Neutral Citation Number: [2024] EWHC 2005 (Ch)

BL-2023-001104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

31 July 2024

Before:

MR JUSTICE LEECH

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B E T W E E N:

(1) TONSTATE GROUP LIMITED (in liquidation) **(2) TONSTATE EDINBURGH LIMITED (in liquidation)** **(3) DAN-TON INVESTMENTS LIMITED (in liquidation)** **(4) ARTHUR MATYAS** **(5) RENATE MATYAS**	**Claimants**
- and –	
ROSLING KING LLP	**Defendant**

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MR ANDREW FULTON KC (instructed by **Rechtschaffen Law**) appeared on behalf of the Claimants

MR PATRICK LAWRENCE KC (instructed by **Reynolds Porter Chamberlain LLP**) on behalf of the Defendant

Hearing dates: 18 and 19 June 2024

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APPROVED JUDGMENT

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Mr Justice Leech:

I. The Applications

1. By Application Notice dated 9 November 2023 (the "**Claimants' Application**") the Claimants applied to strike out those parts of the Defence of the Defendant, Rosling King LLP ("**Rosling King**"), in which they challenged the correctness of the decision of Zacaroli J (as he then was) in *Tonstate Group Ltd v Wojakovski* [2019] EWHC 3363 (Ch). In that decision (to which I will refer as the "***Duomatic* Judgment**") he held that the principle named after *Re Duomatic Ltd* [1969] 2 Ch 365 had no application to a number of payments made for the unlawful purpose of defrauding HMRC. For ease of reference.

2. By Application Notice dated 19 January 2024 (the "**Defendant's Application**") Rosling King also applied to strike out two of the three claims which the Claimants advanced against them pursuant to CPR Part 3.4(2) because the relevant paragraphs in the Particulars of Claim disclosed no reasonable grounds for bringing the claim. They also applied for reverse summary judgment pursuant to CPR Part 24.2(a)(i) because the Claimants had no real prospect of succeeding on those claims and because there was no other compelling reason to deal with them at trial.

3. I heard both applications over two days. Mr Andrew Fulton KC, who appeared for the Claimants, opened the Claimants' Application. Mr Patrick Lawrence KC, who appeared for Rosling King, then made his submissions on the Claimants' Application and opened the Defendant's Application. Mr Fulton then replied to Mr Lawrence before Mr Lawrence had the last word on his application. Both counsel submitted further materials after the hearing which I have taken into account in preparing this judgment. Mr Fulton submitted draft amended Particulars of Claim but Mr Lawrence has not so far made any submissions in relation to them following the hearing.

II. Procedural History

A. The Claims against Mr Wojakovski

(1) The Claims

4. The background to the Applications was conveniently set out by Zacaroli J in a

subsequent judgment dated 30 April 2021 which he handed down after the *Duomatic* Judgment: see [2021] EWHC 1122 (Ch). For present purposes, is not necessary to describe the issues which he had to determine on that occasion but I cite his summary of the litigation at [7] to [11] and I gratefully adopt the terms which he defined in bold (below):

> "7. There is a long and complicated background to the underlying litigation. There are three actions:
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> (1) Action number BL-2018-000544, a derivative action in which the claimants, principally Tonstate Group Limited ("**TGL**") and other companies in the Tonstate Group and companies in a related group known as "**THH Group**", seek the return of money wrongfully extracted from them by the first defendant, Mr Wojakovski (the "**Main Action**");
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> (2) Action number BL-2019-000304, in which the claimants, Mr and Mrs Matyas, seek the rescission of transfers of shares in TGL made by them to Mr Wojakovski (the "**Shares Claim**"); and
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> (3) Action number BL-2018-002541, an unfair prejudice petition in which Mr Wojakovski seeks various orders against Mr and Mrs Matyas and other entities in the Tonstate Group (the "**Petition**").
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> 8. I provided a summary of the background in a judgment dated 28 April 2020, in relation to an application for a debarring order made by the Claimants against Mr Wojakovski: [2020] EWHC 1004 (Ch). For convenience, I set out paragraphs 3 to 8 of that judgment:
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> "3. By way of very brief background, the Tonstate Group is a group of companies that have been involved in the property investment business for over a quarter of a century. Mr Wojakovski was formerly married to Mr Matyas's daughter. The entire group is effectively deadlocked, as a result of the current dispute between Mr Wojakovski (who is the beneficial owner of 50% of the group) and Mr Matyas (who, with his wife, is the beneficial owner of the other 50% of the group).
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> 4. It is common ground that both Mr Matyas and Mr Wojakovski had, for some years, been extracting funds from the Tonstate Group without lawful authorisation. Mr Wojakovski contends that all of the extractions that he made were done with Mr Matyas' knowledge and consent. Mr Matyas denies this. In light of Mr Wojakovski's admission that the extractions made by him were done for the purpose of defrauding the revenue, I concluded (for reasons set out in a judgment dated 5 December 2019) that even if all the shareholders in the Tonstate Group had consented to the extractions, Mr Wojakovski's defence based on the *Duomatic* principle was bound to fail.
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> 5. There being no other defence raised to the Main Claim, on 20 November 2019 I therefore granted judgment in the Main Action against Mr Wojakovski for the sum of £12,994,642.43, being the sum of the monies he admitted he had wrongfully extracted from the Tonstate Group companies. In addition an Account was ordered against him of all

payments wrongfully extracted from the Tonstate Group companies. These orders were temporarily stayed.

6. Subsequently, Mr Matyas consented to an Account being ordered against him in the same terms as that ordered against Mr Wojakovski and consented to repaying such amounts as he accepted he had wrongfully extracted from the companies. This was formalised in an order dated 16 January 2020, recording various matters either agreed or determined at a case management conference on that date. Among other things, in that order:

i) I directed a trial of the Shares Claim, along with the trial of certain claims made by Mr Wojakovski in the Main Action (the "**Additional Claims**");

ii) The Petition was stayed pending determination of the above claims;

iii) The stay on payment of the judgment debt owed by Mr Wojakovski was extended until 31 March 2020;

iv) Mr Wojakovski was restrained from dealing with any of the funds extracted from the Tonstate or THH companies or their proceeds;

v) Directions were given in relation to the taking of the mutual Accounts by Mr Matyas and Mr Wojakovski, including directions for disclosure.

7. The case management conference was restored for a further hearing on 2 March 2020. On that occasion:

i) The trial of the Shares Claim and the Additional Claims was listed for a hearing commencing on 18 June 2020 with a time estimate of 12 days, and directions were given for further disclosure, witness statements and other procedural matters relating to the trial;

ii) Mr Wojakovski was ordered to pay 85% of the total costs of (1) the case management conference held on 16 January 2020 and (2) the costs of all of the applications heard at the case management conference on 16 January 2020 or withdrawn by Mr Wojakovski. These costs were summarily assessed in the sum of £61,740.64. They were apportioned as to £23,152.74 in favour of TGL and as to £38,587.90 (plus VAT of £7,717.58) in favour of Mr Matyas. Those sums were payable by 30 March 2020.

iii) Mr Wojakovski was ordered to provide security for costs in respect of the defence of the sixth and seventh respondents to the Petition, in the sum of £135,244.90, such sum to be paid into court by 30 March 2020.

8. Mr Wojakovski has failed to pay any of the sums which fell due for payment by him on 30 March or 31 March 2020 (the judgment debt in the Main Action, the costs order of 2 March 2020 and the security for costs ordered on 2 March 2020)."

9. Subsequent to that judgment, the Shares Claim and the Additional Claims were settled on 20 May 2020. So far as the Shares Claim is concerned, it was settled on terms that Mr Wojakovski's shares in TGL were transferred to Mr Matyas, Mrs Matyas, and to Nadine Wojakovski, save for 22,500 (i.e. the Shares) which he was entitled to keep.

> 10. On 2 June 2020, the Claimants filed an application for an interim charging order over the Shares, in respect of the judgment debt obtained in the Main Action. On 7 July 2020 Candey consented on behalf of Mr Wojakovski to a final charging order. The charging order was made final (by consent) by an order dated 21 July 2020.
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> 11. On 18 August 2020 a bankruptcy petition against Mr Wojakovski was presented by Mrs Rachel Robertson, who had been joined as a defendant to the Petition. On 15 October 2020 I made a bankruptcy order on that petition."

5. The Claimants and a number of other Tonstate companies also commenced proceedings against Mishcon De Reya LLP ("**Mishcon**"), the firm of solicitors who acted for Mr Wojakovski between 2017 and 2019. They claimed equitable proprietary relief and knowing receipt in relation to the sums with which Mr Wojakovski paid their invoices. In a judgment dated 9 November 2022 Master Pester granted summary judgment in relation to the claim that the Claimants had a proprietary interest in the relevant funds on the basis that the Claimants and the other Tonstate companies had a proprietary interest in the funds used to pay Mishcon.

6. On 5 December 2023 Edwin Johnson J handed down a judgment in which he found that Mr Wojakovski had committed a contempt of court and imposed a suspended sentence: see [2023] EWHC 3119 (Ch). He also gave the following more detailed description of one of the critical periods of the underlying litigation with which I am concerned at [13] to [17]:

> "13. On 20th November 2019 Zacaroli J made an order striking out parts of the Defence filed by the Defendant in the Main Action and, consequent upon that strike out, ordered that judgment should be entered against the Defendant in relation to what were referred to as the Transactional Payments, which I understand to have been a reference to the sums wrongfully extracted from the First to Third Claimants by the Defendant. The Defendant was ordered to pay the sum of £12,994,642.43 to the Claimants. The Defendant was also ordered to give an account of what he had done with the monies extracted from the Claimant companies and whether he had extracted monies from any other company in the Tonstate Group.
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> 14. The order for payment was subject to a temporary stay, pending a case management conference. The case management conference was held on 16th January 2020, consequent upon which Zacaroli J made the first of the four orders in the Main Action with which I am concerned in the Contempt Application. By paragraph 3 of the order of 16th January 2020 the stay on the earlier order of 20th November 2019, for payment of the judgment sum of £12,994,642.43 and any other sum due on the account

> to be given by the Defendant, was extended to 4.00pm on 31st March 2020. As from that time the judgment debt and any other sum due on the account were stated to be immediately payable.
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> 15. By paragraph 4 of the order of 16th January 2020 Zacaroli J also directed that the Claimant companies had a proprietary interest in the judgment debt and its traceable proceeds, which were held by the Defendant on trust for the Claimant companies.
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> 16. As part of the same order of 16th January 2020, the Fourth Claimant, Mr Matyas, consented to an order that he should give an account in the same terms as the account which the Defendant was ordered to give. The Fourth Claimant also agreed to pay to the Claimant companies the sum of £3,215,469.75 and any other sum found to be due on the account which he was ordered to give.
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> 17. The Defendant has not paid the judgment debt of £12,994,642.43. A relevant point to make in this context is that the Defendant was made bankrupt, on 15th August 2020, on the petition of a Mrs Rachel Robertson, who had been joined as an additional defendant to the Petition. The Claimant companies however have a proprietary interest in the monies comprising this judgment debt; see paragraph 4 of the order of 16th January 2020. I will refer to these monies, being monies wrongfully extracted from the Claimant companies by the Defendant, as "the Extractions". This proprietary interest entitles the Claimant companies to continue to pursue payment of the Extractions and their traceable proceeds."

7. On 26 April 2024 Adam Johnson J also handed down a judgment in which he held that the Court had jurisdiction to make a *Bankers Trust v Shapira* order in relation to assets held in Israeli trust and bank accounts in the name of Mr Wojakovski's father. He described the Claimants' efforts at enforcement at [18], [19] and [22]:

> "One of the main initiatives to recover the Extractions has involved a claim in respect of funds paid to Edward's former solicitors, Mishcon de Reya. The sums involved were over £3m. In a judgment dated 19 November 2022, Master Pester decided that the Claimants had properly shown that monies used to pay Mishcon's fees represented the traceable proceeds of Extractions. The funds received by Mishcon came from an account at Bank of Singapore….Another successful enforcement effort has related to certain properties acquired using the Extractions. Three such properties, in Edinburgh, were acquired via a Jersey company known as Quastus Holdings Limited. In a Judgment dated April 2021, Zacaroli J made orders for the interests held by Quastus Holdings to be transferred to the Claimants, since they represented the traceable proceeds of Extractions (see [2021] EWHC 1122 (Ch) at [118]-[127])."

8. For ease of reference I will refer to the Main Action, the Shares Claim, the Petition and the Additional Claims collectively as the "**Claims**". I will also refer to the claim against

Mishcon as the "**Mishcon Claim**", the committal application and the other enforcement action brought by the Claimants (including the *Bankers Trust* application) as the "**Enforcement Proceedings**".

(2) Rosling King's Retainer

9. In August 2017 Mr Matyas instructed Rosling King to act for him and his wife in relation to the Extractions. On 6 February 2018 they sent a Letter of Claim to Mr Wojakovski and on 6 March 2018 they issued a Claim Form on behalf of the three corporate Claimants. On 30 May 2018 Mr Wojakovski served his Defence. In a witness statement dated 3 June 2024 Ms Georgina Squire, the principal litigation partner at Rosling King, gave the following evidence about a consultation with counsel a few weeks later (references omitted):

> "51. On 15 June 2018 I attended a telephone consultation with counsel. A note of that discussion is at [20/409]. I remind myself from page one of that note that Michael Todd KC and Andrew Blake had considered the possibility of making some form of strike-out application. Counsel did not advise that a strike-out application of the type that was eventually made in November 2019 should be made at that early stage. I explain later in this statement why that did not appear feasible or advisable at that stage.
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> 52. On 4 July 2018, we attended a further telephone consultation with Michael Todd KC and Andrew Blake. A note of that discussion is at [21/411]. I remind myself from page five of that note that Michael Todd KC and Andrew Blake had considered a strike out application in relation to two discrete parts of the Defence. Neither of them would be dispositive of the claim. Again, counsel did not advise in favour of a strike out of the type contended for in the Duomatic Allegation (and, for the avoidance of doubt, counsel did not at any point during my firm's retainer advise that such a strike out application should be made). They did advise in favour of an application for an interim account if we could be sure that our own clients would make available the requisite documents that would be needed."

10. On 26 July 2018 Rosling King served a Reply on behalf of the corporate Claimants and on 27 July 2018 they issued an application for an interim account. On 8 October 2018 Mr Wojakovski served his response to a request for further information (which Mr Fulton described as "vague and ambiguous"). Telephone calls to Rosling King's offices are recorded and they have yet give disclosure of the telephone logs and recordings. However, the Claimants were able to produce WhatsApp exchange between Ms Squire

and Mr Jeremy Benjamin, Mr Matyas's son-in-law, which took place on 31 December 2018:

> "Georgina: Jeremy - to obtain SJ we have to prove on paper by the documents alone that there is no case to answer - a hint of a defence on the papers will allow E to avoid SJ. Whilst we believe we have a strong claim, Edward's defence is that Mr M consented to all he took. That issue will form witness evidence and so it is likely SJ would not be obtained. An added complication here is that Mr M signed some docs allowing some of these monies to go to Edward, so those docs dont help us [sic] and we have to explain them away through Mr M's witness evidence. Whilst we know Mr M did not consent, a judge would not give SJ until his evidence is heard and tested in court."

11. On 26 to 28 March 2019 the first CMC took place in the Claims at which Zacaroli J gave directions for the Claimants to serve schedules in a specified form of the sums which they alleged that Mr Wojakovski had extracted and also of a number of other payments concerned with his personal property. I will use the term "**Extractions**" to refer to the first category of payments and "**Personal Property Payments**" to describe the second category. The principal issue which the judge had to consider was whether to give permission for Mr Matyas to bring a double derivative claim on behalf of the Claimants against Mr Wojakovski and, if so, whether to order an indemnity out of the assets of the relevant companies. For these applications Rosling King instructed Mr Michael Todd QC and Mr Andrew Blake. On 28 March 2019 the judge gave judgment in which he made the following observations at [13] to [16] and [20]:

> "13. In the light of these authorities, Mr Todd submits that the claim in this case is clearly brought for the benefit of the companies, each of which is on the claimants' case the victim of Mr Wojakovski's misappropriation of funds. It is, he says, demonstrably a case that would have been, and indeed was, authorised by an independent director. Once that is accepted, he submits that it follows that it is appropriate that the companies' funds are used to pay for the action. For Mr Wojakovski, Mr Kitchener contends that that is an oversimplification. This is, he says, in substance a shareholder dispute, because it is Mr Wojakovski's case that Mr Matyas not only consented to the extractions made by Mr Wojakovski but also indemnified Mr Wojakovski against any claims that may be made in relation to those extractions.
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> 14. At this stage it is clearly impossible for me to conclude whether Mr Matyas or Mr Wojakovski will succeed at the end of trial. Each side has shown me evidence which, on its face, provides support for their position. I accept in the first place these are claims which properly belong to the companies. If Mr Wojakovski is correct, that all the extractions

were authorised, then that might constitute a defence to the companies' claims, but it does not in itself turn the issue into a shareholder dispute. On any view, given the nature of Mr Wojakovski's defence - which is in essence that the extractions were structured in the way they were in order to evade tax and deceive investors, all of which was approved by Mr Matyas - it is possible that his actions constituted a breach of duty to the companies irrespective of any question of authority. Equally however, if that is right, then Mr Matyas' actions (which he admits) in extracting substantial sums for himself via his own companies in a similar way, at least so far as evading tax is concerned, would also constitute a breach of duty to the companies by him, although I emphasise that Mr Matyas has recently made voluntary disclosure to HMRC in an effort to remedy the tax position. But while the actions are properly brought by the companies, it is in the context of this case appropriate to consider the economic reality that these companies are essentially in wind-down, with a view to the remaining assets being distributed to the shareholders. The only substantial asset in the Hotels Group is a single remaining hotel in Cardiff and some cash balances. The only evidence I have in relation to the hotel is that the secured lenders, as a condition to extending the term of lending, have imposed a timetable for its early sale.

15. In other words, the companies here have no substantive continuing purpose other than to be wound down for the benefit of their shareholders. In these circumstances, while it is true that the claims are for the benefit of the companies, the dividing line between benefit to the companies and benefit to Mr Matyas as a shareholder is far less obvious that it might be in other cases. I consider the approach to be followed is that identified in *Halle v Trax* and *Bhullar v Bhullar*: can I be confident that the court would at the end of the proceedings – and whatever the outcome – burden the companies and thus, to the extent that he is a 50 per cent shareholder, Mr Wojakovski with the costs of pursuing them? As to this, if Mr Wojakovski were to succeed, I find it virtually impossible to conceive the court would consider burdening any part of his interest in the companies with the costs of pursuing the claims against him. It would, to adopt the language of the Vice-chancellor in *Halle v Trax*, be quite wrong.

16. That, however, is not an end of the matter because Mr Todd stressed that any order he seeks would not be intended to operate that way. It would be without prejudice to the court adjusting the rights of the shareholders in such a way that, if he won, Mr Wojakovski's economic interests in the companies would not be burdened with any part of the claimants' costs. In other words, in reality the claimants are not seeking an irrevocable undertaking that the companies bear the costs at all, rather that Mr Matyas' economic share in the companies' assets, using that term in a colloquial not a legal sense, should be used to fund the costs of the proceedings in the interim on an ongoing basis. Mr Matyas' real problem is that, because of the deadlock in the companies, it is impossible for him to access any part of his 'share', for example through a distribution of profits. If it were clearly the case that Mr Matyas' share of the companies' assets was sufficient to cover the costs between now and the end of the

> proceedings, then the approach advocated by the Vice Chancellor in *Halle v Trax* and by Morgan J in *Bhullar* could be said to be irrelevant. There would be no unfairness in Mr Matyas' own share of the assets being used to fund the proceedings even if they were in substance for his and not the companies' benefit."
>
> "20. Turning to the red companies, the financial position here is somewhat different. It is common ground that the TGL Group holds a substantial amount of cash. Mr Wojakovski's own position has for some time been that his share of TGL is worth more than the value of the claim against him, ie it is worth more than £15 million. It necessarily follows that Mr Matyas' share is of at least that value. This is corroborated by recently filed evidence indicating that TGL has very substantial liquid assets, including approximately £24 million on deposit with RBS, plus other assets in excess of £13 million, including the debt owed by the Hotels Group, and has only relatively minor known liabilities. Even accounting for the potential liabilities to HMRC and potential liability to investors, it would appear that Mr Matyas' share of the assets is well in excess of the highest possible estimate of TGL's costs for the whole proceedings, which is approximately £4.5 million."

12. On 24 May 2019 Zacaroli J heard the second CMC. He made an order requiring Mr Wojakovski to respond to the Claimants' schedules and produce schedules of his own identifying those Extractions which he had made (the "**Extraction Schedule**") and those Personal Property Payments which he had made (the "**Personal Property Payments Schedule**") by 21 June 2024. Mr Wojakovski did not comply with that order and on 9 July 2019 Rosling King issued an application for an unless order on behalf of the Claimants.

13. At the end of July 2019, however, Mr Matyas terminated Rosling King's retainer and on 2 August 2019 Rechstschaffen Law wrote to them enclosing a notice of change of solicitor. In a witness statement dated 19 January 2024 Mr Nicholas Bird, a partner at Reynolds Porter Chamberlain LLP ("**RPC**"), the firm of solicitors acting for Rosling King, explained the reason for this as follows (references omitted):

> "…Rosling King made an inadvertent error in advising TGL on the making of a £2m loan to Mr Matyas in July 2019 in breach of an undertaking to the Court. This loan was subsequently repaid by Mr Matyas. Mr Matyas then committed at least one further breach of the undertaking, without any prior notice to Rosling King and with knowledge that it was or might be a breach of the undertaking... Rosling King advised Mr Matyas that the legal team could not go to court as was scheduled on 13 August 2019 unless he gave instructions to reveal the breaches of undertaking and address the issue fully and openly... Mr Matyas declined to give such instructions and on 2 August 2019 the

> Defendant received a letter from Rechtschaffen Law enclosing notices of change of solicitor... Rechtschaffen Law thereafter had conduct of the Wojakovski Disputes on behalf of the Claimants."

14. In his Skeleton Argument dated 14 June 2024 for the hearing before me Mr Fulton was much more critical of Rosling King's conduct and contended that they had failed to comply with their obligations under the Solicitors' Code of Conduct when Mr Wojakovski challenged the loan. He submitted that they facilitated a contempt of court and were willing to generate a misleading paper trail. It is impossible for me to determine whose description of the termination of the retainer was the more accurate on this application. But in any event, it is unnecessary for me to do so for the purposes of either application and it is obviously desirable that I should not comment further at this stage on the way in which the parties categorised Rosling King's conduct.

(3) The Rechtschaffen Retainer

15. On 23 September 2019 Rechtschaffen Law issued an application to vary the Extended Disclosure order which Zacaroli J had made at the second CMC. In support of the application Mr Shlomo Rechtschaffen, the firm's principal, made a witness statement dated 24 September 2019 in which he justified the variation of the order for the following reasons:

> "11. The variations sought by the Main Claimants on this application concern disclosures issues 1-5 in the Main Claim DRD [ref] ("the Authorisation Issues"). In broad terms, the Authorisation Issues are: (1) how much money has Mr Wojakovski extracted from the Tonstate/THHL Group, (2) how (if at all) were those extractions authorised; and (3) what was the purpose of (some of) those extractions. These are the same issues in respect of which Mr Wojakovski has failed to comply with a Court order requiring him to particularise his case (which is the subject of the Main Claimant's application for an Unless Order). The Authorisation Issues are the central issues in these proceeding: they go directly to whether or not Mr Wojakovski is liable to pay the Main Claimants' c.£.15m in damages/compensation. At present, the Main Claimants know almost nothing about Mr Wojakovski's case on the Authorisation Issues. All that can be ascertained from his pleadings is that he accepts extracting some money and he alleges that any extractions were authorised by Mr Matyas. The Main Claimants do not know how much money he accepts taking or when and how he says that he received authorisation."
>
> 13. As to the change of circumstances which justify the variation: a. First, as set out above, Mr Wojakovski has failed to comply with the Order of

> Zacaroli J dated 24 May 2019 requiring him to particularise his case on the Authorisation Issues. The result of this is that the Main Claimants are currently unable to conduct any sensible Model D disclosure exercise on the Authorisation Issues. They do know what case Mr Wojakovski is advancing and so cannot conduct a search for documents which would support it or undermine their own responsive case. For example, the Main Claimants could potentially spend hundreds of thousands of pounds searching for the alleged authorisation/s at around the time of each extraction when, unbeknown to the Main Claimants, Mr Wojakovski's case is in fact that an overarching authorisation was provided by Mr Matyas years before the extractions took place. Similarly, the Main Claimants may spend hundreds of thousands of pounds on disclosure in relation to the amount of each extraction when, unbeknown to the Main Claimants, the amounts are not in in fact in dispute. This risk of wasting enormous amounts of money is obviously deeply unsatisfactory."

16. On 23 May 2019 Mr Wojakovski terminated Mishcon's retainer and on 23 September 2019 instructed Candey LLP ("**Candey**") to act in their place. The applications for an unless order and disclosure were listed for hearing on 3 October 2019. Rechtschaffen instructed Mr Fulton to appear for the Claimants and in his Skeleton Argument for the hearing he made the following submissions (references omitted):

> "7. There are a number of points from the transcript of the CMCs which bear emphasis. As to the first CMC:
>
> a. first, the importance of obtaining clarity as to Mr Wojakovski's case on the Extractions and the Personal Property Payments was recognised at the very outset; the Judge commented that "the central issue in this entire case…is whether Mr Wojakovski was authorised to make the extractions…it needs resolving as soon as possible";
>
> b. second, it was also recognised that the claim could not really be progressed and a trial could not take place unless Mr Wojakovski had identified his case. The Judge noted that Mr Wojakovski had "not pleaded to his allegation that he made payments to the EW companies that were authorised…."; that "it seems to me that the pleadings are not ripe for disclosure yet, there are some huge gaps in them, on that issue…" and "one of [the Claimants'] main arguments seems to me that in order for this trial to take place, [the Claimants] need to have the information first. Well that's obviously right. You need to know what the issues are";
>
> c. third, Mr Wojakovski's counsel accepted the Judge's view that Mr Wojakovski's pleading was "embarrassing". In response, the Judge noted that "it is fair to say there was no attempt to engage with what you could engage with in [the Appendices to the Particulars of Claim]";
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> d. fourth, in response to a comment by the Judge that "we need to have, on the pleadings, properly defined, what the issue is in relation to each payment that is currently alleged to have been made away", Mr

> Wojakovski's counsel indicated that further detail as to Mr Wojakovski's case could be provided if the Claimants were able to provide the date of each payment;
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> e. fifth, the Judge's suggestion that the parties exchange schedules was aimed at obtaining the particulars of Mr Wojakovski's case. The Judge's view was that "what this needs is something like…Scott Schedules… something like that - where you identify such particulars as you can give in relation to every payment".
>
> 8. The order for both the Extraction Schedule and the Personal Property Payment Schedule was thus a pragmatic response, originally proposed by the Judge, to the Claimants' "Account Application", by which they had sought interim relief in the form of an order requiring Mr Wojakovski to account for the receipts by the EW Companies."
>
> "18. It is now appropriate for the Court to make an unless order as: a. first, the effect of Mr Wojakovski's non-compliance with the May Order is severely prejudicial to the Claimants' conduct of this case, given that they still do not know the case they have to meet. They do not know whether Mr Wojakovski accepts the amounts of the Extractions, they do not know whether Mr Wojakovski's case is that all of the Extractions were specifically authorised, they do not know when any authorisation is said to have taken place and they do not know how any authorisation is said to have taken place. The result is that disclosure cannot be conducted in any sort of targeted way, witness statements cannot be directed at the issues in the case and it is not possible to prepare for trial.
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> "19. The purpose of the unless order is therefore primarily to encourage Mr Wojakovski to provide the particulars of his case so that the claim can proceed to disclosure, witness statements and ultimately a trial. But if he fails to comply then the sanction of strike-out ensures that the Claimants' funds and the Court's time do not continue to be wasted. The unless order sought would be proportionate, given the track record of default and the nature the exercise, and it would be effective, in that it will either result in the necessary clarification or the striking out of a vague and unparticularised defence."

17. On 3 October 2019 Zacaroli J made an order that unless Mr Wojakovski complied with paragraph 1 of his earlier Order dated 24 May 2019 (above) and served the Extraction and Personal Property Payment Schedules, his Defence would be struck out. The judge also ordered a third CMC to be fixed on the first available date after 4 November 2019. He dismissed an application by Mr Wojakovski for an adjournment of the CMC and directed that the Extended Disclosure application should be heard at the third CMC.

18. Mr Wojakovski served the Extraction and Personal Property Payment Schedules but by Application Notice dated 11 November 2019 the Claimants applied to strike out Mr Wojakovski's Defence on the basis that he had not adequately complied with the Order

dated 24 May 2019 and served adequate Extraction and Personal Property Payment Schedules and also on the basis that his Defence disclosed no reasonable grounds for defending the Main Claim. In a witness statement dated 11 November 2019 Mr Rechtschaffen gave evidence that in the Extraction Schedule Mr Wojakowski had admitted for the first time that he had received 57 Extractions totalling £13,594,642.43 and also that there was no legitimate business purpose for the payments or any consideration received by the Claimant companies in return.

19. By letter dated 14 November 2019 Candey wrote to Rechtschaffen and a number of other individuals stating that if the strike out of Mr Wojakovski's Defence in the Main Claim was successful, it would result in a judgment of £14.5 million and his bankruptcy would follow as a matter of course. They also stated that they calculated that this would expose the parties to unpaid VAT, NICs and corporation tax of £14 million and that with interest and penalties the liability would exceed £20 million. They invited the Claimants to agree to an immediate stay of the proceedings for mediation. The letter was headed "without prejudice" but I was told that it was put before the judge at the hearing which took place on 20 November 2019 (below).

20. On 20 November 2019 Zacaroli heard the strike out application. The Claimants were represented by Mr Fulton and Mr Sam Goodman. In their Skeleton Argument dated 19 November 2019 they made the following submissions:

> "17. Quite apart from Mr Wojakovski's procedural non-compliance there is also now a quite separate basis to strike out his defence in light of his admissions for the first time in the schedule both as to the sums alleged to have been extracted and also that such payments had no legitimate business purpose. Mr Wojakovski and his solicitors appear to realise that his position on the strike-out is hopeless. Hence the response to Cs' application was not to identify any grounds to oppose it but instead to send the 14 November 2019 letter.
>
> 18. The legal point on which this limb of the application is based had been trailed at the March CMC, with exchanges between Michael Todd QC for Cs and the bench raising the possibility that Mr Wojakovski could not avail himself of a *Duomatic* defence if the purpose of the payment had been dishonest and unlawful, such as to defraud HMRC and/or the companies' investors. The discussion was brief and tentative but the doubts then expressed about ratifiability on the factual premise of Mr Wojakovski's own case were well-founded."

21. Mr Fulton and Mr Goodman also stated that the Claimants sought an order for payment

of £13.5 million together with directions for the taking of an account in relation to the use of that sum. They also submitted that in practice disclosure for the purposes of taking the account could proceed in tandem with disclosure in relation to the remaining issues in the Main Claim, the Petition and the Shares Claim. They continued:

> "35. The point of principle dividing the parties is as to whether Cs should have to give Model D (old-style standard disclosure) on all issues. Cs' position, as articulated in correspondence and which had also formed a main plank of its disclosure application, is that this would be an enormous burden which in the particular circumstances of the case is impossible to justify. Rather, the important issue of whether extractions and personal property payments were authorised should be dealt with in one of two ways (at Mr Wojakovski's option):
>
> a. Model C requests for specific categories of documents which Mr Wojakovski considers might be relevant (some of the sorts of categories he is likely to want to see are already identified in Column G of his schedule); or
>
> b. a "keys to the warehouse" approach whereby Mr Wojakovski is given access to the universe of Cs' documents, subject only to a privilege review but without filtering for relevance."

22. Candey instructed Mr Muhammed Haque QC to represent Mr Wojakowski on the strike- out application. In his Skeleton Argument dated 19 November 2019 he submitted that the only arguable derogation from the *Duomatic* principle was where the acts were ultra vires the company for an improper purpose. He also submitted that there was no improper purpose in reducing capital and making payments to entities controlled by the shareholders and that for the purposes of the strike out application it had to be assumed all the payments were for a proper purpose, namely, remuneration or reducing capital where the company was insolvent.

23. At the hearing Zacaroli J struck out Mr Wojakovski's Defence with reasons to follow. In the course of it Mr Fulton accepted that Mr Wojakovski had an arguable set off and counterclaim for £600,000 and the judge made the following Order (and the "Transactional Payments" to which he was referring were the same as the Extractions):

> "*CMC*
>
> 1. There shall be a CMC in this matter on 16 December 2019 before Zacaroli J with a time-estimate of half a day ("the December CMC").
>
> *Strike Out*
>
> 2. The First Defendant's Defence to the Main Claim is struck out insofar

> as it relates to the Transactional Payments (as defined in the Amended Particulars of Claim).
>
> 3. Judgment shall be entered in the Main Claim against the First Defendant on the Claimants' claim in respect of the Transactional Payments.
>
> 4. The First Defendant shall pay to the Claimants the sum of £12,994,642.43.
>
> 5. The First Defendant shall account to the Claimant as to: (a) what he has done with the Transactional Payments and; (b) whether he received any other sums for similar purposes from any other group company of which he was at the relevant time a director.
>
> 6. There shall be a stay of execution of paragraphs 4 and 5 above pending the December CMC."

24. On 5 December 2019 Zacaroli J handed down the *Duomatic* Judgment containing his reasons for striking out Mr Wojakovski's Defence. He summarised the substance of his defence at [5] and [6]:

> "5. EW's essential case in relation to the EW Extractions is that he and AM long ago agreed to adopt a practice, in connection with the property development deals they were involved in, of causing companies in the Tonstate Group to make payments, purportedly for the purposes of the relevant company in connection with the development, but in reality to benefit themselves at the expense of the companies. EW contends that these payments were used to disguise the profits made by the relevant company in the Tonstate Group with the purpose of defrauding, at least, the revenue. He contends that over the years AM also caused payments running to many millions of pounds to be made to companies controlled by or associated with AM (the "AM Extractions"). He says that there was an arrangement between him and AM that, at a point in time when AM decided to retire from the business, there would be an overall reckoning between them, such that they would each ultimately benefit from 50% of all the AM Extractions and the EW Extractions.
>
> 6. EW's defence to the Main Claim, therefore, is that while he accepts that the EW Extractions had no legitimate business purpose, and would therefore otherwise amount to a breach of duty, they were made with the agreement of AM and his wife and thus with the approval of all of the shareholders of the relevant companies. He relies on the *Duomatic* principle (named after *Re Duomatic Ltd* [1969] 2 Ch 365, although dating from much earlier) that the informal approval of all the members of a company is sufficient to ratify a breach of fiduciary duty."

25. The judge then recorded Mr Fulton's acceptance that it had to follow that if the strike-out application succeeded, then the "mirror image" defence which Mr Matyas had raised in the Petition (in respect of certain payments which were defined as the

"**Cavendish Payments**") was similarly defective and that some of those payments might well have constituted a breach of duty: see [9]. He then went on to consider the *Duomatic* principle and began by recording the common ground between the parties at [10] to [12]:

> "It is common ground that the Duomatic principle is subject to at least some limitation. Mr Haque accepts, for example, that it does not apply where the company is or is likely to become insolvent, consistent with the principle that where a company is or is likely to become insolvent the directors owe a duty to take into account the interests of creditors: see *BTI 2014 LLC v Sequana S.A.* [2019] EWCA Civ 112 , per David Richards LJ at [220]. He also accepted that the principle does not apply where the acts in question are ultra vires the company for an improper purpose. He contends, however, that in this case the EW Extractions were entered into for the proper purpose of remunerating directors or reducing capital at a time when the companies were solvent and, accordingly, were not caught by either of those limitations."

26. The judge then considered the decision of Flaux J (as he then was) in *Madoff Securities International Ltd v Raven* [2011] EWHC 3012 (Comm) and the suggestion that there is a wider exception to the principle based upon dishonesty. But he did not find it necessary to consider the precise limits of the principle because whatever those limits were, it could not apply to conduct which the company could not lawfully carry out itself. He stated this at [14] to [16]:

> "14. It is unnecessary, however, to consider the precise limits of an exception to the *Duomatic* principle based upon dishonesty, since whatever those limits I am satisfied that it cannot apply to conduct which the company could not lawfully carry out itself. That was the conclusion reached by Robin Knowles J in *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWHC 1257 (Comm). In that case the defendants procured that the first claimant make payments to accounts owned by the defendants against invoices falsely describing them as in respect of research and development. The purpose was to extract money for the defendants and avoid payment of tax on the payments. The first claimant sought summary judgment on the basis that the first defendant acted in breach of his fiduciary duties as a director of the claimant. The first defendant relied on the approval of the members of the company on the basis of the *Duomatic* principle. His counsel contended that the scope of the principle was something on which differing opinions had been expressed both in this jurisdiction and across the Commonwealth which made the point inappropriate for summary determination.
>
> 15. The judge disagreed, concluding that the principle did not apply in a case where the transaction was one which the company itself could not lawfully undertake: see the judgment at [16]:

> "In the present case payments were procured dishonestly; they were said to be for research and development when they were not; they were for the Defendants to have for themselves and to have in a way that dishonestly evaded the tax consequences. Whatever else may be the precise compass of the *Re Duomatic* principle, as a principle developed to save conduct it has not been developed to save conduct of this nature. The company, the First Claimant, could not do lawfully what was done and the assent of all its members could not alter that. The principle is for transactions that are "honest": *Parker and Cooper Ltd v Reading* [1926] Ch 975 at 984 (per Astbury J) cited with approval in *Randhawa and Another v Turpin and Another (as former Joint Administrators of BW Estates Limited)* [2017] EWCA Civ 1021; [2018] Ch 511 at [56]-[57] (Court of Appeal; Sir Geoffrey Vos CHC)."
>
> 16. This, being a decision of a judge of co-ordinate jurisdiction, is one which I should follow unless persuaded that it was plainly wrong. Mr Haque QC did not attempt to persuade me of that."

27. The judge also rejected an argument that the question whether the *Duomatic* principle applied was not suitable for summary judgment and the argument that the principle applied because the Extractions could have been made lawfully: see [17] and [18]. He then dealt with the question of loss at [19] before stating his conclusion at [20]:

> "19. Finally, Mr Haque submitted that the fact that payments could have lawfully been made in the amount of at least some of the EW Extractions means that the loss suffered by the relevant claimant company is less than the full amount of the EW Extractions. He refers to a similar argument made in the Auden McKenzie case. The first answer to this point is that the claimants claim, apart from equitable compensation, an account of the sums paid away by EW and payment of the sums found due under the account to the claimants. Secondly, the similar point made in the *Auden McKenzie* case was dismissed by Robin Knowles J (save insofar as the company's loss was reduced by tax rebates that it received as a result of the first defendant's dishonesty, which it should never have received and which had been repaid by the first defendant to HMRC). As he pointed out at [21] of his judgment: "There is no question that the First Defendant caused loss in the amount of the payments by reason of the breaches. If the payments had not been made unlawfully then the company would still have the money "in the till"".
>
> 20. Accordingly, the relevant paragraphs of the defence which plead a defence based on the *Duomatic* principle will be struck out."

B. The Claims against Rosling King

(1) The Assessment Proceedings

28. On 1 September 2020 the Claimants issued proceedings for the assessment of fees and disbursements totalling £5,540,909.19 which Rosling King had charged between August 2017 and July 2019. On 1 September 2021 an order was made by consent for detailed assessment on the basis that all of the bills which Rosling King had issued were *Chamberlain* bills and on 14 July 2022 Rosling served a detailed breakdown of those fees and disbursements

29. On 21 March 2023 the Claimants served Points of Dispute (the "**POD**") which provided for Rosling King and the costs officer's decision to be included in the same schedule (rather like a Scott schedule). On 12 May 2023 they later served revised POD. The Claimants took a number of general points (each a "**GP** and together the "**General Points**") of which the first four are relevant to the issues which I have to decide. The Claimants described GP1 as "aimlessness" and after itemising nine separate workstreams they set out the following criticisms of Rosling King's conduct:

> "All but one of these – 5402-00001-6 'Unfair Prejudice Petition (TPD Investments)' – arose out of a dispute between the Claimants and Edward Wojakovski ('EW'), the son-in-law of Arthur Matyas ('AM') and Renate Matyas ('RM'), the Fourth and Fifth Claimants in these proceedings. That is, a total of £5,161,382.12 including VAT, or £4,396,605.75 excluding VAT, was charged by the Defendants to the Claimants over the period late August 2017 to 31 July 2019 (a period of just over 22 months) for work arising from the dispute with EW. AM was the controlling mind of the Claimants. He was also however an elderly man (born in 1932) who was deeply distressed and rendered intensely emotional by the betrayal of his son-in-law, EW. Given the strength of his grievance, AM was highly motivated to litigate aggressively against EW.
>
> However, it was not in the interests of any of the Claimants to become embroiled in ever more expensive "no holds barred" litigation against EW. Whatever the animus of AM against EW, it was the task of those instructed to progress the interests of the Claimants in a coherent, diligent, purposeful and cost-effective manner, yet there is no evidence that the Defendant formulated a clear and coherent litigation strategy after early settlement attempts failed. In particular, the Defendant should have identified the available strategic options and advised the Claimants in writing of the pros and cons of each and likely attendant costs."

30. The Claimants described GP2 as "Inquorate Companies" and contended that Rosling King had incurred costs unreasonably in failing to anticipate the resignation of a director before making the double derivative claim. The Claimants described GP3 as "The Defendant's failure to appreciate the limits of the '*Duomatic Principle*'" and

made the following additional criticisms:

> "In his Defence, filed on 30 May 2018, EW pleaded that the extraction of funds had been agreed by AM, the other shareholder in the Claimant Companies. This was an invocation of the principle arising from *Re Duomatic Ltd* [1969] 2 Ch 365, that a director in breach of duty to the company will have a defence to a claim if his actions were ratified by a unanimous vote by the shareholders of the company ('the *Duomatic* Principle'). The *Duomatic* Principle cannot apply however where the act or acts are ultra vires the company or for an improper purpose, such as fraud. EW expressly admitted to a sustained and deliberate fraud upon HMRC in his Defence. The Defendant failed to appreciate and advise the Claimants that EW could not defend the claim by relying on the Duomatic Principle. The factual dispute over whether AM knew about and authorised EW's extractions was irrelevant since the payments were not ones which the Claimant companies could ever lawfully make. Such unlawful payment was plainly ultra vires. Any application to strike-out would not have required evidence as it would have rested on a point of pure legal principle based upon EW's own admission in his pleadings as to the unlawful purpose of defrauding HMRC. Rather than be proactive and strategic, the Defendant was reactive to EW. As a result, enormous costs were incurred without the dispute being very far advanced by the time the Claimants instructed alternative solicitors."

31. The Claimants also contended that this failure was compounded by the failure to appreciate the significance of the comments made by Zacaroli J in his judgment at the CMC and that Rosling King should have advised the Claimants to apply to strike out Mr Wojakovski's Defence in June 2018 when the relevant companies would also have been quorate. Finally, the Claimants described GP4 as "The Loan" and made the following criticisms of Rosling King's conduct:

> "During the course of the Case Management Conference in March 2019 and in the context of the debate about how the litigation was to be funded, undertakings were given through MTQC on behalf of the Claimant Companies and AM and RM and were recorded in the final order dated 28 March 2019. The undertakings were that: 'until the trial of the Claims or further Order of the Court and except with the prior consent in writing of Mr Wojakovski: (1) Mr and Mrs Matyas shall not transfer or in any way whatsoever dispose of or deal with the shares in TGL registered in their names or either of them; and (2) Mr and Mrs Matyas and TGL shall not cause or, in so far as they are in a position to do so, allow to be made any dispositions from the assets of TGL or its subsidiaries otherwise than in the ordinary course of business.'
>
> Plainly, those undertakings prevented the Claimant Companies from giving, or AM from taking, a loan from the Claimant Companies for the financing of the litigation and the payment of the Defendant's fees. The

> Defendant nevertheless allowed – and indeed, advised – AM to take such a loan and acted for the Claimant Companies in documenting the loan to AM with associated board resolution. Georgina Squire (the Defendant's matter partner) ("GNS") advised that it was possible to borrow money from the First Claimant in order to pay the Defendant's fees and she said that she would ask her colleague, Alexander Edwards, to draw up the necessary documentation. AM eventually borrowed £950,000, of which around £728,000 was used to pay the Defendant's bills. The agreed facility was £2 million on the Defendant's advice, so that their future bills were secured. On the day the loan completed, 3 July 2019, GNS sent a text message requesting that the monies borrowed be used to pay immediately the invoices of the Defendant. This loan put AM in clear breach of the undertakings and amounted to a contempt of court. It came about through the Defendant's negligence (GNS told AB on 25 June 2019 that "we forgot about the undertaking"). The result of the loan was the occasion of a contempt application by EW that was only forestalled by immediate repayment of the loan. Not only was the Defendant negligent, this episode was the result of a clear conflict of interest, because the purpose of the loan was to pay the Defendant's bills. The costs charged by the Defendant to the Claimants in connection with the loan have been unreasonably incurred."

32. On 18 July 2023 Rosling King served their Points of Reply (the "**POR**") in which they denied each of these allegations. On 29 August 2023 a first hearing took place in the Assessment Proceedings. By this time the Claimants had issued the Claim Form in the present proceedings (to which I will refer as the "**Negligence Claim**"). By letter dated 6 September 2023 Rechtschaffen wrote to Rosling King agreeing not to pursue GP2 to GP4 in the Assessment Proceedings and proposing a stay until the Negligence Claim had been determined. They also addressed the question of causation:

> "The counterfactual scenario in which you gave our clients the advice which ought to have been given following receipt of EW's defence will be informed by what actually happened when our clients took the point. The strike out application was successful and judgment was entered against EW for around £13 million. Following that judgment, EW's unfair prejudice petition ("the Petition") was stayed pending a trial of the Shares Claim and some remaining issues in the Main Claim. A settlement was reached before the trial took place. Because of his failure to satisfy the judgment against him, EW was made bankrupt. The Petition has remained stayed with the result that the proceedings between our clients and EW are in practical terms at an end save for enforcement proceedings and contempt of court proceedings against EW.
>
> Had you given appropriate advice upon receipt of EW's defence, our clients would have made the strike out application which they in fact made and it would have succeeded. The Petition was issued on 10 August 2018 and the alleged basis for it was that it was unfairly oppressive for

> the companies to claim back their money from EW. If you had acted as you should have done, then either the Petition would not have been issued at all (since there was no benefit to EW in doing so while an application to strike out his defence to the Main Claim was on foot) or, if it was issued, it would have been stayed pending determination of the strike out application and would have remained stayed thereafter. Either way, our clients would not have had to deal with the Petition.
>
> The Shares Claim and Part 20 Claim might well still have been issued, but establishing EW's liability in the Main Claim and bankrupting EW would have reduced the costs of them as EW would have lost a lot of his leverage with judgment against him and the taking over of EW's litigation by his trustee in bankruptcy meant that the proceedings in fact progressed – and would have progressed – more smoothly and less contentiously.
>
> This would have saved our clients a huge amount in costs as follows. Firstly, our clients would have avoided all of the costs billed on the Main Claim and the Derivative Claim from 1 July 2018 (one month after service of EW's Defence). These amount to around £3 million. You are not entitled to credit for the cost of taking the steps which should have been taken, because our clients incurred the cost of taking those steps when they instructed this firm.
>
> Secondly, our clients would have avoided all of the costs of the Petition, which you billed in the total sum of around £500,000.
>
> Thirdly, our clients estimate that they would have saved 30% of the costs of the Part 20 Claim and the Shares Claim. That is a deliberately conservative estimate for these purposes and our clients reserve the right to argue in the negligence proceedings that the savings would in fact have been greater than this. For present purposes, that aspect of their loss is valued at around £55,000.
>
> The total of the figures above is £3,555,000, which is almost 65% of the total amount billed to our clients by you. That is without taking into account additional losses resulting from the allegations relating to aimlessness and the loan. In those circumstances, it would make no sense to incur the costs of progressing the detailed assessment before the negligence claim has been resolved."

33. On 19 September 2023 a further hearing took place. In his Skeleton Argument for the hearing Mr Jamie Carpenter KC, who appeared for the Claimants, invited the Court to stay the proceedings pending the determination of the Negligence Claim. He stated that the Court had already indicated that GP1 could be dealt with in the Assessment Proceedings. He also summarised the Claimants' case on GP1 and addressed the merits of dealing with all four General Points in the Negligence Claim as follows (references omitted):

> "57. The essence of the point is that D failed to consider the strategic options and put in place a clear and cost-effective plan for the litigation. Instead, the EW Dispute was allowed to drift and D operated in a way which was reactive to EW rather than proactive. As well as at the outset, the PoDs identify five specific points when the future conduct of the case should have been considered.
>
> 58. Determining this Point will involve the Court answering the following questions:
>
> (a) What sort of roadmap for the litigation should D have come up with?
>
> (b) What were the different strategic options?
>
> (c) How much would each of them have cost?
>
> (d) What should Cs have been told about the cost-benefit analysis for each option?
>
> 59. Those are the same sorts of questions that the Court answers when dealing with complaints about costs estimates not being given. Determination of the point will not require lengthy or apparently any cross-examination. D have already written that they do not see any need for evidence (see their letter of 3 August 2023).
>
> 60. Points 2 to 4 undoubtedly raise issues of professional negligence. However, they are all discrete issues. None involves extensive factual investigations. It has already been noted that D considers that no evidence is required. Point 4 is already the subject of an effective admission of D's negligence.
>
> 61. However, Cs do not dispute that Points 2 to 4 would be better determined in the Negligence Proceedings than in these proceedings. That is a reason to stay them (and indeed the whole proceedings), but it is not a reason to strike them out.
>
> 62. It is submitted that Point 1 is suitable for determination in these proceedings, whether or not they are stayed."

34. Mr Roger Mallalieu KC, who appeared for Rosling King, submitted in his Skeleton Argument that the four General Points should be struck out whether or not a stay was granted on the basis that they were "bad" PODS which did not satisfy the requirements for a solicitor and own client assessment. In particular, he submitted that the allegation of aimlessness failed to satisfy the requirements of CPR Part 47 and PD8. He also submitted that the Negligence Claim was a bad one and bound to fail. Ms Squire stated in her witness statement for the Defendant's Application that the Assessment Proceedings have now been stayed pending resolution of the Negligence Claim. She did not suggest that any of the General Points had been struck out or that the Court had found that they were bound to fail.

(2) The Negligence Claim

35. On 19 December 2022 Rechtschaffen Law sent a Letter of Claim to Rosling King in which they advanced three complaints which broadly corresponded to GP1, GP3 and GP4 (above). They did not advance a separate claim in relation to GP2. In relation to GP1 and the allegation of aimlessness Rechtschaffen Law referred to Rosling King's engagement letters in which they had stated that they would review costs on a regular basis and not less than every six months and also that they would take instructions before taking any steps which might involve costs which would be more difficult to recover. They then continued:

> "We have seen no evidence of any such periodic review of the costs being incurred, nor of any focus upon proportionality. As to obtaining instructions before launching expensive applications, it does not appear that you gave your clients the advice they were entitled to expect in relation to the costs implications of such steps. We emphasise again in this context that the cost of all such steps was "doubled up" due to Mr Wojakovski's use of Tonstate funds to pay Mishcon and the One Essex Court team. The acid test as to the aimlessness and financial profligacy of your firm's strategy is that by the end of your retainer, and with millions having been spent, all our clients had to show for that expenditure were some pleadings, permission to pursue the derivative actions and an undertaking from Edward not to deal with his shares. At no point were our clients advised that they might need to spend so much in order to be left with so little. It is not good enough for you to assert, without evidence, that questions of costs and strategy were discussed orally. If such discussions were in meetings then a proper attendance note ought to have been kept. If such discussions were over the telephone then we note that your firm appears to have had a system for recording and transcribing such calls. Moreover, if you wish to assert that strategic advice or warnings about costs were given but ignored then you will need to adduce the evidence. If only for their own self-protection, any solicitor concerned that their clients are acting contrary to their advice will take the obvious precaution of setting out that advice in writing. It seems to us also that considered, written advice was particularly important in the context of a very elderly man such as Mr Matyas whose judgement was inevitably clouded by the emotions of the case."

36. On 11 August 2023 the Claim Form was issued indorsed with Particulars of Claim. Given that the Claimants propose to amend the Particulars of Claim, it is sufficient only to set out the Claimants' case in relation to the *Duomatic* principle in the original form in which this allegation was pleaded:

> "14. The relevant background to this specific allegation of negligence is

as follows:

a. Mr Wojakovski's pleaded defence to the claim for the return of the Extractions (first appearing in a Defence served on 1 May 2018) was that they had been authorised by Mr Matyas in his capacity as shareholder;

b. this was also the main plank of both his unfair prejudice petition (in that it was said to be unfair for the companies to pursue him over authorised conduct) and of his defence to the claim for the rescission of the transfer to him of shares in TGL (which he said was made with full knowledge of the Extractions);

c. Mr Wojakovski's admitted purpose in making the Extractions was to defraud (at least) HMRC;

d. Mr Matyas vehemently denied ever knowing about, let alone authorising or ratifying, the Extractions;

e. the factual dispute about Mr Matyas' knowledge would be the costliest issue to resolve in the whole of the litigation, including because of the potential scope of disclosure;

f. if there had been a trial in 2020 as planned then Mr Matyas, by then an 88 year-old man, would have been put under the strain of extensive cross-examination in respect of events dating back 20 years;

g. any competent solicitor would in the circumstances have sought to investigate whether any legal shortcut was available;

h. it was in any event part of RK's general duty to exercise reasonable care and skill in the conduct of the retainers to consider and advise upon whether an opponent's arguments were legally viable.

15. For the reasons given by Zacaroli J in a judgment of 5 December 2019 (see [2019] EWHC 3363 (Ch)), given after RK had come off the record and in response to the strike-out application which the Claimants' new solicitors had made, Mr Wojakovski's arguments as to Mr Matyas' authorisation were not legally viable and the Tonstate group companies were as a matter of law entitled to recover the Extractions without the need to resolve the factual issues about what Mr Matyas knew and consented to. Because of the admittedly unlawful and improper purpose of his Extractions, Mr Wojakovski was unable to rely upon the "Duomatic" principle to ratify his breaches of fiduciary duty.

16. It was negligent for RK to have failed to identify that Mr Wojakovski's pleaded case was as matter of legal analysis untenable. RK's initial failure to advise on the point following receipt of the Defence was compounded by the failure to revisit the point even after reference was made during a March 2019 CMC to the potential limitations of the Duomatic principle and Zacaroli J observed in his Judgment of 28 March 2019 .17. Moreover, RK was acting not only for Mr Matyas personally but also for, and for the benefit of, companies within the Tonstate group, both directly (in the case of TGL, TEL and Dan-Ton) and indirectly via the Court's permission to pursue derivative actions on behalf of deadlocked companies. RK was therefore under a duty to those companies to consider whether they might be entitled to the

> return of any of the sums which Mr Matyas had taken from the companies without the appropriate tax having been declared and paid. As anticipated in the 28 March 2019 Judgment at [14] and reflected in the 5 December 2019 Judgment at [9], the same logic of companies' claim against Mr Wojakovski might require Mr Matyas to make such repayments. (After the Claimants' change of representation, and the striking-out of Mr Wojakovski's defence, Mr Matyas did in fact make such voluntary repayments without objection)."

37. On 11 October 2023 RPC served the Defence. I set out or consider Rosling King's pleaded case in relation to the aimlessness allegation in greater detail below. But their defence to the *Duomatic* claim involved two principal strands. The first was that Zacaroli J was wrong to determine the *Duomatic* point against Mr Wojakovski on a summary judgment application. The second was that it was reasonable for them to take the view that it was not advisable to make such an application. They pleaded both of these points in the summary of their Defence:

> "The Duomatic allegation is misconceived. In short:
>
> 11.1 Mr Wojakovski's pleaded defence in the Main Action which relied on the allegation that all shareholders in TGL knew of and had authorised his extractions should not have been struck out. It raised legal and factual issues which should not have been determined on a summary application.
>
> 11.2 In any event it was reasonable for any lawyer who was under a duty to consider whether Mr Wojakovski's said defence should be struck out to take the view that an application to strike out was inadvisable. It was reasonable to take that view in July 2019; it was, a fortiori, reasonable to take that view in 2018 following receipt of Mr Wojakovski's Defence, because at that point Mr Wojakovski's case as to the quantum of and as to the justification for the alleged extractions was not fully known.
>
> 11.3 Further and in any event, the question whether Mr Wojakovski's reliance on the allegation that all shareholders in TGL knew of and had authorised his extractions was tenable as a matter of law raised complex issues of company law which a reasonably competent commercial solicitor would refer to specialist company law counsel. The case pleaded herein against Rosling King in that respect is necessarily founded on the proposition that any reasonably competent commercial solicitor would have recognised that Mr Wojakovski's reliance on the authorisation by all shareholders of his extractions was bad in point of law and was therefore liable to be struck out. That proposition is not articulated in the Particulars of Claim and is unsustainable.
>
> 11.4 Yet further, counsel (Mr Todd KC and Mr Blake) did not advise at any point that Mr Wojakovski's case as to reliance on shareholder authorisation of the extractions was liable to be struck out. For the avoidance of doubt, they were entirely correct not to give such advice. Rosling King was entitled to suppose that counsel would have advised if

> any significant point in Mr Wojakovski's Defence in the Main Action was bad in point of law and therefore liable to be struck out, and reasonably relied on the absence of any advice to that effect."

38. They also pleaded that the Claimants' analysis of the legal principles governing Mr Wojakovski's defence was simplistic and in certain respects wrong (see paragraph 25) and pleaded a positive case that the correct analysis was as follows (paragraph 26):

> "26.1 Mr Wojakovski's pleaded case in the Main Action and in the Petition was that Mr Matyas had authorised the extractions, and that both he and Mr Matyas had extracted money from the Tonstate companies on the basis of an express agreement or understanding that there would in due course be a reckoning which would ensure that each received a fair share of the money that was available for distribution during the existence of the companies and on the companies' corporate lives coming to an end.
>
> 26.2 It is true, as stated at paragraph 14(d), that Mr Matyas vehemently denied knowing about, let alone authorising, Mr Wojakovski's extractions. It is noted that the Particulars of Claim in this action do not aver Mr Matyas's denial that he had any knowledge of the extractions at the time at which they were taking place was truthful.
>
> 26.3 There existed documentary and circumstantial evidence which supported Mr Wojakovski's factual case as to Mr Matyas's knowledge of the extractions. The said evidence was extensively discussed in the skeleton argument dated 24 March 2019 prepared by Mr Wojakovski's counsel, Mr Kitchener KC and Mr Harty, for the first CMC in the Main Action and in the Petition. Rosling King will refer to that document, and to the evidence referred to in it, to the extent that it may be necessary to do so at trial or any earlier application for summary relief.
>
> 26.4 The Tonstate Group, and in particular TGL, was at all material times highly profitable, asset-rich, and able lawfully to make distributions of profits to shareholders in accordance with the provisions of Part 23 of the Companies Act 2006.
>
> 26.5 Mr Wojakovski and Mr Matyas, had they wished to do so, could have taken the money which they covertly extracted from the Tonstate companies by reference to fictitious transactions by, instead, taking steps to arrange for distributions of profits to be made lawfully in accordance with the said statutory provisions.
>
> 26.6 The covert extraction of money by Mr Wojakovski and Mr Matyas was a fraud on the Revenue. It was not in any relevant sense a fraud on the company in question (in particular, TGL).
>
> 26.7 In the Main Action the Claimants sought an order that Mr Wojakovski repay to TGL the extracted monies.
>
> 26.8 Mr Wojakovski's plea that all shareholders had authorised the extractions was legally relevant and capable of giving him a complete or,

alternatively, at least a partial defence to the claim for the repayment of the extracted monies. The defence could be put in one of two ways.

26.9 First, it was well arguable that the Duomatic principle was engaged. The Claimants argued before Zacaroli J. on 20 November 2019, and contend herein, that the fact that the extractions were dishonest and unlawful in that they were a fraud on the Revenue meant that the Duomatic principle could not be engaged. Counsel for Mr Wojakovski did not develop any sustained argument to the contrary, and Zacaroli J. accordingly decided the application before him on the basis that the said argument accurately stated the law. It did not. The correct analysis is that the Duomatic principle is not displaced merely by proof that the relevant transaction was dishonest or unlawful; it is only displaced where the relevant transaction involved dishonesty or bad faith directed towards the company. Rosling King will refer in particular to *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21 at paragraphs 31 to 46 per Lord Burrows and *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287 at paragraphs 56 to 58 per Nugee LJ. The extraction of money from a solvent and profitable company by shareholders, where authorised by all shareholders, and where there is no prejudice to creditors, does not involve dishonesty or bad faith being directed towards the company in any relevant sense and the Duomatic principle is capable of being engaged as a matter of law.

26.10 Second, in a case where the money that was covertly extracted could have been taken as a lawful distribution of profits, an issue arises as to the nature and extent of the relief to which the company is entitled against the extracting party. It is well arguable in such a case that the court should not order that the extracting party must pay equitable compensation in respect of his default which is equivalent to the full sum extracted. Zacaroli J. considered an argument by counsel for Mr Wojakovski to this effect at paragraph 19 of his judgment, citation number [2019] EWHC 3363 (Ch). He dismissed the argument, relying on a decision of Knowles J. in *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWHC 1257 (Comm). Auden McKenzie was a case that in certain respects resembled the case brought against Mr Wojakovski. However, after the hearing before Zacaroli J., the decision of Knowles J. was reversed by the Court of Appeal: [2019] EWCA Civ 2291. The court decided that the issue as to the quantum of equitable compensation to be paid by a shareholder who had unlawfully extracted money which could have been lawfully extracted by way of a distribution of profits was not fit for summary disposal and should go to trial.

26.11 In the foregoing premises, the decision of Zacaroli J. that Mr Wojakovski had no arguable defence to a claim for the repayment of all monies extracted from TGL and accordingly that summary judgment should be entered in the relevant sum was wrong."

39. Rosling King admitted the Particulars of Claim, paragraphs 14(a) to 14(f) (above) but pleaded that it would not have been obvious to a reasonably competent solicitor that

there was an advantageous shortcut. They admitted the *Duomatic* Judgment but denied paragraph 16 of the Particulars of Claim (above) and asserted that Mr Wojakovski's case was not legally untenable for the following reasons:

> "30.1 First, Mr Wojakovski's case was not legally untenable. Paragraph 26 of this Defence is repeated.
>
> 30.2 Second, it was in any event (supposing, which was not so, that Mr Wojakovski's case was legally untenable) open to reasonably competent counsel to form the view that Mr Wojakovski's case was legally tenable.
>
> 30.3 Third, whether any point in Mr Wojakovski's Defence in the Main Action which raised complex and relatively obscure issues of company law was susceptible to summary disposal was a matter for the specialist company law counsel retained by Rosling King, not for Rosling King (unless so obvious that it was a point that no reasonably competent solicitor could overlook). Mr Todd KC and Mr Blake considered the Defence; settled a Reply thereto; and, on 4 July 2018, considered whether there were matters in the Defence which were liable to be struck out. Rosling King was entitled to consider that, and it was the case that, Mr Todd KC and Mr Blake did not consider that Mr Wojakovski's reliance on Mr Matyas's knowledge and authorisation of the extractions was susceptible to being struck out. Mr Todd KC and Mr Blake were in all the foregoing premises entirely correct to take that view. Even if (which is not so) they were incorrect to take that view, Rosling King was entitled to rely on their view and reasonably did so.
>
> 30.4 Fourth, as a matter of causation, even if (which is not so) Rosling King was under a duty to ask counsel whether Mr Wojakovski's said case was susceptible to being struck out, any omission to do so was inconsequential since counsel would have advised that it was not.
>
> 30.5 Fifth, even if (which is not so) Mr Wojakovski's said case was legally untenable, it would have been premature and unfeasible to make any application for summary relief until clarification had been obtained as to the quantum of the relevant extractions and as to the reasons for those extractions. Counsel advised in 2018, entirely correctly, that the best course was to force Mr Wojakovski to account in the relevant respects. An order for the provision of accounts by way of responsive schedules was made on 28 March 2019 by Zacaroli J. That order was amended on 25 May 2019, providing for Mr Wojakovski to provide an account as to extractions by 21 June 2019 and as to personal property payments by 19 July 2017. The fact that the making of this account permitted the summary judgment application to be made was expressly recognised by counsel for the Claimants when making submissions to Zacaroli J:
>
> > *"And it – it may come as a great surprise to your Lordship that we take that point now, given that there were exchanges at the earlier hearing about it. Now that more attention has been paid to that aspect of it, and in particular we say that what has made the difference ... what makes – makes the difference is that now Mr*

> *Wojakovski, in his schedules, has admitted both the amounts of the payments in order to crystallise the sum on which the inapplicability of Duomatic bites and also has admitted that there was no purpose for the – the payments connected to the lawful purposes of the company. It was simply a means of diverting sums away for at least himself and he says also Mr Matyas. So we say it's a very narrow factual point which doesn't require any factual enquiry."* [emphasis added]
>
> 30.6 Sixth, the striking out of Mr Wojakovski's case as to authorisation of the extractions by Mr Matyas did not remove the need for a factual enquiry into that matter, which remained relevant to the Petition and to the Shares Claim."

(4) The Proposed Amendments

40. At the end of the hearing Mr Fulton indicated that he wished to put forward draft amendments to the Particulars of Claim and Mr Lawrence did not object to him putting the proposed draft before the Court (without making any concession that he was entitled to permission to amend). I set out the principal allegations below together with the proposed amendments. Mr Fulton identified the proposed amendments by using a red font. I use the traditional method of underlining them below (and references below are to the draft Amended Particulars of Claim unless otherwise stated).

(i) Aimlessness

41. The Claimants' case is that Rosling King were generally aimless in the conduct of the disputes, that no proper strategic advice was given, that no discussion of the likely costs or any cost/benefit analysis took place and that there were no periodic reviews. Mr Fulton originally pleaded this case in paragraph 3(a) and it remains in its original form:

> "RK's general aimlessness in the conduct of the disputes, in which the Claimants paid more than £5.7 million in legal costs, of which more than £4 million were RK fees, before the disputes had even reached the disclosure stage, there having been no proper strategic advice from Rosling King, no proper discussion of likely costs, no cost/benefit analysis, and none of the periodic cost reviews which Rosling King had expressly agreed to provide."

42. The Claimants also rely on statements in Rosling King's engagement letters that they would review costs on a regular basis but not less than every six months, that they would try to ensure that costs were proportionate and that they would take instructions prior to taking any step which might involve costs which would be difficult to recover:

see paragraph 7. They now propose to amend to allege the following breaches of duty:

> "10. The duty to exercise reasonable skill and care in the overall conduct of the Retainers required RK to have regard to the following considerations:
>
> a. Mr Matyas was born in 1932 and so was 85 years' old at the inception of the first of the Retainers;
>
> b. in addition to his advanced age, Mr Matyas was intensely emotional in relation to what he perceived as a betrayal by Mr Wojakovski and the impact upon the family of the Extractions;
>
> c. given the strength of his grievance, Mr Matyas was highly motivated to litigate aggressively against Mr Wojakovski;
>
> d. it was plainly not, however, in his, his wife's or the Tonstate group companies' interests to become embroiled in ever more expensive "no holds-barred" litigation with Mr Wojakovski;
>
> e. in the circumstances, it would have been particularly appropriate for RK to set out clearly in writing the available strategic options, along with an explanation of the financial implications and suggestions as to how costs might be minimised.
>
> 11. In breach of duty, and without any adequate regard to the above considerations, RK failed to provide any such written advice or explanations about the overall conduct of the litigation. Further particulars of strategic options are set out at Annex A. The approach in fact taken by RK corresponds to the "Maximum" options in terms of aggressiveness and cost. Properly advised, the Claimants would likely have pursued the "Moderate" option. The only cost estimate that the Claimants can identify as having ever been provided were some headline figures in an email of 15 October 2018, to which Mr Matyas was copied (but which he cannot recall reading) in the context of a potential security for costs application against Mr Wojakovski. The Claimants do not believe that these figures were ever discussed with them by RK. The estimate of £3.5 million of taking the claim to trial is in any event now shown to be a gross underestimate given that RK spent over £5.7 million on the pleadings phase alone. The discipline of producing, discussing, agreeing (and where necessary revising and updating) costs estimates would of itself have substantially reduced the costs to the Claimants of the litigation. RK would have conducted the litigation with the estimates in mind and/or written off some or all of the excess costs insofar as they were unjustifiably exceeded.
>
> 11A. A further means of exercising cost control would have been by way of costs management under the supervision of the Court pursuant to CPR 3.1-3.18 and PD3D. RK's stance in this regard was conveyed in a call with counsel on 20 September 2018: "we don't want to do costs budgets as it is just so much work". The Claimants can find no record of the pros and cons of costs budgeting being explained to them, despite the obvious benefits to the Claimants of the discipline which costs budgets would have imposed.

12. RK was in any event in breach of the express duties identified at paragraph 7 above to review costs with the Claimants at least every six months and to have regard to the proportionality and potential difficulties of recovery from Mr Wojakovski of the costs being incurred. The discipline of periodic reviews would have caused the Claimants and RK to focus on burn rate and cost-effectiveness and helped to reduce overall costs. As to proportionality, Mr Wojakovski's own costs in respect of the identical disputes were around £4.5 million such that the total costs incurred on both sides were over £10 million (in respect of a dispute worth c.£14.5 million) before the disputes had even progressed beyond the pleadings stage. RK had done little or nothing to try to ensure that costs remained proportionate to the amounts at stake. Moreover, RK had failed to warn the Claimants as to the likely difficulty in recovering costs from Mr Wojakovski. Had warnings been given then they would have been heeded and costs reduced accordingly.

13. RK's breaches of duty in failing to consult with, inform and advise the Claimants in advance of costs being incurred, or to undertake the periodic reviews of costs as required by the Retainers, were further compounded by the format of RK's invoices which provided no breakdown of the time spent on different tasks. Although Mr Matyas knew in general terms (and was anxious about) what he and TGL were spending on RK they had no proper visibility of how that money was being spent, whether such time was reasonable, and how it might be reduced. Had RK provided clearer and more detailed billing information then RK would either have themselves recognised that the times being charged were excessive and reduced their bills accordingly, or the Claimants would have been able to make specific challenges to the bills, prior to payment. Either way, the overall costs to the Claimants would have been reduced.

13A. The Claimants recognise that complaints of overcharging and the absence or inadequacy of estimates can in principle be dealt with in the Senior Courts Costs Office. Indeed, the Claimants have issued a separate action in the SCCO to challenge RK's bills which is stayed to await the outcome of this action. However, such complaints can be (and are here) relied on as a breach of duty and an aspect of RK's systematic mishandling of the litigation. This is not only actionable as a standalone breach but is also important context to the Court's consideration of the Duomatic and Loan allegations set out below. The Claimants anticipate that an assessment of the detailed financial implications of all such complaints will be more conveniently remitted to the SCCO. In the meantime, any fragmentation of the dispute between this action and the SCCO would be inefficient, chaotic and likely to obstruct a just disposal of the Claimants' allegations by denying to any single judge the full perspective of RK's incompetence."

43. Annex A pleaded in paragraph 11 (as it is proposed to be amended above) is headed "Matrix of Potential Strategic Options" and it consists of a table which sets out in detail the options which the Claimants allege that Rosling King ought to have given them at

five different stages of the litigation running from late 2017 or early 2018 to the first CMC in March 2019.

(ii) Duomatic

44. The Claimants have made a minor amendment only to paragraph 14 and paragraph 15 remains unchanged. However, they now propose to make more substantial amendments to paragraph 16 and to add two further paragraphs as follows:

> "16. It was negligent for RK to have failed to identify that Mr Wojakovski's pleaded case was as a matter of legal analysis untenable. A reasonably competent solicitor would have recommended promptly upon receipt of the Defence that the Claimants: (a) apply to strike it out insofar as it wrongly relied upon the Duomatic principle; and (b) postpone a Reply and minimise expenditure on other workstreams whilst awaiting a determination of that critically important legal point. Had such advice been given then it would have been accepted by the Claimants, given that it was overwhelmingly in their interests and a far more cost-effective route to advancing the Claimants' position in the litigation than any other available option. (Alternatively, a reasonably competent solicitor would have at least presented the Claimants with the option of a strike-out application which they would have taken.) RK's initial failure to advise on the point following receipt of the Defence was compounded by the failure to revisit the point even after reference was made during a March 2019 CMC to the potential limitations of the Duomatic principle and Zacaroli J observed in his Judgment of 28 March 2019 ([2019] EWHC 857 (Ch) at [14] that Mr Wojakovski's tax-evading Extractions were possibly a breach of duty to the Claimant companies "irrespective of any question of authority". Had a strike-out application been made at any point during RK's engagement then it would have succeeded, saving substantial costs on unnecessary workstreams and improving the Claimants' position as against Mr Wojakovski in the litigation generally.
>
> 16A. As to the saving of costs and the improvement in the Claimants' position, the Claimants rely on the following as the most likely counterfactual:
>
> a. Mr Wojakovski's unfair prejudice petition would never have been issued (because its core premise that the attempted recovery of the Extractions was unfair would have been absent) or, if issued, would have been stayed to await the outcome of the strike-out application, thereby saving the Claimants all or substantially all of the costs of engaging with the petition;
>
> b. the Claimants would have obtained (by June or July 2018) judgment against Mr Wojakovski as to his breaches of duty, an order that he give an account of his Extractions and what had become of those Extractions, a declaration of trust over such Extractions and their traceable proceeds as remained under Mr Wojakovki's control, and a costs order;

> c. upon the giving by Mr Wojakovski of an account which identified the traceable proceeds of the Extractions, the Claimants would have been able to trace into and recover those assets, just as they have done since obtaining orders against Mr Wojakovski in November 2019 and January 2020;
>
> d. given the dramatic deterioration of his negotiating leverage, Mr Wojakovski would have settled Mr and Mrs Matyas' claim for the return of shares on similar terms to those which he in fact accepted in May 2020, i.e. surrendering 75% of his shares in TGL and abandoning his claims against Mr Matyas for an indemnity or to enforce the alleged "Cheshbon" agreement;
>
> e. Mr Wojakovski would have failed to comply with costs against him and would as a result have been made bankrupt, as he was in October 2020.
>
> 16B. The elements of the counterfactual described above correspond to what in fact happened after a replacement legal team took over from RK in August 2019. The application to strike out the defence would most likely have needed to be accompanied by an application for permission to pursue claims derivatively on behalf of deadlocked companies in the group but such an application would have been straightforward if it could be shown that Mr Wojakovski's only defence to the claim for the return of the Extractions was legally misconceived."

(iii) Joint Retainer

45. One of the points which the Claimants took in the Particulars of Claim was that Rosling King were acting not only for Mr Matyas but also for TGL and other companies in the THH Group and that they owed a duty to the companies to consider whether they might have a claim against him as well as a claim against Mr Wojakovski. They now propose to amend to expand that case:

> "17. Moreover, RK was acting not only for Mr Matyas personally but also for, and for the benefit of, companies within the Tonstate group, both directly (in the case of TGL, TEL and Dan-Ton) and indirectly via the Court's permission to pursue derivative actions on behalf of deadlocked companies. RK was therefore under a duty to those companies to consider whether they might be entitled to the return of any of the sums which Mr Matyas had taken from the companies without the appropriate tax having been declared and paid. As anticipated in the 28 March 2019 Judgment at [14] and reflected in the 5 December 2019 Judgment at [9], the same logic of companies' claim against Mr Wojakovski might require Mr Matyas to make such repayments. (After the Claimants' change of representation, and the striking-out of Mr Wojakovski's defence, Mr Matyas did in fact make such voluntary repayments without objection). If RK had not negligently overlooked the Duomatic point then they would not have caused substantial costs to be

> incurred on preparing pleadings in both the "Main Claim" and the "Petition" which (a) relied upon a Duomatic defence to receipts by Mr Matyas which mirrored Mr Wojakovski's defence but as explained at paragraph 9 of Zacaroli J's 5 December 2019 judgment was legally "defective"; and (b) set out in exhaustive detail a factual response as to Mr Matyas' ignorance of the Extractions which on a proper legal analysis was irrelevant.
>
> 17A. Paragraphs 16 and 17 above identify the costs which could have been saved in relation to the procedural conduct of the litigation. In fact, competent solicitors in the position of RK would have identified and advised in late 2017/early 2018 based on instructions from Mr Matyas, without prejudice negotiations and pre-action correspondence with Mishcon de Reya that repayments needed to be made by both Mr Matyas and Mr Wojakovski, regardless of who was telling the truth about what may or may not have been known about and agreed between them. No such solicitor would in those circumstances have recommended the sort of aggressive, inflammatory and expensive litigation as conducted by RK. Had the correct points been deployed at the correct time then it would have been possible to lower the temperature of the dispute and potentially avoid some or all of the litigation altogether.
>
> 17B. The Claimants would probably have pursued a more conciliatory strategy if only the position had been properly explained to them. They recognise, however, that its outcome would have depended on how Mr Wojakovski and his advisers responded. The Claimants therefore seek damages under this head based on the loss of a chance of avoiding litigation. Any costs in the litigation to which RK might otherwise establish an entitlement fall to be reduced because of the chance that such costs could themselves have been avoided if RK had given proper advice before they were incurred."

(iv) Cumulative Effect

46. The Claimants' third claim against Rosling King mirrors GP4 (above) and relates to the loan made in breach of the undertakings. The Claimants also pleaded in the Particulars of Claim and continue to plead that the cumulative effect of all three separate claims (the aimlessness, Duomatic and loan claims) demonstrated that Rosling King were out of their depth:

> "26. The three discrete heads of complaint set out above demonstrate that RK was unable to:
>
> a. formulate a coherent strategy, commit its advice and recommendations to writing or to exercise appropriate control over spiralling costs;
>
> b. identify the obvious legal defects in the other side's case; or
>
> c. keep track of the orders and undertakings within which its clients were required to operate.

> 27. In the circumstances, and having regard to the cumulative effect of these failures, the Claimants will invite the Court to infer that RK was significantly out of its depth in trying to run litigation of this nature."

(v) Loss and Damage

47. The Claimants alleged in the Particulars of Claim that their losses as a result of all three claims amounted to £3.2 million. They now propose to amend to plead that these losses should be the subject of assessment either in this action or in the Senior Court Costs Office (the "**SCCO**") and also to plead in addition a "loss of a chance" claim:

> "28. As a result of RK's breaches of duty, the Claimants have suffered loss and damage as summarised at paragraph 4 above. This will need to be the subject of separate assessment, whether in this action or in the SCCO (see paragraphs 5 and 13A above).
>
> 29. The Claimants' best estimates on present information are as follows:
>
> a. since the failure to identify the Duomatic point is an aspect of the wider aimlessness and absence of strategy, the Claimants take those two complaints together and estimate their losses at around £3 million (net of VAT), equivalent to around 75% of the fees after the Defence was filed;
>
> b. in respect of the loan agreement, the Claimants estimate the duplicated costs of having to engage a fresh legal team at around £200,000 (net of VAT);
>
> c. the Claimants' total losses are therefore estimated to be in the region of £3.2million, not including the loss-of-a-chance claim."

(vi) Summary

48. The Claimants set out a summary of their claims at the beginning of the Particulars of Claim. I have already set out paragraph 3(a) and Mr Fulton summarised the *Duomatic* claim in paragraph 3(b) (to which a minor amendment is proposed). He summarised the Claimants case on causation and loss in paragraphs 4(a) and 4(b) to which the following amendments are proposed:

> "4. The Claimants have suffered substantial loss and damages as a result of RK's breaches, including (but not limited to):
>
> a. the fees paid to Rosling King in the litigation having been out of all proportion to the value to the Claimants of the services provided, and far in excess of the level of fees which would have been incurred if Rosling King had communicated properly with the Claimants about costs and not allowed them to spiral out of control;
>
> b. the costs unnecessarily incurred by (i) missing the opportunity to strike

> out Mr Wojakovski's defence, (ii) pleading back to Mr Wojakovski's allegations on a legally flawed and irrelevant basis and (iii) otherwise undertaking work which would not have been undertaken if RK had correctly understood the relevant legal principles and their strategic implications;"

III. The Issues

49. The Claimants' Application gave rise to a pure question of law. Mr Fulton did not submit that it was an abuse of process for Rosling King to challenge the *Duomatic* Judgment or a collateral attack on that decision. He adopted the simple position that they were wrong as a matter of law to challenge Zacaroli J's decision because it was right and that, as a consequence, the Court should strike out paragraphs 11.1, 25, 26.8 to 26.11 and 30.1 of the Defence (which I have set out above) together with paragraph 29 (in which Rosling King admit the *Duomatic* Judgment).

50. Mr Lawrence submitted that this approach was simplistic and wrong in the light of later authorities. But he also submitted that if the Defendant's Application succeeded, the Claimant's Application would cease to be relevant because the Court would have struck out the *Duomatic* claim altogether. Rosling King invited the Court to strike out paragraphs 10 to 18, 26 and 27 and 29(a) and 29(c) of the Particulars of Claim above. They also invited the Court to strike out the relevant parts of the summary.

51. I accept Mr Lawrence's analysis and I propose to deal with the issues in the following order. First, I will decide whether the aimlessness and *Duomatic* claims should be struck out either in their original form or in the form in which Mr Fulton proposed to amend them. Secondly, I will consider whether the court should grant reverse summary judgment on each of those claims whether in their original or in their proposed amended form. Thirdly, and finally, if the Defendant's Application fails on either basis, I will decide the Claimant's Application and whether to strike out those paragraphs in the Defence in which Rosling King challenge the *Duomatic* Judgment.

IV. Determination

C. The Defendant's Application

52. Mr Lawrence submitted (and I accept) that a statement of case must plead the material facts so that the opposing party is able to admit or deny the relevant allegations and

thereby define the issues for decision: see *Boake Allen v HMRC* [2006] EWCA Civ 25 at [131] (Mummery LJ). He also relied on the observations of David Richards LJ (as he then was) in *UK Learning Academy v Secretary of State for Education* [2020] EWCA Civ 370 at [47]:

> "I would add here that I endorse the view expressed by the judge to the parties at the trial and repeated in his judgment at [11] that the statements of case ought, at the very least, to identify the issues to be determined. In that way, the parties know the issues to which they should direct their evidence and their challenges to the evidence of the other party or parties and the issues to which they should direct their submissions on the law and the evidence. Equally importantly, it enables the judge to keep the trial within manageable bounds, so that public resources as well as the parties' own resources are not wasted, and so that the judge knows the issues on which the proceedings, and the judgment, must concentrate. If, as he said, there was "a prevailing view that parties should not be held to their pleaded cases", it is wrong. That is not to say that technical points may be used to prevent the just disposal of a case or that a trial judge may not permit a departure from a pleaded case where it is just to do so (although in such a case it is good practice to amend the pleading, even at trial), but the statements of case play a critical role in civil litigation which should not be diminished."

53. In *Civil Procedure* (2024 ed) Vol 1 at 3.4.2 (p. 94) the editors of the White Book also state that where a statement of case is found to be defective, the Court should consider whether the defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend. With these principles in mind I now consider whether I should strike out the aimlessness claim or the *Duomatic* claim.

(1) The Aimlessness Claim

(i) CPR Part 3.4(2)(a)

54. Mr Lawrence submitted that the aimlessness claim was pleaded in a cursory and wholly unparticularised way. In particular, he submitted that no case was pleaded as to the gist of the oral advice which Rosling King gave on the available strategic options. He also submitted that the reader was wholly in the dark as to the strategic options which the Claimants alleged that Rosling King should have identified and whether they identified any of them at all. He also submitted that no proper case had been pleaded in relation to causation or loss and that it was not appropriate to combine the claims to produce a

single estimate of loss.

55. Mr Fulton submitted that the aimlessness allegation was adequately pleaded and that Rosling King were fully aware of the case which they had to meet. In particular, he relied on the Assessment Proceedings, the Letter of Claim and Rechtschaffen Law's letter dated 6 September 2023. He also submitted that no request for further information had been made and that if Rosling King did not understand any of the issues which Mr Lawrence had identified, they would have made such a request. Finally, he reminded me that the Claimants had never suggested that "aimlessness" was a cause of action and that this was no more than shorthand for the allegations of breach of duty which were properly pleaded in paragraphs 10 to 13 of the Particulars of Claim.

56. In my judgment, the Particulars of Claim set out the necessary ingredients of a claim for professional negligence and, in particular, the elements of both a claim for damages for breach of contract or damages for negligence including both causation and loss or damage. My analysis of the Claimants' case is as follows:

    (1) The Claimants rely on the express terms of Rosling King's retainer to review costs on a regular basis and not less than once every six months and also to take instructions before taking any steps which would involve costs which might be difficult to recover: see paragraph 7.

    (2) The Claimants also allege that it was an implied term of the retainer that Rosling King would exercise reasonable skill and care and that they owed a duty of care in tort: see paragraph 8.

    (3) The Claimants make a number of allegations of breach of duty which they might have pleaded in a more orthodox fashion but which are nevertheless clearly set out in paragraphs 11 to 13:

        (a) Rosling King failed to provide written advice or explanations about the overall conduct of the litigation.

        (b) Rosling King failed to comply with the express terms of their retainer to review costs every six months or to have regard to the proportionality or difficulty of recovering the costs being incurred from Mr Wojakovski. In

fact, they only provided a single estimate in an email dated 15 October 2018 and that was inadequate.

(c) Rosling King failed to consult with, inform or advise the Claimants in advance of costs being incurred or to undertake periodic reviews of costs. In particular, their invoices provided no breakdown of the time spent on different tasks.

(4) The Claimants allege that the fees which the Claimants paid to Rosling King were far in excess of the fees which they would have incurred if Rosling King had communicated properly with the Claimants about costs and not allowed them to spiral out of control: see paragraph 4(a).

(5) Finally, the Claimants estimate that they are entitled to recover approximately £3 million (net of VAT) in respect of all three claims: see paragraph 29(a). But in any event, they seek an assessment of their damages: see paragraph 5.

57. I am also satisfied that paragraph 4(a) contains an adequate plea of causation and both paragraphs 4(a) and paragraph 29(a) contain an adequate plea of damage. The Claimants' case, as I understood it, is that if Rosling King had complied with the express terms of their retainer and exercised the skill and care to be expected of a reasonably competent solicitor in budgeting and reporting on costs, the discipline of this process would have resulted in them charging the Claimants far less and that the saving from this together with the savings which would have been made if Rosling King had taken the *Duomatic* point much earlier and had not advised the Claimants to make the loan would have resulted in an overall saving of £3 million in costs.

58. I am prepared to agree with Mr Lawrence that the Claimants' case in relation to both causation and damage is pleaded in very general terms. But it is trite law that the same loss may be caused by concurrent breaches of duty and Mr Lawrence did not provide me with any authority for the proposition that the Claimants were not entitled to claim damages for the cumulative effect of all three pleaded breaches of duty. I am not prepared, therefore, to strike out paragraphs 26 and 27 as a matter of law.

59. Moreover, in my judgment it is desirable that the costs judge ought to assess the quantum of any damage which the Claimants may have suffered if and when this Court

has determined the issues of liability and causation in the Negligence Claim. Although no case management directions have yet been made to this effect, I take the view that I can properly take this into account in determining the Defendant's Application (and, if necessary, I will make the relevant case management directions myself).

60. Indeed, if Rosling King had made a request for further information of the damage which the Claimants alleged that they have suffered, it would have been sufficient for the Claimants to plead that their case was set out in the POD in the Assessment Proceedings and that once this Court had resolved whether Rosling King were negligent and what the consequences would have been, the precise amount of any loss would be determined in the Assessment Proceedings. If Rosling King had objected to Mr Fulton incorporating these documents by reference or annexing the specific documents to any response, the Claimants could have cut and pasted the relevant paragraphs into the Particulars of Claim.

61. Finally I accept that the Claimants pleaded that Rosling King failed to give strategic advice in the summary in paragraph 4(a) (above) but did not plead what advice they should have given or what the consequence would have been in the particulars in paragraphs 11 to 13. But in my judgment this is not a valid criticism. The aimlessness claim is directed at the manner in which Rosling King gave advice, the frequency with which they did so and their failure to identify the relevant costs risks involved. Mr Carpenter KC fully articulated the Claimants' case in paragraphs 56 to 58 of his Skeleton Argument (above). The substance of the advice which Rosling King either gave or did not give is the subject of the *Duomatic* allegation and I consider Mr Lawrence's criticisms in that context below. I therefore dismiss Rosling King's application to strike out the aimlessness claim under CPR Part 3.4(2)(a).

(ii) CPR Part 24.2(a)

62. Rosling King admit that they issued seven engagement letters to the Claimants between 1 September 2017 and 9 July 2019. They also admit that three of those engagement letters contained the statements in paragraph 7. They also admit that it was an implied term of each retainer that they would exercise reasonable care. Their defence in relation to the aimlessness case in paragraphs 11 to 13 (as originally pleaded) was as follows:

> "23.1 The breach of duty alleged in paragraph 11 is denied.

> 23.2 The Claimants, and in particular Mr Matyas, were kept fully informed as to the costs being incurred on the various cases and workstreams by invoices that were sent to them by Rosling King as the cases progressed. Mr Matyas was in contact with Rosling King on a day-to-day basis. He would often call Ms Squire or other members of the team on multiple occasions in one day. The level of costs being incurred and to be incurred was frequently discussed.
>
> 23.3 It is denied (if alleged) that Mr Matyas did not read the email of 15 October 2018. He was accustomed to pay close attention to communications from Rosling King about the litigation, and then to raise any issues or concerns by telephone.
>
> 23.4 The estimate of £3.5m was reasonable, having regard to the position at that time. The Particulars of Claim do not plead any case to the contrary, since they merely refer to the fact that by the end of the retainers in July 2019 costs of c. £5.7m had been incurred.
>
> 23.5 The first sentence of paragraph 12 erroneously treats passages in engagement letters as contractual terms giving rise to unqualified obligations. Rosling King's relevant contractual obligation was to exercise reasonable skill and care, having regard to the content of the engagement letters and to the scope of the retainers. It did so in relation to the provision of costs information, as in relation to other matters.
>
> 23.6 It is admitted and averred that Mr Wojakovski and his lawyers conducted the litigation with great energy and aggression, in a way that inevitably led to very substantial costs being incurred on both sides. That was not something which Rosling King was able to control.
>
> 23.7 The said paragraphs are admitted to the extent set out above and are otherwise denied.
>
> 24. If paragraph 13 is intended to make a further allegation of breach of duty, that allegation is denied. The invoices provided sufficient information. It was not the case that, and the Particulars of Claim do not allege that, Mr Matyas was deprived of information about costs which would have made any difference to any decision that he took in relation to his dispute with Mr Wojakovski."

63. None of the relevant engagement letters were in evidence and I was not taken to Rosling King's standard terms or any of their invoices. It is not possible for me to decide, therefore, whether the Claimants have no real prospect of persuading the Court that the extracts in paragraph 7 were express terms of the retainer. If they were, that is sufficient in itself to dispose of the application for reverse summary judgment because Rosling King do not expressly aver that they reviewed with the Claimants the costs incurred on a six monthly basis. Nor do they aver that they took instructions before taking any steps to recover costs which might be more difficult to recover. It may well be that any breaches of these express terms did not cause loss. But this must be a matter

for trial.

64. Further, Rosling King did not adduce any evidence to support the positive averment that they kept the Claimants fully informed about costs and that Mr Matyas called Ms Squire and other members of the team on a daily basis. As I have indicated above, Rosling King have not yet disclosed the recording of any telephone calls and none of them were put in evidence before me. Indeed, there was no evidence which would justify the conclusion that the defence in paragraph 23.2 (above) was bound to succeed. In his Skeleton Argument Mr Fulton submitted as follows:

> "53. Cs' basic point is that solicitors who saw fit to bill £5.7m in fees and disbursements should be in a position when challenged to identify, with specificity and supporting documentation, what they actually told their clients in order to enable those clients to make an informed choice about whether to incur costs at that sort of level and to incur a corresponding adverse costs exposure.
>
> 54. One would expect to see: written advice on merits; explanations and recommendations as to overall strategy; cost estimates as to specific applications and other steps to implement such a strategy; cost/benefit analysis of different options; and periodic reviews of overall costs, with a clear focus at all times upon proportionality and recoverability. RK's Defence contains no detail of any such communication of information to their clients, nor did any of that sort of document appear in their Initial Disclosure. Cs say that little or no such documentation was ever provided to them."

65. It may well be that Rosling King will answer these points convincingly and in full at trial. But I accept Mr Fulton's submission that on an application for summary judgment, it would be necessary for Rosling King to provide a substantial suite of supporting documentation of the kind which he set out in this passage in order to persuade the Court that the Claimants had no real prospect of success. I am satisfied, therefore, that the Claimants have a real prospect of success on both the terms of the contractual retainer and breach of duty.

66. Perhaps because of the high hurdle which Rosling King had to overcome on this application, Mr Lawrence focussed his submissions on causation and loss. I have already dismissed Rosling King's application to strike out the Claimants' case that the breaches of duty had a cumulative effect. Moreover, they did not suggest that the costs judge held that GP1 was unarguable or bound to fail on the evidence. In my judgment, the Claimants have a real prospect of persuading that Court that if Rosling King had

undertaken regular costs reviews at no less than six monthly intervals or given clear advice about the costs risks before undertaking any major step in the Claims, then the Claimants would not have authorised them to incur all of the costs for which they were billed. The purpose of terms is to impose a discipline on solicitors and to ensure that they only incur substantial costs with the informed consent of the client.

67. Furthermore, Rosling King do not aver that they gave estimates of costs apart from an estimate of £3.5 million to take the claim to trial in an email dated 15 October 2018. In my judgment, the £2.2 million difference between this estimate and the total amount which Rosling King charged the Claimants imposes an evidential burden on them to justify the additional fees which they charged. It may well be that Rosling King will discharge this burden fully by reference to the advice which they gave. But this must also be a matter for trial. For these reasons, therefore, I dismiss the application for reverse summary judgment in relation to the aimlessness claim.

(iii) The Amendments

68. If I am wrong and the aimlessness claim should be struck out, I am satisfied that this is one of those cases in which it is appropriate to give the Claimants an opportunity to cure any defects in the Particulars of Claim by amendment. There is a significant overlap between the Negligence Claim and the Assessment Proceedings and the Claimants have given Rosling King notice of their case in those proceedings and, in particular, in the POD and in Mr Carpenter's Skeleton Argument.

69. In the event, Mr Fulton elected to submit draft amended Particulars of Claim without waiting for the outcome of the Defendant's application and I am satisfied that they meet Mr Lawrence's objections. In my judgment, paragraph 11 (as amended) and Annex A provide adequate particulars of the strategic advice which the Claimants allege that Rosling King ought to have given, paragraphs 11A, 12 and 13 provide further and specific particulars of the breach of duty, paragraph 11 pleads the causative effect of the alleged breaches of duty and in paragraph 13A the Claimants invite the Court to remit the question of quantum to the SCCO to be dealt with in the Assessment Proceedings.

70. In my judgment, the proposed amendments to the aimlessness claim are coherent and properly particularised and are not merely arguable but carry the necessary degree of conviction to justify permission to amend: see *Kawasaki Kisen Kaisha Ltd v James*

Kemball Ltd [2021] EWCA Civ 33 at [18](1) and (2). However, if Rosling King wish to oppose the amendments either on the grounds that they are not supported by the evidence or on discretionary grounds, I will give directions for the issue and hearing of a formal application for permission to amend.

(2) The Duomatic Claim

(i) CPR Part 3.4(2)(a)

71. Mr Lawrence submitted that the *Duomatic* claim (as pleaded) was incoherent because Mr Wojakovski's case that Mr Matyas authorised the Extractions was relevant not only to his defence in the Main Claim but also to his case in both the Shares Claim and the Petition. He argued that because the Claimants had accepted that the question of Mr Matyas's authority would be the costliest issue to resolve, no legal shortcut was available: see paragraphs 14(e) and (g); and he submitted that for this reason it was necessary to scrutinise closely the breach of duty which Rosling King were alleged to have committed.

72. Mr Lawrence also submitted that the Claimants had not alleged that Rosling King failed to give advice but only a failure to identify the fact that Mr Wojakovski's pleaded case was not tenable as a matter of law. He argued that there were two fatal flaws in the Particulars of Claim. First, they did not set out what advice Rosling King should have given and, secondly, no case was advanced at all in relation to causation.

73. Although there is force in these criticisms, I would not have struck out the Particulars of Claim (in their original form) but would have followed the guidance in the White Book and given the Claimants an opportunity to amend. I have reached this conclusion for the following reasons:

(1) In my judgment, paragraph 14 is neither inconsistent nor incoherent. The Claimants' case is that because the Shares Claim and the Petition were a mirror image of the Main Claim and the question of authority would be costly to try and put a heavy burden on Mr Matyas, a competent solicitor would have been looking for an alternative resolution without incurring the costs of a trial and subjecting Mr Matyas to the burden of giving evidence. I am satisfied that the Claimants have pleaded reasonable grounds for the allegation that a duty arose to investigate

whether there was an available legal shortcut.

(2) I am not satisfied that the distinction which Mr Lawrence drew between identifying a point of law and giving advice is any more than a semantic one. A solicitor who has identified an important point of law on which their client is bound to succeed is usually under a duty to point it out to the client. The Claimants' case is not that Rosling King spotted the *Duomatic* point but then failed to point it out but that they failed to spot it at all. The allegation of negligence is that they failed to analyse the facts and the law or both. Again, I am satisfied that the Claimants have pleaded reasonable grounds for the allegation of breach of duty.

(3) I accept Mr Lawrence's submission that the Claimants do not set out what advice they say Rosling King ought to have given and what instructions Mr Matyas would have given if he had received that advice. However, it is not difficult to spell out the answers to these questions. Mr Fulton pleaded that Mr Wojakovski's pleaded case was untenable for the reasons given in the *Duomatic* Judgment and he summarised the reasoning: see paragraph 15. He also pleaded that Rosling King owed a separate duty to consider whether the Claimant companies might be entitled to recover payments from Mr Matyas: see paragraph 17. Finally, he also pleaded that the Claimants had suffered substantial loss and damage because they missed the opportunity to strike out Mr Wojakovski's defence: see paragraph 4(b).

(4) In my judgment, therefore, it was obvious that the Claimants were alleging that Rosling King had failed to identify the point of law which Zacaroli J had decided in their favour in the *Duomatic* Judgment, that if they had done so, they would have advised the Claimants to apply to strike out Mr Wojakovski's defence and that, if such an application had been made at an early stage of the proceedings, it would have succeeded and the Claimants would have avoided substantial costs. Again, I am satisfied that the Claimants have pleaded reasonable grounds for these elements of their claim.

(5) However, where I agree with Mr Lawrence is that the Particulars of Claim contain no allegation that Mr Matyas would have accepted their advice.

Furthermore, it is not self-evident that he would have accepted this advice early on in the Claims and, in any event, it would still be necessary for the Claimants to plead that he would have done.

(6) Nevertheless, I would have refused to strike out the *Duomatic* claim and given the Claimants an opportunity to amend because Rosling King were fully aware of the case which they had to meet. Rechtschaffen Law set out their case in detail in their letter dated 6 September 2023 to Rosling King less than a month after the Claim Form was issued. Indeed, Mr Lawrence described this as their "real" case in his Skeleton Argument and was ready to address it in relation to the reverse summary judgment limb of the Defendant's application.

(ii) CPR Part 24.2(a)

74. Mr Lawrence also submitted that the Claimants' "real" case had no real prospect of success because there was no point in making a strike-out application until Mr Wojakovski had finally made the admissions in the Extractions Schedule. He argued that it was within the range of reasonable conduct to compel Mr Wojakovski to provide the Extraction Schedule before applying to strike out his defence and that it would always have been necessary to have this information before the Claimants could obtain a money judgment and enforce against him. He also argued that the question of authority would have remained material and would have been the subject of disclosure and evidence.

75. In addition to the material which I have set out in section II (above) Mr Lawrence took me to a letter dated 31 January 2018 in which Mishcon had sought disclosure of Mr Matyas's disclosures to HMRC in respect of the Extractions. He relied on the fact that Mr Wojakovski had made "tit for tat" disclosures to HMRC in relation to Mr Matyas' own conduct and that the Claimants were forced to deal with these disclosures in their Reply. He submitted that this letter and the Reply demonstrated that even if the Claimants had made the strike out application much earlier, they would not have avoided incurring the costs of disclosure across all of the Claims.

76. Ms Squire also gave detailed evidence in her witness statement for the Defendant's Application that there were practical reasons why it was necessary to obtain an order for an account. Mr Lawrence took me to Ms Squire's evidence about her discussions

with counsel, the attendance of the consultation dated 4 July 2018 and the WhatsApp exchange with Mr Benjamin (and I have set out extracts from both in section II above). He submitted that Ms Squire's evidence and these documents demonstrated that the Claims had no real prospect of success on the allegation of breach of duty.

77. Finally, Mr Lawrence also took me to Mr Rechtschaffen's witness statement dated 24 September 2019 and Mr Fulton's Skeleton Argument for the hearings on 3 October 2019 and 20 November 2019 in support of his submission that it would always have been necessary to obtain an order compelling Mr Wojakovski to produce the Extraction Schedule. He submitted that the Claimants have no real prospect of demonstrating that they would have avoided a substantial element of the costs even if Rosling King had identified the *Duomatic* point as a legal shortcut much earlier in time. He also submitted that these documents demonstrated that the Claimants had no real prospect of success in relation to causation and damage.

78. These arguments may well succeed. But in my judgment, they all gave rise to complex issues of fact which I cannot determine on a summary basis and Mr Lawrence was in substance inviting me to embark on a mini-trial in order to determine them. The authorities state that this is an invitation which the Court should refuse to accept on a summary judgment application: see, e.g., *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J) cited with approval in *AC Ward & Son Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24]. I have reached this conclusion for the following reasons.

(i) The *Duomatic* principle

79. The Claimants' original case was that Rosling King failed to identify or spot the point that Mr Wojakovski was not able to rely on the *Duomatic* principle and that this point would provide a successful argument for striking out Mr Wojakovski's Defence. Ms Squire gave evidence in answer that the parties and their advisers were aware of this point by the first CMC but considered it necessary to clarify the amount and justification for the Authorisations before the point could be taken.

80. Mr Fulton challenged this evidence on the basis that Ms Squire's witness statement was served very late on 3 June 2024 (and only six days before exchange of Skeleton Arguments were due). He also submitted that her evidence was an attempt to "pivot

away" from the pleaded defence that the *Duomatic* Judgment was wrong to a different case that Rosling King were alive to the argument but were biding their time before deploying it: see Ms Squire's witness statement at paragraphs 51 and 71. Finally, he submitted that the basis for the potential strike out application which Rosling King were considering in June and July 2018 was completely different.

81. Mr Fulton also relied on the fact that Rosling King did not appear to have understood the significance of their retainer from the corporate Claimants and failed to advise them that they had the right to demand the return of payments not only from Mr Wojakovski but also from Mr Matyas. He drew attention to correspondence in which Mishcon had raised this issue and Rosling King's potential conflict of interest and also to Ms Squire's witness statement dated 21 March 2019, which she made in the Main Action and in which she stated that it was a "nonsense" to suggest that the Cavendish Payments were Mr Matyas' extractions or in any way comparable to the Extractions or the Personal Property Payments.

82. I am not satisfied that the Claimants have no real prospect of success at trial on this issue and, in my judgment, it can only be resolved with the benefit of full disclosure, witness statements and cross-examination. The trial judge may well accept Ms Squire's evidence that she was aware of the *Duomatic* point from the outset of the Main Action. Indeed, Mr Wojakovski's principal defence to the claim was that Mr Matyas had authorised the Extractions. However, the trial judge may also accept that Rosling King did not appreciate the significance of the point, that it was no answer to the proprietary claim by the corporate Claimants that Mr Matyas had authorised the Extractions on a reciprocal basis and that it provided a potential legal shortcut to the determination of the Main Action. This must be a matter for trial.

83. But in any event, the Claimants now seek to amend to plead that a reasonably competent solicitor would have recommended a strike-out application on receipt of the Defence and, in my judgment, this allegation has a real prospect of success. Moreover, the Claimants may succeed whether or not Rosling King were aware of the significance of the *Duomatic* point and its potential as a legal shortcut. Given the significance of the point and the individual circumstances upon which the Claimants rely in paragraph 14, it is at the very least arguable that this is a point on which Rosling King ought to have given detailed advice and given their clients an opportunity to make an informed

decision whether to make a strike-out application as soon as possible. It may well be that Rosling King are able to point to such advice or persuade the Court that in context the advice which Ms Squire gave to Mr Benjamin in December 2018 discharged Rosling King's duty. But, again, these are all matters for trial.

(ii) Breach of Duty

84. Mr Lawrence submitted that to make out a case of negligence the Claimants have to establish that no reasonably competent solicitor would have taken the view that it was appropriate to compel Mr Wojakovski to disclose the amount and justification for the Extractions before applying to strike out. He also submitted that the Claimants had no real prospect of success on that issue because Mr Rechtschaffen accepted that this was reasonable in his witness statement dated 24 September 2019 and Mr Fulton accepted this too in his Skeleton Arguments for the hearings on 3 October 2019 and 20 November 2019. Mr Lawrence placed particular emphasis on Mr Fulton's first Skeleton Argument in which he described the application for an interim account as a "pragmatic response" and gave a number of reasons why it had been necessary to pursue that application first.

85. Mr Fulton did not challenge the test as formulated by Mr Lawrence. He submitted that the statements upon which Mr Lawrence relied were "presentational" in the sense that he had to present the strike-out application in the most favourable light and give the judge a good reason for the Claimants' delay in making the strike-out application and a good reason why the judge should hear it at the resumed CMC. He also submitted that if the Claimants could and should have made the strike-out application much earlier even without the benefit of the Extractions Schedule, the Court could still have made a declaration that the corporate Claimants were entitled to the return of all sums extracted and the necessary orders and inquiries to work out the judge's decision would have cost considerably less than they did.

86. I accept that it is necessary for the Claimants to demonstrate not only that Rosling King might have adopted a different strategy but that no reasonable solicitor would have adopted the strategy which they chose. I also accept that Mr Rechtschaffen's witness statement and Mr Fulton's Skeleton Arguments provide evidence that they accepted that Rosling King's strategy was a reasonable one. However, I am not satisfied that this

provides a complete defence or that the Claimants have no real prospect of establishing that Rosling King acted in breach of duty for the following reasons:

(1) Mr Rechtschaffen and Mr Fulton had to give the Court an explanation for the failure to take the *Duomatic* point at any time before November 2019 and they could not have been expected to be critical of the Claimants' former legal team for failing to take this point at a much earlier stage. Indeed, it would not have been in the interests of their clients to do so.

(2) Mr Rechtschaffen's witness statement and Mr Fulton's Skeleton Arguments described their predecessors' strategy as a pragmatic one and explained the benefits of adopting that strategy. But they did not contain any statements to the effect that the Claimants could not have taken the *Duomatic* point any earlier or that there would not have been a costs saving if they had done so.

(3) Mr Fulton did not deny that there was a practical benefit to the Claimants in compelling Mr Wojakovski to provide the Extractions Schedule before making the strike-out application. His submission was that the Claimants would have improved their position and made considerable costs savings if they had made the strike-out application much earlier (and this submission is reflected in paragraph 16A of the draft Amended Particulars of Claim).

(4) Moreover, even if the Court finds that Rosling King's strategy was within the range of conduct which a reasonable solicitor could have adopted, this is not an answer to the Claimants' case that they embarked on that strategy without giving the Claimants any advice about the benefits of that strategy or explaining the alternatives and their benefits.

(iii) Causation

87. The Claimants now wish to amend to plead that if Rosling King had recommended that they apply to strike out Mr Wojakovski's Defence, they would have accepted that advice. Mr Matyas did not make a witness statement in answer to the Defendant's Application or in support of the proposed amendments. However, I am not prepared to grant the Defendant's Application purely because the Claimants have failed to file evidence to substantiate their case on causation. I have reached this decision for the

following reasons:

(1) Mr Fulton took me through the history of the two Applications and the correspondence. He submitted that the Defendant's Application was originally made on a very limited basis and that the scope of Rosling King's challenge only became clear when RPC served Ms Squire's witness statement dated 3 June 2024 together with an exhibit of more than 1,000 pages. I accept that this evidence was served late and that the Claimants did not have a full opportunity to respond to it.

(2) But in any event, the Claimants are entitled to ask the Court to draw the inference that they would have given instructions to make the strike-out application given their conduct after the appointment of their new legal team and once the point had been taken. On 2 August 2019 Rechtschaffen served notice of change and the application was heard on 20 November 2019.

(3) Rosling King may persuade the trial judge that Mr Matyas would have given different instructions a year earlier when the Claimants' legal advisers and he did not have the benefit of the Extractions Schedule. But, again, this must be a matter for trial.

(4) Finally, it seems to me that the fair way to approach this issue is to require the Claimants to issue an application for permission to amend and to give Rosling King an opportunity to oppose it. Such an application must of course be supported by evidence to establish a factual basis which meets the merits test: see *Kawasaki* (above) at [18] (Popplewell LJ).

88. Mr Lawrence's principal argument on causation was that even if the Claimants had made a strike out application, it would not have been possible to make an application for a quantified sum, that the question of authorisation would have remained a material issue in the Claims as a whole and that it would still have been necessary to carry out disclosure and prepare witness statements. Again, I am not satisfied that this provides a complete defence to the Negligence Claim or that the Claimants have no real prospect of proving that they would have made substantial costs savings if they had made a strike-out application at a much earlier stage. I have also reached this conclusion for the following reasons:

(1) Zacaroli J considered that Mr Wojakovski's only defence in the Main Claim was to rely on the *Duomatic* principle and that it was bound to fail: see his judgment at [2021] EWHC 1122 (Ch) (above). It also appears that once the judge had decided the strike-out application against Mr Wojakovski, the parties had settled or resolved all of the Claims within a period of five months (although full disclosure has not yet been given for this period).

(2) In my judgment, the Claimants have a real prospect of persuading the trial judge that they would have achieved the same or substantially the same outcome if they had made the strike-out application immediately after the service of the Defence. The judge ordered a series of further accounts against both Mr Wojakovski and Mr Matyas, stayed the Petition and directed a trial of the Shares Claim with certain additional issues to commence on 18 June 2020. I cannot be satisfied at this stage that the Claims would have taken a materially different course if Mr Wojakovski had not provided the Extractions Schedule before the strike-out application had been heard and it had also been necessary for the judge to make an order for him to account for the Extractions.

(3) In particular, I am not satisfied that the judge would not have made substantially the same directions with the same outcome even if the Claimants had been unable to quantify the Extractions before the strike-out application. The judge stayed the judgment debt until 31 March 2020 and if he had made an order requiring Mr Wojakovski to account for the Extractions, it is possible that the Claimants would have obtained the Extractions Schedule, quantified the Extractions and obtained an order for payment before the period of that stay had expired. I cannot be satisfied, therefore, that the Claims would have had a materially different outcome if the strike-out application had been issued immediately after the service of the Defence.

(4) The strike-out application also prompted Candey's letter dated 14 November 2019 in which Mr Wojakovski proposed an immediate stay for mediation. Mr Fulton was highly critical of this letter and submitted that it amounted to a blackmail attempt but it also shows that Mr Wojakovski's response to the strike-out application was to make an immediate attempt to negotiate a settlement. Again, I cannot be satisfied at this stage that the parties would not have settled the

Claims within five months if the strike-out application had been issued immediately after the service of the Defence.

(5) It is, of course, quite possible that Rosling King will persuade the trial judge that the Claimants would not have achieved the same outcome or, indeed, any costs savings at all even if the strike-out application had been made much earlier and had been successful. But in order to reach this conclusion, the Court will have to conduct a wider inquiry into the history of the Claims. Indeed, it will be necessary to explore the extent to which the orders the judge made were dependent on the progress which Rosling King had already achieved, e.g., in relation to disclosure, before the strike-out application was made. But, again, these are all matters for trial.

(6) Finally, it is important to note that the Claimants now wish to amend to claim damages on a "loss of a chance" basis. I accept that Rosling King has not had an opportunity to contest these amendments and I will give them an opportunity to do so. But the earliest cases in which claimants have recovered damages on a loss of chance basis involve lost or abortive litigation and in assessing damages the Court will usually give the claimant a "fair wind" in establishing that they would have succeeded in recovering or avoiding those losses which they have suffered as a consequence of negligent conduct.

(7) It follows, therefore, that if the Claimants prove negligence and establish on a balance of probabilities that they would have taken advice to issue a strike-out application immediately after the service of Mr Wojakovski's Defence, they only have to establish that there was a real and substantial chance that they would have made substantial costs savings if they had issued that application and it had succeeded. I cannot be satisfied that they have no real prospect of succeeding on such a claim at trial.

D. The Claimant's Application

(1) The Duomatic principle

89. In *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122, an appeal to the Privy Council from the Court of Appeal of the Eastern Caribbean, Lord Burrows JSC gave

the only judgment. He set out the *Duomatic* principle at [31]:

> "The *Duomatic* principle is, in short, the principle that anything the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. See generally Palmer's Company Law, looseleaf ed, vol 2, paras 7.434–7.449; and Peter Watts, "Informal Unanimous Assent of Beneficial Shareholders" (2006) 122 LQR 15. The principle derives its name from *In re Duomatic Ltd* [1969] 2 Ch 365 , in which it was encapsulated by Buckley J, at p 373, as follows: "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

90. Lord Burrows also pointed out that the origins of the principle pre-date the decision in *Re Duomatic* and can be traced back to *Salomon v Salomon & Co Ltd* [1897] AC 22. He also stated that: "There are numerous other cases relying on, or referring to, the same principle." Zacaroli J stated the principle in the *Duomatic* Judgment at [6] (above) and Mr Lawrence did not submit that he had done so inaccurately or incorrectly.

(2) Exceptions to the principle

91. The editors of *Palmer's Company Law* (2022 ed) identify a number of limitations or exceptions to the *Duomatic* principle: see Vol 2 at 7.441 to 7.449. The first exception deals with the nature of the provision for which the resolution of the shareholders was required. They state that it is now generally accepted that the principle will apply where the provision in question was intended for the protection of current members but will not apply where the provision was intended to protect either creditors or future members: see 7.444. They then deal with other limits to the principle (footnotes omitted) at 7.446 to 7.449:

> "**Non-ratifiable acts or breaches of duty by directors**
>
> 7.446 The *Duomatic* principle does not permit shareholders to do informally what they could not have done formally by a resolution. It follows that it cannot be used to ratify any act which is ultra vires the company, such as an unlawful payment of dividends, an unlawful return of capital, or the exercise of powers for an improper purpose.
>
> **Where the company is insolvent or of doubtful solvency**
>
> 7.447 It is clear law that the shareholders cannot ordinarily ratify any act where the company is insolvent or of doubtful solvency so that the

> *Duomatic* principle equally cannot apply. The argument that this will not apply if the directors honestly and reasonably (but wrongly) believed that the company was solvent has not yet found any success. It is for the party who seeks to invoke the *Duomatic* principle to prove, if it be disputed, that the company was solvent at the material time.
>
> **Where the transaction is neither bona fide nor honest**
>
> 7.448 There is a dictum of Sir Andrew Morritt C to the effect that a transaction which is neither honest nor bona fide cannot be ratified. Similarly, in *Auden McKenzie (Pharma Division) Ltd v Patel* it has been expressly held that the principle cannot apply to a dishonest act.
>
> **Where the shareholders are acting in bad faith**
>
> 7.449 Whether the *Duomatic* principle will apply if the directors were acting honestly but the assenting shareholders approve the transaction in bad faith was left open in *Madoff Securities International Ltd (In Liquidation) v Raven*."

92. Mr Haque accepted in his Skeleton Argument for the hearing on 20 November 2019 that the only relevant exception was the first one (above), namely, that it is impossible to ratify a decision which is ultra vires the company although he submitted that it did not apply because the judge should treat the Extractions as a lawful reduction of capital for the purposes of the strike-out application. The judge recorded that concession in the *Duomatic* Judgment: see [11]. However, he held that it was irrelevant that the EW Companies could have distributed the funds lawfully: see [18].

93. Mr Lawrence argued that Mr Haque was wrong to make that concession and that the law has moved on since Zacaroli J gave judgment. He relied on a number of authorities in support of this submission of which it is necessary to consider four in detail. First, he relied on *Ciban* (above) in which Lord Burrows considered the scope of the dishonesty exception identified in 7.448 and 7.449. The issue for the Privy Council was whether the *Duomatic* principle could apply to clothe an agent with ostensible authority where the shareholder had routinely authorised that agent to give instructions on his behalf. Lord Burrows considered both whether the company could have entered into the transaction and, secondly, whether the dishonesty exception could apply at [44] to [47]:

> "44. Clearly here what was being done in relation to the fifth POA was not outside the powers of the company and neither Mr Byington nor TCCL was acting dishonestly in relation to that POA. Put another way, the *Duomatic* principle would not be permitting the ultimate beneficial owner or the director to commit a fraud against the company. Although *In re Duomatic Ltd* was not mentioned by Bannister J, he may

have had it in mind when he said the following at para 62: "Spectacular cannot have had any greater expectation about the scope of the duties of its sole director than had Mr Byington. Provided that Mr Byington's instructions did not involve dishonesty or illegality, therefore, TCCL could safely act upon them without more." True it is that the earlier transaction by which Mr Byington acquired Spectacular so as to take the property out of the hands of GEL's creditors may be regarded as dishonest. But the transaction with which we are concerned—and in relation to which we are considering the application of the *Duomatic* principle—is the issuing of the fifth POA and the sale of the property. In relation to that transaction, we have just observed that neither Mr Byington nor TCCL acted dishonestly; but what about the alleged dishonesty of Mr Costa?

45. Mr Thompson for the defendants submitted that Mr Costa had not been dishonest. There was no finding that the sale of the land was at an undervalue and Mr Costa accounted openly for what he had received and only took what he alleged was owed to him. All one could say was that Mr Costa was doing something that was unauthorised by Mr Byington and that was not dishonest in relation to Spectacular.

46. However, as a matter of principle the *Duomatic* principle would have applied on these facts even if Mr Costa had dishonestly pocketed the money from the sale without regarding it as discharging a debt owed to him. This is because the whole of Mr Byington's set-up—and the clothing of Mr Costa with ostensible authority—was taking the risk on behalf of the company, albeit informally, that Mr Costa would use that apparent authority for his own purposes, including dishonest purposes. In a situation where Mr Byington, and through his (informal) conduct, Spectacular, led TCCL reasonably to rely on Mr Costa in relation to the fifth POA, Spectacular cannot now be allowed to pursue TCCL in a claim for negligence to reverse the very risk that it was running.

47. A further possible qualification of the *Duomatic* principle is that, in some cases, doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders, who consent. See, e g, *Palmer's Company Law* , looseleaf ed, vol 2, para 7.439. But the correct view is that, at least as here where the ultimate beneficial owner and not the registered shareholder is taking all the decisions in the relevant transactions, the *Duomatic* principle applies as regards the consent of (and authority given by) the ultimate beneficial owner. This is supported, as a matter of principle, by Mann J's judgment in *Shahar v Tsisekkos* [2004] EWHC 2659 at [67]; and by Newey LJ's judgment in *Dickinson v NAL Realisations (Staffordshire) Ltd* [2020] 1 WLR 1122 , para 20, in which, while not deciding the point, he stated that he was willing to assume (in the same way as he had done as Newey J in *In re Tulsesense Ltd; Rolfe v Rolfe* [2010] 2 BCLC 525, para 42) that "the assent of the beneficial owners of a share can meet Duomatic requirements". Certainly the claimant in this case did not seek to argue that, in relation to the *Duomatic* principle, any distinction should be drawn between Mr Byington, as ultimate beneficial owner, and Mr

> Stollman, his lawyer, who held the bearer shares."

94. Secondly, Mr Lawrence relied on *Satyam Enterprises Ltd v Burton* [2021] BCC 640 in which the Court of Appeal remitted the decision to the Court below because the judge had decided the case on a basis which was not the subject of argument or evidence at the trial: see [38]. However, Nugee LJ (with whom Lewison and Arnold LJJ agreed) went on to consider an alternative ground of appeal based on the *Duomatic* principle. He rejected the argument that the shareholder had not consented to the relevant transaction and held that there were insufficient findings of fact to decide whether there had been an unlawful return of capital. He then considered the dishonesty exception and held that it was not engaged where a TR1 contained a deliberately inflated price intended to deceive a future lender. He stated this at [56] to [59]:

> "56. The next question concerns Mr Temmink's third answer to the Duomatic point, namely that the Duomatic principle does not apply unless the transaction in question is bona fide and honest: see e.g. *Re Bowthorpe Holdings Ltd [2002] EWHC 2331 (Ch) (Bowthorpe)* at [50] per Sir Andrew Morritt V-C. Here Mr Temmink relies on the judge's finding that the purpose of the transfer was to manufacture a transaction with an artificially inflated price to enable monies to be fraudulently raised (Jmt at [67]: see [29] above). That is a finding which seems to have been entirely justified on the evidence, Mr Burton's own evidence being that the price on the TR1 was artificially inflated to induce a lender to lend against the higher price either by being tricked into believing that was the true value, or because some of those working for the lender would turn a blind eye to the same (Jmt at [20]), although the plan to re-mortgage was in the event for various reasons unsuccessful (Jmt at [26]).
>
> 57. Mr Shaw does not dispute the principle but points out that it is not any dishonesty associated with the transaction which brings it into play but only "relevant" dishonesty: *Ciban* at [43] per Lord Burrows. This is exemplified by the example Lord Burrows gives at [46] of the agent (Mr Costa) dishonestly stealing the proceeds of sale. Mr Shaw submitted that "relevant dishonesty" connoted dishonesty or bad faith towards the company.
>
> 58. I accept this submission. The way in which Morritt V-C put it in Bowthorpe at [55]–[56] is that the *Duomatic* principle would not provide a defence if the sole member had misapplied the assets of the company otherwise than in good faith; in other words the principle is that the members of the company cannot simply help themselves to its assets. But if the members are not acting dishonestly towards the company, we have been shown no authority that the fact the transaction was intended to be used subsequently as an instrument to defraud someone else precludes the application of the *Duomatic* principle. Nor would there seem to be any good reason in principle why it should: this restriction on the

> application of the *Duomatic* principle would appear to be for the protection of the company and its creditors, not the court's response to fraud more generally.
>
> 59. I would therefore reject Mr Temmink's third ground for challenging the judge's finding that the *Duomatic* principle applied. The fact that the judge found that the TR1 contained a deliberately inflated price so as to enable a fraud to be committed on a future lender, although undoubtedly dishonest, was not in my judgment relevant dishonesty such as to prevent the application of the *Duomatic* principle."

95. Thirdly, Mr Lawrence relied on the decision of the Court of Appeal in *Auden McKenzie (Pharma Division) Ltd v Patel* [2020] WTLR 1133 which was handed down just over two weeks after the judge had himself handed down the *Duomatic* Judgment. It is important to record that there was no appeal against that part of the first instance decision in which Robin Knowles J had held that the *Duomatic* principle did not apply (and upon which Zacaroli J relied in the *Duomatic* Judgment). However, the Court of Appeal allowed the Defendant's appeal on the basis that he had a real prospect of defending the company's claim for equitable compensation for breach of fiduciary duty on the ground that it had suffered no loss.

96. David Richards LJ (as he then was) gave the leading judgment with which Lewison and Newey LJJ agreed. Before turning to his reasons, it is important to set out the relevant facts upon which the decision was based. David Richards LJ summarised them at [2] to [8]:

> "2. The appellant, Mr Amit Patel, was a director of the first claimant, Auden McKenzie (Pharma Division) Limited (the company). He and his sister, the second defendant, founded the company in 1999 and they were at all material times the sole directors. Both worked in the business, Mr Patel as managing director and Ms Patel as operations director. Between them, they directly or indirectly owned all the shares in the company.
>
> 3. Mr Patel accepts that between 2009 and 2014 he caused the company to pay an aggregate amount of £13,763,452 against sham invoices raised purportedly for "research and development" (the Payments). The company received no value for these payments. They were made in order to extract funds from the company in a way that would evade the payment of corporation tax by the company and the payment of income tax by Mr and Ms Patel (collectively, the Shareholders).
>
> 4. Mr Patel caused the sham invoices to be raised by three companies incorporated in Dubai. Those companies retained between 5% and 10% of the invoiced sums and, as Mr Patel accepts and asserts, paid the balance, on the instructions of Mr Patel (or of Mr and Ms Patel), to their

> personal bank accounts, to them in cash and to third parties for the purchase of an apartment in New York and for goods and services supplied for their personal use. Ms Patel denies knowledge of, or any complicity in, any breach of duty as regards the payments from the company or their subsequent application. She has served a detailed defence, and no application was made for summary judgment against her.
>
> 5. By a share purchase agreement dated 23 January 2015 (the SPA), the second claimant (Actavis Holdings UK Limited) (Actavis) agreed to purchase the entire share capital of the company for an initial consideration of £323.5 million, with further amounts payable under earn-out provisions. On 29 May 2015, Activis assigned all its rights under the SPA to the third claimant (Chilcott UK Limited) (Chilcott) which completed the purchase on the same day.
>
> 6. Following investigations by HMRC, Mr Patel made disclosures between 1 May and 26 November 2015 to HMRC, which resulted in a settlement under which the Payments were treated as undeclared remuneration and he paid £14.6 million to HMRC, in respect of income tax and National Insurance contributions on that deemed income, and corporation tax which, on the agreed basis, would have been payable by the company, together in each case with interest and penalties. HMRC confirmed that there would be no tax implications for the company's future accounting periods arising from the investigation and that the company started again "with a clean slate". The company and Chilcott, its holding company since 29 May 2015, were not involved in or aware of these disclosures or the negotiations or settlement with HMRC.
>
> 7. The present proceedings were issued in November 2017. The company claims relief in respect of the Payments against Mr and Ms Patel, comprising (i) "Damages and/or equitable compensation for breach of fiduciary duties" and (ii) "An order that the Defendants hold the Extracted Sums and/or their traceable proceeds on constructive trust for the [company]". There is also a claim for all "such further orders, accounts, inquiries and declarations as shall be necessary or appropriate in order to fully compensate the Claimants for the Defendants' wrongs". In addition, Actavis and Chilcott claim damages for fraudulent misrepresentation and for breach of warranty, but these claims are not relevant to this appeal.
>
> 8. The company applied for summary judgment in the sum of £13,149,479 plus interest on its claim "for damages and/or equitable compensation for breach of statutory fiduciary duties" against Mr Patel pursuant to CPR 24.2. Mr Patel made strike-out and summary judgment applications on part of the claims brought by Actavis and Chilcott and applied for summary judgment on a counterclaim in respect of the earn-out provisions."

97. After recording that there was no appeal against the decision of Robin Knowles J in relation to the *Duomatic* principle, David Richards LJ also recorded that there was no question of any other shareholder or creditor being affected by the payments which

were made (or which would have been made) because Mr Patel had reached a comprehensive settlement with HMRC: see [28]. He then undertook a detailed analysis of the principles applicable to an award of equitable compensation for breach of fiduciary duty. It is not necessary for me to consider those principles in any detail here although the judgment should be essential reading on this topic. He then set out his conclusions at [57] to [59] and [62] to [65]:

> "57. It is not in doubt that directors, while not strictly trustees because title to their company's assets are not vested in them, are in a closely analogous position to trustees by reason of their fiduciary duties to the company and are treated as trustees as respects company assets which are under their control: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* at [34].
>
> 58. Where a director causes a company to make unauthorised payments for which the company receives no value, the director is liable to the company to pay compensation equal in amount to the payments. This is established in authorities dealing with the payment of unauthorised dividends. In *Bairstow v Queens Moat Houses plc* [2001] EWCA Civ 712, [2001] 2 BCLC 531, the directors were held liable to pay compensation equal to the full amount of unlawful dividends which they had procured to be paid. This was confirmed to be the correct remedy by this court in *HMRC v Holland* [2009] EWCA Civ 625, [2010] Bus LR 259 , at [98] per Rimer LJ and at [125] per Elias LJ. In both cases, a submission based on Target Holdings that recovery should be restricted to the loss calculated by reference to what would have been the financial position of the company if the dividends had not been paid was rejected. On the appeal to the Supreme Court in *HMRC v Holland* [2010] UKSC 51, [2011] Bus LR 111, it was not necessary to decide this point but three members of the court agreed with this court, while the other two Justices expressed no view: see Lord Hope at [49], Lord Walker (who as Robert Walker LJ gave the only reasoned judgment in *Bairstow v Queens Moat Houses*) at [124-125] and Lord Clarke at [146]. I can see no reason why there should be a difference in remedy where the unauthorised payment is not a dividend, but, as here, a misappropriation of funds paid against bogus invoices.
>
> 59. The above analysis provides grounds for concluding that Mr Patel is not entitled to rely on the assumed fact that dividends equal to the Payments would have been paid to his sister and himself in response to the claim for equitable compensation. However, the order below was for summary judgment, not judgment on a preliminary issue, and we must be satisfied that Mr Patel's defence is unsustainable in law.
>
> 60. The assumed facts are striking. Mr Pymont is right to say that the position of all parties would by now have been precisely the same as it was immediately after the Payments were made. The company would not have the money and Mr Patel and his sister would have received the money (whether directly or through companies controlled by them).

> Moreover, as the only shareholders, Mr Patel and his sister were able at all material times to procure this result. No case of which counsel or the court are aware has raised facts as stark as these. While the decisions in *Target Holdings* and *AIB* do not directly assist Mr Patel for the reasons I have given, they do demonstrate a willingness on the part of the courts to develop the equitable remedies for breach of trust and breach of fiduciary duty and, where required to do what is practically just, to entertain some departure from the strict obligation of trustees and fiduciaries to restore the fund under their control. This potential for flexibility has been emphasised in many cases and commentaries, not least *Target Holdings*, *AIB* and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* at [47]."
>
> 62. Mr George advanced as his central submission that none of the counterfactual payments of dividends would have constituted a loss, properly so called, to the company. While that is right, it does not seem to be a conclusive point in his favour. The converse example of a counterfactual payment which constituted a loss would clearly not assist Mr Patel. Mr Patel could not defend the claim on the basis that, if he and (as he says) his sister had not misappropriated the Payments, someone else would have done: see AIB at [58]. That, however, is different from the counterfactual of a lawful payment properly made to the defendants who in fact received the same amount by way of misappropriation.
>
> 63. Mr George also submitted that if Mr Patel could rely on his proposed defence, it would enable a dishonest director who in effect steals money from the company to escape without redress. This consideration echoes what was said by Lord Toulson in AIB at [62] that the principle underlying the decision applied "absent fraud, which might give rise to other public policy consideration". The possibility of a fraud exception has been criticised; see Lewin at 39-014. It does not seem to accord with principle that equitable compensation should be payable only because the defendant has acted dishonestly.
>
> 64. I am far from saying that Mr Patel has a defence that will succeed if he establishes the facts on which he relies, but nor I am prepared to say that it is unsustainable in law. As with many questions in a developing area of the law, it is an issue which requires much fuller submissions than is normally appropriate on a summary judgment application. It is also an issue best decided on the facts as found at trial.
>
> 65. I would accordingly allow the appeal and set aside the summary judgment against Mr Patel."

98. Fourthly, and finally, Mr Lawrence relied on the decision of the Privy Council in *SR Projects Ltd v Rampersad* [2022] UKPC 24. In that case Lord Leggatt JSC (with whom Lord Lloyd-Jones and Lord Stephens JJSC agreed) described the difference between the concepts of ultra vires and agency and lack of authority in the following passage:

> "23. The concepts of ultra vires and illegality were not clearly

> distinguished when the ultra vires doctrine was first established in English law and have not always been clearly distinguished since. But the distinction is important. The term ultra vires, in its strict sense in which it has properly been used by the courts below in this action, refers to a situation where a corporation has no legal power (or capacity, as it is often put) to enter into a transaction. That is different from saying that it is against the law for the corporation to enter into a transaction. The two may coincide. There could in principle be a case where, for example, a corporation does not have the power to make a contract and where, even if it did have such power, it would be illegal for the corporation to do so. But lack of power or capacity and illegality are different concepts and the legal consequences of each may differ.
>
> 24. A third concept which has not always been clearly distinguished from ultra vires is that of lack of authority of a person or body to act for a corporation. Thus, it may be argued that, for example, a contract entered into or approved by the board of directors of a company is not binding on the company on the ground that it was beyond the powers of the board to make such a contract. This is different from saying that the company itself did not have the power to make the contract. It is a question of agency, governed by the law of agency.
>
> 25. One aspect of the law of agency as it applies to companies is what is known as the rule in *Turquand's* case after *Royal British Bank v Turquand* (1856) 6 E & B 327. The rule is that a person dealing with a company is generally entitled to assume that matters of internal management have been regularly carried out and that the formalities (if any) necessary to enable the company's officers to exercise their powers have been duly performed. The rule only applies when the person dealing with the company is acting in good faith and without notice that the agent is contracting in excess of their authority.
>
> 26. The rule in *Turquand's* case is of no relevance, however, where an act is not merely beyond the powers of the company's board of directors (or other organ of the company) but beyond the powers of the company itself. The doctrine of ultra vires operates as a legal sledgehammer. Where it applies, it is of no avail that the person dealing with the company was acting in good faith and did not know or even have means of knowing that the company lacked the capacity to enter into the transaction. The consequence at common law is that the transaction is treated as a nullity."

99. Lord Leggatt then described the rise of the ultra vires doctrine and considered a number of leading nineteenth century cases before considering the subsequent history of the doctrine and the Cohen Committee's recommendation that it should be abolished. He continued as follows at [47]:

> "That recommendation was not implemented, however, and it was not until the United Kingdom joined the European Community in 1973 that legislative reform took place to comply with the EC First Directive on

> Company Law (First Council Directive 68/151/EEC of 9 March 1968). Subsequently, the UK Companies Act 1985 was amended in 1989 to provide in section 35(1) that: "The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum." See now section 39 of the Companies Act 2006. A similar provision is contained in section 23 of the Trinidad and Tobago Companies Act (Chapter 81:01). The ultra vires rule in company law has also been effectively abolished in the United States, Canada, Australia, New Zealand and Barbados: see Stephen J Leacock, "The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience over Logic" (2006) 5 DePaul Business & Commercial Law Journal 67."

100. In my judgment, none of the authorities upon which Mr Lawrence relied cast doubt on Mr Haque's concession that the *Duomatic* principle does not apply where the acts in question were ultra vires. I am also satisfied that the Court of Appeal's decision in *Auden McKenzie* casts no doubt on the judge's decision to follow the first instance decision of Robin Knowles J. I have reached these conclusions for the following reasons:

The ultra vires doctrine

(1) I fully accept that section 35(1) of the Companies Act 1985 (as amended and as now re-enacted in section 39 of the Companies Act 2006) abolished the doctrine in the sense that a transaction which is ultra vires the company's constitution is void. I also accept that a company is bound by the acts of the directors in favour of any third party dealing with the company in good faith notwithstanding any limitation in the company's constitution: see section 40.

(2) However, this does not mean that the *ultra vires* doctrine is irrelevant for all purposes. It remains the primary duty of a director to act in accordance with the company's constitution and only to exercise the powers for the purposes for which they are conferred: see section 171 of the Companies Act 2006. The *ultra vires* exception to the *Duomatic* principle is concerned with the ratification of breaches of that duty by directors (as the heading to the passage in *Palmer* (above) makes clear).

(3) The issue for both Robin Knowles J in *Auden McKenzie* and Zacaroli J in the *Duomatic* Judgment was not whether third parties were entitled to rely on the acts

or omissions of the directors but whether the company itself was entitled to bring proceedings against the director for breaches of their statutory duties as directors and, in particular, whether the company should be held to have ratified those breaches of duty. This is a very different question and not the one which Lord Leggatt was considering in *SR Projects Ltd v Rampersad*.

(4) In *Duomatic* itself Buckley J cited with approval the decision of Astbury J in *Parker and Cooper Ltd v Reading* [1926] Ch 975 at 982 that the principle only applies where "the transaction is intra vires and honest". In *Bowthorpe Holdings Ltd v Hills* [2003] 1 BCLC 226 Sir Andrew Morritt V-C referred to the same passage: see [50] and [51] and in *Madoff Securities International Ltd v Raven* (above) Flaux J cited those paragraphs in *Bowthorpe* and rejected the submission that the Vice-Chancellor had been wrong. He also accepted that *Bowthorpe* was authority for the proposition that the principle would not apply where the shareholders were acting dishonestly or using the company as a vehicle for fraud or wrongdoing in ratifying the directors' acts: see [105] to [112].

The ultra vires exception

(5) It is fair to say Lord Burrows did not mention the *ultra vires* exception in *Ciban* and identified three exceptions only: prejudice to creditors, consent and dishonesty. However, I am not satisfied that he intended to set out an exhaustive list of the exceptions for a number of reasons. First, he was concerned with the specific question whether there was any specific objection to applying the *Duomatic* principle in the context of ostensible authority: see [40]. Secondly, he clearly had the question whether the transaction was within the powers of the company in mind: see [44]. Thirdly, he approved the entire passage in *Palmer* dealing with the *Duomatic* principle including paragraph 7.446 (above). If he had intended to exclude the *ultra vires* exception, he could have been expected to say so clearly and to qualify his reference to *Palmer*. Fourthly, and finally, he made no reference to the unlawful payment of dividends and the unlawful reduction of capital. He could have been expected to mention them if he was giving an exhaustive list of the exceptions to the principle.

(6) The editors of *Palmer* cite the decision of the Court of Appeal in *Rolled Steel*

Products (Holdings) Ltd v British Steel Corporation [1986] Ch 246 for the proposition that the *Duomatic* principle does not apply to ratify the exercise by directors of their powers for improper purposes. They also cite *Madoff* (above) and *Ceredigion Recycling and Furniture Team v Pope* [2021] EWHC 1783 (Ch) in which His Honour Judge Jarman QC also recognised the *ultra vires* exception and cited *Palmer* at paragraph 7.446: see [86]. Although it was not necessary for the Court of Appeal to decide the issue in *Rolled Steel* Slade LJ stated this at 296E-297A:

> "First, if an act is beyond the corporate capacity of a company it is clear that it cannot be ratified. As against the company itself "an ultra vires agreement cannot become intra vires by means of estoppel, lapse of time, ratification, acquiescence, or delay": *York Corporation v. Henry Leetham and Sons Ltd* [1924] 1 Ch. 557, 573 per Russell J. However, the clear general principle is that any act that falls within the corporate capacity of a company will bind it if it is done with the unanimous consents of all the shareholders or is subsequently ratified by such consents: see, for example, *Salomon v. A. Salomon & Co. Ltd* [1897] A.C. 22 , 57 per Lord Davey; In re Horsley & Weight Ltd. [1982] Ch. 442, 454 per Buckley L.J. and *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd*. [1983] Ch. 258. This last-mentioned principle certainly is not an unqualified one. In particular, it will not enable the shareholders of a company to bind the company itself to a transaction which constitutes a fraud on its creditors: see, for example, I*n re Halt Garage (1964) Ltd*. [1982] 3 All E.R. 1016, 1037, per Oliver J. But none of the authorities which have been cited to us have convinced me that a transaction which (i) falls within the letter of the express or implied powers of a company conferred by its memorandum, and (ii) does not involve a fraud on its creditors, and (iii) is assented to by all the shareholders, will not bind a fully solvent company merely because the intention of the directors, or the shareholders, is to effect a purpose not authorised by the memorandum. The recent decision of this court in the *Multinational* case [1983] Ch. 258 seems to me to point to a contrary conclusion: see also *Attorney-General's Reference (No. 2 of 1982)* [1984] Q.B. 624, 640, per Kerr L.J. However, none of these matters relating to ratification, in my opinion, call for decision on this appeal. I have touched on them only because they weighed with the judge and have been covered fully in argument."

(7) In this passage Slade LJ referred to *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016 in this passage. In that case, Oliver J, who also relied on the dictum of Astbury J in *Parker and Cooper Ltd v Reading* (above), explained why there is an overlap between the *ultra vires* exception and the dishonesty exception. It is

because the unanimous decision of the shareholders to approve acts which the directors have committed in breach of the proper purposes rule is ineffective where they use the company as a vehicle for fraud. Oliver J stated this at 1037:

> "No doubt the effectiveness even of a resolution in general meeting will depend on its bona fides. Fraud opens all doors and the court will not uphold or permit the fraudulent exercise of a power. *Re George Newman & Co* [1895] 1 Ch 674 was clear case of dishonesty, and it is not surprising to find in the judgment of the court the doubt expressed whether what was done there could have been sanctioned even by all the shareholders, although the point was not actually decided. But there is no suggestion of bad faith in this case and, as is shown by Re British Seamless Paper Box Co (1881) 17 Ch D 467, which is referred to in the judgment of Lindley LJ in the *George Newman* case, the position is quite different where the transaction is honest and is sanctioned by all members of the company at the time (see also Re Express Engineering Works Ltd [1920] 1 Ch 466).

The dishonesty exception

(8) Mr Lawrence also submitted that the dishonesty exception only applied to "relevant dishonesty" which he characterised as "dishonesty against or in relation to the company itself". I accept that *Ciban* is authority for the proposition that the *Duomatic* principle may apply even where a director acted dishonestly but the dishonesty was incidental to the actions which the shareholders had resolved. In *Ciban* the issue was whether the shareholder had clothed the director with ostensible authority to authorise the execution of a power of attorney not whether he had applied the proceeds of sale of the property sold using the power of attorney for an improper purpose.

(9) It is fair to say that in *Satyam Enterprises Ltd v Burton* Nugee LJ accepted the submission that "relevant dishonesty" connoted dishonesty or bad faith towards the company itself: see [58]. However, the issue in that case was whether the company had ratified the actions of the sole shareholder and director in transferring a number of properties from one company to another at an undervalue not whether he intended to use the TR1 as an instrument of fraud in the future. Moreover, Nugee LJ relied on *Bowthorpe* (above) and he was not concerned with either the *ultra vires* exception or the use by the shareholders of the company as a vehicle for fraud.

Auden McKenzie

(10) Finally, Mr Lawrence submitted that the decision of Robin Knowles J in *Auden McKenzie* was no longer reliable and that Zacaroli J should not have followed it in the light of the decision of the Court of Appeal which was handed down only a few weeks later. I reject that submission. Although the Court of Appeal reversed the judge's decision to grant summary judgment, there was no appeal against the decision that the *Duomatic* principle did not apply and the Court gave permission to defend on the basis that the defendant had a real prospect of establishing at trial that the company had suffered no loss.

(11) In my judgment, the present case is (and was) clearly distinguishable. There was no claim for proprietary relief and the issue for the Court of Appeal was whether with the benefit of hindsight the company could recover equitable compensation in circumstances where a former director and shareholder had settled the claims of HMRC and there was no risk to the company of future liability to HMRC (whatever conclusions the Court reached). David Richards LJ considered that the remedy of equitable compensation was sufficiently flexible that the defendant had a real prospect of success on this issue.

Novel point of law

(12) Finally, Mr Lawrence submitted that this was a developing area of the law and unsuitable for summary determination. I disagree. In my judgment, Rosling King have no real prospect of succeeding at trial in demonstrating that the *ultra vires* exception to the *Duomatic* principle does not exist or that the question whether it does is a developing point of law. It has been recognised since (at least) the decision of Astbury J in *Parker and Cooper Ltd v Reading* and it underpins the specific exceptions relating to the unlawful reduction of capital or the unlawful payment of dividends.

(13) Moreover, Oliver J's decision in *Re Halt Garage (1964) Ltd* explains why the exception applies where the directors and shareholders use a solvent company as a vehicle to defraud their own and the company's creditors and, in particular, HMRC. This is because the conduct of the directors involves a breach of their duty under section 171 of the Companies Act 2006 and a formal resolution by the

shareholders to ratify that breaches of duty would be ineffective.

(14) But even if this is wrong and there is no separate *ultra vires* exception then an agreement by shareholders and directors to use a company as a vehicle to defraud HMRC clearly falls within the dishonesty exception. In my judgment, *Madoff* is authority for this proposition. I accept that Flaux J only had to be satisfied that there was a serious issue to be tried and he did not reach a final conclusion about the limits of the dishonesty exception and whether it was based on public policy: see [123]. Nevertheless, he accepted the core proposition that the *Duomatic* principle does not apply where the shareholders were acting dishonestly or using the company as a vehicle for fraud or wrongdoing: see [105] and [112].

(15) Finally, I am satisfied that there is nothing in the judgments of Lord Burrows in *Ciban* or Nugee LJ in *Satyam Holdings Ltd v Burton* which casts doubt on these conclusions or sufficient doubt to refuse summary judgment on this issue. Both decisions are concerned with the extent to which incidental dishonesty in the course of a transaction prevent the application of the *Duomatic* principle and both are authority for the proposition that even if the shareholder consents to the relevant conduct, the *Duomatic* principle will not apply where the company is the intended victim of the fraud. But neither case involved the ratification by the shareholders and directors of a conspiracy to defraud HMRC or other creditors of the company.

(16) I have set out my analysis of the legal issues at some length because of the quality of the argument and the submissions of both counsel. But I respectfully suggest that this analysis was obvious to Zacaroli J and for this reason he considered Mr Haque's concession to be rightly made and that it was unnecessary for him to consider *Madoff* and the limits of the dishonesty exception: see the *Duomatic* Judgment at [11] and [14]. I am also satisfied that the later decisions upon which Mr Lawrence relied and, in particular, the decision of the Court of Appeal in *Auden McKenzie* do not cast any doubt on the correctness of the decision.

(3) The short answer

101. Quite apart from this question of law, Mr Lawrence submitted that there was a short answer to the Claimant's Application. He submitted that the relevant legal principles

would have informed any advice on a strike-out application; that because the point was complex and developing the outcome of any strike-out application was uncertain; and that it was entirely reasonable for Rosling King to adopt the approach which they in fact adopted. For the reasons which I have given I am not satisfied that the point of law was novel or developing. However, I make it clear that the only point which I have decided on the Claimants' Application is that the *Duomatic* Judgment was correctly decided and not wrong. It will remain open to Rosling King to argue that a reasonable solicitor could have taken the view that it involved a complex point and advised the Claimants not to make a strike-out application. This, again, must be a matter for trial.

(4) Precedent

102. I am not technically bound by either the decision of Zacaroli J in the *Duomatic* Judgment or Robin Knowles J in *Auden McKenzie* at first instance. However, as a matter of precedent, judges should follow decisions of co-ordinate jurisdiction unless there is a powerful reason not to do so (such as two previous inconsistent decisions) or the decision is plainly wrong: see *Willers v Joyce (No 2)* [2018] AC 843 at [9] (Lord Neuberger PSC) and *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2023] Ch 343 at [106] (Lewison LJ). For the reasons which I have stated, I consider both decisions to be correct and given that conclusion I am bound to follow them.

103. However, even if I had been concerned, say, that later authorities cast some doubt on the correctness of those decisions, I would still have felt bound to follow them. Two very experienced judges of co-ordinate jurisdiction have reached the conclusion that the *Duomatic* principle does not apply to the present case, neither has been overruled and Mr Lawrence was unable to persuade me that they were plainly wrong. Indeed, Andrews LJ referred to the *Duomatic* Judgment without adverse comment in the related case *Candey Ltd v Tonstate Group Ltd* [2022] EWCA Civ 936 at [31].

(5) No other compelling reason

104. Mr Lawrence might have persuaded me to dismiss the Claimants' Application on the basis that the legal issue which it raised was not determinative of the Negligence Claim and I should leave it over to trial. I might have taken this course if I had been persuaded that there was real doubt whether the *Duomatic* Judgment was correct but I felt bound to follow it as a matter of precedent. However, Mr Fulton persuaded me that it was

important for me to decide whether there was any basis for Rosling King to challenge the *Duomatic* Judgment at the earliest opportunity. Having reached the conclusion that the *Duomatic* Judgment was plainly right, it is only right that I should grant summary judgment now to dispel any doubt and to maintain the authority of the decision.

V. Disposal

105. For these reasons I dismiss the Defendant's Application and I grant the Claimants' Application. I am satisfied that the Defendant has no real prospect of persuading the Court at trial that the *Duomatic* Judgment is wrong and that there is no other compelling reason for permitting that issue to go to trial. I will, therefore, strike out paragraphs 11.1, 25, 26.8 to 26.11, 29 and 30.1 of the Defence. On the hand down of this judgment, I will adjourn all questions of costs and permission to appeal to be dealt with at a hearing to be listed on the first available date from 1 October 2024 and I invite the parties to agree a form of Order to that effect. It will also be necessary for the Claimants to apply for permission to amend. If the parties cannot agree, I will hear that application at the same time as dealing with any outstanding consequential matters.