



Neutral Citation Number: [2019] EWHC 1576 (QB)

Case No: HQ17X01297

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/06/2019

**Before :**

**HH JUDGE RICHARD PARKES QC**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

**[1] JOHN THITCHENER**  
**[2] GAVIN MASTERS** **Claimants**  
**- and -**  
**VANTAGE CAPITAL MARKETS LLP** **Defendant**

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**Mr James Couser** (instructed by **Coyle White Devine**) for the **Claimants**  
**Mr Niran de Silva** (instructed by the **Legal Department of Vantage Capital Markets LLP**)  
for the **Defendant**

Hearing dates: 4-6,10 and 21 June 2019  
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## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
HH JUDGE RICHARD PARKES QC

**His Honour Judge Richard Parkes QC :**

**Introduction**

1. This claim concerns the terms of membership of a limited liability partnership (LLP).
2. The claimants, John Thitchener (JT) and Gavin Masters (GM), have substantial experience as interest rate options (IRO) brokers. Interest rate options are financial derivatives enabling holders to benefit from changes in rates of interest on bonds such as UK gilts and US Treasury securities. The claimants specialised in Euro IROs.
3. The defendant Vantage Capital Markets LLP (Vantage) is an interdealer broker. It provides specialist intermediary brokerage and execution services in derivative products to professional traders in the wholesale financial markets.
4. The claimants joined Vantage in March 2011 with a view to their setting up and running an IRO desk. This action is about the circumstances in which they left Vantage at the end of March 2012, and the financial consequences of their departure. The claim is for the return of sums which the claimants say are repayable to them under the contractual terms which governed their role at Vantage. Vantage say that they are entitled to exercise a contractual set off and to counterclaim for the losses which they incurred.

**Witnesses**

5. The claimants gave evidence, as did Vijay Angelo, who recruited the claimants and conducted the negotiations with them on behalf of Vantage. He had been tasked by Vantage with headhunting suitable talent for the fixed income side of the business. A further witness was Matthew McCarthy, who worked for Vantage as an interest rate derivatives broker between June 2014 and April 2017. His evidence related to the likely profitability of the Vantage IRO desk had the claimants continued as members of Vantage after March 2012. In other words, his evidence goes to the Vantage counterclaim.
6. For Vantage, the witnesses were Roderick Wurfbain, managing partner of Vantage, and Robert Hampel, a board member with senior management responsibility. The two men were Capital Partners, and were the owners of Vantage during the period 2010-2012.
7. Each side also instructed expert witnesses. They were Andrew Herrtage for the claimants and Philip Turner for Vantage. They put together a joint statement, which is in some respects more a statement of their differences than of their shared views. Neither of them was called to give evidence. That being so, it is not possible for me to express a preference for the opinion of one expert over the opinion of the other. I am confined to relying on their views to the extent that they coincide or at least overlap.

**Negotiations**

8. The claimants have great experience as IRO brokers. They knew Vijay Angelo, who had for some years tried to persuade them to come and work for him, initially when he was working for RP Martin & Co. By early 2010, Mr Angelo had moved to

Vantage's Fixed Income desk, and JT and GM were working together for a French broking house, where they had started an IRO desk in its new London office. They had a series of meetings with Mr Angelo, whose role for Vantage was to establish an Over the Counter (OTC) interest rate business, involving interest rate swaps, repurchase agreements (REPOs) and IROs. He wanted JT and GM to help set up the new IRO desk.

9. Mr Angelo said that during their discussions, he would check the terms being discussed with Danny Hassell and Rob Hampel at Vantage. I do not think that this evidence was challenged. Nonetheless, there was some dispute about Mr Hassell's involvement: Roderick Wurfbain, Vantage's managing partner, insisted that Mr Hassell did not have any involvement in the day to day running of Vantage after the end of 2009 or the start of 2010, because Vantage anticipated the outcome of an FSA investigation (ultimately published on 17 June 2010), which penalised Vantage for allowing him to perform a controlled function at the firm when he was not approved by the FSA to do so, and prevented Mr Hassell from having any involvement in the day to day running of the business. Mr Robert Hampel, a board member of Vantage, said that Mr Hassell was not responsible for recruitment at the time when the negotiations with the claimants were under way. I have not heard from Mr Hassell, and it is not necessary for me to determine whether or not Mr Hassell was in fact involved in the process of recruiting JT and GM, nor whether (if he was) his involvement was authorised, although I saw no reason to doubt the evidence of Mr Wurfbain or Mr Hampel on the formal limits of Mr Hassell's role at the time. What matters is what was in fact agreed with JT and GM. On Mr Wurfbain's evidence, negotiations were conducted initially between Mr Angelo and the claimants, and then between Vantage's head of legal, Charles Eddis, and the claimants' solicitor.
10. It is clear to me from the evidence of JT and GM that they took some persuading to join Vantage. They were concerned about setting up a new IRO desk at a business with no background in that field of trading, given that IRO was a tough and highly competitive market. The big brokering houses had large teams of brokers with long established client relationships and used expensive trading platforms and infrastructure which a smaller company would find it difficult to match. Moreover, there had been a substantial amount of legislation which applied to OTC derivatives, and there was some contraction in the Euro IRO market. However, they were not entirely happy at their current employer, so they finally agreed to join Vantage.
11. On both GM's and JT's evidence, they were assured by Mr Angelo that the IRO desk would be set up by one Steve Johnston before their arrival, including making sure that direct lines to clients were operational, brokerage deals were in place and documentation authorised and signed. That was crucial, because finding new clients in a highly competitive area was difficult enough, and they did not want to risk any difficulties in relations with their existing clients.
12. Terms were agreed in June or July 2010 over a handshake in a Borough Market restaurant. It appeared at one stage that there might be some dispute about the authority of Mr Angelo to bind Vantage, and as to whether the terms agreed had been approved by senior management. It seems highly unlikely that Mr Angelo would have been willing to imperil his own position as head of interest rate derivatives by signing off on terms which had not been agreed by senior management. But there are two reasons why it does not matter whether or not the terms were approved by senior

management at Vantage. One is that on any view Mr Angelo was the agent of Vantage to agree terms with JT and GM. That was Mr Hampel's evidence. In any event, the effect of s6(2) Limited Liability Partnerships Act 2000 is that Mr Angelo would only not have been the agent of Vantage if in fact he had no authority to act for Vantage and JT and GM knew that he had no authority. The other reason is that the claim is founded on the obligations of the parties contained in the written contractual documentation, as subsequently amended, not on pre-contractual representations. The real relevance of the pre-contractual discussions lies in the claimants' growing realisation of the gulf between what they believed had been agreed and the actual written terms that they entered into, and in the impact which that mistaken understanding had on their belief about their entitlements.

13. I remind myself also that (as is apparent from email exchanges between Vantage and an eminent firm of solicitors between March and July 2010) JT and GM were advised by a solicitor, who seems to have been involved in the translation of the oral discussions into written form. I do not think it right to name the firm or the solicitor, because I have not heard from him and I do not know what advice he gave; yet it is difficult not to infer from the disparity between the agreement which JT and GM believed they had reached, and the terms in which that agreement was reduced to writing, that they were by no means as fully aware of what they were committing to as one would have expected. Whether or not that was the fault of the solicitor would depend on the advice which he gave, and I know nothing of that. All that I know is that JT and GM have instructed another firm to act for them in this litigation.
14. GM's understanding of the terms agreed was that he would receive a signing on payment of £100,000, a salary of £200,000, a profit distribution of 50% of net broking profits and an expense account of £100,000 for client entertainment, which would not come out of desk profits.
15. JT's understanding was that he would receive a signing on payment of £100,000, an annual salary of £200,000 and 100% of the first £250,000 of net broking income, with 55% thereafter.
16. GM seems to have believed that the 100% of the £250,000 was to be paid to him and JT jointly, and would be paid gross, not net of draws and expenses: he said that if it was not gross they would not have known when the necessary revenue had been earned. By contrast, JT's evidence in his witness statement was that he thought he would receive 100% of the first £250,000 of net broking income, not gross revenue; but in cross-examination he maintained that he did not think that there should be any deductions. GM also believed that he and JT could bring the agreement to an end by invoking an 18 month break clause.
17. Those earnings figures broadly corresponded with the recollection of Mr Angelo, except that it was Mr Angelo's evidence that the £250,000 payable to JT was to be 100% of the first £250,000 in gross brokerage (not net broking income).
18. The claimants' understanding of what had been agreed, such as it was, was far from fully realised in the written agreements which the claimants signed, after taking legal advice. In particular, the signing on payment was a loan forgivable after four years; there was no £100,000 expense allowance; there was no break clause exercisable by them, but a four year commitment; and JT's belief that he would receive the whole of

the first £250,000 of net broking income, plus a salary of £200,000 for two years, was not reflected in the written agreements. GM seems not to have understood even that the written agreements provided for JT to receive the full £250,000, rather than that it should be split between the two of them. JT did not understand that drawings were in anticipation of income allocation: he said that he had expected a certain guarantee when he moved, especially to a new desk. Both men accepted that they did not read the contracts carefully. I do not understand (and it is not necessary for me to decide) how such a situation can possibly have arisen, given that JT and GM were highly valued and experienced brokers who had apparently acted on legal advice from a well respected firm of City solicitors.

19. The claimants' belief that they would receive a 'salary' illustrates a lack of understanding of the nature of an LLP, where those who join do so as self-employed partners, not as employees, and receive a share of profits dependent on revenues rather than a salary. That misunderstanding, and the overall disconnect between what they believed had been agreed and the written agreements which they actually signed, were not conducive to a happy relationship with Vantage.
20. Neither JT nor GM could join Vantage at once because they were bound by contractual obligations to their existing employer. However, by agreement they were able to move to Vantage in March 2011.

#### Contractual terms

21. The terms of the claimants' membership of Vantage were in fact governed by the Partnership Deed, to which they became parties by entering into Deeds of Adherence, and by their individual Allocation and Contribution Deeds (A&C Deeds), which contained the terms that were specific to them.

#### Partnership deed

22. The Partnership Deed contained, so far as material, the following terms:

##### 9. Profit Allocations

###### 9.1 Accounts

The Managing Member shall procure that accounts are drawn up in respect of each financial year of the Partnership in accordance with the provisions of the Act, the regulations and this clause 9 and subject thereto in accordance with generally accepted accounting principles in the United Kingdom. Such accounts shall comprise a profit and loss account for the Partnership in respect of such financial year and a balance sheet for the Partnership at the end of that financial year ('the Partnership Accounts') and the Managing member shall arrange for the Partnership Accounts in respect of each financial year to be audited in accordance with the requirements of the Act.

###### 9.2 Determination of allocations

Following the end of each financial year the Board shall, by reference to the Partnership Accounts drawn up in respect of that financial year calculate the Broking Profits, determine the allocation of the Broking Profits among the Members in accordance with the provisions of clauses 9.3, 9.4 and 9.5 and determine what proportion of such profits as have been so allocated shall be capable of being withdrawn by such Members and at what time. In deciding what proportion of the profits may be withdrawn the Board shall make appropriate allowance (to the extent that allowance has not already been made) as the Board determines in good faith to be required:

[A] to meet anticipated current and foreseen liabilities and expenditure of the Partnership;

[B] to be sufficient to cover other contingencies in accordance with the general principles of prudent management;

[C] to satisfy any obligation imposed on the Partnership by any regulatory body to maintain a minimum level of financial resources; and

[D] as provided by clause 10.7 (tax retention).

### 9.3 Principles of allocation

..... the profits of the Partnership in respect of each financial year of the Partnership shall be allocated among the Members as follows:

[A] first, there shall be allocated to the Retention Account of the Corporate Member such amount of profits as shall in the opinion of the Board acting in good faith be required to be retained in the Partnership to meet anticipated, current or foreseen liabilities and expenditure of the Partnership, to be sufficient to cover other contingencies in accordance with general principles of prudent management and to satisfy any obligation imposed on the Partnership by any regulatory body to maintain a minimum level of financial resources ....

[B] second, there shall be allocated to the Retention Accounts of the individual members such amounts as provided for under clause 10.7 (tax retention); and

[C] the remainder of the income profits shall be allocated amongst the Members in accordance with the terms of the relevant Allocation and Contribution Deeds.

## 10. Members' Accounts and Distributions

### 10.1 Members' Accounts

Each Member shall have a Capital Contribution Account and a Distribution Account which shall be operated in accordance with the provisions of clauses 10.2 to 10.4. In addition, each Member shall have a Retention Account which shall be operated in accordance with clauses 9.3(B), 10.7 and 10.8 and the provisions of the relevant Allocation and Contribution Deed...

#### 10.2 Credit of capital contributions

The capital contributions of each Member shall be credited to that Member's Capital Contribution Account.

#### 10.3 Credit or debit of profits and losses

The profits (or losses) allocated to the Members in respect of each financial year of the Partnership pursuant to clause 9.3, clause 9.4 and clause 9.7 shall be credited (or debited as the case may be) to the Distribution Accounts of the Members.

#### 10.4 Withdrawals from Distribution Account

Each Member shall be permitted (after taking account by way of deduction any advance drawings made by or to that Member in accordance with clause 10.5) to withdraw amounts standing to the credit of its Distribution Account in accordance with the decision of the Board (pursuant to clause 9.2) in connection with the withdrawal of profits in respect of each financial year.

#### 10.5 Drawings

Subject in all respects to the Board being satisfied as to the level of profits anticipated in respect of any financial year, the Board shall have the discretion to allow Members to make drawings in advance of the end of a financial year in anticipation of their profit entitlement for such financial year on such terms as shall be determined by the Board...

#### 10.6 No refund of profits

No Member shall have an obligation to pay back to the Partnership any profits of the Partnership standing to the credit of the Distribution Account of that Member, otherwise than as required by Law.

#### 10.7 Tax Retention

The Managing Member shall retain from a Member's profit allocation and/or drawings such amounts as are anticipated may be required to pay any income tax, capital gains tax or national insurance contribution due on such Member's share of the profits and/or drawing. The amounts retained shall, following allocation of the Broking Profits in accordance with clause 9.2 or, if earlier, on an Outgoing Member's Succession Date, be credited to a Member's Retention Account and shall be held in a segregated account in the name of the Partnership for the purposes of

such payments on such terms as the Managing Member, acting reasonably, shall determine.

#### 10.8 Return of Tax Retention

##### [A] Outgoing member

On ceasing to be a Member the amount standing to the credit of an Outgoing Member's Retention Account (the Credit Amount) shall, subject to clause 10.8 (B) and save as provided by clause 10.8 (C), be paid to the Outgoing Member 120 days after the Succession Date or earlier at the Managing Member's discretion.

##### [B] Outgoing Member in breach

Save as provided by clause 10.8 (C), where the Outgoing Member has, in the reasonable opinion of the Board, materially breached any of his obligations to the Partnership, the Board may in its discretion do any of the following:

- (1) delay payment of all or part of the Credit Amount for such period as the Board may deem fit, provided that such period does not exceed 12 months from the Succession Date;
- (2) set off against the Credit Amount the amount of any loss, cost, expense or liability which the Partnership has, in the reasonable opinion of the Board, suffered as a result of any acts or omissions of the Outgoing member, including the amount of any contingent loss, cost, expense or liability.

##### [C] Outgoing Member's tax liabilities

The Partnership shall pay to the Outgoing Member such amount from the Credit Amount in time for the Outgoing Member to satisfy his Partnership related income tax and national insurance liabilities which have crystallised and which fall due earlier than 120 days after the Succession Date.

#### 16.4 Removal of any Member

Any Member may be removed from the Partnership following a resolution of the Board in accordance with clause 13.7 .... in the event that the member at any time .... (K) commits any serious breach, or continues to commit any repeated or continual breach after having been warned in respect thereof, or any of his obligations under this Deed...

#### 16.6 Bad Leavers



A Member who is an Outgoing member pursuant to any of the following shall, unless determined by the Board otherwise be regarded as a 'Bad Leaver'

[A] by reason of removal under any of clauses 16.4(A) to (L) inclusive ...

## 19. Restrictive Covenants

### 19.1 Covenants applying whilst a member

Each individual Member shall at all times whilst he remains a Member:

[A] ... devote his whole time and attention during normal business hours to the Business so as to promote and develop the Business to the best advantage in accordance with good business practice except during any holiday leave or incapacity due to illness, injury or other substantial cause; ...

[E] conduct himself in a proper and responsible manner and use his best skill and endeavour to promote and conduct the Business;

[F] act in the utmost good faith in his dealings with the Partnership ....

## Allocation and Contribution Deeds

23. The A&C Deeds of Mr Masters and Mr Thitchener were not in identical terms. Both, however, were contained in letters dated 6 July 2010 from Roderick Wurfbain, Managing Partner, and Robert Hampel, described as Capital Partner. Each broker signed his deed in the presence of his solicitor, and confirmed that he had read and fully understood the terms of the deed and had had the opportunity to take independent legal advice on its contents.
24. Both A&C deeds had (so far as material) the following clauses in common. They differed in substance only at clause 6.

### Clause 2

'Broking Revenues' means the revenues from the Broking Business attributable to you;

'Costs' means the agreed costs charged at the rates set out in the Shared Costs Agreement as updated from time to time;

'Expenses' means authorised travel and entertainment expenses;

'Income Allocation' means the income profit allocated to you pursuant to clause 6.2;

'Net Broking Income' means the Broking Revenues less Costs.

### Clause 6 Income profits Distribution

	Gavin Masters		John Thitchener (where different)
6.1	The provisions of this Clause supplement the provisions of Clauses 9.2, 9.3(A), 9.3(C), 9.5 and 9.6 of the Partnership Agreement		As GM
6.2	In respect of each financial year you will be allocated an income profit distribution of 50% of the Net Broking Income. It is anticipated that the process of allocation will, subject to clause 6.9, take place within 12 weeks of the end of each quarter.		In respect of the first two years you will be allocated 100% of the first £250,000 of Net Broking Income. Once you have received Income Allocations of £250,000 or the two years have elapsed, whichever is the earlier, you will be allocated an income profit distribution of 55% of the Net Broking Income. It is anticipated that the process of allocation will, subject to clause 6.9, take place within 12 weeks of the end of each quarter.
6.3	In your first full year the Income Allocation is guaranteed to be no less than £200,000. This guaranteed minimum Income Allocation applies retrospectively and is only applicable where you are a member of the Partnership at the end of the full year.		As GM
		6.4	The Board may, at its discretion and depending on the performance of the Desk, award you an Income Allocation in excess of your entitlement under clause 6.2 above.
6.4	The Income Allocation, less any deductions in accordance with clauses 6.5 and 6.6 below and subject to clauses 6.8 and 6.9 below, will be credited to your Distribution Account within 12 weeks of the end of each respective quarter.	6.5	Income Allocations, less any deductions in accordance with clauses 6.6 and 6.8 and subject to clauses 6.9 and 6.10, will be credited to your Distribution Account within 12 weeks of the end of each respective quarter.
6.5	In accordance with Clause 10.7 of the Partnership Agreement there shall be retained from your Income	6.6	As GM 6.5

	Allocation such amount as may be required to pay any income tax, capital gains tax or national insurance contributions in respect of your Income Allocation and/or advance drawings. The amount retained shall be paid into your Retention Account.		
6.6	Your Income Allocation for each quarter will be reduced by any Expenses for the relevant quarter.	6.8	As GM 6.6
6.7	Any amounts standing to the credit of your Distribution Account, after taking into account any advance drawings in accordance with clause 9 below, will be paid to you by way of bank transfer within 5 days following the crediting of the Distribution Account.	6.7	As GM
6.8	Income Allocations and payments to you from your Distribution Account are subject to adjustment according to the extent, if any, to which the audited accounts make any corrections to the figures used to calculate your Income Allocation.	6.9	As GM 6.8

Clause 9 Advance drawings

9.1 Subject to the Board being at all times satisfied as to the level of profits anticipated from the Broking Business, the Board has the discretion under the Partnership Agreement to permit you to make drawings in advance of the end of a financial year in anticipation of your Income Allocation for each quarter. Your net drawing will be based on a gross annual draw of £200,000 and calculated on current tax rates, £9,583 per calendar month.

Clause 12 Termination

12.1 Subject to clauses 12.2 and 12.3, this agreement is for a minimum fixed term of four years from the Start Date and may only be terminated

by the Partnership giving to you, or you giving to the Partnership, notice in writing during the forty-fourth full calendar month following the Start Date, such notice, subject to clause 12.7, not to expire before the end of the fourth anniversary of the Start Date. On the expiry of such notice you cease to be a Member....

12.2 After the first fifteen months from your Start Date, the Partnership may at any time terminate this agreement with not less than three months' notice in the event that your aggregate Broking Revenues are less than the sum of your Costs, Expenses and gross drawings over the immediately preceding three months.

12.3 The Partnership may terminate this agreement at any time in accordance with clause 16.4 of the Partnership Agreement...

### Clause 13 Sign-on Bonus

13.1 You will receive within one month of your Start Date a sign-on bonus (by way of a forgivable loan) of £100,000 (less appropriate income tax retention). The loan will be forgiven in its entirety at the end of the fourth anniversary from the Start Date or, if earlier, the date on which your membership of the Partnership is terminated by the Partnership for any reason other than a termination pursuant to clause 16.4 of the Partnership Agreement.

25. It is not at all surprising that GM and JT found these contractual provisions difficult to understand. JT, in particular, candidly admitted that he should have read the contract more carefully. Both accepted that their contracts differed from what they thought they had agreed. JT told me ruefully that he would not have joined Vantage had he known the true position. What is harder to understand is that the two men should apparently not have had the provisions sufficiently explained to them by their then solicitor, who appears to have been acting for them during the negotiations and advising them on the agreements reached.
26. What these provisions seem to have amounted to is as follows. There was no salary. The claimants' remuneration was linked to the broking revenues that they brought in, which was the net broking income attributed to them. The Board decided at the end of each financial year, by reference to broking profits, what allocation should be made to partners and what proportion of the allocation could be withdrawn and when. The profits were then allocated: any sums thought necessary to meet liabilities and contingencies were allocated to the retention account, together with partners' tax and national insurance liabilities, and the remainder of the profits or losses allocated to each partner was credited or debited to their distribution accounts in accordance with the terms of their A&C Deeds. So, leaving aside the unusual inducements offered to persuade them to join Vantage, they were each to receive a percentage of the net broking income, otherwise known as their Income Allocation, ie their broking revenues less costs as set out in their Shared Costs Agreement (such as Bloomberg terminal, other IT costs and desk costs), and less authorised travel and entertainment expenses. There was also to be deducted from the Income Allocation, in accordance with clause 10.7 of the Partnership Deed, a sum sufficient to pay their tax and national insurance liabilities. The Board had the discretion to permit advance drawings in

anticipation of Income Allocation, and in the case of JT and GM, for the first year this was £9,583 per calendar month (based on the first year's guaranteed Income Allocation of £200,000).

27. There was no expense allowance of the sort expected by the claimants, that is to say an allowance of £100,000 which would not be chargeable to the IRO desk.
28. There was a sign on fee of £100,000, which (as clause 13.1 of the A&C Deed makes clear) took the form of a loan forgivable after four years.
29. Mr Wurfbain accepted that JT and GM needed an enhanced percentage deal at the front end to counterbalance the start-up phase, when revenues were likely to be lower than they were used to. The deals agreed with them were, on Mr Wurfbain's evidence, heavily front-loaded, and in consequence Vantage required a minimum four year commitment (standard practice in the broking industry, he maintained) in order for the deals to make commercial sense. The forgivable sign-on loans were designed to provide an incentive for the claimants to see out the full length of their minimum terms. His expectation was that Vantage could make good profits if JT and GM could secure even a small percentage share of the large London IRO market.
30. GM, in particular, did not agree that his contract was front-loaded, nor that it was very generous. His view was that there was a cost to attract people who are in employment to a new business.
31. Mr Wurfbain described the remuneration model as a waterfall, starting with the gross revenues attributed to the broker, from which the broker's costs would be deducted to reach a figure for net broking income. Vantage then applied the percentage split agreed with the broker to arrive at the income allocation, which was calculated on a quarterly basis, three months in arrears. The income allocation was paid net of expenses and drawings to the broker. Brokers were paid monthly drawings against anticipated quarterly income allocations, the drawings being set (as a matter of financial prudence) at a level anticipated to be no more than 70% of the annual income allocation. For incoming brokers, the assessment would be based on projected revenues. But as self-employed LLP members, brokers at Vantage were not paid salaries, and drawings were variable at the discretion of the board.
32. The standard split of net broking income, according to Mr Wurfbain, was 50/50, although where commercial reality demanded it the split might be as high as 65/35, or even 80/20, in favour of the broker; but to grant JT 100% of the first £250,000 of net broking income was a significant concession which he could not remember having made before. Moreover, guaranteeing minimum income allocation was also highly unusual. However, Vantage had sufficient confidence in the claimants to give them a floor for their first year earnings. Robert Hampel believed that these were the most attractive packages that Vantage had offered. The final element of the claimants' package was the £100,000 sign-on, which, according to Mr Wurfbain, was designed to compensate the broker for the bonuses which he would be leaving behind at his old firm and/or loss of income while he served post-termination restrictions; but the quid pro quo was a commitment from the broker to serve a minimum term with the new employer. Hence the sign-on fee was in reality a loan which was forgivable after four years.

The operation of the IRO desk

33. When JT and GM started work at Vantage in March 2011 the desk had not been set up, contrary to the assurances which they maintained they had received from Mr Angelo. That delayed the start of trading. Once the desk was set up, trading began well, but it is clear from the evidence of GM and JT that it was not long before they faced substantial problems to do with their existing clients.
34. Their main client was Martin Lifka of Erste Bank, who had assured them that he would continue to talk to them as long as they had other clients to make a market. Without other clients they would have no market depth or liquidity. They had contacts at other major banks, including Merrill Lynch, JP Morgan, Citibank, Nomura and Barclays, who said they would try to work with them as long as they could get permission to do so. Even though Vantage was not a large broking house, JT and GM believed that they could continue to exploit their existing contacts. In May 2011 a junior colleague on the desk was introduced to a big trader at Credit Suisse, as a result of which broking revenues in June 2011 were very high, but the colleague fell out with his contact and the business was lost. That serves to illustrate how crucial such introductions can be and how important it is to work at maintaining them. But events proved that even well-oiled relationships could not be relied on. By July, they were down to a three man desk (the third member was Christopher Rhodes, who had moved to Vantage with them).
35. It appears that in late June or July 2011, JT was invited to dinner with Mr Wurfbain, Mr Hampel and other desk heads. He explained that the Euro IRO market was in decline and that there was a need to invest in a screen-based trading platform, which would have involved expenditure of millions of pounds. RW did not recall him mentioning that the market was in decline, and Mr Hampel believed that had they been given a pessimistic assessment of the IRO market they would not have been prepared to make concessions to the claimants concerning payment gross of the first £250,000 of broking revenues (discussed below).
36. In late September 2011, GM was informed by Martin Lifka that Erste Bank had become very much more risk averse, and that he had been instructed, in effect, to stop trading IROs. His work had represented about 65% of their monthly revenues. The loss of the Erste Bank work damaged their attraction to other banks, because the volume of Erste Bank work had enabled them to offer attractive prices and good liquidity. The work was not irrevocably lost, as GM accepted in cross-examination, because Lifka introduced GM and JT to other people at Erste, but they did not make use of the Vantage IRO team; and it was not entirely lost, because there was a trade with Erste in March 2012. GM said that he had tried throughout his time at Vantage to persuade other parts of Erste to trade with them as well, and accepted that the March trade showed that he had enjoyed some small success. But the fact remained, according to GM, that their main provider had gone.
37. There were further problems. In October or November, the claimants' main contact at JP Morgan, Fiona Portington, told them that she was leaving London for the US. She did not leave at once: she was still trading at the end of January 2012. GM and JT did continue to trade with JPM, as GM accepted, but their main relationship was with Fiona. Moreover, a contact at RBS also announced that he was returning to the US; and in October 2011 a Citibank broker with whom they had a relationship announced

that he was winding down his trading positions because he was moving to a hedge fund. It was the claimants' evidence that Vantage could not trade with hedge funds, because in the IRO sphere hedge funds were the clients of the banks, and their banking clients would not permit it. If they had spoken to hedge funds, they would have lost the banks as clients. Within the space of a month they had lost their three biggest clients, and on the evidence of JT and GM it was becoming impossible to make money. In November their revenue was zero. There was a brief revival in January 2012, but this was a one-off trade to unwind a position at the request of the counterparties.

38. It was the evidence of both claimants that they tried to secure new clients, that is to say clients with whom they had not previously had a relationship. That was very difficult in what they described as a contracting, increasingly regulated and highly competitive market.
39. By the end of June 2011 over £250,000 had been earned in broking revenues. This was the result of the efforts of the IRO desk as a whole, not JT alone, so in principle no payment was due under clause 6.2 of his A&C Deed, but the claimants persuaded Mr Wurfbain to agree to a variation of clause 6.2 of each of their deeds.
40. So it was that on 29 September 2011, the A&C Deeds were varied so that the 6.2 clauses of each A&C Deed were substantially assimilated. JT's entitlement to 100% of net broking income was capped at £125,000 instead of £250,000, and GM was granted an identical entitlement to 100% of the first £125,000 of net broking income. In effect, the two men, who operated as a team, shared the same benefits, save that JT appears to have retained a slightly greater share of net broking income (55% as opposed to 50%) once the income allocation of £250,000 had been achieved or two years had elapsed, whichever came sooner.
41. There was no doubt that the £125,000 payments related to net broking income, as defined, that is to say, broking revenues less costs. Moreover, it appeared from the wording of clause 6.2 of JT's A&C Deed that his £250,000 (now split in half and shared with GM) was Income Allocation, and as such fell to be reduced by any expenses (clause 6.8).
42. John Thitchener said that at some point after June 2011 he started chasing payment of the £250,000 'bonus' from brokerage that they had earned. All he says is that after a bit of chasing Vantage reluctantly paid it, referring to it as a 'gesture of goodwill', rather than accepting that it had to be paid as a contractual obligation. In fact it was not strictly a contractual obligation to pay him that money, until Vantage agreed the variation of the contracts on 29 September, for the reason given at [39] above.
43. According to Mr Wurfbain and Mr Hampel, the claimants then insisted that the £125,000 payments should be made without deduction of expenses or drawings.
44. Mr Wurfbain agreed with the contemporaneous view of Silvan Herriger, head of broking for Vantage, that this made 'zero sense' (email, 26 October 2011). It meant, he said, that Vantage would have been paying the claimants £185,000 (the aggregate of expenses and drawings) to have them on the IRO desk for the second quarter of 2011.

45. Mr Hampel's evidence was that he told the claimants that the amounts should be net of expenses and draws, and that they said they would walk out and sue Vantage for breach of contract if the full amount was not paid. I do not think he was challenged on that. Mr Hampel did not want them to leave; nor did he want them staying in a disgruntled state. From the results in the first two quarters, it looked to him as if Vantage had made a good investment in them, and he was concerned to keep their morale high. At that stage, it is plain to me that he was not aware of the claimants' concerns about the prospects for the desk, such as they were at this stage, because if he had been, he would not have been in favour (as he was) of paying the claimants their £250,000 on their terms. However, it was not Mr Hampel who agreed this further variation with the claimants.
46. There was a meeting on 9 November 2011 between Mr Wurfbain and the claimants. Mr Wurfbain did not recall exactly what was said at the meeting, but recalled that the claimants were expressing confidence about their ability to generate good revenues, and did not recall any mention of gloomy prospects or a declining IRO market. He then had lunch with JT on 10 November, at which he agreed to pay the £250,000 without deducting drawings, but insisted that there would be no special deal on expenses. In his witness statement, he said that he had decided to compromise on the strict contractual position so that the draws would not be deducted from the £250,000. In other words, the sum would be paid gross, albeit that expenses (but not the draws) would be debited to the desk in the normal way and form a debit to be set against future revenues. That was a substantial concession, and it indicated, on the face of it, that Mr Wurfbain had great confidence in the capacity of the desk to generate revenues in the future.
47. However, in his oral evidence, he said that Vantage felt under commercial pressure to pay the claimants, so allocated the expenses and net transfers and draws so that the drawings and expenses would be debited later. That was rather a different position. On the face of it, what he was now saying was that the drawings (as well as the expenses) would be left as a debit to the desk's account and be taken into account in due course against future profits. I do not think that can be right. The contemporary documents clearly suggest that he compromised on draws but not on expenses.
48. In any event, the full £125,000 (less tax retention) was paid to each claimant. Mr Wurfbain emailed colleagues after the 10 November lunch to say that he had also mentioned that he might be persuaded to give JT and GM an uplift of 5% on their deal over a period of time, to which JT reacted 'very positively' and said that he was totally committed.
49. The details of the payments almost certainly matter less than what this variation of contract suggests about the state of optimism at Vantage about the prospects of the IRO desk. Mr Wurfbain's evidence was that he felt he was being strong-armed, because the claimants were at least implying a threat to leave if they were not paid in full; on the other hand, their first 6 months had been very successful, they were committed for 4 years, indications were positive and he wanted to keep them motivated. That evidence, like the evidence of Mr Hampel, is not at all consistent with the gloomy outlook which JT and GM said that they were beginning to develop in the autumn of 2011. GM maintained that he did not tell Mr Wurfbain that he was confident the desk could continue to maintain a good level of revenue; and he was insistent that he did not threaten to leave if the issue was not resolved to his



satisfaction. I doubt that there was a clear threat to leave, and I note that Mr Wurfbain accepted that it might have been implied; but I do not believe for a moment that Mr Wurfbain would have agreed to payment in full (with expenses to be held against future profits rather than deducted from the gross amount) if he had not still expected the IRO desk to be profitable. That was the effect of Mr Hampel's evidence: he said that knowing Roderick Wurfbain as he did, Mr Wurfbain would not have agreed to make what they regarded as a goodwill payment unless he was comfortable about the future prospects of the desk.

50. However, there was undoubtedly a major downturn in revenues in the late autumn of 2011. Both JT and GM gave evidence that they kept senior management (particularly Mr Hampel) informed of their difficulties and the reasons for them. They may have done so, to an extent, but I cannot accept that Mr Hampel or Mr Wurfbain can have known of the full position in early November when the major concession was made on payment of the £250,000. Minutes of board meetings that autumn do not suggest any awareness of serious problems: at the board meeting on 1 September (from which Mr Hampel was absent), Silvan Herriger reported only that the IRO desk had had a very quiet August as the desk suffered from 'market dislocation'; and at the meeting on 15 November there were no reports of problems with the IRO desk.
51. However, in November revenues were zero, and little better in December. This situation inevitably generated tensions, as evidenced by what JT and GM said was an angry outburst from Mr Wurfbain by their desk, in front of others, as preparations for the Christmas party were underway in December 2011. They said that they were upset by it, although GM accepted that he was not a 'shy flower', and said it did not 'kill' him: he had had a lot worse said to him personally, but not in front of others. Mr Wurfbain denied speaking in the terms attributed to him, maintaining that he positively remembered not having done so. It is a matter of little importance in itself, but on this issue I accept the claimants' accounts of what happened. It seems to me very much more likely that they would remember an embarrassing encounter than that Mr Wurfbain would remember not having spoken angrily to them. Moreover, given the substantial concession that Mr Wurfbain had made to them in early November, which I am confident he would not have made had he known of the claimants' views of the desk's prospects, I am not surprised that by the latter half of December he was in an angry state.

#### Discussion of screen-based trading platforms

52. It is clear that at a meeting in January 2012 there was discussion about the possible adoption by Vantage of a screen-based trading platform. The subject had been raised by JT in the summer of 2011, and it had been discussed at the 15 November board meeting, at which Silvan Herriger suggested that an in-house platform designed by one Ed Cole for the Inflation Linked Gilts desk might be used for the IRO desk, but Mr Wurfbain told the meeting that JT preferred to develop his own product, to which Mr Herriger said that JT had said the opposite to him the week before. What may be more important is that Mr Wurfbain is recorded as having said he did not want any more technological products agreed without his permission as it was 'important to be more realistic with regard to VCM's strengths'.
53. On 4 January 2012, the claimants put to senior management their case for a screen-based system for the IRO desk, through the medium of a report prepared by their

colleague Chris Rhodes. The report drew attention to the fact that although the market volume of electronically traded IROs was still only around 5% of the total, all the big broking houses and a number of smaller ones were developing trading platforms for interest rate swaps and IROs, at least partly in the interests of regulatory compliance and transparency. The report said that they (Rhodes, JT and GM) aimed to develop an efficient electronic service at minimum financial cost and without distracting them from the development of voice broking.

54. Although GM appears to have associated himself, or to have been associated by Chris Rhodes, with the report and its conclusions, he regarded Rhodes as lacking the skills for the project and as having massively underestimated the time and cost that it would involve. JT also felt that in some respects Chris Rhodes did not know what he was talking about.
55. There was a meeting to discuss the proposals. Indeed, Mr Wurfbain asked his PA to fix up a meeting with Chris Rhodes, JT and GM on the day he received them. It was not in fact arranged until 9 February 2012. Asked why not, he said, not unreasonably, that he had asked for the meeting as soon as he received the proposals, and that he could not recall what he (or others) had been doing between those dates. He denied having no interest in investing in new technology for the IRO desk. Mr Hampel's evidence was that Vantage was open to proposals for investment, and had always been prepared to invest in technology where it was appropriate. There was no evidence as to the upshot of the 9 February meeting. Mr Hampel could not recall what took place, but nothing came of it because the claimants left at the end of March. Given GM's and JT's doubts about the value of Rhodes' report, it is perhaps unsurprising that it did not apparently gain traction.
56. The significance of the discussion about screen-based systems was that JT and GM believed that without a screen-based trading system Vantage would find it increasingly difficult to compete against the big broking houses. In GM's view, Vantage lacked the funds and expertise to set one up. JT's feeling was that Vantage senior management paid lip service to the introduction of trading platform technology, while having no real interest in it because of the millions that it would cost to build, introduce and maintain.
57. Mr Wurfbain's evidence was that Vantage was predominantly a voice-broker, receiving orders by telephone or Bloomberg and putting buyer and seller together over recorded telephone lines rather than on screen. They did not have the resources to compete with large broking houses in terms of electronic platforms, but had always used screen-based pricing systems where they were necessary or beneficial. Given their focus on voice-broking, Vantage inclined towards product areas that required bespoke broking – for instance, products which were illiquid, where market participants preferred not to expose themselves by entering a bid or offer on-screen when uncertain as to the right price.
58. The experts agreed (although I do not think that the claimants did) that IROs were essentially illiquid, requiring bilateral negotiation. They agreed that in 2012-2015 Vantage would have needed to invest in compliance and technology in order to maintain a presence in the Euro IRO market, but differed as to the continued viability of the Vantage business model and as to the importance of brokers' skills in adding value even where there was limited screen-based assistance. They agreed that

anecdotal evidence suggested that the OTC IRO market remained largely voice brokered during 2012-2015.

59. It is difficult for me to draw conclusions from this debate, given the limited agreement of the experts. For present purposes, it may be sufficient for me to record that the claimants plainly believed that investment in electronic trading platforms would help them to compete with the bigger houses, and it seems likely that the lack of such a platform contributed to their pessimistic view of the prospects for the IRO desk at Vantage.

### March 2012

60. By March 2012, matters were plainly coming to a head. There had been a report to a board meeting on 12 January that the IRO desk was struggling, for which the brokers blamed difficult market conditions, but were working very hard and trying to 'reinvent themselves'; and on 9 March the board was told that the IRO desk had a significant deficit. They had made £40,000 revenue in the last 5 months and were £630,000 down excluding their sign-on fees, and it was hard for them to compete. It was agreed that Mr Wurfbain, Mr Hampel and Silvan Herriger needed to talk to the brokers and initiate draw cuts, and discuss whether with a limited client base there was a future in competition with larger brokerage houses. It was minuted that their skills and client relationship practices needed to be tested to see whether the desk had the potential to make money again.
61. Discussions duly took place in the course of February and March. As far as Mr Wurfbain and Mr Hampel were concerned, management was always going to reassess the claimants' drawings after the first year's guaranteed earnings expired, and adjust them to a level in line with their likely future earning capacity. It seems to me that much of the difficulty that arose in the relations between the claimants and the Vantage senior management in March 2012 was the product of the claimants' failure to understand this. That emerged clearly in cross-examination. GM was not aware that there would be a discussion in March 2012 about future remuneration. He admitted that he probably paid scant attention to the detail of the contract: he had previously had a salary, but now understood that income allocation and drawings were going to be looked at again. The same was true of JT, who thought that he had a two year guarantee, and was not expecting the levels of his drawings to be reconsidered in March 2012.
62. There were a number of meetings between the claimants and Robert Hampel or Roderick Wurfbain in February and March. Only one (that on 29 March) was minuted: the others were not, but notes of what had taken place were made on 15 April 2012 on the basis of Mr Wurfbain's and Mr Hampel's recollection at the time. There is always a risk that such a note will be self-serving, because of the human tendency to remember the convenient and to forget the inconvenient, but at least it is more or less contemporary, by comparison with the seven years that have since elapsed.
63. The first recorded meeting was on 2 March, when Mr Wurfbain met JT. The note records, and it was Mr Wurfbain's evidence, that he told JT that the desk's draws and overheads were very high and that he would like JT to think about how the running costs of the desk could be reduced. I do not think that was disputed.

64. There was another meeting on Friday 9 March between Mr Wurfbain, Mr Hampel, Silvan Herriger and both claimants. Mr Wurfbain told the claimants that the IRO desk was £600,000 in deficit. He said that the claimants disputed that, so he sent them the figures after the meeting. His email said simply 'As promised, let's speak on Monday'. On his account, they discussed the overheads of the desk and the point was made (without mentioning any particular sum) that one way to reduce the overheads was to reduce the claimants' draws. Mr Wurfbain recalled GM as asking what the point was of their being there if the desk was down so much, and (according to the 15 April note) he was so outraged by GM's attitude that he had to leave the room for ten minutes. He explained that in cross-examination: 'I am an honest man and I tell people what I think'. Neither JT nor GM recalled the detail of the meeting.
65. The figures that Mr Wurfbain sent to the claimants included expenses of £113,333.47 and 'net transfers' of £39,419.84. The 'net transfers' were expenses of a kind which Vantage had refused to pay because of their nature, which was not explored in evidence.
66. Mr Wurfbain's 9 March email had pointed to a further meeting on Monday 12 March. Mr Hampel believed that it was he who met the claimants on 12 or 13 March, and that the claimants then proposed reduced monthly drawings of £120,000 each. JT and GM thought that they had earlier offered £150,000, which had been rejected.
67. There was a further meeting with Mr Hampel on 15 or 16 March, he believed, which he thought had been attended by Mr Wurfbain, Silvan Herriger and GM (JT was ill) at which Vantage proposed draws of £80,000 each.
68. Their reasoning, according to Mr Hampel, was that the figure assumed ongoing revenues at roughly the same level as the first 12 months with a percentage split of 50% or 55%, and that £80,000 represented the average draw of Vantage brokers at the time. In his evidence, Mr Wurfbain agreed: with revenues of the order of £500,000 (matching the first year), and net revenues of around £410,000 (assuming a one third reduction in costs once Chris Rhodes' departure was factored in) the claimants' profit share would have been 52.5%, giving them an income allocation of £215,250. Vantage's normal yardstick for assessing appropriate draw levels was 70% of anticipated income allocation, and the proposal for £80,000 in fact worked out at just over 74%.
69. On 19 March, the claimants and Mr Rhodes opened their e-payment accounts and found that their draw was zero. In other words, they had not been paid. That came as a complete shock to them, but they believed that it must have been an administrative error. They had a scheduled meeting with Roderick Wurfbain and Silvan Herriger, so they went to the meeting with Chris Rhodes and GM said that they had not been paid. On JT's and GM's account, Mr Wurfbain responded by saying 'Shut the fuck up', and when GM pressed for an answer, he shouted something similar, at which point all three walked out, went back to their desks and continued trying to work until the end of the month; but, JT maintained in his witness statement, it was obvious that their relationship with Vantage senior management had completely broken down.
70. I was not impressed by the claimants' evidence in cross-examination, wholly unheralded in their witness statements, that they did in fact go back in to the meeting (GM), or have a further meeting (JT) at which matters proceeded more constructively.

GM maintained that he had forgotten that the walk-out was not the end of the meeting, and that they did in fact go back in, and JT said that there was a meeting in the morning and another one the day before an email from GM to which he had been referred in the course of his cross-examination. In fact, that email was sent later the same day (19 March) and referred to one meeting, not to two. I am confident that the claimants were doing their best to recall events rather than making up evidence as they went along, but I am not left with any confidence that their recollection of the 19 March meeting is reliable.

71. It is quite clear from the email which GM sent to Mr Wurfbain and Silvan Herriger at 1708 on 19 March that there had in fact been constructive discussions. GM's email reads:

Roddie, Silvan

As a follow up to our meeting of this morning, just a quick line to clarify our proposals for the IRO desk moving forward:

(Chris Rhodes) to leave company, timescale and exit terms to be negotiated. JT and (GM) to take 35% reduction in Partners' Draw. Annualised reduction £70k each from £200k to £130k each. Business area to be reviewed 3 months from date of commencement of the above changes. Appreciate you need to discuss the suggested changes with (Robert Hampel) and await your feedback.

Regards.

72. It is noteworthy that the email makes no reference to the claimants not having been paid, but Mr Wurfbain's own note of the meeting accepts that they did raise the matter. That note records that the claimants said they had thought about how they could reduce the costs of the desk and that Chris Rhodes had agreed he would leave. It does not mention that the claimants proposed £130,000, but GM's email suggests that they did. On Roderick Wurfbain's account, he said that Rhodes' departure would not reduce costs enough, and that £80,000 was the correct level of draw for a senior broker: he offered the claimants that amount. They said that they would think about it. On the question of swearing at the claimants, he said he doubted it, and thought it very unlikely that he did so; when reminded of GM's words, he said that he would never say anything like that. Given what I have found to be the inaccuracy of the claimants' recollection of the meeting, I am inclined (for what it matters) to accept Mr Wurfbain's evidence on the point. In my judgment it is quite likely that in the heat of the moment, warm words were spoken, but it is quite plain to me that they were not words that had the effect of bringing the meeting to an end or that (as JT put it in his witness statement) demonstrated a breakdown of relations.
73. That conclusion is reinforced by Mr Wurfbain's email to the claimants in response to GM's, and just four minutes later:

Dear team

Thank you for seeing Silvan and myself this morning. I would like to confirm that we will pay you your March draw by the end of this week.

Your March draw will be based partly on your old draw rate and partly on the new rate which is still subject to negotiation.

Regards, Roderick

74. GM responded rapidly with 'OK much appreciated', and JT with 'Understood'.
75. The end of the week would have been Friday 23 March, and the draws were not in fact paid by that date. It is not entirely clear why this happened. Mr Wurfbain said that Vantage did not pay because the negotiations were not over. The claimants had just said that they wanted £130,000, but gave no basis for it. He was not using non-payment as a negotiating tool, he said. He had not made a conscious decision not to pay. I accept that he had not, because on 29 March he authorised payment on the basis of £80,000, but I infer that he felt under no particular pressure to make a payment. It may have been something to do with his commitment to travel to South Africa and Argentina: he left the UK on 21 March and returned on 28 March.
76. On 23 March, Robert Hampel emailed the claimants under the title 'Meeting', saying 'Sorry I missed this, let's grab a coffee this morning'. JT replies 'What time?'. Mr Hampel's evidence was that JT had suggested breakfast. GM did not recall such a meeting, and JT insisted that he had coffee with Mr Hampel only after he had left, not before, but the exchange of emails suggests otherwise. According to Robert Hampel, they had an informal chat, during which they told him that draws of £80,000 each were not acceptable to them, but said nothing about the fact that they had not yet been paid. In his view, they were all working on the basis that the draws would be paid as and when they reached a final determination of the right level, which was always going to be before the end of the month. At the least, that is evidence that contacts continued, and undermines JT's evidence (which I reject) that after the 19 March meeting it was obvious that the relationship had completely broken down.
77. Mr Hampel also said that on the Monday, 26 March, he met the claimants again. He wanted to make sure that they were comfortable with the fact that, with Roderick Wurfbain abroad until the end of the week, they would not be paid their draws until they had reached a final determination, but on the understanding that it would be by the end of the month. On his account, both claimants said that they were happy to wait. In cross-examination, he insisted that the conversation did take place: it was important to keep abreast of matters while Mr Wurfbain was abroad, and he did so. I asked him why he particularly remembered the conversation. He replied that it was a crucial time. He was talking to Mr Wurfbain while he was abroad, and it was important for him to tell the team that it was still under review. There was no doubt, he said, that Vantage would pay: it was just the amount that was uncertain. His account was supported by the note of his recollection which was made on 15 April 2012, which records that before the drawings were paid the amount needed to be finalised and he needed to speak to Roderick Wurfbain: both claimants agreed that this was ok.
78. Asked about Mr Hampel's account, GM said that there were ongoing chats with him when he came to their desk, but insisted that Mr Hampel absolutely did not say there could be no agreement on pay until Roderick Wurfbain returned. Someone else, he said, could have agreed it, and Mr Hampel would not have discussed Mr Wurfbain's affairs with him. JT said there was no conversation as described by Mr Hampel.

79. I do not for a moment doubt the honesty of the evidence of GM or JT. I found them both generally good witnesses, although GM's anger at the way he felt he had been treated was evident. JT, in particular, was a witness who readily accepted his own mistakes (for example, in failing to read his contractual documents properly), and had an attractive line in self-deprecation. My clear impression of both claimants was that they were decent men who were doing their best to give honest and accurate accounts. However, it is clear to me that their recollection of the detail of the March exchanges (in particular, the 19 March meeting) is not accurate, and on the issue of the 26 March conversation I prefer the evidence of Robert Hampel, who in my judgment was indeed concerned to make sure that the claimants knew where they stood.
80. Roderick Wurfbain returned to the UK on 28 March. A further meeting was held on 29 March. This time it was minuted, or rather noted, by Charles Eddis, the head of legal at Vantage, and there is no dispute about the accuracy of the note, which is the basis of the recollection of both Wurfbain and Hampel, although no doubt it was not verbatim.
81. Those present were the claimants, Chris Rhodes, Roderick Wurfbain, Robert Hampel, Silvan Herriger and Charles Eddis. There was discussion about the Vantage proposal for £80,000 draws, with Mr Wurfbain saying that the claimants were looking at the terms as an employment contract, whereas at Vantage staff were paid a percentage of what they made. He said that management believed in their product and wanted them to stay, but wanted to know why they would not work any further on the revised draw. Mr Hampel added that the deal was front-loaded, Vantage had paid out a great deal and was in deficit, and was looking to have some benefits from the IRO desk. They were battening down the hatches, so there had to be belt-tightening, but that when business picked up, they would raise the draws again. GM was plainly under the misapprehension that they could leave after 15 months if the IRO business was not working. Charles Eddis is recorded as saying that only Vantage could exercise the break clause, and that they had faith in the claimants so were not exercising that right. The note does not record any reference to non-payment of draws or to the need for an electronic trading platform. It concludes with GM asking if they could go away, have a chat and reconvene, to which Messrs Wurfbain and Hampel agreed.
82. For the claimants, Mr Couser suggested that the meeting was contrived to produce a favourable impression if there should be litigation. He suggested that the existence of the minutes and the 15 April note recalling the various March meetings could only be 'contrived artifices designed to create a paper trail portraying Mr Wurfbain in a positive light'. That, he maintained, was 'the only reasonable explanation for why the tone of the minutes ... is so markedly different from the tone of the earlier meetings'. It is not wholly clear what he meant, but I assume his suggestion was that Mr Wurfbain adopted a more reasonable stance, knowing that a note was being taken, with a view to casting a rosier glow over his conduct than was merited. I find that a thoroughly implausible suggestion. The minute was contemporaneous and is accepted to be accurate. Vantage re-stated its position at the meeting, and the reasons for it. The IRO desk was substantially in deficit, yet Vantage senior management felt that it could be made to work and still hoped to recoup their losses. I find nothing contrived or surprising in that. It accords with Mr Wurfbain's and Mr Hampel's evidence about their hopes for the future of the IRO desk, which I accept. Moreover, as far as I am

aware there had been no suggestion of litigation by the claimants. Robert Hampel's evidence, which I accept without hesitation (noting that it is supported by his concerned call to JT when he did not turn up for work on 30 March), was that he did not think that the claimants would walk out on Vantage. And my impression of Roderick Wurfbain is of a man who speaks his mind and would find it difficult to act a part, which in essence is what Mr Couser suggested.

83. I should add that Mr Couser's portrayal of Mr Wurfbain as a foul-mouthed bully is not one which I find established by the evidence. I have no doubt that there are heavy pressures on senior management, and on brokers, in Vantage's areas of operation. No doubt that is part of the appeal of the work, which seems unlikely to attract many who are anxious or lack self-confidence. No doubt voices are raised from time to time, and I have found that he probably did speak angrily to the claimants before Christmas 2011. But even had he spoken to them as he is alleged to have done on 19 March, which I strongly doubt, I do not think that would justify the picture which Mr Couser seeks to draw of him.
84. Neither GM nor JT had seen the note of the meeting of 29 March until they were questioned about it, which was unfortunate. GM insisted that even though there was no mention of their not having been paid, it was not his understanding that drawings would be paid once agreement was reached. He (in common with JT) regarded Mr Wurfbain's expression of belief in their product as mere words: if they believed in the IRO team, would they be looking to cut down their earnings so much? GM was asked if their proposal of £130,000 reflected a belief on their part that they could earn net broking income of half a million pounds, and his response was telling. He said that he could not look forward. He felt that it was a level of payment commensurate with their experience. It was not the right figure to judge by their performance over the past 6 months, but it was right for brokers of their experience.
85. Both men accepted that although the note recorded their wish to leave and return later to the meeting, they did not do so.
86. I regard GM's response as telling because it betrays a lack of understanding of how the LLP model at Vantage worked. That lack of understanding may not be surprising in someone who had not read his contract, but in my judgment it lies at the core of his and JT's response to Vantage's position. He and JT saw themselves as experienced brokers who were 'worth' £130,000; but Vantage's model rewarded success and actual returns, not simply experience. The firm had suffered a substantial deficit which it felt it had to (and which it was contractually entitled to) remedy by reducing the claimants' drawings until the desk could start making money again. There was no meeting of minds because the two sides did not understand each other's standpoint.
87. Mr Wurfbain's unchallenged evidence was that after the claimants left, the management team remained in the boardroom and discussed the next steps. They agreed to pay the claimants draws of £80,000 the following day (30 March). The decision was conveyed to Vantage's accounts team that afternoon and implemented at 0935 on 30 March by instruction to Coutts Bank, subject only to formal authorisation, which was given later that day, when there is no doubt that payment was made. In other words, Vantage did pay the claimants, albeit at the reduced draw level which they had proposed.



88. Robert Hampel said, and I accept, that he called JT an hour after the meeting, but he did not pick up, and when JT did not come into work the next morning (GM was on holiday) he called his mobile but again JT did not pick up.
89. However, it appears that the claimants had gone straight to their solicitors when the meeting ended. The solicitors emailed a letter on 30 March, timed 1029 (after the Coutts instruction to pay had been given), in which they complained that the claimants had not been told why they had not been paid and that it was plain that (as had been said at the meeting the day before, ie 29 March) Vantage had no intention of paying them until they agreed to reductions in their remuneration.
90. Pausing there, there was no evidence at all that Vantage said the claimants would not be paid until they agreed to reductions in their remuneration. It would have been an unlikely line to take, since Vantage did not need the claimants to agree: they had the contractual right to reduce the claimants' drawings whether they agreed or not. On the contrary, it was GM's evidence that on 28 March they had an impromptu meeting with Robert Hampel, who told them that he knew he had to pay them something. There was no dispute about the accuracy of the note of the 29 March meeting, yet that note made no reference to any threat by Vantage to the effect stated in the solicitors' letter; nor were Mr Wurfain or Mr Hampel cross-examined to that effect.
91. The solicitors' letter went on to contend that Vantage had acted in breach of their duty of good faith and were in repudiatory breach of their contracts with the claimants, a breach which the claimants accepted.
92. Vantage replied immediately, denying that there was any threat not to pay remuneration until the claimants agreed to reductions, insisting that Vantage always intended to pay them, and therefore denying any repudiatory breach. Vantage warned that if the claimants did not return to work, they would be in breach of their obligations under clause 19.1 of the Partnership Deed, and termination under clause 16.4 would be inevitable, whereupon the sign-on fees would be repayable and there would be recovery under clause 10.8(B).
93. The inevitable happened, except in the case of Chris Rhodes, who reached a separate accommodation with Vantage. The board met on 18 April 2012 and removed the claimants from their membership of Vantage. Letters were sent out on 19 April to notify the claimants of the board's decision. Their removal was said to have arisen from their failure to provide services to Vantage since 29 March and from what were said to be the material misrepresentations which they had made via their solicitors in correspondence. These were said to be breaches of clauses 19.1(A), (E) and (F) of the Partnership Deed. They were regarded as serious breaches and in consequence their membership was terminated under clause 16.4(K). Moreover, they were regarded as material breaches, so that the Board was entitled to take such action as it saw fit pursuant to clause 10.8(B). They also required return of the sign-on fee, which (they warned) would if necessary be deducted from retention moneys.

#### Termination of the contracts: discussion

94. The claimants' pleaded case on repudiatory breach (Particulars of Claim, paragraph 16) was that Vantage failed to pay the advance drawings that they were due to be paid on 20 March 2012; that they did not provide an explanation for that failure; and that

they informed the claimants that they would only be paid any advance drawings if they accepted a 'variation of contract' proposed by Vantage, including a significant reduction in their annual remuneration and changes to their terms and conditions to their detriment.

95. My conclusion is that, whatever the claimants believed, Vantage always intended to continue to pay them. What was in doubt was the amount, which was still under discussion at the 29 March meeting, at which it became clear that there was a disconnect between the claimants' belief in what they were worth and the revenue that they were likely to earn to justify drawings at that level. Vantage had the contractual right to vary their drawings (or even to withhold them), depending on anticipated Income Allocation, as the claimants accepted in cross-examination. There was no threat, and there did not need to be a threat, to pay them only if they agreed to the proposed reduction in drawings. Moreover, there was no contractual date for payment of drawings, so the failure to pay any sum on 20 March, or on 23 March, was not by itself indicative of breach. It was, however, explained in terms of the discussions which had to be conducted over reduced levels of remuneration. It may well be that, as Mr Couser suggests, the negotiation was not going anywhere, and it certainly appears (letter to solicitors, 29 April 2015) that Vantage was trying to make the claimants understand that a reduction to £80,000 was prudent and reasonable, but I am quite unable to regard that as a reprehensible approach. It was desirable that the claimants should understand the commercial reality. That was a legitimate objective of the discussions, and plainly preferable to the imposition of Vantage's wishes without the consent of the claimants. I do not doubt that Mr Wurfain and Mr Hampel hoped and intended that the claimants would continue to work at the IRO desk and that in time the desk could recover its profitability.
96. I have no hesitation in holding that Vantage was not in repudiatory breach of contract. Indeed, in my judgment none of the three matters pleaded at paragraph 16 of the Particulars of Claim as constituting a breach of contract was in fact a breach, let alone a breach which evinced an intention not to be bound by the terms of their contracts with the claimants. The contracts were not, therefore, brought to an end by an accepted repudiation, and (subject to an argument on the effect of s4(3) of the Limited Liability Partnerships Act 2000) the claimants continued as members. In my judgment, the actions of the claimants in walking out on 29 March 2012 were precipitate and extremely ill-advised, not least because they were bound to lead to their removal from the partnership on very unfavourable terms.
97. In the circumstances, I do not have to deal with Mr Couser's submission that I should depart from the decision of Henderson J, as he then was, in *Flanagan v Liontrust Investment Partners LLP* [2015] EWHC 2171 (Ch); [2015] Bus LR 1172, to the effect that the doctrine of repudiatory breach is implicitly excluded from multi-party LLP agreements. (The case went to appeal, but not on that issue). It is true, as Mr Couser says, that the facts of *Flanagan* were very different from those of the present case, but Henderson J was considering the issue not simply on the facts before him but, more broadly, as a question of principle, and Mr Couser has offered no basis for departing from that statement of principle, or for not following it, other than by distinguishing it on the facts. I make no criticism of him when I say that I would have required more cogent persuasion before I would have been prepared to depart from, or not to follow,

so thorough and carefully reasoned a statement of the law. But in the circumstances, given that I have not found a repudiatory breach, there is no need for me to say more.

98. Mr Couser maintains that if the claimants failed to establish repudiatory breach, they could still rely on s4(3), Limited Liability Partnerships Act 2000. That provides as follows:

A person may cease to be a member of a limited liability partnership (as well as by death or dissolution) in accordance with an agreement with the other members, or, in the absence of agreement with the other members as to cessation of membership, by giving reasonable notice to the other members.

99. He argues that in the circumstances, reasonable notice was immediate notice.
100. Mr de Silva, for Vantage, submits that the s4(3) references to ‘agreement with other members’ are plainly capable of applying to the partnership agreement, and cannot be limited to any separate agreement between members at the time of cessation. I agree. Moreover, as he points out, the references to agreement between members at s5(1), and to the absence of agreement, plainly refer to LLP agreements. Thus far, I do not think that Mr Couser disagreed.
101. Since the partnership deed and the A&C deeds contain terms as to the cessation of membership, Mr de Silva submits, there is no scope for the giving of reasonable notice under s4(3).
102. I confess to having been sceptical about this argument. I was not referred to any authority on the point, and one might have expected there to be some. I was doubtful whether the contractual documents did in fact contain terms as to cessation of the claimants’ membership, as opposed to terms which provided that the agreement should last for a fixed minimum term of four years, with notice capable of being given by the members in the forty-fourth month. I was concerned about the absence of any provision enabling members to extract themselves from such an agreement if the doctrine of repudiatory breach did not apply and if the partnership was, for example, failing in some material manner to fulfil its contractual obligations. But ultimately I have been persuaded that clause 12 of the A&C Deed, and clause 17 of the Partnership Deed, do contain agreement as to cessation of membership. They are provisions which tie in the claimants for an initial fixed term, understandably where members are recruited for heavily front-loaded consideration, and they do not enable the claimants to leave before the expiry of the initial fixed term; but that is not what s4(3) requires. I fear that does mean that members faced with persistent breach of contractual obligations on the part of their LLP would have no choice but to claim damages for the breach and/or to petition under s994 of the Companies Act 2006 on the grounds of unfair prejudice.
103. But in any event, I should not forget that no notice under s4(3) was ever given. That was not the effect of the solicitors’ letters sent on the claimants’ behalf after the claimants walked out. Even had it been given, the notion that reasonable notice would have been immediate notice seems to me only remotely arguable had Vantage’s senior management been behaving in the repudiatory fashion which I have found them not to have done. Mr Couser argued that it would have made no difference had the notice

been immediate or 3 months, because there were no revenues; but that ignores the claimants' continuing obligation to work hard to bring in business.

### Consequences of termination

104. Vantage was faced with a situation in which two members of the partnership had walked out and refused to perform their contracts. In the circumstances, they were entitled to, and did, remove the claimants from membership in accordance with clause 16.4(K) of the Partnership Deed (commission or serious breach of any obligations under the Deed), because they had failed to comply with their obligations under clauses 19.1(A) and (E), and arguably (F), of the Deed.
105. What has gone before might be thought no more than a lengthy proem, for this case is in fact a claim by the claimants for the return of the credit amounts, as defined by clause 10.8(A) of the Partnership Deed, namely the sums held in their retention accounts. Those sums are now agreed to be £194,936.71 (GM) and £189,091.36 (JT). They claim those sums, and damages representing the financial losses which they have suffered as a result of having to pay HM Revenue & Customs their income tax and national insurance liabilities out of savings rather than from the sums set aside in the retention accounts. In GM's case, the consequential loss is said to be £12080.01, and interest is claimed at 8.5% on the sum withheld, giving a total of £101,580.82 as at 18 July 2018. In JT's case, the matter is complicated by his having committed his savings to another project, so that he was obliged to obtain a bridging loan to pay his liability to HMRC. The cost of doing so is claimed as consequential loss in the sum of £45,131.21, and interest at 8.5% is claimed to 18 July 2018 in the sum of £107,599.09 (and continuing).

### Set off

106. Vantage's position is as follows. It maintains that, in accordance with clause 10.8(B) of the Partnership Deed, it is entitled to set off against the credit of the claimants' retention account (the credit amounts), the amount of any loss, cost, expense or liability which it had, in the reasonable opinion of the board, suffered as a result of any acts or omissions of the claimants, including the amount of any contingent loss, cost, expense or liability.
107. Its position has been refined as the trial proceeded. Mr de Silva's final stance was that its entitlement to a contractual set-off was £300,769 in the case of GM and £300,411 in the case of JT. In GM's case, this was made up of his earnings in the total sum of £432,025 (sign-on fee £100,000, drawings £207,025 and payment in November 2018 of £125,000), plus expenses of £56,667, less net revenues of £187,923. In JT's case, it was made up of his earnings in the total sum of £431,667 (sign-on fee £100,000, drawings £207,025 and payment in November 2018 of £125,000), plus expenses of £56,667, less net revenues of £187,923.
108. Of course, I must bear in mind that the contractual entitlement is to recover any loss etc which Vantage had suffered in the reasonable opinion of the board. Mr Couser argued for an implied term of the contracts whereby whenever the contracts (ie the Partnership Deed and A&C Deeds) gave Vantage a power to exercise a discretion or to form an opinion as to relevant facts, it had to do so fairly, reasonably, honestly, genuinely, in good faith and consistently with the purpose of the contracts, and that

Vantage would act in good faith. On the pleadings, the implied term was not admitted, and Mr de Silva in argument rejected it, referring to *F&C Alternative Investments v Bathelemy* [2012] Ch 613, a case about the extent to which fiduciary duties and a duty of good faith were to be implied into LLP agreements. The case concerned (and rejected) implied duties owed by members to each other and by members to the LLP, rather than by the LLP to members. I do not want to spend long on this point, because in practice it has no impact on my conclusion, but I would certainly be prepared to accept that Vantage was obliged, in forming its opinion, to make a genuine and honest decision. It is not strictly determinative, but I note that Mr Wurfbain very fairly accepted a duty of good faith in the course of cross-examination.

109. There were two ways in which Mr Couser suggested that such a duty bore on the case: one, of course, was in the context of clause 10.8(B), and the other, he suggested, was in the context of repudiatory breach, if Mr Wurfbain was not acting in good faith in threatening the claimants. As for the second point, I did not find that he did threaten them, and even had he done so it would not have followed that he was not acting in good faith. As for the first, I see nothing about the sums which Vantage seeks to set off which could be said to offend against such a duty, even in the wide terms in which the claimants pleaded it.
110. Vantage are plainly entitled to set off the sign-on fees. They were loans, forgivable in circumstances which did not arise. The contracts were terminated by Vantage, in accordance with clause 16.4 of the Partnership Deed.
111. What Mr de Silva says is that the other sums to be set off are genuine and reasonable figures for losses arising from the claimants' acts as members of the LLP, and therefore, in Vantage's reasonable discretion, were available to be set off against the sums in the retention accounts. They are not, of course, losses flowing from the claimants' breach of contract: they represent in effect the desk deficit, which, by leaving, the claimants deposited in the unwilling hands of Vantage. Although I do not think that it was initially part of Mr Couser's argument, I considered whether, given clause 10.8(B)'s context of material breach, the loss, cost, expense or liability referred to should be construed restrictively as meaning loss etc caused by the claimant's material breach, but I do not think that would be justified. I see the force of the point that the object of the provision is to enable Vantage to recover losses such as a desk deficit which arise when a member leaves in circumstances of material breach, rather than losses caused by the breach.
112. I was initially attracted by Mr Couser's argument that where an amount for tax liability had been retained by Vantage, the whole amount could not be set off, because that would entail double-counting. On reflection, I think that argument is flawed, because the loss to Vantage (on, by way of example, the £100,000 sign on fee) is the payment of £100,000, £49,000 to each claimant and £51,000 to the retention account, not just the payment of £49,000. If there is further argument on the detail of the calculation of the sums properly relied on for the set off, I will hear counsel on it when this judgment is handed down.
113. Subject to what Mr Couser calls his 'distribution point', it seems to me that the sums claimed are properly recoverable in accordance with clause 10.8(B).

114. Mr Couser's 'distribution point', which I do not think was taken until closing submissions, was a reference to clause 10.6 of the Partnership Deed (set out above). The point was not developed at any length, but it was said that the effect of clause 10.6 was to free the claimants from the obligation to repay any profits standing to the credit of their distribution accounts. The difficulty with that, as Mr de Silva pointed out, was that clause 10.6 refers to members, not to outgoing members, and the deed makes a clear distinction between the two. There are distinct provisions for the allocation of profits to outgoing members (at clause 17.4), and in my view it is sufficient to say that it is clear that clause 10.6 has no application to outgoing members.
115. Mr de Silva made clear that he does not seek to recover any excess of the set-off by way of counterclaim.
116. Although of course the retention sums, when the claimed interest and consequential losses are added in, would on the face of it exceed the sums sought to be set off, my conclusion is that the retention sums are not recoverable because they are substantially exceeded by the sums legitimately set off under clause 10.8(B). The claim therefore fails.

#### The Vantage counterclaim

117. There is a counterclaim, limited to future loss which Vantage says it suffered by reason of the claimants' breach of contract. Those losses were represented by (1) lost profit and (2) recovery of debit amounts standing against the claimants' distribution accounts. The lost profit was the amount which Vantage claims it would have earned had the claimants continued to perform their jobs as IRO brokers for the full four year term, and the debits are the totals left standing on the distribution accounts after the £125,000 advances were made to the claimants in November 2011, which Vantage says it would have been able to recover from future income allocations. However, the debits have, as I understand it, already been claimed under the contractual set-off. Moreover, it appears to me that in any event the claim for recoverability of the debits could only succeed if the claim for loss of profits succeeds, because their recoverability is predicated on the generation of profit during the remainder of the contract term.
118. I therefore focus, initially at least, on the counterclaim for loss of profits, which, as is accepted by Mr de Silva, is not a question to be filtered through the reasonable opinion of the board, but a matter for the court's assessment of the losses caused by the claimants' breach of contract.
119. As I understand the final position of Vantage, the calculation of the loss of profit is based on the appendix to the letter from Vantage to the claimants' solicitors dated 16 January 2012. That took the total revenue earned by the claimants during the period from March 2011 to March 2012, namely £501,373, and produced a monthly average revenue of £35,812. Splitting that revenue 50/50 between GM and Vantage, and 55/45 between JT and Vantage produced a net monthly revenue loss to Vantage of £8,238 in respect of GM and £7,414 in respect of JT. Taking into account the saving on the tax cost of expenses produced a total monthly loss of £7,875 in respect of GM and £7,051 in respect of JT. Multiplied by the 35 remaining months of the four year fixed term of

the contract, that produced a claimed loss of £275,612 in the case of GM and £246,780 in the case of JT.

120. Mr de Silva limited Vantage's counterclaim to those figures, as I understood him, rather than pressing the case for the losses in the defendant's Counter-Schedule of Loss, which were based on a monthly desk revenue figure of £58,195. That was sensible, because the figure was reached by taking the claimants' proposal for £130,000 drawings as an indication of the revenues which they expected to achieve. That was an implausible measure, because it was obvious that the claimants' proposal was not based on any estimate of earnings, but on their own belief as to what they were worth and what they thought they should be paid in terms of their experience.
121. Vantage's case was that had the claimants continued to work for it until at least the end of February 2015, as they were contractually required to do, it would have made money out of the desk. Mr Wurfbain's assumption was that the claimants would have been able to at least to replicate, if not improve, the first year revenue levels. The reductions in draws required by Vantage in March 2012 were not, he insisted, a desperate cost-cutting exercise in the face of a collapsing market, but an attempt to place the desk on a level of drawings which was in line with their general practice. Vantage had confidence in the claimants and were ready to adjust the draws upwards again when that became appropriate.
122. Mr Wurfbain gave reasons for that confidence. Firstly, the claimants, he said, had anticipated that the desk would start slowly and build momentum. The answer to that, I think, is that even if it was what they had anticipated, it was plainly not how the first year worked out. Secondly, he did not believe that the first year revenues were a proper reflection of what could have been achieved, since he felt that the claimants were not fully committed to revenue generation in February and March 2012. He took that view because the claimants had had the best of the deal up to that point, they knew or would have suspected that in March 2012 their draws were going to be scaled back to levels more typical of Vantage senior brokers, and they were carrying forward a debit of nearly £110,000 by way of expenses. So he felt that from early 2012 the claimants had at least one eye on exiting Vantage during the second quarter of 2012, by use of the break clause which GM, at least, wrongly believed they could exercise. If that was right, they would have had no incentive to generate revenues in the normal way. Mr Wurfbain's confidence in the future was also founded on his estimate that it was only necessary for the desk to take a market share of 0.33% to be comfortably profitable.
123. I doubt that Mr Wurfbain's scepticism about the claimants' motivation is justified. For a start, JT had (wrongly) believed that his guaranteed level of draws lasted for two years. Moreover, I do not think that either GM or JT fully understood the contractual burdens (eg by way of debited expenses) which their front-loaded deal imposed on them. There certainly came a point when both realised that their draws would have to be reduced, but their proposals for the level of draws, and GM's rationale for them, showed a lack of understanding of the true position. But above all, it was my clear impression from their evidence that although their morale had been damaged by the setbacks that they experienced, they were determined to work hard to claw back the business.

124. It seems to me that a fundamental difficulty with the defendant's projection based on the monthly revenues achieved by the claimants in 2011-12 is that there was a disastrous downwards trajectory, for reasons which I have considered at length above, and which is apparent from the monthly figures. After September 2011, the highest monthly revenues were October's £8,234, apart from the £24,104 figure in January, which was a one-off as a result of the desk being asked to unwind a position.
125. There were a number of factors that gave rise to that situation. There was a general loss of appetite for risk in the aftermath of 2008; there was the contraction of the Euro IRO market, as explained by GM and JT; there was the loss of valuable clients, particularly their contact at Erste Bank, which itself was related to the loss of appetite for risk; and – arguably, at least – there was the fact that the IRO desk did not have the advantage of a transparent trading platform. It is of course an essential part of the broker's work to find new clients when he loses old ones, but it appears from the evidence of the claimants that in the market as it stood, which was dominated by the big brokerage houses, there was great difficulty in persuading potential clients that a small broker like Vantage had enough to offer. Moreover, the process of winning over clients was a protracted one.
126. The expert witnesses, in their joint statement, referred to the actual state of the IRO market between 2012 and 2015. Mr Turner, the defendant's expert, preferred the figures produced by the Bank of International Settlements (BiS); Mr Herrtage, for the claimants, preferred the Bank of England figures. I do not see how I can resolve on paper which set of figures is to be preferred. But the experts agree that volumes of Euro based IRO trades declined over the period 2012-2015. Mr Wurfbain accepted that the decline in Euro denominated IRO volumes between 2011 and 2014 (which he put at 15%) was a factor which had to be considered in assessing future revenues. But he felt that the decline had to be seen in perspective: firstly, it was not automatic that the market decline would correlate to a decline in the volumes generated by the desk; and secondly, even if there was a close correlation, the desk's 2011 figure was skewed on the low side because the first twelve months' revenues were always going to be below the desk's proper earning potential. That might be correct in principle, but it begs the question of what was happening to the market.
127. The experts also agreed that during 2012-2015 traditional market participants (the proprietary trading desks of investment banks) reduced their participation, while hedge funds and other financial institutions not traditionally recognised as liquidity providers became more active. There was, in short, a commercially significant movement of transactions away from the desk's traditional client base to other categories of financial trading organisations. The experts differed, however, on the extent to which the desk would have been able to adapt to the changing client base, Mr Turner not considering that there was a commercial issue with the desk seeking to work with customers directly trading for hedge funds, while Mr Herrtage considered that the claimants had no hedge fund clients and no experience of dealing with them. I cannot resolve their difference of opinion, but I do have the benefit of the evidence of the claimants, which I see no reason not to accept, that it was impossible for them to talk to hedge funds, because they were the clients of the banks.
128. The experts agreed that the platform at Vantage provided the claimants with the opportunity to maintain market presence in the OTC IRO market. They also agreed that the desk would have needed to acquire new clients and/or increase the level of



brokerage generated with existing clients, not to see a decline in revenues. That, I think, is obvious. Unfortunately, they were not able to agree on the extent to which Vantage were placed at a competitive disadvantage by the lack of investment in suitable technology, but they did agree that anecdotal evidence suggested that the OTC IRO market remained largely voice brokered during the relevant period.

129. I heard the evidence of Matthew McCarthy, who was called by the claimants. He was an experienced interest derivatives broker who worked at Vantage from June 2014 until April 2017. He was headhunted by one Patrick Asseman to help start an IRO desk for Vantage, Vantage having apparently closed their IRO desk when the claimants left, rather than drafting in another broker to cover the work. I think it sufficient to summarise his evidence as being that during his time at Vantage, the IRO desk did not make money. He said that year on year, since the end of 2011, and in 2012 to 2013, volumes of trade were down 40%, and banks slashed rates for each trade. Volumes collapsed during that 15 month period, and a lot of senior traders left the market. It did not, he said, pick up after that. Indeed, he had worked at Tulletts until 2013, and he found when he joined Vantage in the summer of 2014 that the market had declined dramatically over that period also, with volumes and brokerage rates both down. His team at Vantage had some good relationships, but he realised that a huge amount of trading was going through on screen, and their clients said that Vantage had to show something different from the big broking houses.
130. Mr McCarthy's evidence is compelling, because it represents the actual experience of a broker working on IRO options after March 2012 both at a big broking house, Tulletts, and at Vantage during the latter part of the four year term of the claimants' contract. That evidence supports and indeed amplifies the experts' views on the decline of the market, and the claimants' own evidence of the difficulties which were already appearing as early as 2010.
131. I quite accept that Mr Wurfbain was optimistic for the future of the Vantage IRO desk, and continued to have confidence in the claimants' ability to turn it round, but it seems to me that the counterclaim is ultimately no more than a speculative projection into the future of what the claimants achieved at the early high point of their time at Vantage. I can find no solid justification for that projection, sufficient to persuade me on the balance of probabilities that such profits, or any profits, would have been made.
132. That being so, the counterclaim must fail. The result is that the claim and counterclaim are both dismissed.

