between the parties in relation to the 2009, 2010 and 2011 Campaigns.

61. These matters are addressed by the terms of the written Advertising Contracts that the parties entered into for each year, and it is convenient to start by considering the terms of those contracts. The argument before me proceeded by reference to the 2011 Advertising Contract and I refer to that contract

below. I was told that the earlier contracts, though not included in the trial bundles, were materially the same.

62. I will address IMA's and Mr Singh's argument, that the Advertising Contracts were varied to accord with what they said was an agreed understanding and practice between IMA and the Ministry's London Office at the end of this section.

1. The Written Terms

63. The 2011 Advertising Contract was a tri-partite contract between the Ministry, DDF and IMA. Article 1 described the parties in the following terms:

> "Article 1
>
> This contract is between Consulate General of the Republic of Turkey, London Turkish Culture and Tourism Office, representing the Ministry of Culture and Tourism of the Republic of Turkey, and dDf International Limited (Agency) and Dream Design Factory LLC, DDF (UK) LLP which has been selected to carry out the advertising campaign and Contracted Media Planning and Buying Partner International Media Advertising."

64. Article 2 contained various definitions, identifying the Ministry as "The Client", the Ministry's London Office as "The Client's Representative", DDF as the "Agency" and IMA as the "Contracted Media Planning and Buying Partner". Article 9 D), which I will address in a moment, referred to IMA as the "Contracted Media Planning and Buying Partner of the Agency" making clear that, for the purposes of the contract, IMA's partner was DDF.

65. Article 2 went on to define the terms "Agency Commission", "Media Plan" and "Net Media Cost" in the following terms:

> "Agency Commission: The commission rate, calculated from the net media cost, to be paid to the Agency by the Client, as a fee for the services of the Agency implemented on behalf of the Client, including the development of creative works, preparation of the communication and the integrated communication strategy plans according to market features, the planning and implementation of media strategies following the Client's approval, and monitoring of the campaign.
>
> …
>
> Media Plan: The plan which is implemented with the approval of the Client sets out the total allocated budget, in integrity with the space, quantity, time and costs of advertisements to be run in the media channelss [sic], tariff prices and discount rates, media buying costs, commissions, production costs, prices of all these items calculated in the local currency, and similar costs that will be paid during the advertising campaign.
>
> Net Media Cost: The remaining net media time/space buying cost, calculated by deducting the VAT, other taxes, other compulsory payments like taxes (ASBOF, BARB, Gateway Charges etc.), the media discounts and the commissions provided to the media buyer."

66. I will come back to some of these definitions later when I deal with the substantive provisions of the 2011 Advertising Contract that refer to them, but two points are worth noting at this stage.

67. The first concerns the Agency Commission. This is expressed as a commission payable by the Ministry to DDF, calculated on the basis of the Net Media Cost. It is noteworthy that the services for which this commission is paid are, facially at least, all embracing; they include not just the creation and development of the media strategy but also its implementation and thus the process of placing advertising in approved media.

68. The second point is that, whilst there is a definition which specifically identifies a commission payable by the Ministry to DDF, there is no definition which, at least clearly, identifies any commission or fee that is to be paid by

the Ministry to IMA. As will be seen below, article 8, which sets out the liabilities of the Ministry (as the Client), contains no provision for payment to IMA.

69. Mr Robinson's case, however, was that the fact that a fee or commission was payable to IMA was implicit in the definitions:

i) The reference in the definition of "Media Plan" to "media buying costs"; this chimed, so Mr Robinson said, with his submission that the media plan was the crucial document; and

ii) The reference in the definition of "Net Media Cost" to the deduction of "the commissions provided to the media buyer". So, Mr Robinson said, whilst commission payable to IMA fell to be deducted in the calculation of the Net Media Cost (on which DDF's Agency Commission was based), the definition nonetheless contemplated that a commission might be payable to IMA.

70. Article 4 appeared (and was the only provision) under the heading "Terms of the Agreement". Its aim appears to have been to set out the general purpose of the contract:

> "Article 4
>
> The contract specifies the following principles related to the Client's 2011 advertising promotional campaign of the Client in the media plan:
>
> A) The Agency's responsibilities, terms of payment to be made by the Client and other conditions,

B) Carrying out an advertising campaign to develop Turkey's values as an unique and different tourist destination and to increase Turkey's share of international tourism in the markets designated by the Client, to include;

1. Producing creative works in accordance with the Client's marketing strategy, preparing and adapting campaigns to local market conditions, preparing media plans and co-ordinating media buying in a professional way,

2. Carrying out advertising campaigns in accordance with the requirements of the market countries."

The clause, it will be noted, speaks only of the responsibilities of the Agency, DDF; it makes no mention of any responsibilities on the part of IMA.

71. Article 5 identified the budget ($4.5 million for the 2011 Campaign), making clear that, if considered necessary by the Ministry, changes could be made to the media plan and budget allocation. Article 6 identified the period of the contract, expiring at the latest on 31 December 2011 or whenever the approved advertising campaign and budget within the media plan had been fulfilled.

72. Articles 7 and 8 dealt with the liabilities and responsibilities of the Agency (DDF) (article 7) and the liabilities of the Client (the Ministry) (article 8). There was no equivalent provision addressing the liabilities and responsibilities of IMA as the Contracted Media Planning and Buying Partner. The articles are lengthy, and I do not set them out in full, but they provided in part as follows:

"LIABILITIES AND RESPONSIBILITIES OF THE AGENCY

Article 7

A) The liabilities of the Agency are listed below:

[…]

2. To ensure the necessary coordination to produce and implement the continuity and integrity of the creative works, which are approved by the Client.

[...]

4. To prepare the necessary plans to ensure time/space effective advertising (right time, right media) in order to achieve the campaign objectives, by evaluating the market requirements and cost/benefit criteria, and to maintain the implementation of the campaign to this end.

[...]

B) The responsibilities of the Agency throughout the implementation of the campaign are listed below:

1. The advertising campaign is to be executed in accordance with the approved media plan. All advertisements to be run in the media, the media schedules and the media buying costs are subject to the written approval of the Client/Client's Representative beforehand. The Agency will be responsible for financial compensation as a result of any changes, made without the prior written approval of the Client or the Client's Representative. […]

2. The Agency shall execute the media buying operations in a well-planned and professional manner and ensure that, the benefits and advantages provided by the media are reflected to the Client.

[…]

6. The Client's Representative has the right to examine the work and the accounting records of the Agency, and to have them examined, relating to the Client's Representative.

In order to fulfil the commitments of this contract, the Agency may also form partnerships with local or international establishments to buy services, carry out research, consulting, planning and production. The Agency takes responsibility for such partnerships, sub-contracting or buying of services.

The Agency takes all necessary measures to avoid any mistake, damage and/or loss during the campaign. Unless the necessary

measures are taken, the Agency is responsible to compensate the damage or loss occurred.

THE LIABILITIES OF THE CLIENT

Article 8

Commissions and the Production Costs to be paid to the Agency are as follows:

- The agency will be paid a [sic] agency commission of 5 (five) % per country calculated, within the allocated budget, on the net media cost for all the tools. The net media cost is the one submitted to the Client in the invoice approved by the medium (newspaper, magazine, outdoor ads, Internet, radio, theatre, etc.) in which advertisement is published.

- Production costs are those payments made to third parties and other expenses approved by the Client as production costs. Other than those amounts paid to third parties, it is necessary to obtain written approval for expenses and production costs from the Client in advance. Production costs must not exceed, per country, 1 (one) % of the net media buying cost within the allocated budget for all tools.

[...]

After having spent the budget allocation specified in the contract for each country, if any additional promotion campaign is needed, with the aim of protecting campaign integrity and the concept, the representative offices can continue to work with the existing agency.

In this case; evolution of the client's representative will be taken into consideration and client's written approval will be taken."

73. Two things are striking about these provisions. First, whilst the 2011 Advertising Contract is a tri-partite contract, responsibility for the advertising campaign is placed squarely and solely on DDF as the Agency. There is no equivalent article to article 7 which deals with IMA, and there is no provision within article 7 which places any positive responsibility upon IMA to do anything in relation to the campaign.

74. Secondly, there is specific provision for payment of commission by the Ministry to DDF, but, as I mentioned in paragraph 68 above, there is no provision for payment of any commission or fee to IMA. The Ministry's case is that this is consistent with the general scheme of the contract: DDF was responsible for the design and implementation of the campaign, and it was to DDF, and only to DDF, that a 5% commission was payable.

75. The point made by the Ministry was that, though this was a tri-partite contract, in fact DDF and IMA were on the same side, IMA being DDF's partner. There was nothing surprising in that context, it was said, for a commission to be paid to one of them, effectively for the benefit of both. A passage in Mr Tuyluoglu's witness statement suggested that this was consistent with how the contract came to be made:[8]

> "4. The decision to work with companies like IMA was made at the headquarters based in Ankara, who organised a tender process each year for the contract to buy advertising space on behalf of the Turkish Ministry of Culture and Tourism. This is a process where different media buyers pitch for the contract for the year, and in doing so present the service they offer and a rate of commission to be paid as their fee for the service. In order to win the contract, different media buyers propose different commission rates; the lower the commission, the more likely they are to be awarded the contract. IMA and their partner DDF charged commission of [5%] which was significantly cheaper than other buyers in the same year, many of whom charged 6, 7 or 8 percent. Accordingly IMA and DDF won the contract."

The contract, according to his evidence, was won by the two of them together.

[8] Mr Tuyluoglu referred in his witness statement to commission rate of 4 percent instead of the rate of 5 percent referred to in the 2011 Advertising Contract but said in his oral evidence that this was a mistake.

76. Mr Tuyluoglu's evidence (see paragraph 9 of his statement) was that he understood that this commission was split between DDF and IMA, although he did not know exactly how it was split, which he regarded as a matter for them. Ms Sahin's evidence was to the same effect. Mr Singh said in cross-examination that in 2008 he had, in fact, tried to negotiate with DDF for a share of its commission but that DDF had said that he should negotiate directly with the Ministry.

77. Article 9 of the 2011 Advertising Contract set out the terms of payment and the procedure for invoicing. Inevitably, its terms are central to this dispute, and they were the subject of submissions from both parties. Although the article is a lengthy one, I therefore set it out substantially in full:

> "Article 9
>
> A) Within the context of the laws and regulations of the market country and with the approval of the Client, media buying will be implemented by the Agency, and the payments shall be made by the Client's Representative directly to the media, Agency Partner and/or to the Agency over the net time/space cost (excluding commission and VAT). According to the Turkish Financial Legislation, the payment is to be made after the work has been completed, service has been received and the necessary documents (together with the invoice of the Media Buying Agency, the approved net media invoice(s) received from the media organization publishing the advertisement) have been submitted to the Client's Representative by the Agency.
>
> In case the Media Buying Partner with whom the Client has been working is not able to receive the purchase invoices due to the circumstances of the region, the Media Buying Partner must notify the Representative of the Client, with a written message, concerning the reasons of the delay; however, the Client's Representative still remains responsible for auditing the costs, checking discount rates and comparing the costs with the ones of the previous years. In this case the invoices of Media Buying Holdings with whom the Media Buyers work and/or the invoices of these countries' agencies will be taken into consideration.

The invoices shall be addressed to the Client as detailed below and sent directly to the Client's Representative's address mentioned in Article 3

[...]

B) In countries where the Client's Representatives are based, if the payment is required in a currency other than Turkish Lira, the exchange rate on the day of payment (or equivalent government administration) of the declared Central Bank or the bank which will be determined by the Culture and Tourism Office in the country is considered as a base rate. Concerning the Agencies' media buying, the Client is not responsible for making any advance payment, warranty or any kind of fee not written in this contract or not approved by the Client to the Agency within the framework of the approved media plan.

C) Within the context of this contract and with regards to the Client's advertising campaign, the Agency is responsible for making the payments to the media and to third parties in respect of all media buying activities.

The production costs will be paid based on third party invoices according to the media used for the advertisement. Production costs are formed by the payments to the third parties and other expenses accepted as a production cost by the client representative. Apart from the payment made to the third parties, prior written approval of the client is necessary to consider related expenses and production costs.

D) The Contracted Media Planning and Buying Partner of the Agency shall confirm that all invoices submitted by third parties are correct and proper and, shall perform the necessary effort to ensure that the Client benefits from all types of discount. The Contracted Media Planning and Buying Partner of the Agency shall reflect all discounts exactly as given by the media buyers or the media companies, and will be responsible to provide the Client will all related documents and information.

The duties of the Contracted Media Planning and Buying Partner of the Agency in respect of issuing the invoices are as follows:

1. The Agency or the Buying Partner shall send the detailed invoices (approved net media invoices issued by the media organization running the advertisement together with the invoices of the Buying Partner) which are addressed to the Client and conducted upon the net time/space cost of the advertisement, to the Client's Representative after the advertising has run. The invoice shall also include attachments of documents confirming the advertising has run

(3 actual copies of the publication for print ads, the radio/TV broadcast reports, 3 photographs each of the outdoor, Internet and billboard ads).

2. The Agency is responsible for ensuring the implementation of the advertising in accordance with the approved media plan and for covering all the necessary expenses for this purpose. The Agency must not request any additional expense other than the ones written in this contract.

3. Concerning the advertisements that are run in all tools, the Agency Commissions due over the total net cost of media buying per country, shall be sent to the Client's Representative after the advertising has run within the allocated budget. The Agency should attach the Agency's Buying Partner's invoices together with certified copies of the net media invoices (received from the media organizations that run the ads) to these invoices.

4. The Client shall pay after the service has been received and all the necessary documents have been completely submitted. In case any of the above-mentioned documents are not submitted, no payment will be made to the Agency. In case the Media Buying Partner of the Agency Representative is not able to receive the invoices of the media purchase due to the regional circumstances, the Media Buying Agency will notify the Client concerning the reasons of this delay; however, the Client's Representative still remains liable for auditing the costs, checking discount rates and comparing the costs with the ones of the previous years. In this case the Media Buying Holding of the mentioned country and/or the invoices of this country's agencies will be taken into consideration.

In case payment is delayed for any reason, no interest shall be charged for the time period between the delivery of the invoice(s) to the Client and the actual payment day. For invoices received from the media unclear descriptions such as 'miscellaneous', 'other' 'similar' etc. must be avoided, and expenses for the service rendered must be clearly and precisely specified.

5. The Agency is responsible to arrange the Agency Commission invoices and to arrange the Agency Commission invoices, and provide the Agency Representative with the production cost by documenting them with the third party invoices. The Agency is responsible to get the invoices of the Media Buyer which show the net media buying cost without the VAT arranged by the media tools on the Client's behalf and to deliver them to the Client's Representative."

78. A number of points can be made about article 9.

79. First, although there are a number of specific references to the Media Planning and Buying Partner (sometimes abbreviated to the "Media Buying Partner" and sometimes referred to as the "Media Buying Agency") and thus to IMA, article 9, like previous articles, places the responsibility for implementing the 2011 Campaign squarely on the Agency, DDF; see:

    i) Sub-paragraph A) ("media buying will be implemented by the Agency");

    ii) Sub-paragraph B) ("the Agencies' media buying"); and

    iii) Sub-paragraph D) 2. ("The Agency is responsible for ensuring the implementation of the advertising in accordance with the approved media plan").

80. Secondly, in terms of submission of documents, sub-paragraph A) contemplates that, although they will include the invoice of the Media Buying Agency, invoices and supporting materials will, in fact, be submitted to the Ministry's London Office not by IMA but by the Agency, DDF ("payment is to be made after ... the necessary documents ... have been submitted to the Client's Representative by the Agency").

81. Thirdly, sub-paragraph B) makes clear that the Ministry is not responsible for making any advance payment that might be required to secure a booking. Contractually, therefore, if such an advance payment is required, DDF and IMA have agreed that the Ministry will not have to reimburse them for it at the time it is made but will only have to pay once the advertisement has actually been placed.

82. Mr Robinson said that one reason or justification for IMA increasing the costs charged by media providers in order to create a margin was to generate cash flow out of which IMA could make any advance payments that were required. Any adverse cash flow impact, however, is simply a consequence of the terms the parties have agreed; Mr Robinson's suggested justification for the practice contradicts the terms of the parties' bargain.

83. A similar point can be made in relation to Mr Robinson's reference to the fact that the Ministry was frequently late in paying IMA. That, he said, was also a reason why it was appropriate for IMA to charge a margin. Article 9 D) 4 says in terms, however, that, in the event payment is delayed, the Ministry is not liable to pay interest. Again, this supposed reason for the charging of a margin is expressly catered for in the parties' contract.

84. Fourthly, article 9 B) provides that the Ministry:

> "[...] is not responsible for making ... any kind of fee not written in this contract or not approved by the Client to the Agency within the framework of the approved media plan."

So, there was an express prohibition on the payment by the Ministry of any fee not set out in the contract or provided for in the media plan.

85. Mr Robinson's submission was that, although there was no substantive article in the 2011 Advertising Contract which explicitly provided for a fee to be paid to IMA, insofar as the figures in the media plan enabled IMA to make profit on media buying because they were higher than the amounts charged to IMA by the media providers, then IMA's fees could be said to be "within the framework of the approved media plan" and thus legitimate. A similar point was made by Mr Robinson in respect of the final sentence of sub-paragraph C)

and its requirement for prior written approval of certain expenses; he said that agreement of the media plan provided that prior written approval.

86. The fifth point concerns sub-paragraph D). The opening part of the sub-paragraph, relied upon by Mr Krolick, required the Contracted Media Planning and Buying Partner, i.e., IMA, to:

> "[...] confirm that all invoices submitted by third parties are correct and proper and shall perform the necessary effort to ensure that the Client benefits from all types of discount. The Contracted Media Planning and Buying Partner of the Agency shall reflect all discounts exactly as given by the media buyers or the media companies, and will be responsible to provide the Client with all related documents and information."

IMA's alteration of third party invoices, said Mr Krolick, was inconsistent with, and in breach of, its obligation to confirm that invoices submitted by third parties were "correct and proper"; equally, IMA's obligation to ensure that the Ministry benefitted from "all types of discount" and that the documentation reflected all discounts "exactly as given by the media buyers or the media companies" was inconsistent with IMA's practice (and its alteration of media provider invoices as part of that practice) of charging the Ministry more than the amount it was itself required to pay.

87. Sub-paragraph D) goes on to identify certain "duties of the Contracted Media Planning and Buying Partner" in respect of the issuing of invoices. It is the only part of the 2011 Advertising Contract which clearly imposes obligations on IMA itself. Of note are the facts that:

i) The invoices to be sent to the Ministry are to include the "approved net media invoices issued by the media organisation" (sub-sub-paragraph 1);[9] so, it is said by Mr Krolick, they must include the invoices that the media providers have actually issued, not altered or fabricated invoices

[9] See also the similar language in article 9 A).

which the media providers have not issued and which do not accurately state what they have charged;

ii) In the context of the calculation and payment of the Agency Commission, the Ministry is to be sent "certified copies of the net media invoices (received from the media organizations that run the ads)" (sub-sub-paragraph 3), which again, Mr Krolick says, supports the proposition that IMA's obligation is to provide copies of genuine, unaltered media provider invoices;

iii) Sub-sub-paragraph 2. explains that the Agency is responsible for implementing advertising in accordance with the approved media plan "and for covering all the necessary expenses for this purpose", and that:

> "The Agency must not request any additional expense other than the ones written in this contract."

Mr Krolick submitted that this provision was inconsistent with IMA's case that it was entitled to a fee; the only fee payable by the Ministry was the 5 percent commission payable to DDF provided for in article 8.

88. Articles 10 to 16 deal with various miscellaneous matters including conflicts, confidentiality, and termination. They are notable for the fact that, like other articles, they point up the primacy of the Agency among the Ministry's contractual counterparties.

89. Article 10, for example, contemplates the change of the "Agency Partner", which in context appears to be (or at least to include) a reference to the Contracted Media Planning and Buying Partner. It states that, where this occurs, "The Agency remains responsible for the works and services of the

previous Media Buyer" consistent with the Agency's personal responsibility, as set out in earlier articles, for implementing the advertising campaign.

90. Article 11 precludes the Agency (DDF) from conducting activities inconsistent with its duties under the contract including carrying out an advertising campaign for a country which is a competitor of Turkey in relevant markets. Article 13 imposes an obligation on DDF to keep materials and information provided by the Ministry confidential. In neither case is any such restriction or obligation explicitly placed on IMA.

91. Article 15 entitles the Ministry's London Office to terminate the contract on notice. The article provides that, if it does so, the Ministry's London Office will "make payment to the Agency, arising from the irrevocable commitments of the Agency made on behalf of the Client". There is no equivalent provision requiring the Ministry to pay expenses or commitments incurred by IMA.

92. Article 16 provides that the 2011 Advertising Contract is governed by Turkish law. Reference was made to the Turkish financial legislation referred to in article 9 concerning the timing of payments, but no submission was made to me that, in relation to matters of contractual interpretation or in any other relevant respect, Turkish law was different from English law.[10]

2. *Do the Written Terms provide for or entitle IMA to a Fee or Commission?*

93. There is no dispute that IMA is entitled under the 2011 Advertising Contract (and the prior Advertising Contracts, which I was told were on materially the

[10] The parties did not make submissions in relation to English law principles of contractual interpretation, but they are well-known and are set out in a number of recent decisions of high authority; see, in particular, *Wood v Capita Insurance Services Limited* [2017] AC 1173 at [8]-[15] (Lord Hodge JSC).

same terms) to be reimbursed by the Ministry in respect of the amounts it has incurred and paid to media providers for advertising space (excluding VAT).

94. The issue between the parties is whether IMA is entitled to recover an amount on top by way of a fee or margin. IMA says that it is so entitled, so long, that is, as the total amount for which it seeks reimbursement from the Ministry is consistent with the relevant media plan. Its primary case, reflected in paragraph 19.4 of Mr Robinson's written opening submissions, is that this is an entitlement that is provided for or which arises under the written (unvaried) terms of the contract.

95. I reject this argument.

96. The first and most obvious point is that the 2011 Advertising Contract stipulates expressly (in article 8) for a commission to be paid to DDF but contains no article which clearly provides for a fee to be payable to IMA. If the parties had intended that such a fee was payable, this would be an extraordinary omission; the absence of such a provision, in my judgment, is a strong indicator that no such intention was held.

97. The second point concerns IMA's argument, that, although the 2011 Advertising Contract contains no substantive clause providing for a fee to be payable to IMA, it does, nonetheless, provide for such a fee indirectly, or at least contemplate that such a fee will or might be received, through the definitions in article 2 and through the provision in article 9 B) for approval of the media plan.

98. In my judgment, there are a number of answers to this argument, and I do not accept it.

99. First, the proposition, that an entitlement on the part of IMA to a fee is created through, or is to be found in, the definitions, is not an easy one to accept, particularly in circumstances where (see paragraph 96 above) DDF's entitlement to a commission is dealt with in a substantive provision.

100. Secondly, however, in my judgment the definitions do not, in any event, provide for such a fee.

i) The definition of "Media Plan" refers to the fact that the plan should set out the costs of advertisements including "tariff prices and discount rates, media buying costs, commissions, production costs". It is not obvious that the references to media buying costs and commissions are intended to refer to costs, fees or commissions payable to IMA as opposed to third parties.

ii) A similar point can be made in relation to the definition of "Net Media Cost". This provides for a number of deductions to be made (inferentially from the "gross" media cost) including deductions for "media discounts and the commissions provided to the media buyer". Exactly what is being referred to is opaque, but, on the face of it, all that it provides is that any discount or commission that is available (i.e., that is provided) to IMA is required to be deducted and thus passed on to the Ministry.

101. Thirdly, the significance of these references in the definitions has, in any event, to be considered alongside the later, substantive provisions of the 2011 Advertising Contract, in particular article 9 which deal with the treatment of discounts. Article 9 D) provides in that regard, as set out in paragraph 86 above, that IMA is to ensure that the Ministry:

> "[...] benefits from all types of discount"

and that invoices:

> "[...] reflect all discounts exactly as given by the media buyers or the media companies"

102. I put to Mr Robinson that this language sat unhappily with the proposition that IMA was entitled to charge the Ministry more than it had to pay itself to the relevant media provider. His answer, as I understood it, was that, whilst IMA might have to give the Ministry the benefit of any *discounts*, the position in relation to *commissions* was different, and IMA was entitled to obtain a commission by charging the Ministry more than it paid.

103. This, however, strikes me as improbable. Looking at the matter objectively, it is difficult to see why the Ministry would draw a distinction between a discount and a commission, and why it would be concerned to obtain the benefit of any discount but content to allow IMA to obtain a commission because it was able to secure the relevant advertisement at a cheaper price than that which it charged to the Ministry. The parties' agreement, that the Ministry should benefit from "all types of discount", in my judgment indicates that the intention was that the Ministry would receive the best price that could be secured for the relevant advertisement.

104. As I explained in paragraph 85 above, Mr Robinson submitted that, whilst article 9 B) provided that the Ministry was not responsible for any kind of fee "not written in this contract or not approved ... within the framework of the approved media plan", this did not preclude payment of a fee to IMA since the fee sought to be recovered by IMA was included within the costs for advertisements that had been inserted in the approved media plans.

105. This would have been a legitimate point if IMA's fee had been separately identified in the media plans. In that event, there would be no question of deception, and IMA could legitimately say that its fee was known about by the Ministry and, by the Ministry's approval of the media plan, had been expressly approved. But as may be gathered from the preceding paragraphs, that was not what happened at all:

i) The media plans I was shown consistently identified the gross (or tariff) costs of the relevant advertisement and then the "net" or "negotiated" cost;

ii) The media plans contained no separate line item for an IMA fee nor any explanation, either in the pages dealing with the different media or in the summaries at the end, that a fee to IMA had been included.

In circumstances where IMA's fee was simply generated by an undisclosed uplift on the cost figures provided to IMA by the media providers, I do not think it can be said to have been approved by the Ministry in any real sense.

106. There is a related point concerning the amount of IMA's fee.

107. As I have said already, the written terms of the 2011 Advertising Contract contained no provision for a fee to be paid to IMA; inevitably, they said

nothing about its amount. Whilst Mr Robinson submitted that the contract nonetheless allowed, or at least did not preclude, IMA receiving a fee by way of an uplift on the cost of advertisements, he accepted that there was no agreement as to exactly what fee could be levied. Mr Singh accepted in cross-examination that there was no discussion with the Ministry as to what percentage commission he could charge.

108. It is, however, inherently implausible that the Ministry would have agreed to pay or to allow IMA to charge a fee without agreeing what, either in absolute or in percentage terms, that fee should be, leaving it to IMA itself to decide how much it would charge. Mr Singh was asked how much over the three annual campaigns IMA conducted for the Ministry IMA had obtained by way of margin. He said that it would have been around 3-4 percent of the agreed media spend each year.[11] When it was put to Mr Singh that he never said anything to the Ministry about how much IMA made out of the difference between the amounts paid by IMA to media providers and the amounts IMA charged the Ministry, Mr Singh said simply that it was never a question he was asked.

109. The third and final point concerns the overall scheme of the Advertising Contract. As will be clear from the paragraphs above, I regard IMA's submission, that, hidden within the definitions and the requirement for approval of the media plan, there was an agreement that IMA could be paid a

[11] Mr Krolick said in his closing submissions that Mr Singh referred in cross-examination to a range of 2-3 percent (though he said that the Ministry's case was that this was too low). My note (no written transcript was provided) records that Mr Singh, in fact, referred to a range of 3-4 percent, but it was, on any view, an approximate figure.

fee for media purchases at an unspecified rate or in an unspecified amount, as inherently improbable and at odds with business common sense.

110. The Ministry's case, on the other hand, comports with the general scheme of the contract.

i) Although the 2011 Advertising Contract was a tripartite contract, DDF and IMA were effectively on the same side, with DDF having the primary role and IMA identified as its partner.

ii) The contract provided explicitly for a commission of 5% to be paid to DDF on the Net Media Cost. There is no reason why this should not be the fee that the Ministry was prepared to pay for the services provided by both DDF and IMA, with the question of how that amount was to be apportioned being a matter for them.

111. Whilst considerations of business common sense are relevant, it is, of course, ultimately the terms of the contract that matter. In my judgment, they make no provision for IMA to be paid a fee by the Ministry (separate or additional, that is, to any share of the 5% commission it agreed with DDF), and IMA was, accordingly, entitled to none.

3. Do the Written Terms entitle IMA to alter Media Provider invoices to support its own Invoices?

112. I have summarised the terms of article 9 D) in paragraphs 86 and 87 above. As there stated, the article required IMA to:

i) Confirm that all invoices submitted by third parties are "correct and proper"; and

ii) Provide "approved net media invoices issued by the media organisation".

The Ministry was to be provided with "certified copies of the net media invoices (received from the media organizations that run the ads)".

113. The answer to this question, in my judgment, is plainly, no.

4. Variation

114. IMA's alternative case was that, if the terms of the written Advertising Contracts did not provide or allow for a fee or commission to be paid to IMA and did not allow for media provider invoices to be altered, then the Advertising Contracts had been varied so as to have that effect.

(a) "Billing to the Media Plan"

115. The basis for this plea was what was said to be an understanding and practice agreed between IMA and the Ministry's London Office whereby IMA would ensure that its own and any supporting media provider invoices would match the relevant media plan. Some of the alterations made to media provider invoices were said to have been specifically requested by the Ministry, but Mr Robinson made clear that his case was not confined to those particular instances.

116. The expression Mr Robinson repeatedly used to describe this understanding and practice, both in his written and oral submissions and during the course of his cross-examination of the Ministry's witnesses, was that IMA was to "bill to the media plan". As I indicated during the course of the trial, however, in my judgment this expression is not a very happy or helpful one.

117. The problem is that the expression is somewhat opaque, and it is capable of describing a number of different practices, some unexceptional and others more controversial (and, insofar as it embraces the latter, can be said to be somewhat euphemistic). It tends to mask the true nature of what was actually being done and is capable of giving rise to confusion, especially where the expression is used in cross-examination.

118. It is certainly the case that, in a number of instances, staff of the Ministry's London Office (and I was also shown instances involving staff in some Ministry offices overseas) appear to have picked up what they perceived to be discrepancies between the invoices and supporting documents sent to them and the relevant media plan and asked for clarification or for corrections to be made, including to IMA's own invoices (the position in relation to changes to media provider invoices was less clear).

119. But this case is not concerned with mundane discrepancies. Nor is it concerned with whether IMA billed more than the amounts contained in the media plans; it is accepted that it did not. What is in issue is whether, when including cost figures in the media plans, IMA was entitled to add a sum on top of the cost figures quoted by the media providers in order to create a margin for itself; and whether, when billing the Ministry, IMA was entitled to render invoices which sought to recover more than the amount it required to pay to media providers, and to support its own invoices with media provider invoices which it had altered or fabricated to show that those providers had billed IMA more than they, in fact, had.

120. As Mr Krolick put it in his oral closing submissions:

> "This case is not about amendments but about forgery. A variation to the Advertising Contracts which enables IMA to forge third party evidence."

Whether the Ministry's officials knew and agreed that IMA could "bill to the media plan" in this sense, i.e., that it could bill the amounts that were included in the media plan regardless of what IMA was required to pay itself and could furnish the Ministry with altered (and untrue) media provider invoices which suggested that IMA had paid greater sums that it had, is the nature of the variation which, in my judgment, IMA must prove.

(b) IMA's Pleaded Case

121. IMA's pleaded case in relation to the practice which it contended gave rise to the suggested variation was principally set out in paragraph 13 of the Re-Amended Reply and Defence to Counterclaim and Amended Defence of Third Party ("RARDC").

122. The first sub-paragraph, paragraph 13.1, explained that the alterations that IMA made to media provider invoices had three purposes:

> "13.1 The alterations had three purposes: (i) to make the relationship profitable for the media purchaser, who would otherwise be carrying out this commercial work for free; (ii) to make allowance for the Embassy/LCTO's [the London Culture and Tourism Office's] late payment of invoices so that agreed media purchases could be funded; and (iii) to give the media buyer funds to pay for events that the Embassy/LCTO required but were not in the media plans."

It is pertinent to note that (save to the extent that the third purpose might be said to be implicit in the explanation he gave in relation to Pearl & Dean) these three purposes were not mentioned in either of Mr Singh's two witness statements. The emphasis in those statements (see paragraph 39 above) was on the need to make alterations to comply with the media plan. The first purpose, to make a profit for IMA, was certainly not mentioned.

123. Sub-paragraphs 13.2 to 13.13 explained how the practice of amending media provider invoices was said to have come about, and how and when it was alleged to have been discussed with staff at the Ministry's London Office. A number of examples were given which were said to show the practice in

operation.[12] These matters were explored with the Ministry's witnesses in cross-examination.

(c) The Origins of the Practice and Discussions with the Ministry

124. So far as the first two matters are concerned, whilst the practice of charging the Ministry more than was paid to media providers and of amending media provider invoices was said to have been carried out by IMA, Mr Singh's evidence was that it had its origins in the relationship between the Ministry and IMA's predecessor, a company called BVVS.

125. IMA took over from BVVS as media buying agent for the United Kingdom and Republic of Ireland campaign with effect from 2009. It appears that there was some initial collaboration between the two of them in relation to the 2009 media plan. Mr Singh said that substantial elements of that plan were inherited by IMA although he made additions.

126. The individual who was apparently involved with the account at BVVS was Mr Phillip Hayes. I was told that Mr Hayes had died prior to the commencement of the trial, and I received no written or oral evidence from him or from anyone from BVVS. I was shown, however, an email exchange between Mr Singh and Mr Hayes on 23 and 31 December 2008. On 23 December 2008, Mr Singh sent an email to Mr Hayes saying:

> "I am pleased to confirm that we can match the proposal from Eire and the UK taxis (David Barnett) which includes 5% commission for us to share.

[12] See also paragraph 18, and paragraphs 31-45 of IMA's written closing submissions, which included other examples which were referred to and relied upon by Mr Robinson without objection.

> As regards London Buses/Underground (CBS) I am waiting on latest availabilities – problem with getting enough T sides in the period – but still checking.
>
> Let me know how you wish to proceed.
>
> Talk soon."

Mr Hayes responded to Mr Singh on 31 December 2008 as follows:

> "I've had Primeads on the phone about you. I told them that DDF wanted you to join the competition and that was that.
>
> Can you forward CBS to me and I'll put together proposal which I'll show you before submitting.
>
> Glad you understand how the invoicing works – it's the only way to make a margin!!!"

127. In circumstances where I have not heard any evidence or submissions from BVVS, and have not seen the contract between BVVS and the Ministry or any documentation concerning the dealings between them, it is not possible or appropriate for me to make detailed findings as to what had gone on between those two parties, still less for me to make findings as to the propriety of Mr Hayes' conduct.

128. IMA's case, however, is that the comment:

> "Glad you understand how the invoicing works – it's the only way to make a margin!"

reflected discussions between Mr Hayes and Mr Singh about the practice which Mr Singh had been told by Mr Hayes was being followed by BVVS with the agreement of the Ministry's London Office of amending media provider invoices for presentation for payment. Mr Singh said in cross-examination that BVVS had given him the background as to how the media buying agency would be remunerated.

129. This email exchange was between Mr Singh and Mr Hayes; the Ministry was not party to it and there is no suggestion (and certainly no evidence) that

anyone from the Ministry or its London Office it saw it at the time. The reference in Mr Hayes' email to there being "5% commission for us to share" suggests that a discount had been obtained which was going to be shared between BVVS and IMA but not mentioned to the Ministry.[13]

130. Mr Tuyluoglu, the Director of the London Office until February 2009, said that he saw this email only when it was put to him in cross-examination. He said it was not clear what it meant, and that it might be read in two different ways; but if it meant that BVVS was invoicing to make a margin he was disappointed. He said that, whilst working with Mr Hayes, he had never spotted anything similar to what had occurred with IMA and that he had never suspected that BVVS had altered invoices to make a profit.

131. So far as discussions with the Ministry are concerned, IMA's pleaded case (see paragraph 13.3 of RARDC) is that Mr Singh met with Mr Onal on 27 January and 4 February 2009, prior to the signing of the 2009 Advertising Contract, where they discussed and agreed that IMA could continue the practice of amending the underlying invoices. There is also reference (in paragraph 13.7) to a dinner that Mr Singh said he attended with Mr Onal at the House of Commons on 28 January 2010 where it is said Mr Onal and Mr Singh agreed that the same approach could be taken to invoices in 2010 as in 2009.

132. Although referred to in IMA's pleading, Mr Singh makes no specific mention of a meeting or discussion on 4 February 2009 in either of his witness

[13] The taxi advertisers in 2009 were a company called Ubiquitous. Row 55 of the Counterclaim Schedule shows how IMA charged the Ministry more than it was required to pay Ubiquitous and supported its own invoice with an altered media provider invoice.

statements. Reliance was, however, placed on an email that Mr Onal sent to Mr Singh on 5 February 2009 which refers to a recent discussion between them and in which, having referred to certain proposed changes to the 2009 media plan, Mr Onal said:

> "I understand invoicing method and its [sic] ok."

Mr Singh also referred in his oral evidence to a private dinner.

133. Mr Singh was asked in cross-examination about his discussions with Mr Onal. He explained that he could not say exactly what he had said, but that he would have said that he was aware of the invoicing process and that Mr Onal said he understood. Mr Singh said that the conversation centred around the fact that Mr Onal was aware of how the invoicing process worked and had asked IMA to do the same so that it would be remunerated.

134. I am sceptical about this account; and, as explained below, although IMA's case, that there was an agreed practice whereby IMA could alter media provider invoices to make a margin, was not put squarely to Mr Onal, he rejected what Mr Robinson said was the implication of this email. Insofar as it is suggested that this practice was specifically disclosed by Mr Singh to Mr Onal, I reject that.

135. Even on Mr Singh's own evidence, however, his discussion with Mr Onal was in the vaguest and most general terms, and this causes me to doubt whether anything was said to Mr Onal about the supposed practice at all, or at least anything which would fairly indicate to Mr Onal what it involved.

i) Mr Singh was asked in cross-examination whether he had said to Mr Onal that IMA was going to add a little or a lot onto the media provider invoices. Mr Singh said he did not, but that Mr Onal had said that whatever invoices IMA provided had to comply with the media plan.

ii) Asked about the size of IMA's margin, Mr Singh said that he and Mr Onal did not discuss percentages, but that IMA would be allowed to make a margin so long as the overall invoice fitted with the media plan. His evidence was that Mr Onal did not ask him how much he had in mind.

iii) Asked about the dinner, and whether he had told Mr Onal at the dinner that IMA was going to inflate the invoices, Mr Singh said: no; Mr Onal didn't know anything about that, but he knew IMA was going to make a margin for providing the service.

136. Whilst Mr Singh said that he wouldn't have seen the 2009 Advertising Contract before he first spoke to Mr Onal, he said that he read it before he signed it and that he appreciated that it did not provide for any remuneration for IMA. But, Mr Singh said, he had by this stage already spoken to BVVS, and the contract was merely "a document for comfort" and "a contract to be signed".

137. Mr Singh said that he did not think it necessary to take up with Mr Onal the fact that the Advertising Contract provided for no remuneration for IMA. When he was asked whether he had considered why IMA was a party to the contract but, according to the contract, was not being paid anything, he said

that he knew it would be an academic conversation because neither he nor Mr Onal would change the contract because it had come from Ankara.

138. It was put to Mr Singh by Mr Krolick that the terms of the Advertising Contracts required IMA to confirm the media provider invoices. Mr Singh agreed, but said that the contract was the piece of paper but the practice was different; the local Ministry directors understood the business practice, but Ankara was further away. When asked why, if Mr Onal had agreed to what he had described, IMA needed to change the terms of the media provider invoices at all - why IMA could not simply submit the original invoice with a covering letter explaining that IMA was entitled to charge more – he said that Mr Onal never requested this and so IMA never provided it.

139. Mr Onal was asked by Mr Robinson about his 5 February 2009 email quoted in paragraph 132 above. Mr Onal said that he did not now recall what the reference to "understanding the invoicing method" meant; maybe, he said, IMA had already asked him for something in relation to invoicing. He said that the Ministry needed to have a third party invoice and an IMA invoice, and that this was the rule.

140. Mr Robinson suggested to Mr Onal that what he had meant by his email was that IMA should invoice to the media plan; that IMA should charge no more than the amount set out in the plan; and that, so long as IMA did that, it would be okay. Mr Robinson did not put to Mr Onal that what he knew about and accepted as "okay" was a practice whereby IMA would charge the Ministry more than it had paid media providers and would alter media provider invoices to show different amounts than those which the media provider had actually

charged. If that was what was being suggested to Mr Onal in my judgment the point should have been clearly put. As it happened, however, whether Mr Onal understood the implication of the question or not, Mr Onal denied that his email meant what Mr Robinson suggested.

141. I referred in paragraph 122 above to IMA's pleaded case that there were three purposes behind the alterations made by it to media provider invoices. Mr Singh was asked about this. So far as the first purpose is concerned – making a profit for IMA – Mr Singh agreed that (as was the case) there was nothing about this suggested purpose in his witness statements.

142. As for the second purpose – late payment of invoices – although on his evidence the arrangement with the Ministry's London Office had been made at a very early stage before any question of late payment could have arisen, Mr Singh justified this on the basis that he knew that there would be late payment and that some media companies would not deal directly with the Ministry. He said, however, that no figure had been agreed with the Ministry as to the uplift that could be justified by this factor. The third purpose – to meet the costs of unplanned events – was, he said, based on what he had been told by BVVS.

143. It was put to Mr Singh that everything was dependent upon what he had been told by Mr Hayes. His answer was that to an extent it was, and that Mr Hayes had said to him that BVVS had an arrangement to receive a margin to do these three things.

144. There followed a discussion as to how costs came to be inserted into the 2009 and subsequent media plans. The media plan for 2009 was largely inherited from BVVS, but Mr Singh said that he had information from Mr Hayes that

there would be enough in it to pay for the costs of the business. Mr Singh said that where he inserted new media into the plan, he ensured that there was sufficient cushion for IMA to get a margin. He accepted that, in some instances, the Ministry was, accordingly, advised in the plan of costs that were higher than the costs or quotations IMA had received.

145. Asked whether he said anything about that to Mr Onal, Mr Singh said: directly, no; but that Mr Onal was already aware of the practice and that Mr Hayes had told him (Mr Singh) that Mr Onal was aware of the arrangement. He said the extent by which IMA increased the media provider's quotation would depend on the nature of the media, and that there would be a range. Mr Singh said that he was the final decision maker within IMA as to what figures would be put in the media plan. The quotations obtained from the media providers would generally, he said, be destroyed after the end of the advertising campaign (very few were in evidence before me).

146. Mr Singh agreed that he was involved in the quantification of the costs within the 2010 media plan. Asked whether he ever told Mr Onal, who was still in charge at the Ministry's London Office for most of the year, that he was going to put figures into the media plan which would give IMA a margin, he said: no, we never had that conversation. Mr Singh said that he did not recall whether there was an email which referred to the fact that IMA was making a profit on media buying, but he said that he did not think it was necessary.

147. In December 2010 Mr Tuyluoglu took over from Mr Onal as Director of the Ministry's London Office. Mr Singh described in cross-examination how he had invited Mr Tuyluoglu to lunch at which, he said, they had discussed media

and invoicing practice. Mr Singh said that Mr Tuyluoglu was familiar with it because he had been the Director of the Ministry's London Office before Mr Onal and had dealt with Mr Hayes. Mr Krolick put to him that what he was saying depending upon Mr Hayes having told the Ministry that he was inflating invoices. Mr Singh agreed.

148. Mr Singh was then asked whether anything was said to Mr Tuyluoglu about inflation of invoices. Mr Singh said that the whole discussion was about service and compliance with the media plan. Asked if Mr Tuyluoglu said that he could inflate the invoices to give himself a margin, Mr Singh answered: in not so many words, yes. Mr Singh accepted that he didn't put in writing what he was going to be doing and that Mr Tuyluoglu did not ask him by how much he would be changing the figures or how Mr Singh would arrive at the numbers.

149. There was then was then this exchange between Mr Krolick and Mr Singh:

> "Q. When you say you told Mr Onal and Mr Tuyluoglu what was going on, that you were going to inflate invoices, none of that is true.
>
> A. You are right, none of that is true. I didn't have to tell them, they knew already."

150. Mr Singh was asked whether that was because of what he thought Mr Hayes had told Mr Tuyluoglu and Mr Singh explained that Mr Hayes had a relationship with Mr Tuyluoglu in 2007 and 2008. Mr Singh was then asked:

> "Q. Mr Hayes has passed away, so he is not around to support what you say. You didn't say anything to Mr Tuyluoglu about what you proposed to do.
>
> A. I didn't have to, sir."

151. In light of this and previous answers, I am not satisfied that Mr Singh had a conversation with the Ministry's London Office in which he explained, and in which it was agreed, that IMA would charge more than it was obliged to pay to media providers in order to create a margin for itself and that IMA would be entitled to alter media provider invoices – effectively to fabricate documents – to support its inflated charges. I accept the evidence of the Ministry's witnesses that no such discussion took place.

152. I have dealt with the evidence Mr Onal gave about his 5 February 2009 email in paragraphs 139 and 140 above. Mr Tuyluoglu was asked by Mr Robinson about meetings that he agreed had taken place during the course of January 2011 with those responsible for the advertising campaign, including IMA. Mr Tuyluoglu accepted that he had had a discussion with Mr Singh about his role.

153. Mr Robinson put to Mr Tuyluoglu that there did not need to be a specific discussion about invoicing because Mr Tuyluoglu was inheriting the way things were operating from Mr Onal. Mr Tuyluoglu said:

> "I don't recall a specific discussion, but I am 100 percent certain that I never, never instructed him [Mr Singh] to alter any third party invoices. I heard a mis-statement from Mr Singh yesterday. That never happened."

I accept Mr Tuyluoglu's evidence.

(d) Taxiadvertising and Pearl & Dean

154. I will deal in due course with the communications between the parties which were said by IMA to show the supposed practice in operation (relied upon to support IMA's case that it was, in fact, agreed). It is convenient to deal first, however, with the two examples that were put to Mr Singh of what the

Ministry said was the fraudulent alteration of invoices carried out in order that IMA could make a margin.

155. So far as this is concerned, as set out above IMA conceded that it had sometimes inserted figures in the media plan which exceeded the costs quoted by media providers; that it had sometimes charged the Ministry more than it had paid media providers in order to make a margin; and that it had altered media provider invoices so that they showed higher amounts than IMA had, in fact, paid. The two examples are, therefore, put forward as examples of a practice which it is accepted existed.

156. In due course, I will have to consider the number of occasions on which the inclusion of inflated figures in the media plans and the rendering of altered or fabricated invoices occurred and the amounts which the Ministry overpaid by reason of these actions. So far as alteration of invoices is concerned, as I explain below the Counterclaim Schedule identifies numerous instances where this occurred.

157. Towards the end of his cross-examination, Mr Singh said that the margin IMA achieved would not have been anywhere near the figure of £911,460.73 included in the Particulars of Claim and the Counterclaim Schedule but would have been around 3-4 percent of the agreed media spend each year.[14] So far as that is concerned:

i) The media plans in my bundles included total media spend figures for each year of $4,500,000, although the sterling equivalent varied

[14] See footnote 11 above and Mr Krolick's reference to a range of 2-3 percent. If the range was 2-3 percent, the figures would be $270,000-$405,000 and £180,000-£270,000.

(presumably for exchange rate reasons) from a little below to a little above £3,000,000.

ii) Over the three year period. Mr Singh's 3-4 percent range would represent $405,000-$540,000 or £270,000-£360,000. That was, accordingly, Mr Singh's own evidence as to how much IMA received by way of margin and the amount by which, according to the Ministry, it overbilled. Mr Krolick's submission was that it was an understatement.

158. It was put to Mr Singh that he never said anything to the Ministry about how much IMA made out of the difference. Mr Singh did not demur but said that it was never a question he was asked. When it was suggested to Mr Singh that he never told the Ministry that IMA was making anything, he said that the Ministry understood that he was providing a service and that the service had a cost. This reinforces my view that there was, in fact, no specific conversation with the Ministry where this supposedly agreed practice was discussed.

159. The two examples that were put to Mr Singh in cross-examination were those that had been raised with IMA before the proceedings were commenced. The first concerned the placement of advertisements on taxis in respect of which IMA contracted with a company appropriately called taxiadvertising. The second was a cinema campaign where the media provider was Pearl & Dean. Both examples related to the 2011 Campaign.

(i) Taxiadvertising

160. The taxi advertising taken out as part of the 2011 Campaign involved an initial three-month campaign which ran in February, March and April 2011 and then a two-month extension which ran in June and July 2011.

161. As set out below, taxiadvertising issued two invoices in respect of the campaign, one invoice number 462 for the original campaign for £110,094.37[15] and another invoice number 472 in respect of the extension for £24,225.00, thus £134,319.37 in all. IMA issued a number of invoices of its own totalling £179,200.00 backed by altered or fabricated taxiadvertising invoices.

162. Mr Singh was cross-examined in some detail about the invoices that IMA had produced, both IMA's own invoices and the invoices submitted by IMA to the Ministry with its own invoices that purported to be taxiadvertising invoices. He was first referred to a document at bundle 4, page 1249 which purported to be an invoice from taxiadvertising, invoice number 472. The invoice referred to purchase order 2084 but the date of the invoice was blank. The detail within the invoice stated:

> "The supply of 150 no. full liveried taxis for the Turkish Tourism Board. Taxis to be based in Central London, Birmingham, Manchester & Glasgow 6th June until 26th July 2011."

The cost that was shown was for the month of July only and was £24,600.

163. Mr Singh was asked whether 150 taxis had ever been booked with taxiadvertising. He confirmed that there had not, and that the invoice in

[15] As the Ministry was not required to pay VAT, the figures I refer to hereafter in relation to taxiadvertising and Pearl & Dean are all ex VAT figures.

question had been altered. He said that the invoice had been prepared by an administrative assistant, Lindsay Swaine, who had worked for IMA on a part-time basis for 6-12 months and who had made an error in not booking enough taxis. Lindsay, he said, was not actually responsible for sending out invoices and the invoice was sent by someone else in the office. He said that he only discovered the error when Mr Tuyluoglu pointed it out to him in 2012.

164. Mr Singh was then asked about another purported taxiadvertising invoice at bundle 3, page 916. This was an invoice dated 1 February 2011, invoice number 462, purchase order 2067. The detail for this invoice said:

> "The supply of 75 no. full liveried taxis for the Turkish Tourism Board. Taxis to be based in Central London, Birmingham, Manchester & Glasgow for the period of 3 months."

The invoice was for the cost for February which was for £33,333.33. This document, Mr Singh agreed, had been sent by IMA to the Ministry because it bore a Ministry stamp.

165. Mr Singh was then shown the document on the preceding page at bundle 3, page 915. This was a taxiadvertising invoice, also dated 1 February 2011, and also bearing invoice number 462 and purchase order 2067. Mr Singh accepted that this was the invoice bearing this number that IMA had actually received from taxiadvertising, i.e., the original, unaltered invoice. The detail provided:

> "The supply of 85 no. fully liveried taxis for the Turkish Tourism Board. Taxis to be based in Central London, Birmingham, Manchester & Glasgow for the period of 3 months only (an additional 4th month will be supplied free of charge in Central London, Manchester & Glasgow. An additional 4th and 5th month will be supplied in Birmingham)."

It will be noted that this invoice was for 85 taxis and not the 75 taxis shown on the altered invoice sent to the Ministry. Below this detail were figures as follows (I omit the VAT and VAT inclusive figures):

"Media cost	£51,250.00
Production cost	£68,750.00
- 15% Agency Commission	£7,687.50
- 5% Agency Commission	£2,178.13
Sub Total	£110,094.37"

Mr Singh accepted that the invoice at bundle 3, page 915 had been partially altered to create the invoice at bundle 3, page 916.

166. Mr Singh was then shown the document at bundle 3, page 922 which described itself as the first of three IMA invoices that had been sent to the Ministry (as was apparent from the Ministry stamp). This invoice was dated 1 March 2011 and bore IMA invoice number 2010. The detail said:

> "Full Livery Taxi Package
>
> 75 Taxis in London
> 75 Taxis across Manchester, Birmingham & Glasgow
>
> Three month campaign to start w/c 15 February"

Mr Singh said that this was prepared by Lindsay or by someone else in his office. The amount billed for the February cost was £36,666.

167. Mr Singh was then shown a second IMA invoice dated 1 April 2011, IMA invoice number 2057 (bundle 3, page 932) in the same terms and in the same amount as that at bundle 3, page 922 but in this case for the March cost (it was marked ″2nd of 3 invoices″). He was also shown the invoice at bundle 3, page 923 purportedly from taxiadvertising dated 1 March 2011, invoice number 472, purchase order 2067, also for the March costs. This bore a Ministry stamp and had thus been sent by IMA to the Ministry. But Mr Singh accepted that this document did not reflect what IMA had actually received from taxiadvertising.

168. The discrepancy relating to the taxi campaign invoices was picked up by the Ministry in early 2012 and it was raised by Mr Tuyluoglu with Mr Singh. On 9 February 2012 Mr Singh wrote to Mr Tuyluoglu explaining what he said had happened, and there was a subsequent exchange of emails between the two of them on 23 and 24 February 2012.

169. In the first of his emails Mr Singh set out the amounts that he said had been billed to IMA by taxiadvertising and the amounts he said IMA had billed to the Ministry (referred to as "TTB" – Turkish Tourist Board) as follows:

> "Taxi invoices to TTB total: 179.200,00 GBP
> Taxi invoices to IMA total: 161,188,10 GBP
> Difference: 18.011,90 GBP
> Outstanding IMA invoices total: 44.600,00 GBP (invoices 2438 & 2439 – taxi campaign)"

Mr Singh said that he proposed to cancel the two outstanding invoices for £44,600 and to credit the difference of £18,011.90 between the figures of £179,200.00 and £161,188.10 against other outstanding invoices. Mr Singh said that the total compensation offered to the Ministry would, therefore, amount to £62,611.90.

170. Mr Tuyluoglu responded saying:

> "According to the contract, IMA must charge our office the same cost as the media charge the agency, without VAT, without adding any profit. All the discounts and the agency commission if there is, must be reflected to us. We pay the service to DDF separately.
>
> IMA have raised invoices for 150 taxis in total across the UK of a total amount of 179.200 GBP. This amount includes the extension. We have realized that the number of taxis were 85 not 150. The cost of the whole activity to IMA was 134,319.37 excluding the VAT which we don't pay. I understand you have just made another mistake and included VAT. You made one more mistake when you insisted that you had received 3 invoices from taxi advertising. I said over the phone there were 2 invoices not three."

171. Mr Tuyluoglu's comment, that IMA was only entitled to charge the same amount that it paid to the media provider and was not entitled to add a profit, is consistent with what, in my judgment, the 2011 Advertising Contract provided. If, of course, there was some agreed understanding and practice whereby IMA could add a mark-up, it would have been wrong or at least only half the story. One might, accordingly, have expected it to be challenged by Mr Singh in his response.

172. Mr Singh's response, however, made no mention of any sort of understanding or arrangement whereby IMA was entitled to apply an uplift and make a profit or indeed entitled to alter media provider invoices. What Mr Singh said was this:

> "Firstly let me apologise for including the VAT in my calculation, as you know we are charged VAT and we do not charge VAT to you. Unfortunately I took the figures from the bottom of the invoices, sorry for that.
>
> I have recalculated the figures as follows:
>
> | | |
> |---|---|
> | Taxi invoices to TTB total: | 179.200,00 GBP |
> | Taxi invoices to IMA total: | 134,323.42 GBP |
> | Difference: | 44876.58 GBP |
> | Outstanding IMA invoices total: | 44.600,00 GBP (invoices 2438 & 2439 – taxi campaign) |
>
> Total compensation will be £89,476.58.
>
> As regards the Invoices from Taxi company – we received three invoices – copies of which I have just faxed to you, two of the invoices totalling £161,188.10 including VAT have been paid.
> The third invoice remains unpaid on our accounting system."

The offer of compensation involved a mistake because it assumed that the outstanding IMA invoices 2438 and 2439 were in addition to, and were not included within, the total of £179,200.00, which it is clear to me they, in fact, were; but the offer was consistent with the position Mr Tuyluoglu had taken,

that the Ministry should pay no more than IMA had itself paid for the taxi campaign.

173. The way in which the figure of £179,200.00 invoiced by IMA had been reached can be seen from two documents: first, a schedule that was put to Mr Tuyluoglu in cross-examination; and secondly, the attachments to an email sent by Paula Windsor of IMA to Ms Ulus on 27 June 2011 (copied to Mr Singh) following a discussion between Ms Ulus and Mr Singh in which Ms Ulus had apparently queried the invoices for February and March 2011.

174. What appears to have occurred is that:

i) IMA initially submitted three invoices to the Ministry (numbers 2010, 2057 and 2257) in respect of the original three-month advertising campaign, each for £36,666,66. These were supported by three (altered) invoices from taxiadvertising two for £33,333.34 and one for £43,333.34.[16] There was then a final IMA invoice 2438 for a further amount of £20,000.02 The IMA invoices total £130,000.00, the amount shown in the 2011 media plan at the relevant time.

ii) Following a query raised by Ms Sahin (the detail of which she said in her oral evidence that she could not recall), on 27 June 2011 IMA invoices 2010 and 2057 appear to have been replaced with two invoices bearing the same numbers but this time each for £43,333.33. Supporting (altered) invoices from taxiadvertising for £43,333.33 were provided. The invoices said that they were the first and second of three

[16] Mr Tuyluoglu's explanation in cross-examination as to how the Ministry came to pay the first two IMA invoices each for £36,666.66 when the supporting media provider invoices were for only £33,333.33 was that these were instalments and that the Ministry was told by IMA that the last media provider invoice would be different as (the altered) invoice for £43,333.34 indeed was.

invoices; assuming a third invoice was submitted in the same amount, the total cost billed by IMA to the Ministry would again be £130,000.

iii) So far as the extension is concerned, IMA rendered an invoice (number 2301) in the amount of £24,600 to the Ministry for the extension of the taxi campaign into June. A further invoice 2439 was rendered in the same amount for July so that the total cost billed by IMA to the Ministry for the two-month extension would be £49,200. This was the same as the amount for the extension in the final 2011 media plan.

iv) The addition of £49,200 charged for the extension to the amount of £130,000 charged for the original campaign would mean that the total amount billed by IMA to the Ministry in respect of the five-month campaign was £179,200.00.

175. The true position was that there were two original invoices from taxiadvertising:

i) A 1 February 2011 invoice (number 462) for £110,094.37 for the period of 3 months from February 2011 (bundle 3, page 915), and

ii) A further invoice dated 27 May 2011 (number 472) for £24,225.00 for the two month extension (bundle 4, page 1083).

On 28 June 2012 taxiadvertising sent an email to the Ministry's former solicitors attaching copies of these two invoices and saying that:

> "These are the only invoices we issued to IMA relation to that campaign."

The total of these two invoices is £134,319.37, almost the same as the figure referred to in Mr Singh's email (there is a £4.05 difference).

176. The third invoice that Mr Singh suggested in his email to Mr Tuyluoglu (and that he suggested in his two witness statements) had been received by IMA from taxiadvertising was identified in the witness statement made by the Ministry's solicitors in support of its application for third party disclosure as a second invoice bearing the invoice number 472. It seems likely, therefore, to have been one of the manipulated invoices.

177. Indeed, it can be seen by comparing the invoice to which Mr Singh refers in his two statements (bundle 4, page 1071) with that issued by taxiadvertising (bundle 4, page 1083) that the dates, invoice numbers, purchase order numbers and narratives match. The costs are different because the invoice to which Mr Singh refers to ignores 20% in agency commissions which had been agreed by taxiadvertising and are reflected in its (genuine) invoice.

178. It is thus clear that there was no third taxiadvertising invoice, as Mr Singh suggested, and that the document Mr Singh refers to is a version of the invoice rendered by taxiadvertising which had been altered so as to remove reference to the agency commissions. This leaves open, of course, the question as to why this would be done; why references to commissions granted by taxiadvertising would be removed? As Mr Krolick submitted in paragraph 11 of his written closing submissions, keeping media provider commissions would be one way in which IMA could obtain a profit. [17]

[17] Mr Singh admitted during his evidence that there were occasions where the media supplier gave a discount but the figure he put in the media plan did not include the discount. He said that it was understood by the directors of the Ministry's London Office that this would be a way in which IMA could make a margin and that it would be done from time to time. Mr Singh said that he didn't have a specific conversation with the Ministry about discounts.

179. The position in summary is thus that IMA invoiced the Ministry £179,200.00 which was some £44,880.63 more than the amount of £134,319.37 it was charged by taxiadvertising, and that it sought to support its own invoices by sending taxiadvertising invoices which were not those that it had received but which had been altered.

180. IMA invoices 2438 and 2439 have, however, not been paid; they are included in the list of unpaid invoices in the annex to IMA's Particulars of Claim. The paid position appears to be that IMA has been billed £134,319.37 by taxiadvertising and that the Ministry has paid £134,599.98, a difference of some £280.61. IMA seeks to recover in respect of invoices 2438 and 2439 as part of its own claim. Plainly, IMA can only do so if it is entitled to recover from the Ministry more than the amount it has actually paid to taxiadvertising.

181. So far as the parties' respective cases relating to taxiadvertising are concerned, the position is as follows.

i) The case presented in Mr Singh's two witness statements is that what happened involved an employee altering invoices and overbilling in order to cover up a mistake she had made in ordering the right number of taxis – an order had been placed for only 85 taxis instead of the intended 150 taxis.

ii) The Ministry's case is, however, that Mr Singh's suggestion of a mistake is not true, and that what happened is that IMA tried to make a profit by pretending to the Ministry that it had booked 150 taxis and using this as a pretext for invoicing for a higher price when IMA had in fact only booked 85 taxis.

182. In my judgment, Mr Singh's explanation for what occurred makes little sense. If, as he says, a mistake had been made by booking only 85 taxis instead of the intended 150, then the only thing that would have been changed on the taxiadvertising invoices (although this would still have involved a misrepresentation) would have been the number of taxis booked. It would not have required IMA to alter the amounts in taxiadvertising's invoices and it would not explain why IMA sought to charge the Ministry more than it had paid to taxiadvertising, as it plainly did and to support that claim by altered invoices which reflected its own inflated charges.

183. What happened in relation to taxiadvertising is, in my judgment and as Mr Krolick submitted, an example of IMA invoicing more than it had paid and altering third party invoices to make a margin.

184. Mr Singh was asked about the fact that IMA's invoices for the taxi advertising campaign were supported by manipulated taxiadvertising invoices. He agreed that they were, but he said that this was the practice that was known about and agreed to by the Ministry's London Office.

185. He was then asked why he did not say anything about the practice to Mr Tuyluoglu in his email (see paragraph 172 above). Mr Singh said that, just as Mr Tuyluoglu's email had not referred to the understanding, he did not allude to it either in his reply. Asked why he did not expect Mr Tuyluoglu to put the understanding in writing, Mr Singh said:

> "Because it was contrary to the contract, and that would have put him in an awkward position … it was nothing to do with the contract. It was a mutual understanding."

In my judgment, the true reason – as reflected in IMA's offer of compensation – is that, as Mr Singh knew, there was no mutual understanding of the kind he suggested at all.

(ii) Pearl & Dean

186. The second example deployed by the Ministry concerned Pearl & Dean, the cinema advertising company.

187. The 7 March version of the 2011 media plan which I was shown identified the net cost of the national cinema campaign as £104,500. The same figure appeared in later versions of the plan.

188. Mr Singh was shown the document at bundle 3, page 919 which appeared to be a Pearl & Dean invoice number 07981 in the amount of £104,500. This was the invoice sent by IMA to the Ministry under cover of IMA's own invoice number 2055 (bundle 3, page 933) in the same amount. The purported Pearl & Dean invoice was dated 14 February 2011 and contained text referring to "Job Ref/Purchase Order No. 2902".

189. Immediately before this document at bundle 3, page 918 was another Pearl & Dean invoice. This was a copy of the original, unaltered invoice that the Ministry had obtained from Pearl & Dean itself. The details of the invoice were in most respects identical to that sent by IMA to the Ministry – it bore the same invoice number 07981, the same date, and it referred to the same Job Ref/Purchase Order No. 2092. But the narrative and amounts were different: the narrative referred to sound lift and BBVF approval and the invoice was for only £337.80.

190. Mr Singh initially baulked at the suggestion that he or someone in his office had changed the Pearl & Dean invoice from an invoice for £337.80 into an

invoice for £104,500, but ultimately he accepted this had been done. He said that IMA received several invoices from Pearl & Dean, which invoiced on a monthly basis, and that these had been consolidated these into one Pearl & Dean invoice at the Ministry's request in order to comply with the media plan which contained a single figure.

191. Ms Sahin denied in her examination in chief that any such request had been made, though she did accept in response to questions in relation to a different media provider that sometimes IMA put cost figures for several months into one invoice of its own.

192. There certainly were a number of original Pearl & Dean invoices:

i) Invoice A81239(1) dated 9 February 2011 for charges for the month of February: £31,818.00 less 45% special discount and 15% agency commission giving a total of £14,874.92 (bundle 3, page 917);

ii) Invoice 07981 dated 14 February 2011 for sound lift and BBFC approval for £337.80 (bundle 3, page 918). This is the invoice to which I referred to in paragraph 189 above;

iii) Invoice A10246 dated 1 March 2011 for charges for the month of March: £63,636.20 less 45% special discount and 15% agency commission giving a total of £29,749.83 (bundle 3, page 924);

iv) Invoice AC1331 (I) dated 17 March 2011 again for charges for the month of March: £14,118.82 less 15% agency commission giving a total of £12,001.00 (bundle 3, page 927); and

v) Invoice A1D337 dated 1 April 2011 for charges for the month of April: £31,818.00 less 45% special discount and 15% agency commission giving a total of £14,874.91 (bundle 3, page 934).

These five invoices together totalled £71,838.46.

193. Mr Singh said in his two witness statements that Pearl & Dean sent two more invoices to IMA. The first invoice he says was dated 9 February 2011 and for £14,874.92, but the document he refers to at bundle 4, page 1076 appears to be simply another copy of invoice A81239(I) referred to in paragraph 192 above. The second, invoice number A10245 dated 1 March 2011 was for £10,001.20.[18]

194. Mr Krolick questioned whether the second of these invoices was a genuine invoice or one of IMA's falsifications, pointing out that it had not been sent by Pearl & Dean or by IMA to the Ministry in response to the Ministry's enquiries. Assuming, however, in IMA's favour, that it was genuine, this would still mean that IMA billed the Ministry £104,500 whereas it only paid Pearl & Dean £81,839.66, a difference of £22,660.34.

195. Mr Singh's evidence in his two witness statements was that the difference – which he put at only £5,785.18 – related to a PR event at a West End cinema proposed IMA in April 2011 and arranged with or through Pearl & Dean. He says that Mr Tuyluoglu agreed that, as there was no specific budget for this event, the cost could be "lost" in the Pearl & Dean cinema campaign.

[18] The figure of £12,001.44 referred to in Mr Singh's witness statements in relation to this invoice is the VAT inclusive figure.

196. So far as this is concerned, the emails in which Mr Singh says the event was agreed were sent on 8 and 14 March 2011. There is an immediate problem, because the figure of £104,500 in respect of the national cinema advertising campaign was already in the 2011 media plan prior to the first of those dates. The figure of £104,500 was thus included in the media plan at a time when the event and its costs were unknown and could not have been communicated to Mr Tuyluoglu.

197. Mr Singh's email of 8 March 2011, in any event, said that the cinema would only charge for the refreshments for the event, and that there would be no charge for the use of the cinema. A suggestion that the cost of the refreshments, whether paid by the cinema or by IMA,[19] might be as much as £22,000 – the true difference between the genuine and the altered invoices – is implausible. Mr Tuyluoglu said in re-examination that he did not remember any agreement with Mr Singh whereby he agreed that IMA would pay for the function and the cost would be "lost" in the Pearl & Dean invoices.

198. It was put to Mr Singh in cross-examination that the difference between £71,000 and £104,000 represented IMA's margin. Mr Singh said that, yes, that would have been the difference. That was not, of course, the account that he had given in his witness statements.

199. I am quite satisfied that the events in relation to Pearl & Dean – IMA's inclusion of the figure of £104,500 in the media plan and its rendering of an invoice in this amount supported by an altered invoice from Pearl & Dean –

[19] Mr Tuyluoglu said that he did not know whether IMA had paid these costs, but the Ministry's London Office had a budget for things other than the advertising campaign and could have paid these refreshment costs itself.

represent an example of IMA including figures in the media plan greater than those provided by the relevant media providers and then billing this amount notwithstanding that it is more than IMA is itself required to pay in order to earn a margin.

200. It follows that both Mr Krolick's examples are, in my judgment, good ones.

(e) The Practice in Operation

201. IMA's case, that there was a variation of the Advertising Contract which allowed IMA to make a margin in this way, rests in part on the discussions which it contends took place with Mr Onal and Mr Tuyluoglu. I have dealt with this in paragraphs 124 to 153 above.

202. IMA also relies, however, on various communications between IMA and the Ministry's London Office (and some between IMA and certain overseas Ministry offices) which, it submits, show the Ministry requesting alterations to invoices, including media provider invoices, and demonstrate the Ministry's London Office's knowledge and agreement that IMA should "bill to the media plan".

203. A number of such communications were relied upon in paragraphs 13.4 to 13.6 and 13.8 to 13.10 to and 13.12 and 13.13 of the RARDC. Some of these, and also some others were referred to in IMA's written opening submissions and in paragraph 22 of Mr Singh's second witness statement. I have considered them all, but the communications relied upon included, in particular, the following:

i) Communications between Mr Onal and IMA on 16 April 2009 concerning the purchase of an Irish Sunday Tribune supplement;

ii) A request made by Ms Sahin to Mr Singh on 15 July 2009 that Mr Singh should change the dates on certain invoices;

iii) An email from Mr Onal to Mr Singh on 14 August 2009 again relating to the dates on certain invoices;

iv) An email exchange between Ms Sahin and Mr Singh on 11 and 13 September 2009 referring to invoices requiring amendment;

v) An email from Ms Sahin to Mr Singh on 29 March 2010 which dealt with a proposed change in the date and amounts of invoices;

vi) An email from Ms Windsor of IMA to Ms Sahin on 6 April 2010 enclosing various amended invoices for the UK (see paragraph 174 ii) above);

vii) An email of 20 May 2010 from Ms Sahin regarding third party invoices which were needed to support missing television adverts (or "spots");

viii) Communications between Mr Onal and Mr Singh on 7 June 2010 in relation to the "Istancool" media event which was being sponsored by the Ministry;

ix) A 10 December 2010 email from Mr Onal to Mr Singh concerning third party invoices for advertising panels at Gatwick and Heathrow airports;

x) An email exchange between Mr Singh and Mr Tuyluoglu on 14 January 2011 in relation to the obtaining of approval from Ankara for the 2011 campaign; and

xi) A request made by Mr Tuyluoglu on 15 June 2011 that a media purchase with "The Business Year" be amended from Euros to Sterling and included in the media plan.

204. The Ministry's witnesses were cross-examined about these various communications. There was, however, a certain amount of common ground.

205. Mr Tuyluoglu's evidence, both in his witness statement and orally, was that the media plan, once agreed, had to be followed rigidly (though the Advertising Contracts provided that changes could be made to the media plan and it is plain that changes were made from time to time, for example to add in an advertisement in the Thomas Cook inflight magazine agreed by Mr Tuyluoglu in May 2011).[20] Mr Onal's oral evidence was to the same effect. Ms Sahin explained in her witness statement that:

> "[…] the media plan has to match the invoices provided by IMA, and IMA's invoices had to match the photocopy of the invoice of the media provider."

In that general sense, the proposition that IMA had to bill to the media plan was not disputed.

206. Ms Sahin also agreed in her witness statement that she sometimes asked IMA to make changes to its own invoices.

[20] Mr Tuyluoglu said that the inflight magazine advertisement had been agreed with the approval of the Ministry's Head Office in Ankara. His evidence was, indeed, that Ankara's approval was always needed even where the new expense fell within the reserve included in the approved media plan, although he said it could be obtained orally. Mr Onal's statement, paragraph 6, suggested that agreement from Ankara was not needed where the item fell within the reserve, but he clarified his position in his oral evidence. If there is a difference between their evidence, it is not one which I regard as material to the issues I have to decide.

i) In paragraph 8 she explained how in 2009 and 2010 (and, she said orally, in 2011 as well) there were delays in funding and that the Ministry's London Office obtained funds from DOSIM. Under the applicable Turkish regulations, invoices paid using DOSIM funds had to be dated after the funds were received by the London Office. Ms Sahin said that the Ministry had sometimes asked Mr Singh to amend the date on IMA invoices to comply with the regulations. Mr Onal said the same in his statement.

ii) In paragraph 9 Ms Sahin explained that occasionally IMA would make mistakes in its invoices in that they differed from the media provider's invoices by a few pence and that, where this happened, she would ask Mr Singh to amend IMA's invoice so as to match exactly the price paid to the media provider.

In paragraphs 10 and 11, Ms Sahin gave examples of this. She denied in her statement that she had ever asked Mr Singh to change a third-party media provider invoice.

207. This last point was disputed. IMA submitted that it had been asked to change not just its own but also media provider invoices. Mr Robinson referred in his skeleton argument to two particular exchanges, the first in September 2009, where he said the Ministry's Stockholm Office had asked IMA to make changes to a media provider invoice, and the second a similar request said to have been made by the Ministry's Helsinki Office on 20 May 2010.

208. These two instances concerned overseas offices, and the London Office employees who gave evidence before me predictably had no personal

knowledge of the detail of the communications and could do little more than comment on the documents they were shown.

209. Mr Tuyluoglu was asked about a request by the Ministry's Stockholm Office in relation to outdoor adverts that "all outdoor sizes and dates should be shown in the Third persons invoices". He said that this did not surprise him. He was then asked about a request made by the Stockholm Office in relation to a press advert involving a media organisation called Batliv which said:

> "In third persons invoice media buying is cheaper than you reflected to us. According to our confirmation you should reflect all reductions to us or CHANCE [sic] the third persons INVOICE (media buying should not be less than 26163.00)."

210. Mr Tuyluoglu said that he was surprised by the reference to changing the third person's invoice and to the fact that media buying should not be less than a specified sum and believed that it was an error. He said the same in relation to a similar reference in relation to another press advert concerning Tva Dagar. He pointed out the statement that IMA was to reflect all reductions in its invoices and said that he believed that the words that followed were a misinterpretation.

211. Mr Tuyluoglu said that if the cost of the media was less than that provided for in the plan, then IMA could raise an invoice for an amount less than the plan: the Ministry, he said, didn't mind paying less than the plan; what it objected to was paying more. He said that, although it was unusual for the costs in the plan to change, because deals would be done with media suppliers at the start of the year, if the campaign cost more then, if this was approved by Head Office, then the Ministry would pay more.

212. It was suggested to Mr Tuyluoglu that the Ministry's report and correspondence in relation to advertising campaigns in Holland in which IMA was also involved also demonstrated that IMA was billing to the media plan. It was put to him that, if IMA paid media providers more than the media plan allowed, that was its bad luck; if, on the other hand, IMA paid less, then IMA would receive cash for its cash flow. Mr Tuyluoglu said that, if that happened, it was wrong and contrary to the Advertising Contract.

213. Mr Tuyluoglu was asked whether, upon checking IMA invoices, he was surprised that there was not one penny difference between those invoices and the media plan. He said he was not, and that the two had to match. He said that he didn't expect any changes from the proposals that were received by IMA from the media providers at the start of the year.

214. So far as the particular communications referred to in paragraph 203 above (and others that were put to the Ministry's witnesses), Ms Sahin was asked about an email from Mr Singh email to her dated 25 March 2009 in which Mr Singh said he would drop in today to go through some of the first invoices "all prepared as agreed with Irfan", i.e., with Mr Onal.

215. Mr Robinson pointed out that the word that was used was "prepared" not "submitted" or "accompanied". Ms Sahin was asked about her own use of the word "prepare" in her email to Mr Singh of 15 July 2009 (paragraph 203 ii) above). Ms Sahin said that what she meant by it was to check the invoices so that they were ready for the Ministry's accounting systems. As for her request for the dates of some invoices to be changed, Ms Sahin said that she was referring to IMA's invoices and that she never asked IMA to change a third-

party invoice. She said in re-examination that, if a change had to be made to a third-party invoice, for example to correct a description of the service provided, whilst she would speak to IMA because she could not speak directly to the providers, she expected any correction to be made by the providers themselves.

216. Ms Sahin was asked about her email of 11 September 2009 (see paragraph 203 iv) above) in which she sent Mr Singh a list of invoices that needed to be changed. Most of these were concerned with the invoice dates, but she was asked about an invoice concerning Yachting World (row 56 of the Counterclaim Schedule), where her email said that there was a difference between the IMA invoice and the supporting invoice.

217. Ms Sahin said that she was questioning why there was a difference; sometimes, she said, the IMA invoices were slightly different, perhaps because of a typo. It was put to her that she was obviously looking at two invoices with different amounts and that it was the third-party invoice that was ultimately changed. She did not agree.[21] Similar points were made in relation to queries she raised in relation to invoices in relation to Irish Travel Trade News and the Observer where she had spotted a difference in the amounts.

218. Ms Sahin was asked in that regard about a number of line entries in the Counterclaim Schedule. She accepted that on some occasions IMA had amalgamated media charges for several months into one invoice of its own. It was put to her, and she accepted (by reference to row 56 of the schedule), that

[21] The relevant invoices were not put to Ms Sahin and presumably were not in the bundles, so it was impossible to tell.

there were discrepancies between IMA's invoices and the supporting invoices (in this particular case in the order of pence). She said maybe the Ministry's London Office did not notice.

219. Mr Onal was asked about Mr Sahin's email to Mr Singh on 29 March 2010 (see paragraph 203 v) above). The email referred to Mr Onal, queried the date on an invoice, and asked Mr Singh to change the date and the amounts. Mr Onal said that he didn't remember what the situation was but guessed that there was something technically wrong with the invoice.

220. Both Ms Onal and Ms Sahin were asked a number of questions about Ms Sahin's email exchange with Mr Singh on 20 May 2010 (see paragraph 203 vii) above).

221. In her email Ms Sahin had said that she was missing media provider invoices in relation to a number of spots placed with ITV. The total, she said, should be 266 but the media provider invoices that had been sent referred only to 177. Ms Sahin asked Mr Singh to resend the document showing exactly 266 spots and made a similar request in relation to spots placed with Travel Channel. The last line of Ms Sahin's email said:

> "Could you check and amend amounts and spots and get back to us."

222. Mr Onal said that he thought that Ms Sahin was just asking for a technical error to be amended: she knew, he said, that the Ministry should have received 266 spots; she believed that the Ministry had received that number of spots; but that this was not reflected on the invoice provided.

223. Ms Sahin's own evidence was that what was missing was not the third-party invoice but "back-up" transmission reports providing supporting evidence that the adverts had actually been shown. She said in answer to questions in cross-examination that she had back-up reports for 177 spots but wanted Mr Singh to resend any other transmission reports he had. In re-examination she said that, as the media plan called for 266 spots, she thought Mr Singh might have forgotten to send something.

224. Ms Sahin said that she would not have been satisfied with back-up for 266 spots if there hadn't actually been 266 spots and in those circumstances the Ministry could not pay. If, she said, she had discovered that the documents submitted by the third-party were false and told lies, she said she would have asked IMA to repay the Ministry.

225. The Istancool event (see paragraph 203 viii) above) was dealt with at paragraph 5 of Mr Onal's witness statement. Mr Onal explained that some money was required to be paid in advance; that IMA paid what was required on the Ministry's behalf because the London Office was waiting to receive its budget; and that IMA then invoiced the Ministry and was paid in full.

226. Mr Onal was asked about his 7 June 2010 email to Mr Singh where he explained he needed help doing this. Mr Onal accepted that he had asked for a favour, and that IMA paid this invoice for the Ministry, but he said IMA was paid back. Mr Onal was also asked about another instances where IMA paid a sum for the Ministry concerning Dance Europe. There, the media plan provided for one insertion at a price of £1,000 but the Ministry booked three more directly and asked IMA to pay on the Ministry's behalf, which it did.

The invoice for these three insertions indicated that the price per insertion was £795 not the amount of £1,000 included in the media plan for the one. It appears that the Ministry did not query why the price was different.

227. In relation to differences in prices, Mr Onal was asked about an exchange on 26 July 2010 in relation to ITV (row 6 on the Counterclaim Schedule) in which Mr Singh explained the invoices IMA had issued. It was put to Mr Onal that, whilst the email showed that IMA was billing to the media plan, the Counterclaim Schedule indicated that IMA had, in fact, paid a little over £20,000 more than it had charged the Ministry.

228. Mr Onal was asked about other entries on the Counterclaim Schedule in relation to advertising in the Guardian and the Daily Mail which Mr Robinson suggested showed that IMA was billing to the media plan even if the media provider charged more. It was put to Mr Onal that it was clear to the Ministry that IMA was not billing the Ministry the amount it was charged itself. Mr Onal did not agree.

229. Mr Onal was asked about his 10 December 2010 email to Mr Singh (see paragraph 203 ix) above) about the Heathrow and Gatwick advertising panels. In the email, Mr Onal had said:

> "[…] could you send third party invoices regarding the Heathrow and Gatwick panels. The invoices I have do not mention the quantity of the panels and amend with the amounts."

Mr Onal said that he did not remember, but what he probably meant was that the number of panels and amounts in the third-party invoices should match the media plan. He said that once the services had been completed, the Ministry would receive the invoices and pay them, but they had to be in line with the approved media plan. If the invoices were wrong or contained mistakes, the Ministry would ask them to be rectified.

230. Mr Robinson put to Mr Onal that his email asked Mr Singh to amend the invoices, the suggestion being (similar to that put to Ms Sahin) that the Ministry was asking Mr Singh to amend media provider invoices himself. Mr Onal said that this was not what he meant; what he meant was that the third-party should make the amendment and correct the mistake in its invoice, not Mr Singh. He had written to Mr Singh because the Ministry was not in contact with the third parties.

231. I have focussed in the paragraphs above upon what seem to me to be the principal documents that were relied upon by Mr Robinson in cross-examination and in his submissions, although I have considered all the documents he referred to. In my judgment, they do not establish the Ministry's acceptance of and agreement to the Ministry to the practice IMA suggests.

232. Certainly, the evidence shows that staff in the Ministry's London Office picked up what they perceived to be discrepancies or inadequacies in the documents provided to them; it also shows that they asked for corrections to be made; and, as the Ministry's witnesses accepted in their own evidence, they asked for the dates of some of IMA's own invoices to be changed in order to allow them to be paid out of DOSIM funds. It might also be said, I accept, that there were sometimes discrepancies between IMA's invoices and the supporting materials which the Ministry's London Office might have spotted.

233. In my judgment, however, all this falls far short of what is required to establish the agreement of the Ministry's London Office to the practice alleged: a practice whereby IMA would include figures in the media plans

which represented an uplift on the figures provided by media providers; where IMA would issue invoices which, contrary to the terms of the written Advertising Contracts, would seek to charge the Ministry more than IMA had itself paid in order to create a margin; and where IMA, again contrary to the written terms of the Advertising Contracts, would not provide genuine media provider invoices but would provide altered invoices to support its claimed figures.

234. As Mr Singh effectively accepted, this practice, if followed, would involve at least a deception of the Ministry's Head Office in Ankara, which would proceed on the basis that under the terms of the Advertising Contracts it was getting the services of both DDF and IMA for the 5 percent commission paid to DDF. It would involve staff at the Ministry's London Office acting in serious dereliction of their duties to the Ministry and, in reality, dishonestly. It is improbable that they would do so, and the evidence I have heard does not justify such a finding.

235. The Ministry did not advance an alternative case that, if there had been an agreement between IMA and staff at the Ministry's London Office in the terms suggested, the Ministry's London Office would be acting outside any actual or ostensible authority it had to bind the Ministry. In my judgment, it had no need to do so. I am satisfied that an agreement in the terms IMA suggested did not exist.

(f) Conclusion

236. I determined in paragraphs 93 to 113 above that the written Advertising Contracts, on their proper construction, did not entitle IMA to charge the

Ministry more than IMA was liable to pay media providers in relation to the campaigns carried out on the Ministry's behalf and did not entitle IMA to submit altered media provider invoices in order to support its own (inflated) invoices.

237. As Mr Robinson acknowledged in his closing submissions, an essential ingredient in any claim that the Advertising Contracts was varied is proof that different terms had been agreed. For the reasons set out above, I am not satisfied that there was any such agreement. IMA's claim that the Advertising Contracts were varied in the manner suggested thus fails.

E. IMA's Claim

238. IMA's claim, as summarised in paragraph 3 above, is for the amount of its unpaid invoices in total £250,700.02 and €170,450. The 33 unpaid IMA invoices making up this sum appear in the trial bundles at immediately behind the Particulars of Claim.

239. In accordance with my findings, under the terms of the Advertising Contracts IMA is only entitled to charge the Ministry the amount that it has paid to the relevant media providers. IMA admits that in some cases it has invoiced the Ministry for greater amounts. The unpaid taxiadvertising invoices numbers 2438 for £20,000.02 and 2439 for £24,600.00, together amounting to £44,600.02, are an established example.

240. What of the remaining 31 invoices? So far as that is concerned, given IMA's admitted practice of sometimes billing the Ministry for amounts greater than those it was required to pay, I cannot be satisfied without more that these invoices accurately represent the amounts that IMA was required to pay to the

relevant media providers. It has not been suggested that IMA did not secure the advertising that these invoices describe, but it is for IMA to prove the price agreed with the media providers and what it had to pay.

241. This ought to have been relatively easy.

i) IMA could have produced the original, unaltered invoices rendered by the media providers; it might have also produced email or other correspondence with media providers setting out their quotations; if it did not have them, it might have obtained copies of invoices or correspondence from the media providers themselves.

ii) In addition, by way of proof of payment, it could have produced receipts, bank records or credit card statements, or evidence from the media providers themselves of what it had paid.

In the great majority of cases, IMA has, in fact, produced none of this.

242. Mr Robinson sought to rely in paragraph 17 of his written closing submissions and orally upon the Counterclaim Schedule as evidence of what, in relation to the unpaid IMA invoices, IMA had paid itself.

243. The difficulty with this submission, however, is that I was told in paragraph 12 of the Ministry's written opening submissions, and it appears generally to be the case subject to a small number of exceptions, that the Counterclaim Schedule includes only invoices which have been paid by the Ministry and that it does not include the invoices which are the subject of IMA's claim.

244. Furthermore, whilst Mr Robinson was able to point to rows within the Counterclaim Schedule which made reference to original invoices from the relevant media providers, in no case was the amounts of the listed media provider invoices the same as those on the IMA invoices. The media provider invoices that were included in the Counterclaim Schedule were, furthermore, set alongside those IMA invoices that the Ministry had paid in calculating what the Ministry said was the Overpaid Balance (see paragraph 20 above). If unpaid IMA invoices were added to the schedule, that would simply serve to increase the discrepancy between the amounts billed by the Ministry and the amount of the original media provider invoices issued.

245. There are four exceptions where information showing the price IMA agreed or paid to the relevant media provider supporting the amount claimed in its invoice is available.

i) At bundle 1, page 14.15 is an IMA invoice number 2427 for an amount of £5,000.00 in respect of an advertisement placed in Business Destinations. The bundles include an email exchange between Mr Singh and Mr Tuyluoglu on 17 and 19 June 2011 in which the price of £5,000.00 is referred to and the placing of the advertisement specifically approved. It appears that in this case IMA's invoice reflects the amount it was actually charged.

ii) Similarly, at bundle 1, page 14.22 is an IMA invoice number 2437 for an amount of £2,200.00 in respect of an advertisement placed in Conference & Media World. The bundles include an email exchange between Mr Singh and Mr Tuyluoglu on 8 and 9 September 2011 in

which the price of £2,200.00 is identified and agreed. Here again, IMA's invoice appears accurately to reflect the amount it was charged.

iii) At bundle 1, page 14.26 is an IMA invoice number 2454 for an amount of £5,250.00 in respect of an advertisement in Square Meal Magazine. The bundles include an email from Mr Tuyluoglu to Mr Singh dated 17 November 2011 which identifies the price of the advertisement as £5,250.00 and in which Mr Tuyluoglu asks Mr Singh to book the advertisement. Mr Krolick confirmed in his oral closing submissions that IMA was entitled to recover for this amount.

iv) At bundle 1, page 14.32 is an IMA invoice number 2414 for an amount of €950.00 in respect of an advertising in July 2011 in the Golf Digest magazine in Ireland. The Counterclaim Schedule in row 50 identifies a genuine media provider invoice in this amount, and, in my judgment, IMA is entitled to recover the amount claimed.

I accept therefore that IMA is entitled to recover the amounts set out in these four invoices, in total £12,450.00 and €950.00. IMA has otherwise not proved its claim.

246. IMA's primary claim was that the terms of the Advertising Contracts entitled it to charge a margin, but in paragraphs 21 and 22 of its written closing submissions it advanced alternative claims in unjust enrichment (which it also referred to as a claim for a quantum meruit).

247. Mr Robinson referred me to a passage in the judgment of Lord Clarke of Stone-Cum-Ebony JSC in *Benedetti v Sawiris* [2014] QC 938 at [10] where Lord Clarke set out the elements of a claim in unjust enrichment. As Lord Clarke made clear in the preceding paragraph of his judgment, however, the

case before him was one where there was no valid and subsisting contract between the parties and his statement of principles was made in that context. As Lord Clarke said:

> "The position is different if there is a contract between the parties. Thus, if A consults, say, a private doctor or a lawyer for advice there will ordinarily be a contract between them. Often the amount of his or her remuneration is not spelled out. In those circumstances, assuming there is a contract at all, the law will normally imply a term into the agreement that the remuneration will be reasonable in all the circumstances. A claim for such remuneration has sometimes been referred to as a claim for a quantum meruit. In such a case, while it is no doubt relevant to have regard to the benefit to the defendant, the focus is not on the benefit to the defendant in the way in which it is where there is no such contract. In a contractual claim the focus would in principle be on the intentions of the parties (objectively ascertained)."

248. Here, there is a valid and subsisting contract, and as I have explained earlier it provides expressly for a commission to be paid to DDF as remuneration for the services provided by DDF and its "Contracted Media Planning and Buying Partner" IMA. A claim in unjust enrichment cannot be used to subvert the parties' bargain and to provide for additional remuneration which has not been agreed.

F. The Ministry's Counterclaim

249. The Ministry claims damages for breach of the Advertising Contracts in respect of sums paid by it in response to IMA invoices which charged the Ministry more than IMA was obliged to pay itself and which were supported by altered media provider invoices.

250. The Ministry also claims damages against IMA for deceit in the two respects I identified in paragraphs 10 and 11 above, the first relating only to the 2011 Campaign and the second relating to the 2009, 2010 and 2011 Campaigns. It

also seeks to hold Mr Singh personally liable in deceit and for the tort of inducing IMA to breach the Advertising Contracts.

1. The Ministry's Contractual Claim

251. So far as the contractual claim is concerned, I have determined that the Advertising Contracts on their proper construction only permitted IMA to bill the Ministry for amounts for which it was liable to the media providers and that IMA was obliged to submit in support of its own invoices copies of original, unaltered media provider invoices.

252. I have rejected IMA's case that IMA was entitled under the Advertising Contracts to make a margin by charging the Ministry more than it was obliged to pay or was entitled to tender altered media provider invoices as IMA itself admits (and as it is established) that IMA sometimes did. I have rejected IMA's case that the Advertising Contracts were varied to this effect.

253. It follows that in tendering altered media provider invoices and in billing the Ministry more than it was itself obliged to pay IMA was in breach of the Advertising Contracts. I reject IMA's pleaded case that any breach of contract was waived; the ingredients for waiver are simply not made out. I will consider in due course how frequent these breaches were and what loss the Ministry has suffered as a result.

2. The Deceit Claims

254. In paragraph 7 of his written closing submissions, Mr Robinson set out the matters he said the Ministry would have to establish in order to make out its claim in deceit, drawing on *Clerk & Lindsell on Torts* (22nd ed.), paragraphs 18-01 to 18-48.

255. The ingredients of a claim in deceit are, of course, well-known deriving from *Derry v Peek* (1889) 14 App Cas 337 and other cases referred to in the lengthy passage in *Clerk & Lindsell* that Mr Robinson cited. What the Ministry had to prove, Mr Robinson said, was as follows:

> "7.1 IMA represented that the invoices which it submitted were true copies of original third party invoices;
>
> 7.2 IMA represented that the figures entered into the media plan were the costs which IMA had received from third parties;
>
> 7.3 Such representations were false, as IMA knew;
>
> 7.4 IMA intended for the Ministry to rely on the representations, i.e. intending the Ministry to be deceived;
>
> 7.5 The Ministry did in fact rely on them;
>
> 7.6 The Ministry has suffered loss as a result."

256. As will be appreciated, this compendious description embraces both the first and the second aspect of the deceit claim: the representation in paragraph 7.2 relates to the first aspect; the representation in paragraph 7.1 refers to the second aspect; the ingredients in paragraphs 7.3 to 7.6 are common to both. In broad terms, I accept this description as accurate.

(a) The Alleged Deceit in Relation to the 2011 Media Plan

257. So far as the first aspect of the deceit claim is concerned, Mr Robinson submitted that no representation was made by IMA that the figures included in the 2011 media plan were figures that IMA had received from the media providers; and/or that the staff in the Ministry's London Office did not understand a representation to have been made in these terms and therefore did not rely upon it.

258. Mr Robinson referred in this context to the evidence of Mr Tuyluoglu that he understood that the figures entered into media plan were fixed costs that IMA would pay to media providers derived from deals he understood would be done between IMA and the media providers at the beginning of each year, contrasting that with Mr Onal's evidence that he understood that the costs (or some of them) were estimated costs and were subject to availability.

259. I am not sure that the difference between the evidence of Mr Tuyluoglu and Mr Onal was as stark as Mr Robinson presented it; Mr Tuyluoglu acknowledged at an early stage in his evidence that some of the figures in the media plan were stated to be subject to availability. In my judgment, however, the point Mr Robinson sought to make misses the point. The issue is not whether the figures included in the media plans were represented to be fixed costs or subject to availability; it is whether the figures (whatever their nature) were represented to be figures that reflected the costs provided by the media providers themselves as opposed to figures which would or might include an uplift applied by IMA in order to achieve a margin.

260. So far as that is concerned, whether any, and if so what, representation was made by a party depends upon how its words or conduct in question would be understood by a reasonable recipient. The test is objective and contextual; any statement must be construed in the context in which it was made and interpreted objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee.

261. In the present case, we are concerned with a representation allegedly made in the 2011 media plan. An important part of the context is the 2011 Advertising Agreement, signed by the parties in late 2010 (and the earlier Advertising Contracts which were in materially identical terms) and what they provided in relation to what and how IMA was to bill. As I explained earlier, article 9 D) provided that IMA, as the Contracted Media Planning and Buying Partner was bound to:

i) Confirm that all invoices submitted by third parties were correct and proper;

ii) Ensure that the Ministry benefited from "all types of discount" and to reflect "all discounts exactly as given by the media buyers or media companies";

iii) Provide "certified copies of the net media invoices (received from the media organizations that run the ads)".

Article 9 B), it will be recalled, provided that the Ministry was not responsible for paying any kind of fee not written in the Advertising Contract or approved by the Ministry within the framework of the approved media plan.

262. In this context, the figures included by IMA in the "net cost" or "negotiated cost" columns of the 2011 media plan would, in my judgment, be understood by a reasonable representee in the Ministry's position as reflecting the figures provided to IMA by the media providers, whether they might be fixed costs or subject to availability, without any uplift. I accordingly find that the representation identified in paragraph 7.2 of Mr Robinson's statement of ingredients made out.

263. Was this representation false? Plainly, to the extent that IMA inserted figures in the 2011 media plan which included an uplift on the figures it had received from the media providers, it was. Mr Singh accepted in his evidence that this occurred. I will consider with what frequency it occurred when I come to consider the extent of the loss suffered by the Ministry as a result of this misrepresentation (recognising that loss is an essential ingredient in a claim for deceit).

264. In my judgment, it is also the case that IMA knew that the representations were false and that it intended the Ministry to rely upon them and to be deceived. Mr Singh knew that the written terms of the Advertising Contracts entitled IMA to bill only that which it was required to pay media providers. I have already rejected the suggestion that there was some agreed understanding whereby IMA would be entitled to bill greater amounts, and having heard him give evidence, I am satisfied that, despite his attempts at times to assert the contrary, Mr Singh knew that there was no such understanding. In that context, Mr Singh would have well understood that the figures inserted in the 2011 media plan would be taken by the Ministry as representing the figures IMA had been given by the media providers and he and IMA intended them to rely upon them as such. His purpose in including uplifted figures was to provide a basis for IMA to charge the Ministry a secret and unauthorised margin.

265. Mr Tuyluoglu and Ms Sahin gave evidence in their statements that they understood that the costs in the media plan were based on Mr Singh's negotiations with the media providers. I do not regard them as meaning by

this that they believed that the figures were based on the figures given by the media providers in some loose sense – that IMA took those figures, but then applied its own uplift. Rather, and consistent with their oral evidence in relation to invoicing, they understood that the figures in the media plan were the figures given by the media providers. I am satisfied that the Ministry relied upon the representation to that effect.

(b) The Alleged Deceit in relation to Media Provider Invoices

266. In the ordinary way, where one party to a contract provides to the other party to that contract with a copy of an invoice which has been issued to the first party by someone else, it is implicitly represented that the copy provided is a true copy of the original invoice, or at least is believed by the party providing it to be so; or, to put the point another way, it is implicitly represented that the party providing it is not aware that it is fake or has been altered.[22]

267. In the present case, the fact that such a representation was implicitly made by IMA in relation to the media provider invoices it submitted to the Ministry along with its own invoices is reinforced by the terms of the Advertising Contracts. As I have already explained, article 9 D) required IMA to confirm that all invoices submitted by third parties were "correct and proper" and indeed to provide "certified copies" of those invoices. A copy of an invoice cannot sensibly be confirmed as correct and proper, still less certified, if it is known to be a fake or an altered document.

[22] See, by way of analogy, the example given in the section from *Clerk & Lindsell* cited by Mr Robinson (in paragraph 18-08) of presenting company accounts to a prospective buyer in the knowledge that they had been doctored (citing *Man Nützfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) at [79] (Moore-Bick LJ).

268. Of course, I accept, there might be circumstances where no such representation was made: where (although the circumstances in which this would occur would be likely to be unusual) the party receiving copies of the third party invoices knew that they had been altered and that what it was being provided with were not, in fact, true copies. Reliance on any contrary representation would, in those circumstances, be impossible. But, as I have determined in rejecting IMA's case that there was an agreement and understanding between IMA and the Ministry's London Office to this effect, that is not the case here.

269. It follows that when IMA sent the Ministry copies of fake or altered media provider invoices, it made false representations. Inevitably, because it had copies of the original, genuine invoices, it knew that the representations were false. For the reasons I have given already, I am satisfied that IMA in the person of Mr Singh knew that there was no agreed understanding or practice whereby copies of fake or altered invoices could be provided and I am satisfied that IMA intended the Ministry to rely upon the copies it sent as copies of the genuine invoices that they purported to be, and the Ministry did so.

(c) Conclusion

270. I deal with the extent and frequency of IMA's inclusion of uplifted figures in the 2011 media plan and alteration of invoices (and its making of false and fraudulent misrepresentations) and the loss suffered by the Ministry as a result below. In principle, however, I am satisfied that the Ministry has established both aspects of its claim in deceit.

G. The Claims against Mr Singh

271. I deal next with the personal claims against Mr Singh. As I indicated earlier there were two such claims: inducing IMA's breach of the Advertising Contracts and personal liability for deceit.

1. Inducing Breach of Contract

272. The inducement claim concerns IMA's breach of the Advertising Contracts in submitting altered media provider invoices in support of its own inflated charges.

273. As to whether Mr Singh could be held liable for inducing this breach, Mr Robinson submitted in paragraphs 32 and 33 of his written opening submissions that:

i) A director of a company will not be liable for inducing that company's breach of contract with a third party where he acts bona fide and within the scope of his authority: *Said v Butt* [1920] 3 KB 497, 505-6 (McCardie J); *Welsh Development Agency v Export Finance Co Ltd* [1992] BCC 270, 289-290 (Dillon LJ), 295 (Ralph Gibson LJ);

ii) The tort of inducing breach of contract is an intentional tort, and so Mr Singh can only be liable if he had actual subjective knowledge that he was procuring a breach of contract, intended to procure the breach and actually did so: *OBG v Allan* [2008] 1 AC 1 at [39]-[44] (Lord Hoffmann).

274. Both points are well founded as a matter of authority. The first is, in my judgment, the impediment to the Ministry's claim, and Mr Krolick had no

answer to it, either in his written or his oral closing submissions. Mr Singh acted as, and within the scope of his authority as, a director of IMA and is not liable for procuring IMA's breach of the Advertising Contracts.

2. Personal Liability for Deceit

275. In *Standard Chartered Bank v Pakistan Shipping Corpn* [2003] 1 AC 959 the House of Lords considered a case where Mr Mehra, a director of one of defendants, Oakprime Ltd, had falsified documents with the intention of inducing the claimant bank to rely upon them in paying out money. The trial judge found Mr Mehra liable in deceit. He appealed to the Court of Appeal, arguing successfully that he made the fraudulent misrepresentation on behalf of his company and not in a personal capacity. The House of Lords reinstated the trial judge's decision.

276. Lord Hoffman dealt with the position of Mr Mehra at paragraphs [20] to [22] of his speech:

> "20. My Lords, I come next to the question of whether Mr Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think that it is unfair. Mr Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr Mehra's representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr Mehra's representation, because otherwise there could have been no representation and no attribution.

> 21. The Court of Appeal appear to have based their conclusion upon the decision of your Lordships' House in Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830. That was an action for damages for negligent misrepresentation. My noble and learned friend, Lord Steyn, pointed out that in such a case liability depended upon an assumption of responsibility by the defendant. As Lord Devlin said in Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, 530 , the basis of liability is analogous to contract. And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.
>
> 22. This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying: "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." Evans LJ *[2000] 1 Lloyd's Rep 218, 230* framed the question as being "whether the director may be held liable for the company's tort". But Mr Mehra was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the way he did, Evans LJ answered it by saying that the fact that Mr Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud."

277. The ratio of the decision is, thus, that a company director who commits all the ingredients of the tort of deceit is liable personally whether or not the company for which he acts is also liable because his conduct is attributed to the company or because the company is vicariously liable. Unlike the position in relation to negligence, liability in deceit does not depend upon whether the director can be said to have assumed personal responsibility.

278. That being so, the question I ask myself is whether the deceits alleged against IMA are deceits committed by Mr Singh himself. Were the false representations alleged by the Ministry in relation to the 2011 media plan and in relation to the tendering of altered media provider invoices false representations made by Mr Singh? Did he know they were false, and did he

intend the Ministry to rely upon them as I have found it did, causing the Ministry to suffer loss?

279. In my judgment, the answer to each of those questions is, yes. So far as the entries in the 2011 media plan are concerned, the material in my bundles indicates that it was Mr Singh who was principally responsible for negotiating with media providers, and, as such, he knew the prices that they had quoted. Mr Singh accepted that higher figures were inserted in the media plan; the extent of the increase, he said in his evidence, would be within a range but might be up to 10 percent. It was put to him that the decision as to what figures were put in the media plan was his, and he agreed. The final decision maker he said would be him. Whether or not the media plan containing the inflated figures was sent to the Ministry by an employee, it was Mr Singh who included the inflated figures which gave rise to the misrepresentation.

280. As for the alteration of invoices, in cross-examination Mr Singh sought to distance himself from the process, suggesting that, although he knew that it was being done, he had not actually carried out the physical process himself. He accepted, for example, that the Pearl & Dean invoice at bundle 3, page 919 had been altered to create the document at bundle 3, page 918 (see paragraphs 188 and 189 above) but said he had not altered the invoice himself and did not know it had been done, though he accepted that he was the responsible director. He said that he only found about this when Mr Tuyluoglu raised it in 2012. More generally, when asked about the manner in which alterations were made, he said that it was done in the office, that in certain circumstances IMA went back to suppliers and asked them to change an invoice, but that he never

did it himself. He denied knowing precisely how individual invoices were created or changes: in some cases, he said, blank invoices might be obtained; in other cases, changes might be made by the use of tippex or other technology.

281. It was put to Mr Singh that he must have given instructions to his staff to change invoices. He said that the figures on the invoices matched the media plan, so his staff would get a media provider invoice, check the media plan and, if necessary, change the media provider invoice. It was put to him that he knew that part of his staff's instructions was to mark-up invoices to match the increased figures in the media plan. His answer was simply that the media plan was agreed.

282. In paragraph 17 of his first witness statement, Mr Singh professed personal involvement in the process of amending third party invoices:

> "17. When the Ministry asked IMA to provide amended third party invoices I would approach the third party and ask them to send an amended third party invoice. If they could not do so, I would ask them if they consented to IMA amending their original invoice (for example from a blank template invoice). After any amendments had been made to the relevant invoices IMA would simply destroy the original, unamended invoices because they were no longer necessary (emphasis added)."

This statement was, however, I accept, made at a time before a personal claim against Mr Singh had been pleaded, and there are references in this and surrounding paragraphs to "us" or to "IMA" doing various things.

283. It may be that Mr Singh did not carry out the physical alteration of all (or perhaps even any) of the invoices himself and that it was, as he said, done by members of his staff. But Mr Singh was responsible for the inflated figures inserted in the media plans, and thus the figures that had to be reflected in the

media supplier invoices sent to the Ministry along with IMA's own invoices. Despite his attempts to distance himself from the process, it is plain to me that Mr Singh must have instructed IMA staff to alter media provider invoices to accord with the higher figures in the media plans; it is wholly implausible that junior (and in Ms Swaine's case, temporary and part time) staff would have effected the alteration and fabrication of media provider invoices as regularly as it was done on their own and without his direction. Even if Mr Singh was not personally involved in the physical process of making alterations (and I remain doubtful about that), I am satisfied that Mr Singh authorised, procured and directed his staff to alter media provider invoices to accord with the inflated figures in the media plans, and he knew that these altered invoices were being tendered along with IMA's own invoices. That is enough to render him personally liable in deceit.

H. The Scale and Frequency of the Inflation of Figures in the 2011 Media Plan and the Alteration of Invoices. Damages

1. Introduction

284. IMA and Mr Singh are liable in deceit, both for the false representations made by the insertion of figures in the 2011 media plan which were greater than the costs given by the media providers and also for the false representations made by the provision of altered media provider invoices. IMA is liable for breach of contract for submitting altered media provider invoices along with its own inflated invoices.

285. There is an issue in each case as to the scale and frequency of the relevant behaviour – whether it be a false representation or a breach of contract – and as to how often it took place. Mr Singh's evidence was that some of the

figures inserted in the 2011 media plan contained an uplift on those given by the media providers, but not all of them. Similarly, whilst it is accepted by Mr Singh and IMA that some media provider invoices were altered, he said it that was not the case in relation to all. The same issue arises in the context of determining the extent of the Ministry's loss and the appropriate award of damages.

286. So far as the media plans are concerned, the 2011 media plan was included in the trial bundles but, save for a few isolated instances, there was generally no evidence about the negotiations between IMA and the media providers and the figures they had provided. Mr Singh's evidence was that media providers would generally give quotations by email, but that, after the campaign was over, they would be destroyed. In the absence of this or any other evidence, all that could be done was to do what Mr Krolick invited me to do, namely to draw what seems to me to be a fair inference that the figure quoted by the media provider was likely to have been the same as that which it ultimately charged. But even then, Mr Singh's evidence was that IMA had not kept the media provider invoices, and though the Ministry had obtained copies of some which were reflected in the Counterclaim Schedule the record was incomplete.

287. Essentially the same problem affects the other aspect of the deceit claim and the breach of contract claim concerning the presentation of altered invoices. In a few cases, such as in the case of taxiadvertising and Pearl & Dean, I have been shown copies of the original media provider invoices. The Counterclaim Schedule contains details of many more (though it is limited to details of those media provider invoices that the Ministry has been able to obtain) and in many

of those cases it can be seen from details of the invoice numbers used on the original and the altered invoices where the figures contained in the original media provider invoices have been altered. There are, however, some gaps.

288. In these circumstances, whilst I am satisfied that IMA and Mr Singh have made fraudulent misrepresentations and IMA has committed breaches of contract, it is impossible on the evidence before me to identify each and every instance where this has occurred. The most I can do, by comparing the information in the Counterclaim Schedule where I am satisfied that it is reliable, is identify those instances where media provider invoices have been altered; and in the case of the 2011 Campaign, by looking at the amounts charged by IMA (which it is common ground matched the figures contained in the 2011 media plan) and comparing them to the amounts the media providers charged and which, it can be inferred, they quoted, identify those instances where the media providers' quotations were different to the figure inserted by IMA into the media plan.

289. So far as the assessment of damages is concerned, I bear in mind that evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. Where it is clear that a claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. Where the claimant's proof has been made more difficult by the defendant's wrong – where the defendant has destroyed or wrongfully prevented or impeded the claimant from adducing relevant

evidence – the court can make presumptions in favour of the claimant. It seems to me that it is appropriate to apply that approach here:

i) Whilst the Ministry has obtained what information it can, knowledge and documents in relation to the prices provided and the original invoices tendered by the media providers lies principally in the hands of IMA; but little such material has been produced and Mr Singh's evidence is that it has been destroyed;

ii) IMA and its lawyers have been in possession of the Counterclaim Schedule for some considerable period of time but have made no attempt – whether by producing a counter-schedule or otherwise – to provide an account or explanation to counter that set out, or to fill in any gaps.

2. The Ministry's Claim

290. As explained earlier, whatever alternative approach might have been taken, the damages that the Ministry claims are the same in relation to both its claim in contract and its claims in deceit. The Ministry claims the Overpaid Balance, that is (as set out in paragraph 60 of Mr Krolick's written closing submissions):

> "[…] the difference between the sums to which IMA would have been entitled had they acted lawfully, and what was actually paid."

This is effectively measured by assessing the difference between the amounts charged by IMA (and supported by altered media provider invoices) and the amount charged (and, in the case of the 2011 media plan it is to be inferred, quoted) by the media providers themselves.

291. The Ministry's pleaded sterling figure for the difference, by way of reminder, was £911,460.73 over the three years of the 2009, 2010 and 2011 Advertising Contracts. This figure was sought to be demonstrated by the Counterclaim Schedule. The aim of the document was straightforward enough: to compare in relation to each media provider:

i) The amounts that IMA had billed, supported by the (oftentimes) altered media provider invoices IMA had provided, with

ii) The original, unaltered invoices issued by the media provider to IMA reflecting the amounts the media provider had charged.

292. As I indicated earlier, however, the Counterclaim Schedule was, in a number of respects, problematic. It suffered, in particular, from the fact – not necessarily the Ministry's fault – that there were gaps in the information: some rows, for example rows 2, 4 and 10, included information about original media provider invoices for 2009, 2010 and 2011 but IMA invoices only for 2009 and 2010. The comparison between the original media provider invoices and IMA invoices was sometimes done (see again row 2) by reference to individual invoices without taking into account the fact that the media provider had issued other invoices for the relevant year, which had been aggregated in IMA's invoices, such that the extent of the overcharging was smaller than suggested. Some invoices denominated in Euros were included in total figures as if they were in sterling. There were other problems affecting individual line entries.

293. Recognising the difficulties with the Counterclaim Schedule, Mr Krolick produced along with his written closing submissions a further document

entitled "Damages Schedule". The explanation given in paragraph 61 of his written closing submissions as to the content of this document was as follows:

> "61. […] For the purpose of this part of the closing submissions, the writer will only refer to those media providers where a difference has been observed. Where a difference is observed between a bogus invoice and an IMA invoice, the observations are made in the Annexed Damages Schedule. Where bogus 3rd party invoices are not available, the Ministry's case is that IMA invoices were in conformity with the bogus invoices."

As Mr Krolick went on to say:

> "64. There are quite a number of items in the schedule where genuine invoices are listed, but with no comparative bogus invoices or IMA invoices. All that can be said is that there are many records where it has not been possible to make comparisons because of the absence of information. They have not been included in the damages figures. It must not be thought that the records under each item are intended to be an exhaustive record of the state of account between the parties."

The Damages Schedule looked at each row, considered where comparisons could or could not properly be made, and identified what Mr Krolick said was the total Overpaid Balance: £572,766.54 and €15,861.72.

294. I have gone through the Counterclaim Schedule and the Damages Schedule carefully myself. My findings are set out in the schedule which is attached to this judgment. There are a number of general points I would make by way of explanation.

295. First, as I have indicated above, where, in the context of the allegation of deceit in relation to the preparation of the 2011 media plan, there is an absence of information about the price that the media provider originally quoted, I consider it reasonable to infer that its quotation was the same as the amount it ultimately charged.

296. Secondly, the comparisons carried out in Mr Krolick's Damages Schedule commonly looked only at the difference between particular original and altered invoices. There is a danger in this, because in some cases IMA charged more than it was billed by the relevant media provider for some invoices and less for others or issued fewer invoices to the Ministry than the number issued by the media provider. It seems to me that, in assessing the Overpaid Balance, the position has to be looked at by reference to the total amount for the media provider for the relevant year.

297. Thirdly, Mr Robinson identified in paragraphs 27 and 35 of his written closing submissions a small number of instances where he said IMA actually charged the Ministry less than the amount that IMA was charged by the relevant media provider. Given Mr Krolick's definition of the Overpaid Balance (see paragraph 290 above), it seems right that where I am satisfied that these cases exist the relevant amounts should be taken into account.

298. Finally, there are a number of rows in the Counterclaim Schedule in respect of which Mr Krolick's Damages Schedule indicates that no claim is being made. Unless these rows need to be considered for some other reason, for example because they involve cases where IMA says that it charged the Ministry less than it was charged by the relevant media provider, I have ignored these rows and they do not feature in the schedule to this judgment.

299. The schedule identifies those instances where I consider there has been inflation of the figures included in the 2011 media plan and where alteration of media provider invoices has taken place, and accordingly where, in my

judgment, there has been breach of contract and deceit. The schedule also identifies the make-up of what I consider to be the Overpaid Balance.

300. The total Overpaid Balance in my judgment is £349,772.55 and €14,274.12. Whilst the information in the Counterclaim Schedule is imperfect, I note that these figures are within (or certainly not greatly in excess) of the range of figures given by Mr Singh as his estimate of the amount charged by way of margin over the period (see paragraphs 108 and 157 above). The conclusion I have reached by analysing the detail is, thus, not very different from that which is supported by Mr Singh's own evidence.

301. In addition, because the Ministry was obliged to pay DDF a 5 percent commission on the media spend it has suffered an additional loss of 5 percent of these amounts, i.e., £17,488.63 and €713.71.

302. The total amount of the Ministry's loss is, therefore, £367,261.18 and €14,987.83.

I. Conclusion

303. IMA is entitled to recover the amounts of £12,450.00 and €950.00 in respect of its claim, which otherwise fails.

304. On the Ministry's counterclaim and third party claim, IMA is liable to the Ministry for damages for breach of the Advertising Contracts, and IMA and Mr Singh are both liable to the Ministry for damages for deceit. The Ministry's is entitled to judgment against them in the amounts of £367,261.18 and €14,987.83.

305. I will hear counsel in relation to any consequential matters, including interest and costs, to the extent that they cannot be agreed. I am grateful to both counsel, and to their instructing solicitors, for their assistance.

SCHEDULE

Row	Media Provider	Overpaid Balance	Findings
1	CBS Outdoors	£62,113.90	I agree with Mr Krolick that the only reliable comparison that can be made is in relation to 2011. For the 2011 year, five IMA invoices were submitted each supported by a media provider invoice. The invoice numbers are in each case identical to the invoice numbers of the original media provider invoices, but in each case the amount on the invoice presented by IMA is greater. I am satisfied that the original invoices have been altered. There were, however, nine original media provider invoices not five as presented by IMA. The total of the original media provider invoices was £189,886.10, which I infer was the cost figure provided by the media provider to IMA. The total of the altered media provider invoices presented by IMA supporting IMA's own invoices was £252,000.00. The Overpaid Balance is thus £62,113.90.
2	JC Decaux	£133,545.58	There are original media provider invoices for 2011 but no details in relation to IMA invoices or the media provider invoices that accompanied them for this period. Mr Krolick's Damages Schedule says that "the only differences noted are for the 2009 year" and it thus appears that no claim is pursued in relation to 2010.

			As far as 2009 is concerned, IMA tendered two invoices of its own in each case supported by a media provider invoice in the same amount. The two media provider invoices submitted by IMA bear the same invoice numbers as the original media provider invoices, but the amounts are different and significantly greater. I am satisfied that the original invoices have been altered. In calculating the Overpaid balance, it is, however, necessary to take account of the fact that there are three additional original media supplier invoices. The total of the original invoices for 2009 is £283,054.42, which I infer was the cost figure provided by the media provider to IMA. The total IMA invoices and the altered media provider invoices £416,600. The Overpaid Balance is thus £133,545.58
3	Taxiadvertising	£280.61	The only figures provided for taxiadvertising are for 2011. I have addressed the position in relation to taxiadvertising in the body of my judgment. The original media provider invoices, which I infer reflected the cost figures provided by the media provider, totalled £134,319.37. IMA rendered invoices, supported by altered media provider invoices for £179,200.00. However, once the unpaid invoices are removed, the Overpaid Balance is £280.61.
4	Airport Advertising	(£15,021.00)	There is insufficient information to make any comparison in relation to

			2011. For 2009 there is an original media provider invoice and an altered media provider invoice supplied by IMA in support of its own invoice for £4,675.00. The media provider invoice supplied by IMA has the same invoice number as the original but has been altered and is for a greater amount. There is, however, an additional original media provider invoice such that the total of original media provider invoices is £2,140.00, such that the Overpaid Balance for 2009 is £2,535.00. For 2010 there is again an original media provider invoice and an altered media provider invoice provided by IMA in support of its own invoice for £13,000.00. The media provider invoice supplied by IMA again has the same invoice number as the original but the amount has been increased. But there are two other original invoices such that, in fact, IMA appears to have been invoiced by the media provider for a total of £30,556.00 which is some £17,556.00 more than it has invoiced the Ministry. Taking the two years together, IMA appears to have paid more than it billed the Ministry by some £15,021.00.
5	Channel 4 Television	£29,000.00	I agree with Mr Krolick that the only comparisons that can be made are for 2011. So far as that is concerned, there are four original media provider invoices totalling £68,000.00,

			which I infer was the cost figure provided by the media provider to IMA, and four IMA invoices totalling £97,000. Although the media provider invoices supplied by IMA are not identified, I infer that these would have been altered media provider invoices in the same amounts. The Overpaid Balance is £29,000.00.
6	ITV 1, 2, 3 Broadcasting Ltd	(£22,837.50)	This is one of the case where Mr Robinson suggests (see paragraph 35.2 of his written closing submissions) IMA billed the Ministry less than it was charged, and the Counterclaim Schedule indicates a difference of £22,837.50. I reject the suggestion that the document at bundle 5, page 1695 suggests that the difference is greater; it does not.
8	Pearl & Dean	£22,660.34	This relates to Pearl & Dean. The only figures available are for 2011. I have dealt with the position in relation to Pearl & Dean in the body of my judgment. Assuming in IMA's favour that there is a missing invoice, the total of original media provider invoices was £81,839.66, which I infer was the cost figure provided by the media provider to IMA. The total amount billed to the Ministry by IMA, supported by altered invoices, was £104,500.00. The Overpaid Balance is £22,660.34.
9	Think Publishing Ltd	£1,200.00	I agree with Mr Krolick that the only comparison that can be done is for 2010.

			There is an original media provider invoice is for £4,500.00 and an altered media provider invoice tendered by IMA to accompany its own invoice with the same invoice number but in the greater amount of £5,700.00. The Overpaid Balance is £1,200.00.
10	Guardian News & Media	£15,220.00	I agree with Mr Krolick that no comparison can be made for 2011. For 2009, there are two original media provider invoices each for £3,250.00 and two IMA invoices in each case supported by an altered media provider invoice with the same invoice number but for an increased amount of £3,485.00. There is, however, a further original media provider invoice for £3,250.00. In these circumstances, it appears that IMA has paid the media provider £2,780.00 more than it has billed the Ministry for this year. For 2010 there are four original media provider invoices each for £4,500.00 totalling £18,000.00. There are four IMA invoices each supported by a media provider invoice in the same amount, two for £7,750.00 and two for £10,250.00 and thus some £36,000.00 in all. Three of the media provider invoices supplied by IMA bear the same invoice number as the original invoices but are for a higher amount and have plainly been altered; the fourth has an invoice number which is different from the number of any original invoice, but again is for an increased amount. The Overpaid Balance for this year is

			£18,000.00. Taking the two years together, the Overpaid Balance is £15,220.00.
11	The Financial Times Ltd	£16,995.00	I agree with Mr Krolick that the only comparison that can be made is for 2010. For 2010 there are two original media provider invoices each for £6,502.50 totalling £13,005.00. IMA has rendered two invoices, each for £15,000.00 and each supported by an altered media provider invoice which bears the same invoice number as the original but is for a higher amount of £15,000. The total amount billed by IMA is £30,000.00 and the Overpaid Balance is £16,995.00.
12	The Week Ltd	£440.00	The only information is for 2011. For this year there are two original media provider invoices each for £3,780.00 totalling £7,560.00 which I infer was the cost figure provided by the media provider to IMA. IMA has rendered two invoices each for £4,000.00 totalling £8,000.00. Although the media provider invoices supplied by IMA are not identified, I infer that these would have been altered media provider invoices in the same amounts. The Overpaid Balance is £440.00.
13	Green Pea Publishing	£810.00	There is insufficient information to make any comparison for 2011, and for 2009 IMA appears to have supplied copies of original,

			unaltered media provider invoices in the same amounts. For 2010 there is one original media provider invoice for £1,940.00 and an altered media provider invoice supplied by IMA which bears the same invoice number is for the higher amount of £2,750.00 reflected in IMA's own invoice. There is another IMA invoice for £2,750.00 supported by another media provider invoice in this amount, but in the absence of further information I do not know whether there is a original media provider invoice which is missing and if there is whether it was for the same or a different amount. I calculate the Overpaid Balance of £810.00 simply by reference to the one (altered) invoice.
14	The Independent Print Ltd / Independent Newspapers	£16,326.80	There is no information as to original media provider invoices in 2009 and 2010 and I agree with Mr Krolick that no comparison is possible for those years. For 2011 there are five original media provider invoices, four for £2,700.00 and one for £655.20 totalling £11,455.20 which I infer was the cost figure provided by the media provider to IMA. There are five IMA invoices, four for £6,500.00 and one for £1,782.00 totalling £27,782.00. In each case, therefore, IMA's invoice is for a higher amount. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance is £16,326.80.

15	Telegraph Media Group Ltd	Nil	There is information about original media provider invoices for 2011 but no information about IMA invoices or altered media provider invoices for this year. For 2010 there is no information about original media provider invoices. No comparisons can be made.
19	News International	£11,462.00	There is some information available for 2009 which suggests that IMA may have charged the Ministry more than it paid to the media provider, but I accept the point made by Mr Krolick that not all bogus invoices appear to be listed and therefore no comparison can be made. For 2010 there were six original media provider invoices (though one was a credit) totalling £37,245.00 and five altered media provider invoices bearing the same invoice numbers but in four cases bearing different and greater amounts (in the fifth case the amount was the same) totalling £41,858. The Overpaid Balance for that year is £4,613.00 For 2011 there were 15 original media provider invoices totalling £89,451.00, which I infer was the cost figure provided by the media provider to IMA, and 15 IMA invoices in all but one case for a higher amount totalling £96,300.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance for this year is £6,849.

			The Overpaid Balance for both years is £11,462.00
20	Boom Media Ltd	£2,611.00	For 2010 there are two original media provider invoices each for £4,770.00 totalling £9,540.00. One of those invoices bears the invoice number 2094. There are two IMA invoices each for £5,250.00 totalling £10,500.00 but these appear to have been supported by an altered version of invoice 2094 for £10,500, i.e. for the full amount of two IMA invoices. The Overpaid Balance for this year is £960.00. For 2011 there are three original media provider invoices each for £1,283.00 totalling £3,849.00, which I infer was the cost figure provided by the media provider to IMA. There appear to have been three IMA invoices; two are identified in the Counterclaim Schedule, each for £2,750.00 and there is a third identified in the Counterclaim Schedule as £0.00 but noted "check amount – not paid". This third invoice appears to be one of the unpaid invoices – a copy is in bundle 1, page 14.14 – and was also for £2,750.00. IMA thus appears to have tendered three invoices each for £2,750.00 against the three original media provider invoices each for £1,283.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. Bearing in mind, however, that the third IMA invoice has not been paid, the Overpaid Balance for this year is £1,651.00. The Overpaid Balance for both

			years is £2,611.00.
22	Bauer Consumer Media Ltd	(£7,950.00)	For 2010 the information is confused. I agree with Mr Krolick that no comparison can be made for that year. For 2009 there are four original media provider invoices totalling £14,625.00 and four IMA invoices each supported by a media provider invoice totalling £16,425.00. Three of the media provider invoices supplied by IMA are the same as the originals; the fourth has the same invoice number but the amount has been altered from £8,775.00 to £10,575.00. The Overpaid Balance for that year is £1,800.00. Whilst the Counterclaim Schedule contains no information about IMA invoices, Mr Robinson submits that (paragraph 27.1 of his written closing submissions) that it can be seen from the Particulars of Claim that for 2011 IMA billed the Ministry some £9,750.00 less than the £25,875.00 amount of original media provider invoices. This appears to be so. Taking this into account, the figure in IMA's favour is £7,950.00.
23	Ink Global.Com	Nil	This is one of the case where Mr Robinson suggests (see paragraph 35.1 of his written closing submissions) IMA may have billed the Ministry less than it was charged. There are, however, substantial inconsistencies and deficiencies in

			the information in the Counterclaim Schedule: the figures for eight original invoices are given which are in different amounts but total £209,507.03, but no invoice numbers have been provided and I have not seen copies of the original invoices. Only three IMA invoices have been listed each for £9,500.00 totalling £28,500.00. There are no details on the schedule of altered media provider invoices just a note saying "not paid – check with client" but the schedule to the Particulars of Claim appears to indicate that these three invoices have, in fact, been paid. The discrepancy in the number and amounts of the original media provider and IMA invoices is such, however, is that it seems likely that something has gone wrong. The information is, in my judgment, too limited and too unreliable for any comparison to be made.
24	European Magazines Ltd	£6,373.50	Three media provider invoices are listed for 2011, two for £4,590.00 and a third for £6,196.00 totalling £15,376.50 which I infer was the cost figure provided by the media provider to IMA. IMA has issued three invoices each for £7,500.00 thus totalling £21,750.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance is £6,375.50.
26	Cedar Communications	£10,213.25	There is one original media provider invoice for 2009 in the amount of £8,597.75 and one IMA invoice supported by an altered media provider invoice bearing the

			same invoice number as the original for £10,936.00. The Overpaid Balance for this year is £2,338.25. There is no information for 2010, but for 2011 there are three original media provider invoices each for £6,375.00 totalling £19,125.00 which I infer was the cost figure provided by the media provider to IMA. There are three IMA invoices each for £9,000.000 totalling £27,000.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance for this year is £7,875.00. The total Overpaid Balance for both years is £10,213.25.
27	Redactive Media Sales Ltd	£2,014.00	There are two original media provider invoices for 2011 each for £4,293.00 totalling £8,586.00 which I infer was the cost figure provided by the media provider to IMA. There are two IMA invoices each for £5,300.00 totalling £10,600.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance is £2,014.00.
28	National Geographic Society	(£160.00)	This is one of the case where Mr Robinson suggests (see paragraph 27.3.1 of his written closing submissions) IMA may have billed the Ministry less than it was charged. The Counterclaim Schedule does indeed suggest that

			there was a £160.00 difference (£80.00 on each of two invoices).
29	Rhinegold Publishing Ltd	£1,000.00	The only year for which comparisons can be made is 2010. For the 2010 year there were two original media provider invoices each for £2,400.00 totalling £4,800.00. There were two IMA invoices each for £2,900.00 totalling £5,800.00 supported by media provider invoices which bore the same invoice numbers as the original media provider invoices but again were each for £2,900.00. The Overpaid Balance is £1,000.00.
30	Conde Nast Publications Ltd	£3,561.75	There is information about original media provider invoices for 2011 but no information about IMA invoices or supplied media provider invoices for that year and therefore no comparisons can be made. For 2009 there are two original media provider invoices each for £3,925.30 and two IMA invoices in the same (less, in each case, £0.30). Original media provider invoices appear to have been provided. One or two further original media provider invoices are listed (the date of one is unclear). For 2010 there are three original media provider invoices each for £3,912.55 totalling £11,737.65. There are three IMA invoices each for £5,100.00 totalling £15,300.00 and in respect of each IMA has supplied an altered media provider invoice with the same invoice

			number as the original but with an increased amount of £5,100.00. The Overpaid Balance (deducting in IMA's favour for 2009) is £3,561.75.
32	Alain Charles Publishing Ltd	£7,650.45	I agree with Mr Krolick that there is clearly an error in the Counterclaim Schedule in relation to 2009 and that no comparison can be made for that year. For 2010, there is one original media provider invoice for £8,995.50. IMA has issued four invoices totalling £14,995.05. It has provided in support a media provider invoice which bears the same invoice number as the original invoice number but in the altered amount of £14,995.05. The Overpaid Balance for this year is £5,999.55. For 2011 there are three original media provider invoices each for £1,199.70 totalling £3,599.10, which I infer was the cost figure provided by the media provider to IMA, and three IMA invoices each for £1,750.00 totalling £5,250.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance for this year is £1,650.90. The total Overpaid Balance for both years is £7,650.45.
34	John Brown Magazines Ltd	£2,625.00.	There is insufficient information to make any comparison for 2011. For 2010 there were two original

			media provider invoices each for £7,437.50 totalling £14,875.00. There were two IMA invoices each for £8,750.00 totalling £17,500.00 each supported by a media provider invoice with the same invoice number as the original invoice but in an increased amount which accorded with IMA's invoice. The Overpaid Balance is £2,625.00.
37	TW Group Ltd	£10,450.00	Mr Krolick submits that no adequate comparisons can be made for 2009 and 2011 and makes no claim in respect of those years. For 2010 there were seven original media provider invoices, five for £1,350.00 and two for £2,025.00 totalling £10,800.00. One invoice for £1,350.00 bore invoice number 1192. IMA issued five invoices each for £4,250.00 totalling £21,250.00. It appears that a single, altered media provider invoice bearing number 1192 was provided for the total amount. The Overpaid Balance is £10,450.00.
38	A Davies	£2,570.00	For 2010 there were two original media provider invoices each for £765.00 totalling £1,530.00 and two IMA invoices each for £1,600 totalling £3,200.00. Each IMA invoice was supported by an altered media provider invoice bearing the same invoice number as a original invoice but in an increased amount. The Overpaid Balance for this year is £1,670.00. For 2011 there was one original media provider invoice for £2,700.00 and one IMA invoice for £3,600.00. Although details are

			not available, I infer that IMA's invoice would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance for this year is £900.00. The Overpaid Balance for both years is £2,570.00.
39	Hello Magazine	£140.00	There is insufficient information to make any comparison for 2009 and no information for 2010. For 2011 there are two original media provider invoices each for £6,630.00 totalling £13,260.00, which I infer was the cost figure provided by the media provider to IMA, and two IMA invoices each for £6,700.00 totalling £13,400.00. Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance is £140.00.
42	Belgrave Group	€10,000.00	For 2011 there were two original media provider invoices each for €2,500.00 totalling €5,000.00 and three IMA invoices each for €5,000.00 totalling €15,000.00 (the three IMA invoices appear in the schedule to the Particulars of Claim). Although details are not available, I infer that each of IMA's invoices would have been supported by an altered media provider invoice in the same amount. The Overpaid Balance is €10,000.00.

43	Travel Extra (2000) Ltd	€527.00	No comparison is possible for 2011 were there is no information about IMA invoices or supplied media provider invoices. For 2009 IMA appears to have rendered copies of the original media provider invoices. For 2010 there were two original media provider invoices each for €1,776.50 (the use of a £ sign in the Counterclaim Schedule appears to be a mistake) totalling €3,553.00. There were two IMA invoices each for €2,090.00 totalling €4,080.00. Each IMA invoice appears to have been supported by altered media provider invoice (in one case the invoice number is the same). The Overpaid Balance is €527.00
44	Express Newspapers	(£5,484.00)	Mr Krolick makes no claim in relation to 2010. For 2009 there are four media provider invoices one for £9,351.00, one for £4,657.50, one for £4,675.50 and one for £4,675.00 totalling £23,359.00. The Counterclaim Schedule contains details of three altered media provider invoices supplied by IMA bearing the same invoice numbers as the originals totalling £22,100.00; they bear the same invoice numbers as the original invoices but the amounts have been changed. It appears that a further altered media provider invoice for £5,525.00 is missing because IMA's own invoices total £27,625.00 (£22,100.00 plus £5,525.00). The Overpaid Balance for this year is £4,266.00.

			So far as 2011 is concerned, though the information in the Counterclaim Schedule is incomplete, Mr Robinson says (paragraph 27.2 of his written closing submissions) that it can be seen from the Particulars of Claim that this is one of those cases where IMA billed the Ministry less than it was charged by the media provider. This appears to be so: the difference is £9,750.00. Taking the two together, there is a figure in IMA's favour of £5,484.00.
45	Evening Standard	Nil	There is information about two original media provider invoices in 2010 and one IMA invoice and what may be an altered media provider invoice supplied with it. The substantial disparity – in particular, the disparity between the ostensible amount of the altered media provider invoice and the IMA invoice – however makes no sense, and it seems likely that one or more of the entries is erroneous. In the absence of sight of the underlying documents, I do not consider it is safe to rely upon it.
46	Tristar Television Ltd	£21,075.00	There is one original media provider invoice for 2010 for £11,050.00 and one IMA invoice for £32,125.00. The IMA invoice is supported by an altered media provider invoice bearing the same invoice number as the original invoice but in an increased amount. The Overpaid Balance is £21,075.00.

53	The Fred Production Company Ltd	£2,887.50	There is insufficient information to allow any comparison for 2010 and 2011. For 2009 there were two original media provider invoices each for £6,056.25 totalling £12,112.50. IMA submitted a single invoice for £15,000.000 supported by a single altered media provider invoice for that amount using one of the two original invoice numbers. The Overpaid Balance is £2,887.50.
54	The Irish Times	€3,465.82.	There is insufficient information to permit a comparison in 2009. For 2010 there was one original media provider invoice for €12,482.18. IMA submitted an invoice for €15,948.00 supported by an altered media provider invoice bearing the same invoice number as the original invoice but in an increased amount reflecting its own invoice. The Overpaid Balance is €3,465.82.
55	Ubiquitous Ltd	£17,999.37	For 2009 there were two original media provider invoices one for £74,520.00 and the other for £87,750.00 totalling £162,270.00. IMA submitted three invoices each for £60,089.79 totalling £180,269.37. They appear to have been supported by a single altered media provider invoice (using one of the original invoice numbers) for the total amount. The Overpaid Balance is £17,999.37.
56	IPC Media	Nil	There is insufficient information for 2011 to make a comparison. In

			relation to 2009 Mr Krolick accepts in his Damages Schedule that there is the possibility of error and he therefore makes no claim in relation to this media provider.
60	Associated Newspapers (Ireland) Ltd	€281.30	For 2009 there were five original media provider invoices totalling €12,199.42. IMA rendered four invoices totalling €12,480.72 supported by altered versions of four of the original media provider invoices (the invoice numbers were the same but the amounts were increased). the Overpaid Balance is €281.30
	Total	**£349,772.55** **€14,274.12**	