IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

ACTION NO. CL 74/04

BETWEEN

SIROCCO LTD.

Plaintiff

-and-

RICHARD F. SAVORY
carrying on business as SAVORY & CO.

Defendant

Mr. Michael Ashe QC and Mr. Paul Keeble for the Plaintiff
Mr. Carlos Simons QC for the Defendant

JUDGMENT

1. Dr. John Watts (W) is a 64 year old surgeon from Michigan. Having retired in 1994, he and his wife visited Providenciales in 1995 and were so impressed with its beauty that they decided to buy two adjacent lots on which to build their retirement home. This was done through the Plaintiff Company, Sirocco (S), named after the sailboat of Errol Flynn, which was specifically incorporated by W in May 1995 for that purpose, he being the beneficial owner and director. He then returned to surgical practice in the United States in order to fund the cost of construction.

2. By 2000 he was ready to transfer sums that he had accumulated, and needed to find a recipient for the funds where they would be secure but also instantly available when required by his architect. In February 2000 he was introduced by a friend to the Atlas Group, and met Mr. Robert Whitney, President of Atlas Private Trust Ltd. (APT) in Providenciales. Also present were Scott Turner and Greg Hurd of Atlas. The details of his dealings are contained in a witness statement he subsequently made to the T.C.I. police (17). W explained to Whitney his need to transfer funds to a secure and liquid account, pending disbursement on direction. The latter said that their company, which W believed to be APT, would be perfect for that as they could hold and disburse funds as directed. W asked how he could be sure that his funds would be safe and was assured by Whitney that they were insured for many millions of dollars.

3. Whitney told him that in order for funds to be transferable to that account it was necessary for him to sign certain documentation, which W did sign, but of which he was not given copies. The documents were those of Atlas Securities Inc. (ASI). APT and ASI were wholly-owned subsidiaries of Atlas Financial Group Limited (AFG).

4. In about May 2000 he was contacted by Mr. Pryzgoda of APT who suggested that W's funds be put into their Fidelity Cash Fund, an interest bearing account, where his monies would be guaranteed secure and remain liquid. As a result some 75% of the $327000 that he transferred was placed in the Fund and the rest was in blue chip securities.

5. On 23 June 2001 W received an e-mail from the Liquidator informing him that ASI had gone into voluntary liquidation and that his funds were in jeopardy, and that he should seek legal advice. As a result he contacted Mr. Keeble, who was representing the Liquidator, who advised him that Mr. Chapman (C), an attorney employed by the Defendant, was already accepting clients in the liquidation. On 25 June 2001 W spoke to C by telephone, and so started the relationship between S, through W, and the Defendant, through C, which is the subject of this action.

6. That has generated some ten Court Bundles of documents, in respect of which most of those that are relevant to the issues before me have been placed in two Core Bundles. The First of these had been prepared on behalf of the Plaintiff without reference to the Defendant, and as a result it has been necessary during the trial to insert documents, so that the numbering may appear at times to be idiosyncratic. Unless otherwise stated the document numbers given in brackets in this Judgment are to the numbering in the bottom right hand corner in the First Core Bundle. However, I have had regard to all the documents to which reference has been made during the trial of the action. The Second Core Bundle contains the pleadings in the litigation the pursuit of which is the subject of the present action. There is also a Trial Bundle containing the pleadings and witness statements in the present professional negligence action, together with a chronology at tab 19. There is also a much fuller chronology prepared by the Defendant. Numerous letters, faxes, and e-mails passing between W and C, together with some of C's notes of their telephone conversations, have been considered by them when giving their evidence. As the advice that was being tendered by C to W evidenced in those communications forms the basis of W's claim, significant reference to them and accordingly the length of this Judgment is unavoidable. Where such a communication is of particular importance, I have underlined its reference.

7. I am grateful to Mr. Ashe, Leading Counsel for the Plaintiff, and Mr. Simons, Leading Counsel for the Defendant, for their skeleton arguments, reference to authority and oral submissions and to Mr. Keeble for marshalling the documents prior to and during the hearing.

The Duty and the alleged breaches

8. Both Leading Counsel agreed as to the nature of the duties owed by C, for which the Defendant was vicariously liable, and both referred to the Judgment of Oliver J. in Midland Bank v. Hett Stubbs & Kemp (1979) Ch. 384 at 403B:

> "No doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled and exacting profession, but I think that the court must beware imposing upon solicitors – or upon professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do...The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession."

9. Mr. Ashe also referred to the gloss put upon this in Sun Poi Lai v. Chamberlains (2005) CA 17/03 in the New Zealand Court of Appeal where is was said that the yardstick was an objective one, namely that which a competent practitioner would normally and reasonably adopt. He also relied on "a standard of care and skill commensurate with the skill and experience which that solicitor...has" in Argyll (Duchess) v. Beuselinck (1972) 2 Ll. Rep 172 at 183, and to the speech of Lord Edmund Davies in Whitehouse v. Jordan (1981) 1 All ER 268 at 278 where he confirmed that the test was of the ordinary skilled man exercising and professing to have a particular skill. He quoted Pollock B. in Re A Solicitor ex p. The incorporated Law Society (1895) 39 SJ 219 at 220: "A solicitor, whatever may be his other duties towards his client, ought always to make his client distinctly acquainted with the legal effect of any step he may take." Finally he referred to the comments of Lyell J. in Holmes v. National Benzole Co. Ltd. (1965) 109 SJ 971 to the effect that a solicitor should not encourage a client to pursue a claim which proper investigation would have shown was hopeless.

10. Mr. Simons referred to the sentiments of Gault J. in Hamilton v. Papakura District Council (200) 1 NZLR 265 at 280 to the effect that the law does not impose an unattainable standard that guarantees against all harm in all cases. He also quoted from the speech of Lord Hope in Harley v. McDonald (2002) 2 AC 678 at 705 where he stressed that, just because a court considers that a case was hopeless, it follows that there was a failure by the lawyer to achieve the appropriate level of competence or care. At 698 he also accepted that often litigation which had a degree of novelty about it was pursued through its interlocutory stages with a view to extracting a settlement offer. Finally he brought reference to judicial thinking on the subject right up to date by referring to Lord Carswell's speech in Moy v. Pettman Smith (a firm) & Anor (2005) 1 WLR 581, which he said raised the bar in relation to negligence of an attorney.. At 599 he said;

> "It would not be in the interests of those clients if they were compelled by the effect of over-prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising litigants about the course to be taken...it would be unfortunate if they felt that they had to hedge their opinion about with qualifications."

11. The allegations made against the Defendant in the Statement of Claim (Trial Bundle, tab 1 para.7) are for breach of an implied term that C would exercise reasonable skill and care and demonstrate professional competence in conducting business, commensurate with his $360 hourly charge. C accepted in his evidence such a standard, and I consider that the pleading properly reflects the judicial encapsulations set out above.

12. A number of failures to comply with the requisite standard to be expected of him when advising W in relation to and the pursuit of his litigation have been made against C. The essential question that I have to decide is whether, when C set out the options for him, his advice fell below the standard to be expected of him. This included advice as to whether a particular cause of action was arguable in law and, if so, its prospects of succeeding at each stage in the litigation, together with advice as to the tactical or other reasons for advancing it, and as to the chances of recovery of his loss against a defendant if successful, and generally as to the costs of litigation.

13. In effect W alleges that if C, having ascertained all the facts relevant to his case, had properly explained the law to him and properly advised in relation to the pursuit of his litigation, he would not have retained the Defendant to proceed with the action. In the alternatives if, for example, the Court finds that, if properly advised, W would have commenced litigation, he would not have proceeded on to defend a strike out and so on. It is agreed that in this process there were obvious times to take stock before incurring further costs, namely prior to:

(i) filing the Writ and Statement of Claim (17 August 2001)

(ii) serving the Statement of Claim (4 September 2001)

(iii) the hearing of the strike out application (13 November 2001)

(iv) the hearing of the appeal (7 February 2002)

(v) the hearing of the application to amend the Statement of Claim (26 August 2002)

14. In this Judgment I shall therefore consider whether, at these stages, S has established its allegations against C and that these caused W to commence or to continue with the litigation when otherwise he would not have done so.

15. S also alleges in the alternative that certain work should not have been charged for (para 61). This can be succinctly disposed of. Regarding the work done on behalf of Gordon Burton, I have heard no evidence that such was covered by the annual management fee. It is accepted that the work done for Royalton Harvey was charged erroneously. The rate charged by C in typing documents has been misunderstood by W.

C, working on a word processor, obviously created documents when drafting them (at 58 he describes typing and revising as he goes) , but this does not mean that a secretarial rate should be charged. Overall I am satisfied that the hourly rate charged by him was not only that which was agreed but a proper one considering his seniority and experience, assuming that it cannot be impugned as negligently carried out. Further I do not consider that the work that he carried out involved excessive hours. W had no complaint about the number of hours that was being billed, and accepted the level of input, including revisions and redrafting, that he required of him. Further it should not be overlooked that, as gestures of goodwill, the Defendant agreed significant discounts on the invoices. W made clear in his evidence before me that he was pleased with and indeed commended C's work, and it was only after his disappointment following the leave application that he refused to pay the fees outstanding.

16. The main allegations against C in the Statement of Claim (Second Core Bundle, tab 2) can be summarized as follows:

(A) Contending in a letter to the Liquidator an impressed ("Quistclose") claim (paras. 12 -16, 60(1) and 63(iii)).

(B) Advising W to take legal proceedings based on a Statement of Claim although its allegations were fatally flawed (paras 45(2), 60(ii) and 63(i)). More particularly in relation to causes of action, as per their numbers, that:

(2) alleged that Mr. Whitney had accepted personal responsibility for his statements as a director who had particular skill experience and knowledge in the finance industry (paras. 26 – 28).

(3) raised a claim against the Directors of ASI under s.167(2) Companies Ordinance (s.167 claim) for allowing ASI to trade when they knew or ought to have known that it was insolvent, when such claim could only be made in the winding up proceedings (paras 29 – 30).

(4) claimed against AFG, the parent company and 100% shareholder of ASI, a duty of care to the clients of its subsidiaries to supervise the conduct of its subsidiaries affairs, when a shareholder owes no duty to the company in which it owns shares or to the clients of that company, even if within the same group of companies (paras.31 - 32).

(5) claimed that the directors of AFG were personally liable for failing to ensure that AFG carried out this duty (paras. 33-34).

(C) Having received a letter from Misick and Stanbrook (M & S), attorneys for the Second and Third Defendants, pointing out the above, nevertheless advised W to defend their strike out application (para 45 (iii), 60(iii)).

(D) Appealed that strike out (paras 40-44, 45 (vii) and (viii), 60 (iv)

(E) Applied for leave to serve an Amended Statement of Claim (as per Core Bundle 2, tab 16).

The Parties

17. These allegations cannot be considered in a vacuum, and must be gauged against my assessment of the personalities and the relationship of client, and here I mean W who was at all times acting for S, and attorney, namely C. I have had ample opportunity to form my impressions of them and that relationship. Although W and C had each made witness statements, which are in the Trial Bundle at tabs 18 and 16 respectively, which they verified on oath, I permitted them, because of the importance to each party of the consequences of this litigation, to elaborate the most important parts of their evidence in chief before being cross-examined. As a result, W spent three and a half days and C one and a half days in the witness box.

18. It should be said immediately that neither when giving evidence showed any hostility toward the other. They both accepted, and this was borne out by their documentary communications, that their relationship was entirely cordial, nor was there any suggestion that W was other than appreciative and approving of C's services, until the Court of Appeal hearing on 7 February 2002 when, to put it in a nutshell, W felt that C had been upstaged by his opponent. Consistent with that, until that time W had paid C's invoices with commendable alacrity. He regarded C as an attentive attorney.

19. My general impression of W, derived from both his and C's accounts and my observations, is that he is intelligent and very much his own man. He was extremely hurt, annoyed and angry that he had been defrauded of his hard earned savings, and therefore of his ability to build his retirement home for himself and his wife. He was determined to see that the perpetrators were brought to book and exposed for what they were. Hence, he was keen to make statements to the police, and complaints to regulatory authorities here, and in the United States and Canada, to the Governor and in the local press. To do so cost him nothing.

20. However, when deciding to pursue his wrongdoers through civil litigation he had to weigh whether to risk further monies by so doing, in effect to risk throwing good money after bad, as he described it. Here his decisions as to whether to proceed fluctuated from time to time, and were influenced by the advice that he was getting and his perceptions as to his chances of success in relation to his various allegations, the chances of recovery even if successful, and the cost of such litigation. This in turn led him to send detailed e-mails to C, on one occasion even late at night the day after Christmas Day, to ask that the legal authorities relevant to his case be sent to him so that he could read them, and to want to go off to a law library when attending his wife's family reunion, as well as to talk about his case to a local Judge. I hesitate to use the word obsessive. I do not think it right to go so far as that, but he did, to some extent, wear this litigation on his sleeve.

21. C said that he found W to be to a somewhat complex character, at times being bullish and ambitiously litigious, and at other times extremely worried as to the chances of winning, the costs of losing and the prospects of recovery. Certainly there are indications of this yo-yo effect in the documentation, but I did not understand C to be asserting that this indicated irrationality, but rather was consistent with W being a very concerned, involved and demanding client, whose situation was not an easy one. C said that in his 30 years of practice he has never had a more demanding client who had wanted to be consulted and involved to such a degree, and having seen the nature and content of W's involvement, that does not surprise me. This, as far as C was concerned, was his client's right, as long as he was willing to pay for the privilege of having his thoughts on the litigation, suggestions as to amendments to the pleadings and numerous e-mails, considered and responded to.

22. C told me, and I accept, that because of the type of client W was, he was careful to ensure that it was the client who ultimately took all the decisions in relation to the litigation. W readily agreed that this was the case. C therefore did not think it was either appropriate or advisable for him to tell the client what he would do if he were him when he was asked, and no criticism is made against him for failing to do so. Having advised W as to the possible causes of action and their chances of success and any tactical considerations, he was willing, if the client wished it, to advance claims that, although not legally secure, were arguable.

23. So far as C is concerned, he said that he held himself out as an experienced litigator, which experience included commercial work, and as someone well able to advise upon and conduct S's litigation. His short-form cv is annexed to his statement in Trial Bundle, tab16. Having attended University in both New Zealand and Oxford, he worked for some 18 months as a legislative draftsman reviewing and revising Bills, and was then a partner in a New Zealand firm of lawyers before joining S in December 2000. He has appeared before me on a number of occasions, but I have not previously had an opportunity to see him cross-examined. I remind myself that attorneys in the fused profession in the T.C.I. have to be client sensitive, and that he tailored his client contact to that which he perceived was expected of him, and in the light of the relationship that developed between them. As the relationship between W and C in this case was a good one, he obviously gauged that appropriately. I suspect he was more attentive and tolerant, C often being contacted in the evenings and at weekends and being asked to consider the minutiae of pleading amendments, than a number of attorneys would have been willing to be. I also consider that C has a genuine interest in the law which he sees very much as something that should adapt and develop to meet the needs of the modern business world, and is therefore perhaps more willing than most attorneys to argue a novel point. I would describe his style of advocacy as somewhat wordy and florid, but not such as to undermine the propositions that he is advancing. Mr. Savory described him as a barrister's barrister, who has a love of the law.

The contention advanced to the Liquidator

24. Returning now to the 25 June 2001, when W first contacted C, W explained his concern that his funds had been lost, dissipated and stolen and asked what he needed to do in short order in view of a court hearing in the ASI liquidation that was to be held on 28 June. W said that he asked C if he was experienced in attending to this type of liquidation, and was assured that he was. C agreed to represent him and sent him his firm's Legal Services Agreement (1), which W signed and faxed back instructing him to act in S's interests in the Liquidation, voicing concern that ASI had breached their fiduciary duties, and that the worldwide freezing order of $7 million may be inadequate.

25. On 3 July W instructed C to make a formal claim in the Liquidation. Also on 3 July W made a statement to Police Inspector Thompson (17) in relation to a fraud investigation into the directors of ASI. The Inspector asked W to obtain from Atlas any documentation relating to his transfer of funds

26. On 4 July W received the Liquidators Report which stated (6P10):

> "The Fidelity Cash Fund was an investment vehicle used by Advisors for clients who were interested in "parking cash" until a market opportunity became available or were conservative investors, looking for safety for their investment. Traditionally, these investment vehicles are considered to be "virtually guaranteed" and the value rarely declines.
> Regrettably, that's not the case for investors at ASI who held this investment. In some cases monies were sent to Fidelity for clients and in other cases not. Monies sent to Fidelity on behalf of clients did not always remain, as ASI often sent redemption requests to Fidelity. These funds were used for other areas of ASI's operation, which included general operating expenses, as well as for those clients that purchased on margin. In all cases, the client never suspected that they no longer held Fidelity, as at all times ASI continued to report to the client a "fictitious" Fidelity position."

27. W said that, on reading this and in particular on seeing the graph which showed that there was nothing left (6P11), he felt ill and realised that his funds had gone. He was also very angry. He telephoned C twice that day telling him to use very strong language and leverage in his letter to the Liquidator and to send a copy to the Financial Services Commission and the Attorney General (6P 21-1), and that it may be appropriate to place an indictment for fraud, as ASI had been developed by the Turners as a shell company into which funds could be funneled. Also on 4 July Whitney wrote to APT's clients assuring them that it remained solvent, operational and insured, stating that a number of clients would be able to transfer or liquidate virtually 100% of their assets in the ASI liquidation, and offered the services of the subsidiary Atlas Discount Brokerage Limited (ADB) to those who wished to transfer their assets in kind (6P 31).

28. On 5 July C faxed to W a draft of the letter ((6P23) "for your review and correction...for substance, tone and of course content." This is the first indication of the extent of the client input in their relationship which was to persist throughout.

29. W informed C that he thought that the letter was very good, and C sent it to the Liquidator on 6 July (7).His intention was, as he described it, to put down a marker to the Liquidator indicating that W's funds were to be held for a single and specific purpose, and were verifiable, identifiable and traceable to the extent of 75% in the Fidelity Cash Fund and as to 25% in stock holdings, and that these funds were impressed with a trust, and therefore subject to a claim in rem (this was referred to throughout the hearing before me as a Quistclose claim). They therefore did not fall in with the general Liquidation monies. Also, very importantly, C did not know that W had signed a Margin Agreement agreeing to his funds being traded on margin and being commingled with other ASI monies. He also did not know that W's funds were untraceable.

31. As to C's representation in the Liquidation, I consider that it was appropriate for C to appear for various creditors, including W, at the hearing on 28 June 2001. I do not accept that C can be criticized for writing the letter to the Liquidator on the information that he had at that time. Although the picture may have been a bleak one, I consider that C's advice to write to the Liquidator to lay down a marker does not evidence any breach of duty, and therefore find that W is liable for the First Invoice (289), which he has paid.

Pre instruction discussions

32. Upon receipt of this letter the Liquidator rang C, who reported to W in a letter of 9 July (12) what he had been told, namely that there was no relevant insurance, at least as taken out by ASI. On 11 July C was told by Tammy Murray at Atlas that there had been unauthorized dissipation of W's funds, that the stocks were in a margined account and untraceable. C told W of this in a telephone attendance of 12 July (15A-1). W commented "they have basically been cleaned out". C also noted him as saying he was "very keen to take all available action" (15 A-1). C described W as being very upset.

33. On 13 July 2001 W and C had their first face to face meeting (15A). W sought advice as to whether a class action suit could be brought to spread the cost of litigation. C advised him that this was not possible as W's "Quistclose" claim was unique and because of confidentiality laws. They then discussed other options as to how to regain W's losses. W said that, although litigation was the last thing he wanted, C indicated that his Quistclose case was a very strong one, which had a high probability of succeeding. This C denies and there is certainly no note to that effect in his attendance record. W asked for a ballpark worst scenario figure for costs if he commenced litigation and was unsuccessful, particularly as C mentioned the tactic of strike out applications being used to increase costs and so discourage litigants, and was quoted maximum exposure of $25000-50000, the large range being to accommodate setbacks such as strike outs. Again there is no reference to this in the attendance note. He was cautioned that he should not commence a claim against anyone unless he had resources to see it through to the end.

34. On 16 July W took to Inspector Thompson copies of the ASI documents that Mr. Whitney had insisted that he sign back in March 2000, which he had obtained from Atlas. They comprised:

(1) Investment Account Agreement (22). On that agreement W put an x in a box to indicate his investment experience as knowledgeable, and also indicated that he wanted his investment to be both 100% low level risk and short term

(2) Corporate Trading Resolution (24), paragraph 2 of which stated that account dealings may be on a cash settlement or margin basis. On that document W is named as the account mandatory to give instructions to buy and sell securities which ASI was to respect and execute.

(3) Corporate Margin Agreement (25). Paragraph 8 of this stated as follows:

> "That whenever there is a credit balance in the Client's account that balance need not be segregated nor held separately but may be commingled with ASI's client funds and used for the general purpose of ASI's business, that such credit balance shall be an item in a debtor and creditor account between the Client and ASI and that the Client shall rely on the liability of ASI in respect thereof."

(4) Appointment of Account Mandator (29).

35. W was closely questioned as to why he had signed the Margin Agreement. He explained that he was told that he had no option but to sign all documents if he wanted to transfer his monies. As he was the account mandatory, he did not have to trade on margin and so was protected. He believed Atlas to be one company with multiple capabilities, all in the same building. W believed that he always dealt with APT, and would never need the services of ASI. When he transferred his funds to ASI he thought it was simply a transfer mechanism to APT. It was not suggested to W that he ever intended to trade on Margin.

36. W accepted that to trust Mr. Whitney, who he did not know and about whom he made no enquiries, was in retrospect incredibly naive. Similarly his failure to run it by a lawyer as to what he was signing, although he had cause to wonder about the reference to trading on margin in the Corporate Margin Agreement, and in particular paragraph 8 thereof, which was precisely what he did not want. However, he believed that the forms were standard documents, and that such paragraphs would not apply to him in view of the clear requirements that he had conveyed to Mr. Whitney.

37. The Inspector informed C by telephone of the Margin Agreement and that it looked as if W had signed it. C said this came as a complete surprise to him, and he immediately appreciated that the impressed trust contention that he had advanced to the Liquidator was no longer tenable. This evidence I accept.

38. At the meeting on 17 July these documents were discussed, but there was disagreement as to the context in which they were discussed. W said that the discussion related to him not appreciating the significance of signing, not as to whether they were signed by him. C said that it centred on whether W had actually signed the documents and, if so, whether he realised what he was signing. This is consistent with the additional statement that W made to the police that he did not recall signing and was not on Island on 1 March 2000 (20). Also C's note of the meeting refers to "if signed Margin Trading agreement" (31A). W said that he asked C if his signing the Margin Agreement had significance to his Quistclose claim, and was told that it was not as strong as if he had not signed it, but it was still strong. I cannot accept that and prefer C's evidence as to this.

39. Although C notes W as saying that he was not ready to proceed with litigation at this stage, C accepts that he advised W as to potential suits, namely against APT, Whitney, Pryzgoda? Hurd? ASI (in liquidation)?? AFG ?? and KPMG?? C explained that ? indicated iffy and ?? very iffy claims. C said that what he told him about costs. His attendance note reads (31B):

> "(Likely cost – say
> around $40-50K through to trial
> (including trial)
> Probably around $5K to launch.
> Say $10-15 up to trial preparation
> And 50% trial preparation to trial.
> But these just "on (off) the wall"
> ballpark indications. No commitment or
> guarantee on costs.)

40. In respect of the discussions as to cost, I prefer the recollection of C, aided as it is by a contemporaneous note, and am satisfied that a figure of $40-50K was mentioned to W.

41. As to their meeting on 18 July again their accounts differ. W said that, as a result of their discussions, he was 95% sure that he would commence litigation, but wanted the weekend to sleep on it. C said that at the end of this meeting W had given no indication of wanting to sue, and he was not expecting to see W again. In fact C' attendance note (43A) relates almost entirely to a possible lawsuit, with references to it being wise to keep S in existence if there was to be a lawsuit, to the fact that APT appears to be alive and doing business but that it could be hanging on by a thread, to possibly suing for negligence for not carrying insurance, or for carrying insurance with a fraud exception, or representing that there was insurance. Certainly therefore I accept that there was extensive conversation about litigation in that 72 minute attendance.

42. In any event, on 22 July W sent C an e-mail (46) informing him that he had decided to proceed with a civil suit. I am satisfied that the instructions to the Defendant to represent S in the litigation date from this time, and were intended to be subject to the

same terms as applied to the Legal Services Agreement in respect of representation in the Liquidation.

Representation up to the filing of Writ and Statement of Claim

43. W's e-mail to C of 22 July (46) indicated that he considered time to be of the essence and hoped that proceedings could be served before C's departure on holiday in August and attached 5 pages of his thoughts (47-51). These are obviously important as indicating his understanding as to the various potential claims. He asked what were the fiduciary responsibilities of APT and Whitney, and what responsibilities did Whitney and Dixon have as directors for the fraudulent conduct of the Turners, and whether they were individually and personally responsible to the clients for damages, and for allowing the company to continue trading when insolvent. Although he had asked these questions, he then stated that Whitney should be enjoined by reason of his breach of his fiduciary duty as a director of APT, and Whitney and Dixon as directors of ASI and under s.167 (2) Companies Ordinance (s.167 claim). He set out the bases for his claims for damages, namely misrepresentation, negligence, breach of fiduciary responsibilities, s.167, breach of contract and fraud (51). He also asked how much he should claim in his law suit.

44. I suggested to W that this attachment showed greater initiative and involvement and legal understanding than is usually found in the ordinary litigant. He protested that he was only expressing the common sense of a layman, although he accepted that he may have extended this further than he should have done. C thanked him for this contribution, indicating that it would be useful in framing the draft Statement of Claim, which he would hope to issue by 9 August. Further e-mails from W asked who should be named and served, and referred to the Turners as the main culprits who should be included in the suit. C agreed that prima facie all the former directors of ASI and the present directors of AFG should be defendants although there could be difficulty in serving the Turners (57).

45. Despite this, in a telephone attendance that followed on 3 August (57A) only 3 causes of action were agreed on. The claims against Pryzgoda, Hurd and KPMG, which had been discussed, were not to be pursued.

APT

46. It was decided that APT should be sued for failing to protect W's interests in breach of contract and fiduciary duty, although W understood that APT may be a man of straw and that there was a danger of it going up in a puff of smoke. There may be insurance as a Licensed Trustee had to insure. In fact only $56000 had been transferred to APT, before being transferred on to ASI. The rest had been wired direct to ASI.

47. It was decided that Whitney should be sued by reason of his representations made to W which induced him to invest in Atlas. In his letter C said that allegations against Whitney for misrepresentations as to insurance were likely to result in a strike out

application. During the course of the litigation Whitney received a substantial severance payment from APT prior to the sale of its assets.

S. 167 claim

48. It was decided to sue the Turners, Dixon and Whitney under s.167 (2) for permitting ASI to trade after it became insolvent. In his letter of 8 August C pointed out that Dixon and Whitney had not been appointed directors of ASI. It was therefore alleged that they came within the Companies Ordinance definition of "director" as including "any person occupying the position of director by whatever name called." Whether this would get them home against Dixon and Whitney, with the Chief Justice seemingly not unsympathetic to them as whistle blowers against the Turners, was debatable but probably worth trying. In his e-mail of 9 August (92) he pointed out that it would be necessary to engage an accountant to establish the insolvency of ASI. It was crucial to establish that Whitney and Dixon had the requisite knowledge or means of knowledge of what the Turners were up to, or should have been put on serious enquiry. He said that these were crucial matters of proof for the hearing and W should be aware that much will turn on such matters at trial. When he faxed his letter of 9 August (95) C did not adopt W's suggestion relating to Dixon and Whitney as directors as they had never "been formally appointed directors of ASI but might be held directors given the wider definition in the Companies Ordinance."

Claim against AFG

49. When C faxed W a letter on 8 August (59) attaching the draft Statement of Claim he pointed out that he had added a claim against AFG on a purely provisional basis for W to consider. He pointed out that it was not secure legally as it was not recognized that a parent company owed such duties of care, but it may be worth trying. C said that it would increase the pressure although it may bring on a striking out application or other delaying tactics. The claim was based on the acts or omissions of AFG which, it was alleged, made it potentially liable in tort.

Claim against Dixon and Whitney as directors of AFG

50. When C sent W the draft Statement of Claim he again said that this cause of action had been added on a purely provisional basis and sounded similar notes of caution. It was also based on them being independent tortfeasors, and was not secure legally as it was not recognized that the directors of a parent company owed such duties of care. He also made similar comments about such a cause of action adding pressure but being likely to result in a strike out application.

51. C said that his motivation in adding these last two causes of action was because W saw Whitney and Dixon as the ultimate authorities of the Atlas Group. Also they might assist in bringing about a settlement and, if it was possible to get to trial, the facts

revealed there may enable them to be brought within the parameters of existing law. If not, this was an area of law that was palpably developing. Mr. Savory said that these claims had to be seen against the company law of the T.C.I. which allows single shareholder/single director companies, corporate directors and no restriction on inter-company holdings. Therefore, there was a framework which would enable the Court to entertain an argument that duties were owed by the parent company or its directors towards people like W, given the particular factual matrix.

Filing the Statement of Claim

52. C asked W to consider carefully whether he wished to make all of the allegations in the draft. C said that the claim against APT, although legally secure, may not have any assets to satisfy any Judgment. In relation to the claim against Whitney, C told me that he had considered whether to allege deceit, but had decided against it at this stage for fear of causing problems with any insurances that there may be. He therefore confined the claim to negligent misstatement, in respect of which it was necessary to show a special relationship and assumption of responsibility to S, which he did not think would be a problem as W had relied on Whitney as a father figure, who had knowledge and expertise in the business of investment and insurance. The s.167 claim depended upon a particular statutory interpretation. The two claims that C had added were not secure legally but may be, in effect, worth tacking on. C felt that here AFG was far from being a passive shareholder. One had to look at the reality. AFG was running this and its directors should be held liable in tort, if the facts could be gone into and a duty analysis could be established.

53. In essence W alleges that, had he been properly advised so that he understood all the manifestations, risks and costs of this litigation, he would never have agreed to the filing of this Statement of Claim. I cannot accept that. The communications that he had had with C, and the advice that he had received about each cause of action, could have left him in no doubt that only one of them was legally secure, in respect of which there may be difficulties of recovery. The second and third, although arguable, depended very much on the attitude of the Chief Justice, as did the fourth and fifth, which were highly speculative. From what he had been told, I cannot imagine that W believed this was a very happy litigation prospect, and must have decided that its potential difficulties should be accepted in an attempt to bring his wrongdoers to book. I believe that this was the prime motivation for W's fax of 8 August, in which he agreed to proceed against all 5 parties and returned the draft with a number of amendments (76-91). I am not satisfied that, when he did so, he was labouring under any misapprehension as to the strengths or weaknesses of his case.

54. On 9 August C e-mailed W (92) saying that he hoped to sign off the draft that day which was his last day in the office until 22 August. C then faxed W a letter (95) setting out whether W's proposed changes had been effected and, if not, why not, adding that if all was now in order he would arrange for filing and service. This was presumably

indicated and on 17 August, in C's absence, the Statement of Claim was filed. The Statement of Claim (Core Bundle 2, tab 2) set out the causes of action as agreed:

> The first 24 paragraphs set out the parties and S's relationship with the Atlas Group.
>
> Paragraphs 26 to 29 alleged against APT, as first defendant, breach of contractual duties of care, in particular to keep S's funds liquid and secure, and breach of fiduciary duties in failing to do so by abandoning control of them to ASI. It was accepted by Mr. Ashe that this was a perfectly legitimate and arguable cause of action.
>
> Paragraphs 31 to 35 alleged against Whitney, as second defendant, personal liability for the representations made and assurances given to W when they met on 17 February 2000, particularly that S's funds placed with APT would be fully insured, which representations were untrue or made recklessly.
>
> Paragraphs 37 to 43 alleged against Dixon, the Turners and Whitney, as "directors" of ASI, as third defendants, a s.167 claim based on them knowing from December 2000 that ASI was insolvent. As directors of AFG, ASI and APT it was alleged that they had responsibility to monitor and control the deficiencies and should not have allowed the Fidelity Cash Fund to have traded on margin. In effect it was said that they shared a duty of care to S to oversee the affairs of ASI.
>
> Paragraphs 45 to 48 alleged against AFG as fourth defendants breach of a duty care, owed to clients of the Atlas financial Group, to ensure that the affairs of its wholly-owned subsidiaries were conducted prudently.
>
> Paragraphs 50 to 52 also alleged against Dixon, the Turners and Whitney, in their capacity as directors of AFG, breach of a similar duty of care owed to clients of the Atlas Financial Group.

55. Obviously some causes of action were more speculative than others, but it was clear that, so far as W was concerned, APT and Whitney had to be included, and I do not believe, therefore, that there was any disadvantage in including the other causes of action, to see if they provoked an offer or, if not, survived an inevitable strike out application. C accepted that his subsequent Amended Statement of Claim was better, he having had more time to consider it, and indeed consider it in the light of the Chief Justice's comments, but felt that the original version was adequate if not perfect. I agree.

Serving the Statement of Claim

56. On his return from holiday C sent to W a letter (113) attaching the Liquidator's Statement of Issues, in which he proposed to treat all cash and Fidelity claimants on an equal footing. C said that this was in S's best interests, bearing in mind that Fidelity Cash claimants were in the worst position as virtually all the fund was used for unauthorized trading or general purposes. Therefore W knew from this time that he would receive some monies back from the Liquidator, although he did not know what percentage that would be. It may be that this appreciation prompted W's e-mail of 26 August (123) in which he asked what his realistic chances were of getting his money back in his law suit. He asked if his chances were nil if APT or AFG filed for bankruptcy and disappeared. He asked whether information regarding APT's insurance could be obtained and a claim filed against the insurers. I am satisfied that this e-mail evidences some doubts by W as to whether to proceed on to actual service of proceedings.

57. C's e-mail in reply of 27 August (126) is important. This states:

> "your company does run the risk, as we discussed when you were here, that a judgment might not be able to be enforced against certain defendants, or if enforced, could prove barren. The company defendants could go out of existence and the individuals might prove to have no assets. Those risks certainly exist. And there is next to nothing that can be done about them – if the Atlas Group does not succeed in its new guise the companies that remain may well cease to exist, and the individuals have no doubt made arrangements concerning their assets long since."

58. I consider that this advice could not have been clearer, namely that there were absolutely no guarantees that, if this action was successful, W would see any money at the end of the day, and I am quite satisfied that W appreciated this. C did add that insurance policies should be obtainable in the litigation discovery, which he accepted was not correct but said that he put this right in an e-mail of 16 October (133A), and W did not suggest that belief in such discovery was uppermost in his decision to proceed.

59. In an e-mail of 31 August (127) C reiterated that service might result in an application for security for costs and that any one of the defendants may apply to strike out certain of the causes of action. These held the potential of delay but would be defended on their merits as and when they were brought forward. I consider that this again warned W of some of the likely cost consequences of service.

60 Clearly some of these cautions hit home as W sent an important and fairly desperate e-mail as on the same day, 31 August, (128) asking various questions which indicated that he was having serious second thoughts prior to service. He asked how he would collect against the defendants whose assets were in Canada if he was successful "after a long legal battle in the T.C.I. courts." He asked whether he would be responsible for all the legal expenses of those against whom he was unsuccessful. He asked what should he, as an innocent victim of Atlas who had entrusted his money to people who had

criminally misappropriated it, do to get his money back, when it appeared that the legal system protected the criminals and abused the innocent.

61. I consider that this e-mail graphically indicates the hurt that W was experiencing from having been defrauded of his money, and his resentment if the perpetrators of the fraud got away with it. He accepted that he was still very angry at this time. He also appreciated that, just because he was the innocent victim, that did not mean that his causes of action against them were going to succeed, and that if he did not succeed he may have the further indignity of having to pay their legal expenses. Even if he did succeed he may not be able to collect against them because they had ensured that their assets were outside the jurisdiction. There was, therefore, a realisation that the outlook for his lawsuit was potentially bleak. There were considerable potential hurdles to his lawsuit being successful and to him seeing any money at the end of it. He realised that the legal battle ahead of him would be a long one.

62. It is understandable therefore that he was tempted to pass the decision of whether to serve to C, by asking C on two occasions in this e-mail what he would do if he were in W's situation. As indicated above, C did not consider that this was his job, and it was not alleged that it was. This e-mail did, however, necessitate a further response as to the position as C saw it.

63. This is contained in C's e-mail later the same day, 31 August (129). Firstly he confirmed that W would have to pay the costs of those against whom he lost. That also applied to interlocutory applications such as a strike out. By way of an example he referred to the third cause of action (s.167 claim). If Dixon and Whitney were successful in a strike out application on the basis that they were not "directors" of ASI, they would be awarded their costs. C then told him in direct terms that one of the risks of civil litigation was that a judgment cannot be enforced against a party that has no money or, if a company, has gone out of existence. Individuals could be pursued to bankruptcy. If that individual had assets in Canada, he could seek to enforce his TCI judgment there. In relation to costs he said:

> "Costs in litigation, it has to be said, are always a concern, like the inherent uncertainty and unpredictability of litigation. Similarly the risk that the fruits of success may be denied."

64. So far, then, this was all downside. However, C then went on to point out that the lawsuit offered S the only chance, "far from a certainty but still some real chance," of making up the shortfall beyond the 50c in the $ that would be produced in the Liquidation. I shall quote the last two paragraphs in full:

> "Conceivably your company may be able to settle with some of the defendants further down the line. The unpredictability of litigation may work in your company's favour, but there is a possibility (which we have never hidden from you and which we know that you realise full well) that the whole thing could be a waste of money and achieve nothing. But if you want your company to have some

chance of making good the liquidation shortfall, which is certain to occur, then this would appear to be the only way, and you may just be lucky and obtain a settlement without your company having to go to trial and incur the full costs of the same (but that prospect is of course entirely unpredictable at this point).

We hope that this is an adequate summary at this point. Your company is in an invidious situation but if you do not take the litigation forward your company will most certainly be limited to its prorated share of the eventual liquidation distribution, with no chance of doing better. The litigation offers effectively the only chance of doing better. That is its justification. It could well be a very hard fight, but you company has enough defendants in there and enough causes of action that, even if it suffers some reverses (on striking out applications), hopefully there will be a worthwhile outcome on some causes of action. The Court should have a basic sympathy for you. Your company is an innocent victim of fraud by finance professionals, and your company's case is not tainted by tax avoidance or other negative considerations. Does it not come to this: Nothing ventured nothing gained."

65. At this stage, therefore, if W had discussed with his wife whether to serve he had the information to inform her of the following:

1. This lawsuit was the only way of seeking to recover about half of the monies that they had lost, about $160000. To achieve that could involve legal fees of up to $50000, and they would be liable for the legal costs of any defendant against whom they did not succeed.

2. Of the causes of action being alleged, only that against APT was being advance on conventional legal grounds. The s.167 claim involved arguing that those who were not directors should be regarded as directors under a certain interpretation of the statute. The claim against Whitney involved showing an assumption of personal liability beyond that of director .The other causes of action would involve breaking new ground in relation to duties owed by a parent company and its directors for the actions of its subsidiaries. These were not legally secure, although it was hoped that the Judge would be sympathetic to W because of the fraud that had been perpetrated upon him which had caused him to lose his retirement monies.

3. Even if they succeeded, there were significant risks of non enforcement, even in relation to APT.

4. As soon as service took place a strike out application was likely, and they would be responsible for the costs if that application was successful.

5. Even if they got over that hurdle, the litigation was likely to be long and hard fought.

6. Despite all of this, C felt that service of the lawsuit had a real chance of a worthwhile outcome, if only by way of a settlement offer.

66. In the light of these considerations the risks of throwing good money after bad was obvious, and this had to be balanced against W's strong desire to expose his wrongdoers, as well as to recover the monies of which they had dishonestly deprived him and his wife, which had had the consequence of, at the very least, delaying their retirement. Whatever thought processes W in fact went through to convert someone who simply did not know to do for the best to someone who had decided to definitely "pursue the litigation vigorously" and "to fight all the way" and to "serve them this afternoon", it is clear that by the time that he spoke to C on 3 September (130A) he wanted to proceed with all guns blazing. Why was this? I cannot believe that it was because of anything in C's e-mail quoted above, or because he was labouring under any misapprehension as to the strengths or weaknesses in his lawsuit, or the chances of recovery or the likely costs of pursuing the litigation.

67. I believe that this transformation evidences that W is very much his own man who was significantly motivated by a deep sense of grievance, anger and indignation against his wrongdoers, and wanted them exposed. This was a stance that he, as litigant, was entitled to take, however inadvisable. It is reflected in his letter written to the local paper signed "An Angry Creditor" (139A). He did not want a conservative approach. Although he saw the third cause of action (s.167 claim) as the weakest, he did not suggest it should be removed from the pleading, nor that service should take place to test the reaction and resolve of the defendants, and to see if a settlement could be attempted. He wanted an all out fight, and knew the cost consequences associated with such a fight. I therefore do not find the allegations against C to be established, and find that W is liable for the Second Invoice (293), which he has paid.

Defending the strike out application

68. The service provoked a letter from M&S (135) dated 29 October on behalf of Whitney and Dixon, and a Summons to strike out all causes of action (Core Bundle2, tab 2). M&S pointed out that Whitney should not be named as both the second and one of the third defendants, and that they would not be representing the Turners. They also pointed out that no loss had been claimed. The main thrust of the letter, however, was to contend that the Statement of Claim disclosed no cause of action. In relation to the cause of action against Whitney as second defendant they pointed out that no contract or personal guarantee was alleged, nor any duty of care between Whitney and S, or anything which fixed him with personal liability. They asserted that such was unarguable as a matter of law, and referred to Williams v. Natural Life Health Foods (1998) 2 All ER 577 in which the House of Lords held that the director of a limited company was only liable for loss suffered as a result of negligent advice given by the company if he had assumed personal responsibility for that advice, which had to be judged objectively, and that assumption of responsibility had been reasonably relied on. As for the s.167 claim they said that this could only be brought in the Liquidation. Not surprisingly they also asserted that the

fourth and fifth causes of action could not be sustained as a matter of law, which did not recognize a duty of care owed to clients either by the parent company as shareholders or by the shadow directors. They therefore would not file a defence until their Summons to strike had been heard on 13 November.

69. C said that this letter did not contain any argument that had not been predicted. In his e-mail to W of 31 October (140) he described the fat as being well and truly in the fire, as all causes of action were under attack. He continued:

> "If we can survive this attempt to strike out the whole of the pleading (even if we lose 1 or 2, or possibly several, causes of action), then the matter can proceed to trial."

70. He pointed out that the Summons was inevitable and would be hard fought, and that if it failed an appeal would be likely. On 6 November W and his wife met with C (140A) when there was a discussion about the M&S contentions, but no consideration of abandonment of anything. W told me that abandonment was not on the agenda. The strike out application had been anticipated, and he wanted it defended. That was not surprising as at the hearing M&S were going to make submissions of law on the part of APT if they were not separately represented, as in fact occurred. Therefore the whole lawsuit was at stake. Also, the decision having been taken to initiate and serve the proceeding, when it was appreciated that this would provoke a strike out application, the defence of which would require the Court to take a liberal and sympathetic view, there was little point in not now going on to see if the Judge did take that view, in which case the defendants or some of them or any insurers would have to think seriously about buying S off. In relation to the second cause of action the arguments in Williams were discussed. The s.167 claim was considered to be correctly brought in the action. The fourth cause of action was said to require cases to show that a parent company can owe a duty based on actual direction and control. The fifth cause of action was based on the fact that the directors of AFG were the same people who were exercising control over the subsidiaries and knew what was going on. Finally the primary relationship being with APT was emphasized.

71. This, then, was the hurdle that they had always known would have to be overcome. I am satisfied that W was still determined to pursue the defendants to trial, that he had no intention of abandoning the whole claim, and decided that there was no downside to defending all of his claims, even the most vulnerable, to see how the Chief Justice reacted, as this would not cause him to strike out the legally secure first cause of action. I therefore am not satisfied that this decision to defend the strike out resulted from any breach of duty by C.

Appealing the strike out

72. C in his e-mail to W of 14 November (141) described the Judge as being very hard to move on the submission that Whitney had accepted personal responsibility. The skeleton arguments of the Applicant and C are in Core Bundle 2 at tabs 4 and 5 respectively. C asked the Chief Justice not to take a narrow legalistic view, but to have regard to the business realities, and rehearsed the arguments that had been explained to W. This entreaty was declined. The Judge adopted the legal stance of separate legal entities. Having done so, C told me that he appreciated that there was a substantial risk that this part of the claim would not succeed. The Judge was also of the view that the s.167 claim should be brought in the Liquidation. C said that the section does not say that it can only be brought in the Liquidation, but accepted that the Chief Justice was correct, although its inclusion had not cost anything. I do not find its inclusion in the action to be determinative of any of the issues that I have to decide.

73. W's e-mail in reply (142) appears to have taken this on board, as it concentrates on APT and asks whether his had a good chance of recovering his losses from the insurance.

74. On 23 November C wrote to W (143) attaching a draft of The Chief Justice's Ruling, which was only finally given on 21 December 2001 (Core Bundle 2, tab7). This struck out the s.167 claim without prejudice to it being renewed in the winding up. He refused to find that the APT claim was insufficiently pleaded. In respect of the third cause of action he relied on Williams as authority for the current state of the common law, namely that there had to be clear evidence to suggest that a director had assumed personal authority for his actions or assertions. He found that there was nothing in the pleaded facts to suggest this, and refused to allow the matter to proceed to trial where all the facts could be established, and struck it out. The fourth cause of action he saw as an attempt to get around the limitation on liability of shareholders, which was trite law, as set out in Prudential Assurance C. Ltd. v. Newman Industries Ltd. (No. 2) (1982) 1 All ER 354 at 367. He refused to accept that the fundamental tenet of company law, that shareholders do not control the day to day operations of their company, could be revisited even where there was 100% ownership of one company by another, in the absence of very clear authority, and struck it out. The fifth cause of action suffered the same fate for the same reasons, as if the parent company could not be liable, neither could its directors.

75. C's skeleton, at paragraph 1.9, had asked for an opportunity to amend if the pleading was capable of being cured by amendment. No opportunity to amend was given. It was suggested that this should have been sought before considering appealing. C said that he did not believe that this was possible, as it had clearly been asked for in his skeleton and had not been given, and it was unrealistic to believe that the Chief Justice would entertain it again, even if it had not been fully developed in oral argument and he had reserved his judgment thereafter. I agree. Even if not asked for, the Chief Justice would have been well aware that giving an opportunity to amend was an option that he should consider before striking out. I believe, therefore, that he must be taken to have

believed, at that stage, that those causes of action that he had struck out could not be improved by amendment.

76. This fact and the result generally called for a significant taking of stock before deciding whether the action should proceed against APT alone, or whether the Judgment should be appealed or whether the whole litigation should be abandoned, with or without an attempt being made to get M&S to pay their own costs.

77. After all, an essential element in the bringing of these proceedings and defending the strike out was the hope and belief that the Chief Justice would be sympathetic and willing to take a liberal or novel approach. He had not done so, and I believe that this must have been seen by both W and C as hugely significant and had to be seriously factored in, as did his reasons, when deciding whether his decision should be appealed. The proceedings had survived, but only just. Only the cause of action against APT remained and if this had no insurance there were significant risks of no recovery. Further the commencement of proceedings had provoked no compromise offer.

78. In his letter of 23 November C said that S should seriously consider filing a notice of appeal, especially in respect of Whitney, which he saw as crucial. He had learnt that there were risks of APT's licence being revoked which "does not augur well in terms of preserving any value in APT." He said that the chances of succeeding against Whitney "would be enhanced if we could come up with anything further, anything at all, which would clearly show Mr. Whitney saying something to you which indicated that he was taking personal responsibility for the advice given." He ended by stating that the Court of Appeal would be an entirely new one as the existing members had recently resigned..

79. In his e-mail of 26 November (145) C remained upbeat, repeating his view that W should seriously consider appealing not only the striking out of the second cause of action against Whitney, although more material facts would need to be pleaded, but also the fourth and fifth causes of action, although the latter would require the finding of more case law. This remark, which is repeated subsequently, was to me a surprising one, and the comment was made to C that surely an advocate did not seek to advance an argument without all the relevant case law. His response was that, when advancing an entirely novel proposition of law, access to the decisions and dicta in various jurisdictions were needed but that his firm simply did not have access to them. This had to be done via London and would be costly and time consuming.

80. W's response in his e-mail of the same day, 26 November (145A-1), was understandable and measured. He was disappointed that his Statement of Claim appeared to have been eviscerated. As the APT claim had survived he wanted to know if he could now see its insurance policy. What was the future of APT? Where would he be if it became bankrupt? He also wanted to know what he had to pay M&S and what the cost of appealing would be. Would the Judge who heard the strike out hear the claim against APT? If so would it be unwise to appeal his decision? This was an interesting observation which does not appear to have been further considered. If the appeal had succeeded and been remitted for hearing it is a moot point as to whether the Chief Justice

would have recused himself. C ended by asking what more could be said or pleaded to the Appellate Court which would not cause them also to be deaf to his Statement of Claim. He felt that he had been throwing good money after bad, and lots of it.

81. More questions were sent the next day, 27 November (145A). He asked what had happened to his Quistclose Trust claim and whether this had been advanced to the Court. He also asked whether APT was likely to renew an application to strike out now that it was separately represented. His next e-mail (146) referred to a letter apparently written by Scott Turner to the Halifax Herald in which he stated that all the directors and senior management knew what was going on. W wondered whether that improved his case against Whitney. In his reply on 29 November (148) C said that he wanted more time to think things over but added: "There is no doubt that your company's claims are merited, and in a larger and more advanced jurisdiction (such as you and I are used to) a broader view of parent company and controller liability would surely be taken."

82. If that could be criticised as being over optimistic, the more measured response in C's next e-mail of 3 December (149), which he accepted was an important one and a distillation of his whole thinking, put that right. He rehearsed the original rationale for bringing the litigation. Firstly, it was to make up the shortfall from the Liquidation. Secondly it was because Whitney had seriously misled him. Thirdly he wanted to hold responsible for their actions those in the Atlas Group.

83. He then stated in terms that this strategy, of attempting to go outside the ASI Liquidation by pursuing Whitney, AFG and its board for their parent company responsibility, had been well and truly frustrated by the Supreme Court, which refused to accept that Whitney was ever wearing other than his APT hat, or that AFG was anything other than a shareholder. Further he said that it was looking increasingly likely that APT was not worth powder and shot.

84. He said that the options were to give up and cut his losses or to fight on in the hope of persuading the Court of Appeal to take a contrary view. If the former was adopted he would try to do a deal on costs. Such a course would mean that any hope of a compromise would go, but at least he would not be throwing good money after bad, and would have to be content with what he got from the Liquidation. Such a decision would be costs led, but still involve paying C's costs of appearing in the Supreme Court and M&S's costs if it was not possible to do a deal. He explained that if W decided to pull out and to try to do a no appeal/no costs deal with M&S, this would have to be negotiated before delivery of judgment (150).

85. If W appealed, C would be willing to limit his costs to $12000. He did not elaborate the merits of an appeal, but the arguments which the Appeal Court would have to accept, and which the Supreme Court had rejected, had been fully considered in the earlier communications between them. C appreciated that the decision was a hard one, but was one that needed to be made now. If the costs exposure was too great W should quit now, although he added that he believed that the factual merits were very much with

them. C told me that he was worried about the economics and that the amount at stake was not that large.

86. Perhaps understandably W responded with a number of questions attached to his e-mail of 3 December (152). He wanted C's appraisal of the chances of success on the appeal. Could further facts be presented? Did the fact that Whitney lied about insurance, knew what was going on and even himself participated in margin trading, not matter under the law? What did the law say? Similarly in relation to the directors of AFG. W told me that he was not anxious to proceed to appeal as he felt his Statement of Claim had been obliterated. Consistent with this he had asked in his e-mail what had happened to his day in court. He added:

> "What could be done at appeal that would result in reversal of the initial hearing? If you do NOT have a strong feeling that I have a good chance on appeal then why appeal?

87. Finally he asked whether retaining his action against APT gave him anything more than a hollow victory.

88. By this stage, therefore, all the indications were that W had stood back and had a good hard look at his situation and, having done so, had decided that the chances of winning the appeal were not worth taking. He had had enough and was willing to cut his losses, unless C could explain why his chances of successfully pursuing an appeal were such that the costs risk was justified.

89. In his important e-mail of 4 December (155) C told W that, if he appealed, he would draft an Amended Statement of Claim, deleting the s.167 claim. He pointed out again that in the Whitney cause of action Whitney did not appear to have said anything from which it could be said that he had assumed personal responsibility, and nothing that had been submitted to the Chief Justice had persuaded him away from his view that Whitney acted only as APT. Perhaps, therefore, they should plead the tort of deceit as well, but this would require a very secure basis for alleging that the representation was made in the knowledge that it was false. To make headway on the 4th and 5th causes of action would need further case law, and the engaging of someone in London and Toronto to carry out specialist research. If an appeal succeeded the chances of settlement would improve radically as Dixon and Whitney would be keen to avoid a trial. The APT situation did not look good, as recent information suggested that the proceeds from the sale of its assets had been paid overseas. It was now simply a shell, so that the real quarry were now Whitney, AFG and its directors. He explained that if S wished to make a claim in the Liquidation on the basis that it had a proprietary interest, it would have to surmount, before the Chief Justice, the difficulties arising from W having signed the Margin Agreement, thereby accepting and being fixed with a creditor/debtor relationship, and negating any trust arrangement or proprietary claim. He emphasized the difficulty in persuading the Chief Justice that W should not be bound by his signature. He then told him in terms that this primarily related to S's status in the Liquidation. He added: "To the extent that it has any relevance in the present litigation, it would arise in relation to the

claim against APT (the cause of action not struck out), but again if APT now lacks substance that cause of action is effectively dead."

90. It was suggested to C that he had never adequately explained to W the nature and extent of a claim based on the decision in Barclays Bank v. Quistclose Investments Ltd (1970) AC 567, namely a proprietary claim in rem in respect of funds transferred for and impressed with a specific purpose. Such had been advanced in the Liquidation, until it was realised that W had signed the Margin Agreement. C accepted under cross-examination that when he settled a claim for breach of trust against APT in the Amended Statement of Claim he should not have described it to W as a Quistclose claim. It is said that as a result W was confused about such a claim. As indicated above, W alleged that C had told him that such a claim was a strong one. This was disputed by C and there is no note of him ever saying this in any letter, e-mail or telephone attendance. There is a reference in the note of their meeting on 17 July (31F) to the effect that, if APT was sued, an allegation, inter alia, based on a trust for the exclusive purpose of a building project was discussed. In fact the claim advanced against APT in the Statement of Claim was for breach of contract and fiduciary duty, which was legally secure in any event, and I do not accept that, whatever W may have believed as to its strengths or weaknesses or what Quistclose in fact amounted to, they realistically affected his decisions as to his lawsuit.

91. When dealing with the chances of appeal in his e-mail of 4 December C said this:

> "Given lack of experience with the new Court, we would have to say that your company's chances are 50/50. The more and better caselaw we can obtain on the liability of a parent company and parent company directors (when in active control of a subsidiary), the better the chances of resurrecting the 4th and 5th causes of action. But it won't be easy. And if there were anything more we could plead in relation to Whitney's representations on insurance (such as might objectively demonstrate that he was assuming personal liability) that would be helpful as far as the 2nd cause of action is concerned, but we do not hold out much hope of anything additional, as the existing pleading seems to include all the elements which you have stressed in recent e-mails. So again, we suggest no better, and no worse, than 50/50. We are sorry that we cannot be more definite, but the new Court is effectively an unknown quantity. Sometimes, on an appeal, it is useful to have to work with a very negative and dismissive judgment as you then have everything to play for, and the Court is sometimes then prepared to "give something back". Let's hope that would apply here."

92. He ended by accepting that the decision was a very difficult one. I personally have considerable difficulty in understanding where the 50/50 odds came from. C told me that he was sure that case law to support the novel fourth and fifth claims was out there, although he accepted that no template case or "golden case" was in fact ever found. W had recounted the conversations he had had with Whitney in numerous e-mails and attendances and it was highly unlikely that he was suddenly going to recall something of significance. A deceit claim against Whitney was going to be difficult to prove. The

claim against APT was worthless. The concept that you are better off appealing a judgment that was resoundingly against you is, to put it its lowest, questionable. So why were the chances of appeal 50% at worst?

93. In any event, I am quite satisfied that W did not consider that any thing that C had told him caused him to believe that the chances on the appeal were worth taking, and in his next e-mail of 5 December (157A) W instructed C to "see what arrangements can be made with M&S regarding fees owed. If those expenses are reasonable then I would be inclined to pay and not pursue it any further." He added:

> At this time and under present circumstances I have no confidence in T.C.I. "Legal/Judicial System" or our ability to be successful in the current environment. I will for the time being rely on the Liquidator and Creditors Committee to pursue on our behalf legal action against AFG and its directors as well as KPMG, in addition to the Turners and their associates. Personally, I will concentrate my efforts toward the criminal prosecution of all involved. I look forward to hearing from you regarding fees."

94. C, in his witness statement, asserts that this constituted instructions to test the no costs/no appeal proposition. I do not accept this. I consider that this evidences that W, having considered all the advice and arguments put before him by C, had clearly drawn a line in the sand and decided not to appeal, and C knew that. Indeed, when C communicated the offer (157B) to M&S it was capable of being accepted at any time, as C made clear in his e-mail of 6 December. I am satisfied that W had decided to terminate his litigation whether or not the offer was accepted, and would at this time have paid the Defendant the outstanding fees without any allegations being made against C.

95. I am also satisfied that C appreciated this as, when he sent W his e-mail on 6 December (158) confirming that he had made the offer, he made remarks these unsolicited remarks:

> "We can empathise with your frustration with the legal system; but, do remember, it is oftentimes the case that a litigant loses in the Court of first instance but then wins on appeal. And to our thinking the Supreme Court has dismissed the fourth and fifth causes of action far too lightly, and taken too narrow (almost a pedantic) approach to the second cause of action.
>
> We are also, for our own satisfaction (if your company does not go ahead with the appeal), endeavouring to obtain from London Chambers further caselaw which, if found, would buttress your company's case on the fourth and fifth causes of action."

Later he continued:

> "If you should have second thoughts and want to withdraw the proposal that we have just put to M&S on your company's behalf, you probably have the best part of 4 working days to do so."

He ended by reiterating that if he had second thoughts and wanted to withdraw the offer, he was to let him know immediately as once accepted it would preclude any appeal.

96. I do not see how W, on reading this, could interpret it in any way other than that C believed that W should have second thoughts about his decision not to appeal and that C had not given up even if W had. Further, that the reason he had not given up was because he believed that, from a legal standpoint, the Supreme Court had been wrong to take the narrow approach that it had in relation to the second cause of action against Whitney, and in summarily dismissing the fourth and fifth causes of action. Therefore the Appeal Court should, again from a legal standpoint, put that right and allow them to proceed. In other words, it was being suggested that W had misjudged or undervalued his chances on appeal, and so C, as his lawyer, wanted him to think again.

97. W clearly so interpreted it as, in his e-mail of 7 December (159), he took C to task as to why, if the case law is there, it had not been used at the first hearing? How confident was he that such would be found? How was he supposed to make a decision not knowing that? He stated in terms that he was hesitant to proceed at further expense. Indeed he said that he did not consider 50/50 a strong recommendation to appeal. It was put to W, and he agreed, that on each occasion when he could have bailed out it was he who decided to proceed. However, he added that when doing so it was after having weighed the advice of his attorney. Accordingly, I am quite satisfied that, from the tone and content of this e-mail, if C had not sent his e-mail of 6 December W would not have appealed.

98. In his e-mail of 9 December (160) W asked a number of questions as "you are asking me to commit to an Appeal and all the inherent costs but you still don't know if there is sufficient case law." He continued that he had spent a considerable amount of money and had nothing to show for it. He asked what pertinent facts had not been before the Supreme Court. He asked C whether he had asked his principal about the chances of an appeal. He stressed again that he had lost confidence in the system and his ability to be successful in the litigation adding:

> "Either our Statement of Claim was obviously "under the law" very weak or not worthy of pursuing further or I'm missing something in the "CJ's" Opinion/Ruling."

99. This was a cogent comment. W wanted to know the reason for C's optimism. What had he missed which he should have taken into account when making his decision not to continue this litigation? The answer was simple, nothing. However, he was not told this and should have been. This was not a case where, on any basis, it could be said that the client was being a fool to himself if he did not proceed.

100. In his response of 10 December (163), C again said that he suspected that the case law existed in the specialist company law series and electronic services. This had not been done heretofore because of the considerable cost of such research. He pointed out to me that the availability of retrieving cases on the internet was not as easy then as it is

now. He continued that he had not considered that such research was warranted given the clarity of the pleading of the fourth and fifth causes of action. He had not anticipated the "tenacity with which the CJ maintained his view that AFG was simply a shareholder and that was the end of the matter." He said that his principal agreed with his assessment. "We think that what was pleaded should have been sufficient to get us to trial on all causes of action, but the CJ thought differently." He hoped that the Court of Appeal would take a different view. C therefore seems to be repeating a theme that had run through his communications since the strike out hearing, namely that they had been unfortunate in their Judge and that the Court of Appeal should in justice and in law take a different view on the same material, plus possibly some authority yet to be found. Nothing that C said in their subsequent communications detracted from that.

101. Finally C told W that the decision was his and C was not asking him to commit to an appeal. The former was of course correct. The latter assertion did not accord with the comments in his e-mail of 6 December and the suggestion that W should think again. After a telephone conversation between them of about 20 minutes that day, the attendance note of which is quite short and not easy to follow (164A), W decided to withdraw the offer and appeal. I am satisfied, from the matters that I have detailed and having heard W give evidence, that he was no longer a bullish litigant, but rather a very reluctant appellant, who would not have appealed if his lawyer had not thought he should.

102. I am therefore satisfied as to causation, and that it was in reliance on that advice that motivated his decision to proceed thereafter. The essential question for me, therefore, is whether I am also satisfied that that advice, in all the circumstances of this case and in the light of all the advice that had been given prior thereto, was advice which a competent practitioner would normally and reasonably have given, particularly when the client had already taken a decision, having considered and weighed the advice that he had been given up to that time. I am satisfied that by asking W to reconsider that decision C was indicating to him that his decision had been wrong, as he had underestimated or misjudged the strength of his causes of action in law, and chances on appeal. I do not believe that he was justified in so doing. The chances on appeal and of this litigation had been reasonably judged by the client as not such as to warrant any further expenditure, and that decision should have been left undisturbed. In so finding I remind myself that it is a significant matter to find that an attorney, particularly one as experienced, diligent and committed as C, fell below the standard to be expected of a reasonably competent practitioner of his seniority and experience, and I should be slow to criticize him for being over optimistic in the advice that he was giving.

103. I do not consider that this should be judged with hindsight or foresight, but only on what was known to the parties at that time. In fact numerous other e-mails followed the withdrawal of the no appeal/no costs offer on 10 December, including, as W saw it, an exhortation from C to hang in there in his e-mail of 14 December (170). In fact the appeal, in respect of which C carried out considerable preparation, did not proceed as the Court of Appeal considered that the Chief Justice should have given a chance to amend. Subsequently, C spent many hours drafting an Amended Statement of Claim and formulating his submissions prior to the Supreme Court being asked for leave to amend,

when it allowed a claim of procurement to be advanced against Whitney. In fact this was never pursued, W having taken advice from other lawyers. It seems that he has now joined in a contingency fee action in Texas against KPMG. I believe that, in relation to all of this additional work, C exhibited the same diligence and commitment as he had shown previously, and that the work that he did was appropriate in view of the difficulty of the applications that he was presenting

104. Accordingly, it was only in relation to his advice which instigated W's reconsideration of an appeal where I find that his advice fell below the required standard, and caused a perpetuation of the litigation that would otherwise not have occurred. I do not consider that by simply telling him that it was his decision and that he was not asking him to appeal alters that.

105. C must have known that W's attitude to this litigation had significantly changed as a result of the strike out. His desire to bring the parties to book in this litigation had given way to a desire not to incur any further expenses in a system which applied legal concepts which, he was disappointed to find, would not right the wrong that had been done to him. C must have known that this change of attitude had resulted from his assessment of the advice that C had given him, as well as the result and reasons given in the strike out. Those matters had resulted in his decision not to appeal, which was arrived at after mature and rational consideration of all the factors that had been presented to him.

106. It follows that I do not consider that W is liable for any of the Defendant's fees after 6 December 2001, save for those relating to 12 December, when arrangements had to be made to receive the Supreme Court Judgment. I would add the disbursements of $564.27. By my calculation, W would therefore liable for $16,872.27 under the Third Invoice (298). However I believe that the credit would not have been given, or not of the same amount, if this had been the concluding invoice, as I believe that such was partly motivated by the fact that W was going to appeal. Also, if the matter had ended there, some costs would be incurred in finalizing the offer to M&S or the costs payable to them. Therefore, using a broad brush, I do not propose to order that any of the $17664.57 that S has paid under this invoice should be repaid. However I find that S does not have to pay anything in relation to any invoice thereafter, and declare that any costs liability that S has to pay in respect of the Leave to Amend Application (Core Bundle 2, tab 24), should be paid by the Defendant although, in fact, I am told that an accommodation was reached over Dixon's costs and that Whitney has become bankrupt and there has been no attempt to institute taxation of his costs.

107. W came to Court asserting that the $55769 that S had paid to the Defendant should be returned, and that S should not have to pay the remainder of the $85116 that had been billed, namely $29437. The Defendant's analysis of payments (323) asserts that the sum paid is $52384. Be that as it may, I have found that S is liable to pay the first three invoices, which appear to total $39502. The sum claimed in the Fourth invoice of $12718. 48, which I believe has been paid by S, should be repaid. In the circumstances, as a significant part of the trial was taken up with allegations that the action would never have commenced, served or proceed to defence of the strike out if W had been properly

advised, which allegations I have rejected, I propose in the exercise of my discretion to order the Defendant to pay S one half of its costs of this action and its total costs on the Counterclaim, which I dismiss. If either party wishes to argue against such costs order they should arrange for a hearing, if necessary by telephone, at the beginning of the Hilary term.

Christopher Gardner QC
Chief Justice
15 December 2005