IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: GC 20 OF 2021

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF GCR O.53

BETWEEN:

(1) MAPLES CORPORATE SERVICES LIMITED
(2) MAPLESFS LIMITED

Plaintiffs

AND

CAYMAN ISLANDS MONETARY AUTHORITY

Defendant

IN COURT

Appearances:

Mr Paul Bowen KC of counsel and Mr Adam Huckle of Maples and Calder (Cayman) LLP for the Plaintiffs, Maples Corporate Services Limited ("MCSL") and MaplesFS Limited ("MFS")

Mr Hector Robinson KC and Ms Laura Stone, Mourant Ozannes (Cayman) LLP for the Defendant (the "Authority"/"CIMA")

Before: The Hon. Justice Kawaley

Date of hearing: 13-17 February 2023

Draft Judgment circulated: 16 March 2023

Judgment delivered: 30 March 2023

INDEX

Judicial review-legality of administrative "requirements" made by Cayman Islands Monetary Authority-scope of anti-money laundering/terrorist financing customer due diligence obligations of financial service providers-statutory interpretation-relevance of Financial Action Task Force 40 Recommendations-Proceeds of Crime Act (2020 Revision)-Monetary Authority Act (2020 Revision)-Anti-Money Laundering Regulations

JUDGMENT

Introductory

1. The present judicial review application pivotally turns on the construction of various limbs of the same sub-paragraph of the Anti-Money Laundering Regulations ("AMLRs"), Regulation 12(1). It also requires adjudication of the legality of the Defendant's administrative supervisory powers pursuant to which it carries out inspections and makes "requirements" of financial service providers, purportedly as a precursor to, rather than as a form of, enforcement action. The application was brought by two prominent trust and corporate service providers ("TCSPs")/financial service providers ("FSPs") against the main financial services regulator, and concerned the scope of the Plaintiffs' statutory customer due diligence ("CDD") obligations. The Plaintiffs and the Defendant share common ground, for private and public purposes, in supporting the broad objectives of the Regulations and the wider legislative scheme. Nonetheless, they differed as to the extent to which that legislative scheme intended to impose CDD obligations on entities such as the Plaintiffs which were (it was contended) onerous to an uncommercial extent.

2. This clash between private commercial entities and the main public regulator as to how the regulatory regime was intended by the rule-makers to operate did not simply reflect an inevitable difference of views from contrasting standpoints. It also demonstrated the vitality of the regulatory system and the vigour with which the Authority[1] approaches its supervisory functions. The application was argued through comprehensive written and oral submissions with a final hearing which consumed 5 full days. I am indebted to counsel for the thoroughness of their researches and presentations.

[1] The Defendant describes itself as "the Authority"; the Plaintiffs described the Defendant as "CIMA", a commonly used acronym. I have used each moniker interchangeably.

3. And looming in the background was the spectre of the Cayman Islands having been placed on the Financial Action Task Force ("FATF")'s 'grey list', reportedly because the number of prosecutions and convictions do not match this jurisdiction's risk profile. This international policy imperative in my judgment has no bearing on the questions of statutory construction but is potentially a significant explanation and justification for CIMA adopting a rigorous stance in its approach to its supervisory functions and the present proceedings.

4. The Plaintiffs' Notice of Application for Leave to Apply for Judicial Review was dated 12 February 2021. The impugned decisions were described as "*'The Focussed Thematic Final Reports' issued by the Cayman Islands Monetary Authority dated 16 and 12 November 2020, respectively*" (the "2020 MCSL Final Report" and the "2020 MFS Final Report"; together, the 2020 Final Reports"). Leave was granted on 7 May 2021. The Plaintiffs' Notice of Originating Motion was filed on 12 May 2021. The Defendant's Grounds of Resistance were filed on 2 August 2021. Thereafter there was a delay prompted by the Plaintiffs' attempts to pursue alternative remedies. The Plaintiffs' Reply to the Defendant's Grounds of Resistance was filed on 21 June 2022. Thereafter there were skirmishes around public interest immunity privilege and of the Court's own motion I granted a stay to enable alternative dispute resolution to be pursued by the parties. I postponed publication of two interlocutory judgments so as not to prejudice the ultimately unsuccessful settlement efforts.

5. In terms of evidence, the Plaintiffs relied primarily at trial upon Affidavits from Ms Phillipa White dated 12 February 2021 ("White 2"), 17 September 2021 ("White 6") and 27 July 2022 ("White 8"). The First Affidavit of Aristotelis Galatopoulos dated 17 September 2021 ("Galatopoulos 1") was also relied upon; however this dealt with the Defendant's complaints about delay which were not pursued at final hearing. The Defendant relied upon Affidavits filed by Mr Rohan Bromfield dated 8 July 2021 ("Bromfield 1") and 4 February 2022 ("Bromfield 2"). Ms White is the Chief Risk Officer of the Maples Group and manages the compliance and risk teams of MCSL and MFS. Mr Bromfield is the Head of the Fiduciary Services Division of CIMA and was authorised by its Managing Director to be the Authority's deponent in these proceedings.

6. Pursuant to a Case Management Order dated 10 August 2022, modified by a Consent Order dated 16 September 2022, a 'List of Agreed Issues for Substantive Hearing' was filed on 11 January 2023.

7. Against this background, the present Judgment will address the following matters:

(a) the Agreed Issues;

(b) a summary of the parties' respective positions in relation to each issue;

(c) the evidence;

(d) the statutory framework and its wider context;

(e) findings; and

(f) disposition of the Notice of Originating Motion.

The agreed issues

8. The List of Agreed Issues submitted by the Plaintiffs on behalf of the parties provides as follows:

"***(1). Nature / purpose of business: Reg. 12(1) (d) (MCSL Grounds 1, 9(a))***

1. Whether CIMA's findings and conclusions ("Findings") of breaches of regulation 12(1) (d) of the Anti-Money Laundering Regulations (2017 Revision) (the "AMLRs") and/or the associated Requirement in relation to "nature and purpose of business" are lawful or unlawful.

(2). Authorised signatories: Reg. 12(1) (b) (MCSL Grounds 2 and 9(a), MFS Grounds 1 and 7)

2. Whether CIMA's Findings of breaches of regulation 12(1) (b) of the AMLRs and/or the associated Requirements in relation to missing due diligence for authorised signatories of bank accounts held by corporate clients are lawful or unlawful.

(3). Scrutiny of transactions: Reg. 12(1) (e) (i) (MCSL Grounds 3 / 7 and 9(a), MFS Grounds 2 / 6 and 7)

3. Whether CIMA's Findings of breaches of regulation 12(1) (e) (i) of the AMLRs and/or the associated Requirements in relation to ongoing monitoring and periodic reviews and "scrutiny of transactions" are lawful or unlawful.

(4). Source of wealth and/or source of funds: Reg. 12(1) (e) (i) (MCSL Grounds 4-7 and 9(a), MFS Grounds 3-6 and 7)

4. Whether CIMA's Findings of breaches of regulation 12(1) (e) (i) of the AMLRs and/or the associated Requirements in relation to "source of wealth and/or source of funds" are lawful or unlawful.

5. Except that CIMA concedes that it made an error of law solely in relation to its Findings and Requirements in relation to "source of wealth".

(5). Review and update of documents: Reg. 12(1) (e) (ii) (MCSL Grounds 8 and 9(a))

6. Whether CIMA's Findings of breaches of regulation 12(1) (e) (ii) of the AMLRs and/or the associated Requirement in relation to keeping due diligence documentation up to date are lawful or unlawful.

(6). Proportionality of the Requirements (MCSL Ground 9, MFS Ground 7)

7. Whether the Findings (MCSL Grounds 1-8, MFS Grounds 1-6) justify the Requirements and are rational and/or necessary and/or proportionate and/or compliant with section 9 and/or section 19 of the Bill of Rights in Schedule 2, Part I of the Cayman Islands Constitution Order 2009 (the "Constitution") and/or the principle in section 6(3)(d) of the Monetary Authority Act (2020 Revision) (the "MAA") and/or section 5 and Schedule 1, Part 1, paragraph 3 of the Data Protection Act (2017 Revision) (the "DPA"), or whether the Requirements, in whole or in part, are irrational and/or unnecessary and/or disproportionate and/or non-compliant with the Constitution, MAA or DPA.

(7). (MCSL Ground 9(c), MFS Ground 7)

8. Whether CIMA had power to make any of the Requirements under section 6(2) (f) of the MAA or otherwise."

9. In light of this helpful agreement as what the main issues to be determined are, there is no need to rehearse the Grounds attached to the Application for Leave to Apply for Judicial Review dated 12 February 2021, which were amended on 16 February 2021 to add MCSL Ground 9 (c) and MFS Ground 7) which were appended to the 12 May 2021 Notice of Originating Motion.

Summary of the parties' positions on each issue

Issue 1

10. The first finding challenged relates to CIMA's 2020 MCSL Final Report as follows:

"*5.2.5 The Licensee is in breach of Part IV, Regulation 12 (1) (d) of the AMLR and has not fully adhered to Part II section 4 A (2) of the AML Guidance Notes, as it has not obtained sufficient information on, the purpose and intended nature of a business relationship.*"

11. MCSL[2] contends that this finding is unlawful because it is based on an erroneous construction of Regulation 12 (1) (d). They essentially contend the CDD requirement is primarily to understand the nature of the business relationship with their own client and that in appropriate cases reliance can be placed on the client's own indication of the nature of the underlying business. The Defendant contends the obligation extends to understanding the client's business and that this generally requires independent confirmation to be sought as to the nature of the underlying business.

Issue 2

12. The second finding challenged relates to CIMA's 2020 MCSL Final Report as follows:

> "*5.2.20 The Licensee is in breach of Part IV Regulation 12 (1) (b) of the AMLR, as it has not verified that persons purporting to act on behalf of its client are properly authorised nor identified and verified the identity of such persons.*"

13. The same finding is challenged in the 2020 MFS Final Report at paragraph 5.2.15. The Plaintiffs contend that these findings are unlawful because they are based on an erroneous construction of Regulation 12 (1) (b). The Regulation requires the FSP to verify persons acting on behalf of their customer in relation to the customer's transactions with the FSP. The Defendant contends that the obligation is broader and extends, if not to all representatives of the customer in the world, at least to those of whom the FSP has it within its ability to be aware of (e.g. through documents it maintains at the registered office).

Issue 3

14. The third finding challenged relates to CIMA's 2020 MCSL Final Report as follows:

> "*5.2.29 The Licensee is in breach of Part IV Regulation 12 (1) (e) (i) of the AMLR, as it has not provided sufficient evidence to demonstrate that it has reviewed transactions undertaken throughout the course of the business relationship to ensure that the transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds.*"

[2] No equivalent finding was made in the 2020 MFS Final Report.

15. The same finding is challenged in the 2020 MFS Final Report at paragraph 5.2.19. The Plaintiffs advance two grounds of invalidity:

(a) the Regulation, properly construed, only requires FSPs to scrutinise transactions it has some involvement in as part of the services it provides to its customer. It imposes no obligation to scrutinise transactions the customer undertakes with third parties;

(b) in relation to 10 out of 14 files in the 2020 MCSL Final Report and 17 out of 17 files in the 2020 MFS Final Report which CIMA has found to be in breach, the findings are invalid for breaching the rule in *R (Anufrijeva)-v- Home Secretary* [2004] 1 AC 604 because the files are not identified.

16. The Defendant contends Regulation 12 (e) (i) clearly requires that the FSP scrutinizes not simply transactions it undertakes but also those its client undertakes with third parties, , to ensure that they are consistent with its understanding of the nature and purpose of the client's underlying business. *Anufrijeva* is said to establish a notice requirement, not a basis for substantively challenging the validity of a decision.

Issue 4

17. The fourth finding challenged relates to CIMA's 2020 MCSL Final Report as follows:

> "5.2.9 *The licensee is in breach of Part IV Regulation 12 (1) (e) of the AMLR and has not adhered to Part II section 4 (A) (3) (4) of the AML Guidance Notes, for failing to adequately obtain supporting documentary evidence to establish the source of funds and/or source of wealth.*" (MCSL)
>
> "*5.2.3 The Licensee is in breach of Part IV Regulation 12(1)(e)(i) of the AMLRs and has not adhered to Part II section 4(A)(3)(4) of the AML Guidance Notes, for failing to adequately obtain supporting documentary evidence to establish the source of funds and /or wealth for its client.*" (MFS)

18. The same finding is challenged in the 2020 MFS Final Report at paragraphs 5.2.2-5.2.3. It was common ground by the hearing that this Regulation did not impose any obligation to establish the client's source of wealth in every case. The Plaintiffs contended that this admitted defect was fatal because there was no way of discerning in relation to which client files there had been exclusively a 'source of wealth' defect. The Defendant contended that the defect was severable. The Plaintiffs also advanced the statutory construction point that the duty to collect source of funds information only applied "*where necessary*", and was not a mandatory or invariable obligation in relation to all

customers, regardless of risk ratings and the nature of services provided. This ground also depended in part on how the term "business relationship" ought to be construed for the purposes of Issue 3. As regards when it might not be necessary to investigate source of funds, the Defendant contended that the basis for a low-risk assessment had to be documented.

Issue 5

19. The fifth finding challenged relates to CIMA's 2020 MCSL Final Report as follows:

> "5.2.29 *The licensee is in breach of Part IV Regulation 12 (1) (e) (i) of the AMLR, as it has not provided sufficient evidence to demonstrate that it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile , including where necessary, the client's source of funds.*"

20. The same finding is challenged in the 2020 MFS Final Report at paragraphs 5.2.18-19. The Plaintiffs' primary point is that these obligations, as a matter of construction, do not create a duty to scrutinize their customers' third party transactions. A supplementary ground of invalidity is the *Anufrijeva* point, and the fact that 10 out of the 14 MCSL files CIMA said were non-compliant were not initially identified. The Defendant's position is similar to its stance in relation to the same points in relation to other issues. It maintains its construction is clearly correct and the *Anufrijeva* case does not provide a basis for vitiating its findings.

Issue 6

21. The sixth issue arises from the Plaintiffs' broad complaint that the "Requirements" are generally unnecessary and disproportionate and, *inter alia*, contrary to section 19 and/or section 9 of the Bill of Rights. The Defendant's case is that no impermissible interference with fundamental rights has occurred and that the Requirements and the laws pursuant to which they are made were necessary in the interests of preventing, detecting and investigating various financial crimes and to enable the Cayman Islands to fulfil its international obligations to protect the global financial system from, *inter alia*, money laundering and terrorist financing.

Issue 7

22. The seventh issue was the Plaintiffs' almost 'nuclear' point that CIMA had no power to impose the Requirements at all under section 6 (2) (f) of the Monetary Authority Act (the "MAA") or otherwise. The Defendant placed primary reliance on section 48 (1) of the MAA (under which

CIMA's Regulatory Handbook was made) as a jurisdictional basis for creating procedures to carry out the statutory functions required by section 6 (1) (b).

The evidence

The Plaintiffs' evidence

23. Ms White's evidence is most significant for explaining the nature of the Plaintiffs' business and the CDD policies which they apply, which form part of the contextual backdrop to the central focus of the judicial review application: questions of statutory interpretation. The following assertions in White 2 were uncontroversial in setting the scene as regards the corporate antecedents and business functions of the Plaintiffs:

(a) the Plaintiffs are part of the Maples Group which has been doing business in the Cayman Islands for over 50 years and is one of the largest financial service providers and employers in the country and operates in over 10 different countries globally. It treats AML/TF/PF risks very seriously;

(b) each of the Plaintiffs is a licensed entity and regulated by CIMA. MCSL holds an unrestricted trust license under the Banks and Trust Companies Act (2020 Revision). Most of MCSL's clients are international financial institutions (which are regulated or listed entities) from major OECD/FATF jurisdictions and are either existing Maples Group clients or referred by major law firms which are subject to similar AML/TF/PF standards;

(c) MCSL's services are very limited: "*25…MSCL maintains the client entity's minute book (which contains the entity's governing corporate documents and statutory registers) in the Cayman Islands, as well as dealing with the formalities of various filing and registration obligations (e.g. filings with the Cayman Islands Registrar of Companies … or with CIMA if it is given written client instructions to do so…26. Each client entity is likely to have multiple additional service providers both within and without the Cayman Islands to assist with its other business requirements*";

(d) MFS provides multiple services including the provision of directors and company secretaries and share trustee services to structured finance vehicles and, to a lesser

extent, investment funds, corporate services and other ancillary services, e.g. accounting and tax reporting.

24. Ms White then addresses the 2018 and 2019 inspections which resulted in MCSL and MFS making significant investments with a view to complying with CIMA's Requirements, including a 50% increase in compliance staff. It is then deposed:

> "*109.4 The critical point for the Court to appreciate is that the most significant Findings and Requirements in the 2020 Final Reports (in particular, the purported failure of ongoing monitoring and periodic reviews in relation to scrutiny of transactions) relate to the same apparent breaches of the AMLRs that were identified in the 2018 MCSL Final Report, namely in relation to the ongoing scrutiny of transactions. As I have explained from para. 93ff. above, the Plaintiffs met the Requirements set out in the 2018 MCSL Final Report having clarified that there was no obligation to conduct ongoing reviews of transactional activity between clients and third parties. CIMA did not disagree with that approach at the time, but has now made Findings and Requirements that impose such an obligation. It is challenging enough for FSPs to comply with all aspects of the AML/CTF/CPF regulation, which have developed significantly over recent years. It is quite impossible to do so, however, if the regulator has endorsed one approach (and regulated on that basis), only later to change that approach whilst not amending the underlying legislation and guidance. If CIMA considers that it is necessary to introduce changes to the existing AML legislation or Guidance, it can do so. In those circumstances, there are established procedures for consulting stakeholders in the financial services industry. However, CIMA's approach involves the introduction of new regulation through the process of inspection, which seems to me to be neither fair nor lawful.*" [Emphasis added]

25. The assertion that CIMA did not disagree with the Plaintiffs' approach of not monitoring clients' transactions was disputed in Bromfield 1 (paragraph 80) in a way which suggests that the limited focus of the point being made in White 2 paragraph 109.4 (i.e. the question of whether a client's third party transactions had to be scrutinised) was not understood. The correspondence quoted by Mr Bromfield to contradict the assertion made by Ms White does not deal with the point at all. This is an arid dispute which need not be resolved in any event. How the AMLRs should be construed cannot in any meaningful way be influenced by the view the parties took in relation to the issue during any inspection process. The Plaintiffs' perception that the Defendant changed course merely

helps to explain by way of narrative the practical regulatory context out of which the ultimately abstract statutory construction dispute arose.

26. White 2 addresses and exhibits various internal policy manuals prepared by the Plaintiffs. The 2018 Inspection made no Findings or Requirements in respect of those manuals. The 2019 Inspection did and the manuals were updated by the Plaintiffs as a result. The Affidavit then proceeds to describe the 2020 Inspections, conducted virtually due to the Covid-19 pandemic and then to support the grounds of the present judicial review application. Inevitably many of the averments made are indistinguishable from argument. However, evidence about how the relevant CDD obligations are complied with in practice in different jurisdictions has some potential contextual relevance to the task of statutory construction. It has recently been observed academically that "*the proper weight to be given to settled practice must necessarily vary according to the circumstances of the particular case*"[1]. The relatively short antecedents of the AMLRs must obviously limit the weight which can be given to that principle.

27. Nonetheless, as regards Issue 2 and authorised signatories, Ms White deposed:

> "*165. Accordingly, in my experience in multiple jurisdictions that give effect to the FATF 40 Recommendations, a TCSP must verify the person from whom it takes instructions and, if receiving and holding cash on behalf of the client (which is extremely rare), the persons that authorise the payments that the TCSP receives from the client; but any verification process going beyond that is unnecessary, duplicative, impractical and forms no part of the CDD that would be expected of a TCSP. Moreover, in such cases the AML responsibility lies elsewhere: it is for the client's bank to verify the identities of persons who purport to act as authorised signatories in respect of any banking services / transactions under its own AML regulations (whether in the Cayman Islands or elsewhere). The same applies in relation to dealings with third parties (in respect of which the corporate services provider may have little or no visibility).*"

28. As regards scrutiny of transactions, Ms White deposed:

> "*198. It is also worth emphasising that, in my experience, other jurisdictions do not prescribe such wide-ranging and onerous obligations on corporate services providers and share trustees, and instead rely on the TCSPs to determine what is appropriate based on their assessment of risk taking into account the backdrop of the client, its business, the scope of services and business relationship. In that respect, it is important to recognise*

[1] Diggory Bailey, '*Settled Practice in Statutory Interpretation*' (2022) 81(1) Cambridge Law Journal pp. 28-49 at 49.

> *that the Cayman Islands' AML/CTF/CPF regime ultimately derives from the FATF 40 Recommendations, a global standard that is very closely mirrored in many jurisdictions. CIMA's Findings and Requirements would go beyond what is required by the FATF 40 and, to my knowledge, by any other jurisdiction that is giving effect to the same framework.*"

29. These averments were not explicitly challenged in Bromfield 2, but Mr Bromfield made it clear that he would not "*respond to every statement, particularly statements of opinion, which are matters of legal argument. As I understand the issues in this case, it is a matter for the court to determine whether the Authority's findings and requirements made in the Final reports are consistent with the applicable, law and regulations and are reasonable and proportionate*" (paragraph 95).

30. White 2 also supported, *inter alia*, the proportionality ground with the following averments, which the Defendant submitted were either "*inaccurate or are based on a misunderstanding, misrepresentation or overstatement of the Requirements and what they entail*"[3]):

> "*187. I am concerned that, were the disputed Findings and Requirements to be upheld, the result would present significant challenges to the operation of the corporate and fiduciary services businesses conducted by MCSL, MFS and indeed all TCSPs in the Cayman Islands engaged in those businesses. This concern arises in particular out of CIMA's Findings in relation to ongoing scrutiny of transactions (including source of funds) and the verification of signatories to bank accounts. The consequences – which I address in more detail below – are:*
>
> *187.1. The Plaintiffs would be placed in a position where they would never be able fully to comply with the relevant Requirements (with respect to their current clients). This is because many clients would not accept either the level of scrutiny that would follow from the Requirements, or the very considerable additional costs that MCSL and MFS would need to charge in order to implement the Requirements (to the extent that this would be possible at all), and so would not co-operate.*
>
> *187.2. Were those Findings and Requirements to become an established element of Cayman Islands regulatory standards, there is a risk that a considerable number of clients would consider leaving the jurisdiction. It is important to note that, in my experience across the Maples Group, the Findings and Requirements would impose a standard of scrutiny (in certain respects without reference to risk) that goes beyond that required in any other jurisdiction when compared in the context of equivalent services and business*

[3] Defendant's Skeleton Argument, paragraph 262.

relationships. That is a point of which many clients would be aware given the global, blue chip nature of the Maples Group client base."

31. White 6 was sworn in reply to Bromfield 1 and combatively disputes all points he makes relative to the merits of the Plaintiffs' grounds. On the scrutiny of transactions issue and the question of whether the AMLRs required scrutiny only of transactions "*over which* [the Plaintiffs] *have visibility*" (paragraph 114), Ms White observed: "*It is instructive that Mr Bromfield has not addressed my evidence on this point*" (paragraph 115). White 8 was primarily sworn in reply to Bromfield 2, and to provide a brief update in relation to IT upgrades the Plaintiffs had implemented since the 2020 Inspections. I do not consider it necessary to resolve the dispute as to whether the internal compliance manuals referred to in White 6 were considered by the Defendant in the course of the 2020 Inspections as this is not materially relevant to any of the issues which require formal adjudication.

The Defendant's evidence

32. The Defendant's evidence served primarily to set out CIMA's view of the regulatory structure and its policy underpinnings as well as to deal with the particularities of the contested grounds of judicial review from the regulator's perspective. Based on CIMA's statutory mandate under section 6 (3) of the MAA, Bromfield 1 made the following significant introductory point which was central to the wider context to be taken into account when construing the AMLRs:

> "*14. The entire regulatory framework for AML/CFT/PF in the Cayman Islands is derived from, and is meant to be consistent with the international framework established to combat money laundering, terrorism financing and proliferation financing. The Authority views the maintenance of the jurisdiction's position as a premier international financial centre as being inextricably linked with its level of success in meeting the international standards set for fighting financial crime, its cooperation with international regulatory authorities, and in ensuring that the Cayman Islands plays its part in limiting the opportunities for 'regulatory arbitrage' by criminals, whilst at the same time promoting a level playing field for legitimate business.*"

33. The international framework was described by way of overview in the following terms:

> "*15. As accepted in White 2, the FATF Recommendations establish the global standard for AML and CTF policy, legislation and regulation. The Cayman Islands, through its membership of the Caribbean Financial Action Task Force (CFATF), one of the 'FATFstyle Regional Organisations' (FSRBs) has agreed to and is committed to adopt and apply the FATF Recommendations.*

> *16. The FATF Recommendations require that all members of FATF and the FSRBs implement the Recommendations. To assess the level of technical compliance with the Recommendations, and the effectiveness of their implementation, each jurisdiction is assessed through a process of 'Mutual Evaluation' following a 'Methodology' prescribed by FATF*."

34. As far as the importance of the risk-based approach, Mr Bromfield pointed out:

> "*20. The prominence of the risk-based approach is highlighted by the fact that it constitutes the first of the 40 FATF Recommendations. This Recommendation states, that in assessing risks and applying the risk-based approach –*
>
> *Countries should identify, assess, and understand the money laundering and terrorist financing risks for the country, and should take action, including designating an authority or mechanism to coordinate actions to assess risks, and apply resources, aimed at ensuring the risks are mitigated effectively. Based on that assessment, countries should apply a risk-based approach (RBA) to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified. This approach should be an essential foundation to efficient allocation of resources across the anti-money laundering and countering the financing of terrorism (AML/CFT) regime and the implementation of risk-based measures throughout the FATF Recommendations. Where countries identify higher risks, they should ensure that their AML/CFT regime adequately addresses such risks. Where countries identify lower risks, they may decide to allow simplified measures for some of the FATF recommendations under certain conditions.*"

35. As regards CDD, the deponent referred to and reproduced the following important FATF Recommendation and extracts from the associated Interpretative Note:

> "*22. FATF Recommendation 10 addresses customer due diligence (CDD). This Recommendation is substantially replicated in AMLRs. Based on its importance to these proceedings, I will here set out Recommendation 10 in full. The added emphasis is mine.*
>
> *'Financial institutions should be required to undertake customer due diligence (CDD) measures when:*
>
> *i. establishing business relations;*
>
> *ii. carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Recommendation 16;*
>
> *iii. there is a suspicion of money laundering or terrorist financing; or*

iv. the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means.

The CDD requirements to be taken are as follows:

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership structure of the customer.

(c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.

(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of the relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

Financial institutions should be required to apply each of the CDD measures under (a) to (d) above, but should determine the extent of such measures using a risk-based approach (RBA) in accordance with the Interpretative Notes to this Recommendation and to Recommendation 1.

Financial institutions should be required to verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for occasional customers. Countries may permit financial institutions to complete the verification process as soon as reasonably practicable following the establishment of the relationship, where the money laundering and terrorist financing risks are effectively managed and where this is essential not to interrupt the normal course of business.

Where the financial institution is unable to comply with the applicable requirements under paragraphs (a) to (d) above (subject to appropriate modification of the extent of the measures on a risk-based approach), it should be required to terminate the business relationship; and should consider making a suspicious transactions report in relation to the customer.

These requirements should apply to all new customers, although financial institutions should also apply this Recommendation to existing customers on the basis of materiality and risk, and should conduct due diligence on such existing relationships at appropriate times.'

23. The Interpretative Note to Recommendation 10 contains the following statements:
'…
4. When performing elements (a) and (b) of the CDD measures specified under Recommendation 10, financial institutions should also be required to verify any person purporting to act on behalf of that customer is so authorised, and should identify and verify the identity of that person.

5. When performing CDD measures in relation to customers that are legal persons or legal arrangements, financial institutions should be required to identify and verify the identity of the customer, and understand the nature of its business, and its ownership and control structure. The purpose of the requirement set out in (a) and (b) below, regarding the identification and verification of the customer and the beneficial owner, is twofold: first, to prevent the unlawful use of legal persons and arrangements, by gaining a sufficient understanding of the customer to be able to properly assess the potential money laundering and terrorist financing risks associated with the business relationship; and second, to take appropriate steps to mitigate the risks. As two aspects of one process, these arrangements are likely to interact and complement each other naturally… "' [Emphasis added]

36. How these general principles apply to FSPs like the Plaintiffs was explained by Mr Bromfield as follows:

"*26. Recommendation 22 relates to the CDD requirements that each country should apply to Designated Non-Financial Businesses and Professions (DNFBPs), which is the FATF designation applied to trust and company service providers (TCSPs), such as MCSL and MFS.*

'DNFBPs: customer due diligence
The customer due diligence and record-keeping requirements set out in Recommendations 10, 11, 12, 15 and 17, apply to designated non-financial businesses and professions (DNFBPs) in the following situations:
…
Trust and company service providers – when they prepare for or carry out transactions for a client concerning the following activities –

• acting as formation agents of legal persons;
• acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;

> *• providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
> *• acting as (or arranging for another to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
> *• acting as (or arranging for another person to act as) nominee shareholder for another person.*"

37. Bromfield 1 then addresses the FATF Methodology and describes as most important Immediate Outcome 4 ("*Financial institutions, DNFBPs and VASPs adequately apply AML/CFT preventive measures commensurate with their risks, and report suspicious transactions.*"). Mr Bromfield quotes (at paragraph 31 (e)) the following description of the characteristics of an effective system for these purposes:

> "'*Financial Institutions, DNFBPs and VASPs understand the nature and level of their money laundering and terrorist financing risks, develop and apply AML/CFT policies (including group-wide policies), internal controls, and programmes to adequately mitigate those risks; apply appropriate CDD measures to identify and verify the identity of their customers (including beneficial owners) and conduct ongoing monitoring; adequately detect and report suspicious transactions; and comply with other AML/CFT requirements. This ultimately leads to a reduction in money laundering and terrorist financing activity within these entities.' (Emphasis added.)*"

38. The risk rating of the sector the Plaintiffs operate within, based on the 2015 National Risk Assessment, was also relied upon, essentially to justify the rigour of the Defendant's approach and also indirectly to support its case on construction:

> "*38. With respect to trust and corporate services providers, the 2015 NRA states:*
>
> *'Within that sector, however …, Trust and Corporate Service Providers were assessed to be the most vulnerable to ML, with a score of 0.57. While this sector is supervised for AML/CFT purposes by CIMA, its vulnerability arises, due to the complexity of its international financial transactions. Trust and Corporate Service Providers are typically engaged in international investments and structured finance activities, and the high value funds and asset transfers (both locally and abroad) add to the vulnerability.' (PXW-3/ page 229) [Emphasis added]*."

39. CIMA's own sector-specific risk analysis was quoted in the following material paragraph in Bromfield 2:

> "*41. In the Authority's Sector Specific Risk Assessment the Authority gave each of the Trust Service Providers (TSP) and Corporate Services Providers (CSP) sectors a rating of Medium High, and the overall TCSP sector a rating also of Medium High. The Authority stated the following with respect to the TCSP sector:*
>
> *'43. The risks associated with the products and services offered by TCSPs are impacted by the potential for opacity. TCSPs are used in sophisticated cross-border commercial transactions such as tax, financing and private asset structures that are established for purposes of preserving and managing private wealth.*
>
> *45. Providing registered office services or business address facilities is considered higher risk where the TCSP is not providing other services to the client (i.e. no other business relationship). This service allows the entity to maintain a physical footprint in the country but can distance itself from the assets and activities controlled by the beneficial owner.*"'

40. This is significant because paragraph 45 of CIMA's Risk Assessment is at first blush completely at odds with the Plaintiffs' contention that because MCSL's functions are more limited it requires less scrutiny. This is a false paradox on closer scrutiny, because it ultimately has no bearing on the construction of the AMLRs which apply to all sectors, not just TCSPs. However, I see no reason to doubt the regulatory judgment of Mr Bromfield, which accords with common sense, that the more tenuous the business relationship between FSP and customer, the greater the risk that the FSP will unwittingly be used as a passive instrument for financial wrongdoing. This assessment also at first blush suggests a regulatory acknowledgement of the Plaintiffs' persistently advanced point that MCSL in particular has no visibility in relation to its clients' underlying third party transactions.

41. Mr Bromfield then addresses the Defendant's "regulatory toolkit", consisting of the AMLRs, the Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and Proliferation Financing in the Cayman Islands (the "Guidance Notes") and the Authority's Regulatory Handbook. All of these instruments were addressed extensively through legal argument. His description of the Mutual Evaluation Review ("MER") conducted by the Caribbean

Financial Action Task Force ("CFATF") in 2019 is a reference to an important background factor which is most obviously relevant to explain the rigorous way CIMA has approached its regulatory functions in the present case. However, it is also potentially relevant to the controversial questions of statutory construction:

> "*97. The Cayman Islands is the domicile to the largest number and a very high percentage of the world's hedge funds and private equity funds. As stated in White 2 (paras. 54 to 64), the Cayman Islands underwent a mutual evaluation by CFATF in 2019, to assess the jurisdictions level of compliance with the technical requirements of the FATF recommendations, and the requirements for effectiveness under the FATF methodology. The Mutual Evaluation Report (MER) arising from that process is very clear as to the scale of the ML/TF/PF risks faced by the jurisdiction generally, and the TCSP sector, in particular.*
>
> *98. Table 1.3 at pg. 34 of the MER (PXW-3/ page 267), lists the number of legal persons and arrangements registered in the Cayman Islands as at 31 July 2017. They include over 82,000 exempted companies, which is the preferred structure for hedge funds, and over 21,000 exempted limited partnerships, the preferred arrangement for private equity funds.*
>
> *99. In its overview of the Cayman Islands financial sector and DNFPs, the MER states, at para. 25:*
>
> *'The Cayman Islands offers a range of products and services which make it attractive for non-residents to establish FIs in the jurisdiction without having a physical presence in the Cayman Islands. Additionally, as an international financial centre, the majority of products and services offered are targeted towards non-resident customers, including high net-worth and institutional clients, resulting in the establishment of business relationships on a non-face-to-face basis. <u>These factors contribute to markedly higher ML/TF risks which require the implementation of appropriate and adequate AML/CFT measures by FIs and DNFBPs.</u>' (Emphasis added.)*
>
> *This assessment is consistent with the findings in the 2015 NRA.*

100. With respect to TCSPs, the MER highlights the critical role that TCSPs need to play in preventing criminals from using the jurisdiction as a haven for financial crime. The MER states at para. 364:

'As formation agents, TCSPs play a critical role as gate keepers for the Cayman Islands financial sector. As part of its supervisory framework, CIMA conducts onsite inspections of TCSPs, which includes a review of TCSPs client files, account records and transaction records to confirm whether TCSPs are maintaining adequate and updated information on their customers and beneficial owners. Where CIMA identifies deficiencies in ongoing CDD and monitoring, CIMA encourages remedial actions, which is successful to a large extent. While this encourages TSCPs to obtain accurate and up-to-date information after completion of an inspection, the imposition of enforcement actions would better influence compliance among these entities, on an ongoing basis.'

At para. 374, the MER further points out that competent authorities, such as CIMA, the RCIPS and the FRA rely on TCSPs to maintain and provide adequate, accurate and current beneficial ownership information, and specifically identifies deficiencies in ongoing monitoring as a matter for particular concern.

101. The MER assesses the Cayman Islands as having a 'low level of effectiveness' in achieving Immediate Outcome 4 under the FATF Methodology,104 which is – Financial institutions, DNFPs and VASPs adequately apply AML/CFT preventive measures commensurate with their risks, and report suspicious transactions.' In doing so, the MER cites deficiencies in ongoing CDD monitoring to be addressed."

42. An important averment is made when Bromfield 1 addresses the Plaintiffs' services. This is the closest the deponent appears to me to come to addressing the "visibility" issue, albeit limited to the specific context of the "*on-boarding stage*":

"*110. The Authority is not prescriptive as to precisely how it expects any FSP to perform its risk assessment and its CDD obligations, especially regarding understanding the nature and purpose of the client's business and ongoing monitoring. The Authority is not, e.g., requiring a TCSP to investigate and track down every transaction conducted by the TCSP's clients. The Authority however has an expectation, consistent with the AMLRs and the*

Guidance Notes that, at the on-boarding stage, a TCSP will ensure it understands for what purpose the entity is being established. To satisfy itself that the purpose is not a nefarious or suspicious one, the TCSP must require documentary evidence to support the statements as to the nature and purpose of the business. It must also have a system whereby it examines, on an ongoing basis, the matters which comes within its purview, or which it is capable of ascertaining, to determine whether the client's business has varied markedly from the purpose stated, and supported at the on-boarding stage. How the TCSP does this will be dependent on the nature of the TCSP's business, the client and the particular circumstances. The TCSP is not however required to do nothing, because the TCSP has a positive obligation to satisfy the Authority as to the measures it is taking to ensure that it is not being used as a means to facilitate financial crime."

43. Mr Bromfield went on to make the following general points which indirectly bear on the construction issue and the Plaintiffs' "visibility" argument:

"*111. An example given in White 2, as part of MCSL's activities is the keeping of the minutes. The minutes of a company can be a potential treasure trove of evidence regarding the activities of a client. No other service provider is likely to have that information within the jurisdiction. It could provide extremely useful information to the TCSP, the Authority, or law enforcement in the event of an investigation, as to whether the client is continuing the conduct its business in accordance with the nature and purpose previously disclosed.*

112. This is consistent with the Guidance for TCSPs provided by the FATF, in which it states the following at para. 94:

'TCSPs are not expected to scrutinise every transaction carried out by a trust, company or other legal entity to whom the TCSP provides services… However, many of the professional services provided by TCSPs enable them to identify suspicious activity or transactions carried out using trust, companies or other legal entities. For example, their direct knowledge of, and access, to the records and management processes and operations and structures as well as through close working relationships with trustees, settlors, managers and beneficial owners may help TCSPs make a determination in this regard. The continued administration and management of the legal persons and arrangements (e.g.

account reporting, asset disbursements and corporate filings) would also enable the relevant TCSPs to develop a better understanding of the activities of the clients.'

113. White 2 further refers to the fact that a client would have other service providers, such as investment manager, administrator, banks and custodians. It should be noted that every service provider sees a different aspect of a transaction, and the other service providers may not likely see what comes within the purview of the TCSP. There is also the possibility of the client or applicant for business providing different information to different service providers, which can be very useful to law enforcement in the event of an investigation. Many of the service providers are also outside the jurisdiction, and are not supervised by the Authority, which would make it difficult for the Authority to gain access to that information. Every FSP has an obligation to comply with the AMLRs, following the Guidance Notes. No FSP is exempt from the requirements. That duty may not be delegated to any other party except as prescribed in the AMLRs for reliance on third parties. If this were to be allowed, criminal elements would simply seek out and exploit the weakest link. Requiring every FSP to adhere to the regulations provides multiple layers of protection against ML/TF/PF risks and enhances the level of protection against these risks."

44. This evidence lends some support to the Plaintiffs' argument that only transactions which are visible to them should be monitored or scrutinised, but also undermines the Plaintiffs' further argument that the fact their clients are regulated elsewhere can be relied upon to lighten the CDD burden of a Cayman Islands FSP. Of course, it is important to re-emphasise that this evidence has no direct bearing on how the AMLRs should be construed. However, it sheds light on both (a) the wider regulatory context which the Regulations may be deemed to be designed to operate in, and (b) an illustration of how the AMLRs practically impact on a particular commercial context. Dealing with ongoing monitoring, the following clear and coherent averments are made:

"*122. As stated above, meeting the requirements relevant to these obligations will not require an FSP to scrutinise every transaction conducted by its client. It requires the client to have a system in place, underpinned by its assessment of the AML/CFT risks posed by that client, which will enable it to satisfy itself that the client's transactions are consistent with the nature and purpose on which the business relationship was established. In the Final Reports the Authority used the examination of the financial statements, where these are provided to the FSP, as an illustration of one method by which this could be done.*

Again, what is adopted will depend on the risk assessment, the nature and circumstances of the FSP, and the client in the relationship." [Emphasis added]

45. The emphasised words reflect a regulatory approach which is broadly consistent with the Plaintiffs' central thesis as to how the relevant legislative provisions should be construed. Critically it is argued by the Plaintiffs that FSPs can only be required to monitor transactions which form part of the business relationship between them and their clients (whether directly between them or transactions facilitated by the Plaintiffs on behalf of their clients). Dealing with the authorised signatories issue, Mr Bromfield deposes as follows:

"*132. The measures put in place would depend on the nature of the business, and the risk-rating applied. A TCSP which provides directors for example, would expect to have information as to the authorised signatories, since they would have had to be authorised by the directors. The directors in those circumstances would be required to satisfy themselves as to the identity of the person being authorised. If the directors delegate the power, then they should ensure that the person delegated is satisfied. As a producer of fiduciary services, MFS very often provides directors for entities within the structure, who would therefore be in a position to ensure that persons authorised to act on behalf of the company are properly verified.*

133. A TCSP which acts as corporate secretary, which is a service provided by MCSL, would also be in a position to ascertain information regarding the account signatories if this is included in the minutes. If the signatory changes, the TCSP is expected to know who the new signatory is, and where the accounts are kept. For example, what if the company inexplicably sets up accounts in high risk countries? Even the payment of the annual fees may be an opportunity to ascertain whether the signatories have changed, and if so, what is the identity of the new signatory?" [Emphasis added]

46. Mr Bromfield significantly does not address in the above context the case of the TCSP which merely provides registered office services, which was said to be the predominant position as far as MCSL is concerned. It is, based on these averments, unsurprising that Mr Bromfield does not advance a clear-cut explanation or even theory as to why the FATF scheme which the AMLRs were designed to implement should be construed in the specific and at first blush counterintuitive way which the Defendant contended for at the hearing. The fact that he did not seek to invoke any explicit international regulatory consensus in support of the construction for which CIMA

contended ultimately merely confirms that the present proceedings pivotally turn upon a traditional exercise in statutory construction focussed on the language found in the legislative provisions read in light of their surrounding context.

The legislative scheme

The PCA and the AMLRs

47. The Proceeds of Crime Act (the "PCA") is significant because it is the primary legislation under which the AMLRs are made and is accordingly an important part of the wider legislative context in which the controversial Regulations must be construed. Section 145 provides:

> "*(1) The Cabinet may, upon the recommendation of the Anti-Money Laundering Steering Group, the Monetary Authority and the Financial Reporting Authority, make regulations prescribing measures to be taken to prevent the use of the financial system and any other facilities provided in or from within the Islands for the purposes of criminal conduct including measures —*
>
> *(a) to utilise systems and train employees to prevent money laundering;*
>
> *(b) to manage and mitigate any risks that may be involved in the course of business;*
>
> *(c) to conduct the appropriate and adequate due diligence of a customer or a person with whom business is conducted;*
>
> *(d) to ensure that proper and adequate records are kept;*
>
> *(e) that may be required to be utilised in matters involving specific types of customers or activities which may include a politically exposed person or the transfer of currency;*
>
> *(f) to maintain the prescribed obligations of a financial institution or a designation non-financial business or profession in the prevention of money laundering; and*
>
> *(g) to ensure that proper and adequate reports are made to the relevant Authority in the Islands regarding any suspicious activity related to money laundering.*
>
> *(2) Regulations made under subsection (1) may —*
>
> *(a) make different provisions for different circumstances or cases and may contain incidental, supplementary and transitional provisions;*

(b) provide that the contravention of any provision of those regulations constitutes an offence and may prescribe penalties for any such offence —

(i) on conviction on indictment, consisting of a fine and imprisonment for two years; or

(ii) on summary conviction, consisting of a fine of five hundred thousand dollars;

(c) prescribe the manner in which an administrative penalty system with a maximum penalty of two hundred and fifty thousand dollars may be implemented; and

(d) prescribe fees, subscriptions or other monies which may be payable by any person who is supervised in accordance with this Law and the regulations." [Emphasis added]

48. The predominant legislative purpose of the AMLRs is clear and was essentially common ground, as noted above. Mr Robinson KC added an additional contextual layer by referring the Court to the primary money laundering offences which the PCA creates:

"***Concealing, etc***

133. (1) A person commits an offence if that person —

(a) conceals criminal property[4]*;*

(b) disguises criminal property;

(c) converts criminal property;

(d) transfers criminal property; or

(e) removes criminal property from the Islands…

Arrangements

134. (1) A person commits an offence if that person enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

49. In the course of argument I wondered aloud how much scope there was for such offences to be committed in the Cayman Islands in relation to entities with assets and principal agents located

[4] Section 144 (3) provides:
"*Property is criminal property if —*
(a) it constitutes a person's benefit from a criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly); and
(b) the alleged offender knows or suspects that it constitutes or represents such a benefit and includes terrorist property."

overseas. After the next long adjournment Mr Robinson KC provided a perfect example by handing up the Court of Appeal's recent decision in *In the Matter of a Company*, CICA (Civil) Appeal No. 24 of 2021, Judgment dated 18 July 2022 (unreported). This case aptly illustrated how a change of authorised signatory being approved by a Cayman Islands company's Board in relation to an overseas bank could constitute an offence under the PCA. There can be little doubt that in general terms the need for strict regulation of FSPs including TCSPs for which CIMA contends is entirely justified by the legislative scheme[5]. How far this affects the construction of the critical AMLRs will be considered below.

50. Before coming to the substantive provisions themselves, it is helpful to consider some of the key definitions to which counsel referred in Regulation 2(1):

> "'**applicant for business**' means a person seeking to form a business relationship, or carry out a one-off transaction, with a person who is carrying out relevant financial business in the Islands…
> '**business relationship**' means any arrangement between two or more persons where -
> (a) the purpose of the arrangement is to facilitate the carrying out of transactions between the persons concerned on a frequent, habitual or regular basis; and
> (b) the total amount of any payment or payments to be made by any person to any other in the course of that arrangement is not known or capable of being ascertained at the time the arrangement is made…
> '**customer**' means a person who is in a business relationship, or is carrying out a one-off transaction, with a person who is carrying out relevant financial business in the Islands…"

51. The PCA contains the following definition which encompasses the Plaintiffs in section 2 (1):

> "'***relevant financial business****' means the business of engaging in one or more of the following —*
>
> *(a) banking or trust business carried on by a person who is for the time being a licensee under the Banks and Trust Companies Law (2020 Revision)*…"

52. The AMLRs were made on 19 September 2017 and consolidated to incorporate various amendments between 2017 and 2019. Although the Court is primarily required to construe specific sub-paragraphs of Regulation 12, other Regulations provide an important backdrop to the function served by Regulation 12 in the context of the AMLRs as a whole. Their overarching purpose is to

[5] Section (2) of the PCA provides: "*This Law applies to property wherever situated.*"

require FSPs to create systems within their own businesses to prevent money laundering and to make these service providers de facto junior partners in the national regulatory system. Regulation 3 firstly provides:

> "***Compliance programme, systems and training obligations***
> *(1) A person carrying out relevant financial business shall for the purpose of ensuring compliance with the requirements set out in these Regulations, designate a person at the managerial level as the Anti-Money Laundering Compliance Officer.*
>
> *(2) To satisfy the requirements of these Regulations, a person carrying out relevant financial business may -*
> *(a) delegate the performance of any function to a person; or*
> *(b) rely on a person to perform any function required to be performed.*
>
> *(3) Notwithstanding paragraphs (1) and (2) the responsibility for compliance with the requirements of these Regulations is that of the person carrying out relevant financial business.*"

53. Regulation 5 provides:

> "***Systems and training to prevent money laundering***
> *5. A person carrying out relevant financial business shall not, in the course of the relevant financial business carried out by the person in or from the Islands, form a business relationship, or carry out a one-off transaction, with or for another person unless that person -*
> *(a) maintains as appropriate, having regard to the money laundering and terrorist financing risks and the size of that business, the following procedures in relation to that business -*
>
> *(i) identification and verification procedures in accordance with Part IV;*
> *(ii) adoption of a risk-based approach as set out in Part III to monitor financial activities, which would include categories of activities that are considered to be of a high risk;*
> *(iii) procedures to screen employees to ensure high standards when hiring;*
> *(iv) record-keeping procedures in accordance with Part VIII;*
> *(v) adequate systems to identify risk in relation to persons, countries and activities which shall include checks against all applicable sanctions lists;*
> *(vi) adoption of risk-management procedures concerning the conditions under which a customer may utilise the business relationship prior to verification;*
> *(vii) observance of the list of countries, published by any competent authority, which are non-compliant, or do not sufficiently comply with the recommendations of the Financial Action Task Force;*

(viii) internal reporting procedures in accordance with regulation 34 except where the person concerned is an individual who in the course of relevant financial business does not employ or act in association with any other person; and
(viiia) procedures for the ongoing monitoring of business relationships or one-off transactions for the purposes of preventing, countering and reporting money laundering, terrorist financing and proliferation financing and such procedures allowing for the identification of assets subject to targeted financial sanctions in the Islands;
(viiib) procedures to ensure compliance with targeted financial sanctions obligations applicable in the Islands; and
(ix) such other procedures of internal control, including an appropriate effective risk-based independent audit function and communication as may be appropriate for the ongoing monitoring of business relationships or one-off transactions for the purpose of forestalling and preventing money laundering and terrorist financing;

(b) complies with the identification and record-keeping requirements of Parts IV and VIII;

(c) takes appropriate measures from time to time for the purpose of making employees aware of –

(i) the procedures under paragraph (a) which are maintained by the person and which relate to the relevant financial business in question; and
(ii) the enactments relating to money laundering;

(d) provides employees from time to time with training in the recognition and treatment of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering, terrorist financing or proliferation financing, or whose assets are subject to targeted financial sanctions applicable in the Islands; and

(e) *designates an Anti-Money Laundering Compliance Officer.*"

54. Regulation 8 provides:

"***Assessment of risk***
8. (1) A person carrying out relevant financial business shall take steps appropriate to the nature and size of the business to identify, assess, and understand its money laundering and terrorist financing risks in relation to —

(a) a customer of the person;
(b) the country or geographic area in which the customer under paragraph (a) resides or operates;
(c) the products, services and transactions of the person; and
(d) the delivery channels of the person.

(2) A person carrying out relevant financial business shall —

(a) document the assessments of risk of the person;

(b) consider all the relevant risk factors before determining what is the level of overall risk and the appropriate level and type of mitigation to be applied;

(c) keep the assessments of risk of the person current;

(d) maintain appropriate mechanisms to provide assessment of risk information to competent authorities and self-regulatory bodies;

(e) implement policies, controls and procedures which are approved by senior management, to enable the person to manage and mitigate the risks that have been identified by the country or by the relevant financial business;

(f) identify and assess the money laundering or terrorist financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms and the use of new or developing technologies for both new and pre-existing products;

(g) monitor the implementation of the controls referred to in paragraph (e) and enhance the controls where necessary; and

(h) take enhanced customer due diligence to manage and mitigate the risks where higher risks are identified."

55. Regulations 17-17A provide:

"***Failure to complete customer due diligence***
17. A person carrying out relevant financial business shall perform enhanced due diligence where the money laundering or terrorist financing risks are higher pursuant to Part VI.

Considerations for applying customer due diligence
17A. A person carrying out relevant financial business shall apply customer due diligence requirements to existing customers on the basis of materiality and risk, and conduct due diligence on such existing relationships at appropriate times, taking into account whether and when customer due diligence measures have been previously undertaken and the adequacy of the data obtained."

56. Provision is made for simplified CDD procedures and enhanced CDD procedures in carefully prescribed circumstances set out in Parts V and VI, respectively. Regulation 31 is of general application and provides so far as is relevant:

"**Record-keeping procedures**
31. (1) Record-keeping procedures maintained by a person carrying out relevant financial business are in accordance with this regulation if the procedures require the following records to be kept as follows —

(a) in relation to a business relationship that is formed or one-off transaction that is carried out, a record that indicates the nature of evidence of customer due diligence obtained under procedures maintained in accordance with Part IV —
(i) comprises a copy of the evidence;
(ii) provides such information as would enable a copy of it to be obtained; or
(iii) where it is not reasonably practicable to comply with sub-subparagraph (i) or (ii), that provides sufficient information to enable the details of a person's identity contained in the relevant evidence to be re-obtained;

(b) a record comprising account files and business correspondence, and results of any analysis undertaken, for at least five years following the termination of the business relationship or after the date of the one-off transaction; and

(c) a record containing details relating to all transactions carried out by the person carrying out relevant financial business, which should be sufficient to permit reconstruction of individual transactions so as to provide, if necessary, evidence for prosecution of criminal activity…"

57. Regulation 12 (with emphasis added to the controversial provisions) provides as follows:

"***Obligation to identify customer***
12. (1) A person carrying out relevant financial business shall —

(a) identify a customer, whether a customer in an established business relationship or a one-off transaction, and whether natural, legal person or legal arrangement and shall verify the customer's identity using reliable, independent source documents, data or information;

(b) verify that a person purporting to act on behalf of a customer is properly authorised and identify and verify the identity of the person;

(c) identify a beneficial owner and take reasonable measures to verify the identity of the beneficial owner, using the relevant information or data obtained from reliable sources, so as to be satisfied that the person knows the identity of the beneficial owner;

(d) understand and obtain information on, the purpose and intended nature of a business relationship; and

(e) conduct ongoing due diligence on a business relationship including —
(i) scrutinising transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile, including where necessary, the customer's source of funds; and
(ii) ensuring that documents, data or information collected under the customer due diligence process is kept current and relevant to customer due diligence, by reviewing existing records at appropriate times, taking into account whether and when customer due diligence measures have been previously undertaken, particularly for higher risk categories of customers.

(2) In addition to the requirements of paragraph (1)(a), for customers that are legal persons or legal arrangements, a person carrying out relevant financial business shall —

(a) understand the ownership and control structure of the customer and the nature of the customer's business;

(b) identify the customer and verify its identity by means of the following information —
(i) name, legal form and proof of existence;
(ii) the constitutional documents that regulate and bind the legal person or arrangement, as well as satisfactory evidence of the identity of the director, manager, general partner, president, chief executive officer or such other person who is in an equivalent senior management position in the legal person or arrangement; and
(iii) the address of the registered office and, if different, a principal place of business.

(3) For the purpose of paragraph (1)(c), for customers that are legal persons, a person carrying out relevant financial business shall —
(a) identify and verify the identity of the natural person, if any, who is the beneficial owner;

(b) to the extent that there is doubt under paragraph (a) as to whether the person with the controlling ownership interest is the beneficial owner or where no natural person exerts control through ownership interests, identify the natural person exercising control of the legal person or arrangement customer through other means; or

(c) where no natural person is identified under (a) or (b), identify the relevant natural person who is the senior managing official.

(4) In addition to the requirements of paragraph (1)(c) and further to paragraph (2), for customers that are legal arrangements, a person carrying out relevant financial business, where applicable, shall identify and take reasonable measures to verify the identity of beneficial owners by means of the following information —

(a) for trusts, the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust (including through a chain of control or ownership); or

(b) for other types of legal arrangements, the identity of persons in equivalent or similar positions.

(5) Information collected and held under paragraph (4) shall be kept accurate and up to date and shall be updated on a timely basis."

58. The FATF 40 Recommendations and Interpretative Notes which are most relevant to the construction of the relevant provisions of the AMLRs are the following. By way of overview and confirming the link between the FATF Recommendations and the AMLRs, Recommendation 10 provides as follows:

"*The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means.*"

59. The most salient portion of Recommendation 10 however is expressed in terms which Regulation 12 (1) (a)-(e) of the AMLRs have substantially replicated:

"*The CDD measures to be taken are as follows:*

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.

(c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.

(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds."

60. Regulation 12 (1) (a) essentially adds in to Recommendation 10 (a) after customer, "*whether a customer is in an established business relationship or a one-off transaction, and whether natural,*

legal person or legal arrangement". Regulation 12 (1) (b) appears to be a bespoke local provision, an elaboration upon Recommendation 10 (a) which is designed to meet local circumstances. Regulation 12 (1) (e) (i) substantially reflects Recommendation 10 (d). Recommendation 10 (and other recommendations) is applied to designated non-financial businesses and professions ("DNFBPs") by FATF Recommendation 22:

> "*(e) Trust and company service providers – when they prepare for or carry out transactions for a client concerning the following activities:*
>
> ▪ *acting as a formation agent of legal persons;*
>
> ▪ *acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
>
> ▪ *providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement;*
>
> ▪ *acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
>
> ▪ *acting as (or arranging for another person to act as) a nominee shareholder for another person.*" [Emphasis added]

61. FATF's Guidance for TCSPs was referred to in the course of argument but in my judgment adds little to the wider legislative context from a statutory interpretation point of view. However, perhaps the clearest support for the proposition that TCSPs' due diligence exercises are assumed to be linked to the transactions they carry out came from the following passage in Section E which also provided some support for the Defendant's general position on the relevance of information to which service providers had access:

> "*59…although individual TCSPs are not expected to investigate their client's affairs, they may be well-positioned to identify and detect changes in the type of work or the nature of the client's activities in the course of business relationship…*
>
> *61.The amount and degree of ongoing review and monitoring and review will depend on the nature and frequency of the relationship…*"

62. In oral argument Mr Robinson KC pointed out that FATF Recommendation 22 applied Recommendation 10 to TCSPs without modification. However he distinguished the language of Regulation 12 of the AMLRs, which applied to all FSPs, from that of Recommendation 22, which

applied specifically to TCSPs: "*So the language which has provided the fuel for the fire behind my learned friend is not part of the language of regulation ten of the AMLRs.*"[6] This may, on the margins, be a relevant consideration when seeking to ascertain the conceptual meaning of certain terms. As far as construction of the provisions of the AMLRs under consideration in the present case is concerned, this is to my mind almost a distinction without a difference. Because the Regulations appear on their face to impose duties which are intended to be shaped, to some extent at least, by the circumstances of the commercial context. And CIMA's Guidance Notes, considered further below, appear to acknowledge both explicitly and implicitly, that what the AMLRs mean in an operative sense is very much shaped by the context in which the relevant FSP conducts its business. Indeed, giving a wooden, mechanistic interpretation to the AMLRs so that each service provider is required to adopt the same 'cookie cutter' approach would seem to be the antithesis of the risk-based assessment principles which lie at the heart of the FATF and AMLRs regimes.

The MAA and instruments related to its jurisdiction and approach to the implementation of the AMLRs

63. The MAA established CIMA. As regards its functions and powers generally, Section 6 provides as follows:

> *"(1) The principal functions of the Authority are —*
>
> *(a) monetary functions, namely —*
> *(i) to issue and redeem currency notes and coins; and*
> *(ii) to manage the Currency Reserve,*
> *in accordance with this Law;*
>
> *(b) regulatory functions, namely —*
> *(i) to regulate and supervise financial services business carried on in or from within the Islands in accordance with this Law and the regulatory laws;*
> *(ii) to monitor compliance with the anti-money laundering regulations; and*
> *(iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law;*
>
> *(c) co-operative functions, namely, to provide assistance to overseas regulatory authorities in accordance with this Law; and*
>
> *(d) advisory functions, namely, to advise the Government on the matters set out in paragraphs (a) to (c) and, in particular, with regard to —*

[6] Transcript Day 3 (a.m.) page 22.

(i) whether the regulatory functions and the co-operative functions are consistent with functions discharged by an overseas regulatory authority;
(ii) whether the regulatory laws are consistent with the laws and regulations of countries and territories outside the Islands; and
(iii) the recommendations of international organisations.

(2) In performing its functions and managing its affairs, the Authority shall —
(a) act in the best economic interests of the Islands;
(b) promote and maintain a sound financial system in the Islands;
(c) use its resources in the most efficient and economic way;
(d) have regard to generally accepted principles of good corporate governance;
(e) comply with this and any other law, including any regulations or directions made or given thereunder; and
(f) have such ancillary powers as may be required to fulfil the functions set out in paragraphs (a) to (e).

(3) In performing its regulatory functions and its co-operative functions, the Authority shall, in addition to complying with the requirements of subsection (2) —

(a) endeavour to promote and enhance market confidence, consumer protection and the reputation of the Islands as a financial centre;

(b) endeavour to reduce the possibility of financial services business or relevant financial business being used for the purpose of money laundering or other crime;

(c) recognise the international character of financial services and markets and the necessity of maintaining the competitive position of the Islands, from the point of view of both consumers and suppliers of financial services, while conforming to internationally applied standards insofar as they are relevant and appropriate to the circumstances of the Islands;

(d) recognise the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(e) recognise the desirability of facilitating innovation in financial services business; and

(f) recognise the need for transparency and fairness on the part of the Authority.

(4) In exercising its co-operative functions, the Authority shall, in addition to complying with the requirements of subsection (2) —

(a) have regard to the matters mentioned in section 50(4); and

(b) comply with section 50(8).” [Emphasis added]

64. Section 6 (2)-(3) was a potential source of the Defendant’s power to impose the Requirements although the Plaintiffs contended that section 6 (3) (c), which requires a balance between imposing international standards and promoting local competitiveness, was relevant to its construction argument. In the course of the hearing I noted that section 6 (3) (c) is an interesting and potentially original provision. On the face of it, this can have no bearing on the construction of the AMLRs which are made under a different Act by Cabinet; it may be relevant to the proportionality ground. As regards CIMA’s regulatory powers, as I observed in the course of the hearing, those are articulated in section 6 in a less than straightforward manner. Indeed, although at one point the Defendant relied upon section 6 (2) (f), it resiled from this position at the hearing. Instead, reliance was placed on the following provision in the Act:

> “***Regulatory handbook***
> *48. (1) The board shall issue, and may amend, a regulatory handbook setting out, as far as is practicable, the policies and procedures to be followed by the Authority, its committees and its officers in performing the Authority’s regulatory functions and co-operative functions.*
>
> *(2) The regulatory handbook shall be consistent with any law or any regulations or policy directions given or made thereunder.*
>
> *(3) The regulatory handbook shall include policies and procedures for —*
>
> *(a) giving warning notices to persons affected adversely by proposed actions of the Authority;*
>
> *(b) giving reasons for the Authority’s decisions; and*
>
> *(c) receiving and dealing with complaints against the Authority’s actions and decisions.*
>
> *(4) In cases where the regulatory handbook would have the effect of creating, directly or indirectly, rules or statements of principle or guidance, the Authority shall consult with the private sector associations and the Minister charged with responsibility for Financial Services.*
>
> *(5) The regulatory handbook may provide for exceptions from its own requirements to be made by the board or a specified committee or officer of the Authority.*

(6) The Authority shall publish the regulatory handbook and any amendments to it in the Gazette, and the regulatory handbook and any such amendments shall take effect and come into operation on the date of such publication.
(7) It shall be a duty of the board to ensure that the regulatory handbook is observed by the committees and officers of the Authority, to keep the regulatory handbook under continuing review, and to consult the Financial Secretary and the private sector associations on the extent to which the regulatory handbook could be made more consistent with section 6." [Emphasis added]

65. The Defendant relied primarily on section 48 (1) as the source of its power to issue Requirements while the Plaintiffs countered that subsections (3) (a) and (4) undermined the case for such reliance. The following provisions of the Regulatory Handbook itself (at page 36) were more directly relied upon by the Defendant:

"***The Objectives of an On-site Inspection***
1. The principal objectives of the Inspection Report ("the Report") are to –

(1) inform the Authority, and the licensee's directors and management, of matters requiring attention and the priority to be given to these matters ; and

(2) assist the licensee to effect timely correction of those matters.

2. In order to meet these objectives the Report must address the many and varied aspects of the onsite inspection. For this reason, accurate and timely reporting of facts is essential to the proper understanding, and ultimately the satisfactory correction of any deficiencies in the licensee's operations, by either the licensee, its directors and/or senior management.

3. The Report is sent to the licensee's board of directors. Its primary purpose is to focus the attention of and require action by the directors and management on matters which the Authority has identified as warranting corrective attention.

4. In that regard, any deficiency of a regulatory or statutory nature will be addressed through 'Requirements'. Matters Requiring Immediate Attention ("MRIA") in the Report will be structured as 'High Priorities' and Matters Requiring Attention ('MRA') in the Report will be structured into 'Medium' and/or 'Low Priorities'. Where the examiner identifies Matters Requiring Immediate Attention, the Authority will direct the licensee, its directors or management to address such matters immediately. Where the examiner identifies Matters Requiring Attention, the Authority will direct the licensee to address such matters within a specified time." [Emphasis added]

66. Despite the coercive implications of the term "Requirements", which Mr Bowen KC argued should have been "Recommendations" to avoid straying into the enforcement regime, as a matter of initial

impression the Requirements did not appear to be intended to constitute a form of enforcement action. Section 48 did not initially appear to be a clear-cut basis for this administrative action, but it ultimately seemed entirely counterintuitive that CIMA should not possess the statutory competence to adopt such an entirely reasonable regulatory approach.

67. The Guidance Notes provided background context as to the way in which CIMA carried out its regulatory functions in relation to the AMLRs. This document could not of course be any way dispositive as to how the AMLRs made by Cabinet under the PCA should be interpreted. As far as the Guidance Notes are concerned, there was no clear-cut support for the Defendant's own construction argument to the effect that the business relationship which the FSP had to fully understand was the underlying business of the customer irrespective of what services the FSP was going to offer. However, the strongest support came in relation to the guidance in relation to the beginning of the relationship with the client. Section 3 A. (the "Risk-Based Approach"), for instance, provided some support for each of the competing arguments:

> "*4. FSPs should at the outset of the relationship understand their business risks and know who their applicants for business ("applicants")/customers are, what they do, in which jurisdictions they operate, and their expected level of activity with the FSP.*
>
> *5. As a part of the RBA, FSPs shall:*
>
> *(1) Identify ML/TF risks relevant to them;*
>
> *(2) Assess ML/TF risks in relation to-*
>
> *(a) Their applicants/customers (including beneficial owners);*
>
> *(b) Country or geographic area in which persons under (a) above reside or operate and where the FSP operates;*
>
> *(c) Products, services and transactions that the FSP offers; and*
>
> *(d) Their delivery channels.*
>
> *(3) Design and implement policies, controls and procedures that are approved by senior management to manage and mitigate the ML/TF risks that they identified under (1), commensurate with assessments under (2) above;*
>
> *(4) Evaluate mitigating controls and adjust as necessary;*

(5) Monitor the implementation of systems in (3) above and improve systems where necessary;

(6) Keep their risk assessments current through ongoing reviews and, when necessary, updates;

(7) Document the RBA including implementation and monitoring procedures and updates to the RBA; and

(8) Have appropriate mechanisms to provide risk assessment information to competent authorities." [Emphasis added]

68. More supportive on their face of the Plaintiffs' broad construction case that CDD obligations were anchored to the relationship between FSP and customer, were the following provisions of Customer Due Diligence Section 4 A:

"*2. FSPs shall take steps to ensure that their customers are who they purport themselves to be. FSPs shall conduct CDD which comprises of identification and verification of customers including beneficial owners, understanding the intended nature and purpose of the relationship, and ownership and control structure of the customer.*
3. CDD measures involve:

(1) Identifying the applicant or customer and verifying that identity using reliable, independent source documents, data or information.

(2) Identifying the beneficial owner(s) (of the applicant/customer and beneficiaries, where appropriate), and taking reasonable measures to verify the identity of the beneficial owner, such that it is satisfied that it knows who is the beneficial owner. Where the applicant/customer is a legal person or arrangement, FSPs should take steps to understand the ownership and control structure of the applicant/customer.

(3) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.

(4) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the FSP's knowledge of the customer, its business and risk profile, including, where necessary, the source of funds…

9. FSPs shall ensure that they understand the purpose and intended nature of the proposed business relationship or transaction. FSPs shall assess and ensure that the nature and purpose are in line with its expectation and use the information as a basis for ongoing monitoring.

> *10. The AMLRs require FSPs to identify and verify the identity of any person that is purporting to act on behalf of the applicant/customer ('authorised person'). The FSP should also verify whether that authorised person is properly authorised to act on behalf of the applicant/customer.*
>
> *11. FSPs shall conduct CDD on the authorised person(s) using the same standards that are applicable to an applicant/customer.*
>
> *12. Additionally, FSPs shall ascertain the reason for such authorisation and obtain a copy of the authorisation document.*"

The Bill of Rights

69. The Plaintiffs relied on two provisions of the Bill of Rights for the purposes of relying upon the presumption against interfering with fundamental rights as one of the canons of construction in aid of their case on construction. My preliminary view was that Mr Robinson KC was right to doubt how far reliance could be placed, in the context of a statutory interpretation analysis, on provisions such as section 9 (the right to privacy) which were not absolute but subject to derogations in the public interest. Such an argument, as CIMA's counsel rightly submitted, does not get off the ground unless it is seriously arguable without much analysis that a construction contended for does not only interfere with the protected rights but in addition is "*not reasonably necessary in a democratic society …in the interests of…public safety, public order*…" (section 9(3) (a)). The construction the Defendant contends for is not as manifestly unconstitutional as this having regard to the global acceptance of intrusive AML regulatory standards.

70. This appears to be why the Privy Council doubted whether the common law presumption of constitutionality, developed within a constitutional framework where fundamental rights are themselves protected in a somewhat fluid manner by the common law, applied in relation to constitutionally entrenched fundamental rights which could expressly be derogated from: *The Attorney General (Appellant) v The Jamaican Bar Association (Respondent) (Jamaica) The General Legal Council (Appellant) v The Jamaican Bar Association (Respondent) (Jamaica)* [2023] UKPC 6 (per Lords Briggs and Lord Hamblen at paragraph 26). The position may be different with other, unqualified rights, and of course more generally ultimately depends on the nature of the contending constructions and the relevant statutory context.

71. However, the following provision is clearly potentially relevant to the proportionality argument:

"***Lawful administrative action***
19.—(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.

(2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act."

Findings: Issue 1 (MCSL only)

Preliminary

72. Issue 1 was defined by the parties, as noted above, as whether or not the following finding was unlawful and invalid because it was based on an erroneous construction of the relevant statutory provision:

> "*5.2.5 The Licensee is in breach of Part IV, Regulation 12 (1) (d) of the AMLR and has not fully adhered to Part II section 4 A (2) of the AML Guidance Notes, as it has not obtained sufficient information on, the purpose and intended nature of a business relationship.*"

73. Section 12 (1) (d) provides as follows:

> "*12. (1) A person carrying out relevant financial business shall —...*
>
> *(d) understand and obtain information on, the purpose and intended nature of a business relationship*".

74. Viewing these provisions in isolation from their context, this Regulation in my judgment obliges a person carrying out relevant financial business to (a) understand, and (b) obtain information on the purpose and intended nature of the business relationship which they are considering entering into, or have entered into, with a client or customer. It was seemingly common ground that understanding the business relationship included a requirement to understand the client's business. That is the preliminary meaning I would assign to the statutory words understood according to their natural and ordinary meaning. But the controversy which arose in this finding was a more nuanced one. Does the requirement to "obtain information" include by necessary implication a requirement to obtain documentary evidence to substantiate the information obtained in each and every case?

75. My preliminary view is that the literal meaning of "*obtain information on*", again read in isolation from the wider context does not necessarily include an obligation in every case to maintain a record

of the information obtained and/or to obtain independent documentary evidence to substantiate that information. Since the Regulations include separate record-keeping obligations, which FSPs can be compelled to abide by, this construction argument initially seemed a somewhat technical one which did not raise any matters of general principle. How much information needs to be obtained and in what form seems self-evidently (under a scheme dominated by a risk-based approach) to be a very fact-specific consideration. However, careful scrutiny of this Issue revealed that the real issue was not a requirement to document information actually obtained but whether an obligation existed at all to obtain information substantiating information already obtained from the client about their business purpose.

The Plaintiffs' submissions

76. The Plaintiffs' Skeleton Argument addressed Issue 1 in two stages, the Defendant's 'original' position and their '*alternative*' position. First:

> "*169. Whether Reg. 12(1)(d) AMLRs requires a person providing RFB to ensure that it obtains independent documentary evidence to substantiate the intended nature/purpose of business at the time of onboarding all new clients:*
>
> *169.1. MCSL's position and, it appears, CIMA's revised case (DGR, ¶6(7)) is that this obligation only arises where the person providing RFB considers that it is necessary to do so, following a RBA, for example where the client is assessed as high-risk.*
>
> *169.2. CIMA's original position is that this obligation arises in every case (2020 Final Reports: 2020 MCSL Final Report, ¶5.2.6.4). This appears to be the position still adopted by Mr. Bromfield, ¶110.*
>
> ***(b) Submissions on Issue 4: CIMA's original position***
>
> *170. CIMA's original position (and that still taken by Mr. Bromfield) is clearly flawed as a matter of law, for reasons developed in the ASG, ¶¶33-40 [CB/B/3/16]. MCSL understands that CIMA no longer maintains this position, although given Mr. Bromfield's evidence this requires clarification. The Plaintiffs will develop this submission if CIMA reverts to its original position in its Skeleton Argument (not yet filed as at the date of the Plaintiffs' Skeleton Argument).*
>
> *171. It is beyond doubt that CIMA's alternative case differs from that in the MCSL 2020 Final Report. The relevant sections of the 2020 MCSL Final Report made no mention at all of Reg. 8 AMLRs or of the conduct of an RBA. Those now form the core of CIMA's alternative case. As a result, CIMA's argument that it has not changed position is not*

sustainable. CIMA must be judged on the reasoning in the 2020 Final Reports: see Reply, ¶¶7-10 and the Findings and Requirements should be quashed (and a declaration made to put the matter beyond doubt: Reply, ¶¶11-16)."

77. In effect, the point being made is that Regulation 12 (1) (d) does not in terms create any general obligation to document the information obtained, even if other Regulations may impose record-keeping obligations, and what information must be obtained is a risk-based requirement rather than an inflexible one. This was the nub of the submissions advanced in oral argument. It was next argued:

"***(c) Submissions on Issue 4: CIMA's alternative case***

172. As to CIMA's alternative case, this is also flawed.

172.1. To the extent that CIMA's case is that MCSL is in breach of Reg. 8 AMLRs by reason of the fact it has not 'documented' the RBA as required by Reg. 8(2)(a) AMLRs, no finding of breach to that effect has been made. Nor is there any finding of a breach of the record-keeping duty in Reg. 31 AMLRs. CIMA cannot, after the event, rely on a new provision of the AMLRs as the purported rationale for the Findings of breach (and Requirement). MCSL denies that any of the files disclose a failure to 'document' its RBA or to keep records in breach of either Reg. 8 or Reg. 31 AMLRs. In any event, the vast majority of the files identified as in 'breach' related to clients onboarded before the AMLRs 2017, and prior to the introduction of the Reg. 8 statutory duty to conduct a RBA. They could not provide the evidential foundation for a breach of Reg. 8 AMLRs.

172.2. Only a finding of breach of Reg. 12(1)(d) AMLRs has been made. However, that provision does not expressly impose a record-keeping duty or require a TCSP to retain and make available to CIMA documentary evidence of the RBA that it conducted: see White # 6 ¶¶87-94 and Reply ¶17). Nor can such a power be implied, applying the principles of statutory construction expressio unius exclusio alterius and generalia specialibus non derogant, above, ¶124.2.

172.3. In any event, MCSL's record-keeping processes have now been substantially developed in the intervening months (as part of MCSL's process of continuous improvement), as explained in White #8, ¶21-27."

The Defendant's submissions

78. In the Defendant's Skeleton Argument, the relevant finding was set out almost in full as follows:

"*71. The Authority's Finding and Requirement in respect of nature /purpose of business appears at para 5.2 of the MCSL Final Report [CB/C/5]. The Finding is as follows:*

'Finding
'5.2.2 The inspection team noted the following from the sample of client files reviewed:
(1) sixteen (16) instances pertaining to client files, where sufficient evidence was not gathered to substantiate the nature/purpose of business documented within the client files; and
(2) one (1) instance in which the nature/purpose of business was not documented for client #131299.
5.2.3 The matter notes and/or incorporation checklists seen contained a narrative of the nature/purpose of business for the sixteen (16) instances. However, no evidence was seen within the client files to substantiate the same. Please see Appendix 3 for the extract from the summary of discrepancies with the inspection team's comments for the sixteen (16) instances.
5.2.4 ...
Conclusion:
5.2.5 The Licensee is in breach of Part IV, regulation 12(1)(d) of the AMLR and has not fully adhered to Part II section 4 A (2) of the AML Guidance Notes, as it has not obtained sufficient information on, the purpose and intended nature of a business relationship."
[Emphasis added]

79. After quoting MCSL's response to the finding (that there was no statutory requirement to substantiate what the client said about the nature and purpose of their business in every case), the following further submissions were made:

"*75. The Authority, quite correctly, did not accept MCSL's comments, which are based on an unfortunate but flawed interpretation of the AMLRs. The Authority, in reference to AMLRs regulation 12(1)(d), points out (as recorded at para 5.2.6.4 of the Final Report) that, '...the Licensee cannot reasonably have understood and obtained information on, the purpose and intended nature of a business relationship, without having collected and reviewed documentation to substantiate the same.'*

76. The Authority, again quite correctly, (as recorded at para 5.2.6.5), pointed MCSL to the record keeping-requirements under regulation 31 which, by regulation 31(2), mandates that an FSP 'shall ensure that all customer due diligence information and transaction records are available without delay upon request by competent authorities.'

77. The Authority pointed specifically to regulation 31(1) which provides that the records which would meet the requirements of regulation 31 are '...a record that indicates the nature of the evidence of customer due diligence obtained under the procedures maintained in accordance with Part IV – (i) comprises a copy of the records...' (The Authority's emphasis.)

D.3.2 The Authority's Findings and Requirements on reg. 12(1)(d) are lawful

78. AMLR regulation 12(1)(d) prescribes that a person carrying out relevant financial business shall - ... '(d) understand and obtain information on, the purpose and intended nature of a business relationship…'.

79. The Guidance Notes at Part II, Section 4, A, 3. states that appropriate CDD measures involve: '...Understanding and, as appropriate, obtaining information on the nature and intended purpose of the business relationship.' Part II, Section 4, A, 9. states that 'FSPs shall ensure that they understand the purpose and intended nature of the proposed business relationship or transaction. FSPs shall assess and ensure that the nature and purpose are in line with its expectation and use the information as a basis for ongoing monitoring.

80. If it were not otherwise clear from the language of regulation 12(1)(d), read in isolation, that an FSP must obtain and keep documentary records of the CDD information obtained, that obligation is patent when regulation 12(1)(d) is read together with regulation 31. Regulation 31 cannot rationally impose an obligation to keep and produce records which there was no obligation to obtain.

81. The obligation to obtain documentary records of all CDD information obtained pursuant to regulation 12, including records of the purpose and intended nature of the business relationship is also clear when read together with Part III – Assessing and Applying the Risk-Based Approach, and in particular regulation 8.

82. Regulation 8(1) creates a clear obligation on every FSP to 'take steps appropriate to the nature and size of the business to identify, assess, and understand its money laundering and terrorist financing risks in relation to – (a) a customer of the person…' Regulation 8(2) requires that the FSP: '(a) document the assessment of risk of the person…'

83. An FSP cannot comply with the obligation under regulation 8 to identify, assess and understand the risks in relation to its customer, and to document that risk assessment, if the FSP has no obligation to obtain documentary records of its compliance with its CDD obligations, including in relation to nature and purpose of the intended business of the customer.

84. Similarly, a provider of relevant financial business cannot meet the requirement of regulation 17A to: 'apply customer due diligence requirements to existing customers on the basis of materiality and risk, and conduct due diligence on such existing relationships at appropriate times, taking into account whether and when customer due diligence measures have been previously undertaken and the adequacy of the data obtained', if the service provider has no obligation in the first place to obtain 'data' of its application of the CDD requirements.

85. The clear legislative intention is that the AMLRs are to be read as a whole. Its provisions are intended to establish an overall cohesive scheme as to the obligations of service providers under the regulations. The collection of client CDD information under

regulation 12 is an inextricable and necessary part of the risk assessment required under regulation 8, which expressly requires that the risk assessment be documented. The service provider is required to conduct CDD, not only at the commencement of the business relationship but, in accordance with regulation 17A, 'at appropriate times'. The service provider is then required to maintain those records and to produce them to the Authority upon request, in accordance with regulation 31.

86. The AMLRs are also clearly intended to be read together with the Guidance Notes, which were issued at or around the same time as the AMLRs. Where, for example, the Guidance Notes indicate that FSPs use the information obtained regarding the intended nature and purpose of the proposed business relationship as a basis for ongoing monitoring, this is a clear indication that there is an expectation that the information be documented and kept for continuing reference throughout the course of the business relationship.

87. The interpretation of regulation 12(1)(d) proffered by MCSL to the Authority would therefore render several other regulations within the AMLRs including, as shown above, regulations 8, and 17A and 31, of no effect. The court should of course eschew any interpretation of a provision which suggests that the legislating body was acting irrationally and intended to create provisions which are inconsistent one with the other. See, Bennion, Section 11.3:

'The legislature is to be taken to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner.'

See also, R (on the application of N) v Walsall Metropolitan Borough Council:

'When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursing the identifiable purposes of the legislation it enacts in a coherent and principled manner.'

88. It is also clear that the AMLRs must have intended that information received on the nature and purpose of business should be documented when the court has regard to the wider context and the purpose for which the information is required. Obtaining CDD to enable the service provider to understand the commercial rationale for a proposed business is an essential aspect of the risk assessment process…."

80. These submissions elide three questions: (1) whether Regulation 12 (1) (d) by its terms imposes an obligation to obtain documentary information substantiating what the client says the purpose and intended nature of their business is in every case, (2) whether Regulation 12 (1) (d) imposes an obligation to obtain substantiating information at all (i.e. in appropriate cases based on risk), and (3) whether regulation 12 (1) (d) (as opposed to Regulation 8 and/or 31) imposes any obligation to record information obtained. The third question does not seem to properly arise because the

finding was clearly based legally on a breach of Regulation 12 (1) (d) and factually on a failure to obtain supporting information. The Defendant is clearly right to submit that it is absurd to contend that no information obtained pursuant to this Regulation needs to be recorded, but that is entirely beside the point. Apart from quoting from the findings themselves on this issue ("*the Licensee cannot reasonably have understood and obtained information on, the purpose and intended nature of a business relationship, without having collected and reviewed documentation to substantiate the same*"), no coherent case was explicitly advanced for the construction contended for by the Defendant. It is noteworthy that the Defendant's Grounds of Resistance also advance broad and high level policy considerations in support of the CIMA findings on Regulation 12 (1) (d) without in any meaningful way engaging with the very narrow and carefully defined point of construction raised by the Plaintiffs.

81. In oral argument Mr Robinson KC was unable to add any real substance to the thin gruel of the Defendant's submissions on this point and advance any coherent case as to why the Regulation should be construed as requiring substantiating information to be obtained in each and every case about a client's business purpose.

Findings on Issue 1

82. The Plaintiffs contended that the findings made in relation to 16 files where the nature and purpose of the client's business was ascertained and recorded but no substantiating documentation was obtained were unlawful because such substantiating information was not mandatorily required in all cases by Regulation 12 (1) (d) of the AMLRs. The dominant philosophy of the risk-based approach to AML/TF CDD obligations, policies and practices, lucidly explained by Mr Robinson KC in oral argument, logically weakened the Defendant's case on Issue 1. At the highest level, reference was made to the following provisions of the FATF Interpretative Notes on Recommendation 1:

> "*1. The risk-based approach (RBA) is an effective way to combat money laundering and terrorist financing….financial institutions and DNFBs should be able to ensure that measures to prevent or mitigate money laundering and terrorist financing are commensurate with the risks identified, and would enable them to make decisions on how to allocate their resources in the most effective way.*" [Emphasis added]

83. The Defendant's counsel also referred to the FATF '*Methodology For assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems*'. As its

title suggests, this document seeks to bridge the notoriously perilous gap between high-flying international regulatory objectives and tangible regulatory outcomes in the real world. Emphasis was rightly given (at paragraph 44) to Immediate Outcome 4:

> "*Financial institutions, DNFBPs and VASPs adequately apply AML/CTF measures commensurate with their risks, and report suspicious transactions.*" [Emphasis added]

84. Mr Robinson KC also referred, *inter alia*, to the following passage in CIMA's Guidance Notes (Section 3 A.):

> "*1. The AMLRs require FSPs to apply an RBA to their AML/CFT framework. The adoption of an RBA is an effective way to prevent or mitigate money laundering and terrorist financing (ML/TF) as it will enable FSPs to ensure that AML/CFT measures are commensurate to the risks identified and allow resources to be allocated in the most efficient ways. As such, FSPs should develop an appropriate RBA for their particular organisation, structure and business activities. Where appropriate and feasible, the RBA should be articulated on a group-wide basis.*" [Emphasis added]

85. The risk-based approach ("RBA") accordingly seeks to achieve practical results in a real world in which regulatory resources (both public and private) are limited and accordingly greater effort is expended in mitigating higher risks than lower ones. That these governing high-level principles were incorporated into the AMLRs is not subject to serious doubt. The Plaintiffs' counsel was keen to refer to the FATF Trust and Company Service Providers Guidance document, which opened with the following statement:

> "*1. The risk-based approach ("RBA") is central to the effective implementation of the FATF Recommendations. It means that supervisors, financial institutions, and trust and company service providers (TSCPs), identify and understand the money laundering and terrorist financing (ML/TF) risks to which they are exposed, and implement the most effective mitigation measures. This approach enables them to focus their resources were risks are higher.*" [Emphasis added]

86. Mr Bowen KC also heavily relied on the following limb of the explanation of what CDD measures involve, also found in CIMA's Guidance Notes:

> "*(3) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.*" [Emphasis added]

87. Against this background, the AMLRs can now be considered. Part III provides as follows:

*"**PART III - Assessing and Applying a Risk-Based Approach***
Assessment of risk
8. (1) A person carrying out relevant financial business shall take steps appropriate to the nature and size of the business to identify, assess, and understand its money laundering and terrorist financing risks in relation to —

(a) a customer of the person;

(b) the country or geographic area in which the customer under paragraph (a) resides or operates;

(c) the products, services and transactions of the person; and

(d) the delivery channels of the person.

(2) A person carrying out relevant financial business shall —

(a) document the assessments of risk of the person;

(b) consider all the relevant risk factors before determining what is the level of overall risk and the appropriate level and type of mitigation to be applied;

(c) keep the assessments of risk of the person current;

(d) maintain appropriate mechanisms to provide assessment of risk information to competent authorities and self-regulatory bodies;

(e) implement policies, controls and procedures which are approved by senior management, to enable the person to manage and mitigate the risks that have been identified by the country or by the relevant financial business;

(f) identify and assess the money laundering or terrorist financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms and the use of new or developing technologies for both new and pre-existing products;

(g) monitor the implementation of the controls referred to in paragraph (e) and enhance the controls where necessary; and

(h) take enhanced customer due diligence to manage and mitigate the risks where higher risks are identified." [Emphasis added]

88. Regulation 8 deals specifically with how to implement a risk-based approach in relation to, *inter alia*, new and ongoing client relationships, subject to the umbrella requirement that the steps taken

should be "*appropriate to the nature and size*" of the FSP's business. There is an express unqualified obligation to "document" risk assessments (Regulation 8 (a)), consistent with such assessments being the centrepiece of that Regulation, if not the Regulations overall. There is an unqualified obligation to monitor controls (Regulation 8 (f)). This Regulation may be seen as a pivotal one, because it clearly extends its reach to CDD policies and procedures (Regulation 8 (c), (e), (g) and (h)). The legislative approach is both flexible and rigid, it usually being apparent what is a mandatory and what is a directory requirement.

89. Part IV deals with '*Customer Due Diligence*' with the obligation to carry out arising, *inter alia* (under Regulation 11 (a), (e)) in relation to "*establishing a business relationship*" and when an FSP "*has doubts about the veracity or adequacy of previously obtained customer identification data*". Regulation 12 then crucially, for present purposes, provides:

> "*(1) A person carrying out relevant financial business shall —*
>
> ….
>
> *(d) understand and obtain information on, the purpose and intended nature of a business relationship*…"

90. The natural and ordinary meaning of Regulation 8 (a) may most simply be expressed as follows. There is an unqualified obligation to understand and obtain information about the purpose and nature of the services the FSP will be supplying which includes, implicitly, understanding the nature of the client's business. "In every case", this must be done when "*establishing a business relationship*" (Regulation 12 (1) (d) as read with Regulation 11 (a)). There is no ambiguity whatsoever. However, the literal meaning is only the first stage in the statutory construction process. In the Defendant's Skeleton Argument, the following principles were commended to the Court which I gratefully adopt:

> "*14. The court's task when interpreting a statute or subordinate legislation is to determine the legal meaning of the text used in the enactment. The legal meaning is 'the meaning that conveys the legislative intention. So the interpreter's objective, when interpreting an enactment, is to determine the true meaning of the words used by the legislature.'*
>
> *15. In determining the legal meaning, the starting point will always be the grammatical meaning of the text, but the grammatical meaning, even if apparently clear and*

unambiguous on its face, may not convey the true legal meaning. The legal meaning may only be ascertained by having regard to the context of the provision and the purpose for which the provision was enacted.

16. The proper context of an enactment includes the Act, or subsidiary legislation, as a whole, together with the wider legal, social and historical context. In construing the enactment, the court must presume that Parliament, or Cabinet in the case of the AMLRs, was at the time of the enactment, fully informed of that wider legal, social and historical context.

17. The principles are correctly summarised by Mangatal J in BDO Cayman Ltd and others v The Governor in Cabinet [2018 (1) CILR 457], at paras 124 – 126, as follows [DAB/2/50]:

'While the grammatical or literal meaning is the starting point, the court must construe the enactment in its wider context in order to determine the intention of the legislator, which is the "paramount criterion". Only then can the court identify the legal meaning of the enactment. It is in my view not necessary …for there to be some "ambiguity" before those aids to construction may be considered.

It is only if the enactment was grammatically capable of one meaning only, and on an informed interpretation of the enactment the interpretive criteria raised no real doubt as to whether that grammatical meaning was the one intended by the legislature, would the legal meaning have the same meaning as the grammatical meaning (the "plain meaning" rule – see Bennion, s.195, (at 507) …'

18. The starting point for ascertaining the context of a provision in an enactment is consideration of the entire Act or legislative instrument. The editors state the rationale for this principle as follows:

'Reading an Act as a whole may reveal that a proposition in one part of the Act sheds light on the meaning of provisions elsewhere in the Act… As Lord Reid said in IRC v Hinchy [1960] AC 748 at 766, "one assumes that in drafting one clause of a Bill the draftsman had

in mind the language and substance of other clauses, and attributes to Parliament a comprehension of the whole Act.'

19. The court should also have regard to the purpose for which the legislative instrument was enacted. This concept of 'purposive construction' is the modern expression of the concept previously known as the 'Rule in Heydon's Case'14, or the 'Mischief Rule'.

20. In some instances, the purpose is specified in the legislative instrument. Otherwise, the court may have to ascertain the purpose from the general provisions of the instrument or from any external aids to construction. The instrument in question may be part of an overall legislative scheme all elements of which are designed to achieve a particular objective. This scheme may have been created in order to enable the jurisdiction to meet its international obligations. In such event, the court is entitled to have regard to all the legislation, reports, and recommendations which constitute that legislative scheme, whether international or local, in order to ascertain the true legislative meaning of a provision in the enactment."

91. In the present case it is common ground that the literal meaning and the legal meaning are not precisely the same. The Plaintiffs contend that, applying a purposive construction, the legal meaning is sufficiently broad to encompass on a risk-based approach basis an obligation to substantiate the purpose of business supplied by the new client. I find that this follows logically from the clear legislative interaction between Regulations 8 and 12. CDD obligations are intended to be fulfilled, in my judgment, applying a risk-based approach, expending more resources where risks seem higher and less resources where risks seem lower. Adopting what Mr Bowen KC (dealing with another point) described as "*one size fits all approach*" would in the present case be endorsing a regulatory approach akin to building castles in the sand. Independently verifying and documenting the nature and purpose of the business relationship for well-known commercial brands setting up vehicles to conduct entirely familiar forms of business would be an obvious waste of resources that could be more effectively deployed elsewhere. The Plaintiffs' construction in no way diminishes the validity of the Defendant's general proposition that a record of any material information obtained for CDD purposes should be kept, but record-keeping obligations are dealt with explicitly in a comprehensive manner by Regulation 31.

92. And so it is difficult to see how the Defendant's construction (as formulated in the relevant finding on Issue 1, which is the only construction properly in issue in the present proceedings) can be justified by applying any recognised approach to statutory interpretation. The clearer the literal meaning of the words used, the clearer the rationale for departing from them and assigning a different legal meaning must be. To construe Regulation 12 (1) (b) as excluding "in every case" an obligation to substantiate the purpose of business would clearly be inconsistent with the manifest purpose of the legislative scheme in its wider local and international policy context. Somewhat less clearly, construing the relevant sub-paragraph as requiring such substantiation "in every case" would also be inconsistent with the purpose and wider legislative context of the relevant provision. As the Plaintiffs submitted in their Skeleton Argument, the implication of words into a statute imposing duties is only done on a restrictive basis:

> "*76. …a statutory provision should not be interpreted so as to impose duties or remove rights save by express words or by necessary implication. This is an aspect of the 'principle of legality': R (Morgan Grenfell) v. Inland Revenue Commissioners [2003] 1 A.C. 563, [44].*
>
> *77. …'A necessary implication is not the same as a reasonable implication. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context' (Morgan Grenfell, [45] [PAB/20/1239]) and having regard to the statutory purpose (Black, [36] [PAB/13/909]). 'It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included': Morgan Grenfell, [45] (emphasis added).*"

93. On the other hand it is entirely consistent with the Regulations read both internally as a whole and in their wider external context to regard the makers of the Regulations as intending to impose the obligation they expressly imposed in Regulation 12 (1) (b) as both a mandatory fixed obligation, but also an obligation which should be discharged in a flexible way, applying the risk-based approach expressly mandated by Regulation 8.

94. Moreover, adopting a construction so far removed from the literal meaning of the statutory words without any compelling justification would potentially create uncertainty in the market place as to how the AMLRs should be construed. Lord Sales has observed extra-judicially[7]:

[7] '*In Defence of Legislative Intention*' https://www.supremecourt.uk/191119 at page 17.

"*As Lord Diplock put it in Fothergill v Monarch Airlines:*

'... the need for legal certainty demands that the rules by which a citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible …'"

95. I accordingly resolve Issue 1 in favour of the Plaintiffs and find that MCSL is entitled to an Order quashing the relevant findings and Requirement.

Findings: Issue 2 (MSCL and MFS)

Preliminary

96. Issue 2 concerns the following finding in relation to MCSL:

"*5.2.17 The inspection team noted, from the sample of client files reviewed, sixteen (16) instances in which the Licensee did not maintain information on bank accounts with a view to verifying the authorised signatories for bank accounts held by its corporate clients. Management had advised in response to the inspection team's enquiries, that the Licensee does not maintain details of bank accounts or signatories for its corporate clients for whom it only provides registered office services. As such, the Licensee has failed to demonstrate how it would verify and collect due diligence on authorised signatories acting on behalf of its corporate clients.' …*

5.2.20 The Licensee is in breach of Part IV Regulation 12 (1) (b) of the AMLR, as it has not verified that persons purporting to act on behalf of its client are properly authorised nor identified and verified the identity of such persons."

97. The Requirement which the Defendant did not resile from provided as follows:

"*5.2.21 The Authority requires that:*
1) within three (3) months of receipt of the final inspection report, the Licensee ensures, that all authorised signatories for bank accounts held by its corporate clients are authorised to act on behalf of such clients and client identification and address verification documentation is on file for all such persons in accordance with Part IV Regulation 12(1) (b) of the AMLR." [Emphasis added]

98. Similar findings and a similar Requirement were recorded in respect of 16 MFS files (2020 MFS Final Report, paragraphs 5.2.17, 5.2.20 and 5.2.21). The Plaintiffs' position during the inspection process was that, *inter alia*:

> "…*The requirement to verify such persons is in the context of the business relationship to be established with the client. In the context of the business relationship that the Licensee has with its client, the Authorised Signatories of that client's bank account(s) have no relevance given they are not parties that have the authority to give instructions to the Licensee. As such, the Licensee has no obligation to verify and collect due diligence on those authorised signatories*…"

99. The question of construction which arose was: what parameters were there, if any, to the duties imposed by Regulation 12 (1) (b)? The Defendant accepted that "all" signatories did not need to be verified but the parties still disagreed as to when the verification obligation arose. Having considered the legislative context while dealing with Issue 1, this point can be considered with somewhat more brevity because it is common ground that the original findings challenged should be quashed but:

(a) the Plaintiffs sought an "advisory opinion" from the Court; and

(b) the Defendant contended that the Court could less formally express its views on the position.

100. I do not consider it appropriate to give a formal advisory opinion, absent consent, on an issue which is not properly before the Court for formal adjudication. Nonetheless, I will set out what I regard as the main kernel of the respective arguments and express some explicitly provisional views about them.

The Plaintiffs' Submissions

101. The Plaintiffs in their Skeleton Argument described this issue in salient part as follows:

> "*148. The key issue raised by this ground of judicial review is whether Reg. 12(1) (b) AMLRs requires a person carrying out RFB to verify that all authorised signatories for bank accounts held by its corporate clients are properly authorised to act on behalf of those clients (and client identification and address verification documentation is on file for all such persons).*
>
> *149. The parties' respective positions on this point are as follows:*

149.1. The Plaintiffs' case is that this obligation is only engaged as regards signatories on accounts over which the person providing RFB has Visibility: i.e., those that the person providing RFB has set up for the client or has received funds from when undertaking (i.e. preparing or carrying out) transactions for the client (MCSL Ground 2, ASG, ¶42, 107); MFS Ground 1, ASG, ¶125, 132)). 149.2. CIMA's original case was that the obligation applies to 'all authorised signatories' on all bank accounts held by the client, including bank accounts used in transactions not undertaken by the person providing RFB (and over which they therefore have no Visibility): 2020 MCSL Final Report, ¶5.2.21.2 [CB/C/16]; 2020 MFS Final Report, 5.2.16.1).

149.3. CIMA's revised position is that the obligation arises in relation to signatories engaged in transactions over which the person providing RFB has no Visibility, but only those who are referred to in the client's filings with the person (such as books of account, files or minutes) that have been provided by the client (CIMA's revised case, DGR ¶19)…

150. The Court should quash the relevant Findings and Requirements in relation to 'authorised signatories' in the 2020 Final Reports at ¶147, above, both on the basis of CIMA's original position (which CIMA now disavows, Reply ¶¶18-24 and on CIMA's alternative position, albeit on an advisory and prospective basis only (see ¶58 above), which is wrong in any event for the reasons developed below and at ASG, ¶¶43-46 and White #2, ¶¶160-166; White #6, ¶¶119-129, 148; Reply, ¶25. Both positions are based on the same flawed premise.

151. Resolution of this issue again involves a question of statutory construction, applying the same principles of statutory interpretation as set out at ¶74, above.

(i) Presumption that the AMLRs should be read consistently with the FATF40

152. Once again, the FATF40 supports the Plaintiffs' interpretation. The Court's starting point should therefore be the presumption that Reg. 12(1)(d) AMLRs should be interpreted consistently with FATF40, unless by clear words or necessary implication it is evident Reg. 12(1)(d) AMLRs was intended to impose a more onerous obligation than the FATF40….

155…The phrase 'purporting to act on behalf of a customer' denotes some action by that person vis à vis the TCSP before the latter can come under any obligation to verify that person. Materially, they must be the signatory authorizing payment from a bank account used in a transaction that the TCSP is preparing for or carrying out for the client. A CDD duty would also arise if, say, a TCSP sets up a bank account for a client or is asked to change the authorised signatories on a bank account for a client. Again, in that situation the authorised signatory is 'purporting to act' on behalf of the customer vis à vis the TCSP.

156. Other than in a situation of this kind, there is no duty on a TCSP under Rec. 10 taken with Rec. 22 to verify an authorised signatory on a bank account under FAT40.

157. Reg. 12(1)(b) AMLRs requires a person carrying out RFB to 'verify that a person purporting to act on behalf of a customer is properly authorised and identify and verify the identity of the person.' These are the same words found in the Interpretive Notes to the FATF40 and should be read consistently with the duties created by Rec. 10 read with Rec. 22. For the reasons already given, a person 'purporting to act on behalf of a customer' must be doing so vis à vis the relevant person before the obligation to verify will arise…" [Emphasis added]

102. The submission in the first sentence of paragraph 155 seemed compelling, but the posited scenarios were clearly too narrow. As regards MFS and other FSPs whose services included corporate secretarial services in relation to meetings or providing directors, the Plaintiffs' counsel accepted in the course of argument that the duty to verify the authorised signatory could potentially arise.

The Defendant's Submissions

103. The Defendant advanced the following key submissions on this point in its Skeleton Argument:

"*111. The grammatical or literal meaning of the language used in regulation 12(1)(b) is clear. As stated in the Authority's comments, an authorised signatory of a corporate entity is a person acting on behalf of that entity. A person designated in the minutes of the board of directors as being an authorised signatory is a person purporting to act on behalf of the entity. The fact that those minutes are in the possession of MCSL and MCSL has admittedly failed to have verified the identity of those persons, means that MCSL is in breach of the requirement under regulation 12(1)(b).*

112. For the reasons stated above under Part B of these submissions, and in relation to Issue 1 above, the Authority is correct to have interpreted regulation 12(1)(b) by reading that regulation together with regulation 8. The Authority is also correct to have had regard to the provisions of the Guidance Notes with regard to the obligation to verify authorised signatories.

113. The Authority's interpretation of regulation 12(1)(b) is also correct when that regulation is interpreted within the wider legal, social and historical context and the purpose for which the provision was evidently enacted.

114. In addition to regulation 8 of the AMLRs, which the Authority considered in its reasons, the court should have regard to the entire AMLRs. In that context, the court should have specific regard to the mandatory requirement of regulation 5 (viiia), that FSPs adopt procedures for the ongoing monitoring of business relationships for the purposes of preventing, countering and reporting money laundering, terrorist financing and proliferation financing. A change in a corporate customer's account signatories is one of the factors identified at GN, Part II, 4 H, para 8, which an FSP must monitor on an ongoing basis in its obligation to be vigilant for significant changes or inconsistencies in patterns of transactions. An FSP which fails to implement a system for verifying and identifying account signatories would therefore be failing to meet the ongoing monitoring requirement under the MLRs.

115. The court should also have regard to Part II, 3 B, para. 7 of the Guidance Notes. Pursuant to that guidance, the extent of CDD measures to be implemented by an FSP in relation to any client is dependent on 'the type and level of risk for the various risk factors' identified with respect to that client. The FSP should document its risk assessment in order to be able to demonstrate their allocation of compliance resources, keep their assessments up to date, and have appropriate mechanisms to provide risk assessment information to the relevant Supervisory Authority, if required (GN Part II, 2B, para. 8).

116. The Guidance Notes, Part II, Section 4, H64, expressly identifies account signatories as one of the areas an FSP should monitor in maintaining its vigilance for significant changes or inconsistencies in the patterns of transactions. The sector-specific guidance for

> *TCSPs in Part IV, Section 1 of the Guidance Notes, identifies changes in transaction types and changes in account signatories as specific activities that warrant special attention from TCSPs. The Interpretative Note to Recommendation 10 of the FATF Recommendations identifies as one of the risk factors relative to product, service, transactions or delivery channels: 'payment received from unknown or un-associated third parties.*'" [Emphasis added]

104. The submission in the third sentence of paragraph 111 seemed compelling. However, the following sentence seemed overly rigid, implicitly assuming (as the Plaintiffs argued) that the AMLRs imposed a duty on FSPs engaged merely to act as a depositary of records to scrutinise the same. It is readily apparent that similar legal and practical issues arose to those considered directly and more fully below in relation to Regulation 12 (1) (e) (i).

Provisional views on construction of Regulation 12 (1) (b)

105. In my judgment it is clear that Regulation 12 (1) (b) according to its terms only applies to situations in which a FSP or TCSP is engaged in some way with an authorised signatory. This is supported by the natural and ordinary meaning of the words in their context and why it is obvious that the obligation does not extend to all of a customer's authorised signatories, as was ultimately agreed:

> "*(b) verify that a person purporting to act on behalf of a customer is properly authorised and identify and verify the identity of the person*…"

106. The scheme of the Regulations is to create general obligations, expressed with varying degrees of specificity, leaving the scope of the obligations to be flexibly measured applying the overarching risk-based approach on a case by case basis. CIMA rightly identifies verification of authorised signatories as an important monitoring tool. This general consideration cannot alter the broad (but necessarily limited) parameters of a specific statutory provision. Statutory construction is not the same thing as identifying the perfect regulatory outcome in an ideal world; but the regulatory ideal may well be relevant to how regulatory provisions are construed. That ideal, as reflected in the FATF Recommendations and related documents and the CIMA Guidance Notes, and implicitly in the AMLRs themselves, is that heightened scrutiny is required in relation to high-risk clients and/or transactions and less scrutiny in low-risks situations. As regards the specific scenario of a registered office provider merely storing and/or filing documents is concerned, my provisional view is that:

(a) there is very arguably no general obligation to analyse all documents held on behalf of a client to see whether authorised signatories are mentioned and, if so, to verify them;

(b) very arguably an obligation may arise from time to time under Regulation 12 (1) (b), due to high-risk considerations, to ensure that some or all of a client's authorised signatories have been verified, either by the registered office provider itself or some other reliable regulated person within the Cayman Islands or abroad. In this context, a TCSP which merely holds Board minutes might be required by this Regulation to interrogate what information about authorised signatories could be gleaned from the stored minutes for the purposes of carrying out this CDD exercise. As a general rule no such obligation would arise.

Findings: Issue 3 (MSCL)

Preliminary

107. Issue 3 relates to the following findings and conclusions set out in the 2020 MCSL Final Report:

"*Findings:*

5.2.27 The inspection team noted, from the sample of client files reviewed, fourteen (14) instances, in which sufficient documentation for periodic reviews having been conducted were not seen. Where for all fourteen (14) instances, a system screen print was provided as evidence for periodic file reviews. These system screen prints seen only contain a date time stamp reflecting last reviewed date and next review date. There was no documentation within these client files to evidence the Licensee reviewing the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds. This was clearly evident for client #122118… where the UBO had an adverse hit, as reported by various press sources …There was no mention of this adverse hit within the client file, wherein response to the inspection team's enquiries, the Licensee noted that the matter was reviewed and decision taken to monitor the business relationship but no further action was warranted at the time. However, the Licensee had made no consideration to reassessing the risk, as the client is still risk rated as a low risk client, with client file reviews taking place quadrennially.

5.2.28 Moreover, for the fourteen (14) client files the last reviewed dates were 13 February 2020, 14 February 2020, and 04 March 2020. There was no evidence furnished of periodic reviews having been conducted prior to these dates. Additionally, three (3) of these fourteen (14) client files contained expired client identification for the UBOs and/or authorized persons. Where for client # 1 client identification had expired on 01 July 2016 and 16 January 2017 for the respective UBOs, client #2 client Identification had expired on 07 January 2017 for the director and client #3 client identification had expired on 26 November 2018 for the director. These clients have been risk rated as "High Risk". As such these client files would be subject to annual periodic reviews per the Licensee's policies and procedures. However, client records have not been kept current and relevant, albeit periodic file reviews would have fallen due annually.

Conclusion:

5.2.29 The Licensee is in breach of Part IV Regulation 12(l)(e)(i) of the AMLR, as it has not provided sufficient evidence to demonstrate that it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds.…

Requirements (High Priority – MRIA):

5.2.31 The Authority requires that:

1) within three (3) months of receipt of the final inspection report, the Licensee maintain documentation to evidence it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds in accordance with Part IV Regulation 12(l)(e)(i) of the AMLR; and

2) within three (3) months of receipt of the final inspection report, the Licensee ensure documents, data or information collected under the client due diligence process is kept current and relevant to client due diligence, by undertaking periodic reviews within the timeframe determined by the respective risk rating applied in accordance with Part IV Regulation 12(1)(e)(ii) of the AMLR.

Management Comments

5.2.31.1 The Licensee does not agree with the Conclusion that it is in breach of the AMLRs for the following reasons:

5.2.31.1.1 The requirement in Regulation 12(1)(e)(i) to 'scrutinis[e] transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile, including where necessary, the customer's source of funds' is in the context of transactions with the person carrying on relevant financial business. It does not extend to transactions carried out by a customer with other parties of which the Licensee cannot be aware.

5.2.31.1.2 The nature of registered office business is such that the service provider may never know (and should not be expected to know) or monitor the transactions of a client. The scope of these services consists of a registered office provider providing a corporate address and providing Companies Law compliance services such as help with filings with the Registrar. These services are not 'transaction' oriented, unlike (for example) a bank, mutual fund administrator or insurance manager.

5.2.31.1.3 Accordingly, in relation to the finding that 'There was no documentation within these client files to evidence the Licensee reviewing transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds', the Licensee submits that it (as with any other registered office provider) is not required to be involved with, and has no knowledge of, the day to day conduct of the client's business or particular transactions of the client (which will be to the knowledge of its directors and officers and those directly involved with processing a particular transaction), and therefore cannot create or obtain such documentation.

***Authority's Comments**:*

5.2.31.2

5.2.31.3

The AMLR does not grant exemptions for trust and corporate service providers as it relates to monitoring transactions/ activities undertaken throughout the course of the client business relationship. If the Licensee's client is engaging in activities that are inconsistent with the established risk and client profile, the Licensee is expected to have mechanisms in place to identify such a deviation. The Licensee's aim should be to ensure the client

transactions I activities are consistent with the Licensee's knowledge of the client, the client risk assessment, and the purpose and intended nature of the business relationship…." [Emphasis added]

108. Again, the disagreement as to statutory meaning revolves around the Plaintiffs contending for a statutory obligation which is shaped by the nature of the services which the FSP provides and the Defendant contending for a more absolutist and rigid interpretation. The somewhat adversarial context of the inspection process was not only inherently ill-suited for resolving a point of statutory construction, but also appears to have compelled each side to seek a clear-cut answer where no such answer could realistically be found.

109. After disposing of the primary dispute on statutory interpretation, I will deal separately with the Plaintiffs' alternative submissions based on *R (Anufrijeva)-v- Home Secretary* [2004] 1 AC 604.

The Plaintiffs' Submissions

110. The Plaintiffs' most significant general and specific submissions were as follows:

> "*75. First, the goal of all statutory interpretation is to discover the intention of the legislation. That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose: R (Black) v SSHD [2018] A.C. 215, [36].*
>
> *76. Second, a statutory provision should not be interpreted so as to impose duties or remove rights save by express words or by necessary implication. This is an aspect of the 'principle of legality': R (Morgan Grenfell) v. Inland Revenue Commissioners [2003] 1 A.C. 563, [44]; Craies on Legislation 12th Ed., ¶12.1.1-2, 19.1.3…*
>
> *79... there is a further presumption that statutory provisions that create a criminal offence should be given a restrictive interpretation and any ambiguity should be resolved in the individual's favour: Craies on Legislation 12th Ed., ¶19.1.14 [PAB/26/1410]; R v Copeland [2021] AC 815, [28] [PAB/15/830]. This is really a specific expression of the more general principle of legality: particularly clear wording (whether express or, exceptionally, implied) must be present to create a criminal offence.*
>
> *86. Reg. 12(1)(e)(i) AMLRs is in materially identical terms to Rec. 10(d) of the FATF40. It is true that the AMLRs do not apply the CDD duties in Reg. 12 to DNFBPs, including TCSPs, in quite the same way that the FATF40, Rec. 22 applies Rec. 10 to DNFBPs: there is no express qualification that those duties apply only when they are preparing or carrying out transactions for the client. The AMLRs (including Reg. 12) apply to persons who carry*

out 'relevant financial business' (RFB) as defined by s 2 and Sch. 6 Proceeds of Crime Act ('POCA'), which includes 'the business of company management as defined by the Companies Management Law (2018 Revision)' [PAB/7/295]: see the AML Guidance Notes 2017, IV.1.B.2 [5/3/296]. The CDD obligations in Reg. 12 therefore apply to TCSPs without any express qualification of the kind in Rec. 22(e). On the other hand, there is nothing in Reg. 12 that stipulates a duty in Reg. 12(1)(e)(i) to 'scrutinise transactions' that a person conducting RFB has not undertaken for the client, i.e. over which the person has no Visibility. On the contrary, read in context and according to its statutory purpose and in accordance with the relevant statutory principles, it is evident that Reg. 12(1)(e)(i) does not impose such a duty, which is limited to transactions undertaken by a person conducting RFB for the client.

87. The key word in Reg. 12(1)(e)(i) in the phrase 'transactions undertaken throughout the course of the business relationship' is 'undertaken'. This phrase also appears in materially the same terms in Rec. 10(d) of the FATF40. Read in context, 'undertaken' means transactions 'undertaken by the person providing RFB for the client'. In the case of a TCSP, undertaken means prepared for or carried out by the TCSP for the client, read in the light of Rec. 22(e) of FATF40. It does not mean transactions 'undertaken by the client'.

88. That follows, first, as a matter of logic. For example, every payment made to and from a bank account is a transaction 'undertaken' by a bank for its client, as in every case the bank plays an active part in either transferring or receiving funds. The bank must, accordingly, scrutinise every such transaction. But a bank is under no obligation to scrutinise transactions its client has 'undertaken' using an account held with another bank: such transactions are not 'undertaken' by the bank for the client. The express qualification on the duty only to 'scrutinise transactions' that are 'undertaken throughout the course of the business relationship' excludes any duty to scrutinise transactions that are not 'undertaken' by the person conducting RFB for the client. In the case of a TCSP, that means a transaction that that they have 'undertaken' by preparing for or carrying out the transaction for the client: i.e. over which they have 'Visibility'."

The Defendant's Submissions

111. The Defendant's most significant general and specific submissions were as follows:

"*D.5.2 The Authority's Findings and Requirements are lawful*

140. The Authority's Finding is lawful, being consistent with the express requirement of AMLR regulation 12(1)(e)(i), both on its plain and ordinary grammatical meaning and when read in its full and proper legal, social and historical context, and the purpose for which the provisions were enacted. The Authority's Finding is adequately supported by the reasons and illustrations set out at paras. 5.2.27 and 5.2.28 of the MCSL Final Report, and

in the Authority's comments at paras. 5.2.31.2 to 5.2.31.4 of the MCSL Final Report. AMLR regulation 12(1) (e) (i) provides:

'12. A person carrying out relevant financial business shall –

…

(e) conduct ongoing due diligence on a business relationship including –

(i) scrutinising transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile, including where necessary, the customer's source of funds…'

142. On the plain and ordinary grammatical meaning of regulation 12(1)(e)(i), the term 'transactions undertaken throughout the course of the business relationship' is a reference to the time period during which the ongoing monitoring obligation exists, that is to say, the obligation commences when the FSP's business relationship with the client is created and ends when that business relationship is terminated. Note, in particular, the words, 'throughout the course of'.

143. The term is not intended to determine which transactions are to be monitored. The transactions to be monitored are intended to be determined by the stated purpose for which the monitoring is to be conducted, which is, 'to ensure that transactions being conducted are consistent with the [FSP's] knowledge of the customer, the customer's business and risk profile…'

144. The Authority is correct when it states in, its response to Management's comments, that regulation 12(1)(e) makes no exception for TCSPs.

145. As regards the context, it is plain that the AMLRs are intended to be read and interpreted as a whole as part of one cohesive regulatory scheme. It could never have been intended that any single regulation, or worse, a sub-item of a sub-paragraph of a sub-regulation, to be read in isolation.

146. Within that context, it is a mandatory requirement of AMLR regulation 5 (viiia) that all FSPs shall maintain procedures for the ongoing monitoring of business relationship 'for purposes of preventing, countering and reporting money laundering, terrorist financing and proliferation financing.'

147. It is a further mandatory requirement of AMLR regulation 8, which imposes the obligation for FSPs to apply the risk-based approach, that FSPs shall take steps appropriate to the nature and size of the business to identify, assess and understand its money laundering and terrorist financing risks in relation to its customer, the country or geographic area in which the customer operates, the products, services and transactions of the FSP, and the delivery channels of the FSP.

148. Regulation 8(2) requires the FSP, among other requirements: to document the risk assessment; consider all relevant risk factors before determining the overall level of risk and appropriate level and type of mitigation to be applied; implement policies, controls and procedures to enable the FSP to manage and mitigate the risks identified by the country or the FSP; and monitor the controls implemented and enhance the controls where necessary.

149. AMLR regulation 11 requires that FSPs shall undertake CDD, not only when establishing a business relationship, but also, among others: when there is a suspicion of money laundering or terrorist financing; or when the FSP has doubts about the veracity or adequacy of previously obtained customer identification data.

150. Regulation 17A creates the obligation on the FSP to apply customer due diligence requirements to existing customers on the basis of materiality and risk, and conduct due diligence at appropriate times, taking into account whether and when the customer due diligence measures have been previously undertaken and the adequacy of the date obtained.

151. It is further, a mandatory requirement of regulation 31(1)(b) that an FSP shall keep for at least five years following the termination of the business relationship, among others, account files and results of any analysis undertaken, and of regulation 31(1)(c), a record containing details of all transactions undertaken by the FSP which would be sufficient to

permit reconstruction of individual transactions to provide evidence for the prosecution of criminal activity.

152. The requirement at regulation 12(1)(e)(i) can only make sense if read in the context of all of regulation 12, all of Part IV, as well as Parts II and III, V and VI, including in particular, regulations 5, 8, 11, 17A and 31 referred to above.

153. It would be a manifestly absurd result of the interpretation of regulation 12(1)(e)(i) if the effect of that interpretation is that the FSP's risk assessment under regulation 8 should be made solely based on the transactions that the customer proposes to undertake with the FSP, without reference to the nature and purpose of the client's underlying business which is being facilitated by the FSP's services. That would be clearly insufficient to allow the FSP to understand the customer, the customer's business and thereby to assign an appropriate risk profile based on the relevant money laundering risks identified in accordance with regulation 8.

154. It would also be a manifestly absurd result of the interpretation of AMLR regulation 12(1)(d) if the effect of that interpretation is that the only aspect of the nature and purpose of a business relationship with a client which the FSP is required to understand is that relating to the business transaction between the FSP and the client, without reference to the underlying business of the client that the FSP's service is being required to facilitate.

155. The court should seek to avoid a statutory construction that produces a result which is absurd, meaning one which is anomalous, illogical futile or pointless: Bennion, Section 13.1."

112. The following aspects of the above submissions were easy to accept but in my judgment did not directly engage with the interpretation of Regulation 12 (e) (i):

(a) it would be absurd if the risk assessment under Regulation 8 did not take into account the client's underlying business. There was no material dispute that in carrying out a risk assessment, some understanding of the underlying client business had to be acquired;

(b) it would be absurd if understanding the nature of the business relationship under Regulation 12 (1) (d) did not require an understanding of the client's underlying business. It was common ground that some information had to be obtained about the underlying business under Regulation 12 (1) (d).

Findings on Issue 3

113. The extent to which the Defendant's written and oral submissions devoted far more time to articulating the wider statutory context rather than the actual words of Regulation 12 (1) (e), it seemed to me, betrayed the difficulties that the express terms of the Regulation presented for the Defendant's case. An important clarification of the Defendant's position on the scope of the monitoring obligation was made when the Defendant's counsel argued on the penultimate day of the hearing that "transactions" meant transactions facilitated by the business relationship. I entirely accept this submission. When forced to confront the actual language of the relevant statutory provision in oral argument on the final day of the hearing, Mr Robinson KC was compelled to advance what appeared to me to be an unarguable proposition: "*business relationship*" means the customer's business:

> "*12. A person carrying out relevant financial business shall –*
> *…*
> *(e) conduct ongoing due diligence on a business relationship including –*
>
> > *(i) scrutinising transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile, including where necessary, the customer's source of funds…*"

114. The Defendant's counsel was right to submit that "*business relationship*" is defined by Regulation 2 in very broad terms:

> "*'business relationship' means any arrangement between two or more persons where —*
> *(a) the purpose of the arrangement is to facilitate the carrying out of transactions between the persons concerned on a frequent, habitual or regular basis; and*
> *(b) the total amount of any payment or payments to be made by any person to any other in the course of that arrangement is not known or capable of being ascertained at the time the arrangement is made.*"

115. It is clear from subsequent provisions, however, that the breadth of that language is designed to ensure that service providers who ought to be caught in the regulatory net are not unwittingly let

off the regulatory hook. The term is designed to prevent FSPs from being able to contend that they are not subject to the AML regime because the form of business they are engaged in is not regulated at all. The draftsman of the AMLRs consistently uses the term "*business relationship*" to describe a relationship between an FSP and another person. For instance:

(a) Regulation 5 (" *Systems and training to prevent money laundering*") provides that a "*person carrying out relevant financial business shall not, in the course of the relevant financial business carried out by the person in or from the Islands, form a business relationship, or carry out a one-off transaction, with or for another person unless that person*…", explicitly using the term "business relationship" in the context of an FSP and another person;

(b) Regulation 11 ("*When customer due diligence is required*") provides that a "*person carrying out relevant financial business shall undertake customer due diligence measures when —(a) establishing a business relationshi*p…", again explicitly using the term "business relationship" in the context of an FSP and another person;

(c) Regulation 15 ("*Verification of identity of customer and beneficial owner*") provides: "*(1) A person carrying out relevant financial business shall verify the identity of the customer and beneficial owner before or during the course of establishing a business relationship or conducting transactions for one-off customers*", again explicitly using the term "business relationship" in the context of an FSP and another person again explicitly using the term "business relationship" in the context of an FSP and another person;

(d) Regulation 30 (1) ("*Additional requirements-politically exposed persons*") requires FSPs to "*(a) put in place risk management systems to determine whether a person or beneficial owner with whom that person has a business relationship is a politically exposed person, family member or close associate*", again explicitly using the term "business relationship" in the context of an FSP and another person;

(e) Regulation 31 (1) imposes record-keeping procedures on FSPs, *inter alia* "*(a) in relation to a business relationship that is formed or one-off transaction that is carried out*…", yet again explicitly using the term "business relationship" in the context of an FSP and another person.

116. Accepting the broad submission that the Regulation 12 obligations must be read in the wider context of the AMLRs as a whole, and without having to look beyond the local statutory scheme, it is difficult to see why the term "*business relationship*" should be given an entirely different meaning in Regulation 12 to the meaning clearly assigned elsewhere in the Regulations. In fact, it is impossible to make much sense of Regulation 12 at all if the term is not given the meaning it is obviously intended to bear. Regulation 12 (1) (a) for instance contrasts "*a customer in an established business relationship or a one-off transaction*", again explicitly using the term "business relationship" in the context of an FSP and another person. But more than this, in contrasting an "*established business relationship*" with a "*one-off transaction*", further clarity is provided by the way in which Regulation 2 defines each of those terms:

> "*'established business relationship' is a business relationship where a person providing a relevant financial service has obtained, under procedures maintained by that person in accordance with Part IV, satisfactory evidence of the identity of an applicant for business;…*
>
> *'one-off transaction' means any transaction other than a transaction carried out in the course of an established business relationship formed by a person carrying out relevant financial business*…"

117. This construction is entirely consistent with the Defendant's evidential case as to what FATF Recommendation 10 is all about. It is about imposing an obligation on FSPs to conduct CDD both when establishing "*business relations*" and in the course of a "*business relationship*". Bromfield 1 avers as follows:

> "*22. FATF Recommendation 10 addresses customer due diligence (CDD). This Recommendation is substantially replicated in AMLRs. Based on its importance to these proceedings, I will here set out Recommendation 10 in full. The added emphasis is mine.*
>
> *'Financial institutions should be required to undertake customer due diligence (CDD) measures when:*
>
> *i. establishing business relations;*
> *ii. carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000)14; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Recommendation 16;*

iii. there is a suspicion of money laundering or terrorist financing; or
iv. the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means. The CDD requirements to be taken are as follows:

(a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

(b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership structure of the customer.

(c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.

(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of the relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds…' "

118. The irresistible conclusion that the term "*business relationship*" in the AMLRs generally and in Regulation 12 (1) (e) (i) in particular means a relationship a FSP has with a customer does not mean that no CDD obligations can ever arise which require regard to be had to the customer's business activities. The statutory regime is far more elegant, flexible and nimble than that. Some provisions impose broad and somewhat fluid obligations (Regulation 8, risk assessment); others impose obligations which are somewhat more prescriptive and prosaic (Regulation 21, record-keeping). Other Regulations contain a mixture of different regulatory imperatives, Regulation 12 being one of them. On-boarding CDD (e.g. Regulation 12 (d)) is obviously more fluid and nuanced, in my judgment, than "*ongoing due diligence*" under Regulation 12 (1) (e) (i), because that will

presumptively take place after an initial risk assessment has been carried out under Regulation 8 as read with Regulation 12 (1) (a)-(d). However, what is ultimately clear beyond reasonable doubt is that the mandated task of "*scrutinising transactions undertaken throughout the course of the business relationship*" means both:

(a) temporally, transactions taking place during the relevant business relationship between the FSP and its client; and

(b) relationally, transactions which fall within the ambit of that business relationship, because the central focus of the regulatory regime is to regulate (in collaboration with service providers) how FSPs conduct their business with their clients.

119. It follows that the findings relating to Issue 3 in the 2020 MCSL Final Report (which were based on the premise that Regulation 12 (1) (e) imposed a duty on all FSPs to scrutinise their clients' transactions and that the content of this duty was not materially shaped or defined by reference to the nature of the business relationship between service provider and customer) are liable to be set aside. In reaching this conclusion, I accept Mr Robinson KC's submission that the Plaintiffs' proposition that CIMA was calling for the inspection of <u>all</u> third party transactions was a 'Straw Man' argument. Although the regulatory position was not as stark as that, in my judgment the statutory provision was misconstrued because properly understood the nature of the relationship between service provider and client is pivotal to a legally valid determination of what transactions must be monitored.

120. MCSL expressly argued during the inspection process, as recorded in the 'Management Comments' section of this part of the 2020 MCSL Final Report, that the statutory duty "*does not extend to transactions carried out by a customer with other parties of which the Licensee cannot be aware*" and explained the peculiar non-transactional nature of the business relationships formed by registered office providers. The Inspection response was: "*The AMLR does not grant exemptions for trust and corporate service providers as it relates to monitoring transactions / activities undertaken throughout the course of the client business relationship.*" This response was entirely accurate in a narrow sense, because the Regulation 12 (e) (i) obligations apply to all FSPs without exception. But the regulatory conclusion implicitly, if not explicitly, rejected the valid legal argument that what compliance was required would vary according to the nature of the relevant business relationship. Subject to this important qualification, the Defendant was in general principle terms quite correct to conclude in the 2020 MCSL Final Report:

> "…*The Licensee's aim should be to ensure the client transactions / activities are consistent with the Licensee's knowledge of the client, the client risk assessment, and the purpose and intended nature of the business relationship…*"

121. In the course of oral argument, neither counsel was able to formulate what I consider to be a satisfactory formulation of what transactions should be scrutinised in the context of non-transactional business relationship. Neither can I, after considerable rumination. This difficulty in my judgment arises because the statutory scheme is not designed to produce neat, formulaic answers, applicable to every conceivable scenario, as to how CDD obligations are to be carried out applying a risk-based approach. However, I accept the Defendant's posited view that a registered office provider cannot, in effect, simply cover its eyes and trust that regulated persons in other entities with greater visibility of underlying transactions will identify unusual transactions. I also accept as a matter of legal principle that if understanding the nature and purpose of the business relationship requires some regard to be had to the underlying business of the client under Regulation 12 (1) (d), the same principle must by analogy potentially apply in the Regulation 12 (1) (e) (i) context, albeit with significant modifications.

122. The requirement will undoubtedly apply to a far lesser extent in the case of the more passive service provider than for a more transactionally active one. How to monitor transactions and be alert to any unusual business trends is a very context-specific question to which there are no black or white answers. Front and centre must be, of course, the risk-based approach; so that with some clients next to nothing might be required on the part of a bare registered office provider as regards low-risk clients, and more would be required as the risk rating increases. The sort of procedures that might be required could possibly include the following (which may well already reflect existing practice):

(a) a contractual requirement for clients to notify the registered office provider of any material changes in business activities;

(b) arrangements with other service providers to share information about CDD concerns linked to, *inter alia*, unusual transactions[8];

[8] Assuming, of course, that CDD obligations override standard client confidentiality obligations.

(c) in carrying out risk assessments taking into account the extent to which it is reasonable to rely on other third-party service providers who have more visibility of the client's third party transactions to monitor them;

(d) in relation to high-risk clients, conducting periodic high level reviews of the documents filed with a view to identifying any obvious alarm bells.

123. These are extremely tentative suggestions intended to stimulate further regulatory debate between the public and private parties concerned. It is ultimately for FSPs who understand their business to develop bespoke CDD solutions for their peculiar business relationships and for the Authority and other designated statutory regulators to stress-test those solutions applying a suitably flexible-yet firm approach.

Alternative findings on Issue 3

124. I was explicitly invited by the Plaintiffs' counsel to deal with their alternative case even if they succeeded on the primary limb of their case in relation to Issue 3. MCSL's alternative case was that the findings should be set aside on the grounds that the specific files said to be deficient were not adequately identified. The evidence as to precisely what files were identified, and when, was somewhat unclear and not fully addressed in oral argument, but those matters are not ultimately dispositive. I would, if required to dispose of Issue 3 on the basis of the alternative case, decline to quash the relevant findings on the grounds of the principle in *R (Anufrijeva)-v- Home Secretary* [2004] 1 AC 604. The competing arguments can be summarised shortly.

125. The Plaintiffs' counsel submitted in their Skeleton Argument:

> "*104. It is well established that 'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system.' (Anufrijeva [26]; R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245 at [35]; see also Craies, ¶19.1.23.*
>
> *105. CIMA says that it is entitled to make systemic findings of breach, on the basis of which it imposes Requirements, without identifying any files in which those breaches occurred.*

This is contrary to the principles outlined above. It robs regulated persons – in this case the Plaintiffs – of the ability to evaluate those files and identify whether it accepts, or does not accept, that the alleged breaches had been committed, contrary to the rule of law.

106. CIMA offers three answers to this argument:

106.1. First, the principle in Anufrijeva is concerned only with 'notice' and notice was given: 'No issue as to notice arises in this case.' [CB/B/64] This misunderstands the case against CIMA. The Plaintiffs do complain of a lack of notice because – in the absence of any identification of the client files and the reasons why they were said to disclose a breach – the Plaintiffs were unable properly to respond to CIMA's position.

106.2. Second, CIMA says the breaches were systemic and it was not necessary to identify any files at all. This illustrates the extreme nature of CIMA's position. Indeed, it is particularly striking in a context where breaches of the statutory regime might give rise to criminal sanctions. CIMA's position empties a public authority's obligation to provide a prospective Plaintiff with an adequate opportunity to make an informed response of all meaning [CB/B/64].

106.3. Third, any unfairness is now remedied because the remaining ten files were identified in the response to the PAP Letter. But in the present case the failure to identify the files at the time of the draft 2020 Draft and/or Final Reports deprived the Plaintiffs of the opportunity to make representations on those files during the 2020 Inspections and when responding to the 2020 Draft Reports, in breach of principles of natural justice.

106.4. Fourth, CIMA has not taken any enforcement steps so the issue is said to be irrelevant to this judicial review claim [CB/B/65]. The absence of enforcement is not a sufficient basis to justify a failure to comply with the duty to give notice and provide reasons in relation to a decision that amounts, in substance, to a finding of breach of the criminal law.

107. In conclusion, this issue of law is a matter of considerable importance. It concerns the propriety of CIMA's approach to the exercise of its powers and the extent of its obligation to give notice and provide reasons for its decisions. CIMA's approach is an

affront to basic notions of procedural fairness; the Plaintiffs seek an appropriate declaration and quashing orders in relation to the relevant Findings. [Emphasis added]

126. The Defendant's counsel submitted in their Skeleton Argument:

"*177. The Authority's challenged Finding and Requirement in relation to regulation 12(1)(e)(i) cannot be vitiated on the basis of the principle in R (Anufrijeva) v Home Secretary [2004] 1 AC 604 (Anufrijeva) for the following reasons:*

178. First, the principle in Anufrijeva does not apply to the substantive validity of a decision. The principle applies to the date on which the decision takes effect for the purpose of any consequential actions based on the decision. The best formulation of the principle in Anufrijeva is to be found in the following statement of Lord Steyn at para. 26 of the judgment –

'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.'

179. Anufrijeva therefore concerns notice and effective date. That much is also clear from the facts and issues in the case. Applied to the facts of this case, it can mean no more than that the Authority's Final Report became effective on the date notice was provided to MCSL. No issue as to notice arises in this case.

180. Second, the Authority's challenged Finding and Requirements are not specific to any particular client file or files. They relate to systemic failures in MCSL's processes for ongoing monitoring and periodic review. The Authority's conclusion on this Finding at para. 5.2.29 does not identify any specific file or client. The stated basis of the Authority's finding of a breach of the regulation is that MCSL 'has not provided sufficient evidence to demonstrate that it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile…'

181. It is clear from reading the MCSL Final Report that the Authority identified four of the files merely to illustrate some of the failures identified by the Authority, whilst making clear, that its findings were based on failures identified in 14 files. The Authority's Findings and Requirement would have been no less valid if the Authority had identified none of the client files.

182. Third, there was no procedural unfairness or any other prejudice to MCSL by the Authority failing to identify all fourteen (14) client files in the Final Report. The identity of the client files is irrelevant to the Findings and Requirement and therefore irrelevant to these judicial review proceedings.

183. The Authority's Findings were made following the receipt of MCSL's responses to questions raised by the Authority in the Discrepancy List which identified all the clients and client files. MCSL's responses to the questions relating to ongoing monitoring made clear its position that it does not consider scrutiny of its clients' third party transactions necessary. The identity of the client files is irrelevant to that position.

184. Further, the Authority provided MCSL with a copy of the Draft Report and gave MCSL an opportunity to comment. MCSL raised no issue in its comments to the Draft Report regarding the Authority's failure to identify the additional ten (10) client files and raised no issue to which the identity of the client files would be relevant." [Emphasis added]

127. In finding above that the Issue 3 findings are liable to be quashed because of an error of law in construing Regulation 12 (1) (e) (i) in relation to the ongoing monitoring obligations, I explicitly accepted that the relevant findings adopted an incorrect general regulatory approach. I also implicitly found that the regulatory conflict focussed not on an analysis of flaws in specific files, but rather that there was a dispute as to whether or not a registered service provider had to scrutinise underlying transactions of which it was unaware. The Defendant's submissions on the Plaintiffs' alternative case must clearly be accepted on the prosaic basis that the impugned findings were systemic ones and the approach adopted in the circumstances by CIMA was an entirely fair one.

128. MCSL was given notice of the administrative finding by way of the draft Report and invited to comment on it. It did not say: "We cannot comment on these findings because you have failed to identify the files you contend are non-compliant." It understood the finding to be a systemic one,

and provided a systemic response. Mr Bowen KC in oral argument referred, *inter alia*, to the following key passages in Lord Steyn's at page 621 of *Anufrijeva*:

> "*26. The arguments for the Home Secretary ignore fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: Raymond v Honey [1983] 1 AC 1, 10G per Lord Wilberforce; R v Secretary of State for the Home Department, Ex p Leech, [1994] QB 198, 209D; R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115...*[9]
>
> *28. This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category. If this analysis is right, it also engages the principle of construction explained by Lord Hoffmann in Simms.*"

129. I accept the submission of Mr Robinson KC that *R (Anufrijeva)-v- Home Secretary* [2004] 1 AC 604 is fundamentally a case about notice and that MCSL was given effective notice of the relevant Inspection findings. However, if required to decide this issue, I would not necessarily accept the proposition that the principle established in that case cannot provide a legal basis for invalidating a decision. The majority of the House of Lords clearly felt that a failure to give notice of a decision resulted in its invalidity or lacking any legal effect: see Lord Steyn (at paragraph 35), with whom Lord Hoffman entirely concurred, and Lord Scott (at paragraph 57). Lord Millett's disagreement on this point, in his concurring judgment (at paragraph 42) seems more technical than substantive:

[9] Paragraph 26 was cited with approval by Lord Dyson in *R (WL Congo)-v-Home Secretary* [2012] 1 AC 245 at paragraph 35, to which the Plaintiff's counsel also referred.

"*The presumption that notice of a decision must be given to the person adversely affected by it before it can have legal effect is a strong one. It cannot be lightly overturned. I do not subscribe to the view that the failure to notify the appellant of the decision invalidated it, but I have come to the conclusion that it could not properly be recorded so as to deprive her of her right to income support until it was communicated to her…*"

130. In the present case the relevant decision was not invalid for lack of proper notice of it, because the decision was systemic in nature and only referenced a limited sample of files for illustrative purposes. On the facts that constituted adequate notice; had adequate notice of any decision not been given, however, the decision would potentially have been liable to be quashed on the grounds of the *Anufrijeva* principle.

Findings: Issue 4 (MCSL and MFS)

131. Issue 4 relates to the following aspects of the 2020 MCSL Final Report (in relation to six low-risk files):

"*5.2.9 The Licensee is in breach of Part IV Regulation 12(1)(e)(i) of the AMLR and has not adhered to Part II section 4(A)(3)(4) of the AML Guidance Notes, for failing to adequately obtain supporting documentary evidence to establish the source of funds and/ or source of wealth for clients.*

Requirement (High Priority - MRIA):

5.2.10 The Authority requires that:
1) within three (3) months of receipt of the final inspection report, the Licensee take reasonable measures to establish the source of funds and/or source of wealth with the requisite supporting documentary evidence for prospective and existing clients, as necessary.

Management Comments
5.2.10.1 Part IV Regulation 12(1) (e)(i) requires the Licensee to 'conduct ongoing due diligence on a business relationship including scrutinising transactions undertaken throughout the course of the business relationship to ensure that transactions being

conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile, including where necessary, the customer's source of funds'. Note the requirement to ensure consistency against knowledge of source of funds is 'where necessary'. Should clients send large amounts of cash to the Licensee and ask the Licensee to pay those funds into bank accounts of entities being formed, prudence would suggest a need for source of funds to be verified. However, clients do not send any funds to the Licensee other than to settle the Licensee's bills (which may include government fees and charges) (which are typically for only hundreds of dollars or, including the annual fee, in the region of $2000), and as such there are no transactions that could be scrutinised where source of funds is a relevant factor. It is submitted that this part of the Regulation is most relevant to businesses carrying on relevant financial business where client's funds are being handled on a regular basis, e.g. banking…

5.2.10.3.3 'Source of Funds' (per the Glossary of the AML Guidance Notes) refers to the origin of the particular funds that will be used for the purposes of the business relationship or transaction (e.g. the amount being invested, deposited or remitted).

5.2.10.3.4. As noted above, in the context of company formation and ongoing provision or registered office services - the only funds remitted in the context of the business relationship are the payment of fees for the engagement of the Licensee to form an entity and provide a registered office address. We would submit that identifying source of funds is not necessary in the circumstances since there are no funds passing through the hands of the Licensee.

5.2.10.3.5. In addition, several of the clients (please refer to Appendix A to this letter) meet the criteria under Regulation 22 of the AMLRs. The Licensee has applied a risk-based approach and simplified due diligence measures for such clients, so there is no requirement (pursuant to Regulation 22) to obtain information documenting source of funds or wealth…

[Inspector's Response]

Upon review of the client documents and management's comments, to Appendix A, it does not appear that the relevant clients satisfy the criteria to qualify for simplified due diligence…

4.) Whilst the Authority appreciates that the Licensee does not carry on financial business where client's funds are being handled on a regular basis. The Authority· does note that as a Registered Office Service Provider, pursuant to the Section 59 (2B) of the Companies Law (2020 Revision) the Licensee should have access to its client's books of account.
Where Section 59 (2B) states that 'A company which keeps its books of account outside of the Islands shall, in the form and manner prescribed, provide to its registered office, annually or with such other frequency and within such time as may be prescribed, information regarding its books of account; and, if a company fails to comply with this subsection without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.' Where Section 59 (1) states that 'Every company shall cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices with respect to -

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place:
(b) all sales and purchases of goods by the company: and
(c) the assets and liabilities of the company.'

Where Section 59 (2) states that 'For the purposes of subsection (1), proper books of account shall not be deemed to be kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.'

The Authority notes that the Licensee can reasonably be expected to carry out review of the client's transactions, as their monitoring mechanisms may require, to establish the source of funds with the requisite supporting documentary evidence given the Licensee's access to the client's books of accounts which would provide a fair view of the state of the company's affairs. Moreover, where the Licensee were to determine the collection of

source of fund information is unnecessary it failed to provide documentary evidence to substantiate the same…" [Emphasis added]

132. CIMA confirmed its initial finding primarily by concluding that MCSL should have access to information about its clients' funds rather than engaging with any explicit analysis of what Regulation 12 (1) (e) (i) properly required in relation to source of funds. It explicitly rejected Management's view that Simplified CDD was appropriate and implicitly rejected the contentions that "source of funds" verification did not apply to comparatively modest periodic service provider fees, at least as regards low-risk clients. Although the Requirement ended with the words "*as necessary*", nothing in the response to Management's comments acknowledged the possibility that source of funds analysis might not need to be carried out in the registered office service provider low-risk client context.

133. The construction analysis here is closely linked to that just undertaken in relation to the ongoing monitoring of transactions requirement. The first limb of Regulation 12 (1) (e) (i) requires "*ongoing due diligence on a business relationship*" in the form of "*scrutinising transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the person's knowledge of the customer, the customer's business and risk profile*". The second extends that obligation to include "*where necessary, source of funds*" [Emphasis added]. Because of the significant qualifying words, which are echoed by the final words of the Requirement ("*as necessary*"), there is little room for serious dispute that the duty to conduct ongoing due diligence in relation to "source of funds" is more limited than the general duty to scrutinise "*transactions*".

134. It follows that having found that the Defendant misconstrued the broader limb of Regulation 12 (1) (e) (i) by failing have regard to the relevance of the type of service provided and the significance of risk levels to the scope of ongoing due diligence required, the same conclusion must be reached on Issue 4 on a more clear-cut basis. The relevant findings and requirement are accordingly quashed. As with Issue 3, it is obvious that a systemic decision was made so (a) no need to consider the Plaintiffs' alternative argument based on the *Anufrijeva* principle arises, and (b) the argument would fail if it did arise. That disposes of MCSL's application.

135. As regards MFS, the following findings and supporting observations were recorded in relation to this issue in its 2020 MFS Final Report linked to low-risk client files:

"*Conclusion:*

5.2.3 The Licensee is in breach of Part IV Regulation 12(1)(e)(i) of the AMLRs and has not adhered to Part II section 4(A)(3)(4) of the AML Guidance Notes, for failing to adequately obtain supporting documentary evidence to establish the source of funds and /or wealth for its client.

Requirement (High Priority – MRIA):

5.2.4.1.1 The Authority requires that: within three (3) months of receipt of the final inspection report, the Licensee take reasonable measures to establish the source of funds and/or source of wealth with the requisite supporting documentary evidence for new and existing clients, as necessary.

Management Comments

5.2.4.3.4 'Source of Funds" (per the Glossary of the AML Guidance Notes) refer to the origin of the particular funds that will be used for the purposes of the business relationship or transaction (e.g. the amount being invested, deposited or remitted). 5.2.4.3.4 'Source of Funds' (per the Glossary of the AML Guidance Notes) refer to the origin of the particular funds that will be used for the purposes of the business relationship or transaction (e.g. the amount being invested, deposited or remitted)…

5.2.4.3.7 The Licensee acknowledges that there may be circumstances (e.g. in enhanced risk circumstances) where it might expect to establish the source of funds and/or source of wealth for prospective and existing clients.

5.2.4.3.8 However, based on the examples that have been used as the basis of the Finding, the Licensee does not consider it to be in breach of the AMLRs or the AML Guidance Notes and therefore does not consider there to be any new measures that need to be actioned/remediated within the three (3) month period as stated in the Report…"

136. As in the case of MCSL, the Authority dismissed the Management Comments on the following express grounds: (a) simplified CDD was not available due to the country's National Risk Assessment ("NRA"); and (b) MFS could access source of wealth information under the Companies Act. Implicitly, the decision was further justified on the grounds that (c) the limited scope of services had no bearing on the scope of the obligation, and (d) the fact that the clients were

validly assessed as low-risk had no bearing on whether or not ongoing due diligence in relation to source of funds was required under Regulation 12 (1) (e) (i). 'Ground' (a) was not comprehensively challenged by the Plaintiffs[10] and ground (b) was not relied upon by the Defendant at the hearing. Accordingly, in light of the qualified terms in which the "source of funds" obligation is expressed and my findings in relation to Issue 3 about the relevance of the nature of the client relationship in the context of the more widely drafted first limb of this Regulation, it again seemed clear that these findings and the related requirement should be quashed.

137. Having found that the unqualified scrutinising of transactions obligations are shaped by risk-based contextual considerations depending on the nature of the client relationship (Issue 3), the same reasoning must apply with greater force to an obligation which is explicitly expressed in qualified terms. There is no material distinction as regards Issue 4 between the MCSL and MFS decisions.

The Plaintiffs' Submissions

138. The Plaintiffs' Skeleton Argument addressed various sub-issues relating to the source of funds and/or source of wealth issue, some narrow and one broad. The broad point was the following:

> "***(a) The issue***
>
> *117. Whether Reg. 12(1)(e)(i) AMLRs requires the person providing RFB to scrutinise transactions to establish the SOF of low-risk clients. The parties' positions are as follows:*
>
> *118. The Plaintiffs' position is that Reg. 12(1)(e)(i) AMLRs only requires SOF information to be obtained 'where necessary'. It will not be 'necessary' to obtain that information for low-risk clients; only where the person providing RFB has assessed, pursuant to a RBA, that the relevant client and/or transaction is high-risk is SOF information 'necessary' (the Plaintiffs' case: ¶5.2.10.1 of the 2020 MCSL Final Report; ¶5.2.4.1 of the 2020 MFS Final Report…*
>
> *(b) Submissions on Issue 2(iv)*

[10] It was submitted that the risks were overstated by the Defendant and that simplified CDD was indeed properly available. As the Plaintiffs also relied on a slightly lower threshold of 'low-risk', I do not propose to adjudicate either (1) the question of whether or not CDD was available, or (2) the errors of fact complained of by way of alternative argument.

120. The 2020 Final Reports found that the duty to scrutinise transactions for SOW applied to low-risk clients: above, ¶111.1; ¶5.2.8 (MCSL) [CB/C/8]; ¶5.2.2 (MFS) [CB/C/51]. CIMA appears to concede that this obligation does not apply in such cases: DGR, ¶72 [CB/B/70]. The Plaintiffs adopt their submissions on this issue in the ASG, ¶68 [CB/B/3/27] which they will develop if CIMA (now) contests this point. The relevant Findings and Requirements should be quashed on this ground also (MCSL Grounds 4 and 9 and MFS Grounds 3 and 7).

(c) CIMA's alternative case on Issue 2(iv)

121. CIMA's alternative case, at DGR ¶72, is that what CIMA in fact meant to say was that the Plaintiffs had failed to document their conclusion that the relevant clients were low-risk in accordance with Reg. 8 AMLRs.

122. CIMA's alternative case is wrong, in any event. Its alternative case hangs on two flawed premises:

124. Second, that the failure to 'document' SOF and/or SOW information is a breach of Reg. 12(1)(e)(i) AMLRs. This argument has no merit because:

124.1. The relevant breach is not a breach of Reg. 12 at all but a breach of the obligation in Reg. 8(2) AMLRs to document the relevant risk assessment: DGR ¶¶70-71 [CB/B/70]. But no such breach is identified in the 2020 Final Reports. CIMA cannot rely ex post facto on a breach of the AMLRs that is not identified in the 2020 Final Reports.

124.2. Failing that, CIMA must establish that Reg. 12(1)(e) AMLRs contains within it an implied duty to generate and retain documentary evidence for CIMA which is separate from the duties in Reg. 8(2)(a) AMLRs and the record-keeping duty in Reg. 31 AMLRs. However, that provision does not expressly impose a record-keeping duty or require a TCSP to retain and make available to CIMA documentary evidence of the RBA that it conducted: see White #6 ¶¶87-94 [CB/D/174] and Reply ¶17 [CB/B/88]). In the absence of an express duty such a duty cannot be implied given the existence of the specific duties in Reg. 8(2)(a) and Reg. 31 AMLRs and applying the principles of statutory interpretation

expressio unius exclusio alterius (specific mention of one thing indicates an intention to rule out others) and generalia specialibus non derogant (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case): Minister of Energy v Maharaj [2020] UKPC13, [56] [PAB/19/1182].

125. In conclusion, even on CIMA's revised case the relevant Findings and Requirement must be quashed on this additional ground…"

The Defendant's Submissions

139. The Defendant's Skeleton Argument advanced various arguments the most pertinent of which will be summarised here as they relate to the central question of statutory construction:

"*(2) Documentation of source of funds not necessary/Regulation 12(1)(e)(i) regarding source of funds not applicable to transactions over which FSPs have no 'Visibility'.*

(a) Source of funds documentation not necessary

202. The challenge to the Findings and Requirements on the basis that it is 'not necessary' for the Plaintiffs to collect source of funds information and documents from its clients is on the same basis as the challenge to the Authority's Finding and Requirement in relation to scrutiny of transactions. As stated above in relation to scrutiny of transactions, the challenge is based on a flawed interpretation of regulation 12(1)(e)(i) when read in its full legal, social and historical context.

203. The requirement under regulation 12(1)(e)(i), interpreted within this context, is that the FSP should monitor the transactions of the client to ensure that those transactions are consistent with the FSP's knowledge and understanding of the client and the business relationship, acquired following its risk assessment, carried out in relation to the client in accordance with AMLR regulation 8. A client's source of funds is but one of the elements of a client's business and risk profile which the FSP must have assessed and understood as part of its risk assessment.

204. As stated above in relation to scrutiny of transactions, regulation 8(1) requires the FSP to consider and understand its money laundering and terrorist financing risks in

relation to: the client or applicant for business; the country or geographic area of operation; the products, services and transactions being provided; and the delivery channels of the FSP. This risk assessment should be documented in accordance with regulation 8(2). In accordance with regulation 12(1)(d), the FSP should collect sufficient information to enable it to understand the purpose and intended nature of the business relationship and, in accordance with regulation 12(1)(e), the FSP should monitor the business relationship on an ongoing basis to ensure that transactions undertaken by the client for the duration of its business relationship are consistent with the FSP's risk assessment carried out in accordance with regulation 8, and the FSP's understanding of the nature and purpose of the business relationship in accordance with regulation 12(1)(d).

205. It is only open to an FSP to determine that collection of information regarding source of funds is 'not necessary' if the FSP can demonstrate to the Authority, by documentary evidence, the basis for such a determination, arising from the FSP's risk assessment of the client and the business relationship. It is not open to an FSP to declare a client to be 'Low Risk', without being able to demonstrate the basis of that determination in accordance with Part V of the AMLRs.

206. In any event, the term 'where necessary', within the context of the AMLRs, the Guidance Notes, the FATF Requirements and Methodologies and the FATF TCSP Guidance, cannot properly be interpreted such as to exclude an entire category of clients regardless of their risk classification. Every category of clients, including those rated 'low risk' must provide information on source of funds. The term refers to the need to obtain additional source of funds information where it is necessary to understand a transaction for the purposes of ongoing monitoring, such as where a transaction is unusual for a customer.

207. The collection of information on source of funds is highly relevant to a number of the matters which, in accordance with Part II, 4 H of the Guidance Notes, the FSP is required to monitor. For example, GN Part II, 4 H, para. 5 provides the following examples of triggering events which may require an FSP to update its CDD on a client:

(1) material changes to the customer risk profile or changes to the way that the account usually operates;

(2) where it comes to the attention of the FSP that it lacks sufficient or significant information on that particular customer;
(3) where a significant transaction takes place;
(4) where there is a significant change in customer documentation standards;
(5) significant changes in the business relationship.

208. The Plaintiffs argue at para 68 of the Arguments in Support of the Grounds and at para 111.3 of the Plaintiffs' skeleton argument, that the only 'transactions undertaken in the course of the business relationship', in the case of a registered office provider, would be the funds, amounting to approximately US$2,000, received for the payment of registration and filing fees. Accordingly, as the Plaintiff's Management argued during the on-site inspections, 'there are no transactions that could be scrutinised where source of funds is a relevant factor.' That argument is highly flawed.

209. First, that argument is based on a flawed interpretation of the term 'business relationship'. That is not the interpretation that would arise after due consideration of the term 'business relationship' read in its full and proper context. That is not the way the term is used in the AMLRs, the Guidance Notes, the FATF 40 Recommendations, including the Interpretative Notes, and the FATF TCSP Guidance.

210. The term 'business relationship' properly construed applies not only to the contract for services between the FSP and the client but encompasses the purpose for which the client is engaging the service by the FSP, including the underlying business purpose of the client which the FSP's service would facilitate. Within the context in which the term is used, the interpretation propounded by the Plaintiffs is manifestly absurd.

211. Second, such an interpretation would not be consistent with the purpose for which the AMLRs were enacted, specifically as they relate to TCSPs, regarded as the 'gatekeepers for the financial services industry', which have a distinct role to play to prevent the Cayman Islands from being chosen by financial criminals as the weak link in the international AML/CFT chain. This is in light of the multiple purposes for which a company registered in the Cayman Islands may be used overseas, with financial criminals potentially using the fact of registration in the Cayman Islands as cover for activities undertaken elsewhere. TCSPs are very well placed to assist law enforcement in the detection of such activities.118

212. Thirdly, the fact that a client pays small sums does not, by itself, mean that the client is not engaged in financial crime. Some financial crimes, such as proliferation financing, may well involve the payment of small sums. For example, typologies of proliferation financing include being involved in dual use goods, using complicated structures and the business activities not matching the business profile. These indicators, would not be identified if the Plaintiffs' interpretation were correct.

213. Fourthly, if the Plaintiffs do not monitor the payment of small amounts they will have no ability to discern a change in the pattern of payments. A change in pattern of payments is expressly one of the activities of a company which TCSPs are required to monitor in order to detect possible financial crime.

(b) Regulation 12(1)(e)(i) regarding source of funds not applicable to transactions over which FSPs have no 'Visibility'.

214. The fundamental problem with this argument is that it is based on a brazen misrepresentation of the Authority's Findings and Requirements. The stated basis of the argument, at para 111.1 of the Plaintiffs' skeleton argument, is that the Authority's requirement that the Plaintiffs 'take reasonable measures to establish the source of funds and/or source of wealth with the requisite supporting documents' was not qualified and can only be read as 'applying to all clients (low and high risk) and all transactions entered into by the client, whether the Plaintiffs had Visibility over them or not.'

215. No reasonable reading of the Authority's Requirement can lead to the meaning that the Plaintiffs ascribe to the Authority's Requirement. A few points can readily be noted regarding the Plaintiffs' interpretation…

225. The issue in relation to source of funds is whether the Authority's Findings and Requirements as stated in the Final Reports are lawful. The Final Reports are the decisions which are the subject of challenge in these judicial review proceedings. The Plaintiffs' arguments at paras 117 to 124 of their skeleton argument are based on distortions of the Authority's Findings and of the contents of the Authority's Grounds of Resistance. It is not possible to respond to these arguments except to say that the Authority has not changed its

Findings and Requirements in the Final Reports in relation to source of funds. Those Findings and Requirements are lawful upon proper interpretation of the AMLRs and the Guidance Notes.

226. The Authority made factual findings relating to clients designated by the Plaintiffs as 'low risk'. Whether those clients are properly designated as low risk depends on the documentary evidence provided by the licensee of the risk assessment which was undertaken. Adequate evidence would include evidence as to source of funds. The Authority found that no such evidence was seen on multiple MCSL client files and two MFS client files.

227. Notwithstanding the designation of the clients as 'low risk', the Authority found no evidence that the clients met the requirements of regulation 22, such as to qualify for simplified due diligence. Neither was there any evidence that the Plaintiffs had taken into consideration the National Risk Assessment, which is a requirement under regulation 22.

228. Based on the documentary evidence made available to the Authority, there was, among the files identified by the Authority, no properly designated low risk client in accordance with the regulations. The Plaintiffs' arguments in their skeleton argument are therefore based on a hypothetical 'low risk' client and do not relate to the actual Findings made by the Authority during the on-site inspection…" [Emphasis added]

Findings on Issue 4

140. It was difficult to extract from the various assertions what each party's actual case is on the statutory construction issue which was formulated in agreed form as Issue 4. However, the Defendant's counsel correctly pointed out that the Court can decide for itself based on the 2020 Final Reports what the impugned decision was. The blended approach that I have adopted is to define the decision by reference to the initial findings reached by the Authority, Management's comments and the reasons given by the Authority for rejecting the points raised by Management of the relevant licensee. Building on the preliminary views set out above about the nature of the impugned decisions against each of the Plaintiffs, I find that the key elements of those decisions were as follows:

(a) the primary administrative finding is "*failing to adequately obtain supporting documentary evidence to establish the source of funds and/ or source of wealth for clients*". That implies that Regulation 12 (1) (e) (i) imposes a general obligation to establish the source of funds in the context of ongoing CDD. A failure to follow 4 (A) (3) (4) of the AML Guidance Notes is also recorded[11];

(b) in light of the objections raised by Management in each case, the decisions were expanded to include the following additional findings:

(1) simplified CDD was unavailable;

(2) neither the nature of services provided nor the risk level of the clients was relevant to the question of the duty to conduct due diligence on source of funds because the Plaintiffs could access information on the underlying transactions; and

(3) the words "*where necessary*" had no material impact on the generality of the ongoing due diligence obligation.

141. For the same reasons set out above in relation to Issue 3, the decision must be quashed because it is based on an overly prescriptive and rigid construction of a provision which is intended to be sufficiently malleable as to be adapted to the particular circumstances of each "*business relationship*". What Regulation 12 (1) (e) (i) requires in terms of ongoing monitoring in relation to source of funds "*if necessary*" cannot be reduced to any simple formula. Bearing in mind that it is common ground that the AMLRs are essentially governed by the risk-based approach, however, the Regulation can only mean that ongoing monitoring in relation to source of funds is required if the risk factors inherent in a particular business relationship make such due diligence enquiries "necessary". The relevant decisions (i.e. findings and Requirement) must accordingly be quashed.[12]

[11] The Guidance Notes essentially restate the terms of Regulation 12(1) (e) (i).
[12] I see no need to decide the Plaintiffs' alternative factual complaint that the admittedly invalid "source of wealth" findings are not severable from the "source of funds" decision. If required to decide this issue, I would need to hear further argument and possibly receive further evidence.

Findings: Issue 5 (MCSL)

142. The findings of a breach of Regulation 12 (1) (e) (ii) are parasitic on findings of a breach of Regulation 12 (1) (e) (i) which I have held (in disposing of Issues 3 and 4 above) should be quashed. It follows that these findings must be quashed for the same reasons, although had the only challenge been based on the *Anufrijeva* principle it would have failed, for the reasons I have already given at paragraphs 124-130, above. The 2020 MCSL Final Report critically concluded:

> "*5.2.29 The Licensee is in breach of Part IV Regulation 12(l)(e)(i) of the AMLR, as it has not provided sufficient evidence to demonstrate that it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds.*
>
> *5.2.30 The Licensee is further in breach of Part IV Regulation 12(1)(e)(ii) of the AMLR, as it has not ensured that documents, data or information collected under the client due diligence process is kept current and relevant to client due diligence, by reviewing existing records at appropriate times, taking into consideration whether and when client due diligence measures have been previously undertaken, particularly for higher risk categories of clients.*
>
> *Requirements (High Priority – MRIA):*
>
> *5.2.31 The Authority requires that:*
> *1) within three (3) months of receipt of the final inspection report, the Licensee maintain documentation to evidence it has reviewed transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with the Licensee's knowledge of the client, the client's business and risk profile, including where necessary, the client's source of funds in accordance with Part IV Regulation 12(l)(e)(i) of the AMLR; and*
>
> *2) within three (3) months of receipt of the final inspection report, the Licensee ensure documents, data or information collected under the client due diligence process is kept current and relevant to client due diligence, by undertaking periodic reviews within the*

timeframe determined by the respective risk rating applied in accordance with Part IV Regulation 12(1)(e)(ii) of the AMLR…"

143. The main Management response was that no monitoring was required because of the nature of the business relationship, an argument which was summarily rejected on the grounds that the nature of the relationship was irrelevant. It is of course possible that applying a correct statutory construction and factual analysis it might ultimately be concluded that, in particular as regards high-risk clients, ongoing due diligence and documentation of those steps was indeed required. However, as the correct legal analysis was not carried out, whether or not any such findings might be justified cannot presently be ascertained.

Findings: Issue 6 (MCSL and MFS)

144. Issue 6 was described in the List of Agreed Issues as follows:

"*Whether the Findings (MCSL Grounds 1-8, MFS Grounds 1-6) justify the Requirements and are rational and/or necessary and/or proportionate and/or compliant with section 9 and/or section 19 of the Bill of Rights in Schedule 2, Part I of the Cayman Islands Constitution Order 2009 (the 'Constitution') and/or the principle in section 6(3)(d) of the Monetary Authority Act (2020 Revision) (the 'MAA') and/or section 5 and Schedule 1, Part 1, paragraph 3 of the Data Protection Act (2017 Revision) (the 'DPA'), or whether the Requirements, in whole or in part, are irrational and/or unnecessary and/or disproportionate and/or non-compliant with the Constitution, MAA or DPA.*"

145. The Plaintiffs' disproportionality grounds were alternative fall-back arguments relied upon if their primary grounds were rejected. Because of the conviction with which I have resolved Issues 1-5 in the Plaintiffs' favour, I do not propose to deal with Issue 6. However, if I was required to decide the MCSL application on the basis of Issue 6, I would:

(a) summarily dismiss the argument that the impugned decisions contravened the Bill of Rights; and

(b) summarily accept the argument that requiring service providers with over 40,000 clients to introduce systemic changes within 3 months was disproportionate and/or unreasonable.

146. One submission made on behalf of the Defendant in relation to the proportionality point merits reproduction here:

> "*100. It is part of the Authority's duties under section 6 of the MAA to regulate and supervise financial services carried on in or from the Islands and to monitor compliance with the Anti-Money Laundering Regulations. The Authority would be derelict in those duties if it were to have identified breaches of the regulations and not require remediation of those breaches.*
>
> *101. To the contrary, failure by the Authority to require remediation of breaches of the AMLRs found by the Authority is likely to place the Cayman Islands at risk of receiving a poor rating on its mutual evaluation by CFATF. Such a failure will likely be regarded as detrimental to the global fight against ML/TF/PF, especially give the relative size and role played by the Cayman Islands in the international financial system.*"

147. To my mind a genuine and well-founded concern about the importance of strengthening the Cayman Islands financial system underpins the rigorous approach that CIMA has adopted to carrying out its statutory duties in relation to one of the largest service providers in the jurisdiction. But for legitimate concerns about the jurisdiction's rating status, the Authority might well have felt able to adopt a more flexible approach to the disagreements which arose in the course of the inspection process. In my judgment flexibility ought ideally to be the norm because the statutory framework is clearly based on the notion that FSPs will primarily regulate themselves on an individual basis and/or through the Supervisory Authorities of DNFBPs designated under Regulation 55B of the AMLRs, with enforcement action a last resort. The Guidance Notes themselves clearly suggest that FSPs are expected to exercise their own judgment in relation to both risk assessment and CDD measures deployed. For instance Section B provides:

> "*6. FSPs should make their own determination as to the risk weights to be given to the individual risk factors or combination of risk factors. When weighing risk factors, FSPs should take into consideration the relevance of different risk factors in the context of a particular customer relationship or occasional transaction. Examples of the application of various factors to the different categories that may result in high and low risk classifications are provided below.*
>
> *7. FSPs may differentiate the extent of CDD measures, depending on the type and level of risk for the various risk factors. For example, in a particular situation, they could apply*

> *normal CDD for customer acceptance measures, but enhanced CDD for ongoing monitoring, or vice versa. Similarly, allowing a high-risk customer to acquire a low risk product or service on the basis of a verification standard that is appropriate to that low risk product or service, can lead to a requirement for further verification requirements, particularly if the customer wishes subsequently to acquire a higher risk product or service.*
>
> *8. FSPs should document their risk assessment in order to be able to demonstrate their allocation of compliance resources, keep these assessments up to date, and have appropriate mechanisms to provide risk assessment information to the relevant Supervisory Authority (and competent authorities and self-regulatory bodies ("SRBs"), if required). The nature and extent of any assessment of ML/TF risks should be appropriate to the nature and size of the business.*" [Emphasis added]

148. Even the CIMA Regulatory Handbook states (at page 147):

> "*Under the RBA, where higher risks have been identified, FSPs are required to take enhanced measures to manage and mitigate those risks; and correspondingly, where the risks are lower, simplified measures may be permitted. However, simplified measures are not permitted whenever there is a suspicion of ML/TF. In the case of some very high-risk situations or situations which are outside the firm's risk tolerance, the FSP may decide not to take on the applicant, or to exit from the relationship.*" [Emphasis added]

149. It was in a general sense clearly proportionate for the Authority to adopt the rigorous approach to the inspection process which it clearly did because the Plaintiffs run large businesses with over 40,000 clients. The Court is in no position to reliably evaluate the impact on risk factors of the high percentage of 'blue-chip' clients upon which the Plaintiffs relied. As noted above, requiring systemic reforms to be implemented in relation to all such clients within 3 months is another matter. Absent genuine disagreements about statutory interpretation, which arose here, the regulatory focus might have been expected to have been on the documenting duties in relation to risk assessments under Regulation 8(2) (a) and in relation to customer due diligence under Regulation 31 (1), which did not form the basis of the impugned decisions in the present case.

150. That said, it is important to note that the 2020 Final Reports did reach some findings and impose Requirements which were not challenged. The Plaintiffs' AML systems are clearly robust but not

flawless, just as the regulatory actions of the Authority are robust and not flawless in truly trying regulatory times.

Findings: Issue 7 (MCLS and MFS)

Preliminary

151. Issue 7 was described in the List of Agreed Issues as follows:

> "*Whether CIMA had power to make any of the Requirements under section 6(2)(f) of the MAA or otherwise.*"

152. This ground of judicial review raised a discrete issue of statutory interpretation which fell to be determined primarily by a comparatively narrow analysis of CIMA's governing statute. However, in my judgment the most important general legal consideration to be brought to bear in deciding whether or not the Requirements were in excess of the Authority's statutory powers was their non-coercive and non-penal legal character. In the course of oral argument, I expressed the provisional view that the Requirements were a bespoke regulatory tool designed to assist FSPs to comply with their CDD obligations as opposed to enforcement action.

The Plaintiffs' Submissions

153. In the Plaintiffs' Skeleton Argument, the following main arguments were advanced in relation to the power to make the Requirements:

> "*177. The Plaintiffs' case is that, while CIMA can request or advise an FSP to take remedial action, it has no power to impose Requirements that are enforceable in law. Such a power would need to be set out in primary legislation, as it is (for example) under s 18 BTCA: ASG ¶¶109-123; Amendment to ASG, ¶1.*
>
> *178. CIMA's case is that it has an express power to issue Requirements under the Regulatory Handbook because that was issued pursuant to express powers contained in s 48(1) MAA. Alternatively, such a power arises as an incidence of its 'ancillary powers' conferred by s 6(2)(f) MAA function in relation to fulfil the functions set out in s 6(2)(e) MAA, namely to 'to comply with this and any other law, including any regulations or directions made or given thereunder': DGR ¶¶113-14.*

(3). Submissions on Issue 6

179. The Plaintiffs' case is as follows.

180. CIMA is a creature of statute; it only enjoys such powers as are expressly conferred on it or which arise by necessary implication (Commissioner of the Independent Commission of Investigations v Police Federation (Jamaica) [2020] UKPC 11, [15]; see further Fordham, Judicial Review Handbook, 7th ed., ¶6.1.1 [PAB/25/1387]). The test of necessary implication is an exacting one: see above, ¶ 77. It is not enough for CIMA to say that it would have been sensible to give it the power to impose Requirements; it is obliged to show that the power must follow from the express words of the legislation.

181. CIMA already has an express power to 'require' a person licensed to conduct RFB to 'take such steps' as CIMA 'considers necessary' whenever it is of the opinion that the person has, among others, failed to comply with a condition of its licence: s 18 BTCA. The BTCA is one of the 'regulatory laws' referred to in s 6(1)(b) MAA, defined in s 2 MAA. Other regulatory laws also confer upon CIMA the regulatory power to 'require such action by [the licensee] as the Authority considers necessary', including where the licensee is carrying on its business in a manner 'detrimental to the public interest' or in breach of its license conditions (which would presumably cover an actual or anticipated breach of the AMLRs) or, in some cases, where CIMA has a reasonable suspicion the licensee is in breach of the AMLRs (for example, s 24 of the Insurance Act (As Revised).

182. CIMA does not argue that the Requirements in this case were imposed in the exercise of its power under s 18 BTCA, no doubt because CIMA did not take the necessary procedural steps before imposing such Requirements, namely by adopting the Warning and Decision Notice Procedure set out in CIMA's Enforcement Manual dated February 2018, s 9, following which the Plaintiffs would have had a statutory right of appeal on the facts under s 25 BTCA. It is evident from the Enforcement Manual that the imposing of such requirements is one of the powers intended to be subject to the Warning and Decision Notice Procedure:

'9.2 The purpose of issuing Warning Notices is to give reasonable opportunity for parties affected by enforcement decisions of the Authority to make representation to the Authority prior to those decisions being finalised.

9.3 This procedure is relevant to the following regulatory decisions: ... (f) requiring licensees or registrants to take such action as the Authority reasonably believes necessary.'

183. This has two consequences:

183.1. Where Parliament has granted CIMA an express and specific power to impose requirements (lex specialis), the Court will be slow to find that a general power (to exercise ancillary functions) may lawfully be used for precisely the same purpose (lex generalis). This is the well-known principle of statutory construction that generalia specialibus non derogant (see Minister of Energy v Maharaj [2020] UKPC 13 [56] [PAB/19/1183]).

183.2. This principle applies a fortiori where the legislature has constrained the exercise of the specific power by imposing a series of procedural restrictions on its use. The Court will not find, in such a case, that a public authority may circumvent such a carefully constructed statutory regime by exercising a general power that is not subject to equivalent protections.

184. CIMA offers two answers to this point, neither of which assists CIMA's case:

184.1. First, CIMA says that the power to issue Requirements is set out expressly in the Regulatory Handbook, which was made pursuant to CIMA's express power to make such a handbook in s 48(1) MAA [PAB/6/270]: DGR ¶113. This argument has no merit whatsoever. S 48(1) provides that CIMA may issue and amend a regulatory handbook setting out 'policies and procedures to be followed by the Authority ... in performing [its] regulatory functions'. A power to set out 'polices and procedures' that CIMA will follow by the publication of a Handbook does not confer power to grant itself additional statutory powers. The Court would need to be very slow to interpret a statutory provision so as to confer such a 'Henry VIII' power, and must give a restrictive interpretation to any statute purporting to do so: R (PLP) v Lord Chancellor [2016] AC 1531, [20-28]. S 48(1) does

not confer such a power, both on an orthodox reading and on a more restrictive reading. It is notable that this argument was not made by CIMA in its PAP Response, ¶¶45-47.

184.2. CIMA relies, in the alternative, on s 6(2) (f) MAA, which provides that CIMA shall 'have such ancillary powers as may be required to fulfil the functions set out in paragraphs (a) to (e)'. It is important to recognise that these powers are ancillary to the functions set out in s 6(2) (a)-(e) MAA, which impose a series of duties upon CIMA. They are not powers ancillary to the functions set out in s 6(1) MAA, namely '(ii) to monitor compliance with the anti-money laundering regulations; and (iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law'. CIMA now recognises this, and has abandoned the contrary argument made in its PAP Response: ¶¶45-47. CIMA now asserts that the power to issue Requirements is a power that is ancillary to its function in s 6(2)(e) MAA, namely that '(2) In performing its functions and managing its affairs, the Authority shall — ... (e) comply with this and any other law, including any regulations or directions made or given thereunder.' However, s 6(2)(e) MAA imposes duties on CIMA to comply with the law. It does not give it power to impose enforcement measures such as the Requirements. An 'ancillary' power may only confer powers that are truly ancillary or incidental to powers that otherwise exist. An 'ancillary' power does not confer power to do that which is otherwise not permitted by the statutory function to which it attaches: such an asserted power is 'incidental to the incidental' and not permitted R (Risk Management Partners Ltd) v Brent LBC (CA) [2010] P.T.S.R. 349, [40], [49-50], [121]. Furthermore, the interpretation of ancillary powers is still subject to other axioms of statutory construction, including the principle of legality and the expressio unius and lex specialis doctrines. There can be no ancillary power to issue requirements if the legislature has specifically provided such a power – with appropriate procedural safeguards – under s 18 BTCA.

185. In conclusion, CIMA lacked power to impose the Requirements. CIMA either should have used other powers (e.g. s 18 BTCA), which would have given the Plaintiffs the procedural rights of the Warning Notice and Decision Procedure plus a statutory right of appeal on the facts thereafter; <u>otherwise it had no power other than to request or advise the Plaintiffs to take steps to comply with the AMLRs.</u> The Plaintiffs submit that all of the Requirements should be quashed for this reason." [Emphasis added]

154. These submissions were plainly arguable but appear on their face to be based on the premise that the Requirements were intended to have more than recommendatory effect.

The Defendant's Submissions

155. The following main arguments were set out in the Defendant's Skeleton Argument on this vital issue to the way in which the Authority carries out its regulatory functions:

> "*243. The Authority has an express power under the Authority's Regulatory Handbook to issue Requirements. The Regulatory Handbook was issued pursuant to the express powers conferred on the Authority's board of directors by section 48(1) of the MAA.*
>
> *244. Section 48(1) of the MAA provides that the Authority's Board 'shall issue, and may amend a regulatory handbook setting out, as far as is practicable, the policies and procedures to be followed by the Authority … in performing its regulatory functions …'*
>
> *245. The Authority's 'regulatory functions' are defined at section 6(1) (b) of the MAA to be:*
>
> *(i) 'to regulate and supervise financial services business carried out on in or from within the Islands in accordance with this Law and the regulatory laws;*
>
> *(ii) to monitor compliance with the anti-money laundering regulations; and*
>
> *(iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law.'*
>
> *246. As part of the policies and procedures set out in the Regulatory Handbook, the Authority's supervisory functions are divided into three broad categories (which are consistent with the Authority's powers under the regulatory laws), namely,*
>
> *(a) licensing;*
> *(b) monitoring (off-site and on-site inspections); and*
> *(c) enforcement.*

247. On-site inspections are therefore part of the procedures prescribed in the Regulatory Handbook to be followed by the Authority in carrying out its monitoring functions under section 6(1) (b) (ii). A summary of the Authority's 'Supervisory Approach' is explained at pages 25-26 of the Regulatory Handbook including an explanation of the on-site inspection process. See pages 33 to 39 for a detailed outline of the on-site inspection process. The issuing of a 'Requirement' is part of the procedure within an on-site inspection, which in turn is a means by which the Authority monitors compliance with the anti-money laundering regulations.

248. Contrary to the Plaintiffs' arguments, a Requirement is procedural, not punitive. It is issued as part of the Authority's monitoring functions, not part of its enforcement functions. None of the principles relied on in the Plaintiffs' skeleton argument is therefore invoked." [Emphasis added]

156. It was clear by the time of the hearing that the Defendant had decided to 'pin its colours to one mast' and to rely upon the power to issue the Requirements said to be found in section 48 of the MAA. This argument seemed entirely persuasive on the pivotal basis upon which it was advanced, even if the abstract legal analysis detached from the adversarial context of the inspection process seemed somewhat inconsistent with the quasi-coercive tone of the 2020 Final Reports.

Findings on Issue 7

157. All section 6 of the MAA clearly does is to confer regulatory functions, not powers:

"***Principal functions of Authority***
6. (1) The principal functions of the Authority are —

(a) monetary functions, namely —

(i) to issue and redeem currency notes and coins; and

(ii) to manage the Currency Reserve, in accordance with this Law;

(b) regulatory functions, namely —

(i)to regulate and supervise financial services business carried on in or from within the Islands in accordance with this Law and the regulatory laws;

(ii) to monitor compliance with the anti-money laundering regulations; and

(iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law;

(c) co-operative functions, namely, to provide assistance to overseas regulatory authorities in accordance with this Law; and

(d) advisory functions, namely, to advise the Government on the matters set out in paragraphs (a) to (c) and, in particular, with regard to —

(i) whether the regulatory functions and the co-operative functions are consistent with functions discharged by an overseas regulatory authority;

(ii) whether the regulatory laws are consistent with the laws and regulations of countries and territories outside the Islands; and

(iii) the recommendations of international organisations.

(2) In performing its functions and managing its affairs, the Authority shall —

(a) act in the best economic interests of the Islands;

(b) promote and maintain a sound financial system in the Islands;

(c) use its resources in the most efficient and economic way;

(d) have regard to generally accepted principles of good corporate governance;

(e) comply with this and any other law, including any regulations or directions made or given thereunder; and

(f) have such ancillary powers as may be required to fulfil the functions set out in paragraphs (a) to (e).

(3) In performing its regulatory functions and its co-operative functions, the Authority shall, in addition to complying with the requirements of subsection (2) —

(a) endeavour to promote and enhance market confidence, consumer protection and the reputation of the Islands as a financial centre;

(b) endeavour to reduce the possibility of financial services business or relevant financial business being used for the purpose of money laundering or other crime;

(c) recognise the international character of financial services and markets and the necessity of maintaining the competitive position of the Islands, from the point of view of both consumers and suppliers of financial services, while conforming to internationally applied standards insofar as they are relevant and appropriate to the circumstances of the Islands;

(d) recognise the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;

(e) recognise the desirability of facilitating innovation in financial services business; and

(f) recognise the need for transparency and fairness on the part of the Authority.

(4) In exercising its co-operative functions, the Authority shall, in addition to complying with the requirements of subsection (2) —

(a) have regard to the matters mentioned in section 50(4); and

(b) comply with section 50(8)."

158. In the course of argument, I observed that section 6 of the MAA appeared to me to be somewhat unhappily worded in not expressly conferring ancillary regulatory powers on the Authority. However, there may well be a sound legal reason for not dealing with regulatory powers in such an indirect manner. Regulatory powers, because of their potentially intrusive nature, are probably customarily dealt with in both primary and subsidiary legislation in a more substantive manner than by merely conferring "ancillary powers". It was against this background that the Defendant placed reliance on the following more specific provisions of section 48:

"***Regulatory handbook***
48. (1) The board shall issue, and may amend, a regulatory handbook setting out, as far as is practicable, the policies and procedures to be followed by the Authority, its committees and its officers in performing the Authority's regulatory functions and co-operative functions.

(2) The regulatory handbook shall be consistent with any law or any regulations or policy directions given or made thereunder.

(3) The regulatory handbook shall include policies and procedures for —

(a) giving warning notices to persons affected adversely by proposed actions of the Authority;

(b) giving reasons for the Authority's decisions; and

(c) receiving and dealing with complaints against the Authority's actions and decisions.

(4) In cases where the regulatory handbook would have the effect of creating, directly or indirectly, rules or statements of principle or guidance, the Authority shall consult with the private sector associations and the Minister charged with responsibility for Financial Services.

(5) The regulatory handbook may provide for exceptions from its own requirements to be made by the board or a specified committee or officer of the Authority.

(6) The Authority shall publish the regulatory handbook and any amendments to it in the Gazette, and the regulatory handbook and any such amendments shall take effect and come into operation on the date of such publication.

(7) It shall be a duty of the board to ensure that the regulatory handbook is observed by the committees and officers of the Authority, to keep the regulatory handbook under continuing review, and to consult the Financial Secretary and the private sector associations on the extent to which the regulatory handbook could be made more consistent with section 6." [Emphasis added]

159. The Regulatory Handbook itself firstly states by way of introduction:

"*The Handbook is issued under section 48 of the MAL by the Board. The MAL sets out the purposes of the Handbook and the procedures for making amendments to ensure statutory obligations and commitments are adhered to within the guidelines/operations set forth.*"

160. The most relevant portion of the Handbook is the following (at pages 36-39):

"***The Objectives of an On-site Inspection***

1. The principal objectives of the Inspection Report ("the Report") are to –

(1) inform the Authority, and the licensee's directors and management, of matters requiring attention and the priority to be given to these matters ; and

(2) assist the licensee to effect timely correction of those matters.

2. In order to meet these objectives the Report must address the many and varied aspects of the onsite inspection. For this reason, accurate and timely reporting of facts is essential

to the proper understanding, and ultimately the satisfactory correction of any deficiencies in the licensee's operations, by either the licensee, its directors and/or senior management.

3. The Report is sent to the licensee's board of directors. Its primary purpose is to focus the attention of and require action by the directors and management on matters which the Authority has identified as warranting corrective attention.

4. In that regard, any deficiency of a regulatory or statutory nature will be addressed through 'Requirements'. Matters Requiring Immediate Attention ('MRIA') in the Report will be structured as "High Priorities" and Matters Requiring Attention ('MRA') in the Report will be structured into "Medium" and/or 'Low Priorities'. Where the examiner identifies Matters Requiring Immediate Attention, the Authority will direct the licensee, its directors or management to address such matters immediately. Where the examiner identifies Matters Requiring Attention, the Authority will direct the licensee to address such matters within a specified time…

8. The contents of the Report will include the examiner's finding(s) and the Authority's instructions for corrective action. The view of the management of the regulated entity, whether representing assurances of correction or disagreement with the examiner's position, should also be stated in the Report.

9. As a general rule, the Report will first be sent out in draft form to allow opportunity for response and comment on the accuracy of the findings within the Report. Judgement will play a major role in the amendment of the Report.

10. Once a Report is finalized, the Authority will require licensees to submit an action plan that identifies remedial actions to be completed within specified timeframes for its MRIAs and MRAs and report on a monthly basis on their progress against that plan.

11. For inspections where there were no material deficiencies identified or in the case of some limited scope inspections, there may not be formal reports. In these circumstances, the results of the inspection may be communicated via letters.

Post-Inspection

At the conclusion of the examination the Authority lead examiner will:

- *Review the work performed by the Authority Inspection Staff (if not previously reviewed)*
- *Organize the overall conclusions, and verify that all assertions of facts or opinions are specifically substantiated in the checklist(s) and any accompanying work papers*
- *Formulate general comments and conclusions relative to the licensee's overall condition, and specific comments and conclusions relative to particular subject areas, practices, etc.*
- *Present findings to the HOD*
- *Present the results of the inspection to the management of the licensee.*

Follow-up

Once the licensee has been provided with the inspection report it is the responsibility of the Authority to ensure that the institution implements the recommendations. The licensee should be advised of an appropriate time frame in which to effect the implementation. The inspection team will then conduct a follow-up visit to review the progress the licensee has made towards achieving the recommendations." [Emphasis added]

161. The next section in the Regulatory Handbook is entitled "*Enforcement*". It is clear that the Requirements made in the course of the inspection process are:

(a) "*recommendations*" as opposed to enforcement action;

(b) imposed as part of the Authority's procedures for carrying out their regulatory functions under, *inter alia*, the MAA and the AMLRs;

(c) designed to "*inform…management of matters requiring attention*…[and to] *assist the licensee to effect timely correction of those matters*

(d) implicitly a mechanism of warning licensees that enforcement action may follow if they fail to take the corrective action which has been in substance 'recommended', even if in terms 'required'.

162. Considerable detail is also set out on the procedures to be followed by inspectors in relation to the AML regime. The Handbook states (at page 49):

> "*In compiling the report, the examiner will make an assessment of whether the licensee is complying with the AMLR. To make an informed judgment, the examiner should review the licensee's policies and procedures, operations and testing of sufficient files and transactions to be able to report and make a determination of an institution's compliance with the AMLR.*
>
> *Included in the report are assessments of the licensee's:*
> - *Policies and procedures manuals to prevent money laundering*
> - *Systems to prevent money laundering*
> - *Training to prevent money laundering*
> - *Client identification procedures*
> - *Record keeping procedures*
> - *Internal reporting procedures*
> - *Reporting of suspicious transactions*

> *In the event, that the examiner considers that an institution is not in compliance with the AMLR, the results should be promptly reported to the HOD.*"

163. So the main focus of inspection reports in relation to AML regulation is compliance with the AMLRs. None of this in my judgment affects the generality of the earlier explanation of primary functions of the inspection process, which is to recommend remedial steps in relation to identified compliance shortcomings. Read sensibly in a contextual way, the "examiner" in reporting on compliance with the AMLRs is not to be regarded as making a regulatory "finding" at all in the strict sense. The inspector is merely recording and reporting his professional investigative view that a breach of the AMLRs has potentially occurred. The inspector reports to the Authority's Head of Division, and it is the Authority which decides, in accordance with the general inspection procedures described earlier in the Regulatory Handbook, whether or not to require remedial action. This is an entirely different type of finding to the quasi-judicial finding of a breach of the law which would justify the Authority imposing an administrative fine under Part VIA of the MAA. But it is very close to such a finding, and the Handbook expressly acknowledges that after management comments on a draft report are received: "*Judgement will play a major role in the amendment of the Report.*"

164. As Mr Bowen KC submitted on behalf of the Plaintiffs, once a Requirement is imposed an FSP has to decide whether to expend resources on complying with the Requirement taking into account the implications of potential enforcement action if it does not. Accordingly, the Requirements clearly embody administrative decisions which have potentially significant commercial consequences for the businesses concerned, which is why it was common ground that they are amenable to judicial review. I can see no proper basis, however, for concluding that the Authority has no power to impose the Requirements at all.

165. In my judgment it is, accordingly, ultimately clear that Mr Robinson KC was right to submit that the Authority has clear statutory authority to make the Requirements and that the Plaintiffs' contrary submissions were based on a mischaracterisation of their true legal character and function. Issue 7 is accordingly resolved in favour of the Defendant and this ground of judicial review is dismissed. Because of the subtleties inherent in assessing what compliance means in the AMLRs context, the important role played by FSPs in designing and implementing AML compliance solutions and the ever-shifting shape of what compliance needs actually are from time to time, the Authority's approach is an eminently sensible one overall. It entails using the inspection process articulated in the Regulatory Handbook as a means of developing and sustaining effective compliance systems on an incremental and rolling basis, and only using the blunt weapons of enforcement as a last resort.

166. This approach also seems appropriate in the Cayman Islands where, based in part on the evidence adduced in this case, my instinctive sense (as I observed in the course of the hearing) is that most substantive elements of any money laundering offences involving Caymanian international entities are likely to take place abroad where most assets are likely sited. However, the Authority's evidence and its counsel's submissions also suggest that the need to detect and prevent more elusive facilitation of wrongdoing elsewhere on the part of entities based here has rightly been identified by the Authority as a significant practical concern. This concern to my mind potentially explains why the Authority adopted what I have found above to be, in effect, an 'envelope-pushing' approach to the construction to the controversial provisions of Regulation 12 (1) of the AMLRs, as they apply in the limited context of registered office service providers.

Conclusion

167. To summarize, for the reasons set out above the Agreed Issues are resolved in the following way:

(a) Issues 1 and 5 are resolved in favour of MCSL and Issues 2,3, 4 and 5 are resolved in favour of MCSL and MFS;

(b) I did not consider it necessary to resolve Issue 6, but if I did I would resolve it on the basis set out in paragraph 145 above; and

(c) Issue 7 is resolved in favour of the Authority.

168. I will hear counsel, if required, on the terms of the Final Order, costs and any other matters arising from the present Judgment[13].

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

[13] The Authority's counsel shortly before delivery of this Judgment requested that publication of the Judgment be postponed for 21 days to enable consultation with internal officers and the possibility of an appeal to be considered because of the implications for how the Authority was required to carry out its duties. My provisional view was that I should indicate at the time of delivery that the Order would not take effect for 21 days to enable the Authority to consult internally on whether it wished to appeal and seek a stay pending appeal. The initial request was then expanded to request that publication of the Judgment should be embargoed for seven days to enable consultation with other stakeholders to take place. This modified request was extraordinary in relation to proceedings which have taken place in open Court and in relation to which the implications of various outcomes could easily have been canvassed by the Authority with interested public sector stakeholders long before Judgment was due to be delivered. That these consultations have not already taken place undermines entirely any suggestion that tangible harm will flow from the judgment being delivered in the ordinary course of public law proceedings. The Plaintiffs objected (a) to postponing publication on compelling open justice grounds and (b) to any postponement of the effect of the declarations to which they are entitled. In my judgment, the appropriate case management decision is to direct now that the final Order will not in any event take effect any sooner than 14 days from the date of delivery of this Judgment. However, it is open to the Authority to persuade the Court either that that the final Order should provide for an operative date which is later than that (in the public interest) or that a stay should be granted pending appeal.