Neutral Citation Number: [2021] EWHC 1272 (Comm)

Case No: CL-2017-000323

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**IN THE MATTER OF GERALD MARTIN SMITH**
**AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988**

Date: 18 May 2021

**Before** :

**MR JUSTICE FOXTON**

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**Between :**

**(1) THE SERIOUS FRAUD OFFICE**
**(2) MR JOHN MILSOM AND MR DAVID STANDISH**
**(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith)** **Applicants**

**- and -**

**LITIGATION CAPITAL LIMITED**
**(a company incorporated in the Marshall Islands) and others** **Respondents**

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**Daniel Saoul QC, Tim Akkouh** and **Richard Hoyle** (instructed by **Harcus Parker Limited** and **others**) for the First and Second Applicants and the Fifth to Seventh, Tenth and Twenty-First to Twenty-Fifth Respondents ("**the Settlement Parties**")
**Rupert Bowers QC** and **Tom Stewart Coats** (instructed by **Keystone Law LLP** ) for the First Respondent ("**LCL**")
**Richard Thomas** (instructed by **Berkeley Square Solicitors**) for the Third Respondent ("**Dr Smith**")
**David Lord QC** and **Sebastian Kokelaar** (instructed by **Richard Slade & Co**) for the Eighth and Ninth Defendants ("**P&M**")
**Andrew Crossley** of **St Paul's Solicitors** for the Sixteenth and Seventeenth Respondents ("**Messrs Thomas and Taylor**")
**James Pickering QC** and **Samuel Hodge** (instructed by **Spring Law**) for the Twelfth to Fourteenth Defendants ("**HPII**")
The **Twentieth Respondent** in person **("Mr Pelz")** with assistance on a pro bono basis from **Jeremy Brier** (instructed by **Advocate** through the **Advocate** and **COMBAR Commercial Court and London Circuit Commercial Court Pro Bono Scheme**)

Hearing dates: 19-22 and 25-28 January; 2-4, 8-10, 15, 22-25 and 28 February; 1, 2, 8 and 9 March 2021
Draft Judgment circulated: 26 April 2021

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# Approved Judgment

**I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic**.

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MR JUSTICE FOXTON

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 18 May 2021 at 10:00 AM.

**The Honourable Mr Justice Foxton:**

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# A INTRODUCTION

1. This is the trial of claims to five classes of property, which have been referred to collectively in these proceedings as the Relevant Property:

   i) Shares in 18 BVI and Manx companies transferred into the ownership of a Marshall Islands Company called SMA Investment Holdings Ltd ("SMA") shortly after the conclusion of a settlement agreement reflected in various documents between December 2013 and March 2014 ("the IOM Settlement") ("the Transferred Companies" and together with the IOM Settlement Cash – defined at [422(iv)] below – "the Transferred Assets").

   ii) Shares in 27 Marshall Islands, Manx, Canadian, Dutch, Jersey and English companies created by entities alleged to be associated with Dr Smith (which were not transferred under the IOM Settlement) ("the Non-Arena Companies").

   iii) Four properties in Jersey ("the Jersey Properties").

   iv) A collection of "Identified Underlying Assets" ("the IUAs") comprising various properties, the proceeds of properties, the benefit of a loan and jewellery which are identified in schedule 2 to my order of 20 May 2020.

   v) The sum of £2m paid into the account of Stewarts Law LLP ("Stewarts") on 14 September 2016.

   The trial of those claims has been referred to in this litigation as the Directed Trial.

2. The disputes before the Court originate in dealings between two entrepreneurs who amply merit the traditional epithet of colourful:

   i) Dr Gerald Martin Smith ("Dr Smith") who by mid-2002 had become the CEO of a property portfolio which included 32 Thistle-branded hotels. Dr Smith had already served a two-year sentence of imprisonment for theft from a company pension fund, and he was later to serve an 8-year sentence of imprisonment for theft of a further £35m from a company called Izodia plc ("the Izodia Theft").

   ii) Mr Andrew Ruhan, a businessman who was active in a variety of industries, in particular property.

   Dr Smith is a party to these proceedings. Mr Ruhan is not, although he features prominently in the key events which give rise to the parties' disputes. The litigants before the court are principally parties who dealt with, and in some shape or form claim to derive entitlements through, one of Dr Smith or Mr Ruhan, or those associated with them.

3. Neither Dr Smith nor Mr Ruhan are individuals who were straightforward in their business dealings which gave rise to this litigation, nor indeed were many of those associated with them. Many of the relevant transactions were undertaken either with a view to obscuring their true nature, or negating the apparent effect of other transactions.

The result has been a dispute of labyrinthine complexity, in which matters are rarely what they appear to be, and which has offered a near-infinite possibility for disputation.

4. The case was tried over seven weeks, and because of the prevailing Covid-19 pandemic, it was conducted on a wholly-remote basis. I am grateful to all the parties and their representatives, to Epiq, who provided the electronic document and transcript services, and to my clerk Kaylei Smith for the co-operation and effort which made this possible. I also wish to record my gratitude to all of the legal representatives for the high quality of their submissions in opening and closing, which have been of invaluable assistance to me, and for the excellent spirit in which the case was conducted.

5. The case was originally scheduled to last 10 weeks. At the end of the second week, the scope of the trial was significantly reduced by a settlement agreement ("the LCL Parties Settlement") between the Settlement Parties and a number of other parties, in particular:

   i) LCL.

   ii) Mr Anthony Smith.

   iii) Dr Gail Cochrane.

   iv) Dawna Marie Stickler.

   v) Dr Smith.

   vi) Dr Imogen Laura Smith.

   vii) Iona Cara Smith.

   viii) Sinead Catherine Irving.

   ix) Alison Hollis.

   x) Nicolas David Anthony Greenstone.

   xi) Patricia Greenstone.

   xii) Robert Morris.

6. On 23 February, the Settlement Parties reached a further settlement with the Eighteenth Defendant ("Mr Sodzawiczny").

## B THE PARTIES

### B1 The Settlement Parties

7. A number of the parties to the Directed Trial entered into a Settlement Agreement in 2019 ("the 2019 Settlement Agreement") following which they have advanced a common position in the litigation ("the Settlement Parties"). The background to the 2019 Settlement

Agreement has been set out in previous interlocutory judgments which addressed its case management implications.

8. The Settlement Parties comprise:

   i) The Serious Fraud Office ("SFO") and the Enforcement Receivers ("ERs") first appointed on the application of the SFO in April 2008 (the current ERs, Messrs John Milsom and David Standish, being appointed in May 2013). They bring claims to Dr Smith's realisable property under the Criminal Justice Act 1988 ("the CJA 1988") for the purpose of satisfying a confiscation order made against Dr Smith in November 2007 ("the Confiscation Order"). The outstanding amount of that order currently stands at £72m.

   ii) The Viscount of the Royal Court of Jersey ("the Viscount") in her capacity as administrator of the *en désastre* (bankruptcy) estates of Dr Gail Cochrane (the former wife of Dr Smith) and a Jersey company, Orb a.r.l. ("Orb") which was the holding company of Dr Smith's property empire in mid-2002.

   iii) Harbour Fund II LLP ("Harbour") who provided over £5m of funding to the claimants in proceedings commenced in 2012 ("the 2012 Proceedings") by Orb, Mr Roger Thomas and Mr Nicholas Taylor ("Mr Thomas" and "Mr Taylor") against Mr Ruhan. Orb, Mr Thomas and Mr Taylor are collectively referred to as "the Orb Claimants".

   iv) Stewarts, who acted for the Orb Claimants in the 2012 Proceedings.

   v) The Joint Liquidators ("the JLs") on behalf of a number of BVI and Manx companies who claim that assets worth £80m were transferred out of those companies in the aftermath of the IOM Settlement in breach of fiduciary duty.

## B2 Other participating parties

9. Following the LCL Parties Settlement, the other participating parties comprised:

   i) Messrs Thomas and Taylor, the second and third claimants in the 2012 Proceedings.

   ii) Phoenix Group Foundation ("Phoenix") and Minardi Investments Limited ("Minardi") (and, together, "P&M"), companies incorporated respectively in Panama and the BVI, who claim to have proprietary rights stemming from the April/May 2016 settlement of the 2012 Proceedings ("the Geneva Settlement").

   iii) Hotel Portfolio II UK Limited ("HPII"), a company whose shares were transferred into the ultimate control of Mr Ruhan under the May 2003 agreement, and which alleges that it has claims arising from a breach of fiduciary duty committed by Mr Ruhan in 2005. The legal team representing HPII also represented Orb Estates Plc and Mitre Management Limited, although, with effect from April 2018, those two companies ceased pursuing the claims they had initially advanced. These three entities are sometimes referred to together as "OMH".

iv) Mr Ulrich Pelz ("Mr Pelz") who also makes a proprietary claim to certain of the IUAs, stemming from profits he says were made from Mr Ruhan's property developments in Qatar.

### B3 Other interested parties

10. Finally, there are a number of other parties to the proceedings who did not play an active role at this trial. Following the LCL Parties Settlement these comprised:

i) SMA, which received the Transferred Companies under the IOM Settlement;

ii) Philip Barton, who was involved in Mr Ruhan's Qatar property developments, and who advances personal claims against Mr Ruhan;

iii) Clive Mills, who claims an interest in one of the IUAs, a bracelet; and

iv) The various companies holding legal title to the Hamilton House properties.

## C THE WITNESSES

### C1 Susan Dunn

11. Ms Susan Dunn is the co-founder of the Harbour group of companies, which includes Harbour itself, a well-known litigation funder operating in this and other jurisdictions. Ms Dunn was not involved in the original decision to fund the Orb Claimants' claim (she was undergoing surgery at the time), but she became involved in the claim thereafter. Ms Dunn was an honest witness. Her ability to assist the court was limited by the relatively high level at which Harbour, as litigation funder, engaged in the detail of the 2012 Proceedings and the surrounding events, and by the time which had passed since the events with which her evidence was concerned. As I explain below, I was somewhat surprised by what, on the evidence available at trial at least, was the lack of any clear consideration within Harbour of the terms and effect of the IOM and Geneva Settlements and their potential implications.

### C2 Sean Upson

12. Mr Upson is a solicitor, and a partner in Stewarts. He has been a qualified for over 25 years. From mid-2013 onwards, he had overall supervision of the 2012 Proceedings as part of a large team which involved three other partners, a number of associates and leading and junior counsel (in particular Antony White QC and Nicholas Gibson). Mr Upson was an honest and careful witness, albeit one with the experienced litigator's appreciation of the key issues, of the documents which were likely to feature in his cross-examination, and of the cross-examiner's purpose in taking him to them. Entirely properly, he had read extensively into the trial bundles before giving evidence, but on occasions this led his answers to stray beyond his recollection of his contemporary understanding into supposition based on the documents he had read.

13. In the course of his evidence, Mr Upson accepted that the IOM Settlement involved a number of challenging features, and, as I explain below, I am satisfied that the Orb

Claimants' legal team were aware of many of them at the time the settlement was concluded (and advised accordingly). It is right to note that acting for the Orb Claimants in the 2012 Proceedings would have presented a challenge for any legal team, not least because of the dominant role which Dr Smith played in formulating strategy and in opening parallel fronts of attack, and because Dr Smith's unconstrained pursuit of the litigation appears to have been matched by the other side. Mr Upson said that he had never "come across a case with so many difficult issues as this case … it was an unbelievable case in terms of how many issues one had to deal with". The way in which the case developed involved the legal team in a number of very difficult decisions, and I suspect that these were the source of a number of anxious moments. Principal among them was the difficulty in reconciling the fact and scale of recovery of assets under the IOM Settlement from Messrs Cooper and McNally, with the Orb Claimants' firmly held and maintained case theory that (i) those assets belonged not to Messrs Cooper and McNally but to Mr Ruhan, and (ii) the Orb Claimants' were entitled to only 40% of the profits emanating from a particular source. This was a circle which could not realistically be squared.

## C3 Carl Jackson and Simon Bonney

14. Mr Jackson and Mr Bonney are licensed insolvency practitioners who act as the liquidators and/or directors of the twenty-first to twenty-third respondents and are directors of the twenty-fourth and twenty-fifth respondents. Mr Jackson's evidence set out the findings made by the JLs as to the misappropriation of the assets of those companies, which were not challenged by any of the other parties. Mr Bonney gave evidence about the settlement entered into on 12 August 2015 between one of the companies under the control of the JLs (Unicorn Worldwide Holdings Limited – "Unicorn") and SMA, by which SMA agreed to transfer the shares in three companies known as "the Connected Companies" to Unicorn (the so-called "Hayes Settlement"). That issue had fallen away by the time of closing arguments.

## C4 Elaine Millar

15. Ms Millar has held the Office of the Viscount of the Royal Court of Jersey since July 2015. Her evidence summarised the course of the bankruptcy (or *en désastre*) of Dr Cochrane and Orb and was not challenged by any of the other parties.

## C5 Anthony Stevens

16. Mr Stevens is the sole director of the sole council member of Phoenix (Giotto Investments Ltd, a BVI company) and one of the directors of Minardi. He was an assertive witness, who gave little ground. There is a major dispute between the Settlement Parties and HPII on one side, and Mr Ruhan and Mr Stevens on the other, as to whether Mr Stevens' involvement in a number of the events which give rise to these claims was on his own behalf, in pursuit of his own independent business interests, or as a nominee for Mr Ruhan. In particular, HPII alleges that Mr Stevens was acting as Mr Ruhan's nominee at the time of the Cambulo Transaction (defined at [63] below) and the Geneva Settlement. That issue has already been the subject of adverse findings so far as Mr Stevens (and Mr Ruhan) are concerned in divorce proceedings commenced by Ms Tania Richardson-Ruhan against Mr Ruhan, in a judgment of Mostyn J (Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam)). However,

Mr Stevens was not a party to and did not give evidence in those proceedings, and he has since applied to have those findings re-visited by the Judge.

17. The issue of whether Mr Stevens was acting as Mr Ruhan's nominee in the Cambulo Transaction has never formed part of the Directed Trial, and, as I explain below, I concluded at the start of the trial that the Geneva Nominee Issue (defined at [161]) would not form part of the Directed Trial either. In these circumstances, although the issue was explored at some length by the Settlement Parties in Mr Stevens' cross-examination, I do not intend to make any findings on the question of whether Mr Stevens was acting as Mr Ruhan's nominee at any stage.

18. The Settlement Parties made a number of submissions as to why I should place very limited weight on Mr Stevens' evidence at the Directed Trial. In the event, it has not proved necessary for me to make any findings on those very limited matters to which considerations of Mr Stevens' credit might have been relevant. Further, Mr Stevens will be giving evidence before me at the HPII trial in a context in which considerably more evidence will be available on the relationship of Mr Stevens and Mr Ruhan (including from Mr Ruhan himself). In these circumstances, it is not necessary to address the Settlement Parties' criticisms of Mr Stevens' evidence, or P&M's response to them.

## C6 Elizabeth Aird-Brown

19. Ms Aird-Brown is a licensed insolvency practitioner and certified fraud examiner who works for the MacDonald Partnership Limited. She was appointed as the liquidator of HPII on 9 March 2018. Ms Aird-Brown's evidence was principally concerned with the investigations which she, together with HPII's solicitors, had conducted in relation to the underlying events. Her witness statement incorporated a chronology, cast list and tracing analysis, prepared by individuals who she accepted had no first-hand knowledge of the relevant events.

20. The coming into force of PD57AC ("Trial Witness Statements in the Business and Property Courts"), which applies to trial witness statements signed on or after 6 April 2021 in new or existing proceedings, should prevent the service of further witness statements in this form. Paragraph 3.2 of P57AC provides:

> "A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case".

21. In the event, the greater part of Ms Aird-Brown's cross-examination concerned an issue which arose during the case in relation to documents which Ms Aird-Brown obtained from Mr Alan Campbell following phone and telephone contact with him in the evening of 23 January 2021, and which are said to be relevant to the issue of whether the Settlement Parties had notice of HPII's claims. As will be apparent from what follows, Mr Campbell is someone who has played various parts in the Smith-Ruhan saga: initially a business associate of Mr Ruhan, who following a falling-out with him threw in his lot with Dr Smith (and in that context provided witness evidence which was used by the Orb Claimants in the 2012 Proceedings and the Isle of Man applications), before falling out with Dr Smith. Mr Campbell, as a former director of HPII, was the subject of an order under ss.234 and 236 of the Insolvency Act 1986 requiring him to produce a wide variety of books and records,

and in 2016 he entered into a Deed of Release and Assistance with OMH under which he agreed to co-operate with those parties (a document disclosed by HPII on 3 February 2021).

22. Pursuant to the s.236 order, Ms Aird-Brown had obtained a number of documents from Mr Campbell which were *prima facie* privileged. HPII brought an application in which it contended that the documents fell within the iniquity exception to privilege. That application was heard by Moulder J, who reviewed the material and rejected HPII's challenge. Nonetheless, Ms Aird-Brown's witness statement for trial served in October 2020 quoted extensively from this material. HPII issued a further application, on the same day the witness statement was served, seeking a determination that privilege in this material had been waived. However, in the course of the July 2020 CMC, I had made an order that any such application had to be issued by 31 August 2020. I held that the attempt, without any satisfactory explanation, to raise that application so close to trial, in breach of my July 2020 order, was abusive, and I dismissed the application. For present purposes, it is sufficient to note that these events ought to have left Ms Aird-Brown and those advising HPII alive to the risk that documents provided by Mr Campbell might include material over which other parties were entitled to assert legal professional privilege.

23. The documents obtained as result of Ms Aird-Brown's conversation with Mr Campbell on 21 January 2021 included an email which had been sent to Stewarts by Dr Smith in August 2014, which it is accepted was (or at least was arguably) subject to legal professional privilege, and which Dr Smith had forwarded to Mr Campbell at or around that time ("the Stewarts Email"). The Stewarts Email was provided by Ms Aird-Brown to counsel, and clearly formed the basis of the following passage of Mr Pickering QC's cross-examination of Mr Upson:

> "Q As a matter of fact, Mr Upson, were you asked to consider an offer letter to HP Holdings?
>
> A. No.
>
> Q. Mr Upson, you are of course under oath. Are you absolutely certain that, in early August 2014, there were no communications between you and Dr Smith relating to the plan to acquire the holding company? I don't want to go into privileged areas, just your awareness of the fact of the plan.
>
> A. Yes. Yes, I am.
>
> Q. Okay.
>
> A. I suppose I could trawl through thousands of documents and double check that recollection but that is my very, very clear recollection. Yes.
>
> Q. In that case I will move on".

24. Mr Pickering QC's cross-examination moved on, but HPII's pursuit of the point did not. That evening, it sent Mr Upson at Stewarts a letter which set out this passage of cross-examination, and stated:

> "We respectfully request that Stewarts should indeed check its servers for any emails from Dr Smith or any other persons at Pro Vinci (i.e. Dawna Stickler or Sinead Irving), to Stewarts, Sean Upson or Adam Erusalimsky in late-July 2014 and the first half of August 2014 regarding the proposed acquisition of HP Holdings Group Limited, a BVI company (which was the 100% shareholder of HPII and the largest creditor recorded in HPII's statement of affairs) – whether that acquisition be by Pro Vinci, the Orb Claimants, or another entity related to Dr Smith.
>
> We ask you to check the 21 day period (from 28 July 2014 through to 17 August 2014) because this is a time period during which it appears that Dr Smith and Mr Campbell were discussing the potential acquisition of HP Holdings Group Limited … If it assists we suggest that you run the following search terms for the time period ….
>
> Please confirm that you will do this check as soon as possible and whether any email correspondence is found regarding this topic. We expect there to be some, given that Dr Smith and Mr Campbell were discussing this tactic around that time, and Stewarts were involved closely with Pro Vinci and Dr Smith. If Stewarts did receive or send any emails on the potential HP Holdings Group Limited acquisition, we would expect Stewarts to inform the court".

25. With the knowledge now available that Ms Aird-Brown had had the Stewarts Email since 23 January, and HPII's legal team since 26 January 2021, this letter makes unfortunate reading. When asked why HPII had not itself provided the Stewarts Email to the Court, rather than stating that it expected Stewarts to do so, Ms Aird-Brown replied, "but would it not be privileged?" However, that raises the obvious question as to why the email was not returned to Stewarts or the legal representatives of the Orb Claimants, rather than used as a basis for cross-examination without disclosing it. In the event, the matter was fully explored before the Court, it was accepted on the part of HPII and its legal team that matters had proceeded in a less than ideal way, and apologies were offered. However there are five matters I should briefly address.

26. First, in my view it would have been much the better course, in circumstances in which they had received obviously privileged material, for HPII to have returned that material to the Orb Claimants, albeit I accept that, having done so, HPII would have been entitled to ask Stewarts to correct any unintended misapprehension which may have arisen from Mr Upson's evidence.

27. Second, it was accepted by HPII and its legal team, and rightly so, that Mr Upson's evidence was honestly given and reflected his best recollection at the time. The Stewarts Email

comprised exchanges within a 21 minute period over 6 years ago. It is unfortunate, however, that Mr Upson was reminded he was "under oath" when questioned on this topic.

28. Third, it was accepted by HPII that, at least so far as Harbour was concerned, the defence of bona fide purchaser for value was raised on the statements of case, and, so far as Stewarts are concerned, I found in my ruling on 22 January 2021 that they had expressly denied any knowledge of HPII's claim. In those circumstances, it ought to have been obvious to HPII that the issue of the knowledge of the Orb Claimants and Stewarts of HPII's claim was a matter in issue in the trial, for which it needed to prepare, both when giving disclosure and serving witness statements. The attempt, after opening submissions had concluded, to obtain further disclosure and information on this issue reflected, in my view, a failure properly to engage with the need for such evidence at the appropriate stage.

29. Fourth, there are a number of authorities which made it clear that the statutory jurisdiction under ss.234 and 236 of the Insolvency Act 1986 is not to be used for the purpose of giving an office-holder special advantages in ordinary litigation in which it is involved. That principle was first stated, in respect of predecessor powers, in Re North Australian Territory Co (1890) 45 Ch D 87. In Re Bletchley Boat Co Ltd [1974] 1 WLR 630, 637, Brightman J stated that such powers were not to be used "to gain an advantage in the action … over and above the ordinary advantages available to an ordinary defendant and an ordinary plaintiff in litigation." The issue of whether it was appropriate for Ms Aird-Brown to invoke the s.236 power when asking Mr Campbell, after the commencement of the Directed Trial, for material which involved communications with other parties to the trial (in particular Stewarts and Harbour) was not discussed before me, and does not appear to have been the subject of consideration before the request was made.

30. Finally, immediately following her initial contact with Mr Campbell in the evening on Saturday 23 January 2021, Ms Aird-Brown sent Mr Campbell an email seeking information about certain settlement offers which had been made by the Orb Claimants to HPII in 2015, effectively asking Mr Campbell to provide information as to what was happening within the Orb Claimants' camp at that time. The request asked Mr Campbell for:

> "Documentation that demonstrated that Smith/Orb Claimants, Stewarts Law, Harbour (others knew):
>
> i) The offers were being made to 'TMP" (Orb Estates/HPII).
>
> ii) For, under the control of, or on behalf of the Orb Claimants.
>
> iii) The draft offer you emailed on Stewarts draft letterhead on 05/08/2015 originated from Stewarts
>
> iv) Generally that HPII (in particular) was coming [incomplete sentence]
>
> I don't know what you have, if anything but might include, for example

> Notes of any discussions regarding why Orb C's should settle with Orb Estates/HPII
>
> Interaction with Stewarts on the topic
>
> Interaction with Harbour/others on the topic
>
> Discussions with CIT, where Smith tried to get a position as an HPII creditor
>
> …
>
> Such information would, in my view, fall under the s.236 order obtained by HPII against you and I would much appreciate your earliest response".

31. I accept that Ms Aird-Brown did not, in the pressure of the moment, identify the risk that a request in this form could elicit the production of material which was privileged as against HPII. Had there been an opportunity more fully to consider the matter, I am sure that HPII and its team would have realised that there was such a risk (particularly given the issues determined by Moulder J in 2019). It cannot seriously be argued, for example, that information provided by Dr Smith to Mr Campbell about the Orb Claimants' decisions as to whether and on what basis to seek to settle any dispute with HPII was information which Mr Campbell was free to share with the world (including HPII). Mr Campbell clearly received that information under a duty of confidentiality, which preserved the Orb Claimants' privilege, and it could not be suggested that s.236 empowered HPII's liquidator to require Mr Campbell to provide her with material which was privileged and confidential as against the company in liquidation: Re Brook Martin & Co (Nominees) Limited [1993] BCLC 328 and Re Ouvaroff (A Bankrupt) [1997] BPIR 712.

## C7 Roger Taylor

32. Before his retirement, Mr Taylor was a businessman with a background in property development, and in particular in preparing and co-ordinating planning applications. He worked with Dr Smith on what became Orb's acquisition of the portfolio of Thistle hotels, and on the sale of the hotels to Mr Ruhan in 2003. It was Mr Taylor's evidence that he was present at the meeting at which the 2003 Oral Agreement (defined at [57] below) was concluded, and that he was a party to that agreement. Mr Taylor's evidence was that, under that agreement, he was entitled to 18.75% of the 40% profit share which Mr Ruhan agreed to provide as a condition of the sale by Orb to him of the various assets.

33. Mr Taylor's claim in this action arises under the trust created by the Harbour IA (defined at [34] below). However, Mr Taylor parts company with the Settlement Parties on a number of issues which I address, to the extent necessary, below.

34. In cross-examination, Mr Taylor was an honest witness, willing to give ground or correct his evidence when shown contemporary documents which pointed in another direction, and to accept the points put to him. That cross-examination shed much greater light on the

degree to which Mr Taylor had received assets originating from the IOM Settlement than Mr Taylor's witness statement. I am satisfied that in 2014, 2015 and 2016:

i) Mr Taylor received a number of payments which he understood to represent the proceeds of the IOM Settlement, in circumstances in which he knew Harbour had a prior interest under the trust said to have been created by the Investment Agreement entered into by Harbour and the Orb Claimants on 10 July 2013 ("the Harbour Trust" and "the Harbour IA").

ii) After undertakings had been offered by the Orb Claimants (including Mr Taylor) to Cooke J in February 2015 in respect of the assets transferred under the IOM Settlement (the effect of which was to prevent any payments being made from those assets other than those made in the ordinary course of business), in 2015 and 2016 Mr Taylor continued to receive payments which he understood to be the proceeds of those assets by way of his share of litigation recoveries.

35. Mr Taylor was happy to receive these payments, and sign the documents which were used to facilitate them, without worrying too much about the accuracy of those documents or the prior claims of others to the monies. It became clear through his largely open answers in cross-examination that he had been more closely involved with Dr Smith and his team with respect to the disposition of the proceeds of the IOM Settlement than his witness statement had disclosed.

## C8 Nicholas Thomas

36. Mr Thomas is a businessman, who has been involved in a variety of start-up businesses, and who put together a proposal to buy the Hyde Park Hotels from Orb in 2003 (albeit the transaction did not go ahead). It was Mr Thomas' evidence that he was party to the 2003 Oral Agreement. Mr Thomas' evidence was that, under that agreement, he was entitled to 18.75% of the 40% profit share which Mr Ruhan agreed to provide as a condition of the sale by Orb to him of the various assets.

37. Mr Thomas's claim in this action also arises under the Harbour Trust. However, like Mr Taylor, Mr Thomas parts company with the Settlement Parties on a number of issues which I address, to the extent necessary, below.

38. Mr Thomas had a good knowledge of the detail of the claim, and the legal issues which the various claims raised, and he accepted that he had paid close attention to matters of detail at the relevant time. I found some aspects of Mr Thomas' evidence unsatisfactory. He was generally combative, and I am satisfied that Mr Thomas' forensic understanding of the case coloured aspects of his evidence, for example leading him to suggest that his relationship with Dr Smith at the relevant time was less close than it had been. I am also satisfied, for reasons I explain below, that Mr Thomas knew or suspected that payments made to him by Dr Smith in 2014 and 2015 originated from assets recovered under the IOM Settlement.

39. For these reasons, I have approached Mr Thomas' evidence with caution.

## C9 Ulrich Pelz

40. Mr Pelz is a businessman with considerable experience of doing business and investing in the Middle East. From 2008, he worked as the CFO of the Al Rajhi Holding Group, one of the main shareholders in Al Arrab Contracting Company JSC ("Al Arrab"). Al Arrab was the contractor engaged to construct the residential towers which comprised Mr Ruhan's Qatar Projects (defined at [66] below). It is Mr Pelz's case that in 2011, at the invitation of Mr Phillip Barton, he became Mr Barton's and Mr Ruhan's partner in the Qatar Projects. Mr Pelz advances claims arising from that participation and from his subsequent co-operation with Mr Barton and Mr Ruhan in resisting the claims brought by the Orb Claimants and their associates.

41. Mr Pelz has been unrepresented in this action, and I mean no criticism of Mr Pelz when I observe that the precise nature and basis of his claims has, at times, been difficult to discern. In the course of his evidence, it (unsurprisingly) proved difficult for Mr Pelz to separate the evidence he was in a position to give, and the submissions he wished to make, something made more difficult by the fact that aspects of his cross-examination were aimed at seeking the clarity as to Mr Pelz's case which was not apparent from his written filings. I am satisfied that Mr Pelz feels a genuine sense of grievance, and that the factual evidence he gave when explaining the reasons for that grievance was honestly given.

42. The exploration of Mr Pelz's case in the course of his cross-examination identified some potential legal issues. I was concerned that Mr Pelz might be in difficulty in arguing these points himself. In the event, it proved possible to arrange some pro bono assistance for Mr Pelz. I wish to record my gratitude to Jeremy Brier for providing that pro bono representation and for his very helpful and clear submissions on Mr Pelz's behalf which were prepared and advanced on very short notice. I would also like to thank Advocate, COMBAR and the administrators of the Commercial Court and London Circuit Commercial Court Pro Bono Scheme for the speed with which they were able to organise that pro bono assistance. I am extremely grateful for all their efforts.

## C10 Nicole Langlois

43. Ms Langlois is an Advocate of the Royal Court of Jersey and an English barrister, who was called to give expert evidence on Jersey law. She was called to the Jersey Bar in 1998. I am satisfied that Ms Langlois is amply qualified to provide such evidence, and that at all times, she sought to assist the court by providing her true and complete professional opinion. The issue of Jersey law which arises in this case is not one on which there is any controlling Jersey authority. As is often the case with expert evidence on foreign law, the cross-examination of Ms Langlois largely took the form of legal argument conducted through the medium of cross-examination as to what conclusions should be drawn from the Jersey law materials in evidence.

## C11 Adverse inferences

44. Few cases are now complete without a submission to the court that it should draw an adverse inference against a party from that party's failure to adduce evidence from one or more potential witnesses. This case was no exception:

i) HPII invited me to draw an adverse inference as to Dr Cochrane or SMA's knowledge or notice of HPII's claims from the fact that Dr Smith, Dr Cochrane, Ms Irving and Ms Stickler were not called by the Settlement Parties to give evidence.

ii) Messrs Thomas and Taylor invited me to draw inferences adverse to the SFO's case that certain assets were held by nominees for Dr Smith from the fact that Dr Smith, or the ERs who held meetings with Dr Smith, had not been called to give evidence.

iii) The Settlement Parties invited me to draw an adverse inference as to Dr Cochrane or SMA's knowledge or notice of HPII's claims from HPII's failure to call evidence from Mr Campbell, particularly on the issue of whether the Orb Claimants knew or believed that HPII could trace into the Transferred Assets.

## (1) The relevant legal principles

45. The principles relating to the drawing of adverse inferences against a party from its failure to call a witness were recently reviewed by Cockerill J in Magdeev v Tsvetkov [2020] EWHC 887 (Comm), [149-154]. The Judge deprecated the increasing frequency with which adverse inference arguments were being deployed, noting that it was a principle "which is likely to genuinely arise in relatively small numbers of cases, and even within those cases, the number of times when it will be appropriate to exercise the discretion is likely to be smaller still". I respectfully agree with those observations. The tendency to elevate any missing witness from the role of second gravedigger to the missing prince is scarcely conducive to cost-effective litigation, and it is necessary to remember that there are many reasons why a particular witness might not be called other than a desire to keep unhelpful evidence from the court.

## (2) HPII's adverse inference case

46. As I have stated HPII invites me to draw an adverse inference against the Settlement Parties from the fact that Dr Smith, Dr Cochrane, Ms Stickler and Ms Irving did not give evidence on the issue of their knowledge or notice of HPII's claim. However, until the LCL Parties Settlement, the interests of those witnesses were to a significant extent adverse to those of the Settlement Parties, and the witness statements they served in this litigation to support their own positions were not accepted as truthful evidence by the Settlement Parties. Indeed, the Settlement Parties have at various times challenged the honesty and the veracity of evidence given by each of Dr Smith, Dr Cochrane, Ms Stickler and Ms Irving. Further, the evidence of those individuals is directly opposed to the SFO's case on the extent of Dr Smith's realisable property (evidence which would have supported, for example, Messrs Thomas and Taylor's claims on the nominee issue). The Settlement Parties cannot reasonably have been expected to adduce evidence from individuals that they did not consider to be witnesses of truth, thereby curtailing their right to challenge the veracity of that evidence (Anonima Petroli Italiana SpA and Neste Oy v Marlucidez Armadora SA (The Filiatra Legacy) [1991] 2 Lloyd's Rep 337).

47. In these circumstances, there can be no question of drawing an inference against the Settlement Parties from the fact that these witnesses did not give evidence. Finally, as I explain at [445] and following below, the real issue between the Settlement Parties and HPII relates to the issue of notice of HPII's ability to trace into particular assets. I am not

satisfied that any of Dr Smith, Dr Cochrane, Ms Stickler or Ms Irving were in a position to give useful evidence on this issue at the Directed Trial.

### (3) Messrs Thomas and Taylor's adverse inference case

48. For essentially similar reasons, I am satisfied that there is nothing in Messrs Thomas and Taylor's argument that I should draw an adverse inference against the SFO from its failure to adduce evidence from Dr Smith (either directly or from one of the ERs as to the product of interviews with Dr Smith) on the issue of whether assets were held for Dr Smith by nominees. Those who use nominees to hold assets on their behalf – particularly those who do so when they have been subject to criminal confiscation proceedings – do not generally admit this fact, whether in interviews or cross-examination. During his participation in these proceedings, Dr Smith made it clear that he denied the SFO's nominee case. SFO could not reasonably be expected to call Dr Smith to allow Messrs Thomas and Taylor (if they were sufficiently bold) to invite the Court to accept the truth of that denial, nor to call the ERs (who would have no first-hand knowledge of this issue, and whose notes of interview were disclosed in any event).

### (4) The Settlement Parties' adverse inference case

49. As I noted above, in 2016 HPII entered into a Deed of Release and Assistance with Mr Campbell under which he agreed to co-operate with the OMH parties. I accept that Mr Campbell is likely to have had knowledge relevant to Dr Smith's awareness of potential claims by HPII against Mr Ruhan, for reasons which I explain at [434]-[439] below. However, I have concluded that it would not be appropriate to draw an inference against HPII from the fact that it did not invoke a contractual right of co-operation and require Mr Campbell to give evidence:

    i) Mr Campbell is clearly a witness about whose reliability legitimate concerns are held. I have already referred to the various *volte faces* in Mr Campbell's allegiances as the contemporary events unfolded. Ms Aird-Brown gave evidence (which I accept) that she was "very wary of Mr Campbell". Mr Upson, who had also had dealings with Mr Campbell, said he came to have serious doubts about what Mr Campbell had told him, that at one point Mr Campbell appeared to offer his services as a witness in the Orb Claimants-Ruhan litigation dependent on "who sees me right", and that when Mr Campbell became frustrated that he had not benefited from the 2012 Proceedings in 2014, he suggested "his recollection of the evidence might have changed". Cooke J had suggested that Mr Campbell's evidence was "open to question" ([2015] EWHC 262 (Comm), [6]), and it became apparent in a freezing order application brought by Mr Hock Chan ("Mr Chan") that Mr Campbell had entered into an agreement to be paid for his evidence.

    ii) Against that background, it is easy to see why HPII may have felt unable to put forward Mr Campbell as a witness of truth. HPII faced the further difficulty that Mr Campbell claims an entitlement to participate in Mr Ruhan's alleged 60% profit share under the 2003 Oral Agreement, a claim which puts his interests in clear conflict with HPII's claim that it benefits from a constructive trust over the profits made from the Hyde Park Hotels.

iii) Finally, the issue on which the Settlement Parties particularly wish to draw adverse inferences is whether HPII could trace "from the proceeds of the sale of the Hyde Park Hotels into the assets transferred by Cooper & McNally to the Orb Claimants". I have no reason to believe Mr Campbell had relevant evidence to give on that tracing issue, and if he had, I would have expected it to have been deployed by the Orb Claimants in support of their own tracing case before Cooke J in February 2015 and thereafter. In any event, I am unable to see how Mr Campbell would have been in any better position to offer insights as to the understanding within the Orb Claimants and their legal team on that issue than Mr Upson – the reality is that the constraints of privilege would equally have applied.

## D MY FINDINGS ON THE FACTS

50. Edmund King QC, one of the most talented and popular advocates at the Commercial Bar before his tragically early death on 24 December last year, wrote an essay entitled "How to Lose A Case", which is essential reading for any litigator (young or old). The essay sets out 15 rules for the conduct of (un)successful litigation (I am sure that Mr King was pleased to exceed President Wilson's fourteen points, and unfazed by Georges Clemenceau's reported response). Rule 9 is "Ignore the Facts", Mr King observing:

> "Every single case is only ever won on the facts, even the ones that supposedly aren't".

51. I now set out my findings on the principal factual issues.

### D1 Dr Smith, the Izodia Theft and the May 2003 Agreement

52. This complex narrative begins with Dr Smith, who practised medicine until 1987 when he turned his talents to the world of business, and in due course from healing to stealing. In November 1993, he was convicted of stealing £2m from a pension fund, and sentenced to two years' imprisonment. That did not bring his business career to an end, and by 2002 he had built up a substantial pool of assets which were largely held on behalf of his family or possibly for himself through the Ozturk Trust No 2, a Jersey discretionary trust ("the Ozturk Trust"). The assets of the Ozturk Trust came to include shares in Orb, a company incorporated in September 2001 and of which (his conviction for dishonesty notwithstanding), Dr Smith became the CEO. Orb's assets included:

i) about 30% of the shares in an information technology company called Izodia plc ("Izodia");

ii) a portfolio of 37 hotels ("the Hotel Portfolio") held through HPII and an associated Jersey company, Hotel Portfolio II (Jersey) Ltd; and

iii) a portfolio of development, commercial and warehouse businesses ("the Orb Securities Portfolio").

53. The Hotel Portfolio was acquired with the benefit of a £598m loan made by Morgan Stanley in March 2002. 32 of the 37 hotels were operated under the Thistle brand, including three

valuable central-London hotels with considerable development potential for alternative use: the Lancaster Gate, Kensington Palace and Kensington Park Hotels ("the Hyde Park Hotels"). The other five hotels were "country-house" hotels in various parts of England. The Morgan Stanley loan was securitised through a loan note issue (the "HPII Notes").

54. Between August and November 2002, Dr Smith committed the Izodia Theft:

    i) In July 2002, the holders of 26.3% of the shares in Izodia agreed to sell their shares to a member of the Orb group.

    ii) Dr Smith used his control over this shareholding to procure the appointment of Sir Anthony Jolliffe as chair of Izodia. He also caused Izodia's directors to open a bank account with Royal Bank of Scotland International Limited ("RBSI") in Jersey, on the premise that the account offered a more attractive interest rate.

    iii) Within hours of the opening of the new account on 2 August 2002, £27.25m was transferred from Izodia's account in Reading to the new RBSI account. The next working day, Monday 5 August 2002, Dr Smith procured the transfer of the entirety of that amount into an account maintained with another Orb group company, Lynch Talbot Limited ("Lynch Talbot").

    iv) In an attempt to hide the transfer to Lynch Talbot, a forged RBSI bank statement was presented at an Izodia board meeting on 18 September 2002. After the forgery came to light, Dr Smith made further efforts to hide the Izodia Theft, including attempting to bribe Sir Anthony Jolliffe and procuring Sir Anthony's resignation when Sir Anthony refused to comply with Dr Smith's demands. Dr Smith also stole further sums from Izodia between 23 October and 15 November 2002.

55. On 16 December 2002, after being alerted to the Izodia Theft, the SFO raided Orb's offices in London and Jersey, and Dr Smith's home in Jersey. Events of default were declared on the HPII Notes. In March 2003, Dr Smith was introduced by Mr Thomas to Mr Ruhan. Dr Smith was looking for ways to raise money to repay the amount stolen from Izodia. To this end, on 7 May 2003, an agreement was concluded between Orb, Mr Ruhan's company Atlantic Hotels (UK) Ltd ("Atlantic Hotels") and Lynch Talbot ("the May 2003 Agreement").

56. Under the May 2003 Agreement, Orb transferred the following assets to Atlantic Hotels and to another company in which Mr Ruhan was interested, Bridgestone Properties Ltd:

    i) The shares in Euro & UK Property Ltd ("Euro&UK"), which indirectly held the shares in HPII and hence the Hotel Portfolio.

    ii) The shares in Orb Securities Ltd, which indirectly held the Orb Securities Portfolio.

    iii) Orb's shares in Izodia.

    In return, Atlantic Hotels agreed to provide (a) an initial payment of £2m, secured by two post-dated cheques written by Mr Campbell; and (b) £35m of interest-bearing loan notes issued by Atlantic Hotels, to be used to repay the funds transferred from Izodia to Orb.

57. There is a dispute as to whether there were further, undocumented, terms of the May 2003 Agreement to the following effect ("the 2003 Oral Agreement"):

    i) That 40% of any profit from the development of the Hotel Portfolio would be paid by Mr Ruhan to Orb (25%), Mr Taylor (7.5%) and Mr Thomas (7.5%).

    ii) That 50% of the profits generated on the restructuring, development and disposal of the Orb Securities Portfolio would be paid by Mr Ruhan to Orb and 7.5% to Mr Thomas, with Orb and Mr Taylor being entitled to 50% and 7.5% respectively of any retained businesses.

    iii) That 40% of the profits realised on the disposal of shares in Izodia would be paid to Orb (25%), Mr Taylor (7.5%) and Mr Thomas (7.5%).

## D2 Mr Ruhan, Messrs Cooper and McNally and the Arena Settlement

58. By a deed executed on 29 March 2004, a Manx law discretionary trust ("the Arena Settlement") was established on Mr Ruhan's instructions:

    i) Mr Simon Cooper, a retired solicitor based in Switzerland, was named as the settlor, it being asserted that he had caused £3,000 to be placed into the trusteeship of the Jersey trust company, Atticus Trust Company Limited ("Atticus") in order to constitute the trust. Mr Cooper and another solicitor, Mr Simon McNally, were partners in Bridgehouse Partners LLP, an Isle of Man law firm, and both had business connections with Mr Chan, an English solicitor based in the Isle of Man.

    ii) The trust comprised a power of appointment during the life of the trust, with a wide discretionary power to distribute assets pursuant to the power of appointment.

    iii) Messrs Cooper and McNally were the named members of the class of beneficiaries, with the trustee having the power to add further individuals or charities as beneficiaries.

    iv) A number of the trustee's powers could only be exercised with the prior written consent of the protector of the Arena Settlement, the first nominated protector being Mr Chan.

59. It is clear that it was Mr Ruhan who was the source of the assets settled into the Arena Settlement, with Messrs Cooper and McNally effectively acting as service-providers in setting up and operating the Arena Settlement. To the extent that Messrs Cooper and McNally were named as eligible beneficiaries from time-to-time, I am satisfied that they were acting as nominees for Mr Ruhan. By way of summary:

    i) Mr Ruhan began dealing with Mr Cooper and Mr McNally as professional service providers who assisted him in establishing structures to hold (and hide) his assets. That involved establishing Isle of Man companies to hold shares as Mr Ruhan's nominee (as acknowledged in a letter from Mr Cooper's then firm, Cooper Chan, to AIB of 13 August 2014).

ii) Mr Ruhan was added as a discretionary beneficiary of the Arena Settlement on 3 November 2004.

iii) From November 2004 until 21 March 2012, the *only* eligible beneficiary under the Arena Settlement was Mr Ruhan. Mr Cooper was excluded as a potential beneficiary from 22 November 2005, but re-appointed on 17 July 2012. During that period, a number of very valuable assets were settled into the Arena Settlement, including those operating the Sentrum data centre business. No sensible explanation has been offered as to why Mr Ruhan should have been the sole eligible beneficiary for nearly 8 years if Mr Ruhan was not the intended beneficiary of the Arena Settlement.

iv) By contrast, the stated purpose of the removal of Mr Ruhan from the list of beneficiaries on 21 March 2012 was to reduce the risk of adverse revenue action (on the basis that his apparent involvement "presented a risk to the structure given his UK residence"), not to deprive Mr Ruhan of any interest he might have.

v) The businesses placed into the Arena Settlement were those established or acquired by Mr Ruhan – for example the Atlantic hotels business and the Orb Securities Portfolio – rather than any businesses of Messrs Cooper and McNally.

vi) A sum of £150m taken out of the Arena Settlement in 2012 was distributed in accordance with Mr Ruhan's instructions, not so as to benefit Messrs Cooper and McNally.

vii) No explanation has ever been offered (including by Messrs Cooper and McNally themselves in the FS Arbitration to which I refer at [61] below) as to how Mr Cooper and Mr McNally could have accumulated a beneficial entitlement to the very significant assets held within the Arena Settlement, or why they would have been the gratuitous beneficiaries of Mr Ruhan's businesses.

60. For similar reasons, I am satisfied that the other assets which Messrs Cooper and McNally transferred under the IOM Settlement – shares in companies which were never held within the Arena Settlement ("the Cooper and McNally Companies") and that part of the cash held by Messrs Cooper and McNally and transferred under the IOM Settlement – were held by them on bare trust for Mr Ruhan:

i) The findings in [59] as to Messrs Cooper and McNally's backgrounds, and the nature of their relationship with Mr Ruhan apply with equal force in this context.

ii) It is highly improbable that Messrs Cooper and McNally were acting as Mr Ruhan's nominees so far as any interest in the Arena Settlement is concerned, but held the other Transferred Assets – the Cooper and McNally Companies and cash - in their own interest.

iii) Messrs Cooper and McNally's willingness to hand over the Cooper and McNally Companies and cash alongside the other companies in the IOM Settlement, and the absence of any attempt in that process to distinguish between the two, strongly suggests that Messrs Cooper and McNally's relationship with all three groups of assets handed over was essentially of the same kind.

61. I have reached this conclusion on the basis of the materials before me. I note that the same conclusion was reached by Mr Stuart Isaacs QC when sitting as arbitrator in an arbitration brought by Mr Sodzawiczny against Dr Smith, Ms Stickler and Messrs Cooper and McNally ("the FS Arbitration") in an award made on 9 December 2020. With the possible exception of Messrs Thomas and Taylor, none of the parties to the Directed Trial contended that Messrs Cooper and McNally held a beneficial interest in the Arena Settlement or the other assets transferred under the IOM Settlement. On the basis of my findings, any interest which Mr Cooper and/or McNally appeared to have in those assets at any time was held as nominee for Mr Ruhan.

62. The assets within the Arena Settlement comprised four holding companies ("the Arena Holdcos") and two other companies, and I shall refer to these six companies collectively as the Arena Companies. They comprise six of the eighteen Transferred Companies. The Arena Holdcos, all incorporated in the BVI, were

    i) Ballaugh Holdings Limited ("Ballaugh");

    ii) Glen Moar Propertes Limited ("Glen Moar");

    iii) Sulby Investment Holdings Limited ("Sulby"); and

    iv) Unicorn.

## D3 The Cambulo Transaction

63. Dr Smith was arrested for the Izodia Theft on 18 February 2005, and the SFO obtained restraining orders against Dr Smith, Dr Cochrane and others on 20 May 2005. On 1 March 2005, HPII exchanged contracts for the sale of the Hyde Park Hotels to companies owned by Cambulo-Comércio Internacional e Serviços Sociedade Unipressoal Lda ("Cambulo Madeira") for £127m ("the Cambulo Transaction"). Cambulo Madeira is a company said to be owned by Mr Anthony Stevens, although HPII alleges that Mr Stevens was acting as Mr Ruhan's nominee. The transfer of the Hyde Park Hotels was completed on various dates between 10 March and 4 April 2006. The various Hyde Park Hotels were sold on by companies in the Cambulo Madeira group. The Lancaster Gate Hotel was sold to Minerva Plc and Northacre Plc at a profit of some £7.76m. In March 2008, the Kensington Park and Kensington Palace Hotels were sold with planning permission for residential redevelopment at a profit of £250m. The Cambulo group's share of that profit was £125m, of which 80% was payable to Euro Estates Holdings Limited ("Euro Estates"), a company which Mr Stevens says is beneficially owned by him.

64. Dr Smith pleaded guilty to various offences arising out of the Izodia Theft on 4 April 2006, and on 11 September 2006, he was sentenced to 8 years' imprisonment. On 13 November 2007, the SFO obtained the Confiscation Order against Dr Smith in the sum of £40,856,911, to be paid within 12 months. On 7 April 2008, the-then ERs, Messrs Finbarr O'Connell and Jeremy Outen, were appointed to enforce the Confiscation Order against Dr Smith's realisable property.

65. In addition to the dealings with the Hotel Portfolio, there were two other business ventures involving Mr Ruhan which I should mention at this stage. The first is Sentrum

Holdings Limited ("Sentrum"), which established a number of data centres (hosting electronic data for its corporate clients). From 2005 onwards, this proved to be a very successful business, and on 26 June 2012, the ultimate holding company, Glen Moar, entered into an agreement to sell shares in Sentrum to a US company called Digital Stout Holding LLC for a total consideration of £700m. After discharging various debts of the business, the net proceeds of sale amounted to £220m.

66. The second concerned property developments in Qatar ("the Qatar Projects"). The ownership structure of these projects was complicated, but in summary, Mr Ruhan's interest was held via two Manx holding companies called Bridge Tower Holdings Nos 1 and 2 Limited ("BTH1" and "BTH2"). BTH1 in turn held six further Manx companies ("BT1" to "BT6" or "the BTH1Subs") and BTH2 owned BT7 to BT12 ("the BTH2Subs"). Each of the BTH1Subs and BTH2Subs contracted to acquire a plot of land on which a residential tower block was to be constructed.

67. BTH1 obtained funding from Investec Bank (UK) Limited ("Investec"), who entered into a facility to lend BTH1 £141,083,325 on 21 December 2007 ("the Investec Facility"). It is P&M's case that Mr Stevens agreed in late 2007 that Euro Estates' 80% stake in Cambulo would be used as collateral for the Investec Facility in return for a small profit participation. The Investec Facility was secured against the rights of the BTH1Subs in relation to the six development plots, the Sentrum business and the shares in Euro Estates. The Investec Facility was repaid by Euro Estates with the proceeds of sale of the Kensington Park and Palace Hotels on 2 April 2008, and Euro Estates acquired loan rights against BTH1 and the BTH1Subs on very similar terms to those previously offered by Investec. On 16 April 2008, Euro Estates lent a further £19.91m to BTH1 and BTH2.

68. Moving ahead in the story, the two loans made by Euro Estates were terminated by a Termination and Settlement Agreement concluded on 14 November 2012 ("the TSA"). It is P&M's case, and Mr Stevens' evidence, that the Qatar Projects were presented to him by Mr Ruhan as having proved a "disastrous" investment, and that the claims under the loans were released for a payment of £91,839,921.09 plus 10% of any further recoveries which might be made in Qatar. The figure (which I will round to £92m, although the Orb Claimants invariably rounded it to £91m in the 2012 Proceedings) was paid to Legion Management Corporation ("Legion"), a company administered by Messrs Cooper and McNally, the shares in which were then transferred to Mr Stevens. The £92m came from the proceeds of Glen Moar's sale of the Sentrum data centre business. As I have explained, there is a dispute between the parties as to whether Mr Stevens was acting as Mr Ruhan's nominee in relation to the TSA and the receipt of the £92m.

## D4 The background to the 2012 Proceedings

69. On 8 June 2010, Dr Smith was released from prison. In advance of his release, he had been seeking to persuade the ERs to bring claims against Mr Ruhan under the 2003 Oral Agreement. The ERs sent a letter before action to Mr Ruhan on 3 July 2008, to which Bridgehouse Law on behalf of Mr Ruhan responded on 28 October 2008. On 18 May 2009, the-then ERs issued a protective claim form in the name of Dr Smith (rather than Orb), but those proceedings were discontinued on 20 August 2010 (on the basis of advice that Dr Smith was not the appropriate claimant).

70. Investigations in relation to a possible claim continued. A substantial letter before action was sent on 28 June 2012, and proceedings were commenced on 29 October 2012. Mr Ruhan initially sought to strike out the Orb Claimants' claims under the 2003 Oral Agreement, on the basis that the agreement was illegal and/or too uncertain, but withdrew that application at the start of a hearing before Hamblen J. His Defence, served on 19 April 2013, denied that he was interested in the Arena Settlement, and pointed to a deed executed by Atticus, Mr Cooper and the Arena Settlement's then-protector (Mr Clive Fletcher) on 21 March 2012 which irrevocably excluded him as a beneficiary.

71. Harbour was approached to provide the Orb Claimants with funding for the 2012 Proceedings. Its investment committee met on 24 May 2013 and various documents were prepared to assist Harbour in its funding decision. On 25 June 2013, Harbour decided to fund the 2012 Proceedings, and it entered into the Harbour IA with the Orb Claimants on 10 July 2013. Harbour undertook to provide funding of £5,280,000 in return for a share of the proceeds, to be calculated in accordance with the formula set out in Schedule 2 to the Harbour IA. In addition to the Harbour IA, various ancillary agreements were entered into in relation to Harbour's funding including (a) a personal guarantee from Dr Cochrane; (b) a security interest agreement over Dr Cochrane's shares in Orb; and (c) a debenture granted by Orb.

72. On 7 August 2013, Stewarts went on the record as the Orb Claimants' solicitors in the 2012 Proceedings. An application for security for costs by Mr Ruhan was compromised on the basis that the Orb Claimants would obtain ATE insurance, which Harbour paid for at a cost of £970,575, thereby avoiding a stay of the proceedings.

## D5 The IOM Settlement

73. At some point in 2013, Pro Vinci Limited ("Pro Vinci"), a company linked with the Orb Claimants and owned and controlled by Ms Stickler, who was a close associate of Dr Smith, signed a protocol under which it was appointed as the Orb Claimants' agent for the purposes of the 2012 Proceedings. That protocol formalised the role which Pro Vinci was already performing.

74. On 12 April 2013, Pro Vinci wrote to Mr McNally, stating that they were acting "for a number of claimants who are engaged in litigation against Mr Ruhan … for recovery of very substantial sums outstanding under the terms of an agreement concluded on 6 May 2003". This was clearly a reference to the 2012 Proceedings, and the letter went on to refer to Hamblen J's ruling on the strike out application in those proceedings on 10 April 2013, attaching a copy of the court's order. The letter stated that the case was proceeding to trial, that "as a consequence" Pro Vinci had been instructed to report on the affairs of Mr Ruhan and Messrs Cooper and McNally, and that their investigations had "uncovered evidence of long term fraud, tax evasion, misrepresentation, false accounting and money laundering". There was also a suggestion that Isle of Man regulatory requirements were being breached. Those investigations had included interviews with Mr Ruhan's former business associate, Mr Campbell, who had been contacted by Dr Smith and asked to assist in the 2012 Proceedings in July 2012, and who, by August 2013, was assisting the Orb Claimants in their claims.

75. Further correspondence followed on a similar theme. In particular, Pro Vinci sent a 48 page letter to Messrs Cooper and McNally on 21 May 2013, headed "Re Orb a.r.l., Mr Roger Taylor and Mr Nicholas Thomas .. vs Mr Andrew J Ruhan; claim number 2012/1444" (i.e. the 2012 Proceedings) stating that Pro Vinci had "been independently contracted to provide litigation and investigative services to the Claimants relating to" the 2012 Proceedings, and had prepared a report "as a proper part of the Claimants' case preparations". The letter contained a number of explicit and implicit threats, and was accurately characterised in testimony which Dr Smith gave in the FS Arbitration as "part of fairly brutal litigation tactics".

76. On 5 September 2013, the Orb Claimants obtained without notice Norwich Pharmacal relief in the Isle of Man against Mr Chan (on the basis of his role as the first protector of the Arena Settlement) and his company, Chan Fiduciary Limited (now known as CFL Limited), requiring disclosure of a wide variety of records relating to the 37 hotels transferred by Orb to Atlantic, the Orb Securities Portfolio and shares in Izodia (i.e. the subject-matter of the 2003 Oral Agreement). His Honour Deemster Corlett's order provided that any documents obtained could not be used (without the Court's permission) for any purpose other than continuing the 2012 Proceedings or proceedings with the same subject-matter arising from matters associated with the 2012 Proceedings. A witness statement made by Dr Cochrane on 30 August 2013 which was filed in support of the application stated that the order had been sought because "it was necessary and appropriate in connection with giving assistance to the English Proceedings". The material obtained was provided to Stewarts.

77. A second Norwich Pharmacal order was obtained in the Isle of Man on 18 October 2013 against Messrs Cooper and McNally, containing a similar provision as to the use which could be made of any documents obtained. A witness statement filed in support of that application by Laurence Keenan, the Orb Claimants' Isle of Man solicitor, on 10 October 2013 stated that his firm had "been instructed by the Claimants to obtain certain Disclosure Orders in the Isle of Man, to assist them in [the 2012 Proceedings]".

78. Shortly thereafter, settlement discussions began between the Orb Claimants (essentially acting through Dr Smith) and Messrs Cooper and McNally. It is clear that in the course of these discussions, Dr Smith sought to use the threat of regulatory and legal action against Messrs Cooper and McNally to maximum advantage. The negotiations culminated in a letter agreement dated 8 November 2013 ("the November 2013 Letter") signed by Dr Cochrane and Messrs Cooper and McNally. By the November 2013 Letter:

    i) Messrs Cooper and McNally agreed to pay £10m "on account of the Claimants' claims" into a bank account to be nominated by Dr Cochrane, such payment being made by them "personally", as a "gesture of good faith" and on a "without prejudice' and "strictly confidential" basis.

    ii) The Orb Claimants agreed to adjourn an impending hearing in relation to the second Norwich Pharamacal order and to vary the terms of some of the orders obtained from the Manx Court.

iii) After the £10m had been paid, there were to be good faith negotiations between the Orb Claimants and Messrs Cooper and McNally, with a settlement to be achieved if possible by 6 December 2013.

79. The £10m was paid to Dr Cochrane on 15 November 2013. In a judgment in the 2012 Proceedings, Cooke J stated that it appeared likely that the money came from the Arena Settlement ([2015] EWHC 262 (Comm), [90]) and an analysis performed by the JLs, and set out in an affidavit sworn by Mr Jackson on 28 June 2016 in aid of BVI proceedings, establishes that £8,249,254 came from Glen Moar, with just over £7.5m of that originating from the proceeds of sale of Sentrum. This appears to have been Dr Smith's contemporaneous understanding as well. An email he received from an associate, Mark Keegan, on 8 November 2013, stated:

> "The myth that Messrs Cooper McNally were settling appears to have become the truth. Colin [Emson – who appears to have been acting as an intermediary between Dr Smith and Messrs Cooper and McNally] spoke as if that was the case and asked me to believe that the £10m was McNally's. I was asleep when he rang and could not summon hollow laughter …. In due course give me evidence of the deposits and, if possible, show the £10m is Ruhan's and Colin will turn like Campbell".

80. In text messages exchanged between Dr Smith and Mr Campbell between 5 and 13 December 2013, Dr Smith said the IOM Settlement would mean "we trace all and toss [Mr Ruhan] to the wolves". On 16 December 2013, Dr Cochrane sent Messrs Cooper and McNally a side letter to the agreement to be executed the following day, which promised to repay the £10m to them once sufficient money had been realised from the assets to be transferred, together with a further fee of 5% of the amounts realised from the sale of those assets or the value of any assets Dr Cochrane retained ("the December 2013 Letter"). It is clear that the promises in the December 2013 Letter were intended to provide a financial carrot to Messrs Cooper and McNally to enter into the IOM Settlement, supplementing the stick of legal and regulatory exposure which had already been deployed.

81. On 17 December 2013, Dr Cochrane and Messrs Cooper and McNally entered into a preliminary agreement through which the IOM Settlement was eventually brought into being ("the IOM MSA"). The IOM MSA referred to the claims advanced by Orb to interests in assets which were said to have been "inter-mingled" with assets belonging beneficially to Messrs Cooper and McNally (thereby treating Messrs Cooper and McNally as, at least in part, the beneficial owners of assets within the Arena Structure). I accept, however that, the Orb Claimants and Messrs Cooper and McNally knew that the beneficial owner of the Transferred Assets was Mr Ruhan rather than Messrs Cooper and McNally themselves. That had been the basis upon which the Orb Claimants had sought relief in the Isle of Man, and nothing which occurred during the course of those proceedings could have led them to change their view (indeed quite the contrary). However, it clearly suited Dr Smith and Dr Cochrane, and through them the Orb Claimants, to play along with Messrs Cooper and McNally's assertion that they had their own proprietary interests in the Transferred Assets, for the purpose of facilitating the transfer of those assets to the Orb Claimants under the IOM Settlement.

82. The IOM MSA provided for an audit process with a view to the separation of these assets as between the two sides, with a value-transfer ("the Settlement Consideration") to be made in respect of Orb's proprietary claims. Security over shares in Unicorn was provided in respect of any value due to the Orb Claimants.

83. On 30 December 2013, Atticus resigned as trustee of the Arena Settlement – its correspondence suggests that this was due to a loss of trust and confidence on its part in Messrs Cooper and McNally - and it was replaced by a Jersey company called AS Managers Ltd ("ASML"). Atticus had informed Messrs Cooper and McNally of its desire to be replaced as trustee on 21 March 2013, referring to "a breakdown in its relationship with the beneficiaries" and "a lack of openness" with regard to the claims against Mr Ruhan. The precise degree of influence which Messrs Cooper and McNally were able to exercise over ASML was not addressed in evidence, although Mr Cooper eventually became one of ASML's directors. On 26 February 2014, Messrs Cooper and McNally, Dr Cochrane, Orb and ASML entered into a further agreement ("the IOM Security Deed") which dealt with three different classes of assets:

    i) So-called "Claimed Trust Assets" comprising shares in the six Arena Companies.

    ii) Shares in the 13 Cooper and McNally Companies.

    iii) Cash held by either Messrs Cooper and McNally or ASML ("the Other Claimed Assets").

84. The Claimed Trust Assets were charged by ASML in favour of Dr Cochrane as security for the discharge of the obligations under the IOM MSA; and Messrs Cooper and McNally charged the Cooper and McNally Companies' shares and the Other Claimed Assets to the same end.

85. There were further meetings between Dr Smith and Messrs Cooper and McNally in early February 2014, and it is clear from texts exchanged between Dr Smith and Mr Campbell at this time that Dr Smith was holding Messrs' Cooper and McNally's feet to the fire of potential legal and regulatory action against them personally arising from their conduct in relation to the Arena Settlement. In one text, Dr Smith described Mr Cooper as "very, very anxious indeed". On 25 February 2014, Laurance Keenan sent a letter before action to Messrs Cooper and McNally alleging that the assets which the Orb Claimants were seeking to recover through the 2012 Proceedings could be traced into their hands in the Arena Settlement and otherwise, and demanding the delivery up of those assets. Given how far advanced the settlement process was by this stage, I have concluded that the letter is likely to have been an act of legal choreography, intended to assist Messrs Cooper and McNally in suggesting that they had effected the transfers by way of settlement of a claim, and to ease interactions with ASML in relation to the transfer.

86. Finally, on 24 March 2014, Orb, Dr Cochrane, Messrs Thomas and Taylor, and (at the request of Mr Cooper as set out in a "Letter of Wishes" of 22 March 2014) ASML entered into the final IOM Settlement document ("the IOM Confidential Deed"). This transferred the Claimed Trust Assets to Dr Cochrane and the shares in the Cooper and McNally Companies and the Other Claimed Assets to or for the benefit of Orb and Dr Cochrane. It also provided that reasonable endeavours would be exercised to effect the transfer of any

further assets belonging to Orb and Dr Cochrane which were subsequently discovered. On the same day, another side letter was entered into between Dr Cochrane and Messrs Cooper and McNally, purporting to sanction the diversion to them of £40m which Messrs Cooper and McNally had paid into bank accounts controlled by them in September 2012, on the basis that the £10m already paid to Dr Cochrane had come from that fund, further payments totalling up to £10m would be paid to Dr Cochrane from those or other assets, and that £15m would be returned to Messrs Cooper and McNally through a 15% commission on the proceeds of transferred assets realised by Dr Cochrane.

87. The transfers of the Claimed Trust Assets and the shares in the Cooper and McNally Companies were effected by ASML and Messrs Cooper and McNally over the following weeks, with those interests being transferred into the ownership of SMA, which was itself owned by Dr Cochrane (subject to any issues of nomineeship which I address at [191] below). In October 2014, Harbour, the Orb Claimants, Dr Cochrane, Messrs Cooper and McNally and Stewarts entered into a deed ("the Harbour Deed") under which it was agreed that for the purpose of clause 9.1 of the Harbour IA, the Settlement Consideration paid to or for the benefit of Dr Cochrane under the IOM MSA would be treated as "proceeds received as a result of Success in the Proceedings".

88. Before returning to the 2012 Proceedings, it is convenient briefly to summarise what happened to the various assets placed in the control of the Orb Claimants by the IOM Settlement. A number of the assets were liquidated, including shares in the parent company of Global Marine Systems Limited ("GMSL") and the Cannaziro House Hotel, and a sum of $43m realised through the compromise of a construction dispute relating to the Qatar Projects. The liquidated proceeds of the IOM Settlement were used to acquire various other assets, some of which are in issue in this trial. These included (but are not limited to):

    i) Long leases to 15 flats in Hamilton House, which were purchased by 13 Non-Arena Companies over the period from 16 December 2013 to 15 June 2015.

    ii) Dr Cochrane acquired a 50% interest in Bodega Limited ("Bodega"), an Isle of Man company which owned a substantial property, the Steephill Estate, in Jersey, from the Viscount (as part of efforts undertaken by the-then Viscount, acting pursuant to a *saisie judiciaire*, to realise Dr Smith's property in Jersey: see [114] below).

    iii) The Jersey Properties were conveyed to Dr Cochrane between July 2014 and June 2015: two properties known as the Moedwill Cottages, and Montrose and Antoinette Gardens.

    iv) Dr Cochrane granted a loan to Mr and Mrs Greenstone for the purpose of acquiring or re-mortgaging Walham Court on 11 July 2014.

    v) Ms Hollis purchased Goodwood Court on 26 September 2014.

    vi) Just over £500,000 in cash was transferred to Atticus Legal LLP.

    vii) The Jewellery was purchased in November and December 2014.

viii) Ms Irving acquired a 50% interest in Moor Lane on 30 June 2014.

ix) Ms Irving purchased Montagu Square on 15 June 2015.

## D6 The 2012 Proceedings continued

89. The transfers received under the IOM Settlement did not cause the Orb Claimants to abandon the 2012 Proceedings, even though the immediate effect of the recoveries under the IOM Settlement was that the Orb Claimants had recovered significantly more than they were claiming in the 2012 Proceedings – something later noted by both Cooke J ([2015] EWHC 262 (Comm), [43-47]) and Popplewell J ([2016] EWHC 850 (Comm), [19], [85-88]).

90. On 26 March 2014, the Orb Claimants issued a without notice application in the Isle of Man for a freezing order against Mr Stevens and various companies with which he was linked, the injunction being said to be "necessary and appropriate in connection with giving assistance to the English Proceedings". Dr Cochrane's witness statement in support of the application continued to suggest that the Isle of Man structures had been used to hold assets beneficially owned by Mr Ruhan, although it also referred to an assertion by Messrs Cooper and McNally that the assets in the Arena Settlement belonged to them.

91. On 9 April 2014, Stewarts wrote to Mr Ruhan's solicitors, Memery Crystal LLP ("Memery Crystal"), notifying them of the IOM Settlement, and the transfer of various companies thereunder, and seeking various undertakings in relation to those assets. The premise of the letter was that the assets recovered were those into which the Orb Claimants were entitled to trace by virtue of the claims against Mr Ruhan in the 2012 Proceedings. The letter stated:

> "The above companies, and their subsidiaries, appear to control a substantial part of the Orb Assets [those to which proprietary claims were brought in the 2012 Proceedings] although … the Claimants are presently carrying out due diligence …. to ascertain the full extent of the Orb Assets now within their control. Once this exercise is completed, the Claimants will give appropriate credit in the English Proceedings for the value of the assets recovered. For the avoidance of doubt the English Proceedings will continue against Mr Ruhan as there remain Orb Assets outside of the 'Arena Settlement'".

Assets said to remain "outside the Arena Settlement" included various assets said to be held by Mr Stevens or companies associated with him on Mr Ruhan's behalf.

92. On 7 May 2014, the Orb Claimants applied to vary the directions in the 2012 Proceedings to allow for the fact that they had "obtained control of substantial assets which represent Orb Assets or the proceeds thereof". On 4 June 2014, the Orb Claimants applied to amend the 2012 Proceedings to add Mr Stevens, Phoenix and another company connected to Mr Stevens, Grenda Investments Ltd ("Grenda"), as defendants, on the basis that they had received assets into which the Orb Claimants were entitled to trace, namely the proceeds of the £92m payment which had purportedly been made under the TSA. A proprietary freezing

order was sought against the proposed new defendants in May 2014. In her affidavit in support of the application, Dr Cochrane referred to "the steps taken by the [Orb] Claimants to obtain relief in support of the English Proceedings in the Isle of Man", describing the Isle of Man applications as "ancillary disclosure proceedings".

93. On 24 June 2014, Memery Crystal (for Mr Ruhan) sent a letter before action to Messrs Cooper and McNally accusing them of gross breach of trust and fiduciary duty, and attaching a draft Amended Defence and Counterclaim in the 2012 Proceedings. This document withdrew Mr Ruhan's previous denial of any interest in the Arena Settlement, and sought to join Messrs Cooper and McNally to the 2012 Proceedings. On 15 September 2014, Mr Ruhan issued an application seeking permission to make the draft amendments. He also sought disclosure, proprietary freezing order relief, and to join Dr Cochrane and SMA to the 2012 Proceedings. In his witness statement, Mr Ruhan claimed that he had thought he could truthfully sign the statement of truth to his Defence which denied having a beneficial interest in the Arena Settlement or other assets because he did not understand that an arrangement whereby Messrs Cooper and McNally held such an interest as his nominees constituted a beneficial interest "in a strict legal sense" (an understanding said to have been formed on the basis of advice from Messrs Cooper and McNally).

94. In addition to the applications issued in the 2012 Proceedings, the Orb Claimants pursued their dispute against Mr Ruhan across a wider front. This included issuing bankruptcy petitions against Mr Ruhan in respect of debts said to be due to companies which had been transferred under the IOM Settlement. Registrar Barber dismissed these petitions on 19 December 2014, in terms which were highly critical of the Orb Claimants and their legal representatives for pursuing the petitions, which she held were "being used as instruments of oppression". The Registrar observed that some demands "should never have seen the light of day, still less be pursued through to a hearing".

95. Between 2 and 5 February 2015, Cooke J heard the various applications which had been issued in the 2012 Proceedings. With characteristic expedition, he handed down judgment on 11 February 2015. In summary:

    i) While holding that the Orb Claimants had real prospects of success in tracing into the £92m on the basis of the 2003 Oral Agreement, he concluded that it would not be just to permit the amendment to bring claims against Mr Stevens and the associated companies because the Orb Claimants had already over-recovered through the IOM Settlement, and because of their behaviour in failing to inform the court of the effect of the IOM Settlement.

    ii) He held that Mr Ruhan would be permitted to contend that he had an interest in the Arena Settlement and to pursue a counterclaim on the basis that the IOM Settlement involved a misappropriation of assets in which he was interested, his *volte face* being a matter for cross-examination in due course.

    iii) He ordered the Orb Claimants to provide disclosure of the location and value of the assets received as a result of the IOM Settlement.

    iv) He accepted undertakings from all parties in relation to assets within their control.

96. In the course of the hearing, Cooke J had asked the Orb Claimants to produce the IOM Settlement documentation. Some of that documentation was produced on the third day of the hearing. Cooke J described the documents provided to him as "extraordinary" ([2015] EWHC 262 (Comm), [50]) and he held that in failing to be open about the terms of the IOM Settlement, the Orb Claimants had not adopted a "clean hands" approach, which reflected badly on Orb, Dr Cochrane, SMA, Messrs Cooper and McNally "and Dr Smith who was doubtless the architect of it all".

97. On 5 March 2015, Dr Cochrane placed Unicorn into creditors' voluntary liquidation, leading to the appointment of the JLs. On 13 March 2015 they were appointed over the other Arena Holdcos, which were similarly placed into liquidation.

98. Following a further hearing on 19-20 March 2015, Cooke J granted Mr Ruhan a worldwide freezing order against the Orb Claimants, Dr Cochrane and SMA up to a value of £67,323,000. He also made a number of criticisms of the Orb Claimants for not disclosing information to the court, observing that "Mr Ruhan's complaint that the Orb parties cannot be trusted is well-founded".

99. There were settlement discussions between the two sides in April and August 2015. On 30 July 2015, following an enquiry from HMRC, Stewarts explained that the Orb Claimants were holding settlement discussions with Mr Ruhan, that Mr Stevens was involved in those discussions, and that the Orb Claimants believed Mr Stevens was acting as Mr Ruhan's nominee. Stewarts filed a Suspicious Activity Report ("SAR") in relation to the proposed settlement which explained:

> "Mr Ruhan has indicated to our clients that a condition of the settlement is that the great majority of the settlement payments be made to Mr Stevens (or companies nominally controlled by him). Most recently he has insisted that the payment should be split with £5m paid to Mr Ruhan directly and the remaining £25m paid to Mr Stevens. Mr Ruhan asserts that it is a condition of settlement that there are completely separate arrangements with him and with Mr Stevens … We are concerned that under the proposed settlement funds would be paid to Mr Stevens as nominee for Mr Ruhan. Our concerns are exacerbated by the fact that we are aware that Mr Ruhan is the subject of an investigation by HM Revenue and Customs, and also that he is involved in divorce proceedings in which the value of his assets is an issue … In this report we request consent for the entering into of the settlement agreement between our clients and Mr Stevens (or companies nominally controlled by him ….)".

100. On 4 August 2015, Stewarts wrote to Mr Ruhan's solicitors explaining that the Orb Claimants had been advised that a settlement under which Mr Stevens would receive a significantly greater sum than Mr Ruhan was "potentially criminal". Two days later, HMRC wrote to Stewarts advising the Orb Claimants against entering "into a settlement deal with Andrew Ruhan/Anthony Stevens" for the reasons set out in Stewarts' SAR.

101. In the absence of a settlement, the interlocutory disputes, including those arising from the orders previously made by Cooke J, continued. These included an application by the Orb Claimants that the freezing order which Cooke J had granted should be discharged, among other reasons because they had provided sufficient security for Mr Ruhan's claims, Mr Ruhan had provided inadequate fortification and/or Mr Ruhan had unclean hands. This latter issue concerned allegations that Mr Ruhan had:

    i) procured the hacking of Pro Vinci's computers;

    ii) harassed and intimidated the Orb Claimants and those associated with them;

    iii) set out to blackmail the Orb Claimants;

    iv) sought to suborn the Orb Claimants' security advisers and obtain confidential information from them;

    v) misled the Court as to his interest in the Arena Settlement;

    vi) taken steps to prejudice his creditors; and

    vii) engaged in oppressive litigation tactics.

102. On 15 January 2016, the Orb Claimants and Pro Vinci obtained without notice Norwich Pharmacal relief in this jurisdiction against Mr Fiddler and Mr Anciano, two individuals alleged to have been involved in Mr Ruhan's "black ops" campaign, with a view to revealing what were said to be attempts by Mr Ruhan to compromise or blackmail Dr Smith, and to obtain confidential and/or privileged information relating to the 2012 Proceedings by hacking computers and bribing security guards. That order succeeded at the "without notice" stage. However, on 26 February 2016 Popplewell J set the order he had made aside for what he found to be "very serious failures of the duty to make full and frank disclosure", and because the application was an abuse of process, its purpose not being to ascertain the identity of a wrongdoer but to obtain evidence with a view to discrediting Mr Ruhan ([2016] EWHC 361 (Comm)). He concluded (at [105]);

> "This is yet another example of Orb and Dr Smith's abusing the court's process for improper purposes in the hope of using the results to harass Mr Ruhan in relation to the main action".

103. A number of outstanding applications were heard by Popplewell J between 14 and 17 March 2016. He gave directions for the trial of the 2012 Proceedings, and for a separate and expedited determination of the unclean hands allegations against Mr Ruhan. The Orb Claimants, Dr Cochrane and SMA were ordered to provide wide-ranging documentation on an "unless" basis and to commission an independent accountant's report relating to the assets obtained under the IOM Settlement. The Judge also granted proprietary and personal injunctions against the Orb Claimants.

## D7 The Geneva Settlement

104. About a week after the hearing before Popplewell J, on 24 March 2016 Mr Ruhan and Dr Smith exchanged text messages regarding a possible further round of settlement discussions. There is limited evidence as to the content of the discussions, but matters progressed sufficiently quickly for draft agreements to be served by Akin Gump LLP ("Aken Gump"), who were acting for Mr Stevens, on 21 April 2016.

105. The various settlement agreements which make up what is referred to in this action as the Geneva Settlement were executed in Geneva on 29 April 2016. A signed consent order dismissing the 2012 Proceedings with no order as to costs was sealed on 6 May 2016. At around the same time:

    i) On 5 May 2016, LCL, Orb and Dr Cochrane signed an agreement which provided that LCL would release its rights said to have arisen from funding the Orb Claimants' litigation in return for (i) the assignment to LCL of all claims Orb had against the JLs and (ii) the transfer to LCL of the "Settlement Property" received under the IOM Confidential Deed.

    ii) On 6 May 2016, Dr Cochrane executed stock transfer forms for the purpose of transferring shares in a number of companies, including 25 of the 27 Non-Arena Companies, to LCL ("the LCL Transfers").

    iii) On 6 May 2016, Dr Cochrane and Dr Imogen Smith executed declarations of trust in favour of LCL over the Jersey Properties and Flat 1 Hamilton House.

106. On 6 May 2016, Mr Ruhan informed Mr Barton, Mr Pelz and Mr Sodzawiczny, all of whom had an interest in Mr Ruhan prevailing in the 2012 Proceedings, that he had filed the discontinuance because of lack of funds, and that "if in the meantime I have funds … to instruct lawyers to attend the court … we can continue". He provided his ex-wife, Ms Richardson-Ruhan, with a copy of the order dismissing the 2012 Proceedings, but not the other documents relating to the Geneva Settlement until ordered to do so in 2017 in the context of the divorce proceedings.

107. The various agreements comprising the Geneva Settlement share the complexity which is characteristic of the dealings of those who were parties to them. However, in broad terms:

    i) A document which I will refer to as the "Confidential Settlement Deed" contained general releases by 11 parties of all claims relating to the 2012 Proceedings and associated litigation.

    ii) The seven principal individuals who were parties to the 2012 Proceedings entered into another document, "the Confidential Deed", which included covenants not to sue those parties and their affiliates (an expression defined in notably wide terms).

    iii) There were two agreements relating to Minardi: "the Minardi SpA" and "the Minardi Deed of Release". The former transferred shares held in Minardi to Phoenix, a company said to be owned by Mr Stevens. The latter involved a release by SMA of a £2,500,000 loan which it had made to Minardi.

iv) A loan note issued by Dr Cochrane ("the Loan Note") under which Dr Cochrane agreed to pay £73,750,000 to Phoenix by 31 December 2017 (under a structure which incentivised early interim payments, to avoid an interest rate of 15%, the first instalment falling due on 31 May 2016 in the sum of £3m). In support of that obligation Dr Cochrane provided a negative pledge over certain assets said to be worth £80.2m.

v) A document entitled the "Liquidation Inter-Creditor Settlement Agreement" (the "LICSA") which was entered into between SMA, Phoenix, Minardi and Dr Cochrane, the terms of which are considered in detail at Section K below.

108. On 6 May 2016, Mr Greenstone – a solicitor who acted for Pro Vinci and who was a long-term associate of Dr Smith - submitted a further SAR ("the Greenstone SAR") in relation to the Loan Note. The Greenstone SAR stated:

> "Mr Stevens is believed to act as nominee for Mr Ruhan and on 29 April 2016 the legal proceedings were settled against Mr Ruhan on the basis that a loan note for £73,750,000 was issued to Phoenix … It appears that this payment is a sham and has been structured by Mr Ruhan so that he will evade liabilities he may have to HMRC and others. Since the primary claim was against Mr Ruhan the payment to Phoenix … appears to have been directed by Mr Ruhan .."

109. The National Crime Agency ("the NCA") responded on 17 May 2016, refusing permission for Dr Cochrane to make the £3m payment due on 31 May 2016, and suggesting that the payment might involve an offence under ss.327, 328 or 329 of the Proceeds of Crime Act 2002. There was a provision in the Loan Note which relieved Dr Cochrane from liability if payment could not be made by reason of *force majeure*, which expression included "any law or any action taken by a government or public authority including [that] which arises due to any act or omission of the obligor or any person associated with [Dr Cochrane]". Dr Cochrane relied upon the NCA's response as a reason for not making the £3m payment on 31 May 2016.

110. After becoming aware of the various transactions involving Drs Cochrane and Smith in May 2016, the SFO, the JLs and P&M took steps to protect their various interests. Between 18 and 20 May 2016, Popplewell J (sitting in the Administrative Court) made an order on the application of the SFO restraining dealing with various assets. On 24 June 2016, Popplewell J granted a without notice freezing injunction, on the application of Phoenix, against Dr Cochrane. This injunction froze various assets, including a development site in Krakow, Poland owned by Bridgehouse Developments (Krakow) Sp Zoo. In the course of that without notice application, Phoenix's counsel informed the Court that Mr Stevens "strenuously" denied any allegation that he was acting as Mr Ruhan's nominee. On 28 June 2016, the JLs sought freezing order relief against Dr Cochrane under s.25 of the Civil Jurisdiction and Judgments Act 1982 (in support of proceedings to be brought in the BVI).

111. On 6 July 2016, the JLs caused the companies under their control to issue proceedings against Dr Cochrane in the BVI to recover £83.5m transferred out of those companies. On

8 July 2016, the JLs obtained freezing order relief in the Commercial Court in support of those proceedings.

112. In the aftermath of these various injunctions, on 24 August 2016, Dr Cochrane executed:

i) a deed of trust purporting to declare a trust over SMA's shares in Glen Moar in favour of Dr Smith;

ii) a share sale agreement in respect of the same shares in Glen Moar in favour of Dr Smith; and

iii) a trust deed in favour of Dr Smith over the entirety of the share capital in Orb;

in what, in a late change of strategy, appears to have been an attempt to increase the assets available to satisfy the Confiscation Order.

113. On 30 September 2016, Phoenix obtained a further without notice injunction against Stewarts ("the Stewarts Freezing Order") in relation to the sum of £2m which had been transferred by LCL into Stewarts' client account on 14 September 2016 on account of outstanding fees. At the return date hearing, Popplewell J continued the Stewarts Freezing Order. At a follow-up hearing on 6 March 2017, Popplewell J took the first steps to manage the dispute by directing interested parties to circulate position papers.

114. In addition various steps were taken in Jersey:

i) On 24 November 2016, Harbour obtained bankruptcy (*en désastre*) orders against Orb and Dr Cochrane from the Jersey Royal Court, the effect of which was to vest the property of Orb and Dr Cochrane in the Viscount as administrator of their estates (with the exception of property which was already the subject of a *saisie judiciaire* referred to in the following sub-paragraph). A very late appeal by Dr Cochrane against the order made against her was refused by the Jersey Court of Appeal on 14 August 2020.

ii) Immediately before those orders, the Jersey Royal Court varied the *saisie judiciaire* which had been obtained by the SFO against Dr Smith on 26 May 2006 to encompass any property situated in Jersey held by Dr Cochrane or Orb "for, on behalf of, as nominee for, or for the benefit of" Dr Smith, including the shares in Bodega. The effect of this order is that assets which were subject to the *saisie judiciaire* did not form part of the estates of Dr Cochrane or Orb in accordance with Article 16 and 22 of the Proceeds of Crime (Jersey) Law 1999 as modified and included within the Schedule to the Proceed of Crime (Enforcement of Confiscation Orders) (Jersey) Regulations 2008.

115. In December 2016, Minardi was added as a claimant and Dr Smith, Mr Anthony Smith and Ms Dawna Stickler were added as defendants to the proceedings commenced by Phoenix, and freezing order relief was obtained against those additional defendants and Dr Cochrane.

116. On 9 January 2017, Stewarts applied to discharge the Stewarts Freezing Order. Various parties claiming an interest in the £2m made submissions in those proceedings. Popplewell

J continued the order, and directed that the £2m be paid to the ERs to be held by them pending further order of the court.

## E THIS LITIGATION

117. At a hearing on 6 March 2017, Popplewell J directed any party claiming an interest in the assets in issue in the various applications issued in 2016 to file a position paper setting out which assets it asserted a claim to, and the basis of that claim. Some 23 parties filed position papers. With the benefit of the various position papers, Popplewell J held a directions hearing on 22 June 2017 at which he directed the SFO and the ERs (if so advised) to issue an application seeking a determination of the extent to which (what became) the Transferred and Non-Arena Companies and the Jersey Properties constituted the realisable property of Dr Smith for the purpose of the CJA 1988 ("the SFO Proceedings"). He also ordered the SFO and the ERs (if so advised) to serve a statement of case, to which other interested parties would respond.

118. Popplewell J held a further hearing on 6-7 December 2017, at which he directed those interested parties who had served statements of case to:

> "file at court and send to the other Interested Parties a brief document which shall:
>
> (1) identify any other Interested Party's claim which is accepted;
>
> (2) identify any other Interested Party's claim which is accepted as taking priority;
>
> (3) provide a brief explanation, in relation to any other Interested Party's claim which is not accepted and/or not accepted as taking priority, of the reasons why not (insofar as such explanation has not previously been set out in an Assets and Claims Position Paper or in the statement of case filed in relation to the SFO Application, in which case cross-references to the said explanation should be provided).
>
> For the avoidance of doubt, such documents are not intended to be in form of, or to stand as, statements of case, but are to be provided in order to assist the Interested Parties and the court in identifying the Interested Parties' positions for the purposes of the directions hearing ….".

119. Popplewell J also appointed the ERs as receivers over the shares in the Non-Arena Companies (other than Orb and LCL), and two other companies (Buena Vida Living 2 BV and Sixup Ltd). He made an order giving the ERs power to require the parties to transfer the shares in these companies to the ERs.

120. On 6 April 2018, HPII issued separate proceedings against Mr Ruhan and Mr Stevens alleging that Mr Stevens had acted as Mr Ruhan's nominee in the Cambulo Transaction, and that Mr Ruhan had acted in breach of fiduciary duty in relation to that transaction.

121. Popplewell J heard a further directions hearing on 24 and 25 April 2018 at which he established the structure for managing the litigation:

    i) he joined various parties as respondents to the SFO Proceedings;

    ii) he directed a trial ("the Directed Trial") to determine the ownership of the Transferred and Non-Arena Companies, and the Jersey Properties, which make-up the Relevant Property; and

    iii) he made orders for the advertising of the Directed Trial, and set a deadline for all those asserting interests in the Relevant Property to notify their claims.

    The reasons for Popplewell J's rulings are reported at [2018] EWHC 2862 (Comm) and [2018] EWHC 2865 (Comm).

122. There were a number of further developments in the management of this litigation, which have been the subject of separate judgments: by Moulder J ([2019] EWHC 446 (Comm), [2019] EWHC 2597 (Comm) and [2019] 2598 (Comm)) and by me ([2020] EWHC 788 (Comm), [2020] EWHC 1280 (Comm), [2020] EWHC 2201 (Comm), [2020] EWHC 2077 (Comm), [2020] EWHC 2079 (Comm) and [2020] EWHC 3548 (Comm)). For present purposes, it is sufficient to note that:

    i) On 29 March 2019, Moulder J fixed the Directed Trial to commence on 13 January 2020, with a time estimate of 10 weeks.

    ii) The Settlement Parties entered into the 2019 Settlement Agreement on 5 September 2019, which allowed them to adopt a common position in relation to their claims. The need for certain parties to obtain court sanction for that agreement led to the adjournment of the Directed Trial from January 2020 to January 2021. The Settlement Agreement was sanctioned by the Jersey Court in January 2020, the Isle of Man Court on 2 July 2020 and by the BVI Court on 22 June 2020. The decision of the BVI Court was upheld by the Eastern Caribbean Court of Appeal on 17 November 2020, and on 8 December 2020, Phoenix and Minardi sought permission to bring a further appeal to the Privy Council.

    iii) I included issues as to the ownership of the IUAs within the Directed Trial in July 2020, and made similar orders to those previously made by Popplewell J for advertising the enlarged scope of the Directed Trial, joining further interested parties, and providing a cut-off date for the notification of claims.

123. Finally, as I have mentioned, the scope of the issues in the trial was significantly narrowed by the LCL Parties Settlement concluded on 27 January 2021, and further narrowed by a settlement between the Settlement Parties and Mr Sodzawiczny on 23 February 2021.

## F GENERALLY APPLICABLE LEGAL PRINCIPLES

124. There are a number of contested legal issues which are best considered in context, rather than as a matter of generality at the outset. However, there are points of general application which it is convenient to set out at this stage.

### F1 A beneficiary's right to trace into the proceeds of trust property

125. In Foskett v McKeown [2001] 1 AC 102, 127-128, Lord Millett stated:

> "A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds every one who takes the property or its traceable proceeds except a bona fide purchaser for value without notice.
>
> …
>
> Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim. That will depend on a number of factors including the nature of his interest in the original asset. He will normally be able to maintain the same claim to the substituted asset as he could have maintained to the original asset. If he held only a security interest in the original asset, he cannot claim more than a security interest in its proceeds. But his claim may also be exposed to potential defences as a result of intervening transactions. Even if the plaintiffs could demonstrate what the bank had done with their money, for example, and could thus identify its traceable proceeds in the hands of the bank, any claim by them to assert ownership of those proceeds would be defeated by the bona fide purchaser defence."

126. It has been held that when conducting a tracing analysis, the court can apply a matched transactions approach, identifying by reference to transactions in a chain the substitutions through which the value is to be traced. This may rest on inferences drawn from the amount and timing of payments, as well as contextual factors, such as intention, motivation and the structure and character of prior dealings: Relfo Limited (in liquidation) v Varsani [2014] EWCA Civ 360; [2015] 1 BCLC 14, [56-58] (Arden LJ). In some circumstances, it is permissible to trace a debit effected by one transaction into a credit effected by a chronologically anterior transaction. The circumstances in which this is possible are addressed at [22]-[48] of my judgment on the Settlement Parties' strike-out application against HPII's tracing claim ("the Strike-Out Application"), which was heard on 24, 25 and

26 March 2021. That judgment was handed down on the same date as this judgment, and is reported at [2021] EWHC 1273 (Comm) ("the Strike-Out Judgment").

127. Where a security over an asset is discharged using relevant funds, the remedy of subrogation is frequently available to allow a party with an interest in the funds to step into the shoes of the party in whose favour the security previously operated and to claim proprietary protection as if the security was still in place: Menelaou v Bank of Cyprus UK Limited [2016] AC 176.

## F2 Tracing into mixed funds

128. There are additional rules which apply where there is competition as between innocent claimants as a result of the mixing of funds. The editors of *Lewin on Trusts,* (20th) ("*Lewin"*), 44-064 explain:

> "There is a mixed substitution when the sum standing to the credit of the bank account is not wholly attributable to payments into it from one source. That will be so if that sum is attributable in part to payments into the account of the account holder's own beneficial money and in part to money held by him in trust, or where that sum is attributable to payments into the account from different trusts."

129. Lord Millett in Foskett, 132 stated that "the primary rule in regard to a mixed fund … is that gains and losses are borne by the contributors rateably." Addressing a shortfall in a mixed fund, Henderson J in Charity Commission for England & Wales v Framjee [2015] 1 WLR 16, [48] stated:

> "In principle, there are three techniques which could be applied in order to determine how the shortfall in the notional blended fund should be borne by the ultimate recipients, all of whom are equally blameless for the mismanagement of the Dove Trust which has led to the shortfall. The first technique is to apply the rule in Devaynes v Noble; Clayton's Case (1816) 1 Mer 572 whereby payments out of an account are attributed to payments into the account in the order in which the payments in were made, or in other words on a "first in, first out" basis. The second technique is to divide the remaining money between the recipients in proportion to the amounts which they are owed. This solution, where distribution is made on a rateable, or pari passu, basis, has frequently been adopted in recent years where the claimants on the fund are all the victims of a common misfortune. It also has the great advantage of being simple and inexpensive to implement. The third technique, which has been considered in a number of English authorities but never yet applied in practice in this jurisdiction, is to apply the 'rolling charge' or 'North American' methodology, which combines the *pari passu* approach with the lowest intermediate balance principle. Its effect is that the position has to be analysed whenever a payment is made out of the fund, and no contributor can be paid more than his rateable

> share of the lowest intermediate balance while his money remained in the fund."

Henderson J held that the *pari passu* principle was to be applied.

## F3 The priority of competing equitable interests

130. The general rule when determining priority between competing equitable interests is that the first in time prevails when the equities are equal: *Snell's Equity* (34th) ("*Snell*"), 4-002. This is subject to the bona fide purchaser for value defence. *Snell*, 4-018 explains this defence as follows

> "a bona fide purchaser for valuable consideration who obtained a legal estate at the time of his purchase without notice of a prior equitable right was entitled to priority in equity as well as at law. He took free of the equitable interest. In such a case equity followed the law; the purchaser's conscience was in no way affected by the equitable right so there was no justification for invoking the jurisdiction of equity against him. Where there was equal equity the law prevailed."

131. I will now consider the separate elements of the defence in turn.

### (1) Bona fide

132. One of the disputed issues of law in this case is whether the reference to a "bona fide" purchaser adds anything to the requirement that the purchaser takes "without notice of a prior equitable right". It is possible to find statements in cases which lend support to both sides of this argument, although I was not referred to any case in which the claim of a purchaser for value without notice was subordinated to a prior equitable interest because of a lack of bona fides alone. *Snell*, 4-021 expresses the view that "in view of the development of the doctrine of notice it is difficult to imagine a case in which the purchaser does not have notice and yet is not acting in good faith". *Lewin*, 44-124 expresses a similar view. The Settlement Parties submitted that the reference to 'bona fide' is in reality a conclusory label flowing from the fact that a party who has notice, but seeks to proceed in any event, can be said to have acted in bad faith. This is consistent with early judicial analysis of the defence, which treats that type of knowing inconsistent dealing as a species of fraud or bad faith.

133. In support of what might be termed "the wider view", Mr Pickering QC for HPII relied on the statement by Lord Wilberforce in Midland Bank Trust Co v Green [1980] AC 513, 528, when addressing whether a purchaser of land was "a purchaser of a legal estate for money or money's worth" against whom an unregistered option was void under s.13(2) of the Land Charges Act 1925:

> "My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and

> the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words 'in good faith' related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James L.J. in Pilcher v. Rawlins (1872) L.R. 7 Ch App 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. and there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see Berwick & Co v Price [1905] 1 Ch 632, 639; Taylor v London and County Banking Co [1901] 2 Ch 231, 256; Oliver v Hinton [1899] 2 Ch 264, 273)".

134. Berwick v Price and Oliver v Hinton were essentially cases of constructive notice in which the purchasers of the legal estate did not ask for production of the title documents which would have revealed the prior equitable interest. Pilcher refers in general terms to the need for the purchaser to show "the bona fides … of his purchase" and Taylor states that "a legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice" and that "from such a purchaser a Court of Equity takes away nothing which he has honestly acquired". None of these cases assist in identifying the content of any requirement of bona fides independent of the requirement of lack of notice.

135. The passage in Lord Wilberforce's judgment in Green was considered by the Court of Appeal in Corbett v Halifax Building Society [2002] EWCA Civ 1849; [2003] 1 WLR 964. In that case, the claimant had mortgaged property to the first defendant. The terms of the mortgage precluded any employee of the first defendant from purchasing the property. The second defendant, an employee of the first defendant not involved in the sale, wished to acquire the property and arranged for his uncle to purchase the property and sell it to him. Unbeknown to the second defendant, his uncle purchased the property at an undervalue. The owner sought to set the sale aside, arguing that the second defendant was not a bona fide purchaser for value (and therefore entitled to the protection afforded by s.104(2) of the Law of Property Act 1925) because of his deception of his employer. At [38], Pumfrey J rejected that contention:

> "There is no doubt that Lord Wilberforce contemplated that the investigation of the question of 'good faith' in its context in the definition of 'purchaser' in section 205(1)(xxi) of the Law of Property Act 1925 might involve an investigation of motive. In Midland Bank Trust Co Ltd v Green was no doubt that the purchaser

> had knowledge of the interest the defeating of which was the whole purpose of the transaction, and the passage in Lord Wilberforce's speech is intended to point up the difference between the definition of 'purchaser' in the Land Charges Act 1925 (where the crucial words do not appear) and that in the Law of Property Act. There are no cases where such an investigation has been carried out, and the natural meaning of the words certainly suggests that the principal matter affecting 'good faith' is notice, as it was in Pilcher v Rawlins (1872) LR 7 Ch App 259 itself. But in any event, it seems to me that it is relevant to ask, good faith vis-a-vis whom? What makes this case unusual is that the lack of good faith has nothing to do with the Corbetts, but has only to do with the Halifax, whose internal rules were dishonestly broken by Mr Deakin. The lack of good faith is thus immaterial to the Corbett's interests, and did not affect those interests. I do not consider that Lord Wilberforce meant that a purchaser for value who has neither actual nor constructive notice of an impropriety connected with the exercise of the power of sale is nonetheless affected by that impropriety merely because of a lack of good faith that has no connection with the impropriety."

136. Without deciding that there can never be a case in which an absence of bona fides could prevent the purchaser of the legal estate without notice from asserting priority over a prior equitable interest, in my opinion it could only be a rare case in which it might do so. The suggestion that the acquirer of a legal title for value without notice of a prior interest could nonetheless be subordinated to it as a sanction for bad behaviour would raise serious issues for the security of receipt in English commercial and property law, and might engage consideration of the purchaser's rights under Article 1 Protocol 1 of the European Convention of Human Rights. Following Corbett, I would hold (at a minimum) that any such lack of good faith would have to be directed to the holder of the prior equitable interest, and that it must be something which is directly relevant to the acquisition of the legal estate or the purchaser's assertion of a superior title against the holder of the equitable interest.

**(2) For value**

137. This requirement is intended to exclude those who acquire the legal estate as volunteers. It is clear that "value" requires a consideration which must be more than nominal, but that beyond that the court is not concerned with the adequacy of the consideration: *Snell*, 4-022; *Lewin*, 44-120.

**(3) Of a legal interest**

138. Subject to a limited number of exceptions, it is only the purchaser of a legal interest (or in the case of a chose in action, the right to sue at law) for value and without notice who has priority over a prior equitable interest in the property which is the subject of the sale: *Snell*, 4-023.

139. The first exception – although it is not properly so-called - is the rule that the purchaser of an equitable interest for value will prevail over the claims of someone with a "mere equity" as opposed to an equitable interest in the property. A "mere equity" is defined by *Snell*, 2-006 as "an inchoate right binding on specific property", which would give the purchaser an equitable proprietary claim once it performs some further legal act which crystallises its claim as an equitable interest. The classic example of a "mere equity" is the misrepresentee's right to rescind a transaction under which property has passed, and through the exercise of that right, re-vest legal title in itself. However, this is also the position in other cases where property is paid or money transferred under a voidable transaction: Guinness Plc v Saunders [1990] 2 AC 663, 698.

140. The second exception is where the holder of the later equitable interest acquires a better right to call immediately for the transfer of the legal estate. This will be the case where the purchaser purchases the legal estate under the transaction, but rather than vesting it in itself, has the legal estate transferred to a trustee or nominee on its behalf, both being without notice. In Macmillan Inc v Bishopsgate Investment Trust Plc (No 3) [1995] 1 WLR 978, 1001, Millett J explained:

> "It is not necessary that the purchaser should obtain the legal estate and have the same vested in himself. It is sufficient if he has the legal estate transferred to a trustee or nominee for him. Provided that neither he nor his nominee has notice of the prior equitable interest, he will take free from it, for he has the better right to the legal estate."

This principle was applied when a payment was made into court in order to discharge a liability to the counterparty in litigation, the counterparty gaining priority over prior equitable interests even though legal title was vested in the accountant general, solely for the purpose of discharging the liability (Thorndike v Hunt (1859) 3 De Gex & Jones 563).

141. The third exception applies in some circumstances where the purchaser of the equitable interest for value later acquires the legal estate, even if, prior to doing so, it was on notice of the prior equity (provided that this happens without breach of trust): Blackwood v London Chartered Bank of Australia (1874) LR 5 CP 92, 110. One context in which this exception applies is when a creditor takes equitable security over shares by deposit of a share certificate accompanied with a completed transfer form, and is then able to obtain registered title without recourse to the legal owner: Dodds v Hills (1865) 2 H&M 424 (a case in which the security-holder was able to perfect its title even though it acquired knowledge of the prior equitable interest before registration). In Macmillan, 1004, Millet J explained the basis for this exception as follows:

> "A transferor who delivers to a transferee a share certificate together with an executed transfer may still retain the legal estate for the time being, but he has done everything in his power to vest it in the transferee, while the transferee for his part has it within his own power to vest the legal estate in himself without further recourse to the transferor. As between the transferee who has given value on the one hand and the transferor and those claiming under him on the other, this rather than the time when the transferee actually obtains

> the legal title is to my mind the appropriate time for the question of notice to be tested."

142. Finally, an earlier equitable interest which would otherwise have priority over a later equitable interest may lose that priority by reason of conduct which makes it inequitable to assert it. Cases applying this principle usually involve conduct by the earlier interest holder which contributes to an assumption leading to the creation of the later interest (*Lewin*, 26-033), and the rule bears some similarities with the species of estoppel recognised in Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890, or conduct which leads the later interest-holder to fail to take steps which would have protected its interest.

**(4) Without notice of the equitable interest at the time of transfer of the legal estate**

143. The general rule is that lack of notice must be established at the time of the transfer of the legal estate: *Lewin*, 44-137. In Independent Trustee Services Ltd v GP Noble Trustees Ltd [2012] EWCA Civ 195; [2013] Ch 91, [88], Lloyd LJ observed that:

> "The question whether the recipient of the legal title had notice is to be determined at the time of acquisition of that title, at the latest. The cases in which an earlier date may be relevant do not matter for present purposes and I will ignore that possibility. I am not aware of any circumstances in which the question whether the recipient had notice could be affected by anything that happened later. That is because it is a question of fact."

144. *Lewin*, 44-136 states:

> "[N]otice in the commercial context will [not] necessarily be equated with actual knowledge, but the purchaser may be fixed with notice, in the absence of actual knowledge, only where in the particular commercial context involved he has failed to draw inferences which ought reasonably to have been drawn in that context or has been put upon inquiry by knowledge of suspicious circumstances indicative of wrongdoing on the part of the transferor, but has failed to make inquiries that are reasonable in the circumstances. The defendant will have notice where the inferences to be drawn from his knowledge are such that he should have appreciated that a proprietary right (as distinct from mere claim) probably existed, or where the facts known to the defendant, including facts as to the commercial purpose of the transaction as well as the source of the relevant funds or property, would have given a reasonable person in the position of the defendant serious cause to question the propriety of the transaction and thereby put the defendant on inquiry, but none or none sufficient in the circumstances was made."

145. The issue of actual knowledge, and how far that is to be equated with a belief as to a state of affairs which turns out to be true, is considered at [424]-[430] below, in the context of HPII's claim. So far as constructive notice is concerned, the applicable principles which emerge from the judgments of Lord Neuberger MR in Sinclair Investments (UK) Ltd v

Versailles Trade Finance Ltd [2012] Ch 453, [106-109] and Lord Clarke in Papadimitriou v Crédit Agricole Corporation and Investment Bank [2015] 1 WLR 4265 (PC), [17-20] are as follows:

i) The court must consider whether, on the facts known to the person claiming to be without notice, a reasonable person with the attributes of the relevant person should have appreciated that a proprietary right (not merely a proprietary *claim*) probably existed. If so, there is constructive notice (which, to distinguish it from the further stages of the enquiry, it is convenient to refer to as "type 1" constructive notice).

ii) If there is no type 1 constructive notice, the court should consider whether the facts known to the person claiming to be without notice would have led a reasonable person with the relevant attributes to make enquiries or seek advice which, had they been made or sought, would have revealed the probable existence of such a right. If so, there is also constructive notice ("type 2" constructive notice).

iii) The threshold for seeking advice or making enquiries is not merely where a reasonable person would have been aware of a possible right, but nor it is necessary that he would have been aware of a probable right. The state of knowledge which triggers such a duty lies somewhere between the two. Enquiries must be made where there is a serious possibility of a third party having such a right or, to put it another way, if the facts known would give a reasonable person with the relevant attributes serious cause to question the propriety of the transaction.

146. It was suggested by HPII in its written submissions that, in a "type 2" scenario, if a person failed to make any attempt at inquiry and the proprietary right did in fact exist, they should be fixed with constructive notice, whatever those enquiries would have revealed. The point was not pressed in oral closing arguments and I would not have been willing to accept it. It is clear from the judgment of Lord Clarke in Papadimitriou that a person will only have type 2 constructive notice if the enquiries they ought to have made would have revealed the probable existence of a proprietary right. Lord Browne-Wilkinson in Barclays Bank plc v O'Brien [1994 1 AC 180, 195, said that notice was established "if the acquirer of the later right knows of the earlier right (actual notice) *or would have discovered it had he taken proper steps* (constructive notice)" (emphasis added). Lord Neuberger in Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2012] Ch 453, [109] adopted essentially the same test: "should either have appreciated that a proprietary claim probably existed or should have made inquiries or sought advice, *which would have revealed the probable existence of such a claim*" (emphasis added), a formulation approved in Papadimitriou, [19]. I would add that Lord Sumption, in a short concurring judgment in Papadimitriou, [33] noted that: "[w]e are in the realm of property rights, and are not concerned with an actionable duty to investigate." The doctrine of constructive notice does not exist to punish those who fail to carry out reasonable enquiries, regardless of what those enquiries would have revealed.

147. HPII also argued that the references to "probable" in Papadimitriou should be understood as equivalent to "believable" or something which "could reasonably be expected to be the case". I do not think it is helpful to seek to gloss the language in Papadimitriou in this way.

148. Where the legal estate is transferred to a nominee or bare trustee for the purchaser, the notice requirement must be satisfied by both the nominee/ bare trustee and the purchaser, as confirmed by the passage from Macmillan quoted at [140] above.

### (5) Burden of proof

149. It is for the party claiming to be a bona fide purchaser for value without notice to prove that they gave valuable consideration and had no notice. In In re Nisbet and Potts' Contract [1906] 1 Ch 386, 404, Lord Collins MR said:

> "Has the appellant, the present vendor, shewn – as the burden is upon him to shew – that, having bought this land for value, he bought without notice of this incumbrance?"

150. To similar effect, Mummery LJ in Barclays Bank Plc v Boulter [1998] 1 WLR 1, 8 stated:

> "On the authority of Lord Browne-Wilkinson's speech in the O'Brien case [1994] 1 AC 180 and on well-established equitable principles, the burden is not on Mrs Boulter to plead and prove that the bank had constructive notice: it is on the bank to plead and prove that it did not have constructive notice … It is well-established at this level of decision that the doctrine of bona fide purchaser for value without actual or constructive notice is a defence which can be raised to defeat a claim of an equitable right or interest and that the burden is on the person raising that defence to plead and prove all its elements: it is a 'single defence'…"

151. If the initial transferee can establish the bona fide purchaser defence then anyone claiming through them (such as a subsequent transferee) will also take free of the prior equitable interest, unless the person claiming through the transferee was previously bound by the equitable interest (such as where they were the initial trustee): *Lewin*, 44-143.

## F4 Declarations of trust over property which the trustee has yet to acquire

152. Sometimes a party promises to vest an equitable interest in another party in property which has yet to be acquired (i.e. future property). In that situation, no trust over the property comes into existence at the date of the agreement (because the trust is not yet constituted), but a covenant for value is effective in equity, and an equitable interest in the property arises once the promisor obtains it. In Collyer v Isaacs (1881) 9 Ch D 342, 351, Sir George Jessel MR said:

> "A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. If a person contract for value, e.g., in his marriage settlement, to settle all such real estate as his father shall leave him by will, or purports actually to convey by the deed all such real

> estate, the effect is the same. It is a contract for value which will bind the property if the father leaves any property to his son."

153. In Holroyd v Marshall (1862) 10 HLC 191, 11 ER 999, a case in which a charge was granted extending to any machinery later installed in the chargor's factory, Lord Westbury LC explained the law as follows (p.212):

> "But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

154. This was confirmed in Tailby v Official Receiver (1888) 13 Ap Cas 523, 533, where Lord Watson observed:

> "As soon as they [the future choses in action] come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control at the time when the assignment was made."

## G THE NATURE OF THE COMPETING CLAIMS

155. In broad terms, the parties to the Directed Trial fall into two groups: those who claim to derive their rights from Dr Smith or companies associated with him or persons close to him, and those who claim to derive rights from Mr Ruhan or those associated with him.

156. The "Smith-side" claimants comprise:

i) The SFO and the ERs who assert an entitlement to the realisable property of Dr Smith, and contend that a number of other parties hold assets as Dr Smith's nominees, or have received them as gifts and therefore subject to their statutory entitlements. They accept that their rights do not prevail over those who have proprietary interests in the Relevant Property which arise otherwise than by way of gift.

ii) The Viscount who seeks to recover the assets of Dr Cochrane and Orb. Subject to an issue which arises in relation to the Jersey Properties (as real property in Jersey), the Viscount accepts her claims are subject to any prior equitable rights over those assets.

iii) Various parties who claim entitlements arising from their involvement in the Smith-side of the 2012 Proceedings:

a) Harbour;

b) Stewarts; and

c) Messrs Thomas and Taylor.

157. The "Ruhan-side" claimants comprise:

i) P&M who claim rights under the Geneva Settlement which it is said that Mr Ruhan agreed they should receive in discharge of a liability owed by Mr Ruhan.

ii) HPII, who claims to be entitled to assets beneficially owned by Mr Ruhan to the extent that they represent the traceable proceeds of profits said to have been made by Mr Ruhan in the Cambulo Transaction (both against the Smith-side claimants and P&M).

iii) Mr Pelz who claims a right to trace into Mr Ruhan's assets as a result of agreements he reached with Mr Ruhan and Mr Barton in relation to the Qatar Projects.

158. The only party who does not fall into either camp are the JLs, who seek to recover amounts which they say were wrongfully paid out of the companies over which they were appointed (which companies constitute Relevant Property and were subject to the IOM and Geneva Settlements).

159. While the very beginning has been said to be a very good place to start, it is not the starting point in this trial when determining which proprietary claims to the Relevant Property are valid, and which claims they have priority over or are subject to. The proprietary claims to be determined in the Directed Trial are not those said to arise at the start of the complex factual narrative, but when it was well underway. As a result, it has been necessary for the purpose of deciding certain issues to make assumptions as to the starting point on matters which will only fall to be determined in the second phase of the litigation, or at least outside of the Directed Trial.

160. In particular, this is the case so far as so-called "upstream" tracing entitlements of HPII and Mr Pelz are concerned (who I will refer to, in this capacity, as "the Upstream Claimants"). It is necessary to say a little more about the "upstream" claim of HPII because it gave rise to a late emerging issue of case management raised before me at the PTR on 11 December 2020 (with which I dealt in my judgment at [2020] EWHC 3548 (Comm)) and again at the start of the trial. In summary:

i) HPII claims an entitlement to trace arising from the sale of the Hyde Park Hotels from HPII to Cambulo Madeira.

ii) It alleges that the apparent ultimate beneficial owner of Cambulo Madeira, Mr Stevens, was acting as a nominee for Mr Ruhan, one of HPII's directors, with the result that Mr Ruhan breached the self-dealing rule (and hence his fiduciary duties) in relation to the transaction.

iii) HPII claims to be entitled to trace into the gains made by Mr Ruhan from the alleged breaches, and asserts an entitlement on that basis to trace into the Relevant Property.

161. The case management issue arises because, although HPII's "upstream" claims do not form part of the Directed Trial, the issue of whether Mr Stevens was acting as Mr Ruhan's nominee arises again in relation to the Geneva Settlement of 2016 (the so-called "Geneva Nominee Issue"), and in relation to the application brought by Stewarts to set aside the freezing injunction obtained by Phoenix and Minardi in 2016. The dividing line between the Geneva Nominee Issue and the "upstream" issues involves a number of rough edges (as I noted in [2020] EWHC 3548 (Comm), [12]), and yet further rough edges have become apparent since that hearing. However I noted in that judgment at [29], on the basis of the issues and claims as then before me, that removing the Geneva Nominee Issue from the Directed Trial "could significantly undermine the purpose and intent of the Directed Trial, namely resolving the proprietary claims relating to the Geneva Settlement, subject only to HPII's 'upstream proprietary claims'".

162. I encouraged the parties to explore options which would allow the Directed Trial to achieve its intended purpose without having to determine the Geneva Nominee Issue. Considerable progress was made in that direction, although it was not possible to reach a position in which the Geneva Nominee Issue would not have to be resolved on any iteration of the relevant parties' cases. However, it became clear that the Geneva Nominee Issue was far down the list of contingencies on the interested parties' cases, in that each had identified a number of arguments on which it was said they would succeed however the Geneva Nominee Issue was resolved. In these circumstances, I decided to remove the Geneva Nominee Issue from the scope of the Directed Trial, for reasons which I gave in a ruling given following argument on the issue on 22 January 2021. On the findings made in this judgment, the resolution of the Geneva Nominee Issue would not have affected the outcome of the Directed Trial.

163. Towards the end of the Directed Trial, further case management difficulties arising from the fact that HPII's "upstream claims" did not form part of this trial emerged. I explain those difficulties, and my response to them, when considering the claims of the JLs at Section R below.

## H ISSUES ARISING IN RELATION TO THE HARBOUR IA

### H1 The construction of the Harbour IA

164. Various issues have arisen as to the scope of the Harbour Trust and the Harbour IA which, given their impact on subsequent stages of the argument, I address at this point.

#### (1) The relevant terms

165. The Harbour IA contains the following definitions at clause 1.1:

i) "Success in the Proceedings" includes "any … third party agreement between the Claimants or its Affiliates and any other person arising out of or related to the Causes of Action and 'Succeeds' and 'Successful' shall be construed accordingly, including any direct or indirect consequential outcome resulting in a monetary financial benefit to the Claimants and/or any of its Affiliates".

ii) "Affiliates" means "in relation to a specified person, any person who controls, or is controlled by, or who is under common control with, that specified person."

iii) "Cause of Action" means "Each and every claim that the [Orb] Claimants may seek to assert against [Mr Ruhan] or any other person, arising out of or related to [the 2003 Oral Agreement] … and includes any and all statutory, legal or equitable cause or causes of action, whether to be made in England and Wales or in any other jurisdiction that are or may be vested in the [Orb] Claimants or its Affiliates against [Mr Ruhan] or any other person, arising out of or related to the said agreement" (by virtue of clause 1.1 together with Schedule 1).

iv) "Proceeds" means "any amount of money or the value of any goods, services or benefits recovered or received by the [Orb] Claimants or its Affiliates as a result of Success in the Proceedings …"

166. By clauses 8 and 9 of the Harbour IA, the Orb Claimants agreed on a joint and several basis that they would hold any and all "Proceeds" received as a result of "Success in the Proceedings" on bare trust absolutely for the benefit of the Orb Claimants and Harbour to be distributed in accordance with an agreed waterfall.

**(2) Does the Harbour Trust extend to the assets transferred to Dr Cochrane or SMA under the IOM Settlement and/or the Geneva Settlement?**

167. P&M contends that the Harbour Trust only applies to "Proceeds" recovered or received by "the Claimants or its affiliates". On that basis, they contend that the transfers made to Dr Cochrane and SMA under IOM Settlement and/or the Geneva Settlement did not fall within the scope of the Harbour Trust on the proper construction of the Harbour IA.

168. For reasons I set out at [191] below, I am satisfied that Dr Cochrane and SMA received and held any assets transferred or retained by them as a result of the IOM and Geneva Settlements as nominees for the Orb Claimants. The definition of "Proceeds", which includes benefits "recovered or received by the [Orb] Claimants or its affiliates", clearly extends to benefits received by nominees acting for the Orb Claimants, and there is no difficulty in the Orb Claimants agreeing with Harbour that any amounts received by bare trustees on their behalf will be held on the Harbour Trust (as P&M accepted). It does not matter that neither Dr Cochrane nor SMA were parties to the Harbour IA, because the Orb Claimants were, and the promise they had made in clause 8.1 of the Harbour IA extended to equitable as well as legal interests.

169. What of the position if Dr Cochrane and SMA had not been acting as the Orb Claimants' nominees?

i) As a director of Orb, Dr Cochrane clearly owed fiduciary duties to Orb, and she could not personally have received an unauthorised benefit which derived from Orb's causes of action. To the extent of any interest of Orb, therefore, I am satisfied that any rights acquired by Dr Cochrane under the IOM or Geneva Settlements otherwise than as nominee for the Orb Claimants would have been held on constructive trust for Orb (which interest would, in turn, have been subject to the Harbour Trust).

ii) I am satisfied that this would also be the position so far as assets received by SMA are concerned. SMA was wholly owned by Dr Cochrane, and her knowledge was attributable to it. SMA was at all times aware that the assets transferred to it were assets which Dr Cochrane was obliged to hold for Orb. Orb's rights as against SMA are similarly capable of being subject to the Harbour Trust.

iii) Dr Cochrane was acting on behalf of all of the Orb Claimants in the negotiations with Messrs Cooper and McNally which resulted in the release of all of the Orb Claimants' claims against Messrs Cooper and McNally. In so doing, I am satisfied that she was acting in a fiduciary capacity so far as Messrs Thomas and Taylor's claims are concerned as well, and that any personal benefit she sought to derive from the settlement of those claims would have been held on constructive trust for them to the extent of their interests (with the same consequences).

iv) In these circumstances, and subject to the issues raised in relation to Mr Ruhan's claims which I consider in Section I below, I am satisfied that assets received by Dr Cochrane and SMA under the IOM Settlement would be held in equity for the Orb Claimants, which interest would in turn be subject to the Harbour Trust, even if I had rejected the nominee argument.

v) I am also satisfied that this argument is open to the Settlement Parties on their statement of case, which asserts that "it would be unconscionable for SMA and/or Dr Cochrane and/or her nominees to deny that SMA and/or Dr Cochrane and/or her nominees held such assets (or their traceable proceeds) on trust for the benefit of the Orb Claimants and Harbour".

170. Had the transfers to Dr Cochrane and SMA had the effect that the Orb Claimants or their affiliates had not received "Proceeds", it may be that Harbour would have had its own proprietary remedy in any event (in addition to any contractual or tortious claims which might arise). The authorities suggest that the right of the beneficiary of a promise to hold future property on trust, in the period before the property is acquired by the promisor, is not merely contractual in nature, but is a "higher right" (Performing Right Society Ltd v B4U Network (Europe) Ltd [2013] EWCA Civ 1236; [2014] Bus LR 207, [26] and Re Lind (No 4) [1915] 2 Ch 345, 375). Dr Cochrane was clearly aware of the terms of the Harbour Trust at the time of the IOM and Geneva Settlements. She had provided warranties to Harbour as a director of Orb, a personal guarantee to Harbour of the Orb Claimants' liabilities under the Harbour IA, and signed the Harbour IA on Orb's behalf. As I have noted, her knowledge was attributable to SMA, of which she was a director and the sole shareholder. The authorities on solicitors' liens, which are considered in Section L below, provide the solicitor with the protection of equity not simply in respect of an asset received by its client, but also when there is an identifiable "fund in sight" which would be subject to the lien once it reached the client's hands but which is diverted from the client in an attempt to defeat the lien (Addleshaw Goddard LLP v Wood [2015] EWHC B12 (Costs), [99-122]; Re Fuld [1968] P 727, 736 (Scarman J) and Clifford Harris & Co v Solland International Ltd [2005] EWHC 141 (Ch); [2005] 3 Costs LR 414, [21(iv)], Christopher Nugee QC). It is not necessary to determine whether any similar relief would have been available in respect of a collusive arrangement intended to defeat the Harbour Trust, but the point is clearly seriously arguable.

**(3) Were the IOM Settlement or the Geneva Settlement entered into by the Orb Claimants or their affiliates?**

171. It was not disputed that the IOM Settlement was entered into by the Orb Claimants or their affiliates:

i) Orb was a party to the IOM Security Deed and the IOM Confidential Deed.

ii) Dr Cochrane was a party to both of these deeds and the IOM MSA. She was an affiliate of Orb because she controlled Orb by virtue of being one of its two directors and its 100% shareholder.

iii) SMA is an affiliate as a person under common control with Orb.

172. The Geneva Settlement was also entered into by the Orb Claimants or their affiliates:

i) All of the Orb Claimants were parties to the consent order which dismissed the 2012 Proceedings and to the Confidential Settlement Deed.

ii) Dr Cochrane and SMA were parties to the Confidential Settlement Deed and the LICSA.

iii) Dr Cochrane was party to the Loan Note and the Confidential Deed.

173. Accordingly I am satisfied that this aspect of the definition of "Success in the Proceeding" in the Harbour IA is satisfied by both the IOM Settlement and the Geneva Settlement.

**(4) Did the IOM Settlement arise out of or relate to the Causes of Action?**

174. It was argued that the Harbour Trust does not extend to any settlement of the claims brought against Messrs Cooper and McNally in the Isle of Man, the effect of the argument being that they were too remote from the 2012 Proceedings which Harbour was funding.

175. I am satisfied that there is nothing in this argument:

i) The definition of "Success in the Proceedings" provides for a very wide connecting factor – "arising out of or related to" the "Causes of Action" - and includes any agreement not simply with the defendants to the 2012 Proceedings but with "any persons".

ii) The expression "Causes of Action" also includes the same wide connecting factor, between any claims brought – against any person and in any jurisdiction – and the 2003 Oral Agreement.

iii) It is clear that the applications brought in the Isle of Man, which were the immediate genesis of, and resolved by, the IOM Settlement, had a close connection with (and certainly sufficient to be said to arise out of or to be related to) the 2003 Agreement. That is clear from the terms in which the applications were advanced, as set out in [74] to [77] above.

iv) The Particulars of Claim in the 2012 Proceedings had specifically reserved the right to assert claims against Messrs Cooper and McNally.

v) The IOM Settlement specifically released Messrs Cooper and McNally from any claims relating to the 2003 Oral Agreement (clause 4 of the IOM Confidential Deed together with the definition of "Claims" and the linked definition of "Proceedings" which included both the English and Isle of Man proceedings).

176. Finally, it was argued that Harbour had not in fact funded the proceedings brought in the Isle of Man. That point goes nowhere because there is nothing in the Harbour IA which limits the clause 9.1 trust to recoveries through action specifically funded by Harbour. The factual premise of the argument is also unsound:

i) The evidence establishes that before the IOM Settlement, Harbour had paid the ATE premium of £970,575, without which the 2012 Proceedings would have been stayed, and the attempt to bring ancillary proceedings in the Isle of Man in support of those proceedings made much more difficult.

ii) In addition, Harbour paid £245,402.05 to the Orb Claimants' Isle of Man lawyers, met the costs incurred by Chan Law in complying with the first Isle of Man Norwich Pharmacal Order, and paid Stewarts' £737,628.60. It was the evidence of Mr Upson that Stewarts directed and supervised the work of the Orb Claimants' Isle of Man lawyers, including work relating to the Isle of Man applications, and that Stewarts worked extensively on the documents which comprised the IOM Settlement.

iii) Although various points have been taken about the timing of Harbour's first payment (on 14 October 2013), much of the work covered that by that invoice was undertaken before that date.

## (5) What did the Orb Claimants agree to hold on trust?

177. Finally, an issue arises as to what the Orb Claimants agreed to hold on trust. As explained below, it is Harbour's case that, even if the Orb Claimants acquired the assets under the IOM Settlement subject to a proprietary right on the part of Mr Ruhan, the Orb Claimants had nonetheless agreed in the Harbour IA to hold the property they acquired on trust for Harbour (thereby placing themselves in a position in which they would be subject to conflicting obligations to hold those assets on trust both for Harbour and for Mr Ruhan, to be resolved as between the competing beneficiaries on the application of conventional equitable priority principles).

178. That argument raises the anterior issue of the scope of the promise which the Orb Claimants made to hold property on trust, and whether that promise extended only to the extent of any interest in property which the Orb Claimants acquired free of the equitable rights of others.

179. I have set out many of the relevant terms of the Harbour IA at [165] above. In summary:

i) By clause 8, the Orb Claimants agreed to hold the Proceeds "on bare trust absolutely for the benefit of the Claimants and for [Harbour]" (a provision which pre-supposes that the Orb Claimants were in a position to hold the property on such a trust).

ii) The Orb Claimants also agreed to provide a notice and irrevocable direction to the solicitors acting in the litigation to receive and disburse the Proceeds.

iii) "Proceeds" was defined by reference to value "recovered or received by the Claimants".

iv) The definition of "Success in Proceedings" extended to "any direct or indirect consequential outcome resulting in a monetary financial benefit to the Claimants and/or any of its affiliates".

v) Clause 9.1 placed the Orb Claimants under an immediate obligation to pay the greater part of the Proceeds to Harbour.

vi) Further, by clause 3.1, the Orb Claimants agreed not to place themselves in a position in which they came under other obligations which conflicted with their obligations under the Harbour IA.

180. The effect of Harbour's construction is that if, for example, the Orb Claimants settled the 2012 Proceedings on the basis that property would be transferred to them to hold as to 50% for themselves and 50% for another party, they would find themselves under contractual and equitable obligations to hold 100% of the property on trust for Harbour, obliged to pay Harbour on a basis which reflected 100% of the value of the property, and:

i) would be in breach of contract and their equitable obligations to Harbour to the extent that they gave effect to the 50% interest for the other party;

ii) in breach of their equitable obligations to the other party if they did not; and

iii) in breach of clause 3.1 (such that the Orb Claimants would have to refuse any settlement offered on that basis unless Harbour agreed to vary the Harbour IA first).

Equally, if property was recovered subject to a third party's equitable charge, on Harbour's construction of the Harbour IA, the Orb Claimants would come under contractual and equitable duties to them in relation to the entirety of the recovered property. If Harbour was aware of the conflicting equitable right, it would seem to follow that performance by the Orb Claimants of their clause 9.1 obligation would place Harbour in the position of a knowing recipient of trust property.

181. That appears to me to be an uncommercial outcome, which the parties are unlikely to have intended, and which is inconsistent with the focus in the definitions of "Proceeds" and "Success in the Proceedings" on the value recovered or received by or for the benefit of the Orb Claimants. I have concluded that the better construction of the Harbour IA is that the promise which the Orb Claimants made to hold property on the Harbour Trust is limited to the extent of any interest in property they acquired for their own benefit.

## H2 The construction of the Harbour Deed

182. The Harbour Deed was entered into between Harbour, the Orb Claimants, Stewarts, Messrs Cooper and McNally and Dr Cochrane in October 2014, and was intended to address the

fact that assets transferred under the IOM Settlement had been transferred to Dr Cochrane and SMA, who were not parties to the Harbour IA. Clause 1 provided:

> "The parties to this Deed and each of them agree that for all purposes, in particular for the purposes of the [Harbour IA], the Settlement Consideration paid out or provided to Cochrane or for her direct or indirect benefit shall be treated as 'Proceeds received as a result of Success in the Proceedings' as referred to in Clause 9.1 of the [Harbour IA] such that they should be applied in accordance with Clause 9.1(a) to (f) inclusive of the [Harbour IA]".

183. Once again, P&M argue that SMA were not parties to the Harbour Deed, but given my finding that SMA received the assets as nominees, this point goes nowhere. Once again, however, if I had not reached that conclusion, there would have remained the question of whether SMA (a company owned and controlled by Dr Cochrane, and which on any view gave rise to an "indirect" receipt of benefit by her) could have asserted an entitlement to hold those assets free of clause 9.1 of the Harbour IA.

184. P&M also argue that the Harbour Deed:

> "… merely provides at clause 1 that the Settlement Consideration would be treated as 'Proceeds received as a result of Success in the Proceedings' as referred to in clause 9.1 of the [Harbour IA] such that they should be applied in accordance with clauses 9.1(a) [to] (f) of the [Harbour IA]. The Harbour Deed … does not provide that the Settlement Consideration would be held on trust pursuant to clause 8.1 of the [Harbour IA]."

185. I agree with the Settlement Parties that this is not "a sensible construction of the Harbour Deed":

i) Recital B to the Harbour Deed provides:

> "… by Clause 9.1 … of the [Harbour IA], [Harbour] and the [Orb] Claimants agreed the terms upon which the [Orb] Claimants should apply recoveries made in the proceedings and the extent of [Harbour's] interest in those recoveries, <u>which the Claimants agreed to hold on trust for [Harbour]</u>" (emphasis added).

ii) Clause 1 of the Harbour Deed then confirms that the IOM Settlement consideration paid to Dr Cochrane or "for her direct or indirect benefit" shall be treated as "Proceeds received as a result of Success in the Proceedings" within the meaning of clause 9.1 of the Harbour IA, "such that they should be applied in accordance with Clause 9.1(a) to (f) inclusive of the [Harbour IA]".

iii) Clause 9.1 of the Harbour IA in turn emphasises that the "Proceeds received as a result of Success in the Proceedings" were to be held "on trust" and that certain amounts were to be paid to Harbour "in its capacity as Trust Beneficiary pursuant to Schedule 2".

186. In these circumstances, if I had concluded that receipt by Dr Cochrane and SMA was sufficient to preclude the application of the Harbour Trust, I would have held that the Harbour Deed extended the ambit of the Harbour Trust to overcome that difficulty (albeit the Harbour Deed would not, of itself, have resolved any issues arising from the fact that SMA was not a party to the Harbour IA).

### H3 Harbour's alternative claims

187. If its claims under the Harbour Trust fail, Harbour advances two alternative claims.

188. The first relies on Harbour's rights under the charge over the shares in Orb and the debenture over Orb's assets:

    i) I understand that these arguments were intended to address a counterfactual in which Orb recovered assets through the IOM and Geneva Settlements which did not fall within the Harbour Trust. On the findings I have reached, that counterfactual has not materialised.

    ii) It was argued by Messrs Thomas and Taylor that they stood to benefit from the existence of the Orb debenture, which would ensure that Harbour's entitlements under the Harbour Trust were met from Orb's share of the Proceeds. This argument is misconceived. The debenture secures the amounts payable by Orb to Harbour under the Harbour IA. Before Orb could receive any amounts under the Harbour Trust to which the debenture might attach, Harbour's entitlements would first have to have been met (in which eventuality there would be no outstanding amount due to Harbour to be discharged from the security provided by the Orb debenture). If, by contrast, the amounts realised under the Harbour Trust are insufficient to meet Harbour's entitlement, there will be no amounts due to either Orb or Messrs Thomas and Taylor under the Harbour IA.

    iii) In these circumstances, it is not necessary to say anything more about the Orb share charge or debenture in this judgment.

189. The second alternative is an application for relief under the Berkeley Applegate jurisdiction which I address in Section N below.

## I THE EFFECT OF THE IOM SETTLEMENT

### I1 The parties to the IOM Settlement

190. On its face, the IOM Settlement involved the transfer:

    i) by ASML of the Arena Companies;

    ii) by Messrs Cooper and McNally of the Cooper and McNally Companies; and

    iii) of cash held by the Arena Companies and Messrs Cooper and McNally;

    to Dr Cochrane and SMA.

191. On the transferee side, I am satisfied that Dr Cochrane and SMA were acting on behalf of the Orb Claimants, and that any assets which they received were received as nominees, on bare trust for the Orb Claimants. I have reached this conclusion for the following reasons:

i) The actions brought in the Isle of Man against Messrs Cooper and McNally were brought by the Orb Claimants and the November 2013 Letter described the first £10m payment as having been made "on account of the Claimants' claims", to secure the adjournment of the Orb Claimants' pending application, and to obtain variations of the orders the Orb Claimants had obtained.

ii) The IOM MSA characterised itself as an agreement to recover the Orb Claimants' assets, and for the transfer of assets which were subject to the Orb Claimants' proprietary claims.

iii) The IOM Confidential Deed provided for assets to be transferred to Orb and Dr Cochrane as "the Entitled Parties".

iv) Dr Cochrane in her third witness statement dated 16 March 2015 stated "I asked Dawna Stickler and her team to take control of the [Arena] companies on behalf of the [Orb] Claimants".

v) That this was the contemporaneous understanding is confirmed by other documents. On 13 December 2013, Dr Cochrane wrote to Messrs Thomas and Taylor stating her execution of the IOM MSA would "not in any way or manner change my obligation to you both as regards the distribution of the proceeds of any settlement of the litigation that we are engaged in against Mr Ruhan" and that "the litigation currently going on in the Isle of Man will be treated as if they are the proceeds of the primary litigation and any proceeds from such will therefore be distributed to you in the same manner". Stewarts' letter to Mr Ruhan's solicitors, Memery Crystal, of 9 April 2014, stated that the IOM Settlement "provided for the transfer of Orb Assets held within the `Arena Settlement' to the Claimants or their nominee" and that "pursuant to the terms of the IOM Settlement, Dr Cochrane has, on behalf of the Claimants, taken ownership of the entire share capital [of the Arena Holdcos]".

vi) In evidence, Mr Upson of Stewarts confirmed his contemporary understanding that Dr Cochrane's position was as "trustee, nominees … some form of arrangement like that", and that it was his understanding that Dr Cochrane was receiving assets under the IOM Settlement in a capacity of that kind.

vii) I reject Dr Cochrane's later assertions to the contrary (for example in a letter incorrectly dated 5 March 2019 and sent on 28 March 2019 to Addleshaw Goddard LLP) which reflect an attempt by Dr Smith through Dr Cochrane to re-characterise the position *ex post facto* to his advantage.

192. On the transferor side, I have already set out my reasons for concluding that any interest that Messrs Cooper and McNally had in the Transferred Assets was held as nominee for Mr Ruhan.

## I2 The nature of Mr Ruhan's interest in the Arena Settlement

193. A question then arises as to the nature of Mr Ruhan's interest in the Arena Companies. At the time of the IOM Settlement, the position so far as the Arena Settlement is concerned was that Messrs Cooper and Mr McNally were the only named beneficiaries, albeit as an Isle of Man resident, Mr McNally was not eligible to benefit under the trust. As Mr Cooper was acting as Mr Ruhan's nominee, it follows that Mr Ruhan was the only eligible member of the class of beneficiaries when the IOM Settlement was concluded.

194. The key terms of the Arena Settlement were as follows:

i) It defined the "Beneficiaries" as Mr Cooper, Mr McNally and "any person or class of persons or charity or charities who have been added to the class of Beneficiaries pursuant to Clause 5 hereof".

ii) Under clause 3, the Trustee could (with the prior written consent of the Protector) exclude persons currently named as Beneficiaries from the Settlement.

iii) Clause 5 provides that, subject to powers of exclusion, the Trustee, with the prior written consent of the Protector, could direct that additional persons are added to the class of beneficiaries.

iv) Clause 7 provides that the Trustee is possessed of the Trust Fund and the income on trust for all, or such one or other of, the beneficiaries in such shares and at such times as the trustee "may at any time or times … appoint".

v) Clause 8 provides that at the end of the Trust Period, the trustee will hold the Trust Fund and income "upon trust absolutely for such of the Beneficiaries as are then living … in such shares … as the Trustee shall in its absolute discretion determine and in default of determination prior to the expiration of the Trust Period then in equal shares and subject thereto upon trust for such charity or charities determined by the Trustee in its absolute discretion, or, in default, the International Red Cross".

195. It is well-settled that the entire class of eligible beneficiaries of a discretionary trust can act together to terminate the trust under the principle in Saunders v Vautier. As explained at *Lewin*, 22-22:

> "The question arises how far the existence of dispositive powers vested in the trustees (or others) will prevent the beneficiaries from terminating the trusts under the principle of Saunders v Vautier. In the case of a discretionary trust, each of the objects as an individual has no more than a right to the due administration of the trust, including a right to proper consideration; but it is nonetheless clear that, as long as the class of objects has closed, the trust can be terminated by all of them acting together. The fact that the objects do not have absolute and indefeasible interests, indeed do not have interests in the strict sense at all, makes no difference: it is sufficient if they are the only persons entitled to the due administration of the trust. So if a settlement includes both fixed interests and a

> discretionary trust the consent of the discretionary objects in addition to that of the beneficiaries with the fixed interests will be required for a termination."

196. This principle was applied in Re Smith [1928] 1 Ch 915. The named discretionary beneficiaries under a trust were a Mrs Aspinall and her three adult children, one of whom had died. Mrs Aspinall was of an age when it was impossible that she could have further issue. Romer J held that Mrs Aspinall, the two surviving children and the personal representatives of the deceased child could terminate the trust and require the trustees to hand the trust fund over to them.

197. Does the fact that it was open to ASML to add further beneficiaries to the class, or remove current beneficiaries from its scope, preclude the operation of the rule in Saunders v Vautier in this case? In Re Trafford's Settlement [1985] Ch 32, Peter Gibson J held that the rule in Saunders v Vautier could not be invoked by the present members of a class of eligible beneficiaries under a discretionary trust "for the benefit of the settlor and ... any wife whom he may marry and the child or children or issue of the settlor... or any of them as the trustees shall in their absolute discretion think fit." He stated at p.40:

> "When income is received by the trustees of a discretionary trust of income, the sole object of a class which is not yet closed cannot in my judgment claim an immediate entitlement to that income. It is always possible that before a reasonable time for the distribution of that income has elapsed another object will come into existence or be ascertained and have a claim to be considered as a potential recipient of the benefit of that income. So long as that possibility exists, the sole object's entitlement is subject to the possibility that the income will be properly diverted by the trustees to the future object once he comes into existence or is ascertained. Indeed, in strictness the entitlement of the sole object is only an entitlement that the trustees should consider whether to pay income to him. In respect of income already received it may be possible to say that such an entitlement has arisen, but for present purposes I must consider the position immediately before the death of the settlor not in relation to income previously received by the trustees but in relation to the settlor's rights to income then or thereafter accruing. Such income as it accrued was subject to the possibility that it could properly be withheld by the trustees from the settlor and diverted to a future beneficiary, unlikely though the possibility of such a beneficiary coming into existence or being ascertained undoubtedly was in the present case. On that footing the settlor did not immediately before his death have an interest in possession."

198. That was a case in which the membership of the class of potential beneficiaries from time-to-time depended on external events outside the trustee's control – marriages and births – rather than the exercise of a power of appointment by the trustee. In Orb Arl and others v Ruhan and others [2015] EWHC 262 (Comm), [118], having been referred to Re Trafford's Settlement, Cooke J described the issue of whether the principle in Saunders v

Vautier was excluded by the possibility of further potential beneficiaries being added by the exercise of a power of appointment by the trustee rather than as a result of external events as arguable. The law has been described as "unsettled" (*Lewin*, 22-023).

199. There is support in other jurisdictions for the view that Saunders v Vautier can be invoked by the current members of the class at a particular point of time in this context: in particular, the Royal Court of Guernsey in Rusnano Capital AG v Molard International PTC (Limited) [2019] GRC 01. This decision turned on the interpretation of s.53 of the Trusts (Guernsey) Law 2007, which provides that "notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained … they may require the trustees to terminate the trust and distribute the trust property among them", "beneficiary" being defined as "a person entitled under a trust or in whose favour a power to distribute trust property may be so exercised". Although that decision depended on the construction of the Guernsey statute, the Deputy Bailiff was of the view that if a closed class was required, that question was to be answered at a particular point in time, and that a class was not "open" simply because there was a power to appoint further beneficiaries ([32]). The Guernsey Court of Appeal ([2019] GCA 077, [42]) expressed no views as to the position which would apply absent s.53. I was also referred to the decision of the Jersey Court of Appeal in Mubarak v Mubarak [2008] JCA 196, a decision concerned with the power to vary trusts under the Trusts (Jersey) Law 1984. One objection to an order varying the existing trust was that there had been no consideration of the interests of those potential beneficiaries who might be added to the trust under a power of appointment. The Jersey Court of Appeal was not persuaded that this precluded the variation order because there was "no defined class within which there are individuals who have the right to expect their interests to be taken into account". However, the question of a court-sanctioned variation of trust, with all the limitations and protections inherent in that process, appears to me to raise very different questions to the ability of the current members of a class of potential objects of the exercise of a power of distribution under a discretionary trust to bring the trust to an end.

200. If the members of the eligible class of potential beneficiaries at any point in time can put an end to the trust and call for the transfer of trust property to them, some notable consequences would follow. In particular, it is a feature of many discretionary trusts that they are drafted with only one eligible member of the class of beneficiaries at inception (frequently the International Red Cross), with the trustees having the power to add further beneficiaries to the class whose interests might be supposed to be rather closer to the settlor's heart. A whole-hearted embrace of the Saunders v Vautier principle in this context would appear to allow the IRC, and those in similar positions, to put an end to all such trusts at inception, and "scoop the pool". That practical objection led *Lewin*, 22-023 to doubt that the principle can be invoked, for so long as the possibility of the appointment of additional eligible beneficiaries remains possible.

201. These are treacherous waters for a commercial judge to navigate. Had it been necessary to reach a decision, I would have been inclined to the view that, on the present state of English law at least, the existence of and ability to exercise the power to appoint further members to the class of eligible beneficiaries precludes the operation of the Saunders v Vautier principle save where the trustee has released the power of appointment. The rationale for drawing a distinction in this context between a case in which there may be additional

members of the class of potential objects of the power of distribution as a result of external events (births, marriages etc), and cases where this might follow from the trustee's exercise of a power to add to the class (e.g. a power to add beneficiaries to the class following births or marriages), is not immediately clear to me. The contrary position would also nullify the trustee's power to remove and exclude members of the class in those cases when (as in this case, albeit subject to the approval of the protector) the trust instrument contains such a power. I note that the view that Saunders v Vautier cannot be invoked in these circumstances has support not only from *Lewin*, but also from observations of Lord Walker (albeit obiter) in Schmidt v Rosewood Trust [2003] 2 AC 709, [40-41] to the effect that the object of a mere power to add beneficiaries under a discretionary trust, like the object of a fiduciary power, has the ability to "block" the operation of the Saunders v Vautier rule. It also finds support in Ladywalk LLP v HMRC [2020] UKFTT 00207 (TC), in which the First-tier Tribunal considered the various authorities to which I have referred above, and at [129] approved the statement in *Lewin* to the effect that the power to appoint further members of the class of eligible beneficiaries precludes the operation of the rule in Saunders v Vautier.

202. However, in this case, I have been persuaded by Mr Kokelaar (whose submissions on this issue were advanced with notable skill) that this does not mean that Mr Ruhan had no relevant rights at all in relation to the transfer of assets under the IOM Settlement.

203. First, as noted in *Lewin*, 47-073:

> "An object of a discretionary trust or fiduciary power has no right to the present or future entitlement to trust income or capital, whether contingent or defeasible, unless and until the discretion is exercised in his favour. … Objects of discretionary trusts had *locus standi* to bring an action to secure the trust fund and their rights in it … And objects of both discretionary trusts and fiduciary powers have *locus standi* to seek relief for the protection of their rights, though the court has a discretion to determine what relief, if any, should be granted … The protection which the court may award includes the disclosure of information, documents and accounts. But we consider that there is no tenable basis for the view either that the protection cannot extend to the reconstitution of a trust fund which has been dissipated or depleted by a breach of trust or that the protection must extend to the reconstitution of the trust fund without the court having any discretion in the matter. In our view, a discretionary beneficiary, whether as an object of a discretionary trust or of a fiduciary power, can invoke the court's jurisdiction to seek the proper administration of the trust and the relief claimed can be the reconstitution of the trust; and whether that relief is granted is a matter for the discretion of the court".

204. There is a similar statements at *Lewin*, 1-061, where it is noted that "a discretionary interest includes … a right to bring a claim for breach of trust, including a right to compel a third-party recipient of trust assets to restore them to the trustees".

205. I am satisfied that, at the time of the IOM Settlement, Mr Ruhan as the sole member of the class of eligible beneficiaries at that point in time, had the right to require the trustee of the Arena Settlement to administer the assets in accordance with the terms of the Settlement, and to seek relief in the event that the trustee dealt with any assets in breach of trust, including against any third party recipients of that property (save to the extent that those third party recipients were able to set up a defence to an action requiring them to return any trust property they had received). Such an entitlement is more than a "mere equity", for the purposes of determining the priority of competing interests: Mr Ruhan's rights in relation to the property transferred did not require a prior legal act before they crystallised, nor are they rights which Mr Ruhan had himself transferred under a contract, which had first to be set aside before they could be reclaimed.

206. In addition, I accept Mr Kokelaar's submission that it is necessary to look carefully at the mechanism whereby ASML came to transfer the Transferred Companies under the IOM Settlement. I agree that properly analysed, this involved the following steps:

i) Under the Arena Settlement, it was open to ASML distribute the entirety of the trust assets to members of the class of eligible beneficiaries as it saw fit (clause 7) and thereby bring the Arena Settlement to an end.

ii) A board minute of ASML resolved to exercise ASML's power of appointment under the Arena Settlement in favour of Mr Cooper, and to do so by entering into and performing obligations under the IOM Confidential Deed, on the basis that Messrs Cooper and McNally considered this to be in their best interests.

iii) A Deed of Appointment dated 25 March 2014, between ASML, Mr Cooper and Dr Cochrane, referred to the clause 7 power of appointment and recorded that Mr Cooper was the only eligible member of the class of beneficiaries of the Arena Settlement. It further noted that Mr Cooper had requested ASML to exercise its power of distribution in his favour, and to do so by agreeing to transfer those assets to Dr Cochrane in accordance with the terms of the IOM Confidential Deed.

iv) ASML gave effect to Mr Cooper's request by entering into the IOM Confidential Deed, in which it agreed to hold the shares in the Arena Companies on bare trust for Dr Cochrane and to transfer the shares in those companies to Dr Cochrane.

v) I accept Mr Kokelaar's submission that the effect of these arrangements was fully to distribute the Arena Settlement to or for the benefit of Mr Cooper, bringing the Arena Settlement to an end. Unless the Arena Settlement was brought to an end through the exhaustive exercise of the power of appointment, ASML could not have authorised the distribution it did to someone falling outside the class of eligible beneficiaries without committing a gross breach of trust.

vi) However, the distribution to or for Mr Cooper's benefit was, for the reasons I have set out, a distribution of assets which he held on bare trust for Mr Ruhan, whose nominee he was. Mr Ruhan is entitled to follow the assets which were distributed to Mr Cooper, or trace into those proceeds, by virtue of Mr Ruhan's interest under that bare trust.

207. Finally, for the avoidance of doubt, I should record that I do not accept that the IOM Settlement constituted a valid exercise of the power of the trustee to settle or compromise litigation "affecting the Trustee or the Trust Fund". There is no evidence that ASML formed any independent view of the merits of any claim which the Orb Claimants might have against assets in the Arena Settlement, nor that they took any advice on this issue. Mr Barber, one of the directors of ASML, gave evidence in the FS Arbitration that he had no recollection of seeing the Orb Claimants' Particulars of Claim in the 2012 Proceedings, that he had never seen the Pro Vinci letters and was unaware of the allegations in them, that he had no recollection of receiving advice as to the merits of the Orb Claimants' underlying claims save that Mr Cooper had told him there was nothing in them, and that he essentially agreed to enter into the IOM Confidential Deed because Mr Cooper asked him to. Against that background, I am satisfied that ASML's conduct in entering into the IOM Confidential Deed was not by way of exercise of its power to settle claims against the Trust Fund, but by way of a distribution to Mr Cooper.

## I3 Was the IOM Settlement entered into in breach of trust?

208. I am quite satisfied that in entering into the IOM Settlement, Messrs Cooper and McNally were acting in fraudulent breach of trust. I have already explained in [59]-[60] the reasons for my conclusion that Messrs Cooper and McNally were not the beneficiaries of the Arena Settlement, and that any apparent interests they had were held as nominees for Mr Ruhan. It follows that Messrs Cooper and McNally owed trust obligations in relation to any rights or interests they appeared to have in the Arena Settlement or the Cooper and McNally Companies.

209. However, they transferred almost the entirety of those assets to Dr Cochrane and SMA without any evident or apparent benefit to Mr Ruhan (who did not even secure a release of the claims against him in the 2012 Proceedings). I find that they did so without Mr Ruhan's approval. Not only is it difficult to conceive of any basis on which Mr Ruhan would have consented to such an arrangement, but when Mr Ruhan counterclaimed against Messrs Cooper and McNally accusing them of breach of trust in entering into the IOM Settlement, neither responded with what would have been the obvious riposte that they had been acting with Mr Ruhan's informed consent.

210. Further, the value of the assets transferred – 100% of the Arena Settlement and the Cooper and McNally Companies – substantially exceeded any entitlement the Orb Claimants might conceivably have had arising from the 2003 Oral Agreement (which is said to have given them a 40% share in profits made from the assets transferred under that agreement, and of which profits made from the re-sale of two of the Hyde Park Hotels were the only identified example). While it was suggested that there was a case theory (referred to by Mr Upson as the Pallant v Morgan argument) by which the Orb Claimants could have used a 40% entitlement to those profits to lay claim to the entirety of the Transferred Assets, there was no attempt before me to show that this argument was remotely viable, and Mr Upson, who referred to the theory in his evidence, accepted that it was "not the most promising of arguments". I have seen no evidence to suggest that it was a factor in the minds of either Dr Smith or Messrs Coopers and McNally when the terms of the IOM Settlement were concluded.

211. Finally, it is clear that Messrs Cooper and McNally obtained secret benefits for themselves in return for entering into the IOM Settlement. The December 2013 Letter offered to return the £10m to Messrs Cooper and McNally personally, and to pay them a fee representing 5% of the value of the assets transferred. A further letter of 25 March 2014 from Dr Cochrane to Mr McNally varied that arrangement to allow Messrs Cooper and McNally to retain some £40m from the Arena Settlement.

## I4 Were the Orb Claimants aware that the IOM Settlement was entered into in breach of trust?

212. It is clear on the evidence that the IOM Settlement was negotiated, on the Orb Claimants' side, by Dr Smith, and that it was Dr Smith who was the moving force behind the tactics used to obtain the IOM Settlement. Mr Upson accepted that Dr Smith could be fairly described as the "driving force" behind the 2012 Proceedings, and that he was "the source of the knowledge, the ideas". Dr Smith's evidence in the FS Arbitration was essentially to the same effect. In these circumstances, there can be no serious challenge to the conclusion that the knowledge of Dr Smith in relation to the transaction he negotiated on the Orb Claimants' behalf is attributable to the Orb Claimants. Any contrary conclusion would allow the Orb Claimants to benefit from the transaction, freed from any limitations arising from the means by which Dr Smith obtained it. I am also satisfied that Dr Smith's knowledge is attributable to Dr Cochrane, who was acting in relation to the IOM Settlement at his direction (for the reasons set out at [606] below).

213. It is clear that Dr Smith knew that Messrs Cooper and McNally were acting in breach of trust in entering into the IOM Settlement.

214. First, it is clear Dr Smith knew and understood that Messrs Cooper and McNally were not beneficially entitled to the assets held in the Arena Settlement:

i) It was the Orb Claimants' case in the 2012 Proceedings, which I find was consistent with the views held by Dr Smith who was closely involved in the formulation of that case, that Mr Ruhan was the beneficial owner of the Transferred Assets. That case, which was supported by a statement of truth, remained the Orb Claimants' sole case throughout the period when the IOM Settlement was under negotiation, and its primary case thereafter. After Mr Ruhan had served Further Information denying any interest in the Arena Settlement, Dr Smith sent a copy of the response to Mr Campbell on 3 December 2013, and made his own views clear, describing the response as "utter bollocks".

ii) Dr Smith exchanged a number of text messages with Mr Campbell between 5 and 13 December 2013 from which it is also clear that he knew and understood that it was Mr Ruhan, not Messrs Cooper and McNally, who was the intended beneficiary under the Arena Settlement of the assets which Messrs Cooper and McNally were proposing to transfer under the IOM Settlement: see [80] and [85] above.

iii) Dr Smith received an email from his long-term associate, Mark Keegan, on 8 November 2013 in which Mr Keegan was clearly of the view that the assets which were to be transferred were not Messrs Cooper and McNally's but Mr Ruhan's: see [79] above. I am satisfied that the view expressed in that email (that Messrs Cooper

and McNally's claims to be the beneficial owners of the assets was laughable) reflected the shared view of Mr Keegan and Dr Smith.

iv) This was also the premise of the pre-application letters sent by Pro Vinci to Messrs Cooper and McNally. By way of example, the letter of 12 April 2013 referred to Messrs Cooper and McNally being employed by Mr Ruhan "to shield and hide his assets", with similar assertions in the further letter of 21 May 2013. This was also the basis of the Isle of Man Norwich Pharmacal orders (see for example paragraphs 1.5, 1.11 and 2.4 of Dr Cochrane's witness statement of 30 August 2013 in support of the first application, which described Mr Ruhan's contention in his defence in the 2012 Proceedings that he had no interest in the Arena Settlement as "preposterous", and paragraph 1.55 of Dr Cochrane's statement of 9 October 2013 in support of the second Norwich Pharmacal order).

v) I am unable to accept any suggestion that the views of Dr Smith and Dawna Stickler, and through them of the Orb Claimants, on this issue were in any way shaken by the materials obtained as a result of the Isle of Man Norwich Pharmacal orders (whatever impression they may have sought to give Mr Upson). No material was ever identified which could credibly have changed the views of Dr Smith and Ms Stickler as who the beneficial owner of the Transferred Assets was, nor was any such material deployed in any legal proceedings.

vi) On the contrary, Dr Cochrane's further witness statement of 26 March 2014 (two days after the IOM Settlement had been signed), prepared for a freezing order application in the Isle of Man, was still premised on the Arena Settlement forming part of "the current offshore structures used by Mr Ruhan which contain and control his assets", with Mr Ruhan's assertions to the contrary once again described as "preposterous". While reference was made to Messrs Cooper and McNally's assertions of ownership, this appeared under the "full and frank disclosure" section identifying the assertion of other parties, rather than the Orb Claimants' own case. In witness statements prepared in May 2014, the Orb Claimants asserted a claim to £92m premised on Mr Ruhan being beneficially entitled to the Arena Settlement. Further, a letter written by Pro Vinci to Mr Chan and Mr Campbell on 1 October 2015 stated that, after reviewing the material obtained from Messrs Cooper and McNally, "it became incontrovertibly clear that the [Orb] Claimants' case was made out on the facts". As I have stated, long after reviewing that material, it remained the Orb Claimants' primary case (supported by a statement of truth) that Mr Ruhan, not Messrs Cooper and McNally, was the intended beneficiary of the Arena Settlement. The fact that they were willing, if that case was rejected, to advance an alternative claim premised on Messrs Cooper and McNally's assertions that they were the beneficial owners, in no way detracts from their belief.

vii) Nor do the warranties given by Messrs Cooper and McNally in the IOM Settlement documents as to their beneficial ownership of the Transferred Assets assist. The readiness of Messrs Cooper and McNally to make such promises as were required of them did not change the firm and well-founded belief within the Orb Claimants, their legal team and advisers to the contrary effect.

viii) As Popplewell J records in his judgment in Orb arl v Fiddler [2016] EWHC 361 (Comm), [3], Dr Smith told Mr Mason, a person alleged to have been involved in the attempted hack of Pro Vinci's computers, at a meeting on 8 January 2016 that "we have recovered the money from Ruhan. He can't recover this".

215. Second, Dr Smith knew that Messrs Cooper and McNally had entered into the IOM Settlement not because they believed it to be in Mr Ruhan's best interests, but because he had threatened to ruin them by exposing them to adverse regulatory and fiscal intervention if they did not. He described a suggestion to that effect as "reasonable" in the FS Arbitration, describing his tactics as a "sort of tree-shaking" which had "delivered a lot of fruit on the ground", and describing the Pro Vinci letters "as part of fairly brutal litigation tactics". An email from Mr Keegan to Dr Smith of 8 November 2013 stated "McNally thought he was giving in to blackmail".

216. Third, Dr Smith (and through him the Orb Claimants) knew that the financial inducement offered to Messrs Cooper and McNally to enter into the IOM Settlement involved an inappropriate personal incentive to Messrs Cooper and McNally, which is the reason why the arrangement was recorded in the December 2013 Letter and not referred to in any of the principal agreements making up the IOM Settlement; why the existence of the December 2013 Letter was hidden from Stewarts until very shortly before it was disclosed in a court hearing (on which issue I accept the evidence of Mr Upson); why it was also hidden from Cooke J when he forced the disclosure of the IOM Settlement documents in the course of the hearing in February 2015 (as Popplewell J later found in his judgment of 15 April 2016, [47(2)]) and why the 25 March 2014 letter had not been produced even by the time of the hearing before Popplewell J.

217. In those circumstances, it is not strictly necessary to determine Stewarts' state of knowledge, but as this may be relevant to other issues I have to decide, and it was subject of extensive submissions at trial, I will set out my conclusions:

i) Mr Upson accepted that throughout the period from December 2013 to March 2014, he thought it "more likely" that Mr Ruhan was the true beneficial owner, "without a doubt", and in response to a question from the Court, he accepted that his antennae pointed "very strongly to the conclusion that the assets were, substantially at least, intended for the benefit of Mr Ruhan". I have concluded that the legal team thought it much more likely that Mr Ruhan was the intended beneficiary of the Arena Settlement. While Dr Smith and Ms Stickler may at times have sought to persuade Mr Upson that they were no longer confident that was the case, this did not affect Mr Upson's own view. Further, I think it likely that back in 2013, he was more sceptical about their apparent change of view than he recalled when giving evidence in 2021. It was clearly in Dr Smith's and Ms Stickler's interests to profess that they had come to accept Messrs Cooper and McNally's assertions that they were the "real" owners (as Mr Upson accepted) and there must have been concerns as to Dr Smith's reliability, given his prior convictions for offences of dishonesty, and as to the readiness of Ms Stickler to endorse Dr Smith's view given their close business relationship and Dr Smith's forceful personality.

ii) It was clear to Mr Upson that the value of the assets being transferred was greatly in excess of any realistic value of the Orb Claimants' proprietary claims. Mr Upson accepted it was "quite a result … a very good result". The only basis on which it was suggested that the Orb Claimants' 40% share might have enabled them to recover 100% of the assets in the Arena Trust was the so-called Pallant v Morgan argument which, as I have stated, Mr Upson described as "not the most promising of arguments". In any event, I find it impossible to reconcile the suggestion that Messrs Cooper and McNally, rather than Mr Ruhan, were the persons beneficially interested in the Transferred Assets with the assertion that the Orb Claimants could trace into 100% of the assets of that settlement because their 40% share in the profits from the re-sale of the Hyde Park Hotels had proved the key to establishing the entirety of *Mr Ruhan's* fortune.

iii) So far as Mr Upson and the legal team were aware (and as I have found was in fact the position), Mr Ruhan had not approved the decision of Messrs Cooper and McNally to enter into the IOM Settlement. Mr Upson accepted that his view at the time was that "it was very likely" that Mr Ruhan did not know about the IOM Settlement, and that if Mr Ruhan had not approved it and Messrs Cooper and McNally were Mr Ruhan's nominees, then the transfer involved a breach of trust. While Mr Upson said that for a time he thought Mr Ruhan was behind the settlement as some form of trap, he accepted that by March 2014, that view had "completely diminished and gone", and any idea that Mr Ruhan was using Messrs Cooper and McNally to negotiate on his behalf to save face is wholly irreconcilable with the fact that, in their final form, the IOM Settlement documents contained no provisions which prevented the 2012 Proceedings continuing. There could have been no serious possibility of Mr Ruhan approving such a notably generous settlement on a basis which did not even secure any form of release for him.

iv) In these circumstances, there was a clear, obvious and very significant risk on the facts known to Stewarts that the IOM Settlement involved a breach of trust on Mr Cooper and Mr McNally's part, and that it would be open to Mr Ruhan to enforce the terms of the trust and to seek to recover the Transferred Assets.

218. Mr Upson confirmed that he was aware "that Mr Ruhan would have challenges to that settlement" and that, at the time the settlement was under discussion, "there were general warning bells going off in the sense it was odd" and that "one can see there would be difficulties". When Mr Pickering QC for HPII suggested that there was "a very serious risk that Messrs Cooper and McNally were … about to commit a very serious breach of trust, a breach of fiduciary duty", Mr Upson replied:

> "*As you and I know*, that is an issue one would consider when giving privileged advice … I am obviously trying to refer to the fact of, obviously [some]one in my position would give advice on all the risks, the risk that Mr Ruhan is behind it, the risk that could be a breach of duty".

219. The italicised words were a reference to the fact that material relating to this issue had been obtained by HPII from Mr Campbell, and been the subject of a unsuccessful challenge by

HPII to the Orb Claimants' assertion of legal professional privilege. Having inspected the material, Moulder J found as follows ([2019] EWHC 1754 (Comm), [74-75]):

> "Rather than amounting to evidence that Stewarts were complicit in facilitating the alleged iniquity or deceived into being an instrument to perpetrate the iniquity, in my view the emails demonstrate that Stewarts/Isle of Man counsel were giving legal advice as to the risks inherent in what was proposed.
>
> It seems to me therefore that the emails cannot be said to show that Stewarts were acting outside the normal scope of professional engagement. Stewarts were performing their proper professional role of giving advice on the risks of the transaction".

There was no evidence at this trial which called that conclusion into question. It was clear at trial that that advice included identifying the risk that Mr Ruhan would claim those assets back.

220. I am satisfied that the knowledge which Stewarts had amounted to notice on the part of the Orb Claimants of Mr Ruhan's proprietary claims:

i) The facts objectively known to Stewarts would have led a reasonable person in Stewarts' position to conclude that Mr Ruhan probably had a proprietary right in the assets to be transferred under the IOM Settlement.

ii) In any event, those facts were sufficient to establish a serious possibility of Mr Ruhan having such a proprietary right, so as to require the Orb Claimants to confirm the position with Mr Ruhan or his solicitors (which would have revealed the breach of trust), failing which they or their nominees received the legal estate in the Transferred Assets subject to such proprietary interest as Mr Ruhan had.

## I5 The effect of my findings

221. The effect of my findings is as follows:

i) Dr Cochrane and SMA received the assets transferred under the IOM Settlement as nominees for the Orb Claimants.

ii) Through the knowledge of Dr Smith, Dr Cochrane and Stewarts, the Orb Claimants knew (or in the case of Stewarts were on notice) that Messrs Cooper and McNally were acting in breach of trust in concluding and performing the IOM Settlement, and hence took subject to the equitable rights which it was open to Mr Ruhan to assert as a result of that breach of trust.

iii) To the extent that any Upstream Claimant is otherwise entitled to trace into Mr Ruhan's interest in the Transferred Assets, those rights were not defeated by the IOM Settlement because Dr Cochrane and SMA (who received the legal estates) were not bona fide purchasers for value of those assets and acquired them subject to Mr Ruhan's interest, leaving the Upstream Claimants in a position to trace into Mr

Ruhan's continuing interest in the Transferred Assets. It should be noted, however, that this raises a different question to whether those Upstream Claimants are independently able to trace into Transferred Assets, once Mr Ruhan had surrendered his own claims to those assets.

## J THOSE CLAIMING INTERESTS IN THE ASSETS TRANSFERRED UNDER THE IOM SETTLEMENT

### J1 Harbour

222. On the basis of my findings in Sections H and I above:

i) On the construction I have reached of the Harbour IA at [177-181], the Orb Claimants were not free to deal with any part of their interest in the Transferred Assets because they were subject to Mr Ruhan's proprietary claims.

ii) In circumstances in which Harbour did not itself acquire the legal estate in the assets transferred under the IOM Settlement, it takes subject to Mr Ruhan's rights unless both Harbour and the recipient of the legal estate were without notice of those claims. The legal estates were received by Dr Cochrane and SMA, a company wholly-owned by Dr Cochrane, who knew that Messrs Cooper and McNally had entered into the IOM Settlement in breach of trust, and who were acting as nominees for the Orb Claimants who had a similar state of knowledge.

223. It is not strictly necessary, in these circumstances, to make any findings as to Harbour's own knowledge of the circumstances of the IOM Settlement. However, once again I set out my findings below because they may be relevant to other claims, and given the time spent on these issues at trial.

224. The Harbour IA provided for Stewarts to provide monthly reports on the progress of the litigation and the evidence of both Ms Dunn and Mr Upson was that such reports were provided. Those reports were privileged, and were not before the Court, which has made the process of ascertaining the facts known to Harbour about the IOM Settlement particularly difficult. The following matters are clear:

i) Harbour was aware, from the Orb Claimants' statement of case in the 2012 Proceedings, that the case being advanced was that Mr Ruhan was the sole beneficiary of the Arena Settlement.

ii) Harbour received a general update from Stewarts about the Norwich Pharmacal proceedings in the Isle of Man.

iii) Harbour received some communications from Ms Stickler about the progress of the negotiations which led to the IOM Settlement. While Ms Dunn could not recall the position, I am satisfied that Harbour is likely to have been told that Mr Ruhan was not involved in the negotiations, and Ms Dunn accepted that she was aware that the IOM Settlement involved no release of claims against Mr Ruhan (so that the 2012 Proceedings which Harbour was funding would continue).

iv) Harbour was aware that the IOM Settlement was entered into with Messrs Cooper and McNally.

v) Harbour was provided with some of the documents constituting the IOM Settlement in April 2014, and given an explanation as to the effect of the settlement. There is no suggestion that, on receiving the documents, Harbour expressed the view that the broad structure or nature of the settlement was otherwise than in accordance with its general understanding.

vi) On the evidence of Ms Dunn, Harbour appears to have regarded the IOM Settlement as a litigation advance, because it gave the Orb Claimants' control of assets belonging to Mr Ruhan at a time when he was denying he had any significant assets.

225. On these facts, Harbour has not persuaded me (the burden being on Harbour to do so) that it did not have notice of Mr Ruhan's proprietary rights at the time the IOM Settlement was concluded. Even allowing for the very different position of Harbour as a funder as compared (say) with Dr Smith, or indeed Stewarts, when it came to involvement in the detail of the case, the facts known to or believed on solid grounds by Harbour – that the assets were Mr Ruhan's, that Messrs Cooper and McNally were entering into the IOM Settlement as trustees of Mr Ruhan's assets, and that Mr Ruhan was not a party to the IOM Settlement nor had he secured any release of claims against him – were sufficient to raise something appreciably more than a mere possibility of a proprietary right on Mr Ruhan's part, sufficient to require a reasonable person in Harbour's position to conduct further investigations if it wished to acquire a beneficial interest in the assets being transferred under the IOM Settlement free of any proprietary right which Mr Ruhan might have. Had such investigations been undertaken, Harbour would have become aware of facts which would have led a reasonable person in Harbour's position to conclude that Mr Ruhan probably did have such a right: namely that Mr Ruhan had not approved the settlement (Stewarts believing this was "very likely" and which contact with Mr Ruhan's solicitors Memery Crystal would have confirmed) and that it was more likely that it was Mr Ruhan, and not Messrs Cooper or McNally, who was beneficially entitled to the Transferred Assets.

## J2 Messrs Thomas and Taylor

226. Messrs Thomas and Taylor advance their proprietary interest through the Harbour Trust, and they can stand in no better position than Harbour in this regard, nor than Stewarts who were acting as their solicitors. However, as with Harbour and Stewarts, I will set out my findings as to their own understanding.

227. I am satisfied that Mr Thomas believed that the assets transferred under the IOM Settlement belonged to Mr Ruhan, not to Messrs Cooper and McNally personally, and I reject his evidence at trial that he was "absolutely open" to the contrary position. That is inconsistent with his clear contemporary evidence, in particular in the affidavit he swore in the Isle of Man proceedings in August 2013. When presented with that evidence in cross-examination by Mr Pickering QC, Mr Thomas acknowledged:

> "That is what I have said, yes. That must have been what I believed".

Mr Thomas' evidence that he might have changed his mind, not because of any documents obtained but because "it is possible to reflect on the reality of a moving situation without documents" was thoroughly unconvincing.

228. I am also satisfied that Mr Thomas did not believe that Mr Ruhan had approved the transfer. He said that it was "not necessarily" the case that Mr Ruhan did not know about the transfer. In cross-examination, entirely unheralded in his witness statement, he suggested that he had been told that Mr Ruhan had instructed Mr Cooper and Mr McNally "to settle the matter on the basis that they had just got loads of money out of the Sentrum deal", but this proved to be surmise on Mr Thomas' part, and I am satisfied that if he had had any direct evidence on this issue, it would have found its way to Stewarts to deploy when resisting Mr Ruhan's counterclaim in 2015, and into his witness statement in this action.

229. In any event, the suggestion that Mr Ruhan was using Messrs Cooper and McNally to settle the 2012 Proceedings made no sense. Mr Thomas accepted that he saw and read the documents comprising the IOM Settlement, and he must therefore have known that Mr Ruhan was not a party to those documents, that there were no releases of the Orb Claimants' claims against Mr Ruhan, and nothing which would prevent the 2012 Proceedings continuing. I am unable to accept Mr Thomas' evidence that he thought the 2012 Proceedings had been settled by the IOM Settlement, not only because there was no release of those claims, but because the Orb Claimants continued their active pursuit of Mr Ruhan after the IOM Settlement, seeking to recover the sum of £92m paid out of the Arena Settlement in late 2012. In these circumstances, I am satisfied that Mr Thomas had notice of the proprietary right which I have held that Mr Ruhan was in a position to assert to recover the assets transferred under the IOM Settlement.

230. The position so far as Mr Taylor's knowledge is concerned is not quite as clear-cut. It was Mr Taylor's evidence that he only read Schedule 2A to the IOM MSA, and not the other documents which made up the IOM Settlement, although he accepted that he would have wanted to see the whole of the IOM MSD, and that there would have been some discussion of the IOM Settlement with others in the Orb Claimants' camp. However, Mr Taylor accepted that he had read Schedule 2A, from which it was clear that the IOM Settlement did not extend to claims against Mr Ruhan, and he accepted that he knew that Mr Ruhan was not a party to the IOM Settlement. He also confirmed the evidence he gave in his August 2013 affidavit filed in the Isle of Man proceedings that he believed that the assets in the Arena Settlement were Mr Ruhan's and that "it didn't seem likely to me at all" that the assets belonged to Messrs Cooper and McNally. I am satisfied that, on the basis of these facts, a reasonable person in Mr Taylor's position would have appreciated that it was probable that Mr Ruhan had a proprietary right to the assets being transferred, and, therefore, that Mr Taylor had notice of that interest.

### J3 Orb

231. The knowledge of Dr Smith and Dr Cochrane in negotiating the IOM Settlement on Orb's behalf, and the knowledge of Stewarts as Orb's solicitors, is attributable to Orb, which is therefore in the same position as Harbour and Messrs Thomas and Taylor.

# K THE GENEVA SETTLEMENT

## K1 Introduction

232. The Geneva Settlement settled the claims of all parties to the 2012 Proceedings, including the claims by Mr Ruhan to recover the assets transferred under the IOM Settlement. It was common ground before me that the effect of the dismissal of the 2012 Proceedings was that Mr Ruhan relinquished his claim to the Transferred Assets, and that any equitable interest which he had previously had ceased to be an obstacle to those claiming interests under the Harbour Trust at that point. However, the Geneva Settlement gives rise to further issues.

233. First, P&M argue that the effect of the Confidential Settlement Deed was that the Orb Claimants agreed to release any claims they had against Dr Cochrane and SMA in their capacity as trustees (an argument which would appear to defeat the claims not just of the Orb Claimants, but of Harbour claiming through them).

234. Second, the Geneva Settlement gives rise to a number of priority issues as between those claiming interests under the Harbour Trust, and P&M.

## K2 The argument that the Orb Claimants gave up their claims against Dr Cochrane and/or SMA in respect of assets held by them on trust

235. This aspect of P&M's closing argument is dealt with in a single paragraph (paragraph 124 of their written closing). The argument asserts that the effect of the waivers in the Confidential Settlement Deed was that the Orb Claimants gave up any equitable interest in the property which would otherwise have been held by Dr Cochrane and SMA on bare trust for them, leaving Dr Cochrane and SMA (subject to such proprietary claims as Phoenix might have) as the beneficial owners of those assets. The argument runs counter to the overall thrust of P&M's closing submission, which is that the effect of the Geneva Settlement was "in broad terms, … to leave the disputed assets in the hands of the Orb parties in return for the Loan Note, the LICSA and the transfer of the shares in Minardi to Phoenix" (paragraph 1) and that "any entitlement of Harbour, the Viscount *qua* Orb and Messrs Taylor and Thomas under the Harbour Funding Agreement falls to be paid out of the net value of assets left in the hands of SMA and Dr Cochrane as a result of the Geneva Settlement after deduction of the sums due to P&M …".

236. The argument relies on the fact that the Confidential Settlement Deed of 28 April 2016, to which the Orb Claimants, Dr Cochrane, SMA and Dr Smith were all parties, contained the following provision:

> "On Completion, this Deed will constitute the full and final settlement of, and the Parties will thereby have released and forever discharged, all and/or any actions, or claims, rights, demands, defences and set-offs … that the Parties or their Affiliates or any of them ever have had, may have or hereafter can, shall or may have against any other Party or any of their Affiliates arising out of or connected with:

6.1.1 the Claims …

6.1.9 the Arena Assets."

237. Clause 6.2 also contains wide words of release: "any actions, claims, rights, demands and set-offs … arising out of or connected with the same facts giving rise to the English Proceedings or the Freezing Injunction Application …"

238. The "Arena Assets" are defined in clause 2.1(b) of the Confidential Settlement Deed, which refers to the counterclaim brought by Mr Ruhan to recover those assets in the 2012 Proceedings. The Claims are defined by reference to a lengthy list of litigation in clauses 2.1 to 2.9, including the claims asserted by the various parties (actual or potential) to the 2012 Proceedings.

239. In summary, P&M allege that any claim by any of the Orb Claimants, Dr Cochrane, SMA or Dr Smith that any of those parties held assets as their nominee or on bare trust was released, leaving the former nominee in the happy position of full beneficial ownership.

240. I cannot accept that this was the understanding or intention of the parties to the Confidential Settlement Deed, and indeed for the greater part of their written closing submissions, P&M proceed on the assumption that it was not (see [235] above). This is clear not only from the context of the Confidential Settlement Deed, and the wholly improbable consequences which follow from P&M's argument, but is apparent from the face of the Deed itself. Clause 2.1(b) refers to claims "against the Claimants, [Dr Cochrane], SMA" and others arising from "SMA's acquisition in March 2014 of the Arena Assets … through a settlement agreement referred to by the Parties as the 'IOM Settlement'", reflecting the parties understanding that Dr Cochrane and SMA had acted in that acquisition on behalf of the Orb Claimants. Dr Cochrane signed the Confidential Settlement Deed on behalf of Orb and SMA (and would therefore have been in a position of impossible conflict of interest if the releases extended to assets she or SMA held on Orb's behalf).

241. The issues which can arise when the drafters of documents adopt a "saturation bombing approach" in an attempt to obliterate their target, with the risk of wholly unintended collateral consequences, has attracted judicial comment before. In Arbuthnott v Fagan [1995] CLC 1396, a case in which Mr Lord QC and I found ourselves on opposing sides (Mr Lord, I should add, on the side of the winners), Hoffmann LJ noted at p.1403 that the court could not construe an expression so vague as "connected with" without regard to the purpose of the clause as a whole because:

> "Connections may exist in an infinite variety of forms and degrees. Only the context can indicate which of these connections is meant. The need to examine the context is not obviated by the use of intensifiers like 'in any way'. I accept Mr Eder's submission that such words indicate an intention that the concept of connection should be broadly construed. But they cannot be read literally, or else they will include connections such as Fluellen found between Harry Monmouth and Alexander of Macedon:

> 'There is a river in Macedon, and there is also moreover a river at Monmouth … and there is salmons in both.'
>
> It is therefore still necessary to limit the connections to those which are relevant for the purpose in hand."

He continued at p.1404:

> "It is a common consequence of a determination to make sure that one has obliterated the conceptual target. The draftsman wanted to leave no loophole for counter-attack by the recipient or intended recipient of a call. It is no justification for construing the language so as to apply to a situation which, on a fair reading of the general purpose of the clause was not within the target area."

242. Approaching clauses 6.1 and 6.2 with that in mind, I am satisfied that they are concerned with adverse claims, and those where the legal basis of the claim arises from the facts underlying the settled claims. They do not extend to consensual relationships which arise between parties whose relationship was not adversarial at the time of the Confidential Settlement Deed, nor to proprietary claims the source of which was one party's consensual (and undisputed) undertaking to hold assets on another's behalf. The contrary construction would have defeated one of the main purposes of the Confidential Settlement Deed, because it would have involved the Orb Claimants giving up any claim to recovery, and conferring a wholly unintended windfall on Dr Cochrane and SMA.

## K3 Did the LICSA effect an equitable assignment to Phoenix?

243. The rights which P&M say that they acquired by virtue of the Geneva Settlement comprise:

i) the Loan Note, pursuant to which Dr Cochrane agreed to pay Phoenix £73.5m; and

ii) the LICSA, under which Phoenix and Minardi say they acquired certain rights.

244. There was no dispute that the Loan Note gave rise to no more than a personal claim by Phoenix against Dr Cochrane in the first instance (although, as explained below, it was suggested for the first time in closing that Phoenix can and should be subrogated to a proprietary claim which it said Dr Cochrane has arising from this liability). It is accepted that the obligations owed to Minardi under the LICSA are also personal rights. However, Phoenix alleges that the LICSA involved a transfer of rights by SMA in the form of an equitable assignment, which had the effect of taking those rights out of any trust arising in favour of the Settlement Parties or Messrs Thomas and Taylor, or which has priority over any such rights.

### (1) The terms of the LICSA

245. The LICSA was entered into on 29 April 2016. It contains various drafting infelicities, and includes a number of defined terms which did not find their way into the substantive provisions of the final agreement. It is an agreement whose commercial rationale is difficult to derive from its terms, and there was no other evidence (for example contemporaneous

correspondence) which shed any light on what the document was intended to achieve. As a result, it has given rise to issues of construction of the purest kind, on which P&M's case has developed over time. Both the Settlement Parties and P&M sought to buttress their arguments by reference to contextual arguments:

i) The Settlement Parties suggested that Mr Ruhan was in a weak position when the Geneva Settlement was negotiated, both as a result of the 2012 Proceedings, and because of his desire to ensure any recovery went to Mr Stevens.

ii) P&M suggest that I should approach the construction of the LICSA on the basis that it was intended to return some assets (or their equivalent) to the Ruhan-side.

246. I do not believe it would be appropriate for me to approach the LICSA with any form of pre-disposition as to the strength of one or other party's negotiation position, as to the type of deal towards which the parties were aiming or as to what would constitute a 'fair' outcome to a dispute which was so singular both in its content and in the means by which it was pursued. The documents were prepared to settle hard-fought litigation in which both parties had access to legal advice, and there is evidence that Aken Gump had some involvement on the Ruhan/Stevens side. Lord Neuberger JSC's warning in Arnold v Britton [2016] AC 1619, [19-20] that the court should not impose its own terms on the parties in the guise of construction is particularly apposite in the present context.

247. The parties to the LICSA are SMA, Minardi, Phoenix, and Dr Cochrane. The recitals to the LICSA relevantly provide that:

> "J. Minardi is a creditor of Unicorn and thus a substantial claimant upon the Arena Estate.
>
> L. [SMA] is the shareholder of the Arena Holdcos but not a creditor. [SMA] and Dr Cochrane are warranting that they own or control or are the ultimate beneficial owner(s) of all the creditors except the following: Minardi, TMP, Philip Barton, Franek Sodzawiczny and Abry Partners.
>
> M. The Parties have agreed to work together and to immediately upon execution of this Agreement compromise or procure the compromise of their claims and those of their Related Parties. In particular the Parties will work together, in the utmost good faith and on an open book basis, to ensure an orderly and speedy winding up of the liquidation of the Arena Estate and its affairs and the distribution of the Arena Estate assets to the Parties.
>
> N. The Parties have agreed that Minardi will receive 50% of all distributions made by the Liquidators except those made to the following parties: TMP, Philip Barton, Franek Sodzawiczny and Abry Partners.

> O. Dr Cochrane, as ultimate beneficial owner of [SMA], will procure the direct payment to Phoenix from the Liquidators in prepayments of her debt to Phoenix under the loan note instrument ("the Loan Note") all payments to [SMA] or related parties are entitled to receive under this Agreement and [SMA] as shareholders of the Arena Holdcos".

248. Section 2 of the LICSA, entitled "Settlement Steps", contains the following clauses:

> "2.2 Both Parties agree to complete or procure the completion of the Conditions Precedent on the date of this Agreement.
>
> 2.3 [SMA] and Minardi hereby agree to take all necessary actions that are required to conclude the liquidation of the Arena Estate in a timely manner and distribute the Assets and cash of the relevant liquidations of the Arena Holdcos and the Arena Estate in the manner prescribed under the terms of this Agreement. In particular, irrespective of any other right or entitlement, Minardi will receive 50% of all distributions made by the Liquidators except those made to the following third parties: TMP, Philip Barton, Franek Sodzawiczny and Abry Partners.
>
> 2.4 Dr Cochrane, as ultimate beneficial owner of [SMA], undertakes to procure the direct payment to Phoenix from the Liquidators in prepayments of her debt to Phoenix under the Loan Note all payments to [SMA] or related parties are entitled to receive under this Agreement and [SMA] as shareholders of the Arena Holdcos.
>
> 2.5 There are five (5) members in the creditor committee of the Arena Holdcos. [SMA] and Minardi shall be entitled to have each two (2) representatives in the creditor committee of the Arena Holdcos, with the fifth to be an independent agreed between [SMA] and Minardi. If [SMA] and Minardi fail to agree, the fifth member shall be appointed by the Liquidators.
>
> 2.6 [SMA] and Minardi shall direct the Joint Liquidators to make payments as described in clauses 2.3 and 2.4 above. In this respect, they undertake to inform the Joint Liquidators in writing that they entered into this Agreement as per schedule 4.
>
> 2.[7] The Parties have agreed that as soon as practicable, the Minardi Reserved Assets will be transferred by the Liquidators to Minardi in one or more transfer(s). [SMA] undertakes to give whatever directions is [sic] required to the Liquidators to facilitate such transfer, including for the

> avoidance of doubt, the exercise of their votes on the creditors committee and provide the Liquidators with any required release. 50% of the respective values (as listed in schedule 3) for each asset effectively transferred to Minardi will be applied as a prepayment of the Loan Note."

249. The "Arena Holdcos" are defined as Unicorn, Ballaugh, Glen Moar, Sulby, Land Consultants Limited, Legion NA Investments Limited, Square Mile Services Limited, Local Protectors Limited, and Misprint Limited. Schedule 4, as referenced in clause 2.6, contains a notice to be sent to the JLs. In so far as relevant this states that:

> "In particular, the parties to the Agreement have agreed that irrespective of any right or entitlement, Minardi is entitled to receive 50% of all distributions from the Arena Estate made by the Joint Liquidators, save for any distributions made to TMP, Philip Barton, Franck Sodzawiczny and Abry Partners. Moreover, Dr Cochrane, as ultimate beneficial owner of SMA, undertook to procure that all payments SMA or its related parties are entitled to receive under the Agreement or as shareholder of the Arena Holdcos be made by the Joint Liquidators directly to Phoenix, the parent company of Minardi."

250. The "Minardi Reserved Assets", as mentioned in clause 2.7, are set out in schedule 3. The "Conditions Precedent", referenced in clause 2.2, are set out in schedule 2. They include:

> "2. The lodging of a notice of dismissal in the agreed form between the Orb Claimants and Mr A J Ruhan in the High Court in relation to proceedings (together 'the Proceedings').
>
> 3. The execution of a non-sue, mutual hold harmless and mutual assistance deed of agreement as between Dr G M Smith Dr G A Cochrane and Mr A J Ruhan."

251. Clause 6 of the LICSA imposes confidentiality obligations as follows:

> "The terms of this Agreement, and the substance of all negotiations in connection with it, are confidential to the parties, who shall not disclose them to, or otherwise communicate them to, any third party, including but not limited to Simon Cooper and/or Simon McNally, without the prior written consent of the other parties other than:
>
> 6.1.1 to the parties' respective auditors and lawyers on terms which preserve confidentiality;
>
> 6.1.2 as far as necessary to implement and enforce any of the terms of this Agreement;
>
> 6.1.3 pursuant to an order of a court of competent jurisdiction, or pursuant to any proper order or demand made by any

> competent authority or body where they are under a legal or regulatory obligation to make such a disclosure."

252. Clause 7 contains an agreement to submit "[a]ny dispute, controversy, or claim arising out of, or in relation to [the LICSA]" to arbitration.

253. There was some argument before me as to the scope of clause 2.3, and its interrelationship with clause 2.4. Reading the LICSA as a whole, I have concluded that it falls to be interpreted as follows:

i) While the first sentence of clause 2.3 (by which SMA and Minardi agree to take all actions to ensure a timely winding-up of the Arena Holdcos) is of general application, the second sentence is concerned with payments to creditors of the Arena Holdcos on such winding-up, and not distributions to shareholders.

ii) The second sentence of clause 2.3 specifically refers to those parties identified in Recital (L) as creditors of the Arena Holdcos, and the words "irrespective of any other right or entitlement" in that sentence are a reference to Minardi's own rights as a creditor of Unicorn, which are referred to in Recital (J) (making it clear that its right to 50% of the amounts due to the other creditors is in addition to the amount to which it is entitled as a creditor in its own right).

iii) Despite the infelicities of drafting in clause 2.4 arising from the words "under this Agreement and SMAI" (which mirror a similar infelicity in Recital (O)), the provision appears to be aimed at payments made to SMA or SMA related parties either as "shareholders of the Arena Holdcos" or under the LICSA. This appears more clearly from the approved letter template in Schedule 4, which provides:

> "Moreover, Dr Cochrane, as ultimate beneficial owner of SMA, undertook to procure that all payments SMA or its related parties are entitled to receive under the Agreement or as shareholders of the Arena Holdcos be made by the Joint Liquidators directly to Phoenix".

iv) A construction whereby clause 2.3 is concerned with distributions to creditors and clause 2.4 with distributions to SMA as the shareholder reconciles a number of the differences between clauses 2.3 and 2.4 or associated clauses: the fact that clause 2.3 provides for payment of 50% of distributions to Minardi and clause 2.4 for payment of all distributions (up to the relevant ceiling) to Phoenix; the fact that Recital (J) provides that Minardi is a creditor and Recital (L) provides that SMA is a shareholder but not a creditor; and the fact that payments under clause 2.3 do not constitute pre-payments under the Loan Note, whereas those under clause 2.4 do.

254. The LICSA refers to the Loan Note, which also formed part of the Geneva Settlement. The Loan Note is expressed on its front to be an "unsecured loan note". Clause 6.1 provides for the repayment of the principal sum and interest with a final repayment date of 31 December 2017. Clause 6.2 allows Dr Cochrane to make voluntary pre-payments. Clause 6.5 provides that:

> "[Dr Cochrane], as ultimate beneficial owner of [SMA], will procure direct payment by the Liquidators to [Phoenix] of all payments [SMA] or related parties are entitled to receive under the [LICSA] and [SMA] is entitled to receive as shareholder of the Arena Holdcos. Any such payments received by [Phoenix] shall be applied as prepayments in respect of the Note."

255. Pulling these strings together, the LICSA makes provisions relating to:

i) payment to Minardi of 50% of amounts payable to those creditors of the Arena Holdcos owned or controlled by SMA and/or Dr Cochrane;

ii) the transfer of various assets from one of the Arena Holdcos, Unicorn, to Minardi; and

iii) the payment of any amounts payable to SMA as the shareholder of the Arena Holdcos on the winding up of the Arena Holdcos to Phoenix up to the amount necessary to ensure the discharge of the Loan Note;

with 50% of the agreed value of the assets within ii) and 100% of the amounts in iii) counting towards payment under the Loan Note (but none of the amounts in i).

256. As I have stated, it is common ground that the obligation in i) did not involve an equitable assignment of the right to 50% of the amounts payable to the relevant creditors, because the relevant creditors (who had the right to receive payment of the debts in question) were not parties to the LICSA. However, P&M contends that the obligation in iii), through the combination of clauses 2.4 and 2.6 of the LICSA, involved an equitable assignment of SMA's rights to those distributions to Phoenix.

**(2) Are the rights which are subject to clause 2.4 capable of assignment in equity?**

257. The future chose in action which P&M claims the LICSA assigned in equity is SMA's entitlement as the sole shareholder in the Arena Holdcos to receive any surplus from the liquidations of the companies. The Arena Holdcos are BVI companies, and s.207(3) of the BVI Insolvency Act 2003 provides that:

> "(3) Any surplus assets remaining after payment of the costs, expenses and claims [of creditors (including interest) and the liquidators] shall be distributed to the members in accordance with their rights and interests in the company."

258. SMA's right to the surplus is a future asset or merely an expectancy; whether there will be a surplus and, if so, how much was unknown when the LICSA was agreed and is still unknown today. However, it is nonetheless assignable in equity, provided that the agreement to assign is for value: Norman v Federal Commissioner of Taxation (1963) 109 CLR 9, [35]; *Snell*, 3-040; *Guest on the Law of Assignment* (3rd) ("*Guest*"), 1-08 and 3-21. In these circumstances, the assignee obtains an equitable interest in the assets once they are obtained by the assignor, but has more than a merely contractual right in the meantime (see [170] above). It is common ground that value was given for the rights acquired by P&M

under the LICSA (which formed one of the agreements by which the 2012 Proceedings were settled).

### (3) The principles relevant to determining whether clauses 2.4 and 2.6 of the LICSA constituted an equitable assignment

259. There are two principal ways in which an equitable assignment can be effected: (a) the assignor can inform the assignee that he has transferred the chose to them; or (b) the assignor can instruct the debtor to discharge the obligation by payment to, or performance for, the assignee: *Chitty on Contracts* (33rd ed), 19-022; *Guest*, 3-10.

260. In Phelps v Spon-Smith & Co (a firm) [2001] BPIR 326 Peter Whiteman QC (sitting as a Deputy High Court Judge) provided a helpful summary of the requirements for determining whether an equitable assignment has been effected. As Mr Whiteman QC noted, "it is well established that it is not necessary for an equitable assignment to follow any particular form … What is necessary … is that [1] there should be an intention to assign, [2] that the subject-matter of the assignment should be so described as to be capable of being identified at the time of the alleged assignment and [3] that there should be some act by the assignor showing that he is transferring the chose in action to the (alleged) assignee": [34] (numerical identifiers added).

261. As to [1], the intention to assign:

i) There must be an intention to bring about an assignment, but the word "assignment" does not have to be used. The key intention is that of the assignor as the person making the disposal (Phelps, [39]).

ii) The intention can be inferred. P&M relied on William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454. In that case, the seller instructed its purchaser to pay the price directly to the seller's bank (which had financed the transaction). By an oversight, the purchaser paid the seller, and the bank sued the purchaser to recover the debt. Lord Macnaghten held (at p.460) that it was "difficult to conceive of a plainer case of an equitable assignment or a clearer case of notice to the debtor". He continued (at p.462):

> "But, says the Lord Chief Justice, 'the document does not, on the face of it, purport to be an assignment nor use the language of an assignment.' An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person."

iii) That passage has been cited and applied on a number of occasions including by the Court of Appeal in Burridge v MPH Soccer Management Ltd [2011] EWCA Civ 835. In Burridge the Chancellor made it clear at [19] that the question of whether a written document effects an assignment "is a question of construction to be determined in the

light of the circumstances then prevailing". *Guest* addresses the issue of a direction to the obligor at 3-11:

> "The difficulty is, however, that the direction to the obligor may be merely a revocable mandate and not an assignment, that is to say, it may merely be an authority given to the obligor to act on behalf of the alleged assignor, which authority may be revoked up to the time the obligor acts on it. For an assignment, there must be a clear expression of an intention to make an immediate and irrevocable transfer of the chose to the assignee …. It must be plain that the assignor intends by the request to divest himself of the chose and vest it in the assignee. The intention must be determined objectively: the subjective intention of the assignor is irrelevant. The test is how the direction would be understood by a reasonable obligor, having regard to the words used, the nature and purpose of the transaction and the relevant surrounding circumstances..."

262. As to [2], the identification of the subject-matter of the assignment:

i) In Tailby v Official Receiver (1888) 13 App Cas 523 a bill of sale purported to assign all book debts due and owing or which might become due and owing. The House of Lords held that the subject-matter of the assignment was sufficiently certain. Lord Macnaghten held (at p.543) that the subject matter had to be "of such a nature and so described as to be capable of being ascertained and identified". Lord Watson noted (at p.533) that "mere difficulty in ascertaining all the things which are included in a general assignment…will not affect the assignee's right to those things which are capable of ascertainment or are identified".

ii) *Guest* deals with the requirement for certainty of subject-matter at 1-45:

> "The subject-matter of the assignment must be capable of ascertainment and identified with sufficient certainty to establish what is being assigned. If a creditor simply instructs his debtor to pay a sum of money to a third party, but does not specify the debt or fund out of which payment is to be made, the instruction will fail as an assignment. But an order to pay out of money owed by the debtor to the creditor or out of a specific fund coming to the debtor may be an assignment. Where the whole of a debt or fund is assigned, it is not necessary to state the amount. If part of a debt or fund is being assigned, it may be expressed as a monetary amount or as a fraction or percentage of the debt or fund. However, an assignment of an indeterminate portion of a debt or fund would fail for uncertainty. It is also necessary to determine that the claimed right was included in the assignment."

263. As to [3], the manifestation of an immediate transfer:

i) In Phelps, [41], Mr Whiteman QC held that:

> "[T]here must be some act by the assignor showing that he is passing the chose in action to the supposed assignee: see Kijowski v New Capital Properties Limited (1987) 15 Con LR 1 at 8 … Clearly, a broad approach has been taken to what constitutes such an 'act', and there is, for example, no necessity for a deed. None the less, there must be an 'act' which establishes clearly the nature of the transaction being effected. As with the first and second requirements, the fact that in terms of form it is comparatively easy to effect an equitable assignment, makes it all the more important that there is clear evidence of an 'act' which is alleged to constitute the assignment."

ii) Blackburne J in Finlan v Eyton Morris Winfield [2007] EWHC 914 (Ch), [33] held that what was required was "some outward expression by the assignor of his intention to make an immediate disposition of the subject matter of the assignment. It must be possible to identify some act on the assignor's part from which his intention then and there to divest himself — in favour of the assignee — of the right or interest to be assigned, on the terms which have been agreed, can be inferred".

**(4) Does the LICSA effect an assignment of SMA's s.207(3) rights?**

264. I have not found this issue straightforward, but I have concluded that on its proper construction the LICSA did not effect an equitable assignment of SMA's s207(3) rights arising from the liquidations of the Arena Holdcos. I have reached that conclusion as a result of the combined effect of two matters.

265. First, any assignment can only have been effected by SMA, as the legal owner of the shares in the Arena Holdcos. Yet clause 2.4, which is the clause which creates an obligation to pay Phoenix, and is the only clause which makes it clear that the amounts paid will reduce Dr Cochrane's liability under the Loan Note, imposes an obligation only on Dr Cochrane "as ultimate beneficial owner of [SMA]" and not on SMA itself, and does so in language ("undertakes to procure") which is redolent of a personal obligation, rather than an intention to divest SMA of the s.207(3) right and vest it in Phoenix. It is not clear why clause 2.4 came to be framed in these terms – whether because it was Dr Cochrane who was liable under the Loan Note, or whether it resulted from the fact that clause 2.4 appears to have been aimed at capturing payments to related parties as well as to SMA. In any event, the absence of a promise from SMA is striking, and tells against any intention to assign or to make an immediate transfer of the entitlement.

266. Phoenix points to two provisions of the LICSA in answer to this point:

i) The first sentence of clause 2.3, which imposes an obligation on SMA to "take all necessary actions" to distribute the assets from the liquidation "in the manner prescribed under the terms of the [LICSA]". However that clause does not involve an immediate transfer of SMA's entitlement, but a personal obligation on SMA to take necessary steps to ensure P&M were paid any amounts to which were entitled to under the LICSA (whether under clauses 2.3 or 2.4). Further, the same obligation is placed on Minardi.

ii) P&M place significant reliance on clause 2.6 of the LICSA. In contrast to clause 2.4, clause 2.6 does place an obligation on SMA – an obligation to give directions to the JLs. The question is whether, objectively construed, clauses 2.4 and 2.6 in combination demonstrate the intention of SMA to effect a transfer of SMA's rights in a way which clause 2.4 does not on its own. I have concluded that they do not. In my view, the purpose of clause 2.6 is to require SMA and Minardi to facilitate the performance of the obligations created by the LICSA by informing the JLs of them. It is essentially a supplementary provision, intended to provide a machinery for giving effect to entitlements created elsewhere. It is for that reason that, while the substantive obligations created by clause 2.4 are anticipated in Recital (O), there is no similar recital anticipating an assignment by SMA under clause 2.6. It would be surprising if clause 2.6 had the effect that clause 2.4 gave rise to an equitable assignment when clause 2.4 did not have that effect on its own. Further, clause 2.6 imposes an obligation on Minardi, as well as SMA, even though there is no question of Minardi assigning any rights under the LICSA.

iii) Further, the first and second sentences of clause 2.6 are linked by the words "in this respect". Those words suggest that the letter which the sentence requires to be sent involves performance of the obligation created by the first sentence. In these circumstances, it is legitimate to have regard to the terms of the draft letter when determining the effect of the first sentence. The letter refers to Dr Cochrane's obligation "as ultimate beneficial owner of SMA … to procure that all payments SMA or its related parties are entitled to receive under the Agreement or as shareholders of the Arena Holdcos be made … directly to Phoenix", but contains no reference to any transfer by SMA of its rights. This reinforces my view that clause 2.6 is concerned with facilitating the performance of Dr Cochrane's personal obligations under clause 2.4, rather than effecting a transfer of SMA's rights.

267. Second, the payments to Phoenix under clause 2.4 are expressed to be prepayments under the Loan Note. The Loan Note and the LICSA were executed as part of the Geneva Settlement and it is clearly appropriate to seek to read the documents together (Durham v BAI (Run Off) Ltd [2012] UKSC 14; [2012] 1 WLR 867, [69] and In Re Sigma Finance Corp (in administration) [2009] UKSC 2; [2010] BCC 40, [12]).

i) The Loan Note is expressly stated to be unsecured, both in its title ("Loan Note Instrument Constituting £73,750,000 Unsecured Loan Note Due 2018") and in clause 12.12. Clause 6.5 of the Loan Note refers to the LICSA, but in terms which reflect only the personal covenant assumed by Dr Cochrane under clause 2.4 ("the Obligor, as ultimate beneficial owner of [SMA], will procure direct payment by the Liquidators to the Noteholder of all payments [SMA] or related parties are entitled to receive under the [LICSA] and [SMA] is entitled to receive as shareholder of the Arena Holdcos"). There is nothing in the Loan Note which recognises that there has been an outright transfer of SMA's rights to Phoenix.

ii) In circumstances in which it is common ground that Phoenix's entitlement under clauses 2.4 and 2.6 is limited to such amount as is necessary to discharge the outstanding balance of the Loan Note at the relevant time, it is significant that there is no provision for re-assignment back to the extent of any surplus. The terms of the

Loan Note envisage payments by Dr Cochrane from as early as 31 May 2016 up to 31 December 2017. Clause 2.7 of the LICSA envisaged that the balance due under the Loan Note would be reduced by 50% of the value of the Minardi Reserved Assets. There was no prospect of distributions from the Arena Holdcos by the date the first instalment under the Loan Note was due, and in fact there have yet to be any distributions to SMA qua shareholder. At the time the LICSA was concluded, therefore, there was every possibility that the amounts outstanding to Phoenix under the Loan Note would be less than SMA's s.207(3) entitlement once it became payable.

iii) If clause 2.4 had effected an immediate and unconditional assignment of SMA's s.207(3) entitlement, then, absent a provision for reassignment, there was a clear risk of over-recovery. If there had been an assignment by way of security, it might have been possible to imply such a re-assignment, but no assignment of this nature was contended for, no doubt because it would have been wholly inconsistent with the terms of the Loan Note.

iv) This factor also tells against any intention to assign the s.207(3) entitlement by the LICSA.

268. P&M argued that there was no need for a reassignment clause, and that what was being assigned by SMA was the right to receive distributions up to the outstanding amount of the Loan Note. However, that figure was one likely to change over time – whether through increases resulting from contractual interest or decreases from pre-payments by Dr Cochrane or credits under clause 2.7 of the LICSA. As *Guest*, 1-45 makes clear, an assignment of an indeterminate portion of a debt or fund must fail for uncertainty of subject-matter because what is to be transferred must be clear at the date of the assignment. The uncertainty of subject-matter to which Phoenix's assignment case gives rise is a factor which weighs against construing clauses 2.4 and 2.6 as giving rise to an equitable assignment (as well as a factor which would prevent the assignment being valid if the intention to assign was otherwise sufficiently manifest).

269. For these reasons, I have concluded that clauses 2.4 and 2.6 of the LICSA did not effect an assignment in Phoenix's favour. In reaching this conclusion, I have attached no weight to the Settlement Parties' reliance on the confidentiality provision, which it is suggested would have precluded the giving of notice of any assignment, not least because clause 6.1 permitted disclosure "as far as necessary to implement and enforce" the LICSA. Nor is the presence of an arbitration agreement of any relevance.

**(5) Who has priority if the LICSA gives rise to an equitable assignment in favour of Phoenix?**

270. If the LICSA gave rise to an equitable assignment in favour of Phoenix, then a number of issues would arise as to the priority as between those claiming under the Harbour Trust and Phoenix. I have decided that it is appropriate to consider some of these questions, even though I have concluded that the LICSA does not give rise to an equitable assignment in Phoenix's favour, not least because that threshold question turned on the construction of a short and imperfect document which gave scope for argument to both

sides. Necessarily, the section of the judgment which follows assumes that Phoenix had been able to make out its equitable assignment case.

271. This aspect of the case raises the following questions:

i) Did the Harbour IA give Harbour and the Orb Claimants an equitable interest in the Transferred Companies prior to the Geneva Settlement?

ii) If not, who has priority as between those claiming interests under the Harbour IA and Phoenix?

iii) Is there any reason why the conventional order of priorities should be adjusted?

iv) If any interests of Harbour and the Orb Claimants otherwise have priority, did Phoenix take free of those interests as a bona fide purchaser for value?

## (6) Did the Harbour IA give Harbour and the Orb Claimants an equitable interest in the Transferred Companies prior to the Geneva Settlement?

272. This question raised what might be thought to be a foundational issue of the law of trusts, which does not appear to have been directly considered in any authority.

### Introduction

273. By way of brief summary, the Settlement Parties contend that:

i) There is nothing which prevents a trustee (T) who holds property on trust for a beneficiary, B1, coming under or declaring an obligation to hold the same property to the same extent on trust for another beneficiary, B2.

ii) For so long as both obligations subsist, the Settlement Parties contend that T will face conflicting obligations, with the respective entitlements of B1 and B2 falling to be resolved by the equitable priority rules, including the rule that when equities are equal, the first in time will prevail.

iii) If, however, for some reason T's obligation to hold the property on trust for B1 ceases to exist, but in the meantime (or perhaps as part of the same transaction) T has purported to create an equitable interest in favour of B3, the effect of the extinction of B1's interest is that B2 will have priority over B3, its interest having been created first in time on the date it was declared (rather than the date when B1's interest ceased to have priority).

I will refer to this as the "priority model".

274. P&M and HPII, by contrast, argue that if T declares or becomes subject to a valid trust over property in favour of B1, it thereby disables itself from declaring or constituting a valid trust over the same property to the same extent in favour of B2, and any such purported declaration of trust in favour of B2 is of no effect. That conclusion is said to reflect the operation in a trust context of something akin to the doctrine of *nemo dat quod non habet:* T, having divested itself of the beneficial interest in the property and vested it

in B1, is no longer in a position to vest the same beneficial interest in B2. Addressing the example in [273(iii)], they contend that the interest created in favour of B3 has priority, because the declaration of trust in favour of B2 could not create any equitable interest in B2's favour for so long as the entirely inconsistent interest in favour of B1 continued. I will refer to this as the "disability model".

## Commentary

275. The conflict between the disability and priority models echoes (but is not co-extensive with) competing conceptual models of the law of trusts advanced in academic commentary. The Settlement Parties rely on the "rights against rights" model of trusts which is strongly supported by a number of academic commentators. That model argues that, for all the talk of equitable estates and equitable interests in property, trust rights and obligations are essentially bilateral obligations between the beneficiary and the trustee, which attach to the trustee's rights in relation to the legal estate (or, I suppose, in the case of a sub-trust, which attach to the sub-trustee's rights attaching to the trustee's rights in relation to the legal estate). In the course of their argument, the Settlement Parties placed particular reliance on the analysis of Professor Lionel Smith, appearing among other places in "Trust and Patrimony" (2008) Revue General de Droit 38(2), 379-403. Professor Smith challenges the suggestion that the creation of a trust involves the split of property in trust assets between the legal and equitable estates (however prevalent that language in case law). At [16], he observes:

> "'Equitable title' suggests a direct relationship between a beneficiary and the trust property. This does not exist. All equitable proprietary rights require at least two people, in addition to the object of the right … I mean that the beneficiary's right itself cannot be understood as a direct relationship between the beneficiary and the trust property. The trustee has rights in the object; that is, rights in the trust property. The trust beneficiary's rights are rights in the rights that the trustee holds in the object".

276. To similar effect, the Settlement Parties referred me to an article by the-then Professor (now Justice) Edelman, "Two Fundamental Questions for the Law of Trusts" (2013) LQR 129 (an analysis to which Justice Edelman was able to give judicial endorsement in Commissioners of State Revenue v Rojoda Pty Ltd [2020] HCA 7) and an article by Dr Sinead Agnew and Professor Ben McFarlane, "The Paradox of the Equitable Proprietary Claim", chapter 17 of *Modern Studies in Property Law* (10th). Between footnotes 34 and 35, they state:

> "The key Hohfeldian point that all legal relations exist only in relation to specific other parties is highly relevant here. In the example just discussed, it might be said that, owing to the terms of the particular trust, T has no power to dispose of the trust property without the consent of X; but that simply means that T has no power *in relation to B* to extinguish B's right by making such a disposition. T does not need to rely on the terms of the trust to have a power *in*

> *relation to C* to transfer the trust property to C; rather T (and C) can simply rely on the fact that T holds the trust property."

277. Between footnotes 62 and 63, they continue:

> "When T transfers trust property to C, it is not the case that T purports to transfer distinct legal and equitable title to C, and only succeeds in transferring equitable title where the defence [of bona fide purchaser] applies. Rather, as discussed above, T simply exercises her general power, as holder of the trust property, to transfer that property to C. Even where C is a bona fide purchaser the operation of the defence does not constitute a disposition of B's interest to C. This is because C never acquires B's right, as B's right depended on the existence of a duty between B and T, and C does not benefit from any such duty".

278. On the basis of this conceptual framework, the Settlement Parties submit that once it is recognised that trust rights and obligations involve correlative rights and obligations between the relevant beneficiary and the trustee in relation to the trustee's rights in the legal estate, there is no reason why a trustee might not place itself under conflicting trust obligations in relation to its rights in the same legal estate (just as a person can assume conflicting contractual obligations).

279. There is also academic support for the disability model and the *nemo dat* comparison. Professor James Penner, in "The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust" (2014) 27 Canadian Journal of Law and Jurisprudence 473, squarely addressing the "right against a right" proponents, and in support of his defence of "the 'orthodox' conceptual understanding of the trust under which the trust beneficiaries are regarded as the 'beneficial owners' of the property held on trust for them" (p.471), posited the following example at p.491:

> "Take the case where A enters into successive contracts for the sale of Blackacre, first to Y and then to Z. Hasn't A created two trusts over the same asset, with Y's merely having priority over Z's? If that is the right analysis it would suggest that A is a residual claimant, for he retains an interest in the trust asset that is sufficient to declare a trust in Z's favour, even though the entire beneficial interest has been created in Y's favour by the first trust. I dispute that this is the correct analysis of this fact situation …. Cases such as Re Hay's Settlement Trusts tell us so. Those cases concern the validity of an exercise of a power to dispose of trust assets by transferring them to a new settlement; a bad exercise is considered null and void, there is no whiff of a 'priorities' analysis …
>
> *A fortiori*, a trustee declaring a trust of the asset he holds in favour of some third party, when he has no power to do so under the terms of the trust, does nothing at all Such a declaration would be no more effective to displace B's interest under a trust than would my contract

> to sell you London Bridge displace the interest of whoever has title to sue. I have no power to sell London Bridge because I don't own it, and the trustee has no power to declare a trust of assets in which, in the eyes of equity, he has no beneficial interest".

Later in the article (p.493), Professor Penner suggests that:

> "Equity regards a beneficial owner of property as having the power to create a trust. Only someone with a beneficial interest in property can do that – it is not equivalent to having a legal estate, which is why a beneficiary under a trust can create a sub-trust but why a trustee of a trust, with the legal title but no beneficial interest, has no power to declare any trust whatsoever of the trust assets he legally owns"

and he concludes (at p.500) that "to have a power to declare a trust over an asset is, in the eyes of equity, *what it means to have a beneficial interest in an asset*". (I should note at this point that the argument before me, and addressed in this judgment, was directed to what might be termed competing "horizontal" equitable interests, and not the "vertical" relationship of trusts and sub-trusts, etc).

280. There are also passages in some trust text books which support, at least in certain contexts, the disability thesis. *Hayton and Mitchell on the Law of Trusts and Equitable Remedies* (14th), 1-054 states that "a settlor's power to set up a trust generally stems from the fact that the settlor (S) holds property outright. In such a case, she can create a trust in one of two ways". The editors imply that the only exception to this requirement is where "the trustees are given by the terms of the initial trust a power to create new trusts over the trust property". Similarly, *Snell*, 10-005 states:

> "While a beneficial owner of property can declare a trust of it simply because he is the beneficial owner, a trustee cannot do that. It would be a gross breach of trust for a trustee to defy the terms of the trusts on which he held certain assets by attempting to hold them for some third party. Any attempt to do this would therefore be necessarily ineffectual, though other principles of law (such as estoppel) might give some limited effect to the purported declaration."

## Authority

281. The parties were unable to refer to me any authority which directly addressed this issue. P&M noted that the vocabulary of the trustee transferring the equitable interest in trust property to the beneficiary (in the case of a declaration of trust) or a splitting of legal and equitable title (when property is conveyed to a trustee to be held on trust or conveyed by a trustee in breach of trust) has proved notably resilient in English authorities. It was the analysis adopted by Lord Diplock, a judge noted for the care he took in his analysis of legal concepts, in Ayerst v C&K (Construction) Ltd [1976] AC 167, 177, and which still finds favour in more recent authorities. In this connection, Mr Kokelaar referred me to the decision of the Court of Appeal in Independent Trustee Services Ltd v GP Noble Trustees Ltd [2013] Ch 91. In that case, in breach of trust, funds had been paid by a husband to his

wife in performance of a consent order made under the Matrimonial Causes Act 1973, the wife being ignorant of the breach. The wife asserted that she had received the money as a bona fide purchaser for value (in discharge of the husband's obligation under the order), and the issue arose as to the effect of the setting aside of that order. That judgment is reasoned on the basis that the effect of a trustee's transfer in breach of trust is to transfer legal title only, with equitable title remaining in the original beneficiary, unless the transferee is (and remains) a bona fide purchaser for value. Lloyd LJ (with whom Tomlinson LJ agreed) stated at [77] that "in the case of an innocent volunteer recipient which is the product of a breach of trust, the legal title is in the recipient but the equitable title remains in the beneficiaries throughout". Later, at [106], he analysed the question in essentially *nemo dat* terms:

> "A transferee of the legal title to property under a disposition made in breach of trust, or a successor in title to such a person, does not have the beneficial title to the property, which remains held on the original trusts, unless either the transferee, or a successor in title, was a bona fide purchaser for value without notice. The trustee acting in breach of trust can transfer the legal title, but cannot vest the beneficial interest in the property in a bona fide purchaser for value without notice, since he does not own that title and is not acting in a way which enables him, under the trust, to overreach the beneficiaries' equitable interest."

282. Mr Kokelaar also referred me to the decision of the Supreme Court in Akers v Samba Financial Group [2017] UKSC 6; [2017] AC 424, a decision on whether a transfer of shares in breach of trust constituted a "disposition of property" within s.127 of the Insolvency Act 1986. In the course of his judgment, Lord Mance JSC referred to the debate between "rights against rights" and proprietary analyses of trust interests, stating at [15-16]:

> "As to what constitutes 'property', this is always 'heavily dependent on context … something can be 'proprietary' in one sense while also being non-proprietary in another sense', M Conaglen, 'Thinking about proprietary remedies for breach of confidence' [2008] Intellectual Property Quarterly 82, 89, referring to R Nolan, 'Equitable Property' (2006) 122 LQR 232, 256–257. As the Chancellor noted 16 ITELR 808, para 62, there is a school of thought (which can be dated to F W Maitland, *Equity—a Course of Lectures* (1936)) which analyses the equitable interests created by a common law trust not as proprietary, but as personal or 'obligational', even as against third parties. The issue 'whether trusts are properly seen as part of the law of property or as an aspect of the law of obligations' is described in Burrows, *English Private Law*, 3rd ed (2013), para 4.140 as a 'difficult question', see also Burrows, *The Law of Restitution*, 3rd ed (2011), pp 191–193, Nolan, 'Equitable Property' 122 LQR 232. Supporters of a personal analysis include B McFarlane, *The Structure of Property Law* (2008); see also G Watt, 'The Proprietary Effect of a Chattel Lease' [2003] Conveyancer and Property Lawyer 61. A recent discussion of the pros and cons of each

> analysis appears by P Jaffey in 'Explaining the Trust' (2015) 131 LQR 377. Jaffey concludes that, although a trust involves personal rights against the trustee, only a proprietary analysis explains satisfactorily those aspects which concern the beneficiary's position vis-à-vis third parties, such as the trustee's creditors and recipients of unauthorised transfers of trust property.
>
> As before the Chancellor, so before the Supreme Court, the parties were content to proceed on the basis of the 'conventional' analysis that a trust creates a proprietary interest, at least to the extent that such an interest is capable of existing and being recognised in the relevant asset. In this judgment, I am also content, without expressing any view about the appropriate analysis, to proceed on the same basis."

283. Later in his judgment, Lord Mance referred to the controversy surrounding the "split title" analysis ([49-50]), but said it was not necessary to consider it further. At [51], he summarised the position in terms which are consistent with both the priority and disability models, stating:

> "What is clear, on any analysis, is that, where a trust exists, the legal and beneficial interests are distinct, and what affects the former does not necessarily affect the latter. Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain. They are not disposed of. They continue to be capable of enforcement unless and until the disposition of the legal title has the effect under the lex situs of the trust asset of overriding the protected trust rights. If the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden."

284. However at [52], he expressly approved Lloyd LJ's analysis in Independent Trustee Services, [106] which I have set out above. Lord Neuberger JSC also approved that passage at [62-63], noting that a transfer in breach of trust does not transfer the beneficial interest, albeit it may in some circumstances (viz the transfer of the legal title to a bona fide purchaser for value), be "lost or disappear". Lord Sumption JSC at [88] used language consistent with a *nemo dat* analysis ("Mr Al-Sanea purported to transfer the legal interest to Samba. That was the only interest that he had. He did not purport to dispose of SICL's interest. Only SICL could do that, and it did not do so"), although at [88-89], in a passage relied upon by the Settlement Parties, he held that the transfer of a legal estate to a bona fide third purchaser for value did not involve the transfer of the beneficiary's equitable interest, but its extinction. He also emphasised that the recognition of equitable interests depend on the conscience of the holder of the legal interest being affected, which the

Settlement Parties submitted it might be simultaneously in respect of two different parties, with the conflict being resolved by the rules of priority.

285. The Settlement Parties referred me to three authorities which were said to support the view that two conflicting equitable interests can attach to the same legal estate at the same time, their respective entitlements being determined by the rules of priority. The first two were cases of successive equitable charges: In re Samuel Allen & Sons Limited [1907] 1 Ch 575 and In re Morrison, Jones & Taylor Limited [1914] Ch 50. I accept that when the holder of an estate creates more than one equitable charge over the same property, the creation of the first does not mean that the second is a nullity, but the charges are subject to the rules of priority. However, I do not think the rule as it applies to competing equitable charges is necessarily applicable to all equitable interests. It can be argued that there is no necessary inconsistency between successive equitable charges, because, for example, the first secured debt may be paid without the need for recourse to the security or because the enforcement of the first charge may not consume the entire value of the property. Further, the decision in Morrison, justifies the "first in time" equitable priority rule essentially on *nemo dat* grounds, Eve J stating at p.55 that the effect of the first charge was that "the company's interest in the subject-matter … was not an absolute one, but a qualified one; and in my opinion that which is included in the charge to the debenture-holders is the interest so qualified and nothing more" (one of many decisions which rationalise the "first in time" rule on the basis that the grantor of an equitable interest can grant no more than it is in his power to grant: see e.g. Phillips v Phillips 4 D F & J 208, 215).

286. The third case was the decision of the Privy Council in Sookraj v Samaroo [2004] UKPC 50, a case concerned with a dispute between successive purchasers of the same parcel of land from the same vendor. There does not appear to have been argument in that case to the effect that the vendor-purchaser trust which arose from the first contract precluded a second vendor-purchaser trust from coming into existence. At [15], the Board stated:

> "A purchaser who enters into a specifically enforceable contract for the sale of land acquires an equitable interest in the land and retains that interest for as long as the contract remains enforceable. On making pre-completion payments on account of the price the purchaser acquires also an equitable lien on the land to secure their repayment (subject to any set-offs and the possible forfeiture of the deposit) if the contract goes off. Mr Samaroo's equitable interest in the present case arose on 3 November 1980, the date of the agreement. Mr Sookraj acquired an equitable interest on 8 January 1981, the date of his agreement, and further equitable interests when he made payments on account of the purchase price payable under his agreement. But Mr Samaroo's equitable interest, being earlier in time, has priority over all these equitable interests of Mr Sookraj."

287. The Settlement Parties are entitled to point to the fact that the Board, which included two former Vice-Chancellors in Lord Scott and Lord Nicholls, and Lord Millett to boot, analysed the case as one in which two (competing) vendor-purchaser trusts came into existence. However, the issue of whether this was conceptually possible does not appear to have been argued. The argument that two successive contracts of sale create two successive,

and competing, vendor-purchaser trusts might be thought to be particularly challenging. The orthodoxy is that a vendor-purchaser trust only arises "if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract" (Howard v Miller [1915] AC 318, 326) (or "if and so long as": Jerome v Kelly [2004] 1 WLR 1409, [29] and [32]). If there is a prior contract with another purchaser in respect of the same land, that would normally preclude an order for specific performance in the second purchaser's favour for so long as the first purchaser remained entitled to specific performance and, presumably, preclude a vendor-purchaser trust in favour of the second purchaser as well (Warmington v Miller [1973] QB 877, 886; Willmott v. Barber (1880) 15 Ch D 96, 107; Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd and others [1985] Ch. 103, 122).

288. In the course of preparing this judgment, I came across a further case of some relevance to this issue, BS Lyle Ltd v Rosher [1959] 1 WLR 8. In 1933 and again in 1934, W and his father, as trustees of a 1927 settlement, exercised a power under the settlement to cause funds to be transferred to the Society of Lloyd's to be held on those trusts necessary to support W's underwriting membership, save that in so far as under such trusts the assets or any proceeds would otherwise be held on trust for W, they were to be held on the terms of the settlement. In 1951 and 1953, W purported to charge the funds so deposited in favour of BSL, who in 1954 gave notice of the charge to Lloyd's. After W was adjudicated bankrupt, BSL claimed priority over the trustees of the settlement on the basis of the rule in Dearle v Hall by reason of being first in time to give notice to Lloyd's. Viscount Kilmuir LC rejected that argument, on the basis that the exercises in the power of appointment in 1933 and 1994 had never vested any equitable interest in those funds in W. At p.13 he stated:

> "The application to the investments of the trusts of the settlement being preserved (subject only to their postponement in order to secure the due performance of the bankrupt's underwriting obligations), the bankrupt never had any equitable interest in the investments and so never was capable of reassigning to the trustees of the settlement … He was to my mind never capable of assigning or charging the investment at all".

289. As this was a case in which W had never had either a legal or a beneficial interest in the relevant property, it did not directly raise the disability versus priority debate. However, there was discussion in the case as to why the rule in Dearle v Hall did not apply, the explanation being that the rule only applied when the fundholder "has, or has had, a beneficial interest" which has been the subject of successive (inconsistent) assignments. The qualification "has had" was introduced to address this issue (at p.14):

> "We were pressed with the argument that, in the classic Dearle v Hall case, the assignor has no beneficial interest at the time he makes the second assignment and is, indeed, constructive trustee for the first assignee. I do not think that the rule would be restricted beyond its intendment or present effect if it were held to apply only where, at the time of the assignment, the assignor had a beneficial interest or had no beneficial interest only because he voluntarily divested

> himself of it. Put negatively, the rule does not apply where the assignor had no beneficial interest and had not deprived himself of one by voluntarily divesting himself of it",

Lord Reid, who dissented, did not regard this distinction as persuasive, stating at p.19 that:

> "I have great difficulty in regarding it as a significant distinction that the bankrupt in this case never had a beneficial right whereas the assignor in the typical Dearle v Hall case had a beneficial interest until he assigned it to the first assignee … The assignment to [the first assignee] completely divests the assignor. In both the typical Dearle v Hall case and the present case, the assignor had nothing at all to give when he made the second assignment, and I have difficulty in finding any sufficient reason why the position of the second assignee should be improved by the historical accident that his assignor once had some right which he had no longer at the time when he made the second assignment".

He reached the same conclusion as the majority on the basis that the rule in Dearle v Hall did not apply to the interest of a beneficiary under a trust, stating "it would be an innovation in the law of England to require a cestui que trust for his own protection to give notice of the trust in his favour to the person who holds the fund".

## Discussion

290. I have not found that an easy issue, and persuasive arguments can be (and were) made on both sides. Proponents of the "priority" model derive support not merely from the status of successive equitable charges, but also from the treatment of successive equitable assignments, the relative status of which is determined by two rules of priority rather than on the basis that the second attempt to transfer the same chose in action is a nullity: the "first in time" rule, save where notice of one of the assignments has been given to the debtor, in which case, the first to give notice prevails under the rule in Dearle v Hall (*Guest*, 6-02). However, it is possible to distinguish the position of charges and assignments from competing bare trusts, and there is a lively debate as to whether equitable assignments are, or are not, a species of trust (see J Edelman and S Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 LQR 228, 248-49 who favour that analysis, PG Turner, "Prohibitions on Assignment: Intellectualism v. Law" (2018) 134 LQR 532, 535-36 for the contrary view and cf Lord Reid's comment at [289] above).

291. The priority model also offers a more intuitively appealing answer to certain hypotheticals explored in argument (albeit other legal doctrines such as estoppel may provide alternative routes to the same conclusion):

i) The position where, in breach of trust, property held by T1 on trust for B1 is conveyed to an innocent volunteer recipient, T2, who declares or holds that property on trust for B2, T2 then effecting "wrongful" disposals of the property in the period before it becomes aware of B1's interest.

ii) The position where T declares successive bare trusts for B1 and B2, and then enters into an equitable charge over the trust property in favour of C, who knows of B2's equitable interest but not B1's, in a case in which B1 subsequently relinquishes its interest.

292. However the disability model better coheres with the nature of a trustee's obligations, and in particular the "duty of single-minded loyalty" (Lehtimaki v Cooper [2020] UKSC 33; [2020] 3 WLR 461, [43-45]). It also has the support of the textbook passages I have referred to, and provides a better fit with the "equitable property" approach to trusts, which, although subject to significant academic challenge, remains a substantial presence in the decided cases. Further, as is so often the case, while the issue was presented in argument as involving a binary choice for the Court, the "correct" model may turn on the nature of the equitable interests under consideration or the circumstances of their creation. For example, it is possible that the application of the disability and priority models may depend on whether the conflicting interests are created by someone who did hold a beneficial interest in the property until the creation of the first interest (with the priority model being appropriate where both equitable interests are 'created' by the same source), or whether the person purporting to create the second interest has never held a beneficial interest (cf BS Lyle above).

293. On the facts of this case, it is not necessary for me to resolve this question, and with some reluctance given the quality of the parties' submissions on this issue, I have decided that the issue is best left to the ruminations of the Obligations Discussion Group until such time as a decision on the point is necessary. This is because, even assuming the priority model otherwise applies, I have concluded that the Harbour Trust cannot be constituted for so long as the Orb Claimants or their nominees held the proceeds of the IOM Settlement on bare trust for Mr Ruhan.

294. That conclusion is the inevitable consequence of the construction I placed on the Harbour IA at [177]-[181] above. However, I am satisfied that, regardless of the construction issue, that conclusion follows independently from the fact that the constitution of the Harbour Trust depends on the equitable doctrine of anticipation (that is to say, giving effect to the Orb Claimants' promise to hold any Proceeds on the terms of the Harbour Trust once received on the basis that equity treats as done what ought to be done). As noted at [152-154] above, when a trustee promises to hold future property on trust, that does not of itself give rise to a trust obligation, and if the promise is not made for value, equity will not assist the volunteer in realising the promised trust. If the promise is made for value, and the promisor then acquires the property, the equitable doctrine of anticipation, by which "equity treats as done what ought to be done", will come to the promisee's assistance: Collyer v Isaacs (1881) 19 Ch D 342, 351, and Holroyd v Marshall (1862) 10 HLC 191; 11 ER 999, 211 (in which the Lord Chancellor said that the rule "assumes that the supposed contract is one of that class of which a Court of Equity would decree specific performance"). It is possible to find conflicting statements in the authorities as to whether the constitution of the trust is strictly dependent on the availability of specific performance. In Tailby v Official Receiver (1888) 13 App Cas 523, 532, Lord Herschell doubted the need for the availability of specific performance, as did Lord MacNaghten at p.547. However, the case nonetheless recognises that the putative beneficiary's proprietary interest rests on the doctrine of anticipation. Lord McNaghten, for example, at pp.546-47 referred to the fact that it was

"well-settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done what ought to be done". In Central Trust & Safe Deposit Co v Snider [1916] 1 AC 266, 272, the Privy Council observed:

> "It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically. If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all".

295. In this case, I have found that Dr Cochrane and SMA received the legal estate in the Transferred Companies with knowledge of Mr Ruhan's equitable rights, and that the Orb Claimants, Stewarts and Harbour were on notice of Mr Ruhan's equitable rights. In these circumstances, it is to my mind inconceivable that a court of equity would enforce the Orb Claimants' covenant on the basis that it should treat as done what ought to be done, in circumstances in which this would have required conduct inconsistent with Mr Ruhan's equitable rights. As the Court of Appeal noted in Warmington v Miller [1973] QB 877, 887:

> "That which is agreed to be and ought to be done is treated as having been done and carrying with it in equity the attendant rights. But the intended lessee's equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done."

296. The matter can be approached in another way. Save for cases of intervening bankruptcy, the cases in which equity anticipates the performance of a promise for value to hold property on trust assume that the promisor acquires the property on a basis which allows it to perform its anterior promise. Lord Chelsmford in Holroyd, 217-218 refers to the completion of the promisee's equitable right by "subsequent possession, or some act equivalent to it to perfect the title", and Lord Watson in Tailby at p.533 referred to the requirement that "the new chose in action is in the disposal of their assignor" or at the assignor's "disposition and control". For so long as Mr Ruhan's equitable rights subsisted, this was not the position.

297. For these reasons, I have concluded that the Harbour Trust was not constituted until the Transferred Assets were held by the Orb Claimants or their nominees free of Mr Ruhan's equitable rights, which only happened when he relinquished his claims through the Geneva Settlement. For the same reason, I conclude that there were no recoveries by the Orb Claimants over which Stewarts' equitable lien might attach until that point.

**(7) If not, who has priority as between those claiming interests under the Harbour IA and Phoenix?**

298. The Settlement Parties and Messrs Thomas and Taylor argued that even if (as I have found) Harbour and the Orb Claimants had no equitable interest in the Transferred Companies prior to the conclusion of the Geneva Settlement, the interests of Harbour and the Orb Claimants under the Harbour Trust, and of Stewarts pursuant to any equitable lien, had priority over those of Phoenix as equitable assignee.

299. In particular, they contended that even if the Harbour Trust was not fully constituted until the Geneva Settlement, clauses 8 and 9 of the Harbour IA gave those claiming under it more than mere contractual rights before that time, which crystallised into a full equitable interest once the future property was obtained, which preceded whatever rights Phoenix acquired under the LICSA (even if those rights amounted to an equitable assignment of future property). They also contended that the full crystallisation of the equitable interest of those claiming under the Harbour Trust occurred before Phoenix acquired any rights under the LICSA.

300. These are serious arguments, which were impressively presented. So far as the legal basis of the arguments is concerned:

i) The authorities which address promises for value to hold future property on trust recognise that, in the period before the promisor acquires the property, the promise has more than a mere contractual right. In particular, In re Lind (No 4) [1915] 2 Ch 345 rejects the contention that the rights of the promisee are purely contractual in nature in the period prior to the promisor acquiring the property (such that those rights fall into the promisor's bankruptcy). Phillimore LJ suggested that "in order that the assignment may survive and have its effect it must give to the assignee something more than a mere right in contract, something in the nature of an estate or interest" (p.364). Bankes LJ referred to the assignment creating a security interest which "was not enforceable until the property came into existence, but nevertheless the security was there" (p.374). It is this feature of equitable assignments of future property which underpins the floating charge: In re Spectrum Plus Ltd (in liquidation) [2005] 2 AC 680, [52], [95-102].

ii) There is also support in the authorities for the proposition that, once the promisor does acquire the relevant property, the full equitable interest which then comes into existence relates back to the date of contract. For example Lord Watson in Tailby at p.533 states:

> "As soon as [the future book debts] come into existence, assignees who have given valuable consideration will, if the new chose in action is at the disposal of the assignor, take precisely the same right and interest as if it had belonged to him, or had been within his disposition and control at the time when the assignment was made".

*Guest*, 3-24 expresses some scepticism as to the scope of the doctrine of relation back, and its impact on priorities, but I accept that it has support, both in the authorities and

from other commentaries, at least in a context in which the competing rights in question both derive from the promisor.

301. The Settlement Parties also rely on the fact that it was a condition precedent to the coming into force of the LICSA that the consent order had been made discontinuing the 2012 Proceedings, and thereby leading to the abandonment of Mr Ruhan's claims (clause 2 of Schedule 2 of the LICSA), in support of the argument that the release of Mr Ruhan's claims (which allowed for the full constitution of the Harbour Trust) occurred prior to the LICSA coming into effect.

302. However, it is necessary to stand back and look at the overall effect of the Geneva Settlement:

i) Mr Ruhan was surrendering his equitable interest in the Transferred Assets as part of a negotiated settlement under which Phoenix was to acquire rights under the LICSA (whatever they were), either on Mr Ruhan's behalf, or by way of discharge of Mr Ruhan's liability to Mr Stevens (depending on how the Geneva Nominee Issue is in due course resolved).

ii) Those representing the Orb Claimants in those negotiations were willing to undertake the commitments in the LICSA as part of the price for Mr Ruhan surrendering his equitable rights, such that Dr Cochrane and SMA would no longer hold the Transferred Companies subject to them.

iii) The commercial deal, therefore, involved an agreement by which Mr Ruhan was to get certain benefits (either personally or through payments made to someone asserting claims against Mr Ruhan) in return for giving up his rights.

303. A priority analysis which gave those claiming under the Harbour Trust priority over all of the Transferred Companies, without regard to the price which had to be paid in order to put the Orb Claimants in a position to constitute that trust, and indeed on my construction of the Harbour IA, put the Orb Claimants into the position for the first time where they held property which fell within the scope of the promise they had made under the Harbour IA, would run wholly counter to the commercial deal which had been done.

304. In Gartside v Silkstone (1882) 21 Ch D 762, 767-68, Fry J considered the position when two deeds were executed at different times as part of the same transaction:

> "I think the law stands in this way, that when two deeds are executed on the same day, the Court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to shew an intention, either that they shall take effect pari passu or even that the later deed shall take effect in priority to the earlier, in that case *the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties*."

(emphasis added).

305. The need for the court to have regard to the overall effect of documents executed as part of a single transaction which are "indissolubly bound together", and the commercial realities of the transaction, was also stressed by the House of Lords in Abbey National Building Society v Cann [1991] 1 AC 56, 92-93. Further, it is a principle of the construction of contracts that where there is in substance one transaction, all the contracts which give it effect may be read together for the purposes of determining their legal effect: Sir Kim Lewison, *The Interpretation of Contracts* (7th ed), 3.06. As Fletcher Moulton LJ remarked in Manks v Whiteley [1912] 1 Ch 735, 754:

> "…where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others."

306. On the assumption that the LICSA did effect an equitable assignment to Phoenix, I have concluded that the manifest intention of the parties to the Geneva Settlement is best given effect by considering the events in the following order:

i) SMA agreed (with the approval of Mr Ruhan, for whom it held the Transferred Assets on a bare constructive trust) to effect the assignment to Phoenix.

ii) In return, Mr Ruhan agreed to surrender his equitable interest.

iii) At that point, SMA held the Transferred Assets subject to the equitable assignment, but free of Mr Ruhan's equitable rights.

iv) SMA (and through SMA, the Orb Claimants) were then in a position to constitute the Harbour Trust, and treated in equity as having done so. However, the interests which were at the disposal of the Orb Claimants (picking up the language of Tailby), and which fell within the scope of the Harbour IA as I have construed it, did not include the subject-matter of any equitable assignment to Phoenix.

307. For these reasons, had I accepted Phoenix's argument that the LICSA gave rise to an equitable assignment, I would have rejected the following arguments:

i) The Settlement Parties' argument that the Harbour Trust was fully constituted before any equitable assignment effected by the LICSA took effect.

ii) The Settlement Parties' argument that Harbour's uncrystallised equitable interest under the Harbour IA had priority over any equitable assignment effected by the LICSA, both because:

a) the promise in the Harbour IA was limited to the extent of any fruits of the litigation acquired by the Orb Claimants for their own benefit;

b) any equitable assignment was effected at the request and with the approval of Mr Ruhan, by way of a disposition of his equitable interest, which had priority over any uncrystallised entitlement arising under the Harbour IA; and

c) all the Orb Claimants ever had "at their disposal" was subject to the equitable assignment.

iii) The Settlement Parties' reliance on the doctrine of "relation back". The doctrine does not enlarge the scope of the Harbour Trust nor change the identity of the property held under it (with effect from whatever date). The Orb Claimants had not promised and/or were never in a position to dispose of the Transferred Companies on the terms of the Harbour Trust free of any equitable assignment.

iv) Stewarts' argument that Phoenix took subject to its lien (because the only recoveries made by the Orb Claimants would have been subject to Phoenix's rights).

## (8) Is there any reason why the conventional order of priorities should be adjusted?

### Introduction

308. If Phoenix's rights under clause 2.4 of the LICSA would otherwise have had priority over their rights, the Settlement Parties and Messrs Thomas and Taylor invite the Court to decline to give effect to Phoenix's equitable rights on account of its unclean hands, or to adjust the order of priority between those parties and Phoenix for the same reason.

309. The matters giving rise to the unclean hands allegations are the subject of the Geneva Nominee Issue, and will not be determined at this trial. However, it was agreed that the Court could determine at this trial whether the matters relied upon, if established, were capable of justifying the Court in refusing Phoenix relief or subordinating its claim if made out. For that purpose, it is necessary to summarise the unclean hands allegations which are advanced:

i) It is alleged that at hearings on 24 June 2016, 30 September 2016 and 15 December 2016, in the context of applications made by Phoenix for freezing order relief, Mr Stevens consciously and with full deliberation caused multiple misleading statements to be made to the court both through affidavits and oral submissions denying that he had acted and was acting in relevant respects as Mr Ruhan's nominee.

ii) It is alleged that Mr Stevens' evidence at the Directed Trial denying he had acted as Mr Ruhan's nominee was perjured.

iii) It is alleged that Phoenix's case in these proceedings and at the Directed Trial itself has been advanced on the false and dishonest basis that Mr Ruhan is not concerned with and will not benefit from any recoveries made.

iv) Finally, in their statement of case, Stewarts allege that the nominee arrangement involved a fraud on the Revenue and was undertaken with a view to defrauding Mr Ruhan's creditors.

## The applicable principles

310. I was referred to the summary of the "unclean hands" doctrine at *Snell*, 5-010:

> "The question is not whether any general moral culpability can be attributed to B, the party seeking relief, but is rather whether relief should be denied because there is a sufficiently close connection between B's alleged misconduct and the relief sought. It is accepted therefore that 'the scope of the application of the 'unclean hands' doctrine is limited' and the maxim is applicable only in relation to conduct of B which has 'an immediate and necessary relation to the equity sued for', so that B is 'seeking to derive advantage from his dishonest conduct in so direct a manner that it is considered unjust to grant him relief'. It is also accepted that: '[u]ltimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought' and the application of the maxim thus requires 'one of those multi-factorial assessments to be conducted by the trial judge …'".

311. *Snell* draws an analogy between the application of this equitable doctrine, and the factorial analysis required when determining the effect of illegality at common law following Patel v Mirza [2015] UKSC 42; [2017] AC 467. I was also referred to the summary of the applicable principles set out by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] EWCA Civ 328; [2013] 1 CLC 586, [157-159]. Aikens LJ noted that there were cases in which the court had refused equitable relief not only to parties who had sought to mislead the court by presenting a false case, but also to parties who had made misleading statements to bolster the truth, albeit that these were cases where "the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief".

312. Careful consideration is required before holding that a false statement made in legal proceedings in support of an otherwise valid claim for equitable relief justifies the court in refusing that relief. An (admittedly absolute) rule to similar effect in insurance cases was rejected by the Supreme Court in Versloot Dredging BV v HDI Gerling Industrie Versicherung AG [2016] UKSC 45; [2017] AC 1, [36], Lord Sumption JSC noting that "there are principled limits to the role which a claimant's immorality can play in defeating his legitimate civil claims". The Supreme Court conclusion that there was no such common law rule made it unnecessary to consider the alternative argument advanced in that case that such a rule infringed Article 1 Protocol 1 of the ECHR (at least to the extent that it was not

subject to limitations similar to those which apply to dishonestly exaggerated personal injury claims under s.57 of the Criminal Justice and Courts Act 2015). The suggestion that false statements at trial can themselves provide a basis for refusing relief has also been rejected in insurance cases (Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea) [2003] 1 AC 469). While there is an obvious point of distinction between relying on conduct in litigation to refuse substantive discretionary relief, and as a basis for forfeiting otherwise absolute contractual entitlements, the policy considerations which have led to the restatement of insurance law in this context may have implications for similar arguments in equity.

313. It is also clear that a party who would otherwise have priority over another interest may lose that priority where its conduct makes it inequitable for it to rely on that priority as against another claimant (*Lewin*, 26-023). Most of the cases applying this principle involve conduct which leads the earlier holder of an interest not to protect its interest or which encouraged the holder of a later interest to create it in ignorance of its subordinate status. Such conduct apart, I am not persuaded that the principle applied in these cases could lead to a loss of priority in circumstances falling short of those in which the unclean hands doctrine could be invoked.

**The position in this case**

314. If the Settlement Parties establish the facts alleged in support of the unclean hands argument, there can be no doubt that they will have established very serious and reprehensible conduct on the part of Mr Stevens and, through him, on the part of Phoenix. Without deciding these issues, it is easy to envisage the consequences such findings might have on the freezing order relief Phoenix has obtained and their potential relevance to questions of costs, putting entirely on one side any sanctions which might follow in response to any criminal conduct established.

315. However, to my mind such conduct does not bear an "immediate and necessary relation to the equity sued for'" nor could the enforcement of any equitable assignment in such circumstances be said to involve Phoenix "seeking to derive advantage from [its] dishonest conduct in so direct a manner that it is considered unjust to grant [it] relief".

316. Such rights as arise under the LICSA followed from the settlement of the 2012 Proceedings, in which those who had negotiated the Geneva Settlement on the Orb Claimants' behalf were fully alive to, and had advanced, allegations that Mr Stevens was acting as Mr Ruhan's nominee. By clause 6.2 of the Confidential Settlement Deed, the Orb Claimants were content to release "any claims or causes of action which may be brought in light of the Claimants' allegations that…. Phoenix … acted as nominees of [Mr Ruhan]". The steps taken by Dr Smith and Mr Greenstone in relation to the NCA which I address at [108] above and [639] below, show that, if the Geneva Nominee case is made out, it cannot be said that the entry by the Orb Claimants into the Geneva Settlement was in any way the result of some misapprehension on the part of the Orb Claimants as to the true position. At inception, therefore, there was no immediate and necessary relation between the matters relied upon to establish unclean hands and the equity asserted. Further, any attempt to rely on the doctrine in that context would face the further difficulty that acceding to the Settlement Parties' argument would involve giving them a

benefit that they had failed to obtain in negotiations, when they agreed to settle in full knowledge of the matters now relied upon, and doing so at the expense of the Revenue or creditors whose interests had been relied upon in support of the unclean hands plea. In my view, that would involve a wholly disproportionate detriment to Mr Stevens, Mr Ruhan and those with claims against them, and a wholly unjustified windfall for the Orb Claimants and those claiming through them.

317. So far as the subsequent matters relied upon are concerned, they involve allegedly dishonest statements in applications for injunctive relief. I will say nothing for the present about their connection with any injunctions sought and obtained, but in my view, they lack a sufficiently immediate and necessary relation with the equitable assignment to provide a basis for, in effect, forfeiting what on the present hypothesis is the proprietary right obtained in hard-fought but informed negotiations to settle the 2012 Proceedings. So far as the present proceedings are concerned, the issue of whether the LICSA contains an equitable assignment has been determined purely as a question of construction of the relevant document, to which Mr Stevens' evidence on his relationship with Mr Ruhan was wholly irrelevant. Essentially for the same reasons as those set out in the preceding paragraph, it would be wholly disproportionate for those events to negate such priority as Phoenix enjoyed by virtue of the Geneva Settlement when the settlement was concluded.

**(9) If any interests of Harbour and the Orb Claimants otherwise have priority, did Phoenix take free of those interests as a bona fide purchaser for value?**

318. This issue was dealt with relatively briefly in the Settlement Parties' and P&M's submissions and, on the conclusions which I have reached, it is doubly contingent. I will therefore deal with it equally briefly.

319. The general position is as stated in *Lewin*, 26-013 to 26-015.

> "The general rule is that an assignee of a beneficial interest under a trust takes it subject to all the equities that affect it. These include all equitable interests affecting it, and the basic rule applies even if the assignee is a purchaser for value without notice. The exceptions to the basic rule are listed in § 26-014 and examined further on. The reason for the rule is that an assignment of an equitable interest has no tortious operation, but passes only what the assignor is justly entitled to, and it follows that equitable interests take priority according to the order in which they are created: first in time, first in right. A beneficial interest under a trust is, of course, an equitable interest for this purpose. Therefore, if the trustee wrongfully grants an equitable mortgage or charge over the trust property, it ranks behind the beneficial interests. By the same token, the beneficiaries take subject to an equitable mortgage or other equitable interest affecting the trust property at the creation of the trust".

320. Phoenix advanced two reasons why it is said this principle does not apply here. The first was that the position of an equitable assignee is, in substance, that of someone who has acquired the legal title because the effect of the assignment is to give the assignee the ability

to sue the debtor on the chose in action, albeit as a matter of procedure it may be necessary to join the assignor to the claim (*Guest*, 3-07 to 3-09 and Three Rivers DC v Bank of England [1996] QB 292, 313). This argument, which would treat the equitable assignee of any chose in action as in the same position as the acquirer of a legal interest, is one I am unable to accept. First, it appears inconsistent with the law as summarised in *Lewin* and set out above. Second, even where there is a statutory assignment, the effect of which is to give legal title to the assigned chose in action to the assignee, the assignee takes subject to prior equitable interests, bona fide purchaser for value or not (E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd [1988] 1 QB 150, 161-163; Compaq Computers Ltd v Abercorn Group Ltd [1991] BCC 484, 501-502).

321. Phoenix's second argument was that it could rely on the principle whereby "a purchaser without notice who at the time of the purchase fails to obtain either a legal estate or the better right to one will nevertheless prevail over a prior equity if, without being party to a breach of trust, he subsequently gets in a legal estate, even if he then has notice of the equity". It was said that this condition would be satisfied because, when a surplus became available for distributions, the JLs would be bound to pay it to Phoenix, and "once Phoenix receives the distribution, it will have acquired the legal title to it". I have had some difficulty in following this argument, but in any event, I am satisfied it cannot avail Phoenix.

322. First, as noted above, even if Phoenix was a statutory assignee, with legal title to the chose, it would not take free of a prior equitable interest. In these circumstances, I fail to see how a doctrine of "tacking" premised on the subsequent acquisition by Phoenix of legal title can assist.

323. Second, the legal title postulated in Phoenix's argument is not, in any event, legal title to the chose in action, but legal title to any amounts paid in discharge of that chose in action. However, so analysed, that argument is wholly circular – that Phoenix has priority to any payment because, once Phoenix has been paid, it will have legal title to the sums paid. I understand Mr Lord QC to have accepted this difficulty with his argument in the course of his oral closing submissions.

324. Third, I see no scope for the doctrine of tacking in this case in any event, because the legal estate of the relevant chose is held for the Orb Claimants, the very parties asserting the prior interest. It is well established that what *Lewin*, 26-027 refers to as this "tabulo in naufragio" argument "is not available if the legal estate is in the hands of a trustee for the prior interest" (not least because the acquisition of the legal estate in those circumstances would necessarily be subject to the prior equitable interest). The specific authorities relied upon by Phoenix – Dodds v Hills (1865) 2 H&M 424 and Macmillan Inc v Bishopsgate Investment Trust Plc (No 3) [1995] 1 WLR 978, 1002-1005 – were cases in which legal title fell to be conferred by a "neutral" third party (they were cases of share sales where it is registration by the company which gives the buyer of shares legal title, and the company commits no breach of trust in effecting registration). They have no application here.

325. Had it arisen, therefore, Phoenix's argument that it enjoyed any equitable assignment in its favour free from any prior equitable interest as a bona fide purchaser for value would have failed as a matter of law. In these circumstances, I do not propose to address the doubly contingent issues of fact as to the state of Phoenix's knowledge, and whether it was on

notice of the prior equitable interests, not least because that issue is to a significant extent bound up with the facts which relate to the Geneva Nominee Issue, which I have excluded from this trial.

## K4 P&M's alternative case

326. In the event that the LICSA does not affect an equitable assignment, P&M have advanced various arguments as to why it is said that they can nevertheless recover the distributions referred to in clauses 2.3 and 2.4 of the LICSA. One of these contentions – that the Court could and should make orders for specific performance of Dr Cochrane's and SMA's obligations under the LICSA – was not pursued in oral closing submissions as a ground for asserting a proprietary interest in Relevant Property (without prejudice to such personal claims as might arise, which did not form part of the Directed Trial). However, two arguments were.

### (1) The first argument: the amounts payable by Dr Cochrane and SMA to P&M must be deducted in order to arrive at the "Proceeds" held on the Harbour Trust

327. P&M's first argument is that, even if they acquired no proprietary rights under the Loan Note or LICSA, that nonetheless the "Proceeds" for the purpose of the Harbour IA were limited to such net sum (if any) as was left after deducting any amounts payable under the LICSA and the Loan Note. This argument was not advanced as an argument of law but on the construction of the Harbour IA. As developed in P&M's closing, the argument proceeded as follows:

i) As "Proceeds" are defined as "the value of any goods, services or benefits recovered or received", these have to be calculated "on the basis that the terms of the Geneva Settlement have been fully implemented and complied with, including the LICSA and the Loan Note" because "otherwise Harbour and the Orb Claimants would receive a windfall as a result of Dr Cochrane's default" (paragraph 106 of P&M's written closing).

ii) It is not entirely clear what happens on this argument to the figures deducted to arrive at "the net sum left in the hands of the Orb Claimants and their Affiliates after deduction of the sums due to P&M under the LICSA and the Loan Note". However, it appears to be alleged that these fall into Dr Cochrane's *en désastre* for the benefit of all her creditors. Thus paragraph 104 of P&M's closing provides "as for the Loan Note, P&M accept that this did not create any proprietary rights in respect of specific assets" and "they will have to prove in the *désastre* of Dr Cochrane for any sums outstanding under it". The sample calculation at paragraph 108 of P&M's written closing submissions shows £48m being deducted in respect of the outstanding amount of the Loan Note and being available in Dr Cochrane's *désastre*.

328. I am unable to accept this argument:

i) There is nothing in the definition of "Proceeds" in the Harbour Trust (which is essentially about identifying the property which will be held on the terms of the Harbour Trust) which requires the *personal* liabilities of, for example, Dr Cochrane under the Loan Note to be deducted. The definition provides that "Proceeds" is "the

gross amount prior to any set-off or counterclaim". It is noteworthy that clause 9.1 of the Harbour IA provides for the deduction of certain categories of expenses *from* the Proceeds as part of the waterfall. That of itself is inconsistent with the suggestion that it is necessary to deduct personal liabilities others may have assumed in order to arrive at the "Proceeds".

ii) In so far as the argument depends on the assertion that the Orb Claimants had Harbour's authority to compromise the 2012 Proceedings on such terms as they thought appropriate (by virtue of clause 6.2 of the Harbour IA), the difficulty for P&M is that would not of itself lead to the conclusion that the cost of discharging any obligations Dr Cochrane may have assumed fall to be deducted from the amount otherwise subject to the Harbour Trust. In particular, there was no suggestion that the liability assumed by Dr Cochrane fell within one of the categories of expense which are to be deducted as part of the waterfall, and Dr Cochrane was not a beneficiary under the terms of the Harbour IA.

iii) Implicit in P&M's argument is the contention that certain of the assets recovered by the Orb Claimants have to be liquidated in an amount sufficient to discharge the outstanding amount of the Loan Note before the "Proceeds" can be calculated. However, the outstanding amount of the Loan Note is not a fixed figure but one which will vary over time (not only because of the possibility of partial payments and credits but because the Loan Note carries interest). It is difficult to discern when and how the "deduction" which P&M contend is necessary to arrive at the Proceeds could be effected, and impossible to reconcile this complex process with the wording of the Harbour IA.

iv) The mechanism by which sums deducted to arrive at the figure for "Proceeds" find their way into Dr Cochrane's *désastre* so as to be available for the benefit of all her creditors is wholly unexplained, unless the argument is premised on Dr Cochrane having a right to indemnity (in which case I address the only argument advanced to this effect at [331] and following).

329. At paragraph 8 of their closing, P&M submitted that the Settlement Parties should not be able to "take the benefit of the release of Mr Ruhan's claims free of the burden of the Loan Note and the LICSA". I understand the commercial appeal of that argument, to which I have given careful consideration. However, for it to succeed, a legal principle must be identified which can give it effect, otherwise the argument ignores what in commercial as well as legal terms is the very real distinction between the position if P&M had obtained proprietary rights in assets held by Dr Cochrane or SMA in the settlement negotiations, and position if P&M obtained only personal rights. The former, so far as they had priority, would reduce the extent of the assets recovered by the Orb Claimants, and hence subject to the Harbour Trust. The latter would not. While in land law, there are contexts in which a principle of "no benefit without burden" may subject those who acquire an interest in property to the obligation to perform a negative personal covenant associated with it, I was not referred to any legal principle which would make the rights of Harbour and the Orb Claimants in the Harbour Trust conditional upon the discharge of any positive personal covenants assumed by Dr Cochrane and/or SMA.

330. However, in a supplement to their written closing, P&M sought to bridge the divide between personal and proprietary claims through a further argument, contending that whilst they had only personal claims against Dr Cochrane (or SMA), they were subrogated to a proprietary right which Dr Cochrane or SMA had over the recovered assets in respect of their entitlement to an indemnity from trust assets against any personal liability. I now consider that argument, and whether it was fairly open to P&M at the time it was raised.

## (2) The second argument: the subrogation argument

### Introduction

331. In opening their case, P&M submitted:

> "P&M accept that the Loan Note does not create any proprietary rights to any Relevant Property or any of the Identified Underlying Assets. The obligations arising under it are personal to Dr Cochrane, and Phoenix will have to claim in her *désastre* for the outstanding debt …"

This was also accepted in para. 104 of P&M's written closing.

332. Nor was there any suggestion in P&M's opening argument that, if its equitable assignment argument failed, Phoenix could be subrogated to a proprietary claim by SMA to Relevant Property. Indeed, so far as SMA was said to owe obligations under clause 2.3 of the LICSA (which was not alleged to give rise to an assignment), it was accepted that clause 2.3 "merely imposes a personal obligation".

333. However, in a short written supplement to their closing submissions, P&M contended that they could assert a proprietary interest in Relevant Property by another route, namely that P&M had claims against SMA and Dr Cochrane for which SMA and Dr Cochrane were entitled to an indemnity from trust assets, and that P&M were subrogated to that right of indemnity. That argument was supplemented by short oral submissions from P&M, to which the Settlement Parties responded.

334. In summary, P&M contend as follows:

i) SMA entered into the LICSA in its capacity as a trustee of the Harbour Trust in order to settle proprietary claims brought by Mr Ruhan against the trust assets,

ii) SMA did not act in breach of trust in doing so, and it acted with the authority of the Orb Claimants who themselves had authority to settle the 2012 Proceedings under clause 6.2 of the Harbour IA.

iii) In these circumstances, SMA is entitled to an indemnity against the assets which it holds on trust, namely the Arena Holdcos, which gives rise to a charge over those assets.

iv) If Dr Cochrane held the Non-Arena Companies on the terms of the Harbour Trust, then Dr Cochrane's liability under the Loan Note should similarly be interpreted as a

liability assumed by Dr Cochrane as a trustee of that trust, for which she is also entitled to an indemnity which gives rise to a charge over the Non-Arena Companies.

v) P&M are, in respect of their claims under the LICSA, subrogated to SMA's charge over the Arena Holdcos, and Phoenix is, in respect of its claims against Dr Cochrane under the Loan Note and the LICSA, subrogated to Dr Cochrane's charge over the Non-Arena Companies.

335. The Settlement Parties contend in response that this point was raised too late, that material relevant to its determination is not before the court and that I should hold that it was not open to P&M to advance this argument. They also contend that the point is without merit in any event.

## The applicable legal principles

336. The common law principles underpinning the trustee's right to indemnity and the ability of third parties to have access to trust assets to enforce a debt were discussed by the Privy Council in Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2018] UKPC 7, [2019] AC 271, [59] where the law was summarised as follows:

> "(v) A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate: In re Blundell (1888) 40 Ch D 370, 376. To secure his right of indemnity, the trustee has an equitable lien on the trust assets: *Lewin on Trusts*, 19th ed (2015), para 21-043. Because an equitable lien does not depend on possession, it normally survives after he has ceased to be a trustee: In re Johnson (1880) 15 Ch D 548, 552.
>
> (vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity: In re Johnson.
>
> (vii) Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default or gross negligence. More generally

> a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity. As has frequently been observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can in principle protect his position, for example by taking a fixed charge over the trust assets, or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary…"

337. The starting point for P&M's argument is the trustee's right to indemnity out of trust assets, which is set out in s.31(1) of the Trustee Act 2000:

> "(1) A trustee—
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,
>
> expenses properly incurred by him when acting on behalf of the trust..."

338. This reflects the pre-statutory position, as explained by Nicholls LJ in Holding and Management Ltd v Property Holding and Investment Trust Plc [1989] 1 WLR 1313, 1324:

> "To be entitled to an indemnity the costs and expenses in question must have been properly incurred by the trustee. This is axiomatic, but if authority is needed it can be found in Turner v. Hancock (1882) 20 Ch D. 303, 305, where Sir George Jessel M.R. refers to the trustees' right to receive out of the trust fund 'all their proper costs incident to the execution of the trust'…"

339. The trustee's right to indemnity can extend to future liabilities of the trustee such as contingent liabilities: X v A [2000] 1 All ER 490, 493-494.

340. The Court of Appeal in Price v Saundry [2019] EWCA Civ 2261; [2020] 1 P&CR DG19 considered the issue of trustee indemnity in the context of costs incurred by, and awarded against, a trustee in hostile litigation. Asplin LJ held at [24] that the test for whether an indemnity is available is "best expressed in the form of two questions: were the expenses properly incurred?; and were the expenses incurred by the trustee when acting on behalf of the trust? The answer to those questions is often far from straightforward. They are dependent upon all the circumstances of the case." Asplin LJ then concluded that:

> "29. All of this discussion brings one back to the question of whether the costs incurred by trustees in defending an action or arguing a point in the particular circumstances were expenses 'properly incurred' when acting on behalf of the

> trust. It seems to me that 'properly incurred' should be interpreted to mean 'not improperly incurred'. This was the way in which Lindley LJ approached trustee indemnity in Easton v Landor (1892) 62 L.J. Ch 164 and in In re Beddoe, Downes v Cottam (1893) 1 Ch 547. See also In re Grimthorpe Dec'd [1958] Ch 615 per Danckwerts J at 623.
>
> …
>
> 31. It seems to me, therefore, that if a breach of trust causing loss to the trust fund or other misconduct is established against the trustee, the trustee may be deprived of his indemnity depending upon all the circumstances. Misconduct in this context should be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances. It does not extend, however, to a mere mistake on the part of the trustee: see *Lewin on Trusts*, 19th ed. para 27-112…"

341. Turning to the enforcement of the trustee's right to indemnity, the following general principles are well-established:

i) A trustee has a first charge or lien upon the trust assets to secure the liabilities and expenses covered by the right to indemnity. This right takes priority over the beneficiaries of the trust: Re Exhall Coal Co Ltd (1866) 35 Beav 449; *Lewin*, 19-044.

ii) Generally, the trustee's charge extends over the whole trust fund so that a liability in respect of part of the trust fund may be discharged out of any other part of the trust fund: Hardoon v Belilios [1901] AC 118, 123–124; *Lewin*, 19-045.

iii) Unsecured creditors of the trustee do not have a direct claim against the trust assets in respect of liabilities incurred by trustees in the administration of the trust. However, the creditors are entitled to be subrogated to the trustee's right of indemnity, enabling the creditor to reach the trust assets and enforce against them: Re Johnson; *Lewin*, 19-049.

iv) The creditors' claims against the trust property are therefore dependent on, and cannot exceed, the scope of the trustee's right to indemnity: *Lewin*, 19-050.

v) A trustee who is in default is not entitled to indemnity out of the trust property until he has made good his default: *Lewin*, 19-38 to 19-039. *Lewin* notes:

> "If a defaulting trustee is insolvent, he will not be entitled to his costs properly incurred without making good his default and so only the amount by which his proper costs exceeds the sum for which he is accountable can be recovered by his trustee in bankruptcy, even though the proper costs are incurred after the insolvency."

vi) In general, a trustee is not entitled to indemnity if he incurs costs or liabilities in a transaction which is unauthorised by the terms of the trust instrument and without the request or implied assent of the beneficiaries. However, if the trustee acts in good faith, and the transaction benefits the trust estate, he may be entitled to indemnity to the extent that the transaction benefits the trust estate, though whether the indemnity is a matter of right rather than of discretion of the court is not clear: *Lewin*, 19-044.

342. So far as the creditor's entitlement to be subrogated to the trustee's right is concerned, the remedy may be denied where there are policy reasons for doing so (Banque Financiere de la Cité SA v Parc (Battersea) Ltd [1999] 1 AC 221). As an equitable remedy, generally conceptualised as a remedy designed to reverse unjust enrichment, it is subject to the traditional bars to equitable relief (*Goff and Jones: The Law of Unjust Enrichment* (9th) para. 39-28).

## (3) The claims against SMA

### What claims do P&M have against SMA?

343. There was very little argument before me as to whether P&M had personal claims against SMA, of what kind and in what amount. I was told by the Settlement Parties that no such claim had been articulated against SMA before, and the nature of the obligations said to have been assumed by SMA to P&M, and the circumstances in which they would be breached, received limited exploration before me.

344. In their supplemental closing note, P&M rely on clause 2.6 of the LICSA as imposing an obligation on SMA to direct the JLs to make payments in P&M's favour in accordance with clauses 2.3 and 2.4. By way of a recap, clause 2.6 provides:

> "[SMA] and Minardi shall direct the [JLs] to make payments as described in clauses 2.3 and 2.4 above. In this respect, they undertake to inform the [JLs] in writing that they entered into this Agreement as per schedule 4".

345. The letter which SMA and Minardi were required to send to give that direction has been sent (whatever effect it might have), so that the direction has been given. In any event, P&M have not explained how, on the hypothesis that the LICSA does not create an equitable assignment, the giving of such a direction could improve their position. Clause 2.6 (in contrast to the obligation assumed by Dr Cochrane under clause 2.4 and referred to in Recital (O)) was not an undertaking to procure a particular outcome, and there are obvious difficulties for P&M in arguing that it was, because Minardi assumed the same obligation as SMA in this respect.

346. While P&M did not expressly refer to the obligation created by the first sentence of clause 2.3 in support of this part of their argument, similar issues arise in relation to that clause: the obligation appears to be one of co-operation only rather than an absolute obligation to procure a particular result (a conclusion reinforced by the language of Recital (M) which it tracks), and it is an obligation owed equally by SMA and Minardi, and must have the same character for each of them.

347. In these circumstances, P&M have failed to persuade me that they have a claim against SMA under the LICSA capable of supporting the first stage in their indemnity/subrogation argument.

## Did SMA undertake its obligations under the LICSA in its capacity as trustee of the Harbour Trust?

348. This issue was subject to relatively little argument. I have held that SMA held the Transferred Companies as bare trustee for the Orb Claimants who in turn held those assets on the terms of the Harbour Trust, but I accept that the interposition of a bare trust for no obvious purpose should not change the analysis (any more than it should be capable of turning a personal claim into a proprietary claim – something I consider below).

349. There is the complication in this case that, on my findings, the Geneva Settlement was not (or, at least, not simply) the settlement of a claim against trust assets, but the very act which enabled the Harbour Trust to be constituted (because it led Mr Ruhan to relinquish the equitable interest, which had previously stood in the way of the Transferred Assets being held on the terms of the Harbour Trust). However, SMA was (on my findings) a putative nominee or bare trustee of a trust which would be constituted once Mr Ruhan's claims were released, and in those circumstances, I have concluded that, so far as SMA made promises in relation to assets to be held on the Harbour Trust, as part of a settlement by which Mr Ruhan gave up claims to those assets, SMA was acting in its capacity as putative trustee.

350. The Settlement Parties raise the further objection that the settlement was not authorised under the terms of the Harbour Trust. P&M relied on the terms of clause 6.2 of the Harbour IA:

> "Subject to the Overriding Objective, the Claimants shall have control over the conduct of the Proceedings and have the right to conduct the Proceedings as they consider appropriate, including the right:
>
> (a) To compromise the Causes of Action and/or the Proceedings against any Defendant on any terms they consider appropriate; and
>
> (b) To abandon, withdraw or discontinue the Proceedings or any part of the Proceedings."

P&M contended that this gave the Orb Claimants the authority to settle the 2012 Proceedings.

351. The Settlement Parties submit in response that clause 6.2 is concerned only with the conduct of proceedings, not with the actions of the trustees after the Harbour Trust has been constituted. The Settlement Parties further rely on clause 9 of the Harbour IA which in their submission governs the trustee's conduct after the trust has been constituted:

> "9.1. Subject to clause 9.3, the Claimants shall apply or instruct the Legal Representatives to apply any Proceeds received as a result of

> Success in the Proceedings, and which it holds on trust, in the following order immediately upon receipt of such Proceeds:
>
> …
>
> 9.2. Until such time as all amounts payable to HF2 under this Agreement have been made, the Claimants shall not be entitled to deduct from Proceeds received as a result of Success in the Proceedings any charges, fees, taxes (including Corporation or Pay As You Earn taxes) incurred by any other party including the Defendant(s) in connection with the proceedings unless such fees fall within the definition of Claimants' Legal Costs. Nor shall the Claimants be entitled to apply any set-off in relation to monies owed to the Defendant whether or not owed to the Defendant in relation to the Proceedings."

352. However, the difficulty with this argument is that, on my findings, the Harbour Trust was not constituted until (and only as a result of) the Geneva Settlement. I am conscious that this gives SMA something of the quality of Schrödinger's trustee, if it is to be treated as entering into the Geneva Settlement as a trustee ([349]), yet those clauses of the Harbour IA addressing the Harbour Trust only applied once the Geneva Settlement had been concluded (to the extent of the trust to which the Geneva Settlement gave rise). However, I am satisfied that the distinction is principled, in a case in which the trust framework had been established before the Geneva Settlement, but the existence of Mr Ruhan's equitable interest, for so long as he maintained it, precluded the constitution of the trust.

353. The Settlement Parties advance a further argument, relying on clause 4.2 of the Harbour IA:

> "Provided that nothing in this Agreement shall oblige any of the Claimants to take any step which may prejudice the conduct of the Proceedings and in particular the maintenance of privilege, the Claimants will take such action as HF2 and its advisers may reasonably request to enable HF2 to have knowledge about the conduct of the Proceedings (but without HF2 thereby acquiring any right to interfere in the Claimants' conduct of the Proceedings). Accordingly each of the Claimants undertakes that it or he will, and does hereby direct its or his Legal Representatives (which direction is hereby acknowledged by the Legal Representative) to:
>
> …
>
> (c) Give HF2 prior written notice if they propose to take in the Proceedings any step specified in clauses 6.2(a) or 6.2(b).
>
> …

> (i) In the event any Claimant receives an offer of Settlement, whether in oral or written form, from one or more of the Defendants, immediately notify the Legal Representatives and HF2 of such offer and instruct the Legal Representatives to provide a written recommendation on whether to accept such offer and immediately provide a copy of such offer and recommendation to HF2.
>
> (j) Not enter into any new agreement or arrangement which does not acknowledge the enforceability of this Agreement and the rights of HF2 hereunder…"

354. Reading this clause together with clause 6.2, clause 4.2 gives the Orb Claimants freedom in how they conduct the proceedings and thus how they achieve Success in the Proceedings. The Orb Claimants are entitled to compromise the proceedings and causes of action on any terms they consider appropriate. However, clause 4.2 makes clear that the Orb Claimants were required to consult with Harbour before accepting any offer of settlement, and that they were not to enter into an agreement which did not acknowledge the Harbour IA.

355. The Settlement Parties submitted that the Geneva Settlement was entered into without Harbour's consent or concurrence. There was very little evidence as to Harbour's knowledge of the fact or content of the discussions which culminated in the Geneva Settlement. Ms Dunn's witness statement referred to the fact that "settlement discussions had recommenced, with settlement a serious possibility by (at the latest) early April 2016", but she stated that "Harbour did not … have sight of the documents" until the completed documents were provided in "early May". It is not clear whether that was before or after the Consent Order was filed on 5 May 2016. Ms Dunn also confirmed in evidence that she had met with Dr Smith and Ms Stickler when they came back from the Geneva negotiations, but that she could not recall the detail of her discussions with them. In particular she could not recall whether she was told of the £73.75m liability under the Loan Note. She also confirmed that at some point she appreciated that the settlement may have involved some assets going back, but said she was "not involved in the day-to-day".

356. I found the evidence on the issue of Harbour's knowledge of the settlement discussions surprisingly vague. I am not prepared on the basis of the material I do have to find that the terms of the Geneva Settlement were not authorised by Harbour. I am satisfied that Harbour was content to allow the 2012 Proceedings to be settled on the basis which had been discussed in Geneva, with whatever consequences that might have, albeit there was no evidence that it had specifically been asked to or had signed off on the relevant terms. The reality is that, for understandable reasons, Harbour was content to leave Dr Smith to "get on with it". Certainly there is no evidence of any complaint by Harbour once the documents constituting the Geneva Settlement were received (and presumably reviewed).

357. The position is the same so far as the Orb Claimants are concerned. Clearly Dr Cochrane (the director of Orb) and Messrs Thomas and Taylor were aware that negotiations were underway with Mr Ruhan, and they were content to let Dr Smith conduct those negotiations. Against the background of the hearing before Cooke J, with its findings of over-recovery, they must have been aware that such a negotiation was likely to involve

some obligations being assumed to Mr Ruhan or at his direction. They both signed the Confidential Settlement Deed which expressly referred to the Loan Note and the LICSA.

358. I would, therefore, have been willing to accept the second stage of P&M's argument on this issue: that any liability of SMA was incurred when acting as a trustee of the Harbour Trust and was authorised by the Orb Claimants and Harbour.

**Is SMA entitled to an indemnity from the trust fund constituted by the Arena Holdcos?**

359. One of the difficulties with the late stage at which the indemnity argument was raised is that, in consequence, the key questions of whether SMA was itself in breach of the Harbour Trust, and if so, what the amount of its liability was, were not addressed. It is clear that SMA was party to the transfer of assets out of the Transferred Companies: Recital (D) to the LICSA referred to SMA transferring to itself and its shareholders various sums by way of cash transfers following the sale of various Arena Group assets, part of which was utilised to run and the Arena Group and part for SMA's own purposes. Those transfers, which formed part of the extensive "looting" of the Transferred Companies at the behest of Dr Smith in the period between the IOM Settlement and the Geneva Settlement, are matters which, to my mind, the Orb Claimants and those claiming under them were entitled to rely upon as reasons why no indemnity should be available to SMA, or at least to limit the amount of such an indemnity.

360. However, there is no material before me which would allow me to quantify any liability which SMA might have to P&M, and whether and, if so, to what extent, the amount of that liability exceeded any claims which the SMA might face for breach of trust. For these reasons, I am unable to conclude on the evidence before me that SMA would be entitled to an indemnity against the Arena Holdcos to which P&M might be subrogated, even if they were able to establish a personal claim against SMA.

**(4) The claims against Dr Cochrane**

361. It is clear that Phoenix has claims against Dr Cochrane under the Loan Note, and under clause 2.4 of the LICSA. P&M's claim to be subrogated to Dr Cochrane's entitlement to indemnity depends on establishing that Dr Cochrane entered into the LICSA and the Loan Note as trustee of the Non-Arena Companies:

i) either on the terms of the Harbour Trust; or

ii) on the terms of a bare trust for Dr Smith, if the SFO's case that Dr Cochrane held assets as Dr Smith's nominee succeeds.

362. While the Settlement Parties advanced a fall-back case that the Non-Arena Companies were held on the terms of the Harbour Trust, no one developed that argument before me. The Non-Arena Companies were not transferred under the IOM Settlement, nor were they recovered from the "Ruhan-side" of the 2012 Proceedings. There was no material at the Directed Trial which suggested that the shares in the Non-Arena Companies were themselves the traceable proceeds of the Transferred Assets. In these circumstances, and unassisted by any contrary argument, I see no basis for concluding that the Non-Arena Companies represented "Proceeds" for the purposes of the Harbour IA, so as to be held on

the terms of the Harbour Trust. Accordingly, I will consider Phoenix's claim on the alternative basis (that Dr Cochrane held the Non-Arena Companies on bare trust for Dr Smith and entered into the Loan Note and the LICSA as trustee of that trust).

**Is it open to Phoenix now to assert a proprietary claim to the Non-Arena Companies?**

363. Phoenix has not hitherto asserted a proprietary claim to the Non-Arena Companies, beyond asserting that the effect of the negative pledge which Dr Cochrane entered into through the Loan Note is that such assets remain available to meet personal claims against her. Within the compressed submissions on this issue, I was not addressed on the question of whether Popplewell J's barring order of 28 April 2018 precluded such a claim now. Paragraph 4 of that order allowed the parties (including Phoenix) to "apply to have any proprietary claim …. in relation to the Relevant Property … or any argument which they wish to make in relation to any such proprietary … claim" included within the Directed Trial provided they served a "properly particularised statement of claim identifying the relief which is sought and/or the argument which is sought to be raised" but also provided that:

> "save to the extent that any such application is granted, the parties and non-parties shall be debarred from (i) contending that they have a proprietary claim …. which takes priority over the claims included within the Paragraph 11 issues".

364. Whatever might be the position when a party identifies a different legal theory to support a proprietary claim to an asset to which a proprietary claim has always been asserted, I am not persuaded that it is open to Phoenix, in the face of that order, to advance a proprietary claim to a new asset class for the first time at trial, and to differentiate its position from others who failed to notify proprietary claims to the Non-Arena Companies in time on the basis that it had brought a timely proprietary claim to the Arena Companies or assets derived therefrom.

**Did Dr Cochrane undertake her obligations under the Loan Note and the LICSA in her capacity as a trustee of the bare trust of the Non-Arena Companies?**

365. I am not persuaded that Dr Cochrane can be said to have entered into the Loan Note and LICSA as trustee of the bare trust of the Non-Arena Companies. The Non-Arena Companies were not transferred under the IOM Settlement, there were no claims to those companies in the 2012 Proceedings (reflecting the fact that Mr Ruhan was not asserting an equitable interest in the Non-Arena Companies themselves) and with the exception of GAC Holdings Limited ("GACH"), claims against those companies are not mentioned in the Confidential Settlement Deed. The Non-Arena Companies do not feature in the LICSA. Further, Dr Cochrane had warranted in the Loan Note that she was the ultimate beneficial owner of the Non-Arena Companies, which further militates against the suggestion that she entered into the Loan Note as trustee of a trust constituted by the Non-Arena Companies, and those companies features in the LICSA as the subject of a negative pledge (which does not create a security interest or give rise to proprietary rights, which would be the ultimate effect of P&M's argument on this issue). Moreover, it was envisaged that the obligations under the Loan Note would at least in part be settled under clause 2.4 of the LICSA by distributions from the liquidations of the Arena Holdcos (see also clause 6.5 of the Loan

Note). If Dr Cochrane's liability under the Loan Note was incurred as trustee of the shares in the Non-Arena Companies, it is difficult to see how this provision could have been included.

366. If the issue had been whether Dr Cochrane had entered into the Loan Note and LICSA as a trustee of the Non-Arena Companies on the terms of the Harbour Trust, I would have concluded that she had not for essentially the same reasons as set out in [362]. The Non-Arena Companies did not constitute Proceeds and were not recovered in the 2012 Proceedings.

**Is Dr Cochrane entitled to an indemnity from the trust fund constituted by the Non-Arena Companies?**

367. There was no material before me which suggested that Dr Cochrane had breached any bare trust under which she held assets for Dr Smith. Accordingly, if Dr Cochrane had assumed her liabilities under the Loan Note and LICSA as trustee of the Non-Arena Companies, I would have upheld her claim to an indemnity.

368. If, however, the suggestion was that Dr Cochrane had entered into the Loan Note and LICSA as a trustee of assets held on the terms of the Harbour Trust, or as bare trustee for the Orb Claimants, then there is ample evidence that Dr Cochrane was party to extensive misappropriation of the assets of the Transferred Companies, such that the issue would inevitably have arisen as to the quantum of Dr Cochrane's liability for breach of trust. Once again, there is no material before me on the basis of which I could quantify the amount of any liability which Dr Cochrane might have for that breach of trust.

**If Dr Cochrane holds the Non-Arena Companies on bare trust for Dr Smith, could Dr Cochrane assert an equitable lien over the Non-Arena Companies, such that Phoenix could be subrogated to that lien?**

369. The first question which arises is whether, as a bare trustee, Dr Cochrane benefits from a lien in respect of any indemnity claim, or whether the indemnity in this context should be merely a personal claim, akin to that arising as between agent and principal, in order to reflect the minimal nature of the trusteeship in question. In my view, that is an arguable proposition at a general level, but I only need to consider the position in a very specific context, one in which:

    i) the SFO is entitled to take Dr Smith's realisable property free from personal, but not proprietary claims, such that the recognition of a lien on Dr Cochrane's part would directly impact on the SFO's recovery; and

    ii) the clear and obvious purpose of any nominee arrangement between Dr Smith and Dr Cochrane in relation to the Non-Arena Companies was to render enforcement by the SFO of the Confiscation Order more difficult.

370. The Settlement Parties referred me in this connection to the decision of Henderson J in Serious Organised Crime Agency v Szepietowski [2009] EWHC 344 (Ch); [2010] 1 WLR 1316. In that case the defendant had accepted money which he held on trust for a client. The SOCA sought civil recovery in respect of the property. The defendant argued for an

exclusion from an interim receiving order which would allow the assets to be used to meet his legal expenses on the ground that he was defending proceedings in his capacity as a trustee. Henderson J concluded that the statutory scheme did not allow for such an exclusion in favour of a defendant who defended proceedings in his capacity as trustee. However, on an obiter basis, he also made the following observations:

> "66. I would only add that if, contrary to the view which I have just expressed, I did have a discretion to leave Mr Szepietowski's personal assets out of account, I would not consider it appropriate in the circumstances of the present case to do so. The Heritage Investment Trust could hardly be more shadowy, and there is no evidence before me that Mr Szepietowski ever properly exercised any of the functions or duties of a trustee in the years between the establishment of the trust in 1999 and the 2008 consent order (which provided for Mr Szepietowski to retire as trustee, although in the event SOCA has been unable to find anybody willing to replace him) …
>
> 68. In short, there appear to me to be strong prima facie grounds for suspecting that the whole trust arrangement was a sham, and at all material times Mr Szepietowski held the purported trust property as Mr Mitchell's nominee. If he wishes to be treated as a bona fide trustee today, it seems to me that it is incumbent on him to dispel that suspicion and to produce solid evidence that he has in the past behaved as a real trustee of real trust property."

371. The context in which Henderson J approached this issue was the consideration of whether to exercise a discretionary power to exclude particular property from restrictions imposed on dealing with property under s.252 of the Proceeds of Crime Act 2002, a context which would permit the court to have regard to a wide variety of considerations in determining whether to grant relief in any particular case. The issue does not arise before me in that context, but the trustee's lien is an equitable remedy. In circumstances in which the obvious purpose of any nominee arrangement between Dr Smith and Dr Cochrane was to make the enforcement of the Confiscation Order more difficult, I would not have been willing to recognise any equitable lien on Dr Cochrane's part which would avail against the rights of the SFO under the CJA 1988. To my mind, that would be inconsistent with what Henderson J referred to in Szepietowski, [64] as "the very strong public interest that property representing the proceeds of crime should be recovered with as few deductions made from it as possible".

372. If I had been willing to recognise a lien, the question would then have arisen as to whether Phoenix should be subrogated to it, or whether the benefits of the recovery under the indemnity should inure for the benefit of all of Dr Cochrane's creditors. The effect of Phoenix's argument is that, by dealing with Dr Smith's nominee instead of Dr Smith himself, they are effectively able to turn a personal claim against Dr Cochrane into a claim which benefits from a lien over the assets held by Dr Cochrane as nominee for Dr Smith, even though Phoenix did not deal with Dr Cochrane on the basis that she was purporting to act as a trustee for Dr Smith, and even though Phoenix did not bargain for such a security

interest in the Loan Note ([365]). That is not an attractive argument, and I am not able to accept it.

**Has Phoenix waived its claim to enforce a lien over Dr Cochrane's assets?**

373. Finally Mr Saoul QC pointed me to the decision of the Court of Appeal in Candey Ltd v Crumpler [2020] EWCA Civ 26; [2020] Bus LR 1452, [86-88] in which a solicitor was found to have waived its equitable lien by submitting a proof of debt in a BVI liquidation without asserting or reserving its security. He argued that the late assertion of the subrogation argument had deprived the Settlement Parties of the ability to run a similar argument by reference to Jersey law, and in particular Article 3(4) of the Bankruptcy Désastre Rules 2006. As I understand Phoenix's contention, it is not that it benefits from a lien over Dr Cochrane's property, but that it is subrogated to any lien Dr Cochrane had over Dr Smith's property. Nonetheless, there is clearly scope for argument that the Viscount as administrator of Dr Cochrane's *désastre* needed to know whether the fruits of any lien which Dr Cochrane may have enjoyed over other assets was available for the benefit of Dr Cochrane's creditors generally, or only Phoenix. I do not feel able to conclude that this argument is so fanciful that it cannot represent a legitimate head of prejudice to the Settlement Parties from the late stage at which the subrogation argument was raised.

## L STEWARTS' CLAIM FOR A LIEN

### L1 The legal principles relating to a solicitor's lien

374. As Lord Briggs JSC explained in Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21; [2018] 1 WLR 2052, [1], a solicitor's "lien" "provides a form of security for the recovery by the solicitors of their agreed charges for the successful conduct of litigation out of the fruits of that litigation". It has long been recognised that, unlike a solicitor's lien over papers, it is not a "lien" in the traditional (common law) sense of that term (viz the right of someone in possession to withhold delivery from someone otherwise entitled to it until an amount due is paid). Rather it is a form of equitable charge enforced "up to the amount contractually due to the solicitor in priority to the interest of the successful client, or anyone claiming through him" [3]). In addition to the equitable remedy, which does not apply to real property, s.73 of the Solicitors Act 1974 creates a statutory remedy of similar scope (which does extend to real property):

> "(1) … any court in which a solicitor has been employed to prosecute or defend any suit, matter or proceedings may at any time—
>
> (a) declare the solicitor entitled to a charge on any property recovered or preserved through his instrumentality for his [assessed] costs in relation to that suit, matter or proceeding; and
>
> (b) make such orders for the [assessment] of those costs and for raising money to pay or for paying them out of the property recovered or preserved as the court thinks fit;

> and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the solicitor".

375. The authorities which have considered the solicitor's equitable lien reveal the following principles.

376. First, subject to the exception considered at [377] below, the lien gives the solicitor no better right to retain property than the client would have if the property remained in its possession (*Snell*, 44-019 and 44-023). For that reason, where the property recovered is held by the client on trust, the solicitor cannot override the prior claim of the trust beneficiaries to the fund (Francis v Francis (1854) 5 De M & G 108, 120). As Lloyd LJ noted in Withers LLP v Rybak [2012] 1 WLR 1748, [53], "the solicitor can have no better right to assert a lien over the money than his client has to use the money for payment of the sums due to the solicitor."

377. However, the solicitor may be able to assert a lien as against a third party with an interest in the property which has been recovered as a result of the solicitor's work in the litigation. In Scholey v Peck [1893] 1 Ch 709, 711, Romer J held:

> "[The] authorities shew that what is recovered by the action of the solicitor is to be treated as if he had earned salvage, and that he is to be paid for his services on the theory that salvage services have been rendered. It is not necessary that the property charged should belong to the same person as employed the solicitor; but it must be by reason of the employment that the property is preserved. Here undoubtedly the property was preserved by the action brought by these solicitors on behalf of the Plaintiff, and but for the proceedings taken by them the mortgagee would have lost her security".

The salvage analogy as a basis for asserting the lien against others interested in the recovered property appears in other cases (eg Greer v Young (1883) 24 Ch D 545, 549, 552-3, 556).

378. Second, there must be an identifiable fund (property, a judgment or award debt or amount payable under a settlement agreement) obtained as a result of litigation in which the solicitor acts, and earns fees, over which the lien can operate (Edmondson, [35]). As noted at [170] above, it has been held that the lien applies in cases where there is a "fund in sight" even if the fund has not been received by the client.

379. Third, the solicitor's work must have contributed to obtaining the fund. The required link between the solicitor's work and the relevant fund has been described in various terms. In Edmondson, Lord Briggs stated that the lien applied to a debt which arose "in part from the activities of the solicitor" ([35] and [37]), and also to debts which "owe their creation, to a significant extent" to the solicitor's services ([45]). I have concluded that there is a requirement of "but for" causation, but one which is applied relatively generously and in a pragmatic way. In Guy v Churchill (1887) 35 Ch D 489, 491, Cotton LJ stated that "the solicitor has a lien on what is recovered in an action although the recovery of this sum was not the direct result of the action". In addressing the closely analogous question of whether

the court should grant a charge under s.73, it has been noted that the causal requirement is widely construed, and can be satisfied in respect of a negotiated settlement even if the solicitor was not involved in or was unaware of the negotiations (In re Peak Hotels [2019] EWHC 282 (Ch); [2019] Bus LR 1901, [37-38], Andrew Hochhauser QC).

380. Fourth, the lien extends to the cost of services of a kind that "a solicitor would perform in conducting litigation or contemplated litigation" (Bott & Co v Ryanair [2019] EWCA Civ 143; [2019] 1 WLR 3375, [53], Lewison LJ). It has been suggested that the lien is limited to the solicitor's costs of recovery of the fund or "those immediately incidental thereto" (Re Meter Cabs Ltd [1911] 2 Ch 557, 559, Swinfen Eady J). However, this issue must be approached in the broad spirit which characterises the causal enquiry generally, and does not require parsing of the benefits of each element of the litigation.

381. Fifth, it has long been established that the lien avails against a judgment or settlement debtor ("the counterparty") who colludes with the client to cheat the solicitor of his charges (Edmondson, [4]). In those circumstances, payment to the debtor or a third party will not discharge the judgment debt, and the counterparty can be required to pay again (Khans Solicitors v Chifuntwe [2013] EWCA Civ 481; [2014] 1 WLR 1185, [13]).

382. It is worth saying a little more about this aspect of the lien:

i) Even where there is no collusion, the authorities establish that if the counterparty pays the client when it has notice of the solicitor's lien, the payment will not defeat the lien. Most of the cases which supported the extension of the lien beyond cases of collusive payment are cases in which the solicitor gave notice to the payer of its lien before payment was made (Welsh v Hole (1779) 1 Doug 238, Read v Draper (1795) 6 TR 361, Ross v Buxton (1889) LR 42 Ch D 190 and Khans). In these cases, the "notice" in question bears strong similarities with that which is given in cases involving legal or equitable assignment, in which the assignee tells the debtor "pay me and not the assignor". The analogy with assignment is adopted in some of the lien cases, for example Welsh v Hole and Read v Dupper.

ii) What of the position where there is no notice in this sense, but it is said that the counterparty knew (or was "on notice") that the solicitor had unpaid fees and would have a lien for them? The Settlement Parties suggested that if the counterparty pays the client in these circumstances, it does not get a good discharge, relying on Haymes v Cooper (1865) 22 Beav 431. However, that case was not concerned with the effect of notice on the counterparty, but the effect of notice on an assignee who derived its title to the recovery from the client. In that context, Sir John Romilly rejected the argument that the assignee took free of the lien, stating at pp.433-34:

> "Again, it is not a question of notice, because every man who knows there is a fund in Court, knows also that it is liable to the lien for costs of the solicitor, through whose exertion the fund has been obtained, and the assignee has the benefit of those exertions as well as the assignor … This Act declares the Court shall have power to declare that the solicitor is entitled to a charge for his costs, and that all conveyances to defeat it, unless to a bonâ fide purchaser for value

> without notice, shall be void. My opinion is that where a man knows that there is a fund in Court, he knows also that it is subject to the solicitor's lien for his costs in recovering it, and that he is entitled to be paid in the first instance. The Act, however, clearly points out that there may be a bonâ fide purchaser who may have priority".

The same conclusion was reached, in a similar context, in Cole v Eley [1894] 2 QB 180, albeit that case did not involve claims to a fund in court, but to a judgment debt which the client had assigned. The Court held that a party purchasing a judgment debt was, as a matter of law, on notice of the solicitor's lien over that debt for unpaid fees, treating knowledge of the suit as knowledge of the solicitor's lien.

iii) In my view, mere knowledge of the suit or that a solicitor will have a lien for any unpaid fees will not prevent a counterparty from obtaining a good discharge, provided it has not acted collusively with the counterparty or been given notice by the solicitor of the assertion of its lien. The contrary position would significantly enlarge the legal jeopardy faced by a counterparty when attempting to settle litigation or satisfy a judgment debt. The argument is also inconsistent with the decision in The Hope (1884) 8 PD 144, 146, Sir William Brett MR rejecting the argument that the counterparty should pay again in that case because:

> "The solicitors must shew that both the plaintiffs and the defendants entered into the compromise with the intention of depriving them of their lien. Now there is here absolutely no evidence of any such intention. We are asked to infer it from the fact that the compromise was made by sailors with shipowners; but there is no rule of law that sailors are to be presumed to be cheats, nor can we presume that the shipowners would suppose that the sailors would not pay their solicitors".

iv) It is open to the counterparty and the client to enter into a bona fide compromise of their claim which has the effect of preventing an identifiable fund from coming into existence (such as where two cross-claims are settled, with no net payment), and to do so even after notice has been given by the solicitor of the assertion of the lien (Ross v Buxton, 201 where Stirling J held "that a bona fide compromise entered into before verdict or judgment, and even after notice of the solicitor's claim for costs, is good, and will not be set aside or affected at the instance of the solicitor unless collusion or fraudulent conspiracy exists between the parties"). Similarly, the court may permit a set-off between the parties even though this will have the effect of preventing a fund over which a lien can arise coming into existence, provided there is no collusion between the parties to defeat the lien (Puddephat v Leith (No 2) [1916] 2 Ch 168, 180).

383. Sixth, I accept that, by analogy with other forms of equitable charge, the solicitor can trace its lien into the proceeds of the fruits of the litigation, to the extent that conventional tracing requirements are satisfied (as to the position of an equitable charge created by an unregistered mortgage see Buhr v Barclays Bank [2001] EWCA Civ, 1223, [39-50]).

384. Finally, there are authorities which suggest that the lien is discretionary. That is certainly the case so far as the granting of a legal charge under s.73 is concerned, with the authorities suggesting that the conduct of the solicitor may in some cases deprive the solicitor of the lien (Clutterbuck v Bradford [1945] Ch 61, 67, Lord Greene MR). However, in the statutory context a solicitor who satisfies the requirements of the section will ordinarily obtain a charging order unless good reasons are shown to deprive him of it (ibid; Clifford Harris & Co v Solland International [2005] EWHC 141 (Ch); [2005] 3 Costs LR 414, [22-23], Christopher Nugee QC). So far as the equitable lien is concerned, Lewison LJ referred to it in Bott & Co v Ryanair, [33] as "no more than a right to ask the court to exercise a discretion in his favour". It is not clear to me whether Lewison LJ was doing more than referring to the discretion which is inherent in any equitable remedy (making considerations of laches and unclean hands, for example, relevant considerations). Like other forms of equitable relief, the solicitor's equitable lien operates according to clear and predictable principles.

## L2 Against whom can Stewarts assert a lien?

385. If the requisite conditions are otherwise met, Stewarts can assert a lien against the Orb Claimants, who were their clients in the 2012 Proceedings. The issue of whether Stewarts can assert a lien against Harbour was not argued before me by Stewarts and Harbour, because it was not live between those parties in the light of the 2019 Settlement Agreement. However, the issue was raised by Messrs Thomas and Taylor, and it is potentially relevant when considering the position as between those who find themselves subject to the lien *inter se*. I am satisfied that, to the extent that Stewarts claim fees over and above those which Harbour agreed to meet under the Harbour IA, they do not have a lien over those fees against Harbour's recoveries. Stewarts agreed to waterfall provisions in the Harbour IA under which only the agreed (and capped) legal fees had priority over Harbour's entitlement, and that contractually agreed scheme of priority precludes any assertion of a lien against Harbour for fees which Harbour has no contractual obligation to pay (cf. the position when Berkeley Applegate relief is sought at [478(vii)] below).

386. Stewarts contend that they can go further and asset a lien against HPII and P&M. However, neither of these entities were Stewarts' clients, and as entities deriving such entitlements as they have from the Ruhan side of the litigation, they cannot be said to have benefited from Stewarts' work in the litigation (being, in effect, on the other side). In summary:

i) So far as the IOM Settlement is concerned, for the reasons set out in Section I above, the assets transferred to the nominees acting for the Orb Claimants were subject to the prior proprietary claims of Mr Ruhan. Stewarts cannot be in a better position than the Orb Claimants so far as asserting a proprietary interest against Mr Ruhan is concerned: see [376] above and note also [217-220] above.

ii) As far as the Geneva Settlement is concerned, a lien against P&M could only arise to the extent that P&M obtained proprietary rights thereunder (and I have held that they did not). To the extent that P&M had acquired such rights (and to the extent of any interest of HPII in them), those rights were not recovered by the side for which Stewarts were acting in the 2012 Proceedings, and were recovered by the Ruhan-side

claimants despite, rather than in any way as a result of, Stewarts' work for the Orb Claimants.

iii) I am unable to accept Stewarts' argument that they can claim such a lien because, on P&M's own case (which Stewarts strongly challenged), Mr Stevens only became aware that Mr Ruhan had not paid him his due from the Qatar Projects as a result of reading Ms Stickler's witness statement filed in the Isle of Man proceedings. Even taking that evidence at face value (and I would not be willing to have made a finding in Stewarts' favour on this basis without finally determining the issue of fact), the fact that a third party derives knowledge of a potential claim from reading a document which is filed in court proceedings does not render any recovery on that claim the "fruits" of the solicitor's work, nor is that tenuous connection sufficient for the recovery to have been obtained through the solicitor's instrumentality.

iv) For these reasons, Stewarts' lien is only capable of attaching to such property as the Orb Claimants became beneficially entitled to as a result of the Geneva Settlement.

387. In these circumstances, Stewarts' claim that the Ruhan-side claimants were or are on notice of Stewarts' lien claim in respect of any interest acquired or to be acquired under the Geneva Settlement does not arise:

i) The argument assumes that Stewarts' lien had arisen over the assets transferred under the IOM Settlement, which (for the reasons set out above) it had not.

ii) Stewarts' lien did not extend to the interests acquired or retained by the Ruhan-side claimants for the reasons set out above.

iii) In any event, this was not a case in which Stewarts had either given notice of the assertion of a lien to the Ruhan-side claimants (in the sense referred to in [382] above) nor had there been any collusion between the Orb Claimants and the Ruhan-side claimants in the negotiations which culminated in the Geneva Settlement in an attempt to defeat Stewarts' lien.

## L3 Is there an identifiable fund (or fund in sight) over which the lien can be asserted?

388. Messrs Thomas and Taylor argue that there is no identifiable fund (or fund in sight) in this case, but only "a random collection of assets now the subject of numerous claims". However, the only claims advanced by Messrs Thomas and Taylor in these proceedings is to their share in the assets recovered under the terms of the Harbour Trust. While determining the extent of that interest has given rise to a number of complicated questions, it is not possible for Messrs Thomas and Taylor simultaneously to advance that proprietary claim and at the same time deny the existence of a recovered fund to which a solicitor's lien might attach.

## L4 Is the requisite causal relationship between Stewarts' work in the 2012 Proceedings and Messrs Thomas and Taylor's share in any recovery made out?

389. Messrs Thomas and Taylor also submitted that the requisite causal relationship or instrumentality between the costs which Stewarts seek to recover through a lien and their recoveries under the Harbour Trust was not satisfied in this case. They take two points:

i) The only work which Stewarts undertook which contributed to any recovery was the limited work done in support of the Isle of Man Norwich Pharmacal applications, which has already been paid for by Harbour.

ii) Much of the work which Stewarts seeks to claim for concerned unsuccessful satellite litigation which made no contribution to any recovery.

I am satisfied that these points are without merit.

390. The first complaint is largely aimed at the IOM Settlement which I have held did not constitute a relevant recovery, which was only achieved as a result of the Geneva Settlement. The Geneva Settlement settled the 2012 Proceedings, in which Stewarts had acted since August 2013, and in my view the settlement came into being because (in effect) both sides had fought themselves and the other side to a state of litigation exhaustion. There was more than a sufficient connection between Stewarts' work in the 2012 Proceedings and the Geneva Settlement to meet the relatively broad causal test necessary to establish a solicitor's lien or to provide the basis for a s.73 charge.

391. As to the issues raised about the alleged satellite litigation, these concern a series of applications made to obtain information which it was thought would reveal a campaign by Mr Ruhan unlawfully to obtain confidential or privileged information from the Orb Claimants or those acting on their behalf, or to put Mr Ruhan in a position to blackmail some of those persons:

i) The attempt to obtain such information began before the period of work to which Stewarts' lien claim relates. On 17 December 2014, Dingemans J gave judgment in proceedings brought by Pro Vinci, Orb and Dr Cochrane against Quest Global Limited granting Norwich Pharmacal relief against Quest Global Limited in relation to investigative work it was suggested that they had been carrying out on Mr Ruhan's behalf ([2014] EWHC 4723 (QB)). Warby J later refused Orb permission to use that material in the 2012 Proceedings ([2015] EHC 1073 (QB)).

ii) There were a series of further applications on this aspect of the dispute over the period 25 September to 21 December 2015, leading to six orders from Walker J.

iii) On 15 January 2016, the Orb Claimants and Pro Vinci sought and obtained a "without notice" order for Norwich Pharmacal relief against Mr Fiddler and Mr Anciano to obtain information in relation to their involvement in what was said to be Mr Ruhan's campaign. The order was set aside because there had been a failure to make full and frank disclosure, and because the application had been brought for the collateral

purpose of obtaining material which could be used against Mr Ruhan in the 2012 Proceedings (Popplewell J's judgment appears at [2016] EWHC 361 (Comm)).

392. I accept that the application before Popplewell J was a notable failure, but that of itself does not mean that Stewarts' (and the rest of the legal team's) costs in relation to that application fall outside the scope of their lien. A party to major and complex litigation may frequently make applications which fail, and result in adverse costs orders, but the litigation nonetheless culminates in a net recovery in the form of a settlement or judgment. Absent a breach of contract on the solicitor's part in recommending or pursuing a particular application, or a lack of authority to do so (to which I turn below), the solicitor's client must take the rough with the smooth when it comes to the payment of fees. Certainly so far as the assertion of a lien against the solicitor's client in support of fees which are due is concerned, it is no answer to the claim that some of the costs of the litigation were incurred on applications or in the pursuit of arguments which did not prevail. Where the claim is advanced against someone other than the solicitor's client, on the "salvage" theory that those interested in recovered property have benefited from the solicitor's efforts, there is more room for argument. In the solicitor-client context, it may be theoretically possible for there to be cases where some of the work done was so obviously unreasonable or so tangential to the recovery that those costs should be excluded from the scope of the lien even though contractually due. Subject to that possibility, I do not believe that close parsing of the different elements of litigation which culminates in a successful recovery is appropriate, provided that (i) the costs in question were incurred for the purpose of or are incidental to effecting the recovery, and (ii) that the work in question was of a kind that "a solicitor would perform in conducting litigation or contemplated litigation".

393. In this case, I am satisfied that the costs incurred in pursuing information about these aspects of Mr Ruhan's conduct were incurred for the purpose of achieving success in the 2012 Proceedings (in particular, to support the argument that Mr Ruhan should be denied equitable relief on the basis that he had come to the court with unclean hands). The information which the Orb Claimants derived from the Quest applications, and in relation to Messrs Fiddler and Anciano, was supplemented by material which was subsequently obtained from Mr Mills, and all of this material contributed to Popplewell J's decision to order a trial of the "clean hands" issue. In his judgment explaining why he had adopted this course ([2016] EWHC 850 (Comm), [105-106]), Popplewell J held that the evidence from Mr Mills had "to be seen together with the evidence before Dingemans J and Warby J of the recruitment of Quest to carry out such behaviour …. and evidence that Mr Anciano was recruited by Mr Ruhan in the Autumn of 2015 to try to suborn one such security officer" and that:

> "As Andrew Smith J observed in the Fiona Trust case at paragraph 19, elements of misconduct must be looked at cumulatively, not just individually, to determine whether they are sufficiently serious and connected with the equity invoked to bring the doctrine into play. What is said by Mr Mills must be considered together with the other allegations which go to make up the unclean hands argument advanced by the Orb Claimants".

394. The result of the applications heard by Popplewell J from 14-17 March 2016 was to place both sides under considerable pressure, and in the case of Mr Ruhan, a significant source of that pressure was the expedited trial of the unclean hands issue, which was set down to be tried between 28 November and 12 December 2016 with a time estimate of 5-7 days, and with tight deadlines for pleadings, disclosure and factual and expert evidence. It is no coincidence that a week after those orders were made, Dr Smith and Mr Ruhan were in contact about a possible further round of settlement negotiations. In these circumstances, it is clear that the legal team's strategy of pursuing material to support the unclean hands argument did play a part in bringing the Geneva Settlement into being, and the fact that not every application undertaken in pursuit of that strategy succeeded on its own terms does not take Stewarts' costs of those applications outside the scope of their lien.

## L5 To what costs claimed by Stewarts does the lien extend?

395. Stewarts assert a lien over costs incurred in the period from September 2015 (costs up to that date being covered by Harbour) up to 5 May 2016, when Messrs Thomas and Taylor claim that Stewarts ceased to act for them. In the course of the hearing, I identified a number of invoices in respect of which the lien was claimed which were addressed to other clients, appeared to involve other matters, or related to the period after May 2016. I will not set out the detail of these matters here, because, to simplify their claim, those invoices were removed from the lien claim in the course of Stewarts' closing submissions (without any admission that the amounts claimed were not recoverable).

396. The amounts for which the lien is now sought fall into three parts:

i) Part A comprises £3,473,940.33 in respect of work done in the period from 5 February to 5 May 2016.

ii) Part B concerns success fees due to junior counsel, Mr Gibson, totalling £1,206,083.08.

iii) Part C comprises unbilled disbursements totalling £488,865.04.

397. Messrs Thomas and Taylor challenge the claim for Mr Gibson's fees relating to the Fiddler/Anciano application, submitting that the application was not successful and therefore no success fee is due. Mr Gibson entered into a CFA on 11 November 2013 in respect of the Orb Claimants' claim against Mr Ruhan for work to be done "until the claim is won, lost or otherwise concluded". The CFA provides:

> "Win, Won etc shall mean that the Claim is Finally decided in the Lay Client's favour … Where the Claim is not a money claim, Win will be defined by reference to the remedy or result sought. For the avoidance of doubt, a compromise that achieves the same ends as that remedy or result will amount to Win".

The Success Fee is payable not by reference to the success or failure of a particular application but the Claim as a whole. In these circumstances, I am satisfied that Mr Gibson's entitlement to the Success Fee was triggered by the Geneva Settlement, which involved the recovery or retention of assets by the Orb Claimants. The position is the same

so far as Mr White QC is concerned, as he was acting on the basis of an identically-worded CFA.

398. Based on my own review of the materials, and with the benefit of the adjustments now made, I am satisfied that the subject-matter of these invoices properly relates to the pursuit of the 2012 Proceedings. There has been no assessment of the costs claimed on the solicitor-own client basis, and, with the exception of certain disbursements, an extension of time would now be required if there is to be such an assessment. I return to the question of assessment below.

**(1) The effect of the 2019 Settlement Agreement**

399. I have held that, among the parties to the Directed Trial, Stewarts are only able to assert a lien against the Orb Claimants. The 2019 Settlement Agreement settled the litigation as between Stewarts, Harbour and Orb. P&M argue that, by the 2019 Settlement Agreement, Stewarts released their entitlement to recover fees from Orb (and it might be argued, given the joint and several liability of the Orb Claimants for Stewarts' fees, their entitlement recover fees from Messrs Thomas and Taylor as well).

400. I accept that clause 2.1 of the 2019 Settlement Agreement is expressed in wide terms, and provides that the Settlement Parties "fully and finally settle all of the Claims among themselves", with "Claims" being defined expansively.

401. However, the 2019 Settlement Agreement must be read as a whole:

i) Clause 2.3(ii) provides:

> "The Settlement Parties do not intend to release or otherwise extinguish their claims to any of the Settlement Assets, the Jersey Settlement Assets, the Arena Property and/or the Arena Settlement Assets (and all such claims shall continue to exist so that they can be enforced for the benefit of the Settlement Parties pursuant to this Agreement) save that such claims shall as between the Settlement Parties be compromised pursuant to the terms of this Agreement".

ii) Further, clause 2.3(i) of the 2019 Settlement Agreement provided that "the Settlement Parties do not intend to compromise their personal or proprietary claims against any Third Party or any Non-Settlement Parties" (such that there could be no settlement of Stewarts' claim for costs against Messrs Thomas and Taylor).

iii) Clause 5, which sets out how proceeds recovered by any of the Settlement Parties would be distributed among the Settlement Parties *inter se*, recorded that Stewarts' claims was limited to £8m, which was described as "the maximum value of Stewarts' claim as set out in paragraph 3 of its Statement of Case dated 22 November 2017". That figure comprised the entirety of the costs claim, including the costs claimed against Orb.

402. Reading the 2019 Settlement Agreement as a whole, I am satisfied that the Settlement Parties were not releasing any proprietary rights, nor any contractual claims on which such

rights depended, but settling the claims *inter se* through an agreed distribution of such amounts as any of them were able to recover through the proprietary claims asserted. In these circumstances, I am satisfied that there is nothing in the 2019 Settlement Agreement which impairs Stewarts' entitlement to a lien over any recoveries achieved by the Orb Claimants.

**(2) The liability of the Orb Claimants**

403. The Conditional Fee Agreement between Stewarts and the Orb Claimants dated 7 August 2013 provides that invoices would be rendered monthly. It also provided for the addition of VAT, although this was in fact only payable by Messrs Thomas and Taylor. On the same date, the Orb Claimants signed a letter of engagement with Stewarts which recorded that Stewarts were pleased to act "in accordance with … our enclosed Terms of Business". Clause 5.9 of the Terms, which were enclosed, provides:

> "When we act for more than one client in relation to a matter, each client will, unless otherwise agreed by us in writing, be jointly and individually liable for the full amount of our charges. If we do agree that each client's responsibility for our charges will be limited to a certain proportion of the total and one or more clients should cease to instruct us, the share of our charges which would otherwise have been payable by them will become the responsibility of the remaining clients in equal shares".

404. There is no evidence before me of any written agreement to contrary effect. While from the outset the fees were split in invoices prepared by Stewarts in accordance with the proportionate shares under the 2003 Oral Agreement (viz 25/40ths for Orb and 7.5/40ths each for Messrs Thomas and Taylor), this reflected the differential VAT treatment, and did not amount to a variation of the joint and several basis of the retainer.

405. In these circumstances, I am satisfied that Stewarts are entitled to assert the entirety of their lien against each of Orb, Mr Thomas and Mr Taylor. To the extent that one of those joint debtors discharges the full amount of the debt, it will have a right to contribution from the others (*Chitty on Contracts* (33rd), 17-027), including a right, once judgment has been obtained against one debtor, to obtain a prospective order directing a co-debtor, on payment by the debtor of its appropriate share, to pay its proportion to the principal creditor. While I did not hear argument on the point, it appears to me at the moment to be implicit in the profit share letter signed by the Orb Claimants and which bears a date of 13 October 2011 that the proceeds were to be split in the agreed proportions (with the result that any costs of recovery would be equally so split). To the extent that any Orb Claimant pays more than their proportionate share of the contractual liability to Stewarts, issues would arise as to whether they would be entitled to the benefit of Stewarts' lien as against the litigation recoveries of the other Orb Claimants by way of subrogation. It is to be hoped that pragmatism on the part of all concerned will ensure that these remain purely theoretical enquiries.

### (3) Should I allow an assessment of the costs claimed?

406. In the preceding paragraphs, I have referred to certain "in principle" issues raised by Stewarts' invoices. However, in addition to those general points, issues might arise in relation to the detail of the charges (for example as to the reasonableness of the number of hours spent on particular tasks etc). Issues of this kind as between the solicitor and its client are generally addressed through the client's entitlement to seek assessment of the costs. Under s.70 of the Solicitors Act 1974, a client has one month from the delivery of the bill to seek an assessment, with the court having a discretion to order an assessment thereafter. If the application for an assessment is made more than 12 months after the delivery of an unpaid bill, an out-of-time assessment will only be permitted "in special circumstances".

407. S.71 of the 1974 Act addresses the position where someone other than the client is liable to pay the bill, and provides that that third party may also apply for assessment as the client could. It is clear that the time limits which apply to applications by a client for an assessment apply equally to a third party, section 71(2) providing:

> "Where the court has no power to make an order by virtue of subsection (1) except in special circumstances, it may, in considering whether there are special circumstances sufficient to justify the making of an order, take into account circumstances which affect the applicant but do not affect the party chargeable with the bill".

408. The provisions of ss.70 and 71 only apply to "statute bills" (i.e. those complying with s.69 of the 1974 Act), which generally exclude the solicitor's right to charge more for the work covered by the invoice. When a solicitor acts under a CFA with a success element, interim bills rendered at the base figure are unlikely to be statute bills because the solicitor is reserving the entitlement to charge more for the same work: Sprey v Rawlison Butler LLP [2018] EWHC 354 (QB); [2018] 2 Costs LO 197.

409. In relation to the invoices relied upon in support of the lien in this case, the invoices for Stewarts' time are statute bills, and the period during which the Orb Claimants could seek an assessment as of right has long passed. I am not persuaded that any special circumstances exist which would justify an extension of time for an assessment on a solicitor-client basis. The hourly rates are fixed by the CFA, and this litigation has provided Messrs Thomas and Taylor with a more than sufficient opportunity to raise any queries, including in the course of Mr Upson's cross-examination. Further, as I have indicated, I have looked carefully at the bills, and raised a number of issues which have led to a significant downwards adjustment to the claim. In these circumstances, not only is there no satisfactory explanation for a failure to seek an assessment in time, but I am not persuaded that ordering such an assessment would serve a useful purpose.

410. However, in respect of some amounts claimed, all concerned with disbursements, no invoices were rendered, but the amounts were claimed and the basis for them were clearly set out in the evidence filed in these proceedings. Given the limited scope for dispute as to these bills in the context of a solicitor-client assessment, I concluded that the appropriate course was to summarily assess those costs myself. I asked Mr Crossley appearing for Messrs Thomas and Taylor to make such points as he wished to make with regard to those

bills in the course of his closing submissions, and I have dealt with those points which he raised.

### (4) The significance of Messrs Thomas and Taylor's claim against Stewarts

411. Finally, I should note that proceedings were issued by Messrs Thomas and Taylor against Stewarts in the Chancery Division in which, as I understand the position, it was alleged that Stewarts breached their duty to Messrs Thomas and Taylor or acted in excess of their authority. I have no knowledge of the detail of those allegations, but it seems likely that they may involve claims which, if made good, would have provided a defence to the amounts claimed, whether by way of the common law doctrine of abatement or an equitable set-off or otherwise. I was told after the hearing that service of those proceedings had been set aside, and that Messrs Thomas and Taylor intend to issue a new claim form. To the extent that a clam of this kind is hereafter pursued by Messrs Thomas and Taylor, it may impact the final amount for which Stewarts are able to exercise a lien over any recovery made by Messrs Thomas and Taylor. However, the fact that the final amount due has yet to be established does not prevent the lien arising (albeit only the final amount can in due course be satisfied by applying the recoveries). The solicitors' lien would be of little use if the client was free to apply any recoveries as it wished at all points prior to final assessment.

412. In these circumstances, I accept that it is open to Stewarts to assert a lien based on the amount of costs claimed now, subject to those adjustments as I have found to be necessary in this judgment, even though the final amount (if any) recoverable by Stewarts is not yet known.

## L6 Should the Court refuse to give effect to the lien as a matter of discretion?

413. At one stage, there were suggestions that the court should refuse to give effect to any lien Stewarts might otherwise have in the Relevant Property by reason of the nature and circumstances of the IOM Settlement. In circumstances in which I have held that the IOM Settlement did not itself give rise to a recovery for the purposes of the lien claim, but only the Geneva Settlement did so, it is not necessary to address the criticisms made (and, in any event, they had fallen away by closing). For the avoidance of doubt, I do not regard any issues which might be raised as to the IOM Settlement as providing a reason for refusing Stewarts a lien over the recovery made by the Geneva Settlement, which involved the settlement of very hard fought litigation in which both sides had a great deal to say about the litigation tactics of the other.

414. Messrs Thomas and Taylor point to the criticisms made of certain applications brought by Stewarts in the period with which the lien claim is concerned (which I have referred to above). However, I do not regard the failure of the Fiddler/Anciano application, for example, or the criticisms made of the application by Popplewell J, as a reason to deprive Stewarts of their lien over any recovery made through the 2012 Proceedings. Those applications formed part of a very long and complex action, and, in any event, the "unclean hands" strategy which they were intended to advance did make a material contribution to the Geneva Settlement.

## L7 Conclusion

415. In these circumstances, I am satisfied that Stewarts have established their entitlement to an equitable lien over the amounts recovered by the Orb Claimants from the 2012 Proceedings, in the amounts claimed by Stewarts in closing submissions, namely:

i) £3,473,940.33 billed but unpaid fees and disbursements;

ii) £1,206,093.08 for Mr Gibson's success fee; and

iii) £488,865.04 for further counsel's fees and disbursements which have not been billed, but which I have assessed;

to the extent that those remain outstanding in the light of my conclusion on the £2m issue at Section O below.

416. I am also satisfied that it is appropriate, no satisfactory reason to the contrary having been shown, to give effect to that lien by granting Stewarts a legal charge under s.73 of the Solicitors Act 1974.

417. However these orders do not preclude the ability of Messrs Thomas and Taylor to pursue the arguments raised in the Chancery Division proceedings they had commenced and may re-commence against Stewarts, which may reduce the amount which Stewarts are entitled to realise from the liened property.

## L8 Stewarts' alternative claims

418. Stewarts advance two alternative claims.

419. First, Stewarts argued that they were entitled to be subrogated to the Orb Claimants and Dr Cochrane's rights as trustees to be indemnified against the costs they had incurred in recovering, preserving and protecting trust assets. I do not need to consider this argument here, in view of my conclusion on Stewarts' lien.

420. Second, Stewarts claim Berkeley Applegate relief which I briefly address in Section N below.

# M HPII

## M1 HPII's claim

421. The assumed basis of HPII's claim is that at the time of the sale of the Hyde Park Hotels to Cambulo Madeira, Mr Ruhan was a director of HPII and also the true beneficial owner of Cambulo Madeira (with Mr Stevens acting as his nominee). On that premise, it is said that the sale of the Hyde Park Hotels involved self-dealing on the part of Mr Ruhan who was thereby in breach of his fiduciary duties to HPII. HPII contends that in these circumstances, it can trace into the profits made on the development and sale of the Hyde Park Hotels, which can in turn be traced into the Arena Settlement and/or the Cooper and McNally Companies.

422. For the purposes of the Directed Trial, I am required to assume that HPII's claim against Mr Ruhan for breach of duty and its entitlement to trace into the proceeds of the sale of the Hyde Park Hotels are made out. However, the Settlement Parties applied to strike-out HPII's upstream tracing case so far as it concerned the Relevant Property. The position as finally crystallised following the hearing of the Strike-Out Application is as follows:

i) HPII now accepts that it has no tracing claim into the Arena Holdcos' shares and it confirmed in the context of the Strike-Out Application that it is not seeking to trace into the ownership of any of the other Transferred Companies.

ii) For the reasons set out in [362] above, I have concluded that the Non-Arena Companies are not the proceeds of the assets transferred under the IOM Settlement.

iii) The only bona fide purchaser for value issues which arise for determination in the Directed Trial are those which relate to the Transferred Assets. To the extent that such issues might arise in relation to the assets transferred prior to the IOM Settlement, they did not form part of the Directed Trial and, so far as HPII's claim to the IUAs are concerned, were not to be determined at the Directed Trial (see [657]-[658] below).

iv) It follows that the only issues of bona fide purchaser for value which remain live at this trial concern the cash paid pursuant to the IOM Settlement – the initial £10m, a further £583,321.80 and a payment made at Messrs Cooper and McNally's direction of £2.5m (together "the IOM Settlement Cash").

v) For the reasons set out in the Strike-Out Judgment at [113], it is clear to summary judgment standard that 75% of the £10m did not emanate from the Hyde Park Hotel profits, but from the Sentrum sale proceeds.

vi) However, further such issues may arise in relation to the receipt by Transferred Companies of underlying assets, which do not form part of the Directed Trial.

## M2 Legal Principles

423. I set out the legal principles relating to the bona fide purchaser for value defence at [130]-[151] above, but left the issue of what is required to establish actual, rather than constructive, knowledge, to this part of the judgment.

424. It is clear that actual knowledge embraces knowledge which would have been acquired but for a person wilfully shutting their eyes to the obvious, or wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make: *Lewin*, 44-126. This was the approach adopted in Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch); [2013] Ch 156, [114], [123] by reference to the five types of knowledge identified by Peter Gibson J in Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note) [1993] 1 WLR 509.

425. Actual notice of a proprietary right presupposes that the right exists. As Lord Hope observed in R v Montila [2004] UKHL 50; [2004] 1 WLR 3141, [27], "[a] person cannot know that something is A when in fact it is B. The proposition that a person knows that something is

A is based on the premise that it is true that it is A". In this case, I am to assume for the purposes of the Directed Trial that HPII does have a proprietary interest in the IOM Settlement Cash, which has required me to determine whether someone knows that something is A, without determining whether it is in fact A.

426. There is a fundamental, but at times elusive, distinction in the law between knowledge and belief: Collier v Williams [2006] EWCA Civ 20; [2006] 1 WLR 1945, [68]-[69]; R v Hall (1985) 81 Cr App R 260. A mere belief that a fact is true is not of itself knowledge that the fact is true, and it follows, in my view, that it is not the position that in all cases where a person believes a fact is true, and it is in fact true, they can be said to have knowledge of that fact.

427. Mance J dealt with the requirements for knowledge in ICCI v Royal Hotel [1998] Lloyd's IR 151, 162 in terms which I have found helpful in addressing the distinction between knowledge and belief in the present context. An issue arose as to whether a contract had been affirmed, which required actual knowledge by the affirming party of their right to avoid. Mance J commented that:

> "Whether a person has knowledge is for lawyers essentially a jury question. The meaning of knowledge has perplexed philosophers from Plato (and no doubt before) to after A J Ayer, and been said by some to be ultimately unanswerable. But as a matter of law and everyday understanding some points are reasonably clear. First of all, I reject Miss Bucknall's submission that a party must be taken to know whatever he could properly plead. The submission cannot be accepted, even if attention is confined to dishonest conduct which, under the Code of Conduct of the Bar of England and Wales, requires a pleader to have
>
> > '... before him reasonably credible material which as it stands establishes a prima facie case.'
>
> At the other extreme, knowledge is not to be equated with absolute certainty, itself an ultimately elusive concept. The impossibility of doubt which Descartes found only in the maxim 'I think, therefore I exist' is not the criterion of legal knowledge. For practical purposes, knowledge pre-supposes the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. The element of regression or circularity involved in this description indicates why knowledge is a jury question."

## M3 The facts

428. Even though Harbour and the Orb Claimants did not, on my findings, acquire a beneficial interest in the assets transferred under the IOM Settlement until Mr Ruhan released his claims by the Geneva Settlement, it was common ground between the Settlement Parties and HPII that the question of whether Harbour and the Orb Claimants were bona fide purchasers for value was to be determined at the point when Dr Cochrane and SMA

acquired legal title to the Transferred Assets (on my findings as nominees for the Orb Claimants).

429. It was also not disputed before me that the Orb Claimants were purchasers for value of the Transferred Assets (the Orb Claimants providing releases and a waiver of claims against Messrs Cooper and McNally as part of the IOM Settlement) and that Dr Cochrane and SMA acquired legal title to the Transferred Assets. However, the question of notice was very much in issue. In order for the Settlement Parties to be able to demonstrate that the Orb Claimants lacked notice of HPII's assumed rights, they need to show either:

i) that the Orb Claimants did not have notice of the basis of HPII's claim against Mr Ruhan; or

ii) that the Orb Claimants did not have notice of the basis of HPII's tracing route into the IOM Settlement Cash.

430. For the reasons I have set out at [212] above, I am satisfied that the knowledge of Dr Smith is attributable to the Orb Claimants and to SMA at the time of transfers under the IOM Settlement (and the Geneva Settlement). I am also satisfied that the central role of Dr Smith in these events is such that if he did not have actual or constructive notice of HPII's assumed proprietary rights, no other person acting for the Orb Claimants can have been in any different position. That reflects Dr Smith's central role in these events, the extent to which he had immersed himself in the detail, and his role as the principal source of strategic thinking in the pursuit of the Orb Claimants' claim. As Cooke J noted, Dr Smith was "the architect of it all": [2015] EWHC 262 (Comm), [51].

**(1) Notice of a Breach of Duty**

**The material relied upon by HPII**

431. HPII relied on a number of matters in support of its contention that Dr Smith had actual or constructive knowledge of Mr Ruhan's breach of his fiduciary duty to HPII at the time of the IOM Settlement.

432. The Orb Claimants claim First, the fact that the Orb Claimants' case in the 2012 Proceedings was that Mr Ruhan set up schemes and corporate vehicles (including the Cambulo companies) in order to conceal the fact that Mr Ruhan was acquiring and personally profiting from the sales of the Hyde Park Hotels.

433. The Harbour ATE Document Second, the terms of the Harbour ATE Insurance Document, which I accept is likely to have been prepared with Dr Smith's input. The note states:

> "This note focuses on the sale of the three large hotels that surrounded Hyde Park, the former Lancaster Gate, Kensington Park and Kensington Palace Thistle hotels (the 'Hyde Park Hotels') which were acquired by Orb for their residential development potential. Twenty months after the Agreement was concluded in March 2005, Mr Ruhan arranged for HPII, the legal owner of the three Hyde Park Hotels, to enter into a business sale agreement wherein HPII agreed

> to sell to the Cambulo Madeira group of companies the three hotels for a total price of £126 million, a sum that was equivalent to the underlying debt advanced by Morgan Stanley at the time of their original acquisition. Mr Ruhan had secretly caused Cambulo Madeira to be incorporated in the early part of 2005 upon the Island of Madeira for that purpose."

The note then referenced the Qatar Projects:

> "In 2007, Mr Ruhan was introduced by Mr Campbell to a residential development, construction and sale and leaseback opportunity within the Pearl scheme in Doha, Qatar which involved the construction of approximately 16 residential towers. To fund the project, Mr Ruhan again approached Investec Bank who agreed to advance $141 million secured upon Mr Ruhan's interests in Euro Estate Holdings Limited and Cambulo Madeira and its Hyde Park Hotel assets. That facility is evidenced by an Investec Deed which we have a copy of which shows Euro Estates Holdings as one of the Obligers. The Mood Facility was advanced to Mr Ruhan on the 21 December 2007 with the funds being transferred to Unicorn Worldwide Holdings Limited, an important sub holding company of Mr Ruhan's Isle of Man structures. In July 2007, Mr Ruhan obtained final planning consent for residential conversion of the Kensington Park and Kensington Palace hotels and entered into negotiation, aided by the Candy brothers to sell the sites to Abu Dhabi interests. On 26 March 2008, De Vere Estates, a company owned by members of the Abu Dhabi ruling family completed their purchase of the Kensington Park and Kensington Palace hotels for £320 million."

The summary states that "[d]uring his ownership, without the [Orb] Claimants' consent, Mr Ruhan used the security of the Orb assets and funds from the sale of those assets to advance his various other business interests including the Sentrum Group, Global Marine Systems and in particular, developments in Qatar."

434. The January 2013 Emails Third, a series of emails involving Mr Campbell, Mr Ruhan and Dr Smith in January 2013. The first is an email of 9 January 2013 from Mr Campbell to Mr Ruhan (which was clearly sent in co-ordination with Dr Smith) in which Mr Campbell raised the issue that HPII's accounts did not disclose that the Hyde Park Hotels sale was to a related party and that a reader would assume the sale was to "genuine unrelated third parties". Mr Campbell then noted:

> "On the basis of the information provided by the [Orb Claimants] and your previous personal statements, I have cause to suspect the statement that those hotels were disposed of to Cambulo as an (unrelated) third party cannot be correct. Given the common ownership (direct/indirect and/or through persons acting in concert) and control evidenced by the documents and events referred to above, I am unable to reconcile the various disclosures contained in

> the HPII accounts and your director's legal obligations under FRS8 and Companies Act sections 317 and 320 amongst others…"

435. Mr Campbell sent a chasing email to Mr Ruhan on 21 January 2013, copying in Mr McNally, Mr Chan, Dr Smith and Ms Irving, and stating:

> "Your lack of denial, the claimant's evidence, coupled with the comments that you made to Hock Chan and I in August would indicate the Hotel sales were to related parties and you can only have done so having deliberately misled the auditors, Morgan Stanley and Thistle. This is in spite of your obligations under the Companies Acts and accounting standards…"

436. While the thrust of Mr Campbell's emails relate to accounting practice, I accept that it is plain from them that the allegation made extended to a breach of Mr Ruhan's director's duties to HPII, and I cannot believe for a moment that Dr Smith was not alive to this implication. Mr Ruhan responded on 21 January 2013 denying that the sale was to a related party. After receipt of this email, Mr Campbell emailed Dr Smith and Mr Chan. Mr Campbell noted that in responding, Mr Ruhan "is not making matters better for his response does not deal with the issues that were put to him.. [sic] the email bears no scrutiny whatsoever!" Mr Campbell then noted Mr Ruhan's denial and stated: "[w]e known its [sic] not the case, controlled by Cooper and McNally for at the time the deal was done Cooper was no where [sic] in sight as it was controlled by Arena and the trustees to the Arena settlement .. and the only beneficiary at the time was one AJR!" Mr Campbell then encouraged Dr Smith and Mr Chan to "take up matters" with Mr Ruhan's lawyers.

437. A further email was then sent by Mr Campbell to Dr Smith and Mr Chan which set out a proposed email to be sent to Mr Ruhan (although it is not clear whether it was in fact sent). The draft stated:

> "By responding the way that you did you have given [Dr Smith] the invitation to approach [your lawyers] direct… one he tells me his going to take up. You might be right that you have made no misrepresentation that require the financial statements to be restated based on all the evidence. The problem is that he will also need to look at this and if he thinks that you are into tax evasion then he is under a duty to report you. He cannot tip you off and you will never know. It is you that will have started that process running by responding the way you have. Despite what you may think I am independent of Gerald Smith and anyone independent (including your own lawyers) will conclude that you have some explaining to do and that is probably sufficient for your lawyers to make a report to the police and HMRC."

438. <u>The Pro Vinci Letter</u>: Fourth, the letter sent from Pro Vinci to Messrs Cooper and McNally on 21 May 2013 which noted that HPII had filed accounts addressing the sale of the Hyde Park Hotels which were "inaccurate and false" because they did not make "proper third party disclosures as to owner and controller of the Cambulo companies".

439. The Campbell-Smith Texts: Fifth, texts sent shortly after the IOM Settlement in mid-2014 which discussed the prospect of the Orb Claimants purchasing HPII's largest creditor and sole shareholder, HPHG Holdings. There is a reference in a text from Dr Smith on 28 July 2014 to Mr Ruhan having "no defense to the hotel charges" (it being unclear whether this was a reference to a debt claim for charges incurred by Mr Ruhan at one of the hotels owned through HPII or some other type of claim). Dr Smith replied asking Mr Campbell to "get all you can on HP Holdings group ltd etc. we can close this all down through that mechanism." On 6 August 2014, Mr Campbell texted Dr Smith stating "[o]n reflection I would move to close HP Holdings now and not delay.. I will get the information and even if it is not what is expected I would recommend proceeding as it will be a blow to them when they are told that you have it and what you intend to do .. more blofeld". Mr Smith replied "[a]gree." I accept that these texts show that Dr Smith had identified that HPII had potential claims against Mr Ruhan, albeit the texts themselves do not expressly refer to claims arising from the Cambulo Transaction.

## The points raised by the Settlement Parties

440. The Settlement Parties raised a number of points which they submitted weighed against any suggestion that Dr Smith or a reasonable person in his position would have known that HPII had a claim against Mr Ruhan for breach of duty:

i) HPII had been dissolved prior to the IOM Settlement (on 29 May 2010).

ii) It was at least arguable that HPII had rejected the corporate opportunity to make a profit from the Hyde Park Hotels so that Mr Ruhan was not in breach of his duty to HPII (relying in this regard on Peso Silver Mines v Cropper [1966] SCR 673 and the decision of Cockerill J in Recovery Partners v Rukhadze [2018] EWHC 2918 (Comm); [2019] Bus LR 1166, [66]-[67]).

iii) Any claim by HPII would or might well be barred by limitation.

iv) Any claim required rescission of the Cambulo Transaction (which has still not taken place), relying on Guinness Plc v Saunders [1990] 2 AC 663, 698D-E and the decision of the New South Wales Court of Appeal in Greater Pacific Investments Pty Ltd v Australian National Industries Ltd (1996) 39 NSWLR 143.

## Conclusion

441. I remind myself that the sole question is whether, on the assumption that Mr Ruhan had in fact breached his fiduciary duty, the Orb Claimants (through Dr Smith) either knew this, knew facts from which a reasonable person with the relevant attributes would have concluded that an actionable breach had probably occurred (type 1 constructive notice) or facts which would have led a reasonable person to have serious cause to believe that this might be the position (or to appreciate that there was a serious possibility that this was the position), and to undertake reasonable investigations which would have led to type 1 constructive notice (type 2 constructive notice).

442. I will deal with the Settlement Parties' legal objections first, approaching these points on the assumption that HPII can in fact make out this part of its case, the issue being whether

the Settlement Parties can persuade me (the burden being on them) that those acting for the Orb Claimants would not actually or constructively have appreciated this fact. Taking the points in turn:

i) HPII's dissolution did not remove such claim as it had, but merely vested those claims in the Crown as bona vacantia. I am satisfied that Dr Smith had considerable expertise in the formation and dissolution of companies, and (as the Pro Vinci Letters drafted with heavy input from him make clear) of the legal regime relating to companies and their directors. As a highly intelligent and devious businessman, I am confident that he was aware that HPII's dissolution did not bring an end to its claims, and that HPII could be restored to the register to assert them, with retrospective effect (as in due course happened under s.1032(1) Companies Act 2006 with effect from 13 July 2015 ). I am also satisfied that a reasonable person with Dr Smith's business experience would have been similarly so aware.

ii) Given the secret nature of Mr Ruhan's involvement in the Cambulo Transaction, and Dr Smith's knowledge (as apparent from the January 2013 Emails) that no such involvement had been revealed in HPII's accounts or disclosed to HPII's shareholders, I am not persuaded that Dr Smith could have or did believe that Mr Ruhan's conduct did not involve a breach of duty because HPII had not itself sought to exploit the development opportunity represented by the Hyde Park Hotels. Nor do I believe a reasonable person in Dr Smith's position would have reached that conclusion.

iii) Given the secret nature of what, on Dr Smith's understanding, had taken place, I am not persuaded that Dr Smith would have believed that it was too late for HPII to bring any claim arising out of Mr Ruhan's involvement in the Cambulo Transaction.

iv) Nor do I accept that Dr Smith, or a reasonable person with his attributes, would have concluded that it was not probable that there had been an actionable breach of duty because HPII had not sought to rescind the Cambulo Transaction. HPII's proprietary claim to the HPII profits was not dependent on setting aside the Cambulo Transaction, but involved tracing into the profits Mr Ruhan had made from his undisclosed participation in that transaction. HPII was entitled to adopt Mr Ruhan's transaction, effected in breach of trust, and trace into its proceeds.

443. Turning to the substance of the matter, on the basis of the factual matters set out above, I am satisfied that the Orb Claimants, through Dr Smith, had a firm belief that Mr Ruhan had acted in breach of his fiduciary duty to HPII in the Cambulo Transaction, and a sufficient justification for that belief to characterise their state of mind as one of knowledge of a state of affairs rather than a mere belief that this would prove to be the position:

i) Dr Smith believed, and objectively had strong grounds for believing, that Mr Ruhan had personally profited from the sale of the Hyde Park Hotels.

ii) Dr Smith knew that Mr Ruhan was a director of HPII and that the likelihood was that his involvement in the Cambulo Transaction involved a breach of fiduciary duty. Further, in my view, a person in Dr Smith's position would have at least a basic

understanding of the responsibilities of directors including on profiting and self-dealing.

iii) This knowledge is apparent from the January 2013 Emails and the subsequent Pro Vinci letter, which made clear allegations of a failure by Mr Ruhan to disclose his involvement in the Cambulo Transaction and of breach of directors' duties by Mr Ruhan.

iv) It is also something which was inherent in the Orb Claimants' own claim, as Cooke J made clear in exchanges with Mr White QC for the Orb Claimants on Day 2 of the February 2015 hearing. Cooke J noted that it was the Orb Claimants' case that the 2003 Oral Agreement had been concluded to avoid problems with HPII's other shareholders. Cooke J then observed:

> "What he [Mr Ruhan] achieves by what takes place, the transfers to Cambulo, on your case, is that he manages to see off Morgan Stanley and Thistle with repayments of loans and nothing else, and then gets 100% of the profits for himself".

Mr White QC agreed. That implication of the Orb Claimants' own case would no more have been lost on Dr Smith than it was on Cooke J.

444. In these circumstances, I am satisfied that Dr Smith had actual knowledge that there had probably been a breach of duty by Mr Ruhan. If it were necessary, I would conclude that the Orb Claimants had type 1 constructive notice. In these circumstances, it is not necessary for me to consider whether type 2 constructive notice was made out, albeit I should record that I find it difficult to see how there could be any world in which the assumption I am proceeding on (that Mr Ruhan was in breach of duty in fact) was true, in which reasonable enquiries by Dr Smith would not have led a reasonable person in his position to conclude that there probably had been such a breach.

### (2) Notice of a Tracing Claim

445. It is not enough for the Orb Claimants (through Dr Smith) to know that Mr Ruhan had probably breached his fiduciary duties to HPII through his undisclosed participation in the Cambulo Transaction. The requirements of actual or constructive notice must extend to the fact that the breach probably gave HPII a proprietary right to the IOM Settlement Cash. HPII alleged that Dr Smith has such notice.

### The materials relied upon by HPII

446. The Particulars of Claim in the Orb Proceedings: First, HPII relied on the fact that the Orb Claimants were themselves asserting that it was possible to trace the profits of the Hyde Park Hotels into Mr Ruhan's assets in their Particulars of Claim in the 2012 Proceedings. However, the Particulars of Claim do not identify any particular tracing route, or identify the assets into which the profits could be traced. While I accept, therefore, that it can be inferred from the Particulars of Claim that the Orb Claimants were aware that Mr Ruhan's breach of fiduciary duty would probably allow them to trace into the profits from the Hyde Park Hotels (wherever they went), the Particulars of Claim take matters no further than that.

That remained the position when the Amended Particulars of Claim were served in 2015, in which the Orb Claimants continued to assert the position in the most general terms, with the only detail being given in relation to the £92m paid to Mr Stevens.

447. The First IOM Norwich Pharmacal Evidence: Second, HPII points to the witness statements dated 30 August 2013 submitted by the Orb Claimants in support of the First IOM Norwich Pharmacal Application:

i) In her statement, Dr Cochrane stated that the Orb Claimants "…assert a proprietary claim in the moneys moved to the Isle of Man and onwards through the structures managed there by the Bridgehouse Team…"

ii) In his statement, Mr Campbell explained his involvement in the Qatar Projects and the use of the Cambulo companies as security for loans made in connection with them. He then stated that "…I have been provided with a copy of the Defence filed by Mr Ruhan. [H]is denial of his interest in Cambulo Madeira completely flies in the face of the factual situation and his actions following on from the Agreement with the Claimants."

iii) In his statement, Mr Taylor expressed the view that "[t]he Defence of Mr Ruhan is in my view a complete fiction intended by him to deny the existence of the profit share and the Claimants' entitlement to substantial assets held in structures located and administered in and through the Isle of Man."

iv) Finally, in his statement, Mr Thomas stated his belief that "Mr Ruhan, through his Isle of Man structures that are operated by Simon Cooper and Simon McNally, sits on substantial assets, a large part of which arose through the ORB contract."

I accept that these statements evidence a belief, on the part of the Orb Claimants or those working with them, that Messrs Cooper and McNally held assets on Mr Ruhan's behalf, and that the profits from the sale of the Hyde Park Hotels were probably held somewhere within that structure. It will be necessary in due course to consider the quality of and basis for that belief.

448. The Harbour ATE Insurance Document: Third, this document, the relevant sections of which have been set out at [432] above, which stated that "Mr Ruhan used the security of the Orb assets and funds from the sale of those assets to advance his various other business interests including the Sentrum Group, Global Marine Systems and in particular, developments in Qatar". Pro Vinci also prepared a schematic of fund flows which was attached to the insurance document, which showed a high-level understanding on the part of the Orb Claimants of various routes by which it might be possible to trace the Hyde Park Hotel profits into the Arena Settlement.

449. The Second IOM Norwich Pharmacal Evidence: Fourth, HPII referred to the witness statement of Dr Cochrane dated 9 October 2013 which was filed in support of the Second IOM Norwich Pharmacal Application. Dr Cochrane stated that the First IOM Norwich Pharmacal Application had provided a large volume of documents relating to the Qatar Projects and that "the movement of the Orb assets, which are the subject of the English Proceedings, can now be traced from Orb directly into the companies that are part of the

Arena Arrangement". No detail was given of any documents said to support that statement, or of any particulars of the tracing route. She further stated that:

> "At paragraph 7.12 Schematic 3 item 9 of my first witness statement (GAC1A) I referred to certain English proceedings between a Mr Al Jufairi and Mr Ruhan/ Unicorn Worldwide Holdings Limited ('UWH'); which is one of the companies listed on the List of 18) relating to the Qatar project outlined above. At pages 257-270 of GAC2A, obtained as part of the Initial Disclosure Order, is a copy of a draft board minute, undated but signed, and a dated but unsigned similar board minute of UWH that describes a proposed settlement between UWH and its affiliated companies (together the 'BT Group'), [the Bridge Tower Group of companies] that were incorporated for the purpose of developing residential tower blocks in the Pearl Development, Doha, Qatar. The board minute states that the settlement figure of $135 million would be received by UWH which would deliver net to UWH $90,440,000 after expenses. Attached to the board minute as page 265 is a copy of a Without Prejudice Non-Disclosure Agreement between various Bridge Tower Companies, UWH, Bridgehouse Capital Limited, Bridgehouse Partners LLP, Mr Ruhan, Mr McNally, and Mr Abdullah AI Jufairi and others. The document is signed on behalf of the various Bridge Tower, Bridgehouse Capital, Bridgehouse Partners companies by Mr McNally in eleven different capacities, i.e. this document suggests that Mr McNally was an authorised signatory of all of these eleven companies,
>
> From the above explanation of the relevance of the various Safe Contents List namely, the materials relating to the Mood Facility, Bridge Tower 1 and UWH and the documents relating to the 18 companies which are amongst the documents in the safe are very relevant to the Claimants' claims in the English Proceedings. In particular, the fact that the former Orb assets have been used (as security) to return a benefit to Mr Ruhan (in which the Claimants are entitled to share under the 6 May 2003 agreement) of at least $135 million United States Dollars. The documents explaining the true transaction and what has happened to that $135 million have not been produced, under the Initial Disclosure Order and are sought under this Claim."

450. The "Without Prejudice Non-Disclosure Agreement" in question involved BT7 to BT9, BT11 to BT12 and BTH2. No explanation was given of how the profits from the Hyde Park Hotels could be traced into the payments of $135m or $90m referred to, nor which assets were said to represent the traceable proceeds of any such payments.

451. The IOM Ex Parte Application Evidence: Fifth, an affidavit of Ms Stickler dated 24 March 2014, and served in support of the Orb Claimants ex parte application against Mr Stevens

and companies connected with him in the Isle of Man (which was ultimately withdrawn), states:

> "In particular, it has come to light from the documents obtained pursuant to the Disclosure Orders that the Hyde Park Hotels (which formed part of the Orb Assets transferred to Mr Ruhan) were, via Cambulo-Comercio International E Servicios Sociedade Unipessoal LDA ('Cambulo Madeira') and the assistance of Mr Anthony Edward Stevens ('Mr A Stevens'), used to leverage finance for a residential construction sale and leaseback project in Portia Arabia and the Pearl, Doha, Qatar ('the Qatar Project'), a purported settlement of the Qatar Project resulted in the sum of £91,839,921.09 ('the £91 million') being transferred to a bank account of Legion Management Corp. held at the Royal Bank of Scotland International Limited in the Isle of Man. At Index 6 is a copy of the Spanish and English translation of a notarial deed that records that Mr Cooper and Mr McNally were two of the three Directors of Legion Management Corp. prior to its dissolution on the 16th October 2013. The £91 million was then transferred to various entitles including the First, Third, Fourth and Fifth Defendants. Further details in relation these entities and the transactions can be found below."

452. Ms Stickler then set out what she described as the "convoluted tracing of the £91 million". She set out a description of Mr Ruhan's actions in incorporating certain Cambulo companies, the sale of the Hyde Park Hotels and the Qatar Projects and what was said to be her understanding of the profits made from the sale of the Hyde Park Hotels and the use made of those profits. She then stated:

> "At Index 30 is a schedule from the October Order that describes a series of payments transferred from Qatar to Unicorn Worldwide Holdings Limited in partial settlement of a series of contract claims that total $157,364,148 from 13 May 1999 [sic] until 1 March 2011. It is, I believe, very relevant that these monies were paid to Unicorn Worldwide Holdings Limited a principal sub holding company of the Arena Arrangements rather than being 'repaid' to Mr A Stevens' company Euro Estates as would have been expected if the loan from Euro Estates which I describe in the following paragraphs had been a genuine third party loan."

453. HPII submits this passage shows that the Orb Claimants were fully aware that very large sums had been paid back into Arena Settlement from the Qatar Projects. I accept that the document records an understanding that $157,364,148 appeared to have been returned from the Qatar Projects to Mr Ruhan, albeit the payments were relied upon not for the purpose of asserting an entitlement to trace into the $157m, but to support the inference that Mr Stevens had received the £92m into which the Orb Claimants were seeking to trace as a nominee rather than in his own right. This is not surprising, in circumstances in which the purpose of the affidavit was to support an application for injunctive relief against Mr Stevens.

454. The English Freezing Injunction Evidence: Sixth, HPII referred to an affidavit of Ms Stickler dated 3 June 2014 filed in support of the Orb Claimants' application for injunctive relief against Mr Ruhan and other entities. The document, and the Cooke J judgment which was also relied upon by HPII, postdate the IOM Settlement. These documents are relevant, therefore:

i) to the extent that they cast light on the state of knowledge of those acting on behalf of the Orb Claimants in the period up to the IOM Settlement; and

ii) as evidence of what additional information might have been obtained if further enquiries had been made before the IOM Settlement.

455. I accept that this document must be read keeping in mind that the Orb Claimants had already recovered de facto control over the assets transferred under the IOM Settlement, and their focus was on asserting an entitlement to trace into the £92 million obtained by Euro Estates in November 2012 in return for releasing their rights under the two loans made in relation to the Qatar Projects. Ms Stickler stated in relation to the Qatar Projects that:

> "The Cambulo Profits can also be traced into the Bridge Tower Companies (defined at paragraph 108), a further group operating, at all relevant times, under Mr Ruhan's control, and assets held by those companies, particularly in Qatar, and into profits realised from those assets ('Qatar Profits'). A further part of the Cambulo Profits was used to repay certain loan facilities obtained by the Bridge Tower Companies, which loans had also been acquired using the Hyde Park Hotels as security for the purpose of investing in a residential construction, sale and leaseback project in Porto Arabia and the Pearl, Doha, Qatar (the 'Qatar Project'), and with the intention of using the Cambulo Profits to repay those facilities.
>
> Consequently, if the £91 million derives from Qatar Profits, the £91 million and the other Relevant Assets remain the traceable products of the Claimants' interest in the Orb Assets. In correspondence, the Second Respondent, Mr A Stevens, claims that the £91 million represented profits realised from the Qatar Project. Even if the £91 million did in fact derive from Qatar Profits rather than the Sentrum Profits, the Claimants maintain the £91 million still represents the traceable product of the interest in the Hyde Park Hotels.
>
> The Applicants have reason to believe that further Qatar Profits have been received by the Second Respondent, Mr A Stevens, as directed by Mr Ruhan, and yet further Qatar Profits may also soon be received by the Second Respondent. The Applicants also fear that funds left in the control of Mr A Stevens will, given the events set out in this affidavit and the unsatisfactory Akin Gump correspondence, be moved out of the Applicants' reach."

456. Ms Stickler set out the Orb Claimants' case that the profits from the Hyde Park Hotels could be traced into Sentrum and from there into the £92 million. She then dealt with an

alternative argument that the Hyde Park Hotel profits could be traced into the Qatar Projects and then into the £92 million.

457. The Cooke J Judgment: Finally, HPII referred to the judgment of Cooke J handed down on 11 February 2015 and reported at [2015] EWHC 262 (Comm). Cooke J observed at [14] that "[t]he issues centre on a payment of just under £92 million derived from the sale of Sentrum Holdings Ltd which was ultimately payable to Euro Estates Holdings Ltd as set out below… what is alleged here is that the £92 million paid by Sentrum properly represents the profits made on the Hyde Park Hotels because there is a sufficient causal and transactional link to render it a substitute for tracing purposes."

458. At [23-24] Cooke J concluded that:

> "On the evidence before the court, there is no causal link between the profits made on the Hyde Park Hotels and monies in the hand of Sentrum Holdings Ltd which were used to pay the £92 million. It is asserted in the claimants' evidence that Orb Assets were used to set up the Sentrum data centres, that Mr Ruhan funded Sentrum from the Orb Assets and used them to secure Sentrum's borrowings. Ultimately, the claimants mainly rely on an inference that profit on the Thistle Lancaster Gate Hotel of £7.76 million was available for use at the relevant time in establishing Sentrum but there was no evidence at all that these funds were used in the way suggested. There was no evidence that they ever went into the Arena Settlement. The allegation was based solely upon speculation by Ms Stickler and supposed verification by Mr McNally in his first affidavit at paragraphs 4 and 5 and 14 to 17, without any supporting evidence in the shape of documents, despite the fact that the claimants have had access to the Arena Settlement documents in the circumstances I have already outlined (since October 2013 and March 2014)
>
> In the light of the evidence from the defendants, in my judgment the point is unsustainable."

459. Cooke J went on to note at [34] that:

> "The claimants submit that there is a sufficient causal and transactional connection between Euro Estates' use of the profits on the sale of the Hyde Park Hotels to fund the loans made to Bridge Tower Holdings 1 and 2 (for it to pay off the Investec loan and as working capital for the Qatar development) and the payment of £92 million as a part recovery under those loans. The question that arises is whether or not, on those facts, as they appear from the evidence, the £92 million payment can be said to represent the profit share so as to amount to a substitute asset for the purpose of tracing. It is of course true that the loans made to Bridge Tower Holdings 1 and 2 were not repaid by those companies at all and that the £92 million approximately was paid by another company allegedly owned by Mr

> Ruhan (Sentrum) but in the overall context of Mr Ruhan's empire and the allegations made as to his use of corporate entities within it, I consider that tracing the profits into this payment by Sentrum cannot be said to have no realistic prospect of success. There are plainly fact sensitive issues involved here."

460. However, Cooke J refused to permit service out of any claims in circumstances where the Orb Claimants, through the IOM Settlement, had already recovered more in monetary terms than their best prospective entitlement: [47]. Cooke J noted at [46] that:

> "It appears that the claimants have sold Global Marine Systems for a price of £75 million in September 2014 and that Unicorn has recovered some $150 million between 2009 and 2011 in respect of the Qatar project. There are traceable proceeds of the Qatar assets which are now in the claimants' control as a result of the transfers which took place under the Isle of Man Settlement."

461. HPII submitted that Cooke J had plainly considered that, in principle, there was a seriously arguable case that the Orb Claimants could trace the Hyde Park Hotels profits through the Qatar Projects into the £92 million, and suggested that if Cooke J was prepared to endorse a claim through the Qatar Projects into the £92 million, then it was arguable that anything coming out of the Qatar Projects represented traceable proceeds of the Hyde Park Hotel profits.

## The Settlement Parties' arguments

462. The Settlement Parties pointed to the lack of any detail in the various documents relied upon by HPII before the Cooke J judgment. However, they placed most reliance on the February 2015 hearing before Cooke J.

463. They noted that:

i) Cooke J had held that "the [Orb] Claimants have had, over an extended period of time, every opportunity to examine the documents held in the Arena Settlement, the assets belonging to them, the transactions undertaken by them and the loans and distributions effected by them" and were "in a strong position to see, from the documents, what has been going on and to make good any allegations that they wish to make in relation to the transactions undertaken, loans made and profits obtained" ([12]).

ii) Cooke J had laid bare the willingness of the Orb Claimants to assert tracing claims with no sufficient support (for example in relation to the £7.76m from the Lancaster Gate Hotel, which was said by the Orb Claimants to have gone into the Arena Settlement without "any supportive evidence in the shape of documents, despite the fact that the claimants have had access to the Arena Settlement documents since … October 2013 and March 2014" ([23]), with a similar observation about an alleged tracing claim in respect of $40m paid to Minardi ([35], a claim which Cooke J held "falls at the first hurdle").

## Conclusion

464. I remind myself that the sole issue which arises for determination is whether Dr Smith and the other persons acting for the Orb Claimants around the time of the receipt of the IOM Settlement Cash had either actual or one of the two species of constructive notice that HPII were probably entitled to trace into the IOM Settlement Cash:

i) 25% of the £10m paid on 15 November 2013.

ii) £582,321.80 paid by Equinox Trustees Ltd from an account held for Messrs Cooper and McNally at NatWest Bank on the Isle of Man, on 1 April 2014.

iii) £2.5m paid from an account of Devonshire Investments Ltd on 25 March 2014.

465. I am satisfied that no one on the Orb Claimants' side had actual knowledge of the probable existence of a proprietary right on HPII's part in any of these amounts. I am sure that the Orb Claimants hoped, for their own purposes, that the profits from the Hyde Park Hotels could be traced into as many of the assets held by Messrs Cooper and McNally as possible, and were willing in litigation to assert a belief that, in the most general terms, this was indeed the position. However, this was a speculative rather than firm belief (indeed little more than an aspiration), and there were no facts known to those acting for the Orb Claimants which provided sufficient support for that belief to make it probable as a matter of fact:

i) Dr Smith, Dr Cochrane, Ms Stickler and Ms Irving (and indeed all those on the Orb Claimants' side of the divide) had no first-hand knowledge of what had happened to the amounts recovered from the Qatar Projects, and the essentially speculative nature of their understanding of these issues is clear from the fact that (as is now accepted) the Hyde Park Hotel profits cannot be traced into the Arena Holdcos' shares.

ii) The extent to which the Orb Claimants' tracing assertions in the 2012 Proceedings (including the various witness statements) exceeded the bounds of any supporting material is also clear from [23] and [35] of the Cooke J judgment, and from the assertion in Ms Stickler's affidavit of 3 June 2014 of an entitlement to trace the profits of the Hyde Park Hotels into Sentrum, a claim Cooke J found to be unarguable, and which HPII has made no effort to resurrect. That provides a further reason why HPII cannot advance its case by inviting the Court to draw adverse inferences against the Settlement Parties and Messrs Thomas and Taylor for not calling evidence from Dr Smith, Dr Cochrane, Ms Stickler and Ms Iving – those individuals had no knowledge which could have assisted the court on the detailed tracing questions.

iii) I do not accept that the reference in [46] of Cooke J's judgment is a finding by Cooke J that there was an arguable tracing route from the Hyde Park Hotel profits into the Arena Settlement. It was merely identifying that the amounts over which the Orb Claimants had exercised a right of self-help included the proceeds of the sale of GMSL (i.e. that these profits were the fruits of the self-help remedy and needed to be brought into account when calculating the amount the self-help remedy had realised).

iv) With the exception of the claim to trace into the £92m, the Orb Claimants' statements that the documents obtained under the Isle of Man Norwich Pharmacal orders supported their tracing claim were no more than unsupported assertions, always made at a level of generality, without identifying supporting documents, which the Orb Claimants were unable to make good before Cooke J.

v) HPII has been unable to point to any information known to those acting for the Orb Claimants which provided a proper foundation for any firm belief that the Hyde Park Hotel profits could be traced into the IOM Settlement Cash. With the exception of the £92m paid to Mr Stevens, the wider assertions in witness statements relied upon by HPII are unsupported either by any detail of the tracing route or contemporaneous documents, and in most cases come from individuals who could have had no first-hand knowledge of the position.

vi) While Messrs Cooper and McNally had been involved on the Ruhan side, they were unable to point the Orb Claimants to any material which linked the Hyde Park Hotel profits to anything other than the £92m paid to Mr Stevens, as is apparent from the Orb Claimants' acceptance that they were unable to make good such a case before Cooke J (see [466(ii)] below), and the wholly exiguous nature of the "Recoveries Spreadsheet" document Messrs Cooper and McNally commissioned in 2016, which I address at [90] of the Strike-Out Judgment.

466. For essentially the same reasons, I do not accept that a reasonable person in the position of those acting for the Orb Claimants would have concluded that it was probable that HPII had a proprietary right to the IOM Settlement Cash. I accept, on the basis of the material available when the payments were received, that there was a possibility that this might be the position, and that it was a sufficiently serious possibility to require further enquiries. However, had the Orb Claimants carried out such further enquiries as were reasonably open to them at the time of the IOM Settlement – or indeed at any point up to and including the Geneva Settlement - they would not have ascertained information which would have led a reasonable person to conclude that it was probable that HPII had a proprietary right to some part of those three cash payments:

i) First, I am satisfied that the Orb Claimants had every incentive before and after the hearing before Cooke J to investigate the issue of whether the profits from the Hyde Park Hotels could be traced into Mr Ruhan's structure, and if so into which assets: in order to support their argument that they were entitled to retain the assets transferred under the IOM Settlement notwithstanding Mr Ruhan's counterclaim; to meet or partially answer any case that they had over-recovered in fact; and to pursue Mr Stevens. In following this course, they had the benefit of Stewarts and a team of experienced counsel. I accept Mr Upson's evidence that the Orb Claimants and their legal team knew that the issue of whether the Hyde Park Hotel profits could be traced into the assets in the Arena Settlement would be one of the significant issues on the agenda before Cooke J and that the only viable tracing claim which the Orb Claimants were able to identify was to the £92m paid to Mr Stevens.

ii) One of the issues which Cooke J raised with the Orb Claimants was how far they could link the Hyde Park Hotel profits with assets in the Arena Settlement. The

position of the Orb Claimants at that hearing (which I accept reflected the reality) is that they were unable to do so;

a) On Day 1, pages 32-33, Mr White QC stated that "the [Orb] Claimants of course don't know what went on inside the Arena Settlement so we can't point to particular transfers". Cooke J pointed out that they had had all the documents to perform this exercise for some time. Mr White QC confirmed that they had tried to identify the link. He then stated:

> "I take the force of my Lord saying you have had them [the documents obtained from the Isle of Man Norwich Pharmacals and from the de facto control of the companies transferred under the IOM Settlement] since April [2014], surely if there was something which showed a large amount of the Orb assets going in, surely you would be able to point to. And we can't."

b) Later that day, at pages 93-94, Mr White QC raised the possibility that Mr Ruhan might at trial be able to show that the Orb Claimants could not trace into some of the recovered assets (and by implication, retain sufficient of them to ensure that the Orb Claimants were not "out-of-pocket", such that they needed the further claims against Mr Stevens). Mr White QC also accepted at that stage that the Orb Claimants would not know until trial "which ones we can trace into".

c) On Day 4 of the hearing, there was the following exchange between Cooke J and Mr White QC. Cooke J asked:

> "The question I am asking, Mr White, to which I don't think there is any sensible answer, is why nothing at all has been done to assess what it is that you have recovered and that to which you can therefore legitimately be entitled as a self-help remedy?"

Mr White QC replied:

> "My Lord, I am stuck, as my Lord pressed me and I accept, I am stuck with the unanswered evidence that the value of the assets transferred under these arrangements is 150 to 205 million. What I am urging on my Lord *is not all of that may turn out to be assets to which we have the proprietary claim … One simply doesn't know until the exercise has been done*."

(emphasis added). In short, it was clearly the position of the Orb Claimants before Cooke J that they were not in a position to show that the Hyde Park Hotel profits had gone into the assets received under the IOM Settlement, still less into any particular assets (such as the IOM Settlement Cash).

iii) Second, after the Cooke J hearing, facing Mr Ruhan's counterclaim to recover the assets transferred under the IOM Settlement, the Orb Claimants were unable to provide any particulars of their tracing claim into the assets they held in their Amended Particulars of Claim.

iv) Third, it is legitimate to look at the position as it appeared at the hearing of the Strike-Out Application. With the benefit of the material identified at [120] to [122] of the Strike-Out Judgment, it is clear that there is no right to trace into 75% of the £10m, nothing which evidences any form of link between the Hyde Park Hotels profits and any other part of the IOM Settlement Cash, and that the tracing claim generally remains thin, and only survived a strike-out on the facts on the basis that it could not be said that there was no realistic possibility of further relevant material becoming available. Even if the Orb Claimants had carried out further enquiries, in my view there is no credible basis for concluding that they would have got themselves into a better position than HPII was in at the hearing of the Strike-Out Application some 7 years after the IOM Settlement: a sketchy tracing case which in certain respects survived strike out, but no more.

467. This is not to say that knowledge of the precise route by which a tracing right can be asserted is necessary before a purchaser will cease to be a bona fide purchaser for value, or that the purchaser of a pool of assets, who knows there is probably a right to trace into some of them, but not which, is equity's darling. However, in this case:

i) HPII's entitlement to trace into the Relevant Assets can now be seen, at best, to be capable of extending to no more than £5.6m of liquid assets;

ii) Mr Ruhan had substantial other sources of wealth (for example the £200m generated by the sale of Sentrum);

iii) there is no reason to suppose that the IOM Settlement Cash is a more likely tracing target than any other assets; and

iv) even now the claim is no more than arguable; and only success by HPII after a long and complex trial could establish the probable existence of such a right.

468. In Carl Zeiss Stiftung v Herbert Smith & Co [1969] 2 Ch 276, 293, Danckwerts LJ observed of the position of the solicitors in that case:

> "… Claims are not the same thing as facts. Mr. Harman contended that for the purposes of the present issue all the allegations contained in the statements of claim in both the actions must be taken as true. That will not do. What we have to deal with is the state of the defendant solicitors' knowledge (actual or imputed) at the date when they received payments of their costs and disbursements. At that date they cannot have had more than knowledge of the claims above mentioned. It was not possible for them to know whether they were well-founded or not. The claims depended upon most complicated facts still to be proved or disproved, and very difficult questions of German and English law."

Sachs LJ noted at 296 that "cognisance of what has been termed 'a doubtful equity' is not enough", and that "no stranger can become a constructive trustee merely because he is made aware of a disputed claim the validity of which he cannot properly assess". That was, and remains, the position so far as any proprietary right on HPII's part in the £5.5m of IOM Settlement Cash is concerned.

469. As I noted at [428] above, it was common ground between the Settlement Parties and HPII that the question of whether Harbour and the Orb Claimants were bona fide purchasers for value was to be determined at the point when Dr Cochrane and SMA acquired legal title to the transferred assets. It might be thought curious to be addressing the issue of notice at that time, because at the date when the legal interests were transferred to Dr Cochrane and SMA, they remained subject to Mr Ruhan's equitable proprietary rights, and no rival (even if subordinate) equitable proprietary interest arose in favour of the Orb Claimants or under the Harbour Trust until the Geneva Settlement. For that reason, I should state that if the issue of notice of HPII's assumed proprietary rights had fallen to be assessed at the date of the Geneva Settlement, rather than the IOM Settlement, it would have remained my conclusion that the Orb Claimants did not have notice of HPII's assumed proprietary right to the IOM Settlement Cash. As I have made clear, the Orb Claimants were in no better position so far as tracing the profits of the Hyde Park Hotels were concerned in May 2016 than they had been in late 2013 and early 2014.

**(3) Good Faith**

470. I now deal with HPII's argument that, even if the Orb Claimants and their nominees were without notice of HPII's claims, they were not purchasers acting in good faith. At [132]-[136] above, I have set out my reasons for concluding that any additional requirement of good faith over-and-above the issue of notice could only arise where the want of good faith is directed to the holder of the prior equitable interest, and is directly relevant to the purchaser's assertion of a superior title against that holder.

471. In this case, I have found that Dr Cochrane and SMA were on notice of Mr Ruhan's equitable interest in the Transferred Assets. Further, for the reasons set out in [212]-[220] above, the circumstances in which those transfers took place (in particular the use of threats and inducements to cause Messrs Cooper and McNally to act in breach of their fiduciary duties) involved bad faith vis-à-vis Mr Ruhan which was directly relevant to the acquisition of the legal estate. HPII submits that, in circumstances in which the Orb Claimants and their nominees received substantially more than any legitimate claim they might have had, the transfers involved bad faith not simply vis-à-vis Mr Ruhan, but "anyone else who may have had a proprietary claim to the assets." HPII submitted that in effecting an over-recovery, the Orb Claimants:

> "were, at least possibly, running a non-fanciful risk of violating the rights of any other person who might have a proprietary claim to the assets in question … They were more than happy to run roughshod over the prima facie rights not only of Mr Ruhan – someone who they must have appreciated had prima facie beneficial rights to at least 60% of the property – but **also** over the rights of *any* beneficial owner of the property who might have (for all they knew) existed

> and who might have been able to assert a proprietary claim to that 60% of the wealth and assets they took".

(emphases in original).

472. I am unable to accept this argument. It would have the effect that although HPII's assumed equitable right, considered on its own terms, would not avail against the acquirer of the legal estate, HPII could nonetheless defeat the defence of bona fide purchaser for value by relying on notice of the proprietary right of or bad faith vis-à-vis someone else. For so long as Mr Ruhan retained his proprietary rights to the Transferred Assets, it remained open to HPII to trace into those rights (to the extent that they represented the traceable proceeds of HPII's property). Once, Mr Ruhan had given up his rights as part of a settlement agreement, and the Harbour Trust had come into existence, I can see no reason why HPII should still be able to sustain its equitable interest, parasitic on the now-settled dispute between the Orb Claimants and Mr Ruhan, even though the Orb Claimants did not have notice of HPII's claims at any relevant time (including the time of the settlement). The potential for such an argument to undermine the security of dealings with property and the finality of settlements is obvious. To the extent that HPII can stand in Mr Ruhan's shoes, they will be able to take advantage of relevant bad faith vis-à-vis Mr Ruhan. Where, however, HPII wishes to assert its entitlements irrespective of the position of Mr Ruhan, only bad faith vis-a-vis HPII could be relevant.

473. HPII's second argument is that, in his actions relating to the IOM Settlement, Dr Smith was acting in bad faith vis-à-vis HPII. That argument requires a little unpacking:

i) It is asserted that at the time the 2003 Oral Agreement is said to have been agreed, Dr Smith was a shadow director of HPII.

ii) It is then asserted that if the 2003 Oral Agreement was agreed (which HPII does not accept), this involved a breach of Dr Smith's fiduciary duties to HPII as its shadow director.

iii) It is said that it follows that "Dr Smith … was acting mala fides vis-à-vis HPII when the deal was struck and … at the time the Orb camp obtained gains pursuant to the IOM Settlement which were (as is assumed, and whether he knew it or not (although he plainly did)) the traceable proceeds of the Hyde Park Hotels Profits."

474. There are a number of difficulties with this argument and I am unable to accept it:

i) There was no attempt before me to make good the assertion that Dr Smith was a shadow director of HPII in May 2003 (when the 2003 Oral Agreement is said to have been concluded).

ii) The May 2003 Agreement transferred control of HPII to Mr Ruhan, who became its 100% ultimate beneficial owner (and remained so until 23 December 2004). The effect of the 2003 Oral Agreement is said to have been that Mr Ruhan acquired ultimate beneficial ownership of the assets (including HPII) in return for a promise to share the profits from the development of the Hyde Park Hotels with (inter alios) Orb. I find it difficult to see how, when obtaining a promise on Orb's behalf from the new

beneficial owner of the Hyde Park Hotels that Orb would receive a share in the development proceeds of the Hyde Park Hotels, Dr Smith could have been acting as a shadow director of HPII.

iii) The argument assumes – but HPII denies – that there was a 2003 Oral Agreement. However, there was no attempt by any party to explore the issue of whether or not such an agreement had been concluded at the Directed Trial.

iv) The alleged bad faith by Dr Smith vis-à-vis HPII in 2003 is not, in my view, directly connected with the acquisition by Dr Cochrane and SMA of the legal estate under the IOM Settlement over 10 years later. Further, Dr Smith himself acquired no property under the IOM or Geneva Settlements.

### (4) Conclusion

475. For these reasons, I have concluded that the Orb Claimants are entitled to rely on the bona fide purchaser for value defence in respect of the assumed tracing entitlement of HPII into the £5.6m transferred under the IOM Settlement (the only asset in relation to which this issue arises at the Directed Trial).

## N CLAIMS FOR BERKELEY APPLEGATE RELIEF

### N1 The applicable principles

476. The Berkeley Applegate jurisdiction derives from the decision of Edward Nugee QC, sitting as a deputy judge, in Berkeley Applegate (Investment Consultants) Ltd (No 2) [1989] 1 Ch 32. In that case, a company in liquidation held assets for the benefit of third parties ("third party assets"), as well as assets for its own benefit ("free assets"). The company's liquidator incurred fees in collecting in both third party and free assets, and the amount of the free assets was insufficient to meet those costs. The liquidator sought an order from the court allowing it to take its fees (or a proportion of them) from the third party assets. Mr Nugee QC held that as a matter of principle, it was entitled to such an order. The third parties, who had only beneficial rather than legal interests, needed the assistance of a court of equity to secure their rights, and Mr Nugee QC held (at p.290) that:

> "as a condition of giving effect to their equitable rights, the court has in my judgment a discretion to ensure that a proper allowance is made to the liquidator"

because

> "he has added to the estate in the sense of carrying out work which was necessary before the estate could be realised for the benefit of the investors … If the liquidator had not done this work, it is inevitable that the work, or at all events a great deal of it, would have had to be done by someone else, and on an application to the court a receiver would have been appointed whose expenses and fees would necessarily have had to be borne by the trust assets. On the evidence

> before me, the beneficial interests of the investors could not have been established without some such investigation as has been carried out by the liquidator".

477. The principles first formulated by Mr Nugee QC have been developed in subsequent cases, and the existence of the jurisdiction is referred to by Lord Walker of Gestinghope in Re Lehman Brothers International Europe (in Administration) [2012] UKSC 6; [2012] 3 All ER 1, [101].

478. Drawing on Berkeley Applegate and subsequent authorities, the following matters are relevant to the exercise of the jurisdiction:

i) The jurisdiction has been applied to claims for relief by liquidators (Berkeley Applegate) and administrators (Re Sports Betting Media Ltd [2007] EWHC 2085 (Ch); [2008] BCC 177).

ii) The jurisdiction only applies in those cases where the owner of the relevant property who is asked to contribute to the office-holder's costs (who I shall refer to as the "third party") needed the assistance of the court to secure its rights (Bell v Birchall [2015] EWHC 1541 (Ch); [2017] 1 WLR 667, [19], per HHJ Pelling QC).

iii) Reflecting the limitation in (ii), it was held in Green v Bramston [2010] EWHC 3106 (Ch), [42] that the jurisdiction "does not result in the creation of a personal claim against the beneficiary of the trust property" but "operates by way of subjecting his beneficial interest to an obligation to pay the remuneration and costs allowed by the court".

iv) The jurisdiction is one that is to be sparingly exercised (Berkeley Applegate, 290).

v) It is relevant to ask whether, if the work had not been done by the person seeking the allowance, it would have had to be done either by the person entitled to the equitable interest "or someone else" and whether "the work has been of substantial benefit to the trust property and the persons interested in it in equity" (Berkeley Applegate, 290-91).

vi) No allowance will be appropriate if the person seeking an allowance has not "materially contributed" to the protection or securing of the relevant interest (Re Sports Media, [12]).

vii) The terms of any contract between the party seeking relief and the person asked to contribute to those costs are likely to be relevant (Berkeley Applegate, 292).

viii) Where the office-holder has incurred costs both in protecting or securing assets to which the appointment extends, and third party assets, only the latter can be the subject of Berkeley Applegate relief, with the court effecting a "rough and ready" apportionment between the two (In re Berkeley Applegate (Investment Consultants) Ltd (No 3) (1989) 5 BCC 803, 807, Peter Gibson J).

ix) However, costs incurred by the office-holder when acting in an adverse capacity to the holder of the third-party interest are not recoverable under the jurisdiction. In Gillan v HEC Enterprises Ltd [2016] EWHC 3179 (Ch), Morgan J rejected such an application insofar as it concerned costs incurred by the administrators for the benefit of the unsecured creditors, for purposes which were adverse to the interests of the third party beneficiaries ([102-103]):

> "There is a further example of the same point in relation to the opposing interests of the beneficiaries and the administrators as to whether certain assets were trust assets. In that respect the interests of the beneficiaries and the administrators were opposed and work done to enable the administrators to advance the case that assets were not trust assets or to determine whether they were or were not trust assets can be said to be work done for the benefit of the unsecured creditors but it is not work for which the beneficiaries under the trusts should pay."

To similar effect see Green v Bramston [2010] EWHC 3106 (Ch), [35-36] (His Honour Judge Cooke, rejecting a claim relating to work on matters "adverse or potentially adverse to the interests of the true beneficiary"). For that reason, it has been suggested that the discretion "is unlikely to be exercised in favour of the applicant if he claims to have an interest in the trust fund" (Patel v Barlows Solicitors [2020] EWHC 2753 (Ch); [2021] 4 WLR 6, [290] Judge Mithani QC).

## N2 Harbour's claim

479. As a fall-back case, Harbour contends that, if it does not obtain any proprietary rights over the Relevant Property by reason of the Harbour Trust, the Court should grant it an allowance in equity under the Berkeley Applegate jurisdiction "in respect of the £5.1m that it invested in the 2012 Proceedings and the commercial risk it took in doing so".

480. This claim could only avail against those who benefited from the assets recovered from Mr Ruhan and retained following the Isle of Man and Geneva Settlements (and not the Upstream Claimants or P&M whose interests have at all relevant times been adverse to the claims funded by Harbour, and who did not benefit from such recoveries as Harbour's funding achieved). Following the settlement between the Settlement Parties and the LCL Parties, the only "live" parties in that position are the Settlement Parties themselves and Messrs Thomas and Taylor, who advance no proprietary claims other than those arising under the Harbour Trust, in respect of which they accept that their interests are subordinate to Harbour (and whose rights *inter se* are regulated by the Harbour IA as a matter of contract in any event). In these circumstances, there is no "gap" in which Harbour's claim to Berkeley Applegate relief might need to operate.

481. In any event:

i) I am not persuaded that Harbour is entitled to an allowance to be enforced by way of granting it an interest in any property recovered to any extent greater than the rights it obtained as a matter of contract, or which follow in law from any

interference with those rights. Harbour and the Orb Claimants were parties to a commercial agreement which provided for the terms of Harbour's security.

ii) Nor am I persuaded that it is appropriate to extend the categories of person who can seek Berkeley Applegate relief from office-holders or those exercising some form of management or stewardship over other people's assets to a commercial funder of litigation (who enjoys personal rights against those whose litigation it has funded). In this regard, there are analogies with the reasoning of Robin Dicker QC, sitting as a deputy judge, in refusing to grant a lien over litigation recoveries to a legal expenses insurer in Glasgow v ELS Law Ltd [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564, [57-69].

## N3 Stewarts' claim

482. As a fall-back to its claim for a solicitor's lien, Stewarts argues in the alternative for an allowance under the Berkeley Applegate jurisdiction. As I have explained above, the solicitor's right to seek the intervention of the court in relation to the recovery of fees from the proceeds of successful litigation in which it has acted is well-established, as are the requirements and limits of that entitlement.

483. In this case, the only parties against whom this fall-back case might be live are Messrs Thomas and Taylor (for the reason given in [385]-[386] above). Messrs Thomas and Taylor were at the relevant time Stewarts' clients, and their respective rights and responsibilities so far as Stewarts' remuneration is concerned are determined by the terms of Stewarts' retainer, and regulated by the court's supervisory jurisdiction over solicitors and by the extensive primary and delegated legislation which govern that relationship. Against that background, it would not be appropriate to extend the Berkeley Applegate jurisdiction so as to apply it to a solicitor's claim for payment of fees against its client, and to grant Stewarts any entitlement beyond any to which they were entitled under the terms of their retainer or the established equitable lien jurisdiction.

## O STEWARTS' CLAIM TO THE £2M

484. On 14 September 2016, Stewarts received a payment of £2m into their client account, at the behest of LCL or Dr Cochrane, on account of outstanding fees. Before transferring the £2m into their office account, Stewarts gave notice of the transfer to Phoenix, who applied for and obtained a freezing order over the amount from Newey J on 30 September 2016. That order was continued by Rose J on 4 October 2016. On 22 February 2017, Popplewell J ordered that the £2m should be transferred to the ERs, to hold to the court's order. He held that it was arguable that whoever had paid the money to Stewarts did not have title to do so, such that the transfer was capable of being reversed so as to make the £2m part of a pool of assets amenable to execution by anyone who obtained a judgment against Dr Cochrane. On the evidence before him, Popplewell J held that there were two "immediately realistic possibilities as to the ownership of the £2 million" ([33]):

> "It may have belonged to [Bridgehouse Poland] as the legal owner of the property and vendor. Alternatively it may have belonged to

> [Radix UK] … as mortgagee with a charge on the property or possibly as legal owner and vendor".

He held that if the money belonged to someone who had not authorised payment, then Stewarts could not claim a beneficial interest on receipt ([37]). He also held that the £2m was arguably amenable to execution of a judgment against Dr Cochrane on the basis that she was entitled to the money when it was transferred to Stewarts ([38]).

485. I am satisfied that the issue of whether Stewarts received the £2m in circumstances in which they were permitted to apply it in discharge of their fees forms part of the Directed Trial, given paragraph 11(d) of Popplewell J's order of 25 April 2018.

486. The evidence before me establishes that the £2m derived from the sale of a property in Poland ("the Polish Property") which was owned by Bridgehouse Development (Krakow) Sp Zoo ("Bridgehouse Poland"). Bridgehouse Poland was in turn ultimately owned as to 66.2% by Unicorn. With somewhat less clarity, the evidence before me supports the conclusion that the £2m belonged to Radix UK as a mortgagee with a charge on the Polish Property:

i) The Polish Property was encumbered by a loan originally made by UniCredit Bank Austria ("UniCredit") to Bridgehouse Poland in the sum of €6.5m.

ii) On 17 September 2014, Dr Cochrane wrote on behalf of GACH to Unicredit confirming an agreement to take an assignment of UniCredit's receivables regarding various projects, including Bridgehouse Poland.

iii) Unicredit assigned the loan to Radix UK on 12 November 2014, as recorded in a transfer agreement of that date.

iv) The shares in Radix UK appear to have held by Pro Vinci as nominee for Dr Cochrane (as recorded in a nominee agreement dated 17 July 2015).

v) It was the evidence of Ms Stickler at a prior stage of these proceedings that the loan was held by Pro Vinci for Dr Cochrane, and it is said that Dr Cochrane transferred her beneficial interest to LCL on 6 May 2016.

vi) I am not persuaded that there was any valid transfer of the benefits of the loan over the Polish Property from Radix UK to LCL. That transfer – which was relied upon before but strongly doubted by Popplewell J – was effected as part of a series of purported transfers of assets by Dr Cochrane to LCL on 6 May 2016, which took place shortly after the Geneva Settlement, and it appears to have been undertaken with a view to preventing those claiming an interest in any recoveries from enforcing their claims. There was no attempt before me by any party to argue that these transfers were effective to transfer a beneficial interest in the assets concerned, and, even when it was still active in the Directed Trial, LCL made no attempt to justify the transfer or assert a claim to the £2m.

vii) A board meeting of Bridgehouse Poland of 8 September 2016 referred to the forthcoming sale of the Polish Property, and the fact that €6,441,294.13 was to be paid as "senior loan to Radix" from the proceeds of sale.

viii) On 13 September 2017 (the day before the £2m was paid to Stewarts), on the unchallenged evidence of Mr Upson, the sale of the Polish Property completed. That provides support for the view that it was money released by the sale of the Polish Property which was the source for the payment to Stewarts, and I note that the investigations performed by the ERs on the SFO's behalf came to the same conclusion.

ix) For these reasons, I am satisfied that Radix UK was the source of the £2m.

487. In these circumstances, the issue arises as to whether Radix UK authorised the transfer of £2m to Stewarts, or at least effected a distribution of the money to Pro Vinci or Dr Cochrane who were so authorised. The evidence on this issue is thin, but I must decide the issue on a final basis at this trial. Stewarts argued that it is likely that a dividend was declared by Radix UK, which was paid at the request of its 100% owner, Pro Vinci or Dr Cochrane, to Stewarts. However, there is no evidence of any such dividend being declared. In these circumstances, I am not satisfied that the use of these monies to pay Stewarts' fees was an authorised use of Radix UK's funds.

488. The issue which then arises is whether Stewarts' knowledge was such as to prevent Stewarts using the £2m (which was clearly paid to Stewarts for the purpose of discharging their fees) to effect a partial reduction in the sums they were owed. Stewarts relied in this context on the judgment of Danckwerts LJ in Carl Zeiss Stiftung v Herbert Smith (No 2) [1969] 2 Ch 276, 290, which I have set out at [468] above.

489. As that judgment makes clear, the question of when a solicitor is entitled to apply funds paid to it to discharge its fees is simply an aspect of the bona fide purchaser for value defence (the solicitor having given value for the payment received through the work done): Carl Zeiss, 289-290.

490. The position on the evidence is as follows:

i) In the context of this dispute, Stewarts acted for a wide variety of entities, on the basis of instructions from Pro Vinci. On the invoices I have seen, these included not simply the Orb Claimants, but Mr Trachtenberg, Minardi, Pro Vinci, Andiamo Office Services and Dr Cochrane.

ii) The £2m was paid into Stewarts' account by LCL on 14 September 2016 and it was previously Stewarts' position that LCL was the beneficial owner of the £2m. There was very little exploration at trial, or in the context of the £2m injunction proceedings, of what was discussed between Dr Cochrane/LCL and Mr Upson about the source of the £2m.

iii) I am satisfied that Mr Upson – who was acting for clients who formed part of a complex group of companies, for many of whom Stewarts had come to act at different stages in the litigation – believed that the £2m was money which Stewarts were

entitled to receive, and that it had been paid with the authority of the payer. Indeed the contrary suggestion was not made. It is also clear that at some point, Mr Upson was told that the source of the money was the proceeds of the sale of the Polish Property, which he understood to be an investment made by one of the companies under Dr Cochrane or Pro Vinci's control, (which is consistent with the conclusion I have formed as to Mr Upson's state of mind).

iv) However, I am prepared to assume against the Settlement Parties for present purposes (without deciding the point) that Mr Upson knew enough to require Stewarts to make enquiries as to the source of the £2m, given that LCL was not one of Stewarts' clients, even though it was clearly closely connected to some of the clients Stewarts had acted for as a result of their involvement in the 2012 Proceedings.

v) Making that assumption, however, had Stewarts enquired of LCL where the funds had come from, and been told that they had come from Radix UK, I am satisfied that reasonable solicitors in Stewarts' position would not have concluded that there was anything untoward in those funds being used to pay their bill, and would not have been on notice that the monies were being applied in breach of trust. Radix International, a company through which at one stage Dr Cochrane may have held her interest in Radix UK, or which may have acted as nominee on Radix UK's behalf, had made payments to Stewarts on account of the Orb Claimants' legal fees behalf before (on 9, 13 and 17 March 2015). Dr Cochrane was the 100% owner of Radix UK. She had guaranteed the payment of Stewarts' fees, and proceedings had been commenced against her under that guarantee on 20 July 2016. She had every incentive to take steps to pay Stewarts' fees. I would note that the basis on which Popplewell J concluded it was arguable that Phoenix could obtain a non-proprietary freezing order in relation to the £2m was that it was arguable that it was open to Dr Cochrane to recover the amount.

vi) On the evidence before me, Radix UK operated as a family office / a treasury company so far as Pro Vinci and Dr Cochrane are concerned. Discovering that the funds had come from Radix UK would not have made a reasonable person in Stewarts' position aware of the probable existence of an adverse proprietary right in the £2m, nor do I accept P&M's submission that a reasonable solicitor in Stewarts' position would, in those circumstances, have felt it necessary to undertake further enquiries to ascertain whether the payment had been approved by Radix UK's board and/or whether Radix UK's finances permitted such a payment to be made.

491. In these circumstances, I am satisfied that Stewarts acquired good title to the £2m, and were entitled to apply that sum in reduction of the Orb Claimants' outstanding legal fees. It follows that the £2m should be paid over to Stewarts, and the injunction granted by Popplewell J discharged.

492. An issue then arises as to how this amount should be treated in the context of Stewarts' lien claim (in circumstances in which Stewarts was content, for the purposes of this trial, to treat certain of their outstanding invoices as falling outside the scope of the equitable lien). I will hear the parties on this issue when ruling on the consequential matters to which the judgment gives rise, but I would encourage the parties to approach this issue pragmatically.

## P THE VISCOUNT'S CLAIMS

493. The Viscount's claims in closing were advanced orally with considerable skill by Mr Akkouh and Mr Hoyle. There are three distinct issues:

i) The LCL Transfers and Orb Shares.

ii) The shares in Bodega and Glen Moar.

iii) The claims to the Jersey Properties.

### P1 The LCL Transfers

494. I referred at [105] above to the LCL Transfers effected by Dr Cochrane in favour of LCL on 6 May 2016. No party before me sought to defend the validity or efficacy of those transfers. This is equally true of the declaration of trust which Dr Cochrane made in favour of Dr Smith over the shares in Orb on 24 August 2016.

495. To the extent that the assets which were subject to the LCL Transfers were held beneficially by Dr Cochrane, the Viscount challenges those claims under Article 17 of the Bankruptcy (*désastre*) (Jersey) Law 1990 ("the Jersey Désastre Law"). Under s.426 Insolvency Act 1986, if the English court receives a request from the courts of a "relevant territory" (which includes Jersey) to assist in its administration of an insolvent estate, the English court may apply the insolvency law of the requesting country in providing that assistance. In what Lord Neuberger described in Re HIH Casualty & General Insurance Ltd [2008] 1 WLR 852, [81] as a "slightly mystifying" provision, s.426 provides that "in exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law".

496. The Jersey Bailiff made a request for assistance under s.426, and on 15 March 2017 Chief Registrar Baister made an order under s.426 recognising the Viscount as the administrator of Dr Cochrane's *en désastre*, and authorising the Viscount to exercise such of her powers and functions as administrator "as may be necessary". Against that background, I am satisfied that it is appropriate, having regard to the principle of modified universalism, for me to apply relevant provisions of the bankruptcy law of the place of the insolvency, which bear a strong similarity to those which apply as a matter of English insolvency law (as HHJ Behrens QC did in McKinnon v Graham [2013] EWHC 2870 (Ch), [26(2)]). The application of the Jersey anti-avoidance provisions in the present context is also supported by Lord Collins in Rubin v Eurofinance [2013] 1 AC 236, [131].

497. Under Article 17 of the Jersey Désastre Law, if "a debtor has [1] at a relevant time [2] entered into a transaction with a person at an undervalue [3] the court may, on the application of the Viscount, make such order as the court thinks fit for restoring the position to what it would have been if the debtor had not entered into the transaction":

i) The "relevant time" is 5 years before the declaration *en désastre* provided, if the debtor and creditor are not connected or associates, that the debtor was insolvent at the time of the transaction.

ii) Under Article 17(7), a transaction is at an undervalue if it is by way of gift or for a consideration which is significantly less than the value, in money or money's worth, of the consideration provided by the debtor.

498. I am satisfied that the LCL Transfers, which were effected on 6 May 2016, 6.5 months before Dr Cochrane was declared *en désastre*, were entered into by Dr Cochrane with an associate. As I explain at [610] below, I am satisfied that Dr Smith was the ultimate beneficial owner of LCL. Under Article 17B, a company (in this case, LCL) is the associate of a person (Dr Cochrane) if an associate of that person (which includes a former spouse) has control of the company. I am also satisfied that Dr Cochrane – who had just assumed a £73.75m liability to Phoenix under the Loan Note – was insolvent at this time.

499. I am also satisfied that the LCL Transfers were entered into by Dr Cochrane at an undervalue. The Deed of Release between Dr Cochrane and LCL purported to give LCL 100% of the entire recovery in the litigation without deduction of costs when, even assuming the validity of the LCL Funding Agreement (which, in the event, no one sought to establish at the Directed Trial), LCL was only entitled to 50% of the proceeds of any net recovery, and then in subordination to the interests arising under the Harbour Trust. Further, the position of Messrs Thomas and Taylor was entirely ignored. Finally, LCL made no effort to defend the LCL Transfers when it was still active in the Directed Trial (including in opening).

500. I am satisfied that the declaration of trust over the shares in Orb was also a transaction at an undervalue, being a gift (because no consideration was provided in return). Once again, Dr Smith made no attempt to defend the declaration of trust.

501. To the extent that the assets which were the subject of the LCL Transfers were held beneficially by Dr Smith, or the position so far as Dr Cochrane is concerned falls to be addressed as a matter of English law, I am satisfied that it would be appropriate to grant relief under s.423 of the Insolvency Act 1986. In addition to my finding that the LCL Transfers were transactions at an undervalue, I am also satisfied that the transactions were entered into by Dr Cochrane and/or Dr Smith for the purpose of putting assets beyond the reach of persons who were making or might at some time in the future make claims against her or them (in particular the SFO in the case of Dr Smith and Stewarts, Phoenix and Harbour in the case of Dr Cochrane) or prejudicing those persons:

i) The LCL Transfers were entered into on the very day that the 2012 Proceedings were dismissed, which brought Dr Cochrane's £73.75m liability under the Loan Note into effect and discharged the freezing order which had previously been in force against Dr Cochrane to assist in the enforcement of any judgment later obtained against her.

ii) The declaration of trust was effected after Stewarts had commenced proceedings against Dr Cochrane under a guarantee she had provided for Stewarts' fees.

iii) The LCL Transfers and the declaration of trust were effected secretly, Dr Cochrane and Dr Smith not informing Stewarts, Messrs Thomas and Taylor, Harbour, the SFO or the ERs about these transactions.

iv) For the reasons I explain in Section S below, I am satisfied that Dr Smith used Dr Cochrane as a nominee in an effort to impede the SFO's recovery under the Confiscation Order, and that Dr Smith was behind the decision to effect the LCL Transfers.

v) The effect of the transfers was, ostensibly, to move assets with a very substantial value into the hands of a Marshall Islands company which, as I explain below, I am satisfied was under the effective control of Dr Smith and of which he was the ultimate beneficial owner, or to Dr Smith himself.

502. In these circumstances, I am satisfied that it is appropriate to set the LCL Transfers and the declaration of trust aside.

## P2 The shares in Bodega and Glen Moar

### (1) Bodega

503. On 24 January 2014, Dr Cochrane paid the-then Viscount (in his capacity as the seized asset manager appointed in relation to Dr Smith's realisable property in Jersey) £3,560,000 to acquire a 50% interest in Bodega. The ownership of that 50% is in issue in this action. However, I am satisfied that the other 50% of Bodega is vested in the Viscount and is not subject to adverse proprietary rights:

i) In 2009, the ERs and Dr Cochrane reached an agreement which compromised a disputed claim by the ERs to Bodega and the assets it held, on the basis that 50% represented the realisable property of Dr Smith and 50% the property of Dr Cochrane ("the Retained 50%").

ii) The 50% which represented realisable property of Dr Smith was vested in the-then Viscount pursuant to the *saisie judiciaire*, and was the subject of the contract of sale concluded on or about 24 January 2014.

iii) However, the Retained 50% remained beneficially owned by Dr Cochrane, and, subject to its removal from the *saisie judiciaire*, vests in the current Viscount following the declaration of Dr Cochrane's *en désastre*.

iv) Accordingly, I am willing to make a declaration that the beneficial ownership of the Retained 50% is vested in the Viscount as administrator of Dr Cochrane's estate, free from adverse proprietary rights (and that legal title to those shares will vest in the Viscount once it is discharged from the *saisie judiciaire*).

### (2) Glen Moar

504. On 24 August 2016, Dr Cochrane, acting as a representative of SMA's corporate director, executed a share sale agreement and deed of trust over Glen Moar's shares in favour of Dr Smith. However, the share sale agreement was subject to the condition precedent of obtaining the approval of the BVI court which was never done, and legal title in the shares was not transferred.

## P3 The Jersey Properties

### (1) The relevance of Jersey Law

505. It is common ground that Jersey law is relevant to the question of whether a constructive trust can arise in respect of the Jersey Properties. This conclusion can be reached by one of two routes. Firstly, because the *lex situs* should determine whether a constructive trust arises in respect of the Jersey Properties, because the constructive trust is said to arise by reason of the receipt of property to which Dr Cochrane was not entitled, and that receipt occurred in Jersey (or, alternatively, Jersey is manifestly more closely connected to the obligation giving rise to the alleged trust). Alternatively, Jersey law is relevant because, while the rule in Penn v Baltimore (1750) 27 ER 1132 permits the court to impose and enforce *in personam* equitable obligations in respect of foreign land, that rule is subject to certain exceptions. Those exceptions were considered by Lord Mance in Akers v Samba Financial Group [2017] UKSC 6, [2017] AC 424, [25-28] and explained in *Dicey, Morris & Collins on the Conflict of Laws* (15th ed), 23-46 to 23-51:

    i) where the *lex situs* would not permit or enable the defendant to do what the court might order, such that it prohibits the enforcement of the order in some relevant sense; or

    ii) where anything has occurred in the country where the land is located which would be regarded by the *lex situs* as destroying any equity the English court might otherwise consider existed.

506. The Settlement Parties contend that both exceptions are engaged here, either because Dr Cochrane's *en désastre* has destroyed any equity which might otherwise have existed or because a foreign trust of Jersey immovable property is regarded as "unenforceable" under Jersey law. The resolution of the second of these issues clearly raises issues of Jersey law.

### (2) The expert evidence

507. The issue of whether expert evidence on Jersey law was required at the Directed Trial was considered before Moulder J at a CMC on 29 March 2019. Reflecting the range of procedural options available to a judge when considering how to deal with issues of foreign law, Moulder J ordered that some of the Jersey law issues raised (including those concerning the Jersey Properties) should be the subject of expert evidence on the basis that such evidence was reasonably required to resolve the proceedings, and that other issues should be dealt with by way of submission on the basis of Jersey law materials.

508. The Court received expert evidence on the law of Jersey from Nicole Langlois, an Advocate of the Royal Court of Jersey and an English barrister. Her evidence was directed to the issue of whether and, if so, in what circumstances a constructive trust can exist over immovable property situated in Jersey. None of the other parties adduced expert evidence of Jersey law.

509. Where the court has directed that the content of foreign law be established by expert evidence, the proper function of the expert is clear. Evans LJ in MCC Proceeds Inc v

Bishopsgate Investment Trust plc (No 4) [1999] CLC 417 at [23-24] summarised the position as follows:

> "23. In our judgment, the function of the expert witness on foreign law can be summarised as follows:
>
> (1) to inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction
>
> (2) to identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) where there is no authority directly in point, to assist the English judge in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.
>
> 24. The first and second of these require the exercise of judgment in deciding what the issues are and what statutes or precedents are relevant to them, but it is only the third which gives much scope in practice for opinion evidence, which is the basic role of the expert witness. And it is important, in our judgment, to note the purpose for which the evidence is given. This is to predict the likely decision of a foreign court, not to press upon the English judge the witness's personal views as to what the foreign law might be. Thus, in G & H Montage GmbH v Irvani [1990] 1 WLR 667 (CA) , Mustill LJ said (at p. 684G)
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> > 'The fact that the plaintiffs' expert was not able to do more than assert, in this novel situation, his own view on how the German court would react when faced with a similar problem does not disqualify his evidence from being relied upon. There are many fields of law in which the books provide no direct answer, and where the skill of the lawyer lies precisely in predicting what answer should be given. If the judge concludes that the expert's prediction is reliable, he is fully entitled to give effect to it'.
>
> This passage emphasised that the expert witness is entitled to give opinion evidence in the absence of direct authority, but we would underline the restrictions which it places upon him. His role is to 'predict' what the foreign court would decide, and only in this sense should he say 'what answer should be given'."

510. The Court of Appeal also gave general guidance as to the approach the court should adopt when scrutinising foreign law expert evidence at [13]:

> "Sometimes the foreign law, apart from being in a foreign language, may involve principles and concepts which are unfamiliar to an English lawyer. The English judge's training and experience in English law, therefore, can only make a limited contribution to his decision on the issue of foreign law. But the foreign law may be written in the English language; and its concepts may not be so different from English law. Then the English judge's knowledge of the common law and of the rules of statutory construction cannot be left out of account. He is entitled and indeed bound to bring that part of his qualifications to bear on the issue which he has to decide, notwithstanding that it is an issue of foreign law. There is a legal input from him, in addition to the judicial task of assessing the weight of the evidence given. The same applies, in our judgment, in the Court of Appeal. When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the court is as well placed as the trial judge to form its own independent view."

511. In Yukos Capital Sarl v OJSC Oil Company Rosneft [2014] EWHC 2188 (Comm), [2014] 2 CLC 162, [29-30] Simon J discussed the approach the court should adopt when determining the content of foreign law. I was referred to the following paragraphs:

> "28. Thirdly, in determining the question of foreign law the court is entitled, and may be bound, to look at the source material on which the experts express their opinion. This is true of any expert evidence which comes before the court, and if authority were required for the proposition in relation to foreign law it can be found in Dicey (see above) at 9–017 and the cases at footnote 91.
>
> 29. Fourthly, the claimant (for reasons which I will come to) submitted that the relevant issue would have to be resolved in the 'supreme court' of the foreign jurisdiction; and that therefore the relevant question is: what would the 'supreme court' decide if the matter were before it? Mr Pollock relied in support of this proposition on: Re Duke of Wellington, Glentanar v Wellington [1947] Ch 506 (Wynn-Parry J at p. 519); Rendall v Combined Insurance Company of America [2005] 1 CLC 565 (Cresswell J) and Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan [2008] EWHC 1901 (Comm) (Aikens J at [103]). I accept that this may be the right approach in some circumstances, but it will not be the right approach in every case. The legal issue may, for example, have been plainly decided by a court which is inferior in

jurisdiction to the 'supreme court'. I have concluded that the law is correctly stated in Dicey at 9–020:

> 'Considerable weight is usually given to the decisions of foreign courts as evidence of foreign law … But the court is not bound to apply a foreign decision if it is satisfied, as a result of all the evidence, that the decision does not accurately represent the foreign law. Where foreign decisions conflict, the court may be asked to decide between them, even though in the foreign country the question still remains to be authoritatively decided.'

30. Fifthly, a further issue may arise where the foreign law is going through a period of change (as the claimant contended in the present case). The question is then the extent to which the English court can anticipate the 'trajectory' of the developing law. Mr Pollock referred to a passage in the judgment of Beatson J in Blue Sky One Ltd v Blue Sky Airways LLC [2010] EWHC 631 (Comm) at [88] in support of his contention that it can. In that case Beatson J was considering a particular problem: that the decisions of the Iranian courts are seldom referred to, the views of commentator are seldom relied on and only decisions of the supreme court sitting in banc constitute legally binding precedent. In these circumstances I am not persuaded that Beatson J's reference to the 'trajectory of Iranian law' bears the weight that Mr Pollock sought to attach to it. To the extent that he was submitting that the English court should decide what conclusion a foreign court would reach on a developing area of the law, the point is unobjectionable. If he was intending to invite me to make findings which went beyond the present state of Russian law and to anticipate a rational development of it, his invitation must be declined."

512. More recently, in a case in which only one party had adduced expert evidence for reasons explained to the court, Gross LJ in Bank Mellat v HM Treasury [2019] EWCA Civ 449, [53] summarised the proper approach in the following terms:

> "The propositions which follow are well-established and emerge clearly from the judgment of Scott LJ, in A/S Tallina Laevauhisus v Estonian State S.S. Line (1947) 80 Ll. L. Rep. 99, at pp. 107-108, together with *Dicey, Morris and Collins On The Conflict of Law*s (15th ed.), at paras. 9-015 – 9-016:
>
> i) In English private international law, foreign law is a question of fact, to be proved by a duly qualified expert in the law of that foreign country. The function of such an

expert extends to both the interpretation and application of the foreign law.

ii) The burden of proof rests on the party seeking to establish the proposition of foreign law in question.

iii) Although the English Court will scrutinise the evidence adduced, it will not undertake its own researches into questions of foreign law, any more than it will into other questions of evidence.

iv) When scrutinising evidence of foreign law, as on any other question of evidence, the Court is not inhibited from using its own intelligence and common sense.

v) Where expert evidence on foreign law is uncontradicted, the Court 'should be reluctant' to reject it and is not entitled to do so on the basis of its own research; however, as explained in *Dicey, Morris and Collins* (at para. 9-016):

'….while the court will normally accept such evidence it will not do so if it is 'obviously false', 'obscure', 'extravagant', lacking in obvious 'objectivity and impartiality' or 'patently absurd' or if 'he never applied his mind to the real point of law' or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'….Or, in other words, 'using its own intelligence as on any other question of evidence'…."

**(3) Ms Langlois' evidence**

513. Ms Langlois emphasised that the law of Jersey is influenced by two traditions: the customary law of Jersey, based on Norman customary law and informed by Roman law and French civil law, and English common law. According to Ms Langlois, the Jersey law of trusts has been heavily influenced by English common law, but the law of real property remains strongly influenced by Jersey customary law.

514. I was referred to a number of the provisions of the Trusts (Jersey) Law 1984 (the "TJL"). Article 1 of the TJL defines "property" as "property of any description wherever situated, and, in relation to rights and interests includes those rights and interests whether vested, contingent, defeasible or future". Within Part 2 ("Provisions Applicable Only to a Jersey Trust"), Article 11 appears in a section entitled "[c]reation, validity and duration of Jersey trusts". Article 11 provides:

"Article 11 – Validity of a Jersey Trust

(1) Subject to paragraphs (2) and (3), a trust shall be valid and enforceable in accordance with its terms.

(2) Subject to Article 12, a trust shall be invalid –

(a) to the extent that –

(i) it purports to do anything the doing of which is contrary to the law of Jersey,

(ii) it purports to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey,

(iii) it purports to apply directly to immovable property situated in Jersey, or

(iv) it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose;

(b) to the extent that the court declares that –

(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty,

(ii) the trust is immoral or contrary to public policy, or

(iii) the terms of the trust are so uncertain that its performance is rendered impossible.

…

(5) Where paragraph (2)(a)(iii) applies, any person in whom the title to such immovable property is vested shall not be, and shall not be deemed to be, a trustee of such immovable property."

515. Also, within Part 2, Article 33 appears in a section entitled "[l]iability for breach of trust":

"Article 33 – Constructive Trustee

(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain, or advantage.

(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust.

(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it.

> (4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."

516. Within Part 3 ("Provisions Applicable to a Foreign Trust"), Ms Langlois also referred to Article 49:

> "Article 49 – Enforceability of a foreign trust
>
> (1) Subject to paragraph (2), a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with its proper law.
>
> (2) A foreign trust shall be unenforceable in Jersey –
>
> (a) to the extent that it purports –
>
> (i) to do anything the doing of which is contrary to the law of Jersey,
>
> (ii) to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey, or
>
> (iii) to apply directly to immovable property situated in Jersey;
>
> (b) to the extent that the court declares that the trust is immoral or contrary to public policy.
>
> (3) Where paragraph (2)(a)(iii) applies, any person in whom the title to such immovable property is vested shall not be, and shall not be deemed to be, a trustee of such immovable property."

517. Finally, Ms Langlois drew the Court's attention to the two key decisions of the Royal Court of Jersey: Re Esteem Settlement [2002] JLR 53 ("Esteem") and Flynn v Reid [2012] (1) JLR 370 ("Flynn").

518. In Esteem proceedings had been brought by the victim of a fraud to recover sums misappropriated in breach of fiduciary duty. The victim sought to trace those sums into movable property. The Court considered whether the beneficiary of a Jersey trust had an equitable proprietary interest in trust property. At [84] it held that:

> "As the point does not arise specifically, we can express our views on it briefly. We think that the submissions of Mr. Santos-Costa require us, first, to consider whether a beneficiary under an express Jersey trust has an equitable proprietary interest in the trust property. In our view, he does. It is true that nowhere does the 1984 Law state

specifically that a beneficiary under an express trust has an equitable proprietary interest in the trust fund. However, the 1984 Law is not a codification. Trusts were recognized and enforced by the Jersey courts well before the passing of the 1984 Law and, in doing so, they looked to English law for guidance on trust matters and, by and large, adopted English principles save where it was appropriate to differ. A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications. We conclude that the position is summarized correctly in Matthews & Sowden, *The Jersey Law of Trusts*, 3rd ed., para. 1.20, at 8 (1993):

> 'Turning to consider trusts proper, it is also clear from the terms of various of the provisions in [the Trusts (Jersey) Law 1984] that in a Jersey trust the beneficiary is intended to have and does have a proprietary interest in the trust property, and not merely a personal right against the trustees to compel due administration. Indeed, were this not so, Art 50(1), (4) would mean that, in some circumstances, at least, no-one had a proprietary interest in the trust assets (see also Arts. 9, 23, 29, 31, 34, 42 and 43). It is true that the beneficiary's interest is not stated to be an 'equitable' interest, although in Art. 50(4) there is reference to 'beneficial interest.' On the other hand, the trustee has some interest in the property [of] the subject of the trust, however limited (see Arts. 2, 50(1)), and so, whether or not the trustee's and beneficiary's interests are properly called 'legal' and 'equitable' in the English style, there is little doubt that the [Trusts (Jersey) Law 1984] is referring to concepts serving identical purposes: c.f. Hawksford and Renouf v. Giffard (1885), 210 Ex 206 at 211, where the court drew the distinction, in the case of a trust of immovables, between the owners 'en droit' and those 'en équité.'"

519. At [88], the Court concluded that:

> "These provisions provide that a beneficiary under a constructive trust imposed by virtue of art. [33](1) has a proprietary interest in the property (see, in particular, art. [33](3) and art. [54](3)). Article [33](4) clearly envisages that constructive trusts will arise in circumstances other than those set out in art. [33](1). It would be highly illogical if a constructive trust arising in other circumstances did not involve a proprietary interest on the part of the beneficiary, whereas those arising pursuant to art. [33](1) did so. It would be unusual and confusing to have two different types of constructive trusts, one recognizing an equitable proprietary interest on the part of the beneficiary and one recognizing only a personal right against the trustee. Accordingly, we hold that a beneficiary under a

> constructive trust does have an equitable proprietary interest in the assets which are the subject of that trust."

520. The Court at [92], in a passage which Ms Langlois noted was *obiter*, expressed a view on the possibility of a constructive trust arising in respect of immovable property in certain circumstances:

> "We appreciate that the recognition of constructive trusts in such circumstances may raise questions concerning art. [11](2)(a)(iii) of the [TJL], which provides that a trust shall be invalid to the extent that 'it purports to apply directly to immovable property situated in Jersey.' That will be for decision on another occasion but, as at present advised, we think it is strongly arguable that that provision does not apply to constructive trusts. Articles 29 and [54] refer to 'property,' which is defined by art. 1(1) to mean 'property of any description wherever situated.' It is hard to envisage that Jersey law would accept that, if a trustee, in breach of trust, uses trust moneys to purchase Jersey immovable property for his own benefit, he should be permitted to hold that immovable property free from any trust for the beneficiaries. In any event, any concerns about Jersey immovable property are not sufficient, in our judgment, to negate the general principle which we have described."

521. Flynn involved a dispute between former cohabitees of a family home. In Ms Langlois' view Flynn squarely raised the issue of a constructive trust in respect of Jersey land. At [69], the Court noted that there was no binding decision on the issue as a matter of Jersey law, but it had been "touched upon" in Esteem. After considering Esteem, the Court noted at [72-73] that:

> "72. This is not a case of trustee fraud and therefore we do not have to decide whether there is some special category of constructive trust which could apply to Jersey real estate in the context of trustee fraud, and the issue is left over should such a case ever arise. Nonetheless, we do comment that the issue is not necessarily straightforward. Of course, at one end of that spectrum, one could be faced with a trustee who has fraudulently deprived the beneficiaries of the trust estate and purchased with the proceeds some real property in Jersey. There, equity may indeed demand that the beneficiaries should have recompense. More difficult is where there are competing equities, even in such circumstances. The fraudulent trustee may have other creditors and, where there has been an insufficiency of assets, it would then be an issue as to whether, in effect, the beneficiaries who have been fraudulently deprived of the trust estate should be preferred to other creditors, who might also be the victims of fraud, albeit not as beneficiaries.

> 73. Like Birt, Deputy Bailiff in In re Esteem, we do not have to decide this issue today because the factual circumstances are quite different. We are considering today only whether a constructive trust in relation to Jersey real estate can arise in the circumstances of this case."

522. The Court concluded at [85] that "[t]he law does not recognize any split or division between legal and beneficial interests. We do not in Jersey have anything comparable to the extended property legislation in the United Kingdom in 1925, nor is there any possibility of registering equitable interests." At [87] it then held that:

> "Although the court in In re Esteem (7) was not required to consider these matters in detail, it is necessary to approach these issues in a holistic way. In our judgment, the provisions of art. 11(2)(a)(iii) of the Trust Law are in place because, save perhaps in the proprietary estoppel cases referred to above and in the statutory exceptions, Jersey law has never recognized a division between legal and equitable interests in Jersey immovable estate. To hold that such different interests could arise would be to create an enormous gap in Jersey property law, with all the ensuing uncertainty as to the ownership of land. It would be to ignore the distinctions which for years have existed between those who are fondée en héritage and those who are not. It would be to create uncertainty in bankruptcies and désastre. It may indeed be desirable that there should be a distinction between legal and equitable interests in land, and this judgment does not address whether that is so. What we do recognize is that, if such a distinction is to be introduced, then it must be by the legislature after appropriate consultation and consideration."

523. Ms Langlois in her evidence fairly accepted that neither Flynn nor Esteem were on their facts determinative of the issue – the former involving immovable property but not 'trustee fraud' and the later 'trustee fraud' but not immovable property. However, in Ms Langlois' view:

> "It is true that the Court in [Flynn] left open the theoretical possibility that a constructive trust of Jersey immovable property might be capable of arising in the (specific) context of a claim by the victim of a 'trustee fraud' to recover misappropriated assets. However, it is, in practice, impossible to see how this could be. As the Court held in Flynn, Jersey law simply does not recognise the essential underpinnings of such a claim, namely the existence of an equitable proprietary interest in Jersey immovable property
>
> In any event though, it would plainly be illogical to hold that Jersey law would recognise a constructive trust that arises in one context (a fraud) but not in another (a common intention to acquire property for the benefit of another) when, in all fundamental respects, both types of constructive trust are the same animal."

524. Ms Langlois' evidence was that it was strictly unnecessary to reach a view on the construction of Article 11(2)(a)(iii) of the TJL, since the question of whether Jersey law recognises constructive trusts of immovable property was to be determined by customary law. Ms Langlois considered that it is implicit in Flynn that the Court did not think that the provisions of the TJL created a division between legal and equitable proprietary interests. In any event, she considered that the wording of Article 11(2)(a)(iii) of the TJL was broad enough to encompass both express and constructive trusts and that, given the wider context, a Jersey Court would reach the same conclusion.

525. In cross-examination, both Mr Crossley and Mr Pickering QC highlighted that Flynn was not a case of "trustee fraud" and that the Court had left that issue open. Ms Langlois' response was to highlight the practical difficulties which would follow from the introduction of a constructive trust in respect of immovable property in Jersey. In particular she drew attention to the effect it would have on the priority of security rights, which may not qualify for the bona fide purchaser defence. As the Royal Court explained in Flynn at [81], the Jersey law *hypothtec* is very different to an English law mortgage because it does not create a legal or equitable interest in the property, and therefore would not be capable of taking advantage of the bona fide purchaser defence. Ms Langlois' evidence, therefore, was that the introduction of any form of trust in respect of immovable property in Jersey would have far reaching consequences.

526. Mr Crossley and Mr Pickering QC also drew attention to the following passage in the report of the Jersey Law Commission entitled *The Jersey Law of Real Property* and dated September 2002:

> "It should be noted that the provisions of the 1984 Trusts Law appear to apply to express trusts only and not to constructive trusts. This view is supported by Matthews and Sowden at paragraph 7.16 of the TLJ:
>
> > '…A Jersey Trust is invalid to the extent that it "purports to apply" to Jersey immovables. These words are apt to cover an express trust, but not one imposed by the law or by the courts. Moreover, our Arts ([54]) (3) (tracing) and [33] (constructive trustees) contain no limitation on the kind of property which may be subject to a proprietary claim. Indeed, both provisions refer to "property", which is defined by Art 1 (1)(1) to mean "property of any description wherever situated". It would be absurd if the beneficiaries of a Jersey Trust could not trace into Jersey land bought, in gross breach of trust, by a trustee with trust funds, or if such beneficiaries could lay claim to shares bought with a bribe given to the trustee but not Jersey land bought with the same bribe. It would be an affront to justice in such a case to say that the Trustee held such property free from any trust (cf art (10)(5)). In our view it is clear that there may be a constructive trust of Jersey immovable property.'"

527. In response Ms Langlois noted that this passage was tentative and pre-dated Flynn so it could be regarded as having been overtaken by it. She disagreed with the views of Matthews and Sowden, which also pre-dated Flynn.

528. Mr Pickering QC suggested to Ms Langlois that Article 11(2)(a)(iii) of the TJL more naturally applies only to express trusts - he placed particular emphasis on the words "purports" and "its terms". Ms Langlois accepted that there was some force in the point, but considered that a Jersey court would not adopt such a construction. Mr Pickering QC also put it to Ms Langlois that Article 33 of the TJL on its face provided for constructive trusts in respect of immovable property. Ms Langlois accepted the possibility of such a construction, but remained of the view that Article 33 had to be read in harmony with Article 11(2)(a)(iii). She considered that the reasoning in Flynn was contrary to this reading of Article 33, and that the interpretation for which Mr Pickering QC was arguing would represent a major change in the property law of Jersey which she would have expected to have been subject to more detailed discussion.

**(4) Analysis and conclusion**

529. This is clearly an interesting point of Jersey law concerning the interaction of property and trusts law in the context of trustee fraud which is not subject to any direct Jersey authority, and on which there is much to be said on both sides. As Simon J held in Yukos Capital, the role of the court in these circumstances is to decide what conclusion the foreign court would reach on a developing area of the law, not to seek to anticipate a rational development in the foreign law or decide what the law should be. In deciding this issue, I have sought to arrive at a conclusion which best fits with the Jersey law materials which are available to me, paying appropriate regard to the evidence of the only expert before the court.

530. Approached on that basis, the following matters are clear as a matter of Jersey law:

i) Jersey law relating to immovable property has distinctive features which make it very different from English law. Ms Langlois confirmed that this is an area of Jersey law where the civilian rather than common law influence is particularly strong, referring me to a decision of the Royal Court of Jersey which in 1981 had noted that Jersey's law of real property had "diverged to a substantial extent from English law".

ii) The division of title to real property into legal and equitable interests is not recognised in Jersey customary law (as the Court in Flynn confirmed, "Jersey law has never recognised a division between legal and equitable interests in Jersey immovable estate"), and the recognition of such a division in relation to movable property in Esteem represented a significant development in Jersey law.

iii) The recognition of separate legal and equitable estates in real property would represent a very significant step in Jersey, with implications for the historic civilian categories of interest recognised in Jersey land law, and was a development which the Court in Flynn observed should only be introduced "by the legislature, after appropriate consultation and consideration" ([87]).

iv) While the Court in Esteem provided *obiter* support for the recognition of an equitable interest in Jersey real property, and those *obiter* remarks were not expressly

disapproved in Flynn, the Court in Flynn emphasised the real difficulties which would flow from developing Jersey law in that direction (in particular at [67] and [84-88]).

v) It is not possible to have an express trust over Jersey real property.

vi) It is not possible to have a common intention constructive trust over Jersey real property.

531. To my mind, the opinion expressed by Ms Langlois – that Jersey law does not recognise any type of constructive trust in Jersey real property – best fits with these conclusions. The principal argument raised in response to Ms Langlois' analysis was that Article 11 of the TLJ did not apply to constructive trusts falling within Article 33. However:

i) There are indications within the TJL that Article 11 is not so limited: for example Article 11(2)(a)(i) and (ii) would seem to extend to all types of trust, and the language of Article 11(5) – stating that "when paragraph (2)(a)(iii) applies, any person in whom title to such immovable property is vested shall not be, and shall not be deemed to be, a trustee of such immovable property" – appears apt to apply to those whose trusteeship arises by operation of law (emphasis added).

ii) The argument requires a distinction to be drawn between constructive trusts falling outside Article 33 (to which the Court in Flynn held that Article 11 does apply) and those within Article 33, a distinction which is not immediately compelling.

iii) Reliance on Article 33 still leaves open the question of who can be a constructive trustee as a matter of Jersey law. The argument that Article 33 itself introduces the concept of equitable title in land into Jersey law finds little support in the TJL itself, and it is noteworthy that in Esteem it was Jersey customary law, rather than the TJL, which was said to be the origin of equitable interests in movables.

iv) The argument that Jersey law recognises an equitable interest in Jersey land in cases of some types of constructive trusteeship, but not express trusteeship, or in cases of trustee fraud, but not other types of breach of trust, gives rise to formidable difficulties of delineation: for example as to the position of trustees *de son tort*, in cases of unauthorised substitutions of trust assets by express trustees, or cases of dishonest receipt following an innocent breach of trust. The extent of these difficulties, and the absence of any Jersey law materials pointing to their resolution, strongly suggested that Messrs Thomas and Taylor and HPII are asking the court to develop Jersey law, rather than merely to ascertain the content of Jersey law as it is currently recognised and applied by the Jersey courts.

532. Messrs Thomas and Taylor and HPII also argued that it was not conceivable that Jersey law would leave the victim of trustee fraud without remedy in those cases where misappropriated assets had been used to acquire real property. It was colourfully suggested by Mr Crossley that Ms Langlois' approach was "behind the curve of the zeitgeist of today's climate in the world of modern finance" and that "there exists today an impetus in the governance of all major financial centres and institutions of the world to flush out and clamp down on fraud in all its cunning guises". However, as Ms Langlois noted in her evidence, Jersey law does provide personal (as opposed to proprietary) remedies in such

circumstances, and there are a great many legal systems, including those with "major financial centres and institutions", which do no more. As the Settlement Parties submitted, and the Royal Court noted in Flynn, the policy considerations which arise when considering whether to recognise a proprietary claim in these circumstances are not straightforward, particularly in cases of bankruptcy or insolvency where regard needs to be had to the consequences of recognising a constructive trust on other creditors, and there are also legitimate issues as to the effect on the transparency of public records of land ownership in Jersey. The policy arguments raised by Mr Crossley are nowhere near sufficiently compelling to persuade me that I should reject Ms Langlois' evidence. It would scarcely behove a court sitting in the jurisdiction which brought the Statute of Uses 1535 into being to regard it as so unlikely or extravagant that another jurisdiction should prohibit equitable interests in land in all circumstances that the only expert evidence before the court (to that effect) should be rejected.

533. For these reasons, I am satisfied that (subject to the removal of the Jersey properties from the *saisie*) title to the Jersey Properties vests in the Viscount, free of the equitable proprietary claims advanced in this litigation, however they are resolved.

## Q THE ISSUES BETWEEN THE SETTLEMENT PARTIES AND MESSRS THOMAS AND TAYLOR

534. As I have stated, Messrs Thomas and Taylor support the Settlement Parties' proprietary claims to the Relevant Property, subject to:

i) the issues which arise as to Stewarts' lien, which I have dealt with above; and

ii) the issues which arise as between Orb and Messrs Thomas and Taylor as to their respective shares in any proprietary rights which the Orb Claimants have arising from any recoveries made from the 2012 Proceedings.

535. On this second issue, Messrs Thomas and Taylor assert that the respective proprietary interests of Orb and Messrs Thomas and Taylor should be adjusted to reflect claims which Messrs Thomas and Taylor say they have against Orb arising from the misappropriations made by Dr Smith, Dr Cochrane and others from the Transferred Assets. However, Messrs Thomas and Taylor accept that they must give credit for the amounts which they have already received from the Transferred Assets.

536. Messrs Thomas and Taylor's argument proceeds as follows:

i) Dr Smith and Dr Cochrane misappropriated assets on a significant scale from the assets transferred under the IOM Settlement.

ii) Any proprietary claim which Orb has under the Harbour Trust is to be treated as a claim by Dr Smith and/or Dr Cochrane, because it is appropriate to pierce the corporate veil (Dr Smith and/or Dr Cochrane being the ultimate beneficial owners of Orb and Orb being their "creature").

iii) Alternatively, the misconduct of Dr Smith and Dr Cochrane is to be attributed to Orb, such that Orb acted in breach of trust and/or contractual duties of good faith owed to Messrs Thomas and Taylor under an agreement between them which, to the extent that they have caused a reduction in the amounts in fact recovered by Messrs Thomas and Taylor, have caused them loss.

iv) Messrs Thomas and Taylor can set-off their damages claims against Orb against Orb's proprietary claim to the Relevant Property.

537. At the Directed Trial, I am only concerned with proprietary rights in the Relevant Property, not personal claims. In these circumstances, the key issue which arises for determination is whether any interests which Orb, Mr Thomas and Mr Taylor have under the Harbour Trust are affected by the issues raised by Messrs Thomas and Taylor. I am satisfied that it is not arguable that they are.

538. The interests under the Harbour Trust, under which both Orb and Messrs Thomas and Taylor derive any proprietary interest they have, are held as follows:

i) Dr Cochrane and SMA held the legal estate in the Transferred Assets;

ii) as nominees (and hence on bare trust) for the Orb Claimants;

iii) who in turn hold their respective interests on the terms of the Harbour Trust;

iv) under which each of Orb, Mr Thomas and Mr Taylor have subordinate interests after deducting legal costs and Harbour's entitlement in the proportions of 25/40ths, 7.5/40ths and 7.5/40ths respectively.

539. I do not accept, at stage one of Mr Crossley's analysis, that Dr Cochrane and SMA are to be treated as though they were Orb:

i) The very strict conditions for ignoring corporate personality are not satisfied here. Orb was a distinct legal person from Dr Smith and/or Dr Cochrane not only in law but in fact (and vice versa). It is for that reason that proceedings to enforce the 2003 Oral Agreement had to be brought by Orb, not by Dr Smith. Mr Taylor was a director of Orb from 17 December 2010 until Orb was placed *en désastre* in 2016. Both Mr Thomas and Mr Taylor accepted in their evidence, correctly in my view, that Dr Cochrane held the assets transferred to her under the IOM Settlement in her own capacity, and not as a director of Orb or on its behalf, and this was also the position which Dr Cochrane communicated to Messrs Thomas and Taylor contemporaneously (in her email of 13 December 2013).

ii) Rather the relationship between Dr Cochrane/SMA and Orb at stage one of Mr Crossley's analysis is the same as Dr Cochrane/SMA's relationship with Messrs Thomas and Taylor on their case: that of bare trustees and beneficiaries respectively.

iii) This was not a case in which either the concealment or evasion grounds for piercing the corporate veil identified in Prest v Petrodel [2013] UKSC 34; [2013] 2 AC 415

apply. Dr Cochrane did not conceal her personal role in holding these assets from Messrs Thomas and Taylor, nor was she seeking to evade a liability of Orb to Messrs Thomas and Taylor in doing so.

540. Nor do I accept that Orb is liable for any breach of trust by Dr Cochrane or SMA (whether in contract or otherwise):

i) First, as I have explained, Dr Cochrane and SMA's dealings with the assets transferred under the IOM Settlement were not undertaken as agents for Orb (one of three beneficiaries of the bare trust) but as nominees for all three Orb Claimants.

ii) Second, as potential beneficiaries of the assets which Dr Cochrane and SMA were misappropriating, Orb (like Messrs Thomas and Taylor) was a victim of the conduct of which Messrs Thomas and Taylor complain (and lost more because it had a greater share). Orb derived no benefit from Dr Cochrane and SMA's conduct: the amounts misappropriated were not applied to Orb's purposes. In these circumstances, applying the principles relating to the attribution of conduct in Bilta (UK) Ltd v Nazir (No 2) [2016] AC1, [9] and [71-78], I am satisfied that Dr Cochrane and SMA's conduct is not attributable to Orb for the purposes of the claims which Messrs Thomas and Taylor seek to assert.

iii) For essentially the same reasons, to the extent that Orb owed relevant contractual obligations to Messrs Thomas and Taylor (something which it is not necessary for me to decide), the conduct of Dr Cochrane and SMA in their dealings as bare trustees for the Orb Claimants of the Transferred Assets is not attributable to Orb when determining if there has been a breach of such obligations.

541. In any event, such claims as Messrs Thomas and Taylor might have against Orb for breach of contract cannot be set-off under Article 34 of the Jersey Désastre Law (as Messrs Thomas and Taylor contended) against the proprietary interest which Orb has under the Harbour Trust for two reasons:

i) the requisite mutuality of parties is lacking (because Messrs Thomas and Taylor's claims in contract lie against Orb and Orb's equitable rights are against Dr Cochrane and SMA as nominees and under the Harbour Trust);

ii) Messrs Thomas and Taylor's personal claims against Orb cannot be set-off against Orb's proprietary claims in Orb's bankruptcy (which would have the effect of turning unsecured claims into secured claims).

As *Goode and Gullifer on Legal Problems of Credit and Security* (6th), 7-80 note of the equivalent English legislation (which is expressed in essentially similar terms):

> "the requirement of mutuality has two facets. First, the respective characters of the claim and cross-claim must be commensurate. This means that the claim and the cross-claim must both be monetary claims or claims which a party is entitled to have reduced to money. So a person holding property as bailee or trustee for another cannot set-off against his delivery or accounting obligation a monetary

> claim against the … beneficiary … The same rule applies where it is the insolvent party who is the trustee. Second, there must be mutuality of parties, that is the claim and cross-claim must be between the same parties in the same right."

542. Further I am satisfied that both Messrs Thomas and Taylor knew of, and acquiesced in, the fact that the proceeds of the IOM Settlement were being transferred to Dr Cochrane and SMA rather than to the Orb Claimants directly. I am also satisfied that Messrs Thomas and Taylor knew or suspected that some of the assets so transferred were being applied by Dr Smith and Dr Cochrane for their own benefit, and that Messrs Thomas and Taylor were content for that to happen for so long as Dr Smith was making payments from those assets to them as well.

543. As to first of these issues (the identity of the transferees of the assets), both Mr Thomas and Mr Taylor signed the documents which effected the IOM Settlement. Mr Thomas accepted that he would have read those documents before doing so, and Mr Taylor was willing to accept that he is likely to have wanted to see all of the documents before signing anything. In any event, Dr Cochrane informed them of the position in her email of 13 December 2013, without dissent or demur at that point, or at any point prior to these proceedings.

544. As to the second issue (knowledge of Dr Smith and Dr Cochrane's use of the Transferred Assets), Mr Taylor accepted that he was aware that he was receiving sums from Dr Smith which came from the IOM Settlement (which I find to be some £1.6m in total). He must have been aware that Dr Smith – who he knew enjoyed a lavish lifestyle and was spending large amounts of money – was also using those proceeds for his own benefit (and indeed he accepted that he was aware Dr Smith was procuring substantial payments to himself through a company called Arcana). He agreed that it was "probably right" that "as long as [he was] receiving money from Dr Smith, [he wasn't] going to ask any questions", and he essentially accepted that he "didn't want to rock the boat in any way" because he was "receiving regular payments from Dr Smith and Dr Cochrane".

545. Mr Thomas also received substantial payments from Dr Smith, Dr Cochrane or companies associated with them over the period from 15 November 2013 to 3 December 2014 totalling just over £1.01m, all bar £20,000 of which came from one of Dr Cochrane's bank accounts (including a payment of just over £600,000 on 24 June 2014). The relevant payments are set out below (with matching payments made to Mr Taylor in square brackets for comparison):

    i) £100,000 on 15 November 2013 [£100,000 on 15 November 2013].

    ii) £50,000 on 30 December 2013 [£50,000 on 24 December 2013].

    iii) Four payments of £20,000 on 14, 15 and 22 May and 1 June 2014 and £10,000 and £20,000 on 2 and 6 May 2014.

    iv) A payment of £50,000 on 9 June 2014.

    v) The payment of £600,000 on 24 June 2014 [£600,000 on 24 June 2014].

vi) A payment of £100,000 on 3 December 2014.

546. Mr Thomas was aware that Harbour had not received the amounts which it was entitled to receive under the Harbour IA before Mr Thomas would have any entitlement. It was Mr Thomas' evidence, both before me and in his 2017 interview with the SFO, that he did not understand that the payments made to him came from the proceeds of the IOM Settlement, but that he believed that they came from a loan facility made available to Dr Smith by Mr Campbell and Mr Chan. I am unable to accept that evidence, and I am satisfied that Mr Thomas was at all times either aware, or at least had a strong suspicion which he chose not to investigate, that he was being advanced amounts from the proceeds of the IOM Settlement in circumstances in which Harbour's prior entitlements to "Proceeds" under the Harbour Trust had not been satisfied:

i) The advance which Mr Thomas says Dr Smith agreed to make to him by way of loan was entirely undocumented and, on Mr Thomas' evidence, did not carry an interest rate. There was no suggestion that any security was provided for the loan. Mr Thomas advanced no persuasive reasons as to why Dr Smith should have advanced over £1m to which Mr Thomas accepted he had no legal right at the relevant time. It is also difficult to see why Mr Campbell and Mr Chan would have been willing to provide an interest-free and unsecured loan, or if they did not, why Dr Smith would have been willing to bear the cost himself.

ii) In the contemporaneous documents (including the Stern Report, prepared on behalf of the Orb Claimants to explain what payments had been made after this issue came into sharp focus at and after the February 2015 hearing before Cooke J), many of these payments were explained on other (and I am satisfied largely false) grounds as costs related to the Arena companies or "payment for assistance with structure".

iii) Mr Thomas swore an affidavit on 26 April 2016, to comply with an order of Popplewell J requiring the Orb Claimants to explain what had happened to the proceeds of the IOM Settlement. Mr Thomas addressed some of the payments he had received: the payment of £100,000 in December 2014, the payment of £50,000 on 9 June 2015, and three payments of £20,000. Mr Thomas did not suggest that these were advances by Dr Smith to him drawing on a facility provided to Dr Smith by Mr Campbell and Mr Chan. Instead it was asserted that "these payments remunerated me for work I undertook and invoiced in relation to the Arena Assets in South Africa". The other payments received by Mr Thomas – and in particular the £600,000 payment – were not revealed at all.

iv) It is striking that Mr Thomas received the benefit of the first payment - £100,000 – on the day Messrs Cooper and McNally made the first payment of £10m to Dr Cochrane under what became the IOM Settlement, and that £100,000 was paid to Mr Taylor on the same day. It is also striking that Messrs Thomas and Taylor received £600,000 on the same day. Mr Taylor admitted that he knew that the £100,000 and £600,000 paid to him came from the IOM Settlement, and I find it improbable that Mr Thomas and Mr Taylor received the same amounts on the same days with different understandings of the source of the money. While Mr Thomas denied that he and Mr Taylor were in regular contact, I accept Mr Taylor's evidence that they were, not least

because in an interview with the SFO in January 2017, Mr Thomas accepted that he saw Mr Taylor "quite often", and that in particular they were in contact around the time of the IOM Settlement.

v) I am sure that Mr Thomas was aware (or at least strongly suspected) that Dr Smith was also drawing on those funds for his own benefit, and that his contemporary appreciation of Dr Smith's lavish lifestyle (which he sought to deny) made it clear to him that this was happening on a significant scale. Mr Thomas had a closer interaction with Dr Smith and his entourage over the period from 2013 to 2016 than he was willing to admit at trial. While I accept that Mr Thomas informed the SFO in his 2017 interview that the views he was expressing were heavily informed by hindsight, and that he had only learned of Dr Smith's dissipation of assets in February 2015, he accepted he met with Dr Smith in Pro Vinci's offices every six weeks in the period after the IOM Settlement, and that he frequently encountered Dr Cochrane and Mr Greenstone there. In his affidavit of 22 April 2016, Mr Thomas had referred to "regular briefings" he had provided to "various people at Pro Vinci".

547. In these circumstances, any suggestion that Orb was in breach of duty in failing to inform Messrs Thomas and Taylor that Dr Smith and/or Dr Cochrane were misappropriating funds from the proceeds of the IOM Settlement for their own benefit would have failed on causation grounds (Messrs Thomas and Taylor being sufficiently aware of this and content to tolerate it, rather than do anything about it, for so long as they too were benefiting).

548. Finally, as I have noted, it is common ground that any interest of Messrs Thomas and Taylor under the Harbour Trust in the Relevant Property falls to be reduced by the amounts already paid to them from the assets transferred under the IOM Settlement in the amounts of:

i) £1,546,998 for Mr Taylor; and

ii) £1,010,097.75 for Mr Thomas.

## R THE CLAIMS OF THE JLS

549. The JLs advance a series of claims on behalf of companies over which they have been appointed or which were under their control to recover sums which are said to have been misappropriated from those companies ("the JL Misappropriation Claims"). The JL Misappropriation Claims were not opposed by any of the parties to the Directed Trial, and have largely fallen to be determined on the documents.

### R1 Introduction

550. The JL Misappropriation Claims are advanced on behalf of a series of companies transferred under the IOM Settlement, to recover sums which it is alleged were misappropriated from those companies. The companies concerned are:

i) Glen Moar;

ii) Unicorn;

iii) Bridge Properties (Arena Central) Limited ("BPAC"); and

iv) Specialty Finance Limited ("Specialty").

551. All bar one of the payments were made when Dr Cochrane was a director of the paying company, and it is said that the payments were made in breach of fiduciary duty and/or in breach of the duty which a director owes to have regard to the interests of the company's creditors once the company is on the verge of insolvency or insolvent.

## R2 The applicable legal principles

552. I can state the applicable legal principles relatively briefly.

553. Taking the BVI companies first, under ss.120 to 125 of the BVI Business Companies Act 2004 the director of a BVI company owes the company duties:

i) to exercise their powers or perform their duties honestly, in good faith and in what the director believes to be in the best interests of the company; and

ii) to exercise powers for a proper purpose.

As person standing in the position of a fiduciary to the company, the director cannot deal with the company in their own interest without making full disclosure to the board, and such a transaction is voidable on the application of the company (unless adopted by the members).

554. For a solvent company, the best interests of the company are normally equated with the best interests of the shareholders. However, where the company is insolvent or of doubtful solvency, the best interests of the company are those of the general body of its creditors: see BTI 2014 LLC v Sequana SA [2019] EWCA Civ 112; [2019] Bus LR 2178 as to the position under English law, there being no evidence that the law of the BVI is any different in this respect.

555. These duties are owed not only by those formally appointed as directors, but by those who assume and act as such (*de facto* directors) and those "in accordance with whose directions or instructions a director or the board of a corporate body may be required or accustomed to act" (s.6 of the BVI Insolvency Act 2003: so-called "shadow directors").

556. Under ss.56 and 57 of the 2004 Act, directors can only approve the payment of a dividend to shareholders when they are satisfied on reasonable grounds that, after paying the dividend, the company will remain solvent on both a balance sheet and cash-flow basis.

557. So far as the Isle of Man companies are concerned, I received no evidence of Isle of Man law but I am willing to proceed on the basis that, in the relevant respects, it is to the same effect as English (and BVI) law. In circumstances in which those duties owe their origins to rules of equity or common law, that is a realistic assumption, and it is one which is confirmed by the Isle of Man Government "Guidance Note on the Responsibilities and Duties under the Laws of the Isle of Man" and the terms of the Isle of Man Companies Act 2006.

## R3 Payments by Glen Moar

558. Dr Cochrane became a director of Glen Moar on 9 May 2014.

559. Before she did so, on 10 April 2014, some £2.5m was paid by Glen Moar to Messrs Cooper and McNally who immediately paid the sum onto Radix UK. On the material available to me, I am satisfied that, as at this date, the board of Glen Moar was accustomed to act on the direction or instruction of Dr Cochrane, who was, therefore, a shadow director:

i) Ownership of the company was transferred to SMA, a company owned and controlled by Dr Cochrane, on 24 March 2014, and on 9 April 2014, representatives of the Orb Claimants took control of Glen Moar's corporate records.

ii) In any event, Messrs Cooper and McNally also owed fiduciary duties to Glen Moar by reason of their control of the company.

560. Thereafter, the following further payments were made:

i) £500,000 to Radix UK on 15 May 2014.

ii) £500,000 to Radix UK on 23 May 2014.

iii) £2.3m to Dr Cochrane on 6 August 2014.

iv) £395,247.71 to Messrs Cooper and McNally on 21 August 2014.

v) A further £2.237 million to Radix UK on 21 August 2014.

561. On the evidence before me, the JLs have used their statutory powers to carry out extensive investigations in relation to all of these payments, including a detailed review of the company's books and records (physical and electronic), and engaged in correspondence with third parties. The effect of those investigations is as follows:

i) Save for the £2.5m first payment, they were all listed in Glen Moar's books as "dividends".

ii) The £2.5m payment was described as a "debt due to management".

iii) None of the payments were authorised by any resolution of the directors nor was there any evidence that the directors gave any consideration to the effect of making the payments on the solvency of the company.

iv) No consideration was received for the payments, and there is no evidence that there was any proper purpose for these transactions (for example documents supporting the existence of the alleged "debt due to management").

v) The payments are either to Dr Cochrane or Messrs Cooper and McNally personally, or to Radix UK which appears to have operated as a family office company for Dr Cochrane.

562. Further, I am satisfied that the payments were made at a time when Glen Moar was on the verge of insolvency, such that the directors were under a duty to act in the best interests of the company's creditors:

i) Glen Moar was a non-trading company, and its sole potential source of income was a highly uncertain "earn out" arrangement following the sale of its only profitable subsidiary, Sentrum, in June 2012.

ii) Its remaining subsidiaries were loss-making, and as at April 2013, it owed outstanding loans of £9.684m to other group companies. In October 2013 Glen Moar had to borrow a further £4m to support its subsidiaries.

iii) On the evidence, there was no likelihood of these loans being repaid (and they never were).

iv) The effect of these matters was that Glen Moar could not lawfully declare dividends by reason of ss.56 and 57 of the BVI Business Companies Act 2004.

563. Further, although a party to these proceedings, and despite the fact that she served a witness statement for the Directed Trial, Dr Cochrane made no attempt to explain or justify the payments.

564. In these circumstances, I am satisfied that all these amounts were paid in breach of fiduciary duty on the part of Dr Cochrane, and in the case of the payment of 10 April 2014, Messrs Cooper and McNally, both because they were not made for any proper or legitimate purpose but to benefit Dr Cochrane, and because they were not made in the best interests of the company's creditors. I am also satisfied that the JLs are entitled to trace into the proceeds of these payments.

### R4 Payments by Unicorn

565. Dr Cochrane became a director of Unicorn on 15 May 2014. Between June 2014 and March 2015, Unicorn made the following payments:

i) £250,000 to Radix UK on 4 June 2014.

ii) £700,000 to Messrs Cooper and McNally on 29 October 2014.

iii) £3m to Dr Cochrane on 4 November 2014.

iv) £141,406.53 to Steephill Aviation Ltd ("Steephill") which provided the private jet used by Dr Cochrane and Dr Smith on 6 February 2015.

v) £2,631,179.82 to Radix UK on 5 March 2015.

566. Given Dr Cochrane's position as director, and the identity of the payees, I am satisfied that Dr Cochrane was aware of and involved in these payments.

567. The first four payments were recorded as loans to Radix UK in Unicorn's accounting records. However, there is no evidence of any documents referring to or recording any such

loans (for example loan agreements and demand letters), nor any commercial basis for them. Only one of the payments went to Radix UK. Further, other documents contain a wholly inconsistent description of the payments: the second payment was described as settlement of a debt due from Radix UK to Messrs Cooper and McNally and an email from Ms Stickler of 4 November 2014 described the third payment as a dividend and not a loan. Most of the payments were not authorised by any directors' resolution.

568. I am satisfied that the payments were made at a time when Unicorn was on the verge of insolvency, such that the directors were under a duty to act in the best interests of the company's creditors:

i) Unicorn's management accounts recorded net liabilities of £25m as at 31 May 2014.

ii) Its financial position only got worse thereafter.

iii) It made the payment to Steephill at a time when Steephill was already substantially indebted to it.

iv) It went into liquidation in March 2015.

569. Once again, although a party to these proceedings, and despite the fact that she served a witness statement for the Directed Trial, Dr Cochrane made no attempt to explain or justify the payments.

570. In these circumstances, I am once again satisfied that:

i) all of these amounts were paid in breach of fiduciary duty on the part of Dr Cochrane, both because they were not made for any proper or legitimate purpose but to benefit Dr Cochrane, and because they were not made in the best interests of the company's creditors;

ii) Unicorn could not lawfully declare dividends by reason of ss.56 and 57 of the BVI Business Companies Act 2004; and.

iii) the JLs are entitled to trace into the proceeds of these payments.

571. I have referred to Unicorn's payment to Steephill of 6 February 2015. On 5 December 2012, Unicorn had lent Steephill $2.45m, secured by a debenture over Steephill's assets, which Steephill used to acquire the aircraft M-ZUMO ("the Aircraft"). Steephill sold the Aircraft on 19 February 2015, and the proceeds of sale were subject to Unicorn's debenture. However, the proceeds of sale were not paid to Unicorn, but into Dr Cochrane's Coutts Zurich account where they were converted into sterling. From this amount, £4,500 and £230,000 were used to fund part of the acquisition of Montagu Square.

572. I am satisfied that Unicorn has a proprietary claim to the proceeds of sale of the Aircraft, by reason of the charge which arises under the debenture, and that accordingly the JLs are entitled to trace into the payments of £4,500 and £230,000 which went into the Montagu Square property.

## R5 BPAC and Specialty payments: the proceeds of Bridgehouse Marine

573. Dr Cochrane was appointed a director of Ballaugh on 9 May 2014, and she was also appointed a director of two subsidiaries of Ballaugh: its direct subsidiary BPAC on 13 May 2014 and BPAC's 100% subsidiary Specialty on 27 March 2014. BPAC and Specialty owned 45% and 52% respectively of Bridgehouse Marine Limited ("Bridgehouse Marine") which in turn owned GMSL.

574. BPAC and Specialty sold their shares in Bridgehouse Marine in September 2014 for £69.8m. From the proceeds of sale, BPAC was entitled to £31,079,242 and Specialty to £36,661,042. However, BPAC and Specialty did not receive those monies.

575. Of the £31m due to BPAC, some £15.46m appears to have been applied (in effect) to repay a loan made to Dr Cochrane. The position is complex and obscure (probably deliberately so), but on the face of the documents:

i) In June 2014, GMSL lent Bridgehouse Marine £15m. That loan appears to have been used by Bridgehouse Marine either to make a loan to BPAC who made a loan to Dr Cochrane, or to make a loan directly to Dr Cochrane:

a) There is a loan agreement between Bridgehouse and BPAC, but only for £5m, albeit this might be a typing error.

b) There is a loan agreement between BPAC and Dr Cochrane, which uses the same template as the Bridgehouse-BPAC loan but in which one of the references to £5m has been hand-corrected to £15m.

c) Bridgehouse Marine's audited reports and accounts as at 31 December 2014 suggest that it lent £15m directly to Dr Cochrane.

ii) Both loans and accrued interest were repaid in full on 22 September 2014 from BPAC's share of the proceeds of sale of GMSL. The net effect, therefore, was a £15.4m payment by BPAC or Bridgehouse to the benefit of Dr Cochrane.

576. Whether the loan was made to Dr Cochrane by BPAC or Bridgehouse Marine, there is no evidence of any proper commercial basis for it, nor as to why BPAC or Bridgehouse Marine should have borrowed funds from GMSL solely for the purpose of advancing funds on an unsecured basis to Dr Cochrane. I am satisfied that it was never intended that Dr Cochrane would repay the loan from her own resources. BPAC's balance sheet reflects the loan as part of a larger sum under heading "Loan to ?? – no details" without identifying the payee. The net effect of the transactions is that monies which should have been applied in the best interests of BPAC were applied for the benefit of Dr Cochrane instead.

577. So far as the balance of the amount due to BPAC is concerned (£15,619,239), it was paid to Dr Cochrane on 23 September 2014 by Fox Williams LLP, BPAC's solicitors. This amount is included within the figure described as "Loan to ?? – no details" in BPAC's balance sheet. There are no documents which explain why it was believed to be consistent with BPAC's interests for these amounts to be advanced to Dr Cochrane, whether by loan or otherwise, and there is no loan documentation nor any directors' resolution approving

such loans. In any event, I am satisfied that it was never intended that Dr Cochrane would repay this amount from her own resources.

578. So far as the £36,661,042 due to Specialty is concerned:

i) Some £21,661,042 was paid to Dr Cochrane by Fox Williams LLP on 23 September 2014 (together with the payment from BPAC's share).

ii) £15m was retained in escrow, but £1m of that sum was released to Dr Cochrane on 21 October 2014.

579. Once again, there appears to be no commercial justification for the payment of £22,661,042 to Dr Cochrane, and no interest on Specialty's part was served by making loans in these amounts to Dr Cochrane. In respect of the 23 September 2014 payment, the sum of £22,845,089 appears in Specialty's balance sheet as "loan to unknown", and no loan was documented. There is no record in Specialty's books of the £1 million. Once again, I am satisfied that it was never intended that Dr Cochrane would repay these amounts to Specialty.

580. The assumption of a liability on BPAC's part to Bridgehouse Marine, the advance of funds by BPAC and/or Bridgehouse Marine to Dr Cochrane, and/or the use of some of the proceeds of the sale of Bridgehouse Marine for the benefit of Dr Cochrane can be seen even more clearly to be transactions which were not in the best interests of BPAC and Specialty when regard is had to the financial condition of BPAC's parent (Ballaugh) at the time the loan was taken out, the proceeds advanced to Dr Cochrane and the proceeds used to discharge those liabilities or make advances to Dr Cochrane:

i) While Ballaugh's management account as at late May 2014 recorded net assets of £5m, this relied substantially on intercompany loans of £12.3m. I accept the evidence of Mr Jackson that these loans had no realisable value at the relevant time, for the reasons he gives at paragraph 19 of his witness statement.

ii) From June 2014, Ballaugh's financial position worsened.

iii) In those circumstances, a director acting in the best interests of BPAC and Specialty over the period June to September 2014 could not have concluded in good faith that the interests of those companies were best served by the transactions which were undertaken for the benefit of Dr Cochrane, rather than by distributing any surplus funds to their shareholder for onwards distribution to Ballaugh.

iv) If any attempt were to be made to argue that the payments should be treated as an informal dividend by Ballaugh to Dr Cochrane, paid directly by Ballaugh's subsidiaries, then there is no evidence that any such dividend was declared, and I am satisfied that Ballaugh's financial condition was such that it could not lawfully declare a dividend.

581. For these reasons, and particularly in circumstances in which Dr Cochrane has made no attempt to explain these transactions, I am satisfied that:

i) any loan transaction between BPAC and Dr Cochrane and the payment made thereunder; and

ii) the use of sums deriving from the proceeds of sale of Bridgehouse Marine by BPAC and Specialty to benefit Dr Cochrane;

involved a breach of Dr Cochrane's fiduciary duties as a director of BPAC and Specialty. I am also satisfied that the JLs are entitled to trace into the proceeds of these payments.

## R6 Alleged further misappropriations from BPAC

582. In or around April 2015, Specialty declared a dividend in favour of BPAC in the amount of £4,045,697. That sum was not paid to BPAC, but to Pro Vinci who in turn paid it to SMA who held it on behalf of BPAC (as confirmed by emails exchanged between Ms Stickler and the JLs on 27 April 2015). In those emails, the JLs recorded their understanding (which Ms Stickler did not challenge) that the sum was being held by SMA "on behalf of [BPAC] and/or its parent [Ballaugh]".

583. However, at a meeting with Mr Jackson of the JLs on 20 May 2015, Ms Stickler claimed that the money had been advanced to SMA by way of loan, and had been spent. Mr Jackson's account of that meeting was recorded in a contemporaneous email, and Ms Stickler (who was a party to the Directed Trial) did not give evidence to contradict it. In his email, sent to Ms Stickler and Dr Smith, Mr Jackson stated "we would expect to have sight of a formal loan agreement to this effect (BPAC to action)". A document described as a "Loan Agreement" was prepared with a date of 15 August 2015, providing for repayment of the loan the following month, albeit those who created this document cannot have believed that SMA would be in a position to meet that deadline.

584. I am satisfied that there was no genuine loan between BPAC and SMA, and that the "loan" story was invented to justify SMA's failure to hold the sums received to BPAC's order, as had been agreed:

i) The suggested loan was inconsistent with the confirmation effectively given to the JLs on 27 April 2015 that SMA held the payment to the order of BPAC.

ii) The payment appears to have been advanced two days after the JLs had been told that the loan had already been made.

iii) There was no commercial rationale for such a loan.

iv) The loan was documented months after the £4m said to be the subject of the loan had been advanced.

v) The JLs had clearly not approved any such loan.

585. Further, the funds were made available for SMA's use in circumstances in which BPAC had an ongoing funding requirement of £700,000 to meet a cash call relating to a Birmingham property investment, and BPAC's parent Ballaugh was in liquidation.

586. In these circumstances, and in the absence of any attempt by Dr Cochrane or Ms Stickler to defend the position, I am satisfied that Dr Cochrane acted in breach of fiduciary duty in her capacity as a director of BPAC in approving the transfer of the beneficial interest in these funds to SMA for them to apply to their own purposes, and that SMA (which was wholly owned by Dr Cochrane) applied those funds for its own purposes with knowledge of that breach of fiduciary duty. I am therefore satisfied that the JLs are entitled to trace into the proceeds of these payments.

587. In May 2015, Unicorn agreed to lend £4m to BPAC to enable it to fund the cash-call I have referred to in [585], a loan which was documented on 22 June 2015. The loan agreement included an undertaking by BPAC that the monies would only be used "to fund the ongoing commitments of the Group and for the purpose of providing an onward loan to meet its obligations under the LLP Deed with respect to the development of certain buildings and land in Birmingham".

588. Pursuant to that loan, on 22 June 2015 £2,630,000 was transferred from Unicorn into Stewarts' bank account. However, Ms Stickler informed the JLs that on the day the money was transferred, BPAC had agreed to lend it to SMA, who had agreed to lend £2,500,000 of it to Minardi, who had agreed to lend it to Mr Ruhan (to meet his ongoing legal expenses in the 2012 Proceedings). A document purporting to record the BPAC-SMA loan was provided by Dr Cochrane to the JLs on 13 August 2015. Once again, it provided for repayment in September 2015, and it permitted SMA to use the moneys for the widest possible purposes ("general corporate purposes"). Dr Cochrane also signed a shareholder's resolution purporting to approve the BPAC-SMA loan, even though BPAC's sole shareholder, Ballaugh, was under the control of the JLs who did not approve any such loan. That resolution bears the date of 2 June 2015.

589. No legitimate commercial purpose for such a loan has been identified, and Dr Cochrane has not chosen to seek to defend it. The failure to offer such an explanation is particularly telling, because in a judgment in this litigation reported at [2016] EWHC 850 (Comm), [154], Popplewell J had noted that:

> "No evidence in support has been provided as to these loans or their alleged commercial basis. They look like a simple payment to the vehicle used by Dr Cochrane and Dr Smith in the Isle of Man Settlement for their unconditional benefit".

590. If Dr Cochrane had wished to resist that inference, it was incumbent on her to adduce evidence doing so. In the absence of such evidence, I am satisfied that:

i) the transfer of £2,500,000 involved BPAC applying monies in breach of the terms on which BPAC had obtained those funds;

ii) the funds were used in a transaction which was not in any way in BPAC's interests, and which at best exposed BPAC to a significant risk of non-payment (given that the loan was made on a non-secured basis to a Marshall Islands company);

iii) in all likelihood, the transfer of £2,500,000 by BPAC was not a loan but a transfer intended to operate for Dr Smith and Dr Cochrane's unconditional benefit.

591. The remaining £130,000 was transferred to another company owned or controlled by Dr Cochrane, GACH, on 27 May 2015. This also involved a breach of the terms on which BPAC had acquired the £4m, and was once again a transaction with no apparent commercial rationale undertaken for no apparent consideration. Both the £2,500,000 and £130,000 were paid at a time when Ballaugh, BPAC's parent, was in liquidation. Once again, there has been no attempt to justify or explain the payment.

592. For these reasons, I am satisfied that the payments of £2,630,000 from BPAC were procured by Dr Cochrane (who signed both the Loan Agreement for SMA and the resolution) in breach of her fiduciary duties as a director or shadow director of BPAC (as evidenced by her ability to procure conduct by BPAC so obviously against its interests), in that she knew that the payments were not for the commercial benefit of BPAC, but she procured them for her own purposes and benefit. Once again, I am satisfied that the JLs are entitled to trace into the proceeds of these payments.

## S THE CLAIMS OF THE SFO

### S1 Introduction

593. The SFO's claims are advanced respect of any realisable property of Dr Smith, to the extent that it has not been found to be subject to the proprietary rights of other parties. In summary, the SFO contends that the following persons were nominees of Dr Smith, such that any property they hold constitutes the realisable property of Dr Smith:

i) SMA, in respect of the Transferred Companies;

ii) Dr Cochrane, in respect of the Non-Arena Companies, the Jersey Properties and any interest in the IUAs traceable to funds emanating from Dr Cochrane;

iii) LCL, in respect of the Non-Arena Companies to the extent transferred to them by the LCL Transfers, the Jersey Properties and Flat 1 Hamilton House (and LCL is also alleged to have received any interest in Flat 1 by way of gift);

iv) Conduit Asset Management Limited ("Conduit"), as the legal owner of the shares in LCL; and

v) Dr Imogen Smith in respect of Flat 1 Hamilton House (who is also alleged to have received any interest in that property as a gift).

594. The effect of the findings I have made above is that:

i) SMA received the Transferred Companies as nominee for the Orb Claimants;

ii) Jersey law does not recognise any trust interests in the Jersey Properties; and

iii) The LCL Transfers are to be set aside.

595. Given those findings, the only live issues which arise on the SFO's case are whether:

i) Dr Cochrane held the Non-Arena Companies and any interest in the IUAs as Dr Smith's nominee;

ii) LCL and/or Dr Imogen Smith held Flat 1 Hamilton House as Dr Smith's nominee or whether they received any interests in Flat 1 by way of gift; and

iii) Conduit held its shareholding in LCL as Dr Smith's nominee.

596. In addition, the following further issues arise as between the SFO and P&M:

i) whether Dr Smith has waived any claim against Dr Cochrane in respect of any assets she holds as his nominee by the Confidential Settlement Deed;

ii) whether Dr Smith has waived his claim to any such property by the LCL Settlement Deed; and

iii) whether the SFO is obliged to satisfy P&M's personal claims from the Non-Arena Companies.

## S2 The legal regime

597. The Confiscation Order was made against Dr Smith under Part VI of the CJA 1988. A court asked to make such an order must first determine whether the defendant has benefited from any criminal conduct (s.71(1A)) and, if so, the amount to be recovered from that defendant. This amount is the lesser of the benefit which has been made and the amount that might be realised from the defendant's assets (ss74(1) and (3)). The Confiscation Order required Dr Smith to pay £40,956,911. That amount carried interest under s.17 of the Judgments Act 1838 (s.75A(1) and (3)), and as of 29 January 2021, the outstanding amount was £73,047,478.

598. The amount of a confiscation order can be recovered from the defendant's "realisable property". This means:

i) any property held by the defendant (s.74(1)(a), 102(1) and 102(7)); and

ii) any property held by a person to whom the defendant has "directly or indirectly made a gift" (s.71(1)(b)).

599. As to the relevant definitions:

i) "Property" includes "money and all other property, real or personal, heritable or moveable, including things in action and other intangible or incorporeal property" (s.102(1)).

ii) Property is "held" by a person "if he holds any interest in it", which includes a "right" (s.102(1) and (7)).

iii) Property "is transferred by one person to another if the first person transfers or grants the other any interest in the property" (s.102(10)).

iv) For the purposes of s.71(1)(b), the gift must have been made after the commission of the relevant offence (s.74(10)(a)) and the court must consider it "appropriate in all the circumstances to take the gift into account" (s.74(10)(b)). A gift includes a transfer "to another person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration provided by the defendants" (s.74(12)).

600. So far as priority is concerned, the enforcement authority's rights rank after those with property interests acquired otherwise than by gift. This is the result of s.82(4) which provides that the powers of the court shall be exercised "with a view to allowing any person other than the defendant or the recipient of a gift to retain or recover the value of any property held by him." In an earlier hearing in this case, reported at [2017] EWHC 3332 (Comm), [31], Popplewell J observed of these provisions that "the legislative steer in section 82 of the … Act requires the Court to give priority to the property rights of innocent third parties, in priority to those of the prosecutor, in seeking to enforce the confiscation order". Subject to that provision, the powers are to be exercised "with a view to making available for satisfying the confiscation order … the value for the time being of realisable property" (s.82(2)).

601. There are a number of provisions which make it clear that the SFO has priority over unsecured claims against the object of the confiscation order:

i) S.82(6) provides that "no account shall be taken of any obligations of the defendant or of the recipient of any such gift which shall conflict with the obligations to satisfy the confiscation orders".

ii) S.84 provides that if the object of the order is adjudged bankrupt, then property which is subject to a confiscation order or its proceeds are excluded from the bankrupt's estate.

602. The SFO relied in this connection on two decisions which address materially identically worded provisions under the Proceeds of Crime Act 2002. In SFO v Lexi Holdings Plc [2009] QB 376, the Court of Appeal rejected the argument that a restraint order should be varied to allow the property to be used to meet the claims of unsecured creditors. At [86], the Court noted:

> "It will be seen that, when the court decides on the amount to be specified in the confiscation order, it has to use the total of the values of the property the defendant holds, less only 'priority' obligations, such as fines and preferential debts. The existence of obligations owed to ordinary third party creditors is to be disregarded when a confiscation order is made. It seems to this court that it would have been wholly illogical for the legislature to have decided to allow third party debts to be paid during the period when assets are supposedly being preserved by a restraint order when such debts are to be left out of account at the stage when the confiscation order is made. We can see no reason why Parliament should have decided to allow unsecured creditors to reduce the assets during the restraint

> phase when such creditors could not reduce the assets at the confiscation stage. If that were the position, it would put a premium on well-advised creditors getting in quickly during the restraint phase before their opportunity is lost, and we do not accept that that situation is one which was ever intended".

At [88], the Court concluded that "the intention of the legislature that restraint orders should be made and subsequently be maintained without regard to debts owed to third party unsecured creditors is evident".

603. In R v Luckhurst [2020] EWCA Crim 1579; [2021] 1 WLR 1807, [25], Popplewell LJ explained that:

> "A confiscation order is not proprietary in nature. It does not confer a proprietary interest in any property. It is for a specified sum and may be enforced against any realisable property whether or not the latter constitutes the proceeds of crime. Nor, however, is it the same as a personal debt or money judgment. It ranks ahead of other unsecured creditors in a number of ways. Section 69(2)(c) provides that all the relevant powers, which include those of enforcement, must be exercised without regard to obligations to unsecured creditors. Sections 417 and 418 of the Act exclude property which is the subject matter of a restraint order or otherwise recoverable in confiscation proceedings from the estate of a bankrupt, and so such assets are unavailable for distribution to unsecured creditors of a bankrupt; and there are equivalent provisions in relation to the assets of a corporate defendant in liquidation in s.426 of the Act. In calculating the 'available amount' under s.9, there is no reduction in the calculation of the value of the defendant's assets to take account of debts to unsecured creditors. Moreover s.58 provides that once a restraint order in support of a future confiscation order is in place, no distress may be levied against realisable property, nor may any tenancy of premises be forfeited without the court's consent, and courts may stay any other proceedings in respect of any property which is the subject of the restraint order. In these ways the debt constituted by a confiscation order is afforded priority over those owed to unsecured creditors generally".

## S3 Nomineeship

604. In the context under consideration, a nominee is someone who owns property, but holds it on a bare trust for the principal absolutely, effectively dealing with the property as the principal directs, including conveying it to the principal so as to terminate the trust: see *Lewin*, 1-028. Whether property is held by someone in the capacity of a nominee is essentially a question of fact. Lord Sumption, in Prest v Petrodel Resources Ltd [2013] UKSC 34; [2013] 2 AC 415, [52], observed:

> "Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership. Of course, structures can be devised which give a different impression, and some of them will be entirely genuine. But where, say, the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership."

605. There are number of matters which may support the conclusion that the apparent owner of property in fact holds it as a nominee for someone else: whether someone other than the alleged nominee exercises control over the asset (Phoenix v Cochrane [2017] EWHC (Comm), [17(5)]); whether the apparent owner uses or allows the asset to be used in a manner which advances someone else's interests rather than its own (Prest, [52]); who paid for the asset, which may support a conclusion that it is held on constructive trust (*Lewin*, 10-019) and whether the person alleged to be the "real" owner had a motive to disguise his or her ownership (JSC BTA Bank v Solodchenko & Ors [2015] EWHC 3680, [8]).

## S4 Did Dr Cochrane hold the Non-Arena Companies and any interest in the IUAs as Dr Smith's nominee?

606. Subject to (a) my finding as to the Retained 50% in Bodega (at [503(iv)] above) and (b) any issues which arise as to the effect of the Ozturk No 2 Trust which do not form part of the Directed Trial, I am satisfied that Dr Cochrane held the shares in the Non-Arena Companies as Dr Smith's nominee. I would note that neither Dr Cochrane nor Dr Smith now seek to challenge this finding, and I am satisfied that it is established on the evidence. In summary:

i) Dr Smith has a track record of seeking to disguise his interest in assets behind Dr Cochrane. The investigations brought by the SFO in connection with the Izodia Theft identified a ski chalet held through a corporate vehicle of which Dr Cochrane was a director and the transfer of his luxury car collection into Dr Cochrane's name shortly after the Izodia Theft came to light.

ii) Although notionally assetless, Dr Smith has been able to live "high on the hog" (in his own phrase) off assets notionally owned by Dr Cochrane, spending those assets in accordance with Dr Smith's idiosyncratic tastes (including a commissioned water clock and artwork chosen by Dr Smith) or for his personal benefit (for example on private jet travel, much of which involved Dr Smith travelling alone). While I accept that much of the money spent by Dr Smith belonged to others, the freedom with which he dissipated assets notionally in Dr Cochrane's ownership is relevant when considering whether such interest as Dr Cochrane had in those assets was held in her own right, or as Dr Smith's nominee.

iii) Dr Cochrane has on a number of occasions proclaimed that she is a "busy GP with two young daughters and no real business experience", with minimal knowledge of Dr Smith's business activities. Dr Smith has himself accepted that Dr Cochrane lacked "any independent experience of the world of business, the world of property deals". The vast network of companies which she apparently owns, and the complex web of dealings in which those companies have engaged, strongly support the suggestion that her involvement is nothing more than as a cipher, and that Dr Smith – with his extensive track-record of complex, contrived and dishonest business dealings – is "calling the shots".

iv) Dr Cochrane has no obvious sources of independent wealth from which she might have acquired these assets independently of Dr Smith. In 2005, according to her own evidence, she was close to destitution, and in 2014 and 2016, she gave accounts of her assets and wealth which identified no substantial assets beyond those transferred under the IOM Settlement.

v) The confiscation order made against Dr Smith gave him every incentive to hide his ownership of assets behind a nominee owner who he could trust to follow his directions. It is clear that Dr Smith has acted at all times since the Confiscation Order was made with a view to making it appear as if he has no assets – for example his Deed of Separation with Dr Cochrane of 11 March 2014 sought to give Dr Smith all the benefits of certain properties, while transferring no property for the SFO to attach.

## S5 Did LCL and/or Dr Imogen Smith hold Flat 1 Hamilton House as Dr Smith's nominee or as the recipients of a gift?

607. I can also deal with the position of Dr Imogen Smith and LCL in relation to Flat 1 Hamilton House briefly:

i) Flat 1 Hamilton House was placed into Dr Imogen Smith's name on 21 October 2015. There is no evidence she made any contribution to the acquisition cost.

ii) Dr Imogen Smith then signed an undated nominee agreement certifying that she held the flat "as nominee for and on behalf of Gail Alison Cochrane".

iii) On 6 May 2016, the same day as the LCL Transfers were executed, Dr Imogen Smith signed a further nominee agreement agreeing to dispose of the property in such manner as LCL directed. However, as a nominee herself, Dr Imogen Smith was not in a position to dispose of the beneficial interest in the property. In these

circumstances, I have concluded that this document does not change the position, and that Flat 1 continued to be held by Dr Imogen Smith on trust for Dr Cochrane.

iv) I am satisfied that Dr Cochrane was in turn acting as a nominee for Dr Smith (for the reasons in [606] above).

v) The document signed on 6 May 2016 clearly formed part of a co-ordinated attempt to make enforcement more difficult, by transferring assets away from Dr Cochrane after she had signed the Loan Note. If, contrary to my previous conclusion, that document did effect a change in the beneficial ownership of Flat 1, then I am satisfied that LCL gave no value for this transfer, and that it falls be set aside either under Article 17 of the Jersey Désastre Law or Section 423 of the Insolvency Act 1986.

608. The effect of these conclusions is that to the extent Dr Cochrane, Dr Imogen Smith or LCL appeared to hold interests in Flat 1 Hamilton House, those interests were held for Dr Smith.

## S6 Did Conduit hold the shareholding in LCL as Dr Smith's nominee?

609. LCL was incorporated in the Marshall Islands on 12 August 2011. It was clearly formed on Dr Smith's instructions, as evidenced by his communications with LCL's administrator, Mr Charles Helvert, on 26 February 2013. In 2016, Conduit became LCL's sole shareholder, but it held those shares as nominee. The question is for whom.

610. Conduit's position as it appears from the documents is that it held the shares for Dr Smith's brother, Mr Anthony Smith. I am satisfied that the true beneficial owner was Dr Smith, for whom Mr Anthony Smith was a nominee. Mr Anthony Smith accepted he was not "engaged meaningfully in the day to day events" involving LCL before 2016, and the available documents relating to its formation and its early administration involve Dr Smith or his close business associate, Ms Stickler, not Mr Anthony Smith. LCL's position in this litigation appears to have been largely determined by Dr Smith, with remarkable similarities (even to the extent of common errors) in correspondence sent on Dr Smith and LCL's behalf. The metadata for certain documents emanating from LCL - a statement of case and two letters from Mr Anthony Smith – identify the author as "Gerald", and this is also true of Mr Anthony Smith's witness statement served for this trial. Finally, I am satisfied that the LCL Transfers were co-ordinated by Dr Smith, and done for the purposes of seeking to make enforcement against the Non-Arena Companies more difficult, while still leaving them within his control.

## S7 P&M's first argument: the effect of the Confidential Settlement Deed

611. P&M advance a similar argument to that which I have considered at [240]-[242] above, on this occasion arguing that the releases in the Confidential Settlement Deed released Dr Smith's rights against Dr Cochrane as his nominee in holding the Non-Arena Companies. It fails both because the 2012 Proceedings did not concern the Non-Arena Companies, which do not therefore fall within the various "anchor points" to which the releases in clauses 6.1 and 6.2 are tied, and because the non-adversarial nominee arrangement does not fall within clauses 6.1 and 6.2 on their proper construction, for the reasons I gave when addressing the similar argument in relation to Dr Cochrane and SMA.

## S8 P&M's second argument: the effect of the LCL Settlement Deed

612. Clause 3 of the LCL Settlement Deed provided that the LCL Parties (including Dr Smith):

> "hereby release, discharge and waive …. all and any actions, claims, rights, demands and set-offs that they have, had, may have or hereafter can or shall or may subsequently acquire against the Settlement Parties or any other person…. where such action, claim, right demand or set-off etc relates to or arises out of or in connection with:
>
> 3.1 The Relevant Property;
>
> 3.2 The [IUAs];
>
> ….
>
> 3.5 (For the avoidance of doubt) The LCL Parties' claims to the assets listed in Schedule 1".

613. P&M argue that this released any claims Dr Smith had against Dr Cochrane as his nominee.

614. This argument is, to my mind, without merit.

615. First, the argument depends on the waivers in the LCL Settlement Deed having effect not only as a contractual term between the parties to the LCL Settlement Deed, but as some form of renunciation of property of which non-parties can claim the benefit. However:

i) Recital (B) refers to the parties agreeing "a settlement between themselves", and the releases are properly to be understood as releases of claims *as against the other parties* to those assets.

ii) Clause 18 provided that "the Settlement Parties are unable to compromise or deal with or in any way affect the rights and claims of any Non-Settlement Parties."

iii) Clause 32 provided that "the terms of this Settlement Deed are not enforceable by any third party under the Contracts (Rights of Third Parties) Act 1999".

616. Second, it is in any event clear that the releases in the LCL Settlement Deed did not extend to any proprietary rights of the LCL Parties on which the Settlement Parties relied for the purposes of their own claims against third parties (as opposed to the assertion by the LCL Parties of such rights as against the Settlement Parties). Thus:

i) Clause 4.1 provided that "the above withdrawal, release, discharge and waiver of claims or entitlements by the LCL Parties … will not impact or in any way impact or affect and is not intended to impact or in any way affect, the Viscount's right and ability to deal with the assets which have vested as part of the *en désastres* estates (or, for the further avoidance of doubt the Settlement Parties' claims to the Paragraph 3 Property)."

ii) Clause 5 provided that "the LCL Parties do not and will not challenge … the Settlement Parties' cases at the Directed Trial".

iii) Clause 6 provided that "the LCL Parties will not seek to challenge [the] Settlement Parties cases at the Directed Trial, including their cases to the effect that the Paragraph 3 Property is the realisable property of Gerald Martin Smith …." P&M accepted that this paragraph pre-supposed that the SFO would continue to advance its case that the Relevant Property constituted the realisable property of Dr Smith, a state of affairs which would be inconsistent with Dr Smith having renounced any entitlement to the Relevant Property.

### S9 P&M's third argument: s.82(4) of the CJA 1988

617. Finally, to the extent that Phoenix does not benefit from an equitable assignment under the LICSA and P&M are not otherwise subrogated to an equitable lien over any assets held under the Harbour Trust, P&M contend that the SFO's claim to recover Dr Smith's realisable property is contingent upon payment to P&M of any sums due to them under the LICSA or the Loan Note. They suggest that the wide definition of "property" in the CJA 1988 (" … including things in action …") extends to their debt claims, and that the effect of s.82(4) is to require the SFO to act so as to enable P&M to recover the value of their debt claims, by ensuring they are paid.

618. However, this argument falls foul of the clear scheme of priority established by the CJA 1988. Once it has been determined that P&M have only personal claims, then they do not benefit from s.82(4) of the Act, which is concerned with proprietary claims (hence the words "retain or recover the value of any property held by him"). The argument that this provision requires the SFO to act with a view to enabling non-secured creditors to "realise the value" of their debt claims would negate the distinction between proprietary and personal claims which the CJA 1988 clearly draws, and remove the priority which the SFO was clearly intended to enjoy over unsecured claims. It would also be inconsistent with s.82(6) and the requirement to take no account of obligations of the defendant which conflict with the obligation to satisfy the confiscation order. The fact that Phoenix obtained a negative pledge from Dr Cochrane in respect of assets which I have found to be the realisable property of Dr Smith does not turn its claim under the Loan Note into a proprietary claim (and no doubt it was for this reason that the Loan Note was described as "unsecured": see [267(i)]).

## T THE CLAIMS OF MR PELZ

### T1 The position of Mr Pelz in the litigation

619. Mr Pelz's claims were set out in the following documents:

i) His "Assets and Claims Position Paper" of 24 April 2017.

ii) His statement of case of 29 November 2017.

iii) His "Response to Other Interested Party Claims" of 9 March 2018.

iv) His witness statement of 19 October 2020.

v) His written closing submissions of 17 February 2021 and his oral closing submissions.

vi) Mr Brier's written closing submissions of 6 March 2021 and his oral closing submissions.

620. At the hearing before Popplewell J on 24 and 25 April 2018, the Judge noted that Mr Pelz appeared to be advancing claims to the underlying assets which, at that point, did not form part of the Directed Trial. However, Popplewell J stated that, in so far as the Court made any findings as to the status of the IOM and Geneva Settlements at the Directed Trial, Mr Pelz would be bound by them. In my order of 30 July 2020, I expanded the scope of the Directed Trial to include the IUAs, but on terms that at the Directed Trial, Mr Pelz is not required to demonstrate his tracing entitlement upstream of the Qatar Settlement Agreement.

## T2 Mr Pelz's claims

### (1) The Qatar Settlement Agreement claims

621. As I noted at [40] above, Mr Pelz was the CFO of the main shareholders in Al Arrab, which contracted with the six SPVs (the BTH1Subs) to construct the six towers comprising one of the Qatar Projects.

622. Mr Pelz says that in 2009, Al Arrab made four loans to BT1 totalling $25m. It is Mr Pelz's case that the proceeds of these loans were paid into the Arena Companies. In 2010, Al Arrab entered into negotiations (in which Mr Pelz was involved on Al Arrab's behalf) with the BTH1Subs and BTH1 which led to the cancellation of two of the six towers (those to be owned by BT3 and BT6), and the conclusion of an SPA on 1 July 2010 whereby BTH1 agreed to sell its interest in BT1 and BT2 to Al Arrab for $64m. Al Arrab paid the first $28.5m under that contract to BTH1 in 2010, but defaulted on the remainder, leading BTH1 to terminate the SPA on 6 April 2011. Al Arrab then sought to reclaim the amount it had paid. Once again, it is Mr Pelz's case that the $28.5m received has been transferred into the Arena Companies.

623. It is Mr Pelz's case that the Qatar Projects were initially a joint venture between Mr Phillip Barton and Mr Ruhan, but that in 2011 Mr Barton agreed to split his 50% interest in the Qatar Projects (which came to be held through Minardi) with Mr Pelz. This agreement is referred to by Mr Pelz as the "PB/Minardi-UP Agreement". The documents said to contain or evidence this agreement have yet to be produced, and it appears, on the present state of the evidence, that Mr Pelz is unable to locate them.

624. In 2012, Mr Pelz claims he entered into fee agreements with Mr Ruhan and BT1, BT2, BT4 and BT5 ("the BT Entities") under which he was entitled to a "Revenue Share" in return for his services (an agreement Mr Pelz called the "Agreement_AJR"). Mr Pelz says this was replaced by a more formalised version of the agreement (which Mr Pelz referred to as the "Profit Share Agreement") concluded on 1 April 2014 with the BT Entities. Mr Ruhan was not a party to the Profit Share Agreement.

625. The BT Entities commenced an arbitration against Al Arrab which was settled on 11 June 2015 by a contract known as the Qatar Settlement Agreement. The agreement, to which the BT Entities, Minardi, the Land Investment & Real Estate Development Company ("the Land"), Mr McNally (it has been suggested as Mr Ruhan's nominee) and Al Arrab were parties:

    i) provided that Al Arrab and the Land would pay $43m in cash in discharge of the claims of the BT Entities and the others, which sum was to be paid to Ocean Advisory and Consulting Ltd "for the benefit of any one or more of the BT Entities, Minardi, Mr McNally and/or the Releasing Parties". The payment was to "constitute good and final payment and … be treated as payment made to all of such entities/individuals jointly and severally and therefore shall release and discharge the Claimants from any and all claims"; and

    ii) otherwise waived all claims against the parties or their related parties (which Mr Pelz says included Al Arrab's claim to recover the $25m paid to BT1 in 2009 and the U$28.5m paid to BTH1 in 2010).

626. Mr Pelz claims to be entitled to trace into the proceeds of the $43.5m paid under the Qatar Settlement Agreement:

    i) This is a claim to trace into assets held by the Arena Companies or their subsidiaries rather than into the shares in the Arena Companies themselves, and therefore constitutes a proprietary claim to underlying assets. These claims only form part of the Directed Trial, to the extent that they concern the IUAs which were brought within the Directed Trial by my order of 30 July 2020.

    ii) On the evidence before me (which was not in dispute), the only IUAs into which the $43.5m can be traced are Flat 12 Hamilton House and Montagu Square. Mr Pelz asserts an entitlement to trace into $14.775m of the $43.5m applied in the purchase of Flat 12 Hamilton House and Montagu Square (some 34%). Whether he can do so is not, as I have said, a matter for this trial. However, in my view it is appropriate when determining the entitlement to the IUAs to fix the maximum amount of Mr Pelz's interest at this trial.

    iii) If Mr Pelz is contending that other IUAs were acquired with the $43.5m paid under the Qatar Settlement Agreement, then I am unable to accept this on the evidence before me. The other IUAs were all acquired prior to the receipt of the $43.5m pursuant to the Qatar Settlement Agreement and there is no evidence of the $43.5m being applied, e.g., to discharge loans used to acquire other IUAs, so as to provide a basis for a claim premised on some form of backwards tracing analysis. That is not to preclude the possibility that there are other underlying assets, not forming part of the Directed Trial, into which the $43.5m can be traced. However, that question is for another day.

627. In addition to proprietary claims to the proceeds of the $43.5m, Mr Pelz also asserted an entitlement to trace into the payments of $28.5m and $25m which Al Arrab made in 2009 and 2010 and which they gave up their claim to recover as part of the Qatar Settlement Agreement:

i) There is an obvious difficulty in Mr Pelz's claim that the 50% interest he says he acquired in 2011 and his rights under agreements said to have been concluded between 2012 and 2014, entitled him to trace into sums paid by Al Arrab in 2009 and 2010.

ii) In closing submissions, Mr Pelz sensibly accepted that, whatever claims others may have in relation to those funds (which, to the extent that they succeeded, might benefit Mr Pelz if they increased the assets available to those against whom he has claims), he was not himself in a position to assert a proprietary claim to these payments.

628. Mr Pelz has also asserted that the Qatar Settlement Agreement settled the claims of the BT Entities at a significant undervalue. As to this:

i) The issue of whether Mr Pelz, as at best someone who stood to benefit from distributions made by the BT Entities arising from any claims they may have against Al Arrab (whether through the 50% share he says he has in Mr Barton's interest in the Qatar Projects or as a creditor of Mr Ruhan and/or the BT Entities or of Minardi) has standing to seek relief in relation to the Qatar Settlement Agreement was not argued before me.

ii) However, there has been no attempt to set the Qatar Settlement Agreement aside, nor were all the parties to the Qatar Settlement Agreement made parties to these proceedings (something which would have been necessary if any such relief had been sought).

iii) Nor was any evidence adduced before me which would have allowed me to conclude that the Qatar Settlement Agreement was entered into at a significant undervalue (had that been relevant to any issue to be decided at the Directed Trial). On any view, Al Arrab made a substantial payment under the Qatar Settlement Agreement and the underlying dispute was hugely complex and hard-fought.

iv) In these circumstances, Mr Pelz's complaints about the Qatar Settlement Agreement are not relevant to the issues to be decided at the Directed Trial.

### (2) The Assignment Claims

629. Mr Pelz advanced three further claims ("the Assignment Claims"), all of which concern claims said to have arisen after the IOM Settlement and which were the subject of assignments involving Mr Pelz on 17 November 2015. These assignments came about as a result of a "joint battle plan" agreed between Mr Pelz, Mr Ruhan and Mr Barton in opposition to the Orb Claimants and Dr Smith.

630. The first claim arises from Mr Barton's sale of Minardi to GACH in August/September 2014 in return for GACH's promise to pay 50% of any net recovery it made from the Qatar Projects to Mr Barton:

i) Mr Pelz says that as, in effect, the owner of 50% of Mr Barton's interest, he is the beneficiary of 50% of the amount payable by GACH.

ii) By a Deed of Assignment dated 17 November 2015 ("the GACH Assignment"), to which Mr Barton, Mr Pelz and Mr Ruhan were parties, Mr Barton assigned the claim against GACH to Mr Ruhan absolutely, on terms whereby any recovery would (after deduction of expenses) be shared $^1/_3$-$^1/_3$-$^1/_3$ between Mr Ruhan, Mr Barton and Mr Pelz.

iii) Mr Ruhan was obliged to commence proceedings for the recovery of the debt, and all the parties agreed at their own cost and promptly to "do … such further acts, documents and things required by … the other parties … to give full effect to this Agreement, the recovery of the Debt and the collection of the Recovery Proceedings".

iv) Mr Pelz suggests that Mr Ruhan gave up this claim under the terms of the Confidential Settlement Deed (which settled various claims between the Smith-side and Ruhan-side entities). This would appear to be the case, although the issue was not addressed in argument and I make no finding on it.

631. The second claim arises from the allegation that Mr Barton was owed $181,425,353 by Minardi under a loan agreement dated 3 August 2014:

i) By a Deed of Assignment dated 17 November 2015, to which Mr Pelz and Mr Ruhan were parties, Mr Barton assigned his debt claim against Minardi to Mr Ruhan absolutely.

ii) By clause 3.3, the net proceeds of recovery (after deduction of expenses) were to be paid as follows:

a) The first £2.5m to Mr Ruhan.

b) The next £2.5m to Mr Pelz.

c) The next £10m to be split evenly between Mr Baton and Mr Pelz.

d) Any further amounts to be split between Mr Barton, Mr Ruan and Mr Pelz.

iii) Mr Ruhan owed the same obligations as under the GACH Assignment.

632. The final claim arises from loans which Mr Pelz says he made to Minardi over the period from 2011 to 2014 in the sum of $5,659,494.70:

i) By a Deed of Assignment dated 17 November 2015, Mr Pelz assigned the loans to Mr Ruhan absolutely.

ii) The Deed of Assignment provided for the first £2.5m of any recovery to be paid to Mr Ruhan, and the balance to Mr Pelz. It was Mr Pelz's evidence that the Deed of Assignment did not properly record his agreement with Mr Ruhan, which was that the entire recovery was to be paid to Mr Pelz. However, the assignment was intended to enable Mr Ruhan to resist claims being made against him by Minardi by relying on the assigned debt as a defence to Minardi's claim. The £2.5m claim brought by

Minardi arose from a loan made by Minardi to Mr Ruhan in 2015 to fund his costs of the 2012 Proceedings.

iii) The arrangement between Mr Pelz and Mr Ruhan was set out in an email Mr Pelz sent to Mr Ruhan on 17 November 2015 which stated:

> "Reference made to our phone call 15 minutes ago. Aim of this agreement is to support you in your battle with Minardi and also the entire set-up (SM, SC, HAC, Unicorn etc) (the 'Adverse Parties')… Through the agreement you will aim to use GBP 2.5 mill of that claim to set-off against Minardi and avoid that you need to pay Minardi £2.5 mill. The agreement does not include a consideration of the effective transfer of GBP 2.5 mil claim. We agree that this consideration will be settled in priority when the entire claim scenario gets settled with the Adverse Parties. A specific side letter shall be agreed between us in that respect".

iv) Mr Ruhan was under the same obligations as under the GACH Assignment.

633. I am satisfied that none of these claims can give Mr Pelz a proprietary interest in the assets in issue in the Directed Trial. They all involve personal debt claims, assigned to Mr Ruhan. While it might be said Mr Ruhan had agreed (for value) to hold any proceeds on trust for Mr Pelz to the extent of his share, the claims themselves are personal claims against the alleged debtors and not proprietary in nature.

634. Mr Pelz's complaint regarding the Assignment Claims is that they were "settled in the Geneva Settlement". As I have stated, that may be the position so far as the GACH Assignment is concerned. So far as the two claims against Minardi are concerned, when Minardi was sold to Phoenix, those claims were specifically acknowledged in the sale agreement as potential liabilities of Minardi which were preserved (Schedule 4 of the Minardi SPA). The Geneva Settlement did not involve any release of Minardi's liabilities in respect of the assigned claims. Indeed Mr Ruhan had commenced proceedings against Minardi to enforce the claims (CL-2015-000874). Those proceedings were not discontinued or dismissed as a result of the Geneva Settlement, but were stayed by a consent order of 22 January 2019 pending the determination of the Directed Trial. In these circumstances, there has been no release of these two Assigned Claims, and the Geneva Settlement cannot be impugned on the basis that there has been such a release.

635. In the course of his evidence, it became clear that Mr Pelz's claim was a practical one – that if (as Mr Pelz contends, but is very much in dispute), Mr Stevens holds his indirect interest in Minardi as Mr Ruhan's nominee, then Mr Ruhan would have no incentive to pursue the Assigned Claims against Minardi. Mr Pelz stated:

> "If one considers the relationship between Andy Ruhan and Anthony Stevens … when you take this in context, it is very clear that the Minardi cases have been settled because Mr Ruhan has not actively pursued the matter".

636. However, I do not think that this provides any basis for Mr Pelz to impugn the Geneva Settlement either. First, it was the sale of Minardi which (on the hypothesis of Mr Pelz's case) is said to have achieved the position whereby Mr Ruhan had no incentive to pursue the claims. I have identified no rule of law which rendered such a sale void or voidable on the basis that Mr Ruhan would have less incentive to pursue claims against Minardi in its new ownership. Second, the obligations imposed on Mr Ruhan by virtue of these assignments give Mr Pelz a remedy (certainly in contract, and possibly in equity, although there was no argument on this) if Mr Ruhan does not pursue those claims as he should or if the claim against GACH has been settled when it should not have been. I note that Mr Barton has applied to be joined to the proceedings Mr Ruhan had commenced against Minardi to ensure that those proceedings are properly conducted, which application has also been stayed pending the outcome of this trial. Whatever claims Mr Pelz might have, I see no basis on which he can impugn the Geneva Settlement.

637. Mr Pelz also complained that, as part of the Geneva Settlement, Minardi had given up valuable claims against the BT Entities, Ocean Consulting and various companies associated with Dr Smith (referring in this connection to clause 6 of the Sale and Purchase Agreement for the sale of the shares in Minardi by GACH to Phoenix). The valuable rights which it is alleged were given up are said to arise from the fact that the Qatar Settlement Agreement was entered into at an undervalue. However:

i) For the reasons set out in [628] above, to the extent that any proprietary claims to assets in this trial depend upon a finding that the Qatar Settlement Agreement settled the claims against Al Arrab at an undervalue, the evidence before me was not sufficient to make out this complaint.

ii) For the reasons set out at [642] below, I am not persuaded on the evidence before me that the settlement of the disputes between the Smith and Ruhan-side parties effected by the Geneva Settlement was at an undervalue.

638. Mr Pelz also suggested that the Geneva Settlement was a "sham" because Dr Smith, who negotiated the Geneva Settlement on behalf of the Orb Claimants, did not intend to perform the agreement. I accept that was indeed Dr Smith's intention, because he admitted as much in his evidence in the FS Arbitration. The strategy adopted was:

i) To include a widely-worded force-majeure clause in the Loan Note, which would apply even if the force majeure event in question was induced by Dr Cochrane.

ii) To trigger the operation of that clause by reporting the payment due to be made to Phoenix to the NCA as a suspected criminal payment, in the hope and expectation that NCA would refuse consent to make the payment.

iii) To that end, on 6 May 2016, Mr Greenstone wrote to the NCA on Dr Cochrane's behalf stating that Mr Stevens was believed to be acting as Mr Ruhan's nominee in relation to the payments to be made under the Loan Note, that "the payment is a sham and has been structured by Mr Ruhan so that he will evade liabilities he may have to HMRC and others" and that "it is suspected that the loan note structure is being used to defraud creditors and/or cheat the public revenue".

iv) The NCA provided the hoped-for response in which they refused consent to the payment, on 17 May 2016, stating "if you do proceed with that matter you may be committing an offence under Section 327, 328 or 329 of [the Proceeds of Crime Act 2002]".

v) The NCA's letter was then relied upon as a force majeure event.

639. The incident provides ample confirmation, if any more is needed, of Dr Smith's complete lack of scruple. However, it does not render the Loan Note or the LICSA void. At best, it might have provided a basis for Phoenix and/or Mr Ruhan to seek to rescind the Loan Note and/or the Geneva Settlement on the basis that it was induced by a false representation as to their counterparties' intention to perform the contract. Such a claim would raise a number of issues which it is not necessary to explore because none of the parties have sought to rescind the Geneva Settlement or any part of it on such grounds, with the result that the agreements remain binding. It certainly does not provide a basis for a non-party, such as Mr Pelz, to seek to impugn the agreements.

640. That brings me to a final possible objection to the Geneva Settlement suggested by Mr Pelz's evidence: that the effect of the Geneva Settlement was significantly to reduce Mr Ruhan's assets to the detriment of his creditors, and that the settlement was reached "in disregard of any claim of creditors". It is necessary when addressing this issue to consider the two distinct elements of the Geneva Settlement separately:

i) The agreement which led the Orb Claimants and Mr Ruhan to give up their claims against each other.

ii) The agreement said to have been reached between Mr Ruhan and Mr Stevens to resolve what is said to be Mr Stevens' claim against Mr Ruhan arising from the Qatar Projects by giving rights to P&M under the LICSA and the Loan Note.

641. The second issue is very closely linked with the Geneva Nominee Issue (not least because if Mr Stevens was acting as Mr Ruhan's nominee and holds any relevant interest on bare trust for him, there has been no relevant transfer of value by Mr Ruhan which might be said to have prejudiced his creditors). It has already been determined, in relation to a contingent claim advanced on that basis under s.423 of the Insolvency Act 1986 by HPII against P&M, that this issue is not part of the Directed Trial. I accept Mr Brier's submission that it remains open to Mr Pelz to challenge the alleged agreement between Mr Ruhan and Mr Stevens on the same basis as HPII is seeking to challenge it.

642. So far as the first issue is concerned, Mr Pelz confirmed in closing submissions that he is not seeking to advance an application to set aside Geneva Settlement to the extent it settled the 2012 Proceedings. Accordingly, it is not necessary to resolve the issue of whether it would have been open to Mr Pelz to advance such a claim in circumstances in which it had not been raised in his statements of case. While Mr Pelz is, of course, a litigant in person, that would not of itself have answered any legitimate issues of prejudice which those resisting such an argument might have raised (Barton v Wright Hassall [2018] UKSC 12; [2018] 1 WLR 1119, [18]). In any event, it seems to me that there would have been insuperable difficulties in this argument:

i) First, the Geneva Settlement settled long-standing and hard-fought litigation between the Orb Claimants and Mr Ruhan. There was no basis, on the evidence before me, which would have enabled me to conclude that Mr Ruhan settled the 2012 Proceedings at an undervalue.

ii) Second, I can see no arguable basis for concluding that Mr Ruhan's purpose in settling the 2012 Proceedings was to put assets beyond the reach of persons who were or might at some time in the future make claims against him. This requires more than simply foresight that this would or might be the effect of the transaction (see Leggatt LJ in JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176; [2019] BCC 96, [15]). Mr Ruhan and Dr Smith had fought a long and at times vicious commercial war, and there was no love lost between them at the time of the Geneva Settlement. As Cooke J noted at [2015] EWHC 262 (Comm), [57]:

> "This is hard fought litigation with no holds barred between parties who were, and are at enmity with one another and where a war of attrition is being waged in the shape of this action by the claimants against Mr Ruhan".

So far as the Orb Claimants are concerned, the obvious reason why Mr Ruhan settled the 2012 Proceedings on the terms on which he did was a desire to end this hard-fought and damaging litigation on the best terms he could. Certainly, it is difficult to imagine he was so desirous of damaging his other creditors that he was willing to transfer assets into the hands of the Orb Claimants at an undervalue to achieve that end.

643. In these circumstances, it is not necessary to consider the further issue of whether Mr Pelz had standing to bring a s.423 claim as someone whose interests had been or were capable of being prejudiced by the Geneva Settlement.

644. Finally, P&M contend that, to the extent that Mr Pelz had any tracing claim to property in which they claimed a proprietary interest, P&M took free of that claim as bona fide purchasers for value. This argument was advanced on the basis that Mr Pelz did not suggest in his evidence that he had informed Mr Stevens of those claims before the LICSA was concluded, or otherwise suggest Mr Stevens had knowledge of them. I have found that P&M did not acquire proprietary (as opposed to personal) rights under the LICSA and therefore this issue does not arise. Had I reached the contrary conclusion, the position would have been as follows:

i) If P&M prevail in due course on the Geneva Nominee Issue, then I accept on the evidence at this trial that P&M were not on notice of those claims. No such suggestion was made to Mr Stevens and no evidence as to Mr Stevens' knowledge of his claims arising from the Qatar Settlement Agreement was given by Mr Pelz.

ii) However, I make no determination as to Mr Ruhan's knowledge, nor as to whether, if P&M were acting as Mr Ruhan's nominees, the bona fide purchaser for value defence is made out. That is a matter for determination as part of the Geneva Nominee Issue, on which I acceded to P&M's application that it should be removed from the scope of this trial.

iii) This determination would not impact Mr Pelz's entitlement to seek s.423 relief in any event.

## U THE IUAs

645. As I have explained, the Directed Trial, as originally formulated, was concerned with the determining the ownership of the Transferred Companies, the Non-Arena Companies and the Jersey Properties. With the exception of the Jersey Properties, this involved determining the ownership of companies, but did not directly address issues which might arise further down the corporate chain as to whether some of those companies had received assets into which others were entitled to trace.

646. I acceded to an application to bring claims in relation to certain assets – the IUAs – into the Directed Trial, and steps were taken to advertise the fact that the Court would be determining the ownership of the IUAs at this trial.

### U1 Downstream tracing issues

647. There are three sources of funds which can be traced into the IUAs:

i) The IOM Settlement Cash ([422(iv)].

ii) Payments made from those companies now under the JLs' control, which have been the subject of my findings in Section R above ("the Wrongful Payments").

iii) The $43,500,000 paid in settlement of the Qatar claims, to which I have referred in Section T above ("the Qatar Settlement Payment").

648. The tracing exercise from the relevant start points – the cash paid in the case of the IOM Settlement Cash, the payments from the companies under the JLs' administration and from the $43.5m payment – are not in dispute. For the avoidance of doubt, I find that the cash-flows between those start points and the IUAs set out in the Settlement Parties' and the JLs' Statement of Case in relation to the Identified Underlying Assets correctly reflect the factual position.

### U2 Upstream tracing issues

#### (1) The IOM Settlement Cash

649. Subject to one point I shall come to, the entitlements to trace into the IOM Settlement Cash essentially stand in the same position as the Transferred Companies:

i) These were assets held by Messrs Cooper and McNally on trust for Mr Ruhan.

ii) Mr Ruhan surrendered his equitable interest through the Geneva Settlement, following which these amounts were held by Dr Cochrane as nominee for the Orb Claimants who themselves held the assets on the terms of the Harbour Trust.

iii) The effect of my finding in (ii) is that any such amounts, to the extent of the Orb Claimants' interest in them, represent recoveries (or the traceable proceeds of recoveries) from the 2012 Proceedings to which Stewarts' lien extends.

iv) The reasons for my finding that HPII is not entitled to trace into the IOM Settlement Cash are set out at [464]-[475] above.

650. An issue then arises as to the effect of my conclusion that the Harbour Trust was only constituted once Mr Ruhan released his rights in the assets transferred under the IOM Settlement by the Geneva Settlement, to the extent that the IOM Settlement Cash was applied to acquire the relevant IUAs before that date. I have concluded that this does not prevent the Harbour Trust applying to these fruits of the IOM Settlement Cash:

i) The fruits of the IOM Settlement Cash, once Mr Ruhan's rights were released, represented recoveries which Dr Cochrane was under an obligation to hold for the Orb Claimants. There was never any point at which Dr Cochrane held those assets or their fruits for her own benefit, or was in a position validly to pass a beneficial interest in those assets to anyone other than a bona fide purchaser for value (and no such acquisition has been made out).

ii) In any event, as I have noted at [300(ii)] above, the constitution of the Harbour Trust related back to the date of the Harbour IA so far as dealings by the Orb Claimants or their nominees with those assets are concerned. This also appears to be position when a vendor-purchaser trust comes into being, so far as dealings with the subject-matter of the contract between the date of contracting and the date when specific performance becomes available are concerned: Professor Goode, "Ownership and obligation in commercial transactions" (1987) 107 LQR 433, footnote 6 citing Shaw v Foster (1872) LR 5 HL 321; Lysaght v Edwards (1876) 2 Ch D. 499 and Rayner v Preston (1881) 18 Ch D 1, 13.

iii) In these circumstances, I do not need to consider whether there is any alternative legal doctrine which would prevent Dr Cochrane from denying her trusteeship and breach of trust as against the Orb Claimants in respect of misappropriations of trust property in the period between her receipt of the IOM Settlement Cash and the constitution of the Harbour Trust (whether some form of estoppel or by analogy with the position of a trustee *de son tort*).

651. It is not clear to me whether the effect of these findings is to exhaust the extent of any beneficial interest of those IUAs into which the IOM Settlement Cash can be traced. If not, then the position is as follows:

i) Flat 24 Hamilton House (the only IUA acquired with the IOM Settlement Cash alone) was acquired by Ingenuity Capital Limited ("Ingenuity"), one of the Non-Arena Companies. However, I am satisfied that Ingenuity acted as a nominee, in the first instance for Dr Cochrane.

ii) In any event, Ingenuity gave no value for the acquisition, such that any transaction between Dr Cochrane acting in her own right and Ingenuity falls to be set aside as a transaction at an undervalue under Article 17 of the Jersey Désastre Law.

iii) I did not hear argument on the issue of whether Dr Cochrane's receipt of these assets was as Dr Smith's nominee (and it is far from clear to me that there is any scope for such an argument in the light of my finding that Dr Cochrane was acting as the nominee of the Orb Claimants in relation to the 2012 Proceedings). I am told that the effect of the 2019 Settlement Agreement is that it is not necessary to decide this question even if (which I am told is unlikely) it arises, and I have therefore refrained from doing so.

## (2) The Wrongful Payments

652. The issue which arises here is whether these are to be treated as payments wrongfully made by the companies under the JLs' administration, such that the paying companies are entitled to recover them, or whether the payments are to be treated as dividends paid by those companies "up the chain", in which case it is said that, at the point when they become dividends of the Transferred Companies, they represent "Proceeds" for the purpose of the Harbour IA and fall to be distributed in accordance with the terms of the Harbour Trust.

653. I can deal with this argument shortly. I have accepted the JLs' case in Section R above that the Wrongful Payments were not payments properly made by the companies concerned by way of dividend, but were misappropriations. The Settlement Parties other than the JLs have accepted that if the Court concludes that "the JLs' Wrongful Payments claims are meritorious … the dividends could not lawfully be made", with the result that the claims to these amounts under the Harbour Trust must fail.

654. At this point it is necessary to consider two further arguments which arise in relation to the claims brought by the JLs, the first concerning HPII, and the second concerning P&M.

### The position of HPII

655. As I have explained, HPII seeks to trace into the profits made by Mr Ruhan from the Cambulo Transaction, which it is alleged involved a breach of the self-dealing rule. That claim – whether there was such a breach of duty, whether it is time-barred and whether it gives rise to a right to trace into the assets in issue in the Directed Trial – was postponed to the second phase of this litigation (for the reasons given in Popplewell J's rulings reported at [2018] EWHC 2862 (Comm) and [2018] EWHC 2865 (Comm)). The resultant order expressly provided that the Directed Trial would not determine:

i) "any proprietary claims to any of the assets of the Arena Companies or the Non-Arena Companies", but would determine claims to the Jersey Properties;

ii) "whether HPII is able to follow or trace the transferred property and/or its proceeds into the hands of the Cambulo Group and any subsequent recipients".

656. As I have stated, in July 2020 I added the IUAs to the Jersey Properties as assets which would form part of the Directed Trial. At that point, there had been no proper particularisation of HPII's tracing case (a state of affairs which only changed when evidence was served by HPII in response to the Strike-Out Application in February this year). It was only at the point that it became apparent that HPII's tracing exercise was largely directed

to property received at the "underlying asset" level, rather than the Arena Companies themselves.

657. When considering whether to add the IUAs to the Directed Trial, a question arose as to how HPII and Mr Pelz's upstream tracing claims would fall to be dealt with when resolving issues as to the ownership of the IUAs. To address HPII and Mr Pelz's concerns, the Settlement Parties agreed to the following proviso which was included in my order of 31 July 2020:

> "HPII and Mr Pelz shall not be required to demonstrate at the Directed Trial (i) their entitlement to trace into the IUAs (such as a relevant proprietary base, breach of fiduciary duty or other legal matters such as compliance with the relevant limitation periods), or (ii) the factual basis for tracing into the IUAs;
>
> i. for the period prior to the Isle of Man Settlement; or
>
> ii. insofar as the Qatar Settlement Agreement concluded on 11 June 2015 and the payments made to Ocean Advisory & Consulting WLL which followed are relied upon, for the period prior to the Qatar Settlement Agreement."

658. As a result, HPII was not required to bring forward its tracing claim in respect of the period up to the IOM Settlement so far as the IUAs were concerned.

659. It is necessary to record this background because the Settlement Parties argued in the course of their closing submissions that HPII had abandoned any tracing claims it might have to the IUAs in the course of argument on the fourth day of trial, following opening speeches, on the question of whether it was open to each of the Settlement Parties to rely upon the bona fide purchaser defence on the basis of their pleaded cases. During that argument, a question arose as to whether HPII opposed the JLs' claims, or whether HPII was content for the companies administered by the JLs to recover the Wrongful Payments because, if its own case succeeded, HPII would benefit in due course. In formulating what I understood HPII's case to be, I assumed that any benefit to HPII would come through its ability to trace into companies further up the ownership chain whose asset pool would be enlarged by the JLs' recovery, rather than by HPII tracing into the assets which the JLs had themselves followed or traced into the IUAs (page 64 of the transcript of 22 January 2021). It is also right that I should record that, somewhat over-confidently as it turns out, I expressed considerable surprise when Mr Pickering QC initially disagreed with that characterisation. Having taken instructions, Mr Pickering QC confirmed HPII's position as follows:

> "We accept what your Lordship has said, your analysis earlier on. We accept it is not necessary for the joint liquidators to raise this form of defence [sc. bona fide purchaser for value]".

Mr Pickering QC then confirmed my understanding of HPII's position, namely that "the JLs are collecting your client's money and you are going to get it out the top, as it were". That expression was somewhat ambiguous as to the precise mechanism by which HPII would benefit, and while the words "out the top" reflected my deficient understanding of

HPII's case, they could equally apply to a case in which HPII's proprietary claims to those recoveries took those assets out of the liquidations altogether.

660. The Settlement Parties contend that, by that confirmation, HPII irrevocably abandoned any tracing claim into the IUAs, contending that "the entire trial has taken place on a particular basis and … it is not right for HPII to seek to resile from that when the whole trial has taken place on the basis of what they said". It was also said that the Settlement Parties had "come forward to argue the points that are the subject of this trial, the relevant property and the IUAs on a particular basis." The Settlement Parties further submitted:

> "What is now being suggested is that actually this trial will not resolve – either this trial does not have to resolve the IUAs, in which case there is simply no evidence and has been no evidence advanced by HPII to advance this case … ; or HPII is going to be saying, actually, you can't decide any of this now <u>which has never been the position in respect of the IUAs</u>".

(emphasis added).

661. The entire debate on this issue, both on day 4 of the trial and in closing, proceeded without the parties or the Court recalling the carve-out the Settlement Parties had offered when obtaining the order including the IUAs in the Directed Trial. Once it is appreciated that HPII's ability to trace into the IUAs had never formed part of the Directed Trial, and that trial preparations had proceeded accordingly, the Settlement Parties' contention that "the entire trial has taken place" on the basis that HPII has no such claims can be seen to be without merit, as can its contention that HPII was obliged to bring forward evidence on this issue at the Directed Trial. Nor can Mr Pickering QC's statement reasonably be interpreted as abandoning such proprietary claims as HPII might have given the following factors:

i) HPII had pleaded such claims, and the Court had ordered they did not form part of the Directed Trial.

ii) Mr Pickering QC's statement was ambiguous, and influenced by the Court's mistaken appreciation of the position, provisionally confirmed by the Settlement Parties, which had not been informed in either case by a review of HPII's statement of case bringing such a claim or the terms of the order bringing the IUAs into the trial (matters which would have fundamentally changed the debate on this issue).

iii) It was obvious to all parties during the argument on day 4 of the trial that HPII had yet to serve its evidence on the tracing application, so that any statement made was necessarily subject to such issues as might be raised by that evidence.

iv) In any event, in circumstances in which, at the Settlement Parties' own invitation (before, I should say, Mr Saoul QC had been instructed), the Court had ordered that this part of HPII's case did not form part of the Directed Trial, the Settlement Parties cannot have acted to their detriment by relying on Mr Pickering QC's statement.

## **Relief sought by P&M**

662. P&M argued that, if and to the extent the JLs' claims to IUAs succeeded, the Court should direct the ERs to transfer the IUAs to the JLs. Clearly the extent of the JLs' entitlement depends on my findings in relation to those claiming to have prior proprietary interests, as set out above. However, P&M's argument raises a further issue as to the effect of the 2019 Settlement Agreement, and whether the Court should order a transfer of assets to any greater extent than clause 5 of the 2019 Settlement Agreement provides for.

663. By way of brief summary, the 2019 Settlement Agreement was an agreement by the Settlement Parties to share, *inter se*, the benefits of any proprietary rights they established in the Directed Trial in accordance with pre-agreed percentages which varied depending on which of three "settlement pots" the proprietary entitlements fell into. For present purposes, the Court is concerned with Pots 1 and 2:

i) Pot 1 concerned the "Net Proceeds of Realisation", defined as the amount in the hands of the ERs after paying Priority Claims and certain categories of expense ("Priority Claims" being the proprietary claims of those ranking ahead of the Settlement Parties). The JLs were entitled to 7.32% of these amounts in their capacity as agents of the Arena Companies.

ii) Pot 2 concerned "the Arena Surplus", being the surplus of the liquidations from the Arena Companies. Reflecting the fact that the Arena Companies would be distributing, rather than receiving, any such surplus, the JLs' share was zero.

664. In the proceedings commenced by the JLs seeking sanction from the BVI Court to enter into the 2019 Settlement Agreement, P&M advanced two reasons why sanction should not be granted:

i) First, it was said that the provisions of the 2019 Settlement Agreement, so far as they concerned Pot 2, required the JLs, as the officers effecting that distribution, to distribute the surplus to persons other than those entitled to it under the BVI insolvency legislation.

ii) Second, it was said that the JLs' 7.32% share in Pot 1 was insufficient (the "bad deal" argument).

665. The first of these arguments was premised on the assumption that the percentages of Pot 2 required the JLs to distribute any surplus to those parties in those shares, regardless of whether they were entitled to it or not. However, the Settlement Parties argued that this misunderstood the 2019 Settlement Agreement, and that the effect of the percentage entitlements to Pot 2 assets was to agree how the Settlement Parties would distribute *inter se* such sums as the Settlement Parties were entitled to when the surplus was distributed in accordance with BVI insolvency legislation (with the result that if none of the Settlement Parties had such an entitlement under the BVI insolvency legislation, Pot 2 would be empty). Jack J accepted the Settlement Parties' construction, but the Court's order removed any room for further misunderstanding by declaring:

> "On the true construction of the terms of the Settlement Agreement:

> (1) The [JLs] are not required to make any distribution of the Arena Surplus … otherwise than in accordance with Section 207(3) of the Insolvency Act 2003.
>
> (2) The [JLs] shall only be entitled to distribute the Arena Surplus to [the other Settlement Parties] in the proportions set out in clause 5 of the Settlement Agreement in the event that one or more of the parties establish a proprietary claim to the shares in the Arena Companies … and then only to the extent … that any such claim is not outranked by the proprietary claims of [any non-Settlement Party]".

666. The second argument – the "bad deal" argument – was rejected by Jack J on the facts and rejected in the Eastern Caribbean Court of Appeal. In the run-up to their appeal to the Eastern Caribbean Court of Appeal, P&M raised a further query about Pot 1 in a letter of 7 September 2020, querying the JLs' authority to compromise any claims of the Arena Companies to Pot 1 assets, and suggesting that any such compromise would fall foul of Jack J's order (although that new point was not run before the Eastern Caribbean Court of Appeal). To my mind, this point was misconceived:

i) A liquidator is, within limits, permitted to compromise the causes of action of the companies over which it is appointed. In relation to Pot 1, the JLs did just that, securing an entitlement for those companies to 7.32% of all Pot 1 assets (in circumstances in which those companies would have had no claim to many of the assets which might fall into that pot), in return for agreeing that any proprietary claims the companies might have would be placed into that pot.

ii) The conclusion of such a settlement agreement does not involve a failure to comply with the distribution requirements of BVI insolvency legislation. It involves the settlement of litigation and claims at the level of the companies themselves. Accordingly, it raises a fundamentally different issue to that raised in relation to Pot 2 before Jack J (which is what is to happen to any eventual surplus, once the liquidation has been completed, with such compromises or settlement or claims as might be appropriate).

iii) It might be possible to object to such an arrangement on the basis that it constituted a "bad deal", but that argument had been advanced and rejected.

iv) The obvious lack of commerciality in P&M's argument can be seen from consideration of the position in which (a) only the JLs' claims in respect of assets going into Pot 1 succeeded; and (b) only the other Settlement Parties' claims in respect of assets going into Pot 1 succeeded. On the argument raised by P&M, the Arena Companies would secure 100% of such recoveries in the first scenario, and 7.32% in the second.

667. The Eastern Caribbean Court of Appeal upheld Jack J's conclusions albeit in some respects for different reasons.

668. In these circumstances, I am satisfied that there is nothing in the orders made in the BVI proceedings which require or justifies the order which P&M ask me to make.

### (3) The Qatar Settlement Payment

669. The Qatar Settlement Payment ($43,500,000 or £30.8m) was paid by Al Arrab to Ocean, "for the benefit of any one or more of the BT Entities, Minardi, Mr McNally and/or any of the Releasing Parties". Of that amount, £23,921,641.59 was paid to Candey LLP, acting as solicitors for Dr Cochrane and Dr Smith and used to purchase Montagu Square, Flat 12 Hamilton House and one of the Jersey Properties. Subject to the payment arising in relation the Aircraft, which I have dealt with at [571] above, the JLs advance no claim in relation to any of the IUAs acquired with the Qatar Settlement Payment.

670. A number of issues arise in relation to the "upstream" aspect of this claim:

i) I received no evidence as to the proportionate entitlements (if any) which the BT Entities, Minardi or Mr McNally had in the $43.5m received by Ocean. However, I am concerned only with the £23,921,641.59 used to acquire IUAs.

ii) The shares in the BT Entities were transferred under the IOM Settlement. On that basis, subject to any prior claims, the shares in those entities were held on the terms of the Harbour Trust as from the date of the Geneva Settlement.

iii) The right to follow the BT Entities' share of the amounts paid is, prima facie, an asset of the BT Entities, rather than an asset directly held on the terms of the Harbour Trust. However, the BT Entities were all dissolved on 19 January 2017, and the BT Entities' share is, in a sense, one of the fruits of those shares.

iv) The ownership of the IUAs, and the right to trace from the Qatar Settlement Agreement payment into the IUAs, is part of this trial, and any parties asserting proprietary interests in the IUAs were required to assert those claims.

671. Doing the best I can on the inadequate material before me, and subject to any proprietary claims which on my findings enjoy priority or which were expressly carved out of the Directed Trial, I am satisfied that the proceeds of the £23.9m are held on the terms of the Harbour Trust:

i) The BT Entities were dissolved 4 years ago, and have not been represented before me so as to assert any right of recovery themselves, or to challenge any distribution of the £23.9m to Dr Cochrane and Dr Smith. In these circumstances, I must treat the £23.9m as having been received by Candey LLP free from any claim by the BT Entities.

ii) I am satisfied that the £23.9m, representing money received by Drs Smith and/or Cochrane by way of payments arising from some of the Transferred Companies, and, in the absence of any claim by the BT Entities, represented Proceeds of the 2012 Proceedings and hence was subject to the Harbour Trust.

iii) However, that entitlement is subject to any proprietary rights which Mr Pelz is able to establish in the Qatar Settlement Payment. Had HPII overcome the issue addressed at [76]-[81] of the Strike-Out Judgment, it would also have been subject to any proprietary right HPII established in the Qatar Settlement Payment.

iv) The registered proprietors of Montagu Square and Flat 12 were Ms Irving and Blackwood (Investments) Ltd ("Blackwood"). However, I am satisfied that Ms Irving and Blackwood – who provided no value for these acquisitions – were acting as nominees for Dr Cochrane (in the first instance). If there was any transaction between Dr Cochrane and Ms Irving or Blackwood in relation to these properties or the funds used to acquire them, then the transactions were in the nature of a gift which fall to be set aside under Article 17 of the Jersey Désastre Law.

672. It follows from my conclusion that the tracing rights in relation to the £23.9m represent recoveries in the 2012 Proceedings that they are also subject to Stewarts' lien.

673. It is not clear to me whether the effect of these findings is to exhaust the extent of any beneficial interest of those IUAs into which the Qatar Settlement Payment can be traced. If not, then on the evidence before, me any remaining cash belonged either to Dr Cochrane or Dr Smith, and therefore falls either within Dr Cochrane's *en désastre* or constitutes Dr Smith's realisable property. I did not hear argument on the issue of whether Dr Cochrane's receipt of these assets was as Dr Smith's nominee (and it is far from clear to me that there is any scope for such an argument in the light of my finding that Dr Cochrane was acting as the nominee of the Orb Claimants in relation to the 2012 Proceedings). I am told that the effect of the 2019 Settlement Agreement is that it is not necessary to decide this question even if (which I am told is unlikely) it arises, and I have therefore refrained from doing so.

### (4) IUAs acquired through a mixture of IOM Settlement Cash, Wrongful Payments and/or the Qatar Proceeds

674. The proprietary interests in these assets will reflect the proportionate contribution of each payment source.

## V THE DECLARATIONS TO BE MADE

675. The parties are asked to seek to agree the terms of declarations which the Court can make in order to give effect to my findings. To the extent that they are unable to agree their terms, I will hear submissions on the matters in dispute, together with any other consequential matters.