IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. GC 20 OF 2021

BETWEEN:

(1) MAPLES CORPORATE SERVICES LIMITED

(2) MAPLESFS LIMITED

Plaintiffs

AND

CAYMAN ISLANDS MONETARY AUTHORITY

12/05/21

Defendant

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that pursuant to the leave of the Honourable Mr Justice Kawaley given on 7 May 2021, the Court at the Law Courts, George Town, Grand Cayman will be moved on at or as soon thereafter as counsel can be heard, by counsel on behalf of the Plaintiffs for an order of certiorari to quash certain Findings and Requirements made in the "*Focused Thematic Final Reports*" issued by the Defendant on the Plaintiffs dated 16 and 12 November 2020, respectively.

And/or for declaratory relief as appropriate to give effect to the Court's judgment.

And for costs.

AND FURTHER TAKE NOTICE THAT the grounds of this application dated 12 February 2021 and arguments in support dated 12 and 16 February 2021 are appended hereto.

DATED this 12th day of May 2021

Maples and Calder (Cayman) LLP

Maples and Calder (Cayman) LLP
Attorneys for the Plaintiffs

TO: The Clerk of the Court

AND TO: Mourant Ozannes, attorneys for the Defendant

THIS NOTICE OF ORIGINATING MOTION was filed by Maples and Calder (Cayman) LLP, attorneys for the Plaintiffs, whose address for service is PO Box 309, Ugland House, Grand Cayman, KY1-1104, Cayman Islands. (Ref: AAG/ADH/781422.1/66454561)

GROUNDS UPON WHICH RELIEF IS SOUGHT

1. These Grounds are to be read in conjunction with the accompanying Arguments in Support of Grounds.

A. THE 2020 MCSL FINAL REPORT

(1). *Ground 1: Unlawful Findings in relation to nature / purpose of the business (Regulation 12(1)(d)) (5.2.1)*

2. CIMA's Findings in relation to nature / purpose of the business ((5.2.1)) are unlawful because they are based on an erroneous interpretation of Regulation 12(1)(d) of the AMLRs. CIMA has applied a higher standard of CDD than that set out on the face of the provision.

(2). *Ground 2: Unlawful Findings in relation to authorised signatories for bank accounts (Regulation 12(1)(b) (5.2.16)*

3. CIMA's Finding that MCSL failed to document verification of authorised signatories for bank accounts held by corporate clients, contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.(38) of the AML Guidance Notes ((5.2.16)), is wrong in law for a number of reasons as developed in the arguments in support of Grounds.

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(3). *Ground 3: Unlawful findings in relation to ongoing monitoring and periodic reviews: scrutiny of transactions (Regulation 12(1)(e)(i)) (5.2.29)*

4. CIMA found that MCSL was in breach of Regulation 12(1)(e)(i) of the AMLRs by virtue of its failure to evidence that it had reviewed the business relationship on an ongoing basis to ensure that transactions being conducted are consistent with MCSL's knowledge of the client (5.2.27, 29). CIMA also found that there was insufficient evidence that periodic reviews had been conducted prior to early 2020. CIMA's Findings are vitiated by a number of errors of law, both in relation to 'high risk' and 'low risk' clients, as developed in the arguments in support of Grounds.

(4). *Ground 4: Unlawful findings in relation to ongoing monitoring and periodic reviews: source of funds / source of wealth (Regulation 12(1)(e)(i)) (5.2.7)*

5. CIMA concluded that there had been a breach of Regulation 12(1)(e)(i) of the AMLRs by reason of MCSL's '*practice of not collecting source of funds and/or source of wealth information for its 'Low Risk Clients"* (5.2.8(2), 5.2.9). This Finding is vitiated by a number of errors of law as developed in the arguments in support of Grounds.

(5). *Ground 5: CIMA's errors as to the NRAs in relation to 'low risk' clients under Regulation 21(2) of the AMLRs (5.2.10.4(1))*

6. In its 2020 MCSL Final Report CIMA adopted three fresh reasons for its conclusion that MCSL was in breach of Regulation 12(1)(e)(i) of the AMLRs in failing to conduct CDD in relation to 'source of funds'. The first of these was that, by virtue of Regulation 21(2), it was not open to MCSL to assess any client as a 'low risk', and therefore to apply simplified CDD, because of the findings of ML/TF risks made in the 2015 and 2020 National Risk Assessments (**'NRAs'**); alternatively, that MCSL had failed to take into account those NRAs when assessing those clients as being at low risk. This involved a number of errors of law as developed in the arguments in support of Grounds.

(6). *Ground 6: CIMA's application of the simplified CDD requirements for 'low risk' clients in Regulation 22 of the AMLRs (5.2.10.4(3))*

7. A further (second) reason given by CIMA for rejecting MCSL's reasons as to why CIMA was wrong in its Findings for 'source of funds / source of wealth' was that, of the six identified files said to be 'low risk', '*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*' (5.2.10.4(3)).

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This conclusion was reached by CIMA in its 2020 MCSL Final Report. It was not prefigured in the 2020 MCSL Draft Report so MCSL did not have a reasonable opportunity to respond to it. The conclusion is flawed for want of procedural fairness and also for lack of reasons.

(7). *Ground 7: CIMA's erroneous interpretation of, and reliance upon, s. 59(2B) of the Companies Act (5.2.10(4))*

8. CIMA's third reason (see ¶6 above) involved reliance upon s. 59(2B) of the Companies Act. As with the other two reasons, the Plaintiffs had no opportunity to comment on this argument before the 2020 MCSL Final Report was issued. CIMA also relied on the s 59(2B) argument as a reason for rejecting MCSL's arguments in relation to 'scrutiny of transactions'. CIMA's reasoning discloses two further errors of law as developed in the arguments in support of Grounds.

(8). *Ground 8: CIMA's erroneous interpretation and application of Regulation 12(1)(e)(ii) of the AMLRs in relation to the obligation to review and update documents, data or information (5.2.28)*

9. MCSL challenges the Findings, in relation to both 'low risk' and 'high risk' clients, that MCSL was in breach of Regulation 12(1)(e)(ii) of the AMLRs insofar as documents, data or information collected under the CDD process was not reviewed and kept up to date at appropriate times in fourteen cases. Those Findings were wrong in law for the reasons developed in the arguments in support of Grounds.

(9). *Ground 9: the Requirements in relation to all the Findings*

(a) *Ground 9(a): Requirements premised on the same errors of law as in Grounds 1-8*

10. CIMA's Findings do not justify the making of any of the Requirements in relation to Nature / purpose of business (5.2.1)), Authorised signatories for bank accounts: (5.2.16)), Ongoing monitoring and periodic reviews: Scrutiny of transactions: (5.2.29)), Ongoing monitoring and periodic reviews: Source of funds / source of wealth (5.2.7)) and Ongoing monitoring and periodic reviews: Updating documents, data or information: (5.2.27 and 28). Each one is premised upon the same errors of law as CIMA has applied in making its Findings, which are unlawful for the reasons developed in relation to the preceding Grounds.

(b) *Ground 9(b): Requirements are unnecessary and disproportionate*

11. The Requirements set out in the Final Reports are unnecessary and disproportionate. These flaws arise as to: (i) the substantive Requirements themselves; (ii) the time within which they are to be

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complied with, by reference to any of the Findings CIMA has lawfully made (if any). The Requirements are contrary to s. 19 of the Cayman Islands Bill of Rights (the '**BOR**') and the principle in s 6(3)(d) of the MAA, and will lead to unnecessary and disproportionate interferences with private and confidential information contrary to s. 9 of the BOR (considering *Michaud v France* (2014) 59 E.H.R.R. 9) and the Data Protection Act, 2017, in particular s. 5 and Sch. 1 Part 1, para. 3 (the third data protection principle).

(c) Ground 9(c): Power to issue requirements

12. Further or alternatively, CIMA had no power to issue any of the Requirements under the power CIMA purported to exercise, namely s. 6(2)(f) of the MAA.

B. THE 2020 FINAL MFS REPORT

(1). Ground 1: Unlawful Findings in relation to authorised signatories for bank accounts (5.2.12)

13. CIMA's Finding that MFS failed to document verification of authorised signatories for bank accounts held by corporate clients, contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.(38) of the AML Guidance Notes (2020 MFS Final Report, 5.2.12), is wrong in law for the same reasons as apply to the identical Finding made in relation to MCSL, Ground 2.

(2). Ground 2: Unlawful findings in relation to ongoing monitoring and periodic reviews: scrutiny of transactions (Regulation 12(1)(e)(i)) (5.2.18)

14. CIMA found that MFS was in breach of Regulation 12(1)(e)(i) of the AMLRs by virtue of its failure to evidence it had reviewed the business relationship to ensure that transactions being conducted are consistent with MFS' knowledge of the client. This failure is stated to have occurred in relation to seventeen files, but no instances are identified (2020 MFS Final Report, 5.2.18). CIMA's Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for all the reasons given under Ground 3, above.

(3). Ground 3: Unlawful findings in relation to ongoing monitoring and periodic reviews: source of funds / source of wealth (Regulation 12(1)(e)(i)) (5.2.1)

15. CIMA concluded that there had been a breach of Regulation 12(1)(e)(i) of the AMLRs by reason of MFS' failure to document source of funds and/or source of wealth information for a single, 'low risk'

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client (2020 MFS Final Report, 5.2.1). This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 4, above.

(4). *Ground 4: CIMA's erroneous interpretation and application of the implications of NRAs in relation to 'low risk' clients under Regulation 21(2) of the AMLRs (5.2.4.3.10(1)-(2))*

16. As with MCSL, one of the reasons MFS gave for objecting to CIMA's Finding in relation to 'source of funds' was that several of the relevant clients were 'low risk' because they met the criteria under Regulation 22 of the AMLRs for the application of simplified CDD (5.2.4.3.1). Again, as with MCSL, CIMA rejected this argument for three reasons, the first of which (5.2.4.3.10(1)-(2)) was that it was not open to MFS to assess *any* client as a 'low risk', and therefore to apply simplified CDD, because of the 2015 and 2019 NRAs by virtue of Regulation 21(2) of the AMLRs. This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 5, above.

(5). *Ground 5: CIMA's application of the simplified CDD requirements for 'low risk' clients in Regulation 22 of the AMLRs (5.2.4.3.10(3))*

17. Again as with MCSL, a further (second) reason given by CIMA for rejecting MFS' reasons as to why CIMA was wrong in its Findings in relation to 'source of funds / source of wealth' was that relevant client said to be 'low risk' (82846): '*does not satisfy the criteria to qualify for simplified due diligence*' (5.2.4.3.10(3)). This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 6, above.

(6). *Ground 6: CIMA's erroneous interpretation of, and reliance upon, s. 59(2B) of the Companies Act (5.2.4.3.10(4))*

18. The third reason involved reliance upon s. 59(2B) of the Companies Act, in the same terms as for MCSL, see above. CIMA also relied on this as a reason for rejecting MFS' arguments in relation to 'scrutiny of transactions' (5.2.20.4), in identical terms to the 2020 MCSL Final Report. These Findings are therefore vitiated by the same errors of law as apply to the identical Findings made in relation to MCSL, for the reasons set out at Ground 7, above.

(7). *Ground 7: the Requirements in relation to all the Findings*

19. Further or alternatively, CIMA's Findings do not justify the making of any of the three Requirements in respect of each or any of the three Findings challenged in the 2020 MFS Final Report, whether

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within three months or at all for the same reasons as apply to the identical Requirements made in relation to MCSL set out at Ground 9, above.

12 FEBRUARY 2021

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Brick Court Chambers, London

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12/02/21

PLAINTIFFS' ARGUMENTS IN SUPPORT OF GROUNDS OF JUDICIAL REVIEW

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I. INTRODUCTION

1. The Plaintiffs are Maples Corporate Services Limited ('**MCSL**') and MaplesFS Limited ('**MFS**') (together, the '**Plaintiffs**'), two trust and corporate service providers (**'TCSPs'**) based in the Cayman Islands and part of the Maples Group. The Plaintiffs challenge certain Findings and Requirements in two '*Focused Thematic Final Reports*' issued by the Cayman Islands Monetary Authority ('**CIMA**') dated 16 and 12 November 2020, respectively (together, the '**2020 Final Reports**'). The 2020 Final Reports found that each of the Plaintiffs had breached certain customer due diligence ('**CDD**') requirements of Regulation 12 of the Anti-Money Laundering Regulations (2020 Revision) (the '**AMLRs**'), and required the Plaintiffs to take certain compliance measures within a time-limited period.

2. In a letter dated 15 January 2021, the Plaintiffs set out the basis of their claim by way of a formal complaint to the Managing Director and Chairman of the Board of Directors of CIMA under para. 2.5 of CIMA's Regulatory Handbook: 'Procedure – Complaints against the Authority' dated July 2005 (the '**Complaint**'). This letter also served as a letter before action in accordance with the Pre-Action Protocol for Judicial Review (Practice Direction No. 4 of 2013) (the '**Protocol**') (the '**PAP Letter**').

3. In its response dated 29 January 2021 (the '**PAP Response**'), CIMA refused to entertain the Complaint and refused to take the steps requested of it in the PAP Letter. The Plaintiffs, having sought to resolve this dispute by alternative means, now have no option but to bring these proceedings for judicial review. The Plaintiffs respond to the matters set out in CIMA's PAP Response at the end of each of the Grounds in Section IV below.

4. In summary, the Plaintiffs challenge the following decisions (set out in more detail in Section III, below):

    4.1. CIMA's '**Findings**' in the 2020 Final Reports that the Plaintiffs have breached Regulation 12 of the AMLRs (duty of CDD) in relation to:

        4.1.1. Failure to gather sufficient evidence and/or document the nature / purpose of business for a number of clients, contrary to Regulation 12(1)(d) of the AMLRs;

        4.1.2. Failure to gather sufficient evidence and/or document the verification of authorised signatories for bank accounts held by a number of clients, contrary to Regulation 12(1)(b) of the AMLRs;

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4.1.3. Failure to conduct and/or document ongoing monitoring and periodic reviews in relation to the scrutiny of transactions undertaken by a number of clients, contrary to Regulation 12(1)(e)(i) of the AMLRs;

4.1.4. Failure to gather and/or document the source of funds / source of wealth in relation to such transactions for a number of clients, contrary to Regulation 12(1)(e)(i) of the AMLRs; and

4.1.5. Failure to ensure that documents, data or information collected under the CDD process were kept current and relevant, contrary to Regulation 12(1)(e)(i) of the AMLRs.

4.2. The related '**Requirements**' setting out the measures that CIMA requires the Plaintiffs to take to bring them into compliance; and

4.3. The three-month time period within which those Requirements are to be met.

5. The Plaintiffs submit, in summary, that CIMA's Findings and Requirements rest on a number of errors of law. In particular – contrary to what is set out on the face of the AMLRs – CIMA has adopted a one-size-fits-all approach to the statutory duties to gather information and conduct verification. This approach fails to recognise that the level of CDD in any given case is context-specific, determined by the risk-based approach to CDD (the '**RBA**') which takes into account the nature of the services offered by the financial services provider (the '**FSP**'), as well as the nature of the client and other factors, such as the geographical area in which the client operates. CIMA's approach also imposes duties that are unnecessary, duplicative and disproportionate, which risk breaches of privacy and data protection rights. By seeking to impose additional duties in this manner, CIMA is engaging in a process of increasing regulation by inspection, rather than through the promulgation of new regulations or new guidance, both of which would require consultation with stakeholders in the financial services industry (see ss. 4 and 34 of the Monetary Authority Act (2020 Revision) (the '**MAA**'). The Findings and Requirements also impose disproportionate burdens on FSPs, contrary to the principle in s. 6(3)(d) of the MAA, which obliges CIMA:

> '… *to recognise 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*'.

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6. The Plaintiffs only challenge the Findings and Requirements to the extent that they are based upon or reveal errors of law. The Plaintiffs also dispute many, if not most, of the Findings on their facts, but recognise that these proceedings for judicial review are not the appropriate forum for resolving such errors, unless these also amount to an error of law (as, for example, under Ground 5, below). The Plaintiffs did raise a number of these factual findings in their Complaint (which formed part of the PAP Letter) but, CIMA having refused to engage with the Complaint, the Plaintiffs no longer maintain their challenge to CIMA's Findings of fact. That is not to be taken as a concession that they accept CIMA was correct in any of the Findings that it made, including in those cases where no challenge is made to the Finding or Requirement as a matter of law. But the Grounds focus on the errors of law made by CIMA which vitiate those Findings and Requirements.

II. THE FACTUAL BACKGROUND

7. The factual background, including details of the Plaintiffs and their businesses, is set out in detail in the Second Affidavit of Phillipa White (the '**White Affidavit #2**'), Chief Risk Officer for the Maples Group, and is not repeated here.

III. THE DETAILS OF THE MATTER(S) UNDER CHALLENGE

A. THE 2020 MCSL FINAL REPORT

8. CIMA made seven Findings[1] and Requirements (each designated as a High Priority and a Matter Requiring Immediate Attention (an '**MRIA**')) in relation to MCSL.

9. The following five Findings and Requirements are challenged:[2]

(1). Nature / purpose of business (5.2.1)

10. Failure to gather sufficient evidence and/or document the nature / purpose of business, contrary to Regulation 12(1)(d) of the AMLRs and Part II.4.A.(2) of the AML Guidance Notes,[3] in relation to seventeen identified client files.

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[1] In its PAP Response, ¶. 20, CIMA states that it in fact made six Findings. However, its Findings in relation to 'Ongoing Monitoring and Periodic Reviews' at ¶. 5.2.26 of the 2020 MCSL Final Report, which CIMA appears to treat as one Finding, in fact contains two Findings of breach at 5.2.29 and 5.2.30 in respect of Regs. 12(1)(e)(i) and 12(1)(e)(ii) of the AMLRs, respectively. MCSL considers these to be two separate Findings and addresses them separately.

[2] No challenge is therefore brought in relation to the following Findings and related Requirements: (5.2.11): failure to document client identification/ verification for Directors / Authorised Persons, contrary to Reg. 12(2)(b)(ii) of the AMLRs and Part II.4.A.(10) of the AML Guidance Notes; (5.2.22): Failure to document client identification/ verification of Ultimate Beneficial Owners (UBOs) (13 cases), contrary to Reg. 12(1)(c), (3)(a) and (4)(a) of the AMLRs and Part II.4.B.(37) of the AML Guidance Notes.

[3] CIMA's Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and Proliferation Financing in the Cayman Islands (the '**AML Guidance Notes**').

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11. The Requirement (5.2.6), within three months, to obtain such information to substantiate the nature / purpose of business of all its clients as a High Priority and an MRIA.

(2). Authorised signatories for bank accounts: (5.2.16)

12. Failure to gather sufficient evidence and/or document the verification of authorised signatories for bank accounts held by corporate clients (16 cases), contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.38[4] of the AML Guidance Notes in relation to eight 'high risk' and eight 'low risk' identified client files.

13. The Requirement (5.2.21), within three months, to ensure that all authorised signatories for bank accounts held by MCSL's corporate clients are authorised to act on behalf of such clients, and that client identification and address verification documentation is on file for all such persons as a High Priority and an MRIA.

(3). Ongoing monitoring and periodic reviews: Scrutiny of transactions: (5.2.29)

14. Failure to provide evidence that it has reviewed transactions undertaken throughout the course of the business relationship, to ensure that transactions being conducted are consistent with MCSL's knowledge of the client, the client's business and risk profile, including where necessary the client's source of funds, contrary to Regulation 12(1)(e)(i) of the AMLRs. Failure to ensure that materials gathered pursuant to CDD are kept up to date pursuant to ongoing monitoring and periodic reviews in relation to the scrutiny of transactions undertaken throughout the course of the business relationship. This failure is stated to have occurred in relation to fourteen files, but only four client files are identified: one 'low risk' client and three 'high risk' clients.

15. The Requirement (5.2.31), within three months of receipt of the 2020 MCSL Final Report, that MCSL 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 MCSL'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(I)(e)(i) of the AMLRs.

[4] The reference in the 2020 MCSL Final Report, 5.2.21.2(3) is to Part II.4.B.(45) but this relates to an older version of the Guidance.

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(4). *Ongoing monitoring and periodic reviews: Source of funds / source of wealth (5.2.7)*

16. Failure to gather and/or to document the source of funds / source of wealth, contrary to Regulation 12(1)(e)(i) of the AMLRs and Part II.4.A.(3)-(4) of the AML Guidance Notes in relation to ten identified client files, five 'low risk' and five 'high risk'.

17. The Requirement (5.2.10), within three months of receipt of the 2020 MCSL Final Report, to 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 a High Priority and an MRIA.

(5). *Ongoing monitoring and periodic reviews: Updating documents, data or information: (5.2.27 and 28)*

18. Failure to generate sufficient documentation to show that periodic reviews were conducted. Furthermore, failure to demonstrate that MCSL conducted periodic reviews of the documents, data or information collected under the CDD process prior to early 2020 in respect of fourteen identified client files. Furthermore, failure to conduct periodic reviews in relation to certain higher risk categories of clients (in respect of which an annual review should have been conducted), contrary to Regulation 12(1)(e)(ii) of the AMLRs. This failure is stated to have occurred in relation to fourteen files, but only three instances are identified.

19. The Requirement (5.2.31(1)), within three months of receipt of the 2020 MCSL Final Report, that MCSL ensure documents, data or information collected under the CDD process are kept current and relevant to CDD, 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 AMLRs.

B. THE 2020 MFS FINAL REPORT

20. CIMA made five Findings and Requirements (each designated as a High Priority and an MRIA) in relation to MFS.

21. The following three Findings and Requirements are challenged:[5]

[5] No challenge is made to the following (5.2.6): Failure to document client identification / verification for Legal Persons or Legal Arrangements (three cases) contrary to Regs. 12(3)(b) and (c) of the AMLRs and Part II.4.A.(10) of the AML Guidance Notes; (5.2.7) Failure to produce simplified due diligence documentation (eight cases) in circumstances where MFS has relied upon exemptions for legal persons who are regulated, contrary to Reg. 12(2)(b)(ii) of the AMLRs and Part II.4.A. of the AML Guidance Notes.

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(1). Authorised signatories for bank accounts (5.2.12)

22. (5.2.12) Failure to gather sufficient information and/or document verification of authorised signatories for bank accounts held by corporate clients, contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.(38)-(39) of the AML Guidance Notes.[6]

23. The Requirement (5.2.16), within three months of receipt of the 2020 MFS Final Report, for MFS to ensure that all authorised signatories for bank accounts held by its corporate clients for which it does not provide authorised signatory services, are authorised to act on behalf of such clients, and that client identification and address verification documentation is on file for all such persons as a High Priority and an MRIA.

(2). Ongoing monitoring and periodic reviews: Scrutiny of transactions (5.2.18)

24. Failure to provide adequate evidence of ongoing monitoring and periodic reviews in relation to the scrutiny of transactions undertaken throughout the course of the business relationship to ensure that transactions being conducted are consistent with MFS' knowledge of the client, the client's business and risk profile, including where necessary the client's source of funds, contrary to Regulation 12(1)(e)(i) of the AMLRs. This failure is stated to have occurred in relation to seventeen files, but no instances are identified.

25. The Requirement (5.2.20), within three months of receipt of the 2020 MFS Final Report, that MFS maintain documentation to evidence it has reviewed the business relationship to ensure that transactions being conducted are consistent with MFS' 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(I)(e)(i) of the AMLRs.

(3). Ongoing monitoring and periodic reviews: Source of funds / source of wealth (5.2.1)

26. (5.2.1) Failure to document the source of funds / source of wealth for clients, contrary to Regulation 12(1)(e)(i) of the AMLRs and Part II.4.A.(3)-(4) of the AML Guidance Notes in relation to one client.

[6] The reference in the 2020 MFS Final Report is to Part II.4.B.(45)-(46) of the AML Guidance Notes, but this relates to an old version of the Guidance.

27. The Requirement (5.2.10), within three months of receipt of the 2020 MFS Final Report, to 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 a High Priority and an MRIA.

IV. GROUNDS OF JUDICIAL REVIEW

28. The Findings and Requirements in the 2020 Final Reports are challenged on the following grounds.

A. THE 2020 MCSL FINAL REPORT

29. The nature of MCSL's business is set out in the White Affidavit #2, ¶¶22-29. In summary, MCSL is a provider of registered office ('**RO**') services. While it has certain AML/CTF/CPF[7] duties, they are conditioned by the nature of the services it provides, as well as by its own assessment of the ML/TF/PF[8] risks posed by existing and potential clients. In particular, it will very rarely be involved in transactional activity requiring it to scrutinise those transactions, obtain details of source of funds or to obtain details of authorised signatories to bank accounts.

(1). Ground 1: Unlawful Findings in relation to nature / purpose of the business (Regulation 12(1)(d)) (5.2.1)

30. CIMA's Findings in relation to nature / purpose of the business (above, ¶10) are unlawful because they are based on an erroneous interpretation of Regulation 12(1)(d) of the AMLRs. CIMA has applied a higher standard of CDD than that set out on the face of the provision.

31. Regulation 12(1)(d) of the AMLRs requires an FSP, among others, to '*understand and obtain information on, the purpose and intended nature of a business relationship*' as part of its AML CDD.

32. CIMA has interpreted Regulation 12(1)(d) of the AMLRs as meaning that, *in every case*, this provision requires *documentary verification* of the purpose and intended nature of a business relationship. That is because, on its case, an FSP '*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*': 5.2.6.4.

33. CIMA's interpretation of Regulation 12(1)(d) of the AMLRs is wrong in law for the following reasons:

[7] Anti-money laundering ('**AML**'), counter-terrorist financing ('**CTF**') and coutner-proliferation financing ('**CPF**').
[8] Money laundering ('**ML**'), terrorist financing ('**TF**'), proliferation financing ('**PF**').

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34. First, CIMA's interpretation is inconsistent with the express wording of Regulation 12(1)(d), particularly when read in the context of Regulation 12(1) of the AMLRs as a whole. Regulation 12(1)(d) does not require that any explanation be 'verified'. This is by contrast with Regulations 12(1)(a)-(c) of the AMLRs, each of which requires a process of both identification and subsequent verification, including (in (a)) by means of '*reliable independent source documents, data or information*'.

35. The express stipulation that such information must be obtained in Regulation 12(1)(a) means that such information is not uniformly required by Regulation 12(1)(d) (i.e. when such information is not required as a result of a risk assessment under Regulation 8). This is consistent with the principle of statutory interpretation *expressio unius est exclusio alterius* ('to express one thing is to exclude another'), see Bennion, Statutory Interpretation, Code Section 390, 6th Edition; Craies on Legislation, 20.1.28, (London, Sweet & Maxwell, 2017). For a recent application of the principle see *Minister of Energy v Maharaj* [2020] UKPC13, [56].

36. Provided an FSP (a) conducts a risk-based assessment in accordance with Regulation 8 of the AMLRs, and (b) obtains sufficient information to assess that risk, including understanding the purpose and intended nature of a business relationship, the nature of the client, etc., the obligation in Regulation 12(1)(d) is satisfied. It does not require that *in every case* further documentary evidence to verify or substantiate the nature / purpose of the business relationship must be obtained. As set out in the White Affidavit #2, MCSL has a sophisticated and detailed CDD process. That process ensures that MCSL first assesses the risk arising out of the transaction / client in question and then gathers appropriate information, by reference to the proper risk rating. That is what Regulation 12(1)(d) requires. That requirement was met in each of the client files examined by CIMA: see MCSL's response to the 2020 MCSL Draft Report, ¶¶6-8 and Appendix A to that document.

37. Second, CIMA's interpretation is inconsistent with the AML Guidance Notes, Part II.4.A.3 and 9; Part II.4.B.38; and Sector Specific Guidance on Fiduciaries, section Part IV.1.D.1(1).

    37.1. At II.4.A.3 the AML Guidance Notes state that CDD measures include '*Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship*'. The underlined words, which do not appear in Regulation 12(1)(d), reinforce the Plaintiffs' point that the information that needs to be obtained in order to 'understand' the '*purpose and nature of the business relationship*' will depend on the context. In particular, the extent and form of information required may vary by reference to the specific ML/TF/PF

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risks in each individual case. That is a matter requiring an exercise of judgment by the FSP. As Ms. White explains in the White Affidavit #2, MCSL has a nuanced and careful framework for conducting that assessment.

37.2. At II.4.A.9, the emphasis is again on the FSP's 'understanding' of the nature / purpose of the business relationship. There is no reference to the need to obtain documents to verify that understanding. Again, this may be contrasted to the CDD requirements at II.4.A.7, which require verification using '*independent source documents*'. Where such wording is not used at II.4.A.9, the presumption must be that there is a relevant difference in meaning.

37.3. Part II.4.B.38 also makes clear the importance of context to the nature and extent of information that is to be obtained. It provides that in the discharge of its CDD obligations an FSP '*shall take a risk-based approach in determining the scope of any identification and verification documentation that is required to be collected* [and] *may need to collect several or all types of documentation and information listed below depending on the specifics / type of the corporate applicant and risks posed*' (underline added). The underlined sections all involve an exercise of judgment according to the context, in particular the ML/TF/PF risks posed.

37.4. By Part IV.1.D.1(1), all that is required is '*an explanation of the nature of the proposed company's business*'; by contrast, the other CDD requirements in that paragraph (2) and (3) both require '*satisfactory evidence*'. Once again, the difference in wording must be afforded some meaning.

38. CIMA's response to those parts of the AML Guidance Notes (referred to by MCSL in its response dated 13 July 2020 to the 2020 MCSL Draft Report, ¶8.1) is to argue that these '*do not supersede the AMLRs*', and that reference should be made to the appropriate statutory provisions, namely the AMLRs: 5.2.6.6. However, the AML Guidance Notes support MCSL's interpretation of Regulation 12(1)(d), not CIMA's interpretation. Furthermore, they are consistent with the wording of Regulation 12(1)(d) itself. Provided that they are not inconsistent with the express wording of the AMLRs, the AML Guidance Notes – which are made under statutory powers, s. 34(4) of the MAA – are relevant in determining whether there has been a breach, particularly one which would amount to a criminal offence (see Regulation 56(2) of the AMLRs). Indeed, any failure by CIMA to follow that guidance without good reason is unlawful: *R (Crompton) v South Yorks Police and Crime Comr* (DC) [2018] 1 WLR 131, [48]-[56].

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39. Third, CIMA's reliance on Regulation 31(1) of the AMLRs in support of its interpretation (5.2.6.5) is misplaced. That provision requires that records be kept of '*the nature of evidence of customer due diligence obtained*'. This provision relates to all forms of CDD and makes clear that the 'nature' of the evidence may differ depending on the CDD requirement. For some CDD requirements documentary evidence will be required because the primary obligation requires collection of that form of information (e.g. Regulations 12(1)(a)-(c)). However, Regulation 12(1)(d) does not impose such a requirement; the evidence can be of a different 'nature'. No additional obligation arises by way of Regulation 31(1) itself.

40. In conclusion, CIMA's Findings of a breach with Regulation 12(1)(d) of the AMLRs are based upon an error of law, namely its misinterpretation of that requirement.

41. CIMA's PAP Response on Ground 1. CIMA gave no substantive response to this ground of challenge in its PAP Response: see ¶¶. 22-23.

(2). Ground 2: Unlawful Findings in relation to authorised signatories for bank accounts (Regulation 12(1)(b) (5.2.16)

42. CIMA's finding that MCSL failed to document verification of authorised signatories for bank accounts held by corporate clients, contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.(38) of the AML Guidance Notes (¶12, above), is wrong in law for the following reasons.

43. First, Regulation 12(1)(b) of the AMLRs requires that an FSP '*verify that a person purporting to act on behalf of a customer is properly authorised and identify and verify the identity of the person*'. This only requires the FSP to conduct CDD in relation to the person who purports to act on behalf of the client *vis à vis* the FSP. That means the FSP must verify the person from whom it takes instructions, or the persons that authorise the payments that the FSP receives from the client; those are the persons who are 'purporting to act' on behalf of the client. It does not require the FSP to verify the identities of other persons 'purporting to act' on behalf of the client, including authorised signatories on bank accounts, in their dealings with third parties. CIMA's proposed interpretation of Reg. 12 (1)(b) is, moreover, impractical, unnecessary and duplicative, for the reasons given in White Affidavit #2, ¶162-166. An FSP will have no knowledge of who is purporting to act on behalf of its client in relation to third parties, potentially located in other jurisdictions, and in relation to transactions about which the FSP knows nothing. This does not create an AML lacuna; quite the contrary. The client's bank will be responsible for verifying the identity of persons acting for its client in relation to those transactions that the bank facilitates and over which it has visibility. CIMA's error is to impose that

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obligation on the FSP, which provides the client with corporate services (see ¶22 of MCSL's response dated 13 July 2020 to the 2020 MCSL Draft Report). CIMA's conclusion to the contrary at 5.2.21.2(3) is wrong in law.

44. Second, CIMA's reliance upon the AML Guidance Notes, II.4.B.38(4)[9], is misplaced (2020 MCSL Final Report, 5.2.21.2(3)). Part II.4.B.38(4) provides that the information to be gathered may include: '*In the case of a bank account, satisfactory evidence of the identity of the account signatories, details of their relationship with the company and if they are not employees an explanation of the relationship. Subsequent changes to signatories must be verified*'. However, this does not assist CIMA's argument:

    44.1. We have set out Part II.4.B.38 at ¶37.3, above, which makes clear that an FSP must exercise judgment in determining which of the '*documentation and information listed below*', including at II.4.B.38(4), it should obtain. This makes clear that the extent of the documentation to be obtained involves an exercise of judgment according to the context, in particular the ML/TF/PF risks posed. It does not impose an absolute requirement to obtain that information in every case, regardless of the context.

    44.2. MCSL has already accepted that a CDD duty can and does arise to verify the signatory of a bank account if an individual thereby '*purports to act*' on behalf of the client *vis-à-vis* the FSP, for example by authorising a transaction of which the FSP has knowledge in the course of its business relationship. In those circumstances, there will be a duty to have satisfactory evidence that the duty has been discharged; in that respect II.4.B.38(4) offers helpful guidance. But it does not assist in determining whether a CDD duty under Regulation 12(1)(b) exists in the first place. That, as we have shown, is context-specific.

45. Accordingly, and in conclusion, CIMA is wrong to insist that MCSL must verify all authorised signatories purporting to act on behalf of its clients in respect of all transactions carried out from all the client's bank accounts. Regulation 12(1)(b) does not impose such a requirement. Even in the case of clients that MCSL has assessed as 'high risk', it will not be necessary to gather that information in every case, although MCSL may consider it necessary in individual cases depending on the circumstances. *A fortiori* it is not necessary for all clients that have been assessed as 'low risk'.

[9] See fn4

46. CIMA's PAP Response on Ground 2. CIMA's response on this ground is a little difficult to understand but, in any event, fails to deal substantively with the points raised by MCSL.

46.1. At ¶24 CIMA states that it '*did not…distinguish between low risk and high risk client files because the scope of the Focused Review was limited specifically to regulation 12 of the AMLR and did not extend directly to regulation 8 of the AMLR which deals with the assessment of risk*'. That would appear to disclose a yet further material error of law, which may explain CIMA's flawed approach generally. CDD is not a one-size-fits-all exercise; it involves the application of judgment in each case following a risk assessment under Regulation 8: see, for example, Regulation 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 Regulation 21(1) of the AMLRs ('*a person carrying out relevant financial business may apply simplified customer due diligence measures under this Part where it has identified and assessed a low level of risk in accordance with regulation 8*'). The precise ambit of what is required when fulfilling the duties under Regulation 12 of the AMLRs is context-specific and informed by the assessment of risk, carried out pursuant to Regulation 8 of the AMLRs. Regulations 12 and 8 must be read together; it makes no sense, nor is it lawful, to disaggregate the two in the manner that CIMA has done. CIMA cannot simply point to a file and say 'there is no record of authorised signatories'. It must in each case grapple with whether, given the nature of the services provided and MCSL's assessment of risk, MCSL was wrong to conclude that it was not necessary to obtain that information. MCSL's argument is supported by section 4.B.38 of the AML Guidance Notes, as noted above at ¶35.3.

46.2. In any event, CIMA has not answered the points made under Ground 2 in the PAP Letter and developed in more detail above.

46.3. At ¶25 CIMA states that it '*interpreted the authorised account signatories of the corporate clients to be officers, employees or any other party in addition the identified UBO and directors who would be authorised to act on behalf of the client*'. That, so far as it goes, is unobjectionable: MCSL accepts that a signatory on a bank account may be a person '*purporting to act on behalf of a customer*' who MCSL must identify, and whose identity MCSL must verify under Regulation 12(1)(b). MCSL's point – which CIMA has not addressed – is that this obligation only applies in relation to authorised signatories who

purport to act on behalf of the client vis-à-vis MCSL, or at least purport to act in respect of transactions that MCSL is aware of and/or plays some part in facilitating.

(3). Ground 3: Unlawful findings in relation to ongoing monitoring and periodic reviews: scrutiny of transactions (Regulation 12(1)(e)(i)) (5.2.29)

47. CIMA found that MCSL was in breach of Regulation 12(1)(e)(i) of the AMLRs by virtue of its failure to evidence that it had reviewed the business relationship on an ongoing basis to ensure that transactions being conducted are consistent with MCSL's knowledge of the client etc. (5.2.27, above ¶14). CIMA also found that there was insufficient evidence that periodic reviews had been conducted prior to early 2020.

48. Regulation 12(1)(e)(i) provides that a person carrying out relevant financial business shall '*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*'.

49. CIMA's Finding is vitiated by the following errors of law, both in relation to 'high risk' and 'low risk' clients.

50. First, CIMA found that there were fourteen client files in which MCSL is said to have breached this requirement, but has only identified four such files, see above, ¶14. CIMA's Findings in relation to the ten unidentified client files are vitiated as a matter of law in the absence of any means of identifying those files. The rule of law requires that an individual must know of a decision before their rights can be adversely affected: *R (Anufrijeva) v Home Secretary* [2004] 1 AC 604, [28].

51. CIMA has now sought to justify this omission by asserting in the PAP Response that it has only identified '*the most egregious examples*' and that this is CIMA's '*traditional*' approach. CIMA then goes on to identify the ten previously unidentified files (PAP Response, ¶29-30). To the extent that this is CIMA's '*traditional*' approach, it breaches the principle in *Anufrijeva*. Moreover, CIMA has given no reasons in support of its Findings in relation to those ten other files. The Finding in relation to those files is still defective in law given that absence of reasons.

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52. In any event, CIMA's Finding in relation to all the identified files (i.e. the four identified in the 2020 MCSL Final Report, and the ten only identified in the PAP Response, but for which no reasons were given) is vitiated by the following additional errors of law.

53. Second, CIMA has erroneously interpreted Regulation 12(1)(e)(i) of the AMLRs as requiring an FSP to scrutinise transactions conducted between its client and a third party, even when (as in MCSL's case, where the only services being provided are corporate services, such as RO services) the FSP has no knowledge of, involvement in, or responsibility for, its client's transactions with third parties. Regulation 12(1)(e)(i) requires the scrutiny of '*transactions undertaken throughout the course of the business relationship*': namely those which the FSP has knowledge of, involvement in or responsibility for as a result, and in the course, of the business relationship between the FSP and its client (see ¶31.1 of MCSL's response dated 13 July 2020 to the 2020 MCSL Draft Report). The provision does not require the scrutiny of transactions between the FSP's client and third parties of which the FSP has no knowledge and which are therefore not '*transactions undertaken throughout the course of the business relationship*' between the FSP and client within the meaning of Regulation 12(1)(e)(i) of the AMLRs. The Plaintiffs accept that the position may be different where an FSP provides services as a result of which it obtains some knowledge of transactions between a client and a third party (for example, and most obviously, as a bank). But where (as in the case of MCSL) the only services provided are corporate services (such as the provision of an RO), Regulation 12(1)(e)(i) does not require *in all cases* that the underlying transactions between a client and third parties are scrutinised on an ongoing basis.

54. *A fortiori* that is so where the client has been properly assessed as 'low risk' in accordance with Regulation 8 of the AMLRs.

55. CIMA rejected this argument by MCSL, stating in the 2020 MCSL Final Report, 5.2.31.2:

> '*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 / 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*.'

56. CIMA's approach discloses a fundamental misunderstanding of the nature of the services provided by the Plaintiffs. As the White Affidavit #2 demonstrates, at ¶¶168 and 187-198, a provider of corporate services (such as an RO provider) will rarely have sight of the transactions undertaken by

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its clients with third parties. CIMA's approach requires all FSPs to scrutinise transactions that all their clients conduct with all third parties, even if they have no knowledge or oversight of those transactions in the course of their ordinary business relationship. It is important to recall how onerous this burden is in the case of a provider of corporate services, like MCSL. Its limited services include providing a registered office, forwarding correspondence and making the necessary filings and registrations, as required under Cayman Islands law (see the White Affidavit #2, ¶22-29). In the vast majority of its business it has little or any visibility over the actual operations and transactions of the client. By imposing onerous scrutiny obligations on MCSL in this situation, CIMA imposes an obligation that is unrealistic and disproportionate, but also unnecessary and duplicative. CIMA, in effect, requires FSPs to act as policemen to investigate transactions in relation to which they have no knowledge, involvement or responsibility. That is not what is required by Regulation 12(1)(e)(i).

57. Third, CIMA's interpretation is inconsistent with the FATF 40 Recommendations and the 2019 FATF Guidance for TCSPs.

57.1. FATF Recommendation 10 provides that CDD measures to be taken include '*(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship*'. (This is the provision that ultimately finds expression in Regulation 12(1)(d)). The use of the determiner 'that' makes clear there must be some link between the transactions to be scrutinised and the business relationship between the FSP and its client ('that relationship').

57.2. Recommendation 10 continues that FSPs should be required to apply the CDD measures (including (d)) '*but should determine the extent of such measures using a risk-based approach (RBA)*'. Clearly, this does not require an FSP that provides limited corporate services to scrutinise all transactions that a client has with third parties and which it has no knowledge of, involvement in or responsibility for in the course of that business relationship. The extent of the duty depends upon the FSP's assessment of risk.

57.3. Recommendation 22(e) provides that the Recommendation 10 CDD obligation should apply to TCSPs. The duty is engaged: '*when they prepare for or carry out transactions for a client concerning the following activities…*,' including RO services. This clearly envisages that the CDD duty does not extend to transactions that an FSP that is a TCSP has not 'prepared for' or 'carried out' for the client. That is reinforced by the effect of Recommendation 23(c), which provides that TCSPs should be required to '*report suspicious transactions for a client*

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when, on behalf of or for a client, they engage in a transaction in relation to the activities referred to in paragraph (e) of Recommendation 22.'

57.4. The FATF Guidance for TCSPs of June 2019, at ¶25-26, refers to the same wording in Recommendation 22 and 23.

57.5. Accordingly, the FATF 40 Recommendations are unambiguous that the obligation on a TCSP, like MCSL and MFS, to scrutinise transactions as part of its CDD arises only in relation to transactions that are conducted by the TCSP for or on behalf of the client in the course of the business relationship between the TCSP and the client. The obligation does not extend to all transactions between the client and third parties.

58. Fourth, CIMA's interpretation is also inconsistent with the wording in the AML Guidance Notes. The relevant provisions of the AML Guidance Notes are:

58.1. Part II.16.B.1, which states that '*FSPs are required to understand the purpose and intended nature of the business relationship which it has with the customer*'. The obligation is not to understand the purpose and nature of the business relationship between the client and third parties.

58.2. Part II.16.E.10-28. The detailed guidance in these paragraphs is clearly directed at transactions that an FSP has knowledge of, involvement in or responsibility for in the course of its business relationship with the client. This is reinforced by the sector specific guidance in relation to banks (III.1.G.1), and building societies (III.3.G.1).

59. CIMA's riposte in the PAP Response to MCSL's reliance on these provisions of the AML Guidance Notes is to refer, at ¶31, to Part II.16.B.2 of the AML Guidance Notes:

> '*2. Pursuant to its obligations under the AMLRs, an FSP is required to conduct ongoing monitoring on a business relationship to the extent reasonably warranted by the risk of ML/TF/PF and sanctions-related risks. Ongoing monitoring includes: … (2) Reviewing of transactions conducted to ensure that they are consistent with the FSP's knowledge of the customer, which may include the customer's source of funds and source of wealth, along with the customer's occupation and/or business*.'

60. However, this provision: (a) reinforces MCSL's point that ongoing monitoring is required '*to the extent reasonably warranted by the risk*', so is context-specific; and (b) does not undermine MCSL's fundamental point that the transactions to be scrutinised (*'transactions conducted'*) are those of which

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an FSP will have knowledge and/or involvement in during the course of the business relationship between the client and the FSP, not those conducted by the client with third parties of which the FSP has no knowledge.

61. Fifth, CIMA also asserted that MCSL was under a duty to scrutinise transactions between a client and third parties, even when providing corporate services (such as RO services) only, by virtue of s. 59(2B) of the Companies Act (2021 Revision) (the '**Companies Act**') (5.2.31.3). This erroneous argument is addressed separately under Ground 7, ¶95 below.

62. Sixth, as explained in the White Affidavit #2, at ¶¶90-98, CIMA previously raised scrutiny of transactions as an issue following its inspection of MCSL in 2018 but, following representations by MCSL, they accepted that the remediation measures taken by MCSL were adequate. In particular, CIMA did not persist with the argument that MCSL was required to scrutinise the transactions of its clients over which it had no visibility and in respect of which it had no involvement. There has been no material change in the AMLR or the AML Guidance Notes since 2018. CIMA's new position, therefore, appears to be simply a change in how it chooses to interpret the law.

63. Such a significant change should not be made by way of a different interpretation of the Regulations communicated to a regulated entity by way of Findings and Requirements. It is extremely difficult, if not impossible, for FSPs to comply with the law if the law is subject a shifting interpretation by the regulator. Rather it should be brought about by a change in the Regulations, or at least the guidance, themselves. That, moreover, would offer FSPs an opportunity to be consulted (see s. 4(1) and 34(1)(b) MAA) before the rule change so as to avoid the imposition of burdens that are disproportionate and to ensure consistency of approach and legal certainty. It is also important to note that – as part of any consultation under s 4(1) – CIMA would be required to explain the extent to which a corresponding measure has been adopted in a country or territory outside the Islands (s. 4(1)(iii)). As Ms White explains, the interpretation of Reg. 12 advanced by CIMA in the Final Reports is not – in her experience – consistent with the approach taken in the FATF 40 or by any other jurisdiction (¶¶187.2 and 198).

64. In conclusion, CIMA's interpretation and application of Regulation 12(1)(e)(i) of the AMLRs in relation to 'scrutiny of transactions' was unlawful.

65. CIMA's PAP Response on Ground 3. We have already set out at ¶50 and 59 above the Plaintiffs' rejoinder to CIMA's response on this Ground at ¶29-31, which relates only to asserted breach of the

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provision in the case of ten unidentified files. CIMA has otherwise failed to address the substance of the arguments under this Ground at ¶53-58, above.

(4). Ground 4: Unlawful findings in relation to ongoing monitoring and periodic reviews: source of funds / source of wealth (Regulation 12(1)(e)(i)) (5.2.7)

66. CIMA concluded that there had been a breach of Regulation 12(1)(e)(i) of the AMLRs by reason of MCSL's '*practice of not collecting source of funds and/or source of wealth information for its 'Low Risk Clients"* (5.2.8(2), 5.2.9, above (¶16). This Finding is vitiated by the following errors of law.

67. First, CIMA's finding of a breach of Regulation 12(1)(e)(i) of the AMLRs by reason of any failure to collect '*source of wealth*' (as opposed to '*source of funds*') information is erroneous. No obligation to collect CDD in relation to 'source of wealth' arises under Regulation 12(1)(e)(i). The only circumstances in which an obligation to obtain source of wealth information arises is if a prospective client is a '*politically exposed person*' within the meaning of Regulation 30(1) of the AMLRs, in which case they would be 'high risk' and enhanced CDD would be required (Regulation 27(e) of the AMLRs). The only relevant CDD obligation under Regulation 12(1)(e)(i) relates to 'source of funds', defined in the glossary to the AML Guidance Notes as: '*… 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)*'. On the other hand, '*source of wealth*' refers to '*the origin of the entire body of wealth (i.e. total assets). This information will usually give an indication as to the volume of wealth the customer would be expected to have, and a picture of how the customer (applicant / owner / PEP) acquired such wealth*.' The Plaintiffs were under no obligation to obtain 'source of wealth' information in relation to any of the identified files, which are all low risk and (by definition) did not involve '*politically exposed persons*'.

68. Second, Regulation 12(1)(e)(i) of the AMLRs only requires knowledge of 'source of funds' in the context of scrutinising '*transactions undertaken throughout the course of the business relationship*', '*where necessary*'. Accordingly, it was open to MCSL to conclude that it was not '*necessary*' to establish source of funds in relation to transactions undertaken in the context of its business relationship with at least some of its clients. This is consistent with the arguments set out above and with the overarching approach of the FATF 40 Recommendations and the AMLRs, which emphasise that CDD is driven by an RBA. It is not always '*necessary*' to establish the source of funds in the context of its transactions with 'low risk' clients, for the following reasons (see ¶11 of MCSL's

response dated 13 July 2020 to the 2020 MCSL Draft Report; see also the White Affidavit #2, ¶¶176-180):

68.1. It is possible that in some cases the only transaction in which the source of the client's funds might be relevant in the business relationship between MCSL and its clients is the payment of MCSL's fees, for example for providing corporate services. In some – perhaps many – cases there will be no other transactions undertaken throughout the course of the business relationship. In those circumstances it is open to MCSL to conclude that identifying the 'source of funds' for the payment of those fees is not 'necessary' for the purposes of Regulation 12(1)(e)(i).

68.2. Those fees are typically in the region of US$2,000 p.a., and are likely to fall below the *de minimis* threshold in Regulations 11(b), 20(3)(d), and 31(5)(ii) of the AMLRs.

68.3. CIMA's complaint focuses on certain clients that the Plaintiffs assessed as '*low risk*' for the purposes of Regulations 21 and 22 of the AMLRs. Accordingly, simplified CDD requirements are sufficient, applying the RBA in Regulation 8 of the AMLRs, provided these are commensurate with the low level of risk. As the AML Guidance Notes provide at II.4.B.38,[10] the RBA may affect the intensity of CDD in relation to 'source of funds'.

69. In its 2020 MCSL Final Report, CIMA did not address[11] MCSL's arguments as summarised at ¶68, above. Instead, it raised three arguments that were not set out in the 2020 MCSL Draft Report,[12] namely (5.2.10.4) that:

69.1. It was not open to MCSL to assess *any* client as 'low risk' given the findings of the Cayman Islands National Risk Assessments (the '**NRAs**') in 2015 and 2020;

69.2. None of the six clients in fact met the criteria for simplified CDD in Regulation 21; and

69.3. MCSL was under a duty to scrutinise transactions between a client and third parties so as to establish the source of funds, even when providing corporate services only (such as RO services), by virtue of s. 59(2B) of the Companies Act (5.2.31.3).

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[10] See fn4.

[11] In the PAP Letter, the Plaintiffs stated that CIMA had not 'contested' the arguments. CIMA objects to the use of this term, stating that it did contest the arguments because it stood by its original finding. The Plaintiffs have replaced the word 'contest' with 'address'.

[12] Accordingly, these are argument MCSL had no opportunity to address before the 2020 MCSL Final Report was produced.

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70. Each of these arguments is wrong. They are addressed separately, under Grounds 5-7, below.

71. In conclusion, CIMA's interpretation and application of the 'source of funds / source of wealth' requirement in Regulation 12(1)(e)(i) of the AMLRs was unlawful.

72. CIMA's PAP Response on Ground 4. CIMA's points at ¶¶32-35 of its PAP Response are either of marginal relevance (¶32-33) or merely assert the correctness of CIMA's conclusions. They do not address the substance of Ground 4.

(5). Ground 5: CIMA's errors as to the NRAs in relation to 'low risk' clients under Regulation 21(2) of the AMLRs (5.2.10.4(1))

73. CIMA erred in its finding that, by virtue of Regulation 21(2), it was not open to MCSL to assess any client as a 'low risk', and therefore to apply simplified CDD, because of the findings of ML/TF risks made in the 2015 and 2020 NRAs; alternatively, that MCSL had failed to take into account those NRAs when assessing those clients as being at low risk.

74. One of the reasons MCSL gave in its response to the 2020 MCSL Draft Report for objecting to CIMA's Finding in relation to 'source of funds' was that several of the relevant clients were 'low risk' and so met the criteria under Regulation 22 of the AMLRs for the application of simplified CDD (see above, ¶68.2). In its 2020 MCSL Final Report, CIMA rejected this argument (¶69 above) for a number of reasons, which had not been raised before and to which MCSL therefore had not chance to respond before the Final Report. The first of these reasons (5.2.10.4(1)) was that it was not open to MCSL to assess those clients as a 'low risk', and therefore to apply simplified CDD, because by virtue of the 2015 and 2020 NRAs, under Regulation 21(2) of the AMLRs it was not open to MCSL to assess *any* client as 'low risk' (as explained further, ¶87 below, CIMA now takes a more nuanced approach although that, too, reveals an error of law).

75. Regulation 21(2) provides that an FSP's assessment that there is a 'low risk' of ML/TF/PF in relation to a particular client which otherwise meets the criteria for the application of simplified CDD is only valid '*if the finding is consistent with the findings of the national risk assessment or the Supervisory Authority, whichever is most recently issued*.'

76. CIMA's 2020 Final Reports relied on this provision and argued that there had been two relevant NRAs with which MCSL's assessment of 'low risk' was not consistent, namely (5.2.10.4(1)):

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76.1. The Cayman Islands' first NRA in 2015, which (according to CIMA) had concluded that TCSPs '*were assessed to be the most vulnerable to money laundering, with a score of 0.57, as [TCSPs] 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. As such, the vulnerability level was medium for [TCSPs]*'.

76.2. The Cayman Islands NRA in relation to TF in February 2020, in which (according to CIMA) it was found that *'there is a medium-high risk of the Cayman Islands being misused for TF purposes'*.

77. Given, CIMA reasoned at 5.2.10.4(2), that the AML Guidance Notes I.2.I.4 state that '*While conducting the risk assessments, FSPs shall also take into account the ML / TF / PF threats / risks identified in the [NRA]*', CIMA concluded '*the Licensee's assessment of risk does not appear consistent with the findings of the most recent NRA for the application of simplified due diligence for its Trust and Corporate clients*' and '*it appears the Licensee has not taken into consideration both the findings from the 2015 and 2019 NRA when arriving at the client risk assessment*'.

78. This reasoning reveals two further categories of error of law.

(a) Error of fact amounting to an error of law

79. The first error of law relates to matters of fact. An error of fact which is material, uncontentious and objectively verifiable may constitute an error of law vitiating an otherwise lawful decision: see e.g. *R v Criminal Injuries Compensation Board ex p A* [1999] 2 AC 330; *E v Secretary of State for the Home Department* [2004] QB 1044, [66]; Fordham, Judicial Review Handbook (7th Edition), ¶49.3.

80. CIMA's reasoning reveals two such errors (for which see the White Affidavit, #2, ¶183).

81. First, when CIMA referred to the findings of the 2015 NRA as having assessed TCSPs '*to be the most vulnerable to money laundering*', it misstated and exaggerated the ML risks of TCSPs identified in the NRA. What the 2015 NRA found was that, among Designated Non-Financial Businesses and Professions ('**DNFBPs**'), TCSPs presented the greatest degree of vulnerability at 0.57 (p. 15), a 'medium' risk. But DNFBPs (such as auditors, external accountants, tax advisors, casinos and other gambling service providers, dealers in precious metals, dealers in precious stones, lawyers) are generally not FSPs and, with the exception of TCSPs, were not subject to the AMLRs at that time. The NRA identified other FSPs – which are not DNFPBs – at a much higher ML/TF risk than TCSPs:

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for example, the Securities Sector had a vulnerability score of 0.73 ('medium high'); and the Banking Sector was assessed at 0.61 ('medium high'). CIMA's mistake mischaracterised the findings of the 2015 NRA and overstated the risk that TCSPs were assessed to present relative to other FSPs.

82. In its PAP Response, ¶37, CIMA accepts that the 2015 NRA finding was qualified in the way the Plaintiffs have now pointed out but without accepting it was in error.

83. Second, CIMA's reference to the 2020 NRA in relation to TF risks in the Cayman Islands as 'medium-high' again overstates the nature of the risk found by the NRA. The overall assessment was, in fact, '*that there is a medium risk of the Cayman Islands being misused for TF purposes*' (Summary, ¶3, p. 1).

84. In its PAP Response, ¶37, CIMA accepts that, once again, it was mistaken. However, it denies that these two errors of fact undermine the validity of its conclusion. But having accepted it has made these errors of fact, the only question is whether those were material to its decision. The Plaintiffs submit that these were clearly material facts that CIMA deployed in support of its Finding that the Plaintiffs had not been entitled to assess their clients as 'low risk' for the purposes of Regulation 22 of the AMLRs. CIMA's Finding is therefore vitiated by an error of law.

(b) Incorrect interpretation of Regulation 21(2) of the AMLRs

85. The second error of law concerns the interpretation that CIMA gave to Regulation 21(2) of the AMLRs at 5.2.10.4 (above, ¶77), namely that *any* assessment that a client was at low risk for ML/TF/PF is *automatically* invalid given the conclusions of the 2015 and 2020 NRAs. That is not what Regulation 21(2) says, nor what it means.

85.1. First, it does not follow from a finding in an NRA that TCSPs as a class, or the Cayman Islands as a whole, are at a medium (or even a high) risk of vulnerability to ML/TF/PF that a FSP *cannot* make an assessment under Regulation 8 that a particular client is a low risk for the purposes of Regulation 21(1) of the AMLRs. The question of whether such a finding is 'consistent' with the NRA is a matter of judgment, as Part II.4.A.(3)-(4) of the AML Guidance Notes makes clear. While an NRA assessment of risk other than 'low' is a relevant consideration, it is not automatically and for all purposes determinative, and therefore inconsistent with, an individual FSP's assessment that a particular business relationship or transaction is low risk, justifying the use of simplified CDD.

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85.2. Second, Regulation 21(2) is to be contrasted with Regulation 20(4) of the AMLRs, which provides that '*The simplified customer due diligence measures…shall not be applied to any business relationship or one-off transaction where a person required to comply with regulation 5(a) has reasonable grounds to believe that the business relationship or one-off transaction presents a higher risk of money laundering or terrorist financing*.' Thus Regulation 20(4) of the AMLRs establishes an absolute prohibition on applying simplified CDD, but it is only triggered following an assessment by the FSP that a particular business relationship or transaction presents a higher risk of ML/TF/PF. Regulation 21(2) does not constitute such an absolute prohibition; instead, it only requires FSPs to take into account and give due weight to an NRA.

85.3. Third, Regulation 21(2) can also be contrasted with Regulation 8A of the AMLRs, which states that an FSP '*shall not assess a country or geographic area as having a low risk of* [ML/TF/PF]' when a report from a '*credible source*' has identified the country or geographic area as falling within one of the criteria in Regulation 8A(2) (above). Again, as with Regulation 20(4), Regulation 8A constitutes an absolute prohibition on an assessment of low risk where the criteria are satisfied. Those criteria are not satisfied in relation to the Cayman Islands, so Regulation 8A(2) does not apply.

85.4. Fourth, if CIMA's interpretation is correct, then no FSP in the Cayman Islands, particularly any TCSP, can ever assess any client or transaction as being at 'low risk'. Both Regulation 22(d) of the AMLRs and section 5 of the AML Guidance Notes are rendered redundant. That cannot be what Regulation 21(2) is intended to achieve.

86. In conclusion, neither the 2015 nor the 2020 NRA precludes a finding of 'low risk' in the context of a particular business relationship or transaction, provided the FSP (a) has conducted an assessment of risk in accordance with Regulations 8 and 21, (b) has not concluded there is a higher risk of ML/TF/PF in accordance with Regulation 20(4) of the AMLRs and (c) has taken into account and considered whether the finding of 'low risk' is consistent with any NRA as required by Regulation 21(2).

87. CIMA's PAP Response on Ground 5. In its PAP Response, ¶36-38, CIMA avers that the Plaintiffs have 'misrepresented' its position. CIMA's case is that '*throughout the inspection process, in its responses to the MCSL Interim Report, and even in the letter, MCSL has: (1) failed to demonstrate how it had taken into consideration the findings from the National Risk Assessment; and (2) having*

taken into consideration the findings of the NRA and having reasonable controls to mitigate the risk ultimately arriving at an assessment of low risk, failed to demonstrate how it could apply simplified CDD based on the criteria stipulated within Regulation 22'.

88. The Plaintiffs respond as follows (and see the White Affidavit #2, ¶184-186):

88.1. First, the more natural reading of CIMA's reasoning at 5.2.10.4(1)-(2) (above, ¶77) articulates an absolute position rather than the more nuanced position that it now asserts to be the correct one.

88.2. Second, notwithstanding, CIMA appears to accept that the absolute position is wrong in law, and Regulation 21 is not to be interpreted as meaning that an NRA which assesses the ML/TF risks of the Cayman Islands as a whole, or of a particular business type, as anything other than 'low' means an FSP cannot assess a client as being at 'low risk' of ML/TF. It was therefore open to MCSL to make an assessment that some of its clients were 'low risk'.

88.3. Third, CIMA's more nuanced position is still unlawful. CIMA raised this point for the first time in its 2020 MCSL Final Report. Accordingly, it was never put to MCSL that it had failed to demonstrate that it had '*taken into consideration both the findings from the 2015 and 2019*[13] *NRA when arriving at the client risk assessment*'. Having failed to give MCSL that opportunity, CIMA's conclusion is flawed for want of procedural fairness.

88.4. Fourth, and in any event, MCSL <u>does</u> take into account the NRAs as a matter of course. As Ms. White explains the White Affidavit #2, the Plaintiffs' compliance professionals are well aware of the NRA findings, and the part that they play in the overall risk assessment that is conducted in relation to any client. As she explains, the Plaintiffs both now have company risk assessments that refer in terms to the NRAs. They also take into account the overall risks arising out of the relevant Plaintiff's clients, operations, processes and services. This 'fixed' contextual material then provides the starting point (but no more) for an individualised risk assessment that is conducted in relation to each and every client. That risk assessment will take account of the nature of the service sought, the geographical origin of the client, any previous experience and/or contact with the client and any other relevant contextual information. Thus it is not right to say that the NRAs do not inform the RBA conducted by

[13] CIMA refers here to the 2019 NRA but the report was actually published in February 2020.

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the Plaintiffs. They form a key part of the Plaintiffs' company risk assessments. They are also something of which the Plaintiffs' compliance professionals are acutely aware.

89. It follows that CIMA's dismissal of MCSL's assessments that specific clients were a 'low risk' of ML/TF/PF on the ground that they were inconsistent with the 2015 and 2020 NRAs, and without consideration of MCSL's underlying assessments of risk or inquiry as to whether the NRA was taken into account, was vitiated by an error of law. Although this was not a formal 'Finding' and did not lead to a formal 'Requirement', CIMA's erroneous approach to the NRAs is one of the reasons it gives for defending its Finding in relation to 'source of funds' (¶69 above) and is therefore an additional reason to quash that Finding. The Plaintiffs are also concerned to establish that their interpretation of Regulation 21(2) and their application of the simplified CDD procedure is correct.

(6). Ground 6: CIMA's application of the simplified CDD requirements for 'low risk' clients in Regulation 22 of the AMLRs (5.2.10.4(3))

90. A further (second) reason given by CIMA for rejecting MCSL's reasons as to why CIMA was wrong in its Findings for 'source of funds / source of wealth' (see ¶69, above) was that, of the six identified files said to be 'low risk', '*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*' (5.2.10.4(3)).

91. Again, this conclusion was reached by CIMA in its 2020 MCSL Final Report. It was not prefigured in the 2020 MCSL Draft Report so MCSL did not have a reasonable opportunity to respond to it. Again, the conclusion is flawed for want of procedural fairness.

92. Moreover, with the sole exception of one file, CIMA has given no specific reasons for its conclusion as to why MCSL was incorrect to assess these as 'low risk': its reasons in Appendix A for its conclusion are generic and repetitive:

> '*Regulation 12(1)(e)(i) of the AMLR states scrutinizing 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. As such the Licensee when reviewing transactions / activities conducted by the client should ensure that they are consistent with the Licensee's knowledge of the client, which may include the client's source of funds and source of wealth*.'

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93. Accordingly, in the absence of any, or any adequate, reasons for its conclusion that these clients were wrongly assessed by MCSL as 'low risk', CIMA's Findings are wrong in law. (MCSL no longer maintains the challenge to the factual findings in relation to these client files that it made in the Complaint, for the reasons explained at ¶6, above).

94. CIMA's PAP Response on Ground 6. CIMA's response on this ground, ¶40, is to assert that it has given reasons for its Findings, namely those at ¶5.2.10. However, these reasons are generic to all the files (and are addressed under Grounds 4,5 and 7); they are not specific to the facts of any of those files. CIMA's conclusions in relation to those files are therefore flawed for want of adequate reasons.

(7). Ground 7: CIMA's erroneous interpretation of, and reliance upon, s. 59(2B) of the Companies Act (5.2.10(4))

95. As pointed out at ¶69 above, in its 2020 MCSL Final Report CIMA adopted three fresh reasons for its conclusion that MCSL was in breach of Regulation 12(1)(e)(i) of the AMLRs in failing to conduct CDD in relation to 'source of funds'. The third involved reliance upon s. 59(2B) of the Companies Act. As with the other two, the Plaintiffs had no opportunity to comment on this argument before the 2020 MCSL Final Report was issued. CIMA also relied on the s 59(2B) argument as a reason for rejecting MCSL's arguments in relation to 'scrutiny of transactions': ¶61 above. CIMA's reasoning discloses two further errors of law.

96. As regards 'source of funds', CIMA's argument was as follows (emphasis in original, save where in bold underline) (5.2.10.4(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.'

97. In relation to 'scrutiny of transactions', CIMA also relied upon an asserted 'duty' on a FSP's clients to produce '*information regarding its books of account*' under s. 59(2B) of the Companies Act (2020 MCSL Final Report, 5.2.31.3):

'*As such, the Authority notes that the Licensee can reasonably be able to review the client's transactions / activities, as its monitoring mechanism may require in accordance with Part IV Regulation 12(1)(e)(i) of the AMLRs. Therefore, the Authority stands by its findings, conclusion, and requirements*.'

98. CIMA's reasoning in these passages discloses two further errors of law.

99. First, CIMA has read too much into the requirement in s. 59(2B) of the Companies Act that a company with an RO in the Cayman Islands, but which keeps its books of account outside the Islands, must provide '*information regarding its books of account*' on an annual basis. CIMA has read that obligation to mean such a company must provide its *books of account* to a RO provider, rather than '*information regarding*' its books of account. That is not what s. 59(2B) says; indeed, when one reads s. 59(2A) it is plain that is not what s. 59(2B) means. S. 59(2A) provides:

'(2A) A company which keeps its books of account at any place other than at its registered office or at any other place within the Islands shall, upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Law (2017 Revision), ***make available, in electronic form or any other medium, at its registered office copies of its books of account****, or any part or parts thereof, as are specified in such order or notice; and if the company fails to comply with the order or notice 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*.'

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100. By contrast with s. 59(2B), s. 59(2A) *does* impose a duty on a company with an RO in the Cayman Islands, but which keeps its books of account outside the Islands, to make available its *books of account* in the specific circumstances outlined, namely upon service of an order or notice by the Tax Information Authority. There is a clear distinction between the duty to make available '*books of account*' in s. 59(2A), on the one hand, and '*information regarding its books of account*' in s. 59(2B), on the other.

101. The second error in the passage quoted above is that, even if (contrary to the first argument) s. 59(2B) of the Companies Act does require MCSL's clients to whom it provides corporate services to provide their 'books of account', that does not impose a duty on MCSL to interrogate those 'books of account' for all transactions between the client and third parties and then seek relevant contextual information and context in order to scrutinise those transactions for any suspicious ML/TF/PF activity. No such duty arises for the reasons developed from ¶53, above.

102. CIMA's PAP Response on Ground 7. CIMA's response to this ground is at ¶42, where it states that '*the Authority does not contend that s 59(2B) … imposes an obligation on companies which keep their books of account outside the Islands to provide their books of account to the registered Office. At paragraph 5.2.10 of the MCLS Final Report the Authority was providing an illustration of a possible means by which a FSP which provides registered office services may obtain information regarding the activities of companies in order to satisfy the requirements of regulation 12 of the AMLR*' (underline added). MCSL responds as follows:

102.1. First, (and once again) CIMA is now withdrawing from the more absolute position it took in the 2020 MCSL Final Report, in which it stated that '*pursuant to Section 59 (2B) of the Companies Law (2020 Revision) the Licensee **should have access** to its client's books of account*' (¶96, above). It now states that this is only an '*illustration of a possible means*' by which a FSP '*may obtain information*' in order to satisfy the requirements of Regulation 12.

102.2. Second, CIMA appears to accept the correctness of MCSL's proposition that s 59(2B) does not impose a duty on companies to keep their books of account with a RO provider in the Cayman Islands.

102.3. Third, CIMA's new argument does not support the proposition which it is said to support. If there is no duty on a company receiving corporate services to keep its 'books of account' in the Cayman Islands under s 59(2B), then this does not provide an '*illustration*' of the circumstances in which a FSP '*may obtain*' the relevant information. If a company does not

need to keep its books of account in the Cayman Islands, then it is not a reasonable inference to draw that it will do so.

102.4. Fourth, by the term '*an illustration*' CIMA implies that there are other '*possible means*' by which an FSP providing corporate services would obtain such information, but does not say what they are.

102.5. Fifth, CIMA has not addressed the fundamental flaw in this argument, namely that the existence or otherwise of s. 59(2B) provides no assistance to the issue raised by Grounds 3 and 4 (above, ¶47 and 65) as to whether, under Regulation 12(1)(e)(i), an FSP providing corporate services is obliged *in all circumstances* to scrutinise all transactions, including in relation to 'source of funds'. For the reasons given under Ground 3 and 4, it does not.

103. In conclusion, CIMA's reliance upon s 59(2B) in support of its Findings and Requirements in relation to both 'scrutiny of transactions' and 'source of funds' is erroneous, and is an additional reason to quash those Findings and Requirements. Moreover, and in any event, the Plaintiffs are anxious to establish with certainty whether and, if so, to what extent s 59(2B) is relevant to the discharge of their AML functions.

(8). Ground 8: CIMA's erroneous interpretation and application of Regulation 12(1)(e)(ii) of the AMLRs in relation to the obligation to review and update documents, data or information (5.2.28)

104. MCSL challenges the Findings, in relation to both 'low risk' and 'high risk' clients, that MCSL was in breach of Regulation 12(1)(e)(ii) of the AMLRs insofar as documents, data or information collected under the CDD process was not reviewed and kept up to date at appropriate times in fourteen cases, see above, ¶18. Those Findings were wrong in law, for the following reasons.

105. CIMA found (5.2.28) that there were fourteen files, but only three files were actually identified, see above, ¶18. CIMA's Findings in relation to the eleven unidentified client files are vitiated as a matter of law in the absence of any means of identifying those files: *Anufrijeva*, above ¶50. CIMA's PAP Response to this point is at ¶43 of its letter, in which it cross-refers to its letter at ¶39-30 where it stated it had only identified '*the most egregious examples*' and that this is CIMA's '*traditional*' approach. CIMA then went on to identify the ten missing files (PAP Response, ¶30). The Plaintiffs have identified the flaw in this approach under Ground 3 at ¶51 above, which it adopts.

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106. Although the Plaintiffs (for the reasons given at ¶6) do not pursue their challenge to the factual findings that were made under this Ground in their Complaint, they continue to pursue this ground on the basis of CIMA's error in approach. They are concerned, first, that CIMA appears to consider it appropriate and lawful to make findings of breach of the AMLRs without (a) identifying the files that are said to disclose a breach, or (b) giving reasons why, on the facts of the particular file, a breach had been found. The Plaintiffs contend that this approach is unlawful, and wish to establish by way of an appropriate declaration the proper approach for CIMA to take in future inspections, for their own benefit but also for the benefit of other FSPs, for CIMA itself and for the jurisdiction as a whole.

(9). <u>Ground 9: the Requirements in relation to all the Findings</u>

(a) Ground 9(a): Requirements premised on the same errors of law as in Grounds 1-8

107. CIMA's Findings do not justify the making of any of the Requirements set out above at ¶11 (Nature / purpose of business (5.2.1)), ¶13 (Authorised signatories for bank accounts: (5.2.16)),¶15 (Ongoing monitoring and periodic reviews: Scrutiny of transactions: (5.2.29)), ¶17 (Ongoing monitoring and periodic reviews: Source of funds / source of wealth (5.2.7)) and ¶19 (Ongoing monitoring and periodic reviews: Updating documents, data or information: (5.2.27 and 28)). Each one is premised upon the same errors of law as CIMA has applied in making its Findings, which are unlawful for the reasons developed under the preceding Grounds. Thus:

107.1. CIMA has applied an erroneous interpretation to Regulation 12(1)(d) in its Finding that MCSL is in breach of its duty to verify and document the nature / purpose of the business of its clients (Ground 1, ¶30 above). It follows that its Requirement that MCSL verify and document the nature / purpose of the business of all of its clients is premised upon the same error of law, which should be quashed.

107.2. CIMA has applied an erroneous interpretation to Regulation 12(1)(b) in its Finding that MCSL is in breach of its duty to document verification of authorised signatories for bank accounts (Ground 2, ¶42 above). Accordingly, its Requirement that MCSL document verification of authorised signatories for bank accounts for all its clients is vitiated by the same error of law, and should be quashed.

107.3. CIMA has applied an erroneous interpretation to Regulation 12(1)(e)(i) in its Finding that MCSL is in breach of that duty in failing to scrutinise all transactions between its clients and third parties in a number of identified cases (Ground 3, ¶47 above; also Grounds 5, 6 and

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7). It follows that the Requirement that MCSL scrutinise transactions for *all* its clients is based upon the same erroneous interpretation of the law, and should be quashed.

107.4. CIMA wrongly interpreted Regulation 12(1)(e)(i) of the AMLRs in Finding MCSL was in breach because of its '*practice of not collecting source of funds and/or source of wealth information for its 'Low Risk Clients"* (Ground 4, ¶66 above; also Grounds 5, 6 and 7). The Requirement that MCSL collect such information for all its low risk clients proceeds on the same erroneous basis and should also be quashed.

107.5. CIMA adopted an unlawful approach in making its Finding that MCSL was in breach of Regulation 12(1)(e)(ii) insofar as documents, data or information collected under the CDD process were not reviewed and kept up to date at appropriate times (above, Ground 8, ¶104 above). The Findings being flawed for want of procedural fairness, there is no lawful basis upon which CIMA can make any Requirement as to how MCSL is obliged to take remedial action in relation to all its other files. The Plaintiffs also seek an appropriate declaration as to the approach CIMA should take in making Findings, as outlined at ¶106 above.

(b) Ground 9(b): Requirements are unnecessary and disproportionate

108. The Requirements set out in the Final Reports are unnecessary and disproportionate. These flaws arise as to: (i) the substantive Requirements themselves; (ii) the time within which they are to be complied with, by reference to any of the Findings CIMA has lawfully made (if any). The Requirements arecontrary to s. 19 of the Cayman Islands Bill of Rights (the '**BOR**') and the principle in s 6(3)(d) of the MAA, and will lead to unnecessary and disproportionate interferences with private and confidential information contrary to s. 9 of the BOR (considering *Michaud v France* (2014) 59 E.H.R.R. 9) and the Data Protection Act, 2017, in particular s. 5 and Sch. 1 Part 1, para. 3 (the third data protection principle). The consequences for the Plaintiffs if the Requirements are applied are described in the White Affidavit #2, ¶187-208.

(c) Ground 9(c): Power to issue requirements

109. Further or alternatively, CIMA had no power to issue any of the Requirements under the power CIMA is purporting to exercise, namely s. 6(2)(f) of the MAA. CIMA can request an FSP to take remedial action, but lacks lawful authority to impose a 'requirement' to do so or to impose any enforceable deadline under that provision. Accordingly, the Requirements set out in the 2020 Final Reports are of no effect. While CIMA does have power to issue such requirements under its regulatory powers,

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in this case s. 18 of the Banks and Trust Companies Act (2021 Revision) (the '**BTCA**'), this power may only be exercised once CIMA has followed the Warning and Decision Notice Procedure set out in CIMA's Enforcement Manual dated February 2018 (the '**Enforcement Manual**'), specifically at s. 9, following which the Plaintiffs would have a statutory right of appeal on the merits under s. 25 of the BTCA.

110. This argument proceeds by the following steps.

111. As a statutory body, CIMA only has such powers as are expressly conferred upon it or which arise by necessary implication: see e.g. *Commissioner of the Independent Commission of Investigations v Police Federation (Jamaica)* [2020] UKPC 11, [15]; see also Fordham, Judicial Review Handbook, 7th ed., ¶6.1.1.

112. CIMA asserts in its PAP Response, ¶45-49, that a power to impose requirements and to impose deadlines arises under ss. 6(1)(b)(ii) and 6(2)(f) of the MAA. The Plaintiffs submit, on analysis, that neither ss. 6(1)(b) and 6(2)(f) confers such a power.

    112.1. S. 6(1)(b)(i) and (ii) of the MAA provides that the principal functions of CIMA include '*to regulate and supervise financial services business carried in or from within the Islands in accordance with this Law and the regulatory laws*' and '*to monitor compliance with the anti-money laundering regulations*'. While prescribing those functions, s. 6(1)(b) confers no actual powers. Those must be found elsewhere.

    112.2. S. 6(2)(f) of the MAA then provides that, in exercising its functions, CIMA shall '*have such ancillary powers as may be required to fulfil its functions*' under, materially, s. 6(1)(b).

113. The question for determination is whether, in the discharge of its functions under s. 6(1)(b), in particular to '*monitor compliance with*' the AMLRs, it is necessary ('*required*') for CIMA to have the power to impose a requirement on an FSP to comply within a particular deadline following a finding that it is in breach of the AMLRs. The Plaintiffs submit that such a power is not 'required' for two reasons.

114. First, a power to issue a 'requirement' is not a power that is *'required'* for the purposes of discharging CIMA's function in s. 6(1)(b)(ii) of the MAA of *monitoring* compliance with the AMLRs. To discharge the function of 'monitoring' compliance with the AMLRs it is not necessary for CIMA to have *enforcement* powers.

115. Second, and in any event, those enforcement powers are to be found elsewhere, either in the regulatory laws (such as s. 18 of the BTCA, see next para), the administrative fines procedure (s. 42A(2) of the MAA and the Monetary Authority (Administrative Fines) Regulations (2019 Revision) (the '**MAAFR**')) or the criminal offence in Regulation 56 of the AMLRs.

116. In particular, CIMA already has an express regulatory power to '*require*' a licensee to '*take such steps*' as CIMA '*considers necessary*', namely under s. 18 of the BTCA. The BTCA is one of the 'regulatory laws' referred to in s. 6(1)(b) of the MAA, defined in s. 2 of the MAA. The 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 in breach of its license conditions (which would presumably cover an anticipated breach of the AMLRs) or, in some cases, where CIMA has a reasonable suspicion the licensee is in breach of the AMLRs: see s. 18 of the BTCA; s. 18(1)(vi) of the Companies Management Act (2018 Revision); s. 34(1)(iv) of the Building Societies Act (2020 Revision); s. 41(1)(iv) of the Cooperative Societies Act (2020 Revision); s. 24(1)(iv) of the Development Bank Act (2018 Revision); s. 24(2)(i) of the Insurance Act (2010 Revision); s. 19(1)(iv) of the Money Services Act (2020 Revision); s. 25(2)(d) of the Directors Registration and Licensing Act; see also s. 17(2A)(j) of the Securities Investment Business Act (2020 Revision).

117. The logical inference to be drawn is that, the legislature having conferred specific powers upon CIMA to issue 'requirements' under the regulatory laws in the discharge of its regulatory functions, those are the powers that CIMA should exercise rather than the 'ancillary' power under s 6(2)(f).

118. The distinction is not merely theoretical; there are practical consequences. That is because, when CIMA exercises its regulatory functions under one of the regulatory laws, including when issuing a 'requirement' to take 'such action' as it 'considers necessary', CIMA must follow the Warning and Decision Notice Procedure set out in the Enforcement Manual at s. 9. That provides, materially:

> '*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) <u>requiring licensees or registrants to take such action as the Authority reasonably believes necessary</u>.*'

119. Ss. 9.4 to 9.6 then set out the Warning Notice procedure that is to be followed, which includes giving the party the opportunity to make representations before any Decision Notice is issued.

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120. There is a further practical consequence where CIMA exercises its regulatory power under one of these provisions, namely that in each case there is a right of appeal (see, materially, s. 25 of the BTCA) which, unlike judicial review, is not limited to an appeal on grounds that CIMA has made an error of law.

121. It is plain, then, that the legislature has conferred specific power upon CIMA to issue 'requirements' of the kind it has purported to exercise in this case, namely in the discharge of its regulatory powers under the relevant regulatory laws. It is also plain that the legislature intended licensees to have a statutory right of appeal when that power was exercised, together with any procedural rights under the Enforcement Manual (which is made under statutory provision, namely s. 48 of the MAA).

122. In those circumstances, it is not open to CIMA instead to rely upon the general 'ancillary' power in s. 6(2)(f) to confer a power that the legislature has already given expressly, and subject to statutory safeguards. Applying the principle of statutory construction *generalia specialibus non derogant* (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case) (see e.g. *Minister of Energy v Maharaj* [2020] UKPC13, [56]), CIMA is not able to rely upon the ancillary power in s 6(2)(f) to impose such requirements. It must exercise its regulatory power under the relevant regulatory law, namely s. 18 of the BTCA.

123. The importance of this issue is highlighted by the approach taken by CIMA to its Complaint. Had CIMA exercised its regulatory power under s. 18 of the BTCA, it would have given the Plaintiffs a reasonable opportunity of changing its mind before it issued any 'requirement' to take the steps that CIMA considered necessary. Moreover, the Plaintiffs would have had a right of appeal not only as to matters of law, but also into the factual basis for CIMA's decisions. This is an issue upon which they seek the Court's determination either: (a) to quash the Requirements on this ground, or (b) to obtain appropriate declaratory relief, so as to establish with greater certainty the ambit of CIMA's powers (particularly if there is a lacuna in the current legal regime). Again, this is an important matter not only to the Plaintiffs, but also other FSPs, CIMA itself and, ultimately, the jurisdiction.

B. THE 2020 FINAL MFS REPORT

124. The nature of MFS's business is set out in the White Affidavit #2, ¶¶30-35. In brief, MFS is a TCSP, which provides a wider range of services than MCSL. However, as with MCSL, in the overwhelming majority of cases those services are still relatively limited and will not, ordinarily, result in MFS having any visibility of transactions entered into by the client with third parties.

(1). Ground 1: Unlawful Findings in relation to authorised signatories for bank accounts (5.2.12)

125. CIMA's Finding that MFS failed to document verification of authorised signatories for bank accounts held by corporate clients, contrary to Regulation 12(1)(b) of the AMLRs and Part II.4.B.(38) of the AML Guidance Notes (2020 MFS Final Report, 5.2.12, ¶22, above), is wrong in law for the same reasons as apply to the identical Finding made in relation to MCSL, Ground 2, ¶42, above.

(2). Ground 2: Unlawful findings in relation to ongoing monitoring and periodic reviews: scrutiny of transactions (Regulation 12(1)(e)(i)) (5.2.18)

126. CIMA found that MFS was in breach of Regulation 12(1)(e)(i) of the AMLRs by virtue of its failure to evidence it had reviewed the business relationship to ensure that transactions being conducted are consistent with MFS' knowledge of the client etc. This failure is stated to have occurred in relation to seventeen files, but no instances are identified (2020 MFS Final Report, 5.2.18, see ¶24, above).

127. CIMA's Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for all the reasons given under Ground 3 ¶¶47-65, above.

(3). Ground 3: Unlawful findings in relation to ongoing monitoring and periodic reviews: source of funds / source of wealth (Regulation 12(1)(e)(i)) (5.2.1)

128. CIMA concluded that there had been a breach of Regulation 12(1)(e)(i) of the AMLRs by reason of MFS' failure to document source of funds and/or source of wealth information for a single, 'low risk' client (2020 MFS Final Report, 5.2.1, above (¶26)). This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 4 ¶66-72, above.

(4). Ground 4: CIMA's erroneous interpretation and application of the implications of NRAs in relation to 'low risk' clients under Regulation 21(2) of the AMLRs (5.2.4.3.10(1)-(2))

129. As with MCSL (¶68.2 above), one of the reasons MFS gave for objecting to CIMA's Finding in relation to 'source of funds' was that several of the relevant clients were 'low risk' because they met the criteria under Regulation 22 of the AMLRs for the application of simplified CDD (5.2.4.3.1). Again, as with MCSL (¶69 above), CIMA rejected this argument for a number of reasons, the first of which (5.2.4.3.10(1)-(2)) was that it was not open to MFS to assess *any* client as a 'low risk', and therefore to apply simplified CDD, because of the 2015 and 2019 NRAs by virtue of Regulation 21(2) of the

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AMLRs. This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 5, ¶73-89, above.

(5). Ground 5: CIMA's application of the simplified CDD requirements for 'low risk' clients in Regulation 22 of the AMLRs (5.2.4.3.10(3))

130. Again as with MCSL, a further (second) reason given by CIMA for rejecting MFS' reasons as to why CIMA was wrong in its Findings in relation to 'source of funds / source of wealth' (see ¶69, above) was that relevant client said to be 'low risk' (82846): '*does not satisfy the criteria to qualify for simplified due diligence*' (5.2.4.3.10(3)). This Finding is vitiated by the same errors of law as apply to the identical Finding made in relation to MCSL, for the reasons set out at Ground 6, ¶90-94, above.

(6). Ground 6: CIMA's erroneous interpretation of, and reliance upon, s. 59(2B) of the Companies Act (5.2.4.3.10(4))

131. In the 2020 MFS Final Report (5.2.4.3.10(4)) CIMA adopted three fresh reasons[14] for its conclusion that MFS was in breach of Regulation 12(1)(e)(i) of the AMLRs to conduct CDD in relation to 'source of funds' which were identical to those in the 2020 MCSL Final Report (¶69 above). The third involved reliance upon s. 59(2B) of the Companies Act, in the same terms as for MCSL, see ¶96 above. CIMA also relied on this as a reason for rejecting MFS' arguments in relation to 'scrutiny of transactions' (5.2.20.4), in identical terms to the 2020 MCSL Final Report (¶61 above). These Findings are therefore vitiated by the same errors of law as apply to the identical Findings made in relation to MCSL, for the reasons set out at Ground 7 ¶95-103, above.

(7). Ground 7: the Requirements in relation to all the Findings

132. Further or alternatively, CIMA's Findings do not justify the making of any of the three Requirements set out at ¶23, 25, 27 in respect of each or any of the three Findings challenged in the 2020 MFS Final Report, whether within three months or at all for the same reasons as apply to the identical Requirements made in relation to MCSL set out at Ground 9 at ¶107-123, above.

V. RELIEF SOUGHT

133. The Plaintiffs seek the following relief:

[14] Accordingly, this is an argument MFS had no opportunity to address before the 2020 MFS Final Report was produced.

133.1. Certiorari in relation to the Findings and Requirements challenged;

133.2. Declaratory relief as appropriate to give effect to the Court's judgment;

133.3. Such other relief as the Court considers appropriate; and

133.4. Costs.

12 FEBRUARY 2021

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16/02/21

AMENDMENT TO PLAINTIFFS' ARGUMENTS IN SUPPORT OF GROUNDS OF JUDICIAL REVIEW

(c) Ground 9(c): Power to issue requirements

1. There is a third reason why s 6(2)(f) MAA does not confer upon CIMA the power to make the Requirements that it has purported to make. That is because the ancillary powers in s 6(2)(f) are even more limited than the Plaintiffs have already submitted at ¶¶109-123 as they are explicitly confined to the fulfilment of CIMA's functions listed in s 6(2)(a)-(e): '*such ancillary powers as may be required to fulfil the functions set out in paragraphs (a) to (e)*'. They do not apply at all to CIMA's functions in s 6(1), including monitoring compliance with the AMLRs. The power to issue Requirements must be found elsewhere.

16 FEBRUARY 2021

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