IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 10146/2010P

In the matter between:

MERLIN STUART STOLS	**PLAINTIFF**
and	
GARLICKE & BOUSFIELD	**DEFENDANT**
and	
PKF (DURBAN) INCORPORATED	**FIRST THIRD PARTY**
PATRICK ROBERT	**SECOND THIRD PARTY**
NERAK FINANCIAL SERVICES (PTY) LIMITED	**THIRD THIRD PARTY**
SANTAM LIMITED	**FOURTH THIRD PARTY**
LOMBARD INSURANCE COMPANY LIMITED	**FIFTH THIRD PARTY**
UNDERWRITERS AT LLOYD'S	**SIXTH THIRD PARTY**
ESPRO CAPITAL (PTY) LIMITED	**SEVENTH THIRD PARTY**
DELOITTE	**EIGHTH THIRD PARTY**
RAHIM KHAN N.O.	**NINTH THIRD PARTY**
THAMSANQA EUGENE MSHENGU N.O.	**TENTH THIRD PARTY**
ATTORNEYS INSURANCE INDEMNITY FUND NPC	**ELEVENTH THIRD PARTY**

Coram: Mnguni J

Heard: 5, 6, 7, 8, 11, 13, 14, 18, 19, 20, 21, 22, 25, 26, 27, 28 June 2018, 27, 28, 29, 30 August 2018 and 12 September 2018

Delivered: 08 September 2020

O R D E R

Judgment is granted in favour of the plaintiff and against the defendant for:

1. payment of the sum of R7 000 000;
2. payment of the interest on R5 000 000 at the rate of 30 percent per annum from 5 October 2010 to 12 October 2010 and on R7 000 000 at the rate of 30 percent per annum from 13 October 2010 until 30 November 2010 and mora interest thereafter at the rate of 8,75 percent per annum;
3. costs of suit for the plaintiff and first third party.

J U D G M E N T

Mnguni J:

Introduction

[1] In 1867, Harry Escombe, who was later to become one of the leading figures in the then Colony of Natal, established the firm that is today Garlicke & Bousfield (G&B). He practised under his own name until 1893. When he gave up private practice to become the Attorney-General and then the Prime Minister in the late 19th century, the firm continued under the names of his erstwhile partner, Thomas Garlicke, and his son-in-law, Henry Richings Bousfield. G&B prides itself on being

one of the oldest and largest legal practices in KwaZulu-Natal.[1] The relevance of this brief history will soon become apparent.

[2] On 1 April 2002, Mr Colin Bernard Cowan (Mr Cowan) joined G&B as an executive consultant. At G&B, the term "executive consultant" is used to describe a senior practitioner, who runs a legal practice dealing directly with clients on a day-to-day basis, as distinct from a "consultant", who provides services to practitioners at G&B, similar to that of "in house" counsel, and who has no direct client involvement. Prior to joining G&B, Mr Cowan worked for the law firm Ditz Inc from 1973 and was a director of that firm for approximately 25 years. Mr Cowan brought his legal practice to G&B from Ditz Inc and continued to run it. He also brought along with him Ms Rene Smart (Ms Smart) who was his secretary at Ditz Inc.

[3] On 24 November 2010, around 06h50, Mr Cowan committed suicide. He left a suicide note dated 22 November 2010, wherein he admitted to having committed fraud and misrepresented facts to G&B's directors by inducing them to authorise certain fraudulent transactions. He also apologised to the directors for his actions. Within a few hours of his death, a number of telephone calls were received from individuals claiming to be G&B clients, enquiring as to the whereabouts of their funds, which they claimed Mr Cowan invested with G&B.

[4] Commencing on 24 November 2010, and for several weeks thereafter, certain G&B directors met with various persons and entities, all alleging that they had invested monies with G&B through Mr Cowan. They indicated that they had letters of undertaking on an official company letterhead guaranteeing repayment of these investments on specified maturity dates. The investors alleged that Mr Cowan had been running a bridging finance business on behalf of G&B for its clients who required short-term finance. Those G&B clients were said to be prepared to pay returns that ranged from the prime rate of interest up to 42 percent per annum.

[5] One such investor was Mr Merlin Stuart Stols (Mr Stols), an experienced businessman who invested in various businesses. When the news of Mr Cowan's

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[1] Information obtained from the website of Garlicke & Bousfield at https://www.gb.co.za/about-us.

suicide broke, Mr Stols contacted Mr David Ramsay (Mr Ramsay), one of the directors of G&B, to establish who he needed to contact about his funds that were due for repayment at the end of November 2010. Mr Ramsay advised him to come to G&B's offices. On 25 November 2010, Mr Stols went to G&B's offices and met with Messrs Ramsay and Nike Pillay (Mr Pillay), another of G&B's directors, in one of the consulting rooms. At the commencement of the meeting, Mr Pillay said to Mr Stols that 'they [the directors of G&B] were shocked by this whole issue because no one at G&B had any knowledge that Mr Cowan was running bridging finance'.

[6] Mr Stols was taken aback by Mr Pillay's statement. He stopped Mr Pillay and said to him that Mr Ramsay was aware of it and knew that he (Mr Stols) was doing bridging finance with Mr Cowan and that he (Mr Stols) was providing funds for bridging finance deals. Mr Pillay appeared shocked by what Mr Stols had disclosed. Mr Stols reminded Mr Ramsay about the meeting he had had with him to ascertain whether the bridging finance proposed by Mr Cowan was legitimate prior to him investing in his first transaction. Mr Ramsay acknowledged the meeting, but said that he had approved the first transaction only. Mr Stols disputed what Mr Ramsay said and reminded him about two further interactions they had, the first relating to the "Spud" movie, which was being filmed at Michaelhouse and which Mr Ramsay had urged him to invest in. And, the second, at the Oyster Box Hotel where Mr Ramsay asked Mr Stols and his wife whether he was satisfied with the service he was receiving from Mr Cowan on his investments. Mr Ramsay acknowledged those two encounters as well.

[7] Mr Pillay led the discussion and took notes recording what happened during the meeting. In the course of the meeting, Mr Pillay asked Mr Stols about the investments he had made with G&B. Mr Stols indicated that at that point in time, he had two investments totalling an amount of R7,5 million. Mr Pillay told him that G&B had fidelity cover, but was not sure whether the insurance would pay. Mr Pillay then asked Mr Stols to bring copies of the contracts for the two outstanding investments, which he delivered the following morning. Once 30 November 2010 had passed, Mr Stols demanded payment of R7,5 million from G&B.

Pleadings

[8] Mr Stols' demand was not met. On 17 December 2010, he instituted this action against G&B based on an oral agreement of deposit concluded on 5 October 2010 between himself and G&B, which G&B had confirmed in writing on 13 October 2010. The pleaded terms of the contract were, inter alia, that Mr Stols would deposit the sum of R7 million with G&B, by paying R5 million into the bank account of Topspec Investments (Pty) Ltd (Topspec) on G&B's behalf on 5 October 2010 and R2 million into G&B's trust account on 13 October 2010. G&B would return the amount of R7 million to Mr Stols by no later than 30 November 2010, together with interest thereon at the rate of 30 percent per annum, from 13 October 2010 to date of payment and, 30 percent per annum on R5 million, from 5 October 2010 to 12 October 2010.[2]

[9] In the alternative, it was pleaded that, on 13 October 2010, G&B executed for Mr Stols' benefit, an acknowledgement of debt and written undertaking to pay, which Mr Stols personally accepted. The material express, alternatively, implied terms thereof, were that G&B acknowledged that it held R7 million belonging to Mr Stols, and that it undertook to make payment of R7 million to him no later than 30 November 2010, together with interest thereon at 30 percent per annum, from 13 October 2010 to date of payment and, 30 percent per annum on R5 million, from 5 October 2010 to 12 October 2010. Mr Cowan had executed the document on behalf of G&B.

[10] In its plea, G&B admitted that Mr Cowan was an executive consultant and practising attorney at G&B. G&B also admitted that Mr Stols had caused an amount of R2 million to be paid into its trust account on 13 October 2010, but denied that Mr Cowan was authorised to conclude any such contract on its behalf, or that Mr Cowan was authorised to execute on its behalf the document attached as annexure A to the particulars of claim. In amplification of its denial, G&B alleged that Mr Cowan had entered into such contract for his own dishonest and illegal purposes.

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[2] The pleaded terms of the agreement are set out in para 3 of the plaintiff's particulars of claim.

[11] Mr Stols replicated by raising an estoppel defence. He pleaded that G&B was estopped from denying Mr Cowan's authority to enter into the contract or the acknowledgment of debt by virtue of the fact that G&B, at all times material to his claim and prior to 5 October 2010, acting through its directors, made the following representations:

'11.1. they designated Cowan as an executive consultant and allowed him to practise publicly and openly from their offices as an attorney;

11.2. they knew that Cowan was conducting a bridging finance business as part of his practice housed in G&B's offices and advised the public accordingly;

11.3. they allowed the use of G&B's trust account for the payment in of funds and the payment out of funds connected with Cowan's bridging finance business;

11.4. they allowed him to earn remuneration for and in the name of G&B on each of the bridging finance transactions; and

11.5. G&B's director, Ramsay, reviewed Stols' bridging finance documentation furnished by Cowan and advised him to proceed and informed him that it was a service provided by G&B to conveyancing clients and from which G&B received a commission.'

[12] In addition, Mr Stols replied that G&B represented expressly or impliedly by words or conduct, that Mr Cowan was authorised to conduct a bridging finance business on its behalf, in its interests and/or for its benefit, and in particular, was authorised to conclude annexure A to the particulars of claim. In amplification of this, Mr Stols averred that:

(a) G&B should reasonably have expected that the bridging finance clients who dealt with Mr Cowan would act on the strength of these representations;
(b) he acted reasonably in accepting the correctness of the facts represented and in reliance thereon, dealt with Mr Cowan on the basis thereof; and
(c) he acted as such to his detriment.

[13] G&B amended its plea and averred that Mr Cowan's scheme was conducted on the basis that G&B's directors had no knowledge thereof and did not authorise him to conduct it. The scheme involved the receipt of and disbursement of money received from persons based on a representation made by Mr Cowan that he would

invest or deal with the money and repay with the proceeds. Mr Cowan caused investors to pay over funds which he represented would be invested and repaid with interest. Mr Cowan would pay such amounts to various bank accounts including G&B's trust account. In truth, the money paid was not invested; instead, Mr Cowan used the money as payment of capital and interest to other investors for his own dishonest purposes. Mr Cowan's scheme was part of a "Ponzi scheme", where there were no borrowers only lenders from whom funds were obtained by Mr Cowan to repay prior investors. Mr Cowan was aware that the Ponzi scheme was unsustainable and that it would collapse when he was unable to repay some investors. Mr Cowan knew that when it collapsed, the unpaid investors were likely to look to G&B for payment. The Ponzi scheme was illegal and the contract is therefore unlawful and unenforceable. The Ponzi scheme formed no part of Mr Cowan's practice.

[14] In response, Mr Stols amended his replication and denied that the contract he pleaded was illegal, unlawful and unenforceable. In the alternative, he pleaded that in the event of illegality, he was entitled to the capital of his money based on the *condictio ob turpem vel iniustam causam*. Mr Stols also pleaded that G&B has been unjustly enriched at his expense by possession of the money from the date of payment to date of repayment. He averred that he was at all times unaware of the illegality of the arrangements and persisted in denying the illegality. He pleaded that on the basis of justice and public policy, he is entitled to repayment of R7 million plus interest, from 13 October 2010 to date of payment, at the legally prescribed rate.

[15] G&B rejoindered and pleaded that Mr Stols cannot plead an alternative cause of action in a replication. G&B admitted that, on 13 October 2010, Mr Stols made payment of R2 million into its trust account but averred that such payment did not constitute a payment to G&B. In any event, it denied that Mr Cowan was authorised to conclude the contract or that he was authorised to receive any payment made either to G&B or to any nominee. It further contended that Mr Stols' R7 million was not paid to G&B and that G&B did not have use of such money. G&B further denied that it was enriched at the expense of Mr Stols or at all, and that it never had possession of the money. G&B pleaded that in any event, Mr Stols' enrichment claim

had prescribed before it was introduced into the pleadings for the first time on 22 February 2011.

[16] In a surrejoinder, Mr Stols pleaded that G&B was estopped from denying Mr Cowan's authority and his conducting of the bridging finance business, on the same particulars as set out in paras 2.1 to 2.5 of his replication with reference to the means with which Mr Cowan conducted the bridging finance business. With regard to G&B's assertion that his claim had prescribed, Mr Stols pleaded that the claim set out in the replication is the same debt and therefore had not prescribed.

Third parties

[17] G&B instituted third party proceedings and joined various persons and entities as third parties in the event that Mr Stols' claim succeeds against it. It is necessary to introduce each of these third parties as they were extensively mentioned in evidence in the trial. The first third party is PKF (Durban) Incorporated (PKF (Durban)), a firm of accountants and financial advisors carrying on business at Gateway, Umhlanga. The claim against PKF (Durban) is delictual and premised on a finding that, notwithstanding Mr Cowan's lack of authority, G&B is nevertheless bound by the contract on which Mr Stols relies, on the ground that Mr Cowan was held out as being authorised and that, by reason of such holding out, G&B is obliged to make payment to Mr Stols, as a result of which, G&B will suffer a loss. G&B alleged that PKF (Durban) negligently breached its legal duty that it owed to G&B, to take reasonable steps to inform G&B that Mr Cowan was conducting these accounts in the manner in which he did.

[18] G&B alleged that it had no knowledge of Mr Cowan's dealings or operations. Had the firm been aware of the operation of these bank accounts and the manner in which they were operated, it would immediately have taken steps to ensure that it could not be held bound by any of those transactions. As a result, its claim against PKF (Durban) arises only if Mr Stols' contract is valid and enforceable and is successful against G&B based on the estoppel defence, and this court finds that G&B had no knowledge of Mr Cowan's fraud and was a victim of his fraud. In the event Mr Cowan's conduct is attributed to G&B, its claim against PKF (Durban) does

not arise for consideration and would fail on this basis alone. PKF (Durban) has denied that it had such a legal duty.

[19] The second and third third parties are respectively Mr Patrick Robert (Mr Robert), a financial adviser, and Nerak Financial Services (Pty) Limited (Nerak), an authorised financial services provider. The second third party is the representative of Nerak. G&B joined the second and third third parties on the basis that Mr Robert was instrumental in recruiting potential investors to invest in Mr Cowan's scheme. The claim against Mr Robert and Nerak arises only if it is found that, notwithstanding Mr Cowan's absence of authority, G&B is bound by the agreement on which Mr Stols has sued, on the ground that Mr Cowan was held out as being authorised and that, by reason of such holding out, G&B is obliged to make payment to Mr Stols.

[20] In their plea, Mr Robert and Nerak admitted G&B's allegations that Mr Robert had been involved in the scheme in the following manner:

(a) he informed potential investors of the opportunity for investments allegedly offered by Mr Cowan;
(b) he procured and corresponded with investors and received commission on amounts obtained from investors;
(c) he obtained and collected the written undertakings and distributed them to investors; and
(d) he was aware of the contents of the undertakings and facilitated the receipt and payments of funds invested.

[21] Mr Robert and Nerak pleaded that they had no knowledge whether Mr Cowan was authorised by G&B to act in the manner as alleged, but in any event denied the absence of authority on the part of Mr Cowan. Mr Robert and Nerak went further and pleaded the extent of their involvement in the scheme from the year 2002 until the death of Mr Cowan on 24 November 2010. G&B's claim against Mr Robert and Nerak arises only if Mr Stols' agreement is upheld and he is successful with his claim against G&B on the basis of the estoppel defence, and this court finds that G&B had no knowledge of Mr Cowan's fraud and was a victim of his fraud. Consequently, if Mr

Cowan's conduct (which includes his knowledge) is attributed to G&B, G&B's claim against Mr Robert and Nerak does not arise and G&B would fail on this basis alone.

[22] Santam Limited, Lombard Insurance Company Limited, and Underwriters at Lloyd's (collectively referred to as the insurers) are cited as the fourth, fifth and sixth third parties respectively. The three are the insurers who have all repudiated the claims instituted against them. The claims against the insurers are twofold and are based on indemnification. Firstly, G&B alleged that if Mr Stols is successful against it on the basis claimed in the replication (estoppel), then it is entitled to indemnification from the insurers as Mr Stols' claim arises out of G&B's professional conduct. Secondly, if G&B is held liable to Mr Stols on the basis that the money deposited into its trust account was money described in s 26 of the Attorneys Act 53 of 1979,[3] it then alleged that Mr Cowan stole or misappropriated the money, and its liability would have been incurred in the reimbursement and/or replacement of such stolen or misappropriated money.

[23] The insurers disputed liability and pleaded that in concluding the agreement and giving of the undertaking, G&B did not perform the activities of an attorney, notary or conveyancer. The insurers pleaded that the conclusion of the agreement or giving of the undertaking by the insured was not an investment practice permitted in terms of the rules of the Natal Law Society. I interpose to mention that the Law Societies ceased to exist as at 31 October 2018 and has been replaced by the Legal Practice Council. The insurers also pleaded that there was an exclusion under the insurance agreement of claims arising out of the investment or handling of funds in

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[3] The Act has subsequently been repealed. Section 26 of Attorneys Act 53 of 1979 stated:
'26. Purpose of fund.—Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of—
(*a*) theft committed by a practising practitioner, his or her candidate attorney or his or her employee, of any money or other property entrusted by or on behalf of such persons to him or her or to his or her candidate attorney or employee in the course of his or her practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and
(*b*) theft of money or other property entrusted to an employee referred to in paragraph (*c*A) of the definition of "estate agent" in section 1 of the Estate Agents Act, 1976 (Act No. 112 of 1976), or an attorney or candidate attorney referred to in paragraph (*d*) of the said definition, and which has been committed by any such person under the circumstances contemplated in those paragraphs, respectively, and in the course of the performance—
(i) in the case of such an employee, of an act contemplated in the said paragraph (*c*A); and
(ii) in the case of such an attorney or candidate attorney, of an act contemplated, subject to the proviso thereof, in the said paragraph (*d*).'

contravention of the Banks Act 94 of 1990 (the Banks Act). The insurers further pleaded that Mr Stols' claim arises out of the investment or handling of funds in contravention of s 11 of the Banks Act in that G&B, by concluding the deposit agreement and giving the undertaking and handling of money pursuant thereto, conducted the business of a bank. The insurers also pleaded that Mr Cowan, in concluding the deposit agreement and giving the undertaking on behalf of G&B, conducted a fraudulent Ponzi scheme. The insurers contended that the liability of G&B to Mr Stols arises not from the conduct of the "profession", but is the fraudulent conduct and theft by Mr Cowan.

[24] The seventh third party is Espro Capital (Pty) Limited (Espro). G&B's claim against Espro is based on a payment allegedly made on 14 October 2010, in the amount of R4,5 million, from G&B's trust account to Espro, which allegedly included the R2 million paid by Mr Stols into G&B's trust account on 13 October 2010. G&B alleged that the R2 million was paid in error and without any legal ground for making such payment. G&B alleged that the directors authorised such payments believing that the payments were made (as presented by Mr Cowan) to entities legally entitled thereto, whereas in fact, these entities were not entitled to the payments. In this instance, should Mr Cowan's conduct be attributable to G&B, the claim against Espro would fail.

[25] The eighth third party is Deloitte (Deloitte), a registered accountancy and auditing company that was responsible for the auditing of G&B's trust account for the financial year ending 28 February 2010. The claim against Deloitte arises only if it is found that Mr Cowan was not authorised to act on behalf of G&B but was held out as being so authorised, and that by reason of such holding out, G&B is obliged to make payment to Mr Stols. G&B alleged that had Deloitte not been negligent, it would have investigated fully the alleged suspicious transactions involving Mr Cowan, and would have reported these suspicious transactions to G&B. G&B alleged that had these suspicious transactions been reported to it, it would have become aware of Mr Cowan's scheme and avoided the losses the scheme caused.

[26] Consequently, G&B's claim against Deloitte arises only if Mr Stols' contract is upheld and he is successful with his claim against G&B on the basis of estoppel. G&B alleged that Deloitte owed it a duty to report Mr Cowan's illegal activities. If his conduct (which includes his knowledge) is attributed to G&B, G&B's claim against Deloitte does not arise for consideration and fails on this basis.

[27] The ninth and tenth third parties are the trustees of the insolvent deceased estate of Mr Cowan. The claim against his deceased estate arises only if G&B is held liable to Mr Stols on the ground that it is estopped from denying Mr Cowan's authority. G&B's claim is based on a breach of Mr Cowan's employment contract, alternatively, a negligent breach of the legal duty owed to G&B by Mr Cowan not to act in any way that could cause harm or damage to G&B. The trustees delivered a notice to abide the decision of the court.

[28] The eleventh third party is the Attorneys' Insurance Indemnity Fund NPC (the AIIF). The claim against the AIIF is for indemnification under a series of professional indemnity insurance agreements for payment of the sum of R 3 125 000 (less the excess of R180 000), with such liability to be joint and several with the other third parties. G&B has alleged that Mr Stols' claim is for a liability arising out of its professional conduct and therefore, is covered by the contracts.

[29] The AIIF disputed liability and raised various defences. The main defence pleaded by the AIIF was that G&B's policy does not cover any liability arising out of or in connection with the provision of investment advice, or the administration of any funds in contravention of the Banks Act. The AIIF pleaded that Mr Stols' claim arose out of the administration of funds in contravention of s 11 of the Banks Act. The AIIF also pleaded a number of alternative defences which, inter alia, included that Mr Stols' claim arises from the provision of investment advice, in that G&B as represented by Mr Cowan, alternatively other G&B representatives, induced investors including Mr Stols, to advance monies in accordance with an alleged investment scheme, and represented to investors including Mr Stols, that they would earn interest on funds invested at commercially favourable rates. The claim against

the AIIF arises only if Mr Stols' contract is upheld and he is successful with his claim against G&B on the basis of the estoppel defence.

Two applications for the separation of issues

[30] In the course of the prolonged litigation, two applications for the separation of issues were brought in terms of rule 33(4) of the Uniform Rules of Court. The first was an application by Deloitte in March 2017, and the second was an application by Mr Stols in June 2017. The two applications' papers were dealt with as one composite set of papers. On 10 October 2017, after a comprehensive hearing, Kruger J granted an order in the following terms:

'1. The following issues are to be determined separately and before the other issues in the matter in terms of the provisions of Rule 33 (4) of the Uniform Rules of Court:

1.1 All pleaded issues as between the Plaintiff and the Defendant.

1.2 Whether the Plaintiff is precluded from enforcing the contract in which he sues in paras 3 and 5 of the Particulars of Claim, on the basis of illegality, as pleaded in para 10.6 of the 8th Third Party's plea, or otherwise.

1.3 Whether in relation to the Plaintiff's Claim the conduct of Cowan, in operating the scheme as pleaded by the Defendant constitutes a "Ponzi Scheme", is attributable to the Defendant as pleaded by the 8th Third Party in para 10.7 of its plea.

2. All the remaining issues as between the Defendant and any of the Third Parties not covered in 1.1, 1.2 and 1.3 are to be stayed for subsequent determination, if necessary.

3. A determination of the issues in 1.1, 1.2 and 1.3 above will be binding as between the Plaintiff and Defendant and the Third Parties.

3.1 The evidence adduced during the hearing of the separated issues will be admissible in the hearing of the future issues;

3.2 Any witness who is called to testify at the hearing of the separated issues will be liable to be recalled as a witness for further cross-examination in the hearing of the further issues and shall be warned that he/she may be recalled at the conclusion of the evidence in the hearing of the separated issues;

4. The costs of the applications are to be borne by the Defendant, such to include the costs of two counsel where two were engaged.'

[31] At the time of Kruger J's order, the pleaded issues between Mr Stols and G&B did not include the challenge on the legality of Mr Stols' contract as formulated by Deloitte and subsequently adopted by G&B, or, the consequential pleadings of Mr Stols. At the commencement of the trial, Mr Stols applied that the provisions of Kruger J's court order be extended to include the amended pleadings. An order to this effect was granted. Counsel for Mr Stols, G&B, Deloitte and PKF (Durban) handed up numerous bundles of documents, which were eventually received into evidence and were referred to extensively during the course of the trial.

[32] Mr Stols was the only witness who testified in support of his claim. Seven of G&B's directors testified in defence of G&B, namely, Ms Yvonne Lee Boden (Ms Boden), Mr Ramsay, Mr James Craig Jones (Mr Jones), Mrs Victoria Middleton Schoeman (Mrs Schoeman), Ms Suzanne Louise Collier (Ms Collier) and Mr Francis Jennings (Mr Jennings). The following witnesses also testified on behalf of G&B, namely, Mr Cowan's wife, Mrs Norma Cowan (Mrs Cowan); Professor Harvey Elliot Wainer (Prof Wainer) and Ms Susan Stanley (Ms Stanley), both practising chartered accountants and registered auditors; and Mrs Melinda Lourens (Mrs Lourens) and Mr Andrew Malcom Church (Mr Church), both of Rodel Financial Services (Pty) Ltd (Rodel). Although PKF (Durban) participated in the entire trial, it did not call any witnesses.

[33] On 27 August 2018, Deloitte settled the disputes between it and G&B. By that time, Deloitte had participated in the trial, produced numerous exhibits and cross-examined all the witnesses in the trial up to that point.

[34] This is then the convenient stage to deal with the evidence and issues isolated for determination in this trial. What appears below is a summary of evidence given in examination-in-chief and cross-examination.

Plaintiff's case

[35] Mr Stols testified that he heard about the bridging finance business available at G&B, which was being run by Mr Cowan, from Mr Robert. He had money to invest from the sale of his business in 2007. He had current and daily accounts at Rand Merchant and First National Banks, money invested with Grindrod Bank, as well as property investments with Investec Bank. At some point, he met with Mr Cowan at Mr Robert's home. Mr Cowan explained to him some of the details of how the said bridging finance business worked. Mr Cowan asked him whether he was interested in participating in the business. He answered in the affirmative because he knew that G&B was a reputable firm.

[36] After some time, Mr Cowan contacted him and introduced the first transaction. Mr Cowan explained to him that G&B was involved in bridging finance business for its clients, who were in most cases acquiring immovable property and needing to put up a deposit or funds in a very short period of time, but were unable to access such funds on a short-term basis. Mr Stols became interested. He initially wanted to invest about R10 million. On 26 February 2008, Mr Cowan came to his home and left documents with him relating to the first transaction. He went through the documents but became concerned when Mr Cowan told him that he was required to make a direct payment into a third party's account. Mr Cowan tried to put him at ease by telling him that the reason the payment was made directly to the third party was to avoid delay. He was not entirely convinced with that explanation and wanted more clarity on it. He told Mr Cowan that he would like to speak to a G&B director. Spontaneously and without hesitation, Mr Cowan told him that the best person to speak to was Mr Ramsay in the conveyancing department. Mr Stols knew Mr Ramsay very well from their previous encounters at Boschhoek in the Midlands. He took Mr Cowan's advice and phoned Mr Ramsay that same evening.

[37] In a conversation that lasted 19 minutes and 45 seconds, he read out the contract to Mr Ramsay. Mr Ramsay suggested that they should meet the next day at his offices and that Mr Stols should first call him in the morning before coming to the office. He gave him his direct office number. Around 08h37 on 27 February 2008, and at Mr Ramsay's request, he faxed the contract to Mr Ramsay's fax number with a view to discussing it later that morning. He met with Mr Ramsay at his office that

morning and raised with him the issue of making payment to a third party. Mr Ramsay said to him that it was not a problem because 2200 Pinehurst Investments (Pty) Ltd (Pinehurst Investments), to whom payment was to be made, was one of G&B's "big clients". Mr Ramsay confirmed that G&B often made payments directly into third party accounts or asked investors to pay funds directly into third party accounts. Mr Ramsay also asked him whether he knew that Mr Robert was earning commission on the transaction. He told Mr Ramsay that he was not aware of that, but did not mind because the interest that he was going to earn from that transaction was good.

[38] Mr Ramsay indicated to him that G&B was providing bridging finance as a service to its clients and was only earning a small amount of commission. Mr Ramsay promised to speak to Mr Cowan about the contract and get back to him. However, Mr Cowan pre-empted the situation by phoning him in the course of the day to find out whether Mr Ramsay had come back to him about the contract. At that stage, Mr Ramsay had not yet come back to him. Around 12h18 that same day, Mr Stols phoned and spoke to Mr Ramsay for 3 minutes and 32 seconds. They went through the deal and Mr Ramsay indicated that he had spoken to Mr Cowan. Mr Ramsay said to him that everything was fine and that he could go ahead with the deal. During these conversations, Mr Ramsay showed no concern or reservation about the proposed investment. Mr Stols confirmed that he was to be paid an interest of 30 percent on that transaction. He did some investigations and found this interest rate to be about the usual rate of interest for bridging finance. He established that Rodel and other entities like Rodel charged 50 percent interest for bridging finance. As a result of the comfort of speaking to Mr Ramsay and the reputation of G&B, he went ahead and invested R10 million in the first transaction. Mr Ramsay did not advise him against investing with G&B's bridging finance business. He stated that it would have been an act of stupidity for him to have gone to Mr Ramsay for advice and thereafter proceeded and invested against his advice.

[39] During July 2008, he approached Mr Ramsay regarding the acquisition of immovable property in Mauritius. Mr Ramsay referred him to Mr Tim Desmond (Mr Desmond), whom he introduced as one of the directors of G&B and an expert in

property investments. He consulted with Mr Desmond at G&B's offices. Mr Desmond went through the details with him and then asked him to leave the documentation with him. Mr Desmond indicated that he would go through the documentation and give him a call. Mr Stols waited for about a month without Mr Desmond getting back to him. Eventually, Mr Stols called Mr Desmond regarding progress in the matter. Mr Desmond apologised and indicated that he had been busy but said that he had looked at the documentation. Mr Stols collected the documentation from G&B's offices. When Mr Stols wanted to give his details to Mr Desmond so that he could send him an invoice, Mr Desmond said to him that he was not going to invoice him as Mr Ramsay had said to him (Mr Desmond) that Mr Stols was a good client of G&B and that there was no need to invoice him.

[40] At one point in time, Mr Ramsay approached him about investing in a movie called "Spud", which was being filmed at Michaelhouse. He told Mr Ramsay that he would rather invest his money in further bridging finance deals with Mr Cowan. Mr Ramsay enquired about Mr Cowan's service and asked whether he was being paid on time. He answered in the affirmative. He also met Mr Ramsay at a function relating to a promotion for the Des Roche development at the Oyster Box Hotel. During the course of that evening, Mr Ramsay approached him and asked him whether he was interested in investing in the project. He said no and told Mr Ramsay that he would rather do more bridging finance deals with Mr Cowan. On that occasion, Mr Ramsay again asked him whether he was happy with Mr Cowan's service. He answered in the affirmative.

[41] With regard to the last investment of R7 million, which forms the subject of this litigation, Mr Stols testified that Mr Cowan instructed him to pay R5 million directly to Topspec and R2 million into G&B's trust account. He confirmed that the interest payable was 30 percent per annum. He never thought that there was anything wrong with these transactions nor did he have any reason to be suspicious.

[42] Mr Stols was cross-examined by Mr *Ellis SC* and Mr *Snyckers SC* who appeared for G&B and Deloitte respectively. In cross-examination by Mr *Ellis*, Mr Stols testified that he regarded himself as a client of G&B. It was put to him with

reference to G&B's client communiqué, which was received into evidence as part of bundle F in this trial; where in para 2 of bundle F148, G&B stated that Mr Stols was never one of its clients. He disagreed with the contents of bundle F148. He explained that he consulted with Mr Ramsay prior to his first investment with Mr Cowan and regarded himself as a G&B client. He was asked whether he was aware that there are attorneys in this country who practice as investment attorneys and who are required to register and must be authorised to practice as a financial intermediary in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIAS). He answered in the negative.

[43] He testified that he did not know whether G&B was ever registered and authorised to act as an investment practice in terms of the FAIAS. It was put to him that it was not part of G&B's business to give clients advice on investments or to arrange investments on clients' behalf. His response was that he consulted with Mr Ramsay prior to his first investment, after Mr Cowan had told him that G&B was running the bridging finance business as a service to its clients. Mr Cowan did not explain to him in exact detail how G&B was running the bridging finance business.

[44] He testified that it was extremely important for him to invest with a trustworthy institution because short-term lending was unsecured. He testified that in most instances, G&B would indicate on the contracts that it was holding funds on behalf of the borrower. He assumed that Mr Cowan was referring to long-term secured funds, which G&B's clients could not access on a short-term basis. He could not say which documents Mr Cowan drafted in respect of the transaction between the borrower and the lender as his access to the documents was limited to those that Mr Cowan disclosed to him.

[45] He testified that on 26 February 2008, Mr Cowan left with him the documents in respect of the transfer of immovable property from AL-Bas Holding (Pty) Ltd (AL-Bas Holding) to Solivista Investment (Pty) Ltd (Solivista) for an amount of R20 million, at the interest rate of 8,4 percent per month, from 27 February 2008 to date of payment, which was 31 March 2008. These were the documents that he sent to and discussed with Mr Ramsay. He could only afford to invest R10 million on that transaction. He was unaware that Mr Cowan had advised Mr Ramsay that he (Mr

Ramsay) should not worry about the AL-Bas Holding-Solivista transfer, as it was no longer going ahead.

[46] It was put to him that the underlying letter of undertaking in respect of this transaction evidenced a perfectly legitimate transaction except for a minor change effected by Mr Ramsay. He denied that Mr Ramsay had indicated to him during their telephone discussion on 26 February 2008, that he had a problem with the fixed date of payment on the letter of undertaking. He stated that he would not have known of any changes on the letter of undertaking suggested by Mr Ramsay during his discussion with Mr Cowan. He confirmed that he received the amended letter of undertaking which appears at pages 20 to 21 of bundle H1. Mr Stols said that he found it strange that not one G&B director was aware that he had gone ahead and invested an amount of R10 million on this transaction.

[47] He confirmed that subsequent to his decision to invest, he interacted with Mr Ramsay on two occasions, namely, when Mr Ramsay contacted him to invest in the movie “Spud”, and when they met at the Oyster Box Hotel. On both occasions, Mr Ramsay specifically discussed Mr Stols’ dealings with Mr Cowan. In particular, Mr Ramsay asked him whether Mr Cowan was giving him good service and whether he was being paid on time.

[48] He confirmed that he made payment of R10 million directly to Pinehurst Investments. Mr Cowan gave him Pinehurst Investment’s account number and instructed him to make payment into that account. As far as he was concerned, whether Pinehurst Investment was a borrower or not was information that was within Messrs Ramsay and Cowan’s knowledge. He confirmed that an amount of R5,25 million was deposited into his Rand Merchant Bank account on 28 March 2008 with the reference R Epstein. He was surprised to learn that G&B was not the source of that payment. On 31 March 2008, a further amount of R5 million with the reference G&B was deposited into his Rand Merchant Bank account by Mr Ralph Chin (Mr Chin). He did not know who Mr Chin was. He, however, learnt in the course of this action that Mr Chin was Mr Cowan’s brother-in-law. The agreement with Mr Cowan was that Mr Cowan would indicate to him the date on which the money would be

deposited into his account. As a result, he never worried himself about the source of the payment. He testified that he was advised that the first transaction involved AL-Bas Holding as seller and Solivista as purchaser. He conceded that it would appear from the documents shown to him in the course of the trial that he paid R10 million to a company which was not the ostensible borrower.

[49] He confirmed that Rodlane Trading Investment CC (Rodlane Trading) paid an amount of R45 304.25 into his account on 1 April 2008. He did not know Rodlane Trading at that time. Subsequently, Mr Cowan gave him Rodlane Trading's account number and instructed him to make payment into it. He only made one deposit into that account. Mr Stols accepted the proposition put to him that based on the details disclosed by G&B to him during the trial relating to Rodlane Trading, it would appear that Rodlane Trading was not involved in any business and it had no reason to exist other than to funnel money through its account in terms of Mr Cowan's scheme. He, however, pointed out that prior to the disclosure of the documents in court; he did not know what was happening in Rodlane Trading's bank account.

[50] He admitted receipt of the acknowledgement of debt and undertaking appearing at page 22 of bundle H1, which was security for his deal no 1. Mr Cowan told him that MaxProp Holdings (MaxProp) was either the representative or holding company or was involved with AL-Bas Holding. He did not advance any money to MaxProp. He, however, assumed that he was lending money to MaxProp because MaxProp was providing security for this deal. He did not know whether AL-Bas Holding or Solivista had availed themselves of any bridging finance facility. The letter of undertaking indicated that G&B was holding R10 million from MaxProp at the time, but he did not know whether that amount was already in G&B's trust account.

[51] He was not aware when he paid R10 million that the AL-Bas Holding and Solivista transaction was already opened on G&B's accounting records and that Solivista had already paid a deposit of R500 000 into G&B's trust account on 18 October 2007. He was also not aware that the balance of the purchase price of R20 950 000 in respect of this transaction was to be secured by the furnishing of a bank guarantee. He did not know that Solivista was eventually placed in mora on 18

February 2008 in respect of that transaction and that the transfer on that transaction was registered on 27 March 2008. He was not aware that the proceeds of sale were paid on 28 March 2008 into MaxProp's account on instructions of Mr Allen van der Veen (Mr van der Veen) on behalf of AL-Bas Holding.

[52] Mr Stols was asked questions pertaining to his various deals, with specific reference to certain G&B bundles. In regard to deal no 2, on 25 April 2008, Mr Stols made a payment of R3,8 million, at the interest rate of 2 percent per annum, ostensibly as a loan to the Sharon Klein Will Trust and Benjamin Klein Will Trust. Mr Cowan calculated the repayment in deal no 2 to be an amount of R4 104 000 from 24 April 2008 and a due date of payment by no later than 25 August 2008. He accepted that on 23 April 2008, Mr Cowan issued and signed in his (Mr Stols) favour the acknowledgment of debt and undertaking appearing at page 47 of bundle H1. On 24 April 2008, Mr Cowan emailed him the banking details for the remittance of funds relating to this deal. On 25 April 2008, Mr Stols paid R3,5 million to Ro-Dre-Fer CC (Ro-Dre-Fer) and R300 000 to Rodlane Trading on Mr Cowan's instructions. On 5 May 2008, Mr Ian Duffy of Ro-Dre-Fer emailed Mr Cowan acknowledging repayment of the loan ostensibly made to a certain Mr PM Staten but funded with Mr Stols' payment on deal no 2. Mr Stols accepted the acknowledgment of debt and undertaking as security for deal no 2. Deal no 2 was not paid over to him, instead it was rolled over to deal no 5.

[53] On 6 May 2008, Mr Cowan emailed him the banking details for the remittance of funds relating to deal no 3, along with the letter of undertaking at page 60 of bundle H1 and the acknowledgment of debt and undertaking appearing at pages 61 to 63 of bundle H1 signed by Mr Cowan, ostensibly on behalf of the Sharon Klein Will Trust and Benjamin Klein Will Trust. Mr Stols paid R3 million to PKF (Durban) and this amount partly funded a payment of R5 731 500 to the Bebinchand Seevnarayan Trust (the B.S. Trust) on 8 May 2008. On the same date, Mr Stols paid R200 000 to Rodlane Trading, which funded payment to the Nerak Trust, SAHA Investments (Pty) Ltd and MaxProp. Deal no 3 was not repaid to him but was instead rolled over to deal no 5.

[54] On 24 June 2008, Mr Cowan emailed Mr Stols a new proposal for R7,5 million, at the interest rate of 2,75 percent per month, which he accepted. This was in respect of deal no 5. Mr Cowan subsequently issued and signed the letter of undertaking in favour of Mr Stols appearing at page 74 of bundle H1, with the ostensible borrower being Royal Fern Investments (Pty) Ltd (Royal Fern). On 30 June 2008, Mr Stols paid R7,5 million to MaxProp. Deal no 5 was not repaid to him but was rolled over to deal no 7. On 23 August 2008, Mr Cowan issued and signed in favour of Mr Stols in regard to deal no 5 the letter of undertaking appearing at page 76 of bundle H1 and the acknowledgement of debt and undertaking appearing at pages 77 to 79 of bundle H1, with the ostensible borrower being Pinehurst Investment. As already stated, deal no 5 was a roll-over from deal nos 2 and 3.

[55] On 1 November 2008, Mr Cowan issued and signed the letter of undertaking appearing at page 80 of bundle H1 in Mr Stols' favour in regard to deal no 6, with the ostensible borrower being Estate Late Arthur Sweet. Mr Cowan also issued and signed the acknowledgment of debt and undertaking appearing at pages 81 to 83 of bundle H1. On 9 March 2009, Mr Cowan asked for Mr Stols' banking details to remit repayment of this loan under deal no 6. On the same date, Mr Stols provided his banking details to Ms Smart, who passed them over to PKF (Durban). Ms Smart confirmed Mr Cowan's instructions to pay R8 million to Mr Stols.

[56] On 9 March 2009, PKF (Durban) paid Mr Stols two amounts of R3 million and R5 million respectively using the DS&T nominees' account. Mr Cowan asked Ms Janice van Niekerk (Ms van Niekerk) of PKF (Durban) to remit a further R880 000 to Mr Stols. Ms van Niekerk advised Mr Cowan that PKF (Durban) could not remit until a deposit of R1,4 million was cleared. On 11 March 2009, Mr Cowan emailed Ms van Niekerk proof of payment of R1,4 million from Palm Stationery Manufactures (Pty) Ltd to DS&T nominees' account. On 11 March 2009, PKF (Durban) paid R880 000 using DS&T nominees' account as partial repayment of deal no 6. On 12 March 2009, PKF (Durban) paid Mr Stols R294 150 using their DS&T nominees' account in respect of the balance owing on this deal.

[57] On 21 January 2009, Mr Cowan issued and signed the letter of undertaking appearing at page 92 of bundle H1 and the acknowledgment of debt and undertaking appearing at pages 93 to 95 of bundle H1 in favour of Mr Stols in regard to deal no 7, with the ostensible borrower being the DW Hart Will Trust. Deal no 7 was not repaid to Mr Stols, instead it was rolled over to deal no 10. As stated, deal no 7 was a roll-over from deal no 5.

[58] On 13 March 2009, Mr Cowan issued and signed the letter of undertaking appearing at page 100 of bundle H1 and the acknowledgment of debt and undertaking appearing at pages 101 to 103 of bundle H1 in favour of Mr Stols in regard to deal no 8, with the ostensible borrower being the NK Pattundeen Family Trust. On the same date, Mr Cowan paid R730 000 from Rodlane Trading's account to Shepstone & Wylie, being the balance owed in respect of the Elkington property acquisition. Deal no 8 was not repaid to Mr Stols, instead it was rolled over to deal no 9.

[59] On 24 June 2009, Mr Cowan emailed Mr Stols asking him to remit two payments of R1 million and R660 413.71 to the DS&T nominees' and Rodlane Trading accounts respectively. Mr Stols paid into PKF (Durban's) DS&T nominees' account an amount of R1 million and R660 413.71 to Rodlane Trading. Mr Cowan issued and signed the letter of undertaking appearing at page 109 of bundle H1 and the acknowledgement of debt and undertaking appearing at pages 110 to 112 of bundle H1 in favour of Mr Stols in regard to deal no 9, with the ostensible borrower being the NS Klein Trust. On 15 July 2009, Mr Cowan issued and signed the letter of undertaking appearing at page 122 of bundle H1 and undertaking and acknowledgment of debt appearing at pages 123 to 125 of bundle H1 in favour of Mr Stols, with the ostensible borrower being WAP Marketing. Deal no 10 was not repaid to Mr Stols but was instead rolled over to deal no 11.

[60] On 17 November 2009, Mr Cowan issued and signed the letter of undertaking appearing at page 126 of bundle H1 and the acknowledgment of debt and undertaking appearing at pages 127 to 129 of bundle H1 in favour of Mr Stols in regard to deal no 11, with the ostensible borrower being Waterway Properties (Pty)

Ltd (Waterway Properties). On 18 November 2009, Espro issued a cheque for R3,8 million in favour of Mr Stols. On 19 November 2009, Rodlane Trading also issued a cheque in favour of Mr Stols for R38 301.37. On the same date, Mr Cowan issued two letters of undertaking appearing at pages 118B to 118C of bundle H1 to WAP Marketing (Pty) Ltd (WAP Marketing), with the ostensible borrowers being Mr Stols, the Sharon Klein Will Trust and the Benjamin Klein Will Trust, to support the payment of R3,8 million to Mr Stols' previous investments.

[61] On 24 February 2010, Mr Stols emailed Mr Cowan asking for repayment of the Waterway Properties loan, indicating that he was in financial constraints and could not extend the loan further at that time. On 24 March 2010, PKF (Durban) paid R10 million to Mr Stols using their DS&T nominees' account with money funded by Mr Anand Seevnarayan (Mr Seevnarayan). The letter of undertaking relating to that payment was co-signed by Messrs Jones and Cowan on 24 March 2010, with Mr Stols reflected as a borrower, which he denied. On 9 April 2010, Mr Cowan emailed Mr Seevnarayan and asked him to transfer R929 342.35 to Mr Stols. On the same date, Mr Cowan issued and signed the letter of undertaking appearing at page 146 of bundle H1 in favour of Mr Seevnarayan, with the ostensible borrower being Kestolev (Pty) Ltd in relation to this payment to Mr Stols. Also on that same date, the Shahil Anand Seevnarayan Trust transferred R929 342.35 to Mr Stols.

[62] Mr Stols was asked whether he did not find it strange that in all of the abovementioned deals, no payments were made to G&B. His response was that he questioned Mr Cowan about that before he made a decision to invest. Mr Cowan explained to him that he was required to make payment directly to the third party to avoid delays. Mr Stols explained further that he had made all the payments on Mr Cowan's instructions. Mr Stols testified that he also sought clarity from Mr Ramsay on making payment directly to the third party because he did not want to take Mr Cowan's word for that explanation. Mr Ramsay confirmed Mr Cowan's explanation on this issue. He accepted their explanation and went ahead with the investment. He was comforted by the fact that he was receiving correspondence on the G&B letterhead, with the names of the directors mentioned at the bottom of the letterhead, and, that G&B was a reputable company. He assumed from his discussion with Mr

Ramsay that Mr Cowan was authorised to sign to bind G&B. If Mr Ramsay had advised him that only directors were authorised to sign to bind G&B, he would have asked Mr Ramsay to sign the documents before committing an investment of R10 million on the first deal.

[63] He testified that he had no knowledge as to how G&B operated and that he had no access to its systems and controls. He accepted the proposition put to him by G&B's counsel that by the time deal no 5 was concluded, Mr Cowan had already misappropriated the money that he had invested in deals no 2 and 3. He also accepted the proposition put to him that deal no 5 was merely a cover up for the fact that Mr Cowan was unable to find enough money elsewhere to repay him. He, however, pointed out that it was not a question of Mr Cowan delaying to repay him, as Mr Cowan would always discuss every transaction with him before payment became due. All the rolled over deals were done with his personal approval and authority to fund another transaction. He would ask to be paid out whenever he felt that he needed funds. He did not have any evidence to suggest that any of G&B's directors knew about the transactions other than the discussion he had with Mr Ramsay and the fact that the letters of undertaking were on G&B's letterhead.

[64] He was not aware that the NK Pattundeen Family Trust was one of Mr Cowan's G&B clients. He was also not aware that at that time, the NK Pattundeen Family Trust had four ledger accounts opened for it in G&B's books. As to the reasons why he did not pursue his claim for R500 000 which he had paid to the Mark Robert Family Trust, his explanation was that he submitted all three outstanding claims to Mr Pillay for payment, including the amount of R500 000 that he had paid to the Mark Robert Family Trust. When no payment was received on demand, he instructed his erstwhile attorneys to institute action against G&B on all three claims. In the course of litigation, he terminated his erstwhile attorneys' mandate and instructed his present attorneys of record. He was later informed by his attorneys of record that the file in respect of the claim of R500 000 paid to the Mark Robert Family Trust was never handed over to them. He denied that he was not pursuing the claim of R500 000 in this action as a favour to Mr Robert because Mr Robert had

introduced him to the scheme. He did not know the relationship between Mr Robert and the Mark Robert Family Trust.

[65] He testified that Mr Cowan told him about the offshore investment involving Mr Richard John Greyling Park (Mr Park), an Australian, with whom Mr Cowan was conducting bridging finance deals in Australia. He never had any contact with Mr Park. With regard to offshore investment, he testified that on 30 July 2010, he paid AUD 172 000 to Mr Park. On 5 August 2010, Mr Cowan issued and signed an acknowledgment of debt and undertaking as well as a personal suretyship to pay Mr Stols on behalf of Cicolina Holdings (Pty) Ltd (Cicolina Holdings). Mr Cowan told him that he had registered Cicolina Holdings in Switzerland for his offshore bridging finance operations. Mr Stols was referred to an acknowledgment of debt and undertaking appearing at pages 184A-C of bundle H1, issued and signed by Mr Cowan in favour of Mr Park. He was also referred to a document titled 'mortgage of life policy' appearing at pages 184D-L of bundle H1, in which the Lionel Klein Trust purported to mortgage three Scottish Mutual International PLC policies as security to Mr Park. It was pointed out to him that the three policies had already been redeemed in December 2008, and paid out in January 2009, when they were purported to be mortgaged to a number of investors. He testified that he did not know anything about the said three policies.

[66] He accepted the proposition put to him by G&B's counsel that the offshore transaction was another misrepresentation with which Mr Cowan drew him into the scheme in order to get money out of him. He confirmed that the major difference between the offshore and local transactions was that Mr Cowan had made it clear to him from the beginning that the offshore transaction was not connected to G&B's transactions. He testified that Mr Cowan did not use G&B's letterhead for the offshore investment. He accepted that it would appear from the documents shown to him during the trial that Mr Cowan had raised "a so called investment" from him for no purpose other than to repay other so-called investors.

[67] With regard to his claim of R7 million, he confirmed that he paid R5 million directly to Topspec and R2 million into G&B's trust account on Mr Cowan's

instruction. The interest rate payable on the total of R7 million was 30 percent per annum. The said amount and interest were due on 30 November 2010. Mr Cowan's explanation to him in relation to this transaction was that either Resmax Investments (Pty) Ltd (Resmax) or MaxProp was in the process of acquiring a service station and needed to pay a purchase price of R15 million for that purpose. He initially told Mr Cowan that he could only afford to invest R5 million towards the purchase price, but he subsequently sourced an additional R2 million. Consequently, he invested a total of R7 million in this transaction. Mr Cowan suggested to him that he bring on board anyone else that he knew who could assist in investing towards the raising of the required purchase price for the project. He brought on board his two friends, Mr Neil Rodseth (Mr Rodseth) and Mr David Jaffit to invest in this particular project. Mr Rodseth invested R2,5 million in the project.

[68] When questioned on why a borrower, whose funds were kept and controlled by G&B would apply for bridging finance at such an exorbitant interest rate from a private person, his response was that he did not know how borrowers' funds were held at G&B. By way of an example, he stated that Grindrod holds funds for him on a long-term investment. If he needed to use the funds on a shorter-term transaction, he would have to borrow money from Grindrod against his long-term funds held by Grindrod and pay interest on the loan. As to the receipting of R2 million into Espro's trust ledger account by G&B on 13 October 2010 on the instruction of Mr Cowan, he testified that his understanding of a trust account is that whoever pays money into a trust account has to be credited with that payment. He did not give instructions to Mr Cowan to credit Espro with the money that he paid into G&B's trust account.

[69] He testified that he engaged Mr Ramsay's advice on two occasions. The first occasion was before he decided to invest in his deal no 1. On that occasion, he phoned Mr Ramsay on the evening of 26 February 2008, after Mr Cowan had left the documents relating to that deal with him. He consulted with Mr Ramsay at G&B's offices on 27 February 2008, wherein he sought advice on whether the bridging finance business was in accordance with G&B business, was acceptable, and approved by Mr Ramsay as a director. The second occasion was when he consulted with Mr Ramsay for his advice in respect of investing in Mauritian property. At that

time, Mr Ramsay introduced and referred him to Mr Desmond. Mr Desmond consulted with him and provided him with a report on the matter.

[70] It was put to Mr Stols that Mr Desmond would deny ever meeting him or having consulted with and given advice to him. His response was that he was in possession of an email dated 15 July 2008, confirming what he had testified to on this aspect. He was challenged to bring the email to court after he tendered to produce it the next day of the court sitting. Mr Stols produced this email the next day of the hearing and it was received into evidence as part of bundle F149. He testified that he would not have asked Mr Ramsay whether Mr Cowan was employed by G&B because Mr Cowan's business card stated that he was employed by G&B. Mr Stols denied that Mr Ramsay had told him that Mr Cowan did not have authority to sign letters of undertaking. He reiterated that had Mr Ramsay told him that only the directors of G&B were authorised to sign and bind G&B, he would have asked Mr Ramsay to sign the letter of undertaking before committing an investment of R10 million on the first deal.

[71] When it was put to him that Mr Ramsay advised him not to get involved with a party wanting finance on the basis suggested by Mr Cowan, his response was:
'I mean I don't understand how any sane rational person who's speaking to a director of a company he's about to invest in would continue with an investment when the director tells him not to invest. I mean that just doesn't make any logical sense, M' Lord.'[4]

[72] He confirmed that on 27 February 2008, around 12h00, he spoke to Mr Ramsay for about three minutes. During that conversation, Mr Ramsay confirmed that he had spoken to Mr Cowan about the matter and that it was fine for him to go ahead and invest. He confirmed that Mr Ramsay had a discussion with him at the Oyster Box Hotel function about the bridging finance business conducted by Mr Cowan at G&B. He denied that during the meeting of 25 November 2010, Mr Ramsay reminded him of his (Mr Stols) enquiry in relation to the first deal and that Mr Ramsay had told him not to get involved with the client requiring finance on that basis. Mr Stols denied that he spoke about the Australian investment to Messrs Ramsay and Pillay in that same meeting.

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[4] Page 282 of the record.

[73] In cross-examination by Deloitte's counsel, Mr Stols testified that Mr Cowan made it clear to him that the offshore transaction was not sanctioned by G&B, despite the fact that the offshore transaction had the same general structure in respect of the role played by G&B. His understanding was that in all those transactions where G&B had given letters of undertaking on the funds advanced, G&B was acting on behalf of the borrower when Mr Cowan was dealing with him. He understood the borrower to be a client of G&B, and that Mr Cowan was giving him the letters of undertaking on behalf of G&B as a borrower, to repay his loan on certain terms.

[74] He did not know that the R10 million extracted from him on deal no 1 was used to repay another investor, who also thought that he was investing on the AL-Bas Holding and Solivista transaction. However, the documents shown to him during the trial appear to confirm that this was the case. He thought that he was investing R10 million and that MaxProp was borrowing that amount from him. He confirmed that he did not know Mr Chin and that he learnt afterwards that Mr Chin was Mr Cowan's brother-in-law. Mr Chin paid R5 million to his account on 31 March 2008 as part payment towards his R10 million. He was not aware that Mr Cowan was involved in fraudulent activities. He did not have access to G&B's trust account and was not privy to what was happening in G&B's trust account.

[75] When he paid R3 million to the Sharon Klein Will Trust and Benjamin Klein Will Trust, he thought he was advancing this amount to these two trusts. He was not aware that the payment was in fact a repayment of money that the two trusts had advanced to Ro-Dre-Fer on 7 March 2008. He now realises that Mr Cowan gave him the impression that he was lending money to a borrower, whereas the money in fact was used to repay the loan that another party, with a similar impression, had loaned into the scheme. He also realises that in some documents he was designated as the borrower, even though he never borrowed any bridging finance money. He always thought that he was lending to the borrowers when he was transacting with Mr Cowan. He used the money from his facility with Grindrod to fund the transactions/ deals. He paid interest on the facility. He also paid income tax from the interest that he earned on the deals.

[76] He was asked whether he had any reason to doubt what Mr Cowan said in his suicide note, which was to the effect that none of the transactions he had entered into with the ostensible investors were legitimate or lawful, but were fraudulent transactions. His response was that at the time of writing the suicide note, Mr Cowan was a man in an absolute desperate state and was making a desperate statement. When he was questioned why he did not claim his R5 million from Topspec after Mr Pillay had told him that G&B knew nothing about Mr Cowan's scheme, his response was that he dealt with Topspec through G&B and that he had contracted with G&B. On evidence presented to him, he accepted that there were no borrowers for this short-term bridging finance business that G&B was running.

[77] He testified that he thought Mr Desmond had sent a copy of bundle F149 to Mr Ramsay because he (Mr Stols) had initially contacted and sought advice from Mr Ramsay about the Mauritian property investment. Mr Ramsay had, thereafter, referred and introduced him to Mr Desmond.

[78] This concluded the plaintiff's case.

Defendant's case

[79] Ms Boden was the first witness for G&B. She is a director of G&B and has been in the firm's deceased estates and trusts department since 1990. Mr Cowan was employed in the commercial department. As such, she did not have much interaction with him. She described to the court how G&B is structured. Ms Boden testified that having learned of Mr Cowan's suicide, she and G&B's office manager, Ms Bevin Gane, went to Mr Cowan's house on 25 November 2010, to ascertain whether he left some kind of a letter of explanation for his actions, or any documents that could assist G&B. On arrival at Mr Cowan's house, Mr Chin, who identified himself to her as Mr Cowan's brother-in-law, greeted her. Mrs Cowan was also in the house. She gave Ms Boden her husband's personal computer, a bag containing numerous files and G&B's cellular phone allocated to him for business use. She also gave Ms Boden Mr Cowan's suicide note. Mr Chin gave her a kitbag with prepacked files found in the house. Ms Boden took all the items back to G&B's office. Ms Boden

testified that the scheme participants who had contacted the directors alleged that Mr Cowan had been running a bridging finance business on behalf of G&B for its clients who required short-term finance. Ms Boden referred to the investors in her evidence collectively as the scheme participants. I shall continue using this term in relation to her evidence.

[80] During the subsequent interviews that took place, the scheme participants alleged that Mr Cowan had approached them stating that G&B had certain clients who required short-term finance and who were prepared to pay returns from the prime rate up to 42 percent interest per annum. On the same day of Mr Cowan's death she and Mr Ramsay had a meeting with Mr van der Veen and Adrian Tonkin (Mr Tonkin) of MaxProp. Messrs van der Veen and Tonkin were accompanied by their attorney, Mr Darryl Francois. They told her that an amount of approximately R9 million was still owed to MaxProp in respect of the deals, which were still pending at the time. She testified that the R9 million later increased because a cheque payment to MaxProp was dishonoured.

[81] She testified that G&B was not concerned that its trust account was overdrawn. It instructed Deloitte to perform a special audit with the mandate to ring fence what she called "the Cowan scheme", to look at every client in G&B to satisfy itself that the balances held in G&B's trust account were correctly reflected and that no money was missing. Deloitte had been G&B's auditor for a period longer than her employment. Deloitte ceased to be G&B's auditors after this incident. In addition, G&B was also voluntarily participating in the RAS audit, a pilot project of the Law Societies in which attorneys' firms were invited to participate voluntarily in an audit performed by the Law Societies. On the other hand, G&B's insurers appointed independent auditors, KPMG, to investigate Mr Cowan's conduct. Deloitte produced the report in which it concluded that G&B's trust account balances were not tampered with.

[82] More than a month after Mr Cowan's suicide, G&B was served with summonses commencing actions by the individual investors, claiming the amounts they alleged were due to them from Mr Cowan's scheme. It was then that she started

conducting her own independent investigation to ascertain what was going on in the scheme. She wanted an investigation based on every document that was at G&B's disposal, without any document being tampered with. She uplifted every piece of paper and the files that belonged to Mr Cowan and preserved them. She placed whatever she found under lock and key until KPMG took over on 29 November 2010.

[83] Ms Boden testified that she created a dartboard (exhibit K), after having gone through each and every piece of paper and bank deposit slip and tied up each to the relevant payees and bank accounts that were used in each transaction; in order to understand the role played by each scheme participant. She identified the persons and the entities that she considered to be the role players or persons/entities of interest in the scheme. Having completed this exercise, she concluded that Mr Robert was an agent or generator of the scheme participants. She also concluded that Mr Cowan was at the centre of and controlled the scheme from start to finish. She was unable to find any indication of any legitimate business conducted by Rodlane Trading. She established that Mr Martin Cecil Cowan (Martin), who was Mr Cowan's brother, was the only member of Rodlane Trading.

[84] She testified that the grey slice on exhibit K depicts G&B and relates to the use or involvement of G&B's trust account in the money coming in and out of the scheme. Ms Boden concluded that the total percentage of money that went in and out of G&B's trust account over a period of four years prior to Mr Cowan's committing suicide was approximately 2,7 percent of the total flow of its trust account. She testified that according to her calculation, a total of approximately R174 million went through PKF (Durban's) account.

[85] She testified that what is depicted in the purple slice on exhibit K are Mr Cowan's accounts. She found incomplete records relating to each of the entities that she described as Mr Cowan's accounts. She concluded that those accounts were simply a funnel or channel for funds coming in and out of those accounts for the scheme. She testified that the green slice on exhibit K depicts the accounts linked to Mr David Ginsburg (Mr Ginsburg). Mr Ginsburg is an accountant operating in Johannesburg and owns a company called Johannesburg Enterprises (Pty) Ltd. Mr

Ginsburg's operation is similar to that of an agent. He would refer transactions to Mr Cowan on a commission basis.

[86] The accounts depicted in the blue slice on exhibit K are the accounts linked to PKF (Durban). The accounts depicted in the orange slice on exhibit K are the accounts linked to Cicolina Holding. The accounts depicted in the black slice on exhibit K depict the accounts linked to Rodlane Trading. The accounts depicted in the red slice on exhibit K are the accounts linked to Mr Robert. Ms Boden testified that in almost all instances, Mr Robert's investors paid their funds to either the Nerak Trust or the Patrick Robert Family Trust. She testified that the Nerak Trust is also Mr Robert's family trust, named after his wife Karen, with her name spelt backwards.

[87] She testified that the earliest documents she managed to find whilst trying to trace how long the scheme had been operational dated back to 1993, when Mr Cowan was still at Ditz Inc. Those documents showed that the scheme participants and modus operandi used in Mr Cowan's scheme then were the same as those used whilst he was at G&B. She testified that the funds received from scheme participants were used to repay other scheme participants, without the funds having been invested for any period of time to attract interest to cover the promised return to scheme participants.

[88] She testified that she ascertained that the transfer from AL-Bas Holding to Solivista was not dependent on bridging finance being provided by either Mr Stols or any other person. The required deposit had already been paid on this transaction and the balance of the purchase price was secured by way of Standard Bank guarantee dated 29 January 2008. The only problem with this transaction was that the conditions applicable for the granting of the bond were in conflict with the terms of the sale agreement and that was causing the delay in transfer, resulting in the purchaser being placed in mora.

[89] Ms Boden explained the system and manner in which payments are received and processed into G&B's trust account. She testified that the bookkeeping department would send an email regarding the deposits reflected on a particular day,

together with the details of the deposit, which included a matter reference if available. The recipient of the email would, after recognising that the payment belongs to him/ her, instruct his/her secretary to complete the trust receipt voucher to allocate the funds to that client. The trust receipt voucher would then be handed to G&B's bookkeeping department, which would post that credit to the client's account. The payer of the money may not be the fee earner's client. The invoices are processed and allocated a client code and matter reference.

[90] She testified that a document called a cheque requisition is required to be completed when payments are to be made out of G&B's trust account. A member of staff often does the completion of the cheque requisition, but the signature required to approve payment is that of a director. The signatures of two directors are required for a payment in excess of R20 000. G&B uses an accounting package called CMS. The mechanism for generating a fee note under the CMS accounting package is that fee notes are generated by a fee earner and not by a centralised bookkeeping department. Each individual fee earner inputs into the accounting package the necessary information in order to generate a fee note. The recipient of such a fee note would be the only person who would know the details contained in the fee note, unless a request is made to see the hard copy of the fee note in the file.

[91] She testified that Mr Cowan generated tax invoices with reference to the word "commission", which tied up to the figures that were contained and referred to in various deals involving MaxProp. She testified that any document purporting to bind G&B to a cause of action or to any obligation requires the authority of a director in the form of a signature. The only exception is when briefing counsel on behalf of a long-standing client who appears on a director's approved list, as they have no difficulty with the payment of legal fees.

[92] She testified that on 26 November 2010, she and Messrs Ramsay and Pillay held a meeting at G&B's offices with Messrs Neil McHardy (Mr McHardy) and Peter Duncan (Mr Duncan) of PKF (Durban), which was arranged by Mr Duncan with Mr Ramsay. In that meeting, Mr McHardy confirmed that PKF (Durban) had been operating a corporate saver account in the name of DS&T nominees and more

recently, Rodlane Trading, in respect of G&B's bridging finance operation in which Mr Cowan represented G&B. Messrs McHardy and Duncan conveyed to them that from their point of view, this was G&B's money-lending scheme that PKF (Durban) was administering on behalf of G&B. She testified that Messrs Duncan and McHardy emphasised that they took comfort in the fact that they were dealing with an old and reputable law firm in G&B and that the bulk of the funds received by PKF (Durban) emanated from G&B.

[93] She confirmed that G&B made payments to PKF (Durban) but disputed that such payments constituted the bulk of the funds in the scheme. PKF (Durban) provided her with a summary of DS&T nominees' account. She testified that she was not able to find a genuine borrower and a legitimate loan transaction in the batches of documents that she went through. The scheme was premised on underlying interest rates, which could not be met because the funds were never invested. She stated that G&B did not run a bridging finance business and would refer its clients to Rodel should G&B's clients require such service. She learnt afterwards that Mr Cowan had approached Mr Church in an attempt to obtain funds in respect of a transaction that was being dealt with by G&B's conveyancing department. She ascertained that Cicolina Holdings was not involved in any business other than processing payments between the scheme participants. Cicolina Holdings was an offshore equivalent of Rodlane Trading, which was the South African entity most used by Mr Cowan.

[94] She testified that all payments made to Rodlane Trading were nothing but scheme related payments processed in favour of other scheme participants. She arranged a follow up meeting with MaxProp directors for 29 November 2010. In this meeting, MaxProp directors' furnished G&B with a list of upward adjusted outstanding claims. She found that the individual directors of MaxProp participated in the offshore component of the scheme. She testified that the common thread in respect of the offshore participation was that Mr Cowan would purportedly pledge or cede the already redeemed Scottish Mutual policies, which had already been paid to Cicolina Holdings, in respect of ?? various acknowledgments of debt. She testified that in every case, throughout the bundles of documents, where money was said to have been available and held by G&B on the instructions of a client for the purpose of

repaying those loans, there was no such money earmarked for any of those transactions.

[95] In cross-examination by Mr *Dickson SC*, who appeared for Mr Stols, she confirmed that her evidence was based on the investigation that she conducted after Mr Cowan committed suicide. She was a member of the executive committee at the time. The directors of G&B resolved that the members of the executive committee would be charged with managing the events that followed Mr Cowan's suicide. She confirmed she took notes at the first meeting with MaxProp wherein Mr Stols' name was mentioned, even though he was not in that meeting. She recorded that Mr Stols was one of the scheme participants. She had no reason to doubt Mr Stols' evidence that he did not know the other scheme participants. From an analysis of all the documents in her possession, she did not find any documents suggesting that Mr Stols knowingly participated in the scheme.

[96] She also conducted a search of G&B's accounting records and did not find any record of Mr Stols ever having been taken on as a client on their system. It was put to her that bundle F148 of bundle F indicated an attorney and client relationship. Her response was that bundle F149 indicates that Mr Stols was one of the very rare recipients of free legal advice from Mr Desmond. He was never recorded as a client in their books. She found no legitimate basis to explain the receipting of Mr Stols' money. She testified that G&B's internal processes are such that it enters into a business relationship with a client on production of satisfactory FICA documentation. G&B was able to trace bundle F149 by doing a search using the date that Mr Stols had given them. Mr Cowan came to G&B with an unblemished track record. G&B's directors were never warned or informed that Mr Cowan was involved in any activity other than the practice of law in the firm. She confirmed that some of the funds were processed through G&B's trust account. The directors, who authorised the payments, did so on the strength of the information provided to them by Mr Cowan.

[97] She testified that even though G&B did not conduct a bridging finance business, it would assist parties who wished to conclude a loan agreement with each other by drafting the underlying documents in support of that loan agreement. She

testified that Mr Cowan purposefully misled those directors who signed the letters of undertaking into believing that those letters of undertaking were for genuine transactions. She testified that under Mr Cowan's direction, G&B sent invoices to MaxProp for the payment of commission in respect of various deals.

[98] She confirmed that an attorney who receives money from or on behalf of his or her client or a third party, receipts it into the trust account in the name of the particular client, and is only supposed to cause it to be paid out to that client or in accordance with that client's instructions. She conceded that the receipting of funds to a different ledger account was just another example of the wrongdoing on the part of Mr Cowan. She found no legitimate basis to explain why Mr Stols' R2 million was receipted to Espro. She testified that Mr Cowan misappropriated Mr Stols' R2 million at its point of entry into G&B's trust account and had used G&B's infrastructure without its directors' knowledge. From an analysis of the documents in her possession, it appeared to her that Mr Cowan had juggled around the scheme participants, acting alone without the authority of G&B. She has no doubt that Mr Cowan made considerable mileage out of the use of G&B's reputation and good name.

[99] She disputed Mr Stols' evidence that he had not issued summons on the offshore transaction because Mr Cowan had told him that the offshore transaction was his private business which had nothing to do with G&B. She confirmed that MaxProp's directors had also told her that the offshore bridging finance was Mr Cowan's private business. She did not know what documents Mr Cowan produced to satisfy the queries raised by G&B's auditors. She conceded that if the G&B directors who signed the letters of undertaking had carefully read them, they would have realised that G&B was providing an undertaking and binding itself to pay on transfer. She conceded that the interest rates on the bridging finance business are generally very high. She did not know what the commission invoices raised by G&B intended to cover. She testified that when the arrangement started between Mr Cowan and MaxProp, MaxProp referred to the commission invoices or fees raised by Mr Cowan as a sharing of interest but that later changed and the word "commission" was used in place of the sharing of interest.

[100] In cross-examination by Deloitte's counsel, Ms Boden testified that one of the main features of MaxProp's transactions was that instead of being repaid when they were due for payment, only the interest would be repaid and the capital amount would be rolled over and advanced to an ostensibly different borrower. Mr Cowan was able to keep the scheme alive for as long as he was able to persuade MaxProp to roll-over the capital amount because MaxProp was the biggest source and contributor of his capital funding.

[101] She was taken through Deloitte's bundle 8 containing the flow charts of deals and schedule of transactions relating to MaxProp, Topspec and Mr Seevnarayan. The schedule of transactions provides dates, deal numbers, deposit/roll, terms of letters of undertaking, due date for payment, the amount paid/rolled over for each debt, and source of payment. She testified that from an analysis of the flow charts, it became clear that the scheme participants thought that they were advancing money to someone, when they were in fact repaying each other.

[102] She confirmed that the following MaxProp transactions are linked to Mr Stols' deals. MaxProp's deal no 51 is linked to Mr Stols' deal no 4; MaxProp's deal no 70 is linked to Mr Stols' deal no 9; MaxProp's deal no 98 is linked to Mr Stols' deal no 13; MaxProp's deal no 56 is linked to Mr Stols' deal no 1; MaxProp's deal no 57 is linked to Mr Stols' deal no 4; MaxProp's deal no 112 is linked to Mr Stols' deal no 13; MaxProp's deal no 84 is linked to Mr Stols' deal no 9; MaxProp's deal no 92 is linked to Mr Stols' deal no 12; MaxProp's deal no 104 is linked to Mr Stols' deal no 13; MaxProp's deal no 106 is linked to Mr Stols' deal no 13, and MaxProp's deal no 110 is linked to Mr Stols' deal no 13. She also confirmed that Topspec's deal nos 15 and 18 are linked to Mr Stols' deal no 13, which is the transaction on which Mr Stols is suing.

[103] She testified that all of the above transactions entailed fraudulent advances in relation to Mr Cowan's web. She testified that when Mr Cowan performed in terms of the letters of undertaking to pay a scheme participant, he was misappropriating the capital investments from other scheme participants to pay another scheme

participant. She confirmed that when a scheme participant received his capital investment and promised interest, the scheme participant was receiving the redistribution of the scheme's spoils of misappropriated investments from other scheme participants.

[104] She was shown and taken through the tax invoices rendered by G&B, which linked them to MaxProp's deals. She confirmed the following. On 27 August 2007, G&B rendered tax invoice nos 277100 and 277096 for R11 405.70 and R39 672 to MaxProp linking them to deal nos 40 and 41 respectively. On 31 August 2007, G&B rendered tax invoice no 277614 to MaxProp for R35 601.52, which linked it to deal no 39. On 30 November 2007, G&B rendered tax invoice nos 283629, 283662, 283659 and 283667 for R51 300, R5 130, R24 957.45 and R32 062.50 to MaxProp, which linked them to deal nos 42, 43, 44 and 45 respectively. On 29 February 2008, G&B rendered tax invoice nos 289001 and 289002 for R59 290.52 and R46 091.02 respectively to MaxProp, which linked them to deal nos 46 and 47. On 31 March 2008, G&B rendered tax invoice nos 290778, 290768 and 290774 for R39 461.53, R19 730 and R13 153.84 to MaxProp, which linked them to deal nos 48, 49 and 50.

[105] On 30 June 2008, G&B rendered tax invoice nos 297400, 297398, 297396, 297402 and 297403 to MaxProp. Ms Boden accepted that the commission of R34 200 in respect of deal no 52 was confirmed in the email dated 30 June 2008, addressed by Mr Tonkin to Mr Cowan, appearing at page 454 of Deloitte's bundle 7.2. The tax invoices mentioned were for the amounts of R76 950, R28 785, R1 747.27, R26 291.83 and R32 864.80 and they linked them to deal nos 51, 53, 54, 57 and 58. There was a further commission rendered by G&B to MaxProp for R170 000, which linked it to deal no 55. Deal no 52 linked it into Mr Stols' transaction no 4. On 31 July 2008, G&B rendered tax invoice no 299560 to MaxProp for R44 997.83, which linked it to deal no 59. On 29 August 2008, G&B rendered tax invoice nos 301517 and 301518 to MaxProp for R43 849.79 and R47 236.70 respectively, which expressly linked them to deal nos 59 and 56.

[106] On 30 September 2008, G&B rendered tax invoice nos 303419 and 303420 for R33 853 and R5 194.13 to MaxProp, which linked them to deal nos 60 and 62. On

31 October 2008, G&B rendered tax invoice no 305340 for R88 920 to MaxProp, which linked it to deal 61. On 28 November 2008, G&B rendered tax invoice no 307253 for R76 950 to MaxProp, which linked it to deal no 64. On 8 December 2008, G&B rendered tax invoice no 308211 for R63 073.77 to MaxProp, which linked it to deal 63. On 26 February 2009, G&B rendered tax invoice no 312645 for R123 120 to MaxProp, which linked it to deal no 65. On 9 and 11 March 2009, G&B rendered tax invoice nos 313999 and 314055 to WAP Marketing for R34 000 and R11 400 respectively as fees. On 28 April 2009, G&B rendered tax invoice no 316255 for R74 787.75 to MaxProp, which linked it to deal no 66. On 30 April 2009, G&B rendered tax invoice no 316737 for R89 626.59 to MaxProp, which linked it to deal no 67.

[107] On 11 May 2009, G&B rendered tax invoice no 317654 to WAP Marketing for R114 000 as fees for professional services in respect of a loan transaction. On 30 June 2009, G&B rendered tax invoice no 32089 for R20 787.03 to MaxProp, which linked it to deal no 70. On 31 July 2009, G&B rendered tax invoice nos 323021 and 323051 for R158 004 and R54 189 to MaxProp, which linked them to deal nos 68 and 69. On 31 August 2009, G&B rendered tax invoice no 324997 for R77 919.78 to MaxProp, which linked it to deal no 71.

[108] On 30 September 2009, G&B rendered tax invoice nos 327767 and 327768 for R28 109.58 and R42 867.12 to MaxProp, which linked it to deal nos 72 and 75. On 13 October 2009, G&B rendered tax invoice no 328791 for R6 914.96 to MaxProp, which linked it to deal no 76. On 30 October 2009, G&B rendered tax invoices nos 329963 and 329964 for R15 179.18 and R17 203.07 to MaxProp, which linked them to deals nos 74 and 78. On 26 November 2009, G&B rendered tax invoice no 331584 for R14 546.71 to MaxProp, which linked it to deal no 73. On 29 January 2010, G&B rendered tax invoice no 336177 for R52 171.39 to MaxProp, which linked it to deal no 77.

[109] On 27 February 2010, G&B rendered tax invoice nos 338572, 338573, 338574, 338575, 338576 and 338577 for R60 295.07, R73 935.25, R34 531.01, R3 415.31, R8 643.70 and R3 429.37 to MaxProp, which linked them as commission

to deal nos 79, 80, 81, 84, 85 and 86. On 31 March 2010, G&B rendered tax invoice nos 340466, 340463 and 344823 for R185 944.92, R23 218.52 and R66 057.54 to MaxProp, which linked them to deals nos 82, 83 and 87. On 31 May 2010, G&B rendered tax invoice no 344823 for R66 057.54 to MaxProp, which linked it to deal no 87. On 30 June 2010, G&B rendered tax invoices nos 347170 (summary of commission on deal no 9 appearing at page 1130 of Deloitte's bundle 7.3), 347169, 347171 and 347172 for R43 218.49, R132 227.51, R9 444.82 and R57 976.02 to MaxProp, which linked them to deal nos T89, C91, T93 and C95.

[110] She stated that G&B's directors did not have any arrangement with Mr Cowan allowing him to use its premises for his scheme. She stated that G&B would not have placed itself in a position to allow Mr Cowan to conduct a scheme with the remuneration benefit to G&B. She testified that Mr Cowan was not an independent contractor but an employee of G&B and was earning a salary. She, however, conceded that Mr Cowan rendered these tax invoices on behalf of G&B from the transactions on his scheme.

[111] She admitted that G&B rendered the following tax invoices to Rodlane Trading, which Mr Cowan was using in his scheme. On 25 April 2005, a tax invoice requisition in relation to a fee of R4 845 was rendered to Rodlane Trading with reference JA Kunst. On 25 June 2005, G&B rendered a tax invoice requisition for a fee of R4 148 to Rodlane Trading with reference JA Kunst. On 25 August 2005, a tax invoice requisition for R8 550 was rendered by G&B to Rodlane Trading. On 22 September 2005, G&B rendered a tax invoice requisition for a fee of R7 410 to Rodlane Trading. On 25 October 2005, G&B rendered an invoice for a fee of R5 700 to Rodlane Trading. On 28 February 2006, G&B rendered a tax invoice requisition to Rodlane Trading for a fee of R8 500. On 24 March 2006, G&B rendered a tax invoice requisition to Rodlane Trading for a fee of R5 700. On 27 November 2006, G&B rendered a tax invoice requisition for a fee of R10 260 to Rodlane Trading. On 31 August 2010, G&B rendered a tax invoice requisition for a fee of R5 700 to Rodlane Trading.

[112] Ms Boden was referred by counsel to the letter addressed by Mr Cowan to Mr Ginsberg appearing at page 106 of Deloitte's bundle 8. In the letter, Mr Cowan confirmed the agreement between himself and Mr Ginsberg, in terms of which a client was to pay a fee of 4 percent on the loan, of which Mr Ginsberg was to receive 2,5 percent and G&B was to receive 1,5 percent, payable into its trust account. She testified that she did not recall Mr Ginsberg's funds being processed through G&B's trust account, but accepted the proposition that on the face of this agreement, G&B was going to earn fees out of Mr Cowan's scheme. She was aware before she testified that G&B earned fees out of Mr Cowan's scheme from Rodlane Trading. She, however, did not disclose that piece of evidence in her evidence-in-chief. She conceded that her evidence to the effect that G&B did not derive any benefits from Mr Cowan's scheme was not correct, because it earned fees from both Rodlane Trading and from MaxProp.

[113] She conceded that she did not give KPMG the tax invoices rendered by G&B to Rodlane Trading, because KPMG had access to all the ledger accounts. She did not notice that KPMG did not deal with the commission earned by G&B from Rodlane Trading in its report, which was received into evidence as exhibit M. She conceded that exhibit M only mentioned commission earned from MaxProp. She also conceded that exhibit M did not deal with the invoices linked to Mr Seevnarayan, because they were not disclosed to KPMG.

[114] She testified that at the time when G&B effected payments out of its trust account, it did not know that such payments were in respect of an illegal scheme. G&B had no reason to believe that there was something irregular about the payments. She could not fault her colleagues for the regard and esteem in which they held Mr Cowan at the time that he worked at G&B as she too held him in high regard. She testified that Mr Cowan was a senior attorney who was trusted by G&B's directors and members of staff.

[115] She confirmed that Mr Cowan's scheme paid approximately R3 087 764 in commission to G&B. She confirmed that the scheme aggregate amount for the period 1 April 2002 to 24 November 2010 was R656 812 249.12. She testified that Mr

Cowan channelled an amount of R356 757 251.83 through G&B's trust account; R43 million through the Nerak Trust account; R8,7 million through the Patrick Robert Family Trust account; R50,7 million through Rodlane Trading's account; and R104 million through DS&T nominees', PKF (Durban) and Royal Fern's accounts combined. The scheme money that went through G&B's trust account, accounts for more than half of the whole onshore scheme. She testified that she regarded it as a flagrant dereliction of duty to the firm to rely solely on Mr Cowan's explanation when signing a letter of undertaking and trust cheque requisition, binding the firm to millions of rands worth of payments, without making any independent enquiry.

[116] When she was cross-examined on the issue involving Rodel, her evidence was that on 23 November 2010, Mr Mike Gammie (Mr Gammie) of Rodel contacted Mr Ramsay and asked that they meet about the bridging finance applications Mr Cowan had made to Rodel. Mr Ramsay told her that Mr Gammie had indicated to him that the applications appeared to be based on a transaction that had already gone through the deeds office. Rodel's concern was that the deeds office had already registered the transfer and that Mr Cowan was misrepresenting to them that the transfer was still pending. Her evidence was that upon Mr Ramsay's checking with his department, he ascertained that the transfer of the property that Rodel was referring to had not gone through in the deeds office. Mr Ramsay informed her that he questioned Mr Cowan about the transaction. Mr Cowan produced a resolution relating to the transaction signed by Mr Pattundeen authorising him to apply for the bridging finance on behalf of RWO Properties CC (RWO Properties). Mr Ramsay informed her that he then asked Mr Cowan to produce a memorandum explaining what was happening in this transaction. Mr Ramsay informed her that by that time, Mr Ramsay knew that Mr Pattundeen did not want any bridging finance for the transaction. The next morning Mr Cowan committed suicide. She indicated that Rodel's interaction pointed to Mr Cowan's attempt to obtain some kind of finance on the strength of a transaction, which notwithstanding the resolution that was signed, was not authorised by Mr Pattundeen.

[117] Mr Ramsay was the next witness to testify. He joined G&B on 1 March 1988 and has been in its conveyancing department ever since. He is currently head of the

conveyancing department. He testified that on the evening of 26 February 2008, Mr Stols phoned him on his landline. His wife answered the call. She and Mr Stols spoke for a while before she handed over the phone to him. After exchanging pleasantries, Mr Stols asked him whether he worked at G&B. Mr Stols said to him that he was asking as he had seen his name on G&B's letterhead. Mr Ramsay answered in the affirmative. Mr Stols then asked him whether Mr Cowan was also working for G&B. He gave an affirmative answer to that question as well. Mr Stols then asked him whether Mr Cowan was authorised to sign a letter of undertaking on behalf of G&B. He told Mr Stols that Mr Cowan was not authorised to sign and that only the directors sign letters of undertaking that bind the firm. Mr Stols then told him that Mr Cowan had presented him with a letter of undertaking which he had signed in respect of a property transaction. Mr Stols also asked him whether he could rely on Mr Cowan's signature, to which Mr Ramsay said no.

[118] Mr Stols then read out to him over the phone the letter of undertaking signed by Mr Cowan. The letter of undertaking referred to a transfer of property from AL-Bas Holding to Solivista, which G&B was handling at the time. He testified that he picked up that line three of the letter of undertaking referred to payment by no later than 31 March 2008. He testified that he told Mr Stols that no conveyancer could guarantee a fixed date of transfer. He testified that he further told Mr Stols that he should not get involved on the basis proposed by Mr Cowan and that he should not part with any money.

[119] He testified that Mr Stols did not question him or raise a concern as to why he had to pay the money directly to a third party instead of paying it into G&B's trust account. He denied that he said to Mr Stols that G&B generally makes payment to a third party to save time. He denied that Mr Stols mentioned to him over the phone that the third party involved in the transaction was Pinehurst Investments. He did not tell Mr Stols that he did not foresee any problems because Pinehurst Investment was one of G&B's big clients. He testified that it would have been a concern to him if Pinehurst Investment were mentioned because he would have asked for written instructions from AL-Bas Holding to pay Pinehurst Investment.

[120] He denied Mr Stols' evidence that he seemed to have knowledge about the bridging finance business and that he was positive about him investing in the business. He testified that it was of concern to him that Mr Cowan had signed the letter of undertaking. He asked Mr Stols to fax the letter of undertaking to him in the morning because he wanted to discuss the transaction with Mr Cowan. He also wanted to enquire from Mr Cowan why he was signing letters of undertaking when he was not authorised to do so. He admitted giving Mr Stols his private phone number but denied speaking to him on the phone the next morning at 08h37. He testified that it was possible that someone could have answered his private phone line in his absence. He stated that he did not own a private fax number. Mr Stols used the conveyancing fax line to fax the document to him. On receipt of the fax from Mr Stols, he called for the conveyancing file relating to the transaction to see its status. He found that the purchase price was secured by a bank guarantee. He then phoned Mr Cowan to discuss his signing of the letter of undertaking in this transaction. He asked him over the phone why he signed the letter of undertaking when he was not authorised to do so. He also arranged to have a meeting with him.

[121] He testified that he had a meeting with Mr Cowan at 10h00 on 27 February 2008. He showed Mr Cowan the letter of undertaking and asked him again why he had signed when he knew that he was not authorised to sign. Mr Cowan apologised and acknowledged that he knew that he was not allowed to sign the letter of undertaking. Mr Cowan assured him that it would not happen again. Mr Ramsay then told him that he would have to sign the letter of undertaking if the parties were going ahead with the transaction. He instructed Mr Cowan to make certain amendments on the letter of undertaking in order for it to comply with the status of the file and G&B's conveyancing department's standards. He told Mr Cowan that the letter of undertaking should have a heading. He instructed him to include, 'on the instructions from the seller we undertake to pay to you'[5] in the letter of undertaking. He also instructed Mr Cowan to delete the fixed date of payment and to insert in its stead, 'on registration of the bond in favour of Standard Bank over the said property' as a condition of payment on the letter of undertaking.[6] Mr Cowan undertook to discuss

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[5] Page 2249 of the record, lines 6-7.

[6] Page 2249 of the record, lines 12-15.

the transaction with the parties and come back to him with the amended letter of undertaking for him to sign. Later that same day, Mr Cowan phoned him to advise him that the transaction had been put on hold. He testified that he did not concern himself any further about this transaction because it did not go ahead.

[122] He testified that on the morning of 27 February 2008, his secretary gave him a written message from Mr Stols indicating that he would like to see him. She told him that Mr Stols had indicated that he wanted to see him about Pinehurst Investments. He then wrote “Pinehurst Investment” next to that message. He never had a meeting with Mr Stols on 27 February 2008. He heard about Mr Robert’s involvement in the scheme for the first time on 25 November 2010, in the meeting he and Mr Pillay had with Mr Stols at their office. In the course of that meeting, Mr Stols disclosed to them that Mr Robert was earning 1 percent commission on all the transactions he (Mr Robert) was introducing to Mr Cowan.

[123] He testified that G&B is not involved in the bridging finance business. He stated that G&B refers its clients requiring short-term finance to entities such as Rodel and does not earn commission for such referrals. He denied that he told Mr Stols that G&B earns a small commission for the referrals. He testified that G&B was doing the referrals as a service to its clients. At the time of his discussion with Mr Stols, he was not aware that Mr Cowan was running a money-lending scheme based entirely on fraud, and charging commission. He knew that Mr Cowan acted for wealthy clients who from time to time would lend money, and that Mr Cowan would draft the loan documents in respect of those transactions. He assumed that the letter of undertaking that Mr Cowan had signed would be part of those transactions. He could not recall whether Mr Stols had spoken to him on the phone on 27 February 2008. He denied that he told Mr Stols that he had spoken to Mr Cowan and that he told Mr Stols that he could go ahead and invest in the deal. The transaction involving R10 million including its underlying documents was never discussed with him. He was not aware of Mr Stols’ subsequent participation in the scheme. He only learnt about it after Mr Cowan’s suicide.

[124] He testified that around September/October 2009, he was invited to invest in a movie called “Spud”, which was being filmed at his former school, Michaelhouse. He was willing to take part in the project. The film’s producers needed more investors. He felt that there might be some people with Michaelhouse connections who could be interested in investing in the movie. He contacted Mr Stols and promoted the idea to him. Mr Stols told him that he was not interested because his previous investment in another movie had not yielded positive results. He denied that the topic of Mr Stols investing money with Mr Cowan came up in the conversation. He denied that Mr Stols said to him during that conversation that he would rather invest his money with Mr Cowan in further bridging finance deals. He also denied that he asked Mr Stols if he was happy with Mr Cowan’s service and whether he was being paid on time. He did not have any further engagement with Messrs Stols and Cowan about any further form of bridging finance on behalf of Mr Stols after the first transaction collapsed.

[125] He met Mr Stols again at a function at the Oyster Box Hotel in Umhlanga Rocks during the launch of the Des Roche development in the Seychelles. They had a general social conversation. He could not recall asking Mr Stols whether he was interested in investing in the development. He also could not recall asking him whether he was still happy with Mr Cowan’s service. He could not recall Mr Stols telling him that he ‘would rather just continue dealing with Mr Cowan to do some more bridging finance’.[7] He denied telling Mr Stols that he would speak to Mr Cowan about further bridging finance investments.

[126] He could not recall Mr Stols contacting him on the phone in July 2008 in relation to the acquisition of property in Mauritius or referring Mr Stols to Mr Desmond for advice regarding the acquisition of such property. He testified that it is the policy at G&B to refer a client to a colleague within the firm with the necessary expertise if a person lacks particular expertise in that field. He could not remember whether he had told Mr Desmond that he should not bill Mr Stols for the services he had rendered on the Mauritian property investment because Mr Stols was such a good client of G&B. He stated that Mr Stols was never Fica’ed by G&B and that no file was opened for

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[7] Page 2277 of the record, lines 11-14.

him. Mr Stols never paid any fees to the firm. He did not believe that Mr Stols was a client of the firm.

[127] On 23 November 2010, he received a phone call from Mr Gammie, who informed him that Rodel's in-house legal advisor, Ms Melinda Terblanche who is now Mrs Lourens (Ms Lourens), had raised concerns about two applications which Mr Cowan had presented to Rodel on behalf of RWO Properties and the Raymond Robert Family Trust. Mr Gammie asked to have a meeting with him. On the same day, he proceeded to Rodel's office where he met with Mr Gammie and Ms Terblanche. They indicated to him that the deeds office search in relation to the property that Mr Cowan was putting up as security seemed to indicate that the property had already been transferred to a third party. Mr Ramsay explained to them that the transaction was still pending and that the registration of transfer had not taken place. Mr Gammie mentioned to him that in the course of processing the loan application, when Mr Pattundeen, who was a member of RWO Properties, was asked to sign the suretyship on the loan, he told them that RWO Properties did not want the bridging finance. Mr Gammie also mentioned to him that Mr Cowan looked very stressed and that he (Mr Cowan) was anxious that the R4 million, which was part of the loan in respect of the two applications, needed to be paid directly to MaxProp on 19 November 2010.

[128] Mr Gammie advised Mr Ramsay to investigate the matter and come back to him with the report. Mr Gammie also indicated that the two applications would not be processed until Mr Ramsay had reverted to them with a written explanation regarding what was going on in these applications. Upon his return to the office, he phoned Mr Cowan and informed him about the meeting with Mr Gammie and Ms Terblanche. That same day at around 14h00, he met with Mr Cowan and told him about the concerns Rodel had raised on his two applications. He asked Mr Cowan to provide him with an explanation on the two applications. Mr Cowan provided him with an explanation. After that, he requested that Mr Cowan provide him with a written report so that he could present it to Mr Gammie the following day. Mr Cowan undertook to do so. Around 18h30, Mr Cowan telephoned him and advised him that he was busy writing the report. Mr Cowan asked him whether it would be the end of the matter

once he had given him the report. Mr Ramsay's response was that it would depend on the content of the report.

[129] On 24 November 2010, Mr Cowan committed suicide. That same afternoon Mr Stols phoned and informed him that he had an outstanding bridging finance transaction, which was due for payment at the end of November 2010. Mr Stols asked to have a meeting with him. Mr Ramsay suggested that they meet at 08h30 at his offices on 25 November 2010. The meeting was held as scheduled. Mr Stols repeated to him and Mr Pillay what he had told him over the phone the previous afternoon. Mr Stols told them that he was concerned and asked them to investigate the matter. Mr Ramsay testified that he took notes of what transpired in that meeting. He read the contents of his notes into the record. The notes were subsequently received into evidence as exhibit H1B and appear at pages 94 to 96 thereof.

[130] In that meeting, Mr Pillay told Mr Stols that the directors of G&B were all shocked and that no one in the firm had any idea that Mr Cowan was doing bridging finance. Mr Ramsay disputed Mr Stols' evidence that he (Mr Stols) interjected and said to Mr Pillay that what Mr Pillay was saying was not correct because Mr Ramsay was fully aware that he was dealing with Mr Cowan in providing funds for bridging finance deals. Mr Ramsay testified that it was in fact he who had raised the first transaction with Mr Stols, which they had discussed on 27 February 2008. He testified that he advised Mr Stols not to go ahead with that transaction on the basis that Mr Cowan was proposing. He testified that he also asked Mr Stols whether he went ahead with the transaction despite his advice. He denied that Mr Stols reminded him of the discussions with him around the "Spud" movie and at the Oyster Box Hotel and that he had specifically asked Mr Stols whether he was happy with Mr Cowan's services.

[131] He testified that G&B's directors initially believed that Mr Cowan had committed suicide due to ill health. However, by the afternoon of 25 November 2010, they realised that there was more to it as they were receiving numerous calls from people who claimed to have invested money with G&B through Mr Cowan, and who were demanding their money back. On 23 November 2010, Mr Ramsay mentioned

his discussion with Rodel personnel to Mr Jennings, who was the CEO of G&B at the time.

[132] In cross-examination by Mr Stols' counsel, Mr Ramsay testified that he took down notes of what was discussed in the meeting on 25 November 2010. The notes taken at that meeting were made available to the G&B legal team shortly after this action was instituted. It is common cause that these notes were made available to Mr Stols' team on the 15th day of the trial. He conceded that the notes contained material pieces of evidence, which should have been put to Mr Stols during his testimony in order to give him an opportunity to respond. It is common cause that in the course of cross-examination by Mr Stols' counsel, Ms Boden conceded that she was in possession of the notes taken during that meeting. Instead of producing the notes for the benefit of all involved in the trial, she indicated that 'I don't think they'll be very helpful, because they're quite short'.[8] He was at pains to explain why Ms Boden did not disclose to the court that she was in possession of the notes.

[133] On 26 February 2008, Mr Stols phoned him as a director of G&B to ask him about Mr Cowan. Prior to that, no one had spoken to him about the wisdom of investing through Mr Cowan. He did not have any recollection of receiving bundle F149.[9] He also did not have any recollection of telling Mr Desmond that he should not invoice Mr Stols because he was a good client of G&B. Mr Stols was never a client of G&B. As far as he was concerned, Mr Stols was never Fica'ed, never had a matter code and never paid any fees. He did not recall referring Mr Stols to Mr Desmond in respect of the Mauritian property investment. He testified that Mr Stols came to G&B's office for the first on 25 November 2010.

[134] He confirmed that G&B organised bridging finance for its clients but did not do it as a business. He stated that Mr Stols raised two concerns when he phoned him on 26 February 2008. Mr Stols asked him whether Mr Cowan was authorised to sign the letter of undertaking on behalf of G&B. He seemed to recall Mr Stols reading out to him the wording of the letter of undertaking. He found it significant that the letter of

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[8] Page 2313 of the record, lines 2-3.

[9] Page 2317 of the record, lines 1-3.

undertaking provided for repayment to Mr Stols as a lender on a fixed date. He confirmed that he told Mr Stols that Mr Cowan was not authorised to sign letters of undertaking and that only directors are authorised to bind G&B. With regard to the letter of undertaking providing a fixed date of repayment to Mr Stols as a lender, he told Mr Stols that no conveyancer could guarantee a fixed date for registration because of the risk to him (Mr Stols) if the registration does not materialise on or before the fixed date. He also advised Mr Stols not to part with any money. He asked Mr Stols to fax the document to him so that he could check the file to see whether there were any other precautionary issues that needed to be raised. His understanding was that Mr Cowan would amend the letter of undertaking to comply with his requirements and go back to the parties to decide whether the transaction would go ahead. When Mr Stols phoned him on 26 February 2008, Mr Stols was not concerned about whether the bridging finance scheme run under G&B's roof was a legitimate scheme or not.

[135] Mr Stols did not ask him whether it was safe to get involved in the scheme. He was hard-pressed to explain why he asked Mr Stols to fax the document to him despite having already advised him not to invest in the scheme. Mr Ramsay denied having a meeting at G&B's office with Mr Stols on 27 February 2008. He testified that when Mr Stols phoned his direct line on the morning of 27 February 2008, he was not in his office. One of the paralegals took the call from Mr Stols. The paralegal gave him a written message. Mr Ramsay wrote "Pinehurst Investment" on the message because the paralegal had also told him that Mr Stols was phoning about Pinehurst Investment. He reported to Mr Jennings that Mr Cowan was signing letters of undertaking. He was happy that Mr Cowan apologised and undertook not to do it again. He testified that he would have found it necessary to investigate the involvement of Pinehurst Investments in the transaction if Mr Stols had mentioned Pinehurst to him.

[136] He was referred to an email dated 25 March 2005, addressed to Mr Cowan by Ms Victoria Hodgson (Ms Hodgson)[10] relating to the transfer of property from AL-Bas Holding to Solivista. The email reads, inter alia:

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[10] Ms Hodgson was an associate at G&B at the time.

'The matter might register tomorrow if the hold was withdrawn early enough, otherwise, registration will take place on Thursday. In the interim, Dave asked me to find out from you whether (1) we were to keep Mervin Stols covered for any funds.'[11]

[137] After Ms Hodgson had spoken to Mr Cowan, she made the following hand written note on the same email, '[n]o, no undertaking given'.[12] He was asked for the reason why Mr Stols' name was mentioned in regard to this transaction. His explanation was that he wanted to make sure that there was no money due to Mr Stols. When he was asked why he thought that Mr Stols would be owed money when he advised him not to invest with Mr Cowan, his response was that he was merely taking precautionary measures. Mr Stols also told him that he was in possession of a letter of undertaking which indicated that payment was due at the end of November 2010. Mr Stols wanted to know who was going to take over the matter because he wanted to make arrangements for the payment at the end of November 2010. He insisted that Mr Stols spoke to him about the offshore investments on 25 November 2010, despite Mr Stols' denial of that. He was unable to comment when it was put to him that it would have been most foolhardy of Mr Stols to invest in the scheme after he had advised against such investment. He accepted that advice from a G&B director is something that Mr Stols could rely on.

[138] In cross-examination by Deloitte's counsel, he conceded that there would have been no reason for Mr Stols to fax the document to him after advising him not to invest in the scheme. He, however, went back to his earlier explanation that he was concerned that Mr Cowan had signed the letter of undertaking and that he wanted to speak to Mr Cowan about it the next day. He had asked Ms Hodgson to find out from Mr Cowan whether G&B should keep Mr Stols covered for any funds as a precautionary measure to ensure that no funds were due to Mr Stols in any other transaction, other than the transfer from AL-Bas Holding to Solivista. He was at pains to explain what other funds might have been held for Mr Stols, bearing in mind that the AL-Bas Holding and Solivista transaction did not go ahead. He conceded that he had specifically made reference to Mr Stols because he knew that Mr Stols wanted to invest on the strength of a letter of undertaking. When he was asked why in the AL-

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[11] Page 64 of bundle H1B.

[12] Page 64 of bundle H1B.

Bas Holding and Solivista transaction, he did not refer the party that wanted bridging finance to Rodel, his explanation was that he was not part of the discussion between Mr Cowan and Mr Stols regarding the bridging finance to this transaction. He accepted that the objective evidence in the form of bundle F149 showed that Mr Stols was in their offices in July 2008 for a meeting with Mr Desmond. He accepted that to that extent, his evidence that Mr Stols was never at G&B's office was incorrect.

[139] When cross-examined on the differences between his evidence in this trial and the insolvency enquiry in terms of s 152 of the Insolvency Act 24 of 1936 (s 152 enquiry) relating to Mr Cowan's insolvent estate, he indicated that his answers in the enquiry differed from his answers in the trial because he did not know what questions were going to be asked at the enquiry. He, however, accepted that not being prepared for what he was going to be asked at the s 152 enquiry was not a reason for him to be dishonest.

[140] The reason why he told Mr Stols not to get involved with Mr Cowan on any basis, was that he wanted to check the letter of undertaking that Mr Stols had faxed to him. He did not tell any of his fellow directors that he had told Mr Stols that he should not get involved on any basis with Mr Cowan. He told Mr Jennings about reprimanding Mr Cowan after Mr Cowan had signed the letter of undertaking in the AL-Bas Holding and Solivista transaction. He also told Mr Jennings that Mr Cowan undertook not to do it again and apologised. Deloitte's counsel pointed out to him that in his statement prepared by his legal team, which it was understood was going to be his evidence in court on this aspect, it says that 'Ramsay will testify that he reminded the plaintiff's enquiry some years ago when he told the plaintiff not to get involved with the client requiring finance'.[13]

[141] Mr *Snyckers* reminded him that in his evidence-in-chief he denied that Mr Stols had spontaneously responded that Mr Ramsay knew that he (Mr Stols) was providing funds for bridging finance deals when Mr Pillay said in the meeting which Mr Stols had with him and Mr Pillay on 25 November 2010 that G&B did not have any knowledge that Mr Cowan was conducting bridging finance business in the firm,

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[13] Pages 55-62 of bundle B, part 1.

whereas Mr Ramsay had admitted that Mr Stols had said so at the s152 enquiry. He conceded that he had not been truthful in court in respect of this aspect. He also conceded that at the s 152 enquiry he had denied that Mr Stols had told him that he was not interested in investing in the “Spud” movie because he had invested in another movie before and was still waiting to get his investment back.

[142] He disputed Mr Stols’ evidence that Mr Stols had said to him that he (Mr Stols) would rather do another bridging deal with G&B because he was happy with the returns on his investment. He denied that he had asked Mr Stols whether Mr Cowan was making payments on time. He also denied having said to Mr Stols that he would speak to Mr Cowan about further deals. In relation to the Oyster Box Hotel conversation, he accepted that it was possible that Mr Stols could have told him that he would rather continue doing bridging finance deals with Mr Cowan. He, however, stated that he would have assumed that the deals Mr Stols was talking about were in respect of genuine legal transactions like the transaction between AL-Bas Holding and Solivista that Mr Stols spoke to him about in February 2008.

[143] Mr Ramsay admitted that the fact that Mr Cowan was giving a fixed date on the transaction and signing the letter of undertaking when he knew he had no authority to do so, should have raised an alarm bell on his part. He accepted that he should have investigated the matter to ascertain what Mr Cowan was up to. Mr Jennings did not mention to him that he (Mr Jennings) had also signed several letters of undertaking together with Mr Cowan. He was not surprised to learn that Messrs Jones and Jennings and Ms Collier had also co-signed some of the letters of undertaking and other documents with Mr Cowan. He could not say what documents or representations Mr Cowan made to these directors to make them sign the letters of undertaking and other related documents.

[144] He confirmed that Mr Gammie and Ms Terblanche were concerned that the property Mr Cowan was offering as security was no longer registered with the seller. They were also concerned that the ostensible borrower had indicated to Rodel that no bridging finance was required for that transaction. Mr Gammie asked him to provide him with a formal memorandum explaining what the position was in relation

to Mr Cowan's two applications. They were also concerned that the resolutions given to Rodel on those two applications were not proper because Mr Cowan signed the two loan applications.

[145] He saw RWO Properties' resolution of members dated 17 November 2010 for the first time in the meeting of 23 November 2010, when Mr Gammie and Ms Terblanche showed it to him. He was informed that Mr Cowan had used this resolution to apply for the bridging finance with Rodel. Mr Church and Mr Brett Lambert (Mr Lambert) of Nedbank Private Wealth raised a concern with him that G&B was offering a bridging finance facility to its clients instead of referring them to Rodel; he told them that the allegations were not true.

[146] Mrs Schoeman was called as the next witness to testify. She was a director at G&B from 2008 until March 2011, when she left the firm. She was in the commercial department specifically focussing on shipping and international trade transactions. She had limited interaction with Mr Cowan during her time with the firm. As the director, she was authorised to sign cheque requisitions and cheques. She is one of the directors who signed the trust cheque requisition appearing at page 176 of bundle H1 authorising payment to Espro. A trust cheque requisition is the standard document used by G&B when authorising payment out of the trust account either by cheque or by EFT. This was not the only trust cheque requisition that she signed. She also signed the trust cheque requisitions appearing at pages 18, 25, 36, 51 and 73 of bundle N.

[147] It is possible that she might have signed more trust cheque requisitions in relation to the scheme. She had no independent recollection of how it came about that she signed those particular documents. Her general recollection however, was that Mr Cowan would come to her with his file and supporting documents. He would very carefully explain what it was that he wanted done, and the reasons for it. He would make representations to her and show her the documents, whereafter she would authorise the transaction. G&B had a system in place to ensure that the bookkeeping department would not pay out money, even after the director(s) had approved payment, unless the amount payable stood to the credit of the ostensible

recipient. She was not aware of any bridging finance scheme run by Mr Cowan before he committed suicide.

[148] In cross-examination by Mr Stols' counsel, she testified that the trust cheque requisition for R4,5 million appearing at page 176 of bundle H1 consisted of R2 million paid by Mr Stols on 13 October 2010, and the amount paid by an entity owned by Mr Rodseth.[14] She could not recall what Mr Cowan told her at the time about this transaction but he would have provided her with an explanation for the flow of those funds. She had no independent recollection of any of the events leading to the signing of the trust cheque requisition.

[149] She conceded that the misappropriation of Mr Stols' R2 million paid on 13 October 2010 into G&B's trust account occurred at the entry point when the money was receipted under the name of Espro. Mr Cowan would have told her that the money was in trust under the name of Espro and asked her to sign the trust cheque requisition to pay Espro. Mr Cowan would also have taken her through the transaction with his file to authorise payment. She knew that Mr Cowan was not authorised to sign the trust cheque requisitions and the letter of undertaking. She conceded that by signing the trust cheque requisition that Mr Cowan had already prepared, she was accepting responsibility that what Mr Cowan had done was correct.

[150] She conceded that she was required to do a mini audit of the file in relation to the documents to make sure that the trust cheque requisition she was signing was correct. Mr Cowan could have shown her sufficient details for her to know that the money was due to Espro. She took her responsibility as director very seriously and applied the same caution irrespective of the amount involved. Although she could not express an opinion on whether or not Messrs Stols and Rodseth's money was misappropriated at the entry point into the G&B's trust account, she unwittingly became an instrument in Mr Cowan's fraud by signing the trust cheque requisition.

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[14] Pages 172-174 of bundle H1.

[151] In cross-examination by Deloitte's counsel, she confirmed that she had no independent recollection of the documents that Mr Cowan presented to her to sign in relation to Mr Stols' payment of R2 million to Espro. She would have been alarmed if Mr Cowan had shown her the letter of undertaking on which Mr Stols' action is based. What she would have checked for was whether there were sufficient funds in the trust account to the credit of the payee and whether the payee's banking details were correct. She would have deferred to Mr Cowan's explanation on why payment was being made. Mr Cowan did not show her the two letters of undertaking in favour of Espro dated 3 and 14 June 2010 appearing at pages 361, 371 and 372 of Deloitte's bundle 1. She would have been suspicious about the legitimacy of the transactions had Mr Cowan shown her the two letters of undertaking. Mr Cowan had a file with him for every single authorisation that she signed but she could not say what documents were in that file.

[152] As mentioned previously, Deloitte settled the matter with G&B. Consequent upon the withdrawal of the matter against Deloitte, an agreement was reached between G&B and Deloitte in terms of which G&B took over Prof Wainer as its witness.

[153] Prof Wainer was the next witness to give evidence. He was initially instructed by Deloitte's attorneys to consider and comment upon the nature of the transactions relating to Mr Stols. He was advised that Mr Cowan procured money transfers from various parties, including Mr Stols, as short-term loans to third parties. He produced the report appearing at pages 29 to 59 of bundle E. During the period 28 February 2008 to 2 November 2010, Mr Stols made short-term loans as detailed in schedule B of his report.

[154] Prof Wainer confirmed that Mr Cowan exercised control over a bank account held in the name of Rodlane Trading at First National Bank with account number 62087751725 (the Rodlane Trading bank account). He testified that Mr Cowan used the Rodlane Trading account as a vehicle into which certain deposits were made by and certain transfers made to investors, pursuant to the short-term loans. He testified that Mr Cowan also utilised, inter alia, a bank account operated by PKF (Durban) with

Nedbank under account number 9001184762. He testified that Mr Cowan used this account for certain of the receipts from and payments to certain investors, pursuant to the short-term loans. He testified that he was given the factual data by Deloitte's attorneys reflecting each of Mr Stols' loan transactions, which contained, inter alia, details of amounts paid by Mr Stols on Mr Cowan's instructions (the loans), including dates and recipients; details of amounts received by him as repayments, including the dates and the payer (source) of such funds; and, details of the loans made by him, which on maturity date were rolled over into new loans. He incorporated the data as schedules B and C in his report.

[155] Prof Wainer took the court through the various deals involving Mr Stols. In this regard, he testified as follows. Mr Stols' deal no 1 on schedules B and C reflects, inter alia, his investment of R10 million on 28 February 2008, as a loan, with the borrowers being MaxProp and AL-Bas Holding. That R10 million was in fact paid to Pinehurst Investments on the day the amount was invested by him, as part repayment to Pinehurst Investments of a preceding R18 million investment Pinehurst Investments had itself made as a loan. That an amount of R5 million paid to Mr Stols on 31 March 2008, as part repayment of his R10 million loan to MaxProp and AL-Bas Holding was, in fact, money received from an investment from Mr Chin as an ostensible loan, made on that same day by Mr Chin, ostensibly to some other party. The ostensible loan made by Mr Chin was repaid with interest on 6 and 7 May 2008, from monies received on those days from Ro-Dre-Fer, as an ostensible investment in loans made by Ro-Dre-Fer, ostensibly to some other party.

[156] Regarding deal no 2, Mr Stols made two payments on 25 April 2008, of R3,5 million and R300 000 respectively, as loans to two Will Trusts, but the monies were actually paid into Ro-Dre-Fer and Rodlane Trading's accounts on the day of his investment. His loans in deal no 2 to the Will Trusts were not repaid but were instead rolled over to his deal no 5, in other words, the amount due on the maturity date in respect of his deal no 2 loans was re-invested in a further ostensible loan. No new cash was advanced by Mr Stols in respect of deal no 5. Instead, it entailed a roll-over of the loans in deal nos 2 and 3 into a new loan of R7,624 million to Pinehurst Investments, who also happened to be the actual recipient of the first loan ostensibly

made to MaxProp and AL-Bas Holding. This loan to Pinehurst Investments was also not repaid but rolled over into his deal no 7, being a new loan, this time ostensibly to DW Hart Will Trust.

[157] The loan to the DW Hart Will Trust in deal no 7 was itself also rolled over into his deal no 10, being a loan to WAP Marketing. His deal no 10 was rolled into his deal no 11, being a loan to Waterway Properties. The loan in deal no 11 was then repaid to him with interest on 24 March and 9 April 2010, with monies received from investments made by WAP Marketing and Mr Seevnarayan respectively on those dates, as ostensible loans by them to other parties.

[158] Prof Wainer testified that based on an analysis of the deals in which Mr Stols was involved, there were no real borrowers for any of the amounts paid by him and therefore, no real loans for the monies transferred. He stated that Mr Cowan conducted a scheme where A advanced monies as a loan to B. The money, however, was not lent to B but received by C as a repayment (in whole or in part) to C of a preceding loan made by C. Prof Wainer's opinion was that it was clear from a financial perspective that the deposits and undertakings that form the basis of Mr Stols' claim formed part of this Ponzi scheme.

[159] He testified that Mr Cowan promised high interests to the investors, ranging up to 36 percent per annum, which was well above market investment rates in the relevant period. He testified that the funds received from investors were used to repay other investors, which occurred in most instances immediately, without the funds having been invested for any significant period to attract interest to cover the promised interest to the investors. He testified that there were no investments in businesses or assets, which could yield any interest.

[160] The promised interest was funded from monies received from new investors or new investments. He testified that the eventual inability to find new investors or attract new investors would end the scheme, which would collapse, with the losers being the last/new investors. He concluded that Mr Stols' transactions were in principle indistinguishable from a Ponzi scheme.

[161] He conceded in cross-examination by Mr Stols' counsel that his investigation concentrated mainly on Mr Stols' transactions. He accepted that when an investor is being lied to by a fraudster in a Ponzi scheme, an investor might not see the picture at all and think that he is investing in a lawful scheme. However, it is only in hindsight that the investor sees that he was defrauded. He testified that the instruction he received from G&B was that the directors had no knowledge of the scheme and that Mr Cowan had equally defrauded them.

[162] It was put to him that the scheme could have been uncovered earlier had one of the directors who was given a letter of undertaking to sign conducted a mini audit on the transaction before signing. He stated that his investigation did not cover that aspect. He testified that if Mr Stols had instructed Mr Cowan to credit the amount of R2 million paid into G&B's trust account on 13 October 2010 to himself, but Mr Cowan instead credited it to another person, then the instruction was not complied with. He, however, pointed out that the only person who could have known about the instruction was the person giving the instruction to the accounting staff as to where the money was to be allocated. He concluded that from a financial perspective, the local and offshore transactions were indistinguishable from each other despite Mr Cowan's assurance to Mr Stols that the offshore transaction was his personal business and liability.

[163] In cross-examination by PKF (Durban's) counsel, Mr *Joyner*, he was referred to the letter of undertaking appearing at page 1 of bundle L signed by Mr Jennings. He was asked in relation thereto whether it would have been possible to determine how the bridging finance agreement was going to operate without considering other documents setting out the details of the bridging finance operation, the parties involved and the terms of agreement. His response was that he would have been reasonably required to look at other documents to ascertain the exact details of the agreement. He was also referred to the letter of undertaking appearing at page 92 of Deloitte's bundle 4.1 and asked whether the underlying loan transaction could be gleaned from that letter of undertaking. His response was that the letter of undertaking does not contain any details of the underlying loan between the parties.

No funds from the scheme were personally paid to Mr Cowan. He found it strange that Mr Cowan conducted such an elaborate Ponzi scheme over a number of years without personally benefiting from it. With regard to the amount of R2 million paid by Mr Stols into G&B's trust account, he was able to establish from the documents that the borrower was not the named beneficiary of the funds.

[164] Mr Jennings was the next witness to testify. He has been a director at G&B since 1 September 1983, and is currently the chairman of G&B. He testified that the management structure of G&B consists of the board of directors and the executive committee. The board of directors authorises the conclusion or ratification of agreements and will normally appoint a person to sign an agreement on its behalf, whilst the executive committee deals with the daily management of the firm. The firm operates in specialised departments. He testified that Mr Cowan straddled both commercial and litigation departments and was a very senior attorney with a considerable reputation. Mr Cowan brought clientele with him when he joined G&B, and was regarded as a very good acquisition for the firm. Mr Cowan was also a conveyancer but did not practice as such. He referred all his conveyancing work to the firm's conveyancing department and worked closely with the conveyancing department on those matters.

[165] Sometime after Mr Cowan had joined G&B, Mr Jennings attended a meeting in the firm's committee room to launch the bridging finance scheme for which MaxProp was going to provide funding. Messrs van der Veen and Tonkin represented MaxProp at that meeting. Mr Cowan asked him to attend the meeting because MaxProp had indicated that it was willing to provide bridging finance but wanted the letters of undertaking to be signed by a G&B director. Mr Cowan explained to him that he occasionally had clients selling property who required bridging finance to bridge the gap between the sale and the eventual receipt of the proceeds from the sale. Mr Cowan told him that MaxProp was willing to come on board, provided that it had letters of undertaking signed by a director. His response was that he did not have a problem with that arrangement as long as G&B was not at risk, and the money was to be paid from the proceeds of the sale. The letters of undertaking were going to be

based on a mandate from the borrower and were conditional upon G&B receiving the proceeds of sale of the property. G&B was not going to be at risk at all.

[166] What he understood from that meeting was that Mr Cowan's clients would be the sellers for whom Mr Cowan would do underlying sale and bridging finance agreements. The meeting was already in progress when he was called to join it. He testified that G&B had a standard letter of undertaking that it was using at the time. He arranged for Mr Cowan to get a copy of that standard letter of undertaking to use as a precedent. He testified that the standard letter of undertaking was very similar to the letters of undertaking used by Mr Cowan in the MaxProp deals.

[167] He confirmed his signature on the letters of undertaking in bundle L and trust cheque requisitions in bundle N. With regard to the circumstances under which he had signed these documents, his explanation was that on occasion Mr Cowan would come to his office without an appointment and would find him busy doing his work. Mr Cowan would give him a letter of undertaking, provide some explanation about the transaction and ask him to sign. Mr Cowan would pre-empt any questions by giving him answers before he could ask him. In relation to the payment out of the trust account, his concerns would have been whether there were sufficient funds held in trust and that the payee was the correct person before he could authorise payment. The file would usually provide those details. He never asked for the underlying agreements and did not perform an audit on the files because of the assurances that Mr Cowan gave him. He testified that a trust cheque requisition for payment of an amount in excess of R20 000 from the trust account requires authorisation by two directors.

[168] With regard to Rodel's incident, he testified that on the evening of 23 November 2010, he was leaving the office when he came across Mr Ramsay on the stairs to the parking garage. Mr Ramsay advised him that Mr Gammie of Rodel had called him to a meeting. Mr Gammie reported to him that Mr Cowan had approached Rodel to provide bridging finance to one of his clients. Mr Gammie told Mr Ramsay that when Rodel contacted the entity that was applying for the loan, Rodel was advised that the entity did not require bridging finance. As a result, Rodel became

suspicious of the transaction and red flagged it. Mr Gammie told Mr Ramsay that what further compounded the problem was that Mr Cowan had signed the underlying documents. Mr Ramsay told Mr Jennings that he discussed the incident with Mr Cowan who allayed his fears and undertook to provide him with a written explanation on the transaction the next morning. The next morning, he heard that Mr Cowan had committed suicide.

[169] In cross-examination by Mr Stols' counsel, he confirmed that he did not conduct an audit of the background documents. He believed Mr Cowan completely. As a result, he did not ask him any questions or for any documentation, which would have proved that his explanations in relation to the transactions for which he had signed, were incorrect. He testified that if he had been a lender, he would have looked very carefully at the underlying documents and security, more than the cession of the proceeds of sale, which Mr Cowan was offering. He confirmed that a lender who was given a letter of undertaking signed by a director of G&B could rely upon that letter of undertaking as being a director's stamp of authority. He, however, qualified this answer by stating that that did not mean that the director had personally checked the details. According to him, the letter of undertaking meant that a lender would not be able to claim from G&B, unless G&B received the proceeds from the sale. As far as he was concerned, a lender should have taken more care and interest in what was contained in the letter of undertaking, as it is an ancillary to the underlying loan agreement. It was for a lender to investigate whether the transaction was legitimate or not.

[170] He confirmed that from 2002 to 2010, MaxProp had a connection with Mr Cowan in relation to bridging finance. It became clear during his first meeting with Mr Cowan and MaxProp's representatives that MaxProp was going to provide bridging finance on a continuous basis. MaxProp wanted an undertaking signed by a G&B director as a letter of comfort with certain legal obligations attached to it. At that time, G&B was not registered as a bank or with the Financial Services Board (the FSB) as a service provider that carried on a loan business. The arrangement with MaxProp was that G&B would charge a fee for each transaction because Mr Cowan was doing the underlying work for the transactions. After Mr Cowan's suicide, G&B discovered

that Mr Cowan was charging commission. Mr Cowan had asked him to attend the meeting to confirm specifically that a G&B director would sign the letters of undertaking. He testified that the letters of undertaking were going to produce binding obligations on the part of G&B to pay on receipt of the proceeds of sales of property. He admitted it was his responsibility to do an audit and check the contents of the letters of undertaking. However, he did not do so because he trusted Mr Cowan completely.

[171] He was asked to comment on the evidence of Ms Boden and Mr Ramsay to the effect, that Mr Cowan was not conducing bridging finance business at G&B, and that G&B's clients requiring such services are referred to entities like Rodel. His response was that 'we understood him [Mr Cowan] to be carrying on the legal work in respect of bridging finance transactions'.[15] He conceded that Mr Cowan was conducting the bridging finance business on G&B's doorstep with the help of MaxProp in competition with Rodel. He became aware after Mr Cowan's suicide that Topspec was also providing funds to Mr Cowan so that he could provide a bridging finance service for two of his clients. He did not know of Topspec prior to Mr Cowan's suicide.

[172] He was also questioned about Ms Boden and Mr Ramsay's evidence as well as G&B's stance that Mr Stols was not regarded as G&B's client. In this regard, his response was, 'I think that's only a technicality in the sense that we regard our client as the people who are FICA'd and who open a file'.[16] He was referred to G&B's website publication appearing at pages 150 to 152 of bundle F and headed 'Frequently asked questions regarding Colin Cowan' with specific reference to the question 'Has G&B Inc ever offered bridging finance services to its clients?'. On this question, G&B gave the following answer, 'No. If a client requires bridging finance they are referred to well-known and reputable bridging financiers'. He was asked whether this answer is correct in light of his evidence that MaxProp was providing a bridging finance business within the firm. His response was that what he was talking about was that the firm, with the exception of Mr Cowan, would normally refer its clients to independent firms like Rodel for bridging finance. He conceded that the

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[15] Page 2701 of the record, lines 19-21.

[16] Page 2724 of the record, lines 1-4.

distinction he sought to draw was artificial and technical. He confirmed that MaxProp wanted to enter that particular arena of bridging finance and G&B became a firm that could be used. Mr Ramsay mentioned to him that he made some corrections on a letter of undertaking prepared by Mr Cowan, namely, a date on the letter of undertaking. Mr Ramsay also mentioned to him when they met on the stairs to the parking garage that Mr Cowan was signing letters of undertaking. He did not regard that as an issue because Mr Cowan did not have the authority to bind G&B.

[173] In cross-examination by PKF (Durban's) counsel, he testified that there was one instance where Mr Cowan brought to him a letter of undertaking which Mr Cowan had already signed. Mr Cowan explained that he had signed it by mistake. In that instance, Mr Jennings signed that letter of undertaking underneath Mr Cowan's signature to ratify the transaction because he regarded Mr Cowan's signature as superfluous. Otherwise, in other letters of undertaking, Mr Cowan would sign after him. He did not regard this conduct as a lack of integrity on Mr Cowan's part because he knew that Mr Cowan did not have authority to sign. Furthermore, Mr van der Veen insisted that Mr Jennings sign that letter of undertaking. He presumed that Mr Cowan had told Mr van der Veen that he (Mr Cowan) had signed that particular letter of undertaking by mistake.

[174] He conceded that the letter of undertaking appearing at page 92 of Deloitte's bundle 4.1, signed in favour of Sutech on 16 March 2010, was unconditional. He now realises that he needed more information about the underlying document to determine whether his decision to bind G&B unconditionally for the payment of R150 000 reflected on that letter of undertaking was the correct one.

[175] He testified that after his meeting with MaxProp's representatives, G&B adopted a standard format letter of undertaking in relation to immovable property, which could be adapted and used for the sale of a business or company in future transactions. His department used the standard format quite often. He instructed Mr Cowan to use the standard format letter as the basis of a letter of undertaking in connection with what he described as transactions in which the lender of funds required an undertaking from the borrower. Most of the letters of undertaking that Mr

Cowan had issued were in line with the standard format letter. He conceded that the letter of undertaking appearing at page 92 of Deloitte's bundle 4.1 deviated from the standard format letter. He admitted that that deviation should have been a sign for him to conduct a proper audit of this transaction but he failed to do so. He had confidence in Mr Cowan and his competence and that he could rely on him.

[176] He conceded that the fact that he trusted Mr Cowan could not be used as an excuse to avoid his professional obligation when he signed a contractual undertaking binding his firm in relation to a legitimate transaction. He, however, stated that he was entitled to rely on Mr Cowan because he believed that Mr Cowan was competent, reliable and honest. He conceded that persons issued with the letters of undertaking should be able to rely on his competence as the signatory binding G&B. He confirmed the conversation with Mr Ramsay on 23 November 2010 around 18h30, relating to a meeting that Mr Ramsay had with Rodel's Mr Gammie and Ms Terblanche about Mr Cowan's two bridging finance applications. Mr Ramsay indicated to him that he had called for a written explanation from Mr Cowan to be able to respond to Rodel's query. Mr Ramsay did not give him any further details on the matter.

[177] Ms Stanley testified next. She is a chartered accountant and is presently the managing partner of Baker Tilly Morrison Murray, a firm of chartered accountants based in Durban. Since 2004, she has been in charge of the division that deals specifically with the auditing of attorneys' trust accounts. She presently oversees the audit of approximately ten trust accounts every year. Derived from her years of practical experience, she has knowledge of the accounting systems used by attorneys to control their trust banking accounts, the way in which attorneys generally control and manage their trust accounts, and the legal requirements which attorneys are required to fulfil in operating a trust banking account. Her mandate was to comment and give evidence on how G&B's trust account operated. In 2010, G&B was operating the accounting system, Aderant (which is known as CMS). She has familiarised herself with how the system works in relation to payments into and out of the trust banking account, the operating procedures which G&B has put in place to deal with payments made into the trust account, and the authorisation and the

processing of payments made out of the trust account. She testified that the processing of any such payment is dependent upon the creation of the necessary book entry in the trust ledger.

[178] She testified that whenever a new client consults with someone in G&B's practice, that client is allocated a client code so that all transactions involving that client can be identified. Likewise, every new matter or file opened within G&B's practice is also allocated a distinctive matter code, which is linked to the relevant client code. Every fee earner has a separate fee earner code. It is possible for one fee earner to work on another fee earner's matter, although each matter would be recorded as being dealt with by the responsible fee earner. In this way, payments made into G&B's trust banking account that are properly identified by way of a matter number or some other reference such as a description of the matter, can be credited to the correct trust ledger account. In many instances though, the bank statement does not reflect a matter code, client code or have any other way of identifying the payor. The bank statement may indicate the identity of the person who made the payment into the trust banking account or it may not. Whatever the case, without linking a particular payment to a particular matter code, one cannot safely credit such payment to any particular trust ledger account.

[179] She testified that there is no logical reason to assume that payment into a trust account made by person X is necessarily intended for the credit of a trust ledger account in their name. There are a number of reasons why person X may wish to make a payment into an attorney's trust account for the credit of another party, person Y. She testified that there is nothing untoward or suspicious about the fact that a trust receipt voucher may be generated and presented to G&B's accounts' department staff for processing, which credits a payment by person X to a trust ledger account in the name of person Y.

[180] She testified that she was made aware of the circumstances under which the sum of R2 million paid by Mr Stols was deposited into G&B's trust account on 13 October 2010, and that that payment was only linked to Mr Stols when he provided documents to G&B post Mr Cowan's suicide. She testified that the relevant trust

account bank statement did not refer to a client or matter code, his name, or any other information that would have enabled a person examining the bank statement in 2010 with a means of identifying that the payment emanated from Mr Stols. The bank statement at page 171 of bundle H1 relating to Mr Stols' payment of R2 million simply stated 'Interbank Credit Transfer Grindrod Bank Kingsmead Branch 582'. She testified that as a result of the operation of the spreadsheet in respect of identifying unclaimed deposits, Ms Smart generated a trust receipt voucher, which recorded that the funds received should be credited to Espro with G&B's client code E11470. The matter code to identify the particular trust ledger account to which the credit was passed was C3956/10.

[181] In cross-examination by Mr Stols' counsel, Ms Stanley stated that any money paid into a trust account has to have an underlying matter, but she accepted that that would also depend on whether the attorney had opened a file for a client. She conceded that a crime of theft would have been committed if G&B had used a client's money deposited into its trust account for a purpose contrary to that client's instructions, even in circumstances where that client does not have a trust ledger account with G&B. She stated that Ms Smart filled the trust receipt voucher appearing at page 172 of bundle H1 on behalf of Mr Cowan for the purpose of allocating R2 million to the credit of Espro. What then happened was that Mr Cowan made representations to two directors and persuaded them that R2 million belonged to Espro, whereafter the two directors signed the trust requisition to pay Espro. The misappropriation of R2 million occurred at the point when Ms Smart filled the trust receipt voucher. She was also told that there was a payment out of Espro's account of an amount of R4,5 million, which included the R2 million that Mr Stols paid into G&B's trust account on 13 October 2010. She was not asked to comment on any of the letters of undertaking.

[182] Ms Collier was the next witness to testify. She joined G&B's commercial department as a director in February 2003. Mr Cowan was already with the firm at that time. She was also a FICA compliance officer at G&B. Her association with G&B ended in 2011. She confirmed that her signature appears on some of the letters of undertaking and trust cheque requisitions in bundles L and N. She testified that she

did not have independent recollection of the circumstances under which she had signed letters of undertaking and the trust cheque requisitions. In general, Mr Cowan would come to her office with a file, explain what he wanted done in the file and the reason for doing it. Thereafter, he would provide copies of trust receipts or trust ledger accounts to show that there were sufficient funds in trust and that everything was in order. He would answer any questions she might have and he would volunteer information. She would ensure that there were sufficient funds standing in the trust account in the name of the debit shown on the trust cheque requisition. She would satisfy herself that that payment was being made to the correct person and that there was a valid reason for such payment. She would conduct a mini audit and check the documents before she signed.

[183] In cross-examination by Mr Stols' counsel, she confirmed that she had signed a number of the letters of undertaking and was unable to give the exact number. She could not recall whether Rodlane Trading was Fica'ed at G&B. Mr Cowan managed to deceive her despite her diligence in checking the documents that he made her sign in each transaction. She testified that it did not matter that she had been lied to; she was required to conduct a sufficient audit before signing letters of undertakings. She could not recall finding anything inherently suspicious from his explanations.

[184] In cross-examination by PKF (Durban's) counsel, she confirmed that Topspec was not known to her. She would have asked Mr Cowan for an explanation for payment before she signed the letter of undertaking dated 19 October 2010, issued in favour of Topspec, appearing at pages 76 to 77 of bundle L. She pointed out that even in circumstances where it now appears that there was no underlying transaction; it does not mean that Mr Cowan did not show her some document that was not legitimate. She was referred to MaxProp's deal nos 52 and 53 in Deloitte's bundle 7.1. It was pointed out to her in relation to these deals that when the two deals matured, Mr Cowan paid the interest due on these deals from MaxProp's own ledger account. She conceded that what Mr Cowan presented to her for her signature in respect of deal no 52 was payment of interest due out of MaxProp's own ledger account. She was at pains to concede that there could never have been

legitimate documentation upon which she could have satisfied herself that deal no 52 was a legitimate deal.

[185] She was also referred to the trust cheque requisition appearing at page 31 of bundle N dated 17 March 2010, in which MaxProp is a payee and the client ledger that was to be debited was the B.S. Trust. The background information put to her in this regard was the following. On 17 March 2010, Mr Cowan addressed an email to Mr Tonkin with the subject matter reflected as deal no 80, in which he asked Mr Tonkin to confirm that he agreed with his calculation which was, 'interest of 1.4 million from 20th of 11th 2009 to the 17th of the 3rd 2010, for an amount of R135 780.00 and with total amount payable to be R1 535 780.82', which he split into R1 085 780.82 and R450 000. It was pointed out to her that the trust cheque requisition dated 17 March 2010, appearing at page 31 of bundle N, bore no resemblance to deal no 80 and was fraudulent. It was also pointed out to her that deal no 80 or 83 reflects that there was no payment due to the B. S. Trust. It was put to her that there was no basis on which an amount of R450 000 would have been payable in relation to deal no 80 or any other transaction from MaxProp to the B. S. Trust; further that had she asked for any documents in respect of this deal, she would have established that there was no agreement or evidence to suggest that any payment was due to the B. S. Trust. She testified that she could not recall Mr Cowan showing her the documents that Mr *Joyner* was directing her to in court before authorising payments. She conceded that the B. S. Trust was a lender and not a borrower.

[186] Mrs Lourens was the next witness to give evidence. She is the director of credit and risk at Rodel, and is responsible for making the final decision on an application for financial assistance after an application has gone through Rodel's process and is ready to present for payment or non-payment. Rodel's agreement is structured as a cession in that Rodel takes cession of the proceeds of sale and charges a discounting fee. The agreement is concluded between Rodel and the property seller. The company or a representative of the company or trust, as the primary debtor, signs the application form. In addition to that, the shareholder of the company or the trustees will have to sign a suretyship as additional security.

[187] She testified that towards the middle of November 2010, Mr Cowan approached Rodel in relation to various deals, which he proposed to Rodel for purposes of arranging bridging finance. Amongst them were the applications by RWO Properties and the Raymond Robert Family Trust. The risk analysis team brought the two applications to her for final decision after it had done credit checks, deed searches, collated all documentation and considered the sale agreements and bond conditions.

[188] In the course of the verification process, Mr Robert of the Raymond Robert Family Trust was contacted to ascertain whether the trust was indeed applying for bridging finance, and if so, the amount needed and the trust banking account details into which the money was to be deposited. Mr Robert advised Rodel that the trust had nothing to do with the application for bridging finance and directed Rodel to deal directly with Mr Cowan. Upon hearing that information, she red flagged the application. She found it highly irregular for a client applying for bridging finance to refuse to confirm the details surrounding the application. As a result of that, the application for the bridging finance was declined.

[189] She subsequently discussed the applications with Mr Church, who had been contacted by Mr Cowan in respect of the two applications. Mr Church is the managing director of Rodel. Mr Cowan had advised Mr Church that he had verified all the information relating to these applications and had also told Mr Church that Rodel 'should just go on his word'. Mr Church was of the view that Mr Cowan was a highly reputable senior attorney in Durban and felt that Rodel had no reason to doubt his word. Mrs Lourens, however, remained unpersuaded, resulting in a heated exchange between her and Mr Church. Despite that, she did not waiver from her initial decision to decline the applications. On the evening of 19 November 2010, she received an email that emanated from Mr Pattundeen, indicating that RWO Properties also did not need bridging finance for the transaction. She felt that email vindicated her stance that the applications were highly irregular.

[190] On arrival at the office on 22 November 2010, she reported the matter to Mr Gammie and asked him to contact Mr Ramsay to arrange for him to come to Rodel's

offices to discuss the two applications. Mr Gammie contacted Mr Ramsay and they agreed on a date for the meeting. On 23 November 2010, she and messrs Church and Gammie held a meeting with Mr Ramsay in relation to the two applications. She took Mr Ramsay through the two applications and mentioned her concerns. She also showed him the letter of undertaking signed by Mr Cowan and asked him whether he was in fact authorised to sign undertakings on behalf of G&B. Mr Ramsay responded that Mr Cowan was not authorised to sign letters of undertaking. At the end of the meeting, Mr Ramsay undertook to get a written explanation from Mr Cowan regarding what had actually happened. At around 08h00 on 24 November 2010, Mr Gammie informed her that Mr Cowan had committed suicide.

[191] In cross-examination by Mr Stols' counsel, she confirmed that the discounting fee in their bridging finance agreement is 48 percent per annum, calculated in accordance with the number of days a client had the money before paying it back to Rodel. She stated that she became suspicious when Mr Cowan did not allow Rodel's staff to have personal contact with his clients in order to get the information that was essential to process the applications. She also noticed that some of the information that came had come under his signature. The financial reports were never given to Rodel. She closed the files after Mr Cowan had committed suicide.

[192] Mr Jones was called as the next witness. He was a director at G&B from 1979 until 2012, when he left the firm. He admitted that he signed the letters of undertaking appearing at pages 21, 23, 29, 53, 56, 63 and 78 of bundle L, as well as at page 410 of Deloitte's bundle 4. He testified that he did not have independent recollection of the circumstances giving rise to his signing of the letters of undertaking and trust requisitions. He had serious doubts that the signature appearing on the letters of undertaking at pages 57, 70, 72 and 76 of bundle L is his signature. He testified that Mr Cowan would come to his office and show him the documents that needed to be signed. Before he could say anything, Mr Cowan would explain to him what the documents were about. Mr Cowan would then tell him that G&B was not at risk and he would sign the documents without reading them. He testified that Mr Cowan would pre-empt questions by giving him a convincing, eloquent and modest explanation in advance.

[193] In cross-examination by Mr Stols' counsel, he confirmed that Mr Cowan acted for Mr Roy Eckstein (Mr Eckstein) in rendering services for Mr Eckstein's bridging finance business and that Mr Eckstein's bridging finance company was a G&B client. Mr Cowan was drafting contracts for that company and if there were a conveyancing transaction, he (Mr Jones) would supervise the transaction. Mr Cowan had no authority to sign the letters of undertaking as only a director could bind G&B. He confirmed that he signed the letters of undertaking without reading the underlying documentation properly. He signed on behalf of G&B to bind the firm. He conceded that the rule that only directors can sign is to protect other directors and to give third parties something they can rely on.

[194] Mr Church was called as the next witness. He testified that in September 2010, he and his friend Mr Lambert were having lunch in a Durban restaurant when Ms Jenny Elkington (Ms Elkington) approached them and introduced herself. She said to Mr Church that 'she was in competition with him'.[17] When Mr Church asked her whom she worked for she replied that she 'did not work there but all the money she had in the world was invested with G&B and they administer a bridging finance scheme like Rodel does using her money'.[18]

[195] Mr Lambert said to her that G&B are lawyers and not money-lenders. She responded by saying 'yes but my investment is totally safe. I have it on their letterhead and I am getting very good returns from them'.[19] Mr Lambert informed her that he was from Nedbank and that Nedbank would take a dim view if one of its panel attorneys were a money-lender. He also cautioned her that she should consider getting her money out of G&B as quickly as she could. Mr Church agreed with the caution sounded by Mr Lambert. Mr Church added that it would be highly unlikely that the Law Society would allow G&B to conduct a bridging finance business because of a conflict of interests. Mr Church also cautioned her that a scheme like that could not be 'kosher'.

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[17] Page 3006 of the record, lines 16-17.

[18] Page 3006 of the record, lines 17-20.

[19] Page 3007 of the record, lines 1-3.

[196] Pursuant to that interaction, Mr Church arranged a breakfast meeting on 7 October 2010, with Messrs Ramsay and Troy Oakley (Mr Oakley) of Nedbank at a hotel in Umhlanga. The meeting was attended by his secretary Ms Sam Daiken (Ms Daiken), and Messrs Ramsay and Oakley. He had already briefed Mr Oakley that Rodel had reason to believe that G&B was running a money-lending scheme. He also told him to remind Mr Ramsay about Nedbank's stance on attorneys who are on Nedbank's panel in respect of money-lending business.

[197] At the breakfast, Mr Oakley said to Mr Ramsay, 'do you know that if we catch a panel attorney of Nedbank money-lending they will never work for us again'.[20] In response, Mr Ramsay said 'well, we're not money lenders, we're attorneys'.[21] Mr Church testified that after the breakfast meeting was over he said to Ms Daiken that he felt that there was something very strange going on at G&B. He testified that he felt that either Mr Ramsay genuinely did not know what was going on or he was an incredibly good liar, or that Ms Elkington had been deranged in the restaurant. He did not confront Mr Ramsay about what Ms Elkington had said to him and Mr Lambert.

[198] On 9 November 2010, Mr Cowan phoned him and said to him that he had a client that required access to funds from the proceeds of a property sale, sitting in a fixed deposit controlled by G&B. Mr Cowan told him that the client needed R10 million urgently. Mr Church considered that to be a good deal especially because G&B is a reputable firm and was managing the client's fixed account. He felt that Rodel should advance the money as requested by Mr Cowan. He referred the matter to Ms Daiken for the processing of the application.

[199] Ms Daiken processed the application and took it to Mrs Lourens for her final decision. Mrs Lourens considered the application and wanted to see the money trail. She also wanted proof of the amount in the fixed deposit account. Mr Church did not hear anything more about the deal until 19 November 2010, when Ms Daiken came to him and told him that she was under extreme pressure from Mr Cowan to approve the applications. Ms Daiken told Mr Church that she had referred Mr Cowan's

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[20] Page 3011 of the record, lines 13-15.

[21] Page 3011 of the record, lines 20-21.

applications involving RWO Properties and the Mark Robert Family Trust to Mrs Lourens for her decision. Mrs Lourens was not giving her the time and date for their consideration.

[200] Ms Daiken requested that he to speak to Mrs Lourens. Whilst Ms Daiken was still in his office, Mr Cowan phoned. She answered the call and gave the phone to him to speak to Mr Cowan. He spoke to Mr Cowan and undertook to argue his case with Mrs Lourens that day. Around 15h00, he approached Mrs Lourens and debated the merits of Mr Cowan's applications. He had no reason to doubt the credibility of Mr Cowan. He had a heated debate with Mrs Lourens, trying to persuade her to reconsider her decision. She, however, stood her ground and declined to change her decision.

[201] He could not believe that Mrs Lourens was questioning Mr Cowan's integrity. Mr Cowan phoned around 16h00 and instructed that payment be made into MaxProp's bank account. Mrs Lourens regarded those instructions to be the final nail in the applications. In Mrs Lourens' presence, he phoned Mr Gammie to seek out his opinion on Mr Cowan's credibility. Mr Gammie refrained from committing either way but suggested that the transaction be held in abeyance until Monday when he would be back in the office. On the evening of 19 November 2010, an email came through to Mrs Lourens from Mr Pattundeen indicating that RWO Properties did not need bridging finance for its transaction. Soon thereafter he received a call from Mrs Lourens in which she pointed out to him that Mr Cowan had committed fraud. The matter was discussed internally and it was resolved to report it to Mr Ramsay and the police. On the morning of 24 November 2010, they were informed that Mr Cowan had committed suicide.

[202] In cross-examination by Mr Stols' counsel, he testified that Mrs Lourens had carefully considered the two applications and all the underlying documents without any predisposition. She did not have any pre-conceived ideas about Mr Cowan and did not know him. He admitted that he would have definitely wanted to do a deal with G&B based on that document because of G&B's impeccable reputation. He would not be suspicious if information were conveyed to him on G&B's letterhead. He did

not know what Mr Ramsay knew about the money-lending at G&B. However, Mr Church believed that there was certainly money-lending going on at G&B.

[203] He testified that the Law Society prohibits attorneys from conducting money-lending practices. He was asked whether an entity needs to be registered as a service provider with the FSB in order to conduct a bridging finance business. His response was that there are no legal requirements to register as a service provider with the FSB for such business but the entity has to be registered in terms of the National Credit Act 34 of 2005. He testified that Rodel charges a fee based on a daily charge of 0,133 percent, which is equivalent to 48 percent per annum, if the loan is taken over a period of a year. He was satisfied from the information he obtained from Mrs Lourens that Mr Cowan had committed fraud. He would have laid criminal charges against Mr Cowan had he not committed suicide. He had a discussion with Mr van der Veen after Mr Cowan committed suicide. Mr van der Veen told him that he had been working with G&B and Mr Cowan for many years, assisting with some kind of bridging finance arrangement. Mr van der Veen also told him that at some point he had sat around G&B's boardroom table with Mr Jennings to finalise the bridging finance business arrangement with G&B.

[204] In cross-examination by PKF (Durban's) counsel, he testified that Mr van der Veen was emphatic during their discussion that G&B's directors knew about the bridging finance business that Mr Cowan was conducting at G&B. He confirmed that Rodel was receiving a small trickle of bridging finance deals from G&B's conveyancing department before Mr Cowan's suicide. When he confronted Messrs Ramsay and Graham Phillips, who was also a director at G&B, about the few deals Rodel was receiving from G&B, he was told that the money corporates and developers that were G&B's clients were not bridging finance type of clients. He reluctantly accepted that explanation because Rodel was getting six to seven deals a month from another firm of a similar size to G&B. He found it fairly compelling that Ms Elkington had come after him and said to him that G&B was in competition with Rodel.

[205] This narration constitutes the summary of the respective versions of Mr Stols and G&B. From this narration it is obvious that there is a serious dispute of fact between those versions (especially with regard to the evidence of Mr Stols and Mr Ramsay), and that such dispute needs to be resolved in order to deal effectively with the issues that arise for determination.

The differences between the versions of Messrs Stols and Ramsay

[206] The respective versions of Messrs Stols and Ramsay diverge materially on a number of issues: what was said between them in their interactions on the occasions of the "Spud" movie and at the Oyster Box Hotel; what was said at the meeting between themselves and Mr Pillay on 25 November 2010; and on Mr Stols' evidence that he came to G&B's offices, saw Mr Ramsay about his Mauritian property investment and was referred to Mr Desmond, whom he consulted with at G&B's offices.

[207] Commencing with the dispute relating to what was said at the meeting of 25 November 2010, it is common cause that Mr Pillay could have assisted the court by testifying about what was said, but he was never called as a witness. The same can also be said about Mr Desmond, who could have assisted the court in resolving the dispute about Mr Stols' Mauritian property investment. Importantly, in his evidence, Mr Stols explained that he consulted with Mr Desmond and that when he asked for an account, Mr Desmond said that Mr Ramsay said he should not invoice him because he was a good client. This was denied and it was placed on record that Mr Desmond could not remember having met Mr Stols or advised or consulted with him. However, the next day both Mr Stols and G&B produced bundle F149, which corroborated Mr Stols' version and showed G&B's denial to be false.

[208] Mr Ramsay testified that he advised Mr Stols not to get involved with a party wanting finance on the basis suggested by Mr Cowan. I have already recorded Mr Stols' response to this proposition in para 71 above. I find it improbable that an experienced businessman would continue to invest when Mr Ramsay had advised him in no uncertain terms to keep his money safe by not investing with Mr Cowan.

Importantly, the evidence of Mr Stols demonstrated that he withdrew his money from investment with Grindrod in order to invest in the bridging finance at G&B.

[209] Having considered and evaluated the evidence which was presented by the parties against the factors set out by Nienaber JA in *Stellenbosch Farmers' Winery Group Ltd & another v Martell Et Cie & others*,[22] I am driven to the conclusion that Mr Stols' version of the events that unfolded during these interactions is the preferable one. On the central issue, I accordingly find that Mr Stols has proved that:

(a) he met Mr Ramsay at his office on 27 February 2008;

(b) during that meeting, Mr Ramsay showed no concern or reservations about the proposed investment;

(c) Mr Ramsay told him that Mr Robert would earn a commission on the transaction;

(d) he was contacted by Mr Ramsay to invest in a movie called "Spud" being filmed at Michaelhouse. He responded by saying that he was happy investing in the bridging finance with Mr Cowan. Mr Ramsay asked whether he was satisfied with the service that he was receiving;

(e) he also met Mr Ramsay at a function at the Oyster Box Hotel where there was a promotion for the Des Roche development. Mr Ramsay asked if he was interested in that development and he said he would rather continue with the bridging finance with Mr Cowan. Mr Ramsay asked him again about the service and whether he was still happy;

(f) Mr Ramsay introduced him to Mr Desmond in relation to the Mauritian property investment; and

(g) Mr Ramsay did not advise him not to get involved with a party wanting finance on the basis suggested by Mr Cowan.

Issues for determination

[210] Having resolved the aforesaid disputes of fact, I turn to deal with the issues requiring determination, which are:

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[22] *Stellenbosch Farmers' Winery Group Ltd & another v Martell Et Cie & others* 2003 (1) SA 11 (SCA) para 5.

(a) whether the contract on which Mr Stols sues is in fact illegal, and if so, whether this bars his contractual claim (irrespective of whether it is void or unenforceable);
(b) Mr Cowan's authority to sign the letter of undertaking;
(c) if Mr Cowan was not so authorised, whether G&B is estopped from relying on the absence of authority; and
(d) if the alleged contract is illegal and invalid, is Mr Stols entitled to claim his capital back with the *condictio ob turpem vel iniustam causam* by way of a replication.

As to (a)

[211] Notwithstanding the fact that G&B did not plead the defence of illegality vis-à-vis Mr Stols, G&B adopted this defence as raised by Deloitte in response to G&B's third party notice against it. The attack is predicated on two legs. The first is that the contract, which Mr Stols sought to enforce, was part of an unlawful scheme entailing an unlawful lottery, and was tainted by fraud under common law. The second is that apart from being tainted by fraud, the contract contravened s 11(1) of the Banks Act and s 12(6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (the CAA) and was therefore void, alternatively, unenforceable.

[212] As to the first leg of argument, G&B's contention is that the hallmark of Mr Cowan's scheme was that each and every transaction was based on a fraudulent misrepresentation by Mr Cowan that the money involved was being borrowed by a real borrower, when in fact the scheme had only lenders and no borrowers. The factual basis upon which G&B relied on this leg is the evidence of Ms Boden and Prof Wainer.

[213] G&B's counsel submitted that after Mr Cowan's suicide, Ms Boden spent considerable time over the next eight years investigating Mr Cowan's fraud with reference to documents found in his office and at his home. She identified the relevant parties involved in the scheme and presented a pictorial schedule (exhibit K) of the various role players and scheme participants as at the date of his suicide. He submitted that Ms Boden also explained where and how each participant fitted into the scheme and that she had gone to great lengths to describe the various individual

transactions with reference to Mr Stols' deals. He submitted that the flow of funds in respect of the transactions in which Mr Stols was involved, show that Mr Stols benefited from the scheme by receiving an amount of R6 423 533.58 in purported interest in circumstances where each of the deals were tainted by Mr Cowan's fraud.

[214] G&B's counsel submitted further that Prof Wainers' evidence established that each transaction arose out of fraud and ended in another fraud. The purported lender was induced by fraud to put money into the scheme, and if that lender was repaid, it required a corresponding fraud to be committed upon some other purported lender. The purported or ostensible borrower never used the money paid out by an investor; instead, it was used to repay an earlier, similar fraudulent loan. The transactions were not based on loan agreements with G&B but with named third parties. He submitted that Prof Wainer's evidence established that the fact that G&B's trust account on occasion was used as a conduit for such transactions did not change the nature of the scheme, but it emphasised that even G&B was in each such transaction and defrauded as to the real transaction.

[215] As authority for this contention, G&B's counsel invoked a number of interrelated decisions, the most salient, which he contended are in his favour, being *Visser en 'n ander v Rousseau en andere NNO*;[23] *Fourie NO & others v Edeling NO & others*;[24] *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'*[25] and *Griffiths v Janse Van Rensburg & another NNO*.[26] He submitted that these decisions support his contention that the contract on which Mr Stols relies is illegal and unenforceable because the facts proved an unlawful and fraudulent pyramid scheme.

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[23] *Visser en 'n ander v Rousseau en andere NNO* [1989] ZASCA 132; 1990 (1) SA 139; [1990] 1 All SA 409 (A).

[24] *Fourie NO & others v Edeling NO & others* [2005] 4 All SA 393 (SCA).

[25] *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'* [1990] ZASCA 2; 1990 (2) SA 548; [1990] 2 All SA 163 (A).

[26] *Griffiths v Janse Van Rensburg & another NNO* [2015] ZASCA 158; 2016 (3) SA 389; [2016] 1 All SA 643 (SCA).

[216] I turn to consider these cases. The salient facts in *Visser en 'n ander v Rousseau en andere NNO*[27] are as follows: Kubus Kwekery (Edms) Bpk (Kubus Kwekery) operated a phoney scheme in terms of which it made money for its operators by selling an activator to members of the public who would, by using the activator, grow a milk culture which Kobus Kwekery would buy. Kobus Kwekery did not use the end product. It would sell it as activator to other scheme participants for R30 and undertook to pay R10 for every unit of end product supplied to it but every grower was limited to supplying four units of product for every unit of activator purchased. The continued operation of the scheme was dependant on the recruitment of more growers and would collapse once the sales of further activators to additional growers dropped to the point where Kubus Kwekery could no longer afford to pay growers for the end product. It was common cause that the scheme amounted to an illegal lottery as intended in s 2(1) of the Gambling Act 51 of 1965 (the Gambling Act). Confronted with numerous claims of persons who had bought and paid for the activators but had not yet received anything in return, or who had not been paid for product delivered, or who had bought activators but had not yet had the opportunity to supply any product (the losers), the liquidators rejected their claims on the ground that the scheme was illegal. The liquidators admitted the claims for the repayment of the amounts paid for activators where such amounts exceeded amounts received from Kubus Kwekery. The liquidators reclaimed from those who had been paid more by Kubus Kwekery than they had paid for the activators (the winners) the difference between such amounts.

[217] The Supreme Court of Appeal (the SCA) distinguished between contractual claims instituted against the liquidators of the insolvent scheme and claims based on the *condictio ob turpem vel iniustam causam*. It was not disputed that the contractual claims were correctly rejected by the liquidators of the scheme on the principle of *ex turpi causa non oritur actio*. The liquidators properly entertained the enrichment claims.

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[27] See fn 23 above.

[218] In *Fourie NO & others v Edeling NO & others*,[28] which dealt with the Krion Pyramid Investment Scheme, it was common cause that the scheme was illegal and void as it contravened both the Banks Act and the CAA.[29] The perpetrators of the scheme knew the investments to be illegal. There was, on the other hand, no evidence that any of the investors knew their investments to be tainted, nothing from which to infer that any of them acted *ex turpi causa*. That being so, no question arose of relaxing the *in pari delicto potior est condicio defendentis* rule.[30] The SCA held that upon receipt of a payment, the scheme became liable to repay the investors under the *condictio ob iniustam causam*. The parties agreed that the gains received by investors were illegal and that the investors could not retain them. The repayment of an investor's capital would however not be a disposition without value as 'the investor's *condictio* prevented it from taking on that character: where a disposition was made it was made in discharge of an obligation to return the illegal payment'.[31]

[219] In *Commissioner for Inland Revenue v Insolvent Estate Botha t/a 'Trio Kulture'*,[32] a case based on the same scheme as in *Visser en 'n ander v Rousseau en andere NNO*, Hoexter JA, in summing up the conclusion at which he arrived on this issue, stated:

'Since a contract which is forbidden by statute is illegal and void, a Court is bound to take cognisance of such illegality; and it cannot be asked to enforce or to uphold or to ratify such a contract. . . .But from such convenient generalisations it is not to be inferred that because an agreement is illegal a Court will in all circumstances and for all purposes turn a blind eye to its conclusion; or deny its very existence. . .To the conclusion of such illegal agreements the law accords recognition for particular purposes. That they are void *inter partes* does not rob them of all legal result.'[33]

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[28] See fn 24 above.

[29] The Consumer Protection Act 68 of 2008 has repealed this Act.

[30] *Fourie NO v Edeling NO* para 13.

[31] *Fourie NO v Edeling NO* para 19.

[32] See fn 25 above.

[33] *Commissioner for Inland Revenue v Insolvent Estate Botha* at 556A-G.

In the concurring judgment, Milne JA said '[t]he case must therefore be decided on the basis that it was not established that any of the growers were knowingly parties to a simulated transaction'.[34]

[220] In *Griffiths v Janse van Rensburg & another NNO*,[35] the SCA considered payments made to Mr Griffiths pursuant to loans made to an unlawful pyramid scheme. The agreed facts were that the pyramid scheme was conducted in contravention of s 11(1) of the Banks Act and constituted a harmful business practice in contravention of the CAA, and the loan agreements were illegal and void. The SCA had to consider whether the payments made to Mr Griffiths had been made in the ordinary course of business. Mr Griffiths was not aware at the time when payments were made to him that the agreements were void and that he had a right to claim payment under the *condictio ob turpem vel iniustam.* The SCA held that if a payment is made in terms of a void agreement, the 'claim for repayment would ordinarily lie under the *condictio ob turpem vel iniustam causam*'.[36]

[221] As to the second leg of argument, G&B contended that the scheme contravened s 11(1) of the Banks Act, and that it constituted a harmful business practice as envisaged in para 2 read with para 1.1 of the notice[37] in terms of s 12(6)(iii) of the CAA. For this stance, G&B relied on *Gazit Properties v Botha & others NNO*[38] and *Dulce Vita CC v Van Coller & others.*[39] In *Gazit Properties v Botha & others NNO*,[40] Malokiba Trading 19 (Pty) Ltd, a company in liquidation, which had contravened the Banks Act by procuring loans from the public without being registered as a bank, borrowed money from Gazit Properties. Under the loan, Gazit Properties would be paid interest of 2,5 percent of the loan capital monthly. The agreement would remain in force indefinitely, but after three months, could be

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[34] *Commissioner for Inland Revenue v Insolvent Estate Botha* at 561G-H.

[35] See fn 26 above.

[36] *Griffiths v Janse van Rensburg* para 22.

[37] GN 1135, *GG* 20169 of 9 June 1999.

[38] *Gazit Properties v Botha & others NNO* [2011] ZASCA 199; 2012 (2) SA 306 (SCA).

[39] *Dulce Vita CC v Van Coller & others* [2013] ZASCA 22; [2013] 2 All SA 646 (SCA).

[40] See fn 38 above.

cancelled by either party on 45 days' notice. Gazit Properties gave the requisite notice and demanded repayment, whereupon the capital and interest were paid. In contending that the disposition had not been made in the ordinary course of business, the liquidators originally relied on contentions that the business was irregular in three respects: it contravened the Banks Act; it constituted a prohibited pyramid scheme; and the interest rate paid was usurious. The SCA concluded that the fact that the company contravened the Banks Act did not mean that the loan agreements were not made in the ordinary course of business, and that the tainted nature of the business was irrelevant to the fact that the repayment was made in the ordinary course of business.

[222] In *Dulce Vita CC v Van Coller & others*,[41] Spitskop Village Properties Ltd (Spitskop) operated a property syndication scheme, which was subsequently liquidated. The operation of the scheme fell afoul of regulations issued relating to certain business practices as prescribed information was withheld.[42] The SCA had to consider whether another notice published under the CAA, which declared unlawful the practice of withholding certain information from investors in public property syndication schemes, meant that all the agreements entered into pursuant to such a scheme were unlawful and null and void. In para 33 the court stated:

'The fact that the promoters did not disclose the prescribed information and were guilty of not complying with the requirements of Notice 459, therefore, did not have the effect that the whole scheme or any part of it was unlawful. Consequently, there was no basis for finding that all the agreements entered into pursuant to the scheme were null and void *ab initio*.'

[223] By contrast, Mr Stols' counsel contended that the claims are well-recognised contractual claims based on deposit and written acknowledgment of debt on G&B's letterhead and signed by Mr Cowan. He submitted that Mr Stols has not sued the perpetrator of the illegal scheme, but has instead sued G&B on ostensible authority. In this regard, he relied on *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others*.[43] In this case, the branch manager (Mr Assante) of a bank ran a pyramid scheme of

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[41] See fn 39 above.

[42] GN 459, *GG* 28690 of 30 March 2006, issued in terms of the now repealed Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

[43] *NBS Bank Ltd v Cape Produce Co (Pty) Ltd & others* [2001] ZASCA 107; 2002 (1) SA 396; [2002] 2 All SA 262 (SCA).

investments (the money of later entrants was used to keep the earlier ones content). He used various vehicles to channel money around and solicited investments by issuing letters of undertaking on bank letterheads. The bank contended that the investor was aware of the risks involved and closed his eyes to them and that Mr Assante had no authority, actual or ostensible, to issue the letters of undertaking as he did, because he was acting for his own benefit and not for the bank.

[224] He submitted that in the present case, Mr Stols seeks to enforce the letter of undertaking against G&B, who signed the letter of undertaking and who is estopped from denying the authority of the signatory. He submitted that there is no illegality or unconstitutional effect from such order. He submitted that on either interpretation of the law of ostensible or implied authority or estoppel, Mr Stols' claim should succeed. Correctly, he contended that even if it is found that the contract on which Mr Stols sues is an integral part of an illegal or unenforceability it is not rigid. Reliance on this contention was founded in the judgment of *Trust Bank van Afrika Bpk v Eksteen*[44] at 415H-416A where Steyn JA pronounced on the issue as follows:

'The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other.'

[225] With regard to the cases relied upon by G&B's counsel, it suffices to say that, in my view, those cases bear no resemblance to the facts of this case. I pause to record that whilst the principle enunciated in the cases relied upon by G&B's counsel on this issue is correct, it suffices to say that the principle was made in the context of a pyramid scheme, where the scheme had been liquidated and undue preferences were relevant. In this case, Mr Stols conceded the factual basis for Prof Wainer's evidence and in general, accepted Prof Wainer's conclusions based on his evidence. In relation to this case, there was no evidence whatsoever that Mr Cowan ran a lottery scheme. Mr Ramsay admitted that there was a telephone discussion with Mr Stols on 26 February 2008 about the documents Mr Stols had obtained from Mr Cowan relating to a bridging loan transaction. On the morning of 27 February 2008,

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[44] *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402; [1964] 3 All SA 507 (A).

Mr Stols faxed those documents to Mr Ramsay. The evidence of Mr Church was to the effect that no special registration is required either under the Banks Act or otherwise to conduct bridging finance. Importantly, the court was not referred to any particular legislation that could have prevented G&B from conducting a bridging finance business. On the contrary, Mr Church's evidence was that there were no legal requirements to register as a service provider with the FSB.

[226] When Mr Stols was cross-examined, taken through the transactions and Prof Wainer's report, it became clear that he did not know how Mr Cowan operated the scheme. I pause to record that the evidence demonstrated that Mr Stols invested with Mr Cowan bona fide and on the basis that he was contracting with G&B and this was therefore not a case where the investors were in equal guilt.

[227] After giving this issue careful thought, I can see no reason why Mr Stols' claim cannot be validly based upon the contract in question. However, even were it to be found that I am wrong in this regard, there is more compelling reason why this contention cannot be sustained. In *Afrisure CC & another v Watson NO & another*,[45] Brand JA laid down the following in relation to the *par delictum* rule:

'. . .the keystone to the *par delictum* defence is that the plaintiff has rendered performance dishonourably or with turpitude. Absent turpitude on the part of the plaintiff, the *par delictum* defence is simply not available. Where payment, even though illegal, was not dishonourable, the plaintiff must succeed. . . .'

On consideration of the evidence, and in particular the conduct of G&B's directors in relation to the bridging finance scheme operated by Mr Cowan, I conclude that Mr Stols is not precluded from holding G&B liable on the contractual claim based on estoppel.

As to (b)

[228] G&B contended that Mr Cowan did not have the authority to represent it when concluding any agreement binding on the firm, and in particular, to issue letters of undertaking. It contended that Mr Stols did not adduce any evidence from which an inference of actual authority can be made, but rather he had assumed that Mr Cowan

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[45] *Afrisure CC & another v Watson NO & another* [2008] ZASCA 89; 2009 (2) SA 127; [2009] 1 All SA 1 (SCA) para 40.

had the requisite authority, firstly, from what he had been told by Mr Ramsay, and secondly, from the use of G&B's letterhead by Mr Cowan. It contended that the unchallenged evidence by the directors of G&B who testified in these proceedings was that only a director was at any relevant time authorised to conclude any act binding on G&B. In this regard, it referred this court to an incident when Mr Cowan had to approach the directors for their signatures after Mr van der Veen raised the issue of Mr Cowan signing the letters of undertaking. Lastly, it contended that no such director's signature appears on any of the letters of undertaking relied on by Mr Stols.

[229] Mr Jennings, who was the CEO of G&B at the time, admitted that he attended a meeting to launch the bridging finance scheme in which MaxProp would provide finance. He conceded that this bridging finance scheme performed the same function as Rodel and was in competition with Rodel. Importantly, Ms Boden's evidence was that from an analysis of all the documents in her possession, she could not find any document suggesting that Mr Stols knowingly participated in the scheme. As I see it, the manner in which Mr Stols pleaded the estoppel defence in this matter seems to have its origin in the case of *NBS Bank v Cape Produce.*[46] At para 26, Schutz JA summed up the requirements of estoppel establishing ostensible authority as follows:

'1. A representation by words or conduct.
2. Made by the NBS and not merely by Assante, that he had the authority to act as he did.
3. A representation in a form such that the NBS should reasonably have expected that outsiders would act on the strength of it.
4. Reliance by Cape Produce on the representation.
5. The reasonableness of such reliance.
6. Consequent prejudice to Cape Produce.'

[230] In *South African Eagle Insurance Co Ltd v NBS Bank Ltd*[47] Marais JA said:

'Where, as here, the initial question being addressed is whether the contracts of deposit were seemingly concluded, the fact that Assante had no authority to conclude such contracts is only relevant to the enquiry to the extent that it might throw some light on whether it is

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[46] See fn 43 above.

[47] *South African Eagle Insurance Co Ltd v NBS Bank Ltd* [2001] ZASCA 118; 2002 (1) SA 560; [2002] 2 All SA 220 (SCA) para 26.

probable that he would have purported to contract. But the lack of authority is in itself inconclusive as to whether he purported to contract. Nor, as I see it, does it avail respondent to say that even if there was seeming contractual *consensus*, it was not its conduct which gave rise to the appearance of contractual *consensus* but Assante's. When the question of Assante's ostensible authority to contract is considered respondent will of course be entitled to raise that contention.'

[231] As aptly stated by Schutz JA in *NBS Bank v Cape Produce* para 31:
'When the enquiry becomes focused upon ostensible authority, evidence about the internal controls of the bank is largely irrelevant, despite the fact that the bureaucratic mind believes that things may not happen, do not happen, and finally, cannot happen, unless the regulations are complied with. The outsider does not think that way. Nor does the law. In my opinion a great deal of time and expense was wasted on evidence that took the NBS's case nowhere. Cape Produce did not help matters by relying on actual authority up to the time that the appeal was argued.'

[232] The evidence revealed that Mr Cowan operated his bridging finance scheme as an executive consultant of G&B, who had an office in the G&B building and who was allowed to practice without any supervision, publicly and openly as an attorney. Importantly, G&B also allowed him to use its trust account for the payments in and out in connection with the scheme and to earn commission for the benefit of G&B in relation to the bridging finance transactions, and that Messrs Jennings and Jones knew this. I have already found that Mr Jennings facilitated the flow of the scheme from the beginning to the end by signing letters of undertaking and endorsing the operation of the scheme in G&B under the stewardship of Mr Cowan. In the circumstances, it seems to me that the evidence clearly indicates that the appearance of authority was present in this case.

As to (c)

[233] I find it appropriate to reproduce the letter of undertaking relied on by Mr Stols:
'We hold at your disposal and undertake to make payment to you by not later than 30 November 2010, from funds which we hold on behalf of our client, Resmax Investments (Pty) Limited, the sum of R 7 000 000 plus interest on R5 000 000 at 30% p.a. from 5 October 2010 and on R7 000 000 from 13 October, to date of payment.'

[234] G&B contended that the letter of undertaking does not constitute a loan agreement between Mr Stols and G&B and amounts to no more and no less than an undertaking to make payment as agent, of a sum of money on behalf of the principal, Resmax. G&B's counsel submitted that Mr Stols clearly understood that his money would not go to G&B as borrower, but to some third party ostensibly borrowing same or someone nominated by the borrower to receive the payment. He submitted that Mr Cowan never structured any transaction on the basis that G&B borrowed any money from any scheme participant. Instead, all transactions were premised on the basis that the lender lent the money to a third party, who was either the seller or purchaser of property, or the investor in respect of a fixed investment, which would mature on a future date.

[235] Lastly, he submitted that the letter of undertaking identifies an ostensible borrower as principal, and G&B as the agent allegedly holding funds for and acting on the instructions or mandate of the ostensible borrower. Mr Stols paid the money directly to a third party, Topspec. He therefore knew that by entering into the loan agreement with the third party, the third party as the borrower of the funds became liable to pay the loan, or if there were an illegality attached to the loan agreement, he would have to 'follow the money'. G&B was never the guarantor and Mr Stols therefore could not have an expectation that the money would be paid to or controlled by G&B, other than on behalf of Resmax. Mr Stols never intended to make a payment to G&B, and G&B never intended to receive a payment from him. Relying on the authority of *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd*,[48] he submitted that in the absence of a mandate from any borrower, there was never any obligation on G&B to pay in terms of the letter of undertaking.

[236] This contention is reminiscent of that raised in *South African Eagle Insurance v NBS Bank*[49] which the SCA answered as follows:

'They use the words "confirm" and "repay", which connote both an existing indebtedness and that respondent is the debtor. The document is invested with more significance than a merely confirmatory letter or a receipt for its presentation is required when repayment is made.

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[48] *Stupel & Berman Inc v Rodel Financial Services (Pty) Ltd* [2015] ZASCA 1; 2015 (3) SA 36; [2015] 3 All SA 150 (SCA).

[49] See fn 47 above para 36.

These factors outweigh the use of the potentially ambiguous word “guarantees”. It is a word which, while often used in the context of guaranteeing the performance of a contractual obligation by a third party, is also frequently used as a synonym for “warrants” or “undertakes”. In the entire context of these letters in which no reference at all is made to any third party, the latter meaning is clearly the meaning intended to be conveyed.’

This reasoning commends itself to me as applying equally to the present case. As I see it, the insuperable difficulty facing G&B in relation to this letter of undertaking is that it was delivered to Mr Stols against payment of R2 million and R5 million to G&B and Topspec respectively on instructions of Mr Cowan. In the circumstances, I find that annexure A is an acknowledgment of debt, which independently grounds a cause of action.

As to (d)

[237] In light of the court’s findings in (a), (b) and (c) above, it is not necessary for me to deal with this issue.

Court’s impression of witnesses

[238] It is necessary for me to record my impression of the witnesses in these proceedings. The record will demonstrate that Mr Stols was a very good witness who did not wilt despite being subjected to intense and penetrating cross-examination. He gave a succinct account of what transpired and impressed the court as a credible witness. He made concessions when he was required to do so and his factual account remained reliable on the transactions. From an analysis of the evidence, it became clear that he did not know how Mr Cowan was operating, and when Deloitte’s counsel took him through transactions, especially schedules B and C of Prof Wainer’s report, he was shocked by those revelations but readily conceded them.

[240] With regard to Ms Boden, it is common cause that her evidence dealt in the main with the investigations she conducted into the scheme following Mr Cowan committing suicide. She relied on the paper trail that Mr Cowan had left behind as well as on what she was told by her fellow directors. In some instances, those directors mentioned as a source of information were never called to corroborate those aspects of her evidence. In my observation of her as a witness, she appeared

to be biased and was even prepared to venture into giving an opinion, which was not based on evidence. For instance, during her cross-examination by Deloitte's counsel in respect of the commission earned by G&B on the deals linked to the scheme, the following exchanged ensued:[50]

'MR SNYCKERS SC: Yes, and we've seen them all, all the ones that we've dealt with are in fact linked to those deals.

MS BODEN: They are linked to those deals, M'Lord, but as I indicated in my evidence in chief there is a considerable amount of legitimate legal work done for MaxProp that was not properly billed and I just simply have to draw that to the court's attention.

MR SNYCKERS SC: Yes, perhaps we can deal with that right now. These invoices relate to these deals, let's forget for a moment other work he might have done that he didn't bill for.

MS BODEN: They most certainly are calculated with reference to the deal, I agree with you, M'Lord.'

[241] Importantly, in as much as she testified in detail regarding each scheme participant, no details of the commission earned by G&B appeared in her evidence-in-chief. She also did not disclose to KPMG the tax invoices rendered to Rodlane Trading and MaxProp by G&B.

[242] With regard to Mr Ramsay, the record will demonstrate that he was an entirely unsatisfactory witness. When his evidence was contradicted by objective evidence, he sought refuge in the expression, 'I do not recall'. He was evasive, argumentative and avoided giving answers despite being asked the same question a number of times. I was left with the impression that, to the extent that his evidence was in conflict with Mr Stols', Mr Ramsay was a stranger to the truth. He also resorted to inexplicable explanations when the contradictions between his evidence in court and the s 152 enquiry were pointed out to him.

[243] With regard to Mr Jennings, the record will demonstrate that he resorted to dishonest proposition when he was unable to extricate himself as to why he signed the letters of undertaking without conducting a due diligence audit of the documentation. In this regard, he stated that people should not rely upon the signature of a director on a G&B letterhead and should conduct their own enquiry. He

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[50] Page 1993 of the record, lines 6-20.

said all this despite having assisted Mr Cowan with the format of the letter of undertaking. He contradicted himself on a number of occasions when asked pertinent and crisp questions in cross-examination.

[244] With regard to Ms Collier, it became apparent in cross-examination by PKF (Durban's) counsel that her assertion that she had audited and checked the documents before signing was not truthful. Mr Jones came across as an honest witness. He admitted that he signed a number of letters of undertaking without reading them properly or asking for underlying documents. Likewise, Mrs Schoeman was also an honest witness. She admitted that in authorising letters of undertaking for Mr Cowan, she became an unwitting instrument in his fraud.

Representation

[245] As stated, Mr Jennings admitted that he attended a meeting to launch the bridging finance scheme in which MaxProp would provide the finance, and which performed the same function as and was in competition with Rodel. Mr Cowan was designated as an executive consultant and was allowed to practice publicly and openly from G&B's offices as an attorney. Mr Jennings knew that Mr Cowan was conducting a bridging finance business as part of his practice housed in G&B's offices. G&B allowed the use of its trust account for the payment of funds and payment out of funds connected with Mr Cowan's bridging finance business. G&B allowed him to earn commission for and in its name on each of the bridging finance transactions.

[246] The evidence demonstrates that Mr Stols was concerned that he was required to make payment directly into a third party account and sought clarity about this issue. His evidence was that Mr Cowan, without hesitation, said that he should speak to Mr Ramsay, who was head of the conveyancing department. Mr Cowan, in no way attempted to hide the fact that G&B's directors were aware that he was involved in a bridging finance scheme and consequently, he was more than happy for Mr Stols to approach Mr Ramsay. Once the evidence of Mr Stols to the fact that as a result of the verbal comfort he had obtained from Mr Ramsay as to the integrity of the bridging finance scheme offered by Mr Cowan is accepted, as is the case here, it is clear that

Mr Stols did in fact rely not only on what Mr Cowan had conveyed to him, but on G&B's representation as to the role and authority of Mr Cowan. In the circumstances, the element of causation is established. It must be remembered that Mr Stols only proceeded with the investment of R10 million into the scheme after seeking clarity from Mr Ramsay on making payment directly into a third party account and after discussing with Mr Ramsay, the documents that Mr Cowan left with him (Mr Stols) on 26 February 2008. I conclude, therefore, that Mr Stols acted reasonably herein. Hence the representation and his reliance on it to his detriment.

Prejudice

[247] I am satisfied that Mr Stols has clearly established that he acted to his detriment as a result of the representations made to him in this matter.

Conclusion

[248] To summarize then:

(a) The letters of undertaking were all provided on G& B letterheads;

(b) They represented to the Mr Stols that they were undertakings given by G&B;

(c) The terms of the undertakings and the authority that they could be issued in that form, were authorised by Mr Jennings at the meeting with MaxProp. The undertakings were accordingly authorised;

(d) Where the evidence of Mr Ramsay differed from that of Mr Stols, I have preferred the evidence of Mr Stols and rejected that of Mr Ramsay;

(e) Mr Stols was entitled to rely on the representations, expressed and implied made to him;

(f) G&B cannot in law deny the binding effect of the letters of undertaking issued.

I conclude, therefore, that Mr Stols has proved his claim to hold G&B to its contract of deposit, concluded through Mr Cowan.

Costs

[249] What remains to be considered is the question of costs. The general rule is that in the ordinary course costs follow the result. PKF (Durban) initially adopted the approach of a watching brief in this matter but reserved its right to cross-examine witnesses. PKF (Durban's) counsel submitted that the nature of the evidence

presented by Ms Boden involved an attempt to implicate PKF (Durban) and others in the running of Mr Cowan's scheme, resulting in his objecting to the introduction of any evidence relating to PKF (Durban's) involvement. He submitted that following the withdrawal of the third party claim against Deloitte, it became necessary for PKF (Durban) to cross-examine witnesses and to protect PKF (Durban's) interests to the extent that Deloitte was no longer carrying out that function. He also submitted that PKF (Durban's) participation in the trial on the separated issues was also required given the fact that G&B had subpoenaed Mr McHardy to give evidence. He submitted that it was incumbent upon PKF (Durban) to prepare for the eventuality that Mr McHardy might be forced to give evidence and to ensure that questions relating to PKF (Durban's) involvement were not improperly put to him. Having considered the submission made on behalf of PKF (Durban), I see no reason why the general rule should not apply in its case. I am, therefore, unable to find any circumstances that persuade me to depart from this rule in respect of both Mr Stols and PKF (Durban).

[250] With regard to interest, Mr Stols' evidence was that the agreed interest on R5 million was at 30 percent per annum, from 5 October 2010 to 12 October 2010 and, on R7 million, from 13 October 2010 to date of payment. The agreed date of payment was 30 November 2010. It follows, therefore, that interest shall be granted as agreed until 30 November 2010, and mora interest thereafter.

[251] I, accordingly, grant judgment in favour of the plaintiff and against the defendant for:

1. payment of the sum of R7 000 000;
2. payment of the interest on R5 000 000 at the rate of 30 percent per annum from 5 October 2010 to 12 October 2010 and on R7 000 000 at the rate of 30 percent per annum from 13 October 2010 until 30 November 2010 and mora interest thereafter at the rate of 8,75 percent per annum;
3. costs of suit for the plaintiff and first third party.

Mnguni J

Appearances

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