CL-2020-000864

Neutral Citation Number: [2024] EWHC 2534 (Comm)

Case No: CL-2020-000864

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

Monday 7 October 2024

Rolls Building
Fetter Lane
London
EC4A 1NL

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

1) RECHTSANWALT DR. MICHAEL JAFFÉ
(acting as insolvency administrator over the assets of Wirecard Technologies GmbH)

2) WDB ABWICKLUNGS AG i.L.
(formerly called WIRECARD BANK AG)

Claimants

- and -

1) GREYBULL CAPITAL LLP

2) WINDSOR JERSEY LIMITED

3) PETROL JERSEY LIMITED

4) MARC JOSEPH MEYOHAS

Defendants

- -
- -

James Morgan KC and Robert Mundy (instructed by **Osborne Clarke LLP)** for the **Claimants**

John Wardell KC and Thomas Elias (instructed by **Forsters LLP) for the First and Fourth Defendants**

Hearing dates: 26,27 June, 1,2,3,4,8,9,10,15,17,18 July 2024

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APPROVED JUDGMENT

This judgment was handed down remotely by the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 7 October 2024 at 09:00am.

Mrs Justice Cockerill:

INTRODUCTION

1. This case concerns an allegation of fraudulent misrepresentation about the source of funds being injected into a company. The alleged misrepresentations are said to have been made orally in a meeting which was convened at a key moment in the life history of Monarch Airlines.

2. The representations are said to have been made by the First Defendant Greybull Capital LLP ("Greybull"), an investment advisor and turnaround specialist, via the Fourth Defendant, Mr Marc Meyohas ("Mr Meyohas"). He was and is a designated member of Greybull (i.e. a partner with extra responsibilities).

3. The claim is brought by the First Claimant Mr Jaffé, because he is the administrator of a German company, Wirecard Technologies GmbH ("Technologies") and the Second Claimant, which was (prior to 2022) Wirecard Bank AG ("Wirecard"), a German registered company and licensed bank. Both companies did business with Monarch Airlines and lost money when Monarch failed. Both companies were part of the Wirecard Group, headed by Wirecard AG ("Wirecard AG") which went into insolvent administration on 25 June 2020 for unrelated but not uninteresting reasons, after it was discovered that €1.9 billion of assets that were meant to be held in escrow accounts did not exist.

4. The case is in some respects a classic one, in that at its heart it involves a clash of recollection between two sets of witnesses as to the content of oral statements made at an in-person meeting some years ago. It is also quite unusual in that it requires me to decide, as between the evidence of two equally patently honest and truthful witnesses, which of their recollections is to be preferred.

5. Aside from this key point, the case raises issues as to the proper law applicable to any claim in misrepresentation and the importance of the precise things said (as a matter of English and German Law); in other words, if the critical statements were made, did they actually affect the Claimants' actions to the necessary degree? There is also an issue as to what stops the clock running for the purposes of time bar under German law.

FACTUAL BACKGROUND

6. There was a good amount of agreement as to the relevant factual background. There were also, in the excellent List of Common Ground and Issues, a number of non-core factual issues between the parties as to the backdrop to the critical meeting, which took place on 17 October 2016 ("the Meeting"). I will set out my conclusions on those issues of fact as part of the factual account below, leaving only the events of the Meeting and its aftermath to be examined separately.

Merchant services 101

7. The starting point is the reason why Wirecard and Monarch Airlines were in a business relationship at all.

8. The mechanics of credit card transactions are often not thought about by users, but they underpin this claim. Essentially, when a cardholder presents their card to a merchant, the merchant passes details of the transaction to an "acquiring bank", (i.e. the bank for the merchants who want to accept credit card payments). The acquiring bank passes on the details to the cardholder's bank ("the issuing bank"). The acquiring bank pays the merchant, the issuing bank pays the acquiring bank and the cardholder pays the issuing bank.

9. If a merchant does not provide the goods or services paid for, the customer will usually be able to claim a refund from the issuing bank. The acquiring bank will then be liable to repay the issuing bank. These payments between the banks are known as "chargebacks". The merchant will then be liable to pay the acquiring bank.

10. Wirecard had for some time acted as an "acquiring bank" for Visa/Visa Electron and Mastercard/Maestro credit and debit card payments to Monarch Airlines.

11. Chargebacks formed an important part of its approach to the relationship because, in the context of the airline industry, the position was highly relevant. The starting point was summarised thus by Dr Käppner, former Head of Merchant Services for Wirecard:

> "The typical method of payment for customers of airlines is a card payment via Visa or Mastercard. The card acquirer (i.e. Wirecard) effectively acts as a guarantor to the airline's customer and is responsible for paying any chargebacks which arise if the airline fails to deliver the services paid for (i.e. the flights). Ordinarily, the chargebacks would then be recovered from the airline."

12. It was the unchallenged evidence of Mr Bennett (the former Finance Director and later Group CFO of Monarch Holdings) that a particular issue for card acquirers in the airline business is Unflown Revenue (or "UFR"). This is the revenue produced from a customer when they have bought a ticket but have not yet flown. Customers often purchase tickets some time ahead of proposed trips. It follows that UFR can be high. The risk is that a card acquirer is obliged to refund the cardholders when the airline cannot fulfil its obligations.

13. As a result, card acquirers will tend to scrutinise airline financial records very closely in order to ensure that there is no risk of insolvency in the short to medium term and that there is enough free cash to offset their risk. Often acquirers manage the risk by withholding cash as collateral from UFR and only release it when certain targets are met.

Monarch and Wirecard: the Mantegazza years

14. Monarch Airlines was a wholly owned subsidiary of Monarch Holdings (together, "Monarch"). Monarch had been founded as a British airline in the late 1960s. Throughout its life it was either financed or latterly ultimately owned by the Mantegazza family, the senior member of which was the Swiss-Italian billionaire, Sergio Mantegazza.

15. In what were to be its final years Monarch was one of Wirecard's merchants. Wirecard began providing merchant services to Monarch in 2009. In the usual way, this required the provision of security and collateral by Monarch to protect Wirecard from UFR chargebacks if Monarch became insolvent. Monarch was regarded by Wirecard as high risk and the agreements from time to time in place contained clear provisions about the amount of unsecured risk Wirecard was prepared to accept in respect of Monarch. As will be seen, these fluctuated according to market conditions and Wirecard's views about the risk which Monarch presented. For example, by an addendum agreement concluded in September 2010, Monarch was required to pay a €25 fee for every credit card charge-back. Further changes to terms are described below.

16. Monarch's other acquirer prior to 2014 was Worldpay. Wirecard and Worldpay were the only acquirers who were prepared to deal with Monarch on terms which required much less than 100% collateral.

17. As already noted, acting as the acquiring bank for an airline posed a particularly acute risk of being liable for chargebacks, because of the typically long period between a cardholder paying for a service (a flight) and the merchant providing it. To mitigate its risks, Wirecard generally deferred paying Monarch for four days after any card transaction and required Monarch to pay cash deposits as security. The balance was Wirecard's net unsecured exposure to chargebacks.

18. The exact terms of the contractual relationship between Wirecard and Monarch were governed by Wirecard's Contract for Card Acceptance, its Terms and Conditions for Card Acceptance Card Not Present Business ("Terms and Conditions") as amended by an addendum and numbered side letters.

19. These terms changed from time to time reflecting Wirecard's evaluation of the risk involved in dealing with Monarch at that point in time. To keep an eye on this, Wirecard's executives routinely interrogated the monthly update figures and asked questions about Monarch's financial performance. Mr Bennett recalled Mr Hilz, who acted effectively as client relationship manager, as being careful and meticulous in this respect. That was not challenged and reflects entirely the way Mr Hilz appeared when giving evidence.

20. In July 2011 Mr Bikar of Wirecard (Wirecard's operational risk controlling officer) highlighted the "alarming" figures to Dr Käppner, saying

> "Monarch's presentation for the period from 1 January to 31 May does not look particularly good. During this period, they made a loss of GBP 35.263 million. In the financial year 09/10, balance sheet date 31 October, they made a loss of GBP 30.145 million
>
> Their equity was negative this year at minus GBP 43.497 million. These are alarming figures, which in my view do not justify an unsecured share of € 25 million.
>
> …we absolutely must reduce our unsecured share of the commitment. At this point, a bank guarantee should be

> considered, because a liquidity withdrawal in the millions would probably break their neck."

21. The Agreement was subsequently amended by various instruments so that, by July 2012, Technologies was no longer a party and, in summary:

    i) Wirecard's maximum exposure to UFR was £125m;
    ii) Payment Delay was four days;
    iii) Monarch Airlines had executed and was required to maintain charges over certain (fluctuating) deposits held at Barclays Bank and Santander Bank as security for all its liabilities to Wirecard, including in relation to Chargebacks.

22. By a Referral Agreement dated 27th March 2012, Wirecard agreed to pay Technologies a commission on all credit card transactions processed by the former with merchants that had been referred to them by the latter, including (but not limited to) Monarch Airlines. By clause 6(3), the parties agreed to share all Chargebacks equally. By clause 6(4), Wirecard assigned to Technologies any claims arising against the respective merchant, subject to the condition precedent of full payment of the pro rata amount.

Greybull and the SPVs

23. What Greybull does and how it does it was to some extent contentious. Greybull is an English registered private investment LLP. In other words, it is a private equity company; and its form is that of a limited liability partnership.

24. Mr Meyohas founded it and as a designated member is one of its primary moving spirits. From 2014 to 2018, Greybull had three individual designated members: brothers Mr Meyohas and Nathaniel Meyohas, and Richard Perlhagen. Mr Meyohas was described variously as the "managing", "lead" and "principal" partner of Greybull.

25. In one headline concerning its acquisition of Monarch, Greybull was uncharitably referred to as a "vulture fund", referencing Greybull's acquisition of the high street chain Comet in 2011 - which did not work out well. Mr Meyohas unsurprisingly described Greybull's role differently. His evidence was that Greybull *"is an entrepreneurial investment group, whose purpose is to improve businesses for the benefit of all stakeholders… We acquire underperforming companies and seek to make them viable with an eye to either keeping the investment long term or realising the investment post achieving the required improvements"*. He says that Greybull provides investment advisory services to a small number of ultra-high-net-worth families (i.e. acts as a "family office") and institutional investors. There are therefore two "family" aspects to Greybull: the involvement of the brothers Meyohas at the operating level and the provision of capital for investment by high-net-worth families.

26. Mr Meyohas emphasises that Greybull does not itself hold or make investments but admits that it would, in non-technical contexts, refer to itself as the investor in relation to investments which it had arranged or on which it had advised. In terms of mechanics, investors make an investment into a special purpose vehicle

(SPV) incorporated for the specific purpose and the members of Greybull take significant equity stakes in the SPVs incorporated for the specific purpose of owning and investing in the target company. The Greybull partners take a stake in each SPV to align themselves with their investors.

27. The Second and Third Defendants Windsor Jersey LLP ("Windsor Jersey") and Petrol Jersey LLP ("Petrol Jersey") are examples of such SPVs. They are Jersey registered companies. The latter is the majority shareholder in the former and was a special purpose vehicle formed for the purpose of the acquisition of the Monarch group. The Claim Form was never served on Windsor Jersey and Petrol Jersey.

28. There was some discussion at trial about the elision of Greybull and the SPVs in Greybull's communications. In my judgment nothing turns on this. It is clear from the narrative which follows and clearer still from the full range of evidence deployed at trial that because of the way that Greybull operated (with SPVs for particular investments) the practice was on both sides to speak of Greybull as the investors, even though both sides well knew that the actual investors were those who formed part of Petrol Jersey.

2014: The Greybull Acquisition of Monarch and Project Drake

29. In mid-2014, Monarch hit financial difficulties. It had significant ongoing issues, including being undercapitalised, having a diverse fleet (i.e. operating Boeing and Airbus aircraft without being big enough for that to make financial sense) and being very small compared to its rivals, which made it vulnerable to external shocks. In the summer of 2014, the problems at Monarch had become more acute and it was in "dire shape". Andrew Swaffield ("Mr Swaffield"), Monarch's managing director and Monarch Holdings' newly appointed chief executive was also concerned about the fact that Monarch had virtually nothing on its balance sheets in terms of assets (planes being leased) and a real lack of cash to support what he felt was an overoptimistic business plan.

30. At about this point, having been briefed on the financial position, the Mantegazza family decided to sell their shares in Monarch's holding company, Monarch Holdings Ltd.

31. This links to the first part of the "family" theme which runs through this case. Wirecard says that, though it was aware of some of Monarch's difficulties, it took comfort from the fact that it was owned by the Mantegazza family, whose credibility and reputation would suffer if it failed, and that Wirecard generally placed importance on the nature and commitment of the owners of airlines. I accept this, at least to some extent. I accept that Wirecard wanted if possible to see ownership that had a long term commitment to Monarch, and that the Mantegazza family, who had weathered many problems over the years, offered that sort of comfort.

32. But nonetheless despite the comfort taken from the Mantegazza family commitment, it is also quite clear on the evidence that Wirecard had contracted on the basis of fundamentals. Much was made of a reference to the family in an early credit template; but in fact the focus even there was not on the family

commitment but on its absolute wealth and its expertise (via the Globus Group) in the tour business. Further, and more clearly, by mid-2014, there had been four side letters. Their dates were: 10/14 June 2011, 15/22 November 2011, 13 July 2012, 1 March 2014. The number of the Side Letters and the intervals indicate a careful eye being kept on the fundamentals.

33. Mr Bennett described the terms of these agreements as being "very onerous", due to the risks posed by Monarch and its "weak bargaining position". I accept that evidence – and indeed Mr Hilz agreed with this characterisation. In essence:

    i) Wirecard's Maximum Risk Tolerance was £125 (later) £150 million;

    ii) Monarch agreed to a four day delay before paying out amounts from credit card transactions;

    iii) Monarch agreed to provide a deposit based on 60% of the sum of unflown revenue less what was termed "the Collateral Free Amount" (either £11 or £22 million depending on the month in question);

    iv) There were onerous terms as to use of any financial headroom, effectively giving Wirecard first call on such spare cash to up the deposit amount;

    v) If the credit balance of the security accounts was lower than the deposit amount, Monarch had to (somehow) make up the difference.

    Having said this, Wirecard's maximum net unsecured exposure to chargebacks under Side Letters 3 and 4 was still considerable; it exceeded £56m.

34. As the Defendants noted in closing, this focus on fundamentals was evident in exchanges at this point. When Monarch was in desperate financial difficulty in August 2014, Wirecard refused to release €5.48 million that was due to Monarch. Dr Käppner agreed that it was not a question of trust in the Mantegazza family: *"...at that point in time it wasn't so much about trust, it was far more about getting the best negotiations and terms and ensuring the deal could be carried out without a grounding"*.

35. One of the parties approached as potentially interested in Monarch was Greybull, which was put in touch with Mr Swaffield in early-mid 2014 following an approach from M&A advisers who had been mandated to find a buyer for Monarch. He told Mr Meyohas that the selling shareholders were very conservative and wished "*to avoid this blowing up on their watch*".

36. Wirecard was aware both that investors were being sought and that the situation was dire. On 12 August 2014 Wirecard noted the continued disappointing figures for Monarch in the context of what it understood was a search for new investment "*there is no plan B in the event that Monarch does not find a new investor*". Although Wirecard's chief financial officer Burkhard Ley ("Mr Ley") indicated that he had been told that the family would continue to support Monarch in the same way until a purchaser was found, the contemporaneous documents suggest that the perception at the time was (realistically) that this support could not be

indefinite and absent a purchaser their patience would in due course come to an end.

37. One of the difficulties Monarch had was one created in part by Wirecard. The acquiring banks (understandably) held very substantial levels of collateral, because of the risk; but that then restricted Monarch's cashflow. Running out of money was a very real possibility. Indeed, Mr Swaffield said that day to day operations were "near impossible".

38. Yet throughout Wirecard was tough in its negotiating position. There were meetings and calls between Wirecard, Monarch and Monarch's advisers in September 2014 in relation to Monarch's perilous position and the proposed Project Drake. Monarch was still looking for some accommodation in the form of release of collateral from Wirecard. On 3 September Mr Hilz again reported on a meeting indicating clearly that in the absence of a new investor there was a risk of insolvency.

39. On 8 September Monarch wrote as follows:

> "Thank you for your time on Friday evening during which we hope we made the fragility of the position of the directors and the Boards of Monarch clear. Thank you also for expressing your willingness to support Monarch going forward and for agreeing to reconsider Wirecard's position with your Board today …
>
> As mentioned, in the event that you decide not to release the collateral due back to the company today, it is highly likely that Worldpay will decide to follow suit and withhold collateral due back from them. This will have an adverse impact on the Group's cash flow forecast and on the perception that the relevant companies can continue to trade with a reasonable prospect of avoiding an insolvent liquidation…
>
> I hope you can now see from what we have set out above that your decision to continue to withhold cash would have potentially disastrous ramifications, in a context where your risk is reducing naturally and the Group is working hard on solutions which will lead to a further long term reduction in your risk.
>
> We urge you to continue to support the Group and to release the collateral due to the company today."

40. This hardline position was taken despite the prospect of a considerable drop in risk – if Monarch survived long enough. Fearing that Monarch would otherwise fail, in August 2014, the Civil Aviation Authority ("CAA") (which was responsible, inter alia, for granting operating licences to commercial airlines) intervened – effectively to keep the show on the road pending the sale of Monarch. It agreed in principle to bear the risk of Monarch defaulting on its obligations to its acquiring banks. This arrangement was later called "Project Drake".

41. The arrangement proposed was that Monarch would sell its tickets through its subsidiary, First Aviation Ltd ("FAV"), and the tickets would be ATOL protected. In return, FAV would pay the CAA £2.50 for every ticket sold. This ensured that Monarch's customers would be covered in the event of Monarch's insolvency. The effect of this would be to very significantly reduce Wirecard's unsecured risk with Monarch - and the correlate of this would be that Monarch would be required to provide much less collateral than under normal, commercial terms. This assisted Monarch's cash flow and enabled it to continue trading. It was an exceptionally good deal. As Mr Bennett said – *"you could not get much better"*. It did however come at a cost to Monarch – over £5 million per year by the time the premia of £2.50 were added up.

42. But it took a good deal of organisation, while Monarch teetered on the brink – and Wirecard continued to be cautious about releasing funds.

43. To seek to make buying the shares an attractive proposition, Monarch also went about preparing for restructuring on acquisition. This was a complex operation which required deals to be done with the Pension Protection Fund (to deal with Monarch's unfunded pensions liability), Monarch employees, and the Mantegazza family (as sellers). It also required a simplification of the business and rationalisation of the fleet.

44. Over the course of the year the potential buyer interest had focussed down to Greybull. In mid-September 2014, Petrol Jersey signed non-binding heads of terms to buy 90% of the shares in Monarch Holdings and acquire its shareholder debt for a nominal sum. (It was envisaged that, as occurred, the trustee of Monarch's pension fund would acquire the other 10% of the shares, which would be made non-voting.)

45. Although Wirecard was previously aware of the investor search it appears that it was only at about this time that it learnt of Greybull's involvement as bidder in the proposed acquisition of Monarch. The first notification seems to come in a report on a conference call on 11 September. On the 15 September 2014 there was a call between Wirecard and Monarch regarding the projected sale and restructuring, in the course of which Mr Swaffield told Mr Ley that Monarch was "*in the process of signing heads of terms with Greybull Capital*". Slightly later as part of its regular analysis of the financials of Monarch, Wirecard indicated an intention to *"conduct in depth research on the investor and its intentions here together with the consultants"*.

46. The witnesses for Wirecard were clear that they were happier with a set up whereby the Mantegazza family were Monarch's principals. They took a somewhat dim view of Greybull as a private equity investor as being unlikely to be in the business for the long term. However, Project Drake would reduce the risk to an extent that Wirecard was prepared to continue doing business with Monarch. As Dr Käppner said *"Mantegazza was history; at that point in time we had to focus on closing the deal with as much security as possible given the exposure"*. "*Greybull was the only safety anchor we had*".

47. On 21 September 2014 the Sunday Times ran an article about the proposed Greybull-led purchase under the headline, "*Vulture fund in talks to bail out Monarch airline*".

48. Two days later the official announcement of Greybull as the preferred bidder came from Monarch.

> "The Board of Monarch Holdings Limited ("Monarch" or the "Group"), the UK's leading independent travel group, today announces that Greybull Capital LLP ("Greybull") is the preferred bidder to acquire Monarch … Greybull is a family office with a focus on investing in private companies across a diversified range of industry sectors. … It views an investment in Monarch as a long-term opportunity in a very strong brand with great potential in all of its markets, and intends to be supportive shareholders throughout Monarch's next chapter.
>
> Completion of a deal remains subject to the successful outcome of ongoing negotiations, whereupon Greybull intends to provide significant capital to Monarch in order to grow the Group…
>
> [Greybull] is a long-term active investor with significant or controlling stakes in all of its companies. Within its portfolio Greybull owns significant industrial, manufacturing and energy assets including:…"

49. Days later, Petrol Jersey entered a share purchase agreement on terms akin to the earlier non-binding heads of terms with conditions still in place to a scheduled completion in late October; at about the same time as Monarch's ATOL licence was due for renewal.

50. Shortly afterwards, on 26 September 2014 another part of the restructuring arrangements moved forward. This was the first step in the fleet rationalisation to facilitate a focus on low-cost short haul business, and the acquisition of assets to boost the balance sheet. For these purposes a tender process was being run. This resulted in a contract with the well-known aircraft manufacturer Boeing and a newly incorporated Monarch subsidiary, Vantage Aircraft 2014 Ltd ("Vantage"), agreed to buy 30 Boeing 737-8 Max aircraft and took an option to buy 15 more ("Original Boeing Agreement"). The terms of the deal were excellent. Boeing was very pleased to do a UK fleet deal and this was reflected in attractive prices per plane and finance being provided for the deposits. Unsurprisingly Boeing was *"extremely concerned to ensure that the numbers involved remained fully confidential in order to ensure that they were not disadvantaged in respect of future negotiations with other buyers"*.

51. In early October 2014, Monarch sent its business plan across to Wirecard to give *"a good feel for the business and the improvements which are being made"*. Shortly thereafter Mr Ley met Greybull's Mr Meyohas and Monarch's Mr Swaffield in London. It was plain from their written and oral evidence that Mr Ley and Mr Meyohas did not take to each other. Mr Ley regarded the meeting as "disastrous".

52. Mr Ley says that Mr Meyohas "*did not appear to be interested in Wirecard or what Wirecard wanted from the relationship*". Mr Meyohas for his part says the meeting *"felt a little flat"* and that Mr Ley did not ask "*many questions on us or our plans*". To the extent that it matters I am satisfied that Mr Ley clearly understood that Greybull, although announced as purchaser, would do so via a legal structure.

53. There were some suggestions that Mr Meyohas tried to mislead Mr Ley in this meeting, suggesting that other card acquirers (in particular Worldpay) were prepared to take a more liberal approach when the evidence in this case has suggested that was not so. This was not a central point and was not challenged in cross-examination of Mr Ley. But even so, it is also clear from Mr Ley's own statement that however Mr Meyohas tried to sell this line and whatever the terms of the official announcement, Mr Ley remained sceptical of Greybull and of its professions to be a long term investor *"I did not believe him (I thought he was more likely to be a short term investor)" "I left the meeting feeling that I could not trust Mr Meyohas, whereas I had always felt that I could trust the Mantegazza family"*. His evidence at trial reflected this:

> "so this was why after the meeting I spoke to my team members, Mr Hilz, Mr Brinkmann, Mr Käppner, that I'm coming out of this meeting without any illuminating information and that's why, when it comes to our co-operation with Monarch, I would recommend to only focus on their economic success but to not offer any loans based on the owner, Greybull."

54. The financial crisis continued – with Wirecard reinforced in its determination to *"focus on Monarch's business and financials, and not to give any credit based on its ownership"*. On 7 October Monarch apparently reported that absent funding the business would run out of money later the same week and was asking Wirecard to help it by releasing £6.4 million of funds: £3.6 million at once and £2.8 million the next week (with a similar request being made to Worldpay).

55. On 10 October Mr Meyohas wrote to Wirecard's head of merchant services Dr Käppner at his request giving an update "*from Greybull regarding the progress which has been made towards completing the solvent sale of the Monarch group to Petrol Jersey Limited, our special purpose vehicle for this project…The main outstanding issue of substance is agreeing terms with the card acquirers for post completion trading and, crucially, the release of retained cash collateral.*". Dr Käppner responded that Wirecard would be looking for 85% collateral of non ATOL business.

56. On 13 October Mr Swaffield wrote to Mr Ley and Dr Käppner headed *"Urgent cash request…. We cannot trade into and beyond tomorrow … without receiving at least some of the excess cash collateral you hold against our account"* seeking release of £6 million of the cash collateral to avoid a liquidation ahead of the sale completion.

57. Shortly thereafter by email timed at 15.00, Wirecard noted that "*we have said all along that we are willing to assist Monarch towards achieving a solvent solution*"

and offered (in an email copied to its solicitors) to release £4.8m in collateral by 12 noon on 14 October on the basis of "*agreement in principle…"* confirmed by "*an exchange of emails between us, with the formal documentation to follow*". On the next day the possibility for an even larger advance was agreed in principle internally.

58. On 14 October 2014, Dr Käppner (accompanied by Wirecard's lawyers) also met Mr Meyohas on behalf of Greybull.

59. On 15 October Wirecard agreed to release the sum of £4.8m held as cash collateral, in return for Monarch paying a liquidity fee of £500,000. It was expressly recorded that Wirecard had agreed this in reliance upon certain express representations about its continued solvency. Despite Mr Ley's scepticism, Wirecard was ultimately prepared to help ensure that the business made it to the sale.

60. On 21 October there was a call between Greybull (Mr Meyohas) and Wirecard (including Messrs Hilz and Käppner).

61. As the completion and ATOL renewal dates drew closer the CAA put pressure on Greybull. The original intention had been for the shareholder loan to amount to £35 million but in the last few days of negotiations, the CAA insisted on an extra £15 million as a pre-condition for re-licensing, with the intention of deriving greater comfort that Monarch would survive the (typically more challenging) winter months.

62. Petrol Jersey completed its purchase of the shares in Monarch Holdings on 24 October 2014. Of the consideration £50m came from the Greybull investors and the facility they provided through Petrol Jersey was secured by a suite of guarantees and debentures. The remainder came from the Mantegazza family. The Mantegazza family (or its companies) contributed around £80m on selling Monarch Holdings: about £30m to the pension trustees, about £30m to Monarch companies and £21m in loan facilities (£6 million cash and £15 million via a loan facility guaranteed to the end of January 2015) — a contribution sometimes referred to as the Mantegazza "dowry".

63. In early November 2014, Mr Goldstein of Greybull told its investors that about £32m of this contribution from the Mantegazza family was routed through Petrol Jersey "*which is good as it increases our claim on the company, makes it easier to get profits out, and is good PR for how much support we have given."*

64. The investors acquired 60% of its shares. Capsule Jersey Ltd, a Jersey company then owned by Marc and Nathaniel Meyohas and trustees for Mr Perlhagen's family took the remaining 40%. The agreed structure chart of the ownership of Monarch shows that the ultimate owners of Monarch consisted of the members and employees of Greybull (or connected entities) and the investors connected with Greybull.

65. The Monarch press release, like the earlier statement, elided the position of the SPV and glossed over the Mantegazza dowry. It stated that it had been sold to Greybull and had "*secured £125 million of permanent capital and liquidity*

provided by Greybull Capital LLP…". It also contained a quote from Mr Meyohas including "*We see this as a long-term investment*". Mr Meyohas wrote in similar terms to the employees of Monarch stressing that Greybull was *"a family owned business"*. The press release did indeed garner good PR: the Telegraph published an article headed "*Monarch Airlines rescued as Mantegazzas take flight*" and named Greybull as the investor.

66. At completion on 24 October 2014, Project Drake was put into force pursuant to the following arrangements:

    i) Wirecard agreed to provide acquiring services to Monarch on revised terms, essentially suspending the latter's rights to submit further transactions other than for limited "follow-on transactions";

    ii) Wirecard agreed to provide acquiring services to FAV under new terms;

    iii) The Trustees of the Air Travel Trust, the CAA and Wirecard entered into an agreement pursuant to which Wirecard was protected from chargebacks in respect of transactions covered by the ATOL scheme.

67. Certain categories of transaction were not covered by the ATOL scheme and FAV / Monarch were contractually required to ensure that Wirecard's unsecured exposure to such chargebacks did not exceed £12m from 1 June 2015. Thus Project Drake did not remove all risk, only reducing it very considerably.

68. The third part of the equation was the acquirer relationship. Monarch's "other" acquirer, Worldpay, declined to offer its card acquirer services after 28 October 2014 without 100% security. Wirecard gave a more favourable answer via Side Letter 5, concluded on 24 October. It reflects the 14 October agreement - that the released sum was paid to Monarch strictly on the basis and in reliance upon Monarch's representations to Wirecard that, when combined with contributions and funds from other sources and the release by the CAA of a £10 million bond as part of Project Drake, the Group's directors reasonably believe that Monarch will have sufficient monies to continue trading through to completion of the sale to Greybull. It then reworks the agreement to reflect the start of Project Drake. With 80% of the business protected entirely by ATOL, security was 60%, increasing to 70%, and then dropping back to 60% after June 2015. This was rather different to the terms originally sought. Originally Wirecard sought 85%, despite Project Drake.

69. On 22 December Monarch and Wirecard agreed Side Letter No.6 which released more collateral for a fee. It contained:

    i) Provisions for release of the whole of the £13 million collateral in return for a liquidity fee;

    ii) Released sums to be paid on the basis and in reliance upon Monarch's representations in the Release Request.

    This was an unusual agreement, as Mr Swaffield and Mr Bennett both accepted, because the agreement was reached in order to facilitate Monarch in hedging its

jet fuel costs. However there was an objective up-side for Wirecard in that any hedging would represent a lowering of risk as Monarch would be less exposed to market movements.

2015-2016: Setting the Stage

70. At the start of 2015 the picture had improved markedly. Mr Meyohas became a director of Monarch Holdings. The CAA was broadly positive. Dr Käppner recalled that *"the picture looked quite good. There were positive reports up to the summer at least"*. Business moved on constructively. In August 2015 there was a further restructuring involving: (1) Petrol Jersey transferring all its ordinary and preference shares in Monarch Holdings to another SPV, Windsor Jersey Ltd, (2) new ordinary shares in Monarch Holdings being issued to Windsor Jersey and (3) the setting up of a "management incentive pool" for Monarch's managers—including Messrs Swaffield and Bennett.

71. However within a year the first indications of trouble appeared. In late 2015, Greybull, with Deutsche Bank's help, was engaged in discussions with competitors EasyJet and IAG.

72. But it was broadly against the background of having made good progress that in October 2015, Monarch notified Wirecard that it wanted to end Project Drake and renegotiate normal commercial terms with its card acquirers. Monarch gave notice to Wirecard by email that Monarch intended to exit Project Drake with effect from end of April 2016. That email attached a letter giving 6 months' notice to end the processing arrangement between Wirecard and FAV and indicated that Monarch had interest from other card acquirers on the basis of providing 25% collateral. Monarch also asked for a short-term release of collateral over the winter low point. Based on the factors in play then Wirecard was quite content to negotiate a post Drake deal with Monarch and indeed to try to maintain its share of the business. Wirecard came up with a proposal as to the terms on which the parties would do business once Project Drake had come to an end, based on a two year deal. It obtained confirmation from Monarch that these proposed terms were acceptable in principle, and Monarch's ambition was that this would carry with it significant volumes.

73. However, at the end of October 2015 matters turned significantly for the worse. There was a terrorist attack on a flight leaving Sharm El-Sheikh, one of Monarch's main winter destinations, which seriously affected Monarch's financial position. That was followed in November by the terrorist attacks in Paris. In the event Project Drake ended up being extended and the in principle agreement was not finalised.

74. Following the terrorist attacks Monarch began to suffer real liquidity issues. Wirecard, although the impact of these attacks was presciently flagged by Mr Hilz, remained willing to discuss a post-Drake life with Mr Bikar analysing the risk which it represented with and without ATOL protection.

75. On 3 December 2015, Mr Hilz sent an email with a proposed fee structure for Monarch post Project Drake. It noted that *"the commitment has always been profitable"* and proposed that Wirecard provide a temporary release of £4m

collateral for a fee of 6.4%. It also proposed that Wirecard should provide £5m "free" blank risk, and thereafter charge a risk premium of £0.42 per ticket (a fraction of the fee of £2.50 payable to ATOL under Project Drake) for each additional £1m of blank risk.

76. On 4 December Mr Ley welcomed the *"well thought out and appropriate"* proposal. Further he suggested *"..., we should strive for a medium-term hard agreement for at least 2 years, so that we do not receive the termination again if other acquirers are willing to take risks"*.

77. Mr Hilz recirculated his proposal internally on 9 December, this time incorporating Mr Ley's suggestions. Mr Ley and Mr Wexeler approved it (the latter noting *"The airline appears to be on the way up")*Thus the next day Mr Hilz made the proposal to Monarch, including the request to fix a 2 year contract with a secured basis volume *"in the case more aquirers [sic] will come onboard"*. On 15 December Monarch agreed in principle with Wirecard's "*proposals for securities if the ATOL Scheme will be exited"*.

78. At this point Mr Ley remained keen to ensure significant minimum volumes, chasing up the two year and volume aspects: *"Have we now ensured that they stay with us in 2016 and 2017 with significant parts of the volume?"*. By this stage the anticipated deal included release of £4m collateral for a fee of 7.5%. That release was actioned at once. On 16 December Mr Hilz instructed Wirecard Treasury department: *"Could you please return 4 Mio. GBP in collateral from the deposit account to Monarch tomorrow? This is to temporarily support their liquidity via the winter low point. We will then probably receive the amount back in mid-February. For the period in question, we will charge 7.5% p.a. after the money has been returned."* A draft Side Letter was close to being finalised.

79. But the new deal did not come to pass. Project Drake had been due to end in January 2016, but in February 2016 Monarch was informing the CAA about near term cash pressure and indicating that because of the effects of the terrorist attacks a crisis situation was developing. The CAA reacted constructively. They agreed to extend it to cover bookings taken up to 30 April 2016. But at the same time, they wanted to know what the shareholders were going to do in terms of support. Mr Swaffield reported that *"They wanted and expected the entire £20m short term hole funded by GB and we were pushing for a shared approach"*.

80. It was not until a further loan from shareholders had been agreed that, in April 2016, the CAA agreed to extend Project Drake for a further 12 months, subject to Monarch's ATOL licence being renewed in September 2016.

81. This passage resolves one issue between the parties, namely as to whether Wirecard was unwilling for Monarch to exit Project Drake and agree new terms with it unless Greybull could provide Wirecard with "sufficient comfort". The short answer to this is a no. The documents summarised above show clearly that it was not in Wirecard's gift to control when Drake ended. That was the privilege of the CAA. At the same time it is also clear that (i) Monarch looked to improve the terms upon which card acquirers provided their services in advance of Project Drake's anticipated end and (ii) Wirecard was keen to retain the business if the fundamentals were sound.

82. In March 2016, Mr Bikar learnt that the Sunday Times had reported that Greybull had commissioned Deutsche Bank to find buyers for Monarch. He wrote to colleagues, "*Apparently, their statement that they see Monarch as a long-term investment was not meant very seriously. Monarch is denying the rumours, but we should nevertheless investigate the matter.*" Wirecard commented internally that a meeting in mid-May *"should bring clarity for us on this matter"*.

83. The Defendants say that Monarch's financial troubles worsened as a result of a fall in the value of Sterling after the Brexit referendum in June 2016, increasing its costs. After several months of poor trading, the CAA started to apply intense pressure and there was an increasing risk (flagged in correspondence from the CAA) that it would not renew the Group's ATOL licences. Solving that problem was a key issue for Monarch in early July. Greybull were reporting to the CAA that Petrol Jersey had approved a £3 million investment, but the CAA was continuing to put pressure on. Wirecard too was by now crunching the numbers and reporting internally *"It seems to me that the turnaround has not yet been successful and we should still closely monitor this airline."*

84. In July 2016, Monarch Holdings instructed Deutsche Bank to invite indicative offers for Petrol Jersey's stake. This was known as "Project Henry". On 27 July Mr Swaffield reported to Monarch Holdings' board that advisers had been instructed to advise on the feasibility of the early sale and lease back of the Boeing 737 order. At the same time Mr Bennett was consulting with Mr Swaffield and Mr Meyohas and indicating that *"given the state we are in and the project to rescue the company over the next 3 months… add to that that we're nowhere near any resolution with the CAA"*, the idea of onboarding new acquirers had realistically to await the financial situation being more robust – to enable a "front foot" strategy.

September-October 2016: Restructuring the Boeing Agreement

85. Meanwhile, Greybull and Monarch looked for other ways to raise capital and improve cashflow. By this time, Boeing had a long waiting list for its 737 MAX aircraft, and the price had risen significantly. Monarch therefore entered into discussions with Boeing to release the value inherent in the highly favourable Original Boeing Agreement; this was known as "Project Monarch Wings". Originally, it was anticipated that Vantage would sell and leaseback the ordered aircraft with the co-operation of Boeing / a financer. However, after Monarch contacted Boeing, the latter suggested making a loan to Monarch in exchange for restructuring the contract. This was a promising line for development, but as with the original agreement, Boeing's insistence on confidentiality complicated matters considerably. The whole project had to be conducted in complete confidentiality at the insistence of Boeing, with only a small team privy to the Boeing discussions. Mr Swaffield emailed the group indicating that "*we must urgently agree a plausible narrative with which to explain it to everyone else as needed*".

86. Meanwhile, on 25 September 2016, and despite Monarch's pleas to the CAA to work with them, the CAA gave notice that it intended to refuse to renew the ATOL licences of FAV and other Monarch holiday companies with effect from the end of September unless certain stringent conditions were met (a cash

injection of £38.6 million being one of them). If the conditions were met, the extension would only be until 7 November. This was accompanied by a Proposal to revoke Monarch's operating licence.

87. This was devastating news for Monarch. Monarch immediately appealed the decision and, aware of the likely press interest, published a press release on 26 September 2016 entitled, "*Response to speculation about Monarch*" saying that Monarch was trading well and that it expected "*to announce a significant investment from its stakeholders in the coming days*". Mr Swaffield and Mr Bennett agreed that because of confidentiality concerns care was taken to ensure Boeing's name was not mentioned.

88. The same day there was a call between Monarch, the CAA and Boeing ("Project Warwick"). The CAA was made aware of the potential of the Boeing deal and responded:

> "On the call today, Boeing indicated that, subject to its internal approvals procedures, it was minded to inject USD135m (approx £100m) of capital into Monarch. This would clearly be a helpful first step if executed. We will need urgently to understand the detail of what is proposed and you agreed to send us the Term Sheet tonight. I need, however, to stress one point that arose from our call. Boeing were unequivocal that their proposed injection was dependent on Monarch being granted a 12-month licence. But, for the reasons set out in our letter, an injection of £100 million is not enough to enable us to grant a 12-month licence. If you want a 12-month licence you must take steps, as a matter of urgency, to fund the remainder of the deficit. Our letter explains that the low point in December is £136m and sets out reasons why the funding requirement is in excess of this on a 12-month view; we estimate the additional requirement to be in the region of £40m. So, you will need urgently to look again at funding options that are additional to Boeing."

89. Close attention was paid to the media interest, with regular communications group calls scheduled. At the Wirecard end this was picked up promptly; on 26 September Mr Hilz emailed others at Wirecard saying there had been speculation on social media over the weekend about Monarch's financial stability and attaching Monarch's press statement (received from Mr Perris of Monarch). He said Monarch had offered a face-to-face meeting in Munich from 10 October.

90. On 28 September Mr Bikar forwarded a Google Alert to Mr Wexeler and Mr Hilz, saying, "*According to the attached report, the current main shareholder Grey Bull Capital is attempting to sell part of its stake in the Chinese HNA Group. The planned meeting should therefore also involve the future ownership structure of Monarch Airlines.*"

91. On 29-30 September 2016 the review of the CAA decision took place at a hearing. Monarch had instructed a leading solicitors' firm and Mr Martin Chamberlain KC. In a confidential written submission to the hearing Monarch told the CAA

that shareholders would be providing US$135,000,000 in funding with the source principally being Boeing "*which has confirmed to the CAA that it expects to be in a position to make a transfer to Monarch in approximately two weeks*". Mr Swaffield in his evidence to the panel said that over £100 million capital was coming into the business from Boeing. Mr Meyohas emphasised Greybull's commitment to turning Monarch around, explaining the intention to put in £2.5 million from the investors imminently, and using the expression *"skin in the game"* to characterise this. This was reinforced by the submissions of Mr Chamberlain QC who likewise referred to *"a picture of considerable commitment by a very serious and very large company"*.

92. On 30 September 2016, Monarch's appeal was successful but only on condition that Monarch's shareholders made an immediate injection of £10 million into Monarch. Monarch managed to satisfy the CAA's immediate condition (pending satisfaction of further conditions by 12 October 2016) of an injection of £10m, which was ultimately funded by the investors in Petrol Jersey.

93. At the same time negotiations with Boeing continued, against the background of a need by Monarch to raise funds and the continued background of rigorous attention to confidentiality by Boeing. When he received a draft term sheet, Mr Swaffield replied with a list of the *"only people who will be aware of the existence (although not all the details) of the deal"*. He said that Monarch would avoid "Monarch legal" becoming aware of the arrangement unless *"it becomes unavoidable and essential"*. When Mr Meyohas forwarded the draft term sheet to others at Greybull, he said, *"Need to keep this v confidential to ensure B don't flip out"*.

94. There was a certain amount of variation/flexibility about the way that the Boeing deal would work. After Mr Meyohas had meetings with Boeing in late September 2016, Boeing was discussing making a "loan" of US$130m to Petrol Jersey in exchange for increasing the price at which aircraft would be purchased from Boeing by Monarch (in place of Vantage). On 1 October Mr Meyohas was telling the CAA that "*We are and remain committed to the turnaround and the good news is that since late 2014, Monarch has made phenomenal progress in ensuring that it will be a viable company for years to come. 2016 has been tough but the fact that Monarch can still … secure significant capital from the likes of Boeing is a sure sign that we are on the right path."*

95. On 1 October Mr Perris sent Mr Hilz a press release about Monarch which "*has successfully concluded discussions with the [CAA] to extend its ATOL licence...*", which he forwarded to others at Wirecard as "good news".

96. By 2 October 2016, Boeing had agreed to pay Petrol Jersey US$132m for the exclusive purpose of satisfying Monarch's funding needs. As before, it was premised on the basis that Boeing would "recoup" the amount it had paid through the higher aircraft price or higher lease rentals.

97. The arrangement was carried into effect through various formal documents in the early part of October 2016. In summary:

    i) The Original Boeing Agreement came to an end;

ii) Monarch agreed to acquire aircraft from Boeing on less advantageous terms than those available to Vantage under the Original Boeing Agreement;

iii) Vantage agreed to purchase 30 737 MAX 8 aircraft from Boeing with the option of purchasing 15 more at a price of $4.4 million per aircraft more than the original 2014 purchase price;

iv) Petrol Jersey was to invest $10 million by 30 September 2016;

v) Boeing agreed to pay Petrol Jersey the total of US$132m on terms that it be used for making an *"irrevocable cash contribution by or on behalf of"* Petrol Jersey to Monarch via Monarch Holdings (the "Restructuring Agreement").

98. Pursuant to the Restructuring Agreement, Boeing paid US$132m direct to Petrol Jersey: US$10m (£7m) on 7 October 2016 and a further US$122m (£100m) on around 12 October 2016. A further US$20m (£16m) was due to be received on 6 January 2017 on the exercise of an option in respect of five aircraft.

99. With that deal in place Monarch on 7 October 2016 again came to a decision to come off Project Drake.

Early October 2016: Presentation of the Boeing deal

100. From here on the constraints of the confidentiality requirement led to a succession of stories and conversations which ranged from broadly accurate through confused to (on occasion) somewhat inaccurate.

101. On the morning of 7 October 2016 there was a telephone call between Mr Swaffield, Dr Käppner and Mr Hilz about an "equity investment" into Monarch by its shareholders. Before the call, Mr Swaffield, Mr Meyohas, Mr Bennett and Greybull employee Sam Hancock discussed a "script" for the call in order to deal with the confidentiality issues. Recollections of the call were limited. Dr Käppner characterised it as describing a large future investment by Greybull and that a statement from Monarch was sought. Mr Bennett had no recollection of the call.

102. After the call, Dr Käppner sent Mr Swaffield five questions drafted by Keith Bordell of Osborne Clarke. The latter's answers included the following:

> "3. Who is putting in the new money (Greybull or others or Greybull and others etc) and what is the intended timing of receipt? THE MONEY WILL BE BY WAY OF EQUITY INJECTION FROM THE SHAREHOLDERS. MONARCH AND ITS ADVISORS HAVE FULL VISIBILITY TO THE SOURCE OF FUNDING AND ARE ENTIRELY COMFORTABLE WITH THE COMMITMENT."

103. The characterisation as equity was contentious. Mr Bennett said the reference to equity was accurate because the money was coming in as new shares being issued.

104. Dr Käppner said that Mr Swaffield's answers were *"helpful although not quite as definite as we thought from our phone conversation"*. He asked three follow-up

questions – which did not involve any questions about the source of the funds. He regarded the terminology of equity investment from the shareholder as giving a small amount of comfort because shareholder equated in his mind to Greybull which indicated long term commitment.

105. At 13.10 Mr Hilz sent an email addressed to "Telco participants" summarising the call. He said, "*On 12/10/16, the shareholder placed a cash contribution of 110 million GBP as EC…*" and that a meeting was scheduled for the end of the next week.

106. That evening, Mr Swaffield sent a letter to Dr Käppner. The letter said, "*I promised to confirm in writing the details of our equity injection coming from our shareholders by the 12th October 2016. We received into Monarch on Monday this week an additional equity injection of £10.0m and this will be added to with a further injection of £100.0m on or before the 12th October 2016, bringing the total injection to £110.0m (£7m of which is due today or Monday latest).*"

107. The next day, Saturday 8 October 2016, Mr Meyohas and Mr Swaffield learnt that a journalist at Sky News, Mark Kleinman, intended to publish a story about Boeing and Monarch. The story as published was apparently based on a briefing from Mr Meyohas. Mr Meyohas told colleagues at Greybull that he would explain that the Boeing arrangement was "*just a restructuring of the PA that enables shareholders to provide additional capital (£165m) and allows for S&LB tx in the future. He understands B will not be providing any loans or equity to Monarch*". The article published that day headed "*Boeing flies to Monarch's rescue with restructured fleet deal*" said that a revised deal with Boeing "*would allow Greybull to provide more equity to Monarch*". This article therefore provided a clear indication of funds flowing from Boeing in some form or other.

108. Mr Bikar monitored the press as regards key customers and picked this up. On Sunday 9 October 2016, Mr Klestil of Belview Partners forwarded to the other members of the Supervisory Board, and the Management Board of Wirecard AG (including Mr Ley) a link to the Sky News / Kleinman article, and asked for an update on Monarch.

109. Other press coverage followed:

    i) The Times published an article headed "*Final call to save Monarch Airline*";

    ii) The International Business Times published an article headed: "*Boeing bails out Monarch with new £165m fleet deal*";

    iii) On 10 October the Independent and City AM ran articles whose headlines linked Boeing to the rescue of Monarch.

110. On 10 October Mr Wexeler (of Wirecard's Management Board) provided Mr Klestil and the other members of the Supervisory board with a full report of Monarch. As far as concerns the recent developments, no mention was made of Boeing. The summary was simple: *"Following the emergence of rumours about the future viability of Monarch Airlines, we reacted immediately and, among*

others, telephoned with the CEO of Monarch, Mr Swaffield. Mr Swaffield informed us that the shareholder will re-invest a total of GBP 110 million in the company. Partial payments have already been made, and the entire transaction should be completed and publicly announced as of 12/10/2016. In this context, we refer to the attached letter from Mr Swaffield to us dated 07/10/2016."

111. The same day Dr Käppner asked Mr Swaffield about the conditions precedent to the shareholders' investments and the risks they would not be fulfilled. Mr Swaffield forwarded Dr Käppner's email to Mr Meyohas, Mr Hancock and Mr Bennett, saying, "*Let's think about the best way to reply. It hardly seems productive to share CPs when the funds may be with us in 48 hours…*"

112. Mr Meyohas, at least initially, suggested that Mr Swaffield tell Dr Käppner that Monarch had signed an initial agreement with Boeing and the deal would close by Wednesday.

> "I would reply stating that
>
> 1. We signed the initial agreement with B on Friday as planned and have received the $10m payment
>
> 2. The deal with B is closing on Wednesday at the latest. Aside from completion of the docs & renewal of Monarch's ATOL license (both of which are v well advanced), there are no CPs outstanding. Our degree of confidence in the transaction completing is extremely high…"

113. But Mr Swaffield ultimately did not mention Boeing, instead saying:

> "We signed the initial agreement on Friday as planned and have received the $10m payment. The full deal is closing on Wednesday at the latest. Aside from completion of the documents & renewal of Monarch's ATOL license (both of which are very well advanced), there are no CPs outstanding. Our degree of confidence in the transaction completing is extremely high. We would like to meet at your earliest convenience to update you on the transaction and its very positive impact on Monarch s liquidity and balance sheet. We'd also like to discuss with you how we can develop, deepen and continue our business relationship now that Monarch is on a strong financial footing."

114. Mr Bennett said it was unlikely that Mr Swaffield would have changed this without making sure Mr Meyohas was happy with what was said. Dr Käppner reported to colleagues accordingly.

115. On 10 October 2016, Monarch's PR advisors Bell Pottinger prepared a further press release, anticipating closure of the deal with Boeing. The idea was that a positive message would go out and instil confidence in customers to ensure future business: "*we had to find the correct balance of being able to communicate what was going on without breaching the confidentiality*".

116. Bell Pottinger asked Mr Goldstein to provide "*the key numbers Greybull is happy to use and the language we can use on Boeing*". Mr Goldstein referred to the need to agree the key headlines. Mr Swaffield proposed "*something along the lines of 'Boeing restructured our fleet order to facilitate the injection of equity from Greybull*". Mr Meyohas told Mr Goldstein, ""- *Lets go with same message as the [Sunday Times article]. Kleinman's article is close to the press release we need -165m is the number we [should] run with. The investment is from GB. We shld not go into any detail about split between equity and debt. - Boeing are a key partner and supplier to Monarch but are neither a lender nor shareholder. - Fleet delivery starts in 2018.*"."

117. When a draft was circulated it said this: "*Monarch, a leading UK independent airline group, today announces the biggest investment in its 48 year history, a £165 million investment from its majority shareholder Greybull Capital*.", Mr Swaffield said that Boeing had approved the draft press release and asked for Mr Meyohas's comments.

118. Mr Sunnucks, of Bell Pottinger, was dubious about this approach.

> "I am fully aware of sensitivities and the reasons behind your careful wording in the statement. However, as you know, there will be intense questioning on the Boeing deal, the £165m and how it is made up, and who is providing the capital. The clearer and more upfront we can be in the statement, the safer we will be (and the more credit we will get) in the press. Also, others will be briefing on background. So:
>
> --More clarity on the £165m and what it comprises
>
> -- '£165m investment LED BY Greybull' begs questioning on who other investors are
>
> --'Monarch's growth is in large part based on the order for 30 Boeing' doesn't make clear what we are saying and begs questions on why/how".

119. Mr Swaffield replied, including "*For their own reasons, Boeing don't want a sentence about restructuring the fleet deal in the statement*", and *"£165m from our owners, Greybull Capital is clearer.*"

120. Mr Meyohas wrote, "*I prefer the sentence 'led by' as this is more accurate. On background, you can always clarify that 'led by' means 'from' but at least the official release has it on record that it is 'led by'. Having said that, I'm not overly concerned either way so we can always revert to 'a £165 million investment from its majority shareholder Grey-bull Capital" if you feel v strongly about it."*" [The reference to "on background" refers to supplemental background briefings by the PR agency.]

121. Clinton Manning of Bell Pottinger said, "*Our preference is for 'from Greybull' as the alternative 'led by', whilst probably more accurate, simply invites lots of additional questions.*" Ultimately Mr Swaffield decided to use "from".

122. On 11 October there was a clear confirmation from the CAA that Project Drake would end from 1 January 2017. On the same day Monarch's main CAA contact emailed regarding the draft press release. He picked up on the contentious wording, saying *"the statement implies the £ is coming directly "from" GB. Given the Sky article will this risk being seen by some as misleading? Maybe "organised by" GB or something similar."*

123. The £165m figure was arrived at by adding the £10m which ultimately came from the investors in Petrol Jersey, the sum of £122m (i.e. US$132m plus US$20m) anticipated to be received from Boeing and £30m which the CAA required be injected into Monarch's accounts by 31 January 2017. Anticipating at this time that this portion would be debt, Mr Swaffield asked whether he should nevertheless say the £165m was equity, asking if that was "*risking the later…debt being picked up*". Mr Meyohas said he would "*go with simply stating 'equity'. Anything else [w]ill lead to 1000 questions*".

124. On 12 October 2016, Monarch published the press release:

> "Monarch, a leading UK independent airline group, today announces the biggest investment in its 48 year history, a £165 million investment from its majority shareholder, Greybull Capital…"

125. The accompanying Q&A document, prepared for further briefings to journalists, included this:

> "**Where is the additional funding coming from?** From our majority shareholder, Greybull Capital
>
> **Exactly how is the Boeing contract being re-structured?** The details of our aircraft purchase agreement with Boeing are confidential, but Monarch has restructured its fleet order to facilitate a capital injection from its shareholder.
>
> **Isn't Boeing bailing out Monarch?** No. Boeing is neither a lender nor shareholder in the company"

126. It was very much the case advanced for Wirecard that this press release and Q&A was inaccurate and misleading, in that it said in terms that there was an investment from Greybull, whereas in fact while funds flowed from "Greybull" (in the sense of Petrol Jersey) the source of the vast majority of the money was Boeing. It is certainly right that it was not frank and forthcoming. It told half the truth. Boeing did not directly bail out Monarch, but they were instrumental in facilitating the rescue. Mr Meyohas agreed that the reality was that *"Boeing were absolutely a key part of the overall transaction to save Monarch"*. At the same time, despite the urgings of the Claimants, I reject the case that the statement that Boeing was not a lender or a shareholder was false. Boeing had not itself injected capital; it had not financed the Investment, nor did it directly fund the Investment. It facilitated the Investment by agreeing the Restructuring and it indirectly provided the funds for the Investment by paying them to Petrol Jersey.

127. It is clear that different audiences focussed on (and perhaps understood) different things from the press release. Several newspapers ran articles saying that Monarch had received a £165m investment from its majority shareholder. One characterised it as *"the kind of gutsy investment that burnishes rather than tarnishes the reputation of private business owners"*. Some also reported that this had been facilitated by Boeing, and in terms which came close to joining up the dots. For example:

> "Central to Monarch's rescue bid is a restructuring of a $2bn (£1.5bn) deal with Boeing for up to 45 aircraft, which is expected to release significant cash back into the business and delay an increase in costs for two years. Monarch boss Andrew Swaffield confirmed that the rejigged deal would include a sale-and-leaseback agreement that could see Boeing buy Monarch's order on the condition that the airline agrees to lease the aircraft from 2018 when the first planes are set to be delivered. The company said that the Boeing agreement had facilitated the £165m cash injection from Greybull, which holds a 90pc stake in the company after agreeing to pump £125m of capital into Monarch in 2014."

128. The Sun focussed on what this meant to its readers in terms of Monarch's actual job: *"Monarch is offering package holidays again after receiving cash injection here are there 6 best offers right now"*.

129. Bloomberg's approach reflected both aspects:

> "Monarch Airlines Ltd. announced a 165 million-pound ($202 million) capital injection from majority shareholder Greybull Capital LLP just hours before the U.K. carrier faced a possible grounding amid concern that it lacked the funds to stay in business. …
>
> The airline will go ahead with the $3.1 billion purchase of 30 Boeing Co. 737 Max 8 jetliners originally placed in October 2014, though the deal will be now structured as a sale and leaseback, in which planes are typically purchased from a carrier by a leasing company and then rented back.
>
> Boeing Flexibility
>
> Monarch didn't provide details of the revised terms but said the manufacturer's flexibility had been instrumental in securing the new capital. We have had Boeing's cooperation around restructuring certain aspects of our purchase agreement, which has facilitated the shareholders injection, Swaffield said."

130. At the same time Monarch was focussing on the need to get acquirer services ready for after Project Drake. On this Dr Käppner refused to provide comfort:

> "please let me acknowledge receipt of your letter and the attached email and letter from CAA of today's date. We have

> spoken about Monarch's plans to terminate the current (Drake) arrangements with effect from 1 January 2017. We intend to discuss alternative arrangements with Monarch before the end of the year and in the meantime, we understand that all bookings made up to 31 December 2016 will remain be covered by the existing indemnity arrangements."

17 October 2016: The Meeting

Run up to the meeting

131. There is some disagreement about the backdrop to the key meeting on 17 October 2016. The Claimants say that Wirecard had learnt of speculation about Monarch's financial stability and in September 2016 took up Monarch's offer of a face-to-face meeting in Munich. The Defendants accept a certain amount of this: that it was convened for the purpose of setting out Monarch's business strategy *"and financials"* with a view to "*encouraging Wirecard to put forward proposals…*".

132. The Defendants however see the meeting rather as part of Monarch taking steps to come off Project Drake now that Monarch was recapitalised and its immediate future seemed secure. This version paints it simply as one of numerous meetings with different card acquirers to discuss future terms of business.

133. On this again the answer has elements of both sides' case. It was one of a series of meetings organised to seek competitive deals with a range of acquirers on the basis that now that there was a firmer financial footing Monarch could look to work with other acquirers who might offer better terms (and presumably drive Wirecard and Worldpay to be more generous in their terms). Preparation for the meeting was therefore conducted on the basis of preparing for a range of meetings, including those with companies who knew little of Monarch. But because Wirecard were not just any card acquirer this was a meeting that must have been key: as was acknowledged by Mr Bennett in his evidence "*it's important coming off Drake that we want them involved*".

134. The meeting had been fixed to take place in Munich on Monday 17 October 2016. There were apparently telephone calls as well as emails in the run up to the meeting.

135. On 11 October an exchange between Mr Hilz and Mr Bennett shows the meeting at that point shaping as a review of the position post Drake, and starting to look at potential new terms. The plan appeared to be to look at this over the next couple of months with the main issues for Wirecard being unsecured risk and processing volume for Wirecard. At this point there was no mention of any Greybull attendee. Mr Wexeler indicated that Monarch should be left in no doubt that the meeting would need to convey that "*the reserve would have to be increased as a result*".

136. On 12 October 2016, Monarch sent a copy of the press release to Mr Hilz, which Mr Hilz forwarded to Wirecard's directors and others identifying the "*two most*

important points" as being 165 million GBP investment by Greybull Capital and Extension of the ATOL licence by 12 months.

137. Dr Käppner replied with comments, including saying that *"For the meeting, I am particularly interested in the form and structure of the investment (the figures are different than what has been stated before). Are there any loan components or collateral here? The impacts on the business plan for the coming year. The planned securing of the unflown tickets. Specific forecasts for ticket sales. The identity of the other acquirers. Our current share of volume (there were covenants on this point in the contracts of 2014)."*

138. Mr Bennett wrote to Mr Hilz *"We had $10m (£8m) injected into the company on Monday this week as part of this overall funding package and we are receiving today a further $122m (£106m) into our accounts. The balance of the overall package will arrive in Jan 2017. We will give you more detail when we see you on Monday."*

139. Mr Bennett later confirmed (via sending a screenshot) that Monarch had received £122 million and asked, *"Does this give you the comfort you need to resume passing us our funds?"* Mr Hilz later confirmed processing would start again. Mr Ley congratulated him and noted *"Liquidity issue resolved at Monarch"*.

140. Shortly after this an Agenda was circulated by Wirecard for the meeting on 17 October. The first item on the agenda was:

> "Facts around new Capital Placement
>
> - Gross Amount
> - Tranches paid and to be expected
> - Debt to Equity Conversion
> - Pattern of Finance of the Investment (Loan Components? Collaterals?) Current and future Shareholder Structure"

Other items on the agenda were 2017 Business Plan, post Drake ticket sales forecast, *"Acquirer Structure 2017: Who will get on Board?"* and *"Wirecard's Percentage of Monarch's Processing Volume (Current/Plan 2017)"*.

141. Mr Meyohas had not originally planned to attend and there was an issue as to how and why he came to be there and on whose behalf (solely on behalf of Monarch Holdings or also on behalf of Greybull). The answer to the question of how and when is that on 13 October he decided to come, as an email of that afternoon revealed. It was accepted for the Claimants that this was a realistic conclusion.

142. Later that day, Mr Swaffield told Dr Käppner that "*Marc Meyohas, principal of our majority shareholder Greybull Capital and Chairman of the Monarch Holdings Board would like to come with us on Monday.*" Dr Käppner forwarded Mr Swaffield's email to Mr Ley, Mr Hilz and others (and Mr Hilz forwarded it to Mr von Knoop describing Mr Meyohas as attending in both capacities). On 14

October Mr Hilz wrote to Ms Petra Gommel listing those from Monarch due to attend the meeting including "*Marc Meyohas (Chairman of the Board at Monarch Holding and Director at Greybull)*".

143. This leads to the question of on whose behalf Mr Meyohas attended. This can be cleared out of the way at this point, though by the end of trial it did not seem to be much in issue: he attended for both. It was quite apparent that Mr Meyohas wore two hats in this regard.

144. From late on 13 October serious preparation for card acquirer meetings began on both sides.

145. Having been asked by Mr Ley to draw up a proposal for doing business with Wirecard, Mr Hilz wrote to Dr Käppner saying:

> "At this point in time, this is not very easy, because we will not have the decisive informational transparency regarding the business plan, cash planning, and a potential shareholder commitment until the meeting. What we could do is assume the best case so that we can advocate for an increase in the risk tranche and take up the consideration from a year ago to offer a part of the saved ATOL fee as a risk premium for us. It could look like this: …"

146. Mr Hilz sent Mr Ley a proposal for Monarch collateralisation in 2018, suggesting a £22m blank risk maximum. A range of other emails were exchanged on the Wirecard side, focussed on the figures, dealing with (for example) volume and collateral. It appears from these documents - and Mr Ley accepted in his evidence - that without additional collateral and/or an increase in the unsecured tranche, Wirecard would only be able to process a fraction of the current volume after it came off Project Drake.

147. On 14 October Mr Bikar sent a summary regarding Monarch's position for the Wirecard Supervisory Board, referring to the anticipated meeting "*in which we will thoroughly discuss the entire situation of the company again as well as the future conditions of our cooperation with Monarch"*. Mr Wexeler adapted Mr Bikar's email above and sent it to the Supervisory Board, adding that *"The Executive Board…is of the opinion that the airline now has sufficient financial resources in order to maintain flight operations for at least one year*".

148. On 14 October Mr Ley was asking *"What do they, including the shareholders, want from us on Monday given that the liquidity bottleneck has been resolved?"* Dr Käppner responded explaining the lack of ATOL security and the increased exposure, adding: *"we face the challenge of setting up a collateral model that is acceptable to all. There is also the difficult situation in Brexit times, with potentially rising oil prices and increased competition."*

149. The briefing note for the Wirecard Supervisory Board assumed the financial injection was from Greybull and posited Wirecard's priorities for the meeting thus:

> "Monarch Airlines receives a financial injection of a total of GBP 165 million from its shareholder Greybull Capital….we will thoroughly discuss the entire situation of the company again as well as the future conditions of our cooperation with Monarch Airlines. Important in this context is the type and amount of the collateralisation of the booked, but not yet flown, tickets starting on 01/01/2017…"

150. At the same time Monarch was preparing from its side. It appears that a meeting was held at Greybull's offices on 13 October at which strategy as regards card acquirers (both Wirecard and others with lesser knowledge of the Monarch business), including a script and presentation, was discussed. It was following this that Mr Meyohas indicated that he would come virtually to some meetings, and live to Wirecard.

151. Mr Hancock circulated a key actions list covering presentations which were in draft referring to *"Draft presentation to be used with CAs"*. It deals also with "Process Overview" (who would be met, when, progress reports) and a script for the card acquirer meetings.

152. On 14 October the generic script discussed at Greybull/Monarch came through from Mr Hancock, being circulated to Mr Meyohas and Mr Swaffield amongst others. It said this:

> "See below a slightly different script for use with key partners (e.g. card acquirers, lessors and hedge providers etc)
>
> 1. Monarch has significantly strengthened its balance sheet and liquidity position by announcing its biggest investment in its near 50 year history. This investment will enable Monarch to continue its successful transformation and in particular its transition to its new fleet of up to 45 737-Max 8s due for delivery from 2018 onwards.
>
> 2. Our shareholder has provided an equity investment of £118m and committed a further £45m in Q1 2017. The additional £45m in Q1 2017 is NOT required for working capital purposes and is being provided to strengthen the balance sheet and liquidity of the group. [This additional liquidity will facilitate the planned transition from Drake to standard card acquirer arrangements].
>
> 3. Despite confusing press reports, Boeing have not provided equity or loans to Monarch.
>
> 4. [If pushed for more clarity] Boeing have provided backstop financing in the unlikely event the S&LB market was not available as and when required. This was a requirement with the regulator as they wanted to be satisfied Monarch could finance the transition to a new fleet.

> Can you ensure this consistent messaging is reflected in the communications being drafted for the card acquirers."

153. None of the recipients made any substantive comments on this script, though Mr Swaffield plainly read and approved it: "Good….". Like the Press Release the script was not full and frank, but told half the truth. It was slightly more forthcoming in terms of leaving open a disclosure of Boeing being involved in backstop financing; but it was not candid about the restructuring of the deal and the origins of the £165 million. Again however, as with the Press Release and Q&A, while it was wide open to misconstruction, it was not inaccurate. Boeing had not injected capital; nor had it financed or (directly) funded the Investment.

154. The communications being drafted plainly included a PowerPoint presentation ("the Presentation"). As to the content of this, what was available for me to see was a 35 page document called *"Management Presentation: October 2016: Confidential"*. Whether the exact version available in court was the one used for the Wirecard meeting was contentious and is addressed below.

155. The document was plainly an introduction from the start, designed to suit those with minimal knowledge of Monarch – thus explaining brand, markets and so forth. It explained the turnaround strategy from 2014 and financial performance before moving to how the evolution to an all-Boeing fleet would impact positively on earnings and cash. It indicated as part of this that *"cost of transition is being supported by Boeing"*. It outlined aspirational EBITDA growth and markets. It gave considerable detail on its engineering capabilities. In the final section entitled *"Financial Overview"* it set out a P&L Overview back to 2015 and at page 29 of the document, a Cash Flow Overview back to 2015. A footnote to the seventeenth of 25 lines in this spreadsheet *"Shareholder Capital Infusion"* was "Footnote 27". This stated:

> "Shareholders will secure this funding by monetising off balance sheet assets"

156. The meeting in Munich ("Meeting") was attended by Mr Swaffield and Mr Bennett, who represented Monarch, and by Mr Meyohas. From Wirecard's side, the meeting was attended by Mr Ley, Mr Hilz, Dr Käppner, Mr Bikar, Jörg Möller and two others.

The Meeting and Mr Hilz's Note

157. The Meeting was conducted in English. This is obviously a point of some potential significance, given that the Claimants' witnesses chose to give their witness statements in German and to give evidence before me fully through translators (i.e. not, as is quite often done, with the translators in reserve in case of need). That potential significance was taken relatively lightly by the Defendants, given the obvious facility which all the individuals who gave evidence had in comprehending and speaking English. Dr Käppner says "*I cannot recall having any difficulty understanding what was being said in English or encountering any language barriers. I could follow and comprehend all of what was said*." Nonetheless the point as to first language must be borne in mind.

158. Dr Käppner says that, at the Meeting, Mr Meyohas made three representations, the essence of which is that the monies used for the recent recapitalisation of Monarch derived from Greybull and the "Greybull Investors", and not from Boeing. The Claimants contend that he:

    i) Said that "Greybull" had contributed a significant amount of money, which he described as "family money" to Monarch, without "burdening" Monarch (i.e. it was an equity investment and not debt);

    ii) Explicitly denied that any of the money had come from Boeing.

159. The Claimants say that the ultimate source of the monies invested into Monarch was so important that, if the representations had not been made and Wirecard had not believed that the funds invested into Monarch came from Greybull and the "Greybull Investors", Wirecard would not have offered new terms at all.

160. Each side's witness evidence broadly supported their case. At the same time there was a realistic acceptance that recollections were either absent or unreliable, and that "refreshment" from relevant sources was required.

161. Dealing first with the first part of the alleged representations (equity and the family pool):

    i) Dr Käppner was not challenged on his evidence that Mr Meyohas described the incoming money as "family money", to Monarch, without "burdening" Monarch;

    ii) Mr Hilz says that Mr Meyohas confirmed his understanding that "Greybull" was the source of the £165m investment and said it had come from Greybull's "family investment pool";

    iii) Mr Ley (who left part way through the meeting) recalls Mr Meyohas saying that Greybull's investment was equity and from the "family investment pool".

162. For the Defendants the evidence was that what was said will indeed have referred to an equity injection, but they took issue with the contention that it was said to have come from Greybull or "family". Mr Meyohas was emphatic that he "*would have stuck to our agreed positioning on the matter, namely that the funds received by Monarch came by way of an equity injection from PJL"*. He says he would not have said the money came from Greybull because, "*I would have been acutely conscious of the different roles played by Greybull on the one hand and PJL on the other*".

163. Mr Swaffield says that he can "*confidently state no suggestion made at any point by Mr Meyohas during the meeting that the reported £165 million of additional capital had been invested by Greybull or by the family investment pool"* because he is *"extremely careful at all times in meetings to ensure that only accurate, truthful statements are made"* and that *"had this suggestion been made by Mr Meyohas, I would certainly have remembered and would have taken steps to interrupt him and correct it, there and then*". Mr Bennett's evidence was

narrower; he was confident that there was no mention of funds coming from Mr Meyohas' family.

164. Turning to the second part, the explicit representation regarding Boeing, Mr Meyohas says that he does not recall Wirecard "*showing any concerns about the source of funds for Monarch's recent investment*" and that, if it had, Wirecard would have had to enter a non-disclosure agreement with Petrol Jersey and Boeing, before details about the Boeing investment could be revealed. He says that he does not recall making the representations the Claimants allege. He says, "*If I had been asked for more detail about the source of funds, I would have stuck to our agreed positioning on the matter…*".

165. Mr Swaffield says he can recall "*no interest on Wirecard's part as to the source of Monarch's further funds and frankly I would have been surprised if this was of concern to them*".

166. Mr Bennett says he has "*no recollection of anyone at Wirecard raising a question about the source of our new capital injection at the meeting*" and "*no recollection of Mr Meyohas suggesting that the source of the money into Monarch (by which I assume Wirecard mean the source of all the money into Monarch) was from his own family, as alleged by Wirecard*".

167. Then we have the documentary record: Mr Hilz's Note. The next day, Mr Hilz circulated among colleagues a summary of the Meeting. He wrote a detailed one and a half page summary. Mr Hilz explained the genesis of the note. He had taken a written note at the meeting. After the meeting he had had a short discussion with Mr Bikar only. He had then commenced writing up his note, a process which he completed the next day shortly before sending the email.

168. A part of that summary are the following bullet points which give rise to the representations alleged:

> "- "The capital contributed to Monarch by Greybull Capital and the tranche of capital still to be contributed in January have full equity character. It does not include any loan components, interest or dividend distributions, a repayment plan or the like"…
>
> - Boeing did not contribute capital to Monarch or provide capital to Greybull Capital in any way. The capital placed by Greybull Capital is derived entirely from the assets of Greybull's owners ('Family Investment Pool')."

169. The email also covered the question of long term investment vs sale possibilities, expected EBITDA, new fleet and possible future cashback, ceasing to issue tickets via ATOL, expected processing volume and intended numbers of card acquirers, cash flow forecast and Wirecard "to do's".

170. Another attendee, Mr Brinkmann, thanked him for his *"very good summary"*. Another, Mr Möller, thanked Mr Hilz and added a comment of his own. Dr Käppner responded with a *"few additions"*, though none related to the representations in issue. Rather they were details on existing loans, EBITDA and

available volumes for acquirers. It is common ground that other than as regards the alleged Representations the note has few errors, and those that there are, are trivial.

171. On 20 October Mr Meyohas emailed Mr Swaffield suggesting that he remove from the script the bullet point *"that B provided no equity or debt"* because it was "*defensive and will eventually raise as many questions as it tries to answer"*. Mr Swaffield agreed but said, "*for the meetings this week it was a helpful point*".

172. On 25 October, Wirecard's management board discussed "*...the positive development regarding Monarch Airlines and internally are discussing the maximum amount of any unsecured risk that is necessary for further negotiations with Monarch*".

October-December 2016: Negotiating Side Letter 7

173. Following the Meeting, there were a considerable number of further emails and calls, and a further meeting, between Monarch and Wirecard, in which detailed financial information was provided by Monarch and negotiations conducted. Mr Bennett provided Mr Hilz with further information regarding Monarch's future financial position. Monarch was also pursuing opportunities with other merchant acquirers and banks.

174. There was a single "continuation" meeting on 14 November 2016 between Wirecard (Dr Käppner, Mr Hilz and Mr Bikar) and Monarch (Mr Bennett, Mr Stansfield and Mr Fillbrook of Bank Brokers). Mr Bikar's summary of it suggests a focus on Monarch's financials, in particular their Business Plan and the planned future distribution of their acquisition volume between acquirers. Mr Bikar pasted in tables of figures from Monarch's presentation.

175. On 15 November Mr Hilz emailed Mr Ley and others at Wirecard attaching an excel spreadsheet setting out his analysis of Wirecard's blank risk with Monarch in 2016, and in four different scenarios for 2017 with particular focus on what the uncovered risk would be, assuming that there was no drop in income for Wirecard.

176. There was then an internal meeting at Wirecard on 16 November 2016 to discuss Monarch. Mr Hilz and Mr Bikar summarised that, saying,

> "Today's meeting represented the continuation of our meeting on 17/10/2016, which primarily concerned the capital contribution by the share-holder Greybull Capital ...
>
> There is agreement that the future opportunities/risk profile of Monarch is to be assessed as favourable in view of the capital contribution of the shareholder, the consideration of the present medium-term (6-year) financial and income plan, the liquidity development, and the strategy concept."

177. At this meeting and subsequently it would appear that the figures from the presentation, in particular the table in which footnote 27 appears, were the subject

of discussion; this can be seen from their appearance in a round-up email and a calendar appointment.

178. Mr Hilz was at this point suggesting a proposal focussing on the income balanced against the risk - particularly the uncovered risk, assuming that there was no drop in income for Wirecard. Consequently, on 21 and 22 November 2016, Mr Hilz circulated draft proposals to others at Wirecard (including members of its Management Board) containing the core terms for the continuation of their relationship outside Project Drake, including £43m blank risk and 25% collateral.

179. The Management Board meetings then took place, as noted in an email of 22 November: "*awaiting the final board approval at any moment*". Mr Ley was one of the members of the management board. There is evidence that the other members (Messrs Wexeler and von Knoop) were both copied into Mr Hilz's note dated 18 October 2016 (as amended) as well as his over-view document dated 16 November 2016.

180. At 9.18am on 23 November 2016 Mr Hilz sent Monarch an offer to provide acquiring services in 2017. The core terms of the offer were for a minimum of 28% of Monarch's gross aggregate Visa and Mastercard annual transaction volume with 25% cash collateral and unsecured risk limited to £43m plus a buffer of £15m on further terms.

181. There was on the documents an issue as to what was discussed during a call between Mr Stansfield and Mr Lingard of Monarch and Mr Hilz on 28 November. In the event this formed no real part of the arguments before me.

182. On 5 December 2016, Monarch put those core terms into a draft side letter. Following the circulation of drafts, the offer was put into legal effect through Side Letter 7, entered on 16 December 2016. As compared to the Project Drake terms, Side Letter 7 increased Wirecard's contractual net unsecured exposure to unflown revenue from the previous maximum of £12m to a maximum of £43m (plus the buffer). However, its overall level of contractual net exposure remained below that under Side Letters 3 and 4. Clause 6.9 incorporated a mechanism for imposing collateral of 100% on Monarch, should the free cash position in any given month fall below 50% based on the figures provided by Monarch as to what their projected monthly Free Cash Schedule was. This reflected a concern evinced by Wirecard throughout the discussions.

October 2017: Monarch's failure

183. Despite the sense in late 2016 that the injection of funds would set the company fair for the future, the underlying issues, exacerbated by Brexit, did not go away. In addition a rising oil price placed stress on the financials. By early September with the ATOL licensing window looming the CAA was making its concerns clear.

184. On 19 September 2017 Mr Hilz sent an email to colleagues at Wirecard (including Mr Ley) referring to difficulties Monarch was facing and said, "*During their recent visit a few weeks ago, Monarch emphasised the long-term commitment of*

the shareholder and its capital contribution as 'family money', which is not comparable to the 'intentions' of a pure investment fund."

185. Monarch tried to explore other routes to improve matters including via Boeing or a DTI loan, but met with no success.

186. Monarch and Monarch Holdings went into insolvent administration on 2 October 2017 and the former ceased to operate as a commercial airliner. The administrators reported that there would be no distribution to unsecured creditors.

187. On 8 October 2017, the Financial Times published an article under the headline "*Boeing helped finance bailout of Monarch Airlines*" saying that, "*Although Andrew Swaffield, Monarch's chief executive, said at the time that Monarch had funded a £165m bailout through an equity investment, much of the money came from Boeing, delivered through a complex release of equity embedded in the value of orders placed by Monarch for 30 new Boeing 737 MAX planes*". Three days later, the newspaper published a further article on that theme.

188. Mr Hilz sent an email to colleagues, including Dr Käppner and Mr Bikar, attaching an article from the aero.de website, which had picked up on the Financial Times reporting. The last sentence of that article read, "*The Monarch case sheds a rare spotlight on the shadows behind the scenes of large aircraft deals, because the industry had previously assumed that Greybull Capital alone had carried out the cash injection in 2016…*" Mr Hilz wrote that that last sentence was "interesting" as "*Greybull always promised us that the money invested in Monarch was 'family money' and that a third party was not involved*".

2020-2022: Assignment, the Claimants' insolvency and the issue and service of the claim

189. By an agreement dated 6 April 2020, Wirecard assigned/confirmed the assignment of its interest in various claims to Technologies and the latter subsequently paid the former about €11.2m. There was a dispute as to whether that assignment encompassed this claim and whether the €11.2m should be deducted from Wirecard's losses, but that had resolved by the time of trial.

190. Technologies went into insolvent administration in August 2020. Its insolvency administrator and Wirecard issued the claim in late December 2020, and served it in early January 2021. Wirecard waived its banking licence in December 2021 and went into liquidation in July 2022.

191. Meanwhile, Wirecard's ultimate parent company, Wirecard AG, went into insolvency in 2020 with reports of it missing millions of Euros as a result of an alleged fraud. One of the vehicles of the alleged fraud was the Senjo group of companies, including Senjo Payments Europe S.A.. For present purposes no more need be said about this than that some of the senior executives of Wirecard, including Mr Ley, have been the subject of investigations. Some limited questioning of Mr Ley was done by reference to material relating to Wirecard's financial troubles with a view to demonstrating a disregard for due diligence. Given the view which I formed of the material ignoring this distinct topic, I did not find it of assistance.

Procedural History

192. The claim was issued on 29 December 2020. The principal limitation period for filing a claim under German law expired on 31 December 2020. On 12 January 2021, letters serving the claim form were sent to Greybull and Mr Meyohas at Greybull's registered office and were deemed served on 14 January.

193. The Particulars of Claim were filed and served on 28 January 2021. The Dfiled acknowledgements of service on 10 February. The by agreement Part 18 Responses were served in June 2021, with the Defence being filed at the end of July. The Reply follows at the end of November 2021.

194. The CCMC was held on 4 July 2022, and during the course of 2023 amended pleadings were served.

The passage of time and the challenges for the trial process

195. Nearly eight years had passed since the Meeting by the time this dispute came to trial. Against that background there is an obvious point as to the reliability of recollection – and as I have indicated the witnesses realistically accepted that their "unrefreshed" memories were either non-existent or unreliable. The parties are agreed that recollections can be fallible and that the court must have regard in particular to contemporaneous documentation, the parties' motives and the inherent probabilities.

196. I was of course reminded by the Defendants that in a fraud case a claimant bears a heightened burden of proof in the sense that cogent evidence is required to overcome the inherent unlikelihood of what is alleged: see e.g. Rix LJ in *The Kriti Palm* at [259].

197. Reference was equally predictably made to the now classical passage in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), [2020] 1 CLC 428, at [22]:

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

198. The Claimants prayed in aid the following passage from *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413 [2019] 4 WLR 112 at [48]:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence…."

199. Reliance was also placed on *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm) at [102] – [103], where the judge noted that a further reason to "*attach particular weight to the documentary evidence*" is where the factual evidence is given by persons not in their first language or through an interpreter, which can lead to difficulties in making any assessment of demeanour and which can give rise to issues where a witness looks evasive because of miscommunications.

200. Finally I drew the parties' attention to the important lecture given by Popplewell LJ to COMBAR last year: "*Judging Truth from Memory"*. The Popplewell Lecture updates and expands upon the matters considered by the then Leggatt J in *Gestmin*. It deals with the value of recollection, the nature of the fact-finding exercise in commercial litigation, the science of memory and the problems which result from faulty encoding of memories.

201. Passages of particular interest (either to myself or the parties) include the following:

> "10 ...determining what happened is not the only task. Commercial litigation often involves an inquiry into a witness' state of mind. That state of mind may be an essential ingredient of the cause of action, as for example where claims are framed in constructive trust. But more generally, it matters what the witness knew, or believed, or was thinking or intended at a particular point in the narrative of events because that casts light on the events themselves. Fact-finding is concerned not only with what happened, but just as much with why it happened….
>
> 36. …When we encode our memories we don't photograph what is happening; we interpret what is happening, and that interpretation uses our schema. … So experience and expertise

> can make a big difference to what goes into our memory…. "We don't see things as they are, but as we are"….
>
> 40. The semantic memory can also corrupt a recollection by affecting it at the retrieval stage. Our beliefs, attitudes and approach, our worldview, our schema, changes over time. The recollection is affected by the schema at the time of retrieval, which may be different from that which applied at the time of the events in question…. As Leggatt J said in *Gestmin* "Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs."…
>
> 52. Further, encoding is often influenced by pride or wishful thinking. It is a common, although not universal, human tendency to want to portray our participation in events in a way which paints us in the best light. … it can also infect how witnesses pictures events to themselves when first encoding the memory…
>
> 55. … contemporaneous documents… may be produced near the time, but they are produced after the memory has been encoded, and if there is an encoding fallibility, which there may be for all these different reasons, it infects the so called contemporaneous record every bit as much as other reasons for the fallibility of recollection which affect it at the storage and retrieval stage.
>
> 66. One [other issue] is reconstruction from semantic memory. We assume that something happened because that is what we would expect to have happened. … our memories fill in gaps by reference to what we assume we would have done or would not have done. The witness will respond in cross-examination that they are sure that something did not occur because "I would never have done that", or vice versa.
>
> 67. The dangers here are several: things do not always happen as we expect them to, and may not have done so on this occasion. We are also applying our present semantic memory schema to our attitudes at a different time. A third is another common source of erroneous recollection, in my experience, which is, again, pride or wishful thinking. We like to suppose that we did or thought that which we now consider we ought to have done or thought."

202. The resonances between this paper and the parties' arguments were considerable.

The Trial

203. The trial has been conducted over 12 hearing days (with 2 reading days) in an almost entirely co-operative and helpful spirit. There was excellent advocacy from junior counsel, who took entire responsibility for the German Law issues,

both in cross examination and submissions. This enabled those issues to be very thoroughly thought through and particularly carefully and helpfully presented on both sides.

204. The Claimants called three witnesses of fact. The first was Dr Thomas Käppner, at the relevant time Head of Merchant Services at Wirecard. He attended the Meeting. Dr Käppner was a cautious, calm, somewhat defensive witness, but overall was doing his best to assist the Court.

205. Mr Burkhard Ley was called at the start of Week 2. Until the end of 2017, Mr Ley was CFO of Wirecard and sat on Wirecard's Management Board; he was also CFO of Wirecard AG and sat on Wirecard AG's Management Board. Mr Ley attended part of the Meeting.

206. The Claimants say that Mr Ley was the key decision-maker who relied upon the alleged Representations. He accepted that if he was not the sole person who made the decision that this case should be brought, he was integral to that decision. As such he was a key target of cross-examination – the more so because he remains under investigation by the Munich authorities in connection with the Wirecard fraud. There was some discussion/debate about the admittance of documents going to credit and as to the ambit of cross examination. I ruled that the documents be admitted, but that prior to the calling of Mr Ley the issue to which his credit was said to be relevant be stated clearly.

207. Mr Ley was a more dogmatic, confident witness once his concerns as to the ambit of questioning had been resolved by my directions, nodding his head emphatically to accompany his fluent answers. He tended also to make decisive hand gestures and to engage my eye fully when he was able to. Although, like the Claimants' other witnesses, he chose to give evidence in German, his English was plainly very good – he slipped into it in relation to the mechanics of cross-examination.

208. He was the least satisfactory of the witnesses called. Even the Claimants conceded that he had a tendency not to listen carefully to the questions put. I found him very much focussed on his own vision and keen to give lengthy answers which did not answer the questions asked. Some of this appeared to be down to linguistic confusions (of the type alluded to in *Avonwick*) which ironically arose from a situation where Mr Ley was listening to both German and English versions of the question or where translations were slightly imperfect; but that was by no means always the case.

209. Often it was clear that he was simply determined to go where he would go and (as the Claimants again conceded) he did not focus on the questions as much as he should have done, giving the impression he preferred talking to listening. A simple example of his selective focus was his lack of clarity about whether or not he had been CFO of Wirecard Bank or only of Wirecard AG. His statement said he was CFO of Wirecard Bank; his opening salvo in cross-examination was to deny it. Whether or not he was, was immaterial. But it was revelatory that his first instinct was to blame the (non-existent) translator of his statement and that (one way or the other) he had not read all of his statement thoroughly.

210. Mr Martin Hilz was at the relevant time Team Lead of Merchant Boarding at Wirecard. Mr Hilz was one of the main points of contact between Wirecard and Monarch. He attended the Meeting, and as explained earlier, the following day emailed the key summary of it within Wirecard. He is said to have been instrumental in drawing up the proposals in November 2016 that culminated in SL7.

211. Mr Hilz was an excellent witness. He was a quietly spoken, thoughtful person who consistently gave the impression that he was trying to assist the court – and the mark of the extent to which this was the case was that not the slightest attempt was made by the Defendants to suggest otherwise. He was described by his opposite number, Mr Christopher Bennett, as being precise and "*particularly careful and meticulous*", and that seemed very apt to describe him as a witness also. He listened carefully to questions and gave reflective, balanced answers. He was not shy of accepting appropriate assumptions. He was the antithesis of a partisan witness – notably in re-examination saying: "*Let me try and word ... my answer in such a way that it can be acceptable to both parties.*". I have no hesitation in accepting the truthfulness of his evidence and his desire to help the Court, though I still have to evaluate its accuracy.

212. In respect of the Claimants' witnesses two points fall to be made. Although the key meeting was one which was conducted in English and all of the witnesses either said in their statements, or made plain in their instinctive reaction to proceedings in Court, that they had very good command of the English language, all chose to give their oral evidence fully via interpreters. As the *Avonwick* case notes, it is inevitably less easy to assess such evidence. That is the more so where (as here) there is simultaneous translation - where the flow of questioning can sometimes mean that however good interpreters are translations are rushed and not fully accurate. This, as noted above, can lead to witnesses answering questions as translated which may not entirely capture the question asked, and may tend to make the witness seem evasive. I have borne these points in mind when assessing the evidence of these witnesses.

213. The Defendants called three witnesses of fact. The first was Mr Christopher Bennett, an accountant employed as Finance Director at Monarch from 2010, and Monarch group CFO from January 2016. He now has no link to Greybull. Mr Bennett attended the Meeting. Mr Bennett had worked quite closely with Mr Hilz, and there were some distinct similarities between them. He too was a quiet, thoughtful, precise witness. He gave evidence frankly and without any attempts at evasion of questions which might be thought uncomfortable. He consistently gave the impression that he was doing his best to assist the court. Like Mr Hilz I have no hesitation in accepting his evidence as honest and truthful. Because of their excellence as witnesses, it is between his recollection and that of Mr Hilz that the key clash of recollection occurs. Mr Bennett was very candid as to the limits of his positive recollection of details. He was however emphatic as to the key point: he was very sure that no untruths were told, for reasons which will be evaluated below.

214. Mr Marc Meyohas, the Fourth Defendant, was another of the Defendants important witnesses. He became a non-executive director of Monarch Holdings in 2015, and Chairman of the Board of Monarch Holdings in about August 2016.

He is the person who is alleged to have made the Representations at the Meeting. Unsurprisingly therefore a robust challenge was made to Mr Meyohas' credibility. Mr Morgan KC put to him a succession of points designed to show that he had on previous occasions been less than accurate or positively misleading in his business dealings with others, including in relation to his first meeting with Wirecard in 2014. This was followed up in closing by a submission that his evidence demonstrated that "*he had little concern about engaging in conduct that a reasonable person would consider commercially unacceptable*".

215. In my assessment Mr Meyohas was plainly an intelligent, subtle, sophisticated man and resisted this binary characterisation. He was obviously sometimes exasperated by Mr Morgan's attempt to force him into the straightjacket of "yes or no" answers to questions which he did not perceive as being properly answerable without a degree of shade or qualification. He manifested a degree of quiet amusement about a line of questioning as to inaccurate presentation of stories to the press or eluding press coverage by use of "dark arts", plainly seeing this as a false analogy to the allegations in this case – a position with which I am in agreement. He was also plainly keen to anticipate questions he saw coming; consequently he sometimes answered the question which he saw coming three down the line, rather than the one asked. As such, he was not an entirely frank and open person and not an entirely satisfactory witness. But at the same time, he was generally courteous, extremely engaged and in my assessment overall honest in his approach to answering questions. I was persuaded that he was generally doing his best to assist the court. Having said that, my impression, in particular based on the approach to telling the CAA about Boeing was that he would be capable of telling a good lie in the context of his business dealings, if he felt one was really required. That impression was reinforced by the flavour of the 2014 exchange on Worldpay, though this was not an issue which was central and hence not fully explored.

216. The final factual witness was Mr Andrew Swaffield, MD of Monarch Airlines (from April 2014) and CEO of Monarch Holdings (from 26 June 2014). Like Mr Bennett, Mr Swaffield is not employed by or connected to Greybull. Mr Swaffield attended the Meeting and wrote a number of the emails which were most focussed upon in the course of evidence. Mr Swaffield's evidence was perhaps the most capable of polarising views. The Claimants saw him as "partisan and unconvincing" while for the Defendants he was "compelling" – although at the same time there was a tacit acceptance that his approach was open to criticism. The impression he conveyed to me was that of a polite and earnest witness who was somewhat eager to avoid criticism. He often addressed me directly to explicitly convey his desire to assist the court or his regret if he had been mistaken or unclear. He occasionally struggled with holding focus on the question being asked, which could either be interpreted as evasiveness or as trying very hard to the point of asking for clarification of questions which struck him as ambiguous. Overall my impression was that he really did have an earnest desire to be clear, and that much of what was unfortunate in his evidence stemmed from over-anxiousness. This was reflective of the air of worry which was perceptible in some of his contemporaneous emails (see in particular the exchanges as to the Press release). I have concluded that he was generally doing his best throughout to provide his honest recollection and impressions, to the best of his ability.

217. Expert evidence was obtained in the disciplines of German Law and Forensic accountancy. Ultimately the expert issues at trial were very narrow and those of forensic accountancy were sensibly compromised without having to call the experts.

218. So far as German Law was concerned, there is no issue as to the expertise of either expert. The Claimants called Professor Elsing. He was careful, thoughtful and clear in expressing his views. It was suggested that he was speculating or overstating his case; while it is understandable that the point was put it rather appeared to me that he had a clear view on issues which were complicated or on which there was controversy and that he was endeavouring to assist the Court by providing his firm opinions on these topics.

219. The Defendants called Professor Grigoleit. He was equally careful, thoughtful and clear in his views, in which he maintained his disagreement with the views of Professor Elsing. What was clear from the examination of the experts (who were entirely respectful of each other) is that the main questions in issue are, to quote Professor Grigoleit, *"just not covered clearly by the materials"*.

THE REPRESENTATIONS: WERE THEY MADE?

Introduction

220. In this case the misrepresentation case is really confined to two questions: making of the representations and reliance. That is because it was agreed that if the key representations were made, they were false and known to be so: indeed Mr Meyohas said that any statement that the funds originally came from the *"family investment pool"* would be *"a grotesque lie"*. On that basis there is an acceptance that the court would inevitably conclude that if the lie was told there was intention to mislead.

221. That however puts particular focus on the first question; it is necessary for the Claimants to establish that <u>these</u> representations were made. As I will consider further below, there are questions as to the clarity of what was said which feeds into the question of whether the alleged Representations were made. There is some law on clarity: namely that the representations need not have been made in the precise words alleged - but in order to succeed the Claimants must prove that a reasonable person would have understood the representations alleged to have been made: *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep 264, at [50].

222. This issue was reflected in the way in which argument was ultimately focussed at trial. The majority of the Representations alleged derive from the following single bullet point in Mr Hilz's note.

> "Boeing did not contribute capital to Monarch or provide capital to Greybull Capital in any way. The capital placed by Greybull Capital is derived entirely from the assets of Greybull's owners ("Family Investment Pool")."

> [Original German: "Boeing hat in keiner Weise Kapital in die Monarch eingebracht, oder Greybull Capital auf irgendeine Weise Kapital zur Verfügung gestellt. Das von Greybull Capital platzierte Kapital entstammt vollständig dem Vermögen der Greybull-Eigner (Family Investment Pool)."

223. The key aspects of the representations alleged are that that Mr Meyohas represented that the investment being made was:

    i) "From Greybull" (In the sense that no party other than Greybull or the Greybull Investors had financed or funded it);

    ii) Its source was the "Family Investment Pool" (in the sense of being from the fortunes of the Greybull owners or connected families);

    iii) Not from Boeing (in the sense that Boeing had not played a part in the investment).

224. There is also a further representation derived from the first bullet point that the investment was "equity" in nature ("full equity character" or "at risk shareholder capital")). This was not really in issue at trial because there was plainly a sense in which that representation was true. The money which went directly into Monarch went in as equity as opposed to *"loan components, interest or dividend distributions"* (the dichotomy posed by bullet point 1 of Mr Hilz's note).

225. Similarly the "From Greybull" aspect of the representations was not in primary focus as a distinct representation from the other two. As noted, it is clear that there was routine elision of Greybull and Petrol Jersey; and it was literally speaking true that the money which flowed into Monarch came from Greybull/Petrol Jersey. A representation as to Greybull *"in the sense of no other party than Greybull or the Greybull Investors had financed or funded it"* is not alleged to have been explicitly made, and the implicit sense is a reflection of the other two main alleged representations.

226. The core question was therefore really whether it was represented by Mr Meyohas that (i) the funds originated solely from Greybull's investors ("Family Investment Pool") and (ii) the funds did <u>not</u> originate from Boeing.

227. On whether these representations were made, at the heart of this question is the clash of recollections mentioned at the start of the judgment. That cannot simply be resolved on the basis of an assessment of the credibility of the witnesses. All agreed that their "unrefreshed" recollection was vestigial. And as I have made clear, there were very credible witnesses on both sides. I have no doubt the individual witnesses' truths – in the sense of what they either do (now) recall or what they honestly think they recall - are simply different.

228. This presents a number of difficult issues around the science of memory. One of them was raised by the Claimants as to Mr Bennett's transparently honest evidence that he was sure that if Mr Meyohas had lied in the meeting, he would have remembered feeling "really uncomfortable". The Claimants' submission on this (by reference to the Popplewell Lecture) is "*that is not how memory works. Because he saw himself as a man of integrity, Mr Bennett was all the more*

unlikely to encode, store and retrieve a picture of himself sitting silently through a meeting at which Mr Meyohas had lied (even though there was nothing he could realistically be expected to have done)."

229. One way of resolving this would be to say that the documentary record, in the form of Mr Hilz's note, trumps other sources. That is what the Claimants urge – citing *Gestmin* and the fallibility of recollection. There is obviously a fairly powerful "classic *Gestmin*" case to be made as follows:

    i) *Gestmin* broadly urges the primacy to be given to the written contemporaneous record;.

    ii) Here we have a written record, which although not fully contemporaneous, has many of the features of a contemporaneous record in that it derives from a fairly speedy writing up of truly contemporaneous notes. Mr Hilz had manuscript notes as a base and spoke to only one other person before doing so;

    iii) Mr Hilz is a transparently honest witness who is accepted to be diligent and thorough;

    iv) It is accepted by the Defendants (via the evidence of both Mr Bennett and Mr Meyohas) that in the main (i.e. apart from this point and a couple of minor points of detail) the note is an accurate summary of things which were said at the meeting. As a note, it is overall reliable. There is only one respect in which it is said to be inaccurate.

    The probabilities, say Claimants, are therefore all in favour of the note being accurate as regards the one disputed point.

230. However that is an argument which, as I pointed out in closing, neglects to take into account the possibility (again highlighted by the Popplewell Lecture) of a faulty impression or recollection being encoded at a very early stage and recorded in that document.

231. Ultimately therefore the document can be taken as the basis for a compelling argument; but it itself must be tested against the facts in the full context. That context includes considering what was common to both parties in terms of knowledge, but also what (if anything) the parties were each focussing on which did not get communicated to the other side, which might affect both encoding and recording or which might affect how Mr Meyohas expressed himself.

232. A number of facets therefore need to be considered in order to cover the documents, the motives and the inherent probabilities. In particular:

    i) What was the true nature of the deal with Boeing, and how could it legitimately be described?

    ii) What was the view of Wirecard as regards pure financial and other components to the position of Monarch?

    iii) What was the knowledge of Greybull and Monarch as to that view?

iv) What was Wirecard looking to get from the Meeting?

v) What can we know, apart from the Note, as to what was said?

vi) What is the likelihood of Mr Meyohas going" off message"?

vii) Counterfactuals and motive;

viii) Did Wirecard ask about the original source of the funds?

ix) The short distance between ambiguity and inaccuracy.

The nature of the deal with Boeing

233. This was not in issue between the parties and was not something on which any findings were sought by either party. However it was a fundamental building block for Monarch to re-approach Wirecard and other potential acquirers. While the detail of how it was reached is already set out above, it is worth recapping what it achieved in a "before and after" sense.

234. The starting point is not controversial. Prior to the Boeing deal Monarch was in all sorts of trouble, with the dual blow of Drake being ended and the ATOL Licence revoked. The CAA was adamant that it needed to see a very significant injunction of capital.

235. The deal as finally concluded was as follows:

i) The Original Boeing Deal was cancelled;

ii) In its place, Vantage agreed to purchase 30 737 MAX 8 aircraft from Boeing with an option of purchasing 15 more at an additional price of $4.4 million per aircraft from the original 2014 purchase price.

iii) In return:

a) Petrol Jersey were to invest $10 million by 30 September 2016;

b) Boeing would make an upfront payment of $132 million (of which $10 million was paid on 10 October 2016 and $122 million was paid on 12 October 2016) to Petrol Jersey. This money was exclusively for use as a capital payment into Monarch Airlines for its funding purposes;

c) There was also a further payment from Boeing of $20 million due by 15 January 2017, as Vantage exercised the option to purchase the first 5 MAX Option Aircraft on 12 October 2016;

d) There was also 100% PDP financing, with no interest and no-up front security payments by Monarch.

236. The nature of the deal was therefore that Petrol Jersey would be the direct injector of over £160 million into Monarch. While only £10 million was in any real sense

Petrol Jersey/Greybull money the money did not come into Monarch direct from Boeing – it went into Monarch from Petrol Jersey. Boeing took no equity in Monarch; for Boeing if the deal went well it was a zero sum game – they got back the same money without having to find a new buyer. And the net result for Monarch was that Monarch went from being strikingly undercapitalised to being fairly comfortably funded – just as the CAA required.

The views of Wirecard as to Monarch's position

237. This covers quite a lot of ground: whether Wirecard's representatives were interested in the fundamentals and/or whose money had been used to make the Investment and whether that money was family money or came from Boeing. It can be broken down into three points: attention to fundamentals, the value of "family" and interest in source of funds.

238. When it comes to interest in the fundamentals the evidence is clear and was not seriously in issue. Of course Wirecard was very interested in the financial position of Monarch. It monitored it and responded to it. And it took a fairly hard-nosed approach in dealing with it. It is fair to say that Wirecard adopted a commercial approach to the terms it offered Monarch even under Mantegazza family ownership because of the real risk of insolvency. Wirecard had generally obtained security / collateral from Monarch to mitigate between 85% - 90% of Wirecard's blank risk. Mr Bennett did not feel that Wirecard was generous: his evidence was that the terms Wirecard offered to Monarch while under Mantegazza family ownership "*were (to my mind) very onerous commercial terms."*

239. On the second point, the case as to the subjective importance to Wirecard of "family" was not in my judgment made out. The case advanced by Wirecard was in my judgment over-emphatic on the subject of the importance of family ownership and under-emphatic on the subject of the importance of the financial fundamentals. Wirecard did not include this feature in their risk manuals or risk assessments – so it was not a formal part of the assessment, as might be expected of a material point. No-one ever bottomed out what was meant by "family" in the Greybull context. On any analysis what Mr Meyohas said about family was vague. It appears that Mr Ley never enquired as to who the family members were, or what their resources were.

240. What I conclude that there was (for Mr Ley at least) a value to family ownership, that it was very much a limited one, given to a certain type of family ownership (like that of the Mantegazza family) is borne out by the passing reference to family ownership in the original onboarding document. It was a narrow, rather specific value. It appears to have been something in the mind of Mr Ley only and even there it was not a broad feeling about family *per se*. It was largely to do with deep pockets (re-emphasising the importance of fundamentals) and also about the kind of reputational factor which would not be applicable to all families. The Mantegazzas were well known to be behind Monarch; and to the Mantegazzas, reputation was important. Therefore they might (as they did) steady the ship more readily and for longer in a difficult market than purely commercial investors. It is also fair to say that Mr Ley's evidence did suggest that the warmth to this particular family ownership was to some extent down to Mr Rawlinson, the Mantegazza's CEO.

241. Thus I conclude that the Wirecard value for family ownership was there for Mantegazza ownership, might have been there for other similar ownership, but even where it did exist, that value was a peripheral thing, a small extra comfort factor.

242. I also conclude that whether or not the airline was "family owned" was not a material factor in Wirecard's assessment of risk and its willingness to continue to do business with Monarch after the sale. There is no sign of it impacting the terms prior to the Meeting. The diligent Mr Hilz did not note it down in his analysis of risk. There is no evidence of Monarch being cut favourable breaks because of it. As the Defendants noted in closing, when Monarch was in desperate financial difficulty in August 2014, Wirecard refused to release €5.48 million that was due to it. In September of the same year Dr Käppner agreed that it was not a question of trust in Greybull or the Mantegazza family: *"…at that point in time it wasn't so much about trust, it was far more about getting the best negotiations and terms and ensuring the deal could be carried out without a grounding"*.

243. Having said that, the evidence broadly supported the Claimants' case as to their being to some extent interested in whether Greybull was prepared to put its hand in its pocket. That can be seen from the contemporaneous documents, at least around 7 October 2016.

What was the knowledge of Greybull and Monarch as to that view?

244. Starting first with the broader picture I accept that Monarch anticipated that Wirecard would be interested in where the money had come from. That is consistent with the approach of the PR advisers. It is consistent with the fact that on 12 October 2016, Mr Bennett had promised that Wirecard would get *"more detail"* about the Investment at the Meeting.

245. I also accept that Greybull was aware that presenting the deal as one with a significant contribution from Greybull/Petrol Jersey was going to be well regarded by commentators and stakeholders alike.

246. But at the same time on the evidence I conclude that Greybull/Mr Meyohas had no reason to think that the precise source of funding was of significant interest to Wirecard as at the time of the Meeting. There had been no specific request in advance. It had not been tabled as an agenda item. Mr Swaffield gave unchallenged evidence that the Monarch team thought that all Wirecard was interested in was that this was unencumbered capital coming into Monarch. That is substantially echoed in Wirecard's own internal correspondence in terms of what they were focussing on. It was not suggested to any of the Defendants' witnesses that they knew that the source of the funds was important to Wirecard. Consistently with this, Mr Hilz could not recall having explained to Mr Meyohas or Monarch that it was or might be a matter of importance to Wirecard.

What was Wirecard looking to get from the Meeting?

247. The chronological run suggests strongly that by the time of the Meeting Wirecard's main focus had moved off concerns about Monarch's viability; the injection of capital was enough for that. See for example Mr Ley's *"What do they,*

including the shareholders, want from us on Monday given that the liquidity bottleneck has been resolved?" Perhaps even more telling was the freeing up of funds as soon as the cash injection hit the Monarch accounts.

248. As noted above the exchanges show focus on the figures, dealing with (for example) volume and collateral – where to pitch the risk maxima. Dr Käppner was interested in the form and structure of the investment – but the factors he identified (seen in his email and in the agenda) were not the ultimate source of the funds but whether it included loan components or collateral. In other words, he wanted to know whether this was real solid injection of funds in the company, or fancy footwork on the figures. I conclude that the predominant interest of Wirecard going into the meeting was these financial factors. There was also an interest in whether control had moved from Greybull elsewhere. Mr Hilz was not challenged on his evidence that Wirecard wanted *"to exclude the possibility that another entity (aside from Greybull) would have significant control of Monarch"*. This ties in with *"Current and future Shareholder Structure and Acquirer Structure 2017"* items on the agenda.

249. It is also clear that there was a concern about losing the share it had had of the Monarch business, with Monarch looking to meet other potential acquirers: Dr Käppner specifically referenced the potential for covenants to secure this. While the Claimants relied in closing on Mr Meyohas evidence that "*new terms would be needed to keep the relationship going*" the timeline reflects that Monarch were not coming to the table as a suppliant; rather Wirecard was forced to contemplate the possibility of losing revenue to others as Monarch looked a more attractive business partner.

250. There is evidence of some interest in the precise source of the funds, but it was by no means, on the documents, a point of major interest. There was interest around the 7 October, but it had dropped away by the time of the Meeting. This is consistent with the fact that the question does not appear on Wirecard's agenda, whether directed to funds originating from Greybull or from Boeing, or both.

What can we know, apart from the Note, as to what was said?

251. Aside from the Note and the necessarily less than perfectly reliable recollections of those present, there are two sources for what was likely to be said. The first is the "script" which had been worked on for the acquirer meetings generally. While not designed explicitly for this meeting and while primarily targeted at acquirers with less knowledge of Monarch than Wirecard had, it represents the intentions of the Monarch/Greybull team – and more than that, it will have been material which was close to the surface of their minds and therefore likely to roll out as part of any verbal presentation or response to questioning. This is the more so since it was designed to go with the Presentation, which was used.

252. What of course is contentious about the script and the presentation is the concept of "*monetising off-balance sheet assets*" – the vanilla way to telegraph the nature of the deal without mentioning Boeing.

253. The Claimants points out that the "monetising" phrase was not part of the script for acquirers (as opposed to potential purchasers) and so there was no explicit

plan to say it. But Mr Bennett was clear that by the time he did the presentations there had been an agreement that he could use this phrase. While it was suggested that this reflected a later agreement, the coincidence between this and the wording of footnote 27 suggests that by the time the presentation with that footnote in was deployed this was the agreed response.

254. This of course brings us to the question of whether footnote 27 was in the presentation which Wirecard saw. This was not in issue until part way through the trial. It had been agreed that the Presentation as I saw it (with footnote 27) was the presentation used. However part way through the trial that concession was at least in part qualified.

255. Ultimately the position was summarised in the Claimants' closing submissions as follows:

> "the claimants wish to make clear that they no longer run a positive case that the [Presentation] was the presentation given at the Meeting. There is no proper evidential basis to assert that. The documentary material strongly suggests that the [Presentation] was not the presentation given at the Meeting on 17 October 2016. The [Presentation] was the 6 year plan that Mr Bennett said on 18 October he would send, said on 25 October was being updated, said on 27 October he would "follow up with as soon as I can" and was last modified on 2 November.
>
> .. That said, the claimants do not intend mid-trial to resile from the admissions made in their reply. If the defendants continue to assert, in particular, that the presentation given at the Meeting contained footnote 27 …, the claimants will be bound by their admissions not to challenge those assertions."

256. The Defendants did continue so to assert, and therefore the concession stands. Further, while I entirely understand the scrupulousness not to allow me to proceed on what might have been a false basis which motivated this qualification, I would in any event conclude that the Presentation was in all material respects that which I have seen. There may have been small tweaks to isolated figures. But the important point remains: the relevant footnote had been used in Monarch's standard presentation since early September 2016 (for example in the draft EasyJet presentation of 1 September). I am satisfied that it would have been incorporated into whichever version of the presentation was used. That was the tenor of Mr Bennett's evidence: he said that if the exact same presentation was not used at the meeting, it would have been something very similar with the same numbers. There was not a bespoke presentation for Wirecard to different effect.

257. As it happens, the relevance of the point is not central in that I am not satisfied that there was detailed discussion in the Meeting of the Presentation to the extent of dealing specifically with Footnote 27 or that Wirecard got to the bottom of the footnote at that time. The important point is that it was there as a prompt. That being the case, if questions were asked, there is a strong likelihood that this would have driven the answer.

258. As for the wording around "family" I accept that the word "family" was probably used - in some form. I do not consider that Mr Hilz would have included that unless he had heard it. And, as the Claimants submitted, Mr Meyohas was plainly prone to try to humanise Greybull's investment business away from the "vulture fund" characterisation by referencing the family components of the business. That is consistent with Mr Meyohas' evidence where he described Greybull as investing *"capital on behalf of multiple families"* and *"manging or advising on family capital"* and his acceptance that he had historically used expressions such as "*family office" "family capital", "family funds"* and "*family backing"*.

259. That does not of course deal with the key point, whether it was said that the whole of the investment was from Greybull family investors and that none of it came from Boeing.

The likelihood of Mr Meyohas going "off-message"

260. The Defendants' witnesses agreed that if Mr Meyohas had said in terms that Boeing had nothing to do with it that would have been false. That raises the question of how likely he was to do that. I conclude that it is inherently unlikely on the facts of this case. Had it been the case that the Boeing question would have been a left field question, it would be plausible that such a thing might be said – surprise prompts loose words. But this was a situation where the Greybull/Monarch team had spent quite a lot of time thinking about what they could and could not say with a view to achieving a narrative which kept Boeing's involvement as off camera as possible, but which was also not inaccurate. They had lived through the intense email exchanges surrounding the Press Release. They had anticipated that questions might be asked about Boeing. It follows that Mr Meyohas was not likely to be flustered into misspeaking or going too far.

261. Then there is the question of what Mr Meyohas would think it gained him to lie. As I have concluded, Mr Meyohas might lie if he regarded it as necessary or really worthwhile. Was there a reason for him to think this was the case? Essentially for the reasons I have given regarding knowledge of Wirecard's views I conclude there was no such reason. If it was (subjectively) important to Wirecard, this had not crossed the line. So far as Mr Meyohas knew, portraying a picture of supportive shareholders would gain him nothing more than good publicity.

262. The probabilities therefore are that if asked, Mr Meyohas would have stayed within the ambit of the "script" which had been discussed. It also seemed to me, based on Mr Meyohas' performance as a witness, that he was more likely to provide a subtly nuanced answer which was open to optimistic misinterpretation than he was to provide an unambiguously wrong answer which was open to being contradicted by those accompanying him.

Counterfactuals and motive

263. This dovetails neatly into the question of motive. This is obviously not an area of solid fact and accordingly not one on which I place any real weight. However as was submitted orally, it is an interesting check against the competing narratives to ask both what would have happened if certain things had been said, and also

whether Mr Meyohas had a motive for telling the lie contended for which is central to the case.

264. The first set of questions to ask are those repeatedly posed in cross-examination of the Defendants' witnesses. The point being put to those witnesses was that if (as Wirecard contended) the question as to source of the funding was asked Mr Meyohas had no alternative but to lie:

> "Q….if you're asked about whether the money came from Boeing, what are your options? ... Number 1, … Mr Meyohas could have said, "Yes, it comes from Boeing". He's not going to do that because of confidentiality, is he?
>
> A. No.
>
> Q. Let's think of another option. He could have said, "We need an NDA between you and Boeing before we can tell you anything about it". That's going to give the game away, isn't it? … if you had suggested that, it would be obvious that the money was coming from Boeing?
>
> A. Yes, but then Boeing would have had to be happy to say that.
>
> Q. Which it may not have been?
>
> A. Yeah.
>
> Q. The third option is to say, "Money didn't come from Boeing, it comes from the family investment pool". Now, that's not true, is it?
>
> A. It's not true that the money came from the family investment pool, no."

265. But that breakdown of the possibilities is not exhaustive. It was well open to Mr Meyohas to finesse matters by reference to the Presentation: he could not say in terms what had happened, but he could point to the "monetising" phrase and the phrase describing Boeing assistance. He could invoke the wording of the Kleinman article.

266. The second is the "what if?" about what Messrs Swaffield and Bennett would have done if Mr Meyohas had lied. As for the evidence of the Monarch/Greybull witnesses while I do accept the force of the Claimants' submission as to the subconscious tendency to encode the version of reality which we wish had happened or which places us in the best light, I am nonetheless persuaded that the thrust of Mr Bennett's and Mr Swaffield's evidence as to the counterfactual is correct.

267. If Mr Meyohas had made a representation as to Boeing involvement which was a plain lie it is probably right that they would not have overtly called him out on it. Mr Morgan's point *"you wouldn't want to embarrass your boss"* is a valid one. In addition overt disunity would not be a good sales pitch at a time when the

Monarch team were trying to sell Monarch as a really good risk. However, that is not the end of the story. It was quite easy for one or the other to have quietly clarified during the meeting – for example by reference to the Presentation - or suggested a follow up clarification after the meeting. I do not believe that, having discussed the delicate line which could safely and properly be trodden, one or other of them (particularly Mr Bennett, who had an obvious way in via the figures) would not have done something to realign.

268. I therefore do not need to reach a conclusion on the very difficult question of whether if they did not do this they would remember the lie. I see force in the evidence of those witnesses that they are sure they would have remembered if Mr Meyohas had lied and that they either would have said something or would have recalled it. I believe that they both believe that. However the capacity of the memory to overwrite that which we do not want to believe is profound.

269. As for the motive question raised by the Defendants in closing, the question is this: given the findings I have made (e.g. as to what Greybull/Monarch did not know about Wirecard's internal discussions) what was the point of lying? In order to give the answer which Wirecard believes was given, it is common ground that Mr Meyohas would have had to lie. If (as I have found) he did not know that Wirecard attached any great importance to this point, I accept the submission that there would be no reason for him to infer it; the important point was that Monarch was being put into a stable financial position. Why then would he tell a lie which would (on his information) have no significance?

270. Nor was it the case that Mr Meyohas would have any reason to go beyond what was necessary to maintain Boeing confidentiality. There was no reason to try positively to play down Boeing's involvement beyond what was being said openly. It was not as if Boeing involvement was shameful. On the contrary it was something of a coup. As Mr Meyohas put it: *"It's something that given a choice we would have loved to shout about…"*

271. The counterfactual analysis therefore does not really assist the Claimants as much as they would suggest.

Did Wirecard ask about the original source of the funds?

272. I conclude that Wirecard did not ask in terms about the original source of the funds. The problem for Wirecard is this: unless they specifically asked this exact question, the script which Greybull/Monarch were planning to use very carefully did not go there.

273. One therefore needs to look for a sign that Wirecard was gearing up to ask about this aspect. There is no such evidence. Although the documentary record shows interest by Wirecard in more details of the transaction, and that source was discussed around 7 October, as the date of the meeting approached there is no sign of Wirecard preparing themselves to ask this question. The evidence shows an interest in other facets – in particular debt components and the like.

274. The evidence relied on as to Wirecard's supposed interest in ownership is fairly distant – and relates to ownership, not to the particulars of cash injections. Nor is

the conclusion which Wirecard invited – that they sought Mr Meyohas attendance to grill him on this, one which is sustained on the evidence.

The short distance between ambiguity and inaccuracy

275. Part of the problem here is the very short distance which lies between the Representations alleged, which would be false, and an accurate but potentially ambiguous phrasing of the facts.

276. This was evident in the position as to equity: the position is essentially driven by whether one focusses on the ultimate source or not. If Mr Meyohas spoke of equity going into Monarch this was correct – Monarch did not borrow money, it received a cash injection.

277. That equity did, in absolute mechanical terms come from Petrol Jersey (i.e. the Greybull investors SPV). But those investors did not personally provide that money, save as to the £10 million. Equally there was no direct cash injection from Boeing.

278. If one looks at what Monarch was planning to say and compares it to Mr Hilz's note the scope for misunderstanding, by anyone who had focussed on Mr Wexeler's digest of the reports as opposed to Mr Kleinman's article, becomes very apparent:

Hilz Note	**Monarch script**
Our shareholder has provided an equity investment of £18m and committed a further £45m in Q1 2017. The additional £45m in Q1 2017 is NOT required for working capital purposes and is being provided to strengthen the balance sheet and liquidity of the group	The capital contributed to Monarch by Greybull Capital and the tranche of capital still to be contributed in January have full equity character. It does not include any loan components, interest or dividend distributions, a repayment plan or the like
Boeing did not contribute capital to Monarch or provide capital to Greybull Capital in any way[1].	Despite confusing press reports, Boeing have not provided equity or loans to Monarch
The capital placed by Greybull Capital is derived entirely from the assets of Greybull's owners ('Family Investment Pool'	[Knightsbridge family investment fund Greybull[2]]

[1] See also Q&A document: "Boeing is neither a lender nor shareholder in the company."

[2] The term used in one of the articles at this period.

Making of the Representations: conclusions

279. I am not persuaded on the balance of probabilities that the Representations pleaded were made.

280. Against the background my conclusions as to what (on the balance of probabilities) was said and not said are as follows:

281. I conclude that Mr Meyohas said something very close indeed to the script which had been discussed. As to Boeing what was said was essentially the scripted wording.

282. As to the alleged representation that the money came entirely from a *"family investment pool"*, I do not accept (despite the terms of the original German note) that these exact words were used. Part of the reasons for my conclusions are based on Mr Meyohas' evidence, but part also on what appears the oddity of the language. Part of this has to do with what Greybull was – a group of family offices working in concert. I both accept and agree with Mr Meyohas' evidence that it would be an odd phrase which (wrongly) suggested the investments of a single family: *"Family investment pool to me doesn't mean anything… It would describe all the different investments of a family"*.

283. At the same time I conclude that Mr Meyohas said something about family. A question was probably asked, as it has been on first meeting, about where Greybull's money came from. Mr Meyohas' answers on this were close to the Hilz formulation:

    i) *"if I had been asked who the investors of Petrol Jersey are, I would have said, you know, it's several families or family offices or family investments"*.

    ii) *"I might have used "a pool of family investors", which is an accurate description of who the shareholders of Petrol Jersey were."*;

284. Consistently with this, Mr Ley said: *"The origin of the family investment pool as being equity when I was there was discussed very briefly, I believe, in a very brief introductory statement by Mr Meyohas."*

285. It follows that I conclude that Mr Hilz's record is in the critical respect (entirely innocently) inaccurate. Mr Hilz was reconstructing what was said in his second language from handwritten notes which were necessarily incomplete. It was a fairly lengthy meeting. The Note is not the live transcription with which we have been blessed at trial. It is a reinterpretation of his manuscript notes which he took at the time. The format of the note suggests that those manuscript notes were sketchy and not word for word.

286. The positioning of this issue also suggests that this was not the main focus of interest. There is scope for "Chinese whispers" both in the taking of a note and in its interpretation, particularly when there is discussion immediately afterwards. While the natural tendency is to imagine a note written up later in the same day or the next morning is as good as a transcript the evidence on the fall off of

memory in the immediate aftermath of an event is clear and clearly collated in the speech of Popplewell LJ.

287. It is likely that coming to the meeting with Wirecard's discussed agenda in his mind Mr Hilz encoded and interpreted what was said in a way which deviated slightly but significantly from what was said and that in recording his recollections that small but significant deviation from accuracy became entrenched.

288. It follows from the conclusions above that the case on making of the Representations fails.

CHOICE OF LAW

289. The parties are at odds on the question of the applicable law, with the Claimants contending for English Law and the Defendants (with an eye on the possible limitation argument under German Law) for German Law. They do however agree as to much of the framework for this dispute.

290. Thus they agree that:

i) Since the events in question pre-date the end of the Brexit transition period the applicable law is governed by Regulation (EC) No 864/2007 on the Law Applicable to Non-contractual Obligations ("Rome II");

ii) The general rule in Article 4 of Rome II provides as follows:

> "(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur….
>
> (3) …where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with [another country], the law that other country shall apply".

iii) "Damage" is defined in Art. 2(1) as:

> "For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo."

iv) Although the general rule under Art 4(1) is subject to two exceptions, neither the Claimants nor the Defendants contend that either applies.

v) This is not a case where Article 12 (*culpa in contrahendo*) applies. That deals with the law "*applicable to a non-contractual obligation arising out*

> *of dealings prior to the conclusion of a contract…*" and is to be treated as an autonomous concept—see Recital (30) to Rome II. While it appears that the judgment of Bryan J in *The Republic of Angola v Perfectbit Ltd* [2018] EWHC 965 (Comm) at [198]-[200] does not establish that Article 12 cannot apply to a claim by a contracting party against a non-party for misrepresentation, I am content (for reasons which will become apparent later in the judgment) to proceed on the basis of the parties' agreed position on this point.

291. As it is necessary to identify a single law, Article 4(1) focuses on the place where the damage occurred. Accordingly neither the event giving rise to the damage nor the place where the indirect consequences of the event giving rise to the damage are designed to form the focus of the enquiry.

292. As noted in Dicey, Morris & Collins on the Conflict of Laws (16th edn., inc. Supplement) at 35-024:

> "The distinctions between the place of damage and the place of the event giving rise to damage, and between direct and indirect damages, follow closely the scheme established by the European Court in interpreting the concept of "harmful event" in what is now Art 7(2) of the recast Brussels I Regulation and that jurisprudence is likely to assist in interpreting Art. 4(1) of the Rome II Regulation in difficult cases."

This approach is reflected in authorities such as: *Erste Group Bank SA v JSC "VMZ Red October"* [2015] EWCA Civ 379, [2015] 1 CLC 706 at [90]-[92] and *FM Capital Partners v Marino* [2018] EWHC 1768 (Comm), at [485]-[486].

293. Looking at the potentially relevant authorities, the focus is on where "the direct and immediate" damage occurred: *AMT Futures Ltd v Marzillier mbH* [2017] UKSC 13, [2018] AC 439 at [15].

> "The CJEU has ruled on the correct approach to article 5(3). It has interpreted the phrase "the place where the harmful event occurred" … as "the place where the event giving rise to the damage, and entailing tortious... liability, directly produced its harmful effect upon the person who is the immediate victim of the event" and thus not the place where an indirect victim, … suffered financial loss as a result: and …, where a victim suffered harm in one member state and consequential financial loss in another, as referring to the place where the initial damage occurred… The focus … is thus on where the direct and immediate damage occurred."

294. As Christopher Clarke LJ had said in the same case [2015] EWCA Civ 143, [2015] QB 699 at [54], the question may be posed as follows:

> "(i) what is the place where the event giving rise to the damage…directly produced its harmful effects…(the *Dumez France* case [1990] ECR I-49); or (ii) where was the actual damage which elsewhere can be felt or the initial damage

> suffered (the *Marinari* case [1996] QB 217); or (iii) what was the place where the damage which can be attributed to the harmful event…by a direct and causal link (the *Reunion Europenne* case [2000] QB 690) was sustained…"

295. Sir Geoffrey Vos MR, in *Kwok v UBS* [2023] EWCA Civ 222, [2023] 1 WLR 1984 (a Lugano case, not a Rome II case) indicated that the search for a unifying thread can be delusive noting (at [46]) that: "*It is, in my judgment, dangerous to seek to define the test for where damage occurs in a wide range of financial loss cases, because they are likely to be so fact dependent*".

296. Having said that there is some guidance to be gained from the authorities, if sometimes in a somewhat negative sense:

    i) There is no general rule in misrepresentation cases that the place of damage is where the claimant was induced to enter into the transaction that ultimately led to the loss, though it may be a good starting point for analysis:.

        a) In *London Helicopters Ltd v Heliportugal* [2006] EWHC 108 (QB), [2006] 1 CLC 2097, Simon J. held (at [25]) that "*it is quite likely that in a case of negligent misstatement the damage will occur at the place where the misstatement is received and relied upon*";

        b) In *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287, Andrew Smith J., held (at [214]) that, following a fraudulent misrepresentation: "*Maple Leaf suffered its damage when it committed itself to accepting the deal and sending its subscription form. In a case like this, to my mind, once Maple Leaf had put it outside its control to prevent the loss, the harmful effect occurred*";

        c) That is reflected in Dicey 35-026*"... if the defendant by a representation specifically addressed to the claimant induces the claimant to enter into an unfavourable transaction (such as a contract) with a third party, it is strongly arguable that the claimant should be taken to have suffered damage at the point, and in the place, where the claimant or his or her representative concludes the transaction*….";

    ii) However as the Master of the Rolls made clear those cases do not lay down any general rule, not least because they turned on their own facts and/or the loss was non-contingent at the time of the transaction: *Kwok* at [8], [45]-[48] and (1st instance) at [69]-[83].

    iii) In some cases loss may be held to have occurred where it holds its bank account. In *FM Capital Partners Ltd v Marino* I held (at [508]) that in that case it was, noting the comment from Christopher Clarke LJ in the CA in the *AMT Futures* case that "*In one sense a corporation may be said to suffer a loss wherever it keeps its accounts, for that is where its loss is ultimately felt*";

iv) However in *Dolphin Maritime* at [30]-[31] it was held that the fact that a corporation's loss is felt where its books are made up does not mean that this is the place of the damage. In that case the approach was taken that in a "lost money" case, the damage may as a general rule be regarded as occurring (depending on the facts) either in the place from or to which the moneys were paid: at [60];

v) It may be relevant to ask as Christopher Clarke J did in Dolphin Maritime at [59], "*what would have been the position if the tort complained of had not taken place*";

vi) The EU authorities emphasise the desirability for a predictable venue to enable the claimant to know where to sue.

297. In the present case, the facts indubitably present more than one possibility. So far as Germany is concerned:

i) The alleged misrepresentations were made at a meeting in Munich, Germany. The making of any such misrepresentation is on one view the event giving rise to the damage;

ii) The immediate consequence of the deceit is (assuming reliance is established) that Wirecard decided to enter into and did enter into Side Letter 7. That was decided upon at a meeting in Germany, signed by Wirecard in Germany, emailed to England where it was signed by Monarch, and then emailed back to Germany;

iii) Further, SL7 is governed by German law (Clause 10) as is the principal contract to which it relates (Clause 26(2) of the Contractual terms and conditions "Version 3.0.1 Stand 02/2011");

iv) Wirecard is a German company, and any loss suffered by it would ultimately be reflected in its principal account, which (given that it was a German regulated bank) must have been in Germany.

298. On the England side there is:

i) The fact that Monarch was an English registered company which went into administration in this jurisdiction. However that has little if any connection to direct damage;

ii) Wirecard says that the centre of gravity of its actual loss is in England in that:

a) Side Letter 7 indirectly exposed Wirecard to the contingent risk of liability if customers entered into credit card transactions with Monarch for flights and it was then unable to provide customers with them;

b) It is alleged that Wirecard became liable to account for chargebacks by way of set-off in accordance with the rules of the applicable Visa/Mastercard scheme. There is no pleading as to how this took

place. In closing reliance was placed on the Mastercard Chargeback Guide (August 2017) and Visa Core Rules (April 2017) as well as the Mastercard Rules (June 2016) and Mastercard UK Domestic Rules (May 2016), but there was no formal evidence as to the operation of the rules and the application of these provisions on the ground;

c) Accordingly, Wirecard contends that even if it can be said that it ultimately bore such expenditure from its accounts in Germany, that was merely the remoter financial consequences of the events in England and Wales.

299. Overall – and despite the clear and careful arguments advanced for the Claimants, I conclude that the preferable analysis is that the applicable law is German Law. There are many immediate factors linking the case to Germany both in terms of direction, causation and ultimate feeling of the loss. By contrast Wirecard is forced to rely on the effects of Side Letter 7. But Side Letter 7 did not immediately cause Wirecard damage and would not inevitably do so. It took a further contingency (administration) and the application of the relevant rules to manifest the chargebacks. The links to England are too derivative (described by the Claimants in closing as manifesting at "the fourth and fifth stages" of the analysis) and too poorly evidenced.

300. In terms of direct damage, damage occurred when those misrepresentations took effect in the minds of those attending the meeting in Germany and were subsequently relied upon. The alleged key decisions were said to have been taken at the November meeting of Wirecard's Management Board; and this seems to have taken place in Germany. The direct links to Germany are simply much stronger than any links to this jurisdiction.

301. The damage therefore occurred in Germany, and under the general rule in Art 4 of Rome II, the applicable law is German law.

GERMAN LAW: CAUSATION

302. Once the question of applicable law is determined in favour of German Law, an issue arises as to causation/reliance. The Claimants seek to rely on approaches under German law which potentially ease their case on reliance.

303. The experts agree that the notion of "*conditio sine qua non*" (or "but for" causation) is the primary basis for determining causality in German Law:

> "According to this doctrine, a circumstantial aspect or a conduct is a relevant cause of a certain injury or damage, if the damage would not have occurred without it".

304. The experts agree that the burden of proof is, as a general rule, on the claimant under German Law. The parties have also agreed that the standard of proof is governed by the law of England & Wales.

305. There were two main issues between the experts on causation under German Law:

i) Whether there is a reversal of the burden of proof;

ii) Whether the Claimants could take advantage of the principle of "prima facie evidence".

306. Ultimately however the real fight was on the former issue, as the Claimants sensibly did not press the *prima facie* evidence argument. On that I will simply record that:

i) In some circumstances, a claimant may benefit from "*prima facie* evidence" if the Court concludes that in the circumstances of the case, it is obvious that the claimant would have made a different decision if the representation had not been made, and that decision would have avoided loss.

ii) Professor Grigoleit gave unchallenged evidence on this point explaining how the presumption worked, and the high degree of typicity required. Indeed, his evidence on prima facie evidence generally was not challenged.

iii) The Court would need to determine, from the specific fact-pattern, that it could be confident that a claimant in such a situation would typically react in only one way. That is a high bar.

iv) The facts of the present case would not, in my judgment, come close to satisfying this test.

307. Focussing then on the live issue of the reversal of the burden of proof, the issue was really about whether a general rule could be spelled out of the cases, or whether everything turned on the facts of the case. Professor Grigoleit summed up the present state of German law on these issues in his report as follows:

> "Neither statutory law nor the established case law provides for a general rule facilitating proof in all misrepresentation or deceit cases. Rather, a generally reliable case law basis for a facilitation of proof can only be established if it is obvious according to the circumstances of the case that, from the ex ante perspective of the claimant, it would have been objectively only reasonable for him to make a different decision and that any reasonable decision would have avoided the damages."

308. In this respect there was not a huge distance between the experts. Professor Elsing agreed that *"The legal nature of this relaxation as a genuine reversal of the burden of proof or a mere prima facie evidence has not yet been finally clarified"*. Where the experts parted company was that he was of the view that where (it is contended) the defendant made a positive misrepresentation in face-to-face contractual negotiations the German courts would hold that it is for the defendant to disprove causation. This aligned with the view adopted by Professor Grigoleit some 25 years ago when, as a doctoral candidate, he attempted to systematise the cases. Then he concluded that on the predominant view, the Court *"assumes a reversal of the burden of demonstration and proof with regard to the causality characteristic for the claim for damages from culpa in contrahendo"* and similarly *"with regard to the tortious liability for deception"*.

309. I should make clear that both experts were plainly intelligent, thoughtful people doing their very best to assist the court. My impression, having listed to and considered their evidence, was that but for the demands of the case they would have seen the answer as being along the lines of *"in theory this is what should probably happen, but in practice, much will turn on the facts and the Court's instinct to palm tree justice"*. Their disagreement was simply an attempt to help me do my job, namely to decide what I think a German court would probably decide in this case.

310. There was considerable discussion of a range of authorities within the reports, as both had done an extremely diligent job. While there was within the trial timetable very limited time to test views on the authorities and only a very few were looked at live, the expert reports provided a very sound base for looking further at the main cases. In summary:

    i) The Court of Justice held in 2012 (BGH judgment of 8 May 2012) that there was a reversal of the legal burden of proof when a bank sells an investment without disclosing its commission. This was a case where the standard of proof was very high and the Court reversed the burden of proof on the basis of a public policy rule regarding non-disclosure by investment advisers. The public policy was that the standard of proof under German law was so high for this kind of case, that otherwise it would be impossible for such a claim to succeed. Professor Elsing agreed with this;

    ii) A similar result occurred in the similar case of the BGH judgment of 26 February 2013, which was another investment advice case;

    iii) The Court of Justice held in 2016 (BGH judgment of 15 July 2016) that there is a reversal of the legal burden of proof when an apartment seller misinforms the buyer about the burdens of the purchase;

    iv) The Court of Justice held (BGH judgment of 15 July 2015) that there was no reversal in the burden of proof where a lawyer gave incorrect legal advice;

    v) The Court of Justice recently held that (BGH judgment 15.06.2023) there was no reversal of the burden of proof where a notary failed in the duty to explain a transaction. The reasoning of the Court of Justice was that, unlike in the cases where the defendant was a seller of an investment or the seller of a property, the defendant notary could not be assumed *"to act in his own interest"* and could not be assumed to *"have the intention of influencing the [claimant's] contractual decision to his/her own advantage"*. For these reasons, a reversal of the burden of proof where a notary fails in his duty to explain would lead to *"an inappropriate distribution of risk"*, just as a reversal of the burden of proof where a lawyer gives incorrect advice would.

    vi) For completeness though it is not a reversal of the burden case, in the *Dieselgate* case (judgment of the Federal Court of Justice of 25 May 2020) the Court treated the wrongdoing as equivalent to a direct fraudulent misrepresentation, but applied a rule of prima facie evidence (because it

was obvious that no-one would buy a car that might be forced off the road at any time due to having failed a regulatory emissions test).

311. The Claimants submitted that:

    i) The cases in which the Court of Justice has identified a reversal of the burden of proof cannot be explained away as restricted to "investment" cases. The Court has not suggested that the principle is so limited and the public policy reasons for holding that there is a reversal of the burden of proof apply equally in other cases of pre-contractual non-disclosure;

    ii) The public policy reasons the Court of Justice has identified for justifying a reversal of the burden of proof in pre-contractual misrepresentation and non-disclosure cases are just those factors which Professor Grigoleit argued in his doctoral thesis should justify a reversal of the burden of proof in such cases;

    iii) Not much can be drawn from the Court of Justice decision in the *Dieselgate* because it was not necessary for the court to find there was a shift in the legal burden of proof and the legal burden of proof was not discussed.

312. Ultimately I largely prefer the arguments of the Defendants on this point. This is not an easy issue to decide, particularly when the analysis is complicated by the fact that I am operating under a hybrid of German causation rules combined with English standard of proof. That is to my mind a relevant consideration because it is apparent that in many cases where the reversal operates the standard of proof is very high – in some cases as high as 90%. One can entirely see why a presumption may be particularly attractive in a case where otherwise the standard of proof is so high.

313. One thing which is clear is that the cases do not speak with one voice. They do not establish that there is principle which should be applied to require a reversal of the burden of proof in cases such as this. The various cases were simply examples of a reversal of the burden of proof being applied, or not applied. Professor Grigoleit did, as Mr Mundy submitted, sound rather despairing when he decried the authorities as *"all this mess the German courts have made with...the evidentiary rules"*. But he was exactly right when he said: *"You cannot...make a clear systematic distinction between the application of the different doctrines and different contexts."*

314. Doing the best I can I have some sympathy with Professor Elsing's view that a positive false declaration is generally judged more strictly than a breach of a duty of disclosure. However, I would consider that this is likely to be very fact specific and certainly there was no real authority to support the point; the commentary authority he relied upon had nothing to do with causation, but simply made the point that while the question of whether there was a duty to speak was complex, it was clear that deliberately telling an untruth was clearly not permissible. My own instinct that there is something in this may well be driven by the kind of factors which I have discussed in *Loreley Financing (Jersey) No 30 Limited v Credit Suisse Securities (Europe) Limited and others* [2023] EWHC 2759 (Comm) in particular at [424].

315. I do not consider that there is anything to support Professor Elsing's theory that there would generally be a reversal of the burden of proof in face to face representation cases: this was just an idea advanced by Professor Elsing, as he accepted in the course of Mr Elias's focussed cross-examination and it was not urged on me in closing by the Claimants.

316. My conclusion is that:

    i) There is no overarching principle upon which the German Courts operate in this regard, save that there must be a policy reason for a reversal of the burden of proof.

    ii) Such a reason may be found in a generally applicable point, such as a raised standard of proof for a cause of action. But it would be likely to be applied also in individual cases where not reversing the burden of proof would work an injustice or make it more than usually difficult for a claimant (particularly a claimant who is vulnerable or disadvantaged vis a vis the defendant) to prove their case.

    iii) In a case such as this where both parties are sizeable corporates and the fraud aspect of the case was not in issue (i.e. where the parties were agreed that if the statements relied on were made they were wrong and would be lies) a German judge would not reverse the burden of proof.

317. Accordingly there is no reversal of the burden of proof, the burden remains on the Claimants and the applicable test for reliance is the "but for" causation test.

RELIANCE

The relevance of the proper law

318. Given my conclusion on applicable law I will deal primarily with the issue on the basis of the German Law test. I will then deal briefly with the position as a matter of English Law. In the light of the conclusion on the issue of German Law on causation, it will be no surprise to any reader to discover that the question of applicable law ultimately makes no difference.

Reliance/inducement: conclusions on the facts

319. The Claimants here seek findings that:

    i) The Representations were material: they were likely to induce Wirecard to enter into the contract;

    ii) Wirecard did rely on the Representations and was induced into entering Side Letter 7;

    iii) The Representations were not the only matter of importance. The financial information provided by Monarch was also important. The Representations need not have been the only reason for Wirecard's decision to enter into Side Letter 7 – it is enough that they were a but for cause (or if contrary to

my conclusion above English Law applies, played a real and substantial part in the inducement).

320. The Defendants made a determined attack on the reliance case – both as to form and substance. Attention was drawn to the changes which the case had undergone, namely that in the original pleading the reliance pleaded was agreement to Side Letter 7 without any focus on how and by whom - and that when pressed the answer to that question was via a single decision taken by Mr Ley; whereas the final case was a complex one, involving the Management Board process.

321. While the troubled development of a case is not by any means necessarily a sign that the case is not good, it is worth examining the pleaded mechanics against which the evidence has to be weighed. Here:

    i) The amended pleaded case was inducement of the Management Board into making three separate decisions "*in or around November 2016"*.

    ii) Those decisions were:

        a) Decision 1: "*to continue the trading relationship and negotiate to provide card acquirer services other than on the Project Drake terms*";

        b) Decision 2: "*To offer the Core New Terms to Monarch Airlines*";

        c) Decision 3: "*[T]o enter into a binding agreement with Monarch Airlines on the basis of the Core New Terms*".

    iii) The case as developed in an RFI was that each of the three decisions was made:

        a) "*On or around the evening of 22nd (or possibly early morning of 23rd) November 2016*";

        b) "*At a meeting of the Management Board*"; and

        c) "*All of the members of the Management Board (Berkhard Ley, Rainer Wexeler and Alexander von Knoop) were given the opportunity to participate in that decision, they did so and they were each in favour of it*".

322. There is therefore a pleaded case which stretches over a considerable period after the Meeting and covers a range of things – far from the *"short and direct causal chain"* which the Claimants say exists. This is not impossible but that structure requires careful consideration as regards each of these alleged decisions. The Claimants did not in closing really analyse the inducement case by reference to the pleaded case, preferring a broad brush focus on materiality of the "*powerful signals*" conveyed by the representations as to confidence and willingness to support (*a la* Mantegazza) in the future. This was a case which dovetailed more easily with the reverse burden of proof approach, which I have rejected.

323. I will start by acknowledging the point made by the Claimants as to the evidence given by their witnesses. All of them said, and broadly maintained, that the Representations were important to their decision-making process. But in context (and particularly bearing in mind the hindsight/lack of concrete recollection element which was not merely obvious but manifest on the evidence) that evidence cannot be enough to establish materiality or reliance.

324. That is the more so when not only is the background that which I have explained earlier, as to Wirecard's focus on fundamentals, but also that evidence itself has a considerable degree of variation. Thus:

    i) It is true that Dr Käppner described the shareholders' (apparent) injection of £165m from its own funds as *"for me…a qualitative prerequisite*" – but he did not explain why. On the contrary his next point tends to derogate from the "prerequisite" analysis and revive the fundamentals approach: *"... the numbers themselves of the investments were suitable in order to continue to ... support… Monarch for one to two years, and therefore at this point in time we were relatively relaxed. Both these aspects were of equal importance to us."*

    ii) Mr Ley's evidence seemed to characterise the Investment as a bonus and one which went to solvency rather than commitment: *"The good news here, ... were that we knew someone has 165 million that they are going to inject, so if there is a deviation from the plan in half a year's time, there's a high likelihood that this shareholder will be able inject cash anew".* Even on solvency however, Mr Ley did not know what capital Greybull had and it would appear that no investigations were made by Wirecard in this respect.

    iii) Mr Hilz's evidence was (characteristically) more understated and more obviously realistic: *"the capital funds were seen as a commitment and for us that amount was noticeable"*. That evidence actually dovetailed with his email of 16 November 2016 recording a consensus that, the *"future opportunities/risk profile of Monarch is to be assessed as favourable"* in view of points including *"the capital contribution of the shareholder"*.

325. It is therefore necessary to "walk through" events after any Representations were made and evaluate whether the decisions alleged were caused (in the "but for" (alternatively the "real and substantial") sense) by them.

326. The first "decision" is the immediate one: to continue negotiations. As the Defendants submitted, this is a somewhat elusive concept – a reliance on the representation simply to continue negotiations could not be said to require a decision of the Management Board. What is more, it does not fit with the timeline, which indicates that there was no question over negotiations continuing. This was particularly clear from the final part of Mr Hilz's email which indicates as a given that discussions would continue: *"TO DO: Shortly, Monarch will submit all relevant documents to us for a detailed overall view in order to assess the development and forecast and to be able to evaluate our risk appetite and to continue to negotiate the collateralisation modalities in 2017 (premium model). In this context, we will also receive yesterday's company presentation, among other things."*

327. Decision 1 can therefore be rejected.

328. The second point which comes from the immediate aftermath of the meeting is one which goes to the overarching materiality point and to the alleged decisions to offer terms and to enter into SL7 (Decisions 2 and 3). The Defendants described this as *"the dog that did not bark"*. While that is probably going a little far, I accept that this is a point of some significance. As is clear from the material which covers the earlier part of the relationship Wirecard's personnel were thorough and careful. Where they regarded even a small matter as being of some significance, they recorded discussions on it and outcomes. Where they wanted clarity they sought it – for example the questions asked of Mr Swaffield after the 7 October conversation. If the sources of the funds were regarded as material it would probably be expected that Mr Ley at least (who had no great trust in Greybull and in particular Mr Meyohas) would want to rely on more than an elusive phrase (from Mr Meyohas) in a meeting he could only partly attend (it will be recalled that he left part way through the Meeting).

329. In fact, as is apparent from the factual section above, there was no mention of the alleged Representations in the internal discussions at Wirecard following the Meeting. Wirecard's focus was on Monarch's financials and free cash. Wirecard thought it was completely protected in any event: the Management Board thought prior to the Meeting that the cash injection of $122m was enough to keep Monarch flying for at least another year (see Mr Wexeler's email on 14 October *"Overall, we assume that the GBP 122 million already paid in will ensure that Monarch Airlines' flight operations are ensured for at least one year"* and Mr Ley's *"the liquidity bottleneck has been resolved"*). What the parties negotiated and signed up to in the form of SL7 was an agreement which terminated automatically after that deemed safe year unless extended (cl. 7.1 and 5). And again in line with the Wirecard's eye to fundamentals, by cl. 6.9 Wirecard could increase the required collateral up to 100% if Monarch's free cash fell too low.

330. Also there was no nailing down of the point. At times (see Side Letter 5) Wirecard insisted on representations being formally recorded in a contractual format. Similarly with Side Letter 6 there was a provision made for how cash released was to be used. With the alleged representations relied on none of this was done. When the time came to draft the contract, although there were lawyers involved, the precedents of Side Letters 5 and 6 were not followed.

331. Further, all in all the "mood music" is not that of concern over this point. The question had not been put on the Agenda for the Meeting. Mr Hilz did not pick the specific point out as being more than an item (albeit one of the important items) within a meeting summary in an email. No-one picked him up on the apparent inconsistency with the Sky News report. No-one suggested getting it in writing even by email. The matter just formed part of the continuum of negotiations – part of an email which ended up *"TO DO: ...."*. That gives the appearance of it being interesting, but not significant.

332. The absence of any discussion or nailing down might have less significance if there was almost no time lag – if the decision relied on were 17 or 18 October; but the decisions relied on are (at earliest) 22-23 November – over a month later. That is the pleaded date, though in reality the detailed negotiations were not

concluded until 15 December 2016 and a draft of SL7 was not produced until 5 December. It therefore follows that Decision 3 might (and probably ought to) be said to occur then. In all that time, with all the exchanges which went on in the interim (over 200 items within the chronological bundle) the absence of any follow up on this strongly suggests that it was not a matter of importance.

333. In particular the Management Board Meeting of 25 October 2016 does not indicate that this was even discussed, still less that it is was a matter of any significance. The Agenda for that meeting includes Monarch (no mention of shareholders investment) and the Minutes focus only on credit risk: *"The participants discussed the positive development of Monarch Airlines and agreed internally on the maximum amount of any unsecured risk required for further contract negotiations with the customer."*

334. Then there is the question of silence on Footnote 27. The documentary record after the meeting shows that Wirecard had the Presentation. They clearly went through parts of it with a fine-tooth comb. I find, given their general diligence, that they would have read the whole document carefully in this period. That was Mr Hilz's evidence, which I accept. He said that the Management Presentation was discussed amongst colleagues, including Messrs Bikar, Käppner, Wexeler and Ley in *"many, many meetings around the table"* and that he himself *"definitely went through it carefully, of course"*. That was consistent with Mr Ley's evidence which in fact went further: "*someone who's an expert in airlines"* would have *"worked through this type of PowerPoint presentation. They would have shared it amongst themselves, checked it, counter-checked it, and sat down in a committee to discuss it".*

335. Wirecard would therefore have seen and thought about Footnote 27. I reject the submission of the Claimants that this would have been something that would have been missed in this rather more thorough review (compared to that which was possible in the Meeting). The analogy with the fact that Mr Meyohas and Mr Swaffield did not spot the point when preparing their witness statements is a false one. Wirecard at this stage say that it was auditing the material it had on Monarch with a view to drafting new contractual terms. Anything important would have been seen, by this diligent, specialist team. If not understood, questions would have been asked. But no questions resulted, nor wasthere any reflection of this in discussions or terms. In fact, with the specialists involved, as Mr Ley says there were, the significance of the footnote would, in my judgment have been appreciated.

336. Mr Bennett said:

> "it should have been obvious to anyone with airline experience from the fact that the Boeing deal was prominently mentioned in the Financial Overview and the size of the capital injection, that there was some kind of discount or incentive involved from the airline manufacturer in order to get the deal done or a sale and leaseback or both".

337. This was not challenged, and the evidence of Dr Käppner and Mr Hilz which recognised the concept of monetising discounts using sale and leaseback, and the obvious link to the Boeing deal, tended to support it.

338. Against this background, the second and third "decisions" relied upon can sensibly be taken together. The conclusion is that the Claimants' case, that reliance was placed on any representations by Mr Meyohas on 17 October when any decisions were taken on 22/23 November is not supported by the documentary record, nor by the inherent probabilities of the situation.

339. First, there is no record of the matter even being discussed, and the prior exchanges evaluated above do not compel a conclusion that it must have been. There is no briefing document or exchange of briefing emails on the subject. There is no Board Agenda or Board Minutes for the meeting supposedly held on 22/23 November. There is no Board pack containing relevant papers on the basis of which the Board could make a decision.

340. Second, there is no evidence that any of the members of Wirecard's Supervisory Board were ever informed of the alleged Representations (though there is evidence that members were informed of the Kleinman/Sky News article). This is not insignificant given that the evidence discloses other sources for members of the Board either to believe that the funds were direct from Greybull or to have an appreciation of Boeing's real role. As can be seen there had been a degree of elision of the position of Greybull and Petrol Jersey, and there had been ample press coverage drawing on Monarch's own press releases.

341. Third, there is nothing to show what decisions (if any) were actually made by the Board, or on what basis those decisions were taken. The procedure to be followed appears to have been one in accordance with Annex 10.2 of the Supervisory Board's Rules of Procedure.

    i) The Claimants' pleaded case is and their evidence (in particular that of Mr Ley) that all members of the Board had to agree, but there is no evidence from either of the other two members of the Board (Messrs Wexeler and von Knoop) that they did agree;

    ii) There is certainly room for doubt as to whether unanimity was necessary, though this was not formally in issue. Under the Rules of Procedure of the Management Board, rule 7.2, unanimity was not required. The Claimants plead that unanimity was required under Cl. 4.4 or Cl. 8.1.5 in transactions "of exceptional importance". That itself is not entirely reflective of the rules: Cl. 4.4 and Cl. 8.1.5 require that all members of the Board participate; where unanimity is required, it is stated, as in rule 8.1.4. (To the extent it matters it is hard to see how the transaction was of "exceptional importance" prospectively, rather than in the skewed vision of hindsight; it was merely the renegotiation of terms with one among dozens of long-standing clients);

    iii) It would not be appropriate to conclude that Mr Ley's view was determinative. If anyone had led on this it might have been expected to be Mr Wexeler: Mr Ley's evidence that risk controlling and operational

matters were the responsibility of Mr Wexeler and that Mr Wexeler and not him was involved in negotiating and finalising SL 7. But there is no evidence as to Mr Wexeler's state of knowledge or the effect of any disclosure of any representations to him.

342. I therefore have no difficulty in concluding that the Claimants cannot establish that any Representations were a "but for" (German Law) or a real and substantial (English Law) cause of any of the decisions relied upon.

Materiality

343. Even in the terms posed by the Claimants as to "powerful signals" and materiality I would not accept the case on reliance, in the light of the conclusion I have reached as to the relative weights given by Wirecard to fundamentals and issues such as "family"; as well as the very evident lack of trust in Greybull from the primary decisionmaker, Mr Ley. The original source of the money was plainly a matter of interest to various people. But the degree of that interest varied. The CAA had indicated the strongest signs of assigning importance to this - doubtless because of the implications for restoring the licence against the background of the press interest. It can be seen that they actively pressed for "skin in the game" from Greybull.

344. But none of that was known to Wirecard. Nor did Wirecard take the same approach. The evidence from it is of interest, in the sense of curiosity. The root source of funds was doubtless something Wirecard would like to know - as the exchanges between Mr Hilz and Dr Käppner make clear. As I have found, some minor comfort would be gained from it. But whether or not the Representations were made, the evidence on balance of importance, materiality and causativeness to Wirecard generally (and Mr Ley in particular) is not there; the balance of the evidence points to "solvent for a year" and securing the appropriate share of business as the important considerations for Wirecard.

345. Further, to the extent necessary I would consider that the evidence either does not engage or rebuts any presumption (whether of German Law or the potential evidential presumption under English Law[3]). I accept the Defendants' submission that this is not a case where there is an absence of evidence or the evidence is so evenly balanced that is necessary to have recourse to the burden of proof. As indicated, I conclude on the evidence that any Representations were not material. In any event on the evidence a combination of the lack of overt nexus between any Representations and the pleaded decisions, the background to the meeting (including Wirecard's previous commercial behaviour), the timeline post meeting and the lack of any real evidence of the Board Meeting relied upon would be sufficient to establish that any presumption was rebutted.

346. Finally, though this is not necessary to reach the conclusion above, and is noted simply as an additional matter: much of Wirecard's case was addressed to the misleading impression given by earlier matters, such as the Kleinman article, the

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[3] It being the Claimants' submission that Rome II does not apply to exclude the "evidential presumption" alluded to in cases such as *The C Challenger* [2020] EWHC 3448 (Comm): *Marshall v MIB* [2015] EWHC 3421 (QB at [24]-[25].

press release and the Q&A document. This dovetailed with Wirecard's evidence that they were thinking along the lines set out in Mr Hilz's note before the Meeting. Mr Hilz's evidence was that before the meeting he believed that Greybull was the owner of Monarch and that it was the source of the investment. Likewise Mr Ley said that *"in the run up [to the Meeting] it was already the understanding that it was capital from Greybull"* and Dr Käppner said that prior to the Meeting he assumed that the funds were from Greybull because he had seen Monarch's press release. If Wirecard's misapprehension were based on other sources of information (such as their prior assumptions or Monarch's press release), there would on the evidence be no reliance on what is alleged to have been said during the Meeting – unless it were sufficiently important to have been specifically fact checked – which I have concluded it was not.

347. Accordingly if (contrary to the conclusion above) the pleaded Representations were made they did not induce Wirecard to agree to SL7 and they were not a *conditio sine qua non* of Wirecard's agreement to SL7.

348. I also consider that this conclusion is consistent with Wirecard's reaction on Monarch's failure. Mr Hilz raised his understanding in the email quoted above, but there was no chorus of shock, or statements suggesting that Wirecard would have avoided being involved if something different had been said.

LIMITATION

349. The limitation issue therefore does not arise and can be dealt with fairly shortly. The Defendants contend that as a matter of German Law the claim is time barred.

350. It is common ground that the Claim Form was issued within the German limitation period which expired on 31 December 2020. It is also common ground that the Particulars of Claim were served on 14 January 2020. The issue is simply whether either the Claim Form was sufficiently particularised to meet the German Law test or whether if not 14 January 2021 was a date within the permissible period under German Law for serving the claim.

351. Again the German Law experts were able to set out a very considerable amount of common ground to narrow the issue to this point:

    i) German Civil Code ("GCC") s. 204 para 1 No. 1 governs the suspension of limitation by commencement of litigation with a "Leistungsklage", which is the relevant means of suspension of limitation in this case. The experts agree that the alternative form of "demand for payment" ("Mahnverfahren") which can suspend limitation under GCC s 24 para 1 No 3 does not apply in this case.

    ii) In the case of commencement of litigation in Germany by a Leistungsklage, s. 204 para 1 No 1 requires the filing of a lawsuit ("Klageerhebung"). The requirements for this are not further defined in substantive law, but are set out at s. 253 paras 1-2 of the German Code of Civil Procedure ("GCCP"). Under German law for proceedings in Germany limitation is only suspended by issuing and service of the claim.

iii) A legal action brought in a foreign court can suspend limitation pursuant to GCC s. 204 para 1 No. 1. For a foreign action to suspend the limitation period, it must be (i) *"functionally equivalent in relation to the German action"* and (ii) served on the defendant.

iv) By s. 167 GCCP, limitation will be suspended if, following the expiry of the primary limitation period, the claimant "*has done everything reasonable for prompt service"*. In practice, where the claimant is responsible for the delay, "*service must not be delayed for more than two to three weeks"*.

352. For present purposes (the position is reserved in case of an appeal) it is agreed that German law governs when the time period for both filing, and serving, the claim ends. [4]

353. The starting point therefore is that the test is one of functional equivalency. Not every detail needs to be identical: *"In order to do justice to the diversity of legal systems, neither complete uniformity of the designation nor of the legal content is required. It is sufficient for the essential features to be identical."* Functional equivalency has to take into account what is regarded as necessary in England, as that is the forum. German rules and authorities take into account a number of forum specific procedural matters.

354. My ultimate task is to decide what the likely outcome would be on this question before a German Court (see for example Foxton J in *Banca Intesa Sanpaolo v Comune de Venezia* [2022] EWHC 2586 (Comm) at [121] quoting *CC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417, 424-425). Where it is a case of *(ex hypothesi*) a fraud I do not regard it as remotely likely that court would regard the claim as time barred when (i) the document is good enough in England to stop time running (ii) the difference between what might arguably be required and what was produced is so small and derives from procedural factors in the forum. In my judgment a decision that a claim was time barred based on so slight a distinction would sit very ill with any judge. Further, the approach of the German Court in the German Court of Justice decision of 17 April 2002 is instructive, and supports that conclusion. In that case the German courts held that serving a Swiss payment order is the functional equivalent of serving a German payment order for limitation purposes because it serves the purposes of the German limitation provision which is to suspend the limitation period in circumstances where the claimant has manifested an intention to prosecute the claim and the debtor has been warned the claimant has that intention. It said: *"[T]he decisive factor is the creditor's intention aimed at award and enforcement, which is expressed in a procedural or litigation-like act of legal prosecution."*

355. Similarly the OLG Frankfurt judgment of 11 December 2015 provides support for a constructive, rather than overanalytical, approach. In that case the Court

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[4] There is a point which could be argued on any appeal as to whether English Law determines the procedure for filing and serving a claim form (See for example art.1(3) of Rome II, Dicey at 34-036 and 34-065; *PJSC Tatneft v Bogolyubov* [2017] EWCA Civ 1581 at [32]-[33]; *and Pandya v Intersalonika General Insurance Co SA* [2020] EWHC 273 (QB) at [35] (citing Dickinson, *"The Rome II Regulation: The law applicable to non-contractual obligations"* (2008)).

recognised a claim brought in Argentina as suspending the limitation period, even though the Argentinian statement of claim was ambiguously drafted. The Court did not rigorously compare the Argentinian statement of claim against the requirements of s.253 of the GCCP, but rather looked to the substance of the proceedings in Argentina to decide whether the claim there covered the same subject matter as the claim before it. The court considered the *"meaning and purpose"* (i.e. the function) of s.204, para.1, no.1 of the German Civil Code and concluded that those *"clearly speak in favour"* of treating the Argentinian proceedings as functionally equivalent to German proceedings, because *"the creditor's intention to take legal action is manifested in the filing of the action"* and the bringing of the proceedings *"leaves the debtor in no doubt as to its seriousness"*.

356. Here one can easily see a real basis for functional equivalence. Professor Grigoleit accepted that the question a German court would ask is whether what is written on the claim form is sufficient to enable the Defendants to distinguish this claim from others and sufficient to enable the Defendants to make a decision whether to defend the claim. It is clear that the Claim Form here did just that.

357. Thus I conclude without any difficulty that if there were a claim against Greybull and/or Mr Meyohas it would not be barred by the German law of limitation.

QUANTUM

358. Given the fact that the experts narrowed the ground to one single point, and on the basis of my finding above that point is doubly hypothetical, this issue may be dealt with very briefly indeed.

359. The Claimants claim loss in the sum of £11,819,723 (as revised following discussions and agreements on some points in issue). The only remaining issue is whether, in the counter-factual scenario that Wirecard had not offered new terms to Monarch under SL7, Monarch would have agreed to terminate the contractual relations between them by 1 January 2017 and Wirecard would have returned its security prior to 2 October 2017. In such a case, Wirecard would have suffered loss in that counterfactual scenario, and such loss would fall to be deducted from its actual loss as suffered.

360. It is common ground that Wirecard would have been exposed to £1,597,397 in chargeback claims on Monarch going into administration, even if Wirecard and Monarch had not entered Side Letter 7. Essentially the Defendants say that loss should be reduced by that £1,597,397, while the Claimants say either that the loss would have been covered by collateral of £4.4m or that it should be reduced by only £1,277,918 (on the basis that only 80% of the chargebacks would have materialised).

361. Were the point to arise, the Claimants position as to security appears on balance to be correct. Even if Wirecard or Monarch/FAV had given notice to terminate the agreements immediately after the Meeting on 17 October 2016, the terms of those agreements meant that they would not have terminated until 17 March 2017. The collateral would therefore not have been returned before Monarch went into

administration on 2 October 2017. That is because under both agreements, the collateral held by Wirecard was to be returned *"nine (9) months after termination"* of the contractual relationship.

CONCLUSION

362. For the reasons given above the Claimants' claim fails. In summary:

i) The alleged Representations were not made;

ii) If (contrary to this conclusion) they were made, the Claimants did not rely on them, whether as a matter of German or English Law.