Judgment handed down on 28 July 2025 amended pursuant to CPR 40.12 on 27 August 2025

Neutral Citation Number: [2025] EWHC 1961 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No: BL-2022-000781**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 July 2025

Before:
MR JUSTICE THOMPSELL

BETWEEN:

(1) MR PRADEEP MORJARIA
(2) MRS SANGITA MORJARIA
(3) SUMMERHILL TRUST COMPANY (ISLE OF MAN) LIMITED
(ACTING AS TRUSTEE OF THE WENTWORTH CAPITAL TRUST)
(a company incorporated under the laws of the Isle of Man)
(4) VIPER LIMITED
(a company incorporated under the laws of Jersey) **Claimants**

-and-

(1) MR CAMRAN MIRZA
(2) TYDWELL LIMITED
(3) MR TOJI JOHN
(4) MRS SAIRA MIRZA
(5) MR AMEER MIRZA
(6) BOOMZONE LIMITED
(7) REDWIRE DC LIMITED
(8) OTAKI HOLDINGS LIMITED
(a company incorporated under the laws of Jersey)
(9) WOLVERINE FINANCE LIMITED
(10) LONDON MEDIA HUB LIMITED **Defendants**

AND BETWEEN:

MR CAMRAN MIRZA **Part 20 Claimant**
(1) MR MARK LEWIN **Third Party**
(2) MR OLIVER WEBSTER **Fourth Party**
(3) MS DAWN YATES **Fifth Party**

Anthony Peto K.C., Mark Vinall and Sean Butler (instructed by **Forsters LLP**) for the **Claimants**
Hefin Rees K.C., Stephen Ryan and Jack Fletcher (instructed by **Candey Solicitors**)
for the **Defendants** (excluding Otaki Holdings Limited and Mr Toji John)
Christopher Lloyd and John-Patrick Asimakis (instructed by **PCB Byrne LLP**)
for the **Part 20 Defendants**

Hearing dates: 27 January- 20 March 2025 (inclusive of days for reading in and preparation of closing submissions)

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APPROVED JUDGMENT

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Mr Justice Thompsell:

1. INTRODUCTION

1. It's a tale as old as time. A venture that started with high hopes and expressions of brotherhood between the participants has ended in bitter acrimony and blame on all sides.

2. This case relates to a property joint venture (the "**JV**") formed to develop a property in Ealing, London. The purpose of the JV was to purchase land and develop commercial property in London at 22-24 Uxbridge Road, Ealing (the "**Property**").

3. The original idea was to develop the Property into an office complex and hotel. The part of the Property at 24 Uxbridge Road ("the "**Hotel**") was developed into a hotel and was let to Premier Inn. Later, the plan to develop the part of the Property at 22 Uxbridge Rd ("**No. 22**") into offices was modified in favour of an alternative proposal to develop it into a data centre (the "**Data Centre**"), and one floor and part of the basement of No. 22 were fitted out and equipped accordingly. Later, when the Data Centre proved unsuccessful, the JV adopted a proposal to use the remaining floors at No. 22 as serviced offices.

4. The main parties to the JV were or are the First Claimant ("**Mr Morjaria**") and the First Defendant ("**Mr Mirza**"). These parties, along with the Second Claimant ("**Mrs Morjaria**"), became shareholders in the Eighth Defendant ("**Otaki**"), being the holding company through which the JV was to be conducted. All these parties entered into a joint venture agreement (the "**JVA**") on 14 December 2007.

5. Otaki operated through two subsidiaries. One of these was a company called Krugar Limited ("**Krugar**"). Krugar held a long lease of the Hotel and let this to Premier Inn. The other was the Fourth Claimant ("**Viper**"), which held a long lease of No. 22. I will call Otaki, Viper and Krugar the "**JV Entities**".

6. It is common ground that Mr Mirza was the driving force behind the JV, operating through his company, the Second Defendant ("**Tydwell**"). Later, some of the operations of the JV relating to the Data Centre were operated by the Seventh Defendant ("**Redwire**"). The shares of Redwire were originally all owned by Mr Mirza, but later 50% of them were transferred to the Morjarias' company Trafalgar Limited ("**Trafalgar**"). As events unfolded, various other companies became involved that were in the ownership of Mr Mirza or his family. These included the Sixth Defendant ("**Boomzone**"), the Ninth Defendant, ("**Wolverine**") and the Tenth Defendant ("**LMH**"), although it is the Defendants' case that it was Mr Mirza's children that controlled the latter two companies. Other members of Mr Mirza's family were involved at various times within these companies including the Fourth Defendant, his wife ("**Mrs Mirza**") and the Fifth Defendant, his son, Mr Ameer Mirza. To distinguish him clearly from his father, and without meaning any disrespect, I shall refer to the Fifth Defendant by his first name as "**Ameer**". Similarly, and again meaning no disrespect, I will refer to Mr & Mrs Mirza's younger son, Mr Osman Mirza, as "**Osman**" and to Mr & Mrs Mirza's daughter, originally Miss Shaima Mirza, but after her marriage, Mrs Shaima Sibtain, as "**Shaima**". Likewise, I will refer to Mr Morjaria's

son (who has only a minor role in these events) as "**Shamick**", again, meaning no disrespect.

7. The other parties to this action are the Third Claimant, Summerhill Trust Company (Isle of Man) Limited, acting as trustee of the Wentworth Capital Trust, as the assignee of claims that the JV Entities had against the Defendants, and the Third Defendant ("**Mr John**"), who was an accountant acting for Mr Mirza or his family companies.

8. Mr John has taken no part in these proceedings and has not filed an Acknowledgement of Service or a Defence. He has retired from working for Mr Mirza and it is understood that he is living abroad, probably in India. I have determined to hear the case without him, as the court has power to do under CPR rule 39.3, on the basis that he has been duly served in accordance with the order for service out of the jurisdiction by Order of Deputy Master Arkush dated 16 May 2022. I do remain concerned, however, that these attempts may have been ineffective as they have involved using two email addresses that are associated with companies that he no longer works for and one email address that he had not used for 14 years prior to the Deputy Master's Order. The Claimants have made an application dated 7 March 2025 (served on Mr John in the same manner) for judgment to be entered against him pursuant to CPR rule 12, and with the request that this matter be dealt with at the main trial. This application was mentioned during the trial, but the ramifications of it were not discussed. It was merely requested that I deal with the application summarily within my judgment. I will discuss this further when I get to the question of remedies at the end of my judgment.

9. This is a complicated case, with many claims made in relation to many causes of action. Depending on how you count it, there is something like 8 separate sets of facts that are alleged to give rise to claims or counterclaims, and many of these facts have given rise to several different claims so that there are something like 25 separately pleaded claims in contract, tort and for breaches of fiduciary duty and for relief in equity. The case has been heard over 30 sitting days, nearly all of them involving extensions to the usual court day. The evidence has included over 9,000 documents comprising 90,000 pages of evidence (of which over 1,300 documents were expressly referred to at trial or in submissions); some 37 witness statements; oral evidence from some 11 witnesses; 16 expert reports (plus various joint statements) from 7 separate experts; and authorities bundles including more than 350 cases or textbook extracts. I must express the court's gratitude to the legal teams for their presentation of the case and to Opus2, which provided technological backup in the form of well-indexed and hyperlinked online documents, real-time transcripts and daily hyperlinked transcripts, as well as presenting documents on screen as they were referred to. Without their assistance it would have been impossible to deal with the case in the time allotted.

10. With such a dense case involving many interrelated claims and counterclaims and causes of action, it is difficult to know where to start. I will deal with this as follows:

    i) first, to provide an overview of the progress of the JV and of some of the major events to which this case relates;

    ii) secondly, to provide an overview of the claims, counterclaims and Part 20 claim being made;

    iii) thirdly, to provide my impressions of the witnesses of fact;

iv) fourthly, to consider in detail the JVA, and the duties assumed by the parties under the JVA, and in particular the question about whether the assertion of the Claimants is correct that Mr Mirza owed fiduciary duties;

v) next, to consider the provisions of the JVA in relation to VAT (which will also allow me to make findings in relation to the VAT issue); and

vi) finally, to proceed to consider in detail the remainder of the claims, counterclaim and Part 20 claim.

2. OVERVIEW OF THE PROGRESS OF THE JV

A. The Inception of the JV

11. It is helpful, before diving into the detail, to begin with an overview of the progress of the JV.

12. The main protagonists in this story are Mr Mirza and Mr Morjaria. They met when they were both living in London during the late 1980s or early 1990s and got to know one another. Mr Morjaria emphasises that there was a friendship at this time, whereas Mr Mirza (now) sees the relationship as being more one of acquaintances or business colleagues, although his early correspondence suggests more than this.

13. During late 2006 and early 2007 Mr Mirza, having identified a site at 22-24 Uxbridge Road, made arrangements in preparation for its purchase and development, including arranging planning permission and bank finance from Clydesdale Bank plc ("**Clydesdale**").

14. Mr Morjaria had left the United Kingdom in 1998 to live in Dubai. The two individuals resumed contact in July 2007. It is disputed how this came about. Mr Mirza suggests that this was through their being re-introduced by a third-party, a Mr Duncan Austin, who had been working with Mr Morjaria on a hotel project and to whom Mr Mirza had been introduced by his contact at Clydesdale, Mr Tim Jones, and that possibly the reintroduction was then effected via Mr Morjaria's solicitors, Bowling & Co. Mr Jones corroborates the involvement of Mr Austin. Mr Morjaria remembers nothing of the involvement of Mr Austin and recalls only being contacted by Mr Mirza via Bowling & Co. I do not see that anything turns on which account is correct.

15. The Defendants suggest that Mr Morjaria's lack of memory on this point demonstrates a wider lack of memory of the events at that time, but I do not think I can draw that conclusion. There is nothing to suggest that Mr Austin did anything more to reintroduce the parties than to provide (probably through Mr Jones) contact details for Mr Morjaria and his solicitors. From the documentary record it appears that Mr Mirza did attempt to write to Mr Morjaria in March 2007 to resume contact, mentioning the name of Mr Austin. However, this was to a generic email address not including Mr Morjaria's name and different to the one at which he wrote to Mr Morjaria on 16 July 2007 and there is no reply to this email within the Court Bundle. It is possible therefore that Mr Morjaria did not receive this. It is quite possible then that Mr Morjaria was reached only via his solicitors and was not aware that Mr Mirza had found their name through the good offices of Mr Austin.

16. The two parties met and negotiated terms for the JV. It is disputed whether they met at Mr Mirza's home in Ealing (as is contended by Mr and Mrs Mirza) or in Dubai (as is contended by Mr Morjaria). In my view, based on evidence in the form of a contemporary email, it is most likely that the account of Mr and Mrs Mirza is correct.

17. The precise course of the negotiations regarding the major terms of the JV is disputed.

18. Mr Mirza says that he originally proposed that the two parties would put in similar amounts of funding, but he (with his wife) would receive 70% of the profits, reflecting the fact that he had already put in a great deal of effort which had been successful and was having success in securing the property, finance and a potential tenant for part of the property, Premier Inn. He later relented and agreed that they would receive only 55% of the profits but this was on the basis of having secured both an agreement that he would also get the benefit of any VAT refunds obtained by the JV companies and, according to his evidence, that he, through his company Tydwell, could make a profit on undertaking work.

19. Mr Morjaria disputes this account. He agrees that there was an arrangement that Mr Mirza (with his wife) was to receive 55% of the profits of the JV (despite putting in slightly less cash by way of equity). He considered that that was sufficient recompense to Mr Mirza for the work done by him to date. He agrees that there was an arrangement relating to VAT, but he says that the arrangement relating to VAT was to be merely a funding arrangement – i.e. Mr Mirza would receive amounts equal to the VAT refunds as the project went along but at the termination of the joint venture such amounts would be taken into account so that Mr Mirza's 55% will include the amounts already received in respect of VAT refunds. This matter is discussed in more detail below.

20. Whether or not there was a misunderstanding over some of the terms, an agreement in principle was reached. On 8 August 2007, Mr Mirza (on behalf of himself and his wife) wrote an email to Mr Morjaria confirming the arrangements that there would be 50-50 shareholdings, providing for a 55/45% split of profits "based on our long-standing relationship and trust" and emphasising that Mr Mirza would manage, handle and make decisions on the project. Mr Morjaria replied the same day confirming that he was happy that Mr Mirza would be "responsible and totally in control" and would "manage, handle and make decisions".

21. The JV Entities were formed as Jersey companies. Tax advice was received with a view to avoiding these companies being regarded as having a permanent establishment in the United Kingdom. This advice suggested that it was important to have decisions being made by directors outside the United Kingdom (originally directors provided by a corporate services firm in Jersey) and that the JV Entities should contract with those involved in the development on an arm's-length basis.

22. Although the JVA was signed only on 14 December 2007 (at the same time as the original Facility Agreement provided to Otaki by Clydesdale, guaranteed by Mr Mirza and Mr Morjaria), there had been a sufficient understanding between the parties before then for them to continue with the project and to exchange contracts on the Property in late August 2007 and to develop a Development Appraisal as the basis on which the funding arrangements with Clydesdale would be undertaken.

B. The Appointment of IQEQ

23. Another event that is of some consequence for this action is that, on 1 August 2008, an Isle of Man professional services company (eventually renamed "**IQEQ**", and which I will refer to by that name), was appointed as corporate services provider to the JV Entities, and representatives of that firm took over as the directors of the JV Entities. Some of these directors are the subject of a Part 20 claim by Mr Mirza. They are Mr Mark Lewin ("**Mr Lewin**"), Mr Oliver Webster ("**Mr Webster**") and Ms Dawn Yates ("**Ms Yates**"). I refer to these individuals collectively as "**the Directors**".

C. The Progress of the Construction

24. Planning permission was obtained on 7 February 2008 for construction of a 165-bed hotel and office accommodation.

25. Work began on the project in May 2008, starting with design planning and finalising funding, then preliminary works and demolition in June 2008 and construction starting in September 2010.

26. The construction experts have divided the development of the Property (the "**Project**") into five phases and for convenience I will refer to these phases in this judgment. The five phases are:

    i) Phase 1 – Inception to May 2012;

    ii) Phase 2 – June 2012 to March 2015;

    iii) Phase 3 – May 2015 to October 2017;

    iv) Phase 4 – November 2017 to June 2020; and

    v) Phase 5 – August 2020 to December 2020.

27. During the autumn of 2008, a decision was taken to make a substantial redesign to No. 22, so that it would be designed and fitted out with equipment to become a data centre. This was partly in response to the global financial crisis in 2008 and partly in response to a valuation suggesting that, if redeveloped as a data centre, the property might have a substantially greater value. This valuation, received on 5 December 2008 and prepared by DTZ Debenham Tie Leung, suggested that, if developed as a hotel and data centre, the Property might have a gross development value of up to £110 million.

28. A revised Facility Agreement with Clydesdale was signed on 15 June 2009 to allow funding of the revised proposals. This was revised further on 1 September 2010.

29. In October 2010, Tydwell entered into what is referred to as the "Procurement Contract" with Viper and into a building contract with Mace, which had been appointed as the main contractor to undertake the building work.

30. By June 2012 Mace had completed its work. Premier Inn took occupation of the Hotel. At this point, the Data Centre was finished to a "shell and core" state.

31. At around October 2012 (according to the Defendants) Redwire (of which Mr Mirza, and later also Mrs Mirza, became a director) began to provide management services relating to the Data Centre.

32. In July 2012, Mr Mirza was informed that Clydesdale's parent company, National Australia Bank had decided to exit the UK and wished to terminate the Clydesdale Facility. Mr Mirza was able to use this development to negotiate with Clydesdale to reduce very substantially Viper's liability under the Clydesdale Facility, resulting in Clydesdale agreeing to write-off approximately £15.7 million of the outstanding debt through a Settlement Deed entered into on 20 June 2013. This figure was reflected in Viper's financial accounts for the year ended April 2014.

33. A Certificate of Practical Completion was issued in respect of the partial fit-out of the Data Centre on 25 April 2016.

D. The Involvement of Boomzone

34. By early 2016 it was clear that the Data Centre was not attracting sufficient business. Mr Morjaria and Mr Mirza agreed to change the use of much of No. 22 to provide serviced offices.

35. In April 2016 Boomzone was incorporated by Mr Mirza. Originally Mr Mirza was the director of Boomzone and two days later, his daughter Shaima was appointed as director. Mrs Mirza was appointed as the company secretary. Shaima resigned as director on 20 April 2023.

36. On 1 April 2017 we see the first of a number of leases granted by Viper in favour of Boomzone (the "**First Boomzone Lease**"). This related to the sixth floor of the building and provided a five-year lease at an annual rent of £12,000.

37. Later, in May 2018, there followed what has been referred to as the "**Second Boomzone Lease**", also between Boomzone and Viper. This was in fact a Deed of Variation to the First Boomzone Lease, pursuant to which the demise was changed to include the entirety of No. 22 (the Basement, Ground, First to Sixth Floors) for an annual rent of £60,000, and the length of the lease was extended to run for five years from the date of the variation.

38. Later still came what has been referred to as the "**Third Boomzone Lease**". A version of this was first signed on behalf of Viper on 18 December 2020. A final version was signed on 8 March 2021. It covered the entirety of No. 22, and the term of the lease was to run to 31 March 2032 again at an annual rent of £60,000 per year.

39. The First, Second and Third Boomzone Leases are referred to collectively as the "**Boomzone Leases**".

E. A change in JV parties?

40. In September 2016, Mr Mirza was notified that the shares held by Mr and Mrs Morjaria in Otaki had been transferred to their family trust, the Wentworth Capital Trust.

41. On 19 October 2016, at Mr Morjaria's request, Mr Mirza signed an Addendum to the JVA reflecting and purporting to be by the parties to the JVA that:

> "all references made to Pradeep Kanitlal Morjaria and Sangita Morjaria within the Joint Venture Agreement is to be referred to as the Wentworth Capital Trust".

42. The Addendum is signed by Mr Lewin on behalf of Wentworth Limited, as Trustee of the Wentworth Capital Trust (of which members of the Morjaria family are beneficiaries) and on behalf of Otaki. Later, in December 2017, the Third Claimant ("**Summerhill**") replaced Wentworth Ltd as trustee of the Wentworth Capital Trust.

43. The Addendum cannot have been effective as a contractual novation of the JVA as it was not signed by Mr and Mrs Morjaria. Nevertheless, it may be considered to have some legal effect as Mr and Mrs Morjaria, having allowed this to be put forward to the other parties of the JVA, would, I consider, be estopped from complaining of any action taken by the other parties in reliance on it.

F. The BOS Facility

44. On 14 February 2018, Viper entered into an agreement (the "**BOS Facility Agreement**") with Bank of Singapore ("**BOS**") providing for three tranches of borrowing totalling US $4.2 million plus £8 million (the "**BOS Facility**"). This had been used, not to further the business of the JV, but rather to fund investments – for the most part, indirect investments in companies owned by Mr Mirza and Mr Morjaria that were undertaking other ventures. The BOS Facility Agreement was guaranteed by Mr Mirza and Mr Morjaria. It was secured by a legal charge (the "**BOS Charge**") over Viper's leasehold interest in the Data Centre.

45. This was a highly uncommercial transaction for Viper as it took on the liability of an on-demand facility and in return obtained what were, for the most part highly illiquid investments, although a relatively small part of the facility was used to purchase liquid, income-yielding investments that would provide income to pay the interest under the BOS Facility Agreement. The arrangements were regarded by all parties as providing a form of equity release for the Morjarias and Mr Mirza.

46. A similarly uncommercial transaction occurred later in November 2020 when Krugar borrowed £800,000 under the Coronavirus Business Interruption Loan Scheme from NatWest (the "**CBILS Loan**") and then lent this sum to Otaki, when then lent £750,000 of this to Tydwell and £50,000 to Chevin Limited, another Mirza family company.

G. The Cladding Claim

47. The Claimants make specific claims (the "**Cladding Claims**") centred on deceit said to arise in relation to amounts received by Tydwell under a Design & Build Contract (the "**Cladding D&B Contract**") between Tydwell and Otaki for cladding.

48. The need for this contract arose because of the Grenfell Tower fire in June 2017, which had increased regulatory focus on ensuring that cladding on buildings was not combustible. Initially, what was identified was a need to replace the cladding on the parts of the Property where cladding had been used. It became apparent later that it was

also necessary to replace the render on this building since this included a combustible membrane.

H. The Termination of the BOS Loan

49. Under the BOS Facility Agreement, BOS had reserved the right to request further information to enable it to satisfy its obligations in relation to anti-money laundering and countering the financing of terrorism ("**AML**"), including its regulatory obligation to obtain information to meet its "Know your Client" ("**KYC**") requirement. On 25 October 2019, Mr Sen at BOS requested KYC information "based on queries from the compliance team as part of a periodic review of the account*"*. The information sought included information in relation to both Mr Mirza and Mr Morjaria.

50. Mr Mirza satisfied BOS in relation to these enquiries, but Mr Morjaria did not. The Defendants claim that Mr Morjaria failed to use his reasonable endeavours to do so in breach of his obligations under clause 2.1 the JVA. This claim is discussed in more detail below.

51. In mid-January, the compliance committee of BOS took a decision that it was unhappy with Mr Morjaria's compliance with its AML requirements. Whilst Mr Morjaria and Mr Lewin stepped up their efforts to find more to answer BOS's requirements for information, it appears that this was too little too late. By early February 2021 BOS made it clear that it wished to exit the Viper account.

I. The Morjarias' civil and criminal suits against the Mirzas

52. It appears that Mr Morjaria began considering action against the Mirzas at some point in the latter part of 2020. Originally, he considered suing Mr Mirza but his instructions later developed so that the case was extended to Mrs Mirza and to Ameer. I will refer to Mr and Mrs Mirza and Ameer together as the "**Mirzas"**.

53. By 23 April 2021, he had developed his case sufficiently that his solicitors in relation to the civil claim at that point, Jones Day, were able to send a letter before action (the "**Letter Before Action**"). The claims were based around alleged false invoices and requests for payment ("**Requests for Payment**") which, it was said, were passing off amounts being paid to and retained by Tydwell as third-party costs, through various representations referred to and regarded as the "**Invoice Representations**".

54. Mr Morjaria and his family also developed a plan during 2021 to bring a criminal action against Mr Mirza. In October 2021 Mr and Mrs Morjaria instructed a second law firm specialising in criminal law, Edmunds Marshall McMahan ("**EMM**") to initiate a private criminal prosecution (the "**Private Prosecution**") initially against the Mirzas.

55. The Private Prosecution related only to the invoices and Requests for Payment relating to the cladding work. To a large extent, the claims regarding cladding may be regarded as a subset of the claims made in respect of the Invoice Representations. Some £2,697,339 (including VAT) of the payments sought by way of the Requests for Payment and Invoices were in respect of the cladding works. However, the Cladding Claims are slightly different, both because they are based on the slightly different contractual background and also because they are based on further alleged misrepresentations.

56. Essentially it was (and still is) alleged that the JV Entities and Mr Morjaria were the victims of a deception that the increased price quoted by Mr Mirza in his email of 11 June 2020 (£2.54m), and the further increases reflected in spreadsheets (the "**Valuation Spreadsheets**") accompanying Requests for Payment and Cladding Invoices (up to, in total £2.69m) arose because of the need to replace render as well as cladding and represented the cost to Tydwell (i.e. what Tydwell was required to pay to its subcontractors).

57. On 20 January 2023, DJ Sternberg set aside the Summonses on the basis that the primary and dominant motive of the Private Prosecution, which was to threaten the Mirzas with imprisonment in order to exert pressure on them and extract a settlement from them in the civil proceedings, was improper, and the proceedings were an abuse of the court's process.

J. The May 2022 Transactions

58. By the spring of 2022 there was a high degree of urgency to find a way to repay BOS. In order to find cash to make repayment under the BOS Facility Agreement, the Directors considered that it would be necessary to sell the 999-year lease of No. 22 held by Viper (the "**Viper Lease**") or the shares in Viper. Mr Mirza made a series of offers to make such a purchase through an unspecified Isle of Man company. It is understood that the company he had in mind was Bane Solutions Limited ("**Bane Solutions**"), which had been formed by Mr Mirza in the Isle of Man and which had professional offshore directors.

59. At the same time that the Directors were in discussion with Mr Mirza, they were also in discussion with Mr Morjaria. Mr Morjaria had shared with the Directors his concern that the JV Entities had been cheated by the Mirzas/Tydwell and, through his lawyers, Jones Day, sought to negotiate arrangements to obtain the cooperation of the JV Entities and of the Directors to bring a lawsuit. Mr Morjaria also, at a point when Mr Mirza's negotiations were well advanced, made his own offer to acquire the shares of Viper.

60. These negotiations led to a series of agreements (the "**May 2022 Agreements**") signed on 5 May 2022 that included:

    i) An agreement (the "**Viper SPA**") under which the shares in Viper were acquired from Otaki by the Morjarias' company Trafalgar. Trafalgar is a company incorporated in the Isle of Man and is ultimately beneficially owned by the Morjarias. From 10 December 2008 to 9 May 2022, Mr Morjaria was the sole director of Trafalgar but, from 9 May 2022, Trafalgar came to be managed by IQEQ;

    ii) A Deed of Release, Discharge and Waiver between Otaki and Viper (the "**Deed of Release**") by which Otaki wrote-off the inter-company debt owed to it by Viper;

    iii) A Deed of Assignment and Co-operation (the "**Deed of Assignment**") whereby the JV Entities assigned certain claims to the Morjarias and Summerhill and agreed to co-operate in the pursuit of those claims in return for an entitlement to benefit from any recovery made on an assigned claim; and

iv) A Deed of Co-Operation, Indemnity and Release (the "**Deed of Cooperation**") whereby IQEQ agreed to co-operate with the making of claims and any connected criminal complaint, and the Morjarias and Summerhill agreed to provide an indemnity to IQEQ and the Directors and not to sue IQEQ or the Directors.

61. Mr Mirza claims that in entering into these arrangements, the Morjarias and Otaki acted in breach of clause 12.2.1 of the JVA (duty to act in good faith towards the other party and use all reasonable endeavours to ensure that the JVA is observed), and/or clause 12.2.2 (duty to do all things necessary and desirable to give effect to the spirit and intention of the JVA). Mr Mirza also brings the Part 20 claim against the Directors for procuring such a breach.

K. Otaki goes into liquidation

62. Otaki went into liquidation on 31 October 2022.

63. On 29 March 2023, the liquidators of Otaki assigned to the Morjarias and Summerhill Otaki's claim to recover the VAT advances on similar terms to those in the Deed of Assignment.

L. The Wolverine Transactions

64. Wolverine was originally incorporated on 13 October 2022 with Mrs Mirza as its sole director. However, by the time that it enters the story, Ameer was its sole director and its shares were owned equally between Ameer, Osman and Shaima.

65. On 16 May 2024, Mr Mirza and BOS entered into a settlement agreement (the "**BOS Settlement Agreement**") whereby Mr Mirza agreed to repay the BOS Facility (which had then risen to an amount of more than £8,546,500) and BOS agreed to assign the BOS Charge to Mr Mirza after receipt of certain payments.

66. On 20 May 2024, the following transactions took place at the same time:

i) Mr Mirza obtained an assignment of the BOS Charge (and notice of the assignment was provided to Viper and Mr Morjaria and BOS executed and delivered a TR4 form to HM Land Registry transferring the BOS Charge to Mr Mirza);

ii) Wolverine and Mr Mirza entered into a loan agreement whereby Wolverine agreed to loan Mr Mirza up to £10.1 million;

iii) Mr Mirza transferred the Viper Lease by a TR2 to Wolverine for a sum stated on the TR2 of £6 million;

iv) Wolverine charged the Viper Lease to Al Rayan Bank as security for the loan of £16 million granted to Wolverine. The charge was registered on 5 June 2024; and

v) Wolverine was registered as the leasehold proprietor of the Viper Lease.

3. OVERVIEW OF THE CLAIMS BEING MADE

67. The various claims that are at the heart of the disputes under consideration may be summarised as follows:

i) The **"Invoice Misrepresentations Claims**". These are claims in broad terms based on a claim that Mr Mirza, Tydwell, Mr John, Mrs Mirza and Ameer dishonestly caused the JV Entities to make payments to Tydwell, on the false basis that those payments were necessary to defray costs and expenses incurred (or to be incurred) by those companies in respect of legitimate goods and services obtained in pursuit of the joint venture, when in fact they had been simply misappropriated by those companies (or passed on to other companies wholly owned by Mr Mirza).

ii) **The Cladding Claims**. These claims may be seen as a subset of the Invoice Misrepresentations Claims, although they rely on some additional representations said to be false. Essentially these claims are based on an assertion that the same Defendants dishonestly caused the JV Entities to make payments relating to the Cladding D&B Contract, on a similar false basis.

iii) The "**Excess Payments Claim**". This is the claim for repayment of amounts that Tydwell received from the JV Entities that are in excess of amounts invoiced by Tydwell.

iv) The "**Boomzone Leases Claims**". These claims, in broad terms, are based on the assertion that Mr Mirza, through Boomzone, appropriated for his own benefit a valuable lease of part of the commercial property owned by the JV for a minimal sum, without the informed consent of his joint venturers, and thereby caused loss of rental income to the JV and the depression of the value of that property.

v) The "**Wolverine Transaction Claims**". These are claims based broadly on the assertion that Mr Mirza, with the assistance of his family, engineered a situation in which companies related to Mr Mirza came to own a chain of leasehold interests for a total price which was a fraction of the market value of those interests combined, making a profit for those companies (or some of them) and causing a loss to the Claimants.

vi) The "**VAT Claim**". This relates to the alleged failure of Mr and Mrs Mirza to repay advances made to the Mirzas by the JV vehicle relating to VAT.

68. Depending on the context, I will use the term the "Defendants" sometimes to refer to all the Defendants, but generally to refer to all the Defendants other than Otaki (which has been included as a Defendant largely for technical reasons) and, where I am referring to submissions made on behalf of the Defendants, solely to the Defendants that have been represented in this action: Mr and Mrs Mirza, Ameer, Tydwell, Boomzone, LMH and Wolverine.

69. The Defendants are pursuing three counterclaims against Mr Morjaria which may be summarised as follows:

i) The "**KYC Counterclaim**". This is the counterclaim that Mr Morjaria was in breach of his obligations under the JVA by failing to use reasonable endeavours to comply with requests from BOS, and that this resulted in BOS terminating the BOS Facility Agreement, causing damage to the JV and to Mr and Mrs Mirza;

ii) The "**Wrongful Prosecution Claim**". This is that Mr Morjaria, in pursuing a criminal action against Mr and Mrs Mirza and Ameer, caused damage to those parties. This claim is pursued in the alternative as a claim under the tort of malicious prosecution or as a claim for abuse of (criminal) process.

iii) The "**May 2022 Agreements Counterclaim**". This is that it was a breach of the JVA by the Morjarias (as well as Otaki) to enter into a sale of Viper and to assign choses in action belonging to Otaki to Mr Morjaria without giving prior warning to Mr Mirza.

70. Finally, Mr Mirza is pursuing a Part 20 claim against the Directors for inducing what is said to be the breach of contract by Otaki referred to in the previous paragraph (the "**Part 20 Claim**").

4. WITNESS EVIDENCE

71. The court has benefited from witness evidence, both in the form of witness statements from the main persons involved in matters under consideration, in many cases including multiple witness statements, and from oral evidence given at trial.

72. In considering witness evidence, particularly in a case like this where the events in question go back as far as some 17 years, the court needs to keep in mind the nature and fallibility of human memory. This point was famously emphasised in the judgment of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22]. In that judgment, he provided salutary warnings concerning the unreliability of memory when it comes to recalling past beliefs, the considerable interference with memory that may be introduced in civil litigation by the process of preparing for trial and the potential for powerful biases where witnesses have a stake in a particular version of events. His observations have been adopted and expanded upon in many other judgments.

73. Accordingly, I have kept in mind the point that the passage of time can cloud or distort memory and that it is unlikely to be the case that individual witnesses will be consistently reliable or unreliable. I also bear in mind that some witnesses may, for whatever reason, have better (or less fallible) recollections than others. In that regard, it is appropriate to record my observations on the witnesses who gave oral evidence.

A. The Claimants' witnesses of fact

i. Mr Morjaria's witness evidence

74. In giving his oral evidence, Mr Morjaria appeared to be comfortable in the witness box and to be enjoying what no doubt he saw as an opportunity to make his case. He was generally relaxed in giving his evidence, although at times he showed a degree of passion when recording instances where he considers that he had been betrayed by Mr

Mirza or was being pressed by Mr Mirza's counsel to answer questions in a particular way. He took every opportunity to argue his case, often giving answers which were not directly related to the particular question that he had been asked.

75. As far as I can tell, Mr Morjaria appeared to be answering questions honestly and to have a good memory of many events, recalling specific dates, emails and numbers. However, it is difficult to assess how far his memory was based on his own recollections of the events at the time, or on a more recent study of the court bundle. Certainly, it was apparent that he had a good knowledge of the contents of the bundle.

76. There was only one answer that he gave that appeared to cast serious doubt on the reliability of his memory. This was when he recalled the first, or an early, meeting that he had with Mr Mirza, and recalled it being in Dubai, whereas a contemporaneous email appears to suggest that that meeting was in London.

77. Overall, Mr Morjaria was quite impressive as a witness, but having in mind the warnings in *Gestmin*, I have been cautious in accepting everything he now says as to what he meant in emails that he sent out many years ago and what he originally understood in relation to emails and documents that he received many years ago. I must also take account of the fact that Mr Morjaria clearly has developed a strong animus against Mr Mirza and has demonstrated, particularly through the criminal prosecution, a determination to get his way by whatever means possible.

ii. Mr Lewin's witness evidence

78. Mr Lewin was the Client Services Director for the JV Entities. As such, he was the director with responsibility for the negotiations and communications with Mr Mirza, Mr Morjaria, BOS, NatWest, and other parties dealing with the JV Entities.

79. He was appearing both as a witness on behalf of the Claimants and as a witness in his own right to defend himself in relation to the Part 20 Claim.

80. Mr Lewin appeared slightly uncomfortable in the witness box. In my view this was not because he was seeking to hide anything, or to give misleading answers. Rather, I think it was because he was not on top of his subject as much as Mr Morjaria. Whilst he had been a director of Otaki, Viper and Krugar, I accept that he relied largely on other members of the IQEQ team to deal with day-to-day detail and was only really brought in when there were major decisions. Also, as a professional trustee and director handling the affairs of many trusts and businesses, it is understandable that he would not many years later have a detailed recollection of one particular company.

81. During cross-examination, Mr Rees did his best to paint a portrait that Mr Lewin was closely aligned to Mr Morjaria, pointing out that they had been working together for many years prior to the inception of the JV. Mr Lewin stoutly denied this, and pointed out that he had also accepted Mr and Mrs Mirza directly as clients and that when it became clear that there was a falling out between the JV partners, he had seen his role as being a mediator/neutral party, to seek to act for the benefit of the JV Entities as a whole, and had attempted not to side with one JV party or the other. I accept that this was his intention at the time.

82. Mr Rees also sought to bring to the court's attention the arrangements whereby Mr Lewin and the other IQEQ directors benefited from indemnification and exculpation clauses under the Deed of Co-operation and suggested that from that point, Mr Lewin was working hand-in-hand with Mr Morjaria and against the interests of Mr Mirza. Mr Lewin pointed out that he was already covered by multiple levels of indemnification and professional negligence insurance. In my view the existence of this Deed of Indemnity does not cause me to doubt Mr Lewin's testimony to any greater extent than I would anyway, given the points alluded to in *Gestmin*. I saw no evidence that this caused him to be untruthful or to dissemble in giving his answers. In any case, there was very little in Mr Lewin's testimony that added to the documentary record available to the court.

iii. Shamick's witness evidence

83. Mr Shamick Morjaria worked for Mr Mirza's companies at the Property between June 2018 around December 2019.

84. In giving his oral evidence, Shamick, like his father, appeared to be comfortable in the witness box and to be generally relaxed in giving his evidence.

85. As far as I can tell, Shamick appeared to be answering questions honestly, albeit that he, understandably, saw events through the same prism as his father.

86. Shamick had no complaints about the way he had been treated by Mr Mirza, but he considered that Mr Mirza had gone out of his way to keep him in the dark about the details of financial matters relating to the JV. He denied having been placed with Mr Mirza in order to spy on him on behalf of his father, but certainly he was taking opportunities to pass interesting titbits of information to his father, including where these did not relate to the JV.

87. Shamick was involved in the briefings of Jones Day in relation to the Private Prosecution and also was asked about this.

iv. Mr Stobart's witness evidence

88. Mr Stobart was part of the IQEQ team with day-to-day management of the JV Entities, although he would defer to Mr Lewin in relation to strategic matters and it seems he largely relied on Mr Lewin to know the details of the JV Entities' contracts with Tydwell or specifically anything about the tax advice that had been received that the JV Entities should contract at arm's length with suppliers.

89. He could not recall forming a view whether Boomzone was regarded as being part of the JV or not and could not recall whether the ownership of Boomzone had been considered in relation to the Second Boomzone Lease in May 2018 (he had not been part of the team at the time of the First Boomzone Lease – the most he could say was that he thought (based on discussions with Mr Morjaria) in 2019 that there was an intention for Boomzone to be partly owned by Mr Morjaria). On 1 September 2019, he emailed Mr Mirza about transferring 50% of the shares in Boomzone to Trafalgar.

90. He was able to speak to the urgency of sorting out the cladding problem after a deal had been done with Mace.

91. He was also asked about what he understood about the basis of Tydwell's charges under the Design and Build Agreement relating to cladding. It was clear that he had not considered this to be a matter on which he needed to have a view, although at one point in internal correspondence with Mr Lewin he had formed a view that Mr Mirza's £2.545 million quote for the cladding work was not unreasonable (on the basis of what he had been given to understand by Mr Mirza).

B. The Defendants' witnesses of fact

i. Mr Jones' witness evidence

92. Mr Jones was a banker who originally worked for Clydesdale at the time that it was making loans to the JV Entities but later left that bank. After he left, he worked for a period for his own financial advisory firm (and in that guise provided advice to Tydwell, at least some of which was billed to the JV). He later worked for another financial advisory firm and after that joined Al Rayan Bank, and was involved in providing loans to companies in the ownership of the Mirza family, including Wolverine.

93. His evidence mostly related to the way that Clydesdale dealt with loans to the JV Entities, and in particular the way that drawdown requests were dealt with. He also dealt with the arrangements much later for financing the acquisition of the freehold.

94. In giving his witness evidence, Mr Jones generally appeared relaxed. He had something of a tendency to go off topic in giving long answers to questions that could have been dealt with more shortly. Generally he was doing so to make a point that favoured Mr Mirza. His memory of the events in question was patchy at best, which is not surprising having regard to the role that he was undertaking in the Project and that the JV Entities were only some amongst very many companies for which he acted as banker. Some of his explanations were confused and self-contradictory. It is clear that some of the source for his understanding of how the JV was to work derived from what he was told by Mr Mirza.

95. It is also clear that Mr Jones was generally highly sympathetic to Mr Mirza, who was the party with whom he had had most dealings. He had had a business relationship with Mr Mirza for some 20 years, and indeed had been paid by Mr Mirza (or one of the companies that he controlled) during a period when Mr Jones operated as a one-man consultancy.

ii. Mr Mirza's witness evidence

96. Mr Mirza, whilst unfailingly polite to the bench, presented in the witness box as a somewhat pugnacious figure. He was prone to deny everything, however unlikely some of his answers seemed in the face of the contemporaneous documentation in front of him. In some cases, he contradicted in his oral evidence statements that he had made earlier in witness statements. Often, rather than answering questions directly, he chose instead to engage in argument with the counsel cross-examining him, with the consequence that many of his answers appeared to be evasive. Like Mr Morjaria, in many cases he answered questions with a degree of passion and took opportunities to go off the topic under question to make statements reiterating other parts of his case.

97. I found a number of the answers given by Mr Mirza to be unbelievable. I have also seen in the evidence examples of where Mr Mirza was giving one story to the JV

Entities (for example in relation to the occupancy of the building) and another to potential lenders. As a result, I am particularly hesitant about relying on his testimony where it is uncorroborated.

iii. Mr Homan's witness evidence

98. Since 2011, Mr Homan has been (and still is) the external accountant to Mr and Mrs Mirza and the Mirza family companies. He has been working with Mr Mirza for nearly 13 years. He estimated that since the Letter Before Action the Mirzas and their companies have accounted for something like 10% of his practice and before that something like 7%. Mr Lloyd (acting for the Directors) has described him as "Mr Mirza's man of affairs" and I consider this an apt description. As such, he had good first-hand knowledge of the operations of those companies.

99. Mr Homan was generally quite combative in the witness box. He often talked over counsel and over the judge. It was clear from the tone and content of his answers that he was a partisan witness. He clearly was anxious to get across points that were favourable to the Defendants.

100. In my view, Mr Homan's clear wish to do the best in the witness box for his client at times clouded his instincts as to what was commercial or accountancy good practice. For example, he could not bring himself to accept that Mr Mirza's case, that Tydwell had been withholding invoices on £1.4 million of work allegedly done for more than 11 years in order to defer VAT, was improper; or that it was not proper accountancy practice to present accounts as if a dividend had occurred which had not occurred, even if there was a contractual obligation for that dividend to have been declared. I remind myself that Mr Homan was there as a witness of fact and not as an expert witness on accountancy and I place no reliance on his assertions as to what proper accountancy practice would be.

101. It appears that he had been a party to the efforts made by the Mirza family to justify retrospectively the invoices that Tydwell have provided to Viper and Otaki. There had been 154 such invoices. 88 of them specifically referred to "Project Management", or "Project Management & OH" (which was taken to be a reference to overheads) although none of them specifically identified that this was a charge being levied by Tydwell. The total of these charges came to a number of around £580,000. Other charges mentioned on the invoices appeared to relate to third-party charges.

102. One particular exchange is notable as it goes to the heart of the invoices issue. It was put to Mr Homan that these invoices were misleading. They were misleading because despite there being (at least in many cases) a separate charge for management and overheads (if one accepts that that charge was one being levied by Tydwell) the total amounts charged by Tydwell were very substantially in excess of the amounts paid to third parties. This was said to be justified by Tydwell invoicing the third-party charges at a higher amount to reflect Tydwell's management and overhead. However, there was no way of telling that, and the fact that there was a separate charge for management and overheads would lead one to think otherwise.

103. Mr Homan disagreed with this analysis. He gave an example that when one has one's car serviced, one is charged for labour and parts and these items are marked up from the cost price to the garage to include the garage's overheads in supervising and

arranging for this work. He therefore did not consider that it was misleading that third-party costs were being marked up before being passed on to Viper. He did agree, however, that whether or not this was misleading would depend on the nature of the service provided. In relation to that point, he considered that it was relevant that the parties to the JV had received tax advice that the JV Entities would need to pay proper arm's-length third-party costs.

iv. Mrs Mirza's witness evidence

104. Mrs Mirza gave her oral evidence carefully. Initially, she looked a little nervous in the witness box, but this soon passed. At times she appeared to be angry, which is perhaps understandable having regard to the Private Prosecution made against her and her family.

105. It was clear that she was extremely loyal to her husband and family and that this was a close-knit family that worked harmoniously together.

106. She had been in court during the entirety of the previous proceedings, and sometimes it was difficult to judge whether her answers were based on her own recollections or on matters that she had heard discussed in the proceedings, for example when she adopted wholesale Mr Homan's analysis about the appropriateness of including a profit or overheads margin when rendering invoices apparently relating to third-party costs.

107. Whilst she had played an increasingly important role in the venture, for example writing cheques, and had been regarded as a key person by Clydesdale, which had required key man insurance in respect of her, it is clear, and she agreed, that her husband was the principal decision-maker in relation to the construction business.

108. When it came to discussion of the arrangement concerning the Boomzone Leases, Mrs Mirza was unable to be of great assistance to the court as it was others within her family who had been leading on this point.

v. Ameer Mirza's witness evidence

109. Ameer began working for Tydwell and more generally in his father's business on 1 July 2019, having trained and worked as a chartered accountant with EY from October 2016. He confirmed that he was generally aware of the provisions of the JVA and was also aware of the addendum to the JVA dated 19 October 2016 which purported to change the parties to the JVA.

110. Ameer was generally at ease in providing his evidence. He answered questions intelligently, and clearly had a good grasp of the things he was being asked about.

111. Ameer made one very interesting point regarding the knowledge of the Directors as to whether Tydwell had charged a mark-up. He pointed out that at one point, before it was known that the render would need to be replaced as well as the cladding, the Directors had been provided with fee quotes from contractors, including in one case a fee quote for £528,000 (plus VAT) and at more or less the same time were being told by Tydwell that the expected outturn costs, assuming that render did not need to be replaced, were between £750,000 and £1 million. They must have been aware, therefore, that Tydwell was assuming a substantial mark-up.

112. In his cross-examination, Mr Vinall sought to establish that Ameer had been involved in putting forward measurements for the total area to be re-rendered which he knew to be untrue to cover up the fact that Tydwell was overcharging. This was denied by Ameer. The Claimants allege in their written closing that:

> "Ameer provided knowingly inflated measurements of the cladding and render to IQEQ (via Mr John), for the purpose of putting any independent expert off the scent."

113. This allegation is not pleaded and therefore it would be inappropriate to rely on it in respect of any cause of action against him.

114. If I considered that the point had been established that Ameer was deliberately misleading IQEQ, I could, however, take account of this when considering the reliability of Ameer's evidence, but I do not consider that this would be appropriate. There were various figures being talked about at this time of this communication. It is by no means clear that Ameer got this wrong by reference to the figures known at the time, and even if he did, it is more likely, or at least just as likely, to be the result of a mistake than the result of deliberate fraud.

115. Ameer was able to explain the arrangements by which LMH was funded – essentially through profits that he and his sister had made in acquiring from his father's company, Chevin, and Mr Morjaria's company, Nilsson, an interest in the project at Surbiton (conducted via an entity called Kingmead Homes (Newlands Limited), funded by Al Ryan Bank. He confirmed that the funding and purchase arrangements involved an element of gift on the part of his father.

116. Ameer was also questioned about Wolverine. He denied that it was his father who was leading on the Wolverine project, although there was clear evidence of his father being given the power of attorney and in acting as a contact with Al Rayan Bank, which was funding this acquisition.

117. He provided a partial explanation as to why LMH and Boomzone were willing to support, through giving security over their own interests in the Property, Wolverine's proposed borrowing from the bank to allow it to acquire the Viper Lease. Their support was necessary to secure funding as the Viper Lease by itself had a much lower value than the borrowing proposed. Ameer explained that there were essentially side arrangements (not fully documented) to reward Boomzone and LMH for providing this support, although he was a little hazy on the details of this.

C. The Part 20 Defendants' witnesses of fact

i. Mr Webster's witness evidence

118. Mr Webster was an employee of and minor shareholder in IQEQ and acted as one of the directors of Otaki, Krugar and Viper from 12 April 2019 until 5 May 2022 (in the case of Viper); and until October 2022 (when Otaki went into liquidation) in the case of Otaki and Krugar. He was also a director of Summerhill but had taken no part in Summerhill's activities on behalf of the Wentworth Capital Trust.

119. Mr Webster gave his answers in a straightforward manner.

120. Mr Webster confirmed the arrangements whereby the JV Entities appointed Mr Ekanyake as their solicitor in relation to dealings with Mace and the dealings with Tydwell, and that as far as he was aware in doing so, the solicitor reported to and took his instructions from Mr Mirza.

121. He explained that whilst he was part of a management and administration team comprising around six people, it was Mr Lewin who was the lead contact for these clients. Mr Webster attended board meetings but had no substantial involvement in between those meetings. He also explained that from February 2022 he knew he had a bowel cancer issue and was diagnosed with stage 3 cancer on 28 April 2022 and so, as he put it "my focus during this time, with the best will in the world, is not on the detail of this".

122. Mr Webster was in cross-examination frequently presented with emails or letters which he had not seen at the time they were sent and asked to comment. He made his position clear that he had not been involved in the negotiations, but on occasion, he could not resist the temptation to express his forthright views on particular issues in the case. In doing so, he was not giving factual evidence but offering comment based on material he had seen in the course of the proceedings (for example, his references to Timeline Television Limited ('**Timeline**') and valuations carried out in 2023/24, which he did not know about at the material time).

123. In considering the testimony of Mr Webster (as well as that of Mr Lewin and of Ms Yates), I must bear in mind that, through the indemnification provisions in their various dealings with Mr Morjaria and Trafalgar, IQEQ was being paid for their presence in court.

ii. Ms Yates' witness evidence

124. Ms Yates was another of the Directors. She attended board meetings of the JV Entities but had no real involvement in between those meetings and she was open and honest in her lack of recollection of these meetings. Like Mr Webster, she placed reliance on Mr Lewin as the lead director.

125. Ms Yates was a somewhat nervous witness. This is unsurprising as she was often being asked about events or documents in which she had no involvement or which she could not honestly remember.

5. THE JVA

126. The JVA was a key document for the operation of the JV and is relied on extensively by the Claimants in relation to certain of their arguments and by Mr Mirza in relation to one of his counterclaims and his Part 20 Claim.

127. The JVA is not the best drafted document I have ever seen. Some of its terms are less than clear and it does not deal with a number of the issues that a joint venture agreement might normally include, such as a list of shareholders' reserved matters. It appears that it was drafted by Mr Morjaria's then solicitors and commented on by solicitors for Mr Mirza. No doubt it was produced in a hurry.

128. The JVA was entered into on 14 December 2007 between Mr and Mrs Morjaria, Mr Mirza and Otaki. The JVA recorded the objectives of the JV (defined as the "**Joint Venture Objectives**") as being Otaki's acquisition of the Property and the enhancement of the Property's value. It defined the "**Joint Venturers**" as being Mr and Mrs Morjaria and Mr Mirza and any lawful assignee of shares in Otaki. The Joint Venturers were obliged each to use their reasonable endeavours towards achieving the Joint Venture Objectives.

129. The JVA included provisions relating to contributions of capital. Mr and Mrs Morjaria were to make contributions to capital jointly of £1,750,000. Mr Mirza was to make a contribution of £1,250,000.

130. The provisions relating to capital contributions included a provision requiring Otaki to refund "all third-party costs properly incurred by Mr Mirza in the promotion of the Joint Venture Objectives" up to the date of the agreement "having received invoices for each item of expenditure" and subject to a maximum refund of £350,000. There was a similar (and similarly capped) provision relating to any such expenditure by Mr Morjaria. Such refunds were to be offset against the obligation to make initial capital contributions.

131. After the initial contributions, Mr and Mrs Morjaria, acting jointly, and Mr Mirza agreed to contribute 50% each to any Further Capital Requirement up to a maximum of £150,000 on each side. The Joint Venturers and the Company were obliged to use reasonable endeavours to secure bank funding to satisfy the "Further Capital Requirements". "Further Capital Requirement" is defined as:

> "the fixed and working capital requirements of [Otaki] including working capital [Otaki] requires from time to time to meet Expenditure but excluding any item included within the Initial Capital Requirement and subject to a maximum total amount of £300,000".

132. "Expenditure" used in this definition is defined as:

> "all liabilities, outgoings and expenses of [Otaki] of every description".

133. I believe it is accepted on all sides that references to expenses etc. of "the Company" (i.e. Otaki) include those of its subsidiaries.

134. Clause 3.4 provided that the capital contributions paid by the Joint Venturers on completion should be applied only towards the payment by the Subsidiaries (i.e. at this point, Viper and Krugar) for the Purchase Price of the Property (defined as £15,823,400) and:

> "all reasonable proper and incidental costs of the purchase including any relevant purchase taxes, statutory levies or registration fees and/or professional charges incurred in connection with the acquisition as set out in a development appraisal attached as Appendix 1."

135. Mr Morjaria and Mr Lewin each deny ever having seen this Appendix. However, there is good evidence that Mr Morjaria at least did see the Development Appraisal a few days before he was sent the JVA for signature. In any case, the Development Appraisal is referenced in the JVA, and it is appropriate to regard it as being part and parcel of the JVA.

136. Clause 5.1 dealt with the appointment of directors and named three professional offshore directors and provided that should any of them die or resign then the remaining directors shall appoint a replacement director or directors. As there was a clause giving primacy to the JVA over the articles of association, this seems to overturn the usual arrangement whereby shareholders can appoint directors, although there may be provisions in Jersey law which might nevertheless override this. Nothing turns on this point for the present case since no one is challenging the appointment of any of the directors at any point.

137. Clause 5.2 dealt with project management. It provided that Mr Mirza:

> "shall manage the daily operation of the Joint Venture and make decisions (including the appointment of all contractors) through his UK construction company in the best interest of the Joint Venture". The clause also obliged him to keep Mr and Mrs Morjaria "fully informed on the progress of the Joint Venture at all times".

138. Clause 5.4 restricted the shareholders of Otaki from:

> "assigning, charging, pledging or otherwise disposing of any interest in any of the rights or interests arising pursuant to this Agreement or any interest in any of the shares of the Company".

139. It appears that clause 5.4 was breached when Mr and Mrs Morjaria transferred their shares to the trustee of the Wentworth Capital Trust. Any such breach would have been cured if the Deed of Assignment had been valid, but as I have explained above, it was not. Nothing really turns on this point, however, as no party has based any case on it.

140. Clause 7 dealt with termination. It has been drafted in slightly confusing terms, but it seems it was intended that this right would apply only up to the point that Otaki entered into a *bona fide* building contract for the development of any part of the Property or after practical completion of the development of the Property. At any point when this right applied either party could terminate the JV by requiring that the Company sell the Property on the open market and that the Company thereafter be liquidated. Service of a notice requiring this entitled any other Joint Venturer who was not one of the terminating shareholders to confirm an interest in purchasing the terminating holders' shares by serving what is referred to as a "Transfer Notice". If a price could be agreed, then the relevant sale would take place. If a transfer pursuant to these arrangements was not to take place within 42 days of the Transfer Notice, then the parties will proceed to seek a buyer for the Property and cooperate in a sale and liquidation of the Company. It is not clear what happens if there is a Termination Notice, but there is no Transfer Notice.

141. Clause 8 states that:

> "Nothing in this Agreement shall be deemed to constitute a partnership or relationship of principal and agent between any of the Joint Venturers who are independent contractors".

142. I deal below with the arrangements for sharing profits and for rebates of VAT.

6. THE DUTY OF GOOD FAITH AND FIDUCIARY DUTIES

A. The nature of the duty of good faith

143. Both the Claimants and the Defendants make a great deal of the duty of good faith contained in clause 12.2 of the JVA. This provides as follows:

> "12.2 Good Faith
>
> 12.2.1 Each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure that this Agreement is observed.
>
> Clause 12.2.2 each party shall do all things necessary and desirable to give effect to the spirit and intention of this Agreement."

144. It is common ground that on a proper construction of clause 12.2.1, the duty of good faith prohibited the Morjarias, Mr Mirza or Otaki from acting in a way that was improper, commercially unacceptable or unconscionable, or in a way that would be regarded as commercially unacceptable by reasonable and honest people.

145. Beyond that, however, the meaning of an express term requiring a party to act in good faith is to be determined by an objective process of construction, having regard to the language of the relevant term, the other provisions of the contract, and the overall context (see for example the dicta of Jackson LJ (as he then was) in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [109], and of Beatson LJ in the same case at [151]). This point, and particularly the importance of context, was emphasised by Snowden LJ in *Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371 at [147]-[151]. He held that this gave rise to a related point that:

> "when considering the interpretation and meaning of an express good faith clause in context, cases from other areas of law or commerce, which turn upon their own particular facts, may be of limited value and must be treated with considerable caution."

146. I must, therefore, take full account of the context as I deal with each of the allegations of a breach of clause 12.2.1.

B. Do Mr Mirza and Tydwell have fiduciary duties?

i. The Claimants' position

147. In the context that under clause 5.2.1 of the JVA Mr Mirza accepts a duty to:

> "manage the daily operation of the Joint Venture and make decisions (including the appointment of all contractors) to his UK construction company in the best interests of the Joint Venture".

The Claimants argue that, in addition to the contractual duty of good faith, the position and role of Mr Mirza imposes on him fiduciary duties.

148. The point is argued in the Claimants' closing skeleton argument as follows:

i) Outside the settled categories of fiduciary relationship, whether a person (D) owes fiduciary duties to another (C) depends upon the nature of their relationship, including any contractual relationship between them.

ii) D will owe fiduciary duties to C where either (a) D manages the affairs and/or property of C, and/or (b) C has entrusted D with providing advice or making recommendations about the best course of action to take in a particular set of circumstances.

iii) Even if D performs his management and/or advisory function through a company, D will still owe those duties personally to C. D's company may also owe fiduciary duties to C, if propositions (i) and(ii) above apply to its activities.

iv) At a bare minimum, D's fiduciary duties will prohibit him from acting in a way which favours his sole interests at C's expense.

v) D will also owe a duty not to make an unauthorised profit from his position, and to avoid conflicts between his interest and duties to C, unless imposing that full range of core fiduciary duties would conflict with some aspect of the contractual relationship that exists as between C and D.

vi) As a matter of fact, Mr Mirza was contractually obliged to manage, and did manage, the affairs of the JV. He likewise managed the JV's property. He owed fiduciary duties in relation to the performance of those tasks. Those duties at least encompassed a duty owed to the joint venturers (i.e., Mr and Mrs Morjaria) and to Viper not to act so as to favour his own interests at their expense when managing the JV's affairs and property.

vii) Alternatively, even if Mr Mirza merely advised the Directors on how to manage the affairs/property of the JV, Mr Mirza owed fiduciary duties in respect of his performance of that role. Those duties required him to provide impartial advice and information to his joint venturers (which is simply another way of stating Mr Mirza's duty not to favour his own interests at the expense of the JV);

viii) The same analysis applies to Tydwell, insofar as it managed the affairs of the JV and/or provided information and advice to the JV.

149. The Claimants accepted that the summary of legal principles outlined by the Defendants in their skeleton argument was broadly accurate, subject to certain reservations and further arguments mentioned further below. As it is the Defendants who have offered the most detailed exposition of the relevant law, I will turn to this first.

ii. The Defendants' exposition of the law

150. The Defendants' summary of the relevant law in relation to fiduciary duties begins with the point that the law recognises certain settled categories of fiduciary relationship such as trustee/beneficiary; director/company; agent/principal; solicitor/client; and partners. Outside such settled categories, fiduciary duties are only held to arise if the particular facts warrant it, though this is unusual in commercial relationships because it is normally inappropriate to expect a commercial party to subordinate his own interests to that of another commercial party. The Defendants cite here *Snell's Equity* (35th Ed.) ("***Snell***") at paragraphs 7-004 – 7-007 as well as *Civil Fraud* (First Edition) ("***Civil Fraud***") at paragraph 11-043.

151. It is worthwhile quoting one or two points from *Snell* at paragraph 7-006:

> "The circumstances in which fiduciary duties arise have therefore also been described in the following way:
>
> "The concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."
>
> While the concept of legitimate or reasonable expectations may not be appropriate in every case, this description is useful in emphasizing the requirement that the fiduciary eschew self-interest, which is thus consistent with the duty of single- minded loyalty. The expectation is assessed objectively, and so it is not necessary for the principal subjectively to harbour the expectation. Nor is it relevant whether the person who is alleged to be a fiduciary subjectively considered himself to be undertaking fiduciary duties.
>
> …
>
> It has been said to be "of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship". However, "it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime". It is clear that it is possible for fiduciary duties to arise in commercial settings."

152. Also, some pertinent points are made at paragraph 7-008:

> "Mortgagees, tenants in common, banks, employees, doctors and professional advisers do not ordinarily owe fiduciary duties. In other words, these are not settled categories of fiduciaries. But it is possible for the circumstances of the relationship between such a person and the other party to the relationship to justify the imposition of fiduciary duties, provided those circumstances are such that it is reasonable to expect that the first person (the

> fiduciary) will subordinate his interests and act solely in the interests of the other (the principal).
>
> Thus, for example, a local branch manager of a bank has been held to have acted in a way that led his customer reasonably to expect that the bank was providing advice as to the wisdom of a proposed transaction in the customer's interests, rather than in the interests of the bank. A manager has been held to owe fiduciary duties.
>
> ….
>
> Joint venturers have been held to owe fiduciary duties to one another, but not all joint ventures necessarily involve such duties. While it has been suggested that joint ventures may be "inherently fiduciary" because of their similarity to partnership, the term "joint venture" is a business term "which does not have a precise legal meaning". Indeed, it has been said not even to be a term of art in business. It is unwise for such an ill-defined term to be the trigger for a category of fiduciary relationship. Instead, it is preferable for joint ventures not to be treated as a settled category of fiduciary relationship.
>
> …
>
> However, an individual joint venture may appropriately be treated as a fiduciary relationship if, "after a meticulous examination of its own facts", the fiduciary expectation is found to be appropriate in the circumstances of the relationship between the joint venturers, bearing in mind the points made above regarding the appropriateness of that expectation between commercial actors. Such could involve one joint venturer owing fiduciary duties to the other, or it may involve each of the joint venturers owing fiduciary duties to the collective group of venturers (similar to a partnership)."

153. The Defendants go on to say that the leading case on the circumstances in which fiduciary duties might arise in a joint venture is *Al Nehayan v Kent* [2018] 1 CLC 216 ("***Al Nehayan**")*. They say that these duties arise only "exceptionally", basing this on a dictum of Etherton LJ (as he then was) at [88] in *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, that:

> "in the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial coventurers".

154. In *Al Nehayan*, Leggatt LJ found that no fiduciary duties arose and found that the prior case law had established principles as follows:

i) In a case in the Australian High Court, *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, Mason J (at [97]) stated that "The fiduciary

relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way to alter the operation which the contract was intended to have according to its true construction" (see at [141]). I will call this "**Principle 1**".

ii) It is "exceptional for fiduciary duties to arise other than in certain settled categories of relationship" which categories "do not include shareholders, either in relation to the company in which they own shares or to each other" (although … "it is clear that fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward, as there is no generally accepted definition of a fiduciary. Indeed, it has been said that a fiduciary 'is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary" (see at [157]). I will call this "**Principle 2**".

iii) "Fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person… The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the 'distinguishing obligation of a fiduciary'. Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests" (see at [159]). I will call this "**Principle 3**".

iv) That explains the cases in which fiduciary duties were found to arise in a joint venture (see at [160]):

a) *In Murad v Al-Saraj* [2004] EWHC 1235 (Ch), "the claimants entrusted the defendant with extensive discretion to act on their behalf and in their interests in selecting a suitable property for investment and in negotiating and arranging the transaction for them".

b) In *Ross River Ltd and another v Waveley Commercial Ltd and others* [2013] EWCA Civ 910; [2014] 1 BCLC 545 ("***Ross River (CA)***"),

> "the control which WCL [the Defendant] had over all aspects of the management of the joint venture project, and over the disposal of the funds arising from it and of the assets comprised in it, and the control which its director was able to exercise over WCL and what it did in these and all other aspects, was held by the Court of Appeal to justify the judge's conclusion that both company and director were under the identified fiduciary duties".

I will refer to this observation as "**Principle 4**".

v) The existence of trust and confidence is thus "not sufficient by itself" to give rise to fiduciary obligations. In the first place, the question whether one party did in fact subjectively place trust in the other is not the test, because the inquiry "is an objective one involving the normative question whether the nature of the relationship is such that one party is entitled to repose trust and confidence in the other" (see at [163]). I will call this "**Principle 5**".

vi) There are "many situations in which a party to a commercial transaction may legitimately repose trust and confidence in another without the other party owing any fiduciary duties" (see at [164]). What distinguishes a fiduciary relationship is "trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal" (see at [165]). I will call this "**Principle 6**".

155. The Defendants point out further that Nugee J (as he then was) carried out a similar analysis in *Glenn v Watson* [2018] EWHC 2016 ("***Glenn***"), in which he (also finding no fiduciary duties) summarised the relevant principles (at [131]), and stated that "so far as joint ventures are concerned, fiduciary duties may in particular be found to arise where one party has control of the assets which are to be exploited for the joint benefit of both" ([131(9)]). The Judge, like Leggatt LJ, added that what is meant by "a relationship of trust and confidence" in the context of fiduciary relationships is "where one party places himself, or is placed, in the position where he trusts and confides that the other party will act exclusively in the first party's interests" ([134]).

156. The Defendants mention also that *Al Nehayan* and *Glenn* were applied by Falk J (as she then was) in *Russell v Cartwright* [2020] EWHC 41 (Ch). This was another joint venture case in which fiduciary duties were held not to be applicable. The judge held that the high level of trust between the parties did not establish a fiduciary relationship, because "the key question is whether the nature of the relationship was such that Mr Russell could trust in the loyalty of the Defendants to put Mr Russell's interests first, and act in what they perceived to be his interests rather than their own". That was not the case, because "each principal was looking after his own interests throughout the life of the joint venture" (see at [79]).

157. The Defendants referred also to two more recent cases. One was *O'Brien v Phipps* [2023] EWHC 1153(Ch) where HHJ Cadwallader (sitting as a judge of the High Court), dealing with a case where two businessman had worked together extensively and were subject to a profit and loss sharing agreement, refused (at [39]) to infer a conclusion that:

> "…it follows, from my having found that they were likely to have trusted each other, that there was any general obligation to be trustworthy to each other, still less to subordinate the interests of each to that of the other".

158. The other was *Connoisseur Developments Ltd v Koumis* [2023] EWHC 855 (Ch) (¶236-242), where HHJ Davis-White KC (sitting as a judge of the Chancery Division) found (at [255]) that no fiduciary duties were owed in respect of a joint venture and added (at [241]) that:

> "the fact that there is an express good faith clause suggests, at the least, that there are no fiduciary duties owed over and above that contractual duty".

159. This finding, as I note further below, is contrary to the finding of the Court of Appeal in *Ross River (CA*), and I consider that I should follow the Court of Appeal on this point. The finding is also contradicted in *Henderson v Merrett Syndicates Ltd* ("***Merrett***") [1995] 2 AC 145 at 206:

> "… the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. … The existence of a contract does not exclude the co-existence of concurrent fiduciary duties (indeed, the contract may well be their source); but the contract can and does modify the extent and nature of the general duty that would otherwise arise."

160. In the case before me I see no conflict between the contractual duties created by the JVA and the fiduciary duties arising from the nature of the relationship. Both of them imparted a duty on Mr Mirza to be honest and open in his dealings with the JV Entities and the Morjarias.

161. Finally, the Defendants make the point that even if, very exceptionally, fiduciary duties do arise in the context of a joint venture, their content depends upon the particular relationship between the parties (and here they refer to *Glenn* at [139(10)] and *Civil Fraud* at [11-027] and they quote Sir Anthony Mann in *Fisher v Dinwoodie* [2023] EWHC 1279 (Ch), at [50] where he states that fiduciary duties are not "some sort of universally applicable homogenous mass".

162. In this regard, the Defendants note that the Directors had their own fiduciary duties and were ultimately the persons responsible for managing the JV Entities; and also that they sometimes accepted instructions from Mr Morjaria as to how to deal with particular issues. These points do not seem to me to negate the fact that the Directors were relying very substantially on Mr Mirza for his recommendations as to how to deal with the Property and that he had invited them, indeed required them, to do so.

iii. The Claimants' exposition of the law

163. The Claimants accept that the Defendants' exposition of the law, as I have summarised it above, is broadly accurate so far as it goes, although the Claimants do not accept that the rhetorical use of "very exceptionally" to describe the circumstances in which fiduciary duties arise in a joint venture is either accurate or adds anything to the fact-sensitive inquiry required to be undertaken in each case.

164. The Claimants back their asserted case as regards fiduciary duties by reference to the following further references to case law.

165. First, they cite the first instance decision of Morgan J in *Ross River Limited and another v Waverley Commercial Ltd and others* [2012] EWHC 81 (Ch) ("***Ross River (HC)***") at [235] to establish the proposition that the settled categories of fiduciaries (such as agent,

director or solicitor) do not exhaust the field of possible situations in which fiduciary duties will arise. He says:

> "The categories of fiduciary relationship are not closed. There may be such a relationship where all the circumstances justify a finding that fiduciary obligations are owed. Identifying the kind of circumstances that produce that result is difficult. The decisions of the courts have sought to retain flexibility as to the approach to be adopted. Numerous academic commentators have offered suggestions but none has gathered universal support. There is said to be growing judicial support for the following two propositions:
>
> (1) a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence;
>
> (2) the concept encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal."

166. The finding of a fiduciary relationship by Morgan J in *Ross River (HC)* was approved in *Ross River (CA*) when this case came to the Court of Appeal.

167. Although *Ross River* concerned a joint venture where the joint venture was being managed by a company owned by the Defendant, the case is by no means on all fours with the case currently before me. An important distinction is that in that case the company owned by the defendant owned the joint venture assets. Nevertheless, the case is useful as authority for the following points:

i) the court did not accept a proposition that the joint venture agreement in that case set out the entirety of the rights and duties of the several parties with the result it was illegitimate to fasten a fiduciary duty onto the express terms of the joint venture agreement (see at [14], [35] and [40]);

ii) the absence of a prior relationship was of no significance as compared with the nature of the structure adopted under the joint venture agreement where one party owned all the assets and was "entirely in control of their exploitation" (see at [60]);

iii) in the circumstances in question:

> "… it is not a breach of such a duty for the operator to pay an expense which is properly payable, or which is in any event agreed to be paid, but if a fiduciary duty exists at all, it throws the burden on the party subject to the duty to justify any payment in any case where there is any doubt as to whether it was properly made."

168. Secondly, the Claimants cite the Court of Appeal in *Farrar v Miller* [2018] EWCA Civ 172 ("***Farrar v Miller***"), which provides further authority that fiduciary duties may arise as between joint venturers even where they do not fall into a settled category of relationship (such as partnership or agency). At [75] Kitchin LJ found as follows:

> "I recognise that joint venturers may or may not have a relationship in which one of them owes fiduciary duties to the other. The question, to my mind, is whether the circumstances of their relationship justify the imposition of such duties, and in answering that question it is often helpful to consider whether, to adopt the words of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, one joint venturer has undertaken to act for or on behalf of the other in a particular matter or circumstances which have given rise to a relationship of trust and confidence."

169. Whilst in that case it appears that the defendant had been a director of a joint venture company, the court did not find a fiduciary duty on that basis, instead holding (at [77]):

> "The basis of this aspect of the claim is not simply the fact that Mr Miller and Mr Farrar were shareholders in Saxon or Artillery; nor simply the fact that Mr Miller was a director of Artillery. It is that the parties had been in business together as property developers for very many years and it was in that context that Mr Miller was entrusted with the corporate aspects of the parties' joint ventures and was specifically given or assumed the responsibility of transferring Long Stratton from Saxon to Artillery and then from Artillery to the Joint Venture entity. It was only as a result of that relationship of trust that Mr Miller was able to transfer Long Stratton out of Artillery to Edged Red, the means by which he thereafter denied Mr Farrar any interest in Long Stratton or its traceable proceeds. I appreciate that these allegations are heavily contested by Mr Miller but Mr Sibbel submits and I agree that, if made good at trial, it is arguable that they did indeed give rise to the fiduciary relationship for which Mr Farrar contends."

170. Thirdly, the Claimants also cite *Murad v Al-Saraj* [2004] EWHC 1235(Ch) ("***Murad v Al-Saraj***") at [328] and [332].

171. This case also concerned a joint venture to acquire a hotel. The claimants lived abroad, had no relevant experience, were wholly dependent on the defendant and reposed trust and confidence in him. The defendant was responsible for instructing professionals and was entrusted with extensive discretion. Fiduciary duties (including a duty to disclose his private dealings in relation to the purchase price of the hotel) were held to arise.

172. There is a distinction in this case in that the defendant in that case was a director of the joint venture company, and as such directly had control (although not ownership) of the joint venture assets. However, the judge, Etherton J (as he then was) found (at [332]) that this fact did not preclude the defendant also having fiduciary obligations to his co-

venturers, including a duty to disclose his private dealings in relation to the purchase price of the hotel.

173. The Claimants argue that management of another's affairs and/or property, and situations in which a person has control (including *de facto* control) over the affairs of a company, are the paradigm cases in which fiduciary duties are owed. Obviously, this would apply to *de jure* directors, but fiduciary duties would also apply to a shadow director, at least in relation to the directions he gives to the *de jure* directors (see *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) at [143]). Whilst it is sufficient for fiduciary duties to arise that a person has control over another person's affairs or assets, absolute control is not a necessary requirement for such duties to arise. Fiduciary duties may also arise where P is entrusted to recommend the best course of action to C, but without P having the authority to bind C to that course of action. If P has undertaken to perform that role, and has accepted a duty to do so in the best interests of C then the starting point is that he must do so on a disinterested basis, and his duty to do so is a fiduciary one.

174. They go on to argue that that principle has been explained by the Court of Appeal in a number of recent cases dealing with commissions paid to credit brokers tasked with recommending credit products to their customers: *Wood v Commercial First Business Ltd* [2022] Ch 123 ("***Wood***") and J*ohnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282 ("***Johnson***"). In those cases, the credit broker's function was to provide the customer with information about available credit products. Absent the informed consent of the customer, they were under a duty to advise on a disinterested basis. That duty was held to be fiduciary in nature.

175. The principal question in *Wood* was whether it was necessary for that "disinterested duty" to be a fiduciary duty before the claimant could have access to equitable remedies in respect of bribery or secret commissions. The court found that it was not: see at [94] where it is said that the authorities make it clear:

> "… that bribery is an actionable wrong at common law, as well as in equity, for which common law remedies, as well as equitable remedies, are available."

176. At [50], it was held that for a claimant wishing to claim the range of remedies associated with breach of fiduciary duty (accounts of profits, compensation for loss and rescission of transactions), on the basis that the defendant had received a secret commission or bribe, it was not an essential pre-condition to obtaining such remedies that the label "fiduciary relationship" should be applicable:

> "While it may sometimes be appropriate to describe a duty to give disinterested advice or information as "fiduciary", it is not necessary to do so. It is the content of the duty, not the label attached to it, that matters."

177. At [110], the Court of Appeal found that the trial judge had been:

> "unquestionably correct to hold that, on the basis of the broker's terms and conditions and on the basis of the findings of fact at first instance, the broker owed duties which engaged the law

> applicable to bribes and secret commissions. It was under a duty to make a disinterested selection of mortgage product to put to its client in each case. To the extent that it is necessary, they were also correct to hold that the broker owed a fiduciary duty of loyalty to Mrs Wood and Mr Pengelly in the performance of its duties. As I have indicated in relation to the first issue, it matters not whether that duty is characterised as "fiduciary", either in a loose sense or at all."

178. After considering the terms and conditions and the acceptance form (which imparted a duty to act on behalf of the customer, to advise on the selection of a mortgage product to meet individual circumstances and confirmed full authority to negotiate on behalf of the customer), the court found (at [111]) that:

> "they contained a number of provisions that are consistent only with such duties".

179. The Defendants point out that *Wood* was essentially about what circumstances would engage the law of bribery to apply to secret commissions. It cannot, therefore, they argue, be relied upon to establish a proposition that someone in the position of Mr Mirza giving recommendations or passing on information to the JV Entities was in the position of a fiduciary. I do not agree. It is true that *Wood* did not find it necessary to engage the whole panoply of fiduciary duties, but the finding was that the circumstances did create a duty to make a disinterested selection of mortgage products and not to make secret profits.

180. In *Johnson*, the question was whether equitable remedies were likewise available in the case of "half-secret" commissions without a finding of fiduciary duties. The Court of Appeal held that those remedies were available only if the broker owed fiduciary duties, since the "half-secret" commission cases fell outside the scope of the law of bribery: see at [77]-[82]. The courts found in this case a duty to provide disinterested advice was a fiduciary one:

> "87. … it was part of the credit broker's role in these cases to provide information to the lenders on the customer's behalf, and to the customer about the available finance. The very nature of the duties which the credit broker undertook gave rise to a "disinterested duty" unless the broker made it clear to the consumer that they could not act impartially because they had a financial incentive to put forward an offer from a particular lender or lenders. The broker could do this, for example, by saying: "I may offer you a product which may be chosen because it benefits me directly, even though it may not be the best product for you. Are you happy with that?" Of course, in most cases the disclosure would be more subtle than that; but it must be sufficient to bring home to the customer the fact that the person he is engaging to find an offer of finance is free to promote his own self-interest at the customer's expense.
>
> ...

> 95. These relatively financially unsophisticated individuals undoubtedly placed trust and confidence in the brokers to secure an agreement which was affordable and which was, at the very least, competitive.
>
> …
>
> 100. It is precisely because the brokers were in a position to take advantage of their vulnerable customers and there was a reasonable and understandable expectation that they would act in their best interests, that they owed them fiduciary duties."

iv. The application of the law to the current facts

181. As the Defendants point out, the cases where a participant in a joint venture has been found to owe fiduciary duties have largely been confined to the circumstances where the defendant participant has had full control and ownership over the assets. The Defendants argue that at all times the assets of the JV were under the ownership and ultimate control of the Directors rather than Mr Mirza.

182. Nevertheless, the question arises whether in the case before me, the circumstances are sufficiently similar such that a fiduciary duty of some kind can be found despite the difference in circumstances. In my view it can, and should be, if one considers the following circumstances.

Did Mr Mirza have fiduciary duties?

183. First, it is a key point that, under clause 5.2.1 of the JVA, Mr Mirza accepted a duty to manage the daily operation of the JV and make decisions (including the appointment of all contractors) through his UK construction company (Tydwell) in the best interests of the JV.

184. Whilst it is true that the assets were vested in the JV Entities and thus, were ultimately within the control of the Directors, the Directors did in fact repose an enormous amount of trust and confidence in Mr Mirza and his company Tydwell. This was understandable and necessary. It was Mr Mirza, not the Directors, who conducted all negotiations with the various banks, planning authorities and other counterparties that the JV Entities dealt with.

185. The JV Entities had been set up offshore largely for tax reasons and offshore directors were chosen also for tax reasons. The Directors knew that they were not expected by the Joint Venturers (who ultimately were their employers) to second-guess the recommendations of Mr Mirza (one of the owners), especially where they had been instructed early on by Mr Morjaria, the other owner, not to do so. They knew that instead they were expected to accept recommendations except where it was clear that there was some reason why they should not. Whilst, for tax reasons, the Directors needed to be the ones signing off on agreements and payments, they understood that (to the largest extent possible without their breaching their fiduciary duties to the JV Entities) they should do so in a way that reflected the common understanding, reflected in the provision in the JVA giving to Mr Mirza the day-to-day management of the JV, that Mr Mirza would remain the driving force behind the JV. Time and time again the

Directors showed themselves to be content to accept recommendations made by Mr Mirza or Tydwell, for example to pay invoices or to enter into agreements generally without making any thorough investigation of the circumstances behind such recommendations.

186. Examples of this include the Directors allowing the JV Entities:

i) to enter into a Procurement Contract, Development Contract and Property Management Agreement with Tydwell with no material negotiation and on terms that were almost completely opaque concerning any fees payable to Tydwell - it is very difficult to imagine that any commercial party would enter into contracts on these terms unless they reposed substantial trust that the counterparty was acting in its interest and not solely within the interests of the counterparty;

ii) to pay invoices without insisting on obtaining the underlying invoices of subcontractors so that they remained in ignorance of what profit Tydwell was taking for itself;

iii) appointing Mr Mirza as agent to negotiate a settlement with Mace in relation to its responsibility to replace cladding and to instruct Mr Ekanyake in relation to that settlement and to draw up the Cladding D&B Contract; and

iv) entering into the Boomzone Leases without making any independent enquiry as to whether doing so was in the interests of the JV Entities and in the case of the Second Boomzone Lease, doing so within hours of this being requested.

187. These points strongly suggest that Mr Mirza was *de facto* controlling the JV. Whilst this was subject to the oversight of the Directors, they allowed him a very long leash.

188. The Defendants rely heavily on the point that the JV parties had received tax advice that they should arrange matters so that the JV Entities would be managed from outside the United Kingdom; the JV assets were not held in the United Kingdom; and that the formal decisions to enter into agreements and to approve invoices should be made by the Directors outside the United Kingdom.

189. This does not, however, negate the fact that Mr Mirza was entrusted with all or virtually all dealings with counterparties and the Directors (encouraged by Mr Morjaria) were accustomed to complying with recommendations made by Mr Mirza or by Tydwell.

190. There has been no pleading that Mr Mirza or Tydwell was a shadow director, and so I will not reach any finding on that point. Nevertheless, I consider that in reality Mr Mirza exercised a decisive influence on what decisions were taken by the Directors. I agree with Mr Peto KC, arguing on behalf of the Claimants, when he suggested that Mr Mirza and/or Tydwell performed a role more like that of a steward in the Middle Ages, who makes decisions on behalf of his Lord, even if it is his Lord who signed the necessary paperwork, than that of an occasional adviser.

191. Secondly, Mr Mirza went out of his way to insist that the Morjarias and Directors should repose this trust in him. To take three examples:

i) in an email exchange between Mr Mirza and Mr Morjaria on 8 August 2007, shortly prior to the execution of the JVA, Mr Mirza wrote that:

> "I am happy with 50/50 relationship & 55/45 shareholding, based more on our long standing relationship and trust, I am basing this on a understanding between the two of us that you are in agreement for me to manage, handle and make decisions on this project. Naturally I will consult with you but you must allow me the freedom to make decisions without having to constantly revert back to you. I believe this level of flexibility, which is based on trust primarily, must be there for the business to follow the right course…".

Mr Morjaria replied that:

> "I have no idea about building, you will be responsible and totally in control."

ii) An email of 15 April 2008 to, amongst others, Mr Lewin and Mr Morjaria where Mr Mirza says:

> "…I just thought it may be useful at this stage to further clarify our understanding of what your role would be as directors on behalf of the beneficial owners and acting under the terms of the JV partnership between myself and Pradeep.
>
> On the construction phase of any development or any other business agreed within the JV, for either Viper ltd and Valtrom you would be responsible for taking instructions from myself and Saira under the terms of the JV agreement and ultimately to Pradeep, Sangita and myself and Saira as the beneficial owners. Please let me know if this would be your understanding, the above instructions would follow whatever is in the best interest of the Company/Companies."

iii) Much later, in an email dated 13 June 2020, Mr Mirza wrote to Mr Lewin and Mr Stobart, in response to Mr Stobart's request for the underlying quotations from subcontractors, in the context that the Directors had just been informed that the price for replacing the cladding and rendering the building had increased to £2,545,763.70 inclusive of VAT in the following terms:

> "In keeping with how I've operated in the best interest of Otaki (since 2007 when we agreed the arrangement) I've kept you and your colleagues (on behalf of Otaki) fully informed with the development decisions/management (clause 5.2.2) that I am authorised by the joint venture to take through my development company (clause 5.2.1). Pursuant to this (and as I have always done) I've given you full information on the cladding (as I did on the 11th June 2020) which resulted in the approval of the development arrangements with Tydwell (my development company). I have therefore fulfilled the requirements of the joint

> venture and followed the pattern of approval we have done many times in the past."

192. These points, in my view, are sufficient to bring the circumstances within those mentioned by Morgan J in *Ross River (HC)* at [235] (which I have reproduced above). Mr Mirza did undertake to act on behalf of the parties to the JVA in circumstances which gave rise to a relationship of trust and confidence and to a legitimate expectation on behalf of Mr and Mrs Morjaria and Otaki that Mr Mirza would not utilise his position in such a way as to be adverse to the interests of the JV.

193. My finding that Mr Mirza owed fiduciary duties is also, I consider, consonant with the principles outlined by Leggatt LJ in *Al Nehayan* as I set these out at [154] above. In particular:

i) In relation to Principle 1, the fact of a fiduciary relationship is not, to my mind, incompatible with the terms of the JVA and in particular the duty of good faith included within the JVA. As I have already noted, *Ross River (CA)* provides authority that an express duty of good faith does not preclude the coexistence of fiduciary duties.

ii) In relation to Principle 2, whilst it may be "exceptional" for fiduciary duties to arise outside settled categories of relationship, the extent that Mr Mirza was able to exert huge and decisive influence over the JV, and accepted a duty to manage it in the interests of the JV, to my mind does bring this into one of those exceptional cases.

iii) In relation to Principle 3, Mr Mirza had accepted what Leggatt LJ describes as "the core obligation of loyalty" which was the "distinguishing obligation of a fiduciary" when he agreed to manage the daily operation of the JV "in the best interests of the Joint Venture". At many points, including in relation to the Cladding Claim, he asserted that he was acting in the best interests of the JV and at no point did he assert that he was acting in his own private interests. Mr and Mrs Morjaria and the Directors were entitled to take these assertions at their face value.

iv) In relation to the observations I have labelled as Principle 4, I have already mentioned, there are differences between the current circumstances and those found in *Murad v Al-Saraj* and in *Ross River (CA).* Even so, the huge influence that Mr Mirza had over the JV, coupled with the fact that the Directors, sitting in the Isle of Man and Mr and Mrs Morjaria in Dubai, were entirely reliant on Mr Mirza and Tydwell for direction on how to manage the JV, afforded Mr Mirza a sufficient level of control to justify amply the imposition of fiduciary duties.

v) In relation to Principle 5, I accept that the fact that the JV Entities, through the Directors and Mr and Mrs Morjaria, did in fact subjectively place trust in Mr Mirza and Tydwell is not the test. However, I consider that the answer to the objective normative inquiry that Leggatt LJ enjoins the court to make must be "yes" in relation to the case before me: the nature of the relationship was indeed such that the JV Entities and Mr and Mrs Morjaria were entitled to repose trust and confidence in Mr Mirza and in Tydwell.

vi) In relation to Principle 6, I consider that what Leggatt LJ describes as the factor that distinguishes a fiduciary relationship, being the "trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal" is present in this case, to the extent necessary for the principle apply. This is apparent when one considers:

a) the terms of the JVA entrusting Mr Mirza with management of the day-to-day conduct of the JV "in the best interests of the Joint Venture" (in addition to a duty of good faith and a duty to report);

b) Mr Mirza's protestations that he should be trusted to deal with management; and

c) tellingly, the evidence that the Directors for almost the entire history of the JV accepted without demur that Mr Mirza and Tydwell were acting in the interests of the JV and not in their own commercial interests, and made no or few attempts to go behind the proposals presented to them by Mr Mirza or Tydwell.

194. Principle 6 cannot mean that to be subject to fiduciary duties one must be absolutely precluded from making a profit. There are many cases where a fiduciary is allowed to have profitable dealings with his/her or its principal. For example directors may take a salary or may be permitted under the articles of a company to act where they have a conflict of interests. What Principle 6 requires (at a minimum) is that the putative fiduciary must be obliged to act in the best interests of the principal and, if the fiduciary is making a profit, to obtain fully-informed consent for that profit. This reading is consistent with *Bristol & West Building Society v Mothew* [1998] Ch 1 ("***Mothew***") (as I mention further below), as well as being consonant with the decisions in *Glenn, Ross River (HC)* and *Ross River (CA), Farrar v Miller, Murad v Al-Saraj,* and *Johnson.*

195. The Defendants' argument that the court should be slow to find fiduciary duties outside the established categories (which largely encompass positions where the putative fiduciary has some sort of power of agency) has some force. Certainly it is not the case that all persons who give advice or recommendations thereby take on the obligations of a fiduciary. However, *Wood* demonstrates that duties traditionally thought to arise only where there is a fiduciary relationship may arise in broader categories. *Johnson* demonstrates that where it is clear that someone has accepted an obligation to act in the interests of another and in so doing has put himself in a position to take advantage of that other person and there was a reasonable and understandable expectation that he would act in that other person's best interests, the person in that position would owe fiduciary duties and if he does not make it clear that he is on a particular occasion acting in his own interests, for example by making a secret profit, then he is in breach of those duties.

196. I have dealt with my basic finding in relation to fiduciary duties relatively early on in this judgment as it colours how various claims are to be considered. However, I will leave working out the consequences of this finding as regards those claims as I tackle them.

Did Tydwell have fiduciary duties?

197. The Claimants suggest that, as Mr Mirza had these fiduciary obligations, and as he was operating in accordance with the JVA through his company, Tydwell also had those fiduciary obligations.

198. I accept the proposition put forward by the Claimants that a joint venturer will still personally owe fiduciary duties even if the business of the JV is carried out through a company. This was evident in *Ross River (CA)* – see at [36]. The duty of the fiduciary not to favour himself at the expense of the joint venturer to whom the duties are owed includes a duty not to favour companies controlled by him or in which he has a substantial interest: (see *Ross River (HC),* at [263]).

199. I do not believe I have been taken to any case, however, to establish the contention argued for by the Claimants that the company itself (Tydwell in our current case) *necessarily* becomes subject to the same fiduciary obligations as its principal.

200. The authorities bundle included a copy of *Prest v Petrodel* [2013] 2 AC 415, which includes the masterly exposition by Lord Sumption JSC as to the circumstances in which the court will pierce the corporate veil. However, I have been unable to conclude from that anything which fixes a genuine commercial company like Tydwell, and not one merely interposed for some nefarious reason, with the fiduciary obligations of its principal.

201. Nevertheless, I consider that Tydwell did accept fiduciary duties. Although Tydwell was not a party to the JVA (and not subject to the contractual duty of good faith found within that agreement), within the scheme of the JVA, Tydwell (being the company which all parties acknowledge Mr Mirza would operate "through" in accordance with clause 5.2.1 of the JVA) was placed within the same position of trust, and subject to the same expectations as Mr Mirza. It willingly assumed those responsibilities and it was relied upon, for example, when it presented invoices and requests for payment by the Directors of Otaki. The reasons for regarding Mr Mirza as a fiduciary apply equally to Tydwell.

202. However, there is no reason to think that these duties apply to Redwire, Boomzone or Wolverine.

203. I therefore conclude that Mr Mirza was subject to fiduciary duties, both when acting in his own right and when acting on behalf of Tydwell. Tydwell also was subject to fiduciary duties, but Redwire was not. Neither was Boomzone or Wolverine.

The nature of the fiduciary duties

204. As the nature of those duties, the "core" duties owed by a fiduciary according to the leading case of *Mothew*, at page 18, have been found by Millet LJ (as he then was) as follows:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single- minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust;

> he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations."

205. The Claimants accept that where fiduciary duties arise outside of the settled categories, the duties may be attenuated depending on the nature of the relationship giving rise to them: see the comments of Lord Browne-Wilkinson in *Merrett* on page 206:

> "The phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. That is not the case. Although, so far as I am aware, every fiduciary is under a duty not to make a profit from his position (unless such profit is authorised), the fiduciary duties owed, for example, by an express trustee are not the same as those owed by an agent. Moreover, and more relevantly, the extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties.

206. The Claimants submit that the "irreducible minimum" is the duty of the fiduciary not to act so as to favour his interests at the expense of the joint venturer to whom the duty is owed, at least in relation to the business of the JV. This they say is essentially the result that was reached by Morgan J in *Ross River (HC)*, at [259], when he held (in circumstances not that dissimilar to the case before me) that the corporate and individual joint venturers were under a fiduciary obligation not to handle the JV's revenues in a way that favoured themselves to the disadvantage of their joint venturers.

207. The finding of Morgan J that fiduciary duties were owed in that case was upheld when the case came to the Court of Appeal. If anything, the Court of Appeal found a stricter duty. Lloyd LJ, after considering the terms of the relevant agreements, considered that the agreements in that case as well as the "normal principles of fiduciary obligations" prohibited the putative fiduciary in that case from paying itself, or using for its own benefit, any part of the proceeds of the development (any joint venture assets, as the judge described them) otherwise than (a) in payment of proper expenses of the development or (b) as agreed with *Ross River*, whether generally or on an *ad hoc* basis.

208. I will return to the question of the precise scope of the fiduciary duties assumed by Mr Mirza as I go on to consider the various elements of this case.

7. THE VAT ADVANCES

209. The Claimants claim repayment of amounts advanced to or at the order of Mr Mirza in respect of VAT or in the alternative a declaration as to the treatment of such amounts. To understand this claim it is necessary to understand the terms relating to this in the JVA. These terms form part of the provisions dealing with the sharing of profits and are in the following terms:

> "**4. PROFITS AND LOSSES**
>
> **4.1 Apportionment**
>
> 4.1.1 If the Company or the Subsidiaries receive any VAT refunds from HM Revenue and Customs which are not charged, pledged or otherwise due to be repaid to the Company's lender or to any other person the Company shall distribute the whole amount of such refunds at the direction of the holders of the Company's "B" shares and such distributions shall be treated as dividends to the extent permitted by Jersey Company Law, any excess being treated as short-term advances to the holders of the "B" shares to be set off against future dividends or future capital distributions on liquidation to which the holders of the "B" shares may become entitled and the holders of the Companies "B" shares shall indemnify all other shareholders in respect of any claim by HMRC for such VAT refunds.
>
> 4.1.2 The amount remaining of the Net Profits or Net Losses of the Company after deducting or accounting for all amounts treated as dividends, advances or capital distributions pursuant to clause 4.1.1 shall be apportioned between the shareholders of the Company in the following ratios:
>
> 4.1.2.1 The holders of the "A" shares in the Company shall be entitled to forty five per centum (45%) of the said amount apportioned to each shareholder in the same proportion as the number of each shareholder's shares bears to the number of issued "A" shares in the Company.
>
> 4.1.2.2 The holders of the "B" shares in the Company shall be entitled to fifty five per centum (55%) of the said amount apportioned to each shareholder in the same proportion as the number of each shareholder's shares bears to the number of issued "B" shares in the Company.
>
> 4.1.3 All amounts apportioned pursuant to clause 4.1.2 shall be distributed to the Joint Venturers as dividends or capital distribution on liquidation."

210. In my view the intent and meaning of these provisions as regards the treatment of VAT receipts is tolerably clear. If Otaki and any of its subsidiaries (that is Viper and Krugar) were to receive any VAT refunds (that are not charged to a lender or some other person – and it is common ground that no such amount was so charged), the holder of the B shares (that is, Mr and Mrs Mirza) would have a right to require these to be paid to him (or, it may be assumed, to his order). If Jersey law allows these payments to be made by way of dividend, they will be paid as such, if not they will be made as a short-term advance (a "**VAT advance**"). To the extent that they are made as a VAT advance this advance will be set off against future dividends or future capital distributions by Otaki on liquidation to which the holders of the "B" shares may become entitled. This much I think is common ground between the parties.

211. In fact, all of these payments (amounting to somewhere around £5 million) were paid as advances rather than dividends. This I think reflected the position that Otaki had not, at the point that VAT advances were due to be made, realised any profits. Even when profits were being recognised in one of its subsidiaries, these profits were never distributed to Otaki so as to put Otaki itself into profit. Jersey company law is similar to that of English law in generally requiring dividends to be made out of realised profits, although it is more liberal in allowing exceptions to this rule.

212. The Defendants and Mr Homan, the accountant acting for the Mirza family companies, have suggested that, even though no dividend was declared by Otaki, dividends should be *treated* as having been declared because there was a period during which there were distributable reserves within Viper or Krugar out of which such dividends could have been, and should have been declared, and had these been distributed to Otaki, Otaki could have, and should have, used these to declare a dividend rather than making an advance to the benefit of the B shareholder. I disagree for two reasons.

213. First, these profits were in Viper, but were not represented by cash so Viper could not have declared a cash dividend. Mr Homan suggests it could have declared a dividend and left it unpaid, creating a liability on intercompany account and thereby transferring profits from Viper to Otaki. Mr Homan argues that the wording of the JVA obliged Viper to do this.

214. I disagree. The Directors as directors of Viper, when considering whether to declare a dividend, needed to act in the interests of Viper, and it is difficult to see why it was in the interests of Viper (which for most of its life was highly indebted) to create a further cash liability, supported only by a highly illiquid asset. Viper was not bound by the JVA and Otaki was not bound by the JVA to take all possible steps to create distributable reserves so as to be in a position to be able to declare a dividend. Further, the obligation on Otaki in the JVA to allow the short-term advances to be "set off against future dividends or future capital distributions on liquidation" included no indication of timing for the dividends – it clearly envisaged that the set-off might only be on liquidation.

215. Secondly, it is clear that no dividends were ever declared. Even if I am wrong in my finding that Otaki was not in breach of the JVA in failing to procure Viper to declare dividends so that Otaki would have distributable reserves to declare dividends at the time that any particular VAT advance was made, that does not mean that dividends can be backdated. At most, the B shareholders have an unsecured claim for breach of contract against Otaki. I understand that Otaki is now in liquidation. The liquidators will need to determine whether any such claim is a good one. For the reasons given above, I consider it is not. However, even if I had concluded that there is a valid claim, it would have been an unsecured claim and, unless the relevant insolvency rules would have allowed a set-off in all these circumstances (on which I have received no argument and make no ruling), any such claim would be paid in full only if creditors generally are being paid in full.

216. The other matters where the Claimants and the Defendants disagree are:

    i) now that Otaki itself is in liquidation, whether the VAT advances need to be repaid given the set off provisions mentioned in clause 4.1.1; and

ii) whether the set off mentioned in clause 4.1.1 is to be taken into account before apportioning between the holders of the "A" shares and the holders of the "B" shares mentioned in clause 4.1.2.1 and clause 4.1.2.2.

217. Underlying these two points there is the question whether these arrangements regarding VAT were intended (as the Claimants contend) to provide a cash flow benefit only to Mr Mirza or whether (as the Defendants contend) they were intended to provide him with a permanently increased share in the allocation of profits.

218. Both parties have referred me to contemporaneous communications which they say support their side of the argument, and both parties make the point that the other's argument leads to uncommercial results. I have not found any of this discussion particularly helpful. Whilst the court can consider the surrounding circumstances when construing a provision that is ambiguous, I do not see any ambiguity here as regards the first two questions.

219. To my mind it is clear from the drafting in clause 4.1.2 Net Profits or Net Losses for the two classes of shareholder are to be calculated "after deducting or accounting for *all* amounts treated as dividends, *advances* or capital insurance pursuant to clause 4.1.1" (emphasis added). In other words, the 45%/55% split occurs only after the advances have been taken into account as a charge on profits in the same way that a dividend would have been. There is only one way of achieving this in the context of liquidation. This is to find that, for the purpose of apportioning between the two classes of shareholder, the assets of Otaki in liquidation include the right to be repaid the VAT advances, but that this asset, to the extent possible, is to be set off against any Net Profits that are available for shareholders in the liquidation, with the effect that this set-off is to operate as a prior capital distribution to the holders of the "B" shares and ranking ahead of the entitlements of the holders of the two classes of share under the 45%/55% arrangements.

220. In summary, the holders of the "B" shares were to have (at least) the cashflow benefit of the VAT refunds received by Otaki as they arise. These amounts were to be paid out on request and in the form of a dividend if possible. If a dividend were not to be possible, then there was to be a VAT advance. VAT advances become repayable following liquidation of Otaki (if not repaid before, for example through set off against a dividend during the interim period). If in the liquidation there were to be profits available to shareholders, these should be used to set off the amount repayable in respect of VAT advances before any other distribution to shareholders. If there are no such profits available to shareholders, or to the extent that there is a shortfall in such profits, the VAT advances cannot be set off and will be an asset that the liquidator can use to satisfy the claims of creditors.

8. WAS IT UNDERSTOOD THAT MR MIRZA OR TYDWELL WOULD NOT CHARGE FOR SERVICES?

221. In this next section, I consider another important element to the background to the remaining claims, which is the question as to whether there was any understanding or agreement between the parties as to whether or not Tydwell would charge for its services.

A. The terms of the JVA

222. The Claimants aver that the provisions of clause 5.2.1 of the JVA demonstrated that Mr Mirza had accepted that he and his management company (Tydwell) had accepted an obligation to undertake the management of the "daily operation of the Joint Venture" and the appointment of contractors and this was alongside Mr Mirza's duty under clause 2.1 of the JVA to use his "reasonable endeavours towards achieving the Joint Venture Objectives". The Claimants argue that the JVA included no provision for Mr Mirza or Tydwell to receive any recompense for his or its involvement in the development and management of the Property, beyond the recompense afforded to Mr Mirza in his capacity as the holder of the B shares through the VAT provisions and through the 55% of any profits Otaki might make which accrued to the holders of the B shares (notwithstanding that the holders of the A shares have provided more initial capital than the holders of the B shares).

223. They point out further that clause 15 expressly stated that "Unless otherwise provided, all costs in connection with the negotiation, preparation, execution and *performance* of this Agreement, shall be borne by the party that incurred the costs". Clause 3.1.4 provided for Otaki to refund "third party costs properly incurred" by Mr Mirza prior to the date of the JVA in the promotion of the JV objectives but did not provide for him to receive any fees for pre-JVA work.

224. The Defendants argue, conversely, that there was nothing in the JVA that prevented Tydwell from charging. Tydwell was not a party to the JVA, and it was unreasonable to think that it would be providing the very substantial services which it did provide without even a charge to cover its overheads.

B. The original oral discussions

225. The Claimants go on to say that the proposition that Tydwell could not charge for its services is also consistent with Mr Morjaria's witness evidence about the parties' original oral discussions. This witness evidence is contradicted by Mr Mirza in his witness statements and his evidence on this point was developed further in his oral evidence when he said:

> "I do remember [Mr Morjaria] saying, 'Possibly, if you can, below slightly market rate, but it must not be above what the valuation - the bank's valuer quote, then I don't care whether you build the building for a pound, or you build it for whatever, whatever you make in there I'll just leave it up to you'. That is what we actually said."

226. I find it very difficult to believe Mr Mirza's sudden memory of this conversation (which goes much further than anything said in any of his witness statements). In particular, it is difficult to believe that if this proposition had been put to Mr Morjaria this way, he would have been happy to rely on the Bank's surveyor to approve the level of fees or mark-up, especially if he had just given way on the VAT point which anyway gave Mr Mirza a very substantial percentage of the costs of the development.

227. The Defendants argue that I should prefer Mr Mirza's account as it appears that Mr Morjaria was incorrect as to the location of these original discussions (thinking that

they took place in Dubai, whereas there is contemporary evidence that they took place in London).

228. In my view it is not appropriate to place any reliance on either party's recollection (or professed recollection) as to what was agreed in the negotiations leading to the JVA. This is appropriate in the context of my comments concerning *Gestmin*, and having regard also to the fact that the JVA contains, at clause 13, an entire agreement clause to the effect that:

> "13.1 This Agreement, and any documents referred to in it or executed contemporaneously with it, constitute the whole agreement between the parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.
>
> 13.2 Each party acknowledges that in entering into this Agreement, and any documents referred to in it or executed contemporaneously with it, does not rely on, and shall have no remedy in respect of, any statement, representation, assurance or warranty of any person other than as expressly set out in this agreement [*sic*] or those documents."

229. Mr Mirza also refers to an email he sent to Mr Morjaria on 23 October 2007 where he described the "basic structure of the company". He regards it as being clear that Tydwell would be charging for its own work when it was said in this email that:

> "The development will be carried out by Tydwell Ltd (UK Company) who will invoice Krugar and Viper in proportion to the work carried out."

230. There are a few points that may be made about this communication:

i) First, it does provide a suggestion that Tydwell would be carrying out the development and charging for it.

ii) Secondly, this communication, also, needs to be considered in relation to the entire agreement clause that I have reproduced above.

iii) Thirdly, it should be noted that there is a distinction between the phrase used within clause 5.2.1 of the JVA of "undertaking the management of the daily operation of the Joint Venture" and undertaking the development itself or procuring to undertake the development.

iv) Finally, it may be noted that this communication provides no hint as to the basis on which Tydwell would charge and in fact there was never any discussion with Mr Morjaria or with the directors of any of the JV Entities as to a basis for Tydwell to charge for its services.

C. The relevance of the Development Appraisal

231. Mr Mirza also asserts that a document referred to as the "**Development Appraisal**" formed part of the JVA and that it "makes entirely clear that Tydwell would be charging for its services".

232. I think it is clear from the content and layout of the Development Appraisal that it had originally been produced by, or for the purposes of, Clydesdale to assist with that bank's evaluation and monitoring of the project. Nevertheless, it was given a significant role within the JVA. The Development Appraisal is referred to within the JVA within the definition of "Purchase Price". That definition is as follows:

> "fifteen million eight hundred twenty three pounds and four hundred pounds (£15,823,400), the price payable by the Company for the Property and all reasonable proper and incidental costs of the purchase including any relevant purchase taxes, statutory levies or registration fees and all professional charges incurred in connection with the acquisition as set out on the development appraisal attached as Appendix 1".

233. There is some question whether the Development Appraisal was attached to the version of the JVA that Mr and Mrs Morjaria were sent for signature, and whether Mr Lewin (for Otaki) was ever given a version of the JVA that included the Development Appraisal as an attachment. Nevertheless, it is clear that Mr Morjaria had earlier been sent a copy of the Development Appraisal, and in my view the reference to it in the definition of "Purchase Price" is sufficient for the court to conclude that this document was incorporated into the JVA by reference.

234. The Defendants argue that the fact that the Development Appraisal contained a reference within a list of categories of "Construction & Professional" costs, to £350,000 to be allowed in respect of "Project Management" was a clear reference to Tydwell, as it was clear to everyone that Tydwell was providing the overall management of the project. As it turned out, some 88 invoices covering a total of £589,673.75 (excluding VAT) specifically mentioned project management fees.

235. Mr Mirza in his Sixth Witness Statement goes on to suggest that the reference to a Project Management cost of £350,000 was there because Clydesdale Bank insisted upon Tydwell receiving this sum as it was important to have Mr Mirza's company being there, and incentivised, throughout the period.

236. His evidence on this point is supported by Mr Jones who states within his First Witness Statement that:

> "…the bank was in agreement that Tydwell could receive £350,000 during the course of the project as it considered that Tydwell should be entitled to a profit and charge fees for its services and thereby ensure that there was continued engagement from Mr Mirza in managing the project. The bank wanted to make sure that Tydwell as the developer/builder would remain solvent and profitable as its failure could potentially affect the delivery of the project and, as Mr Mirza and Tydwell were

> central to the success of the project, this was of paramount importance."

237. The Claimants object that it is by no means clear that the £350,000 earmarked for Project Management was intended for Tydwell. Project management services could have been provided by other professionals. Indeed subsequently the Procurement Agreement identified Christopher Smith Associates ("**CSA**") as the "Project Manager". CSA was also appointed under the Procurement Agreement as the "Employer's Agent" (Viper was the Employer under this Agreement).

238. The Defendants argue that CSA was not undertaking an overall project management role: its role was a lower-level role, primarily based on providing the services of a quantity surveyor and checking the invoices and requests for payment provided by the other professionals.

239. The evidence available as to what CSA charged is not that helpful in resolving the difference of opinion on this point. The Trial Bundle includes various examples of invoices and requests for payment from CSA to Tydwell. These appear to show that a total of £111,500 plus VAT was charged by that firm during the period to 31 May 2013. This is substantially less than the £350,000 originally allowed in the Development Appraisal for "Project Management" and the more so when one considers that at the time of the Development Appraisal the development was forecast to last only for around 18 months but in fact what was referred to as Phase 1 of the development lasted until May 2012, and this invoice was even later. The evidence of the CSA invoices therefore suggests that the allowance of £350,000 for project management was not earmarked for CSA, or at least that not all of it was so earmarked.

240. On the other hand, it is difficult to see elsewhere on the Development Appraisal where the fees of CSA would have been covered. The £410,000 allowed in the Development Appraisal for professional fees appears to cover architects, structural engineers, mechanical engineers and party wall surveyor and not the type of lower-level project management and quantity surveying services that CSA provided. This suggests that, at least some of the £350,000 must have been intended for someone undertaking the role that was in fact undertaken by CSA.

241. If one turns to the applications for drawdown of the Clydesdale Facility prepared by CSA (each an "**Application Notice**"), the evidence remains inconclusive but, if anything, supports the proposition that Clydesdale was expecting Tydwell to charge fees, albeit at a much lower level than £350,000.

242. The Application Notices were used to draw down stage payments from Clydesdale. They operated by defining an "Element Cost" for each element of the build and professional services at a fixed amount. Each Application Notice then explained what percentage of that cost had accrued by the date of that Application Notice, and where this percentage had increased from the previous Application Notice, the difference was the amount to be drawn down from Clydesdale. VAT was added to the summaries of the increases in costs shown in the particular Application Notice.

243. The Application Notices included both an Element Cost for "Project Management (Tydwell)" at £73,419 and separately a line for "Quantity Surveyor/Employers Agent (Christopher Smith Associates)" at £84,000. The same figures appear in both the first

Application Notice and in later Application Notices up to Application No 19 on 10 May 2012, which was the latest Application Notice that I could find within the court bundle.

244. It is difficult to align the Element Costs for consultants and project management given within the Application Notices with those given within the Development Appraisal, even if it is to be assumed that the figures in the Development Appraisal are inclusive of VAT whereas those itemised in the Application Notices are exclusive of VAT:

i) the total for Project Management and professional fees in the Development Appraisal comes to £760,000 whereas the Element Costs in the Application Notices covering Project Management/Consultant Fees total only £531,844 (£638,212.80 if VAT is added at 20%, which is likely to be an over-estimate as VAT was originally charged at lower rates).

ii) The Development Appraisal includes £350,000 for Project Management. The Element Cost described as "Project Management (Tydwell)" in the Application Notices is only £73,419 (or £88,102.80 if VAT is added at 20%). If the Element Cost for "Quantity Surveyor/Employers Agent (Christopher Smith Associates)" (£84,000) is regarded a project management cost, then the cost attributable to project management would get up to £157,419 (or £188,902.80, if VAT is added at 20%). If the fees for a CDM (Construction Design and Management) coordinator (£20,000) can also be regarded as part of the project management costs, then this still would only get project management costs up to £177,419 (or £212,902.80 if VAT is added at 20%).

iii) The Development Appraisal includes a total of £410,000 for professional fees, to include architects, structural engineer, mechanical engineer and party wall surveyor, whereas the Element Costs for professional fees of these descriptions in the Application Notices (Architects (£65,000), M&E consultant (£78,570) and structural engineers (£13,000) come to a total of only £156,570 (£187,884 if VAT is added at 20%). No figures are given for a party wall surveyor but there is a Fund Surveyor costed at £57,500. If we add this and add what is described as "Sundry fees" (£140,355) we get a total of £354,425 (or £425,310 if VAT is added at 20%). This seems fairly close to the Development Appraisal figure (especially as VAT was lower at rates at the time when the Development Appraisal was being compiled (15% from 1 December 2008 and 17.5% between 1 January 2010 and 20% from 4 January 2020).

245. I draw the following conclusions from my consideration of the Application Notices:

i) the Application Notices do support the proposition that as between Clydesdale and Tydwell there was an expectation that Tydwell would charge for Project Management;

ii) however, the amount to be charged by Tydwell for Project Management according to the Application Notices was originally limited to £73,419 and so the Application Notices do not support the proposition that the £350,000 mentioned in the Development Appraisal was all earmarked for Tydwell;

iii) it is difficult to reconcile the breakdown of costs within the Development Appraisal to that set out in the Application Notices, not least because the total

costs for project management and consultants is substantially greater in the Development Appraisal than in the Application Notices;

iv) however, one gets substantially closer to reconciling those figures if one assumes that the costs of CSA and of the CDM coordinator formed part of what was dealt with within the Project Appraisal as project management costs rather than other professional costs.

246. Tim Jones in oral evidence suggested that the £350,000 was paid to Tydwell outside the amounts requested in the Application Notices through a monthly fee that was allowed by the Bank's quantity surveyor over and above the amounts applied for through the Application Notices. He also suggested that the Development Appraisal the court was looking at was not the one used by Clydesdale to monitor the agreement. His evidence on these points was somewhat confused and was not at all convincing.

D. The Clydesdale Facility Agreements and the Procurement Agreement

247. Under the Clydesdale Facility Agreement was a process for drawing down the facility. This process remained more or less unchanged on the two occasions when the Facility Agreement was restated.

248. The borrower (Viper) could draw down under the facility by making a Utilisation Request in a form required by the Facility Agreement accompanied by certain documents. These were to include in relation to the part of the facility used for completion of the Development:

> "evidence from the Building Contractor that all amounts to be funded by the Utilisation have been incurred and paid pursuant to the Building Contract".

249. The Defendants rely on the Procurement Agreement entered into between Viper (as "Employer") and Tydwell (as "Developer") under which Tydwell agreed to procure the development of the Property. The Claimants point out that Mr Morjaria was not told about this agreement before it was signed (and indeed say the same about later agreements signed between JV Entities and Tydwell). The Defendants accept that they did not provide any of these agreements to Mr Morjaria before they were signed, although they deny that they were under any obligation to inform the Morjarias of the terms or existence of any of the agreements and they reserve their position as to whether and when Mr Morjaria might have been told of these agreements by anyone else.

250. The Procurement Agreement made a distinction between payments of "Project Costs" and of a "Fee". Project Costs were defined as amounts properly falling due under the Building Contract (that is the contract with Mace as the design and build contractor) and/or any appointments of a consultant/designer member of the Project Team". "Fee" was defined as:

> "any sums to be paid by the Employer to the Developer in respect of the Developer's costs in properly performing its obligations under this Contract, provided that any such sums have been previously approved in writing by the Funder's Surveyor."

251. The Claimants argue that this provision appears to have been a compromise after Clydesdale refused to include a figure sought by Tydwell of £574,379 plus VAT proposed in an email from Mr John on 1 October 2010 to Mr Ekanyake (the solicitor drafting the Procurement Agreement) copied to Mr Jones. It appears from the email records that shortly after this was sent there was a conversation between Mr Ekanyake and Mr Jones, and possibly also Mr Mirza, in which Mr Ekanayake agreed to replace having a figure in respect of the Fee payable to Tydwell and instead to use the definition I have reproduced above.

252. Mr Jones was unwilling to accept this proposition under cross-examination, giving the unconvincing alternative explanation that the sum related to the recoupment of past expenditure, but I agree with the Claimants' submission that the document speaks for itself.

253. Under clause 18 of the Procurement Agreement, Project Costs were to be paid no more than monthly against an application made by Tydwell which needed to be accompanied by invoices or such other available evidence of entitlement as the Funder's Surveyor may reasonably require together with (if so, required by the Funder's Surveyor) evidence in the form of receipts.

254. The Fee was payable in accordance with clause 19 of the Procurement Agreement. Under clause 19, the Fee was payable in instalments. The agreement was that:

> "The Developer on such dates as agreed between the parties present to the Employer an application for payment of an instalment of the Fee commensurate with the services carried out in that month."

255. Payment then became due upon receipt of that application.

256. There is no suggestion that any specific amount earmarked as the "Fee" was the subject of any application under clause 19. Neither is there any evidence that any claim for fees were specifically drawn to the attention of the Directors or the administration team at IQEQ, except through the provision of invoices by Tydwell where these specifically mentioned "Project Management". This point of course again depends on accepting the Defendants' argument that the references to "Project Management" would have been accepted as being references to project management charges by Tydwell. Importantly there is no evidence that the Directors or the IQEQ administration team saw the Application Notices drafted by CSA which more clearly identified payments charges being made by Tydwell.

257. In practice, it appears that these agreements were operated as follows. Mr John, on behalf of Tydwell, would send an email to IQEQ (on behalf of the relevant JV Entity) setting out the sums to be paid to Tydwell and the purported justification for the payment (the "**Requests**"). Invoices (the "**Invoices**") from Tydwell raised to one of the JV Entities for the sum of the Request would either accompany the Request or, more often, would be sent subsequently. IQEQ would then pass on the request for funds to Mr Morjaria and Mr Mirza. Mr Morjaria would approve the payment of his 50% contribution by Trafalgar (also administered by IQEQ) to Otaki, which would then be transferred to Viper or Krugar as appropriate. Viper/Krugar would then pay Tydwell. Nothing in the Requests or Invoices referred expressly to Tydwell's own fees. The

Requests generally either set out a breakdown of purported third-party costs due to a named third party, or referred to the "costs" and "expenses" in respect of particular goods or services.

258. At one point Mr Mirza suggested in oral evidence that Mr John would disclose any fees or mark-ups for Tydwell orally to IQEQ. He says that "John was constantly talking to the offshore directors" and in the course of those conversations, or conversations with Robin McCauley or Chris Stobart on the IQEQ team, would have disclosed where Tydwell was taking a mark-up on professional fees or making a charge. This oral evidence was offered tentatively. It is contradicted by the evidence of Mr Lewin, and I do not find it believable. I consider that if Mr John had been making it clear that there was a mark-up on third party invoices to the team at IQEQ they would have passed this information on to Mr Morjaria and there would be a record of this.

259. Mr Morjaria complains that he was never sent a copy of the Procurement Contract by Mr Mirza. However, I find it far more likely than not that he knew about the Procurement Contract, even if he had not troubled to obtain a copy of its terms. It was signed by Mark Lewin, as a director of Viper, who was advising Mr Morjaria throughout on a regular basis. Mr Lewin emailed him two months before the Procurement Contract was entered into stating: "… Viper will enter into a procurement contract with Tydwell who will be the Building Contractor subcontracting the various aspects of the project to subcontractors (including Mace) and the Professionals…". Mr Morjaria was a signatory to the Amended Clydesdale Facility Agreement dated 1 September 2010 and this refers extensively to the Procurement Contract.

E. The later Project Agreements

i. The Development Contract

260. The Procurement Agreement dealt with the period of the original build. The fitting out of the Data Centre and installation of a PDMC was dealt with under a second agreement, referred to as the "Development Contract". The copy of the Development Contract in the court bundle is undated, but there is a stamp on the front of it suggesting that it was filed by somebody (probably someone at IQEQ) on 10 December 2015.

261. This agreement also was between Viper and Tydwell. Although this was termed a "Development Contract", rather than a "Procurement Contract," it was in fairly similar terms to the Procurement Contract.

262. Clause 18 dealt with the payment of "Project Costs" and clause 19 dealt with instalment payment of a Fee. The agreement employed similar definitions of "Project Costs" and of "Fee", except that in this case there was no reference in either definition to costs needing to be approved by the Funder's Surveyor. Clause 18.4, however, required the Developer (Tydwell) to procure that demands for Project Costs would be evidenced by "the relevant Project Managers' interim payment certificate" to enable such costs to be properly identified as a Project Cost and confirmation from the Project Manager that in his view the same are properly Project Costs due and payable under this Contract". In this case, the Project Manager was identified as Robert Thorogood of Hurley Palmer Flatt.

263. These provisions provide no way of assessing what was the proper amount of the "Fee". I agree that in order to give meaning to the clearly intended agreement that there would be a Fee, the provisions must be read as providing for a fee to be assessed on *quantum meruit* principles either as a term implied by common law to give the contract business efficacy (as per the discussion in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742) or as implied under the Supply of Goods and Services Act 1982 ("**SGSA 1982**").

ii. The Cladding Design and Build Contract

264. The final contract relating to construction was the Cladding D&B Contract. This dealt with the work to be undertaken in respect of cladding and the replacement of render. This agreement was between Otaki and Tydwell and was dated 9 March 2020. I will deal with this agreement in more detail when I come to the cladding claims, but suffice it to say that this operated in a slightly different manner in that it envisaged Tydwell being paid a "Contract Sum" for completing the cladding project. The "Contract Sum" was payable "as set out in the Cost Plan". This was defined as the agreed cost plan for the Project as set out in the Appendix, as may be revised from time to time by agreement between the parties. The Appendix defined the cost plan as follows:

> "• Advance payment of £750,000 (exclusive of VAT).
>
> • Then payments to cover any further additional costs and expenses as may reasonably become necessary to complete the Project."

iii. The Property Management Agreement

265. The only other written agreement between Tydwell and the JV Entities was titled the "Property Management Agreement". It was dated 3 August 2012 and was between Viper and Tydwell. Tydwell's obligations under this agreement were limited. Under clause 1.2 it was to act:

> "only as agent for the Owner [Viper] on and in accordance with the instructions of the Owner consistent with this Agreement and issued at periodic management meetings".

266. Although described as an agent, Tydwell was to have no authority to enter into any binding agreement in any form with a Tenant or any other party. The services to be provided were defined as "Property Management Services" and were enumerated in clause 3 to include (in summary):

i) to report on any disrepair, breaches of covenant or other matters relating to the Property (which is undefined);

ii) to advise in relation to applications for licenses, consents or approvals in relation to any assignment, under letting or other party with possession relating to the Property and any negotiations for the grant of a new lease or surrender of an existing lease as well as licences for alteration;

iii) to notify the Owner concerning critical dates under any leases; and

iv) to ensure that a representative of the Property Manager is available to attend meetings.

267. This list of particular "Property Management Services" responsibilities is said to be "without limitation", but as there is no other definition of the term "Property Management Services" it is difficult to see what else would be covered. In my view if there are any services to be undertaken under this agreement that are not within the list enumerated in clause 3, they would need to fall within the same sort of category as those listed (i.e. services that could be read *eiusdem generis* with those listed).

268. Under clause 4.1 the Property Manager is obliged not to incur any expenditure in connection with the Property without the prior written consent of the Owner.

269. Under clause 6 the Owner accepts responsibility to pay the Property Manager the "Management Fee". The amount and method of calculation of this fee is left completely undefined. As there is no fee specified, but it is clear that a fee was anticipated, again I consider that must be a term implied by common law or as implied under SGSA 1982 that the fee would accrue on a *quantum meruit* basis.

270. The Defendants argue that in addition to these written contracts there were two contracts formed by conduct.

271. First, they aver that what they refer to as a "Preliminary Works Agreement" was created by conduct between Viper and Tydwell on or around 9 May 2008 for Tydwell to carry out planning, demolition and associated works on the Property before the development could begin. The conduct giving rise to the agreement comprised the rendering of services by Tydwell to Viper between around 9 May 2008 and 10 August 2010 and the payment for such services by Viper (in the total sum of £2,090,854.50 excluding VAT). They say that the nature of the services provided by Tydwell under such agreement is evidenced by the narratives in the invoices rendered by Tydwell between 9 May 2008 and 10 August 2010, including:

i) professional/consultant costs for 22-24 Uxbridge Road;

ii) pre-development costs for 22-24 Uxbridge Road; and

iii) demolition costs for 22-24 Uxbridge Road.

272. They aver further that it was an implied term of such agreement (pursuant to section 15(1) of the Supply of Goods and Services Act 1982) that Tydwell was entitled to a reasonable charge for the services provided.

273. Secondly, they plead that what they refer to as the "Redwire Contract" was created by conduct between Viper and Redwire in or around October 2012 for Redwire to manage the Data Centre. Similarly, they plead that it was an implied term of such agreement that Redwire was entitled to a reasonable charge for the services provided.

F. The relevance of later communications

274. The Claimants and the Defendants also seek to draw the court's attention to communications between the parties after the JVA had been entered into.

275. First, they note that in August 2010, when IQEQ asked Mr John for "backup invoices in relation to expenditure on Uxbridge Road", Mr Mirza complained about this to Mr Morjaria by text, and followed this up with an email saying that

> "they had most of this information about a year ago and we have more important things to deal with at the moment rather than locate emails and correspondence sent previously" and that "they will receive everything on Tuesday"

276. This email was untrue. The back-up invoices had not been received previously and they were not received later.

277. It seems that, not having been supported by Mr Morjaria in asking for back-up invoices at this early stage, the team at IQEQ made few if any further attempts to seek such information until we get to the time of the cladding issue, which I will discuss further below.

278. In what has been come known as the "Concerned Brother" email, an email to Mr Mirza on 11 October 2018, at a point when things were going badly for the JV as it was having difficulty finding users for the Data Centre, Mr Morjaria wrote:

> "… you have said so many times that we both are paying equally and that 'I (Tydwel) [sic] am not charging anything am I' Everything on Tydwell Invoice is what we have been billed. When I asked whether John sends all the backup invoices from all the suppliers, your immediate answer was, of course all back up invoices are sent to First Names, I hope this is the case. I need your reassurance that is the case so at least I don't rely on John and I take your word for it, we have always been totally honest with each other."

279. Although Mr Mirza provided a detailed, point-by-point response (in red text added into the body of the email) to other points in the email he said nothing to contradict that statement. When Mr Mirza was shown this email during cross-examination, he described this statement as "complete lies" that "shocked" him. His explanation as to why he did not challenge Mr Morjaria's understanding at this point was feeble and unconvincing.

280. Similarly, on a telephone call with Mr Lewin and others on 17 June 2020, Mr Mirza said that he was not billing in relation to his negotiations with Mace.

281. Against this, the Defendants argue that the email exchange between Mr Mirza and Mr Morjaria of 9 December 2015 (the "**December 15 Email Exchange**") is evidence that there was no concealment. This relates to the point when Mr Morjaria was asking Mr Mirza whether he had given correct information to his tax adviser. The Defendants put this forward as an email written by Mr Morjaria where he had said:

> "I presume Tydwell charged arm's length fees for the provision of development work and under contract? I also presume the directors of Otaki were inextricably involved in the negotiation and management of the process?

> Is Redwiredc [*sic*] Limited a connected company?"

282. In fact, it is fairly clear from the context and typefaces used that this part of the email was a cut-and-paste by Mr Morjaria of questions and comments made by the tax adviser.

283. Mr Mirza's response, the same day, however, does appear to amount to a disclosure that Tydwell was charging. Mr Mirza answers the tax adviser's question about whether "Tydwell charged arm's length fees for the provision of development work" as follows:

> "Tydwell was project managing the initial build and also carried out building work later…Tydwell has invoiced for these works and have paid UK tax on any profits it has made this is all up to date".

284. Mr Morjaria responded:

> "I have told him exactly the same about Tydwell".

G. The question answered

285. Taking account of all of the points made above, I return then to the question posed as the heading to this section: was there an understanding that Mr Mirza or Tydwell would not charge for services?

286. First, I consider that this question cannot be answered merely by looking at clause 5.2.1 of the JVA, and disregarding the further written agreements that were later entered into between Tydwell and JV Entities (the "**Written Project Agreements**"). First, the JVA was largely silent on the question of whether Tydwell could charge fees for its involvement, but there is in clause 12.1 a strong indication that there could be future dealings:

> "If not provided for in this Agreement, as may be agreed by the parties and, in the absence of such Agreement, on an arm's length basis."

287. Secondly, Tydwell was not a party to the JVA.

288. Thirdly, the duties assumed by Mr Mirza were limited to managing the daily operation of the JV and making decisions in the best interests of the JV, and it is arguable that these duties were narrower than the wider services provided by Tydwell (and Redwire).

289. I consider that it was not clear from the £350,000 mentioned in the Development Appraisal that any or all of this amount was earmarked for Tydwell. This was not clear on the face of the Development Appraisal. Neither is it clear by looking at the pattern of invoicing by the person named as "Project Manager" under the Procurement Agreement (CSA). I do consider, however, that there was some understanding between Tydwell and Clydesdale to this effect.

290. It is clear that CSA (which was supposed to be fulfilling a role as the Employer's Agent, as well as the role of Project Manager) did consider it appropriate to request drawings from Clydesdale partly justified by line items with the description "Project

Management (Tydwell)". However, there is no suggestion that they did this in consultation with or on instructions from the Directors, and it seems overwhelmingly likely that they did this in reliance on instructions from Mr Mirza and by reference to the Clydesdale Facility Agreement and without giving any attention to the costs and fees provisions within the Procurement Agreement, and still less any relevant provisions in the JVA.

291. I consider that there was likely a common intention between Mr Mirza/Tydwell and Clydesdale that the amounts to be drawn down from Clydesdale could include amounts that would cover fees and a profit element for Tydwell.

292. The JV Entities (as represented by the Directors and IQEQ) were put on notice when they received and agreed the Written Project Agreements that there were provisions in these agreements that Tydwell could charge a fee for its services under these agreements. I do not accept the argument that the reference to "Fees" in the Procurement Agreement (and in the later Development Agreement) referred to fees suffered by Tydwell, rather than fees that Tydwell would charge. That makes no sense in the context that there was a separate provision for "Project Costs".

293. The fact that the JV Entities were aware that Tydwell was receiving fees cannot really be separately deduced from contemporary correspondence. Generally, this correspondence involving the JV Entities does not make it clear that Tydwell was claiming fees for itself. By contrast, there is correspondence between Tydwell and Clydesdale to show that Clydesdale was aware that Tydwell was charging, such as when:

    i) on 29 May 2009, Mr John emailed Derek Webster (at McBains Cooper, who took over the role from Davis Langdon as the Bank's Monitoring Surveyor) about approving fees to be drawn down from the Facility, stating that the figures included Tydwell's costs for "project management" and "time spent on discussions and meetings with the consultants";

    ii) on 15 July 2009, Mr Webster emailed Mr John, approving £4,600 in respect of Tydwell's "Pre-development PM". In the context that the other figures provided at the same time referred to 3rd parties (including CSA) this would have been understood as an amount to pay to Tydwell itself;

    iii) a similar exchange occurred on 13 October 2009 where Mr Webster approved fees for Tydwell of £17,250, again where payments to 3rd parties were separately itemised.

294. The fact that the JV Entities were not copied into these types of exchange could be seen as evidence that Tydwell was seeking to hide or at least not to highlight the fact that it was earning fees.

295. Whether Tydwell ever correctly followed the procedure to receive a fee under the Procurement Agreement is open to doubt, as it did not separately present Viper with an application for payment of an instalment of the fee commensurate with the procedure envisaged by clause 19 of the Procurement Agreement. However, I would be prepared to give Tydwell the benefit of the doubt to the extent that I would accept that during the period where it was operating under the Procurement Agreement or the Development

Agreement or the Property Management Agreement, when it presented invoices that mentioned "Project Management" or "Project Management and OH" (even where this was alongside other things that fell within the category "Project Costs"), this amounted to such an application.

296. The amounts identified in Application Notices that are said to be justified by references to "Project Management" covered only some £73,419 plus VAT. No more than this can be attributed to payments properly made to Tydwell for management services under the Procurement Agreement or the Development Agreement. Also, because of the definition of "Fee" in the Procurement Agreement, Tydwell's entitlement relied on the sums it was to be paid being approved in writing by the Funder's Surveyor. Insofar as Project Management costs were specifically attributed to Tydwell within the Application Notices prepared by CSA, it is fair to assume that this requirement was met. However, if these costs were not specifically itemised by CSA then it is difficult to see how they could have been approved as a "Fee" by the Funder's Surveyor. At most, then, the amounts allowed to Tydwell under the Procurement Agreement or the Development Agreement (or the Property Management Agreement) for its project management or overheads must be limited to the amounts identified in the Application Notices as payable as management fees (or management fees and overheads).

297. The total value of invoice items that expressly related to Project Management Fees taking account of those delivered under all contracts came to some £589,673.75. As I will discuss further below I consider that any such items relating to the Cladding D&B Contract need to be taken aside and viewed differently. Nevertheless, it appears that Tydwell has received and kept considerably more than this in respect of fees apparently levied under the Procurement Agreement or the Development Agreement (or the Property Management Agreement).

298. Whilst the Procurement Agreement and the later agreements may have defined Tydwell's rights to receive fees from the JV Entities as a matter of contract, this does not mean that Mr Morjaria must have had any good understanding of the nature and extent of these fees. The likelihood is that he was aware at least of the Procurement Contract but this does not mean that he understood its detailed terms.

299. On the other hand, the December 15 Email Exchange suggests that he may have had some awareness that Tydwell had been charging on an arm's length basis.

300. It is important also to realise that the case the Defendants are facing is not one of breach of contract, but rather one based most fundamentally on fraudulent misrepresentation, and so the analysis of the contractual position is relevant only as part of the factual matrix.

301. This then brings us to the case pleaded by the Claimant in relation to the Invoice Misrepresentations Claim.

9. THE INVOICE MISREPRESENTATIONS CLAIM

302. The Claimants allege that the Mirzas and Tydwell made fraudulent misrepresentations in relation to (a) the requests for payment by Tydwell to the JV Entities between 2007 and 2021 (referred to as the "Invoice Representations") and (b) (as a subset of the Invoice Representations) spreadsheets and invoices provided by Tydwell to Otaki in

2020 in respect of the replacement of the cladding (referred to as the "**Cladding Representations**"). They claim that, as a result of those misrepresentations, the Mirzas and Tydwell wrongfully extracted from the JV Entities and Mr Morjaria an amount of money, referred to as the "**Misappropriated Sum**" (being, in essence, the amounts by which the Claimants say the JV Entities overpaid Tydwell).

303. The Cladding Claims raise distinct issues and are addressed in section 10 below. This section 9 addresses the Invoicing Claims as they relate to the invoices from Tydwell to Viper, Krugar and Otaki from May 2008 to June 2020 and from Redwire to Viper from May 2016 to December 2017, although the legal principles summarised below will apply also to the Cladding Claims. This period was defined as Phases 1-4 in the Further Information provided by the Defendants pursuant to an order of Master Brightwell dated 24 November 2023 the "**Further Information**") - the same Phases as are discussed at [26] above.

304. Before considering these claims in more detail, it is useful to set out what it is that the Claimants need to show.

A. The Requirements of a Misrepresentation Claim

305. The requirements are put succinctly by the authors of *Civil Fraud* (first edition) at 1-003. In order for a claimant to succeed in the tort of deceit he must establish that:

i) the defendant made a representation which was false;

ii) the defendant knew that the representation was made and that it was untrue, or was reckless as to its truth or falsity;

iii) the defendant intended that the representation would induce the claimant to act or refrain from acting;

iv) the claimant was in fact induced by the representation to act or refrain from acting; and

v) the claimant thereby suffered loss.

306. *Clerk & Lindsell on Torts* (24th edition) ("***Clerk & Lindsell**")* at Chapter 17 provides a more detailed summary of the requirements of an action in deceit:

i) The tort involves a perfectly general principle: where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable. This formulation in an earlier edition of the volume was quoted with approval by per Buxton LJ in *AIC Ltd v ITS Testing Services (UK) Ltd (The "Kriti Palm")* [2007] 1 Lloyd's Rep. 555, 617 at [398].

ii) To found an action in deceit the claimant must show a misrepresentation of present fact or law (or, at the very least, something done which was aimed at inducing action on the basis of false information). However, a representation may be either express or implied from conduct; furthermore, adopting the representation of a third party can be sufficient.

iii) The representation must be false. Where an issue arises as to whether a representation is true or not, the court normally looks to the reasonable meaning of what the defendant said. Nevertheless, in strict law the issue in a deceit case is the meaning the representee intended to put on what was said, even if this differs from the literal meaning of the words used. Conversely, if a statement is in terms untrue, but is not intended to be interpreted in its literal sense, it cannot be charged as a deceit.

iv) The general rule is that a positive act or representation is required: "mere silence, however morally wrong, will not support an action of deceit". However, there are a number of qualifications to this principle which greatly reduce its effect. A half-truth or fragmentary statement may amount to deceit if it is suggestive of a falsehood and intended so to be. Active non-verbal conduct can amount to misrepresentation, and hence deceit, just as much as words can.

v) In certain cases, notably where there is a fiduciary relationship between the parties, there may be a duty to reveal information so that (for example) non-disclosure will make any resulting transaction voidable. It now seems accepted that in such cases non-disclosure may equally be capable of amounting to fraud at common law.

vi) Statements of belief or opinion generally carry an implication that the belief or opinion is reasonably held.

vii) A person may be liable in deceit as a joint tortfeasor if he is a knowing and active party to a scheme to defraud, even if he has not himself said anything and the actual representation has been made by someone else.

viii) The tort of deceit is complete only when the representation is acted upon.

ix) The state of mind required in the defendant in order to establish fraud was established in the decision of the House of Lords in *Derry v Peek* (1889) 14 App. Cas. 337,(1889) 5 T.L.R. 625,[1889] 7 WLUK 3:

> "…fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless [in the sense of not caring – see *Angus v Clifford [1891]* 2 Ch. 449, at 471,] whether it be true or false."

x) Where a statement is capable of being understood in more than one sense, it is essential to liability in deceit that the party making the statement should have intended it to be understood in its untrue sense, or at the very least that he should have deliberately used the ambiguity for the purpose of deceiving the claimant. Even though the more natural and reasonable interpretation of the statement is that put upon it by the claimant, and though on that interpretation it is untrue to the knowledge of the defendant, that will not suffice if the defendant did not intend it to be so understood.

xi) A blameless employer may be vicariously liable for a deceit committed by a dishonest employee in the course of his employment, in the same way as he can

be liable for any other deliberate tort. Similarly, where an agent makes a representation he knows to be false, and it was within his actual or ostensible authority to make that representation, the principal will be liable even if personally entirely innocent.

xii) In the converse situation, namely where the agent who makes the representation believes it to be true, but the principal knows facts which show that it is not, if the principal expressly authorises his agent to make a statement which he himself knows to be false, he is liable.

307. The test for determining whether, and if so what, representation was made by a defendant was explained in *Cassai di Risparmio della Reppublica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) by Hamblen J (as he then was) at [215]. He stated that this requires:

i) construing the statement in the context in which it was made; and

ii) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee.

308. Representations need not be express, but in respect of implied representations:

i) The court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context. As with express representations, this involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged: see *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) ("***Vald Nielsen***") at [136].

ii) There must still be clear words or clear conduct of the representor from which the relevant representation can be implied: see *Vald Nielsen* at [136], citing *Property Alliance Group Ltd v Royal Bank of Scotland PLC* [2018] EWCA Civ 355; [2018] 1 WLR 3259.

309. Where fraud is alleged, (a) it must be adequately particularised, and (b) cogent evidence is required by a claimant to prove it.

310. The following guidance is provided by the authorities, as summarised by Calver J in *ED & F Man Capital Markets Limited v Come Harvest Holdings Limited* [2022] EWHC 229 (Comm) at [69] to [71]:

i) In *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), Lewison J (as he then was) stated at [3] that:

> "The burden of proof lies on the [claimants]…Although the standard of proof is the same in every civil case, where fraud is alleged cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability that people

act dishonestly rather than carelessly. On the other hand inherent improbabilities must be assessed in the light of the actual circumstances of the case".

ii) In other words the cogency of the evidence required must be commensurate with the seriousness of the allegation.

iii) When inferring fraud or dishonest conduct generally, it is not open to the Court to infer dishonesty from facts which are consistent with honesty or negligence; there must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved. Here Lewison J refers to *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [55-56], and [184-186]. Fraud or dishonesty must be sufficiently particularised. This point I note was expanded upon by Lord Millett at [185]-[186]:

"184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised … This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal…

186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

iv) The requirement for a claimant in proving fraud is that the primary facts proved give rise to an inference of dishonesty or fraud which is more probable than one

of innocence or negligence (and here Lewison J cites *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm)).

v) Although not strictly a requirement for such a claim, motive "is a vital ingredient of any rational assessment" of dishonesty. Consideration must be given to motive; the less likely the motive, the less likely the allegations of dishonesty are correct (see *Group Seven Ltd v Nasir* [2017] EWHC 2466 (Ch) at [440]). Assessing a party's motive to participate in a fraud requires taking into account the disincentives to participation in the fraud, including the disinclination to behave immorally or dishonestly, and the damage to reputation, both for the individuals and the business, as well as the potential risk to the liberty of the individuals involved: see *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Sanayi Ve Pazarlma AS* [2009] EWHC 1276 (Ch) at [858] and [865] per Briggs J.

B. The Invoice Representations

311. The Claimants allege that by emails from Mr John to the JV Entities (via the Directors), Tydwell made "Requests" for payment, with a justification for such payments, and that by "Invoices" from Tydwell to the JV Entities, Tydwell sought payment, with narrative explanations for the sums sought. They say that by the justifications in the Requests, and the narrative explanations in the Invoices, the following Invoice Representations were made expressly or impliedly by Tydwell and/or the Mirzas to the JV Entities and Mr Morjaria (see the PoC at paragraphs 54-59):

312. The sums sought were required to defray costs that had been properly incurred by Tydwell to third parties in furtherance of the JV (or it was honestly believed would be required to defray such costs) ("**Invoice Representation 1**").

313. The sums sought in respect of specified costs honestly and accurately reflected the sums which Tydwell had incurred (or which it honestly believed it would incur) in respect of those costs ("**Invoice Representation 2**").

314. Tydwell honestly intended to use the sums sought in order to defray costs incurred by it to third parties in furtherance of the JV ("**Invoice Representation 3**").

315. The Claimants allege that the Invoice Representations were made falsely by Tydwell and/or Mr Mirza, Mr John, Mrs Mirza and/or Ameer, who knew they were false or were reckless to their truth, were made with the intention of inducing the JV Entities to make payments pursuant to the Invoices, and Mr Morjaria to make contributions to the JV, to fund those payments, and were relied upon by the JV Entities and Mr Morjaria in that way.

316. These allegations are all denied by the Defendants (see the Re-Re-Re Amended Defence and Counterclaim of the First, Second, Fourth to Seventh and Ninth to Tenth Defendants (the "**Defence and Counterclaim**") at paragraphs 64-66).

C. The Claimants' Pleadings

317. As it is part of the Defendants' case that the Claimants have inadequately pleaded their claim, I will deal with the pleadings in some detail.

318. In their Re-Re-Amended Particulars of Claim (the "**PoC**") at paragraph 14, the Claimants summarise what I am calling the "Invoice Misrepresentations Claim" as follows:

> "The Claimants seek damages and other remedies in respect of wrongdoing carried out during the course of the joint venture by Mr Mirza, acting through and in concert with companies owned and controlled by him and certain family members and employees engaged by those companies. That wrongdoing included:
>
> "a. Dishonestly causing the joint venture vehicles to make payments totalling at least £6.8 million to Mr Mirza's company, Tydwell, on the false basis that those payments were necessary to defray costs and expenses incurred (or to be incurred) by those companies in respect of legitimate goods and services obtained in pursuit of the joint venture, when in fact they have been simply misappropriated by those companies (or passed on to other companies wholly owned by Mr Mirza). £4,876,232 of the sum is now said by the Mirza Defendants to have comprised previously undisclosed "fees", to which Tydwell was not entitled."

319. After the PoC was drafted, more invoices have come to light which the Claimants accept were costs incurred in respect of legitimate goods and services obtained in pursuance of the JV, and so the amount claimed will be less. I discuss this later.

320. The Claimants particularise this claim at paragraph 51 onwards of the PoC in more detail. I will refer to this as necessary.

321. The claim is introduced at paragraph 52 as follows:

> "52. The process for requesting payment and the payment of invoices raised by Tydwell was routinely as follows:
>
> a. Mr John would send an email to one or more of the directors or employees of IQEQ (acting on behalf of the relevant JV Entity) setting out the sums required to be paid to Tydwell and the purported justification for the payment (the "Requests"). The email making the Requests would almost always copy in Mr Mirza and, in many instances, Mr Morjaria. The Requests would often also copy Mr Ameer Mirza and Mrs Mirza.
>
> b. An invoice from Tydwell raised to one of the JV Entities for the sum of the Request would either be attached to the email with the Request or, more often, would be sent by Mr John subsequently (the "Invoices").
>
> c. The Requests would specify the total amount that would be required by way of contribution from the Joint Venturers to meet the sum sought from the relevant JV Entity.

d. The representative of IQEQ would then pass on the request for funds to Mr Morjaria and Mr Mirza, usually by forwarding on the email received from Mr John and simply repeating his request for a contribution (on a 50/50 basis) in the amount stated.

e. Mr Morjaria would then make the payment of the sum sought from Trafalgar to Otaki, which would then be transferred to Viper or Krugar as appropriate. Mr Mirza would, purportedly, make an equivalent contribution. Those contributions were recorded in the accounts of Otaki as shareholder loans. In the circumstances of the wrongdoing set out herein, the true quantum and source of any contribution made by Mr Mirza is a matter for which the Claimants seek an account (and appropriate injunctive relief) as set out below.

f. The relevant JV Entity would then pay that sum (and any contribution from Mr Mirza or his companies) to Tydwell.

53. As to the Requests and Invoices, by way of summary, and without prejudice to the full terms of each of them:

a. The Requests generally either set out a breakdown of the purported third-party costs and named the third parties to whom those sums were due or explained the nature of the third- party good or service purportedly provided and referred to the "costs" and "expenses" that Tydwell had incurred (or would incur) in respect of those goods or services. The following explanations (or terms to similar effect) were routinely used: "Tydwell has been incurring legal and design fees"; "building works/legal & Professional costs"; "costs incurred for the consultants and builders"; "fit out costs"; "funds for the Cabinets, Power Cables and IT equipment etc"; "expenses for the fit out"; "monthly operating costs"; "monthly operational expenses"; "ongoing expenses"; "monthly running costs".

b. The substantial majority of the Invoices raised by Tydwell were headed "Re: Professional/Consultants & Development Costs"; "Re: Professional/Consultants & Development Costs"; "Re-Fit out" or "Re: Operational cost". The substance of the narratives then generally itemised the "costs" for which payment was sought by reference to descriptions of the services that were purportedly provided by third parties.

c. The explanations provided for the payments sought by way of the Requests and the narrative explanations for the sums sought by way of the Invoices did not at any time state that payments were sought by way of payment of fees to Tydwell.

d. Further, the explanations did not state that the payments were sought pursuant to any of the Procurement Contract, Property Management Contract or Development Contract and no request

for prior approval for "costs" incurred by Tydwell in performing any obligations under the Procurement Contract or Development Agreement was sought."

322. The heart of this claim is at paragraphs 54, 55 and 60 of the PoC:

"54. … the justifications provided for the sums sought by way of the Requests and the narrative explanations for the sums sought by way of the Invoices were such as to represent (expressly and/or impliedly) that:

a. The sums sought were required in order to defray costs that had been properly incurred by Tydwell to third parties in furtherance of the JV (or, it was honestly believed, would be required to defray such costs); and/or

b. The sums sought in respect of specified costs honestly and accurately reflected the sum which Tydwell had incurred (or which it honestly believed it would incur) in respect of those costs; and/or

c. Tydwell honestly intended to use the sums sought in order to defray costs incurred by Tydwell to third parties in furtherance of the JV (collectively, the "**Invoice Representations**").

55. The Invoice Representations were made on the face of the relevant Requests and/or Invoices.

Alternatively, to the extent that any of the Requests or Invoices were ambiguous or silent as to the purported justification for the sums sought, the representations were made by implication that later Requests or Invoices were made/raised on the same basis as previously (and were thus also in respect of costs and expenses and not in respect of Tydwell's fees).

….

60. The Invoice Representations were false and were made by the relevant Defendants knowing that they were false or reckless to whether they were true or false. As to this:

a. By the Letter of Response, the Mirza Defendants have stated that £4,876,232 of the Misappropriated Sum, was not required to defray costs that had been properly incurred by Tydwell/Redwire to third parties in furtherance of the JV but instead was retained by Tydwell as "charges" or "fees" (the "**Purported Fees**").

b. The sum of the Purported Fees was calculated by the Mirza Defendants retrospectively by simply subtracting the total of the invoices said to have been raised against Tydwell purportedly in

> respect of the JV (the "**Purported Underlying Invoices**"), from the total amount paid by the JV Entities to Tydwell.
>
> c. Tydwell had no entitlement to charge "fees" to the JV Entities, whether pursuant to the JV/Tydwell Contracts or otherwise. Further and in any event, at no time did any of the Defendants inform the Morjarias or the JV Entities of the intention to charge such fees or seek their consent to do so, and no consent was ever provided.
>
> d. The Mirza Defendants have (contrary to their duties under the JVA) and despite requests to do so, failed to explain how the £4,876,232 of "fees" was charged, what of the sums sought by way of the Requests and Invoices represented those fees, or the basis on which these "fees" were calculated at the time they were purportedly charged. … Without prejudice to this it is averred that a proportion of the sums wrongfully extracted were extracted by inflating invoices purporting to defray specific third-party costs, as set out in respect of cladding below, and as follows [and examples are given]
>
> …
>
> 62. The Invoice Representations were made with the intention of inducing the JV Entities to make payments pursuant to the Invoices and Mr Morjaria to make financial contributions to the JV to fund those payments. The JV Entities and Mr Morjaria did rely on the Invoice Representations in that way."

323. The Defendants complain that this insufficiently particularises the representations which the Claimants say are misrepresentations and invite the court to dismiss this claim on that basis. I do not consider that this complaint is fair or that the Claimants' pleadings are defective in outlining the representations on which they rely.

324. The background here is as follows. The Claimants believed, and it is now clear that in fact it was true, that Tydwell was paid substantially in excess of the amounts that were paid out to third parties (how substantially, I will consider below). Importantly, this remains the case even if it is accepted that references to "Project Management" in the Requests or Invoices issued by Tydwell could not be regarded as a representation that these amounts were payable to third parties rather than to Tydwell.

325. The Claimants were in a position to make a claim that the body of Invoices as a whole made a series of representations that monies were being claimed for payments made or to be made to third parties and that somewhere within this series of representations there must be untrue representations since Tydwell did not pass all of this money on to third parties.

326. The Claimants, however, did not have the information to know which particular invoices included the misrepresentations. Only Tydwell and those involved with it were in a position to match the Requests and Invoices issued by Tydwell to invoices or payments made to third parties. In these circumstances, and particularly given that the

Claimants did not have the relevant information because Mr Mirza and Tydwell was withholding this information, despite Mr Mirza's duties under the JVA and Tydwell's duties under the Written Project Agreements, it is perfectly reasonable for the Claimants to have pleaded their case in the way that they have. The Defendants can be in no doubt of what the case is against them as to the false representations they are alleged to have made.

327. The Defendants have raised a further issue in relation to the Claimants' pleadings: they have put forward an argument that, if I were to find that there was any entitlement for Tydwell or Redwire to receive fees, this destroys the basis of the Claimants' case.

328. I understand this point to be based in relation to Redwire on the pleadings at paragraph 51 of the PoC which states as follows:

> "51. Between 2007 and 2021, Tydwell sought and received payments from the JV Entities in the total sum of £32,498,099. £27,932,964 of that sum was paid by Viper, £392,182 by Krugar and £2,697,339 by Otaki. Further, over the course of 2016 and 2017 Viper made, or was requested to make, payments directly to Redwire, pursuant to invoices raised by Redwire, in the total sum of £246,699. Those sums were sought and paid (to the extent they were paid, which is a matter of expert evidence) notwithstanding that there was no contractual or other legal basis for payment of costs to Redwire."

329. In relation to Tydwell, I understand this point to be based on paragraph 60(c) where it says that:

> "c. Tydwell had no entitlement to charge "fees" to the JV Entities, whether pursuant to the JV/Tydwell Contracts or otherwise. Further and in any event, at no time did any of the Defendants inform the Morjarias or the JV Entities of the intention to charge such fees or seek their consent to do so, and no consent was ever provided."

330. Whilst the question that I have considered above as to whether Tydwell or Redwire had any entitlement to be paid fees is relevant to the surrounding circumstances (as is the question whether Mr Mirza and/or Tydwell had any obligations to disclose relevant matters or any fiduciary duties), I do not accept that the Claimants' case in relation to the Invoice Representations collapses if I accept (as I do) that Tydwell or Redwire had some right to charge fees. They can still be relevant for misrepresentation if they did not invoice honestly, but instead hid the amounts that they were taking by presenting these as being paid to others. The Claimants' central claim is that they were misled in paying out amounts to Tydwell believing them to be amounts payable to third parties. The question of whether Tydwell had any right to fees is not central to that claim.

331. A third complaint that the Defendants make of the Claimants' pleadings is that they do not adequately plead who is said to have made the representations. The question of who was making representations and the involvement of other defendants is dealt with at paragraphs 56 onwards in the PoC as follows:

> "56. The representations were made by Mr John acting on behalf of Tydwell and/or the Mirzas. Further or alternatively, it is to be inferred that Mr Mirza and/or Mrs Mirza and/or Mr Ameer Mirza, authorised, procured or directed the Invoice Representations and/or manifestly adopted and/or approved those representations.
>
> 57. As to Mrs Mirza, she:
>
> a. Was a director of each of Tydwell, Boomzone and Redwire and a shareholder of both Tydwell and Otaki;
>
> b. Actively participated in the financial management of Tydwell, Boomzone and Redwire and was responsible for making payments from those companies.
>
> c. Was named as the relevant contact or customer on third party invoices raised to Tydwell and relied upon by the Mirza Defendants as constituting third party costs incurred by Tydwell in furtherance of the JV; and
>
> d. Was copied in to emails by which the Requests were made.
>
> 58. As to Mr Ameer Mirza he:
>
> a. From 2016, worked for each of Tydwell, Boomzone and Redwire and was a director of Tydwell from 20 February 2019 to 9 September 2019;
>
> b. Was a qualified accountant, and participated in the financial management of Tydwell, Boomzone and Redwire; and
>
> c. From October 2016, was copied in to emails by which the Requests were made.
>
> 59. The Invoice Representations were made to the JV Entities. They were also made to Mr Morjaria, by virtue of Mr Morjaria being copied into the Requests and/or in that they were made with the intention and expectation that they would be passed on to Mr Morjaria such that he would make contributions into the JV necessary to cover the sums requested."

332. I consider this to be a clear enough pleading. I will consider below how far a case is made out against each of the individual Defendants on this basis.

D. The Defence

333. In the Defence and Counterclaim, the Defendants pleaded to these matters. They denied the figures. They asserted that Redwire acted as the manager of the Data Centre from in or around October 2012 and invoiced and was paid for such services; that this gave rise to an unwritten agreement arising by conduct between Redwire and Viper ("**the Redwire Contract**") for Redwire to act as the property manager in relation to the Data

Centre and that it was an implied term of such agreement (to be implied as a matter of custom) that the fee to be charged by Redwire was a reasonable fee at ordinary market rates and commensurate with the services provided. They accepted that:

> "Paragraph 52 is admitted as a generalised summary of the methodology by which payment of invoices was sought by Tydwell subject to the following qualifications".

334. These qualifications included that:

> "56.1 During the construction phase of the development, additional capital contributions were not required from Mr Mirza or Mr Morjaria as funding for the development was provided by Clydesdale.
>
> 56.2 Requests for payment by Tydwell were not invariably agreed to by IQEQ but would be the subject of discussion in relation to amount between Tydwell and representatives of IQEQ.
>
> 56.3 Ameer Mirza and Mrs Mirza were rarely (rather than often, as alleged in Subparagraph (a)) copied into Requests. Ameer Mirza only commenced as an employee of Tydwell on 1 July 2019 and was not copied into emails before then."
>
> 56.4 As to Subparagraph (e):
>
> (a) The first sentence is not admitted. Further, Mr Morjaria did not always provide the contributions requested of him. On such occasions, Mr Mirza made the contributions on his behalf (and on one occasion in 2009, accepted the transfer of a property in Cannes in lieu of payment).
>
> (b) The second sentence is admitted save for the word "purportedly". The contributions made by Mr Mirza to Otaki were monitored by the Directors who at no time raised any issue with the sums being contributed by him.
>
> (c) The third sentence is admitted. The Defendants' position on whether the accounts of Otaki are accurate is reserved pending disclosure.
>
> (d) As to the fourth sentence, the alleged wrongdoing and entitlement to an account are denied.
>
> 56.5 Subparagraph (f) is admitted save that certain of the payments were also made to Chevin.

E. Did the Invoice Representations include misrepresentations?

335. Notwithstanding any right that Tydwell might have had contractually to receive management fees, it is clear that the body of requests for payment and invoices issued on behalf of Tydwell did misrepresent what was being claimed.

336. Even though I accept that Tydwell as against the Project Entities did have some rights to be paid fees, those fees needed to be honestly invoiced. I am prepared to give the Defendants the benefit of the doubt in relation to any fees that were claimed in relation to "Project Management" or "Project Management or OH". Even if it was not clear to Mr Morjaria or to the JV Entities that these line items should be understood as referring to fees that Tydwell was charging, I accept that in including these line items more likely than not these would have been understood by Mr John and by Mr Mirza (and therefore by Tydwell) as disclosing a fee that Tydwell was levying. I am fortified in my conclusion that this is the case when I consider the background of the exchanges in 2015 that I refer to at [283] to [284] above where there appears to have been acceptance by Mr Morjaria that Tydwell was making charges for its own account.

337. However, to the extent that the Requests or Invoices included any charges that were not labelled as being for Project Management or Project Management and Overheads, and the amounts claimed were not justified by third-party invoices, those Requests and/or Invoices must be considered to include misrepresentations.

338. The background facts that I have referred to above also strengthen these conclusions. Mr Mirza had in the JVA accepted an obligation to manage the daily operation of the JV in the best interests of the JV and to keep Mr and Mrs Morjaria "fully informed on the progress of the Joint Venture at all times". He had accepted a contractual duty of good faith. I have found that Mr Mirza had assumed fiduciary duties. Tydwell, when it was charging fees under the Procurement Agreement or under the Development Contract was supposed to do so by means of a specific application for payment of an instalment of a "Fee". The Property Management Agreement also distinguishes reimbursement of expenses from the payment of a "Management Fee". In the light of all of this background, there can be no question that it would have been the expectation of all parties that if Tydwell was charging a fee, it would do so specifically and not by marking up costs that it had received from third parties. Therefore, whenever there was a claim for money by reference to what on its face appeared to be a third-party cost in an amount that was in excess of that third-party cost, the person or persons making that claim were knowingly misrepresenting the position.

F. Who made the Representations?

i. Tydwell, Mr John and Mr Mirza as representors

339. The invoices and demands for payment were routinely sent by Mr John on behalf of Tydwell to IQEQ. They may, therefore, be regarded as including representations made by him and by Tydwell.

340. There is documentary evidence that Mr Mirza was involved in compiling these documents and, given the high levels of involvement that he had in Tydwell, I have no doubt that he was intimately involved in compiling these documents and certainly was

aware of their content and he may be considered to have authorised and procured their being sent.

341. Mr Mirza certainly would have been aware of the terms of the JVA, of the trust that he had asked the JV Entities and Mr and Mrs Morjaria to repose in him and of the terms of the Written Project Agreements. He was the architect of the scheme to avoid the JV Entities and Mr Morjaria knowing the full extent of the monies that Tydwell was extracting from the JV. Mrs Mirza gave evidence that Mr John and Mr Mirza would need to decide the drawdowns and would discuss the matter in Urdu. As he must be reckoned to be the controlling mind of Tydwell, Tydwell must be regarded as having the same knowledge and intentions. Both Mr Mirza and Tydwell must have understood that it was misleading for Tydwell to make charges without properly disclosing them on the face of the invoices and payment requests.

342. I will except from this any amounts where there was a disclosure of fees for "Project Management" as I consider that it is more likely than not that Mr Mirza (and Tydwell) would have understood this to have been a properly disclosed request for a management fee for Tydwell, but to the extent that there are any other amounts where Tydwell has invoiced for amounts that are in excess of properly recouped costs expended for the benefit of the JV, such excess amounts must be regarded as having been obtained by fraudulent misrepresentation.

ii. Mrs Mirza and Ameer as representors?

343. There is no evidence (and no pleading) that Mrs Mirza or Ameer were directly engaged in communicating any misrepresentations. The pleading as regards them is that they, along with Mr Mirza, "authorised, procured or directed the Invoice Representations and/or manifestly adopted or approved those representations".

344. There is no direct evidence for any of these propositions. The Claimants have not been able to find a single instance during the period that we are dealing with here where Mrs Mirza or Ameer directed or otherwise procured Mr John to send out an invoice or request for payment containing a misrepresentation. Neither is there any evidence that either of them "manifestly adopted or approved those representations".

345. The concept of adopting a representation is a relatively narrow one. *Civil Fraud* (at 1-072) explains it as follows:

> "Where a false statement is made by a third person and passed by the defendant on to the claimant representee, the defendant may adopt and approve the statement and so make it his own. In such a case there is no difficulty with treating the defendant as a representor."

346. This concept was said to be engaged in *Bradford Building Society v Borders* [1941] 2 All E.R. 205, but the House of Lords overturned a finding by the Court of Appeal on the facts, and on the lack of congruence between the argument being pursued in the House of Lords and that pleaded by the claimant in that case.

347. In *Libyan Investment Authority v King* [2020] EWHC 440 (Ch); [2020] 2 WLUK 550 the claimants applied to re-amend their particulars of claim alleging deceit, breach of

duty of honesty as agent, dishonest assistance and conspiracy, and then made a further application to amend their application. The court found, amongst many other things, that the claimants had a real prospect of success in pursuing allegations that the defendants had controlled the sending of a letter by a valuer giving a valuation containing misrepresentations and therefore made the representations or caused them to be made to one of the claimants and that the defendants knew that the valuations were excessive or false. In this case the alleged adoption of the false statements was by sending the document containing them on, knowing them to be false.

348. In *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) at [427], a commodity sale contract incorporating a master agreement was held to embody representations contained in the latter.

349. In all these cases, the parties said to have adopted a misrepresentation were alleged to have done something positive to pass on or affirm the representation that the claimant in some sense was relying on so that the claimant would have thought that the defendant was standing behind the representation. Nothing has been shown in evidence to suggest that this was the case in relation to Mrs Mirza or Ameer.

iii. Mrs Mirza's involvement as pleaded by the Claimants

350. As we have seen, the Claimants particularise further their claim in this regard against Mrs Mirza.

351. First, they aver that she was a director of each of Tydwell, Boomzone and Redwire and was a shareholder of both Tydwell and Otaki.

352. Her position as shareholder to Otaki is in my view irrelevant to whether she was sufficiently proximate to any misrepresentations to be regarded as adopting them.

353. She was in fact not a director of Boomzone or Redwire but was the company secretary of each such firm, a position that does not of itself make her responsible for the Invoicing Claim.

354. She was both company secretary and director of Tydwell during the relevant period. It appears that she was involved in dealing with third party suppliers. According to her witness statement she was not aware of the amounts that Tydwell was charging on any given invoice for its fees. She says that she had no involvement in drafting invoices or the emails to IQEQ. She admits that she was copied into emails sent by Mr John or by Mr Mirza to the directors or employees of IQEQ, but her evidence is that she largely ignored them because she trusted her husband. She acknowledges that it was obvious to her that Tydwell was charging for services, but she never knew what the figures were or how they were calculated.

355. It appears that she was sent a copy of the JVA but denies paying attention to it, although she did in her oral evidence agree that she knew that her husband was under an obligation to act in the best interests of the JV.

356. She was not asked about her knowledge of the Development Contract or of the Project Management Agreement. There is nothing in evidence that suggests she was materially involved in the invoicing to the JV Entities prior to the Cladding D&B Contract. I will

deal with her evidence concerning invoicing under the Design & Build Contract when I consider the Cladding Claim in more detail.

357. Secondly, it is claimed that she "actively participated in the financial management of Tydwell, Boomzone and Redwire and was responsible for making payments for those companies".

358. Thirdly, it is said that she was named as the relevant contact on third-party invoices.

359. Finally, it is said that she was copied into emails by which the Requests were made.

360. The fact that she was a director (and company secretary) of Tydwell and was involved in paying third party contractors does not provide sufficient grounds either to demonstrate that she authorised, procured or directed the Invoice Representations or that she adopted and/or approved them (manifestly or otherwise).

361. I will consider separately the other ways in which the Claimants pursue their claim against Mrs Mirza, but I can say at this point that they have not established that she authorised, procured or directed the Invoice Representations and/or has adopted or approved any of them (during this period) in the sense necessary for her to have direct liability in deceit.

iv. Ameer's involvement as pleaded by the Claimants

362. As regards Ameer:

i) First, it is said that from 2016, he worked for each of Tydwell, Boomzone and Redwire and was a director of Tydwell from 20 February 2019 to 9 September 2019;

ii) Secondly, it is said that he was a qualified accountant, and participated in the financial management of Tydwell, Boomzone and Redwire; and

iii) Thirdly, it is said that from October 2016, he was copied in to emails by which the Requests were made.

363. Clearly, nothing in this pleading is capable of fixing Ameer with responsibility for any Invoice Representations made before he joined the business in 2016.

364. Again, the fact that he was involved in the financial management of Tydwell from 2016 (at a junior level to start with, but with increasing responsibility as time went on) does not provide sufficient grounds either to demonstrate that he authorised, procured or directed the Invoice Representations or that he adopted and/or approved them (manifestly or otherwise).

365. Ameer also was not asked about his knowledge of the Development Contract or of the Project Management Agreement. Again, there is nothing in evidence that suggests he was involved in the invoicing to the JV Entities prior to the Cladding D&B Contract. I will deal with the evidence concerning invoicing under the Cladding D & B Contract when I consider the cladding claim in more detail.

366. As with Mrs Mirza, I will consider separately the other ways in which the Claimants pursue their claim against Ameer, but I can say at this point that they have not established that he authorised, procured or directed the Invoice Representations and/or has adopted or approved any of them (during this period) in the sense necessary for him to have direct liability in deceit.

G. Are the other requirements for deceit present?

367. Having found that Tydwell, Mr John and Mr Mirza (together, the "**Representing Parties**") were all responsible for misrepresentations contained in Invoices and Requests, I need next to consider the other elements of the tort.

368. First, I think it is clear that Mr Mirza and Mr John, and therefore Tydwell, knew that the Invoices and Requests that they were presenting would be understood as including a representation that the monies sought had been or were to be paid to third parties except, I will allow, to the extent that these specifically asked for monies for "Project Management" or "Project Management & OH". They further understood that, to the extent that they intended to keep a portion of such monies, such representations were false.

369. That the Representing Parties would have understood this is clear, firstly from the circumstances (including the fact that the Procurement Agreement, the Development Contract and the Property Management Agreement all made separate provision for the recovery of third-party costs to the arrangements for provision of fees) and text of the invoices and Requests. Secondly, it is clear from the surrounding circumstances that on the few occasions when IQEQ asked Mr Mirza for backup information, this was not forthcoming. This is a strong indication that Mr Mirza was looking to obfuscate as to whether and how much Tydwell was keeping for itself.

370. Secondly, it is obvious that the Representing Parties intended that the Project Entities to which the Invoices and Requests were addressed would act on these matters.

371. Thirdly, the JV Entities were induced to make payments that were kept by Tydwell and thereby suffered loss, in that they paid amounts that were kept by Tydwell that they would not have paid absent the misrepresentations. I will deal with the quantum of that loss after I have considered the Cladding Claim.

372. I consider therefore that all the elements of deceit are made out as regards a deceit practised by these three Defendants on whichever JV Entity on which they served such Invoices or Requests.

373. As regards a deceit on Mr and Mrs Morjaria, this is not as straightforward. The representations were not directly made to them, and they did not rely directly on these representations. The most that can be said is that the false Invoice Representations led to the JV Entities requesting further capital from the Morjarias on the basis that such capital was needed to pay legitimate expenses of the JV. The JV Entities were induced to make these requests by the Invoice Representations, and in doing so falsely (but innocently) themselves made an express or implied representation to Mr or Mrs Morjaria (in practice I think this was just to Mr Morjaria) that such further capital was all required for legitimate expenses of the JV, whereas some of it was for a secret profit being made by Tydwell.

374. *Chitty on Contracts* (35th edition) at 10-38 identifies three types of person entitled to relief in respect of misrepresentation:

> "There may be said to be three types of representees: first, persons to whom the representation is directly made and their principals; secondly, persons to whom the representor intended or expected the representation to be passed on; and thirdly, members of a class at which the representation was directed."

375. An earlier version of this section in similar terms was approved and followed by Flaux J in *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm); [2015] 3 WLUK 395 (see at [139]).

376. Whilst these principles are discussed in relation to claims for relief from liability in contract arising out of misrepresentation, I think they are valid also in considering who could be said to be a representee for the purposes of the tort of deceit.

377. Whilst I can see that there is a case for saying that the Representing Parties knew and intended that the false Invoice Representations would (in some cases) cause Mr Morjaria and/or Mrs Morjaria to be asked to advance further funds, that is not the same as saying that the Representing Parties intended or expected that Invoice Representations would be passed on to them; or that Viper or Otaki were receiving the representations as their agents; or that they were a class of person who would rely on the Invoice Representations. Accordingly, the Morjarias did not receive, and cannot be deemed to have received, the Invoice Representations and so cannot be said to have relied on them.

378. The Claimants have not referred me to any authority to the effect that someone who did not receive a representation (in one of the three ways described in *Chitty*) has succeeded in an action based on fraudulent misrepresentation.

379. I consider, therefore, that the case in deceit has been successfully established against Mr Mirza, Mr John and Tydwell in relation to the Invoice Misrepresentations in favour of the JV Entities that received the Requests and Invoices which misrepresented the extent to which Tydwell was claiming third party expenses, but no similar case has been successfully established against Mrs Mirza or Ameer.

10. THE CLADDING CLAIM

A. The Background to the Cladding Claim

380. Before considering the details of the Cladding Claim it is useful to expand further on the details of the events to which it relates.

i. The Mace Settlement and the Cladding D&B Contract

381. In June 2017 following the Grenfell Tower fire, discussions began concerning the need to replace cladding and other combustible building materials on the Property. This led to Mr Mirza being appointed as agent for the JV Entities to negotiate a settlement with Mace and to instruct a construction lawyer, Mr Mads Ekanayake ("**Mr Ekanyake**") to represent the JV Entities for this purpose.

382. The efforts of Mr Mirza and Mr Ekanyake eventually led to a settlement completed on 9 March 2020 whereby Mace agreed to pay £2.75 million to Otaki in return for being released from its warranty as it relates to combustible materials (and therefore its own liability to replace the existing cladding and any other combustible materials).

383. On the same date the Cladding D&B Contract was entered into between Tydwell and Otaki for cladding works. The cost to Otaki of this work was defined by a "Cost Plan" which provided for an advance payment of £750,000 (exclusive of VAT) and then payments to cover any "further additional costs and expenses as may reasonably become necessary to complete the Project".

384. The Cladding D&B Contract had been drafted by Mr Ekanyake. He was acting for Otaki in relation to this, but it appears that he was introduced by Mr Mirza and was obtaining his instructions from Mr Mirza, and I think it likely also that he was also acting for Tydwell in relation to this as there is no record of Tydwell involving any other law firm. In another contemporaneous email, Mr Morjaria refers to Mr Ekanyake as being "Mr Mirza's lawyer".

385. In sending the final draft of the contract to Mr Lewin for signature, Mr Ekanyake commented on the "Cost Plan" as follows:

> "… please note that Tydwell would only be able to claim for further costs/expenses "as may reasonably become necessary to complete the Project".
>
> So this clause does not represent an open cheque book for Tydwell to claim for monies as they please."

ii. The correspondence in March 2020

386. Mr Morjaria was unhappy about this agreement as he had not seen underlying quotations and did not see why what had been represented to him earlier as being the likely entire cost of the cladding replacement was being paid upfront.

387. Mr Lewin or Mr Stobart must have discussed this with Mr Mirza as Mr Mirza emailed Mr Morjaria on 9 March 2020 having spoken to IQEQ and stating that he (Mr Mirza) is:

> "just shocked that you are challenging this agreement when it is the "best deal you've ever had" as you will earn circa £1m for putting in no money and sitting in Dubai".

388. Mr Mirza went on in that email to state that he estimated that a cost of £750,000 for all the required works should be achievable, although this could go up for several factors. He enumerated a number of potential factors that might increase costs, although he did not mention that this might include a requirement to replace the render.

389. On the next day, 10 March 2020, Mr Mirza following a telephone conversation with Mr Morjaria, emailed Mr Morjaria, copied to Mr Lewin and Mr Stobart, stating that "we are on notice to replace the combustible render although this is very debatable and time will tell". He also went on to say that "he would hope" to get the cladding

replacement done "within £750,000-£,1,000,000 all in" and that "Our biggest problem will be to try to get professional indemnity in place as insurance companies are not prepared to provide cover and if they are it is proving to be expensive."

390. Originally the arrangement with Mace had been thought by all parties to be highly beneficial as Mr Mirza had obtained quotations from other contractors suggesting they could replace the cladding on the building for a sum that was a fraction of the sum paid by Mace. Quotations were received in August 2019 from a firm called Harley Facades and another called Argonaut Cladding.

391. Harley Facades quoted to do the work replacing the cladding for £528,550 plus VAT, although it is not clear whether the quotation also included design and site surveys. Whilst Harley Facades noted that there may be a requirement also to replace the areas of insulated render, the quotation did not cover this point.

392. Argonaut Cladding quoted £736,368.42 (I assume plus VAT) to replace the cladding. Their quotation included design and site surveys. It did not cover (or consider) replacement of any render.

393. A quotation relating to cladding only was also received in mid-February 2020 from the contractor that was eventually used, Teampol Ltd ("**Teampol**"). This quoted £418,000 (presumably plus VAT) to replace the cladding only and confirmed that Teampol could also help in other areas such as render.

394. On 12 March 2020 Mr Stobart wrote to Mr Ekanyake and Mr Mirza, copying this to Mr Morjaria and Mr Lewin to confirm that Otaki had received the funds from Mace and asking him to supply cladding removal quotes when available.

395. This almost immediately gave rise to an email from Mr Mirza to Mr Stobart (the "**12 March Email**"), copied to Mr Lewin and Mr Ekanyake attaching the quotations received from Harley Facades and Argonaut Cladding (but not the cheapest estimate, which had been received from Teampol) and stating that Mr Ekanyake "has got nothing to do with this". Mr Mirza went on in the same email to write:

> "The next you hear from us on this will be when Tydwell has negotiated a full contract with the sub-contractor and all the relevant consultants. You will then be able to circulate this with the various stakeholders."

iii. The relevance or otherwise of the knowledge of Mr Ekanyake

396. Mr Mirza's 12 March Email is of relevance to one of the arguments made by the Defendants in their Closing Submissions: that Otaki should be considered to know all about the terms of the arrangements with Teampol as their lawyer, Mr Ekanyake, knew about it.

397. This communication, coupled with the fact that it was clear that Mr Ekanyake was obtaining his instructions from Mr Mirza (even if on occasion he did communicate directly with Mr Lewin and Mr Stobart when he needed them to sign something or to pay his bill), fortifies my decision to dismiss this point.

398. This point is argued in the Defendants' Closing Submissions by reference to the case of *Strover v Harrington* [1988] Ch. 390, [1988] WLR 572.

399. In that case, a misrepresentation was made in relation to negotiations for the sale of a house, which was subsequently corrected by the vendor's agent in a letter to the purchaser's solicitor. The solicitor did not pass on the information, but the purchaser was deemed to have notice of it for the purposes of an action by him under s.2(1) of the Misrepresentation Act 1967 based on the original misrepresentation. Sir Nicolas Browne-Wilkinson V-C held that his loss was not caused by any reliance on a continuing representation but by his solicitor's failure to communicate the correction to him.

400. The Defendants argue that if Mr Ekanyake knew that Tydwell was charging well in excess of the price agreed with Teampol, Otaki must be treated as having that knowledge, and Otaki therefore could not have been deceived about the fact that Tydwell's liability to Teampol was significantly less than the price which Tydwell had quoted to Otaki.

401. This argument, which was not put forward within the Defence and Counterclaim, relies on reading far too much into the decision of Sir Nicolas Browne-Wilkinson V-C. The ratio of his judgment is not that a principal is deemed to have knowledge of everything of which his solicitor has knowledge. Indeed he quoted a leading textbook, *Spencer, Bower & Turner (now Spencer, Bower & Handley*): *Actionable Misrepresentation* which at the time stated that for the purpose of deciding whether a representee knows the representation to be false, and knows the truth of the matter, the knowledge of the agents cannot be imputed to the principal: actual and personal knowledge must be proved; constructive, or imputed, notice was entirely out of the question. Sir Nicholas Browne-Wilkinson VC did not find that this statement was completely wrong, but merely that it was not "right in its full width". The ratio of his case was that he considered that:

> "it ought to be sufficient if in a transaction for the sale of land a vendor who has made an innocent misrepresentation corrects that misrepresentation by informing the purchaser's solicitors of the true facts."

402. The judge acknowledged that there was precedent, in the form of *Wells v. Smith* [1914] 3 K.B. 722, where the defendant made a fraudulent statement to the plaintiff's agent, who communicated it to the plaintiff and where the crucial fact was that the plaintiff's agent himself knew the fact to be untrue and was himself a party to the defendant's fraud. It was therefore hardly surprising in that case that the court held that the knowledge of the true facts by the fraudulent agent of the plaintiff could not be imputed to the plaintiff and that the case was "a 100 miles away" from the case before him in *Strover*.

403. In my view the case before me is a 100 miles away from that in *Strover*. This was not a routine conveyancing matter where Mr Ekanyake was acting as the conduit for information between buyer and seller. Mr Ekanyake had in fact found himself in a position where he had a conflict of interests since, in effect, he was representing both Otaki and Tydwell (even if his engagement with Otaki extended to drafting sub-contracts) and had obtained the information about the Teampol quotation in the course

of drafting an agreement between Tydwell and Teampol, following instructions from Mr Mirza and Ameer. Mr Mirza had made it clear in the 12 March Email that Mr Ekanyake should not pass information to Otaki. In these circumstances it would be a nonsense to impute the knowledge of Mr Ekanyake to Otaki.

iv. The need to replace the render

404. It had already been known at least from 9 March 2020 that there was a possibility that there would be a need to replace the render on the Property. A recital to the Mace Settlement Agreement records that the cladding subcontractor's drawings indicate "a render build-up that may not be compliant with applicable Building Regulations". It became increasingly apparent that the scope of the remedial work would need to be increased to include the removal and replacement of render (which covered some 72% of the exterior wall surface of the Property), as this render had been placed on top of a membrane that was deemed not to meet combustibility requirements.

405. Teampol quoted on 13 May 2020 to undertake the work on the render as well as the cladding originally for a price of £867,681.16 (plus VAT), of which £361,993.84 was for render, but stated that this may be subject to a discount to be negotiated. By 3 June 2020 this figure had been negotiated down to £850,000.

406. By an email on 13 May 2020, Ameer informed Mr Ekanyake that Teampol had agreed to what Ameer (correctly) described as "a Design and Build Contract for which they will have full design and build responsibility for all the works" and asked Mr Ekanyake to draft that contract and collateral warranties. Ameer attached a bill of quantities (the "**Teampol Bill of Quantities**") to be used for valuation payments during the contract with Teampol.

407. The sub-contract (the "**Teampol Sub-contract**") was finally concluded between Tydwell and Teampol on 27 June 2020 for a contract sum of £842,500 plus VAT (£1,011,000) although this price later was increased very slightly as a result of further necessary works being identified.

408. On 17 May 2020, Mr Mirza emailed Mr Lewin referring to the difficulties with obtaining buildings insurance and informing Mr Lewin that:

> "prior to this, we were only looking to remove the ACM Cladding and Trespa which is circa 1000 sq m and the estimated cost for this is circa £1.1m+, over and above this we need to do the total render of the building which is approx. 2,200 sqm. I have been speaking to various contractors and the numbers are unacceptable to me as I am trying to work within what we have".

v. The June correspondence

409. On 11 June 2020, Mr Mirza emailed Mr Lewin (the "**11 June Email**") copying Mr Morjaria and Mr Stobart and attaching an Excel spreadsheet described in the covering email as a "breakdown of costs for the cladding and render works", estimating a "total cost to Otaki" of £2,545,763.70 including VAT, providing a breakdown of that figure in the spreadsheet (the "**Tydwell Costs Breakdown**"). The breakdown was in the form of an Excel spreadsheet that was in an almost identical format to the Teampol Bill of

Quantities, except that all the figures had been adjusted upward to increase the total sum to £2,121,469.75 excluding VAT, and a line was added to say that this amounted to £2,545,763.70 including VAT.

410. In the 11 June Email, Mr Mirza refers to:

> "using a combination of Tydwell's workers and using a specialist external wall sub- contractor we now have a solution that will meet our requirements and therefore satisfy ourselves, the ministry for housing communities and local government, Premier Inn, our future insurers and potential purchasers".

411. It is relevant that a draft of this email in almost identical form had been sent earlier in the day from Ameer to Mr Mirza and Mr John with the heading "Final Draft please review". Ameer's evidence is that he had been helping his father by taking dictation and typing. Mr John emailed back to say that it "Looks fine".

412. On the next day, 12 June, Mr Morjaria wrote to Mr Lewin and Mr Stobart, complaining that Mr Mirza had not provided any estimates for the job and noting that Tydwell did not employ any permanent workers. He asked Mr Lewin to request all the invoices from absolutely anyone who will be involved in doing this job. He was clearly suspicious of Mr Mirza, noting that the estimate of £750,000 had now increased to £2.5 million and stating that he "knew this would happen".

413. Accordingly, the same day, Mr Stobart requested "the range of quotes that were received for the subcontract work".

414. Mr Mirza responded by writing almost immediately an email to Mr Morjaria and Mr Lewin (the "**12 June Email**") to say that he was not prepared to provide full breakdowns of the cladding quotations and that:

> "I have done the best I can – when I negotiated with Mace to get £2.75M at that stage we were hoping to only remove the ACM cladding and this would obviously have cost less but the fact of the matter is that we need to remove the ACM, the Trespa and the Render otherwise we will not be able to get insurance on the building and will not be able to sell. You are asking for full breakdowns of the quotations – I'm afraid I am not prepared to do this. Mark accepted that he has seen all sorts of prices and what we have managed to negotiate is very reasonable… This has been an ongoing battle on all fronts. It has been difficult to get into a position where we don't need to use our own monies to rectify the defects".

415. On the next day, 13 June 2020, Mirza emailed Mr Lewin, copying this to Mr Stobart (the "**13 June Email**") about the request he had had from Mr Stobart saying:

> "In keeping with how I've operated in the best interest of Otaki (since 2007 when we agreed the arrangement) I've kept you and your colleagues (on behalf of Otaki) fully informed with the development decisions/management (clause 5.2.2) that I am

> authorised by the joint venture to take through my development company (clause 5.2.1). Pursuant to this (and as I have always done) I've given you full information on the cladding (as I did on the 11th June 2020) which resulted in the approval of the development arrangements with Tydwell (my development company). I have therefore fulfilled the requirements of the joint venture and followed the pattern of approval we have done many times in the past. I trust that this deals with your points and I look forward to Otaki honouring the terms of the agreement signed with Tydwell. As you'll note Tydwell has now incurred significant expense for the benefit of Otaki which it will be invoicing shortly for prompt payment by Otaki."

416. Mr Mirza then involved his accountant, Mr Homan, in the discussion. On 16 June 2020 Mr Homan emailed Mr Lewin to summarise a call they had had, stating:

> "In accordance with the contract between Otaki Holdings Ltd and Tydwell Ltd dated 9 March 2020 and the subsequent email from Camran on 11 June 2020 stating the 'costs to Otaki will be £2,545,763 inclusive of VAT. The work is to be carried out by Tydwell Ltd in accordance with the JV agreement. The work on site is scheduled to start on Monday 22nd June 2020. Tydwell Ltd have received £750,000 on account of the work in accordance with the contract of the 9th March 2020. Tydwell Ltd will be issuing invoices throughout the project as staged payments as work is completed up to the £2,545,763. You confirm that Otaki will settle these Tydwell Ltd invoices in accordance with the 9th March 2020 contract."

417. After discussing a response with Mr Morjaria, Mr Lewin, on 17 June 2020 agreed with Mr Homan's summary of the call but added that:

> "As Trustees of the Wentworth Capital Trust we as IQEQ have a duty of care to our beneficiaries and will, in the absence of transparency on sub-contractor quotes in relation to the removal and replacement of render, instruct our own independent expert to report to us with a view to verifying that the amount contracted is aligned to market".

418. The Defendants in their submissions refer to this exchange as "an agreement", I think with the intended implication that this exchange of emails amounted to a variation of the Cost Plan agreed within the Cladding D&B Contract. I do not think that this is a correct interpretation of the exchange. I consider that the better interpretation of the communications is that Mr Mirza/Tydwell notified (originally by means of the 11 June Email) that there would be additional costs – this was operating the original Costs Plan, not replacing it. He was, in effect, notifying that there were additional necessary costs and expenses that needed to be claimed under the Cost Plan. It is, in my view, clear from the response to Mr Homan's email, which was not purporting to vary the Cladding D&B Contract or to adopt a revised Cost Plan providing for a new fixed fee, but rather was merely confirming that Mr Lewin accepted that additional costs and expenses were being claimed and that he would pay them subject to undertaking further checks.

419. Also on 17 June 2020 (although I cannot be sure whether this was received by Mr Lewin before or after Mr Lewin had given this response as a result of their writing in different time zones), Mr Morjaria sent to Mr Lewin an email headed "My confidential thoughts" (the "**Confidential Thoughts email**"). In this email Mr Morjaria states that:

> "As it stands I can tell you for sure that the cost of the job is a lot less than what is quoted by Tydwell. As you know the original quote was GBP750,000-00 and the new quote is over 2.5M so full details MUST be provided together with at least two more quotes for comparison. To be honest even if Tydwell was putting a margin on this job as long as this was agreed I would have no problem with that and I would have no problem even if the job was even going to cost 2.75M provided this was tendered out properly and all estimates were provided to us fully.
>
> I know Mace has given 2.75M for the job but as I have said before this was to wipe the collateral warranties to 2025 with Otaki so there is no future come back it was not just for doing the cladding. CM [i.e. Mr Mirza] is responsible to negotiate the best deal since he is running this business, but that does not mean he can divert all this money to his personal company and do the job and not provide any details, total conflict of interest and fraudulent in my opinion.
>
> ….
>
> Otaki can now only agree very reluctantly which is what you need to say to Camran (I need this window open so I can challenge Tydwell's estimate if I need to). CM needs to know that Otaki has to perform its duty and hence will need to get 2/3 estimates so it can compare Tydwell quote and make sure it is very competitive since Tydwell is refusing to provide full details at the last minute despite promise made Otaki who now has been put in a very difficult position especially due to the Insurance timeline which is number one priority. This needs to be made VERY CLEAR so I can deal with this later."

420. On 5 August 2020, Mr John sent an email to Mr Stobart and Katrina Young, copying Mr Mirza attaching a spreadsheet referred to as "Valuation 1", which may be regarded as what I am calling the first of the "**Tydwell Valuation Spreadsheets**". The Tydwell Valuation Spreadsheets set out an assessment of how much of the works identified in the Tydwell Costs Breakdown (as the same was revised from time to time as further costs were identified, as also shown in the Tydwell Valuation Spreadsheets) had been carried out as at the date of that Tydwell Valuation Spreadsheet. The email represented that the value of the works that had been carried out as at that date amounted to £582,822 (excluding VAT) and the total costs of the project (incurred and future) was £2,120,400 (excluding VAT).

421. That Tydwell Valuation Spreadsheet was, and all future Tydwell Valuation Spreadsheets were, in the same form (or substantially the same form) as spreadsheet

costs breakdowns and assessments of the amount of work done to date received from Teampol except that certain figures had been increased.

422. Similar emails with similar Tydwell Valuation Spreadsheets and, once the initial £750,000 had been used up, accompanied by requests for payment, were produced in a similar manner and were sent by Mr John to Mr Stobart, copying in Mr Mirza and Ameer on 27 August 2020; 24 September 2020; 2 November 2020; 27 November 2020; and 16 December 2020 respectively. The emails were in each case forwarded on to Mr Morjaria by Mr Stobart. These were routinely followed up by invoices issued by Tydwell to Otaki (the "**Cladding Invoices**").

B. The Cladding Claim as pleaded

423. Again, as it is part of the Defendants' case that the Claimants have inadequately pleaded their claim, I will deal with the pleadings in some detail.

424. The Cladding Claim may be seen as an important subset of the Invoice Misrepresentations Claim but it is based on what has been referred to as the Cladding Representations, said by the Claimants to be express or implied representations made in correspondence by Mr Mirza or Mr John to the effect (according to the Claimants) that (and I paraphrase using the definitions I have coined above):

i) There had been a substantial increase in the costs of the cladding work (I will call this "**Cladding Representation 1a**") and that this was owing to additional costs of "the Trespa and the Render" (I will call this "**Cladding Representation 1b**" and the two representations together "**Cladding Representation 1**");

ii) The Cladding Invoices and the original and amended Tydwell Costs Breakdowns contained in Tydwell Valuation Spreadsheets were a complete and accurate breakdown of the "costs and expenses" which Tydwell had incurred or intended to incur (or it was honestly believed would incur) in respect of each element of the cladding works ("**Cladding Representation 2**");

iii) The Tydwell Valuation Spreadsheets were a complete and accurate breakdown of the work that Tydwell had undertaken or procured to be undertaken as at the date of each Tydwell Valuation Spreadsheets in respect of each element of the cladding works ("**Cladding Representation 3**").

425. These representations are said to have been made (expressly or impliedly) in:

i) the 11 June Email and the Tydwell Costs Breakdown attached:

ii) the 12 June Email; and

iii) the Tydwell Valuation Spreadsheets and the Cladding Invoices.

426. The Claimants plead that the Cladding Representations were made by Mr Mirza or Mr John (as applicable) on behalf of Tydwell and/or the Mirzas. Further or alternatively, they plead that it is to be inferred that Mr Mirza and/or Mrs Mirza and/or Mr Ameer Mirza, authorised, procured or directed the Cladding Representations and/or manifestly adopted and/or approved those representations.

427. The Claimants plead that:

i) the Cladding Representations were made to Otaki;

ii) they were further made to Mr Morjaria in that they were in emails sent to him and/or made with the intention and expectation of being passed on to him;

iii) the Cladding Representations were false and were made by the relevant Defendants knowing that they were false or reckless to whether they were true or false;

iv) the Cladding Representations were made with the intention of inducing Otaki to make payments pursuant to the Cladding Invoices and inducing Mr Morjaria to agree the payments or not to prevent Otaki from making them and/or to continue to make further financial contributions to the JV;

v) Mr Morjaria did rely on those representations in that way; and

vi) Otaki made payments for the total sum sought by way of each of the Cladding Invoices to Tydwell.

428. The Claimants go on to plead that the Tydwell Costs Breakdown and the Tydwell Valuation Spreadsheets provided to Otaki and Mr Morjaria were simply amended versions of the Teampol Valuation Spreadsheets with the costs dishonestly inflated by multiples of between 2.5 and 3.5. In addition, they plead that the higher figures in respect of incurred costs in most instances represented that a different (and almost always greater) percentage of the work in respect of that line item had been completed than in fact was the case and that in a number of instances, sums were claimed in respect of an element of work for which no work had been carried out at all. They give the example that in the Tydwell Valuation Spreadsheet for end of August, sums were sought representing 45% of the total (inflated) costs of installation of Type 2 cladding when in fact, as set out in the Teampol Valuation Spreadsheet for the same period, that work had not commenced.

C. The Defence and Counterclaim as pleaded

429. I will not seek to summarise the entirety of the Defence and Counterclaim as it is much too long. However, I will mention some of the main points made.

430. In their Defence and Counterclaim, the Defendants aver that the total amount paid to Tydwell under the Cladding D&B Contract was £2,247,782.59. Of that sum, £946,937.66 represented the minimum amount of the subcontractor costs (Teampol and other subcontractors and suppliers). The balance of £1,300,844.93 represented the maximum amount of the fee charged by Tydwell for the services provided by it. I understand that these sums were described as a "minimum" and "maximum" to make allowance for the fact that further third-party invoices might turn up, which would have the effect of reducing the margin retained by Tydwell.

431. The Defendants go on to plead that the fee charged by Tydwell:

i) represented payment to Tydwell for its services as set out under Clause 2 of the Design & Build Contract (under the heading 'Contractor's General Obligations');

ii) took into account Tydwell's exposure in the event of a claim by Otaki in relation to fire combustibility of the materials used in the works;

iii) was considered by Mr Mirza to be fair and reasonable; and

iv) represented no more than market value for the services provided and risk undertaken by Tydwell.

432. The Defendants further plead that the "costs and expenses" which Tydwell intended to incur included not only contractor and supplier costs (principally to Teampol) but also Tydwell's own fees under the Cladding D&B Contract. There was no representation that Tydwell was merely passing through third-party costs incurred by it. They plead also that at most, the matters referred to in paragraphs 66-69 of the PoC (i.e. the paragraphs of the PoC that I have summarised above) gave rise only to an implied representation that the sums sought were contractually due (and that it was true that these costs were due).

433. The Defendants plead also that if, which is denied, the Cladding Representations were made, they were made by Mr Mirza or Mr John acting on behalf of Tydwell. It is denied that they were made on behalf of the Mirzas given that it was Tydwell that was seeking payment for its services and Mr Mirza and Mr John were acting on Tydwell's behalf.

434. They plead further that if the Cladding Representations were made, they were made to Otaki. There was no intention or expectation that the alleged representations would be passed to Mr Morjaria, and the emails relied upon said to be copied to Mr Morjaria have not been identified.

435. It is denied that any of the Defendants made any false representations or that they knew or were reckless that any representation was false.

436. The Defendants accept that the Tydwell Valuation Spreadsheets were based on the Teampol Valuation Spreadsheets but plead that the increases in prices for the different line items were increased because Tydwell built in costs for its own work and overheads and for taking the risk that it took on its warranties.

437. The Defendants plead that Otaki will have relied on Tydwell's entitlement to payment rather than on any of the Cladding Representations and that Mr Morjaria's allegation that he relied on the Cladding Representations is inconsistent with the evidence given by him in the Private Prosecution where he said in a witness statement:

> "I did not believe that the work was actually costing as much as documents such as this made out, but as previously stated I did not have access to the documents that would prove it one way or the other".

D. Did the Cladding Representations include misrepresentations?

438. The analysis regarding the Cladding Representations needs to be considered in the light of a context that is different to that relating to the Invoice Representations made at the earlier stages. That context is different in the following ways:

i) whereas the earlier agreements provided separately for Tydwell to receive a fee for its management efforts and for it to recover third-party costs, the Cladding D&B Agreement operated differently; in this case, Tydwell was acting as the Contractor and was to be paid the "Contract Sum" in instalments;

ii) consonant with this, the Tydwell Costs Breakdown and none of the Tydwell Valuation Spreadsheets made any separate claim for project management: in each case what was claimed was by reference to work being done;

iii) as a result of the 11 June Email, Otaki and Mr Morjaria must have understood that Tydwell claimed to be working itself (in context, in doing some of the work, not merely overseeing it) alongside a specialist external wall sub-contractor, and this must have led to an understanding that Tydwell was including within its figures some charge for its own work;

iv) the Confidential Thoughts email demonstrates that Mr Morjaria did understand and communicated to Mr Lewin that Tydwell was charging more than it was paying to subcontractors. I think it is clear that Mr Lewin and Mr Stobart had the same understanding.

439. In the light of these changed circumstances, I do not consider that anything communicated by the Defendants would support Cladding Representation 2. The relevant communications would have been intended to convey what Tydwell was charging, not what third party expenses it would be covering, and they were understood in that way.

440. As regards Cladding Representation 3, the differences between the extent of work done that Teampol was reporting and that which Tydwell was claiming does suggest a *prima facie* case that Tydwell was inflating its reports of the progress made. However, this might be explained by Tydwell reporting differences in the extent that it had made its own contribution (or that of any subcontractors other than Teampol and its subcontractors), a point on which there was really no evidence. In any case it is common ground that the work required was all done in the end and so the case based on Cladding Representation 3 (taken by itself) is at most a complaint that as a result of Cladding Representation 3, Tydwell was paid earlier than it should have been giving rise possibly to a claim for interest on being misled into paying too early for work that was eventually done. For these reasons and in view of what I am going to say about Cladding Representation 1, which gives rise to far greater consequences, I am not proposing to reach a conclusion at this stage on Cladding Representation 3. If the Claimants wish to pursue this further this can be done as alongside or as part of the trial on quantum.

441. When we turn to Cladding Representation 1, I see much more consequential case for a misrepresentation claims. In considering Cladding Representation 1, it is important to consider the terms of the Cladding D&B Contract, and in particular the basis of charging for Tydwell agreed within it. As we have seen, the "Cost Plan" provided for

an advance payment of £750,000 (exclusive of VAT) and then payments to cover any "further additional costs and expenses as may reasonably become necessary to complete the Project".

442. The "Project" was defined as "the replacement of the ACM Panels, Trespa Panels and the Kingspan Kooltherm K15 insulation on the external walls of the Property". This definition did not include replacement of the render, but there was a definition of "Works" which included "the design and works required to complete the Project and such other works as are instructed by the Employer under this Contract" and there was provision both in clause 12 for the Employer (Otaki) to issue instructions.

443. It would have been more satisfactory if there had been provisions in the Cladding D&B Contract that set out formal procedures for varying the Contract and if there had been a formal request to vary the Contract to include the replacement for the render. However, even in the absence of such provisions and such a request, I consider that it is clear that Otaki and Tydwell agreed that replacement of the render was brought within the terms of the D&B Contract and was covered by the same "Cost Plan" which had built into it the flexibility to deal with any increases in costs occurring.

444. Against this background, the natural interpretation (and the intended meaning) of the 11 June Email and the 12 June Email, was that the increase (over and above £750,000) arose because of "further additional costs and expenses" that had "reasonably become necessary to complete the Project".

445. A natural implication would be that the cost had risen chiefly (but by no means exclusively) because of the change to include the render. However, the idea that the increased cost was entirely due to the need to replace the render, would be dispelled if one considered the detail of the Tydwell Costs Breakdown, which showed cost of render being £187,328.81 for removal of render and £742,711.54 for the new render whilst the cost of the remaining elements of the Project had increased (from the initial £750,000 allowed in the Cost Plan) to £1,746,812.13, suggesting that the costs and expenses of the elements originally anticipated to be covered within the Project had gone up by almost £1 million (all the above figures exclude VAT). Nevertheless, anyone reading the 11 June Email and its attachment would have understood that there had been a substantial increase in the costs under the Cladding D&B Contract (i.e. the representation matched the representation I am calling "Cladding Representation 1a") and that this was owing to additional costs relating to the render and to other elements of the cladding including the Trespa cladding. This is close to what I have described within the Claimants' pleading as Cladding Representation 1b, although not completely full square within it, in that there was a possibility that some of the costs related to the other sort of cladding used on the building (the ACM cladding). Nevertheless, it is fair to hold that the representation overall should be seen as falling within what has been pleaded as Cladding Representation 1.

446. In fact, the costs and expenses to be incurred by Tydwell had not increased by anything like this amount. As we have seen, as at 9 March 2020 when the Cladding D&B contract was being entered into, Tydwell had received quotes to replace the cladding that included £528,550 (Harley Facades); £736,368.42 (Argonaut Cladding) and Teampol (£418,000). As the Claimants aver, accordingly the initial £750,000 (exclusive of VAT) advance payment was expected to cover all or substantially all the costs of the Works, and indeed would do so even allowing for some charges by Tydwell.

447. Accordingly, at the point when the 11 June Email was being sent, Tydwell must have realised that adding in the work to remove and replace the render had increased the costs that Tydwell would pay to Teampol only from the £418,000 that Tydwell originally proposed to charge to £842,500. There might also have been some slight increases in other professional costs, but there was nothing in the costs and expenses to be borne by Tydwell to justify anything like the £1.5 million or so increase in costs and expenses that Mr Mirza was saying had become due.

448. The Defendants seek to explain this by reference to the responsibility that Tydwell was taking as the main contractor, and have pointed out the difficulty and high cost of obtaining professional indemnity insurance that would cover risks relating to combustibility at this time.

449. I do not accept that this was the real reason at the time why they increased their price. I think there is something in Mr Morjaria's suspicion that Mr Mirza, was looking to obtain the lion's share of the benefit of the Mace Settlement for Tydwell. He might quite understandably have thought that he deserved it, having done all the work to deal with the settlement and I expect there was some sincerity when in his email of 9 March 2020, responding to the news that Mr Morjaria had challenged the Cladding D&B Contract, at a point when it looked like the JV partners would be able to profit from Mace, he pronounced himself to be "shocked" at this challenge "when it is the "best deal you've ever had" as "you will earn circa £1 million for putting in no money and sitting in Dubai". There was a pronounced tone of resentment in this communication.

450. Whilst there were discussions regarding insurance at this time (as early as 10 March 2020, Mr Ekanyake wrote to Mr Mirza saying that another of his clients had received a 50x increase in its professional indemnity insurance), it seems to me most likely that this justification was arrived at only later when the 2020 accounts were filed at Companies House in September 2021, well after the Letter Before Action.

451. It is relevant to consider the response (the "**October 2023 RFI**") of the Defendants (other than Mr John and Otaki) to an order of Master Brightwell dated 13 July 2023. When explaining what was provided under the Cladding D&B Contract and the basis of charging, the Defendants did not refer to the responsibility they would be taking under the D&B Contract either as an item of work undertaken. They do mention as one element of making a determination as to whether to seek to arrange specific insurance against cladding risk or to self-insure against that risk, but that is different to stating that they were regarding the taking on of that risk as some kind of separate service.

452. Neither do the Defendants say within the October 2023 RFI that this responsibility was a factor in the determination as to what was a fair and reasonable level of charge for the services provided. Instead, they explain the basis on which all the charges made by Tydwell were determined (including those under the Cladding D&B Contract) as follows:

> "2. The determination as to what was a fair and reasonable level of charge for the services provided by Tydwell and Redwire was made:
>
> 2.1. on an ad hoc basis at the time that each particular invoice was raised by either Tydwell or Redwire;

> 2.2. by Mr John and Mr Mirza;
>
> 2.3. taking into account the value of services and/or goods supplied by third parties;
>
> 2.4. on the basis of, and commensurate with, the services provided by Tydwell or Redwire in respect of the matters set out in each invoice; and
>
> 2.5. using their experience in, and knowledge of (in Mr Mirza's case) property development and business, and (in Mr John's case) accountancy and business."

453. These points were to some extent amended by the response (the "**January 2024 RFI**") of the Defendants to an order of Master Brightwell dated 24 November 2023 which provided a table in which the Defendants attempted to elucidate what was being charged for and by Tydwell under different contracts. This included in relation to "Phase 5" – the period under which cladding was undertaken as one of the Services said to be provided:

> "Carrying the risk of a claim by Otaki in relation to fire combustibility of the materials used in the construction works (i.e. self-insuring) after having been informed by its insurance broker that such a risk (i.e. relating to the fire combustibility of the materials) was effectively uninsurable;"

454. Nevertheless, it seems relevant that this thought was a late addition to the Defendants' pleadings and the new wording does not amend the Defendants' explanation of the basis on which all the charges made by Tydwell were determined to suggest that this basis included a consideration of the risk involved.

455. However the pleadings are interpreted, it remains the case that the fact that Tydwell gave warranties did not provide a good reason for increasing what was due under the Cost Plan under the terms of the Cladding D&B Contract,.

456. First, Tydwell knew that it was taking on this responsibility when it signed the Cladding D&B Contract, so this responsibility was not a change justifying an additional charge. The most that can be said is that between the Cladding D&B Contract and the 11 June Email, Tydwell had discovered that it was difficult, if not impossible, and expensive for it to obtain professional indemnity insurance that covered combustibility and that its subcontractor, Teampol, whilst it did have professional indemnity insurance, this excluded combustibility. Teampol, however, did itself give a warranty that did not exclude combustibility.

457. Secondly, this issue did not give rise to any additional cost or expense justifying a further payment under the Cost Plan. In fact, Tydwell did not purchase insurance so there was no cost or expense. Neither did it put aside any amount to provide any kind of self-insurance in respect of this matter. It merely took this as additional profit. It did provide a note in its accounts to disclose a £1.5 million contingent liability, but this was not a cost or expense.

458. Thirdly, the idea that anything like this figure was a reasonable estimate of the risk that Tydwell was taking is highly unlikely. As we have seen, the actual cost to Tydwell of replacing all of the cladding and all of the render was only a little over £800,000. Tydwell would be responsible for replacing this only if it was in breach of its warranty which was essentially that it would comply with applicable regulations. As it had received advice that the replacement cladding and render did meet regulations, the risk would appear low, even taking account of the heightened sensibilities relating to building regulations following the Grenfell disaster. Furthermore, it had a matching warranty from Teampol. Teampol, unlike Tydwell, did carry professional indemnity insurance, although this did not cover the one element of combustibility. The Defendants try to make something of the fact that Teampol required them to sign off on design choices, but the agreement that it had with Teampol expressly provided that this would not allow Teampol to escape its warranty obligations on this ground.

459. The Defendants put forward one justification on the basis that Tydwell had spoken to an insurance professional and had been given an estimate of £120,000 a year for professional indemnity insurance that would include combustibility, and therefore it was reasonable to multiply this by the 12 years for which the warranty would subsist. This is not at all persuasive. Firstly, this figure was quoted not for insurance for this particular project and still less for the combustibility responsibilities relating to this project, but to cover the entire business of a professional firm undertaking a business involving cladding work. Secondly, there was no reason to believe that premiums would continue at this rate throughout the entire period in which the warranty was subsisting unless Tydwell was undertaking other work for which such a professional indemnity insurance was needed. It seems likely that the risk of a claim on this particular project for combustibility would decrease over time.

460. Even if Tydwell had genuinely assessed the value of its warranty at this time and had decided commercially that it wanted to charge for this, there is no excuse for it not explaining this to Otaki, so that Otaki could have made the choice itself to self-insure on this point or to have sought other insurance, and to have amended Otaki's warranty to exclude responsibility for combustibility, rather than handing over £1.2 or £1.4 million to Tydwell for it to take that obligation.

461. In considering Cladding Representation 1 and whether there has been any breach of it, it is also necessary to consider the background that:

    i) Under the JVA, Mr Mirza had undertaken to manage the daily operation of the JV through his UK construction company. Mr Mirza himself within the 13 June Email referred to this provision being relevant, and thereby represented that he was operating and making decisions in the best interests of the JV.

    ii) Also, under the JVA, Mr Mirza had agreed to keep Mr Morjaria fully informed on the progress of the JV at all times and had accepted a duty to act in good faith.

462. In refusing to provide details of the subcontractor costs, Mr Mirza was acting in breach of these obligations.

463. Also, Tydwell was acting in breach of its obligations under the Design & Build Contract, which included obligations:

i) to submit to Otaki for approval the proposed terms and conditions of any Sub-Contract and any professional appointment;

ii) when proposing a revised Cost Plan to provide such information in relation to revisions as Otaki may require (but see my further analysis on this point at [515] below);

iii) to provide all documents required by Otaki in relation to the Project promptly and in good time; and

iv) to keep Otaki fully informed and provide the Employer with regular reports on all matters which would be of interest to a prudent employer together with such other information in regard to the Project as Otaki may require.

464. The fact that Mr Mirza and Tydwell chose to ignore these obligations and refused point-blank to explain the basis on which they were claiming additional costs and expenses underlines that this was, and Mr Mirza and Tydwell knew that it was, a deliberate attempt to mislead Otaki into paying Tydwell a level of fees that they would not have agreed to had it known the full facts and to induce Mr Morjaria to go along with this.

465. The point is underlined when one considers the terms of the 12 June Email referring to the prices "we have managed to negotiate" when the vast majority of the price rise had come not from the third parties but from Tydwell itself – there was no negotiation.

466. Taking account of all of the points made above, I consider that Cladding Representation 1 was made to Otaki and to Mr Morjaria initially by means of the 11 June Email and was repeated in the 12 June Email and was repeated to Otaki in the form of the Tydwell Valuation Spreadsheets and Cladding Invoices.

E. Who made the Representations?

i. Tydwell, Mr John and Mr Mirza as representors

467. The initial and key instances of a misrepresentation being made in the form of Cladding Representation 1 were the 11 June Email and the 12 June Email. The misrepresentation was effectively repeated in the 13 June Email, but I note that this is not covered by the Claimants' pleadings.

468. These representations were made by Mr Mirza. There is perhaps some small doubt whether he was making these representations on behalf of Tydwell since he did not use a Tydwell email address (he used a "Kingmead" email address) and did not sign himself off as acting as a director of Tydwell. However, as essentially these emails were seeking to justify contractual claims being made by Tydwell, I consider that he was intending to write, and was understood to have written, on behalf of Tydwell as well as himself. I do not accept that because he may be understood to have been writing on behalf of Tydwell he is not to be regarded as giving the representations in his own right. Clearly, he was.

469. Mr John also may be considered to have been involved in the representations made in the 11 June Email since he signed off a draft of it.

470. The same representation was essentially adopted by Mr John and by Tydwell when the Tydwell Valuation Spreadsheets and invoices and demands for payment were routinely sent by Mr John on behalf of Tydwell to IQEQ. These documents may, therefore, be regarded as including representations made by him and by Tydwell. These documents each effectively repeated Cladding Representation 1 since they must be considered to be expressly or impliedly representing that the amount being claimed were properly due under the Cladding D&B Contract whereas they included amounts that were in excess of the original £750,000 in the Cost Plan and were not further costs or expenses that had recently become necessary to complete the Project.

471. The considerations that I outline at [340] and [341] above also apply in relation to these documents. We have evidence that Mr Mirza monitored closely what went out and made suggestions for changes. There can be no doubt that Mr Mirza caused these documents to be sent and approved their contents.

ii. Mrs Mirza and Ameer as representors?

472. There is no evidence (and no pleading) that Mrs Mirza or Ameer were directly engaged in communicating any misrepresentations. In a similar manner to their pleading in relation to the Invoice Representations, the Claimants plead in relation to the Cladding Representations that they, along with Mr Mirza, "authorised, procured or directed the Cladding Representations and/or manifestly adopted or approved those representations".

473. Again, there is no direct evidence for either of these propositions. The Claimants have not been able to find a single instance during the period that we are dealing with here where Mrs Mirza directed or otherwise procured Mr John to send out an invoice or request for payment containing a misrepresentation. Neither is there any evidence that either of them "manifestly adopted or approved those representations". The analysis made at [345] to [349] applies equally in relation to the Cladding Claims.

iii. Mrs Mirza's involvement as pleaded by the Claimants

474. The Claimants particularise further their claim in this regard against Mrs Mirza, in addition to the matters that I have already dealt with at [350] to [361] above, to include allegations (at paragraph 72 of the PoC) that:

i) She drafted (or contributed to the drafting of) the Tydwell Valuation Spreadsheet sent on 2 November 2020; and

ii) was copied-in to emails by which the Cladding Representations were made (including the emails above sent on 2 November 2020, 27 November 2020 and 16 December 2020).

475. I note that Mrs Mirza confirms that she did discuss aspects of the Cladding D&B Contract. She had been involved, along with other members of the family, in obtaining quotes from subcontractors. However, she denies any involvement in the discussions with IQEQ concerning the price for cladding.

476. There is no pleading and nothing in evidence that suggests she was involved in or aware of the 11 June Email or the 12 June Email before they were sent.

477. There was some evidence within the metadata relating to one of the Tydwell Valuation Spreadsheets that Mrs Mirza had been the last one to amend it. She explained in oral examination that she had put into evidence her submission that she had been in Surbiton at the time that this spreadsheet was allegedly amended and sent out and so could not have amended it. She considered the most likely explanation was that she had left her computer open, and someone had used it to make the final modifications.

478. In the Defence and Counterclaim it was said that:

> "... Tydwell Valuation Spreadsheet was created by Mr John. Mrs Mirza may have helped with the formatting or editing of the figures in the spreadsheet under Mr Mirza's guidance."

479. Mrs Mirza resiled from this statement to a certain extent in her oral evidence, describing this as "speculation of how it could have happened at the time".

480. In my view, the most likely interpretation of events was that Mrs Mirza was not involved in compiling the numbers that went into the Tydwell Valuation Spreadsheets. She may have had a role in assisting with formatting. This is not sufficient to make her responsible for the contents of these documents.

481. She was copied into the emails attaching Tydwell Valuation Spreadsheets on 2 November 2020, 27 November 2020 and 16 December 2020, but this again of itself is not any reason to regard her as directing or procuring to adopting or approving those emails or their attachments.

iv. Ameer's involvement as pleaded by the Claimants

482. The Claimants also particularise further their claim in this regard against Ameer. They refer to the matters I have already dealt with at [362] to [366] above and in addition plead (at paragraph 73 of the PoC) that he:

> a. Drafted (or contributed to the drafting of) the Tydwell Costs Breakdown and each of the Tydwell Valuation Spreadsheets;
>
> b. Was copied-in to emails by which the Cladding Representations were made (including the emails above sent on 27 August 2020, 24 September 2020, 2 November 2020, 27 November 2020 and 16 December 2020); and
>
> c. Was the (or, at least, a) representative of Tydwell liaising with Teampol at the material time.

v. Ameer's evidence as to his knowledge and involvement

483. Ameer within his First Witness Statement describes his role within Tydwell, as being a low-level role supervised closely by his father. He claims that he had no involvement with the invoices raised to the JV Entities or the emails that went to Mr Morjaria or the Directors attaching them. His role was on the ground, at an operational level. He did not join in the meetings between Mr Mirza and Mr John where Mr John would have a breakdown of items from which he would produce the invoices. He did not concern himself with the Tydwell invoices, except that he would sometimes get involved in

confirming the work that had been done by subcontractors. He accepts that he was copied into emails but says that he did not give a thought or attention. He says that:

> "… given my lack of business experience and lack of knowledge concerning the JV arrangement/relationship, notwithstanding that this was an unprecedented situation, I was in no place to question my Father or Mr John's work and left it to them."

484. As regards his knowledge of the JVA, he accepted in giving his oral evidence that he saw it in connection with dealing with KYC matters in 2017 or 2018 that he was helping with, where he would have had to pass this onto a funder but did not review it in detail. Since 23 April 2021, when the Defendants received the Letter Before Action, he had become familiar with it, including clause 5.2, but I accept his evidence that he would not have reviewed the JVA in any detail before that time.

485. He agrees that he was aware of what Teampol were charging.

486. His evidence is that he did not work on the Cladding Invoices but was copied in to them. He agrees that he did get involved in formatting drafts of the Tydwell Valuation Spreadsheets, and as a result appeared as author within the meta data. He provides an example where the figures in the spreadsheet that was sent to him were not changed after he worked on the spreadsheet and sent it back to Mr John.

487. In fact, it appears that on at least one occasion he went rather further than this. In August 2020, he reviewed a proposed draft of a Tydwell Valuation Spreadsheet that had been prepared by Mr John and replied to Mr John, copying his father and his mother and his brother, Mr Osman Mirza, making two comments. One was to remove his workings at one place, and the other was to suggest adding another variation for additional preliminaries.

488. He was asked about this in cross examination and in particular it was put to him that he had suggested deleting a figure which showed what percentage of the project was now being stated to be complete in order to disguise the way the figures for percentage works completed had been arrived at. The percentages involved had been presented in a more straightforward manner in the matching spreadsheets received from Teampol.

489. Having considered the spreadsheets, whilst the Tydwell Valuation Spreadsheets were less clearly presented than those from Teampol (and of course included higher figures), I do not think that the way in which the "works completed" figures were compiled could be said to be kept secret. Anyone looking at the spreadsheet would be able to see what percentages of the overall cost was said to have been completed merely by hovering over the relevant cells within the "works completed" column, which would then have shown the percentage by which each of the total figures had been multiplied. Given this, I accept Ameer's explanation that he suggested deleting the cells that he did because he thought that they were merely a cross check and, in the way they have been presented (to include a long decimal number rather than a percentage figure) demonstrated that they were internal workings, rather than something that was intended to be conveyed to the customer. I therefore do not see anything sinister in Ameer's comments, but the fact that he made them showed that he was at least on one occasion involved in considering how figures were presented, and not merely in formatting.

490. It is also relevant that Ameer, as we have seen, was involved in the creation of the 11 June Email, which I regard as being the first email where Cladding Representation 1 was made.

491. Ameer claims that his involvement was merely as a typist, taking dictation from his father.

492. Looking at the totality of the evidence, I consider that Ameer was involved in communications containing Cladding Representation 1, but I do not consider that it is established that he was sufficiently involved to be said to have been directing or otherwise procuring Mr John or Mr Mirza or to have "manifestly adopted or approved those representations" in the sense necessary for him to have direct liability in deceit.

F. Are the other requirements for deceit present?

493. I have found that Tydwell, Mr John and Mr Mirza (still "the "**Representing Parties**" in relation to the Cladding Representations) were all responsible for the communications containing misrepresentations in the 11 June Email and the Tydwell Costs Breakdown attached and the Tydwell Valuation Spreadsheets and the Cladding Invoices. There is, however, no evidence that Mr John was involved in the 12 June Email.

494. I need next to consider the other elements of the tort.

495. First, I think it is clear that Mr Mirza and Mr John, and therefore Tydwell, knew that the representations they were making would be understood as a representation that the monies then being requested resulted from a substantial increase in the costs of the cladding work owing to additional costs relating to the cladding and to the requirement to replace the render and that this representation was false, whereas they were in fact looking to achieve additional profit out of the Cladding D&B Design Contract beyond that envisaged in the original Cost Plan.

496. This point is clear, not only from the circumstances I enumerate at [461] to [465] above and also from the fact that great care that was taken to avoid disclosing what were the actual costs to Tydwell of completing the project and therefore how much money Tydwell was making out of this project.

497. Although I have found that Mrs Mirza and Ameer in any case were not involved, or not sufficiently involved, in making these representations to be regarded as representors, I should add that in my view the Claimants have not done enough to establish that they had the knowledge that a fraud was being committed. Whilst each of them may have had some passing knowledge of the JVA and of the Cladding D&B Contract, it is clear from their witness statements and oral evidence that it did not occur to either of them that Mr Mirza and Tydwell should not be regarded as being at arm's length to Otaki and it is more plausible that they thought that Tydwell was entitled to charge in the amounts that were being charged. They clearly both deferred to Mr Mirza and considered that he was acting honestly. There is no evidence that they reached a conclusion that Tydwell was claiming amounts under the Cladding D&B Contract that went beyond what would be allowed under the Costs Plan. They were each, in fact, concentrating on other parts of the business rather than the contractual and invoicing arrangements with Otaki.

498. Secondly, it is obvious that the Representing Parties intended that Otaki would act on these matters.

499. Thirdly, Otaki was induced to make payments that were kept by Tydwell and thereby suffered loss, in that it paid amounts that were kept by Tydwell that it would not have paid absent the misrepresentations. There may be a question about how far the directors of Otaki actually believed that the amounts being claimed by Tydwell arose from increasing necessary costs and expenses. Mr Lewin was certainly aware of Mr Morjaria's scepticism on this point and his response, where he reserved the right to seek further tenders, suggests that he shared some of Mr Morjaria's suspicion. Nevertheless, the representations made did induce the payments to be made, whether there was scepticism about them or not.

500. I consider therefore that all the elements of deceit are made out as regards a deceit practised by the Representing Parties on Otaki.

501. As regards a deceit on Mr Morjaria, this is not as straightforward. The representations in the 12 June Email and the Tydwell Valuation Spreadsheets and Cladding Invoices were not directly made to him, although it more likely than not was in the contemplation of the Representing Defendants that the 12 June Email would be passed to him. However, the representation in the 11 June Email was directly made to Mr Morjaria.

502. Arguably, it was not predictable that these would lead to further capital requirements from Mr Morjaria since they were covered by the amounts received under the Mace settlement.

503. Nevertheless, it is fair to conclude that the Cladding Representation made in the 11 June Email was made with the intention of inducing Mr Morjaria to agree to the payments and not to prevent Otaki from making them and I consider that this was sufficient misrepresentation and intent to support the practice of a deceit on Mr Morjaria.

504. I do not think it can be said, however, that Mr Morjaria relied on the representations. Clearly, he did not believe them. He made a tactical decision not to challenge the payments at the point they were being made but reserved the right to do so later, and indeed did make a later challenge.

505. I consider, therefore, that Mr Morjaria's case (and Mrs Morjaria's case) as regards the Cladding Representations giving rise to deceit that is actionable by them is not made out.

11. THE OTHER BASES OF CLAIM PURSUED IN RELATION TO INVOICING AND CLADDING

A. The other pleadings in relation to this matter

506. The Claimants have been particularly wide-ranging in the way in which they have pleaded causes of action in relation to invoicing (including that relating to cladding) based on the facts that I have already summarised. In addition to the straightforward claims in deceit that I have already dealt with, they claim further or in the alternative:

i) breach of JVA/fiduciary duties;

ii) breach of JV/Tydwell Contracts and the overpayment;

iii) unjust enrichment;

iv) dishonest assistance;

v) knowing receipt; and

vi) conspiracy.

507. I am obliged to consider each of these separate causes of action, and will do so in turn, starting with breach of the JV/Tydwell Contracts and the overpayment, as the position on this informs the other causes of action.

B. Breach of the of the JV/Tydwell Contracts and the overpayment

i. The Pleadings relating to the Claim

508. The claim for the JV/Tydwell Contracts and the overpayment is pleaded at paragraphs 79 - 81 of the PoC as follows:

> "79. Further or alternatively, Tydwell breached the JV/Tydwell Contracts by:
>
> a. Failing to provide the terms and conditions of contracts entered into with third parties (in breach of clause 2.5 of the Procurement Contract and Development Contract and clause 2.4 of the D&B Contract) or obtain written consent for engagement of third parties or the incurring of costs or the amount of those costs (in breach of clause 4.2 of the Property Management Contract).
>
> b. Failing at any time prior to the Letter of Response, to inform the JV Entities that the Requests, Invoices or Cladding Invoices included sums extracted by way of fees, or the level of those fees, or which part of the sums invoiced were in respect of those fees (in breach of clause 2.1.12 of the Procurement Contract and Development Contract and clause 2.10.1 of the D&B Contract).
>
> c. Failing, at any time prior to 2021, to provide invoices raised by third parties for which payment was sought or, at any time, to provide receipts for payments received by third parties (in breach of clause 18 of the Procurement Contract and Development Contract and clause 2.10.1 of the D&B Contract).
>
> d. Demanding sums in excess of those to which they were entitled under those agreements (in breach of the implied term of good faith in respect of each of the JV/Tydwell Contracts).
>
> e. If, which is denied, those agreements did allow for the charging of fees, demanding a fee that was in excess of a reasonable market rate for services provided (in breach of the

> implied term of good faith in respect of each of the JV/Tydwell Contracts).
>
> 80. Further, or alternatively, any sum paid to Tydwell by the JV Entities in excess of that (a) used to defray third party costs properly incurred by Tydwell in furtherance of the JV; and (b) if, which is denied, such fees were payable, fees paid to Tydwell, was subject to an implied agreement (or agreement by conduct) that any part of the sum not used for these purposes would be repaid to the JV Entities on demand.
>
> 81. The JV Entities hereby demand repayment of all such sums (being the Misappropriated Sum or, alternatively, the Misappropriated Sum minus the Purported Fees). Accordingly, that sum is claimed in debt, alternatively damages.

509. The Defendants' response within the Defence and Counterclaim may be summarised as follows:

i) In relation to the points at subparagraph 79(a), the facts are admitted but it is pleaded that at no time did the JV Entities complain about any such lack of provision and noted that no loss is claimed to have been suffered as a result.

ii) As to subparagraph 79(b), the Defendants plead that neither the Procurement Contract nor the Development Contract contains a clause 2.1.12 and that no provision of the Procurement Contract, the Development Contract or the Cladding D & B Contract required Tydwell to inform the JV Entities of the matters referred to.

iii) As to subparagraph 79(c), it is denied that Clause 18 of the Procurement Contract or Development Contract, or Clause 2.10.1 of the Cladding D&B Contract, required Tydwell to provide such invoices.

iv) As to subparagraph 79(d), none of the JV/Tydwell Contracts contained an implied term of good faith, and Tydwell did not demand any sums in excess of those to which it was entitled.

v) As to subparagraph 79(e), none of the JV/Tydwell Contracts contained an implied term of good faith, and Tydwell did not demand any sums in excess of a reasonable market rate for the services provided.

vi) It is complained of paragraph 80 that no particulars are given as to how the alleged implied agreement or agreement by conduct is said to have arisen, so the Defendants are unable to plead except by way of a general denial. They also deny that any such agreement could have arisen in the light of the "whole agreement" provision at clause 13.1 of the JVA. This point is answered by the Claimants, in their Re-Re-Amended Reply to the Defence and Counterclaim (the "**Reply**") by the pleading that the allegation as to the lack of particularisation, in the first two sentences, is misplaced. As pleaded, the agreements between Tydwell and the relevant JV Entity arose by reason of the request for payment (by Tydwell), payment (by the relevant JV Entity), and

receipt (by Tydwell) of sums in excess of the costs and purported fees identified at paragraphs 80(a) and (b) of the PoC (as quoted above). The Claimants go on to plead that the whole agreement provision at Clause 13.1 of the JVA applies only to the parties to the JVA and is of no relevance to a contract between the JV Entities and Tydwell (a non-party to the JVA).

vii) Paragraph 81 is denied. The Defendants plead also that, other than Viper, the JV Entities are not Claimants. As to the second point, the Claimants in the Reply accept this as being true, but point out that the demand is being made by the Morjarias and Summerhill as assignees of the claims of those JV Entities.

ii. Discussion of the individual claims made under this heading

510. As is admitted by the Defendants, clause 2.5 of the Procurement Contract and the Development Contract and clause 2.4 of the Cladding D&B Contract each required the Developer (Tydwell), unless instructed otherwise in writing, to submit to the Employer (Viper or Otaki) for approval the proposed terms and conditions of sub-contracts. It is clear that these terms were not adhered to. It is also clear that there were breaches of clause 4.2 of the Property Management Agreement, which required written consent for the engagement of third parties or the incurring of costs.

511. The Defendants are right, however, that these breaches were not complained of at the time and that no separate claim has been made for losses arising from these breaches. These breaches, however, form an important part of the factual matrix to be considered when considering the other causes of action claimed, and indeed, I have already referred to them in relation to the claim for deceit.

512. In relation to the alleged breach of clause 2.1.12 of the Procurement Contract and of the Development Contract, the Defendants are correct that there is no such clause. There is, however, an obligation under clause 2.12.12 to:

> "keep the Employer fully informed and provide the Employer with regular reports on all matters which would be of interest to a prudent employer together with such other information in regard to the Project as the Employer may require."

513. I expect that this provision was the one that the Claimants intended to reference. It is, however, curious that they did not correct this incorrect reference in their Reply. In my view this provision was breached whenever there was a refusal to provide supporting invoices in relation to any amount claimed under these agreements, and more generally in that it is clear that a prudent employer would be interested in understanding subcontractor costs.

514. Clause 2.10.1 of the Cladding D&B Contract provides that:

> " when requested to do so by the Employer ensure that a revised Cost Plan to the Employer is issued for approval together with such information in relation to the revisions as the Employer may require".

515. I consider that this particular provision of the Cladding D&B Contract was not engaged since there was no formal request issued by the Employer to revise the Cost Plan. However, there is still a breach of other obligations under the Cladding D&B Contract, as I have noted at [463.iii)] above.

516. In relation to the pleading at subparagraph 79(c) that a failure to produce invoices and receipts for payment was a breach of clause 18 of the Procurement Contract and Development Contract, there was a clear breach of these provisions. Under clause 18 of each of these agreements, applications for payment of Project Costs needed to be accompanied by invoices or such other available evidence of entitlement as the Funder's Surveyor may reasonably require. In fact, in all or almost all cases where payments were made under these agreements, Viper was not provided with such invoices or other available evidence. As I have already noted, however, clause 2.10.1 of the Cladding D&B Contract was not, in my view, engaged, although other provisions of the Cladding D&B Contract were.

517. Again, I note that in relation to any breach of contract claimed, it is relevant that these breaches were not complained of at the time and that no separate claim has been made for losses arising from these breaches. These breaches, however, form an important part of the factual matrix to be considered when considering the other causes of action claimed, and indeed I have already referred to them in relation to the claim for deceit.

518. In relation to the pleading at subparagraph 79(d) of the PoC, that demands were made for sums in excess of those to which Tydwell was entitled under the JV/Tydwell agreements, I agree that this was the case. Tydwell was entitled under the Procurement Contract and the Development Contract to be paid for "Project Costs" and to be paid a Fee, which needed to be separately claimed. The Property Management Agreement again made a distinction between the recoupment of third-party costs and the charging of a fee. As I have already discussed, it appears that Tydwell invoiced for amounts that were not identified as being fees for its management and which were in excess of third-party costs. In relation to the Cladding D&B Agreement, as I have already discussed, amounts were claimed that were in excess of those which were legitimately claimed in accordance with the Cost Plan.

519. However, I part company with the Claimants in relation to the further pleading at subparagraph 79(d) of the PoC, that demanding sums in excess of those to which Tydwell was entitled under those agreements breached an implied term of good faith in respect of each of the JV/Tydwell Contracts. The reasoning for this is explained by the Claimants' Closing submission on the basis that such a duty is necessary to give the contracts business efficacy, given the circumstances in which they were concluded: these were not ordinary building contracts between an employer and a contractor, they were contracts between a JV Entity and a company owned by one of the parties to that JV, who had a duty to act in good faith under clause 12 of the JVA. This in the Claimants' submission brings it into the category of 'relational' contracts involving trust and confidence discussed in *Al Nehayan* at [167] where each party is entitled to trust "that the other party will act with integrity and in a spirit of co-operation".

520. The Claimants argue that most of the elements of a "relational contract" identified by Fraser J in *Bates v Post Office Ltd (No.3 Common Issues)* [2019] EWHC 606 (QB) at [725] are present here. Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships.

521. The characteristics identified by Fraser J as being relevant in deciding whether a contract was relational include those in the following list:

i) no express terms preventing a duty of good faith being implied;

ii) a long-term contract, with a mutual intention of a long-term relationship;

iii) an intention for the parties' roles to be performed with integrity and fidelity to their bargain;

iv) a commitment for the parties to collaborate in performing the contract;

v) the spirits and objectives of the venture being incapable of exhaustive expression in a written contract;

vi) the parties reposing trust and confidence in one another, but of a different kind to that involved in fiduciary relationships;

vii) a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty;

viii) a degree of significant investment by one or both parties;

ix) exclusivity of the relationship.

522. This list was not intended by Fraser J to be exhaustive and, as was noted by Coulson LJ in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103; [2022] 4 W.L.R. 84 at [41], it should be approached as "*a sense check rather than a series of statutory requirements*".

523. Having considered that list in that light, whilst I agree that the JVA may, and should, be regarded as a relational contract, I do not share the Claimants' conclusion that the JV/Tydwell Contracts or any of them fall into the same category. The individual JV/Tydwell Contracts were not long-term contracts: they were particular contracts to undertake particular tasks. There was no real mutuality of expectation: Tydwell was the service provider and the only material expectations of the JV Entities was that they would pay the amounts due from them. There was not an especially high degree of communication. There was no exclusivity in the relationship created by each of those contracts, even if there was a degree of exclusivity in the broader relationship involving Mr Mirza created by the JVA.

524. I therefore find against the Claimants in relation to this narrow point.

525. In relation to the pleading at subparagraph 79(e) of the PoC, that demanding a fee that was in excess of a reasonable market rate for services provided was in breach of an implied term of good faith in respect of each of the JV/Tydwell Contracts, as I have not found an implied term of good faith in any of the JV/Tydwell Contracts, this pleading must fail as well. Except in relation to the Cladding D&B Contract, the only amounts that I am accepting as having been invoiced by Tydwell for its own fees are those mentioning a "Project Management Fee", and I do not think it has been established that the total of those Project Management Fees were in excess of a reasonable market rate. As regards fees under the Cladding D&B Contract, the issue is not whether a fee for Tydwell was reasonable, but is whether the increase in fees over and above the original

£750,000 allowed within the Cost Plan was justified by additional costs and expenses that were reasonably necessary. I have ruled that they were not.

526. In relation to the pleading at paragraph 80 of the PoC, I consider that it follows from my findings so far that the circumstances bear out the Claimants' contention.

527. Under the Procurement Contract and the Development Agreement, amounts were paid in anticipation of third-party costs and, where there was a reference to management fees in respect of invoices already delivered or to be delivered by Tydwell. If those third-party costs were not incurred, or if Tydwell did not invoice for management fees as anticipated, it is obvious that the advances would need to be repaid. Essentially, the same analysis applies under the Property Management Agreement. The point is so obvious that I am not sure that any implied term is necessary to reach such a conclusion, but if it is then I find that such a term exists as being obviously necessary in order to bring about business efficacy.

528. As regards payments made under the Cladding D&B Contract, a slightly different analysis applies. After payment of the initial sum of £750,000, the agreement provides for payments to be made as the project progresses and for an invoice to be submitted plus VAT following practical completion of the Project. In practice, invoices were issued as the project went along – five invoices were issued during Phase 5, although the Defendants have not been able to be clear as to which contracts these related. Insofar as amounts were received in respect of the Cladding D&B Contract but were not justified in accordance with the Cost Plan, so that Tydwell received more than it was entitled to under that agreement, then Tydwell must be obliged to return those amounts, but I do not think that this obligation arises as the result of an implied term.

529. It follows from my conclusions above that (looking at the allegations of breach of contract in relation to the JV Entity/Tydwell Agreements only and subject to any limitations issues), I accept the legitimacy of the Claimants' demand at paragraph 81 to the extent that any payments were made to Tydwell that are in excess of the sums due to Tydwell under the JV Entity/Tydwell Agreements.

iii. Conclusion

530. On the basis of the analysis above, I have found that there is a good claim against Tydwell and Mr Mirza for breach of the JV/Tydwell Contracts.

531. I discuss further the issues relating to the quantum of this claim (and including the effect of limitation) towards the end of this judgment.

C. Breach of the JVA and of fiduciary duty

i. The Claimants' pleadings relating to this cause of action

532. The claim for breach of the JVA and of fiduciary duty is pleaded as follows:

> "Further or alternatively, Mr Mirza has breached clauses 2.1, 5.2 and 12 of the JVA, and Mr Mirza and/or Tydwell have breached their fiduciary duties to the Morjarias and/or the JV Entities, as follows:

a. By making the fraudulent Invoice Representations and Cladding Representations.

b. By causing the JV Entities to make payments to Tydwell in excess of that required in order to defray costs that had been properly incurred (or which it was honestly believed would be incurred) by Tydwell to third parties in furtherance of the JV.

c. By obtaining and/or refusing to repay the Misappropriated Sum (or any part of it) without having any entitlement to those monies.

d. By charging "fees" to the JV without the informed consent of the Morjarias and/or the JV Entities.

e. If which is denied, the JV/Tydwell Contracts did allow for the charging of fees, by entering into those contracts for profit with the JV Entities without the informed consent of the Morjarias and/or the JV Entities.

f. By Mr Mirza causing his wholly owned company, Redwire to demand payments from the JV without having any entitlement to those monies and to thereby obtain a profit, without the informed consent of the Morjarias and/or the JV Entities.

g. By causing the JV Entities to pay VAT on the payments (in (a) to (f) above) such that advances of VAT Refunds were payable to Mr Mirza (pursuant to clause 4.1.1 of the JVA).

h. If, which is denied, the JV/Tydwell Contracts did allow for the charging of fees, charging fees that were excessive and without the informed consent of the Morjarias and/or the JV Entities.

i. By failing to inform the Morjarias of matters material to the JV including the JV/Tydwell Contracts, the Teampol Contract, the Purported Fees or the true position as to the fees incurred by Tydwell to third parties in furtherance of the JV.

j. By failing to disclose the wrongdoing as set out above."

ii. The Defence and Counterclaim and my analysis

533. The Defendants' response within the Defence and Counterclaim is summarised below, together with my findings on each of these matters.

534. In relation to the representations mentioned at 78(a) of the PoC, the Defendants plead that no such representations were made. I have already found against Mr Mirza, Mr John and Tydwell in relation to this point.

535. In relation to subparagraph 78(b) of the PoC, the Defendants deny that Mr Mirza or Tydwell caused the JV Entities to make any payments to Tydwell, on the basis that such

payments were made as a result of their being approved by the Directors or individuals authorised by the Directors.

536. This is no answer to the claim. The point is that the Directors were induced to authorise the payments by misrepresentations which the Claimants say involve a breach of contract and breach of fiduciary duty.

537. The Defendants go on to plead that Tydwell did not charge for any sums in excess of those to which it was entitled.

538. This is not true. Insofar as sums were claimed during Phases 1- 4, the entitlement of Tydwell to charge was at most for amounts which were properly disclosed as being fees to it pursuant to the Written Project Agreements or as may have been agreed *ad hoc* as management fees. Any fees not being presented as project management fees were being represented as sums to reimburse third-party costs. Except in relation to fees under the Cladding D&B Contract, to the extent that Tydwell kept any other fees that were so presented and were in excess of third-party costs, Tydwell had no entitlement to those fees. In relation to fees under the Cladding D&B Contract, to the extent that Tydwell has kept amounts paid to it that are in excess of what it was allowed under the Cost Plan in the Cladding D&B Contract, Tydwell had no entitlement to those amounts.

539. In relation to subparagraph 78(c) of the PoC, the Defendants plead that Tydwell was entitled to receive the sums (they say "wrongly") characterised as the 'Misappropriated Sum' and was under no obligation to repay them. I have already found this not to be so.

540. The Defence and Counterclaim goes on to say that the basis for the allegation that Mr Mirza received such sums is not understood. This is a pure, and not very meritorious, pleading point based on the construction of the Claimants' pleading. I think it is eminently clear that the Claimants are alleging correctly that Tydwell has received monies in excess of that which it is entitled to, and that Mr Mirza has benefited from this.

541. In relation to subparagraphs 78(d) and (e) of the PoC, the Defendants plead that Tydwell had a contractual entitlement to charge for its services under the JV/Tydwell Contracts and what they claim to be a "Preliminary Works Agreement". The 'informed consent' of the Morjarias or the JV Entities was not required; however, Otaki and Viper (as applicable) in fact gave such consent by entering into such agreements.

542. Insofar as amounts were properly claimed by Tydwell under these agreements or through an *ad hoc* request for reimbursement of sums genuinely disbursed for the benefit of the JV Entity, I agree that this is the case. However, insofar as Tydwell was making secret profits by obtaining advances or invoicing for amounts that appeared to be expenses to third parties but were in fact amounts that it intended to keep, then this was a breach of fiduciary duty by Mr Mirza in causing Tydwell, a company he controlled and of which he was the principal shareholder and director, to do this. This is also true insofar as he procured or caused Redwire to do the same. The position is a little more nuanced in relation to any claim for payment made in relation to the Cladding D&B Contract. I would consider that the Directors received sufficient information (or at least information that they considered to be sufficient) to make a decision to enter into the Cladding D&B Contract in that they had received some sub-contractors quotes and would, I think, have understood that Tydwell was proposed as the main contractor

and was itself charging. However, insofar as they agreed to make payments at the increased amount following the 11 June Email, I do not think you can say that their consent was informed consent. They wanted more information but were denied it. Had they been given the true information, it is extremely doubtful that they would have agreed to this price. They were denied the ability to negotiate, for example, a lower price by restricting the warranty that Tydwell was giving. It was a breach of fiduciary duty for Mr Mirza and Tydwell to arrange for Tydwell to receive a profit that the JV Entities had not consented to with informed consent.

543. The Defendants plead as regards subparagraph 78(f) of the PoC by denying the contents of that paragraph and stating that Redwire was entitled to receive payment pursuant to the "Redwire Contract". This is a contract they say arose by conduct because Redwire commenced doing work for the benefit of the JV and was paid for doing so.

544. I do not think that a case was made out that any such contract existed in the sense that there was ever a contract that one party or the other could enforce going forward, but I think that nothing turns on this. The fact is that the Directors agreed on behalf of the JV Entities to make payments to Redwire on an *ad hoc* basis of invoices or requests for payment being made. To the extent that these invoices appeared to be seeking recovery of third-party costs and were justified by third-party costs, then the Directors consented to these payments, and I do not think one can say that there was any failure of informed consent. To the extent that there were any that specifically mentioned management fees for Redwire, then as I have done with Tydwell I would give Redwire the benefit of the doubt that it consented to pay this as a fee to Redwire. In such circumstances I consider that the Directors must be presumed to have had whatever information they considered necessary to justify paying that fee, and I will regard them as having given informed consent.

545. There was, however, a failure to obtain informed consent, and a breach of fiduciary duty by Mr Mirza, to the extent that he procured that Redwire would obtain and keep sums that were not justified by a clear request for a management fee for Redwire's own work, or wholly justified by third-party expenses.

546. As to subparagraph 78(g) of the PoC, the Defendants plead that they do not understand the basis for the allegation that Mr Mirza or Tydwell caused the JV Entities to pay VAT on the sums referred to in Subparagraphs (a) to (f). They deny that either of them did so, and plead that the sums paid by the JV Entities to Tydwell were paid as a result of being approved by the Directors or individuals authorised by them and were properly due.

547. This response combines two of the points that I have already dealt with. The fact that the Directors approved the VAT Payments is no defence to the extent that these payments were procured by misrepresentation, or indeed in the context of fiduciary duties, by a failure to obtain informed consent. I have already commented on the extent of the implications of this point. As to the point that they say these payments were properly due, I have already established that some of the amounts invoiced were not properly due, and to the extent that those amounts were improperly invoiced with VAT added, VAT advances were not properly due under the JVA either.

548. As to subparagraph 78(h) of the PoC, the Defendants deny that the fees charged were excessive and that there was a failure regarding informed consent. As I have already

said, insofar as these were asked for as project management or management fees, these fees do not appear to be excessive, but this is no answer to the point that it appears that third-party costs were inflated. I have also dealt with the question of informed consent.

549. As to subparagraph 78(i) of the PoC, the Defendants plead that they cannot answer this claim except by way of a general denial to the vague assertion that they failed to inform the Morjarias of matters material to the JV including certain matters (non-exhaustively) listed, but without prejudice to this pleading deny that Mr Mirza or Tydwell were under any obligation to inform the Morjarias of the matters listed.

550. I agree that the Claimants' general pleading relating to "matters material to the JV" is too wide to allow a defence to be pleaded. However, insofar as the PoC does list particular matters as being points on which the Morjarias should have been informed, the pleading is fairly made.

551. As to the denial that Mr Mirza or Tydwell were under any obligation in respect of the matters listed, I agree that Tydwell, which was not a party to the JVA or to any other contract where the Morjarias were a party, was under no such contractual obligation. However, Mr Mirza had accepted under the JVA an obligation to keep Mr and Mrs Mirza "fully informed on the progress of the Joint Venture at all times"; "to act in good faith"; and "to do all things necessary and desirable to give effect of the spirit and intention of [the JVA]". This obligation would, in my view, at least extend to telling Mr and Mrs Morjaria when new agreements were entered into that would involve expense on behalf of the JV.

552. I think it is likely that Mr Mirza considered that the Directors were keeping Mr Morjaria up-to-date and this, coupled with emails from Mr Morjaria in the early years suggesting he was relaxed about not being provided with details of fees from subcontractors, perhaps provides a reasonable excuse for not disclosing these matters. They do not, however, provide any excuse for hiding profits that Tydwell was making by taking sums apparently for third-party costs whereas in fact they involved marking up those third-party costs.

553. As to subparagraph (j) of the PoC, the Defendants deny any wrongdoing and they deny that the contractual or alleged fiduciary duties pleaded at Paragraph 78 would require Mr Mirza or Tydwell to disclose their alleged wrongdoing.

554. I have found wrongdoing in relation to the Invoice Representations passing off profits that Tydwell intended to keep as third-party costs and in relation to the Cladding Representations passing off a decision to take an increased profit (whether or not Tydwell considered this justified by an increased perception of risk) as a claim for increased costs necessary to complete the project. These involved breaches of the contractual duties owed by Mr Mirza to the JV Entities and to Mr and Mrs Morjaria and a breach of the fiduciary duties I have found owing by Mr Mirza and Tydwell to the JV Entities.

D. Unjust Enrichment

i. The elements of a claim for unjust enrichment

555. The elements of a claim in unjust enrichment were recently considered by the Supreme Court in *Barton v Morris* [2023] UKSC 3; [2023] AC 684 (see at [77] and [228]). The case largely centred around the relationship between an unjust enrichment claim and the question of express or implied terms of contract. However, it provides a restatement of some well-established principles as to the elements of a claim for unjust enrichment.

556. The court first considers three questions: (i) has the defendant been enriched? (ii) was the enrichment at the claimant's expense? (iii) was the enrichment unjust? If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence, such as change of position.

557. A further helpful summary of the principles can be found in *Terna Energy Trading doo v Revolut Ltd* [2024] EWHC 1419 (Comm), [2024] Bus LR 1401 at [23] onwards. As noted in that case at [28], *in Investment Trust Companies v HMRC* [2018] AC 275 (SC), Lord Reed (with whom all the other judges agreed) stated at [42]:

> "The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases. In carrying out that analysis, it is important to have at the forefront of one's mind the purpose of the law of unjust enrichment. As was recognised in [*Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176], para 23, it is designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted. That is why restitution is usually the appropriate remedy".

ii. The Claimants' pleadings in relation to this cause of action

558. The claim for unjust enrichment is pleaded at paragraphs 82 to 83 of the PoC as follows:

> "82. By receipt of the Misappropriated Sum, Tydwell and Redwire (and any of the other Defendants that have received the proceeds of those sums) have been enriched at the expense of the relevant JV Entity that made each payment.
>
> 83. The enrichment was unjust in that:
>
> a. Those sums were paid by the JV Entities pursuant to a mistake, being that the sums were required for and would be used to defray costs or expenses incurred by Tydwell; further or alternatively, that the sums were properly payable to Tydwell under the JVA or the JV/Tydwell Contracts or otherwise.
>
> b. Further or alternatively, the consideration for the payment of those sums has entirely failed. Redwire had no right to the

> payments. The right of Tydwell to retain the sums is conditional upon those sums being required and properly used to defray costs and expenses incurred by Tydwell.
>
> c. Further or alternatively, the enrichment was as a result of the wrongdoing, being the Invoice Representations and/or Cladding Representations and/or the breaches of fiduciary duty (and/or dishonest assistance in those breaches) as set out herein."

iii. The Defence and Counterclaim

559. In the Defence and Counterclaim, the Defendants pleaded that paragraph 82 of the PoC is denied for the reasons given in relation to paragraph 83 below. Further or alternatively, it is denied that any claim in unjust enrichment is available in circumstances where it would conflict with the terms of the contracts pursuant to which the sums were paid.

560. Paragraph 83 is denied. The denial is supported by the following reasoning:

> "88.1 As to Subparagraph (a), it is to be inferred that the JV Entities made no such mistake but believed such sums to be properly payable under the terms of the JV/Tydwell Contracts and the Preliminary Works Agreement (as was the case). Further or alternatively it is denied that the alleged belief of the JV Entity as to the basis on which the sums were required is capable of constituting a mistake for the purposes of a claim in unjust enrichment.
>
> As to Subparagraph (b):
>
> (a) As to the first and second sentences, the consideration was the performance by Tydwell and Redwire of their obligations under the JV/Tydwell Contracts, Preliminary Works Agreement and Redwire Contract.
>
> (b) The third sentence is denied. The basis for such alleged conditionality is not understood.

561. The wrongdoing alleged in Subparagraph (c) is denied for the reasons set out elsewhere within the Defence and Counterclaim.

iv. Analysis

562. Standing back from the pleadings and considering the four elements of a claim in unjust enrichment, I find as follows.

563. In relation to the first question: has the defendant been enriched, it seems to me that the answer to this is clear. Tydwell and/or Redwire obtained amounts in excess of its contractual entitlement under the Tydwell/JV Contracts or the Redwire Contract. To that extent, Tydwell has been enriched. To the extent that Redwire received any such sums, it too has been enriched. Mr Mirza is enriched to the extent that his interest in Tydwell or Redwire was made more valuable or to the extent that he was able to

withdraw money from Tydwell or Redwire as a result of Tydwell's or Redwire's enrichment.

564. In relation to the second question: was the enrichment at the claimant's expense, it seems to me that the answer to this is equally clear - this enrichment came at the expense of the relevant JV Entity and, to the extent that it was funded by Mr Morjaria, at his expense also.

565. In relation to the third question: was the enrichment unjust? At first sight yes, since the enrichment arose out of misrepresentations as I have found and in the case of Mr Mirza in breach of contractual duties of good faith and/or to make disclosures and in the case of Mr Mirza and Tydwell, breach of fiduciary duty.

566. I must consider, however, the arguments put forward by the Defendants in their closing skeleton argument.

567. They argue that the potential "unjust" factors on which the Claimants rely comprise:

i) **Mistake:** The Claimants say that the sums were paid to the JV Entities pursuant to a mistake, being that the sums were required to defray costs or expenses incurred by Tydwell, or that they were properly payable under the JVA or the JV/Tydwell Contracts.

ii) **Failure of consideration** (properly called, "failure of basis"): Redwire had no right to the payments, and Tydwell's right to retain the sums is conditional on those sums being required and properly used to defray costs and expenses incurred by Tydwell.

iii) **Wrongdoing**: The enrichment was a result of the Invoice Representations and/or Cladding Representations and/or breaches of fiduciary duty (and/or dishonest assistance in those breaches).

568. The Defendants argue that there is a fatal difficulty with the claim under this heading in its interaction with the relevant contracts between the parties. They argue that where a benefit has been transferred pursuant to a contract which is subsisting or which has been discharged by performance, there is simply no room for a claim in unjust enrichment, because that would subvert the parties' own allocations of risk and valuation as expressed in the contract and quote *Goff & Jones, The Law of Unjust Enrichment* 10th Ed., at [3-12].

569. They also cite in support of this proposition, *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930, [2012] QB 244. The central finding of Etherton LJ at [30] was that "the general policy of refusing restitutionary relief for unjust enrichment against a defendant who has benefited from the plaintiff's services rendered pursuant to a contract to which the defendant was not a party" to be a "sound legal policy". Applied to our current case, I think this maxim provides a reason why Mr Mirza could not be the subject of a claim in unjust enrichment to the extent that this is seen to arise under a contract between one of the JV Entities and Tydwell.

570. The Defendants cite also, *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [2021] CLC 583, at [133], where Timothy Lloyd LJ states that:

> "where the basis of the consideration is expressly and unconditionally spelt out on the face of a valid and subsisting contract, as here, there is no proper scope for inquiring into an alternative basis that is plainly contrary to the express basis freely agreed between the parties".

571. Finally, they refer to *Barton v Morris* [2023] UKSC 3, [2023] AC 684, per Lady Rose JSC at [88]-[106]. Here, I consider the essential ratio of the case to be that stated at [96]:

> "When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust. The "silence" of the contract as to what obligations arise on the happening of the particular event means that no obligations arise as Lord Hoffmann made clear in *Belize* cited earlier. This excludes not only an implied contractual term but a claim in unjust enrichment."

572. On the basis of these various dicta, the Defendants argue that Tydwell's entitlement to be paid in return for the provision of its services is governed by the contracts which it entered into with the JV Entities. Those contracts were never terminated for breach; they were discharged by performance. To seek to unwind payments made pursuant to those contracts would be to subvert them, which the law of unjust enrichment will not do.

573. The Defendants rightly point out that the unjust factors relied upon by the Claimants in their pleadings are mistake; failure of consideration/failure of basis; or wrongdoing.

Mistake

574. The Defendants argue in their skeleton argument that there was no such mistake on the part of the JV Entities, who believed that the sums were properly payable to Tydwell under the terms of the contracts they concluded with Tydwell. In any event, the mistake sought to be relied upon by the Claimants is not an actionable mistake for the purposes of unjust enrichment, because that would cut across the contractual relationship between the parties. They refer here to *Goff & Jones* at [9-02] and at [9-98] where it is said:

> "Where a benefit is mistakenly conferred by one party on another under a contract, a claim in unjust enrichment will commonly fail even if the mistake would otherwise support such a claim. As we explain in Ch.3, the contract will bar the claim, to the extent that it entitles the defendant to receive the relevant benefit. For the claim to succeed, the claimant will need to show that the contract is invalid, being either non-existent, void or voidable. This is not a matter for the law of unjust enrichment, but the law of contract."

575. They point out that as Lord Sumption explained in *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 at [18]:

> "an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation".

576. I agree that a mistake by itself would not form the basis for an unjust enrichment claim.

Failure of basis

577. The Defendants also argue that the Claimants' ground based on failure of basis cannot succeed as the consideration for the payment was the provision of services by Tydwell, which did not fail, and the contracts provide the justifying grounds for the payments and thus rule out a claim in unjust enrichment. They cite *Goff & Jones* at [12-06].

578. I agree with the Defendants on this point.

Wrongdoing

579. I part company with the Defendants' argument, however, when we come to consideration of the final "unjust" element pleaded by the Claimants - that of wrongdoing. I have already determined that the Claimants are correct that the enrichment was as a result of wrongdoing in relation to the Invoice Representations and/or Cladding Representations and/or the breaches of contract and fiduciary duty. It would be unjust for Tydwell, Redwire (to the extent that it received any of the Misappropriated Sum), or (to the extent that any of these monies were passed on by Tydwell or Redwire to Mr Mirza or for his benefit) Mr Mirza, to be able to retain amounts that they receive through deception. The fact that these amounts were paid purportedly under a contract is no defence to this to the extent that these amounts were not due under any of the relevant contracts as I have already found. This element of wrongdoing distinguishes the facts here from the cases mentioned above which were solely based on contract.

v. Conclusion

580. On the basis of the analysis above, I have found that there is a good claim in unjust enrichment against Tydwell and Mr Mirza ((and Redwire, to the extent that it received any of the Misappropriated Sum) in favour of the JV Entities to the extent that the JV Entities were presented with invoices that falsely represented that amounts were due that were not due.

E. Dishonest Assistance

i. The elements of a claim for Dishonest Assistance

581. The elements of a claim in dishonest assistance were summarised by Cockerill J in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [82]:

i) A fiduciary obligation (or trust obligation) owed by the fiduciary (or trustee) to the claimant.

ii) A breach by the fiduciary (or trustee). The breach need not be dishonest; what matters is the nature of the fault of the third party.

iii) The third party must have assisted in, induced or procured the breach. There is no requirement to show that the assistance provided would inevitably have resulted in the beneficiary suffering a loss; but the assistance must have had some causative effect and have played more than a minimal role in the breach being carried out.

iv) The third party must have acted dishonestly in providing the assistance.

582. The requirement of dishonesty in the context of a claim for dishonest assistance was recently considered by the Court of Appeal in *Group Seven Ltd v Nasir* [2019] EWCA Civ 614 ("***Group Seven***"), in the light of the Supreme Court's decision in *Ivey v Genting Casinos (UK) t/a Crockfords* [2017] UKSC 67. At [58] of *Group Seven*, the Court summarised the test as follows:

> "In the light of Ivey [2018] AC 391, it must in our view now be treated as settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in [*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378], and that there is no room in the application of that test for the now discredited subjective second limb of the Ghosh test. That is not to say, of course, that the subjective knowledge and state of mind of the defendant are unimportant. On the contrary, the defendant's actual state of knowledge and belief as to the relevant facts forms a crucial part of the first stage of the test of dishonesty set out in *Tan*. But once the relevant facts have been ascertained, including the defendant's state of knowledge or belief as to the facts, the standard of appraisal which must then be applied to those facts is a purely objective one. The court has to ask itself what is essentially a jury question, namely whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people."

583. The reference to *Ghosh* is referring to the test for dishonesty found in *R v Ghosh* [1982] QB 1053, which had earlier been held to apply in the criminal law, which required not only the application of an objective standard of honesty, but also (the now discredited second limb) subjective knowledge by the defendant that what he was doing would be regarded as dishonest by honest people.

584. There are therefore two stages to the test:

i) First, the court must ascertain subjectively the actual state of the defendant's knowledge or belief as to the facts.

ii) Once the actual state of mind as to knowledge or belief as to facts is established, the question whether the defendant's conduct was dishonest is an objective one, applying the standards of ordinary decent people.

585. As to "blind-eye" knowledge, this can be imputed to the defendant, but only if two conditions are satisfied:

i) the existence of a suspicion that certain facts may exist, which is firmly grounded and targeted on specific facts, and

ii) a conscious decision to refrain from taking any step to confirm their existence, which must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe: *Stanford International Bank Ltd v HSBC Bank plc* [2021] EWCA Civ 535, [2021] 1 WLR 3507 at [41] ("***Stanford***").

586. Where allegations of dishonesty are made against corporations, large or small, that must be evidenced by the dishonesty of one or more natural persons, because as Sir Geoffrey Vos MR explained in *Stanford* at [47]:

> "the rules that have been laid down as to what amounts to dishonesty for the purposes of dishonest assistance cannot be circumvented…one cannot avoid the subjective dishonesty stage of the test in order to proceed directly to the objectively dishonest stage…The subjective dishonesty that needs to be established, after consideration of all the facts, must either be the dishonesty of a person within the corporate or the blind-eye knowledge of such a person":

587. If the requirements are satisfied, the dishonest assistant is liable:

i) to compensate for the losses resulting from the fiduciary's breach of duty and/or

ii) to account personally for any profits they themselves made as a result of the assistance (although this is subject to the usual common law rules of causation, remoteness and measure of damages by analogy, and the court's discretion): *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499 at [105].

ii. The Claimants' pleadings relating to this cause of action

588. The Claimants plead this cause of action at paragraphs 84 and 85 of the PoC as follows:

> "84. The breaches of fiduciary duties by Mr Mirza and/or Tydwell set out in section IV(3)(ii) above were procured, induced or assisted by each other (by reason of Mr Mirza being the director, owner and controlling mind of Tydwell) and/or by Redwire and/or Boomzone and/or by Mr John and/or Mr Ameer Mirza and/or Mrs Mirza by reason of their positions within Tydwell and their involvement in the matters alleged as particularised above.
>
> 85. The Defendants thereby acted dishonestly in that their knowledge of the relevant matters was such as to render their conduct contrary to normally acceptable standards of honest conduct."

589. The reference to section IV(3)(ii) refers back to paragraph 78 of the PoC, which I have reproduced at [532] above ("**Paragraph 78**").

iii. The Defence and Counterclaim relating to this cause of action

590. These allegations are denied in the Defence and Counterclaim. In summary it is pleaded that:

i) No particulars are given of the assistance alleged to have been provided by any of these Defendants and the allegation against him falls to be struck out.

ii) As to the allegation of dishonest assistance against Mr Mirza and Tydwell, the Defendants plead that the allegation that either of them procured, induced or assisted the alleged breach of fiduciary duty by the other solely as a result of Mr Mirza being a director, owner and controlling mind of Tydwell is unsustainable as a matter of law.

iii) As to the allegations of dishonest assistance:

a) against Boomzone, Boomzone was only incorporated on 2 April 2016 and cannot therefore have assisted in alleged breaches of fiduciary duty from 2007;

b) against Redwire, Redwire was only incorporated on 16 November 2010 and cannot therefore have assisted in alleged breaches of fiduciary duty from 2007;

c) against Ameer, Ameer is alleged to have "worked for Tydwell" since "around mid-2016" and cannot therefore have assisted in alleged breaches of fiduciary duty from 2007 by reason of his "position within Tydwell".

iv) The Defendants deny that any of the Defendants acted dishonestly and plead further that paragraph 85 of the PoC fails to identify the "relevant matters" of which the Defendants are said to have had knowledge or the basis on which each of them is said to have had knowledge of the same and so falls to be struck out accordingly.

iv. The Reply

591. The Claimants responded to some of these points in the Reply:

i) As regards the allegation of dishonest assistance of Tydwell by Mr Mirza, they explained that it is not alleged that Mr Mirza procured, induced or assisted the alleged breaches of fiduciary duty by Tydwell "solely" as a result of being a director, owner and controlling mind of Tydwell. Mr Mirza procured, induced or assisted the breaches of fiduciary duty by Tydwell alleged at Paragraph 78 in that each of those acts was either carried out by him (in the case of those pleaded Invoice Representations and Cladding Representations made by him on behalf of Tydwell) or were carried out by other employees and agents of Tydwell acting on his instruction or encouragement, that being inferred from Mr Mirza's role as director, owner and controlling mind of Tydwell.

ii) As regards the allegation of dishonest assistance of Mr Mirza by Tydwell, they explained similarly that it is not alleged that Tydwell procured, induced or assisted the alleged breach of fiduciary duty by Mr Mirza "solely" as a result of Mr Mirza being a director, owner and controlling mind of Tydwell. Tydwell, they say, procured, induced or assisted the breaches of fiduciary duty by Mr Mirza alleged at paragraph 78 of the PoC by raising the Invoices, making the Requests and entering into the JV/Tydwell Contracts and thus providing the means by which the Misappropriated Sum was extracted.

iii) As regards the allegation of dishonest assistance of:

a) Redwire, this is explained to be the assistance provided by the raising of invoices pursuant to which part of the Misappropriated Sum was paid;

b) Mr Ameer Mirza and Ms Mirza "as particularised above", this is explained to be the assistance pleaded at 6, 9, 57, 58, 72 and 73 of the PoC.

592. In summary, the relevant points within:

i) paragraph 6 are the points that Mrs Mirza was a director of Tydwell at the relevant time and had a 25% share of Tydwell - this of itself is in my view an unsound basis for establishing a dishonest assistance claim;

ii) paragraph 9 are the points that Ameer is the son of Mr and Mrs Mirza, had worked for Tydwell, Boomzone and Redwire from around mid-– 2016 and was a director from 20 February 2019 to 9 September 2019 - again these points do not provide a sound basis for establishing a dishonest assistance claim;

iii) paragraphs 57 and 58 are reproduced at [331] above and I have discussed them in the ensuing paragraphs;

iv) paragraphs 72 and 73 are summarised at [474] above and again are discussed in the ensuing paragraphs.

593. The Reply does not make any response to the Defendants' point that paragraph 85 of the PoC fails to identify the "relevant matters" of which the Defendants are said to have had knowledge or the basis on which each of them is said to have had knowledge of the same.

v. Analysis

594. I have already found that both Mr Mirza and Tydwell had fiduciary obligations towards the JV Entities and that Mr Mirza had contractual obligations towards Mr and Mrs Morjaria and that these obligations were breached.

595. The next question is whether the allegations are correct that the various parties who have been accused of this did indeed assist in, induce or procure the breach, in a manner that had some causative effect and played more than a minimal role in the breach being carried out.

596. In their closing written submissions, the Defendants repeat the point that there is no proper particularisation of what acts of assistance are alleged as against the alleged dishonest assistants. In view of the clarification given within the Reply, I consider that this point is misplaced. It is clear enough what is being alleged.

597. As to whether these matters had had some causative effect and played more than a minimal role in the breach being carried out, I find as follows:

i) as regards the allegation that Mr Mirza assisted in, induced or procured the breach by Tydwell of its fiduciary duties, this point seems to me to be amply made out: Mr Mirza was the prime mover in causing Tydwell to breach its fiduciary duties as I have found them to be breached above;

ii) as regards the allegation that Tydwell and/or Redwire provided dishonest assistance to Mr Mirza, this point also seems to me to be amply made out: Tydwell and Redwire (to the extent that it did so), in sending out invoices and requests for payments that included the misrepresentations that I have found above, were crucially instrumental in maintaining the deceit and breach of fiduciary duties that I have already found to have taken place;

iii) as regards the case in this regard against Mr John, Mr John was clearly highly instrumental in compiling and sending out invoices and requests for payments that included the misrepresentations, and as such played a substantial role in the breach being carried out;

iv) as regards the case in this regard against Mrs Mirza, in my view this case is not made out: if she had any involvement at all in the compilation of invoices or demands for payment, there is no evidence that this goes beyond minor presentation of spreadsheets and as such would not have involved more than a minimal role in the breach being carried out. The fact that she was involved in dealing with subcontractors is not material to the breach;

v) as regards the case in this regard against Ameer, my analysis is the same: whilst he may have had a little more involvement than his mother on some occasions (we have evidence of only one), there is nothing in the evidence to show that he had anything other than a minimal role in the breach or that any assistance he rendered had any causative effect.

598. Finally, I turn to the final, and in many ways the most crucial, element of the tort: whether the various parties have acted dishonestly.

599. As we have seen, paragraph 85 of the PoC pleads this matter in a very general way on the basis that the Defendants' "knowledge of the relevant matters was such as to render their conduct contrary to normally acceptable standards of honest conduct". The Defendants complained about this pleading within the Defence and Counterclaim and the pleading was not further particularised within the Reply.

600. Whether this pleading was sufficient needs to be considered separately in relation to each of the relevant Defendants.

601. As regards Mr Mirza and Tydwell and Redwire (each of which companies must be regarded as having the same knowledge as Mr Mirza as he was the controlling mind of each), I consider that it is obvious what is being referred to here. Mr Mirza was clearly aware of the provisions of the JVA and of the JV/Tydwell agreements and all the circumstances causing him and Tydwell to have fiduciary duties. He went out of his way to conceal the value of third-party invoices that underlined the demands for payment that he made. The allegations of dishonesty against him are made throughout the PoC. Accordingly, against him and against Tydwell and Redwire, the allegation of dishonesty has been adequately pleaded and has been proved.

602. As regards Mr John, I note that there is no evidence or pleading that he had a sufficiently intimate knowledge of the JVA or of the other circumstances creating fiduciary duties on the part of Mr Mirza or Tydwell. However, this of itself, does not protect him from the claim for dishonest assistance if he knew that he was assisting in a dishonest scheme: see *Group Seven* at [44] where the court quotes Lord Millett in *Grupo Torras SA v Al-Sabah* [1997] CLC 1553 at [135] where he says:

> "It is obviously not necessary that he should know the details of the trust or the identity of the beneficiary. … It may be sufficient that he knows that he is assisting in a dishonest scheme."

603. As to what knowledge Mr John had that rendered his part in these affairs obviously dishonest, I do not think it is established (or pleaded) that he was aware of any fiduciary duty. However, it is more likely than not that he was aware of the terms of the contracts between Tydwell and the JV Entities and that in presenting the invoices and requests for payment in the way that he did, he knew that he was part of an arrangement that was hiding from the JV Entities the true profit that Tydwell was taking. This I consider is sufficient to establish dishonesty and Mr John has put forward no defence to contradict this finding.

604. As regards Mrs Mirza and Ameer, as I have found that they had insufficient involvement to allow an accusation of dishonest assistance to succeed against them, I perhaps do not need to deal with the question of their dishonesty. However, the fact that there has been no particularisation of what knowledge they are said to have possessed that rendered their involvement (such as it was) dishonest provides an additional reason why the Claimants may not succeed in relation to this dishonest assistance against these defendants.

vi. Conclusion

605. On the basis of the analysis above, I have found that there is a good claim against Tydwell, Redwire and Mr Mirza for dishonest assistance of one another in relation to each party's breaches of fiduciary duty. I also find Mr John to be liable for dishonest assistance in relation to such breaches. However, I make no such finding against Mrs Mirza or Ameer.

F. Knowing Receipt

i. The elements of a claim for knowing receipt

606. This cause of action was summarised by Lord Sumption in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 at [31], as follows:

> "The essence of a liability to account on the footing of knowing receipt is that the defendant has accepted trust assets knowing that they were transferred to him in breach of trust and that he had no right to receive them. His possession is therefore at all times wrongful and adverse to the rights of both the true trustees and the beneficiaries. No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately."

607. A summary of the requirements for a claim in knowing receipt is set out in *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm) at [175] (by reference to the summary made by Hoffmann LJ (as he then was) in *El Ajou v Dollar Land Holdings* [1994] 2 All E.R. 685 at 700). Three requirements are set out:

i) a disposal of the claimant's assets in breach of fiduciary duty;

ii) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant; and

iii) knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty. There is no requirement of dishonesty; instead, the question is whether the defendant had such knowledge as to render it unconscionable for him to retain the benefit of the receipt (see also *BBCI v Akindele* [2000] Ch 437 at 455F).

608. The nature of a claim in knowing receipt was recently considered in detail by the Supreme Court in *Byers v Saudi National Bank* [2024] AC 1191, in which it was held that a claim in knowing receipt depended upon the claimant having a continuing equitable proprietary interest in the property transferred to the defendant at the time it was received by the defendant, so that if, by the time the defendant received the property, the claimant's equitable proprietary interest had been extinguished or overridden (by, for example, a transfer to "equity's darling" - a *bona fide* purchaser for value without notice), a claim in knowing receipt would fail.

609. The knowledge of a person who has beneficially received money is to be evaluated at the time of the receipt. If at that time the recipient gave value and did not know of the circumstances relating to the provenance of the money, he will be a *bona fide* purchaser for value, with the consequence that the claim will fail: see Stafford QC et al., *Fiduciary Duties, Directors and Employees*, 2nd edition ("***Stafford***"), at section 7.136.

610. Where knowing receipt is established, the claimant may bring either a proprietary claim by following the trust property wrongly transferred or tracing its value into something

else substituted for it, or a personal claim against the knowing recipient to account in equity. The latter is usually only necessary where following or tracing has been rendered impossible by dissipation or loss of the identifiable asset: *Arthur v The Attorney-General of the Turks & Caicos Islands* [2012] UKPC 30 at [34]. The proprietary claim arises because the knowing recipient is a constructive trustee, so that if he disposes of the money or property, he is liable to restore it or account for its value: see *Stafford* at section 7.100.

ii. The Claimants' pleadings relating to this cause of action

611. The Claimants plead this cause of action at paragraphs 86 and 87 as follows:

> "The Misappropriated Sum was transferred in breach of the fiduciary duties set out above. In the premises, those sums were received by Tydwell and Redwire (and any of the Defendants that have received the proceeds of those sums) in circumstances in which it would be unconscionable to permit those parties to retain them.
>
> 87. Further or alternatively, the Misappropriated Sum is held by Tydwell and Redwire (and/or any of the Defendants that have received the proceeds of those sums) on constructive trust."

iii. The Defence relating to this cause of action

612. These allegations are denied in the Defence and Counterclaim. In summary:

i) It is denied that the Misappropriated Sum was transferred in breach of any fiduciary duty. I have already established that the Defendant's denial on this point is not correct.

ii) The Claimants' pleading fails to identify which circumstances are relied on as rendering it unconscionable for Tydwell or Redwire to retain the sums received by them (or unconscionable for any of the other Defendants who are alleged to have received the proceeds of such sums to retain them). It is liable to be struck out accordingly. Without prejudice to that pleading, it is denied that it would be unconscionable to permit Tydwell or Redwire to retain sums to which they were contractually entitled.

iii) Paragraph 87 is denied, and the Defendants repeat their denial that the Misappropriated Sum was transferred in breach of any fiduciary duty.

613. No further pleading was made by the Claimants in relation to this cause of action within the Reply.

iv. Analysis

614. Again, it is relevant that I have already found that both Mr Mirza and Tydwell had fiduciary obligations towards the JV Entities and that these fiduciary obligations were breached. The first two requirements of this cause of action are therefore present. There has been:

i) a disposal of the JV's assets in breach of fiduciary duty;

ii) the beneficial receipt by Tydwell and (to the extent that any of the Misappropriated Sum was received by Redwire) Redwire of assets that fall within what I have found to be the Misappropriated Sum.

615. As to the third requirement, knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty. It is clear from the circumstances I have already outlined that Mr Mirza would have had that knowledge. As Mr Mirza was the controlling mind of both Tydwell and Redwire I conclude that they also have that knowledge. Insofar, however, as the Claimants are making a claim for knowing receipt against any other of the Defendants, however, I do not think that the knowledge element of the claim has been sufficiently pleaded or proved.

616. In their written closing submissions the Defendants argued that Tydwell and Redwire were entitled to receive the sums that they did as consideration for the services provided, but I have already found in my analysis of the breach of contract claim that they received amounts that were in excess of what they were entitled to contractually, and that they obtained such amounts as a result of misrepresentations in circumstances of those misrepresentations involved breaches of fiduciary duties. I therefore reject this argument.

617. The Defendants make a pleading point that the Claimants have not adequately pleaded the necessary knowledge. In this case (where the cause of action is not dependent on fraud as such) I am not minded to take this point in favour of Tydwell, Redwire or Mr Mirza. The Claimants' pleading refers to "circumstances in which it would be unconscionable to permit those parties to retain them" and this reference is sufficient for the Defendants to have understood sufficiently to have realised that the circumstances being referred to in this case must have included knowledge of receipt of a sum of money transferred in breach of fiduciary duties.

618. However, in relation to any other of the Defendants, I consider that some clearer pleading was necessary for them to have been able to understand the case made against them in this regard and that, together with the fact that I do not think the Claimant has done enough to show that any other of the Defendants had a sufficient understanding of the fiduciary duties arising as a result of the JVA and the relationship between the JV Entities on the one hand and Mr Mirza and Tydwell on the other hand, leads me not to make any finding of knowing receipt in respect of them.

619. In conclusion on this point, to the extent that Mr Mirza, Tydwell or Redwire have received any of the Misappropriated Sum arising from the breach of duty of the other of them, they are liable for knowing receipt.

G. Unlawful Means Conspiracy

i. The elements of an unlawful means conspiracy claim

620. The elements needed to establish an unlawful means conspiracy were summarised by Nourse LJ in *Kuwait Oil Tanker SAK v Al Bader* [2000] 2 All E.R. 271 (Comm) at [108] as follows:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

621. The principles applicable to different elements of the tort are set out in detail in *Lakatamia Shipping Co Limited v. Su* [2021] EWHC 1907 (Comm) at [76]-[106] and were briefly summarised by Henshaw J in *Ivy Technology v Martin* [2022] EWHC 1218 (Comm) as follows:

> "(i) Combination
>
> 582. The following principles were set out in *Lakatamia* in relation to the nature of the combination required for a claim in conspiracy:
>
> i) The combination must be to the effect that at least one of the conspirators will use unlawful means (§ 830).
>
> ii) It is unnecessary, in order for a combination to exist, that it be contractual in nature or that it be an express or formal agreement (§ 83).
>
> iii) It is enough for liability to arise that a defendant be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. However, the conspirators do not need to have exactly the same aim in mind (§ 85).
>
> iv) Direct evidence of the combination is not essential. It is also unnecessary for the claimant to pinpoint precisely when or where it was formed (§ 86).
>
> v) Participation in a conspiracy is infinitely variable and may be active or passive. The courts recognise that it will be rare for there to be evidence of the agreement itself (§§ 86-87).
>
> 583. It is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively, in the conspiracy. Being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned: *Lakatamia* § 96.
>
> 584. Counsel for Mr Bell added also referred to the principle that to establish a conspiracy to commit deceit it is necessary to

> establish that deceit was committed and that it was part of a concerted action taken pursuant to the agreement:
>
> (ii) Intention
>
> 585. The intention to injure the claimant need not have been the defendant's main or only purpose in order for liability to arise. This element will be satisfied simply where the gain to the conspirators is necessarily at the expense of loss to the victim: Lakatamia § 91.
>
> (iii) Knowledge
>
> 586. The parties appeared to agree that, as found by Arnold and Phillips LJJ in *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 §§ 139 and 171, "knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy".
>
> 587. To this counsel for Mr Bell sought to add the proposition that the defendant must know all the facts which make the transaction unlawful (relying on *The Racing Partnership*), and that the requirement for knowledge of all the facts that make a transaction unlawful must necessarily include knowledge of any contractual provision the breach of which is alleged to constitute the unlawful means.
>
> [Henshaw J went on to confirm and explain his agreement with this proposition]
>
> …..
>
> 589. "Blind-eye" knowledge will be sufficient: The Racing Partnership § 159. Blind-eye knowledge requires a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence: *Group Seven & Ors v Nasir* [2019] EWCA Civ 614; [2020] Ch 129 §§ 59-60.
>
> (iv) Unlawful means
>
> 590. A breach of contract can constitute unlawful means: The Racing Partnership § 148. The tort of deceit may also constitute unlawful means."

622. Cockerill J in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [94] provided another summary, adopted in *E D & F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) at [466]. I need not repeat all that summary, but it is worthwhile adding to the summary given by Henshaw J that I have reproduced above, the following two points from her summary:

i) It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of.

ii) In relation to intent to injure, an intention to injure another (which need not be the sole or predominant intention) may be inferred from the primary facts, but foresight that the unlawful conduct may or will probably damage the claimant is not sufficient.

623. A person is not liable in conspiracy if the causative act is something which the party doing it believes he has a lawful right to do: *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303.

624. In the case before me, the unlawful means relied upon are the allegations of deceit and of dishonest assistance (see the PoC at paragraph 90). It is established that deceit can constitute unlawful means for the purposes of conspiracy. Whether equitable wrongs can constitute unlawful means is not settled, having been left open by the Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19; [2020] AC 727 ("***Khrapunov***") (see at [15]). However, for present purposes I am informed that the Defendants accept that dishonest assistance can constitute unlawful means.

ii. The Claimants' pleadings relating to this cause of action

625. The Claimants plead this cause of action (at paragraphs 88 to 90 of the PoC) as follows:

> "88. By virtue of the facts and matters set out above, on a date or dates no earlier than the inception of the Joint Venture, it is to be inferred that two or more of the First to Seventh Defendants agreed and/or conspired and/or entered into a common design ("the Conspiracy") to extract the Misappropriated Sum through the use of false and dishonest invoicing as set out above. Pending disclosure, the facts and matters set out above, from which the combination is to be inferred are as follows:
>
> a. The Mirzas and Mr Ameer Mirza being members of the same immediate family and being directors and/or shareholders of Tydwell, Redwire, Boomzone and Kingmead as pleaded at paragraphs 6, 8 to 11 and 60(f) above.
>
> b. Tydwell and Redwire being the entities which directly gained from the Misappropriated Sum as recipients and Mr Mirza (or, with regard to Tydwell, the Mirzas) being the natural persons who ultimately benefited from that sum as sole shareholders of Tydwell and Kingmead (at all material times) and Redwire (until 5 November 2019) as pleaded in paragraphs 6 and 11 and 60(f) above.
>
> c. The role of Mr Mirza, Mrs Mirza and Ameer Mirza with regard to the Invoice Representations and Cladding Representations as pleaded in paragraphs 56 to 58 and 71 to 73

> above and the further paragraphs referred to in paragraph 35 of the Reply and Defence and Counterclaim to Counterclaim.
>
> d. The role of Mr John with regard to the Invoice Representations and Cladding Representations as pleaded in paragraphs 52, 56, 70 and 71 above.
>
> e. The knowledge and intention of Mr Mirza, Mrs Mirza, Ameer Mirza and Mr John being properly attributed to Redwire, Tydwell and Boomzone by reason of their respective roles at those companies as set out in paragraphs 6 to 11 above.
>
> 89. The Conspiracy was first developed between the Mirzas, Tydwell and Mr John. Mr Ameer Mirza joined the conspiracy by no later than October 2016. Boomzone and Redwire became a conspirator from or shortly after the time of their incorporation.
>
> 89A. The Conspiracy was carried out with the intention to cause harm to the Claimants by the extraction of the Misappropriated Sum. Pending disclosure, the intention is to be inferred from the matters set out in sub-paragraphs 88(a) to (e) above.
>
> 90. The Conspiracy involved the use of unlawful means as set out in paragraphs 77 to 81 and 84 to 85 above."

iii. The Defence and Counterclaim relating to this cause of action

626. The Defendants deny there was a conspiracy. They complain that the meaning of the expression "inception of the Joint Venture" is uncertain so that the Defendants cannot plead to it pending better particulars. They complain also that paragraph 88 of the PoC fails to identify when it is said that the alleged conspiracy came to an end.

627. They deny that any of the matters set out in subparagraphs 88(a) to (e) support an inference of conspiracy and (one detects a perhaps justified note of weariness creeping in at this point) that insofar as those subparagraphs cross refer to other paragraphs of the Claimants' pleadings, the paragraphs of the Defendants' pleadings which reply to those paragraphs are repeated here. They take a similar approach in relation to paragraph 90.

628. They also argue that the purported plea of conspiracy is defective and liable to be struck out because there is no plea of intention to cause the Claimants (or any of them) harm.

iv. Analysis

629. Again, it is relevant that I have already found that there were fraudulent representations and that both Mr Mirza and Tydwell had fiduciary obligations towards the JV Entities and that these fiduciary obligations were breached. One of the requirements is therefore present. At least one of the putative conspirators has used unlawful means.

630. The question whether there has been a combination is a difficult one.

631. The Defendants make a strong defence within their written closing submissions. They say that the basis on which the Claimants seek to infer a conspiracy is very weak. It is alleged to be founded on (a) the Mirzas being members of the same family, (b) Tydwell, Redwire and the Mirzas being the parties who ultimately benefited from the "Misappropriated Sum", (c) the Mirzas' respective roles in the Invoice Representations, (d) Mr John's role in the Invoice Representations and (e) the knowledge and intention of the Mirzas and Mr John being "properly attributable to Redwire, Tydwell and Boomzone by reason of their respective roles at those companies".

632. As to the involvement of Mrs Mirza and Ameer, I agree that the case here is very weak. I do not consider that the Claimants have shown that either of them had sufficient involvement to allow an accusation of dishonest assistance to succeed against them. Also, I do not think it has been established to the requisite standard that they knew that there were any misrepresentations going on in relation to the invoicing and therefore they do not know all the facts that rendered the transaction unlawful.

633. Neither do I think there are any circumstances that constituted blind-eye knowledge on their part. Most likely, to the extent that they thought about the invoicing arrangements, they considered that Tydwell and Redwire were doing things that they had a lawful right to do. In the absence of any findings on this point, the other matters concerning their being members of the same family and involved in the family business are not sufficient to make them participants in an unlawful means conspiracy.

634. As to the further points that the Defendants make as regards the pleadings, I am not troubled by the lack of specificity in the pleadings as regards the date of inception and termination of the JV. That can and has been a matter for evidence. However, the point made by the Defendants that the Claimants have not adequately pleaded the necessary knowledge does need to be taken seriously.

635. The question of the quality of pleadings required for an unlawful means conspiracy was considered in an earlier stage of the *Ivy Technology* proceedings, also before Henshaw J (although in this case before his becoming a full-time judge of the High Court). This was reported as *Ivy Technology v Mr Barry Martin and others* [2019] EWHC 2510 (Comm), [2019] 9 WLUK 324.

636. At [12] he finds (omitting his case references):

> "12. Conspiracy to injure must be pleaded to a high standard, particularly where the allegations include dishonesty:
>
> i) Allegations of conspiracy to injure "must be clearly pleaded and clearly proved by convincing evidence".
>
> ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particularity … an allegation of dishonesty must be pleaded clearly and with particularity.
>
> iii) Unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof.

> iv) Where a conspiracy claim alleges dishonesty, then "all the strictures that apply to pleading fraud" are directly engaged, i.e. it is necessary to plead all the specific facts and circumstances supporting the inference of dishonesty by the defendants."

637. At [16] he considers a particular issue relating to knowledge in that case where it was pleaded that a defendant "*knew or should be taken to know*" that a particular agreement contained certain provisions, and *"was aware (or must be taken to have been aware)"* that certain representations alleged to have been made were untrue. He regarded these as not being a clear and unequivocal allegation of knowledge that would support a finding of fraud, even if the court were to find that there was actual knowledge.

638. The Defendants argue that the pleading is defective because there is no clear pleading on behalf of the Claimants of an intention to cause the Claimants (or any of them) harm. As regards this argument, however, it is relevant to consider the point that, as I have explained, such an intention may be inferred from the primary facts. I do not think there is any doubt that the Claimants have pleaded that Mr Mirza, himself and through the companies that he controls had intended to profit from them by means of deceit, and as that point is pleaded, it follows that the Claimants have pleaded the necessary intention on the part of him and the companies that he controls.

639. As to what intention or knowledge Mr John had that rendered his part in these affairs dishonest, I have already found (on a balance of probabilities and in the absence of any defence) that it is more likely than not that he was aware of the terms of the contracts between Tydwell and the JV Entities and that he was part of an arrangement that was hiding from the JV Entities the true profit that Tydwell was taking. This I consider gives him sufficient knowledge of facts making the transaction unlawful for his participation to be regarded as the knowing participation in the conspiracy.

640. I consider that the Claimants have demonstrated that Mr Mirza, and therefore Tydwell, Redwire and Boomzone (to the extent that Boomzone is relevant at all to the claims relating to invoicing) were all participating in this deceit and that they must have had the knowledge that they were doing so as Mr Mirza had that knowledge and he was the controlling mind of those companies.

641. The Defendants argue that the attribution of knowledge is not a mere formality. Attribution is subject to complex rules of attribution which depend on the relationships between the individual whose knowledge is to be attributed and the company to whom such knowledge is to be attributed. They conclude from this proposition that the Claimants should have given particulars as to why and under what rules of attribution the Claimants claim the knowledge of any of the four different individuals who stand in different relationships to the three companies to whom the Claimants seek to attribute knowledge, is attributable. This is making heavy weather of the point. The basis of attribution is a point for legal argument, and not in my view one that needs to be described in detail within the pleadings. I do not think there is any doubt that these three companies should be attributed with the knowledge and intent of Mr Mirza.

642. To summarise on this point, I consider that the Claimants have shown an unlawful means conspiracy among Mr Mirza, Tydwell, Redwire, Boomzone (to the extent it was

involved in the invoicing arrangements) and Mr John, but not in relation to any other Defendants.

12. THE CLAIMS RELATING TO THE BOOMZONE LEASES

643. On the basis of these facts surrounding the Boomzone Leases, the Claimants make claims in deceit, breach of fiduciary duty and of the JVA; unjust enrichment; dishonest assistance; knowing receipt and constructive trust; and conspiracy.

644. The details of how these various claims are pleaded are dealt with in more detail below, but first it is appropriate to consider in more detail the circumstances of each of the Boomzone Leases.

A. The First Boomzone Lease

i. The Background to the First Boomzone Lease

645. By April 2016, a partial fit-out of No. 22 as a data centre had been completed. There had, however, been limited success in finding tenants for that space. The Data Centre was being run through Redwire and was incurring substantial costs without generating the revenue needed to cover these costs.

646. In order to assist in covering these costs, a decision was taken to repurpose some of the space in No. 22 that had been earmarked for use as a data centre as serviced office space. Mr Morjaria agreed with this decision.

647. The idea was to operate in tandem the Data Centre business (being managed by Redwire) and the serviced office business (being managed by Boomzone). Space was to be allocated according to the relative success of these two businesses. Mr Mirza, whilst he was not particularly straightforward in his answers on this point, I think accepted, that any revenues from either business prior to the First Boomzone Lease were to be applied for the benefit of the JV, although in practice it seems that they were eaten up in covering further costs.

648. Fit out works for the serviced office business were initially undertaken on the Ground Floor and they were paid for by Viper as capital expenditure. In addition, Viper (itself funded 50:50 by the Morjarias and Mr Mirza) continued to pay the power and network costs (through Redwire) and the general maintenance costs of the building.

649. Once Boomzone started getting traction, the fit-out eventually expanded in the following years to the 4th and 5th floors of No. 22.

650. Boomzone had some success in finding tenants for the serviced office space. (For convenience, I use the word "tenant" loosely to include persons occupying under licence.) Between February-March 2017, Boomzone agreed a licence to occupy the 5th floor of the Data Centre with a company called ARIIX Europe BV ("**Ariix**"). The monthly licence fee was set at £13,900, with a licence period of three years. Each of Mrs Mirza, Ameer and Mr Mirza were involved in the negotiation of that licence.

651. It is difficult to judge the state of the business of Boomzone at the time that the First Boomzone Lease was entered into on 1 April 2017.

652. The solicitors for the Defendants provided a document entitled "Boomzone tenants" to the forensic accounting experts which purports to be a list of all of the tenants of Boomzone but which does not show dates of occupancy. The Defendants' separate Boomzone Chronology does not refer to many of the tenants listed in the "Boomzone tenants" document and the Claimants have been unable to locate copies of all licenses/leases in respect of those tenants within the Defendants' disclosure. A version of the "Boomzone tenants" document has been marked up by the Claimants, with tenants that do not appear in either the Claimants or the Defendants' Boomzone Chronology highlighted. Over 100 such tenants are identified, although there may be some overlap of names. The Claimants also note that certain tenants are mentioned in the Defendants' Boomzone Chronology but are not mentioned in the "Boomzone tenants" document.

653. The Defendants acknowledge that between 2 April and 28 November 2016 there were tenants including Assent Building Control, Black Cow Technology, Ealing Fields High School, Imsure Group and others letting private office and/or desk space, but that these tenants were generally in occupation for no longer than a month. The Claimants say this is demonstrably wrong as the documents suggest tenancies of two to three months.

654. However, some idea of the state of the business and its prospects in early February 2017 can be deduced from a document entitled "Boomzone and redwire hsbc forecast". This was produced by Ameer and was sent to HSBC on 6 February 2017 to support an application for a loan secured against the Data Centre.

655. The document projected that Boomzone would enjoy revenue in 2017 of £374,000, and a profit of £314,000. Those projections included an estimate of the net revenue and running costs of both the data centre and the serviced office business. Even when both sets of costs were taken into account, the Mirzas were projecting a net profit from No. 22 of around £335k in 2017.

656. Ameer had earlier circulated that spreadsheet to Mr Mirza and Mrs Mirza for their comment.

657. Ameer followed up on 7 March 2017, explaining that they had secured two further tenants at the rates set out in the spreadsheet. He continues:

> "Based on the above, we would be generating around £18,000 per month after deducting operating costs, which equates to £216,000 per annum, based only on the customers that we already have signed up. You will note we still have a considerable amount of space to expand into".

658. Again, Ameer had before sending it, circulated an identical draft of that email to Mr and Mrs Mirza for their review.

659. According to this document as at 7 March 2017:

i) The revenues for March showed that Redwire was making considerable losses - a loss of £8,500 projected for March after losses in both January and February of £26,000 arising from there being operating costs of that amount and no

revenue in those months. However, Redwire was expected to come into profit by July 2017.

ii) By the end of March 2017 Boomzone was expected to make a profit of £14,950 and Boomzone and Redwire combined were expected to be making profits of £6,450.

iii) At least two more customers had begun to occupy No. 22 and were paying the rents set out in the projection spreadsheet.

iv) The sum of the rent payable by those customers between March-December 2017 was due to be £35,500. That was in addition to the £13,900/month licence fee payable by Ariix.

v) The Mirzas were, moreover, predicting that the profit generated by Boomzone alone in 2017 would be between £216,000-£314,000.

vi) The Mirzas also expected the revenue from Boomzone and Redwire together to cover the running costs of both businesses, such that the net profit from No. 22 in 2017 would be in the region of £335,000.

660. Some indication of the lettable value of the sixth floor shortly after the First Boomzone Lease was signed (on 1 April 2017) is provided by an email on 7 August 2017 to Mr Mirza and copied to Ameer, Mr John and, amongst others, a Mr Brown of Savills. This email refers to a previous valuation provided of the rental achievable by a five-year lease of the sixth floor which must have been at £35 per sq. ft., since in that email that valuation was said to be revised downwards by 25% to £26.25 per sq. ft. because of a term affecting the sixth floor allowing the possibility that Otaki had the benefit of a clause allowing it to take back the sixth floor if it received planning consent to extend the hotel on 12 months' notice. It may be that this particular problem went away through some internal arrangement as it is not referred to in the more formal report referred to by Savills on behalf of BOS (the "**Savills Report**") five or so months later.

661. The Savills Report was dated 22nd December 2017. This was about 8 months after the First Boomzone Lease, but still comprises the most relevant document available that provides a comprehensive view of No. 22 in 2017. The report describes No. 22 as follows:

> "22 Uxbridge Road has been operated as a serviced office/data centre building from 2016 with the sixth, fourth, part second and ground floors let on short term agreements and the remaining accommodation requiring fit out works".

662. The sixth floor is described as "Occupied as either self-contained offices, meeting rooms on an ad hoc basis and serviced office hot desks".

663. It is unclear how far this is contradicted by a document produced by the Defendants titled "Boomzone Fit Out Stages 2017-2023" (the "**BZ Fit-out Summary**") showing a timeline of fit-out stages, but having no information about the cost of fit-out, who was to pay for the fit-out, and who would benefit from the fit-out. This document shows against the date 1st April 2017 that the sixth floor was partly fitted out in 2016 as a

network operation centre (NOC) to control the data centre. Additionally, administrative offices were initially built but not for letting purposes. During 2017, the rest of the floor was fitted-out as small offices and a conference room to be used as serviced office space, and was occupied by Boomzone and sublet to various tenants. These works were ongoing and completed as evidenced by building control sign off dated 15 May 2018.

664. Savills describe the internal specification on pages 15-19 of their report, which includes photographs showing the finishes at the time. These show the serviced offices on the sixth floor as being "finished to an appropriate standard for letting".

665. In summary, therefore, it does seem that at the point that the First Boomzone Lease was created, the sixth floor of the Property demised under that lease was sufficiently fitted out to attract some tenants and had attracted some tenants.

666. The First Boomzone Lease was signed by James Russell of IQEQ on behalf of Viper. It allowed Boomzone to sublet and profit from any subletting (or from any licence to occupy).

ii. The Expert Evidence as to achievable rent

667. Both the Claimant and the Defendants appointed experts to help with certain valuation questions. One of these questions was the fair market rent achievable by Viper for a lease on the terms of the First Boomzone Lease including only the area demised, which, as we have seen, is the sixth floor (only) of No. 22. Understandably, given the poor information available, neither Expert has made any attempt to value the rental that might have been achievable under a lease granted on the terms of the First Boomzone Lease by reference to what tenancies or licences might have been available there, and also given the nature of a serviced office business, whereby any leases or (more usually) licences will be granted on a short-term basis.

668. The Experts have provided their opinions of what level of fair market rent would have been achievable from the property demised under the First Boomzone Lease on the terms and conditions provided for in that lease. It was agreed on all sides that the lease was drawn on standard commercial terms, with Boomzone taking on repairing obligations and reimbursing the landlord any non-recoverable expenditure and that the lease was drawn outside the Landlord and Tenant Act 1954 and therefore the tenant has no security of tenure at lease expiry.

669. The expert appointed by the Claimants was Mr Jonathan Manley. He was a highly experienced chartered surveyor and had been a Fellow of the Royal Institution of Chartered Surveyors since 1995 with appropriate expertise having been garnered in a number of leading firms of surveyors and as the principal valuer to the Portman Estate.

670. Mr Manley considered (and had evidence to back this) that the office market in Ealing at this time was strong. He referred to a contemporaneous report listing the average asking rent in the first quarter of 2017 at £32.88 per sq. ft. for Ealing and stating that the average marketing period for Ealing was only 2.7 months, compared to a London average of 6.0 months. He set out a number of comparable transactions of which he was aware and deduced from those comparables that a fair market rent for the Sixth Floor was £34.59 per sq. ft. As he considered the correct square footage for the Sixth Floor

was 3,325 sq. ft., this equated to an annual rental figure of £115,000 (before taking account of any rent-free period).

671. Mr Manley's rent per square foot was above that which would be reached by taking an average of the sample transactions that he had identified. He had explained that he had used his market expertise to arrive at this figure, having regard to such factors that some of these projects involved much larger lettings, where there would be a discount for taking more space, and that he considered that the sixth floor of 22 Uxbridge Road was particularly attractive because of its natural light.

672. The expert appointed by the Defendants was Ms Victoria Seal. She is a Chartered Surveyor and Director at Jones Lang LaSalle. She is a Member of the Royal Institution of Chartered Surveyors and a Registered Valuer specialising in the valuation of Residential and Commercial properties and development land in London and the southeast. Whilst her experience was not as long or extensive as that of Mr Manley, she had ample experience, having spent 20 years providing consultancy around development, and residential and commercial investment.

673. In considering the market rent, she took as a starting point the Savills Report. Savills had assessed the capital value of the building as a whole as having a rental value of £30 per square foot on the assumption that the whole building had been fitted out; it would take nine months to let; market would require a five-year term certain and there would be a nine-month rent-free period.

674. As these assumptions were not all met at the time, she considered that discounts were required from this figure. In particular:

    i) As it seemed clear that not all of the building had been fitted out by this time, she considered that a prospective tenant would demand a discount to reflect the fact that there would be building work going on with the period giving rise to noise and disruption. This was of particular importance as the building had only one lift so that, in her view, the tenants of the 6th floor space would have needed to share their access to that one lift with the builders fitting out the other floors.

    ii) They would also refuse to agree to a full service charge while the rest of the building was being fitted out.

    iii) Further, she considered that another discount was needed to account for the nine-month rent-free period.

675. Taking account of all of these matters, she considered that the net effective rent would be reduced to £42,739 per annum.

676. Given such a major difference of opinion between two respected valuers, the court has to do its best to reach its own view on the matters that they have taken into account. Taking account of all the discussion, I consider that a figure between these extremes would be relevant.

677. I think the starting point should be a figure of £32.50 as the net rent per square foot. This is less than Mr Manley's assessment but more than the figure that Ms Seal has

taken from the Savills Report as the average figure for the building. This number seems appropriate to me as:

i) I accept Mr Manley's view that the sixth floor may have been more attractive than other floors within the building having a good floor-to-ceiling height, good open accommodation and excellent natural light;

ii) this figure reflects the figure in the majority of the comparable transactions listed by Mr Manley;

iii) this figure is a little below the average asking rent found in the contemporary report referred to above (and I acknowledge that in most markets the rentals achieved may be a little below the asking rent).

678. It is then necessary to consider the reduction factors identified by Ms Seal.

679. Mr Manley agreed that there would need to be a nine-month rent-free period, and therefore to compare this with the First Boomzone Lease (where there was no rent-free period), the net effective rent would be reduced by at least that proportion of the five-year term of the lease (i.e. 9/60 or 15%);

680. Mr Manley initially disagreed that any further reduction was needed in relation to the state of the Property.

681. Insofar as any works were still needed to the Sixth Floor, to bring this up to Category A (i.e. the state that a tenant would expect on taking over such building), Mr Manley worked on the assumption that it was still the understanding that Viper would be paying for this.

682. As regards putting up with the perturbation of being within a building where other building works could be expected to go on, he initially considered that this was allowed for within the nine-month rent-free period. As regards sharing a lift, he considered the contractors fitting out the other floors might be expected to install a temporary external lift.

683. However, in his Supplementary Report, and in cross examination, he acknowledged that it might have been appropriate to allow a 12-month rather than a nine-month rent-free period to allow for this factor. This would equate to a further 5% reduction from the headline rent to arrive at a net effective rent. In my view, this is a reasonable approach and the alternative approach of Ms Seal to allow a 20% discount for this issue, on top of a 15% reduction for the usual nine-month rent-free period, appears less commercial and less realistic.

684. As regards the question of a further discount, to assume a reasonable period of marketing, I do not see the reason for such a discount. These types of valuation are assumed to take place between a willing buyer and a willing seller and therefore at a point when the marketing to find that willing buyer has already been done. Also, as we have seen there is evidence that at the relevant time properties were reletting very quickly, within a few months. My understanding is that Ms Seal made this point because her starting point was the rental in the Savills Report and a longer period of marketing had been assumed in that valuation, but as I am following Mr Manley in approaching

this chiefly by reference to comparable transactions (although I'm not accepting entirely his conclusion from those transactions), the logic for this goes away.

685. Applying the discounts discussed so far then, I consider that the net effective rent achievable on terms similar to the First Boomzone Lease over the five- year period of that lease would be £32.50 per sq. ft. multiplied by the square footage of 3,325 sq. ft. (i.e. £108,062.50 per annum) but multiplied by only by 4 (i.e. the five years minus a one-year rent-free period). This figure comes to £432,250.

686. Finally, as regards the service charge, it became clear in cross examination that Mr Manley had understood his instructions as advising on the market rent, and had made no assumptions about there possibly being a reduction in the service charge during the rent-free period. However, he accepted that if the court was looking to compare the value of the First Boomzone Lease with what would have been achieved by a third party acting at arm's length, it would be appropriate to assume that that party would negotiate some reduction in the service charge, but he thought this would occur only during the rent-free period.

687. I do not think there was evidence before the court or the experts as to what the level of the service charge was. Ms Seal suggested that an appropriate allowance within the net effective rent would be £5 per square foot for the entirety of the lease – a total of £83,125.

688. I accept Mr Manley's opinion that it is most likely that a reduction in service charge would be negotiated only during the rent-free period. In the absence of having figures as to what the service charges actually were for the sixth floor, the court can only guess, but Ms Seal's figure of an £83,125 reduction in rent seems to be very high compared with what I have arrived at as the annual rental figure that we are arriving at under these figures. In the absence of any better guidance on this point I will assume that the appropriate allowance in relation to the service charge would be £30,000.

689. Accordingly, my assessment of the net effective rent that would be achievable under the terms of the Boomzone First Lease from an arm's length third party, having taken account of all the assistance rendered to the court by the two experts, is £402,250 (£432,250 minus £30,000). This compares with the sums that were to be payable by Boomzone under the First Boomzone Lease of £12,000 p.a. for 5 years – that is £60,000.

690. There can be no doubt that the First Boomzone Lease was entered into at a significant undervalue. Both valuation experts find that it was granted at below a market rent, and I have found it to be very significantly below. Whilst one can always criticise a paper-based valuation as being theoretical, this finding is supported by what was actually happening in relation to the premises covered by the First Boomzone Lease. The *annual* rent payable to Viper was less than the *monthly* licence fee Boomzone had already contracted to receive from Ariix and less than the deposit that Ariix had already paid to Boomzone by the time the First Boomzone Lease was granted. Certainly, it was far less than the annual profit that the Mirzas were predicting would be realised from Boomzone's tenants and licensees in 2017 alone.

691. The Defendants have sought to justify the First Boomzone Lease on the grounds that the effect of the First Boomzone Lease was to provide a rent to Viper that "thereby reduc[ed] the capital contributions required to be made to Otaki by the Morjarias and

Mr Mirza". The implication of this appears to be that the low rent payable by Boomzone was nonetheless in the JV's best interests because it at least provided some relief from Viper's (and so the joint venturers') outgoings on business rates and utilities. This makes little sense since, in the absence of the First Boomzone Lease the underlying rentals would have been a greater amount. The "Boomzone and redwire hsbc forecast" projected a net profit in 2017 for both Boomzone alone and Boomzone and Redwire together (i.e., even taking into account the costs of running the Data Centre, they projected rental income of circa £759k and a profit of circa £335k). Accordingly, the obvious way to mitigate the joint venturers' outgoings was for Boomzone's revenues to flow back to the joint venturers, rather than solely to Boomzone. Conversely, if these projections were to prove optimistic and there was a shortfall between the costs and the income, Boomzone had no substantial capital to meet these costs. This may be seen from the fact that in practice Boomzone did not pay rent as it was due and did not pay rates as they were due. Instead, Boomzone accrued substantial arrears to Viper in the period 2017 to February 2022, during which time Viper continued to pay all of the business rates due and received only a small portion of the rent due from Boomzone. The supposed benefit to Viper from Boomzone's agreement to absorb certain costs was, therefore, illusory.

692. There is a suggestion from the Defendants that there was a requirement from BOS for a lease to be put in place to demonstrate revenue. Even if this was true, and even if the arrangements with the underlying tenants such as Ariix did not satisfy this requirement, there was no need for a lease on the terms of the First Boomzone Lease providing for a low fixed rent, with no possibility of upward review in the rent once the Sixth Floor had been populated by the anticipated tenancies. The First Boomzone Lease, and indeed all the Boomzone Leases reserved all the potential upside in rentals for Boomzone. This was not a commercially fair arrangement, particularly when Viper had already expended huge amounts in creating the space and was still paying fit-out costs. A man of Mr Mirza's commercial acumen would never have agreed to an arrangement with this effect had he been the landlord in the position of Viper and an arm's length third party had been in the position of Boomzone.

B. The Second Boomzone Lease

693. What has been referred to as the Second Boomzone Lease came about by way of a Deed of Variation dated 1 May 2018, to the First Boomzone Lease. The effect of this Deed of Variation was to vary the First Boomzone Lease so that every floor of No. 22 was let to Boomzone (again with the same right to grant sub-tenancies), at an increased rent of £60,000 per year and to extend the term to 31 March 2023 (i.e. five years from the inception of the First Boomzone Lease).

i. The background to the Second Boomzone Lease

694. By the time of the Second Boomzone Lease (1 May 2018), it is clear that the occupancy of No.22 had ramped up. Various tenants had been signed up.

695. In October 2017, Mr Mirza prepared a spreadsheet entitled "Tenants Schedule – Oct' 17", in which it is recorded that Boomzone was receiving a monthly rent of £26,625 per month from eight different licensees. The spreadsheet also records the date on which the various licensees are said to be vacating No. 22. In all but two cases, the licence period ended after the date of the Second Boomzone Lease.

696. On 6 November 2017, Ariix signed a three-year tenancy agreement with Boomzone commencing on 11 November 2017. The agreement provided for a demise of part of the 4th Floor of No. 22 to Ariix for an annual rent of £166,800 (or, at least purported to do so, given that Boomzone was not itself yet a tenant of the 4th Floor).

697. On 29 January 2018, Ameer prepared a draft email to a Peter Jenkins of Bluewater Property Consultants, apparently for the purpose of seeking buyers for No. 22. In that email, Ameer notes that (i) "Floor 4 is fully fitted out and has been 100% occupied achieving gross monthly revenue of £25,775"; (ii) one tenant (presumably Ariix) is "paying £14k per month (£96 per square foot)" for the "serviced office offering"; and (iii) he projects the "expected market rent, based on standard office leasing (i.e. not the serviced office model we use)" is over £2.5m per year. On that basis, Ameer says "we would be prepared to sell 22 Uxbridge Road for £38m". The email was sent to Mr Mirza and Toji John with the subject line "Please review".

698. According to the BZ Fit-out Summary the fit-out was as follows:

i) **6th floor** – 3,325 sq. ft: As I have already described the works were completed as evidenced by building control sign off 15 May 2018.

ii) **5th Floor** - 3,465 sq. ft: From January 2018 works were carried out on this floor for fitout into serviced offices. Some works were complete by April 2018.

iii) **4th Floor** - 3,970 sq. ft: During 2017 this floor was fitted out into serviced offices. Although works were largely completed by June 2017, works continued on this space until the floor was completed on 15 May 2018.

iv) **3rd Floor** - 3,970 sq. ft.: Fitted only to Shell and Core.

v) **2nd Floor -** 4,379 sq. ft. lettable: Approximately half of the floor was shell and unoccupied. The floor was fitted-out to be used as a data hall which comprised around 1,500 sq. ft. i.e. 34% of the 4,379 sq. ft. gross floorplate. There were 10 empty data room racks which could have been plugged into if/when required.

vi) **1st Floor** - 3,185 sq. ft.: Fitted only to Shell and Core.

vii) **Ground Floor** - 850 sq. ft.: Works continued on this space until building control sign off on 15 May 2018. Upgrades made to the ground floor to make it more suitable for serviced offices. Area continued to be staffed and maintained by Tydwell.

viii) **Basement -** 850 sq. ft.: Approx. 80% of the floor was shell and unoccupied. The remainder of the floor was fitted-out as the data centre plant which serviced the power and cooling requirements of the data centre.

699. Accordingly, prior to the grant of the Second Boomzone Lease, the position was again that Mr Mirza was anticipating substantial income for Boomzone from third parties. In the majority of cases those benefits would flow to Boomzone after the date on which the Second Boomzone Lease began to run. Yet the Second Boomzone Lease continued to provide for a rent well below the amounts Mr Mirza expected to realise from renting out No. 22 at the date of its execution. As a consequence of that lease, and the ongoing

failure to transfer any shares in Boomzone to Mr Morjaria, this income flowed only to Boomzone (at least initially).

700. The position therefore is similar to that under the First Boomzone Lease. The higher rent payable under the Second Boomzone Lease (£60,000 p/a) was a fraction of the value that the Mirzas believed would be extracted from letting No. 22.

ii. The Expert Evidence as to achievable rent

701. The Experts each also looked at the question of the market rent achievable at the time of the Second Boomzone Lease.

702. In this case each of the Experts agreed that the fair market rent of the property on the terms of the Second Boomzone Lease – if the tenant would need to fit out the property and recoup its investment over the remainder of the five-year period of that Lease - would not give sufficient time for the theoretical tenant to recover its financial outlay and take account of the risk of undertaking the work and finding sub-tenants and so such a lease would have a zero value.

703. The Defendants' Expert, Ms Seal, stayed with this analysis. However, I think the approach taken by Mr Manley in his Supplementary Report (as amended) is more relevant.

704. He pointed out that according to Mr Mirza in his Amended Sixth Witness Statement (which I note is consistent with the BZ Fit-Out Summary), the ground and sixth floor were fully fitted, with the fourth and fifth floors completed by October 2018 and the basement partially fitted out as music studios and gym, completed by 2019, and that these works were paid for by Viper. These floors therefore could be rented out profitably with no further capital outlay and there was no obligation on the putative tenant to fit out the remainder of the floors.

705. Taking account of what had already been fitted out at the time of the Second Boomzone Lease (or where this work had been mostly done and would be completed by Viper), Mr Manley gets to a market rent of £555,000 *per annum* (after any rent-free period granted has expired). In reaching this figure, he is using an assumption of £34.59-£35.91 as the market rent for all floors except the basement where he uses the figure £29.41. From my discussion of the First Boomzone Lease, I would see a need to reduce this somewhat as he may be slightly over-estimating the rent (I used £32.51 per sq. ft. for the first Boomzone Lease), but even if I take 15% off the headline rent and then deduct one-fifth to calculate a net effective rent after allowing for a one-year rent-free period, this gets to an annual rent of £377,400 – many times the £60,000 paid under the Second Boomzone Lease (there would be no need in this case to give a further discount for the perturbation of fitting out as this would be in the hands of the putative tenant).

706. It is worthwhile also to consider that each of these valuations took no account of any existing leases or tenancies that were already in place at the time of the Second Boomzone Lease and assumed that the tenant would take on the liability of fitting out the property (although in the case of Mr Manley's report, only where fitting out had not yet been done or was about to be completed).

707. The Second Boomzone Lease placed no obligations on either the landlord or the tenant to fit out the property. Whilst I accept Ms Seal's opinion that a commercial third-party would be unlikely to take space without a view to using it (and therefore must be assumed, in the absence of any obligation on the landlord to fit out the property, to be considering undertaking that cost itself), this does not mean that Boomzone may not have had other plans.

708. From the indications I have outlined above, it appears that Boomzone could have more than covered the cost of the whole of the rental (and running costs, service charges and rates) just from the floors that were lettable and had been let. It seems that Boomzone could avoid rates on floors that were still in shell and core condition, and the service charges in respect of those floors also ought to be minimal.

709. In summary, I prefer a slightly modified version of Mr Manley's assessment of the market value of the rent achievable under the terms of the Second Boomzone Lease as describing a position near what appears to be the reality of the circumstances. Also, whatever the amount of rent that would be paid by a theoretical arm's-length lessee taking on the terms of the Second Boomzone Lease, it is clear that the Second Boomzone Lease was attractive to and of value to Boomzone, with its much greater understanding of what was achievable with the property.

710. It may be asked why the Directors agreed, unhesitatingly, to the First Boomzone Lease and then later the Second Boomzone Lease. The most likely explanation of this is that they trusted Mr Mirza to be putting forward a proposal that would be in the interests of the JV in accordance with his duties under the JVA. Also, whilst they knew that Mr Mirza held the shares of Boomzone, they had understood that all parties regarded Boomzone as being part of the JV – if not part of the group of companies headed by Otaki, or at least that there was an intention that half the shares in Boomzone would be transferred to Mr Morjaria or Mr and Mrs Morjaria or to Trafalgar. These points are developed further below.

711. Mr Manley in response to my questioning offered an opinion that there was no commercial sense in structuring a letting on the terms of the Second Boomzone Lease. Ms Seal would not answer this question on the grounds that it was outside the scope of her instructions. It seems evident to me that Mr Manley was correct on this point.

C. The Third Boomzone Lease

712. The Third Boomzone Lease was a new lease, signed in its final form on 8 March 2021. Again, this provided for the letting of every floor of No. 22 to Boomzone (again with a right to grant sub-tenancies, in its final form clarified so that no consent was needed from Viper), at the same rent of £60,000 per year and for a term of just over 10 years to 31 March 2032.

i. The background to the Third Boomzone Lease

Projected revenue

713. On 24 August 2018, Ameer Mirza emailed Shamick Morjaria and Osman Mirza, copying to Mr Morjaria and Mr Mirza, a spreadsheet showing his assessment of Boomzone's revenue. This showed monthly revenue for August 2018 of £29,073,

anticipated revenue for September 2018 of £37,663 and projections of income for the months of October 2018 to February 2019 rising from £42,163 to £47,723.

714. These sorts of figures must have been in mind when Mr Morjaria on 11 October 2018 sent what has been referred to in the proceedings (based on the heading to the email) as the "Concerned Brother" email. In this email Mr Morjaria states his concern that:

> "after spending over £3M and despite first phase being ready for over two and a half years we have no Tenant".

and proposes that he and Mr Mirza should:

> "take drastic steps to minimise our outlay and losses going forward".

715. From some point in 2018 and throughout 2019, Mr John was emailing Mr Morjaria with income and expenditure spreadsheets. These would show income from tenants of No. 22 and income for Redwire and expenditure. For example the statement for October 2018 showed total income of £40,491, expenditure on payroll (presumably the payroll of Redwire or Boomzone – the persons listed included Ameer, Shamick and Osman as well as some others) coming to £16,888.10 and supplier invoices (which appear to be a variety of building related costs and maintenance related costs, and which included an invoice for £5,000 from Viper - presumably that month's share of rent under the Second Boomzone Lease).

716. These documents were used to support requests for payment from Mr Morjaria, i.e. to make a further capital loan to Otaki or Viper to allow the payment of these amounts. It is notable that Mr Morjaria was continuing, through Otaki or Viper, to contribute to the maintenance, fitting out costs and indeed even the rent payable to Viper.

717. The fact and nature of these statements support the view that both Redwire and Boomzone were being treated as part of the JV between the Morjarias and Mr Mirza, and that the parties were not making much distinction between this wider joint venture and the JV carried on through the JV Entities.

718. There was some muddled thinking on this point, however, evidenced by the fact that on 23 October 2018 Chris Stobart emailed Mr Morjaria attaching a copy of the Second Boomzone Lease and explaining that Viper had raised an invoice for the rent but this had not yet been paid and that Boomzone had cited their reason for non-payment as being that they were yet to collect any rental income themselves from the underlying tenants.

719. These statements were sent throughout 2019. It is notable, however, that in November 2019 Mr John sent an email to Mr Mirza copied to Mrs Mirza, Ameer and Osman with another statement, for the first time showing a positive balance of income after paying suppliers. This statement was not shared with Mr Morjaria, although a later statement showing a deficit was shared. These circumstances may be considered to support a view that Mr Mirza was only interested in transparency when this justified asking Mr Morjaria for money. Another small surplus was recorded in January 2020 but the schedule in which that surplus was recorded also was never sent to Mr Morjaria. It

seems that these documents were only sent when there was a requirement for Mr Morjaria to contribute to costs.

720. It is unclear whether those sheets are a complete and true record of all the rental income being received by Boomzone as other contemporaneous documents cast doubt on the proposition that a complete record of Boomzone's/Redwire's income/expenditure was produced every month. A draft document entitled "Summary of Properties" dated February 2019 describes an actual rental income from No. 22 of £983,472 (and a potential annual rent of £2.3m). By contrast, the monthly income shown in the income and expenditure spreadsheet for February 2019 showed £37,649.81, which would reflect an annual rent of only £451,798. The provenance of this document is unclear, but it could only have been produced either by someone within Boomzone or by an agent to which Boomzone had provided information. Of course, both figures were a multiple of the £60,000 payable to Viper under the Second Boomzone Lease then in force.

721. The latest of these income and expenditure figures (for January 2020) shows a total income of £42,793.89 (which if annualised would come to £513,527).

Boomzone ownership

722. That it was still everybody's understanding that Mr Mirza would transfer shares in Boomzone for the benefit of the Morjarias may be seen from the correspondence between September and November 2019.

723. On 11 September 2019 Mr Mirza emailed IQEQ, in response to a request from Mr Stobart to Mr John to provide documentations concerning "the necessary share transfer/allotment in order to make Trafalgar Limited a 50% shareholder in Redwire and Boomzone", stating that he had instructed Charles Homan to bring this about.

724. It appears, however, that Mr Mirza did not have just a simple share transfer in mind, as he instructed Mr Homan to accompany this with a joint venture agreement relating to Boomzone. Mr Homan obliged and on 5 November 2019 sent to Mr Morjaria, Mr Stobart and Mr Mirza a draft joint venture agreement relating to Boomzone together with a draft share transfer agreement to transfer 50% of the shares in Boomzone and Redwire from Mr Mirza to Trafalgar, and asking for signature of those documents. In his covering email, he suggested that these drafts had been circulated a year earlier, but Mr Morjaria had no recollection of this, and Mr Stobart was unable to find any such correspondence either. The draft joint venture agreement included terms requiring Mr and Mrs Morjaria (on the one side) and Mr Mirza (on the other side) to contribute 50% of "any funding required" by Boomzone, allowed for the sharing of net losses on the same basis and provided for net profits to be shared by Mr Mirza as to 55% and the remainder as to Mr and Mrs Morjaria.

725. Mr Morjaria wrote to Mr Stobart the next day to say that he did not see the need for a joint venture agreement as these two companies "fall under Otaki/Viper". He felt that a simple letter would be sufficient to deal with this. Mr Stobart replied pointing out that Boomzone and Redwire were treated as and were arm's-length entities from a tax perspective and not part of the same structure as Krugar and Viper. Discussions concerning the need for a joint venture agreement continued through December 2019. On 10 December 2019, Mr Morjaria wrote to Mr Homan with some questions about the

Boomzone joint venture agreement. Mr Homan answered those the following day, and it appears that after that exchange there was no further discussion about the point.

726. Mr Mirza, in his cross-examination confirmed that it was his understanding that 50% of the shares of Boomzone would be transferred for the benefit of the Morjarias, but it was clear that he intended this was only to be the case if Mr Morjaria continued bearing the costs, and it may be deduced that this was the main reason why he was so insistent on not transferring the shares without a joint venture agreement being signed in respect of them.

The Timeline opportunity

727. Another important development in November 2020 was an emerging prospect of a lucrative deal being done with Timeline.

728. By 10 November 2020, negotiations had begun between Boomzone and Timeline for a lease of part of No. 22's basement and 3rd floor. Timeline visited No. 22 on 23 November 2020. On 3 December 2020, Shaima Mirza sent over some specifications and on 10 December, Timeline provided detailed feedback on these matters. Ameer and Shaima visited Timeline's then television studio on 14 December 2020 to improve Boomzone's understanding of their requirements. Detailed discussions with Timeline continued immediately thereafter, with Timeline sharing their first draft specification document on 17 December 2020.

729. On 18 December 2020, the day after this detailed specification document had been sent, Mr Mirza arranged for Mr Homan to write to Mr Lewin stating, curiously, that:

> "Camran looks forward to liaising with you directly on all operational matters as we move to the next stage with the Hotel Datacentre with you only having to revert to Pradeep on shareholder matters in accordance with the JV…".

730. Mr Homan was unable to give any very satisfactory explanation of why he said this, and my feeling is that this probably did reflect a feeling at this time that Mr Mirza did not want Mr Morjaria to know about or be involved in operational matters. Mr Homan went on in the same email to say:

> "In order to repopulate the serviced offices and datacentre, Boomzone will need to have a lease extension based [sic] and so Camran will forward one shortly for your approval and signature."

731. Later that day Mr Homan sent a draft lease (drafted by him) to Mr and Mrs Mirza, Ameer, Shaima and Mark Lewin for signature. His request was effective as within hours Mr Stobart sent a signed lease to Mr Mirza. This was not copied to Mr Morjaria.

732. The same day, Mr Mirza emailed Charles Homan attaching the signed Third Boomzone Lease. One cannot help but detect a note of triumph where he says, "We now have 12.5 years!". In my view, this is a strong indication that by this point Mr Mirza was regarding the ownership of Boomzone to be separate from the JV. He had given Mr Morjaria an opportunity to take ownership of 50% of the shares of Boomzone, albeit on Mr Mirza's

own terms and considered that Mr Morjaria had turned this down and Boomzone was now his.

733. Although a version of the lease was signed on behalf of Viper on 18 December 2020, it was not until 5 January 2021 that the board of Viper met to approve it. The board minutes describe the lease they are looking at as "a newly received lease" and make no reference to this having been previously signed. The board minutes do not evidence any real discussion of the merits of the lease.

734. During January 2021 negotiations continued with Timeline. By 22 January 2021 Timeline was able to confirm that the Timeline Board had signed off on a 10-year lease in principle.

735. Five days later, LMH was incorporated with Mr and Mrs Mirza being appointed as directors alongside Shaima and Ameer. LMH was incorporated specifically to take advantage of the Timeline opportunity although it was only much later, on 20 May 2022 (after Viper had given notice to rescind the Boomzone Leases on 31 March 2022 and after the May 2022 Agreements), that LMH was granted an underlease relating to the Basement, First, Second, Third and Sixth Floors of No. 22 at an annual rent of £80,000.

736. The arrangements with Timeline originally provided for the cost of fit-out to be borne 50% by Timeline. This was later changed to an arrangement whereby Timeline would contribute 75%. The Claimants argue that the amounts finally contributed by LMH and Timeline have not yet been established.

737. The Defendants have tried to underplay the prospect of the Timeline opportunity, pointing out that at the time, Timeline's accounts showed that it was making substantial losses and that its business model involved risks (including substantial damages if it stopped broadcasting for even a very short period whilst it was meant to be producing a live show). However, I do not consider that this was the belief of the Defendants at the time. I have been shown nothing in the correspondence to suggest this, and the facts concerning the incorporation of LMH provide a very strong indication to the contrary. I note further that Savills in its report of 11th November 2021 for BOS (the "**Savills November 2021 Report**") after full consideration of Timeline's accounts for the years ending in December 2017, 2018 and 2019, as well as Timeline's credit rating according to a Dun & Bradstreet Report, considered it appropriate to value the property on the basis that the investment market would perceive Timeline as representing "Good tenant covenant strength".

738. On 23 February 2021, a revised lease between Viper and Boomzone was sent by Adrian Price to IQEQ. The lease had been amended so as to remove the need to obtain Viper's consent to any sub-tenancies and with further amendments suggested by Boomzone. This version of the lease was signed by Mr Lewin on behalf of Viper in or around 24 February 2021.

739. During February and March negotiations carried on apace with Timeline and detail of design of the fit-out was discussed. At some point during this period heads of terms were drafted whereby LMH would be the landlord. Timeline confirmed in this period that it was looking also to take 1,000 sq. ft. on a long-term lease of the First Floor.

740. Boomzone required further amendments to the lease. On 8 March 2021, Viper and Boomzone signed the Third Boomzone Lease. As this is the relevant version of the Third Boomzone Lease put before me, and as I have not been told that the earlier versions were signed on behalf of Boomzone, I will take this version as being the only legally binding version of the Third Boomzone Lease.

ii. The Expert opinions relating to the Third Boomzone Lease

Expert opinions as to market rent

741. Both experts considered the fair market rent of the property in March 2021 on the terms of the Third Boomzone Lease. Again, they agreed that if it is assumed that the tenant would need to continue fitting substantial parts of the property, the market rent was zero, essentially on the same bases as they had determined the fair market rent under the terms of the Second Boomzone Lease – there was no time for a tenant to get back the cost of fitting out.

742. If an assumption was made however that the building was fully fitted out to Category A, they both considered that a market rent would be over £1 million.

743. Ms Seal maintained her opinion that there was substantial fitting work to do. She states that she was valuing the Property in March 2021, based on the fit-out documentation provided under "Boomzone Fit Out Stages 2017-2023" and the Knight Frank report of May 2021. Both valuers acknowledged that this was only a basic and very limited summary of works and that there was conflicting information in some of the third-party surveyors' reports. Ms Seal took the view that the fifth floor was in a poorer specification (although capable of occupation). Mr Manley disagreed, pointing out that the photograph attached to the report shows a fully fitted office, but with finishes to a "warehouse style" with exposed ducting and services (rather than suspended ceilings) which was popular with tenants in many buildings at the time. He also noted that Ms Seal's view appeared to be contradicted by Mr Mirza's Amended Sixth Witness Statement which confirms the fifth floor was fully fitted and complete by October 2018.

744. I consider that the approach taken by Mr Manley more fairly reflected the position on the ground. Ms Seal had relied on the valuation prepared by Knight Frank on 5th May 2021 for Mr Mirza, which was produced for the purpose of negotiating a settlement with the other directors and shareholders of Otaki, and Mr Manley I think was rightly concerned that this might not reflect a wholly objective view. I consider that Mr Manley was correct to prefer relying on the slightly later valuation in the form of the Savills November 2021 Report prepared for BOS. Savills state that they observe the property to be in a "…good condition throughout, with the exception of the first floor and rear basement area requiring a fitout." This is at odds with the Knight Frank report, on which Ms Seal had relied, but concurs with the Boomzone fit-out document and Mr Mirza's Witness Statement.

745. On this assumption, and assuming that the fit-out of the Third Floor began on 27 April 2021 and was completed on 28 July 2021, Mr Manley provided his opinion of the market rent, as being £651,000 per annum. I consider that I should reflect again my earlier scepticism that Mr Manley may have been slightly optimistic about the rentals achievable. I reduced his figure of £34.59 per sq. ft. to £32.50 per sq. ft. – a 6.04% reduction. Accordingly, I consider that I should reduce this the figure of £651,000 per

annum by 6.04%. This reduces the market rent to £605,820 *per annum* for the headline rent. This figure already takes account of void periods where more work is needed. It is unclear to me whether a net effective rent would be lowered further (especially as the Third Boomzone Lease was effectively an extension of the Second Boomzone Lease). If this becomes important in assessing damages this matter can be looked at in more detail, but meanwhile, all I need to note is my finding that the market rent was many times greater than the £60,000 *per annum* that Boomzone was paying.

746. In a Supplemental Report, Mr Manley gave his best assessment of the costs of completing the floors where works were still required as being £1,223,025, but noted that whilst refurbishment works for the third floor and additional basement studio were taking place, Timeline was contributing toward the cost of these works. If those costs were split 50/50, then the cost of fitting-out work to the landlord may have been lower by around £492,075, therefore a cost of £730,950. Thus Boomzone (and another purchaser stepping into the shoes of Boomzone) might be expected to acquire an asset capable of generating something like £605,820 *per annum* for the further period of the Boomzone Lease (10 or 11 years) for a capital outlay of £730,950. This suggests that the Boomzone Lease was granted at a significant undervalue, and provides an explanation of why Boomzone would have found this an attractive proposition.

Expert opinions as to effect on the value of the Viper Lease

747. The experts also provided figures to assist the court to assess what effect the Boomzone Leases had on the capital value of the Viper Lease in March 2021.

748. Mr Manley assessed that the open market of the Viper Lease in March 2021 without the Third Boomzone Lease or the LMH Lease in place (but with the occupiers in place) was £17.59 million (he had revised downward his original figure of £19.05 million).

749. Logically, if I am reducing his assumption of the achievable rent this would be a slightly lower figure, but no more than 15% lower.

750. His valuation is substantially different from that of Ms Seal, who achieves a value of £8.19 million. The difference may be largely attributed to three things:

i) her slightly lower assumption as to market rent;

ii) her different assumption as to the extent of the fit-out of the building; and

iii) her valuing it as a part-complete office building rather than valuing the income from (short-term) tenants and in particular not taking into account income from Timeline as this was not fully contracted.

She also made adjustments for some other sources of income that she thought unlikely to continue.

751. Again, I prefer Mr Manley's view about the need for further fitting-out of the property. I consider also that the view that he takes about the reality of the occupation of Timeline seems to be more in accordance with the relevant evidence as to the nature of the asset that Viper would be holding if the Third Boomzone Lease (and later the LMH Lease)

had not been interposed. As mentioned, however, I consider it appropriate to adjust his rental assumption slightly downwards.

752. Both experts originally came to a similar figure as to the value in March 2021 of the Viper Lease subject to the Third Boomzone Lease. Mr Manley originally put this at £7.65 million. Ms Seal put this valuation slightly lower at £7 million.

753. In summary, whilst Ms Seal considered that the effect of the Boomzone Lease on the value of the Viper Lease was moderately negative (decreasing the value from £8 million without the lease to £7 million with it), Mr Manley considered that the Boomzone Lease had a very substantial negative effect on the value of the Viper Lease reducing it from £17.65 million) down to £7.65 million.

754. I do not at this stage need to consider which of these experts has the better view. The point is that, on the view of both experts, the effect of the Boomzone Leases was to bring about a substantial and perhaps a very substantial reduction in the value of the Viper Lease.

755. As to the commerciality of the arrangements, the points I have made in relation to the First and Second Boomzone Leases apply similarly to the Third Boomzone Lease. If one moves away from the question of valuations to what was happening on the ground, as I have mentioned, even prior to the Timeline lease, Boomzone was enjoying substantial rental income – according to the February 2019 "Summary of Properties", an actual rental income from No. 22 of £983,472 and a potential annual rent of £2.3m. The actual rent enjoyed by Boomzone was thus substantially greater than the £60,000 payable to Viper under the Second Boomzone Lease then in force.

756. The level of rent in March 2021 appears to have been borne out by the later evidence, provided by the Savills November 2021 Report. This confirmed that the building was already almost 60% let and produced £938,772 per annum from 14 tenants.

757. The Savills November 2021 Report also provides the information that Timeline had agreed to rent the remainder of the basement, together with the whole of the first and second floors at £687,310 per annum. However, to facilitate this, two leases on the first-floor offices would need to be terminated reducing the gain by £63,996 per annum. However, as Mr Manley points out in his supplemental report, the tenancy schedule showed that there was a suite of 822 sq. ft. on the sixth floor; 543 sq. ft. on the fifth floor; and 1,699 sq. ft. on the fourth floor vacant. Therefore, if either New Flight or Type 3 Productions could be persuaded to move to one of these alternative vacant suites, this rental income would not be lost.

D. The Background claimed in the PoC relating to the Boomzone Leases

758. The Claimants set out their claim, as it relates to the leases granted to Boomzone, at paragraph 93 onwards of the PoC.

759. The main points as to background pleaded, and my commentary on these points, are as follows. To make it clear what is pleaded and what is my commentary, I have put the summary of what is pleaded into italics.

760. *The Morjarias were not informed of the First or Second Boomzone Leases prior to their execution.* I consider it to be established that they were not informed by Mr Mirza or Boomzone itself of this point. Mr Mirza may have assumed that they would be told by the Directors/IQEQ. There is no evidence of this happening before these leases were signed and it is unlikely, given the short period between these documents being presented to IQEQ and being signed, that this did happen. I accept, however, the point made in the Defence and Counterclaim that Mr Morjaria would have been aware of both the First and Second Boomzone Leases after their execution and prior to the entry into the Third Boomzone Lease.

761. *The First and Second Boomzone Leases were on terms that were extremely favourable to Boomzone and correspondingly detrimental to Viper / the JV. The annual rent of £12,000 and £60,000 respectively was substantially below market rate.* This point certainly is made out in relation to the First Boomzone Lease. As regards the Second Boomzone Lease, the evidence also points to this.

762. *In the Defence and Counterclaim, the Defendants make something of the point that both the First and Second Boomzone Leases were approved by the board of Viper, and in the case of the Second Boomzone Lease the resolution approving this stated that this would be in Viper's best interests.* They are, of course, correct in this, but as I discuss further below, that does not provide an answer to the claims.

763. *Another point made by the Defence and Counterclaim is that the value of the first two Boomzone Leases was depressed by the awareness that everyone had of the cladding problem, which it is pleaded that both Viper and Boomzone were aware of since around 3 August 2017.* This cannot have been a consideration in relation to the First Boomzone Lease. On a balance of probabilities, I consider that it was not a consideration in relation to the Second Boomzone Lease as the cost of this would not have been for the tenant; neither of the expert valuers have taken this into account; and the evidence is that Boomzone had success in sub-letting No. 22.

764. *The Defence and Counterclaim also makes the argument that BOS had required the terms of any lease to be on market terms and that these leases required Boomzone to take over the running costs of the property demised. It argues that Boomzone met some of the very significant utility costs payable on the Data Centre. It was invoiced by Redwire for, and paid, the sum of £491,529.61 for the seven financial years from 1 May 2016 to 30 April 2023.* I note, therefore, that this figure (and any third-party invoices to Redwire in relation to this figure) should therefore be excluded from costs considered to have been expended by Redwire or Tydwell for the JV Entities, as this acknowledges that those payments have become the responsibility of Boomzone.

765. *From at latest October 2018 to the end of 2019 Mr Morjaria sought the transfer of 50% of the shares of Boomzone.* This is true (subject to the clarification that Mr Morjaria was seeking the transfer in favour of his family vehicle Trafalgar, rather than to himself) but omits making any reference to the stand-off about the need for a joint venture agreement and of Mr Morjaria's failure to pursue the point after 11 November 2019.

766. *Mr Mirza repeatedly represented that he intended to make that transfer of shares (or otherwise provide for Mr Morjaria to have an equal share in Boomzone).* I note that the Defence and Counterclaim responds to this point saying that:

> "It is embarrassing for want of particularity. It is entirely unclear what is meant by "repeatedly", to whom and when such representation was made and to whom the transfer of shares was to be made. … It is denied (if it is so alleged) that such a representation would be actionable, being a statement of future intention rather than a statement of fact."

767. *By the end of 2019, Mr Mirza had not made the transfer and took no steps thereafter to do so.* I consider it more likely than not that up to November 2019 Mr Mirza did intend to transfer 50% of the Boomzone shares for the benefit of the Morjarias, albeit subject to an unstated qualification that he would only do so if Mr Morjaria agreed to a new JV Agreement, and to continue to make contributions to the refurbishment and running costs of No. 22. However, from a time no later than 18 December 2019, Mr Mirza considered himself free of any obligation to transfer the shares to Mr Morjaria and regarded Boomzone as belonging wholly to him.

768. Whether Mr Morjaria was refusing to make such contributions is a point at issue. The Defendants' pleading on this point is that Mr Morjaria had repeatedly confirmed this during Skype calls with Mr Mirza. Mr Morjaria denies this, but the "Concerned Brother" email of 11 October 2018 suggests that Mr Morjaria certainly was worried that he appeared to be throwing good money after bad. As I have already mentioned, I think it unwise to rely on the unsupported recollections of these parties, and so all I can conclude is that Mr Morjaria did not make any further contributions after September 2019, but neither is there any evidence that he was asked to by Mr Mirza. In fact, by this point, the income coming into Boomzone and Redwire appears to have covered the day-to-day expenditure, and as we have seen, the fit-out was to be funded to a large extent by Timeline, so it is more than possible that there was no need for any such contributions.

769. The pleading in the Defence and Counterclaim goes on to say that it was a consequence of Mr Morjaria's refusal to make any further contributions that:

> "… the last invoice from Tydwell to Viper in relation to the operational costs of the Data Centre [by which the Defence and Counterclaim is referring to the entirety of No, 22] is dated 2 September 2019."

770. This element of the Defence and Counterclaim is not consistent with the Defence and Counterclaim's pleading that I have summarised at [763]-[764] above. If Boomzone had assumed responsibility for these costs, then there was no basis on which they should have been invoiced to Viper.

771. *By March 2021, Boomzone (through at least Shaima Mirza) was in discussion with Timeline Television Limited ("**Timeline**"), a company unrelated to Mr Mirza which carries on business providing services to the television industry (including among other things "virtual studio" services) regarding a proposal in which Timeline would take a sub-lease of all or part of the Data Centre from the recently- incorporated LMH, and various construction and fitting-out works would be undertaken to adapt the property to Timeline's requirements.* This, as we have seen, is true.

772. *On 8 March 2021, again without the knowledge or consent of the Morjarias, Boomzone entered into the "Third Boomzone Lease". It is to be inferred that the main purpose of the Mirzas in procuring the Third Boomzone Lease was to facilitate the proposed transaction with Timeline (and to ensure that Viper did not benefit from that transaction save to the extent of the rent payable under the Third Boomzone Lease.* I consider this inference to be justified.

773. *The Third Boomzone Lease also was on terms that were extremely favourable to Boomzone and correspondingly detrimental to Viper / the JV in that:*

i) *the annual rent of £60,000 was substantially below market rate. The Claimants will rely in this regard on (a) the very large difference between the rent payable under the Third Boomzone Lease and the rent which was then being discussed with Timeline at that time (being a monthly rent of £23,983.09 for part of the building consisting of 4,263.66 sq. ft., and a further £16,099.03 per month in respect of a further area of 2,862.05 sq. ft. (amounting in total to £480,985.44 per year), and (b) the even larger difference between that rate and the rate subsequently paid by Timeline (circa £2m per year);*

ii) *the lease was for a ten-year term running from 1 April 2022 until 31 March 2032 (Clause 2); and*

iii) *the Landlord's Break Clause (Clause 20) was made significantly more onerous, to circumscribe Viper's ability to exit the lease prior to its end in 2032 and to oblige Viper to pay potentially substantial compensation to Boomzone if it did terminate the lease.*

774. Whilst there are questions about whether the rent under the Third Boomzone Lease was below the "market rent" as assessed by the experts, there can be little doubt that it was very substantially below the amounts that Mr Mirza would have considered to be achievable from the property including the prospect of rents from Timeline.

775. It is argued on behalf of the Defendants that:

i) the Timeline opportunity was not locked down - there had been many other apparent opportunities which came to nothing; and

ii) there were concerns about Timeline's financial viability as its accounts at the time showed it to be loss-making.

776. Nevertheless, I consider it clear from the manner and content of the intensive negotiations that at the time of the Third Boomzone Lease, this was perceived by the Mirza family as offering a substantial and very real opportunity. As I have already mentioned, I consider that the concerns about Timeline's financial viability are being greatly overstated. The Mirzas understood that Timeline had very lucrative arrangements with major broadcasters. As we have seen at [737], Savills in November 2021 considered Timeline to have "good covenant strength". The best indication of the beliefs of Mr Mirza and his family may be taken from how they acted. The fact that LMH was incorporated especially to take advantage of the Timeline opportunity shows that Mr Mirza and his family considered this to be a real opportunity.

777. Further, there can be little doubt that had this opportunity been fully explained to the Directors and had they been advised that the consequence of the Third Boomzone Lease would be to reduce the value of Viper's 999-year Lease and would result in value leaving the JV and accruing instead to Mr Mirza or his family, they would not have signed the Third Boomzone Lease.

778. *By reason of the above terms, the Third Boomzone Lease substantially reduced the market value of Viper's long leasehold interest in the Data Centre. This reduction in value consequently greatly reduced the potential for Viper to repay the BOS Facility either by selling the leasehold interest on the open market or refinancing with an alternative bank/investor.* This, I consider is true.

779. *This, in turn, meant that Mr Mirza (or entities controlled by him) was the only viable potential purchaser of the Data Centre, given only he had the ability to terminate the Third Boomzone Lease (without substantial penalty) and thus realise its true market value, free from that lease.* This is not completely true. But what is true is that the Viper Lease had been substantially devalued and could only be sold to an outside party at a devalued price. Clearly, Mr Mirza understood this point, as when he later sought to purchase the Viper Lease, it was at a valuation that reflected this devaluation.

780. *Throughout the period of the Boomzone Leases until at least May 2022, the office space within the Data Centre was sub-leased by Mr Mirza substantially for his own use and/or for the use of closely related third-party companies. These include Mr Mirza's companies (Redwire, Tydwell, Kingmead, Kingmead Investments Limited Inc, Kingmead Homes (Newlands) Limited, Prime Ealing Properties Limited Inc) and a company belonging to Mr Mirza's daughter, Shaima Mirza (M Dynasty Records Limited).* This is admitted, although the Defence and Counterclaim refers to this as being three small office rooms.

781. *In addition, since May 2022, Boomzone has subleased the majority of the Data Centre to LMH, another company closely related to Mr Mirza (the **"LMH Lease"**).* This is admitted, although the Defence and Counterclaim claims not to understand what is meant by "closely related". Given the background that LMH was owned by his children, and he was a director of it, I consider the point obvious.

782. *It is to be inferred that the main purpose of the Mirzas in procuring the LMH Lease was to further separate Viper (and Boomzone, which as set out below, had been the subject of the 2021 Lease Representation) from the profitable transaction with Timeline.*

783. I consider it to be far more likely than not that this was the main purpose of the introduction of LMH. It is possible that Mr Mirza may have wished to provide his children with their own independent business, but it is far more likely, given the timing of the grant of the underlease to LMH, that the interpolation of LMH was intended to insulate the Timeline opportunity from the actions being taken by the Morjarias and the Directors against the Mirzas. It is surely not a coincidence that LMH was provided with its sublease on the very same day as Timeline was ready to sign and did sign an agreement for lease for the same space. This was after Viper had given notice to rescind the Boomzone Leases on 31 March 2022 and after the May 2022 Agreements and the commencement of litigation against the Mirzas.

784. In the Defence and Counterclaim this is replied to with the following points:

i) The inference sought to be drawn is without any basis and is denied. Such an arrangement for such an alleged purpose (which is denied) would have been unnecessary, given that Boomzone was not a joint venture entity and was permitted by the terms of the Third Boomzone Lease (clause 8.1) to grant a sub-lease without Viper or Otaki's consent. LMH was used, being a new entity, because of the very large fit-out costs of the Data Centre, incurred in the sum of approximately £5 million, and the very significant commercial risks.

ii) In any event, by this point, the JVA had come to an end, Viper had been sold to Trafalgar and had ceased to be a joint venture asset. Paragraph 162A below is repeated.

785. I will discuss this response when I come to consider the Boomzone Lease Claim relating to breach of duty.

786. *In or around May 2022, LMH allowed Timeline into occupation of most of the Data Centre under an agreement for a 10-year lease at annual rent of circa £1.8 million per year from July 2022 (rising to more than £2 million from January 2024). Timeline subsequently occupied the remainder of the Data Centre (the 4th and 5th floors) on terms which are unknown to the Claimants.* This point is true and is admitted, save that the Defendants particularise the date as 20 May 2022.

787. *Since 2022, LMH has benefited from (i) very substantial payments of rent from Timeline and (ii) the value of the right to future rent from Timeline, without Viper benefiting thereby.* This is not entirely true since Viper did benefit from small rental paid (eventually) by Boomzone from the rents in the early years being used to subsidise running costs and some of the build costs. Nevertheless, the point remains true to a very substantial extent. The sentence is admitted in the Defence and Counterclaim "save to note the Claimants' lack of knowledge". The Defence and Counterclaim goes on to plead that Timeline occupied the 4th and 5th floors from November 2022 and subsequently re-fitted the space to suit its own requirements.

788. This takes us then to the meat of the Boomzone Lease claims.

E. The Boomzone Lease Claim relating to Deceit

789. The first claim, in deceit, is pleaded at paragraphs 101-111 of the PoC. As the Defendants take issue about the adequacy of the pleadings, I will set out in full how this claim has been pleaded alongside the commentary made in the Defence and Counterclaim in relation to each point.

PoC	Defence and Counterclaim
"101. By reason of his fiduciary duties and/or duty of good faith pursuant to the JVA, Mr Mirza was at all material times obliged to disclose to Viper (and the other JV Entities) any breaches of duty by him. Further,	"107. The first sentence is denied: (a) Mr Mirza owed no such fiduciary duties. (b) In any event, neither Mr Mirza's alleged fiduciary duties nor his duty of good faith under the

PoC	Defence and Counterclaim
in negotiating the Boomzone Leases (which concerned the disposal of interest in assets of the JV), he was obliged to disclose to Viper all material facts of which he had knowledge and of which is Viper may not have been aware.	JVA obliged him to disclose to Viper or the other JV Entities any alleged breaches of duty committed by him. As to the second sentence, no basis has been pleaded for the alleged duty of disclosure referred to and it is denied that Mr Mirza was under any such obligation.
102. At no time prior to the execution of the Boomzone Leases did Mr Mirza inform Viper of the wrongdoing regarding invoicing set out in section IV above and/or of his breaches of duty arising from that conduct. The failure to inform Viper of those matters, notwithstanding his duty to do so, amounted to a deceit by Mr Mirza and/or by Boomzone alternatively to implied and continuing false representations by him and (through him) Boomzone, to Viper, that: a. The belief held by Viper, that the invoices had been honestly and accurately raised in respect of costs and expenses, was correct. b. At the time of entry into each of the Boomzone Leases there was nothing relevant to disclose to Viper that had not been disclosed (collectively "**the Wrongdoing Representations**").	108. As to the first sentence, it is admitted that Mr Mirza did not inform Viper that he had engaged in the alleged wrongdoing in relation to invoicing or that he had breached his duties as a result. He did not do so because he had not engaged in any wrongdoing and had not breached any duties. As to the second sentence: (a) Mr Mirza was under no duty of disclosure. The allegation that Mr Mirza's failure to inform Viper of the alleged wrongdoing "amounted to a deceit" is not understood. (b) Further or alternatively, it is denied that the failure to inform Viper of the matters alleged was capable of giving rise to the 'Wrongdoing Representations', which are denied.
103. In failing to disclose those matters, Mr Mirza acted knowingly or recklessly. The fact that Mr Mirza had dishonestly extracted substantial sums of money from the JV, in breach of fiduciary duties, would have caused the directors to stop dealing with Mr Mirza, and/or inform the Morjarias (who would in turn have caused the directors to stop dealing with Mr Mirza). It is to be inferred that Mr Mirza (and consequently Boomzone) knew that and	109. The first sentence fails to identify "those matters" which it is said Mr Mirza was under a duty to disclose. Without prejudice thereto, it is denied that Mr Mirza was under any duty of disclosure to Viper and he cannot therefore have failed to disclose anything or acted knowingly or recklessly as a result. As to the second sentence: (a) It is denied that Mr Mirza "dishonestly extracted substantial sums of money from the JV" for the reasons given herein.

PoC	Defence and Counterclaim
consequently deliberately or recklessly withheld that information.	(b) In authorising payment of invoices, the Directors will have relied on Tydwell's contractual entitlement to such sums. It is denied that they would have acted any differently had the (unidentified) " matters" been disclosed to them. The third sentence is denied. Mr Mirza had no such knowledge.
104. Further, during a period that included October 2018 to end of 2019, IQEQ (on behalf of Viper) had repeatedly been informed of the ongoing process by which Mr Morjaria would have 50% of the shares in Boomzone transferred to him and, as such, that the Joint Venturers would both benefit equally from each of the Boomzone Leases. These included representations by Mr Mirza to Mr Stobart of Viper in emails sent on 11 September 2019 (at 10:29 and 11:52) that he had given instructions for the transfer to take place.	110. The first sentence of Paragraph 104 is not admitted. The second sentence is admitted, save that it is averred that Mr Mirza's emails described a transfer to Trafalgar (as opposed to Mr Morjaria). Mr Morjaria had made clear by 10 November 2019 to (at least) Mr Homan that any transfer of shares in Boomzone should be to Trafalgar rather than himself.
105. These gave rise to an ongoing express (alternatively implied) representation to Viper that there was an ongoing process in existence by which Mr Morjaria would become a 50% shareholder of Boomzone (the "2021 Lease Representation"). By the end of 2019 there was no such ongoing process as Mr Mirza had failed to take any steps to make the transfer, meaning Mr Mirza solely owned and would continue to solely own 100% of Boomzone.	111. As to the first sentence, it is embarrassing for want of particularity. The reason why this representation is said to have been "ongoing" has not been explained, nor is it understood what is meant by the phrases "gave rise to" and "ongoing process" in this context. In any event, it is denied that there was any such representation. Further, the statements relied upon to constitute such a representation involved a transfer to Trafalgar (rather than to Mr Morjaria). By or around September 2019, Mr Morjaria was not prepared to make any (or any further) contributions to Boomzone's (or Redwire or Tydwell's) expenses in respect of the Data Centre. This was repeatedly confirmed by Mr Morjaria during Skype calls with Mr Mirza. Further, if (which is denied) there was a relevant representation, it would be a representation as to future intention and such a representation is not actionable because it does not amount to a statement of fact. By or around September 2019,

PoC	Defence and Counterclaim
	Mr Morjaria was not prepared to make any (or any further) contributions to Boomzone's (or Redwire or Tydwell's) expenses in respect of the Data Centre: (a) This was repeatedly confirmed by Mr Morjaria during Skype calls with Mr Mirza. Further (and for the avoidance of doubt), it is denied that any representation in such vague terms would be actionable. Save that it is admitted that the negotiation of a separate joint venture under which Mr Morjaria (or Trafalgar) would become a 50% shareholder in Boomzone had ended by the end of 2019 as referred to above, the second sentence is denied.
106. In light of that change in circumstances prior to the Third Boomzone Lease, Mr Mirza and Boomzone were obliged to correct the ongoing representation that had been made. They did not do so. Through the period up to and including 8 March 2021, Viper (through IQEQ) continued to believe the ongoing representation was true, whereas it was false.	112. The first sentence is denied. Mr Mirza and Boomzone were under no such obligation. As to the second sentence, it is admitted that neither Mr Mirza nor Boomzone informed Viper that 50% of the shares in Boomzone had not been transferred to Mr Morjaria. Neither of them was under any obligation to provide Viper with such information. The third sentence is denied. Mr Lewin (whose knowledge is to be attributed to Viper for these purposes) clearly knew as of 8 March 2021 (when the Third Boomzone Lease was signed and commenced) that Boomzone remained solely owned by Mr Mirza because he said in an email on 20 April 2021 to Knight Frank (to which Mr Morjaria and Mr Mirza were copied) that it was owned by "one of the JV partners". Further, it is inherently incredible that Viper (acting through Mr Lewin) believed or continued to believe at the time of entry into the Third Boomzone Lease that any such representation (to the extent there was one and it was actionable, which is denied) was true: (a) The representation relied on was allegedly made on 11 September 2019 and the Third Boomzone Lease was entered into approximately 18 months later.

PoC	Defence and Counterclaim
	(b) The Third Boomzone Lease was entered into in the context of the communications outlined at paragraph 98A above. It is to be inferred from these communications that the Directors (alternatively Mr Lewin) knew that (i) termination of the JVA was under consideration, (ii) Mr Morjaria and Mr Mirza were not on speaking terms, having not spoken directly for four months prior to 12 February 2021 and (iii) Mr Morjaria was taking legal advice about the joint venture. Accordingly, Mr Lewin emailed Mr Morjaria on 21 April 2021 stating that "[i]t seems clear to the board that the JV is broken". (c) The Third Boomzone Lease was signed on three occasions (prior to subsequent amendments). The Directors, alternatively Mr Lewin, therefore had almost three months prior to entry into the Third Boomzone Lease on 8 March 2021 to consider signing it or to check whether 50% of the shares in Boomzone had or would be transferred to Mr Morjaria. It is averred that they made no such checks. Paragraph 113.1 [appearing immediately below in this table] is repeated.
107. Further or alternatively, at no time prior to the execution of the Third Boomzone Lease did Mr Mirza inform Viper that no transfer of 50% of the shareholding in Boomzone to Mr Morjaria had taken place and/or that there was no intention at that time (on the part of either Mr Mirza or Mr Morjaria) that such a transfer of ownership would take place. The failure to inform Viper of those matters, notwithstanding his duty to do so, amounted to a deceit by Mr Mirza and/or by Boomzone alternatively a further instance of the Wrongdoing Representations.	113. The first sentence is admitted. However Mr Stobart of IQEQ was sent an email from Mr Homan on 11 December 2019 at 23:03 (also sent to Mr Morjaria and Mr Mirza) in which Mr Homan responded to certain queries of Mr Morjaria in relation to the proposed Boomzone joint venture. Mr Stobart was aware that there was no further response from Mr Morjaria. Accordingly, it is to be inferred that Mr Stobart realised by the time of the execution of the 2021 Lease (8 March 2021) that no transfer of 50% of the shares in Boomzone to Mr Morjaria had taken place or was likely to take place. In addition, Mr Lewin knew that no transfer had taken place. Further, the directors of Viper at no point took any steps or made any enquiries as to whether Boomzone was 50% owned by Mr Morjaria prior to signing any of the Boomzone Leases and it is noted that no allegations are made that they thought Boomzone was owned (or would be owned) 50% by Mr Morjaria prior to signing the First Boomzone Lease or Second Boomzone Lease.

PoC	Defence and Counterclaim
	As to the second sentence: (a) It is denied that Mr Mirza or Boomzone was under any duty to inform Viper of the matters referred to (and no basis for such a duty of disclosure has been pleaded). (b) The allegation that the failure to inform Viper of such matters "amounted to a deceit" is not understood. (c) The 'Wrongdoing Representations' were never made and it is denied that the alleged non-disclosure referred to amounted to a further instance of the same.
108. In failing to disclose those matters, Mr Mirza acted deliberately or recklessly: a. As set out above, the Third Boomzone Lease was on terms that were extremely favourable to Boomzone and correspondingly detrimental to Viper / the JV. b. Absent any intention to transfer the shares in Boomzone, the benefit of that lease would accrue solely to only one of the Joint Venturers (Mr Mirza). c. It is to be inferred that Mr Mirza knew that had the directors of Viper been made aware of the above, they would have (or may have) refused to enter into the lease without seeking approval from the other Joint Venturer.	114. As to the second sentence: (a) It is denied that Mr Mirza or Boomzone was under any duty to inform Viper of the matters referred to (and no basis for such a duty of disclosure has been pleaded). (b) The allegation that the failure to inform Viper of such matters "amounted to a deceit" is not understood. (c) The 'Wrongdoing Representations' were never made and it is denied that the alleged non-disclosure referred to amounted to a further instance of the same.
109. Further or alternatively, in making the Wrongdoing Representations and/or the 2021 Lease Representation, Mr Mirza acted negligently.	115. Paragraph 109 fails to identify to whom Mr Mirza is said to have owed a duty of care or on what basis. It falls to be struck out accordingly. Without prejudice thereto, it is denied that Mr Mirza made the representations alleged or failed to act with reasonable care and skill.
110. The Wrongdoing Representations (and/or in respect of the Third Boomzone Lease the 2021	116. Paragraph 110 is denied. Without prejudice to the generality of this denial:

PoC	Defence and Counterclaim
Lease Representation) were made with the intention that Viper should rely upon them and be induced into acting upon them by entering into the Boomzone Leases. In reliance on those representations Viper was induced into entering the Boomzone Leases and agreeing to the terms therein.	Mr Mirza and Boomzone cannot have had the requisite dishonest state of mind or intention necessary to have perpetrated a deceit on Viper given that: (a) They did not understand that they were making the alleged representations; and (b) They did not intend Viper to understand any statements or non-disclosure made by them in the way that Viper is alleged to have understood them. It is to be inferred that Viper entered into the Boomzone Leases because Mr Lewin considered it to be in Viper's best interests to do so. In this regard: (a) Paragraph 105.1 above is repeated. (b) It is denied that Viper was induced into entering the Third Boomzone Lease in reliance on the 2021 Lease Representation. Neither Mr Lewin nor Mr Stobart (acting on behalf of Viper) relied contemporaneously on the notion that Mr Morjaria (or indeed Trafalgar) was to become a shareholder in Boomzone as a condition of Viper entering into the Third Boomzone Lease. Paragraphs 98A and 112.3 above are repeated. Such an assertion was first raised retrospectively on 31 March 2022 (a year after the Third Boomzone Lease had been entered into). It is noteworthy that this occurred three days after Dickinson Gleeson (then the legal representatives of the Directors) received a letter from Jones Day (then the legal representatives of the Claimants) in which Jones Day, inter alia, complained about the circumstances in which the Third Boomzone Lease was entered into, referred to the Directors being manipulated and asked "Have your clients even asked Mr Mirza to surrender the lease?". It is to be inferred from the foregoing that the alleged deceit is a post-dated invention long after the event. (c) Viper sought to rely on the terms of the Boomzone Leases, including by continuing to receive rent from Boomzone, long after, on the Claimants' case, the Directors had become aware of the matters the Claimants allege made the Wrongdoing Representations and 2021 Lease

PoC	Defence and Counterclaim
	Representation false. The points made in paragraph (b) above are repeated. In this regard, on or around 1 February 2022, Dickinson Gleeson, acting on behalf of Viper, sought to and did enforce the terms of the Second Boomzone Lease and acknowledged the terms and validity of the Third Boomzone Lease, in concluding an agreement for Boomzone to settle business rates payable to Ealing Council in respect of the Data Centre. It is noted that the Claimants have not pleaded reliance on a presumption of inducement or any facts and matters to permit them to rely on such a presumption.
111. Viper is accordingly entitled to rescind the Boomzone Leases. By letter dated 31 March 2022 Viper gave notice of its rescission of the Third Boomzone Lease. Viper hereby further gives notice of its rescission of the First and Second Boomzone Lease."	117. The first sentence is denied. Viper had no entitlement to rescind any of the Boomzone Leases. As to the second sentence, the sending of the letter of 31 March 2022 is admitted. It is denied that it was of any effect. The third sentence is noted. Viper has no right to give such notice, which is of no effect."

790. In summary, then, the deceit relied upon comprises:

i) what is described as the "Wrongdoing Representations", arising out of a failure to disclose the invoicing misrepresentations when Mr Mirza had a duty to do so;

ii) what is described as the "2021 Lease Representation" that there was an ongoing process in existence by which Mr Morjaria would become a 50% shareholder and a failure to correct this, notwithstanding a duty to do so, when this became untrue.

791. I have already explained the elements that a claimant must demonstrate to succeed in the tort of deceit. I will consider each of the alleged misrepresentations against each of these required elements of the tort.

i. The Alleged Wrongdoing Representations

792. First, I will consider whether all of these requirements are satisfied in relation to the alleged Wrongdoing Representations.

Was there a false representation?

793. As regards the first requirement, the Defendants deny that there was any wrongdoing about which any representation could be made. I have found that there was such

wrongdoing, and so I dismiss any defence based on the fact that there was no wrongdoing to disclose.

794. As to the question whether such a representation was made, there is no allegation and no evidence, that Mr Mirza (or Boomzone) at this time made any express statement that Mr Mirza/Tydwell were not presenting false invoices. That is not fatal to the Claimants' misrepresentation claim. As we have seen, a representation may be either express or implied from conduct.

795. As is noted in *Clerk & Lindsell* at paragraph 17-10:

> "In certain cases, notably where there is a fiduciary relation between the parties, there may be a duty to reveal information so that (for example) non-disclosure will make any resulting transaction voidable. It now seems accepted that in such cases non-disclosure may equally be capable of amounting to fraud at common law. Thus in *Conlon v Simms* [[2006] EWHC 401 (Ch); [2006] 2 All E.R. 1024], a solicitor who in partnership negotiations failed to mention a number of shady dealings in which he had previously been involved was held liable in deceit to his co-partner."

796. The authors also refer to other cases, including my decision in *Van Zuylen (Baroness) v Whiston-Dew* [2021] EWHC 2219 (Ch) at [174], where I found that a *soi-disant* investment manager for the claimant was bound to reveal that a supposed trust for investment had never been properly constituted.

797. In the current case, the conduct alleged is staying silent on the point when Mr Mirza had a duty to do otherwise. Therefore, whether or not there was such a representation depends on whether Mr Mirza (or Boomzone) must be taken as:

i) having understood that the JV Entities (acting through the Directors) would have believed that all the invoices were correctly compiled and did not include the representations that I have identified as being misleading; and

ii) having the knowledge that he was under an obligation to correct the Directors' false understanding.

798. As to point (i), I think it is clear from all the circumstances that Mr Mirza (and therefore Boomzone as he was its controlling mind) would have known that the Directors believed that the invoices and requests for payment sent to them correctly reflected third-party payments except to the extent that they were claiming management fees on their face. I have also found that he knew that this understanding was untrue.

799. As to point (ii), I cannot see any basis on which Boomzone was under a duty to correct the Directors' understanding on this point, but I consider that Mr Mirza was under such a duty on two bases.

800. The first basis is Mr Mirza's obligations under the JVA. Clause 5.2.2 of the JVA obliged Mr Mirza to keep Mr and Mrs Morjaria fully informed on the progress of the JV at all

times. That provision, however, is not engaged by the Claimants' pleading, which in this case alleges breach of a duty towards Viper, not one towards Mr or Mrs Morjaria.

801. The Claimants plead instead a breach of the duty of good faith, which must be a reference to clause 12.1.1 of the JVA, and possibly also clause 12.1. These provisions are as follows:

> "12.1 Dealings
>
> All dealings between the Joint Venturers shall be conducted in good faith and on the basis set out or referred to in this Agreement or, If not provided for in this Agreement, as may be agreed by the parties and, in the absence of such Agreement, on an arm's length basis."
>
> and
> "12.2.1 Each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure that this Agreement is observed."

802. I have already alluded at [143] that in considering how to treat an express term requiring a party to act in good faith, it is necessary to consider the context. In this case, the context was that up to the fullest extent possible without threatening the tax domicile of the JV Entities or putting the Directors in breach of their fiduciary duties, Mr Mirza had been allowed (in accordance with clause 5.2.1 of the JVA) to manage the daily operation of the JV and the Directors relied on him, when being asked to make decisions, to have given them the information necessary for that decision. Further, he had invited that trust.

803. If Mr Mirza had known that someone was cheating the JV and there was a proposal for one of the JV Entities to deal with that person (or a company wholly-owned by that person), he would have had a duty to speak out. He was not excused from that duty by the fact that the person in question was himself.

804. The contractual duty of good faith was, even on the Defendants' pleadings, in place during the period when the First, Second and Third Boomzone Leases were entered into.

805. Secondly, I have found that Mr Mirza had fiduciary duties towards the JV Entities (see at [192] to [195] above and the discussion leading up to those paragraphs). This also imparted a duty both not to cheat the JV, and if he knew that he had been cheating the JV, to tell them for similar reasons to those I have mentioned in the previous paragraph.

806. I conclude, therefore, Mr Mirza did, through his conduct in keeping silent in the knowledge that Tydwell was presenting invoices on a false basis when he was under contractual and fiduciary duties to do otherwise, make what have been described as the Wrongdoing Representations.

Did Mr Mirza know he was making an untrue representation?

807. The Defendants make the point within their Defence and Counterclaim that Mr Mirza (and Boomzone) cannot have had the requisite dishonest state of mind in that they did

not understand that they were making the alleged representations and did not intend Viper to understand any statements or nondisclosure to be made in the way that Viper is alleged to have understood them.

808. On the balance of probabilities, and having regard to the burden of proof, I find for the Defendants on this point. For the reasons I have given, I consider that Mr Mirza must have known that he was causing Tydwell to render invoices and payments requests on a knowingly misleading, and therefore false and dishonest basis. I do not consider, however, that he understood that he was separately making representations that he was not doing so.

809. In my view the false representations made within the invoices and requests for payment themselves should be understood as including an implied representation that the invoices were honest, and that would have been understood by Mr Mirza. However, these representations, when made, were made to induce the payment of the invoices: they were not made with the intention that they would induce the Boomzone Leases.

810. The representation that the Claimants rely on is the failure of Mr Mirza to draw attention to this wrongdoing which, in the light of his duties, is to be regarded as a misrepresentation by omission in the light of his duties. That was a failure on his part, but I do not consider that Mr Mirza would have realised that in failing to speak up he was making a representation that there was no wrongdoing. Thus, one element of the tort of deceit is missing: Mr Mirza did not know that the representation was being made.

The other elements of the tort

811. On the basis of this finding, there is no need for me to consider the other elements of the claim in deceit, but for the record I would add that, if (contrary to my finding) Mr Mirza did understand that he was practising a deceit by failing to disclose his wrongdoing when he had a duty to do so, then all the circumstances suggest that he would have been making that representation with the intention to induce Viper to enter into the Boomzone Leases.

812. As regards reliance, I consider that the failure to inform the Directors of the wrongdoing was relied upon in the sense that, had they been aware of the wrongdoing, it is overwhelmingly likely that they would not have entered into the Boomzone Leases, or even if they were still prepared to work with Mr Mirza, they would have not done so on the same terms or without undertaking further diligence.

813. As regards loss, there can be no doubt that the net effect of the three Boomzone Leases has been to cause loss to Viper.

814. In conclusion, whilst many of the elements of the tort of deceit are made out, one of the crucial elements is not. Mr Mirza did not know that the representation alleged by the Claimants was being made. I therefore find against the Claimants in relation to their claim for deceit in respect of the alleged Wrongdoing Representations.

ii. The "2021 Lease Representation"

815. Turning to the second basis of deceit pleaded, the alleged "2021 Lease Representation", this also is to be considered in relation to each element of the tort of deceit.

Was there a false representation?

816. The misrepresentation said to arise in this case is that Viper had repeatedly been informed of the ongoing process by which Mr Morjaria would have 50% of the shares in Boomzone and Mr Mirza failed to correct this when it became untrue.

817. I have already mentioned at [766] above that the Defendants complained in their Defence and Counterclaim of a lack of particularity in how this representation is pleaded. This point was addressed at paragraph 104 of the PoC (reproduced in the table above) and in the Reply. In each case, reference was made to two emails (referred to in the Defence and Counterclaim, and so the Defendants will have understood what was being referred to) on 11 September 2019 where Mr Mirza represented that he had given instructions to Mr Homan to transfer a 50% shareholding to Mr Morjaria's company Trafalgar. One of these emails (which I have summarised at [723] above) was to Mr Stobart, copied to Mr Morjaria and Mr Homan, amongst others and the other was to Mr Homan, Mr Stobart and Mr Morjaria.

818. In the Reply the Claimants also admit and aver that, by email dated 10 November 2019 to Mr Homan, Mr Morjaria said:

> "The a/g has my name but really it should be Trafalgar limited since the shares will be owned by Trafalgar."

819. I consider, therefore, that the Claimants' pleadings taken as a whole were clear enough in pleading that Mr Mirza had communicated this intention to the Directors (via Mr Stobart) on at least these two occasions, and that it was to be understood that where the pleadings had talked about a transfer to Mr Morjaria, this should have been read widely to include a transfer to Trafalgar.

820. It is questionable whether these emails were representations in the true sense at all. They were communications relating to the proposed transfer, but I do not think that it is made out that they were representations in the sense of a statement made with the intention that someone else would rely on it for a particular purpose, and certainly not for the purpose of inducing any of the Boomzone Leases. The emails in November 2019 were a response to a request from Mr Stobart to bring about the transfer. There is nothing to indicate that they were made with a view to inducing the Boomzone Leases. Both the First Boomzone Lease and the Second Boomzone Lease were entered into before the emails identified by the Claimants in the PoC (although it is clear from the correspondence that there was an earlier understanding about the transfer proposal).

821. Furthermore, when these statements were made, I consider they were true, if not complete. Mr Mirza did intend to transfer 50% of the shares to Mr Morjaria or if he preferred to Trafalgar, although this was subject to a reservation unstated in the emails referred to that this was subject to Mr Morjaria agreeing to a new joint venture agreement for Boomzone which involved his committing to more funding.

822. A further problem in relying on these communications to establish a misrepresentation claim is that they were essentially a statement as to Mr Mirza's future intention, and the courts draw a distinction between a statement about one's future intention and a statement about a present state of affairs.

823. Of course, the point being made by the Claimants in the PoC is not that reliance is placed on the earlier correspondence itself as representations. It is rather that the failure to inform Viper of his change in heart prior to the execution of the Third Boomzone Lease, notwithstanding his duty to do so, amounted to a deceit by Mr Mirza.

824. For similar reasons to those that I have explained in relation to the Wrongdoing Representations, I conclude that Mr Mirza did make what has been described as the 2021 Lease Representation. He did this through his conduct in keeping silent on the point that Boomzone could no longer be regarded as part of a wider joint venture, but was going to be treated as his own personal company when he was under contractual and fiduciary duties to act in the best interests of the JV and knew that, or at the very least was reckless as to whether, the Directors were under a misapprehension regarding this point .

825. This was a failure on his part, but, on the balance of probabilities and having regard to the burden of proof, I do not consider that the Claimants have established that Mr Mirza would have realised that in failing to speak up he was making a representation that the originally proposed transfer of shares was no longer being planned. Thus, once again, one element of the tort of deceit is missing: Mr Mirza did not know that the representation was being made.

The other elements of the tort

826. Again, on the basis of this finding, there is no need for me to consider the other elements of the claim in deceit, but for the record I will record my findings on these matters.

827. If, contrary to my finding, at the time that Mr Mirza was proposing the Third Boomzone Lease, he did understand that he was practising a deceit by failing to disclose the fact that he no longer proposed to transfer any of the Boomzone shares when he had a duty to do so, then all the circumstances suggest that he would have been making that representation with the intention to induce Viper to enter into the Third Boomzone Lease.

828. As regards reliance, the evidence in relation to this point is as follows.

829. It was the common understanding of all the witnesses who had worked for IQEQ that Mr Lewin was the person who took the lead when the Directors were called upon to make strategic decisions. The evidence of Mr Lewin in his witness statement was that he was aware of an agreement for Mr Mirza to transfer 50% of the shares of both Boomzone and Redwire to Mr Morjaria, although he was not involved in arranging this transfer. He states that:

> "As far as I know, after a protracted period of time, Mr Mirza transferred 50% of the Redwire shares to Mr Morjaria but did not transfer 50% of the Boomzone shares. Notwithstanding that the shares in Boomzone were never transferred (and that those in Redwire were only transferred at a later stage), as far I was concerned, 50% of the shares in Boomzone and Redwire were always held by Mr Mirza on trust for Mr Morjaria in light of the agreement referred to above. I therefore regarded Boomzone and Redwire as Joint Venture entities for all practical purposes."

830. I cannot see any basis (except perhaps conceivably some argument based on proprietary estoppel, which has not been raised by any party) on which Mr Mirza can be found to be holding 50% of the shares on trust for Mr Morjaria, or Trafalgar, or Viper. Nevertheless, it is credible that, and I think it more likely than not that, Mr Lewin thought this to be the case, particularly if he took his information on this point from Mr Morjaria. It is notable in this regard that even in closing submissions, Mr Peto KC was putting forward an argument on behalf of Mr Morjaria that there was some trust arrangement.

831. Mr Lewin's belief on this point is a reason not to pay too much attention to a point raised in cross examination that when he was instructing Knight Frank Surveyors in an email on 20 April 2021 (a few weeks after the Third Boomzone Lease had been executed), he referred to Boomzone being owned by "one of the JV partners". In the same email he considered that the property should still be valued on the basis of vacant possession, suggesting that Mr Lewin still considered Boomzone to be part of the JV.

832. The evidence of Mr Webster, who became a director of the JV Entities in April 2019 (and therefore after the First and Second but before the Third Boomzone Lease was signed), is that prior to the correspondence in these proceedings he was not aware of the Boomzone ownership structure. He was not challenged about this in oral examination.

833. The evidence of Ms Yates was that she did not recall who owned Boomzone and did not believe she was involved in any discussions regarding its ownership. This evidence was not challenged in cross examination.

834. Mr Stobart (who as a reminder was not a director of the JV Entities but was involved in their administration) gave evidence in his witness statement that he had understood that Boomzone was owned by Mr Mirza but that it was intended to be owned by Mr Mirza and Mr Morjaria on an equal basis. He repeated this in his oral evidence. When asked whether he had considered the ownership point at the point that the Second Boomzone Lease was being approved on 11 May 2018 (after it had already been signed by Ms Yates and witnessed by Mr Stobart), he acknowledged that he would have been involved in preparing a suite of documents and recommendations for the directors of Viper to approve and that when he did so he did not put the ownership point to the Directors. He declined to say whether he considered that point to have been important at that time.

835. In fact, the understanding of the Directors on this issue as at the date of the Second Boomzone Lease is not particularly important since at this point there is no suggestion that Mr Mirza had changed his mind as to his intention to transfer shares to Mr Morjaria or to his order, and therefore any understanding the Directors might have had as to Mr Mirza's intention to transfer shares to Mr Morjaria at that time was correct and there could have been no deceit in relation to this point.

836. By the time that we get to the matter of the Third Boomzone Lease, the arrangements for the transfer of the shares had come to a halt, effectively owing to a stand-off between Mr Mirza who insisted on there being a new joint venture agreement and Mr Morjaria who was unwilling to sign one in the terms put forward (which included an uncapped obligation to continue to contribute towards costs).

837. There is a question whether the Directors knew that this stand-off had occurred, and therefore did not need Mr Mirza to tell them of this.

838. It was put to Mr Stobart that he would have been aware if the transfer process had been successful as he was being kept in the loop and he answered that he could not recall what happened after this. Certainly, he was involved in the to and fro of negotiations in November as to the content of the proposed joint venture agreements. Had he thought about the point, he would have been aware that these negotiations did not progress after November. He was also aware that the relationship between Mr Morjaria and Mr Mirza was deteriorating.

839. Mr Stobart and Mr Lewin received an email from Mr Morjaria on 25 February 2021 (the day after the Third Boomzone Lease had been signed on behalf of Viper for the second time, but before the final version was signed) where Mr Morjaria had written:

> "In the current situation between me and Camran [Mr Mirza] where we want to bring all this to an end DO NOT let him ask you to change anything you guys do not agree with."

840. Against the background of that communication, I conclude that when the Third Boomzone Lease was finally concluded on 8 March 2021, the Directors would not have realised that this would have the effect of handing over to Mr Mirza (through his sole ownership of Boomzone) the benefit of prospective revenues from No. 22 for the next 10 years.

841. If he had thought about it, however, Mr Stobart might have realised this. On 1 April 2021 Mr Stobart wrote to Mr Lewin saying that Mr Morjaria:

> "is not involved in with Boomzone/Redwire ownership".

842. Taking all this evidence together, I consider that none of the Directors thought very deeply about the question of the ownership of Boomzone and neither did Mr Stobart. Mr Webster and Ms Yates looked to Mr Lewin. Mr Lewin had early on concluded that Boomzone was to be regarded as another part of the wider joint venture and regarded it as a formality that the shares had not been transferred. It did not occur to any of them that circumstances might have changed. Mr Stobart might, if he had thought about the point, have discussed it with Mr Lewin, but there is no evidence that he did until after the Third Boomzone Lease had been signed in its final form. Even if he had done so, as Mr Lewin had formed the view that the shares were being held on trust anyway, he would have remained under the misapprehension that it did not matter that there had been no formal transfer of the shares.

843. The fact that the Directors paid little regard to the ownership of Boomzone at the point that the Third Boomzone Lease was entered into did not absolve Mr Mirza, with his duties of good faith and fiduciary duties, from making sure that the Directors were fully aware that in granting a lease to Boomzone they were in effect transferring away from the JV and the JV Partners any effective profit from the letting of No. 22 for 10 years. I also consider, having regard to Mr Mirza's formidable commercial acumen, that he would have understood that the Third Boomzone Lease had the effect of devaluing rather than enhancing the valuation of the Viper Lease and therefore of Viper, Otaki and the JV generally.

844. Accordingly, I consider that Mr Mirza's failure to inform the Directors of the fact that he was no longer contemplating transferring half the shares in Boomzone to Mr Morjaria or Trafalgar was relied upon, in the sense that had they been fully made aware that Mr Mirza's intention was to keep all the profits from letting the property for 10 years and not to share them with Mr Morjaria. It is overwhelmingly likely that they would not have entered into these leases, on the same terms or without undertaking further due diligence.

845. As regards loss, there can be no doubt that the net effect of the Third Boomzone Lease has been to cause loss to Viper.

846. In conclusion, whilst many of the elements of the tort of deceit are made out, in relation to the alleged 2021 Lease Representation, one of the crucial elements is not. Mr Mirza did not know that the representation alleged by the Claimants was being made.

847. I therefore find against the Claimants in relation to their claim for deceit in relation to the alleged 2021 Lease Representation.

F. The Boomzone Lease Claim relating to breach of duty

i. The Claim as pleaded

848. The second way that the Claimants claim in relation to the Boomzone Leases is pleaded at paragraphs 112-113A of the PoC. Again, as the Defendants take issue about the adequacy of the pleadings, I will set out in full how this claim has been pleaded alongside the commentary made in the Defence and Counterclaim (at paragraphs 118 onwards) in relation to each point.

PoC	**Defence and Counterclaim**
"112. Further or alternatively, by reason of the matters alleged above, Mr Mirza has breached clauses 2.1 and 12 of the JVA, and/or his fiduciary duties owed to the Morjarias and/or Otaki and/or Viper by: a. Making the Wrongdoing Representations and/or the 2021 Lease Representation; b. Causing his wholly owned company (Boomzone) to enter into the Boomzone Leases and/or to enter into such leases on terms that were favourable to Boomzone and detrimental to Viper and/or the JV; and c. Doing so without the informed consent of the other Joint Venturers or the JV Entities.	118. Paragraph 112 is denied: 118.1 As to Subparagraph (a), the representations were not made. 118.2 As to Subparagraph (b), Mr Mirza did not act in breach of contract or alleged breach of fiduciary duty in causing Boomzone to enter into the Boomzone Leases. Paragraphs 29-30 above are repeated. 118.3 As to Subparagraph (c), Mr Mirza was under no obligation to obtain the informed consent of the Morjarias or JV Entities to Viper's entry into the Boomzone Leases (albeit by entering into them, Viper consented to their terms, and Mr Morjaria will have been aware of the leases as a result of his son Shamick (with whom Mr Morjaria communicated regularly) working at Redwire and Boomzone from within Boomzone's offices).

PoC	Defence and Counterclaim
113. Further, the Boomzone Leases were entered into by reason of the breaches of fiduciary duty set out above. The Boomzone Leases are accordingly liable to be rescinded in equity.	119. Paragraph 113 is denied for the reasons given at paragraph 118 above.
113A. Further, having procured the creation and grant of the Boomzone Leases out of the Viper Lease in breach of fiduciary duty, Mr Mirza used the existence of the Third Boomzone Lease to procure the transfer to Wolverine of the Viper Lease at a reduced value, as set out at paragraph 99(g) above and 119C-119E below. He thereby engineered a situation in which companies closely related to him (Wolverine, Boomzone and LMH) came to own the entire chain of leases between the freehold and the profitable lease to Timeline (the Viper Lease, the Third Boomzone Lease and the LMH Lease) for a total price which was a fraction of the market value of those interests combined, making a profit for those companies (or some of them) and causing loss to the Claimants. That situation was a continuation of, alternatively a consequence of, Mr Mirza's breach of fiduciary duty complained of above. "	119A. Paragraph 113A is denied for the reasons given at paragraphs 105.5 and 118 above [These are in summary, the points I have discussed at [780] to [787] above] and paragraphs 125C-125E below." [which is where the Defendants deal with Mr Mirza's exercise of a power of sale and the circumstances of the Wolverine transaction, as discussed further below]

849. In summary then, the claim for breach of duties relating to the Boomzone Leases relies upon alleged breaches of the JVA and of fiduciary duty said to be comprised in:

i) making the alleged Wrongdoing Representations and/or the 2021 Lease Representation;

ii) causing Boomzone to enter into leases on terms that were favourable to Boomzone and detrimental to Viper and/or the JV; and

iii) doing so without the informed consent of the other Joint Venturers or the JV Entities.

850. I consider each element of this claim below except that I will deal with the allegations relating to Wolverine separately.

ii. The duty of good faith and fiduciary duty

851. As discussed in more detail at [143]-[146] and [207] above, Mr Mirza had accepted a contractual duty of good faith. He had also agreed to manage the daily operation of the JV in the best interests of the Joint Venturers. I have already discussed at [147]-[207] my analysis that Mr Mirza did owe fiduciary duties. When Mr Mirza was acting on behalf of the JV Entities these duties were primarily owed to Otaki, and the relevant JV Entity, most pertinently Viper.

852. I have referred at [204] to the explanation of Millet LJ of the "core" duties owed by a fiduciary and at [205] to how these duties may be attenuated depending on the nature of the relationship giving rise to them. These duties therefore need to be considered in their context.

853. Mr Mirza had accepted a duty to make recommendations to the JV Entities in the best interests of the JV. As with the Court of Appeal in *Wood* and *Johnson* as discussed above, the advisor's fiduciary duty was to provide the recommendations sought by his client on a disinterested basis, rather than to present recommendations from which the advisor stands to make a profit (see *Johnson* at [94]). The content of the duty is, accordingly, in substance the same as that found above in *Ross River (HC)*: the advisor is prohibited from exploiting his position to favour his own interests at the expense of the person relying on him for the advice.

854. However, it had been accepted by the Directors that there could be dealings between the JV Entities and Mr Mirza's companies. I have already found that the Directors had accepted that Tydwell could make and keep a management charge. I do not think, therefore, that the fiduciary duty in this case went so far as to cause Mr Mirza not to allow his companies to make any profit or to require an account for any profit made. The duty did, however, in my view extend to a duty to ensure that the JV Entities were aware of all the circumstances relevant to the transaction and to the likely level of profit that Boomzone might be making out of the transaction.

855. In this I consider I am following a similar analysis to Morgan J in *Ross River (HC)* (see in particular at [263]:

> "WCL did not owe to Ross River a general obligation not to allow duty and interest to conflict nor a duty not to profit from the fiduciary relationship but did owe a duty not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of Ross River."

856. Like WCL in that case, I consider that Mr Mirza owed to the JV Entities a fiduciary obligation not to do anything which favoured himself to the disadvantage of the JV Entities. However, I am following Morgan J also in not finding that the fiduciary in question owed a more general duty not to allow a conflict between its own interests and its duty to the person to which it owed those duties. As Morgan J found in *Ross River HC*, the parties have accepted a commercial relationship under which the fiduciary was allowed to benefit personally.

857. The Claimants argue that there is a difference in the current case since Mr Mirza in the current case has specifically accepted an obligation to act in the interests of the JV, but

I do not consider that point to be determinative. Looked at in the round, there was clearly an understanding by the directors of the JV Entities that Boomzone (as had been the case with Tydwell) might make profits. Mr Morjaria may have had no such understanding, but Mr Mirza was not providing recommendations to Mr Morjaria: he was advising the JV Entities, and it is to them that his fiduciary duties were owed.

858. In summary then, the circumstances surrounding these arrangements:

i) imposed on Mr Mirza duties when making a recommendation or proposal to the JV Entities, to do so with regard to what he considered genuinely to be in the interests of the JV disregarding his own personal interests;

ii) did not place any requirement on Mr Mirza not to place himself in a position where his duty and his interest may conflict;

iii) allowed him through his companies including Boomzone to make profits, where these coincided with the interests of the JV but, in accordance with the core duties owed by fiduciary, only after making full disclosure of the relevant circumstances so as to allow the informed consent of the person to whom the duties are owed.

859. In my view, these duties were owed both as fiduciary duties and as contractual duties in relation to the duties of good faith, and to act in the interests of the JV that Mr Mirza had assumed under the JVA.

iii. The Wrongdoing Representations and the 2021 Lease Representations

860. I have already concluded that Mr Mirza did make the Wrongdoing Representations and the 2021 Lease Representation. I have found that Mr Mirza avoids liability in deceit in relation to these representations as it has not been established that he knew he was making those representations.

861. This Defence and Counterclaim does not apply in the same way in relation to fiduciary obligations and the duty of good faith. In relation to these matters, the question is not whether Mr Mirza was dishonest in making such representations (which depends on him knowing that he had made them) but is essentially another aspect of the question of whether he obtained informed consent for the profit he, through Boomzone, would make. Therefore, I will deal with these matters under that heading.

iv. Breach of duty of disinterested advice

862. As to the allegation that Mr Mirza caused his wholly-owned company (Boomzone) to enter into the Boomzone Leases, there is no doubt about this. Mr Mirza was the prime mover in arranging for the Boomzone Leases to be granted. Of course, the creation of these leases also required the involvement of the Directors, but their involvement cannot be regarded as a *novus actus interveniens* (i.e. an intervening act breaking the chain of causation) when it itself was brought about by Mr Mirza (himself or through Mr Homan) recommending these transactions (or at least proposing them with an implied recommendation).

863. As to the allegation that the Boomzone Leases were favourable to Boomzone and detrimental to Viper and/or the JV, I have already found that this was the case in relation to each of the Boomzone Leases.

864. This position, however, should not be judged with hindsight. As this point is averred in relation to a breach of duties of good faith or fiduciary duties, then the real question is whether Mr Mirza was genuinely motivated in proposing the Boomzone Leases by the best interests of the JV, having regard to the fact that he saw them at the time, or whether he was acting in his own interests or in that of Boomzone.

865. I have no hesitation in reaching the latter conclusion in relation to each of the Boomzone Leases.

866. In relation to the First Boomzone Lease, I have found (at [690]–[692] above that it was entered into at a significant undervalue; that it was not justified by any obligations undertaken by Boomzone in relation to costs or by the requirement from BOS for a lease to be put in place to demonstrate revenue; and that a man of Mr Mirza's commercial acumen would never have agreed to an arrangement with this effect had he been the landlord in the position of Viper and an arm's length third party had been in the position of Boomzone.

867. In relation to the Second Boomzone Lease, again there was no commercial sense in the arrangement. The arrangement had the effect of depriving Viper for 5 years of any benefit from the lettings at No. 22 beyond the small £60,000 rent paid by Viper. It has been argued, once again, that it took away from Viper the costs of refurbishing the floors that were not already refurbished and running costs, but this argument is grossly overstated by the Defendants.

868. As regards the First Boomzone Lease and the Second Boomzone Lease, it is necessary to consider a counterargument that, given that I have accepted that Mr Mirza still intended to transfer 50% of the shares in Boomzone at this time to Mr Morjaria, he expected to share the benefit of them with Mr Morjaria. This, however, still does not excuse a breach of duty towards the JV Entities. It was still necessary for him to propose transactions only where he thought the JV Entities (rather than he and Mr Morjaria) would benefit, and to take a profit only where he had provided full disclosure so as to obtain informed consent.

869. When we come to the Third Boomzone Lease, again having regard to the points that I make above at [754] and [755], it is difficult to conceive how this lease could have been in the interests of Viper.

870. The fairness of the transaction is relevant as evidence of whether that consent was fully informed (see *Snell*, at 7-027).

v. Breach of duty to obtain informed consent

871. The requirement to obtain informed consent arises out of the "core duties" identified by Millet LJ referred to above and is also relevant in relation to the Claimants' claimed remedy for declaration of a constructive trust or for rescission on the grounds of breach of the fair-dealing rule.

872. As to the allegation that Mr Mirza brought this about without the informed consent of the other Joint Venturers (i.e. Mr and Mrs Morjaria), this allegation is unsustainable as a cause of action. The Joint Venturers had, by operating through the JV Entities, effectively delegated the decision whether to enter into leases to the Directors as the controlling minds of those entities. There was nothing in the JVA to require the consent of Mr or Mrs Morjaria, informed or otherwise.

873. However, as to the allegation that Mr Mirza brought this about without the informed consent of the JV Entities, I have explained above that I consider that Mr Mirza was under a duty to obtain informed consent.

874. There is no doubt that the consent of the JV Entities was obtained in relation to each of the Boomzone Leases. The only question is whether that consent could be considered to be *informed* consent. This issue needs to be considered separately in relation to each of the Boomzone Leases, but one matter is relevant in relation to all of them.

875. First, the Claimants argue that Mr Mirza knew that he had been causing Tydwell to present false invoices. I have already found that if Mr Mirza had known that someone was cheating the JV and there was a proposal for one of the JV Entities to deal with that person (or a company wholly-owned by that person), he would have had a duty to speak out. He was not excused from that duty by the fact that the person in question was himself.

876. I find, therefore, that Mr Mirza's failure to draw attention to this matter when he was under a duty in proposing each of the Boomzone Leases did amount to a failure to obtain informed consent.

877. As regards the Boomzone Leases, the Claimants have not really set out in full what information the Directors should have been given in order for them to have given informed consent. The points put in argument as amounting to failure to obtain informed consent are as follows:

    i) The burden is on Mr Mirza and Boomzone to show that he had the fully informed consent of Viper to the transaction.

    ii) There was no fully informed consent for the reasons set out above, and Mr Mirza/Boomzone cannot hope to discharge the burden of showing otherwise. Each lease was granted at a substantial undervalue on market rent (and at the very least at a rent which was only a fraction of the rent that was actually expected to be achieved from sub-tenants during each lease).

    iii) To the extent that the fairness of the transaction has evidential relevance in the light of the clear evidence of the Directors, it militates against a finding of fully informed consent. For those reasons, the Third Boomzone Lease is voidable in equity.

    iv) The Claimants accordingly seek an order rescinding the Third Boomzone Lease.

878. As to the consequences of a breach of fiduciary duty, the Claimants argue in their closing written submissions that the relief they claim (the declaration that there is a constructive trust and/or a declaration that the Boomzone Leases were void or voidable)

can arise under two distinct rules. They cite *Civil Fraud* at 11-086, drawing on the summary by Megarry VC of the self-dealing (and fair-dealing) rules in *Tito v Waddell (No. 2)* [1977] Ch 106 ("***Tito v Waddell***") at page 240 onwards, the "self-dealing rule" and the "fair-dealing rule".

879. The Defendants, justifiably, complain that the Claimants have left it until closing submissions in order to advance the argument that the self-dealing and fair-dealing rules apply. They suggest that the court should reject this argument for that reason alone. That, I consider, would be an overreaction to the point since the argument relating to the application of these rules is essentially the development of the legal argument arising out of the matters that have been pleaded. There may be a case, however, for recognising in costs the inconvenience that the Defendants have been put to in having to deal with these points after the trial had ended.

880. The self-dealing rule is engaged where a fiduciary purchases property that is held on trust or that he or she controls in a fiduciary capacity, such that the fiduciary is effectively on both sides of the transaction. The rule entitles the beneficiary to avoid the sale as of right, irrespective of how fair or advantageous to the beneficiary it was. Where the transfer is procured by self-dealing, that transfer is void and the property will be held by the fiduciary on constructive trust for his principal.

881. The fair-dealing rule is engaged where a trustee purchases the beneficial interest of a beneficiary, and has been said also to apply where a fiduciary purchases property with respect to which he or she owes fiduciary obligations from the principal, or otherwise enters into a transaction with the principal which falls within the fiduciary relationship. In that case, the beneficiary or principal can apply to have the transaction set aside, unless the fiduciary (on whom the burden lies) fails to show that he or she took no advantage of his or her position, that full disclosure was made and the transaction was fair and honest. Breach of the fair-dealing rule renders the transaction voidable in equity (at the discretion of the court, as I explain further below).

The self-dealing rule

882. The Claimants argue that the grant of the Boomzone Leases falls squarely within the scope of the self-dealing rule. Mr Mirza was, as a matter of substance, on both sides of each transaction. He was on the selling side because the Directors simply acted according to his instructions. He was on the buying side of the transaction because Boomzone was his company of which he was a director, and its controlling mind. In those circumstances, the reality was that Mr Mirza simply procured the grant of a lease from himself to himself.

883. I disagree. Whilst I have found a fiduciary relationship, it is going too far to equate this with the relationships involved in the self-dealing cases. Mr Mirza had very substantial influence over the Directors, but he was not a trustee. As Megarry VC put it in *Tito v Waddell* (page 242 at F):

> "A fiduciary obligation towards [in the case before him], the Banaban community generally is one thing; the existence of a trust or fiduciary obligation in respect of specific land another."

884. Although the analyses of Megarry VC regarding the rules on self-dealing and on fair dealing in this case were strictly speaking *obiter dicta,* in view of the eminence of the

judge in relation to matters involving equitable principles, it is appropriate that they are followed, and in fact, they have often been followed by courts in later cases.

885. Whilst the self-dealing rule can apply to classes of fiduciary who were not trustees, this occurs where fiduciaries deal with themselves in circumstances where the fiduciary is on both sides of the transaction. The examples where this has applied have all been examples where the fiduciary had themselves the power to bring about the transaction. *Snell* at 7-026 gives the examples of the purchase by a company of property from a firm in which a director of the company was a partner (*Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq. 461); and the purchase by an agent of his principal's property where the agent arranges the transaction on both sides (*De Bussche v Alt* (1878) 8 Ch. D. 286; *Charter v Trevelyan* (1844) 11 Cl. & Fin. 714).

886. Mr Mirza was not quite in that position.

887. The fiduciary self-dealing cases have proceeded on the basis of the conflict between duty and interest inherent in such a situation (see *Snell* at 7-026 and the cases cited at footnote 223 to that section). I have found that in the circumstances of the current case, the duties assumed by Mr Mirza as a fiduciary do not extend to a duty to avoid conflicts of interest – they are limited to acting in the interests of the JV and obtaining informed consent to any profit or advantage accruing to him.

888. The Claimants submit that even if the court were to hold that Mr Mirza owed no general duty to avoid a conflict between his duties to the JV and his personal interests, he nonetheless owed a duty not to allow a conflict between his duty to manage the property of the JV in its best interests, and his own interests. They argue that it follows that the self-dealing/fair-dealing rules applied to his management of that property and that any other conclusion would allow him to exploit his position to procure the grant of leases to himself or his companies. They pray in aid of this argument the dictum of Megarry VC in *Tito v Waddell* (at page 241, at letters C-D), that both the self-dealing and fair-dealing rules:

> "… have a common origin in that equity is astute to prevent a trustee from abusing his position or profiting from his trust: the shepherd must not become a wolf."

889. The Claimants take this argument too far. Where the principal has accepted that the fiduciary may act in his own interests, and the fiduciary is not in a position to bring the sale about without the consent of the principal (assuming the principal to be of sound mind and not subject to any incapacity), then the principal is sufficiently protected if the fiduciary obtains the principal's fully informed consent.

890. As I consider that the self-dealing rule does not apply, I do not strictly need to consider whether a breach of the rule gives rise to a constructive trust. However, I note that the authors of *Lewin on Trusts* (20th Edition) consider that it does not. At 50-84 they write:

> "As to the self-dealing rule, an express trustee acquiring trust property is not a constructive trustee at all but holds the property subject to a beneficiary's right to seek rescission ex debito justitiae and to obtain an order for conditional resale".

The fair-dealing rule

891. In the alternative, the Claimants argue that if the grant of the Boomzone Leases does not fall within the scope of the self-dealing rule, for all the same reasons it falls within the ambit of the fair-dealing rule.

892. The fair-dealing rule as explained by Megarry VC in *Tito v Wadell* at page 242 is that:

> "… if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable ex debito justitiae [ie under the self dealing rule], but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest."

893. As with the self-dealing rule, the transaction will not be avoided if entered into with the fully-informed consent of the principal.

894. As Megarry VC went on further to explain (on page 235):

> "It is, of course, well settled that the fair-dealing rule, with or without modifications, applies to many persons other than trustees, including agents, solicitors, company directors, partners and many others: see, for example, Snell's Principles of Equity, 27th ed. (1973), pp. 241-243. … The categories of fiduciary obligation are not closed …"

895. As with the cases concerning breach of the rule against self-dealing, the cases dealing with the fair-dealing rule have generally involved trustees or one of the traditional classes of fiduciary. Again, the applicability of the rule appears to be related to the existence of a duty to avoid conflict of interests but as Vinelott J (as he then was) put it in *re Thompson's Settlement* [1986] Ch 99 (at page 115 at H):

> "The same principle also applies, but less stringently, in a case within the fair-dealing rule, such as the purchase by a trustee of a beneficiary's beneficial interest. There, there are genuinely two parties to the transaction and it will be allowed to stand if freely entered into and if the trustee took no advantage from his position or from any knowledge acquired from it."

896. Megarry VC was considering a transaction where a trustee (or fiduciary deemed to come within the rule) was purchasing the beneficial interest of a beneficiary. The authors of *Civil Fraud* (at 11-086) express the ambit of the rule more widely:

> "The fair-dealing rule is engaged where a trustee purchases the beneficial interest of a beneficiary, or a fiduciary purchases property with respect to which he or she owes fiduciary obligations from the principal, **or otherwise enters into a transaction with the principal which falls within the fiduciary relationship**. In that case the beneficiary or principal can have the transaction set aside not as of right, but if the fiduciary (on whom the burden lies) fails to show that he or she

> took no advantage of his or her position, that full disclosure was made and the transaction was fair and honest." (Emphasis added.)

897. The authors do not cite their authority for extending the formulation first offered by Megarry VC to transactions other than the purchase of a beneficial interest.

898. The Claimants have suggested that authority for this might be found in *Re Thompson's Settlement*. That case, however, was dealt with as a matter of breach of the self-dealing rule. Whilst Vinelott J in that case did comment on the fair dealing rule, he did not explain in what circumstances the rule applied. However, the fact that in the passage referred to at [895] above, Vinelott J referred to a case within the fair-dealing rule "**such as** the purchase by a trustee of a beneficiary's beneficial interest" (emphasis added) suggests that the judge did consider that the rule might have a wider ambit.

899. The authors of *Snell* also consider that the fair-dealing rule has a wider ambit. They say at 7-027:

> "As it is merely an application of the general fiduciary conduct principle, the fair-dealing rule applies to any transaction between fiduciary and principal, even if property does not pass, where the transaction falls within the fiduciary relationship such that there is a conflict between duty and interest. The fair-dealing rule does not apply where the property involved in the transaction was not the subject of the fiduciary relationship, because there is no non-fiduciary duty in conflict with the fiduciary's interest in the transaction."

900. In this case, the authors do cite some authority for the proposition including *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164 at [50], [67], [2002] Lloyd's Rep. P.N. 309; *Swindle v Harrison* [1997] 4 All E.R. 705; and *Re Thompson's Settlement* [1986] 1 Ch. 99 at 115.

901. The Defendants argue that the fair-dealing rule has not been expanded beyond a transaction in which a trustee purchases the beneficial interest of the beneficiary. They cite *Lewin on Trusts* at 46-096:

> "The courts have not displayed any willingness to expand the rule described above into a general principle that a trustee must make a full disclosure and act fairly in all dealings with a beneficiary which have some connection with the trust."

902. In support of this point, the authors of *Lewin* cite *Tito v Waddell*, where the court considered the position of a trustee who holds on trust for the beneficiary a royalty derived from mining on land which had been purchased from that beneficiary. The court stated (at pages 242-243) that, if the trustee then purchases additional land from the same beneficiary without acting fairly, the rule will have no application, and it makes no difference that a royalty derived from mining on the additional land will also be held on trust for the beneficiary.

903. The Defendants argue that there is no authority to support a more general principle that a trustee must act fairly in all dealings which have some connection with the trust, or which fall within the fiduciary relationship and that the authorities quoted in *Snell* are not authority for a wider principle of general application. They all involve dealings only between a solicitor and a client (a paradigmatic and very specific type of fiduciary relationship). In addition, one of those authorities, *Johnson v EBS Pensioner Trustees Ltd*, concerned the doctrine of abuse of confidence - a narrow doctrine that has not been applied outside of the relationship of trustee and beneficiary, principal and agent and solicitor and client, or of persons in similar positions (see *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923 at page 964 at letter B).

904. In my view, the Defendants are arguing against a wider principle than the principle that the Claimants are seeking to rely on. The Claimants do not need to establish that there is a general principle that a trustee must act fairly in all dealings which have some connection with the trust (the argument that was dismissed in the passage averted to in *Tito v Waddell*). They are covered by the narrower principle articulated in the passage from *Snell* quoted above: they can show that the transaction falls within the fiduciary relationship such that there is a conflict between duty and interest and that the property in question, an interest carved out from the Viper Lease, was the subject of the fiduciary relationship.

905. Perhaps the argument is just one about words. The breach of the fair-dealing rule may be regarded as just one shorthand phrase dealing with a particular type of breach of fiduciary duty. As I have found a breach of fiduciary duty it should not really matter whether that breach is regarded as a breach of the fair-dealing rule or as some other type of breach of fiduciary duty. In either case it is clearly correct from the basic principles enunciated in *Mothew* (which I have reproduced at [204] above) that a breach of fiduciary duties will give rise to remedies.

906. The Claimants wish the court to consider the possibility of rescission as a remedy. Rescission is not available as of right in all cases involving a fiduciary in breach of the principle of fair dealing or of any other fiduciary duty, particularly where we are outside the strict application of the fair-dealing rule as enunciated by Megarry VC (relating only to the purchase of a beneficiary's interest under a trust).

907. In *Johnson v EBS Pensioner Trustees Ltd* the Court of Appeal at [57] rejected the argument that once a breach of the fair-dealing rule was shown, the court had no discretion to withhold the remedy of rescission, finding that:

> "The judge rightly held that the right to rescission on the grounds of abuse of confidence or breach of fiduciary duty depends on the exercise of discretion by the court to intervene in the enforcement of legal rights."

908. In *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] 2 WLR 1362 [2003] Ch. 409, Lightman J also accepted that the court had discretion. He was dealing with the case of a trustee who had breached what is referred to as the rule in *Hastings-Bass.* This rule governs the validity of the exercise of powers by trustees and requires that a trustee when exercising a power shall take into account all relevant considerations and refrain from taking into account any irrelevant consideration. If the trustee fails to do so, he opens his decision to challenge. Turning to the question whether such a breach

rendered the trustee's decision void or voidable, Lightman J (at [34]) decided that the consequences of such a breach rendered the decision potentially voidable rather than void. However, this was not to say that the court would inevitably provide the remedy of allowing the beneficiary to avoid the contract. It is clear from the other elements of his judgment (in particular at [29] to [31]) that a finding that an act of the trustees is void or voidable depends on the court's willingness to grant relief in any situation. He considered, however, that one of the differences between transactions that are void and those that are voidable is that in the latter case the requirements of justice there may need to be regard to the lapse of time.

909. If the fair-dealing rule is breached the transaction may be rescinded, but the court retains a discretion as to whether to order rescission. This is in part because rescission (in this context) is an equitable remedy; when exercising its equitable jurisdiction, the court considers what fairness requires not only when addressing the question of the precise form of relief, but also when considering whether the remedy should be granted at all. This is also because equitable defences and bars to rescission, such as laches, acquiescence and no restitutio in integrum, will apply.

910. The Claimants argue that the starting point is that the Claimants should be entitled to rescission unless there is some reason for the Court not to make such an order. Potential reasons for not ordering rescission might include:

i) cases where the claimant has either elected, or given the appearance of electing, to affirm the impugned transaction (by way of positive affirmation, acquiescence or delay);

ii) where it would be impossible to substantially restore the claimant and defendant to their pre-transaction positions (by orders for the payment of money and/or transfers of property); and/or

iii) where an order for rescission would prejudice the rights of third parties.

911. They argue that none of those matters bar an order for rescission in this case, but I consider that that contention needs to be examined further, particularly regarding the position of lessees, (and in particular, Timeline) and Al Rayan Bank which has advanced funds partly on the security of the Boomzone and LMH leases.

912. If rescission does not apply, a monetary award either through equitable compensation or an account of profits would be an alternative remedy.

913. The Claimants make the suggestion, which I gratefully accept, that this question, along with other matters relating to remedies, should be deferred to another day.

vi. Summary in relation to the claim for breach of duty

914. I have found that Mr Mirza was in breach of both his contractual duty of good faith under the JVA and his fiduciary duty to Viper by bringing about the Boomzone Leases by means of his position of trust in relation to the JV Entities when these leases were not in the best interests of Viper and without obtaining the fully informed consent of Viper.

915. I have not found a breach of the self-dealing rule, but I consider that this breach of fiduciary duties is within the fair-dealing rule (assuming that it extends to circumstances beyond the purchase of a beneficiary's interest under a trust) or otherwise that such a breach of fiduciary duty should in this analogous case give rise to similar remedies, which may include rescission.

916. However, the question of rescission as a remedy will need to be considered in more detail as part of the more general consideration to be given to appropriate remedies.

G. The Boomzone Lease Claim relating to Unjust Enrichment

i. The claim as pleaded

917. The third way that the Claimants claim in relation to the Boomzone Leases is pleaded at paragraphs 114-115 of the PoC. Again, as the Defendants take issue about the adequacy of the pleadings, I will set out in full how this claim has been pleaded alongside the commentary made in the Defence and Counterclaim (at paragraphs 120-121) in relation to each point.

PoC	Defence and Counterclaim
"114. By receipt of the benefit of the Boomzone Leases, Boomzone has been enriched at the expense of each of Viper and/or Otaki.	"120. Paragraph 114 is denied: 120.1 The taking of leases from Viper on terms whereby rent was payable by Boomzone did not constitute enrichment of Boomzone. 120.2 Alternatively, any alleged enrichment was not (and cannot have been) at the expense of Otaki from which Boomzone took no lease.
115. The enrichment was unjust in that it was as a result of the Wrongdoing Representations and/or 2021 Lease Representations and/or the breaches of fiduciary duty as set out above."	121. Paragraph 115 is denied. The representations were not made."

ii. Discussion of the claim

918. I have already discussed at [555]–[557] above the elements of a claim in unjust enrichment, explaining that there are three basic questions to be considered: (i) has the defendant been enriched? (ii) was the enrichment at the claimant's expense? (iii) was the enrichment unjust? If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence, such as change of position. I will take these elements in turn in relation to each of the Boomzone Leases.

The First Boomzone Lease

919. There can be no doubt that Boomzone was enriched through the First Boomzone Lease. This can be seen first from the fact that both valuation experts considered that the lease had been entered into at substantially under market rent and that I have found (at [685] above) that the market rent over the term of the First Boomzone Lease would have been

£432,250 over 5 years - very substantially above the £12,000 a year rent under the First Boomzone Lease.

920. Secondly, this can be seen from the fact that after the First Boomzone Lease was entered into, Boomzone did receive significant rents, in excess of the £12,000 a year rent payable by it.

921. I do not accept the argument made by the Defendants that this was more than compensated for by the fact that Boomzone assumed outgoings that would otherwise have been outgoings for Viper. The matter is complicated by the fact that some of these outgoings (including the very substantial energy bills) were in fact bills for Redwire, and Viper did not benefit from them. The same may be said for some of the claims for salary which, if they were not for Boomzone itself, were for Redwire. In addition, insofar as Boomzone paid out costs, it only did this out of the rents that it received and it appears that, whenever the total of these costs were more than were covered by rent, the costs were invoiced to Viper (which in turn received an advance from Mr Morjaria to cover half of the costs of this). I consider also that much of the salaries claimed for were also the costs of Redwire or Boomzone.

922. This enrichment clearly came at the expense of Viper since in the absence of the First Boomzone Lease, Viper would have received directly the rentals diverted to Boomzone.

923. As to whether this enrichment was unjust, I have found that the Wrongdoing Representations were made (the 2021 Lease Representation came later and is not relevant to the First Boomzone Lease). Whilst I have not found that the Wrongdoing Representations provided the basis for action in deceit, they contributed towards the breach of fiduciary duty and of the duties of good faith contractually assumed by Mr Mirza that I have found. In my view the circumstances are such to render the enrichment unjust.

924. It may be objected that Boomzone itself was not a party to any contractually assumed duty of good faith, and that, as a commercial counterparty to a lease, it owed no fiduciary duty to Viper or Otaki. This is true, but it does not answer the point that the First Boomzone Lease was the result of an injustice perpetrated by Boomzone's owner, director and controlling mind.

925. Considering all the circumstances, in my view the First Boomzone Lease did give rise to Boomzone being unjustly enriched at the expense of Viper.

The Second Boomzone Lease

926. In the case of the Second Boomzone Lease, I have agreed broadly with Mr Manley's view that the lease was entered into at below market rent having regard to the state of the fit-out at the relevant time. Also, as I have explained at [664]-[709], in the light of the rentals that were being achieved from No. 22, Boomzone expected to be able to let out the floors that were lettable at a profit over and above the rental payable by it under the Second Boomzone Lease and the costs of running No. 22, and indeed this expectation was borne out by reality. Accordingly, Boomzone was enriched through the Second Boomzone Lease.

927. Again, I do not accept the counter-argument regarding the assumption of costs by Boomzone for the same reasons I have given in relation to the First Boomzone Lease.

928. Again, this enrichment clearly came at the expense of Viper since in the absence of the Second Boomzone Lease, Viper would have received directly the rentals diverted to Boomzone. Furthermore, it is possible that the Second Boomzone Lease may have had the effect of depressing the market value of Viper's 999-year lease - the valuation experts were not asked to provide an opinion about this.

929. As to whether this enrichment was unjust, for the reasons I have given in relation to the First Boomzone Lease the circumstances are such to render the enrichment unjust.

The Third Boomzone Lease

930. In the case of the Third Boomzone Lease, again I have accepted (broadly) the view of Mr Manley that the lease was entered into at less than market rent. Also, again on the basis of the rentals that were being achieved from No. 22 (as discussed at [755]-[757] above), Boomzone expected to be able to let out the floors that were lettable at a profit over and above the rental payable by it under the Third Boomzone Lease and the costs of running No. 22. Further, Boomzone had expectations of substantial profit, and of a very substantial contribution to fitting-out costs, from Timeline. Accordingly, there can be no doubt that Boomzone was enriched through the Third Boomzone Lease.

931. In fact, Boomzone gave up most of that advantage in that it sublet to LMH at £80,000 per annum. This seems a highly uncommercial thing for it to do. Mr Mirza explains it in his 10th Witness Statement as follows:

> "LMH would be used, as a new entity, because of the very large fit-out costs of the Office/Data Centre and the significant commercial risks involved. As my son, Ameer, sets out in his second witness statement, the TV production business was also very different to the serviced office business, and my children, the shareholders in LMH, knew a lot more about the media industry than I did, so it made sense to use a new entity specifically incorporated as a media company."

932. This makes little sense. First, if Boomzone did not have the resources to undertake the fit-out costs, then this raises the question why the Boomzone Leases were entered into in the first place. Secondly it was not necessary to incorporate a new company for Mr Mirza to enjoy the expertise of his children.

933. The transactions can only be explained by this not being an arm's-length transaction, but rather one made within the Mirza family. I agree with the Claimants' far more likely explanation that because, in the intervening period, the Claimants issued their Letter Before Action (on 22 April 2021), Mr Mirza wished to insulate the valuable Timeline arrangements from the reach of this litigation.

934. The fact that Boomzone chose to give away most of the benefit it had garnered through obtaining the Third Boomzone Lease to a family company does not change the fact that it had been enriched through the acquisition of that lease.

935. Again, this enrichment clearly came at the expense of Viper since in the absence of the Third Boomzone Lease, Viper would have received directly the rentals diverted to Boomzone.

936. The Defendants suggest that Viper would not have been able to capitalise on the Timeline opportunity since Mr Morjaria was no longer willing to advance further capital to fund the fit-out costs not being funded by Timeline.

937. This seems to me to be a very unlikely conjecture. Mr Morjaria had never actually refused to make contributions. He had merely, through the "Concerned Brother" email and perhaps other conversations, stated his reservations about pouring more money into the venture at a point when there seemed to be little prospect of return. Had Mr Morjaria seen the increases in occupancy achieved as shown in the February 2019 "Summary of Properties" and the terms that Timeline was proposing to enter into, which offered a very quick return to Viper, and a major contribution to fit-out costs, I have no doubt that he would have been willing to contribute his share of any fit-out costs.

938. Furthermore, having considered the expert evidence I consider that the Third Boomzone Lease did have the effect of depressing the market value of the Viper Lease. This is effectively the view of both experts, although they differ in the extent of the diminution, as discussed above.

939. As to whether this enrichment was unjust, for the reasons I have given in relation to the First Boomzone Lease, the circumstances are such to render the enrichment arising from the Third Boomzone Lease unjust. In this case, however, there is the additional point that in not correcting the 2021 Lease Representation by ensuring that the Directors understood that the Third Boomzone Lease would enure entirely to the benefit of Mr Mirza, and that there was no longer any intention for Mr Morjaria or his company Trafalgar to benefit, this may be regarded as a further breach of fiduciary duty and of the duty of good faith and therefore a further aspect rendering the circumstances unjust.

H. The Boomzone Lease Claim relating to Dishonest Assistance

i. The claim as pleaded

940. The third way that the Claimants claim in relation to the Boomzone Leases is pleaded at paragraphs 116-116A of the PoC. Again, as the Defendants take issue about the adequacy of the pleadings, I will set out in full how this claim has been pleaded alongside the commentary made in the Defence and Counterclaim (at paragraphs 122-122A) in relation to each point.

PoC	Defence and Counterclaim
"116. It is to be inferred in light of their respective roles within Boomzone that the breaches of fiduciary duties by Mr Mirza set out above were procured, induced or assisted by Mr John and/or Mr Ameer Mirza (who also assisted in the arrangements with Wolverine referred to at paragraph 99(g)) and/or Mrs Mirza and that their knowledge of the relevant matters was such as to render their conduct contrary to normally acceptable standards of honest conduct.	"122. Paragraph 116 is denied: 122.1 The allegations of breach of fiduciary duty (and the existence of any such duty) are denied for the reasons given at paragraph 118 above. 122.2 No particulars are given of the assistance said to have been provided by Ameer Mirza or Mrs Mirza and the allegations against them are defective and liable to be struck out accordingly. Further, Ameer Mirza cannot have provided any relevant assistance "with Wolverine" in circumstances where it was not incorporated until after the JVA had come to an end (as set out below in paragraph 162A), along with any associated fiduciary duties (the existence of which is in any event denied), and the Third Boomzone Lease had been in place for approximately 19 months. Paragraph 14A.1 above is repeated. 122.3 Paragraph 116 fails to identify the "relevant matters" of which Ameer Mirza and Mrs Mirza are said to have had knowledge or the basis on which each of them is said to have had knowledge of the same and it is liable to be struck out accordingly. For the avoidance of doubt, it is denied that either of them acted dishonestly. Further, they cannot have been dishonest in circumstances where Boomzone entered into the Boomzone Lease on an arm's length basis and on terms that expressly permitted it (such being the common intention behind the Boomzone Leases) to enter into sub-leases with other tenants.
116A. Further assistance in Mr Mirza's breach of fiduciary duty was rendered by Boomzone, LMH and Wolverine in playing their respective roles in the events described at paragraphs 97A, 99(g), 100 and 100A above. Insofar as such assistance was rendered after the breach had taken place, it was nevertheless (a) part of a single scheme to ensure that, by means of Mr Mirza's breach of fiduciary duty, the benefit from the transaction with Timeline would accrue to Mr Mirza's companies and not to Viper, or in any	122A. Paragraph 116A is denied: 122A.1. The allegations of breach of fiduciary duty (and the existence of any such duty) are denied for the reasons given at paragraph 118 above. 122A.2. As to the repetition, in paragraph 116A, of paragraphs 97A, 99(g), 100 and 100A of the Re-Re-Amended Particulars of Claim, the responsive paragraphs 103A, 105.5, 106 and 106A above are repeated. 122A.3. Further, or alternatively, the alleged "assistance", as is

PoC	Defence and Counterclaim
event (b) to complete the implementation of the consequences of the breach of fiduciary duty and realise the proceeds thereof. Their respective knowledge of the relevant matters was such as to render their conduct contrary to normally acceptable standards of honest conduct, as follows: 116A.1. In the case of Boomzone and LMH, through Mr Mirza; 116A.2. In the case of Wolverine, through Mr Mirza (who acted as its agent and whose knowledge is attributable to Wolverine) and/or through Mr Ameer Mirza."	impliedly accepted, post- dated the breaches alleged. 122A.4. Further, or alternatively, the named companies cannot have been dishonest in circumstances where Boomzone entered into the Boomzone Lease on an arm's length basis and on terms that expressly permitted it (such being the common intention behind the Boomzone Leases) to enter into sub-leases with other tenants. Paragraphs 97.4, 104.2, 105.1 and 106.3 above are repeated. 122A.5. Further, or alternatively, Wolverine cannot have provided any assistance or been dishonest, given the date of its incorporation. Paragraph 122.2 above is repeated."

ii. Discussion of the claim

941. Insofar as this claim, and the Defence to it, relate to the transaction with Wolverine, I will defer discussion of them until I am dealing with the Wolverine Transaction.

942. I am therefore considering in this section only the allegation that Boomzone, Mr John, Mrs Mirza and Ameer were each responsible for dishonest assistance in relation to the grant of the Boomzone Leases.

943. I have outlined the elements of a claim for dishonest assistance at [581]-[586].

A breach of fiduciary obligation?

944. I have already found that the first two elements of such a claim are present. Mr Mirza owed a fiduciary obligation to Viper and breached it. It is important, however, to remember the nature of the breach of duty that I have found. The breach was procuring, through his recommendation, for Viper to enter into the Boomzone Leases without obtaining informed consent.

Involvement in procuring the breach

945. The third element is that the third party must have assisted in, induced or procured the breach.

946. It is pleaded in the Defence and Counterclaim that the Claimants have failed to give particulars of the assistance (or inducement or procuring) said to have been provided by Ameer or Mrs Mirza and the allegations against them are defective and liable to be struck out accordingly. The same could be argued in relation to Mr John's involvement.

947. The particulars pleaded in the PoC in relation to Mr John, Ameer and Mrs Mirza were:
    i) (in paragraph 116 of the PoC) that such assistance, inducement or procural is to be inferred in light of their respective roles within Boomzone,; and

ii) (in paragraph 116A) that further assistance in Mr Mirza's breach of fiduciary duty was rendered by Boomzone (and LMH and Wolverine) in playing their respective roles in the events described at paragraph 97A of the PoC (which relates to the involvement by March 2021 in discussions with Timeline); subparagraph 99(g) of the PoC (which relates to the Wolverine Transaction and so I will not discuss here); paragraph 100 (which relates to the sub-leasing to Mr Mirza's companies and, since May 2022 to LMH); and paragraph 100A (which relates to LMH benefiting from Timeline rents).

948. In other words, the only involvement relevant to dishonest assistance in relation to the creation of the Boomzone Leases that is specifically pleaded in relation to Mr John, Mrs Mirza and Ameer is that they had roles within Boomzone; and the only such involvement specifically pleaded in relation to Boomzone is that it had been in discussions with Timeline prior to the Third Boomzone Lease, and possibly also from its involvement in subletting to LMH.

949. The Claimants were given an opportunity to respond generally to the criticisms that the Defendants had made in relation to inadequate pleading. They have done so in the form of a note. However, that note does not deal with the issues relating to shortcomings in the way that this dishonest assistance claim is pleaded.

950. I consider that the involvement of Boomzone in the Boomzone Leases is so obvious from the remainder of the pleadings that it is clear enough that the Claimants were pleading that Boomzone's involvement assisted the breach of the fiduciary duty. There could not have been a Boomzone Lease without Boomzone's involvement.

951. However, the way in which any of Mrs Mirza, Ameer or Mr John are said to have assisted in the breaches of fiduciary duty is not at all obvious from the pleadings, and I agree that this leaves them with no case to answer on this point.

952. I suppose an argument might be made that they (or anyone else who had a role within Boomzone) were assisting Boomzone, and therefore assisting Boomzone in entering into the Boomzone Leases and this was so obvious that no further pleading was necessary. I reject any such argument. The breach of fiduciary duty was not brought about merely by the Boomzone Leases themselves, but by the failure to provide disinterested advice and to obtain informed consent. There is no pleading (and no real evidence) that any of these individuals were involved in assisting these failures.

Acting dishonestly in procuring the breach

953. This last point shades into the final requirement for the equitable wrong of dishonest assistance: that the alleged dishonest assistant must have had knowledge, belief or intent that rendered the assistance given to be dishonest, applying the standards of ordinary decent people.

954. As Mr Mirza was the shareholder, director and controlling mind of Boomzone, it is appropriate to fix Boomzone with the knowledge that he had, which was that he was procuring the entry into the Boomzone Leases through his recommendation, without obtaining informed consent, as he was not ensuring that the Directors were aware of the various matters that I have outlined above that they needed to be aware of in order to provide informed consent.

955. I find, therefore, that Boomzone was aware that it was assisting in a breach by Mr Mirza of his fiduciary duties and that this awareness rendered its actions in entering into the Boomzone Leases dishonest.

956. However, the Claimants do not have such a case against Mrs Mirza, Ameer or Mr John. All that is pleaded against them is that "their knowledge of the relevant matters was such as to render their conduct contrary to normally acceptable standards of honest conduct". The relevant matters are not identified. This is not an adequate pleading.

957. The relevant matters that needed to be identified in the pleading for a case in this regard to succeed against them was that:

i) each of them was aware that Mr Mirza was subject to a fiduciary duty in recommending each of the Boomzone Leases to act in the best interests of the JV and to ensure that he obtained informed consent by disclosing any relevant matters to Viper or alternatively that there was something else that rendered entry into the Boomzone Leases dishonest; and

ii) the circumstances were such that the Boomzone Leases were not in the best interests of the JV and/or Mr Mirza had failed to obtain informed consent.

958. These matters were not specifically pleaded. Neither, in my view, were these points specifically proved against any of Mrs Mirza, Ameer or Mr John. There is some evidence that these parties had seen the JVA at some point, but that does not mean that they were necessarily aware of a fiduciary duty or of any breach. It is not pleaded that they were aware of a fiduciary duty or of any failure to obtain informed consent and in the absence of those factors it is difficult to see in what way it was contrary to normally acceptable standards of honest conduct for them to be involved in assisting Boomzone in entering into a lease.

959. I find therefore that whilst Boomzone may be considered liable for dishonestly assisting Mr Mirza in his breach of fiduciary duties, no such finding may be made against Mrs Mirza, Ameer or Mr John.

I. The Boomzone Lease Claim relating to knowing receipt and constructive trust

i. The claim as pleaded

960. The fourth way that the Claimants claim in relation to the Boomzone Leases is pleaded at paragraphs 117-118A of the PoC. Again, as the Defendants take issue about the adequacy of the pleadings, I will set out in full how this claim has been pleaded alongside the commentary made in the Defence and Counterclaim (at paragraphs 123-124A4) in relation to each point.

PoC	Defence and Counterclaim
"117. The benefit of the Boomzone Leases was transferred (by the grant of those leases) in breach of the fiduciary duties set	"123. As to Paragraph 117, it is denied that any claim in knowing receipt lies in circumstances where (i) no fiduciary duties existed and/or (ii)

PoC	Defence and Counterclaim
out above, as Boomzone (through at least Mr Mirza) knew. In the premises, the benefit of the each Boomzone Lease was received by Boomzone in circumstances in which it would be unconscionable to permit Boomzone to retain that benefit, and Boomzone is liable to account in equity for that benefit (including any rent received by Boomzone under any sub-lease granted out of the Boomzone Leases, including the LMH Lease).	the Third Boomzone Lease has not been terminated. Without prejudice to this: 123.1 As to the first sentence: (a) The meaning of the transfer of the 'benefit' of the Boomzone Leases is not understood. (b) It is denied that any of the Boomzone Leases was entered into in breach of any alleged fiduciary duties. 123.2 The second sentence fails to identify which circumstances are relied on as rendering it unconscionable for Boomzone to retain the 'benefit' of the Boomzone Leases (or any of them) and it is liable to be struck out accordingly. Without prejudice thereto, it is denied that it would be unconscionable for Boomzone to retain the Boomzone Leases, in circumstances where Boomzone entered into the Boomzone Lease on an arm's length basis and on terms that expressly permitted it (such being the common intention behind the Boomzone Leases) to enter into sub-leases with other tenants. Paragraphs 97.4, 104.2, 105.1 and 106.3 above are repeated. Further, the LMH Lease was entered into on 20 May 2022, after the JVA had come to an end and any duties under that agreement or fiduciary duties (the existence of which are denied) had also come to an end.
118. Further or alternatively, the benefit of the Boomzone Leases were and are held by Boomzone on constructive trust for Viper, alternatively for the joint venturers (the Morjarias and Mr Mirza).	124. As to Paragraph 118, it is denied that any constructive trust can arise in circumstances where the Third Boomzone Lease has not been terminated. Without prejudice thereto: 124.1 The meaning of the transfer of the 'benefit' of the Boomzone Leases is not understood. 124.2 It is denied that any of the Boomzone Leases was entered into in breach of alleged fiduciary duties.
118A. The LMH Lease was created by grant out of the Third Boomzone Lease	124A. Paragraph 118A is denied:

PoC	Defence and Counterclaim
(which constituted trust property) and therefore the LMH Lease represented the traceable proceeds of that trust property. When the LMH Lease was granted to LMH, LMH (through at least its director Mr Mirza) knew that (a) the Third Boomzone Lease had been created in breach of Mr Mirza's fiduciary duties, and that (b) the LMH Lease was a sub-lease of the Third Boomzone Lease. In the premises, the benefit of the LMH Lease (and any rent received by LMH under any sub-lease granted out of the LMH lease (including to Timeline)) was received by LMH in circumstances in which it would be unconscionable to permit LMH to retain that benefit. LMH holds the benefit of the LMH Lease (and any rent received under any sub-lease granted out of the LMH lease (including to Timeline)) on trust for Viper (alternatively for the joint venturers) and/or is liable to account in equity for that benefit."	124A.1. The pleading that the Third Boomzone Lease constituted trust property is inconsistent with the pleading in paragraph 118 that "the benefit of" the Boomzone Leases are held by Boomzone on constructive trust, and with the pleading in paragraph 117 that Boomzone is liable to account in equity as a knowing recipient. 124A.2 The allegations of breach of fiduciary duty (and the existence of any such duty) are denied for the reasons given at paragraph 118 above. Consequently, there can be no relevant "trust property". 124A.3. Further, or alternatively, the phrase "created by grant out of" is not understood. 124A.4. Further, or alternatively, LMH cannot have acted unconscionably in the circumstances outlined (and hereby repeated) at paragraph 123.2 above.."

ii. Discussion of the claim

Pleading points

961. I will take first, the pleading points raised in the Defence and Counterclaim.

962. First, I note the assertion that the reference in the Claimants' pleading to the "benefit" of the Boomzone Lease is unclear. It is not.

963. Secondly, I note the complaint that the Claimants' pleading fails to identify the breach of fiduciary duties that would render the retention of the Boomzone Leases unconscionable. There is no merit in this point. The Claimants have clearly identified the circumstances that they say amounted to a breach of duty.

964. Thirdly, I see no inconsistency in the way that the Claimants refer to the Third Boomzone Lease as constituting trust property; with the formulation that "the benefit of" the Boomzone Leases are held by Boomzone on constructive trust, and with the pleading in paragraph 117 that Boomzone is liable to account in equity as a knowing recipient. Each reference is describing in a different way the potential remedies the Claimants consider to be available to them if their case in knowing receipt is made out.

The merits of the claim

965. The elements of and remedies for a claim for knowing receipt have been summarised at [606]-[610].

966. The first requirement is a disposal of the claimant's assets in breach of fiduciary duty. As regards the acquisition by Boomzone of the Boomzone Leases, this point has already been established. I have found that the three Boomzone Leases were each entered into following and in consequence of Mr Mirza's breach of fiduciary duty. The net effect of these leases must be regarded as the disposal, or more accurately, part disposal of Viper's assets as it carves an interest out of the Viper Lease. I consider that this element of the cause of action is also present in relation to the creation of the LMH Lease as that also carves an interest out of the Third Boomzone Lease, which is itself an interest carved out of the Viper Lease.

967. The second element of the cause of action (the beneficial receipt by the defendant of assets which are traceable as representing the assets of the claimant) is also satisfied. In receiving the Boomzone Leases, Boomzone has acquired an interest carved out of the Viper Lease. In obtaining the LMH Lease, LMH has received an interest carved out of the Third Boomzone Lease, which is itself an interest carved out of the Viper Lease.

968. As regards the third and final element of the claim, knowledge on the part of the defendant that the assets received are traceable to a breach of fiduciary duty, for the reasons I have given, there is no doubt that Boomzone was fixed with the knowledge of Mr Mirza who understood that he had not provided disinterested advice and had not obtained informed consent and, therefore, Boomzone must be regarded as having the necessary knowledge. As regards LMH, the position is effectively the same. Although the (three £1) issued shares in LMH were owned by his children, Ameer, Osman and Shaima, Mr Mirza was a director of LMH, alongside Mrs Mirza. I have no doubt that as between them, Mrs Mirza would have allowed Mr Mirza to take the lead in any decisions and as a result, I consider that Mr Mirza can and should be regarded as the controlling mind of LMH, as well as of Boomzone.

969. I consider, therefore, that the elements of a claim for knowing receipt are made out as regards both Boomzone and LMH and accordingly that Boomzone should on these grounds be regarded as holding, and having held, the Boomzone Leases on constructive trust for Viper and similarly LMH should be regarded as holding the LMH Lease on constructive trust for Viper.

J. Unlawful Means Conspiracy

970. The final claim that touches on the Boomzone Leases is another claim for conspiracy. As the conspiracy complained of includes Wolverine and the claim regarding the Wolverine Transaction, I will discuss it in that context.

971. However, rather than moving to that next, I will deal with matters in something closer to date order by turning next to the KYC counterclaim.

13. THE KYC COUNTERCLAIM

972. In contrast with the multitudinous tortious and equitable claims that I have been dealing with so far, the KYC counterclaim is refreshingly simple. The nub of the claim is that Mr Morjaria breached his obligations of good faith under clause 2.1 of the JVA to use reasonable endeavours towards achieving the Joint Venture Objectives (one of which was enhancement of the Property's value) by providing BOS with an incorrect estimate of his total net wealth and/or failing to provide BOS with the enhanced KYC information requested by it. The Defendants also allege a breach of clause 2.2 of the JVA requiring the JV and Otaki to use reasonable endeavours to secure bank funding to satisfy Further Capital Requirements (as defined in the JVA).

A. The Terms applicable to the Facility

973. Viper entered into the BOS Facility on 14 February 2018. The Facility was documented in the form of a "Facility Letter", and terms and conditions set out in a "Services Agreement".

974. The purpose of the BOS Facility was not to develop the Property further, but rather was for the purpose of making investments. The bulk of the monies drawn down under the Facility were in fact used to make illiquid investments that were indirectly invested in companies owned by Mr Mirza and Mr Morjaria respectively. Effectively, this was a form of equity release allowing the equity that had been built up within the JV to be channelled to the Joint Venturers for use in another project or projects.

975. This was a highly hazardous step for the JV to take since it was borrowing on terms that allowed BOS to terminate the Facility and demand repayment at any time, whilst the greater part of the investments being made for the JV were highly illiquid.

976. The Facility was secured against personal guarantees given by Mr Mirza and Mr Morjaria and by a legal charge over the Viper Lease.

977. Mr Morjaria and Mr Mirza each signed a "Guarantor(s) Acceptance" in which they each expressly confirmed that they had received a copy of the Facility Letter and the Services Agreement and confirmed that they had read and understood, and had agreed to be bound by, the terms and conditions in the Facility Letter and the Services Agreement and that:

> "I/We agree in particular (but without limiting my/our agreement to be bound by the Services Agreement generally) to Clauses A(18) to A(20) of the Services Agreement and also that Clauses A(15) and A(27) of the Services Agreement shall apply to me/us as they do to the Client."

978. The meaning of agreeing to be bound and of this additional sentence is a little difficult to construe where an obligation relates to a particular obligation of Viper as borrower, for example, the obligations in the Facility Letter and in the Services Agreement to comply with margin requirements prescribed by the Bank or the obligation in the Facilities Letter to take out fire insurance over the charged property. Neverthless, it is tolerably clear that certain obligations in the Services Agreement were meant to apply to Mr Morjaria and Mr Mirza as they do to Viper. In particular:

i) Clause A(18) set out guarantee obligations on behalf of Mr Morjaria and Mr Mirza of sums due under the Services Agreement;

ii) Clauses A(19) and A(20) made any duties, obligations and liabilities of the Client and Guarantor joint and several and provided for what would happen if one of the obligors ceased to exist;

iii) Clause A17 dealt with the provision of further security or collateral; and

iv) Clause A15 set out various representations, warranties and undertakings including, importantly for the current action, an acknowledgement that the Bank is subject to laws relating to AML including, at Clause A15(xiii)(d), an undertaking:

> "… to provide to the Bank, promptly upon request, any such information or documentation that the Bank deems necessary and appropriate, and to take such other reasonable actions upon the Bank's request, to enable the Bank to satisfy its AML/CFT responsibilities and to comply with Applicable Laws and Regulations. In the event of any enquiry or request from regulatory, tax and other governmental authorities and agencies and/or competent law enforcement agencies, you agree to provide the Bank with all information and documentation that is necessary to satisfy the enquiry or request."

979. Paragraph 3.13 of the BOS Facility Letter provided BOS with the right to review the facilities provided and to terminate them at any time.

980. Mr Mirza's skeleton argument and closing written submissions also draw attention to paragraph 3.18 of the Facility Letter. This sets out conditions precedent to the utilisation of the Facilities, including receipt by BOS of certain documents in form and substance satisfactory to the Bank, including "such other evidence or documents (including legal opinions) as the Bank may require". This, however, was a condition precedent to drawdown rather than an obligation on any party, and as the Facility had already been drawn down at the time when the KYC issue emerged, this was of marginal importance.

B. The requests for KYC information and how they were answered

981. As the case regarding KYC depends on judging whether Mr Morjaria had used reasonable endeavours towards achieving the Joint Venture Objectives, it is useful to set out in some detail the correspondence so as to show what he was being asked to provide and in what circumstances, and how he responded.

982. Of course, Mr Morjaria (and Mr Mirza) had been required to provide KYC information before the BOS Facility was granted. As part of his efforts in this regard, Mr Morjaria provided a letter from Slater & Gordon stating: "We understand that Pradeep's and Sangita's estimated overall wealth is in the region of £50m". Slater & Gordon's letter referred to a portfolio of properties known as the Fortress Portfolio, which were stated to have been "sold around 2006 for a profit of circa £5m", as well as investments in properties in the UK and Dubai "worth around £30m".

983. After BOS raised various further KYC queries, in response to which IQEQ provided information, BOS confirmed on 7 February 2018 that the necessary approvals had been received and that a facility would be advanced.

984. BOS had no further requirements in relation to KYC until, on 25 October 2019, Mr Sen at BOS requested KYC information. This was presented as being a routine request,

> "a standard procedure based on queries from the compliance team as part of a periodic review of the account".

985. The information sought included information in relation to both Mr Mirza and Mr Morjaria. One of the requests was information "to reasonably corroborate the estimated net worth of GBP 50mio" given in respect of the Morjarias (with a parallel request in respect of Mr Mirza's estimated net worth).

986. Mr Mirza asked Mr Morjaria to "please send your info as required", noting that he would "deal with my end".

987. Mr Morjaria probably regrets that when this request was conveyed to him, he responded jokingly (and with a liberal use of emojis):

> "I see 50M [emojis] should[sic] have been £50K and not £50M [emojis] hmmmmm we will have to send back the same thing I suppose."

988. This was a joke rather than any serious attempt by Mr Morjaria to estimate his net worth. It remains his case that he still had net wealth in the order of £50 million at that time.

989. Mr Mirza passed on to Mr Homan Mr Morjaria's suggestion to send the same information back to BOS. On the same day, Mr Homan emailed Mr Sen, copying Mr Morjaria and Mr Mirza, attaching a draft letter referring to the £50m wealth estimate previously provided by Slater & Gordon.

990. Nearly a month later, on 22 November 2019, Mr Salunke of BOS responded to ask for more information including certain information relating to Mr Morjaria's previous investments through a company called Mercantile International Ltd ("**Mercantile**"). At this point, the tone of the communications was still that of a routine query.

991. Mr Homan, in an email on 27 November 2019, sent to Mr Mirza a partial response that he had drafted and suggested obtaining the information concerning Mercantile from Mr Stobart. He must have asked this of Mr Stobart since, on 3 December 2019, Mr Stobart passed the query onto Mr Morjaria who replied the same day to say:

> "No I don't have anything, this company goes back 20 years. I have never provided any information before and it has never been requested before so I don't know where this has come from."

992. On 13 December 2019, Mr Homan emailed Mr Mirza and Mr Morjaria with a proposed response. He wrote:

> "Please confirm you are happy with my proposed amended response as is follows…I have the breakdown of the assets for supporting Camran's letter but I do not have the full breakdown of Pradeep's assets making the £50m. As discussed I feel it is better to forward a combined statement of wealth to satisfy the compliance side of BOS".

993. Mr Morjaria and Mr Mirza agreed with the proposed response, and it was sent to BOS on 16 December 2019 (and copied to Mr Mirza and Mr Morjaria). In relation to Mercantile, the response said:

> "This company goes back 20 years and Pradeep is not aware of where the records are relating to it."

994. Nothing more was heard about this until 4 May 2020 when a Ms Lim of BOS wrote to Mr Homan with more requests for information.

995. Ms Lim explained that in view of the changing financial regulatory landscape in Singapore, banks were expected to increase their level of due diligence on all clients. This included a need for the bank to understand and document the economic rationale for clients to set up complex structures for private wealth management purposes and for this rationale to be accompanied by supporting documents. Accordingly, she requested such a rationale and supporting documents. She explained also that BOS needed to understand with supporting documents any past employment in businesses that have led to the buildup of the client's wealth today. She requested in particular for Mr Morjaria to provide documentation in relation to Mercantile showing proof of ownership and past financial statements; and in relation to Mr Morjaria's sale of UK assets (i.e. those in the Fortress Portfolio), documentation showing proof of ownership and proof of sale; income from properties, business, dividend on investments; bank statements, and salary slips.

996. The next day, Mr Homan passed these queries on to Mr Morjaria saying that he thought that "BOS have time on their hands and are trying to fill in the holes in their KYC where they do not have documents" and promising to reply to them in the next week on the same lines as before using the same documents and references as before and reaffirming the lack of documents from such a long time ago in Dubai.

997. Mr Morjaria replied the same day saying amongst other things:

> "The previous documents they are requesting goes back over 20 years and I do not have anything to give them this has been pointed out to them before. In fact if I recall I could not even use the computer in those days and most things were manual so these records are gone years ago specially in Dubai when there was no filing of the accounts or any returns to be submitted.
>
> I have dealt with Mark Lewin for almost 20 years and he is aware of my History is all we can confirm but as for documents I do not have these going back all these years. Now that cladding issue is resolved and we have the planning for extension we are hopping (sic) to sell the Hotel and DC as soon as we can and

> BOS loan will be paid off. All these additional questions should have been covered before is all I can say, and as for the structure and beneficial owners it is quite straight forward now which IQEQ can confirm."

998. BOS followed its queries up with a chaser on 13 May 2020; by making some additional queries relating to Viper on 14 May; and on 26 May sending an email consolidating their queries into the four main points of: (i) complex structure; (ii) original source of wealth; (iii) current source of income; and (iv) transaction queries. In relation to source of wealth, the email emphasises its wish to obtain information and "any supporting documents" on the historic buildup of the clients' wealth.

999. After first checking with Mr Mirza and Mr Morjaria and asking Mr Morjaria to send any further information if he had it, Mr Homan wrote to BOS on 15 June 2020 explaining (amongst other things) that:

> "As Pradeep lives in Dubai, and the requirement in that jurisdiction is not to keep any records dating back to the 1990's, we do not have any further documentation to send you in relation to these old closed businesses. If it was local requirement to maintain records, then I am sure Pradeep would have complied, but as there was not requirement and it was in the time before mass electronic storage of records, none are available."
>
> and stating in relation to the sale of Mr Morjaria's UK assets that:
>
> "The only records I have relating to the sales is the mention in the letter from Slater and Gordon and you already have that on your files."

1000. On 24 June 2020 Mr Morjaria had a telephone conversation with Mr Salunkhe and Mr Sen of BOS, which he later on the same date confirmed in an email. He explained that he had had a very successful trading business in Dubai between 1998 and 2003/4 but did not have the accounts for this and he gave his estimate of the turnover and profit during the last year of trading. He also attached two documents and stated his hope that this would bring the KYC matter to a close.

1001. One of these documents was a profile of Mr Morjaria (written in the first person, and therefore, I assume written by himself) which summarised in very broad terms his past business interests going back to 1977. The second was a document written by Mr Lewin summarising (again at a very high level) his knowledge of Mr Morjaria's business dealings.

1002. Mr Morjaria followed this up on 30 June, with a chaser to Mr Sen asking for a reply (and including a query on another matter). Mr Sen replied also on 30 June 2020:

> "Thank you for the information that you provided on the call and the subsequent mail...This would allow us to complete our internal evaluation."

1003. On 15 July 2020 Mr Salunkhe wrote to Mr Morjaria thanking him for the information provided earlier and describing it as "very helpful" but passing on "a few queries" from Compliance. These included:

> - "Estimated total income from your first job between 1977-87
> - Estimated income from First county garages & how much was the business sold for
> - Approximate purchase & sale price for Streamside hotel.
> - Approximate purchase & sale price of Ridgewood Nursing home
> - Trafalgar Limited is the holding company for the properties, can we get the COI showing ownership. Also would you have any document giving details of the properties owned under Trafalgar Ltd.
>
> • Would you have any documents related to your ownership & sales deeds of the properties (under your Fortress Portfolio) which were leased out to Cadbury Schweppes etc"

1004. Mr Morjaria was clearly frustrated at the level of detail still being asked for and responded the same day saying "NO IDEA".

1005. Mr Morjaria apparently considered that this concluded the KYC matter since he wrote to Mr Mirza on 23 July 2020 stating:

> "In the last two weeks I have had emails and long phone calls from BOS regarding my unfinished KYC. These questions could not be answered by Charles and with whatever Charles gave it still was not enough. Anyway with new information and additional details that I found I think finally they are happy and hopefully there won't be any more questions."

1006. Any such belief however must have been shaken when, on 28 August 2020, Mr Sen wrote to him requiring further information about the ownership of Trafalgar; any documents giving details of the properties owned under Trafalgar; and any documents related to the ownership and sales deeds of properties under Mr Morjaria's Fortress Portfolio leased out to Cadbury's Schweppes etc. and concluding:

> "We'd need some supporting documents sir. ..None of these were part of the information provided at the time of account opening.
>
> We have run a similar exercise with Camran sir, and are on the verge of closing the matter. .request your help on this sir."

1007. Mr Morjaria and Mr Sen continued to correspond through August and September 2020, with Mr Morjaria providing some further information including some documentation

concerning the Fortress Portfolio and title deeds of properties in the name of Trafalgar which have been sold and a certificate of incumbency for Trafalgar.

1008. In particular, on 3 September 2020, Mr Morjaria sent an email to Mr Sen attaching a few sale agreements and title deeds in respect of properties in Dubai owned by Trafalgar, and a statement from Mr Lewin (who therefore, contrary to Mr Mirza's evidence, had been involved by Mr Morjaria and not only by Mr Mirza, and at an earlier stage than is claimed by Mr Mirza). This did not, however, respond to Mr Salunkhe's request for evidence showing Mr Morjaria's ownership interest in Trafalgar (so as to link him to the Fortress Portfolio), and did not provide any documentary evidence concerning Mercantile. Secondly, Mr Morjaria did not tell BOS that he would continue to look for and provide further documents. On the contrary, he stated:

> "The problem we have is anything that is given to you, you come back with ten more questions and really it is not fair that after three years since we started this process you are still asking irrelevant questions and some of the questions go back 40 years, and this is two years after the drawdown was done. It is just NOT right and BOS management at the highest level should know… I hope this now should be it."

1009. In response, Mr Salunkhe emailed Mr Morjaria to request a Certificate of Incumbency showing his ownership of Trafalgar and a copy of the trade licence for Mercantile or in the alternative a request to be put in contact with Mr Morjaria's accountant.

1010. Mr Morjaria provided a self-contradictory response saying that the bookkeeping "was all internal" but on the other hand "no firm of accountants would keep client records". In fact, it turned out that Mercantile had employed external accountants. About six weeks later, on 27 January 2021, Mr Morjaria produced accounts for Mercantile from a firm of accountants in Dubai, Bel Lad & Al Sayagh, who he described as "chartered accountants (BLS) for Mercantile International".

1011. Mr Mirza says that he was not kept up to date with the progress of the provision of KYC information by the Morjarias, and was surprised to learn, in December 2020, during a phone call with Mr Sen, that documents remained outstanding from them. His evidence is corroborated by Mr Mirza's email to Mr Lewin on 16 December 2020 in which he refers to his conversation with Mr Sen and to being:

> "very disturbed to find out that the KYC matters which they had requested had still not been finalised as although they had completed their enquiries on me to the satisfaction of their compliance department they are still awaiting information from Pradeep. To quote Bikram, he said the matter is now 'critical'". He added that it was "imperative for all our sakes that you get this matter resolved".

1012. This email provides a strong indication that, contrary to an argument raised on behalf of Mr Morjaria, up to this point at least, Mr Mirza was looking to solve the KYC problem and was not trying to engineer a default as part of a conspiracy with BOS to end Mr Morjaria's involvement with the Property.

1013. On 24 December 2020, there was a further email from Mr Salunkhe to Mr Stobart, copying Mr Lewin, again asking for documents in relation to various of Mr Morjaria's transactions. Mr Lewin passed this along with comments to Mr Morjaria describing it as being "beyond belief that they are looking for documents going back so long" and making the point that IQEQ was being asked for documents that were outside the period for which it was permitted to retain information under the General Data Protection Regulation.

1014. On 4 January 2021, after the Christmas break, Mr Stobart wrote to Mr Salunkhe suggesting a call with the BOS Compliance Department to find a way forward. This was refused, but Mr Salunkhe suggested that he and Mr Sen could get on a call to discuss.

1015. It appears that on 15 January 2021 Mr Salunkhe had a meeting with the BOS Compliance Department.

1016. On 18 January 2021, there was a call (which Mr Mirza recorded) between Mr Mirza and Mr Sen in which Mr Sen reported that the matter had "gone to the highest level… A committee in the bank and they've taken a decision that we should exit that relationship".

1017. Mr Mirza asked whether BOS was unhappy only with Mr Morjaria or also with him. Mr Sen responded that he was not allowed to reveal information but confirmed that BOS was happy to maintain a relationship with Mr Mirza. Mr Mirza floated the idea of buying out Mr Morjaria and maintaining the relationship with BOS, and the two of them discussed ways in which that might work.

1018. Mr Mirza followed this conversation up with a WhatsApp message asking whether the decision was final or could be appealed. Mr Sen replied that it could not be appealed.

1019. It appears that Mr Mirza was informed ahead of Mr Morjaria and Mr Lewin, since Mr Lewin wrote the next day to Mr Sen providing further information about correspondence with the lawyer that dealt with the sale of the Fortress Portfolio and asked for an update. Mr Lewin mentioned that he had spoken to Mr Mirza yesterday and had been told that "this is getting critical".

1020. Also on 20 January 2021, Mr Mirza wrote to Mr Lewin, explaining that there appeared to be a problem with Mr Morjaria's KYC and attaching an email from a banking lawyer Mr Mirza had consulted called Mr Graham Reid outlining the seriousness of the problem and advocating a solution whereby Mr Mirza would buy Mr Morjaria out.

1021. It seems that Mr Sen did not reply immediately to Mr Lewin, as Mr Lewin wrote to him again on 21 January 2021 following a conversation with Mr Mirza which he said had led him to believe that BOS still had issues with KYC on Mr Morjaria and wanted to know the position. This led to a WhatsApp exchange between Mr Mirza and Mr Sen, in which Mr Mirza received confirmation that the decision of BOS to sever ties with Mr Morjaria had not changed, and in which Mr Mirza informed Mr Sen that Mr Lewin was going to call him and that:

> "he thinks it is not a big deal and should be reconsidered but I will leave that up to him you to talk about that".

1022. On 22 January 2021, Mr Lewin wrote to Mr Sen attaching a copy of the Fortress Portfolio Brochure produced by Strutt & Parker which referenced properties being held in Isle of Man SPV's and stating that he expected to be able to evidence the link to Pradeep in relation to the Fortress Portfolio. He noted that:

> "even if we get the financial information from Pradeep's accountant regarding Mercantile and I am able to now trace back the owning SPVs names via the land registry and connect them to Pradeep's 50% ownership; it remains your belief that BOS have simply taken the decision that they are no longer wanting to do this kind of business and as such you are going to introduce us to alternative funders in order to facilitate a smooth exit and that there is no question of calling in the loan and or tarnishing the reputation or credit worthiness of Camran, Pradeep or me and my co directors. You also mentioned that you were going through similar issues with other clients and this is all driven by increased regulatory requirements in Singapore."

It appears, however, this email was not received when sent as a result of the size of the attachments, as Mr Mirza wrote on 25 January resending it.

1023. On 22 January, Mr Morjaria had a call with Mr Sen, which Mr Morjaria recorded. Mr Sen confirmed that BOS was looking to exit and demand repayment of the Facility because it had received insufficient KYC. Mr Sen did not however pass on a message that there was no prospect of the Compliance Department's decision being reversed. On the contrary, he asked whether there might be "something that will allow us to go back and put up the last fight". Mr Morjaria held out the possibility that there might be something in some old boxes that were put away when he moved house that might help and that he might be able to see if the accountants could be found. Mr Sen avoided the question whether BOS was willing to carry on with just Mr Mirza but denied that there was any ploy to get Mr Morjaria out saying that Mr Mirza "must understand what I was saying in a wrong way". Mr Sen also offered to find another bank who might lend.

1024. On 25 January 2021, after receiving a copy of Mr Lewin's email of 21 January via Mr Mirza, Mr Sen in an email to Mr Lewin copied to Mr Mirza and Mr Morjaria thanked Mr Lewin for the brochure on the Fortress Portfolio saying amongst other things:

> "On a stand alone basis it still doesn't help much. I really wish you'd helped with the details earlier, maybe we wouldn't have been in this situation."

1025. Over the next few days Mr Morjaria and Mr Lewin produced some further information to Mr Sen including from Mr Lewin about the previous arrangements for holding the Fortress Portfolio, and from Mr Morjaria on 27 January 2021, audited accounts for Mercantile, which Mr Morjaria was able to obtain from his previous accountants in Dubai, having recalled the names of those accountants. Mr Morjaria, in sending those documents and stating that Mr Lewin should soon be in a position to confirm the ownership details regarding the Fortress Portfolio, confirmed his hope that BOS would now be able to confirm that his KYC was now in order.

1026. On 5 February 2021, there was a call involving Mr Sen, Mr Mirza, Mr Homan and Mr Lewin. Some of the main points that came up in that call were that:

i) Mr Lewin pointed out that the bank's request to link Mr Morjaria to the Fortress Portfolio came up as a very late issue (previously, BOS had only been asking for completion statements in relation to the Fortress Portfolio) and was answered within a week.

ii) Mr Mirza floated his suggestion for a new company set up by him taking over the loan arrangements.

iii) Mr Mirza asked Mr Lewin to pass on the message so that Mr Morjaria would be under no illusions of thinking that BOS would change its mind, and Mr Lewin agreed to take it forward on that basis.

iv) Mr Sen indicated that BOS would give time to sort matters out.

v) In response to a question from Mr Homan, Mr Sen indicated that if he had received earlier the information he had been sent recently, he considered that he would have had a good chance of "pushing this through".

vi) Mr Mirza speculated that part of the issue that was causing BOS to be particularly careful might have been the fact that Mr Morjaria's previous partner had been a Mr Hitesh Bodani, and that BOS had had problems with that individual. Mr Sen stated that no one had brought that up with him, but that this may have come up at high level discussions.

1027. Mr Sen had a subsequent call with Mr Morjaria on 6 or 7 February 2021. It is obvious that, by this stage, Mr Morjaria had understood that BOS wished to exit the Facility and he was looking for Mr Sen to send an email to confirm this and also to confirm that the Bank did not propose carrying on with either of the Joint Venturers. Mr Morjaria also made it clear that he had the money to pay off his half of the loan. Mr Sen appeared to agree to provide these confirmations, but in a later WhatsApp conversation with Mr Mirza on 10 February 2021, he agreed to almost the opposite course saying that:

> "We are exiting the Viper relationship and he [Mr Morjaria] doesn't need to know what you and I are trying to execute." -

1028. Subsequently the same day Mr Sen sent an email to Mr Morjaria and Mr Mirza, stating that BOS wished to exit the Viper account and that this was because of incomplete KYC, it being "very obvious where that gap was". BOS would give three months for the exit.

1029. On 13 February 2021 there was a WhatsApp exchange between Mr Mirza and Mr Sen. Mr Mirza requested Mr Sen to make it clearer that BOS's reason for the termination was BOS's dissatisfaction with Mr Morjaria's KYC, and that BOS was happy with Mr Mirza's. Mr Sen was not happy to do this but deferred the conversation as he was with his family at the weekend. He suggested a call rather than another email. They attempted to have that call on 15 February, but Mr Morjaria did not answer.

1030. On 15 February Mr Homan wrote to Mr Morjaria and Mr Lewin explaining that Mr Mirza, having invested a considerable amount of time and effort and money in the development, did not want the property to be sold to a third party at the currently depressed values. He outlined what he saw as being the five alternatives as follows:

> "1. Pradeep replaces BOS on same terms/costs to Viper.
>
> 2. Find an alternative financier in sufficient time to fund BOS 's replacement at the same cost to the company.
>
> 3. An alternative company to Viper, owned by Camran, without Pradeep buys Viper's interest in the property.
>
> a. BOS has confirmed that they are discussing with Credit about a similar facility for this new company
>
> b. This route will require bridging finance to exit the Viper relationship for approximately 1 week.
>
> c. BOS said that Pradeep will not be allowed to be connected with the property in the new venture
>
> 4. Do nothing, BOS demand the loan, the guarantees are called in and the Nat West relationship is potentially damaged.
>
> 5. The exit clauses in the JV are followed.
>
> a. This would be a sale in the open market and the current lowest point
>
> b. This would be in no-ones interest."

1031. On 16 February there was an email exchange between Mr Morjaria and Mr Sen. Mr Morjaria registered various complaints about BOS's KYC procedures being excessive and complained that he had shown a willingness to work and provide all reasonably available information. Mr Sen replied that:

> "DETAILS FROM YOUR SIDE WERE PARTICULARLY SLOW TO COME BY AND AT TIMES ON CALLS YOU HAVE INDICATED THAT YOU WERENT ABLE TO PROVIDE ANY MORE."

1032. On 19 February there was a further email from Mr Morjaria to Mr Sen. Mr Morjaria again registered various complaints about BOS's KYC procedures being excessive and having been applied disproportionately between Mr Morjaria and Mr Mirza. He also quoted Mr Homan's alternative 3 (as set out above), describing this as being "most distressing" and that he was:

> "…shocked and concerned that BOS appears to be progressing discussions, in collusion with Camran and Charles Homan, on such a structure and a credit approval process behind my back, where a refinancing plan is underway for the BOS facility with

> my exit from Viper in mind, without Camran, Charles or BOS having informed me previously of any such proposal. I object to this in the strongest terms. Camran does not have my consent to proceed with any such discussions with BOS. I see this as an unacceptable commercial interference by BOS in my private commercial affairs and interests and BOS certainly has no authority to further such a proposal."

Mr Morjaria reserved his right to take appropriate action, including before the Monetary Authority of Singapore.

1033. Mr Sen replied on 22 February reiterating the importance of BOS's regulatory requirements and responsibilities and refusing to be drawn into the discussion as to how the JVs, Mr Morjaria and Mr Mirza manage their affairs.

1034. During April 2021 there were various communications between Ameer and Mr Sen concerning the possible funding by BOS of a Mirza family vehicle (originally Chevin and later Bane Solutions).

1035. It was not until 14 December 2021 that BOS sent a formal notice to Viper of its intention to terminate the Facility. Even this notice, however, did not require an immediate repayment of the Facility, but rather asked Viper to make arrangements to repay the Facilities as soon as possible.

C. Was Mr Morjaria required to use reasonable endeavours to answer BOS's KYC requests?

1036. The Defendants claim that Mr Morjaria in his dealings with BOS breached two provisions of the JVA:

i) clause 2.1 of the JVA, which required the Joint Venturers each to "use their reasonable endeavours towards achieving the Joint Venture Objectives"; and

ii) clause 2.2 of the JVA, which required the Joint Venturers to "use reasonable endeavours to secure bank funding to satisfy the Further Capital Requirements".

i. Does Clause 2.2 apply?

1037. As to the potential for a breach of clause 2.2 of the JVA, this is easily dismissed. "Further Capital Requirements" are defined in the JVA as:

> "the fixed and working capital requirements of the Company including working capital the Company requires from time to time to meet Expenditure but excluding any item included within the Initial Capital Requirement and subject to a maximum total amount of three hundred thousand pounds (£300,000)."

1038. It is not clear that the obligation to use reasonable endeavours to "secure" bank funding extended to an obligation to use such endeavours to keep existing bank funding in place, rather than creating an obligation to obtain such funding in the first place. However, even if we assume the obligation is to be read in this extended manner, there are two

reasons why this obligation cannot be applied to a failure to use reasonable endeavours to secure the BOS Facility in that sense.

1039. First, the BOS Facility was not required for working capital or to meet Expenditure (defined as "all liabilities, outgoings and expenses of the Company of every description"). It was borrowing used to make indirect investments as a form of equity release.

1040. Secondly, by the time that any reasonable endeavours were required to meet BOS's KYC requirements, the Joint Venturers had provided more than £300,000 of capital over and above the Initial Capital Requirement and, therefore, any further requirement for capital fell outside the definition of Further Capital Requirements.

ii. Does Clause 2.1 apply?

1041. It is argued on behalf of the Claimants that clause 2.1 also is inapplicable in that the requirement to use reasonable endeavours is a requirement to use them towards achieving the Joint Venture Objectives, and the Joint Venture Objectives are narrowly defined and are not affected by any failure to maintain the BOS Facility.

1042. The Joint Venture Objectives include, first, the acquisition of the Property, secondly, the enhancement of the Property's value and, thirdly, obtaining necessary building and development consents for the development of the Property.

1043. Clearly, the first and third objectives were not engaged by any failure to maintain the BOS Facility.

1044. Mr Mirza pleads that the second objective is engaged. The pleading is as follows:

> "The value of the Property to be realised by the Joint Venturers would be reduced if the lending from BOS was withdrawn leading to potential enforcement by BOS of its security (and, as has transpired, increased interest charges on the facility)."

1045. I will put to one side the statement concerning increased interest charges, since avoiding increased interest charges was not one of the Joint Venture Objectives. Apart from this, the nub of the pleading is that enforcement (indeed potential enforcement) by BOS would reduce the value of the Property to be realised by the Joint Venturers. The pleading does not spell out why this should be the case, but the obvious inference is that the calling in of the BOS Facility would lead to a disorderly sale of the Property, reducing the price that can be achieved for it.

1046. There are various objections that can be raised to this argument:

i) Although I have presented the first and second Joint Venture Objectives as separate objectives, that is not how they are presented in the definition within the JVA: they are presented as a single objective of "the Company's acquisition of the Property and the enhancement of the Property's value". That suggests that they should be read together and that what is involved in the "enhancement" is physical improvements to the Property to increase its value and matters such as securing valuable sub-leases enhancing the income of the Property from tenants

with a good covenant rather than anything that might be affected by the failure to maintain the BOS Facility.

ii) It can be argued that the devaluation of the Property came at the point that it was encumbered with security for the BOS Facility, not the point when the BOS Facility was called in.

iii) The Joint Venture Objective is to enhance the Property's value (not its sale price). The value of the Property is the price that it could fetch on a particular day. That value is not affected by whether it is being sold or retained on that day. Therefore, a failure to prevent it being sold within a particular period does not affect the value of the Property. It merely affects the ability to benefit from a better price at a future date.

iv) It was by no means obvious that terminating the BOS Facility would lead to a disorderly sale. In fact, as it turned out, BOS allowed a great deal of time for the property to be sold.

v) Mr Morjaria had understood at the relevant time that a sale was planned anyway; if BOS took action requiring a sale, this would only be causing the JV to do what it was going to do anyway.

1047. Taking all these points together, I think it is correct that the obligation to use reasonable endeavours towards achieving the Joint Venture Objectives did not impose any obligation to use reasonable endeavours to prevent BOS from wishing to terminate the Facility.

1048. There is another view that could be taken, which is that the Joint Venture Objectives should be read in a broad commonsense way so that the Joint Venturers should be obliged to use reasonable endeavours to promote the JV more generally, or at least that the phrase "enhancement of the Property's value" should be read in the broadest possible way. I do not think this is correct given the very narrow way the Joint Venture Objectives have been defined and the arguments I have cited above. However, given the possibility of this other view, I will go on to consider whether clause 2.1 has been breached on the assumption (which I do not accept) that the broader reading does apply so that the obligation to use reasonable endeavours towards achieving the Joint Venture Objectives did impose an obligation to use reasonable endeavours to answer BOS's KYC requirements.

1049. The Defendants contend that by (a) providing BOS with an incorrect estimate of his total net wealth, and/or (b) by failing to provide BOS with the KYC information requested by it, Mr Morjaria acted in breach of clauses 2.1 and 2.2 of the JVA.

1050. Putting aside my objection that neither of these clauses could be breached by either such matter, I will consider each such contention.

iii. The breach alleged through a misrepresentation of Mr Morjaria's wealth

1051. As to the first contention, that Mr Morjaria represented to BOS an incorrect estimate of his total net wealth, this point appears in the counterclaim as pleaded but was not developed in oral argument.

1052. I asked Mr Rees KC about this during opening submissions whether it was Mr Mirza's case that BOS withdrew its support because it didn't get enough KYC to satisfy its AML requirements, or just became worried about Mr Morjaria's net worth. Mr Rees answered:

> "No, I think it is the KYC, and I think that's what the evidence shows, but of course that may well be an underlying problem … But ultimately it was KYC was the reason."

1053. Furthermore, apart from the reference to the jokey email where Mr Morjaria immediately joked with Mr Mirza that the figure "should have been £50K and not £50M", no evidence was placed before the court to demonstrate that Mr Morjaria was wrong about his stated level of wealth. The late additions to the KYC material appear to go towards supporting the view that he was not.

1054. I see that within the pleadings (to which I was not taken on this point) it is claimed that the point is demonstrated by a document produced in May 2019 by Spencer Gardner Dickins. This was a draft report and the provenance of the figures within it is unknown. I was not taken to this document either and neither was Mr Morjaria in his cross-examination.

1055. If Mr Mirza wished to establish that Mr Morjaria had misrepresented his wealth to BOS, then he should have put some evidence before the court on this point. In the absence of his doing so, I cannot find that he has established this point.

1056. Furthermore, no argument has been pleaded or pursued that Mr Morjaria, through any alleged misstatement of his wealth, has caused any damage to Mr Mirza or to the JV Entities and in particular the argument that this matter contributed to the BOS decision to terminate the BOS Facility has not been pursued or established.

1057. Accordingly, I find that (even if contrary to my findings, an obligation existed) there has been no breach of obligations by Mr Morjaria in relation to the alleged misrepresentation of his wealth and I find also that even if there had been any such misrepresentation, no damage arising from it has been established so as to give rise to any remedy for Mr Mirza.

iv. The breach alleged through a failure to respond adequately to BOS's KYC requirements

1058. As to the second contention, that Mr Morjaria failed to use reasonable endeavours in responding to BOS's KYC requirements, this point is argued on behalf of Mr Mirza as follows.

1059. Rather than providing BOS with the documents they sought, Mr Morjaria instead sought to address BOS's requests for KYC information, at first with generalised

statements. The argument is that the damage was done in the 15 months following BOS's requests in October 2019, during which Mr Morjaria did not take seriously BOS's requests for documents to support what Mr Morjaria was telling it. Only much later, in 2021, after Mr Lewin got more actively involved, did Mr Morjaria take seriously the need to provide documentary evidence to the bank, by which time it was too late. Once he did take it seriously, he was able to provide documents, such as audited accounts for Mercantile.

D. Did Mr Morjaria use reasonable endeavours?

1060. The question whether what Mr Morjaria did amounted to reasonable endeavours needs to be considered in the context of which he was aware.

1061. In brief, the case advanced by Mr Mirza is that Mr Morjaria did too little too late.

1062. Mr Mirza's Counsel divide the dates into five periods of time:

i. 10 October 2019 to 24 June 2020:

1063. I have not been able to track down the reference to BOS requesting further KYC information from both Mr Mirza and Mr Morjaria on 10 October 2019, but certainly from 25 October 2019 until the middle of June 2020, Mr Homan sought to address the bank's enquiries on behalf of both Mr Mirza and Mr Morjaria, and all parties appear to be content with this arrangement, and with the original decision to re-proffer the KYC information that had originally been provided to BOS and the subsequent response (referred to at [992] above) of providing a joint statement of wealth.

1064. During this period, there was little suggestion that this was anything more than a routine box-checking exercise by BOS. All parties appear to be content with the approach that was being taken and I must conclude that the approach taken was seen as being reasonable in the eyes of all parties. In that context, I do not think that the court could find that Mr Morjaria's efforts fell short of the standard of "reasonable endeavours".

ii. 24 June 2020 to 16 December 2020:

1065. During this period Mr Morjaria began to engage directly with BOS. I can agree with the contention in the Defendants' closing statement that the information he provided to them was piecemeal, and largely comprised bold assertions about his wealth and its sources, unsupported by documents, interspersed with expressions of irritation that BOS was asking questions of him.

1066. Nevertheless, it was still not clear at the beginning of this period that this was not enough and therefore not clear that Mr Morjaria should have understood that he needed to make greater efforts than he was making. Mr Sen's response on 30 June 2020 (referred to at [1002] above), appears to indicate that Mr Morjaria's efforts to date might have been enough. Even when Mr Salunkhe asked for more information, which Mr Morjaria through his response ("No Idea"), indicated that he was unable to provide, it appears from Mr Morjaria's email to Mr Mirza on 23 July 2020 (referred to at [1005] above) that he considered that this was enough.

1067. As more requests for information came in, through August to September 2020 Mr Morjaria did provide further information and explanations as to why he could not provide everything that BOS was looking for.

iii. 16 December 2020 to 18 January 2021

1068. When Mr Mirza learned that Mr Morjaria had still not satisfied the bank's KYC requests, it is his evidence that he urged Mr Lewin to assist in resolving matters with BOS. In fact, it seems that Mr Lewin and/or the IQEQ team had been helping earlier than this.

1069. In December 2020, Mr Stobart started corresponding directly with BOS on this topic but this obviously did not satisfy the bank, because on 18 January 2021, Mr Sen told Mr Mirza in the call mentioned at [1016] above that the bank's compliance committee had "taken a decision that we should look to exit that relationship" .

iv. 18 January 2021 to 23 February 2021

1070. During this period Mr Lewin and Mr Morjaria made greater efforts and were able to find documentary evidence for BOS, but none of this caused the BOS Compliance Committee to change its mind.

1071. Whilst looking at correspondence as a whole it seems that they were never, at this stage, going to change the mind of the Compliance Committee. This would not have been apparent to Mr Morjaria and Mr Lewin at the time. As I explain at [1023] above, even on 22 January Mr Sen was still suggesting that it might be possible to produce further information that "will allow us to go back and put up the last fight".

1072. There are some indications that had the information provided during this period been provided sooner, the decision by BOS to terminate the Facility might have been avoided.

1073. This was the view of Mr Sen in his email of 25 January 2021 when he said:

> "I really wish you'd helped with the details earlier, maybe we wouldn't have been in this situation."

1074. This was Mr Sen's view again in the telephone conversation he had on 5 February 2021 (referred to at [1026] above). It was also the view of Mr Lewin in February 2021 when he wrote that the:

> "issue is that we were too late coming up with the documents we did and their compliance team had made up their mind…"

v. 5 April 2021 to 14 December 2021

1075. Mr Mirza's closing statement identifies this period as being one where Mr Mirza made proposals to BOS about a potential sale of the property to a Mirza family company. In fact, those conversations started as early as 18 January. Nothing came of this, but the Claimants have sought to rely on these proposals as evidence of a conspiracy going back to 2019.

vi. Conclusion in relation to reasonable endeavours

1076. Mr Mirza's pleading does not specify what it is that Mr Morjaria should have done in order to comply with his reasonable endeavours obligation, only that he failed to provide KYC information requested of him. Obviously, a reasonable endeavours obligation cannot require someone to produce information that they do not have and have no way of obtaining. As Mr Mirza's case was developed, it appears that the central plank of the case was there was information which Mr Morjaria was able to get hold of once he redoubled his efforts at the end of January 2021 and that his failure to apply reasonable endeavours was effectively that he had not taken the necessary steps to obtain this information earlier, before BOS had made a decision to terminate the Facility.

1077. In judging whether Mr Morjaria's efforts up to this point were reasonable, it is important to note the full context.

1078. First, the information requests being made by BOS were extraordinarily extensive and difficult to comply with and moreover were continually being increased. Mr Lewin, who was highly experienced as a company director, stated in his witness statement that he had "never seen anything like this" and in oral examination that "I still maintain… that what they were asking for was beyond belief". Similarly, Mr Homan described BOS as requiring "the most comprehensive KYC I've known". Even Mr Sen frankly admitted to Mr Morjaria on the telephone that the Bank's requirements "at certain times are a little unreasonable".

1079. Secondly, it is important to note that no-one at BOS had made any suggestion at any stage prior to 20 January 2021 that Mr Morjaria's failure to provide documentation to BOS might cause BOS to withdraw the Facility - there was never a stage where he was told that he must provide documentation within a certain period or this would happen.

1080. Thirdly, there was never a suggestion made by Mr Mirza or anyone else at the time that Mr Morjaria was failing to act reasonably (and certainly no reference to obligations under the JVA to this effect).

1081. Within the context I have just described, Mr Morjaria, until 20 or 22 January 2021, did not understand that his failure to produce all the information that BOS was requesting might cause BOS to withdraw the BOS Facility. Neither did he understand that this failure could possibly involve him in a breach of his obligations under clause 2.1 of the JVA. I consider also that neither was this understood by Mr Mirza or by anyone else involved in the JV, or they would have put more pressure on Mr Morjaria to try harder. Mr Morjaria did not understand that he would need to do more to avoid the BOS Facility being terminated and, in the circumstances, it was not unreasonable for him to fail to understand this.

1082. If Mr Morjaria had understood this, I consider it is clear that he would, with the assistance of Mr Lewin, have produced earlier the information that was produced in late January. Mr Morjaria had no reason for wanting the BOS Facility to be terminated. He would be just as affected as Mr Mirza by this.

1083. In their closing written for submissions Mr Mirza's counsel sought to suggest a contrary view. They pointed out that during his cross-examination, Mr Morjaria said that he had

"started my plan of this litigation end of 2019" and had "spent 12 hours a day, seven days a week" on that task, and invited me to conclude that from the end of 2019 Mr Morjaria had no interest in using reasonable endeavours to ensure that the JV continued to have funding, because he was fully engaged on a plan to bring the JV to an end through this litigation.

1084. I do not draw that conclusion. The conclusion I draw is that up to 18 January 2021, none of Mr Morjaria, Mr Lewin or Mr Mirza really understood the seriousness that BOS was attaching to having a more complete and better documented understanding of Mr Morjaria's source of wealth. Without that understanding, which, in my view was a reasonable understanding in the circumstances I have outlined above, Mr Morjaria was content to provide documentation that he had available but did not see any need to explore every avenue to try to piece together information that he was not holding. It was only on 22 January when Mr Morjaria had a call with Mr Sen that Mr Morjaria really understood that the lack of KYC could cause the Facility to be terminated and from this point, he and Mr Lewin redoubled their efforts to try to obtain the missing information. Once Mr Morjaria understood that the Facility might be terminated, he did everything that he could to meet BOS's requirements.

1085. Mr Mirza's Counsel have not identified anything that Mr Morjaria could have done but did not do after 22 January. It is their case that from that date there was nothing that could be done: BOS had made up its mind to terminate the BOS Facility.

1086. The ambit of a "reasonable endeavours" clause, and its application to any set of facts is clearly highly dependent on the circumstances. In order for Mr Morjaria to have been required by such clause to do more than he actually did, earlier than he actually did it, he would have needed to have known (or at least to be aware of facts that would have caused a reasonable person to know) that his failure to act in a timely manner threatened the JV Objectives. In fact, it was not until 22 January that he became aware that there was a real danger that BOS would terminate the BOS Facility. Up to this point he did not understand that, and it may be presumed also that none of Mr Mirza, Mr Lewin or Mr Homan had understood this, as none of them had seen a need to make Mr Morjaria aware of any great urgency about this.

1087. In the context of all the points made above, I consider that Mr Mirza has not established that Mr Morjaria was in breach of any requirement to use reasonable endeavours to avoid BOS terminating the Facility, even if such a requirement could be seen to derive from clause 2.1 of the JVA, which for the reasons I have given I consider not to be the case.

E. Issues relating to Causation and Loss

1088. I have concluded that Mr Morjaria's reasonable endeavours obligation under clause 2.1 of the JVA did not put on him a reasonable endeavours obligation to avoid termination of the BOS Facility. I have concluded also that, even if it did, in the circumstances in which he found himself, he satisfied that obligation. Accordingly, the questions of causation and of loss do not arise. However, for completeness, I will address these matters on the assumption that (contrary to my findings) Mr Morjaria was, by his failures to address BOS's KYC requirements earlier and with more vigour, in breach of clause 2.1 of the JVA.

i. Causation

1089. On these assumptions, the first question is whether Mr Morjaria's failures (which were later corrected during January to the extent that any such failure has been argued for) gave rise to BOS terminating the Facility.

1090. Mr Morjaria's counsel argued that they did not. They argue that Mr Mirza from at least January 2021 saw an opportunity arising from these circumstances to get Mr Morjaria out of the JV, and therefore, with the assistance of his son Ameer did his utmost to prevent Mr Morjaria from continuing his dialogue with BOS and thereby satisfying it in relation to its KYC concerns so that the solution of Mr Mirza taking full ownership of Viper or the Viper Lease became the only solution available.

1091. Some of the steps that Mr Morjaria's counsel say illustrate this include:

i) Mr Mirza obtaining the email from Mr Graham Reid mentioned at [1020] above;

ii) requests by Mr Mirza to induce Mr Sen to put on record in an email that BOS required the removal of Mr Morjaria, rather than termination of the Facility;

iii) that he and Ameer Mirza drafted an email for Mr Homan to send to Mr Morjaria, advising him that "if you were to produce documents now, it may only serve to make the position worse", hinting strongly that the late production of documents might make likely that BOS would file a Suspicious Activity Report with the authorities in Singapore, and thereby actively trying to dissuade Mr Morjaria from filling the gaps in his KYC. The email also sought to persuade Mr Morjaria that he was at risk of being reported to the law enforcement authorities, but that:

> "I believe if we were to reach an amicable solution with BOS, whereby Camran was to take over the BOS/NatWest facility on his own, this could potentially allow no further action being taken". On 1 February 2021, Mr Homan made a proposal to Mr Morjaria and sought to agree asset values with him";

iv) during a call on 5 February 2021 between Mr Sen, Mr Mirza and Mr Homan and Mr Lewin, after Mr Mirza asked Mr Sen "for my curiosity" whether the KYC information which IQEQ and Mr Morjaria had now sent to BOS would have been sufficient to pass KYC and receiving the answer that it would, recounting a rumour casting aspersions on Mr Morjaria's creditworthiness;

v) in February 2021, upon seeing an email from Mr Lewin saying that Mr Morjaria was "waiting for something" from Mr Sen, Mr Mirza immediately arranged a call with Mr Sen and emphasised on that call that to make sure that "I don't think Bikram has said anything to us on the call that says he will change his mind or/Bank of Singapore", and prompted Mr Sen to send the further email mentioned at [1028] on confirming the decision in terms suggested by Mr Mirza;

vi) on 13 November 2021, Mr Mirza sent BOS a detailed proposal from his solicitors for a "pre-packaged asset sale" of the property by BOS to his company. One element of this was that "BoS make a demand on Viper Limited

> for full repayment of the existing Facility", wait one business day to "assist in the Defence and Counterclaim of any assertion by Viper Limited that it was not given sufficient time to repay", then exercise its power of sale to sell to Mr Mirza's company. This proposal was not taken up by BOS, although as we will see when we turn to the Wolverine transaction, a transaction was later agreed with a somewhat similar effect.

1092. Mr Mirza is also criticised in that it appears that he took steps to prevent Mr Morjaria repaying BOS, by having his lawyer, Mr Andrew Taplin, write to BOS in May 2022 suggesting that as Viper had been purchased by a party owned by the Morjaria family and the Morjaria family had failed BOS's KYC requirements, BOS should not accept repayment of the loan. This letter impliedly, and as far as I can see without justification, conflates a failure to pass KYC requirements necessary for a bank to form a relationship with a customer with the existence of suspicious circumstances such that receipt of money from a person would risk handling the proceeds of crime or of terrorist financing. It provides a strong suggestion that at that time at least Mr Mirza was actively seeking to avoid the loan being repaid.

1093. Whilst I do not accept that there was anything like a conspiracy between the Mirzas and BOS (or Mr Sen acting outside the interests of BOS), it is certainly the case that once Mr Mirza became aware of the likelihood that BOS would wish to terminate the Facility, he turned away from any solution that would involve changing the mind of the BOS Compliance Committee and concentrated his powers instead on finding a solution that would involve him and/or his family taking sole control of Viper or the Viper Lease.

1094. It is impossible to be sure about what would have happened if Mr Mirza had instead used his powers of persuasion to convince the BOS Compliance Committee that the late-provided KYC information should be sufficient to change their mind about terminating the Facility, but on the balance of probabilities I think it more likely than not that he would not have been successful. In a WhatsApp exchange between Mr Mirza and Mr Sen on 8 February 2021, Mr Sen says that he was "categorical in saying [to Mr Lewin] that the account has to be exited". In a call on 9 February 2021 between Mr Sen, Mr Mirza and Mr Homan, Mr Sen clearly took the view that a document that Mr Morjaria was hoping to deliver:

> "is not really going to move the needle because the bank, the compliance doesn't want to go back and start again. There's no point".

1095. It is true that Mr Sen may have given that impression in his call to Mr Morjaria on 22 January 2021 and by Mr Sen's statement on 28 January that he would "go back to compliance" with the new material, but I do not find that evidence very persuasive. Mr Sen was an account manager and it appears he was used to telling his clients what they wanted to hear. It appears also that he had little sway with the Compliance Committee.

1096. The Claimants argue that any chain of causation is also broken by the fact that Mr Mirza failed to co-operate with Mr Morjaria in repaying the BOS Facility. I see little merit in this argument. If contrary to my findings, Mr Morjaria had failed to use reasonable endeavours to provide KYC (and was under a contractual obligation to Mr Mirza to do so), then I consider that he would not be excused from the consequences of the breach

merely because Mr Mirza was either unable or unwilling to repay the BOS Facility. This might be an issue to consider, however, in relation to mitigation.

ii. Loss

1097. As regards loss, Mr Mirza's pleaded case is to claim:

> "any and all loss suffered by Mr Mirza as a result of the termination (including the sale of Viper to Trafalgar and the purported Deed of Assignment)".

1098. Given my prior findings such that there is no liability I do not need to go into the question of loss in much detail, but I will mention that:

i) Having guaranteed the BOS Facility (as part of an arrangement under which he benefitted through an effective equity release), Mr Mirza could have mitigated any loss by agreeing to Mr Morjaria's offer that each of them should repay part of the BOS Loan. Of course, if Mr Mirza did not have the means to do this, he could not mitigate his loss in that way. However, it was his case that he did have the means to do this.

ii) Insofar as interest was accruing at the usual rates on the BOS Loan, this could not be regarded as a head of loss, but to the extent that the interest rates were increased as a result of the termination, this could be if Mr Mirza can demonstrate he paid such increased amounts.

iii) There would need to be more argument than I heard at trial to determine whether the sale of the Viper Shares can be regarded as sufficiently proximate to the breach to be seen as being a consequence of any such breach.

iv) Any loss calculation would be complicated by the fact that that by the time a sale of Viper came about Mr Mirza had contrived for the Third Boomzone Lease to be granted, and that the sale of the Viper Shares took place at a value greater than the value of the Viper shares encumbered by the BOS Facility. This can be regarded as both affecting the level of any loss and also as being relevant to the question whether loss had been mitigated, since without the Boomzone Leases being in place, there might have been the alternative of a sale in the market in a sum that would pay off the BOS Facility and leave a surplus for the JV.

v) I see no connection whatsoever between any putative breach by Mr Morjaria arising out of his failure to satisfy BOS's KYC requirements and the Deed of Assignment.

F. Summary of conclusions in relation to the KYC Issue

1099. I have concluded that neither clause 2.1 nor clause 2.2 imposed any duty on Mr Morjaria that would be breached by his failing to use reasonable endeavours to answer the KYC requirements of BOS.

1100. I have further concluded that even if Mr Morjaria did have such a duty, in the circumstances in which he found himself, he did not breach such a duty.

1101. If contrary to these findings there was such a breach, then, on the balance of probabilities, I would see this breach as leading to the termination of the BOS Facility. There would, however, be difficulties in assessing what damages could be considered to flow from this.

14. THE VIPER SPA CLAIMS

A. The Pleaded Claim

1102. Continuing to deal with the various claims and counterclaims in roughly date order, I turn next to the Viper SPA Claims.

1103. As I have mentioned in my introduction at [60], on 5 May 2022, Otaki, the Claimants and Trafalgar entered into the 5 May Agreements: the Viper SPA; the Deed of Release; the Deed of Assignment; and the Deed of Cooperation.

1104. Dealing with each of these documents in a little more detail:

i) The Viper SPA was the document by which Otaki sold the entire issued share capital in Viper to Trafalgar for £800,000;

ii) The Deed of Release provided for the forgiveness of intercompany balances between Otaki and Viper. This had the effect of writing-off the inter-company debt owed to it by Viper which at this point stood at around £10.28 million. This agreement should be regarded as part and parcel of the sale of the Viper Shares - essentially Otaki was giving up all its interest in Viper both in relation to equity and debt in return for the payment of £800,000. Whilst at first sight, this may seem a low price, given what had been spent on No. 22, it was more valuable to Otaki than the proposal offered by Mr Mirza (similarly on terms that there would be forgiveness of the intercompany debt) and reflected the fact that Viper was in negative equity, as it had been encumbered by the secured debt under the BOS Facility, and its value had been reduced by the Boomzone Leases;

iii) Through the Deed of Assignment, Otaki assigned to Mr and Mrs Morjaria and to Summerhill, the trustee of the Morjaria family trust, all its rights title interest and benefit in certain alleged claims of Otaki relating to the JVA, including those that had been set out in the Letter Before Action sent by Jones Day to Mr Mirza and Tydwell Ltd dated 23 April 2021 and a further letter from Jones Day to CMS (the solicitors representing the Mirzas and their companies) dated 17 December 2021. This assignment was in return for an entitlement to benefit from the entirety of any recovery made on an assigned claim, except for a pro-rata deduction of legal costs; and

iv) The Deed of Cooperation was agreed between the Morjarias, Summerhill and IQEQ. This provided for IQEQ to cooperate, and procure that the Directors would provide information, documentation, witness statements (and cooperation in relation to disclosure) in relation to the claims assigned pursuant to the Deed of Assignment and in relation to any criminal complaint that the Morjarias or Summerhill might make in connection with the subject matter of such claims. In return the Morjarias provided certain releases of liability and indemnities in favour of IQEQ and the Directors.

1105. Mr Mirza claims that in entering into these arrangements the Morjarias and Otaki acted in breach of clause 12.2.1 of the JVA (duty to act in good faith towards the other party and use all reasonable endeavours to ensure that the JVA is observed), and/or clause 12.2.2 (duty to do all things necessary and desirable to give effect to the spirit and intention of the JVA). They also bring a claim against the Directors for procuring such a breach.

1106. Mr Mirza pleads that:

> "The spirit and intention of the JVA required the parties to cooperate with a view in particular to Otaki's acquisition of the Property and enhancement of its value (with a view to an eventual sale by the joint venture for profit). By contrast, none of the following was a Joint Venture Objective:
>
> (a) The sale of the shares of one of the JV Entities (Viper) which had a lease of part of the Property.
>
> (b) The purported assignment of choses in action belonging to Otaki.
>
> (c) The agreement by the Directors to assist the Morjarias in claims brought by them against Mr Mirza and others.
>
> (d) The Morjarias' covenant not to sue the Directors for their historic conduct of the Joint Venture.
>
> 161.2 Further, the JVA did not provide for any mechanism whereby the shares in Viper or choses in action belonging to Otaki could be sold, let alone to any of the Joint Venturers. Absent agreement, the only means provided for under the JVA by which any of the shareholders in Otaki could exit from the joint venture was by termination under Clause 7, which envisaged either a sale of the Terminating Shareholder's shares in Otaki or a sale of the Property.
>
> 161.3 In those circumstances, the standards of commercially acceptable conduct required the Morjarias and Otaki to inform Mr Mirza in advance (as the co-Joint Venturer) of any circumstances which would be tantamount to an exit or partial exit from the joint venture or which would otherwise materially affect the Joint Venture and/or the achievement of the Joint Venture Objectives. That included any proposal made by the Morjarias to do any of the following (and the key terms of any such proposal):
>
> (a) Purchase the shares in Viper;
>
> (b) Take an assignment of any choses in action belonging to Otaki;

> (c) Procure the Directors' assistance in any claims brought by the Morjarias against Mr Mirza; or
>
> (d) Promise not to sue the Directors in relation to their historic conduct of the Joint Venture.
>
> 162. In the premises, Mr Morjaria and/or Mrs Morjaria and/or Otaki acted in breach of Clause 12 of the JVA by engaging in improper, commercially unacceptable or unconscionable conduct and/or by acting contrary to the spirit and intention of the joint venture."

1107. The pleadings go on to particularise the breaches claimed. Essentially the complaint is that Mr Mirza was not informed in advance of the 5 May Agreements, or their terms; that the negotiations for these agreements had been conducted in secret at the same time that the Directors had been negotiating with Mr Morjaria for him to acquire the Viper Shares; and the Directors had failed to give him an opportunity to take such commercial steps as were appropriate to protect the joint venture.

1108. Mr Mirza claims that:

i) as a result of the failure to give disclosure of the Morjarias' bid to acquire the Viper shares or its terms, Mr Mirza lost the opportunity to improve his bid and acquire the shares himself. As a result, he lost the opportunity to procure that the BOS Facility be repaid, acquire the leasehold interest held by Viper in the Data Centre, complete the development of the Property and obtain a higher return from the JVA; and that

ii) as a result of the failure to give disclosure of the proposed Deed of Assignment, Deed of Release and Deed of Co-Operation, Mr Mirza lost the opportunity to explain to the Directors why such agreements would be a breach of the JVA and should not occur.

1109. The matters complained of give rise to a counterclaim against Mr and Mrs Morjaria and Otaki and a Part 20 Claim against the Directors.

B. The Background to the Claim

i. Background to the Viper SPA and the Deed of Release

1110. BOS had informed Viper that it was terminating its loan facility and would require repayment of the amount outstanding, totalling some several million pounds. As we have seen, Viper had dispersed the amounts drawn down under the loan facility in buying investments that for the most part were completely illiquid. These investments had been made via a fund known as the Adiuvat Fund that invested in the bulk of the money (apart from a small amount invested in securities that would provide a revenue stream to allow the payment of interest under the BOS Facility) in projects so as to benefit Mr Mirza and Mr Morjaria and to provide a rather convoluted method of equity release.

1111. The Directors did not consider that refinancing the BOS Facility was a commercially viable option as the rental payments due from Boomzone in relation to the Data Centre were not sufficient to provide coverage for the interest and capital repayments which any refinancing facility would have entailed (although the Directors did approach commercial lenders to gauge potential interest in any refinancing).

1112. The remaining option open to the Directors to repay the BOS Faciliy was a sale either of the shares Otaki held in its subsidiary, Viper, or a sale by Viper of the long lease which it held in the parts of the Property comprising the Data Centre and/or offices.

1113. Mr Mirza, through his accountant Mr Homan, put together various proposals that were aimed at solving the difficulties that Otaki was in. The offer that gained traction was that proposed on 15 March 2022 by CMS on behalf of Mr Mirza. This involved Mr Mirza, through a new (unnamed) corporate vehicle in the Isle of Man, purchasing the long leasehold interest held by Viper and the freehold of the data centre/offices held by Otaki for a consideration of £8.25 million, on terms that Otaki would use the proceeds of sale to repay the outstanding amount under the BOS loan facility, and subject to other terms and conditions which I discuss further below.

1114. Mr Mirza's lawyers had confirmed in an email to Dickinson Gleeson that this offer was the best and only offer, and Mr Lewin accepted it as being so.

1115. Having at this point received offers only from Mr Mirza, and in view of the urgency of sorting something out, Mr Lewin proposed acceptance of this offer at a board meeting of Otaki on 21 March 2022 and that board meeting approved going forwards with that offer.

1116. On 29 March 2022, Mr Mirza increased his bid for the purchase of the Viper Shares to £8.325 million stating that this was his final offer and requiring Heads of Terms to be signed that same day. He did this after he had been warned that Mr Morjaria was likely to make his own offer for the Viper Shares.

1117. On 31 March 2022 Mr Morjaria made his offer.

1118. The Directors on behalf of Otaki and Viper signed non-binding heads of terms in relation to Mr Mirza's transaction (although there is no evidence that Mr Mirza signed any copy of these heads of terms). The Heads of Terms did not purport to offer exclusivity to Mr Mirza.

1119. Lawyers on behalf of each side drafted near final documentation for the sale and purchase.

1120. The negotiations with Mr Mirza continued up to May 2022 in parallel with those with Mr Morjaria after Mr Morjaria made his offer on 31 March 2022.

1121. Mr Mirza's chief complaint arises out of the fact that, rather than going ahead with that transaction, the Directors, without warning, instead caused Otaki to enter into the Viper SPA selling to Trafalgar (which, as I have already mentioned was a company within the ownership of the Morjaria family through the Wentworth Capital Trust).

1122. This was for a cash price of £800,000, and, of course, by selling the shares in Viper, Otaki was also relieved of any responsibility or exposure to the obligations to BOS in respect of the BOS Facility. Trafalgar did not absolutely agree to procure that the BOS Facility would be repaid, but only that it would use reasonable endeavours to do so.

1123. Mr Lewin has explained (in his witness statement and in oral evidence) his reasons why he considered Mr Morjaria's offer to be more advantageous to Otaki than that of Mr Mirza as follows.

i) Mr Morjaria offered to pay a cash sum of £800,000 for the Viper shares and would take responsibility for the BOS debt which was sitting in Viper. That debt was £7,650,546 and US$130,280 (£99,703). So, on one view, the total consideration Mr Morjaria was offering was around £8,550,250. Mr Mirza was offering to pay different sums depending on the final structure of his deal, but his 'headline' figure was around £8.3m which was to be used to repay the BOS loan, and so was lower than that offered by Mr Morjaria.

ii) Unlike Mr Mirza's offer, Mr Morjaria's offer did not require any adjustment to the JV Entities' accounts. These accounting adjustments involved turning receivables from Tydwell (recognised because payments had been made to Tydwell in anticipation of work but where there had been no invoice for the work) of around £1.4 million into expenses and pretending that the VAT refund advances had been dealt with through a dividend distribution rather than as advances, as well as revaluing the Viper Lease from £16.25 million (the amount it was accounted for in Viper's accounts) to £3 million. There were two ways in which this made Mr Mirza's offer unattractive. First, Mr Lewin considered that these accounting adjustments were not going to be acceptable to the Directors as they would involve substantial reductions in the net assets of the JV Entities. Secondly, Mr Lewin was concerned that it would not be possible to resolve the accounting adjustments issues and that negotiations would continue to drag on and ultimately lead to the JV Entities being put into liquidation earlier.

iii) Mr Morjaria's offer did not require any approval from BOS. In contrast, he had understood that Mr Mirza's March 2022 offer required the cooperation of BOS and that this would not be forthcoming unless Mr Morjaria provided a formal consent to the arrangements and confirmation that he waived claims against BOS. BOS, in an email of 12 April 2022, set out various conditions for their cooperation, which included obtaining the written approval of Mr and Mrs Morjaria and their agreement to waive any claims against BOS.

iv) Mr Lewin did not believe Mr Mirza was acting in good faith and was reasonably concerned, based on the allegations in the Letter Before Action, that Mr Mirza had engaged in wrongdoing including overcharging in respect of the cladding contract, and potential fraud in relation to the Tydwell invoices for which there were no backing invoices and was suspicious of the unwillingness on Mr Mirza's part to provide backing invoices.

v) Mr Morjaria was not subject to any allegations of fraud and was prepared to accept assignment of Krugar's and Otaki's claims against Mr Mirza, which Krugar and Otaki could not afford to bring themselves and on terms by which those companies would benefit.

1124. In view of all these objections it may be asked why the Directors had signed heads of terms and had continued negotiating with Mr Mirza (right up to the last minute and to the point where even the ancillary documents for sale had been drafted). Mr Lewin's answer to this, which I accept, was that:

> "We are running them in parallel in case one falls off a cliff at the last minute".

ii. Background to the Deed of Assignment and the Deed of Cooperation

1125. In oral evidence Mr Morjaria confirmed that from the end of 2020 he had been considering the possibility of legal action. This is corroborated by Mr Lewin's Second Witness Statement where he mentions that by 2020 Mr Morjaria had become increasingly concerned about Mr Mirza's dealings with the JV Entities and in particular in relation to invoicing and cladding as well as a general lack of transparency. Certainly, by 5 March 2021 he wrote to Mr Lewin stating that this was his intention.

1126. By April 2021 he had engaged with his then solicitors, Jones Day, and on 23 April 2021, Jones Day had sent a Letter before Action to Mr Mirza. This was a lengthy and aggressive letter alleging wrongdoing by Mr and Mrs Mirza, Tydwell, Boomzone, Redwire and Mr John. The wrongdoing alleged included invoicing fraud, fraud relating to cladding, claims again in relation to the other joint venture involving Mr Mirza and Mr Morjaria at Surbiton and allegations that Mr Mirza was attempting to exclude Mr Morjaria from the JV at a depressed price. The Letter Before Action reserved rights in relation to possible criminal liability, including the right to bring a private criminal prosecution.

1127. Mr Lewin's recollection is that Mr Morjaria first proposed an assignment of claims in late 2021 as the JV Entities lacked the financial resources to bring those claims and they represented a potentially valuable asset to the JV Entities.

1128. Mr Lewin knew about the Letter before Action and suspected that the claims had merit and considered that they were to be taken seriously. A measure of the seriousness with which he took this issue, and the emerging problems about the future of the JV Entities is that he instructed a firm of solicitors, Keystone, to represent the JV Entities and later also instructed another firm, Dickinson Gleeson, to act on behalf of the IQEQ directors, although he says that at the time, he did not consider it likely that the Directors or IQEQ would become part of the litigation.

1129. The Directors considered that they were obliged to seek to investigate the allegations. If the claims were meritorious, the Directors owed a duty to the JV Entities to seek to pursue them. However, the allegations were complex and any investigation was likely to be time consuming and expensive. The JV Entities did not have the resources to conduct an investigation. Against that background, on 21 November 2021, the Morjarias proposed an agreement whereby:

i) the JV Entities would assign their claims against the Mirzas to the Morjarias/Summerhill on terms that an amount equal to the net proceeds of any claim (after costs) would be paid to the JV Entities;

ii) the JV Entities and IQEQ and the Directors would co-operate in any claims brought against the Mirzas;

iii) the Morjarias would indemnify IQEQ and the Directors in respect of any claims brought against them by the Mirzas as a result of entering into the agreement; and

iv) the Morjarias would covenant not to sue IQEQ or the Directors.

This was the origin of what was to become the Deed of Assignment and the Deed of Co-operation.

1130. The Directors were also aware that the JV Entities did not have the funds to pursue these claims.

1131. Mr Lewin was concerned about what he describes as "a possible conflict of interests". This in my view is understating the position as conflicts of interests (which I think everyone was using to encompass also conflicts of duty) were becoming very real. The Directors offered to resign if suitable replacement directors could be found from a properly regulated service provider. Unfortunately, this was not realistic. Instead, IQEQ took action to erect information barriers within IQEQ restricting communication between the team handling the JV Entities and the Wentworth Capital Trust.

1132. By 14 December 2021 Viper had received the formal notice from BOS requiring repayment of the BOS Facility. At this point the JV Entities were embroiled in the dispute between Mr Mirza and Mr Morjaria; they did not have the money to repay the BOS Facility without support from the shareholders. Mr Lewin says that at the time, he considered that Mr Mirza was more to blame for the solvency issues since he was refusing to pay the rate and rents owed by Boomzone and was refusing to repay the onward loans made to his companies, Chevin and Tydwell.

1133. At the same meeting as the Directors approved the Viper SPA, the Directors considered advice received from Keystone Law and Dickinson Gleeson and Mr Morjaria's offer to take assignments of claims from Otaki and Krugar to the Morjarias.

1134. Mr Lewin claims in his Second Witness Statement that, at the time, he felt the likelihood of Mr Morjaria suing the Directors was low as he had supported all payments to Tydwell. He also did not see a claim being brought against the Directors in relation to the Boomzone leases as he considered Boomzone to be part of the JV.

1135. Mr Lewin maintains that at the time, he did not necessarily see the assignment of claims to Mr Morjaria and the sale of Viper to him as a 'package deal'. Mr Morjaria's proposal to take an assignment of the JV Entities' claims had been under discussion for a long time before he made his offer to purchase the Viper shares. He considered it realistic that, if Otaki were to sell Viper to Mr Mirza, then Viper's claims could be assigned to Otaki before the sale, and it would have remained open to Mr Morjaria to take an assignment of all of the claims from Otaki.

C. The Claim for breach of the JVA

i. Did entering into the May 2022 Agreements breach the JVA?

1136. Mr Mirza's claims in relation to the sale of Viper to Trafalgar and the entry into the other May 2022 Agreements are based on these constituting a breach or breaches of the JVA by Otaki. In particular the breaches are said to relate to clause 12.2 of the JVA.

1137. I have set out clause 12.2 at [143] above. As we have already seen, clause 12.2.1 of the JVA required each party at all times to act in good faith towards the other and to use reasonable endeavours to ensure that the JVA was observed. Mr Mirza contends that on a proper construction, the duty of good faith prohibited the Morjarias and Otaki from acting in a way that was improper, commercially unacceptable or unconscionable, or in a way that would be regarded as commercially unacceptable by reasonable and honest people. Clause 12.2.2 required each party to do all things necessary and desirable to give effect to the spirit and intention of the JVA.

1138. Mr Mirza argues in the Defence and Counterclaim that in construing clause 12.2 of the JVA, it is relevant to consider the mutual intention of Mr Mirza and Mr Morjaria that the Property would be developed and sold by the JV for profit. The Joint Venture Objectives did not include the sale of shares in one of the JV Entities which had a lease of part of the Property; an assignment of choses in action or an agreement by the directors to assist the Morjarias in claims brought by them against Mr Mirza and others.

1139. It is slightly unclear from Mr Mirza's pleadings whether he is alleging that these arrangements of themselves breached the standards of commercially acceptable conduct. If that is the intention of the pleading, then my response is that this would not provide any sound basis for a claim.

1140. Clause 12 and the stated Joint Venture Objectives can never have been intended to provide an exhaustive guide to how the JV should be conducted. If circumstances changed so that it was necessary, or more beneficial, for Otaki to sell a subsidiary rather than seek to sell the Property as a whole or the Viper Lease, Otaki would not be prevented from doing so by these provisions.

1141. As regards the pleading that the JVA did not provide for any mechanism whereby the shares in Viper or choses in action belonging to Otaki could be sold, nothing follows from this. The JVA did not (as joint venture agreements often do) place any restriction on the power of the Directors to sell assets without the consent of shareholders. They have that power under the Articles of Otaki and there was nothing in the JVA to restrict them from using that power if they considered that was in the best interests of Otaki.

1142. The court will always hesitate in second-guessing the judgement of directors in relation to such commercial matters, but I consider that it is appropriate for me to record that the reasons that have been put forward for preferring Mr Morjaria's offer to that of Mr Mirza appear to me to be entirely logical and cogent.

1143. Similarly, if Otaki harboured a strong suspicion that it had been cheated by Tydwell, and did not itself having the funding to pursue legal remedies, it would not be prevented by Clause 12 from entering into an arrangement that would allow someone else to pursue those remedies for its benefit.

1144. In summary, these arrangements of themselves did not breach the standards of commercially acceptable conduct and so cannot be seen to be a breach of the duty of good faith. Neither did entering into them cause any breach of an obligation to use all reasonable endeavours to ensure that the JVA was observed.

1145. As to whether these transactions were a breach of the "spirit and intention of the Agreement", the application of the "spirit and intention" of the JVA to the circumstances in which Otaki found itself is impossible to discern and certainly could not to be a reason for Mr Morjaria to be obliged not to make his own offer for the Viper Shares or for Otaki to be obliged not to entertain such an offer, and to be obliged to leave this only to Mr Mirza. Neither could the spirit of the Agreement oblige the Directors to do something that they did not consider to be in the best interests of Otaki.

ii. Was the failure to inform Mr Mirza in advance a breach?

1146. Mr Mirza is clear in advancing the proposition that standards of commercially acceptable conduct required the Morjarias and Otaki to inform Mr Mirza in advance of any circumstances which would be tantamount to an exit or partial exit from the JV or which would otherwise materially affect the JV and/or the achievement of the Joint Venture Objectives and accordingly that Mr Morjaria and/or Mrs Morjaria and/or Otaki acted in breach of Clause 12 of the JVA by engaging in improper, commercially unacceptable or unconscionable conduct and/or by acting contrary to the spirit and intention of the JVA.

1147. The courts have often needed to wrestle with the question of what is meant by a contractual duty of good faith and various formulations have been put forward. In *Faulkner v Vollins Holdings Ltd* (also referred to as "*Re Compound Photonics*") [2022] EWCA Civ 1371 ("***Compound Photonics***"), Snowden LJ delivered a unanimous judgment of the Court of Appeal that included a magisterial survey on the previous case law relating to the meaning of a contractual duty of good faith. The following points emerge:

i) like any question of interpretation of a contract, an express clause in a contract requiring a party to act in "good faith" must take its meaning from the context in which it is used (see at [147]);

ii) when considering the interpretation and meaning of an express good faith clause in context, cases from other areas of law or commerce, which turn upon their own particular facts, may be of limited value and must be treated with considerable caution (see at [148]);

iii) apart from the obvious point that the core meaning of an obligation of good faith is an obligation to act honestly, it is very far from obvious why it is logical or appropriate to attempt to analyse other cases, decided on other facts, in order to deduce a number of further "minimum standards" of conduct that a defendant must be taken to have agreed to comply with in every case in which a good faith clause has been used in a contract (see at [149]);

iv) there is no equivalence between the duty of good faith imposed by law on partners, between whom there is a fiduciary relationship, and the agreement made between the shareholders of a company (see at [155]);

v) similar points can also be made in relation to the other cases where a duty of good faith was said to oblige parties to act "with fidelity to the bargain" (see at [161]);

vi) there was a danger in relying on case law derived from other jurisdictions such as Australia and the USA, where there was a different juridical context (see at [162] –[196]);

vii) although judges have, on occasions, used the expression "the spirit of the contract" in the context of a good faith clause, that does not connote an open invitation to the court to interpret a good faith clause as imposing additional substantive obligations (or restrictions on action) outside the other terms of the contract, especially where the contract is professionally and comprehensively drafted, and contains an entire agreement clause;

viii) (quoting with approval Arden LJ from *Re Coroin* [2013] EWCA Civ 781, [2014] BCC 14 ("***Coroin***") at [51] (which included a very similar clause in a shareholders agreement to that in clause 12 of the JVA)), he held that the obligation to act in good faith cannot impose a binding general obligation to act in a manner outside the terms of the shareholders' agreement because there is no indication of the circumstances in which the obligation to act in good faith obliges the parties to go beyond the obligations in the shareholders' agreement. There is, therefore, no benchmark against which the court could enforce the obligation: if the other terms of the agreement did not require the respondents to do a particular thing, then the good faith clause could not require them to do so, because there would be no relevant frame of reference (benchmark) outside the terms of the agreement against which to give such clause any particular meaning (see at [207] and [210]);

ix) despite various formulations in the case law that appeared to equate the concept of good faith with dishonesty, Snowden LJ preferred the formulation of Leggat LJ in *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm) ("***Astor***") at [98]:

> "A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result …"

(see at [238] and the formulation of Leggat J (as he then was) in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All E.R. (Comm) 1321 ("***Yam Seng***"),

> "Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable";

x) Snowden LJ also quoted with approval Lord Nicholls' observation in *Royal Brunei v Tan* [1995] 2 AC 378 ("***Royal Brunei***") at page 370 (more recently endorsed by the Supreme Court in *Ivey v Genting Casinos (UK)* [2018] AC 391 ("***Ivey***")):

> "The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J. captured the flavour of this, in a case with a commercial setting, when he referred to a person who is "guilty of commercially unacceptable conduct in the particular context involved".

xi) Finally, the requirement of a duty of good faith was summarised by Snowden LJ at [241] as follows:

> "In my judgment, therefore, the authorities do not support the proposition that a contractual duty of good faith can only be breached by conduct that is dishonest according to the explanation of that concept in *Royal Brunei* and *Ivey*. Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest.

1148. Having regard to the gloss that the case law puts onto the contractual requirement of good faith and the importance of considering all the surrounding circumstances, it seems to me that the following matters are relevant.

1149. First, I note that it appears that Mr Mirza did not consider that entering into important transactions without telling the other Joint Venturer was to be regarded as a breach when he procured the JV Entities to enter into the many important transactions and agreements between them and his companies, including the Procurement Agreement; the Property Management Agreement, the Development Contract and the Cladding D&B Contract as well as the three Boomzone Leases.

1150. Further, between August and November 2021, unknown to the Morjarias or the Directors, Mr Mirza was working on various proposals which would have resulted in him acquiring the Viper Leasehold from Viper as a *fait accompli*. These included a proposal discussed with his family on 29 August 2021 for his company Bane Solutions to buy the BOS debt with funding from Credit Suisse. Mr Mirza's oral evidence was that if Credit Suisse agreed to grant the facility to Bane Solutions, he would have told the Directors and the Morjarias before entering into that transaction, but that evidence is implausible in light of the discussions in September onwards for a 'pre-pack' sale. This was a proposal by which Mr Mirza encouraged BOS to enforce its security and then sell the Viper Lease to Bane Solutions at a pre-determined price.

1151. That plan was outlined in Mr Mirza's email to Mr Salunkhe dated 13 November 2021. The relevant 'steps' were as follows: (i) a valuation of the Viper Leasehold; (ii) pre-agreed documents drawn up for the sale of the Viper Leasehold by BOS to Bane Solutions; (iii) BOS would demand repayment from Viper and Viper would be given

"one full business day" to repay; and (iv) BOS would exercise its power of sale to sell the Viper Leasehold to Bane Solutions. The plan did not go ahead as Mr Mirza was unable to obtain the support of BOS for the proposal and because the directors of Bane Solutions (established as an offshore company with independent directors) were not prepared to sign up to an on-demand loan from BOS. Whilst this transaction did not go ahead, it did demonstrate that Mr Mirza was prepared to ambush Viper with a 'pre-pack' sale provided he was the acquirer of the Viper Lease at the end of it.

1152. Furthermore, by means of an exchange of emails from Dickinson Gleeson and CMS on 29 March 2022, Mr Mirza enjoined the Directors not to share information concerning the amount of Mr Mirza's offer. It is true that Mr Mirza did not put any restriction on his earlier offer on 15 December being discussed with Mr Morjaria, but that was in the context that at least one of the proposals put forward in that offer required Mr Morjaria's cooperation. He also allowed certain features to be shared with Mr Morjaria, including the proposed consideration of £8.25 million (most of which was to be applied in discharging the BOS Facility), and some "accounting adjustments". Similarly, under the draft Heads of Terms which bear the date of 31 March 2022, it was provided that that document could be shared with Mr Morjaria but only in a redacted form including a redaction of the price to be paid (except that it could be stated that that price was over £8.25 million).

1153. Secondly, I note that whilst the Directors did not inform Mr Mirza about the fact of Mr Morjaria's offer or of any terms of it, they were clear by means of the exchange of emails from Dickinson Gleeson and CMS on 29 March 2022 that they expected Mr Morjaria would shortly make his own offer; they refused a request from CMS to grant exclusivity to Mr Mirza; did not answer directly the question whether they had been negotiating in parallel with the Morjarias/Wentworth Capital Trust; but did suggest that they had been sharing some information with the Morjarias and said that they would consider any offer that is made. Mr Mirza must have understood that there was a very strong possibility that Mr Morjaria would make a bid.

1154. In the same exchange of emails, CMS made the following observations or threats:

> "3. Once the HoTs are signed, we will be contacting BoS together and if your clients then pull out due to an offer from WCT/the Morjarias, the property will go into receivership. That is inevitable.
>
> 4. It is unclear how your clients would clear KYC/AML with any funds from WCT/Morjarias given the monies have to go to BoS which has rejected WCT/the Morjarias based on them failing KYC requirements."

1155. Against the background of these points being raised by CMS there was a clear risk to Otaki that if it forewarned Mr Mirza of its proposal to enter into a transaction with Mr Morjaria, Mr Mirza would do his best to scupper that transaction by seeking to persuade BOS to call in its loan immediately.

1156. The application of the contractual duty of good faith as regards the May 2022 Agreements needs to be understood within this context, and within the context that Mr

Morjaria believed, with some good reason, and the Directors strongly suspected, that Mr Mirza had been defrauding the JV Entities.

1157. There was plainly a danger that, if Mr Mirza was informed of Mr Morjaria's offer, he would encourage BOS to enforce its security and thus force a sale to Mr Mirza. Such a sale would have been at a value which would be dramatically depressed by the existence of the Boomzone Leases which Mr Mirza had wrongfully caused Viper to enter into, allowing Mr Mirza to obtain the unencumbered value for himself and his companies at the expense of the joint venture.

1158. It is argued on behalf of Mr Mirza that by failing to tell him of the Viper SPA before it was agreed, the Directors were acting against the interests of Otaki in that this denied them the ability to commence an auction process which would have improved the price that Otaki obtained for the Viper Shares.

1159. Even if the Directors should have realised this (and it seems that they did not since they took seriously Mr Mirza's suggestion that he had made his best and final offer), I do not see that this puts them in breach of a duty of good faith. It is not possible for the court to judge that they were unreasonable in choosing the certainty of what they regarded as a good offer from Mr Morjaria over the possibility of an improved offer from Mr Mirza in circumstances where they had real concerns about Mr Mirza's ability to obtain finance and that Mr Mirza would do his best to sabotage the Viper SPA if warned of it in advance.

1160. I see nothing in this conduct that could be regarded as dishonest, or in bad faith or as commercially unacceptable to reasonable and honest people. A contractual duty of good faith cannot possibly require a prospective defendant to a fraud claim to be given advance warning of the steps being taken to facilitate the bringing of that claim in the interest of the victims. Neither can it oblige a party to give advance warning of a transaction that is in the interests of that party, in circumstances where that party is on notice that the other party would do his best to prevent that transaction.

1161. I therefore dismiss Mr Mirza's claim that Mr Morjaria and/or Otaki were in breach of clause 12.2 of the JVA in entering into the May 2022 Agreements without first discussing this with Mr Mirza.

1162. In a late amendment to pleadings, it has been averred on behalf of Mr Mirza that the breach complained of here amounted to a fundamental breach which was accepted by Mr Mirza and thereby brought to an end the JVA when this was accepted by the conduct of Mr Mirza in his response to the Letter before Action. As I have found that there is no breach, there could not be a fundamental breach, and that is the end of that argument. I will add, however, that I do not accept that responding to the Letter before Action or anything else that was done by Mr Mirza provided any acceptance of a repudiation (had there been a repudiation, contrary to my finding on this point).

15. THE PART 20 CLAIM

A. The Part 20 Claim and its Defence

1163. The Part 20 Claim is made by Mr Mirza against Mr Lewin, Mr Webster and Ms Yates. Mr Mirza claims damages against them for procuring the breach of the JVA discussed in the previous section.

1164. As I have found that there has been no breach of the JVA in this regard, this claim clearly fails.

1165. For completeness, however, I will consider whether the Directors could be found liable if, contrary to my findings, the circumstances of the May 2022 Agreements did give rise to any breach.

B. The elements of the tort of procuring a breach of contract

1166. The complaint made by Mr Mirza relating to the Directors is that they have committed a tort against him: the tort of procuring a breach of contract. In considering this claim it is useful to consider first what are the elements of this tort.

1167. The essential elements of the tort of procuring breach of contract were set out by Popplewell LJ in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33; [2021] 1 CLC 284 at [21]. By reference to the decision of Lord Hogg in *Global Resources Group v Mackay* [2008] CSOH 148, 2009 SLT 104, Popplewell LJ explained that the five elements are as follows:

> "(1) there must be a breach of contract by B;
>
> (2) A must induce B to break his contract with C by persuading, encouraging or assisting him to do so;
>
> (3) A must know of the contract and know his conduct will have that effect;
>
> (4) A must intend to procure the breach of contract either as an end in itself or as the means by which he achieves some further end;
>
> (5) if A has a lawful justification for inducing B to break his contract with C, that may provide a Defence and Counterclaim against liability.

C. The alleged Breach of Contract

1168. The first point, obviously, is that a breach of contract must have been procured. In this case, the breaches claimed are the breaches of clause 12.2 of the JVA that I have discussed and dismissed in the previous section. As I have already mentioned, therefore, the claim falls at the first hurdle. However, for completeness I will consider the other elements a claim.

D. Inducement of the Breach

1169. In the current case the Directors are said to have induced a breach by means of their voting at board meetings for Otaki and Viper to enter into the 5 May Agreements.

i. The rule set out in Said v Butt

1170. In circumstances where the Directors were acting in their capacity as directors of Otaki and Viper, it is necessary to consider the rule set out in *Said v Butt* [1920] 3 KB 497, namely, that in circumstances where an agent (which later cases confirm includes a director) is acting *bona fide* and within the scope of his authority, he has no personal liability for procuring his company to commit a breach of contract.

1171. This rule was more recently considered by Eyre J in *IBM United Kingdom Ltd v LzLabs GmbH* [2022] EWHC 884 (TCC); [2022] FSR 28 at [53] ("***IBM v LzLabs***") where he said:

> "… The principle flowing from *Said v Butt* is well-established and not in issue. Moreover, the test as to whether a director is acting in bad faith and/or without authority so as to become potentially liable for inducing a breach of contract by the company in question is also now clear. It is apparent that both Waller J [in *Ridgeway Maritime Inc v Beulah Wings Ltd (The Leon)* [1991] 2 Lloyd's Rep. 611] and Lane J [in *Antuzis v DJ Houghton Catching Services Ltd* [2019] EWHC 843 (QB) ("***Antuzis***")] took the view that the matter has to be approached by reference to the director's duties to the company with the test of bad faith being whether the director was acting in breach of his duties to the company (as opposed to any question of bad faith towards the other party to the relevant contract). This approach is also reflective of that taken by Gloster J in *Crystalens* [2006] EWHC 3357 (Comm)."

1172. Thus, the question of bad faith is concerned with the director's duties to the company; the question is not whether the director was acting in bad faith towards the third party whose contract with the company is to be broken (see further at [32] and see also *Antuzis* at [114]).

1173. Mr Mirza in his Re-Amended Particulars of Additional Claim against the Third to Fifth Parties (the "**POAC**") pleads that procuring Otaki to act in breach of an express contractual term of good faith constitutes bad faith conduct by the Directors. This is both a *non sequitur* and contrary to the case law. The practical effect of Mr Mirza's argument would be to obliterate the rule in *Said v Butt* in any case where a contractual obligation of good faith is owed by a company: if that obligation is breached, a director who procured such breach is liable in tort, whatever his own motivations or intentions. That cannot be right. It is entirely possible for a director to be acting in good faith towards his company as a matter of company law whilst procuring that company to breach its good faith obligations to a counterparty as a matter of contract law. This allegation was not pursued at trial and for the avoidance of any doubt, I reject it.

1174. Not every instance of breach of duty under e.g. s.172 CA 2006 (or its Jersey equivalent, which is article 74(1)(a) of the Companies (Jersey) Law 1991) will cause a director to act in bad faith for the purposes of the rule in *Said v Butt*. This is clear from *IBM v LzLabs* at [36]:

> "… the matter has to be approached on the basis that the question of whether a director acted bona fide and within the scope of his or her authority will be very dependent on the circumstances of the particular case. Regard is to be had to the director's duties to the company. The director will not have been acting bona fide if he or she was in breach of the duties set out in section 172. However, the question must be considered in the round remembering that liability is to be seen as an exception to the general rule that a director will not be liable in tort for inducing the company of which he or she is a director to breach a contract. It follows that not every instance of causing a company to breach a contract or a legal obligation will involve a director in a breach of the section 172 duties nor will every such instance cause him or her to be characterised as acting in bad faith for the purposes of the rule in *Said v Butt*. The key will be whether the director was properly acting to promote the success of the company taking account of the matters to which he or she is required by section 172 to have regard. In that exercise it will be necessary to consider the circumstances as a whole. Those will include the motivation of the director and the nature of the duties said to be broken but in addition the nature of the obligations being broken by the company and the consequences of the company's breach can be relevant to the question of whether the director can properly have been said to have been acting in the interests of the company."

1175. This approach was adopted also by Arnold LJ in the Court of Appeal's decision in *Northamber plc v Genee World Ltd* [2024] EWCA Civ 428; [2024] 1 WLR 4826 at [91]-[92].

1176. In this case, the companies in question are Jersey companies, and so it is germane (even if not necessarily determinative) to consider the general duties of directors to their companies under Jersey law. These duties are governed by Article 74 of the Jersey Companies Law of the relevant provisions are:

> "A director, in exercising the director's powers and discharging the director's duties, shall –
>
> (a) act honestly and in good faith with a view to the best interests of the company; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

1177. As to the requirement in Article 74(a) to act honestly and in good faith with a view to the best interests of the company, it appears that under Jersey law, the test of compliance

with the duty is applied subjectively – see the decision of the Jersey Court of Appeal in *Financial Technology Ventures II (Q) LP v ETFS Capital Ltd* [2021] JCA 176; 2021 (1) JLR 122 at [48(a)]:

> ".. a director owes a duty to exercise his powers as such honestly in what he believes to be the best interests of the company (for convenience, "the duty of good faith"). This is a principle of fidelity, and the test is applied subjectively. In other words, the question is whether the director did, at the time he performed the impugned act, honestly believe that he was doing what he did in the interests of the company as a whole. This duty derives both from Article 74(1)(a) of the Companies Law and from the general law."

1178. It follows that the duty under Article 74(1)(a) is not breached solely by reason of incompetence: a director may comply with the duty if he honestly but unreasonably believed he was pursuing the company's best interests, as was confirmed by the Royal Court of Jersey in *Vilsmeier v AI Airports* [2014] JRC 257 at [100].

1179. As to the statutory duty in Article 74(1)(b) to exercise reasonable care, diligence and skill, the Article imposes a minimum objective standard, assessed by reference to the knowledge, skill and experience of a reasonable person (and, unlike English law, does not impose a higher standard if the director in question in fact has a higher level of knowledge, skill and experience than a reasonable person) – see *Dunlop on Jersey Company Law* (first edition) at section 20.7. The relevance of this provision to the rule in *Said v Butt*, however, is doubtful. A failure to meet a relevant standard of knowledge, skill and experience is different to a failure to act *bona fide* in the interests of the company and it is the latter that is relevant to the rule in *Said v Butt*. Whether there was a failure to act *bona fide* in the interests of Otaki is considered further below.

1180. There is, potentially a question of conflict of laws as to how far the question of whether the court should consider Jersey law or English law as setting the standard of what involves acting *bona fide* in the interests of the company for the purposes of the rule in *Said v Butt.* However, whichever standard is applied, it is clear to me that the Directors in entering into the May 2022 Agreements were doing so in the light of their assessment of what was in the best interests of Otaki. They considered Mr Morjaria's offer to be better than that of Mr Mirza, they had concerns whether Mr Mirza was acting in good faith and also whether his deal could be implemented, and they considered that Viper was on "borrowed time" as is copiously evidenced in the contemporary correspondence.

1181. Mr Mirza's legal team have sought to establish that this was not the case. They argue that the Directors were not motivated by the interests of Otaki, but were instead motivated to avoid a threat of litigation from Mr Morjaria, and to obtain the benefit of the indemnities and releases from liability included within the Deed of Cooperation.

1182. Certainly, there was a threat of litigation from Mr Morjaria.

1183. On 6 December 2021, Jones Day emailed Dickinson Gleeson and Keystone to chase for their comments on the Documents Deed and the "assignment/joint prosecution

agreement", although Mr Webster and Ms Yates deny having any knowledge of this email.

1184. In that email Jones Day said:

> "I cannot emphasise any more strongly that our client's patience has run out and his offer of an indemnity and covenant not to sue will be withdrawn. Any future proceedings would then be against Camran and Tydwell and his associates and against the directors personally (as derivative action) in respect of their own (in)actions".

1185. Mr Morjaria fairly accepted that he was seeking to bring pressure to bear on the Directors to sign the Documents Deed and agree the assignment of claims.

1186. The threat of litigation must have weighed to some extent on the Directors, but the evidence that this was their primary motivation is weak. It appears that the warranties and indemnities they benefited from were offered upfront and were not the subject of any significant negotiation (although warranties in favour of Otaki were). The text of the final indemnity and the covenant not to sue in the Deed of Indemnity as signed is substantively identical to the first draft document sent by Jones Day on 21 November 2021. Mr Mirza's proposition that the Directors negotiated hard for the covenant not to sue or the indemnities is inconsistent with the documents. The negotiations were principally about the terms applicable to the JV Entities. Indeed, the fact that the Directors were prepared to risk losing the indemnities and covenant not to sue while Mr Garry at Keystone pressed for better terms for the JV Entities provides a strong suggestion that the Directors were not primarily motivated by any desire for personal benefits.

1187. The Directors were already protected individually by indemnities from IQEQ and from indemnification provisions in the agreements that they had signed with the JV Entities and Mr Morjaria and Mr Mirza as well as through indemnity insurance.

1188. Mr Lewin's evidence was that the indemnities in favour of IQEQ and the Directors "was something offered and we would happily take them". He repeated that in relation to the final Deed of Indemnity:

> "This was a document requested by … Mr Morjaria's side because they wanted our cooperation in terms of documents, in terms of we'd assigned the claims, and they also felt that they needed some cooperation in order to bring the claims".

1189. There was no evidence to contradict his evidence on this point and I accept it.

1190. Mr Lewin considered that given the emerging hostility between Mr Morjaria and Mr Mirza, whichever side they took they would be sued by one or the other of these parties. This was a reasonable assumption, given that in his email of 15 December 2021 to Mr Lewin, Mr Mirza had expressly reserved his rights to make recovery against the directors. This indeed has proved to be the case.

1191. Mr Webster also considered it likely that they would be sued by one party or the other, whichever party they sold the Viper Shares to. He claims to have been unaware of any specific threat by Mr Morjaria against the Directors, but it is clear that all the Directors were aware of the possibilities of litigation from one side or the other. This is clear from their appointment of lawyers on behalf of IQEQ and the Directors, separately to the lawyers for Otaki. However, having heard evidence also from Mr Webster and from Ms Yates, I am satisfied that acquiring the indemnity was not a significant motivating factor for any of the Directors.

1192. A further point is that it was Mr Lewin's evidence, which I consider to be credible on this point, that the Directors did not regard the Viper SPA and the Deed of Assignment as a "package deal" and would have gone ahead with the former even if they had decided to sell the Viper Shares to Mr Mirza and therefore in that context would have still been able to negotiate the Deed of Cooperation.

1193. In all the circumstances, I do not consider that they entered into the May 2022 Agreements in order to obtain the benefits of the Deed of Cooperation. I am satisfied that they had good reasons to believe that both the Deed of Assignment and the Viper SPA (together with the Deed of Release) were in the interests of Otaki and also that it was in the best interests of Otaki to sign these agreements before forewarning Mr Mirza. Their primary motivation was to act in the best interests of Otaki and accordingly the rule in *Said v Butt* applies, and they are not to be regarded as having induced any breach (if any such breach did exist, contrary to my finding).

ii. Knowledge of the contract and that a breach will be caused

1194. A claimant must prove that the defendant actually knew of the contract and actually realised that he was procuring an act that would – not might – break that contract; it is not sufficient that the defendant ought reasonably to have realised this. See, for example, *OBG Ltd v Allan* [2008] 1 AC 1 at [39] where Lord Hoffmann said:

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

1195. In the same case at [202] Lord Nicholls put the point even more forthrightly:

> "An honest belief by the defendant that the outcome sought by him will not involve a breach of contract is inconsistent with him intending to induce a breach of contract. He is not to be held responsible for the third party's breach of contract in such a case. It matters not that his belief is mistaken in law. Nor does it matter that his belief is muddle-headed and illogical …"

1196. As I have found that the May 2022 Agreements did not involve a breach, I consider that it is more likely than not that the Directors (who took legal advice on the point) would have reached the same conclusion themselves. This is another reason for concluding that they are not liable under the tort of procuring a breach.

iii. Intention to cause breach as an end in itself or as a means to another end

1197. A claimant must demonstrate that the breach of contract is either an end of the defendant in itself or the means by which the defendant intends to achieve some further end; if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence of the defendant's conduct, then it cannot be said to have been intended. This point also is made in *OBG Ltd v Allan*. At [42]-[43] Lord Hoffmann says:

> 42 The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach...
>
> It is usually to achieve the further end of securing an economic advantage to themselves…
>
> 43 On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been "targeted" or "aimed at"."

1198. As to this point, Mr Lewin's evidence in his second witness statement is that he did not consider that causing Otaki to enter into the transactions on 5 May 2022 (the Viper SPA and the Deed of Assignment) without telling Mr Mirza in advance would be a breach of Otaki's obligation of good faith in the JVA. He was not challenged on this point in cross examination.

1199. Mr Webster says in his witness statement that at the time of the board meeting the Directors were alive to the risk of selling to Mr Morjaria without informing Mr Mirza, including that they might be accused of acting in bad faith. Equally, he says that he thought that if the Directors caused Otaki to sell Viper to Mr Mirza, it was likely that Mr Morjaria would have accused Otaki of breaching the good faith provision. He says that the Directors concluded that, given the circumstances, causing Otaki to enter into the transactions with Mr Morjaria was the least worst option.

1200. Ms Yates gave evidence that she was aware that Mr Mirza was not told about the terms of Mr Morjaria's offer in the lead up to the sale of Viper's shares but says that she had no involvement in those negotiations so cannot speak to why that was. She said in cross examination that she could not comment on why the Directors did not start a 'bidding war' between the two parties.

1201. It was not put to Ms Yates that she knew she was procuring Otaki to breach the JVA in causing it to enter into the Viper SPA, Deed of Assignment and Deed of Release without telling Mr Mirza in advance; or that she intended Otaki to breach the JVA.

1202. In conclusion on this point, there is no real evidence that the Directors intended to breach the JVA or had positive knowledge that their actions would result in such a breach. What evidence there is from their statements and testimony rather suggests the opposite. On the balance of probabilities, I find that they did not intend to breach the JVA, certainly not within the definition given by Lord Hoffmann.

E. Lawful justification

1203. Finally, I note that a defendant may be justified in inducing a breach of contract if he was protecting an equal or superior right of his own – see for example *Edwin Hill & Partners v First National Finance Corp* [1989] 1 WLR 225 at 233F per Stuart-Smith LJ, referred to in *OBG v Allan* by Lord Nicholls at [193]. Simon Colton KC, sitting as a Deputy High Court Judge in the case of *Lakatamia Shipping Company Ltd v Su* [2024] EWHC 1749 (Comm) at [109(f)] also referred to this principle and found further (referring to these authorities and to *Northamber plc v Genee World Ltd* [2024] EWCA Civ 428) as follows:

> "I note that these authorities generally focus on the defendant having an " equal or superior right ". However, it seems to me that justification may also be established if the defendant is subject to an " equal or superior " duty requiring him to take the steps he takes."

1204. The Directors argue that such an "equal or superior" duty would encompass compliance with a director's fiduciary duties. I agree that this provides a further argument as to why the tort does not apply to the Directors. Having concluded that Mr Morjaria's offer was more beneficial to Otaki and faced fewer barriers to implementation, and moreover that pre-warning Mr Mirza that they wished to go ahead with it was likely to give rise to blocking action from Mr Mirza, the Directors were justified in giving primacy to these considerations over any expectation Mr Mirza might have had that he would be warned of the transaction.

F. Conclusion

1205. As I have found that there was no breach of the JVA arising out of the May 2022 Agreements, the Directors can have no liability for procuring a breach.

1206. Further, even if I am wrong about this, the Directors were, I am satisfied, acting according to their best light in the interests of Otaki and Krugar, and fall within the protection provided by *Said v Butt*.

1207. I consider that it is more likely than not that the Directors did not consider that they were procuring a breach (although they expected that they might be accused of one). Certainly, they were not aiming at a breach. This is another reason for concluding that they are not liable under the tort of procuring a breach.

1208. Finally, the Directors were under a duty to do the best they could, under difficult circumstances, for Otaki and that is what they were attempting to do and the fact that they were complying with this duty provides a further defence, if any was needed, against the applicability of the tort.

1209. The Part 20 Claim against the Directors fails at every hurdle.

16. THE COUNTERCLAIMS RELATING TO THE PRIVATE PROSECUTION

A. The Private Prosecution

i. The Criminal Summons

1210. In late 2021, Mr Morjaria instructed a firm of specialist private criminal prosecution lawyers, EMM, to bring the Private Prosecution. Originally this was against only Tydwell and Mr Mirza, but later he extended these instructions to include Mrs Mirza and Ameer, alleging criminal fraud. I will refer to those so accused collectively, as the "**Accused Defendants**".

1211. On 21 December 2021, EMM sent a letter to the Mirzas advising them that the Morjarias were bringing the Private Prosecution and instructing them to attend an interview under caution in January 2022.

1212. On 15 August 2022, the Morjarias applied to Westminster Magistrates' Court for the issue of criminal summonses against the Accused Defendants, seeking to charge each of them under a draft indictment with one count of conspiracy to defraud contrary to common law and six substantive counts of fraud contrary to the Fraud Act 2006 (the "**Application for Criminal Summonses**"). The common law conspiracy charge was confined to the period 1 March 2020 to 31 December 2020 and related to the cladding works, and the six counts under the Fraud Act 2006 related to six Valuation Spreadsheets and invoices relating to cladding.

1213. The allegations on which the Private Prosecution was based were the Cladding Representations, that is, the contention that it was represented that the sums charged under the Cladding Invoices were required to defray Tydwell's costs of doing the cladding work, and did not include any of Tydwell's fees for doing that work.

1214. Annexed to the Application for Criminal Summonses was a "Prosecution Case Summary". This set out a summary of the purported facts from which the allegations of criminal wrongdoing arose.

ii. The Non-Contemporaneous Note

1215. Appendix 3 to the Prosecution Case Summary was the Letter Before Action, which set out more broadly the complaints that the Morjarias had against the Mirzas at this time.

1216. The Mirzas' legal team make much of the fact that the Letter Before Action amongst other things referred to what they refer to as the "Fraudulent Note", but which I will describe more neutrally as the "**Non-Contemporaneous Note**" and relied on this as being a contemporaneous note emailed by Mr Morjaria to himself in January 2008.

1217. The Non-Contemporaneous Note purported to be a summary of a phone call between Mr Morjaria and a Mr Richard Spencer-Breeze of Jordans, which was the original service provider providing directors for the JV Entities before IQEQ took over this role. The note set out various requirements for the running of the JV which Mr Morjaria said that he discussed with Mr Spencer-Breeze, including the following:

> "1.ALL PROFFESSIONAL PARTIES IE. ARCHITECT, DESIGNERS, CONSULTANTS, PROFFESIONAL PROJECT MANAGEMENT COMPANIES ETC ETC SHOULD BE PROPERLY APPOINTED WITH FULL ACCOUNTABILITY AND WHAT EXACTLY WILL BE THEIR ROLE
>
> 2. NOTHING SHOULD BE PAID WITHOUT PROPER BACK UP INVOICES.
>
> 3.FULL MONTHLY REPORTS SHOULD BE SUBMITTED FOR THE WORK IN PROGRESS TOGETHER WITH FULL FINANCILAS ON REGULAR INTERVALS
>
> 4 THERE SHOULD BE NO CHARGES FROM TYDWELL SINCE 10% EXTRA PROFIT IN THE JV AGREEMENT COVERS THE TIME TYDWELL PUTS IN THIS PROJECT WHICH WOULD AMOUNT TO LOT MORE THEN MONTHLY MANAGEMENT CHARGES. THIS IS WHAT WAS REQUESTED BY CAMRAN AND THST IS WHY JV AGREEMENT SAYS 55% PROFIT TO CA & 45% PROFIT TP PM. NO OTHER CHARGES APPLY."

1218. It is not true that this was a contemporaneous note. An explanation of its provenance is contained in the note of a call between Jones Day and EMM of 31 August 2022:

> "The Note was initially provided to Jones Day in PDF form by Mr Morjaria at the outset of Jones Day's engagement (in or around August 2020), at which time the Jones Day team understood (based on the title and content of the document) that it was a contemporaneous note of a call Mr Morjaria had with Richard Spencer-Breeze in January 2008. The Note was referred to, described as contemporaneous in, and enclosed with, the letter before action sent to Mr Mirza on 23 April 2021. Although Mr Morjaria reviewed the letter before action before it was dispatched, he did not note that the Note had been erroneously described as contemporaneous.
>
> Jones Day subsequently became aware that the Note was not a contemporaneous document during the course of discussions with Mr Morjaria beginning in the last week of May 2021."

1219. In other words, Jones Day became aware in the last week of May 2021 that the Non-Contemporaneous Note was not contemporaneous with the call it purports to describe. This was as a result of CMS requiring the metadata in relation to this document. Within six weeks of the Letter Before Action being dispatched, Jones Day corrected the point and confirmed that the document had been created in July 2020, some twelve and a half years after the discussion which it purported to record. This date was later confirmed by the metadata.

1220. Mr Morjaria's witness evidence is that he had drafted the Non-Contemporaneous Note after re-reading an email of 10 January 2008 from Mr Breeze to him and Mr Mirza

which had summarised Mr Breeze's requirements in relation to the management of the construction process as this had recalled him to recollect the conversation recorded in the Non-Contemporaneous Note. He had not represented this as being contemporaneous evidence when he sent this onto Jones Day (and indeed, I note that the Non-Contemporaneous Note does not on its face make any claim as to when it was written - all that can be gleaned from the heading of the note is that it is a note about an email from Richard Spencer-Breeze Spencer on 10 January 2008). However, his evidence is that Jones Day and the junior barrister instructed by them mistook it as such and he did not notice this when he reviewed the draft Letter Before Action, particularly as at that time he did not understand the true meaning of the word "contemporaneous" (which, I note is a word that changes its meaning according to its context – sometimes meaning contemporary with the present and sometimes contemporary with past events being described, although in the context of litigation it generally is used with the latter meaning).

1221. Whatever were Mr Morjaria's intentions in producing the Non-Contemporaneous Note in the first place, and whether he was fraudulent or merely careless or ignorant of the meaning of "contemporaneous" in its context, the idea that he or his legal team were deliberately looking to mislead the criminal court when EMM attached the Letter Before Action to its Prosecution Case Summary without correcting the reference to it being a contemporaneous note, does not bear scrutiny.

1222. First, as well as appending the Letter Before Action, the Prosecution Case Summary appended the Main Defendants' response to the Letter Before Action which made it very clear that the Claimants had accepted that the Non-Contemporary Note was produced in 2020.

1223. Secondly, Mr Morjaria's understanding in 2008 as to whether Mr Mirza's company could charge fees had no direct relevance to the criminal case that was being prosecuted, which was based on misrepresentations in relation to Valuation Spreadsheets and invoices relating to cladding. The Letter Before Action had been appended only by way of background and was not the document setting out the case to be answered in the criminal prosecution.

1224. Thirdly, it would have been stupid to continue to make a case that the Non-Contemporaneous Note was in fact contemporaneous after it had been confirmed to Mr Mirza's lawyers that it was not.

1225. As the Letter Before Action was annexed to the Prosecution Case Summary, if EMM was aware of the point that the Non-Contemporaneous Note was not in fact contemporaneous, then it is probably correct to say that this point should have been dealt with under heading "Prosecutor's Duty of Candour" and it was not. However, it is far more credible that this was due to an oversight rather than any deliberate attempt to mislead. In fact, the tenor of the call between Jones Day and EMM of 31 August 2022 rather suggests that EMM was not aware of the circumstances surrounding the Non-Contemporaneous Note at the time that the Prosecution Case Summary was prepared.

1226. I place no reliance on the Non-Contemporaneous Note. As I have already mentioned, following *Gestmin* I am not relying on the recollections of Mr Morjaria (or of Mr Mirza) where these are not supported by other evidence. There is no evidence that Mr Morjaria

did have the call with Mr Breeze which he later recollected and recorded in the Non-Contemporaneous Note. One would expect to see such a call referred to subsequently by Mr Spencer-Breeze, particularly because the information which Mr Morjaria claims he gave Mr Spencer-Breeze during that call ran contrary to Jordans' tax advice given a few months earlier.

1227. The circumstances of the Non-Contemporaneous Note provide another reason for the court to be careful of any witness evidence provided by Mr Morjaria, but apart from this, it has little bearing on the claims made in relation to the Private Prosecution.

iii. The progress of the Private Prosecution

1228. The Application for Criminal Summonses came *ex parte* before District Judge Sternberg ("**DJ Sternberg**"). On 23 August 2022 he gave written reasons for issuing the summonses. The summonses (the "**Summonses**") were issued on 30 August 2022.

1229. After the Accused Defendants were served with the Summonses, the Mirzas instructed criminal barristers and began preparing an application to set them aside. This application (the "**Set Aside Application**") was served on 20 September 2022.

1230. A disclosure process followed. Two bundles of correspondence were disclosed by Mr Morjaria. The first was disclosed in October 2022 (the "**October Disclosure Bundle**"). This included communications between Mr Morjaria and EMM. A second bundle was disclosed in December 2022 which included communications among Mr Morjaria, EMM and Jones Day.

1231. I agree with the point put in the Defendants' closing submissions that this correspondence demonstrates vividly that Mr Morjaria's sole purpose in bringing the Private Prosecution was to leverage threats of imprisonment against the Mirzas, specifically timed with settlement discussions and a mediation, with an awareness and an intention not to pursue the prosecution to any finality, because that would interfere with the aim of extracting money from the Mirzas and that when prompted by EMM, Mr Morjaria was careful to pay lip service to his motivation being to seek justice, but even then, he was compelled to say that his motivation was money.

1232. A few extracts from this correspondence illustrate the point:

i) On 2 August 2020 Mr Morjaria prepared for his lawyers a document which he titled "Full Final Story" in which he made the following statement:

> "...I have been between a rock and a hard place and so had to wait for the right time to strike, which can only be when the Hotel &Offices/DC are sold. I feel there is enough BAD FAITH and Fraud here and so many schemes to defraud hence we need serious fire power and threat of maximum JAIL term to bring him to his knees and make him want to settle and close the chapter. However, ideally, I want to get the money first and hopefully time inside for him as well is what is needed here...";

ii) on 15 April 2021 Mr Morjaria wrote to EMM stating:

> "Surely there is a threat of jail sentence even if we have to take out a private prosecution and that is what we are determined to do should be the message if our allegations are proved correct. This will wake him up to settle with us.";

iii) on 10 May 2021 Mr Morjaria wrote to Jones Day regarding a letter from CMS saying:

> "...this meaningless back and forth is wasting time and money. The threat of Jail time directly or indirectly need to be hinted to CMS that is the only way to wake up Camran.";

iv) on 14 October 2021 Mr Morjaria wrote to EMM saying:

> "If you guys put the opposition lawyers against the rock and the hard place then what can they do? They will have to ask Camran to settle on which we will play hard initially";

v) on 3 November 2021 Mr Morjaria's son Shamick wrote to EMM saying:

> "We think strategically it is important to mention CM's wife Saira somewhere, whichever way possible, as the more of his family we can attach to this case the stronger our position becomes and the quicker they will come to the table to settle. Ultimately we -want him inside but -we also want to recover the money too.";

vi) on 4 July 2022 Mr Morjaria wrote to Jones Day:

> "The only time the mediation will have any meaning is when the Criminal is filed and CMS makes it clear to CM that Jail time is possible, something I told you & James in my first meeting and I have repeated this fact a hundred times subsequently.";

vii) a note made by EMM of a call between EMM and Mr Morjaria on 7 July 2022 discusses a question by Mr Morjaria as to whether once the case is filed it could be withdrawn before the first hearing;

viii) on 13 July 2022 Mr Morjaria wrote to EMM stating his requirement to file the case before the end of the month so that a without prejudice meeting could then be arranged;

ix) on the same date, Mr Morjaria wrote to Jones Day stating:

> "If Kate [a lawyer at EMM] files before the month end CM will then agree to whatever we ask.";

x) on 25 July 2022 EMM wrote to Mr Morjaria warning that:

> "• …if the criminal court considers that a primary motivation of a criminal prosecution is to put pressure on the defendant and to obtain a settlement, then it will take a dim view of that indeed

> • We have discussed that the Court will assess whether your primary motivation is to exert pressure, or money or justice.
>
> • You have made it clear to me many times that justice is the number 1 priority for you."

and Mr Morjaria responded that:

> "...I know Justice is number one priority BUT the cost is mounting up at an astronomical rate so the question is how do I see this through.. .. I have to think if there is a possibility of getting what we want from Camran since this could go on for a very long time...
>
> ...Bottom line is how am I going to recover the money because once he is inside things will slow down completely hence my thought on finding a way to recover as much as I can with the threat of the Criminal before it is too late to pull out. Although I do see that he will use the threat as a tool I am using to force a settlement, a difficult situation I suppose..."

1233. In cross examination, Mr Morjaria accepted that his intention was for Mr Mirza to be informed about the criminal proceedings at the mediation, and that he was pressing his lawyers to ensure the summons was issued in advance of the mediation.

1234. The Set Aside Application came before DJ Sternberg on 4 January 2023. The application was based on three grounds:

i) Ground 1 was that the prosecution was being pursued for an improper motive;

ii) Ground 2 was that the prosecution case was based on an assertion that Tydwell was not entitled to charge for the work carried out and that the invoices for that work were false, but the prosecution failed to put before the court the necessary contractual agreements and other contemporaneous documents which would have demonstrated this assertion to be false and failed to make it clear that the Non-Contemporaneous Note was not in fact contemporaneous;

iii) Ground 3 was the failure to disclose that the proceedings against Mrs Mirza and Ameer were brought in order to strengthen Mr Morjaria's negotiating position and the allegations against them were vexatious and improper and wholly without foundation.

1235. On 20 January 2023, DJ Sternberg set aside the Summonses on the basis that the primary and dominant motive of the Private Criminal Prosecution, which was to threaten the Mirzas with imprisonment in order to exert pressure on them and extract a settlement from them in the civil proceedings, was improper and the proceedings were an abuse of the court's process.

1236. The Judge rejected the Application on Grounds 2 and 3. However, he found for the Mirzas in relation to Ground 1, and set aside the Summonses saying in his formal Ruling:

i) at [6]:

> "… I accept that there was non-disclosure of highly relevant material as alleged by the defence on Ground 1. Had that material been presented to me at the time that the summonses were sought I would not have issued the summonses…I am more than convinced that the primary and dominant motive of the private prosecution is not a proper one and that the proceedings are plainly an abuse of the court's process…";

ii) at [85(x)], he found:

> "…I have no doubt that his primary motivation in bringing these proceedings was to seek to force the defendants to settle any claims that the prosecutor might advance against them, in order to avoid a prosecution…I consider that his overwhelming primary and dominant motive was to seek to force settlement and that he was prepared to initiate and pursue criminal proceedings to that end. However, when communicating with those outside of his instructed lawyers he sought to give the impression that all he wanted was truth and justice.";

iii) at [92], he found:

> "…the prosecutor does not and has not intended to use these proceedings as a means to obtain punishment for criminality, but as leverage to achieve recovery of money from the defendants…it was and is an abuse of this Court's process in seeking a summons for that purpose"; and

iv) at [98], the Judge concluded:

> "I find that the proceedings are rendered truly oppressive by the failure in the duty of candour and the oblique motive demonstrated by the prosecutor in this case…I do not consider that the dominant or primary motive of the prosecutor was the doing of justice, but instead was to force the defendants to settle the civil claims".

1237. Notwithstanding DJ Sternberg's well-evidenced and damning conclusion in relation to Ground 1, the Morjarias continued to seek to bring the Private Prosecution forwards by bringing a judicial review to challenge this decision at the Divisional Court.

1238. This had the result of dragging matters on for a further year. The judicial review application was rejected. The judgment of Lord Justice William Davis and Mrs Justice Stacey was dated 17 November 2023 and has the neutral citation number [2023] EWHC 2936 (Admin). It found that DJ Sternberg's:

> "conclusion that PM's primary motivation in issuing criminal proceedings was to use those proceedings as a threat in order to

> force CM to settle the claim cannot be open to sensible criticism."

1239. The question of Mr Morjaria's primary motivation may thus be regarded as *res judicata.* Even if it were not, the evidence of this point is so strong that I would have no hesitation in finding this myself.

B. The requirements of the tort of Malicious Prosecution

1240. To establish liability in respect of the tort of malicious prosecution, the claimant must show (see *AG of Trinidad and Tobago v Maharaj* [2024] UKPC 1 ("***Maharaj***") at [8]) that:

i) the claimant was prosecuted by the defendant;

ii) the proceedings were determined in favour of the claimant;

iii) the defendant acted without reasonable and probable cause;

iv) the defendant was malicious, which in this context includes where the defendant deliberately misused the process of the court: the critical feature which has to be proved being that the proceedings instituted by the defendant were not a *bona fide* use of the court's process (see *Willers v Joyce* [2016] UKSC 43; [2018] AC 779 ("***Willers***") per Lord Toulson SJC at [56]); and

v) the claimant suffered damage.

1241. The third and fourth requirements are separate but cumulative requirements (see *Maharaj* at [10]). As was noted in *Willers* at [56]:

> "The combination of requirements that the claimant must prove not only the absence of reasonable and probable cause, but also that the defendant did not have a bona fide reason to bring the proceedings, means that the claimant has a heavy burden to discharge."

1242. Clearly, from what I have already related, the first two requirements are met. It is also clear from what I have related and from the decision of DJ Sternberg that Mr Morjaria was malicious, and indeed this has been accepted by Mr Morjaria in his pleading at paragraph 111H of his Reply.

1243. However, Mr Morjaria pleads that he did not act without a reasonable and probable cause and puts the Mirzas to proof in relation to the question of damage.

C. Did Mr Morjaria have reasonable and proper cause?

i. The test for reasonable and proper cause

1244. The test for reasonable and probable cause is as stated the House of Lords in *Herniman v Smith* [1938] AC 305 at [316] ("***Herniman***"). What is required is:

> "An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed".

1245. This test has both a subjective element (assessing the state of mind of the defendant as to whether he had any honest belief in the guilt of the claimant), and an objective element (assessing whether an ordinary and prudent man would in the circumstances have believed in the charge): see *Clerk & Lindsell* on Torts 24th Ed. at section 15-42; and *Maharaj* at [10].

1246. However, the prosecutor does not have to believe that the proceedings will succeed. It is enough that, on the material on which the prosecutor acted, there was a proper case to lay before the court (see *Maharaj* at [10] and the case references quoted in that paragraph).

ii. The objective element

1247. The objective enquiry is judged by reference to the evidence known to the prosecutor and such other evidence as would have been known as a result of any enquiries that should have been made (see *Maharaj* at [10]).

1248. It is argued on behalf of the Mirzas that no ordinary prudent and cautious man, placed in Mr Morjaria's position, would have been reasonably led to the conclusion that the Mirzas were guilty of the offences claimed.

1249. The offences claimed comprised conspiracy to defraud contrary to common law and fraud contrary to sections 1 and 2 of the Fraud Act 2006. The particulars of the offence were given and may be summarised as including providing a false estimate of the total cost of the works; concealing the identity of the subcontractor and the commercial documents provided by Teampol; providing false works valuations in support of correspondingly false invoices or more pithily:

> "The way in which Tydwell defrauded the prosecutor was through a series of emails which i) started with Camran Mirza over the course of several months explaining that the cost of the remedial work was escalating and ii) emails attaching "valuation" spreadsheets (of which the meta data indicates the individual defendants each played a part in creating) accompanying Tydwell's invoices to Otaki in relation to the project. The emails were sent by Toji John, an accountant working [f]or the Mirzas. The "valuations" sought to explain the value of the work that had been completed to date. The spreadsheet hid the fact that there was actually a subcontractor doing the works and represented that the costs incurred were the costs of the cladding replacement.

1250. In my view, at the point that the Private Prosecution was brought, there was sufficient evidence to support a proper case to lay before the court. The evidence then available

included much of the evidence on which I have been able to conclude that Cladding Representation 1 was made and relied upon, certainly against Mr Mirza himself. The position is more nuanced in relation to Mrs Mirza and Ameer, as I will discuss further below.

1251. It is argued on behalf of the Mirzas that Mr Morjaria himself did not subjectively think that any such representations had been made - his concern at the time was not that Tydwell was charging fees; his concern was whether those fees were "aligned to market". I do not understand the basis for this argument. Mr Morjaria clearly considered that the representations had been made. It is true that Mr Morjaria had doubts about the accuracy of these representations, but this did not go to the root of whether he or Otaki had suffered as a result of such misrepresentations.

1252. As Mr Morjaria's counsel point out, DJ Sternberg found a *prima facie* case in fraud. He did not accede to the Accused Defendants' arguments under Ground 2 of their Set Aside Application that Mr Morjaria failed to put before the court the documents demonstrating the falsity of the contention that Tydwell was not entitled to charge for its services.

1253. The Mirzas' counsel argue that because DJ Sternberg had already found that the Summonses should be set aside, he did not need to attempt to resolve the factual issue of whether Tydwell was entitled to charge for its services. Accordingly, his judgment on Grounds 2 and 3 begins (at [100]):

> "In light of my conclusions on Ground 1 above, I can deal with this ground, and Ground 3, with relative brevity".

1254. However, notwithstanding that introduction he did give a reasonably detailed explanation of his decision in relation to Ground to 2 after which he stated (at [104]) that:

> "On the basis of the material contained in the application for the summonses as supplemented by the totality of the material now before me, I remain of the view, expressed in my written reasons for issuing the summonses dated 23 August 2022, that here the ingredients of each offence are demonstrated."

1255. The Mirzas' counsel argue that he was finding only that "the ingredients of each offence are demonstrated" – i.e. the technical constituent elements of a crime, not any evidence supporting each of those constituent elements, and that that is similar to the kind of enquiry the court undertakes on a strike out application and therefore has absolutely no bearing on whether, in fact, there was substance to the matters complained of.

1256. However this misses the point that the test we are applying here is not proof of the matters alleged but merely to quote again from the passage in *Herniman* mentioned at [1244] above "reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". DJ Sternberg would not have found as he did if he considered that there were no such reasonable grounds.

iii. The subjective element

1257. Mr Morjaria's case is that it does not follow from the fact that he brought a prosecution maliciously, that he also did so without believing that the accused was actually guilty. The Mirzas argue the contrary case that the same underlying facts giving rise to malice also support a finding that Mr Morjaria had no honest belief in the guilt of the accused, because both questions concern the subjective state of mind of the defendant.

1258. It is argued further for Mr Mirza, quoting *Willers* at [54] (where Lord Toulson himself quoted Lord Denning in *Glinski v McIver* [1962] AC 726) ("***Glinski***")) and *Maharaj* at [12], that although the requirements of absence of reasonable and probable cause and malice are separate, they may become "entwined".

1259. I note, however, that the nature of the intertwining being referred to in these cases derives more from the ability to demonstrate malice (in the sense that I have explained above) from the absence of belief as to whether the criminal charge was supportable, rather than from an ability to deduce such an absence of belief from any proven fact of malice. Lord Denning also said in *Glinski* (at page 759):

> "…we all know that malice or improper motive is never a ground for saying there is no reasonable or proper cause. In the words of Lord Mansfield: " From the most express malice, the want of probable "cause cannot be implied ": see *Johnstone v. Sutton* [[1942] A.C. 206; 58 T.L.E]."

1260. The same point was taken up by Viscount Simonds in *Glinski* (at page 744):

> "Since the case of *Sutton v. Johnstone* [((1785) 1 Term Rep. 493], and no doubt earlier, it has been a rule rigidly observed in theory if not in practice that, though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to inferred."

1261. Lord Reid agreed, saying:

> "As Lord Denman C.J. said in the very similar case of *Turner v. Ambler* [10 Q.B. 252, 261.] " The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable or probable cause; for the contrary belief is perfectly consistent with malice"."

1262. In judging whether Mr Morjaria had the subjective belief in the guilt of the Mirzas, it is necessary to consider his actions. As Lord Denning put it in *Glinski* at page 761:

> "Fourthly, there are cases where from the conduct of the defendant himself it may reasonably be inferred that he was conscious that he had no reasonable or probable cause for the prosecution… But the only way of establishing it may be to look at his conduct and see whether it can reasonably be inferred

> therefrom that he was conscious he had no good cause to prosecute".

1263. The Mirzas rely on the following conduct which they say is inconsistent with the actions of a person who held any honest belief that the Mirzas were guilty of fraudulently overcharging in relation to the cladding works.

1264. First, they point out that Mr Morjaria in his "Full and Final Story" document dated 2 August 2020 stated that he wanted the "threat of maximum JAIL term to bring him to his knees and make him want to settle and close the chapter" and did so prior to any of the Valuation Spreadsheets being provided. They argue that even before he had factual material so support the existence of the facts upon which his alleged criminal case was based, Mr Morjaria was committed to threatening Mr Mirza with imprisonment purely to extract money from him come what may and before.

1265. I do not accept this argument. By 2 August 2020, Mr Morjaria knew:

i) that Tydwell was insisting on charging £2,545,763.70 (inclusive of VAT) for the cladding work;

ii) that this figure was very substantially in excess of any of the quotations from subcontractors that have been discussed previously; and

iii) that Mr Mirza refused to disclose the basis on which Tydwell was proposing to charge this amount.

1266. I have no doubt that he felt sure that with further investigations his suspicions would be justified. The fact that he did not have all the evidence at the time of instructing lawyers says nothing about whether subjectively he had suspicions. It also says nothing about whether subjectively he had something stronger than suspicions at the point when he brought the Private Prosecution almost two years later.

1267. Secondly, the Defendants say that Mr Morjaria created false evidence in the form of the Non-Contemporaneous Note to provide some contemporaneous support to his otherwise unsubstantiated case that it was agreed that Tydwell could not charge for its services.

1268. As I have already discussed, the idea is not credible that Mr Morjaria or EMM were relying on the Non-Contemporaneous Note as being a contemporaneous note at the point that the Private Prosecution was brought, when they knew that Mr Mirza's legal team knew that it was not contemporaneous. Further, any evidence within the Non-Contemporaneous Note was in no way central to criminal acts alleged. If it were established that Mr Morjaria had originally hoped to pass the note off in this way, then perhaps a case could be made that he intended to pervert the course of justice by presenting falsified evidence, but such a fact still says nothing about whether Mr Morjaria had a reasonable belief that Mr Mirza and his family were guilty of fraud.

1269. Finally, the Mirzas cite the communications with the Morjarias' lawyers. As we have seen, these communications show vividly that Mr Morjaria was motivated principally only by a desire to force the Mirzas to accept a settlement acceptable to him and also that Mr Morjaria was seeking to time the Private Prosecution to coincide with a

mediation, and did not intend to pursue the proceedings to their conclusion if he could obtain a settlement as a result of them. Mr Mirza's legal team argues that these communications are not consistent with someone who had an honest state of mind or an honest belief in the Mirzas' guilt.

1270. I do not see that this follows. Mr Morjaria could have been (and I believe was) both malicious (in the sense that I have described above) but also convinced that he had been the victim of a fraud. In fact, the point that Mr Morjaria has continued to allege fraud right up to the end of the trial before me, and has expended many millions of pounds in doing so, strongly suggests that he had a belief that he had been defrauded.

1271. Mr Morjaria's witness evidence is that he did believe and still believes that Mr Mirza, Mrs Mirza, Ameer and Tydwell were guilty of cladding fraud, based on:

i) his understanding (a case which he pursued at the conclusion of the civil trial) that Tydwell was not entitled to charge a fee for itself, but only the costs that it incurred in doing building work;

ii) that he had considered that the figures in the Tydwell Valuation Statements and invoices were purporting to be third-party costs and had suspected that they had been inflated;

iii) that this must have been dishonest because of the sheer size of the difference between the amount Tydwell charged to Otaki and costs it incurred doing the work; and

iv) that he had considered the explanation given by the Defendants in response to the Letter Before Action that the difference was a charge for bearing the risk of a combustibility claim as being laughable and an excuse dreamt up after the event.

1272. It is worthwhile adding that DJ Sternberg did not cast any doubt on Mr Morjaria's belief in the guilt of the Accused Defendants. He proceeded on the basis that Mr Morjaria did have such a belief.

1273. Having read the papers and listened to Mr Morjaria's oral evidence, I have no doubt whatsoever that Mr Morjaria had this belief in relation to fraud by Mr Mirza. The position is slightly less clear, however, in relation to his belief that Mrs Mirza and Ameer were involved in the fraud.

iv. Mr Morjaria's belief in the case against Mrs Mirza and Ameer

1274. Mr Mirza's legal team refer in particular to Shamick Morjaria's email to EMM of 3 November 2021 (copied to Mr Morjaria), stating that it was: "strategically important to mention CM's wife Saira somewhere, whichever way possible, as the more of his family we can attach to this case the stronger our position becomes and the quicker they will come to the table to settle". They argue from this that the addition of Mrs Mirza and of Ameer was therefore not borne out of any genuine belief that they were guilty; it was pure, dirty, tactics. They point out that when Shamick Morjaria was asked about this email in cross examination, he sought to suggest that he sent this email because he

knew that Mr Mirza's family were in fact guilty, but could not explain why he had used the word "strategically".

1275. This is another example of using the argument which, as I have explained is an inadmissible argument, that because malice has been established, then a lack of belief in guilt is also established.

1276. Nevertheless, the case against Ameer and Mrs Mirza was demonstrably weaker than that against Mr Mirza and Tydwell and it is appropriate to give special scrutiny as to the question whether Mr Morjaria did have a basis for believing, and did believe, that these defendants were probably guilty of the case made against them.

1277. Part of the case against Ameer and Mrs Mirza was based on metadata showing:

i) Ameer to have been the author of the Valuation Spreadsheets; and

ii) Mrs Mirza to have been the last person to have saved one of the Valuation Spreadsheets.

1278. In the Prosecution Case Summary, EMM, in responding in relation to the duty of candour, acknowledged that a large part of the evidence incriminating Mrs Mirza and Ameer was the metadata of the spreadsheets sent by them to the Prosecutors, which, Mr Morjaria was alleging, dishonestly concealed the true facts and made false representations about the cost of the remedial cladding works and that these defendants were likely to argue that this evidence was insufficient to prove that either of them were aware of the representations being made, particularly as EMM had obtained expert evidence showing that a person who creates a template may be shown as the author of successive documents created using the same template.

1279. They summed up the reasons for nevertheless considering that Ameer and Mrs Mirza had been involved in the alleged fraud as follows:

i) them both being copied into the emails sending various of the Valuation Spreadsheets;

ii) that Tydwell was a small family company consisting entirely of the three parties, with outside assistance from Mr John;

iii) that Mrs Mirza was a Director and Secretary of Tydwell and that there was evidence that she was actively involved in the business;

iv) that Ameer worked actively in Tydwell and was also a director of Tydwell between 20 February 2019 and 9 September 2019;

v) that they considered that there was a strong presumption that both Camran and Saira would be aware of, indeed involved in, the business of Tydwell, and in the terms of the contract with Teampol to remove/replace the render/cladding;

vi) that both were aware of the false representations being made at the time and the false documents were directly copied to them on each occasion at the same time as they were sent out to the victims; and

vii) that witness evidence from Shamick Morjaria illustrated the close working environment and in-depth knowledge of the project of both Ameer and Saira, albeit approximately one year prior to these events.

1280. Mr Morjaria in his relevant witness statement refers to these facts as forming the basis of his belief that they both knew that Tydwell was significantly overcharging Otaki for the cladding work and misrepresenting the value of that work.

1281. This was in my view a sufficient basis to find that Mr Morjaria was not being unreasonable in reaching the conclusion that Ameer and Mrs Mirza were probably guilty of the crime imputed, so that the objective element is met in relation to these defendants.

1282. I note that this was also the view of DJ Sternberg when he concluded that:

> "the material placed before me goes beyond speculation and it does indeed establish a prima facie case that they were party to deliberate and dishonest falsification".

1283. As to whether the Morjarias did genuinely believe this, satisfying the subjective element, he says that he did and there is no real evidence to the contrary. Again, the fact that Mr Morjaria has persisted in expending money in pursuing his civil claims in fraud against these defendants points towards the fact that he has continued to have a belief that they were involved in wrongdoing.

D. Conclusion in relation to the claim for malicious prosecution

1284. Whilst all the other constituents of a claim for malicious prosecution can be established against Mr Morjaria (I have not considered in detail the question of damage, but it is clear that the Mirzas would be able to show damage of some sort) this claim against him fails on the grounds that Mr Mirza has not established against him the absence of reasonable and probable cause and so has not met the "heavy burden" referred to in *Willers*.

1285. For this reason I must dismiss that claim.

E. The Claim for Abuse of Process

1286. The Mirzas argue in the alternative that Mr Morjaria may be liable for his conduct in relation to the Private Prosecution under the tort of abuse of process.

i. Relevant legal principles

1287. The tort of abuse of legal process is distinct from the tort of malicious prosecution. As Lord Wilson JSC put it in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17; [2014] AC 366 ("***Sagicor***") at [62], the two torts "sprang from the same tree" but nevertheless:

> "It is hard not to regard abuse of process as a tort distinct from malicious prosecution if only because, apart from the need to establish a purpose not within the scope of the action (ie a "collateral" or, more helpfully, an "improper" purpose), abuse of

> process requires neither that the action should have been brought without reasonable cause nor that it should have terminated in favour of the alleged victim".

1288. This clarification was necessary because the Judicial Committee of the Privy Council significantly blurred the lines between the two torts in its judgment in *Sagicor*.

1289. The underlying facts in *Sagicor* have many similarities to the case before me. Mr Delessio, the vice president of the insurance firm defendant in that case had concluded that the insurance firm had been overcharged in relation to a claim made by the owners of a large residential development in the Cayman Islands which had been damaged by a hurricane. The costs put forward to the insurance company had been approved by a surveyor providing loss adjustment services. A firm of which the surveyor was a principal was also acting as project manager in respect of the works. Mr Delessio, incensed by the apparent collusion in overcharging, stated that he intended to drive the surveyor out of business and to destroy him professionally and was instrumental in alerting the local press to the allegations which were in consequence published, causing considerable harm to the surveyor's reputation and business. The insurers and the owners issued proceedings against the surveyor (amongst others), claiming damages, inter alia, for breach of contract, deceit, conspiracy to defraud and negligence.

1290. The Privy Council found unanimously that the tort of abuse of process did not apply, since the insurance company, Sagicor, had not used the suit to secure an object for which legal action was not designed: the fact that Sagicor's dominant motive in making the allegations against him was improper did not convert its use of the legal process into an abuse.

1291. It found, however, that all the constituents of the tort of malicious prosecution were present and (by a 3 to 2 majority) found for the claimant on the grounds of malicious prosecution – notwithstanding that the action that had been brought was a civil action rather than a criminal action – and thereby overturning the previous understanding exemplified in the speech of Lord Steyn in *Gregory v Portsmouth City Council* [2000] 1 AC 419 ("***Gregory***") that (for essentially practical reasons) the tort of malicious prosecution did not extend to civil proceedings (or in the circumstances of that case, regulatory proceedings).

1292. The tort of abuse of process was considered in detail by the Court of Appeal in *Land Securities plc v Fladgate Fielder (a firm)* [2009] EWCA Civ 1402; [2010] Ch 467 ("***Fladgate Fielder***").

1293. In that case Moore-Bick LJ stated at [78]:

> "It has been recognised for over 150 years, however, that in some circumstances abuse of process is actionable as a tort at common law. The existence of such a cause of action can be traced back to *Grainger v Hill* (1838) 4 Bing NC 212…"

1294. In *Grainger v Hill* ("***Grainger***") (as summarised by Moore-Bick LJ in *Fladgate* at [78-80]), the defendant had obtained a writ of *capias* in order to pressure the plaintiff into handing over a ship's register. Tindal CJ held at page 221 that the plaintiff's cause of action (which was made out) was:

> "for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for malicious arrest or malicious prosecution...his complaint being that the process of law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."

1295. Lord Wilson JSC explained this in *Sagicor* (at [56]):

> "The judges, led by Tindal CJ, held that the tort committed by the Ds was not malicious prosecution but abuse of the process of the law to effect an object not within the scope of the process which they had initiated, namely to "extort" the register, to which they had no right, from C or to obtain it from him by "duress"."

1296. In *Gilding v Eyre* (1861) 10 CBNS 592 ("***Gilding***"), the defendant had obtained the arrest of the plaintiff under a writ of *capias ad satisfaciendum* (in essence, a writ of execution) in order to extort a sum of money in excess of that which remained due under a judgment, under the threat of arrest. As Moore-Bick LJ stated in *Fladgate Fielder*, at [81]:

> "the court had no difficulty in holding that the pleading disclosed a good cause of action".

1297. As Moore-Bick LJ observed in *Fladgate Fielder* at [89] (by reference to the judgment of Simon Brown LJ in *Broxton v McClelland* [1995] EMLR), what is critical is the misuse of the court's process to achieve something not available in the course of properly conducted proceedings:

> "…the claimant must be able to establish that the defendant's predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers (disregarding for this purpose the use he may seek to make of that remedy once he has obtained it) but to achieve some other object that lies outside the range of remedies that the law grants."

1298. Thus, he explained (at [90],

> "abuse of process in the sense described above and malicious prosecution are at one level related since both involve the misuse of the court's process, but at another level they clearly differ, because a claim for malicious prosecution depends on establishing that the claim was not well founded…whereas abuse of process is not concerned with the merits of the claim but with the purpose for which the proceedings are brought."

1299. Similarly, in *Sagicor*, the Judicial Committee of the Privy Council gave guidance about the nature of the relevant improper purpose in respect of a claim for abuse of process. In particular, Lord Wilson JSC, stated (at [63]:

> "If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse of process for this purpose".

1300. The requirement to show that the defendant's predominant purpose is not to obtain the remedy that the law offers is, in an ordinary case, difficult to meet. That is because, as Moore-Bick LJ explained in *Fladgate Fielder* at [89], the court ignores:

> "the use he may seek to make of that remedy once he has obtained it".

1301. Thus, a defendant whose only aim in pursuing civil proceedings is to ruin his business rival financially, would not be liable for abusing the court's process, because his purpose in bringing the proceedings was to obtain the remedy offered in those proceedings (e.g. a judgment sounding in money). This was explained by Lord Wilson in *Sagicor* at [79]:

> "Sagicor did not commit the tort of abuse of process. Henderson J found that the predominant factor which led Sagicor to allege fraud and conspiracy against Mr Paterson had been Mr Delessio's obsessive determination to destroy him professionally. But he did not proceed to find that Mr Delessio intended to achieve Mr Paterson's professional destruction other than through the initiation and successful prosecution of the action".

1302. In practice, the requirement to show an improper purpose enormously limits the application of the tort. Even if a claimant brings an action with a malicious motivation to bankrupt or discredit another person, if that claimant looked to achieve that purpose or motivation through success in the litigation, then his exercise of his rights to bring that claim is regarded as a proper purpose and it is not regarded by the law as being rendered improper by the fact that he hopes that its success will have these other consequences.

1303. This, as we have already seen, was why the attempts to establish the tort of abuse of process failed in *Fladgate Fielder* and in *Sagicor*. For the same reason, it failed in *Goldsmith v Sperrings* [1977] WLR 478 ("***Goldsmith***") where Sir James Goldsmith had used the threat of litigation to obtain settlements from distributors of the satirical magazine *Private Eye* under which they undertook not to distribute that magazine. In that case Bridge LJ (as he then was) put it (at page 503 at E) as follows:

> "In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance."

1304. I consider that it is for this reason that we have seen so few claims for the tort of abuse of process that the courts have accepted. According to *Winfield & Jolowicz on Tort*

(20th Edition) at section 20-29 it was last successfully invoked 180 years ago (in *Grainger*) or 160 years if *Gilding* is to be regarded as an example of the tort.

ii. Does the tort apply to abusive criminal proceedings?

1305. On the very few (I have been made aware of only two) occasions where such a tort has been successfully applied, it has been applied to an abuse of a civil process. There is no example of a case where the courts have found the existence of the tort of abuse of criminal process, and it appears that the current state of the law is such that there is no such tort.

1306. In *Sagicor* at [149] Lord Sumption JSC described the tort as follows:

> "The essence of the tort is the abuse of **civil** proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought." (*Emphasis added*).

1307. Whilst Lord Sumption in this case was in the minority as regards the majority decision that the tort of malicious prosecution (previously applied only to criminal cases) could be extended to cover civil cases, he was in accord with the majority of the Judicial Committee of the Privy Council, that the tort of abuse of process did not apply in that case.

1308. Baroness Hale JSC (who was in the majority on all questions considered in *Sagicor*) also agreed that the essence of the tort of abuse of proceedings applied only to civil proceedings. In the same case (at [81]), in considering a list of what wrongs the courts would and would not recognise, she said that:

> "Instigating legal proceedings in good faith and with reasonable cause, even if they fail and even if they do damage in the *Savile v Roberts* sense, is not wrongful. Even maliciously instigating legal proceedings is not always, or even often, wrongful."

At this point she could only have been referring to the fact that the tort of malicious prosecution did not protect a victim from all prosecutions that were malicious (including in the sense that they were brought for an improper purpose). If she had thought that the tort of abuse of process applied to criminal cases, she would have described differently the circumstances in which a victim of an improper prosecution would not be protected through the courts recognising a wrong against that person.

1309. It appears that the authors of *Clerk & Lindsell on Torts* (20th edition) agree that the tort applies only to civil actions as they head their explanation of the scope of this tort "Abuse of **civil** process" (emphasis added).

1310. Similarly, the authors of *Winfield & Jolowicz on Tort* (at section 20-29) have civil actions in mind only when they observe that:

> "For now, it seems appropriate to continue to treat abuse of process as a separate tort, distinct from the malicious instigation of civil proceedings, but with the caveat that the courts may in the future decide to merge the two causes of action into a single composite one encompassing all malicious or abusive **civil** claims"
> (*Emphasis added*).

1311. In my view, on the current state of the law, the tort of abuse of process does only apply to civil proceedings. I can accept, however, that there may be arguments as to why it should be extended given the state of flux created by the decision in *Sagicor* and I will return to this point.

1312. Meanwhile, I will turn to the arguments raised on behalf of the Mirzas as to why this tort should be applied in this case.

iii. The case advanced on behalf of the Mirzas and the defence against it

1313. The Mirzas advance the case that Mr Morjaria's predominant purpose in bringing the Private Prosecution was, as found by both the Magistrates' Court and the Administrative Court, not to obtain the remedy that the law offered in those proceedings, but rather to extract a settlement from the Mirzas in the civil proceedings. As DJ Sternberg found at [92]:

> "…the prosecutor does not and has not intended to use these proceedings as a means to obtain punishment for criminality, but as leverage to achieve recovery of money from the defendants…it was and is an abuse of this Court's process in seeking a summons for that purpose".

1314. The Mirzas say that this tort has obvious application to this highly exceptional set of facts: as two courts have found, the Private Prosecution was brought for an ulterior purpose which is not within the proper scope of the legal process. In particular, those courts found that Mr Morjaria's dominant purpose was to threaten the Mirzas in order to extract money from them, which was improper and not within the proper use of criminal proceedings, amounting to an abuse of the process of the court. The particular, and exceptional, facts of this case should lead unequivocally to a finding of liability under the tort of abuse of process.

1315. Mr Morjaria does not dispute that bringing the Private Prosecution satisfied the test for an "abuse of process" justifying a stay of criminal proceedings (see his Reply at 111R). However, he defends the claim based on the tort of abuse of process in two ways.

1316. His first argument is that the tort of abuse of process is limited to the abuse of civil cases and that no tort of abuse of criminal process exists as a matter of law.

1317. Mr Morjaria's alternative argument is that:

> Alternatively, if such a tort (relating to the bringing of a criminal prosecution for which there was reasonable and probable cause) exists at all, it only applies where the defendant's collateral

> purpose is to secure some extraneous benefit to which he has no colour of a right, as opposed to seeking redress of a genuine grievance but using the wrong process to do so. In the present case, Mr Morjaria believed in good faith, and on reasonable and probable grounds, that he had suffered a legal wrong as a result of the conduct forming the subject matter of the summonses, and was using the criminal process to seek redress for that wrong. The purpose alleged at paragraph 178.1 [of the Defence and Counterclaim - being "to threaten the Mirzas in order to exert pressure on them and extract a settlement."] was to achieve an outcome which was closely connected to the matters underlying the summonses and which he believed in good faith reflected his legal entitlements.

1318. I will deal with this alternative argument first before considering the possibility of extending the tort of abuse of process as it has traditionally been understood by the courts to cover these circumstances.

iv. The application of the predominant purpose test

1319. Mr Morjaria's counsel argue that even if the tort of abuse of process were to be extended to criminal proceedings, it must be limited, as in civil cases, to cases where the defendant's purpose is wholly unrelated to obtaining redress for the subject matter of the prosecution. It should not apply to those who are seeking redress for the crimes which are being prosecuted, albeit going about it the wrong way. They refer to the dictum of Bridge LJ that I have reproduced at [1302] above arguing that therefore, the test is whether the object that he seeks to obtain is "reasonably related to the provision of some form of redress for that grievance".

1320. Lord Bridge in the same paragraph distinguished the litigant seeking such "reasonably related" redress with the circumstances where there is:

> "a litigant pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process."

He went on to note that the forbidden collateral advantage:

> "manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements."

1321. Lord Scarman also took a broad view in *Goldsmith* of what was a proper use of a legal process saying (at page 499):

> "Men go to law to redress a grievance. They may not know or understand the limits of the remedies provided by law …But, equally, a man, while pursuing the remedies offered by law, may negotiate to secure, by arrangement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement."

1322. The Mirzas' counsel argue for a narrower test: "whether the defendant's predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers **in those proceedings**, but to achieve some other object that lies outside the range of remedies in those **proceedings**." (Emphasis added.)

1323. To make good this argument they refer:

i) first, to *Fladgate Fielder* at [89] where Moore Blick LJ approved a dictum of Simon Brown LJ in *Broxton v McClelland* [1995] EMLR 485 identifying:

> "as the essential element in abuse of process the misuse of the Court's process to achieve something not available in the course of (or, I would say, by means of) properly conducted proceedings. I respectfully agree. It seems to me that whether the question is one of staying or striking out the proceedings themselves or of the existence of a cause of action, the claimant must be able to establish that the defendant's predominant purpose in bringing the proceedings is not to obtain the remedy that the law offers (disregarding for this purpose the use he may seek to make of that remedy once he has obtained it) but to achieve some other object that lies outside the range of remedies that the law grants. At the level of this principle I see no difficulty in assimilating the decisions on abuse of process as a tort with the decisions concerning staying or striking out the proceedings."

ii) And secondly, to *Sagicor* at [63] where after making his "stalking-horse" comment reproduced above, Lord Wilson goes on to say:

> "If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall - or some other disadvantage to the defendant or advantage to himself - by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper".

1324. Counsel for Mr Morjaria argue that neither of these two cases justifies the Defendants' conclusion.

1325. They point out that in *Fladgate Fielder*, it was alleged that the defendant had brought judicial review proceedings to challenge a planning decision for the purpose of

persuading the claimant (the beneficiary of the planning permission) to assist it with an office move. Etherton LJ at [73] held that:

> "the deputy judge was fully entitled to conclude that the interest of the defendants in relation to their property relocation was insufficiently collateral to the judicial review proceedings as to render those proceedings abusive."

1326. Moore-Bick LJ agreed with Etherton LJ, and his expression of agreement with the "outside the range of remedies that the law grants" test at [89] has to be seen in that context. He also noted at [86] that (in the words of Scarman LJ in *Goldsmith*):

> "a man, while pursuing the remedies offered by law, may negotiate to secure, by arrangement with the parties sued, terms more favourable than, or different from, what he would get in the absence of agreement."

1327. This is why, at [89], he expressed the test as:

> "to achieve something not available in the course of (or, I would say, by means of) properly conducted proceedings."

1328. Counsel for Mr Morjaria go on to point out that *Sagicor* was a case in which the defendant intended to ruin the claimant through the successful prosecution of the action, which was not a collateral purpose at all, so the Privy Council did not need to give any wider consideration to just how collateral a collateral advantage needed to be, but nevertheless both Lord Wilson and Lord Sumption did (at [64] and [154] respectively) quote approvingly from the dictum of Bridge LJ in *Goldsmith* that I have reproduced at [1302] above.

1329. I might add that Lord Sumption also quoted from a case in the High Court of Australia in *Williams v Spautz* (1992) 174 CLR 509 where Brennan J adopted the view of Bridge LJ in *Goldsmith* and concluded at p 537, that:

> "an abuse of process occurs when the only substantial intention of a plaintiff is to obtain an advantage or other benefit, to impose a burden or to create a situation that is not reasonably related to a verdict that might be returned or an order that might be made in the proceeding."

1330. The court can only obtain limited benefit from the cases cited since they were all dealing with the only application of a tort of abuse of process that has been known to the law so far: the tort of abuse of civil proceedings. In that context, it is clear from the cases I have just cited that pursuing a civil case with the intention of obtaining a settlement (even a settlement that goes beyond the remedies that a court could order) is not to be regarded as an abuse of process as long as the subject of the settlement is reasonably related to the subject of the civil proceedings. However, it is far less clear how it should operate in relation to criminal proceedings, if the tort of abuse of proceedings were to be extended to cover criminal proceedings.

1331. Counsel for Mr Morjaria suggest a straightforward transposition. If someone brings criminal proceedings with a view to obtaining a settlement in relation to the subject of the criminal proceedings, then that aim must be regarded as reasonably related to the purposes of the criminal proceedings and not as an attempt to incur a collateral advantage.

1332. There is a sort of algebraic logic to this approach as it involves taking a rule that has been developed in relation to civil proceedings and applying it in the same way in relation to criminal proceedings. The approach ignores, however, the different nature of civil and criminal proceedings in that civil proceedings by their nature are focused on providing a remedy to the claimant whereas criminal proceedings generally are not (although they may in some circumstances, and up to a point, allow for compensation to be provided to a victim).

1333. Nevertheless, it seems to me that this approach would commend itself in a case where the criminal proceedings are being instituted with the intention of bringing those proceedings to a conclusion (even if this was for a collateral purpose, such as gathering evidence or obtaining judicial findings that would assist in a later civil action or in the negotiation of a settlement of a civil action).

1334. The question is more difficult in the case where a claimant starts a criminal action with no intention of carrying it to conclusion merely to obtain the benefit of a favourable settlement. In this case, instinctively, the circumstances look to be sufficiently similar to those in *Grainger* to warrant the same tortious remedy.

1335. In the case before me, it is unclear whether Mr Morjaria ever intended to take the criminal proceedings to fruition. Various of his communications with EMM that I have mentioned above suggest that he hoped that the very act of commencing the criminal proceedings would be enough to bring about a settlement and he had concerns about the cost of pursuing these proceedings to their conclusion. If the proceedings had not been terminated anyway by DJ Sternberg, and if no settlement from the Mirzas had been forthcoming, it is by no means clear whether Mr Morjaria would have continued with the proceedings.

1336. However, on the balance of probabilities I consider it more likely than not that he would have continued, when I consider both the clear animosity that Mr Morjaria now has against the Mirzas and the fact that he did continue to pursue the judicial review to challenge DJ Sternberg's conclusion for something like a year, even though it was clear that the threat of criminal proceedings were clearly proving ineffective in bringing about a settlement.

v. The argument for applying the tort to abusive criminal proceedings

1337. Counsel for the Mirzas argue however that there is no principled reason why the tort of abuse of process should not also apply to the abuse of a civil process.

1338. First, they argue that the authorities (as set out above) draw no distinction between the abuse of civil process and the abuse of criminal process; what matters is the purpose for which the process has been misused; that is determined by asking whether the defendant's predominant purpose is to obtain something other than a remedy which that process (be it civil or criminal) grants.

1339. Secondly, they argue that to impose a distinction between the abuse of civil process and the abuse of criminal process would be contrary to the reasoning of the majority in *Sagicor* and in *Willers*.

1340. They refer to the analysis of Lord Wilson (who was part of the majority in *Sagicor*) at [40] onwards as demonstrating that no distinction was made between civil and criminal proceedings and his conclusion at [78].

1341. These passages do indeed demonstrate that Lord Wilson, and the majority in *Sagicor*, concluded that the common law recognised that the tort of malicious prosecution extended as much to civil as to criminal proceedings, but those passages do not suggest that the tort of abuse of process always applied to criminal as well as civil proceedings.

1342. Similarly, they refer me to the judgment of Lord Toulson JSC in *Willers* at [59], where he held that the tort applied equally to civil and criminal proceedings, for reasons "which largely replicate the judgments of the majority in *Crawford*" (i.e. *Sagicor*) but again I note that the tort he was referring to was that of malicious prosecution. I note also that Lord Toulson refused (at [16]) to rehearse Lord Wilson JSC's and Lord Sumption JSC's historical analyses in *Sagicor*.

1343. Essentially the argument for the Mirzas is that the majority in both *Sagicor* and *Willers* were against drawing a distinction between civil and criminal proceedings for the purposes of the tort of malicious prosecution. Why should this be different when it comes to abuse of process?

1344. The Mirzas' counsel argue further that if the majority in both *Sagicor* and *Willers* were going to be differentiating the two torts in such a fundamental way, they would have explained why the tort of malicious prosecution applied to both civil and criminal proceedings but the tort of abuse of process only applied to civil proceedings and that the fact that they did not do so suggests that they did not consider the tort of abuse of process to be limited to civil proceedings.

1345. I do not accept this argument as neither of these cases related to a criminal action and there was no need for the court in either case to address this very separate issue. As I have already mentioned, there is a good argument that Baroness Hale (as well as Lord Sumption) did fleetingly address the point with the opposite effect of that suggested by counsel for the Mirzas.

1346. The Mirzas' counsel argue also that:

i) if anything, the arguments for compensation for the abuse of criminal process are stronger, because of the far more serious remedies available in the criminal law which are more apt to be misused than civil remedies;

ii) that is demonstrated by both *Grainger* and *Gilding*, in which it was the threat of arrest which was misused by the defendant to achieve his collateral purpose;

iii) the greater the threat, the more apt it is to be abused: whilst, in the nineteenth century, the process of obtaining a writ of *capias* might not have been considered to be part of the criminal law, the point is that there is a clear public law element which has parallels with the misuse of criminal proceedings: in both

instances the coercive power of the state is being misused for a collateral purpose.

vi. The argument against applying the tort to abusive criminal proceedings

1347. I accept the argument made on behalf of Mr Morjaria that the tort of abuse of criminal proceedings is not known to the law, certainly in the sense that there is no recorded case in which such a tort has been found to exist.

1348. However, the ramifications of *Sagicor* and *Willers* still need to be worked through and it is appropriate that I should consider the question posed on behalf of the Mirzas - why should this (the non-recognition of a distinction between civil and criminal cases) be different when it comes to abuse of process?

1349. In answering that question, I will look at the cases cited to me not for their conclusions on this point (because none of them really considered this point) but rather to consider how a question of this nature should be answered.

1350. First, I note the comments of Baroness Hale in *Sagicor.* At [81] she notes:

> "It is always tempting to pray in aid what Sir Thomas Bingham MR referred to as "the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied" … But by itself that wise dictum does not tell us what the law should define as a wrong. Some conduct is wrongful whether or not it causes any damage - that is the essence of the tort or torts of trespass; other conduct is only wrongful if it causes particular types of damage -that was the essence of the action on the case; but not all conduct which causes such damage is wrongful.

She goes on in the same paragraph to make the point I have already discussed at [1308] above.

1351. At [83] Baroness Hale describes the problem:

> "It is not suggested that this Board either can or should abolish the torts of malicious prosecution and abuse of process. We are faced with the task of discerning some rational principles which will enable us to define their boundaries. In an ideal world the separate torts of malicious prosecution and abuse of process might be brought together in a single coherent tort of misusing legal proceedings. This looks like a task much better suited to the Law Commission than to this Board. This Board can research the existing state of the law in this country (which will apply in the Cayman Islands unless there is some local legislation to the contrary). It can research the law in some comparable common law jurisdictions, but by no means all. But it does not have the resources to research and develop the policy arguments, conduct empirical research and consult the legal and general public on possible ways forward."

1352. However, at [84] she went on to say:

> "This … is a case which is particularly well suited for judicial development: it is about the use and misuse of judicial proceedings; the law is entirely judge-made; and some would say that it is in a judge-made mess. If so, the judges should do what they can to sort it out. It is unfair to expect Parliament to do so."

1353. She determined in the end, adopting the reasons of Lord Wilson and Lord Kerr of JSC, that bringing a civil claim which you know to be bad and which results in damage to the defendant's reputation, person, liberty, property or finances, comes within the scope of the tort of malicious prosecution.

1354. Lord Wilson's reasons for this same conclusion were based on a minute examination of the previous case law; the jurisprudence in other common law jurisdictions; his observation that the general rule is that where there is a wrong there should be a remedy is a cornerstone of any system of justice; and his consideration that the arguments of policy against restoration of a general tort of malicious prosecution of civil proceedings are worthy of respect but they are insufficiently strong to override the rule which has first claim.

1355. As Baroness Hale noted, ideally a question of this nature, where it is proposed to extend into new areas a tort which has always been understood to have been confined to the one particular area, is one to be dealt with by the Law Commission.

1356. As she further noted, this may be unrealistic, and it may be up to the courts to develop the law if a development is needed.

1357. If it is, then the courts at the highest level have the time and resources, if not to debate more widely the policy implications, at least to consider the prior jurisprudence in this country and abroad in more detail than I have had the chance to do.

1358. Perhaps there is an argument for extending the ambit of the tort but the issues in extending the tort in this way are difficult and would need to be thought through carefully.

1359. As is argued on behalf of Mr Morjaria, the law, over many centuries, has developed a way of dealing with abusive criminal proceedings by means of the tort of malicious prosecution. The elements of the tort: prosecution; failure of the prosecution; the lack of reasonable and probable cause; malicious intent and loss have been carefully developed to balance competing public interests:

    i) to avoid prosecutions that are malicious; but

    ii) not to deter people from prosecuting in good faith.

    These careful checks and balances would be swept away if the tort of abuse of proceedings were to be applied to criminal proceedings. To have success in the tort the only thing that a claimant would need to show would be that the claimant was bringing a prosecution for an improper purpose.

1360. I would add my own gloss on this point that there is a large overlap between the concept of what counts as malicious within the tort of malicious prosecution and what would count as an improper purpose within the tort of abuse of process. If the tort of abuse of process is to be applied to criminal prosecutions, then this begs the question why for hundreds of years the courts have considered it necessary to show a lack of belief in the guilt of the accused in addition to malice/improper purpose.

1361. There is considerable strength in this point. The law already has developed a tort to protect against malicious prosecution. Would the benefits of developing the tort of abuse of process into one that covers criminal prosecutions as well as civil actions be beneficial or detrimental to the law?

1362. My discussion above as to how the jurisprudence that has developed in relation to this tort in relation to purposes "reasonably related" to the purposes of the proceedings would apply where the proceedings in question are criminal proceedings rather than civil proceedings provides just one illustration of how these points would need to be worked through.

vii. Conclusion in relation to the tort of abuse of criminal proceedings

1363. The reasoning in, and effect of, *Sagicor* has reopened the debate about the approach to be taken to misuse of judicial proceedings and has put a spotlight on the apparent anomaly between the two closely related torts. As a result, there is a case to be made for looking again as to whether the tort of abuse of proceedings should be extended from the current understanding of that tort as applying only to civil proceedings to apply it, in at least some circumstances, to criminal proceedings.

1364. However, the ramifications of this would need to be carefully thought through – particularly the question of how the existing jurisprudence relating to purposes "reasonably related" to the purposes of the proceedings would apply in this new context.

1365. I do not think that it would be correct or desirable to adopt the contention argued for on behalf of the Mirzas that such an extended version of the tort would apply whenever the object of the prosecutor was to achieve some other object that lies outside the range of remedies applicable within the criminal proceedings. Given that criminal proceedings are not designed to obtain a remedy for a prosecutor that would very clearly open up uncertainties as to when a prosecutor would be liable for the tort and this could have a chilling effect on prosecutions, particularly where these are being brought by prosecutors that have a wider agenda than just the upholding of the law, such as the RSPCA or the Financial Conduct Authority.

1366. However, adopting in relation to this question what I have described as the algebraic approach proposed on behalf of the Morjarias would narrow the application of the extended tort so substantially that it may be doubted whether the extended tort would add very much to the existing tort of malicious prosecution.

1367. Whatever the policy arguments, these are not points that can be determined by a court of first instance. I consider that it is tolerably clear that under the existing law the tort of abuse of process extends only to civil proceedings and that it is not the role of the court of first instance to extend the law on this point contrary to the understanding of at

least two eminent judges of the Supreme Court. This would be a point to be dealt with by the higher courts (if not the Law Commission).

1368. Secondly, although I can see that there may be circumstances where a case could be made where this tort might perform a valuable role, I do not consider that this would be one of these cases. As I have explained, it would be difficult to apply the existing law relating to abuse of civil actions without importing in some way the existing rule that an aim that is reasonably related to the relevant proceedings is not to be regarded as an attempt to incur a collateral advantage. I consider that Mr Morjaria's counsel have made the case that his aims were to obtain redress in relation to the very matter on which he was bringing the prosecution. In such circumstances, even if the tort were to be extended to cover criminal prosecutions, I do not think the tort would be committed in this case.

1369. For these reasons, I dismiss the Mirzas' case based on the tort of abuse of process.

17. THE WOLVERINE CLAIMS

A. The Circumstances of the Claim

i. Background to the sale of the Viper Lease to Wolverine

1370. The Claimants argue that the Wolverine Transaction was the culmination of a series of attempts by Mr Mirza to extract the full value of the Viper Lease from the JV at an undervalue. The undervalue is said to arise because each attempt was an attempt to acquire the Viper Lease at a value that had been depressed by the Boomzone Leases (which they argue, and I agree, had been procured by Mr Mirza in breach of his fiduciary duties).

1371. On 13 November 2021, Mr Mirza proposed to BOS a "pre-packaged sale" of the Viper Lease to Bane Solutions. Bane Solutions, as I have already mentioned, was a company incorporated and at least originally wholly owned by Mr Mirza for the purposes of the transaction. The ownership of Bane Solutions is confirmed by an email from Mr Homan to BOS and others dated October 2021 which describes Mr Mirza as the ultimate beneficial owner, and BOS as nominee holder, although the same email contemplated the shares of the company being transferred to Mr and Mrs Mirza.

1372. The outline of the proposal was set out in a note prepared by Mr Mirza's then solicitors. It was as follows:

i) BOS would demand repayment of the BOS Facility (which at that stage it had yet to do);

ii) Viper would be given one business day to repay;

iii) when, as the parties anticipated, the facility was not repaid, BOS would exercise its power of sale as mortgagee to sell the Viper Lease to a new company;

iv) the sale price was to be determined in the following manner:

> "BoS take steps to obtain a robust independent market valuation of Viper Limited's interest in the Property in its current state and

> condition. The valuation exercise would be undertaken by a reputable firm, with appropriate professional indemnity insurance. The valuation would be addressed to BoS, so that BoS can rely on it, but with Mr Mirza in the loop on this so that informed decisions can be made.
>
> The independent valuation of the Property would be used to set the sale price for the Property in the sale transaction referred to below.
>
> The independent valuation exercise would not be public - it would be confidential to BoS and Mr Mirza. If necessary, the valuation could be disclosed to Viper Limited after the sale of the Property referred to below."

1373. Bane Solutions would then purchase the property from BOS at a price at least equal to the market price and sufficient to repay the BOS Facility (the balance outstanding at the time was around £7.5m).

1374. The transaction was to be funded by way of BOS granting a fresh loan facility to Mr Mirza secured on both the property and any rental income being generated by it. Timeline was, at that stage, in occupation and the rentals from it supported the higher valuation of the Viper Lease if the effect of the Boomzone Lease and the LMH lease were to be ignored.

1375. On 27 December 2021 BOS sent to Bane Solutions a signed Facility Letter in which BOS agreed to advance credit of £9.5m secured by an all monies first legal charge mortgage over No. 22 and an assignment of any rental proceeds to BOS.

1376. BOS presumably felt comfortable lending at that level because it had obtained a valuation from the Savills 2021 Report valuing the Viper Lease at circa £19.05m. That valuation appears to have been based on:

i) the fact that Timeline was in occupation; and

ii) the assumption that there were no intermediate leases between the Viper Lease and either Timeline or any other third-party tenant, such that the long leaseholder could receive the benefit of the rent then being paid by third parties of circa £939k/annum, and potentially the market rent, estimated by Savills to be around £1.6 m per annum.

1377. I am not entirely clear as to why this transaction did not go ahead. It may be that BOS got cold feet given various threats of litigation that it received from Mr Morjaria's solicitors. It may be the directors of Bane Solutions (being offshore directors appointed via the service company similar to IQEQ) were unhappy with the transaction given the apparent lack of commerciality in the arrangement if seen purely from the viewpoint of Bane Solutions.

1378. Whatever the reason for BOS's withdrawal, Mr Mirza continued to seek financing that would allow him to realise the unencumbered value of the Viper Lease. This continued after the sale of Viper to Trafalgar through the Viper SPA executed on 5 May 2022.

1379. For example, sometime around February-March 2023, Mr Mirza commenced negotiations with a lender called TAB. This appears to have resulted in a loan offer in principle, on which the applicant is listed as Wolverine (and its then director, Mrs Mirza).

1380. It is clear from the correspondence that Mr Mirza acted on behalf of Wolverine in dealing with the credit broker (although Ameer is copied in).

1381. Mr Mirza explained in correspondence that the proposed transaction (which a representative of TAB described as a "complex and unorthodox transaction") would involve Wolverine acting as receiver/ mortgagee in possession, borrower and selling the Viper Lease to a newly formed company (apparently to be a UK registered company) to be incorporated by Mr Mirza for the purpose of the transaction at a "Red Book" value. The asset being acquired was the Viper Lease subject to (and therefore reduced in value as a result of) the Third Boomzone Lease. This asset was to be sold by Wolverine acting as mortgagee in possession at a value determined by the Red Book valuation for this asset. Mr Mirza (only) would sign a personal guarantee. Security would be provided to TAB over the Viper Lease and, I think it was understood, the leases from Boomzone and LMH.

1382. Mr Mirza was at this stage, therefore, conducting in-person negotiations on behalf of Wolverine to obtain a credit facility, the purpose of which was to put Wolverine in funds to pay off BOS, so that Wolverine could then sell the Viper Lease on to a new company that he would incorporate (and, the Claimants infer, control). The proposed transaction did not occur.

ii. The Al Rayan Loan

1383. In October 2023, Mr Mirza contacted his old friend and colleague Tim Jones, who at that stage was working at Al Rayan Bank PLC ("**Al Rayan**") with the title "Senior Manager, relationships; Commercial Banking".

1384. In an email of 23 October 2023, Mr Jones in an email to Mr Mirza (not copied to anyone else) set out terms on which Al Rayan might be prepared to lend to "valued clients of the Bank, such as yourself". His email confirmed that Al Rayan might be prepared to discuss a loan facility of "around 55% FTV" (presumably funds, or facility to value) subject to obtaining a better understanding of the ownership arrangements and sources of income for the owner of the Viper Lease. Amongst other things, he asks about the proposed ownership structure and states his understanding that "it will be held in the children's names and therefore will be aggregable with Prime Surbiton/Kingmead Holdings".

1385. On 31 October 2023, Mr Jones emailed Mr Mirza (only) to "confirm that we are progressing the proposal to assist with a Facility to facilitate the acquisition of the Long Leasehold interest in the offices at 22/24 Uxbridge Road."

1386. On 10 November 2023 Mr Mirza sent to Mr Jones an email (copied to Mrs Mirza, Ameer, Osman and Shaima) attaching term sheets and asked for the issuance at his earliest convenience of the full credit approved facilities.

1387. I assume that this term sheet was the term sheet dated 8 November 2023 addressed to "The Directors Bane Solutions Ltd" (described as a company registered in the Isle of Man) and was itself titled as an "Indicative Approved Term Sheet". Although it was addressed to "The Directors, Bane Solutions Ltd" the signed version of this crosses out the words "Directors" and replaces it with the words "Ultimate Beneficiary Owners (UBOs)". This alteration is initialled "OM". I believe that this refers to Osman and that it was his signature appearing at the foot of the document with the date 10 November 23.

1388. It appears that this was replaced by a later term sheet in similar terms which Osman signed on 15 December 2023 (the "**Term Sheet**").

1389. The Term Sheet offered a facility of the lesser of £16 million or 55% of the Investment Valuation to assist with the purchase of the Viper Lease, which it noted was ultimately let to Timeline generating £2.095 million per annum of rental income plus £100,000 of ancillary income. The security for the loan was to include a share charge from Ameer, Osman and Shaima (who therefore it may be surmised by then were or were to become the owners of Bane Solutions) and charges and assignments over any lease of the property as well as over insurance policies.

1390. In late December 2023 a decision was made to substitute Wolverine for Bane Solutions. A text message sent on 18 December by Mr Mirza to Mr Jones notes that:

> "if needed we can change from Bane Solutions to Wolverine Finance. Same shareholders it's just that opening a bank account takes a long time and wolverine [sic] is ready".

1391. On 21 December 2023 Mrs Mirza wrote to Mr Jones requesting that the term sheet signed on behalf of Bane Solutions by Osman be readdressed to Wolverine.

1392. Wolverine had been incorporated on 13 October 2022 with Mrs Mirza as its sole director and shareholder. Its filings at Companies House thereafter are inconsistent and difficult to follow. According to a confirmation statement filed on 19 December 2023, as of 12 October 2023, Ameer, Osman and Shaima each held 33 ordinary shares and jointly held 1 ordinary share. There is a slight inconsistency in that, according to filings at Companies House made on 8 January 2024, it was only on 13 October 2023 that Ameer, Osman and Shaima became persons with significant control. Filings on 8 January 2024 also stated that Ameer and Osman were appointed directors on 13 October 2023 but also recorded that Osman resigned as a director on 13 October 2023, i.e. on the same date as his appointment. Further it was only on 17 January 2024 that there was a notification that Mrs Mirza had resigned as a director on 13 October 2023. This was probably backdated; it appears that the need to remove Mrs Mirza as a director arose in the course of Al Rayan's KYC investigations in January 2024. Finally, I note that the financial statements filed for the period 13 October 2022 to 31 October 2023 as being a dormant company with no net assets beyond its £100 share capital.

1393. On 22 December 2023, Tim Jones instructed BNP Paribas to undertake a valuation of the Viper Lease. In an email to Mr Mirza (only) on the same date, Mr Jones passed his instruction letter to Mr Mirza. The instruction letter states that the customer in respect of whom the valuation was prepared is Wolverine.

1394. The report was produced on 23 January 2024 and was sent to Mr Mirza by Mr Jones two days later. The valuation does not mention the Third Boomzone Lease or LMH Lease, but does refer to the Timeline lease (or at that stage agreement for lease). On the basis that Timeline was in occupation, the Viper Lease was valued at £28.5m, or £32m if Timeline exercised an option to extend its lease to 20 years with a 15-year break clause, as it appears it later did.

1395. Sometime around 8 January 2024, Mr Mirza instructed Aitchison Raffety, to conduct a valuation of the Viper Lease but this time on the assumption that it was subject to the Third Boomzone Lease. It is alleged in the PoC that he was doing so as an agent on behalf of Wolverine, but this is by no means clear. Mr Mirza, in requesting the valuation, did not expressly do so on behalf of Wolverine; he wrote in his personal capacity and using a Kingmead email account. The report was addressed to Mr Mirza himself, although I note that the invoice from this firm was addressed for the attention of Mr Mirza and Ameer at Wolverine.

1396. The instructions for the valuation made no mention of the fact that Viper (though its solicitors, Keystone Law) had served a notice rescinding, or purporting to rescind, the Third Boomzone Lease (as well as the First and Second Boomzone Leases) on 31 March 2022 (and on the same date had also provided notice of this to Boomzone).

1397. It appears that Mr Mirza had instructed Aitchison Raffety to produce a valuation in March 2023 on the same basis, presumably for the purposes of the abortive attempt at that time to procure the Viper Lease through TAB. The valuation produced at that time valued the Viper Lease subject to the Third Boomzone Lease at around £4.85m. Aitchison Raffety's later valuation, provided on 15 February 2024, valued the Viper Lease subject to the Third Boomzone Lease at £4.125m.

1398. Also in early January Mr Mirza wrote to another property firm Rolfe East attaching a copy of the Viper lease and providing the information that the property receives a rent of £60,000 per annum subject to the Third Boomzone Lease (also attached) and asking whether this property would sell at a price of around £6 million. A Mr Barrett of Rolfe East wrote back with his indication that "the advertised price would need to be closer to £3 million and we would still expect to receive offers below this based on the yield of return". Mr Mirza wrote a similar email to another property firm, JLL, with the same information and received a reply that:

> "based on the current lease and rent of £60,000 per annum, expiring in March 2032, unfortunately we do not know of any buyers willing to pay £6 million. "given the current risk-free rate and inability to capture any reversion in the short term, the investment market will price this asset below £6 million".

1399. In parallel with those valuations, Wolverine's solicitors, Bower Cotton Hamilton ("**Bower Cotton**"), engaged in negotiations with Al Rayan's solicitors, Shakespeare Martineau ("**SHMA**").

1400. An email dated 16 January 2024 from Bower Cotton to SHMA (copied to Tim Jones and Ameer amongst others but not on this occasion to Mr Mirza) recorded that it was Wolverine's intention to acquire the Viper Lease, and to offer it as security for the loan from BOS. Bower Cotton explained that the security offered included the Viper Lease,

the Third Boomzone Lease and the lease to LMH. It described LMH as being "also in the Mirza Group". In response to a request for insurance details for the property, Bower Cotton responded "Attached. Please note that the freeholder and Knight Frank are not to be contacted."

1401. On 31 January 2024, Al Rayan granted Wolverine a facility of £16m. This was in the form of a Master Murabaha Agreement so as to conform with the tenets of Islamic banking.

iii. The Settlement Agreement with BOS

1402. On 16 May 2024 Mr Mirza entered into a settlement agreement with BOS (the "**Settlement Agreement**"). This was the document under which Mr Mirza would repay the amounts already due under the BOS Facility and also would fund an escrow account as security in favour of BOS for any other liabilities owed by Viper to BOS, including present, future or contingent liabilities.

1403. The Settlement Agreement provided for a "full and final settlement" of the Dispute and any other claims or disputes that may arise between the parties. The Dispute was defined, in summary, as a threat made by Mr Mirza to commence legal proceedings against BOS in connection with differences between Mr Mirza and BOS as to the nature and extent of subrogation rights that Mr Mirza would obtain if he were to repay the BOS Facility in his capacity as guarantor.

1404. Mr Mirza confirmed within the Settlement Agreement that his source of funds was "a loan ultimately from Al Rayan Bank plc in the United Kingdom".

1405. The Settlement Agreement provided that Mr Mirza should within one business day from the Settlement Agreement repay the Facility Agreement in his capacity as guarantor. In return, in addition to a mutual release of liabilities, Mr Mirza obtained assignment of BOS's security over the Viper Lease (comprising the BOS Charge (although this was referred to in the Settlement Agreement as a "Legal Mortgage"); an assignment of rental proceeds pursuant to a legal charge; a memorandum of charge over Viper's bank accounts with BOS and the guarantees from Mr Morjaria and Mr Mirza (the "**Viper Security Documents**")).

iv. Mr Mirza's exercise of a Power of Sale

1406. Through the transactions described below, Mr Mirza accordingly repaid the BOS Facility in his capacity as guarantor and obtained an assignment (by deed dated 20 May 2024) of the Viper Security Documents from BOS and then exercised the power of sale in respect of the Viper Lease.

1407. The following transactions were executed back-to-back on 20 May:

i) Wolverine loaned approximately £10m to Mr Mirza;

ii) Mr Mirza repaid the outstanding BOS debt using that £10m;

iii) Mr Mirza exercised or purported to exercise a power of sale in relation to the Viper Lease in order to sell the Viper Lease to Wolverine for a purchase price of £6m. Wolverine set off that £6m against the debt owed by Mr Mirza. No

money ever changed hands as between Wolverine and Mr Mirza, the creation of the debt and the set off having taken place simultaneously.

1408. It may be noted that for these arrangements to operate, cooperation was needed among various of the companies owned within the Mirza family. In particular:

i) Wolverine was to obtain a loan facility of £16 million from Al Rayan;

ii) Boomzone and LMH were to guarantee and provide security for that loan in the form of security over the Third Boomzone Lease and the lease to LMH (in addition to the charge that Al Rayan would receive over the Viper Lease);

iii) Wolverine would on-lend part of the amounts borrowed from Al Rayan to Mr Mirza, allowing him to use it to repay the BOS Facility;

iv) Mr Mirza would use his powers as mortgagee or chargee in possession to arrange the sale of the Viper Lease to Wolverine and would partly repay his loan to Wolverine out of the proceeds of this.

1409. This arrangement was apparently uncommercial on its face for the individual participants within the arrangements unless they all viewed themselves as working together for the common good of the Mirza family. In particular:

i) Wolverine, paid more than the then assessed value of the Viper Lease encumbered by the Third Boomzone Lease and also was left in a position of lending around £4 million to Mr Mirza without security and leaving Wolverine with no apparent means of repaying the interest on the Al Rayan Facility as this would greatly exceed the £60,000 per year income it could expect to receive under the Third Boomzone Lease.

ii) Mr Mirza, whilst he had discharged his liabilities as guarantor under the BOS Facility, was still left owing millions to Wolverine. In addition, Boomzone, a company in which he was a majority shareholder, was now on the hook for a guarantee of Wolverine's banking facility from Al Rayan for £16 million. The liability on this guarantee was a substantial commitment as Wolverine (of itself) did not appear to have the resources to meet its liabilities to Al Rayan, and certainly not without calling in the remainder of its loan to Mr Mirza. Wolverine had until this transaction been a dormant company with negligible share capital and had apparently overpaid to obtain the Viper Lease encumbered by the Third Boomzone Lease and the income it received under the Boomzone Lease would not cover the interest due on the loan.

iii) Boomzone and LMH were guaranteeing and providing security for a loan that they would not directly benefit from. It appears that they each passed board minutes (apparently drafted in a standard form, probably by lawyers on behalf of Al Rayan) saying that they considered providing this guarantee and security to be in the best interests of each respective company and for a proper purpose of the company, but the board minutes provide no hint as to why this might be the case.

1410. This point was put to Ameer. Ameer offered an explanation for why it was in LMH's interest to give security over its lease. What appeared to be said was that LMH would

be loaned by Wolverine £4m of the funds thereby released and that in exchange it would service the interest on the loan from Al Rayan.

1411. However, it is difficult to see how that arrangement was meant to benefit LMH. What appears to be being said is that in exchange for a £4m loan, LMH would take on responsibility for servicing the debt on a loan of up to £16m, and secure it on its own valuable lease. That is patently uncommercial.

1412. It was also patently uncommercial that none of these complicated arrangements appear to have been documented. Whilst Ameer in his oral evidence thought that there might be some documents, he could only recall board minutes. The board minutes that the court have seen do not detail any of these arrangements between Wolverine, Boomzone and LMH, but only that Boomzone and LMH would provide security for the Al Rayan facility. Certainly, there are no agreements providing for the arrangements between Wolverine, Boomzone and LMH that have been brought to the attention of the court.

1413. The Claimants argue that the transactions make sense from the viewpoint of the individual Mirza companies only if all of the companies were being run for the benefit of the Mirza family collectively. I consider this to be correct.

1414. As well as following from the lack of commerciality for the parties looked at individually that I have alluded to, this theory gains support from the content or phrasing of contemporary communications, including for example:

i) a series of text messages between Mrs Mirza, Shaima and Osman on 29 December 2023 where they discuss separating something, which I consider could only be separating the ownership of the Viper Lease from any company owned by Mr Mirza (as they discuss keeping the personal guarantee in Mr Mirza's name and use the phrase "Otherwise he will pursue Wolverine/Al Rayan" - and I take the reference to "he" to be Mr Morjaria who, of course, by this time had commenced his civil and criminal claims);

ii) that in the email of 23 October 2023, referred to at [1384] above Mr Jones (presumably based on his conversations with Mr Mirza) referred to the ownership structure being "held in the children's names" rather than "being owned by the children";

iii) that Bower Cotton in the email referred to at [1400] above, presumably on instructions, referred to LMH being "in the Mirza Group".

B. The Claimants' Arguments that there was no power of sale

1415. The Claimants have propounded a number of legal arguments which they say should cause the court to invalidate the sale to Wolverine. The first of these that I will deal with is that Mr Mirza had no power of sale.

1416. The Claimants argue that Mr Mirza lacked the power of sale when he purported to transfer title from Viper to Wolverine. This is argued on the basis that the way the transaction was structured was not effective to confer a power of sale on Mr Mirza as a matter of law and, in particular, did not do so by way of subrogation.

1417. The reasons for this are set out in the PoC at paragraphs 119F(d)-119H in the following terms:

> "As at the date of his purported exercise of the power of sale under the BOS Charge:
>
> a. Mr Mirza was not the registered proprietor of the BOS Charge on the title to the Viper Lease.
>
> b. BOS had not assigned to him any rights to the debt under the BOS Facility.
>
> c. Mr Mirza had repaid the Facility and, as far as the Morjarias are aware, no sums remain owing under the BOS Facility (alternatively any sums that remain owing thereunder are not sums owed to Mr Mirza).
>
> d. Thus there were no Secured Liabilities within the meaning of the BOS Charge (alternatively, Mr Mirza could not receive and/or could not give a discharge for all of the sums within the Secured Liabilities (if any)).
>
> **(2) No power of sale**
>
> 119G. In consequence of the matters set out above, Mr Mirza had no right to exercise the power of sale, because he was not a person so entitled as legal owner of the BOS Charge and/or falling within s106(1) of the Law of Property Act 1925, further or alternatively the BOS Charge should have been discharged by him and in those circumstances the power of sale was not exercisable. Nor, if it be alleged, was Mr Mirza subrogated to the rights of BOS, including because (without prejudice to the right to plead more fully by way of Reply) he contracted for different security, namely assignment of the BOS Charge, and/or because in all the circumstances set out herein he does not come to the Court with clean hands.
>
> 119H. The purported transfer to Wolverine is accordingly void, and Wolverine holds title to the Viper Lease on bare resulting trust for Viper."

1418. I discern three separate arguments within these pleadings:

i) **Non-Registration of the transfer of the BOS Charge.** This was the argument that at the point that Mr Mirza purported to exercise rights as chargee in possession, he was not the registered owner of the BOS Charge;

ii) **The BOS Charge was no longer effective.** This was the argument that, as Mr Mirza had obtained the benefit of BOS's security by assignment (rather than through his rights of subrogation as a guarantor meeting the obligations of the borrower), he should be regarded as an assignee of the security rather than as a

guarantor and as the debt had been discharged at this point, therefore as an assignee there was no debt that could be enforced under the Charge;

iii) **No right to an equitable remedy**. The right of subrogation is an equitable remedy and should be denied to Mr Mirza on equitable principles, as for example he is not coming to the court with clean hands.

1419. I will deal with these arguments in turn.

i. The registration of the charge

1420. The registration of the charge point can be dealt with shortly. According to the Official Copy of the Register of Title at the Land Registry as at 20 May 2024 at 15:00:23 Mr Mirza was shown as the registered proprietor of the charge.

1421. Whilst I do not have the benefit of timings as regards the other events that took place on 20 May 2024, it is more likely than not that the transfer to Wolverine occurred after this registration had been effected. It would be odd if the solicitors involved had seen a need to get on with the registration of the charge but nevertheless acted on the transfer before the registration took effect.

1422. I will proceed, therefore, on the basis that at the point at which the transfer to Wolverine took place, Mr Mirza was indeed the registered proprietor of the BOS Charge.

1423. In any case, as I explain below, the registration or non-registration of the charge is in any case irrelevant as Mr Mirza's rights to effect a transfer do not derive from this assignment or any registration of the BOS Charge, but rather under the equitable principles applicable to subrogation.

ii. Was the BOS Charge still effective? The nature of Mr Mirza's enforcement right

1424. The Claimants argue that Mr Mirza bargained for an assignment of the BOS Charge rather than subrogation to BOS's rights, but since he had paid off the amounts due, there were no rights to assign and so he had no power of sale to exercise at the time he purported to do so.

1425. The fact that the Settlement Agreement provided for a formal assignment of the BOS Charge has confused matters. There were two ways in which Mr Mirza could have contracted so as to get himself into the shoes of BOS as creditor and mortgagee:

i) The assignment route: He could have taken an assignment of the receivables due under the BOS Facility and of the BOS Charge securing that payment; or

ii) The subrogation route: He could have repaid the amounts due as guarantor and relied on his rights of subrogation to stand in the shoes of BOS both as creditor and as a person with an equitable right to exercise a charge.

1426. The Claimants' argument that since the loan had been repaid, there was nothing for the BOS Charge to secure, is based on an assumption that Mr Mirza was relying on the assignment route. This falls down when one considers the wording of the BOS Settlement Agreement which:

i) at Recital J records Mr Mirza's desire to pay the amounts due "in his capacity as a Guarantor";

ii) at Clause 1.1 requires Mr Mirza to "pay to the Bank in his capacity as a Guarantor" the various amount due to BOS; and

iii) at Clause 1.8 records that:

> "For the avoidance of any doubt, the payment by Mirza under Clause 1.1 of this Settlement Agreement is made pursuant to Mirza ' s capacity, obligations and/or liability as a Guarantor, to discharge the accrued debt that is due and owing by Viper to the Bank as at the date of this Settlement Agreement. Mirza does not purport to purchase, and the Bank does not purport to sell, any debt owed by Viper to the Bank and/or any of the Viper Security Documents. Nothing in this Settlement Agreement is intended to diminish or negate any right that Mirza may have, if at all and howsoever arising, as a result of his payment as a Guarantor pursuant to Clause 1.1 above."

1427. The BOS Settlement Agreement itself could not have been clearer in providing that Mr Mirza was not taking an assignment of the receivables owed to BOS and that he was paying them in his capacity as guarantor and as such expected to benefit from the subrogation rights afforded to a guarantor.

1428. This being the case, it may be asked, why there was an assignment of the BOS Security Documents at all. There is an answer to this in Recital J to the BOS Settlement Agreement, which explained that there had been a dispute between Mr Mirza and BOS as to whether the effect of section 2 of the Mercantile Law Amendment Act 1856 (the "**MLAA**") was that BOS was obliged to assign to Mr Mirza its security immediately on repayment by him of amounts outstanding under the BOS Facility, or whether this obligation would arise only after all future and contingent liabilities to BOS had been discharged. The Settlement Agreement sought to avoid that dispute having any relevance.

1429. As it is clear that Mr Mirza was repaying debts as guarantor, not taking an assignment of the debts, it is also clear that his equitable remedy of subrogation allowing him to receive repayment from Viper and to stand in the shoes of BOS in relation to any security held by BOS were not vitiated by his payment to BOS.

1430. Following repayment of the principal debt, a guarantor or surety has (i) a right of indemnity against the principal because he has performed the principal obligation to repay and (ii) a right of subrogation against the creditor. These rights are linked.

1431. Singapore law governs the guarantees of Mr Morjaria and Mr Mirza. The Defendants argue that there appears to be no material difference between Singaporean and English law in regard to subrogation, citing *Beckett Pte Ltd v Deutsche Bank AG* [2009] SGCA 18 at [88]. However, in that case the guarantee in question was governed by English law and the security in question (share pledge agreements) were subject to Indonesian law, and so that may not be a firm basis for that conclusion. Nevertheless, no one has put forward any argument (and still less any expert evidence) that the law of Singapore

is any different as regards the subrogation rights of the guarantor, and given that, and given the further context that the BOS Charge was governed by English law, I will proceed on the basis that Mr Mirza's rights of subrogation are those afforded by English law and/or the same rights under Singapore law.

1432. The right of subrogation (and the principles underpinning it) can be summarised as follows (largely based on the summary in the *Law of Guarantees* (7th edition) at 11-017 and 11-022):

i) A guarantor who has performed the obligations of the principal which are the subject of his guarantee is entitled to stand in the shoes of the creditor and enjoy all the rights that the creditor had against the principal. This includes the benefit of all securities held in respect of the guaranteed debt or obligation.

ii) This right (or, more correctly, remedy) does not derive from the contract of guarantee, it arises out of the relationship of guarantor and creditor itself. Equity intervenes to assist the guarantor because, having paid off the principal debt (or at least that part for which he is liable as guarantor), it would be unconscionable for the principal then to be relieved from the securities given to the creditor.

iii) The doctrine of subrogation in the context of the relationship between surety, principal and creditor, is by origin an equitable right, but it is related to the broader doctrine of unjust enrichment, providing a restitutionary remedy against property.

iv) On that analysis, the doctrine operates to treat the security, which is strictly speaking actually discharged by the payment to the creditor, as if it were still available to the surety, to assist him in recovering the amount he has paid in reduction or extinction of the principal debt.

1433. The decision in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221 ("***Banque Financière***") has been of enormous assistance in clarifying the nature and theoretical underpinnings of subrogation.

1434. In *Banque Financière,* a Swiss bank (Banque Financière), agreed to refinance part of a pre-existing bank loan made by another Swiss Bank Royal Trust Bank (Switzerland) (**RTB**) to an English company, Parc (Battersea) Limited ("**Parc**") for the purposes of buying development land. This was arranged in a somewhat roundabout manner in order to avoid disclosure obligations on Banque Financière under Swiss Federal Banking Regulations. Parc was a member of a group of the Omni group of companies headed by Omni Holding A.G ("**Holding**"). Under the refinancing scheme, Mr Herzig, the general manager of Holding, borrowed DM 30 million from Banque Financière and arranged for an equivalent sum to be paid in sterling to Parc to reduce its loan from RTB. Mr Herzig gave Banque Financière a letter of postponement declaring that members of the Omni Group would not seek repayment of their loans to Parc until Banque Financière's loan had been repaid in full. Parc gave Mr Herzig a promissory note for the amount in question, which Mr Herzig assigned to Banque Financière. After the Omni Group collapsed and Parc became insolvent, Banque Financière obtained judgment for GBP 12 million under the promissory note. However, RTB held a first charge over land owned by Parc, and Omnicorp Overseas Ltd ("**OOL**"), another

member of Omni Group, held a second charge over the property in relation to an intra group debt, in respect of which it obtained judgment for GBP 30 million. At first instance, Banque Financière obtained a decision that Banque Financière was entitled to the benefit of RTB's first charge over the property in priority to OOL's claim. On appeal, OOL obtained a ruling from the Court of Appeal ([1997] C.L.Y. 2380) reversing this decision. Banque Financière appealed to the House of Lords against the Court of Appeal ruling.

1435. The Lords allowed the appeal, finding that where the remedy of subrogation was restitutionary rather than contractual, its availability was not based on any agreement or the common intention of the parties, but would depend on: whether the defendant (if subrogation was not allowed) would be enriched at the expense of the plaintiff; whether that enrichment could be regarded as unjust; and whether there were policy reasons for denying relief. It did not therefore depend on construing an intention of the parties except that intention could be material in determining whether the enrichment was unjust. Without subrogation of the first charge, OOL would be enriched at Banque Financière's expense, and apparently unjustly, since Banque Financière only agreed to the loan because it wrongly believed that the letter of postponement would give it priority over intra-group debts. To permit subrogation as against OOL would not give Banque Financière greater rights than it bargained for, rather it would merely bar OOL from enriching itself in respect of the amount by which Banque Financière's loan had reduced RTB's charge.

1436. Lord Hoffmann's speech provided a detailed and thoughtful explanation of how subrogation works, distinguishing between two things which he described as being "radically different institutions": (i) contractual arrangements to transfer rights against third parties and (ii):

> "subrogation as an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived."

1437. Lord Hoffmann explained that in the case of subrogation as an equitable remedy, the intention of the parties was not the basis for the remedy, although questions of intention might be highly relevant to the question of whether or not enrichment has been unjust.

1438. Lord Hoffmann also explained the basis on which an original charge could be said to be "kept alive" notwithstanding the repayment of the debt which that charge was securing saying (on page 236 at F):

> "When judges say that the charge is "kept alive" for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched."

1439. Having regard to the fact that Mr Mirza did not purchase the debt due to BOS but rather repaid it as guarantor, affording him the subrogation rights of a guarantor, as described

above, I reject the proposition that the security afforded to him became ineffective as the underlying debt had been paid off. The fact that the underlying debt had been paid off was not relevant to the subrogation rights afforded to him in equity.

1440. However, it is important to note that his remedy is solely the remedy available to him in equity according to the doctrine of subrogation. Even though at the time of the transfer he was registered as the proprietor of a legal charge, that did not afford him any further rights in law (as opposed to in equity) as that charge was supporting the original debt, which had been repaid. Mr Mirza's entitlement to exercise rights under a charge, accordingly, is subject to equitable principles.

iii. No right to an equitable remedy

1441. The relevance of equitable principles in relation to subrogation was considered by the Court of Appeal in *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 ("***Day***").

1442. The main judgment in this case was given by Gloster LJ, with whom both Vos LJ (as he then was) and Moses LJ agreed.

1443. The decision followed the same analysis as to the nature of subrogation as was explained by Lord Hoffmann in *Banque Financière*, but the main focus in *Day* was on various arguments put forward on behalf of the party that was arguing against the availability of the remedy of subrogation - in particular the contention that any rights to the remedy would be subject to the same vulnerabilities as every right in unjust enrichment and that:

> "…normal equitable principles apply to subrogated rights. Thus, the familiar equitable defences can be raised against a claim for subrogation, and priority as between the person with the subrogated right and other parties are to be determined in accordance with normal equitable principles: see Halifax -v- Omar, at paragraphs 81-83 per Jonathan Parker LJ."

1444. In particular the court considered the principle that "he who seeks equity must do equity" and the principle that "he who seeks equity must come with clean hands". The court accepted (at [51]), citing authority, that equitable defences can be raised against a claim for subrogation (which was anyway common ground between the parties).

1445. On the facts and law, the court rejected the argument that the respondent to the appeal had not "done equity" (which was based on an unliquidated cross-claim, a defence which was blocked off by the line of authorities culminating in *National Westminster Bank plc v Skelton* [1993] 1 All ER 242, to the effect that a mortgagor cannot unilaterally appropriate the amount of a cross-claim which is unliquidated and not admitted (whether a mere counterclaim, or a cross-claim for unliquidated damages which, if established, would give rise to a right of equitable set-off) in the discharge of the mortgage debt).

1446. The court also rejected the argument that the respondent had not come to equity with clean hands. This argument was being advanced on the grounds that the respondent had obtained the money which it had paid to discharge the loan in question by fraudulent misrepresentation. The court agreed with the respondent's submission that:

> "For the defence of unclean hands to operate at all, the impropriety complained of "must have an immediate and necessary relation to the equity sued for". If the relationship to the cause of action relied on by the plaintiff is indirect, it is irrelevant. Mere general depravity is not enough."

1447. I will consider whether these equitable arguments have any bearing on the Wolverine Transaction after dealing with the other reasons put forward by the Claimants as to why the transfer should be regarded as void or voidable.

C. The Claimants' Argument based on self-dealing

1448. The Claimants argue that even if Mr Mirza did obtain a power of sale, his purported exercise of that power of sale is rendered void by a rule that prevents a mortgagee or chargee from self-dealing.

i. The rule against self-dealing

1449. The Claimants argue that it is not only a sale to self that is void under the doctrine of self-dealing: a sale to a solicitor acting on the sale, or a member of the mortgagee (where an association) etc, is no sale, not because the solicitor or the member is the mortgagee, but because the transaction lacks independence.

1450. The Claimants have cited a number of authorities in support of their argument.

1451. In *Martinson v Clowes* (1882) 21 Ch D 857 the court impugned the purchase at auction by the secretary of a building society that was selling the property as mortgagee in possession, notwithstanding that there was no proof of any undervalue in the sale, finding:

> "It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either."

1452. In *Farrar v Farrars Ltd* (1888) 40 Ch D 395 ("***Farrars***") three mortgagees in possession sold under the powers of sale in their mortgage deed to a company formed for the purpose of purchasing the property. One of the mortgagees in possession was a Mr John Riley Farrar ("**Mr Farrar**"). He both acted as solicitor in relation to the transaction and was a promoter of and a 10% shareholder in the purchasing company and became its solicitor. The mortgagor objected to the sale on the grounds that it was a fraudulent sale at an undervalue and that it was a sale to a company promoted by Mr Farrar.

1453. At first instance, Chitty J (as he then was) found the transaction not to be fraudulent, but rather the subject of an honest and independent bargain between Mr Farrar acting for the mortgagees on the one hand and other parties acting for the intended company on the other hand. In relation to the second question, he found the law to be as follows:

> "A mortgagee cannot sell to himself, nor can two mortgagees sell to one of themselves, nor to one of themselves and another. The

> reasons for this are obvious, and are not merely formal but substantial. A man cannot contract with himself, and in the cases supposed there cannot be any independent bargaining as between opposite parties. For similar reasons a mortgagee cannot sell to a trustee for himself; he cannot buy in the name of another. But when mortgagees sell to a corporation, there are, prima facie, two independent contracting parties and a valid contract, and if the bargaining is real and honest, and conducted independently by the mortgagees on the one hand, and by the directors or officers of the corporation on the other, and it is satisfactorily shewn that in concluding the terms of the sale the parties were in no way affected by the circumstance that one of the mortgagees had some interest as a shareholder in the corporation, I see no sufficient reason that the sale ought not to stand."

1454. The matter went to appeal and the judgment of the Court of Appeal was delivered by Lindley LJ (as he then was).

1455. Lindley LJ broadly agreed with the approach taken by Chitty J. He considered that it was necessary to contrast two situations:

i) where there was a sale by a mortgagee to himself and others under the guise of a sale to a limited company; and

ii) where there was a sale by a mortgagee by a person to a corporation of which he is a member.

1456. The court acknowledged that a sale in the first situation could not stand.

> "A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property."

1457. This principle extended to the position where the mortgagee was selling to himself either alone or with others, or to a trustee for himself, or to anyone employed by himself to conduct the sale.

1458. However, a sale in the second situation was not to be regarded as a sale by a person to himself. This is because to hold otherwise would be to ignore the principle which:

> "lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law".

1459. Whilst a sale by a mortgagee in possession to a company of which that person is a member could still result in a sale valid in equity as well as at law, in particular circumstances the sale might still be impugned, for example if it was fraudulent and at an undervalue and he noted also that such a sale:

> "may be made under circumstances which throw upon the purchasing company the burden of proving the validity of the transaction, and the company may be unable to prove it".

1460. Whilst the question of fraud had been disposed of by the judgment of Chitty J, the fact that Mr Farrar was a solicitor to the mortgagees and a promoter and shareholder in the company to which the property was sold, creating a conflict between his duties and interests, did in that case throw upon the company the burden of upholding the sale.

1461. On the facts, however, the court found that Mr Farrar had performed his duties as mortgagee properly, doing his best to induce the mortgagors to pay off the loan; advertising the mortgage property for sale; and putting part of the property up to auction; and communicating the value at which he proposed making the sale to the mortgagors and obtaining no objection to its offer. The court found that Mr Farrar in no way disregarded his duty to his mortgagors. On the contrary he was doing the utmost in his power to find a purchaser at the best price that could be got.

1462. *Williams v Wellingborough* (1975) 30 P&CR provides a slightly more modern example. In this case Wellingborough Borough Council had sold to the tenants of a council house at a low value on terms involving deferred payment over some 30 years, supported by a mortgage, but on the basis that the council reserved to itself the right of pre-emption for five years at the same price as the original sale. The purchasers defaulted on the mortgage and the Council purported to use its power of sale to sell to itself at £5,300. The sale was invalidated by a unanimous Court of Appeal applying the maxim in *Farrars* that: "A sale by a person to himself is no sale at all."

1463. The Claimants in their closing submissions use these cases to substantiate their argument that it is not only a sale to oneself that is void under this doctrine: a sale to a solicitor acting on the sale, or a member of the mortgagee (where an association) etc, also is no sale not because the solicitor or the member is the mortgagee, but because the transaction lacks independence. They argue that there was clearly no such independence. Mr Mirza was effectively on both sides of the sale and purchase of the Viper Lease (in his capacity as both mortgagee and controller of Wolverine). The fact that Mr Mirza carried on the transaction under the auspices of Wolverine does not alter that conclusion.

1464. That is not quite how I would put it.

1465. Of these three cases, *Farrars* is by far the most useful in providing a guide for how the court must consider an allegation of self-dealing. Essentially the court is concerned in relation to the rule against self-dealing only where the sale is one where the mortgagee is selling to himself (either alone or with others). This basic rule is extended to include a sale to a trustee for himself, or to anyone employed by himself to conduct the sale but does not extend to a company in which he is interested. However, circumstances such as a conflict of interests or conflict of interests and duties may throw upon a purchasing company the burden of proving the validity of the transaction, by which is meant to prove that the transaction was made *bona fide* and takes reasonable precautions to obtain a proper price.

1466. Wolverine is clearly a different person to Mr Mirza, so the self-dealing rule does not apply in its purest form.

1467. I reject the suggestion made in the PoC at 119J(c) that the court should pierce the corporate veil on the basis that Mr Mirza had the existing obligations as mortgagee, including a duty not to sell to himself, and

> "Mr Mirza selling to Wolverine instead was an abuse of corporate legal personality to attempt to evade that duty, and justifies the identification of Mr Mirza with Wolverine for the purpose of the rule that a power of sale cannot be used to effect a sale to oneself."

This pleading is a reference to the principles outlined in Lord Sumption's judgment in *Petrodel Resources Ltd v Prest* [2012] EWCA Civ 1395; [2013] 2 A.C. 415 at [35]:

> "I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."

As Lord Sumption says, this is a limited principle. It does not apply in this case because Mr Mirza did not have control over Wolverine. He was not a shareholder or a director of it. No argument has been established that he was a shadow director of it. The most that has been established is that he had a substantial degree of influence over Ameer, the sole director of Wolverine. That is not enough to invoke this principle.

1468. I do not consider that the self-dealing rule applies in its extended form either. There is no evidence that Mr Mirza is himself the owner of Wolverine or that Wolverine is trustee for him or that he is an employee of Wolverine.

1469. Neither is there evidence that Mr Mirza was employed by Wolverine to conduct the sale on its behalf. The matters put forward by the Claimants to support such a claim are simply incapable of supporting it. These points include the following:

i) The Claimants' pleading that in obtaining the valuation from Aitchison Raffety Mr Mirza was acting as agent for Wolverine. I do not consider that the Claimants have established that in obtaining this valuation he was acting as agent for Wolverine, as opposed to providing himself with information to assist him as potential mortgagee/chargee in deciding at what price a sale should be made.

ii) That Mr Mirza had a role in procuring the finance for Wolverine's purchase. I accept that he did have such a role although he was not solely responsible for this: Ameer also gave evidence, which I accept, that he was crucially important in obtaining this finance also through a two-day trip to Al Rayan's head office in Qatar, during which he was able to overcome some policy objections that the parent bank had concerning the facility. However, the fact that Mr Mirza helped arrange finance does not mean that he was acting as agent for Wolverine in arranging its purchase of the Viper Lease.

iii) It is likely also that Mr Mirza had some involvement in some other aspects of Wolverine's business given that Ameer wrote to Coutts asking for Mr Mirza to be added as an authorised signatory on Wolverine's bank account (although Ameer gives evidence that he thought that that was just to deal with holiday cover). Again, the mere fact that Mr Mirza may have been a signatory on a bank account does not mean that he was acting as agent for Wolverine in arranging its purchase.

iv) The sole director of Wolverine at this point, Ameer was under the influence of his father. Whilst no doubt Ameer would be influenced by his father's opinions, there is no evidence that Mr Mirza was the controlling mind of Wolverine. Ameer denies this, pointing out that whilst he was very much under his father's influence when he first started working for Tydwell, the relationship developed and after the bombshell of the Letter Before Action, his father had been preoccupied with dealing with the ensuing legal matters and had relied on him to take a more active part in the business and in particular within Wolverine where he was a one-third owner.

1470. None of these points are capable of establishing that Mr Mirza was the controlling mind of Wolverine or its agent in the sale or that a sale to Wolverine was a sale to himself.

ii. The burden of proof to show the validity of the transaction

1471. It is necessary, however, to consider whether the circumstances are such to invoke the requirement for the purchasing company to satisfy the burden of proof of proving the validity of the transaction. The Claimants argue in the alternative that this requirement applies, describing it as the principle in *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349 ("***Tse Kwong Lam***"), although, as I have explained, this principle can be traced back to *Farrars*.

1472. In *Tse Kwong Lam* the Privy Council considered that a case where a mortgagee exercising a power of sale under a legal charge entered into an arrangement under which his wife would bid at auction for the property being sold on behalf of the company of which he, his wife and their children were the only shareholders. The mortgagee instructed the auctioneers that there should be a reserve price for the property of HK$1.2 million and the wife on behalf of the company bid at the reserve price. This was the only bid, and the property was sold to the company. The court held, following *Farrars,* that:

i) although there was no fixed rule that a mortgagee exercising his power of sale might not sell the mortgaged property to a company in which he was interested, in order to resist a borrower's application to set aside such a sale, he had to show that he had made the sale in good faith and had taken reasonable precautions to obtain the best price reasonably obtainable at the time;

ii) on the facts, the mortgagee was in such a close relationship with the purchasing company and had been subject to such a conflict of duty and interest as to make it necessary to show that he had taken reasonable precautions to obtain the best price;

iii) the mortgagee had failed to satisfy the court that he had taken such precautions;

iv) the mortgagor should be awarded damages calculated as the difference between the best price reasonably obtainable at the date of sale and the price paid by the company, but in this case was not entitled to have the sale set aside by reason of his own inexcusable delay in prosecuting the counterclaim.

1473. I agree that the circumstances in the case before me are such to engage this rule or approach. Mr Mirza was clearly interested in the success and prosperity of Wolverine and to secure a sale to Wolverine since:

i) he, through the transaction that he organised, became a major borrower from Wolverine and Boomzone, a company in which he was the majority owner was guarantor of all its borrowings;

ii) as the owner of Boomzone, he was interested in ensuring that there should be a new owner of the Viper Lease which had no interest in challenging the Boomzone Leases; and

iii) Wolverine was owned by his adult children with whom Mr Mirza enjoyed a close and loving relationship – this was a family that worked closely together.

1474. Mr Mirza, therefore, clearly had a conflict between his duties as chargee exercising a power of sale and his interests in the success and prosperity of Wolverine.

1475. It is for him and Wolverine, therefore, to demonstrate that he satisfied the duties of a mortgagee when exercising a power of sale.

1476. These duties may be summarised as:

i) the "**good faith duty**": a duty to act in good faith and for the proper purpose of obtaining repayment - see *Downsview Nominees v First City Corp* [1993] AC 295 at page 312;

ii) the "**fairness duty**": to act fairly towards the mortgagor. See *Palk v Mortgage Services Funding plc* [1993] Ch 330 at page 337.

iii) the "**price duty**": to take reasonable care to achieve the "true market value of the mortgaged property" - see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at page 966 and at page 967 at E where Salmon LJ (as he then was) quoted approvingly Lord Moulton's dictum in *McHugh v. Union Bank of Canada* [1913] AC 299 where he said:

> "It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold."

1477. As regards breach of the good faith duty and the fairness duty, Mr Mirza, finding himself in the invidious position of being guarantor of a debt owed by a company in which he no longer had any interest and where the interest was mounting daily cannot be criticised for taking steps to pay off the debt and to use his subrogation rights to sell the Viper Lease.

1478. The Claimants argue that Mr Mirza was not acting for that reason, but rather as part of an arrangement for his family to obtain the Viper Lease for itself at a price reduced by the Boomzone Leases and where only his family could benefit from a marriage value in putting together the Viper Lease with the interests held by Boomzone and LMH. They cite *Co-operative Bank Plc v Phillips* [2014] C.T.L.C. 293 at [45]-[47] and *Lightman and Moss* on *The Law of Administrators and Receivers of Companies* (6th Ed.) at 13-006:

> "A mortgagee and a receiver both owe a duty in exercising their powers to do so in good faith for the purpose of preserving, exploiting and realising the assets comprised in the security and obtaining repayment of the sum secured. A want of good faith or the exercise of powers for an improper purpose will suffice to establish a breach of duty."

1479. However, this passage goes on to say:

> "It is proper for the mortgagee to exercise his powers in order to protect his security, and **the exercise of the power is not bad because it is motivated by several purposes, as long as one of the purposes is a proper one, for example to recover the secured debt or to protect the security.**" (Emphasis added).

1480. I agree that even if Mr Mirza had mixed motives, that does not of himself render him in breach of these duties.

1481. However, I am not satisfied that Mr Mirza satisfied the price duty by taking reasonable precautions to obtain the true market value of the mortgaged property (sometimes otherwise described by the court as "best price reasonably obtainable at the time of sale" (see *Michael v Miller* [2002] EWCA Civ 282 at [131])).

1482. As we have seen, the precautions that Mr Mirza took to obtain the best price reasonably obtainable at the time of sale were limited to obtaining a valuation from Aitchison Raffety, which was based on the assumption that the Third Boomzone Lease was in place and was valid and obtaining informal indications of value from JLL and Rolfe East. In none of the instructions to these firms did he mention the fact that Viper (through its solicitors, Keystone Law) had served a notice rescinding, or purporting to rescind, the Boomzone Leases. Neither did he (unlike Mr Farrar in *Farrars*) provide notice to Viper that he proposed to sell at this price.

1483. The Defendants argue that Mr Mirza was not obliged to inform estate agents about Viper's notice of rescission or itself to procure the rescission of the Third Boomzone Lease as Mr Mirza was entitled to sell the property as it was and not to improve it or to spend time or money on it. This argument has some merit as regards any duty on Mr Mirza to procure rescission, but none in relation to the question whether those he was relying upon for a valuation should be kept in the dark about a matter that could fundamentally affect the value to a third party of the Viper Lease.

1484. Neither does it appear that there was very much by way of negotiation between Mr Mirza and Wolverine in setting the price of £6 million. Whilst the £6 million was above

the value that Aitchison Raffety had assessed for the Viper Lease subject to the Boomzone Lease, Mr Mirza was also the owner and director of Boomzone and he also knew the level of commitment that Timeline was making to the property and that the owners of Wolverine also controlled LMH and so were in a position to benefit from a marriage value if they could bring together the freehold and LMH's leasehold interest, especially as Timeline was showing interest in a longer lease. I have no doubt that, if he had wanted to, he would have been able to negotiate a higher price from Wolverine. Perhaps it is too much to expect him to have offered the property also to Mr Morjaria, given that Mr Morjaria was suing him and had brought criminal proceedings against him, but if he had, it is possible that that too would have secured a higher offer for the Viper Lease.

1485. In all the circumstances, I cannot find that Mr Mirza (or Wolverine) can meet a burden of proof to show that reasonable precautions were taken to obtain the best price reasonably obtainable at the time of sale.

D. The Claimants' Arguments based on breach of fiduciary duty

1486. At paragraph 113A of the PoC, the Claimants plead as follows:

> "Further, having procured the creation and grant of the Boomzone Leases out of the Viper Lease in breach of fiduciary duty, Mr Mirza used the existence of the Third Boomzone Lease to procure the transfer to Wolverine of the Viper Lease at a reduced value … He thereby engineered a situation in which companies closely related to him (Wolverine, Boomzone and LMH) came to own the entire chain of leases between the freehold and the profitable lease to Timeline (the Viper Lease, the Third Boomzone Lease and the LMH Lease) for a total price which was a fraction of the market value of those interests combined, making a profit for those companies (or some of them) and causing loss to the Claimants. That situation was a continuation of, alternatively a consequence of, Mr Mirza's breach of fiduciary duty complained of above."

1487. They put this more shortly in their closing argument, saying that the Wolverine Transaction is therefore properly to be regarded as a continuation of, or at the very least a consequence of, Mr Mirza's breaches of fiduciary duty in relation to the Boomzone Leases.

1488. The argument that the Wolverine Transaction was of itself a breach of fiduciary duty does not bear scrutiny. Mr Mirza, having repaid Viper's debt as a guarantor was acting on his own account as a person entitled to subrogated rights against Viper and not on behalf of Viper in any fiduciary capacity. In relation to this transaction, he had no fiduciary obligations beyond those of any mortgagee or chargee exercising a power of sale (to the extent that any duties of such person can be described as being fiduciary duties). In any case, the basis on which I have found him to be a fiduciary no longer applied. At this point, the JV Entities were not relying on Mr Mirza's disinterested advice. They were suing him.

1489. I dismiss the argument made at paragraph 116A of the PoC that the Wolverine Transaction was part of a plot or single scheme hatched at the time that the Boomzone Leases, or any of them, were being created.

1490. This is on the basis that I do not consider that at the time of the First and Second Boomzone Leases, and even in March 2021 at the time of the Third Boomzone Lease any plan had been developed to use the Third Boomzone Lease as a means of obtaining the Viper Lease at a reduced price as part of a conspiracy with the Wolverine Transaction in mind. The Wolverine Transaction did not occur until more than three years later. Even if one accepts the Claimants' point that something like this was being planned much earlier starting with the discussions with BOS, it was not until November 2021 that Mr Mirza made his proposal for a pre-packaged sale to BOS. The timing does not fit for the Boomzone Leases to be regarded as part of one deliberate plot that was designed to lead to the Wolverine Transaction.

1491. The better construction is that the Wolverine Transaction and the similar plans preceding it were developed later by Mr Mirza as a reaction to the situation that he found himself in after Mr Morjaria had acquired control of Viper and was persisting in failing to repay the BOS Facility, which Mr Mirza had guaranteed.

1492. The argument that the Wolverine Transaction was to be regarded as a consequence of Mr Mirza's breaches of fiduciary duty in relation to the Boomzone Leases has not been developed in the Claimants' written closing statement, save that there is a footnote referring me to the case of *Twinsectra v Yardley* [2002] 2 AC 164 at page 194 ("***Twinsectra***"). This refers to a passage discussing the distinction between liability for knowing receipt of trust money and liability for knowing or dishonest assistance in a breach of trust. I do not follow its relevance to the question of whether the Wolverine Transaction was the consequence of a breach of fiduciary duty, although the case may have relevance in relation to the arguments made against other Defendants relating to knowing receipt of trust money and liability for knowing or dishonest assistance of a breach of trust, as I discuss further below.

1493. Mr Peto developed in his closing oral argument the point concerning fiduciary duty. He argued that the fiduciary breach that created the Boomzone Leases had created the situation whereby Wolverine could purchase at a value depressed by the Boomzone Leases whilst the Mirza family could achieve the marriage value through holding both the Viper Lease and the subleases that had been carved out of it. As I have found that the Boomzone Leases did involve a breach of fiduciary duty, this point is obviously correct.

1494. It is overstating the point, however, to say that the Wolverine Transaction was the *consequence* of the Boomzone Leases. It would be more accurate to say that the Boomzone Leases created the conditions under which the Wolverine Transaction was possible and profitable to the Mirza interests, taken in the round.

E. Dishonest Assistance

i. The elements of a claim for dishonest assistance

1495. I have outlined at [581] to [587] the elements of the tort of dishonest assistance in relation to a breach of fiduciary obligation.

1496. As the Claimants have also referred me to *Twinsectra* as having relevance to the circumstances of the Wolverine Transaction, I will also mention one element found in that case that is relevant to this equitable wrong. This is the point that the liability for being an accessory to a breach of trust (or by extension a breach of fiduciary duty) is not (as Lord Millett put it at [107]):

> "… limited to those who assist him in the original breach. It extends to everyone who consciously assists in the continuing diversion of the money. Most of the cases have been concerned, not with assisting in the original breach, but in covering it up afterwards by helping to launder the money."

ii. The pleadings relating to this cause of action

1497. An accusation of dishonest assistance in a breach of fiduciary duty is made in the PoC at paragraphs 116 and 116A. I have already reproduced these paragraphs, and what is said about them in the Defence and Counterclaim at [940] above and have discussed them in relation to their bearing on the Boomzone Leases themselves.

iii. Discussion and conclusion

1498. I have found that Mr Mirza did have fiduciary duties to the JV Entities, including Viper, and that these were breached when he advised and so brought about the creation of the Boomzone Leases. I do not consider, however, that the same fiduciary duties existed in relation to the Wolverine Transaction, where he clearly was acting in a different capacity, and where Viper was no longer part of the JV. Assisting the Wolverine Transaction was not, therefore, of itself assisting in any breach of fiduciary duty.

1499. The only way that any assistance with the Wolverine Transaction might be regarded as assisting in a breach of fiduciary duty is if it can be regarded as falling within the principle enunciated by Lord Millett in *Twinsectra*, quoted above by providing some sort of assistance in relation to the original wrongdoing in relation to the Boomzone Leases.

1500. I do not consider that it can be so regarded. It may be said that the Wolverine Transaction involved taking advantage of the Boomzone Leases as depressing the value of the Viper Lease, but it is difficult to see how it could be regarded as assisting the breach of fiduciary duty involved in the creation of the Boomzone Leases - Mr Mirza's procuring Viper to enter into the Boomzone Leases without obtaining informed consent and failure to give disinterested advice.

1501. The case for this claim, therefore, falls at the first hurdle. Therefore, I dismiss the claim that any of the Defendants rendered dishonest assistance in relation to a breach of fiduciary duty through any involvement that they had in the Wolverine Transaction.

1502. Dishonest assistance is being claimed against Boomzone, LMH and Wolverine in paragraph 116A of the PoC. It is unclear whether the dishonest assistance being claimed against any of Mrs Mirza, Ameer or Mr John in paragraph 116 of the PoC extends to assistance with the Wolverine Transaction.

1503. Given my finding that there was no breach of fiduciary duty in relation to the Wolverine Transaction, it is unnecessary for me to deal with the question of knowledge, but for completeness I will record that:

i) I consider that Boomzone and LMH must be fixed with the same knowledge as Mr Mirza as director of those companies and as their controlling mind;

ii) However, for the same reasons I have given at [956] to [958] there is no proper pleading, and no specific proof, against any of Mrs Mirza, Ameer or Mr John that they were aware of any fiduciary duty or that there was anything dishonest either in assisting Boomzone in entering into a lease or in any assistance they may have given to the Wolverine Transaction.

F. Unlawful Means Conspiracy

1504. In my section dealing with the Boomzone Leases, I said that as the conspiracy complained of includes Wolverine and the claim relating to the Wolverine Transaction, I would discuss this claim in that context.

1505. I have outlined at [620] to [624] the elements required to show an unlawful means conspiracy.

i. The case pleaded

1506. The Claimants plead (at paragraph 119 of the PoC) that the First to Seventh, Ninth and Tenth Defendants agreed and/or conspired and/or entered into a common design to appropriate to Boomzone, Wolverine and/or LMH the leasehold interests in the Data Centre on favourable terms, by the unlawful means complained of in the PoC. They say that this is to be inferred from the following matters:

i) Mr & Mrs Mirza and Ameer being members of the same immediate family and Mr Mirza being the sole shareholder and Mr & Mrs Mirza being the sole directors of Boomzone;

ii) Boomzone being the entity which directly gained from the Boomzone Leases and Mr Mirza being the natural person who ultimately benefited from those leases as sole shareholder of Boomzone;

iii) Redwire and Tydwell being entities which also gained from the Boomzone Leases by virtue of the sub-leases in their favour;

iv) LMH having benefited from the Boomzone Lease by being granted a sub-lease out of it, and thereby being able to grant a very profitable sub-sub-lease to Timeline;

v) Wolverine, Boomzone and LMH having benefited through the exercise of the power of sale;

vi) Mr Mirza or (in the case of Tydwell) the Mirzas or (in the case of M Dynasty Records Limited) their daughter, Shaima, being the natural persons who ultimately benefitted from the sub-leases as shareholders of the respective lessee companies;

vii) the role of Mrs Mirza as a director of and participant in each of Tydwell, Boomzone and Redwire and a shareholder of both Tydwell and Otaki; and of Ameer working in Boomzone and being copied into emails;

viii) the role of Mr John with regard to Boomzone;

ix) the knowledge and intention of Mr Mirza, Mrs Mirza, Ameer and Mr John being properly attributed to Redwire, Tydwell and Boomzone by reason of their respective roles at those companies;

x) the knowledge and intention of Mr Mirza and Ameer being properly attributed to Wolverine by reason of their respective roles as agent and director of that company and/or, in the case of Mr Mirza:

a) that Mr Mirza had a sufficient interest and/or control in Wolverine for this to be a sale to himself (which I have not found to be the case);

b) his instructing Aitchison Raffety to undertake a valuation on Wolverine's behalf in or around March 2023 (but note I have found above that it is not established that those instructions were on behalf of Wolverine);

c) the reasonable inference that Wolverine is controlled by Mr Mirza (which I do not accept) and took advantage of Mr Mirza's exercise of the power of sale and of his control of Boomzone and LMH so as to support the finance from Al Rayan bank;

d) or in the alternative that the sale to Wolverine was an abuse of corporate legal personality to attempt to evade Mr Mirza's duty not to sell to himself.

1507. The Defendants deny that there is any such conspiracy and also in their Defence and Counterclaim deny that any of the facts or matters averred by the Claimants as summarised above support any inference of conspiracy. They also aver that the accusation is embarrassing for want of particularity insofar as it fails to specify the dates of the alleged conspiracy.

1508. The reference to the unlawful means complained of in the PoC, presumably refers to the various claims made in relation to the Boomzone Leases and secondly in relation to the Wolverine Transaction.

ii. The alleged unlawful means conspiracy in relation to the Boomzone Leases

1509. In relation to the Boomzone Leases, the matters complained of as potentially being the unlawful means referred to that I have accepted include:

i) breach of contractual and fiduciary duty on the part of Mr Mirza;

ii) breach of the fair-dealing rule, which I have found applies either directly or by analogy;

iii) unjust enrichment of Boomzone;

iv) dishonest assistance in relation to the breach of trust in bringing about the Boomzone Leases without obtaining informed consent from Viper, which I have found against Boomzone but not against any other Defendant;

v) knowing receipt, which I have found against Boomzone and LMH but not against any other Defendant.

1510. The Claimants have also made other claims in relation to the Boomzone Leases where I have not found in their favour. These are the claims for deceit and for breach of the self-dealing rule.

1511. Applying the principles relevant to an unlawful means conspiracy, these findings and the facts behind them do support the contention that there was an unlawful means conspiracy between Mr Mirza, Boomzone and LMH in relation to the creation of the Boomzone Leases, and also against LMH in relation to the LMH Lease, as I have found that these parties all were knowingly involved in a combination to damage Viper by the unlawful means that I have found.

1512. I consider that the Claimants have demonstrated that Mr Mirza, Boomzone and LMH were all involved in the creation of the Boomzone Leases and the LMH Lease. Mr Mirza knew of all the facts that caused him to be acting as a fiduciary and as a fiduciary in breach of fiduciary duties. He was a director of Boomzone and LMH and it is fair at the relevant period to regard him as being the controlling mind of those companies.

1513. However, I have not found that there was any knowledge on the part of any other Defendant of the facts giving rise to the unlawfulness or damage in respect of anyone else so I consider that there is no other Defendant who can be regarded as a conspirator.

1514. As I have already mentioned, since *The Racing Partnership*, knowledge of the unlawfulness of the means employed is not required to establish an unlawful means conspiracy but the defendant must know all the facts which make the transaction unlawful. The relevant fact supporting all of the elements of unlawfulness that I have found in relation to the Boomzone Leases and in relation to the LMH Lease is that Mr Mirza was acting in breach of his fiduciary duties. It has not been established that any Defendant other than Boomzone, LMH and Tydwell was aware of the facts giving rise to this breach.

1515. I consider that the Claimants have demonstrated that Mr Mirza, and therefore Tydwell, Boomzone and LMH, were all participating in this deceit and that they must have had the knowledge that they were doing so as Mr Mirza had that knowledge and he was the controlling minds of those companies.

1516. The Defendants again argue that the attribution of knowledge is not a mere formality; it is subject to complex rules of attribution which depend on the relationships between the individual whose knowledge is to be attributed and the company to whom such knowledge is to be attributed and criticise the Claimants for failing to explain why and under what rules of attribution the Claimants rely on to attribute the knowledge of any of any person to the three companies. Once again, this is making heavy weather of the point. As I have already explained, the basis of attribution is a point for legal argument, and not in my view one that needs to be described in detail within the pleadings. I do

not think there is any doubt that these three companies should be attributed with the knowledge and intent of Mr Mirza.

1517. As to the further points that the Defendants make as regards the pleadings, I am not troubled by the lack of specificity in the pleadings as regards the date of inception and termination of the conspiracy. That may be regarded as largely obvious enough from the pleaded facts and insofar as it is not, it is in the nature of a conspiracy that the Claimant will often not be certain of all the facts. However, the point made by the Defendants that the Claimants have not adequately pleaded the necessary knowledge does need to be taken seriously.

iii. The alleged unlawful means conspiracy in relation to the Wolverine Transaction

1518. It is a different question as to whether my findings and the facts support the contention that there was an unlawful means conspiracy among any of the Defendants relating to the Wolverine Transaction.

1519. First, I have already dismissed the argument that the Wolverine Transaction was part of a plot hatched at the time that the Boomzone Leases or any of them were being entered into. Therefore, any involvement relating solely to the Boomzone Leases should not be viewed as part of any conspiracy relating to the Wolverine Transaction.

1520. In relation to the Wolverine Transaction, I have dismissed a number of the claims which the Claimants might have sought to rely on to support an unlawful means conspiracy. These include the claims that:

i) Mr Mirza was purporting to exercise a power of sale when he had no power of sale;

ii) Mr Mirza was purporting to exercise power of sale in breach of the rule against self-dealing;

iii) Mr Mirza was acting in breach of fiduciary duty; and that

iv) other Defendants were rendering dishonest assistance in a breach of trust or fiduciary duty.

1521. In relation to the Wolverine Transaction itself, the only matter complained of by the Claimants that could potentially amount to unlawful means that I have so far accepted include that Mr Mirza was obliged to take reasonable precautions to obtain the best price and he has not discharged a burden of proof to show that he did so.

1522. I have, however, so far left open the issue of whether Mr Mirza should be denied the remedy of subrogation on the basis that he should not be afforded an equitable remedy on general equitable principles, but for the reasons that I give below, I consider that he should be denied this remedy at least in relation to an ability to exercise the charge.

1523. The question arises whether these two findings, which each essentially relate to the availability of the remedy of subrogation to Mr Mirza rather than being any criminal act or tort, or even breach of contract or breach of duty that is actionable in its own right, provide the necessary "unlawful means" to found a case in relation to an unlawful means conspiracy.

1524. The ambit of what can be considered "unlawful means" for purposes of the tort was considered in *Khrapunov*. As I have already mentioned, in that case (at [15]) the court left open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty, noting that "These are liable to raise more complex problems."

1525. The question is complicated by the nature of conspiracy as being a tort of primary liability so that to quote *Khrapanov* at [11]:

> "Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means."

1526. Thus, it is not necessary for the putative unlawful means to give rise to a cause of action themselves. Nevertheless, in the case before me, I consider that the only matters that I have found that might possibly be considered to be unlawful means seem to me to be so far away from the paradigm cases of unlawful means (a breach of criminal law or of contract, or tortious act) that they should not be considered to form the foundation of an unlawful means conspiracy.

1527. The claim for an unlawful means conspiracy in relation to the Wolverine Transaction, therefore fails.

G. Conclusions in relation to the Wolverine Transaction

1528. To summarise my conclusions so far in relation to the Wolverine Transaction:

i) I have dismissed the argument that Mr Mirza was self-dealing in relation to the Wolverine Transaction;

ii) I have found, however, that the circumstances in connection with the requirement of fair-dealing are such so as to put on Mr Mirza the burden of proof to show the validity of the transaction and I consider that Mr Mirza has not met that burden of proof to show that he took reasonable precautions to obtain the best price reasonably obtainable at the time of sale;

iii) whilst I have found a breach of fiduciary duty in relation to the creation of the Boomzone Leases I have dismissed the argument based on breach of fiduciary duty specifically in relation to the Wolverine Transaction;

iv) I have found an unlawful means conspiracy between Mr Mirza, and Boomzone (but not involving any other Defendant) in relation to the creation of the Boomzone Leases and among Mr Mirza, Boomzone, and LMH in relation to the LMH Lease;

v) I have not found an unlawful means conspiracy in relation to the Wolverine Transaction.

H. Do equitable principles bar the remedy of subrogation?

1529. Having considered all of these matters in the round, it is now appropriate that I look at the question of whether Mr Mirza should be denied any element of the remedy of subrogation having regard to general equitable principles.

1530. The Claimants have not expressly advanced any pleading or argument that Mr Mirza was not "doing equity" in relation to the Wolverine Transaction and so I will not pursue that point.

1531. The Claimants have, however, pleaded that Mr Mirza was not coming to the court with clean hands as regards the Wolverine Transaction. As we have seen, to maintain this claim they need to show some impropriety with an immediate and necessary relation to the equity sued for. The matter that they rely on is pleaded at 113A of the PoC.

1532. In essence, the complaint is that having procured the creation and grant of the Boomzone Leases out of the Viper Lease in breach of fiduciary duty, Mr Mirza used the existence of the Third Boomzone Lease to procure the transfer to Wolverine of the Viper Lease at a reduced value, and thereby engineered a situation in which companies closely related to him (Wolverine, Boomzone and LMH) came to own the entire chain of leases between the freehold and the profitable lease to Timeline for a total price which was a fraction of the market value of those interests combined, making a profit for those companies (or some of them) and causing loss to the Claimants. That situation was a continuation of, alternatively a consequence of, Mr Mirza's breach of fiduciary duty complained of above.

1533. Whilst I have not agreed with the Claimants that there was one single plot that was commenced with the creation of the Boomzone Leases and led to the Wolverine Transaction, I do agree that Mr Mirza's ability to undertake the Wolverine Transaction at the price that this was undertaken was directly derived from the reduction in value of the Viper Lease brought about by the Boomzone Leases, and that they in turn had been brought about in consequence of Mr Mirza's breach of fiduciary duty. This does seem to me to involve an important element of impropriety with an immediate and necessary relation to the equity sued for, and as a result I consider that I should not regard Mr Mirza as coming to equity with clean hands in relation to the Wolverine Transaction.

1534. It follows from my conclusions relating to fair-dealing, and Mr Mirza's (and Wolverine's) failure to demonstrate that he obtained the best price reasonably available at the time, as well as from my conclusion that Mr Mirza is not coming to equity in relation to his rights of subrogation with clean hands, that the remedies that the court will need to consider may include denying Mr Mirza his subrogation remedy in relation to the BOS Charge and rescission of the Wolverine Transaction, but more argument will be needed on this point having regard to (amongst no doubt many other points that will be raised):

    i) the interests of third parties, including in particular Al Rayan Bank; and

    ii) the requirement to balance interests: it remains the point that Mr Mirza has discharged the amounts due under the BOS Facility, and the court will need to consider the desirability of avoiding unjust enrichment of Viper.

18. SUMMARY OF CONCLUSIONS ON LIABILITY

1535. Through the course of this trial and the helpful (and prolific) submissions from counsel on all sides I have been able to determine the following matters.

A. Claims relating to Invoicing and Cladding

i. Claims in Deceit relating to Invoicing and Cladding

1536. In relation to the Invoice Misrepresentations Claims: that the case in deceit has been successfully established against Mr Mirza, Mr John and Tydwell in relation to the Invoicing Claims but no similar case is made out against Mrs Mirza or Ameer. Such a case has been successfully established in favour of the JV Entities that received the Requests and invoices which misrepresented the extent to which Tydwell was claiming third party expenses, but not in favour of Mr or Mrs Morjaria.

1537. Similarly, in relation to the Cladding Claims: that the case in deceit has been successfully established in favour of Otaki (but not in favour of Mr or Mrs Morjaria) against Mr Mirza, Mr John and Tydwell in relation to Cladding Representation 1.

ii. Claims in relating to breach of the JV/Tydwell Contracts

1538. As regards breaches by Tydwell of the JV/Tydwell contracts through requesting more payment than was properly due to Tydwell, I have found that there have been such breaches and I have accepted (at [529]) that to the extent that any payments were made to Tydwell that are in excess of the sums properly due to Tydwell under the JV Entity/Tydwell Agreements, such sums are repayable.

1539. In relation to payments made other than in respect of any services provided under the Cladding D&B Contract ("**Non-Cladding Services**"), the amounts that may be regarded as properly due to Tydwell are limited to any amounts that were supported by an invoice from Tydwell (or Redwire, but without any double-counting) that either:

i) referred on its face to Project Management or Project Management and Overheads; or

ii) referred to third-party costs but in that case, only to the extent that Tydwell can demonstrate that the costs are justified by third-party costs that were incurred by Tydwell (or Redwire).

1540. In relation to payments for services provided under the Cladding D&B Contract (including those for the replacement of cladding and render) ("**Cladding Services**"), the amounts that may be regarded as properly due to Tydwell comprise those due under the Costs Plan - the advance payment of £750,000 plus any amounts that were supported by an invoice from Teampol plus any amounts that were additional costs and expenses necessary to complete the Project.

1541. The term "additional" must be taken to mean those not in contemplation at the time that the Cladding D&B Contract was signed including any increase in the price charged by Teampol for removing and replacing the render, and any other increases in costs and third-party expenses relating to the removal and replacement of the render.

1542. This, I consider, would include an increase in the costs chargeable by Tydwell for its own services, but only insofar as any additional cost is directly referable to the additional work involved in dealing with the render (or any other work that became necessary and was not contemplated at the time that the Cladding D&B Contract was signed). This, I consider, is most easily measured by considering the margin that Tydwell expected to make at the point of signing the Cladding D&B Contract. This can be calculated as:

i) the amount of the Advance Payment; less

ii) the amounts expected to be charged by Teampol for removing and replacing the cladding plus any other third-party costs relating to the original cladding project (in each case exclusive of any VAT),

and then applying the same margin to the Teampol and third-party costs as increased by the extra work relating to the render (and any other additional costs that emerged in relation to the project). The increase would not, however, extend to any additional margin that Tydwell considered that it was entitled to in relation to taking on the risk of providing a warranty that extended to combustibility or any self-insurance for that risk.

iii) In the alternative, if Tydwell was able to demonstrate that its actual internal costs were increased as a result of the additional work relating to the render (or any other additional work), for example, because it needed to employ extra staff or because its staff were working longer hours on the project, then that might provide an alternative justification for increasing its fees above those originally contemplated at the time of entering into the Cladding D&B Contract. Tydwell could not, however, justify claiming both an increase in its own internal costs and an increase in the sum to which a percentage margin is applied.

1543. A further point to note is that insofar as any amounts invoiced by Tydwell were in excess of the amounts that Tydwell could properly invoice on the basis that I have explained above and were charged with VAT, and the Mirzas received VAT advances as a result, these VAT advances were made improperly and should be repaid to Otaki, and should not be considered to be within the regime for VAT advances provided for in the JVA.

iii. Claims in relating to breach of the JVA and of fiduciary duty

1544. I have found wrongdoing in relation to the Invoice Representations passing off profits that Tydwell intended to keep as third-party costs and in relation to the Cladding Representations passing off a decision to take an increased profit as a claim for increased costs necessary to complete the project. This has involved breaches of the contractual duties owed by Mr Mirza to the JV Entities and to Mr and Mrs Morjaria and a breach of the fiduciary duties I have found owing by Mr Mirza and Tydwell to the JV Entities.

iv. Claims relating to Unjust Enrichment

1545. I have found that there is a good claim in unjust enrichment against Tydwell, Redwire and Mr Mirza in favour of the JV Entities to the extent that they were presented with invoices that falsely represented that amounts were due that were not due.

v. Claims relating to Dishonest Assistance

1546. I have found that there is a good claim against Tydwell, Redwire and Mr Mirza for dishonest assistance of one another in relation to each such parties' breaches of fiduciary duty. I also find Mr John to be liable for dishonest assistance in relation to such breaches. However, I make no such finding against Mrs Mirza or Ameer.

vi. Claims relating to Knowing Receipt

1547. I have found that, to the extent that Mr Mirza, Tydwell or Redwire have received any of the Misappropriated Sum arising from the breach of duty of the other of them, they are liable for knowing receipt, but no other party is liable for knowing receipt.

vii. Claims relating to an unlawful means conspiracy

1548. I have found that the Claimants have shown an unlawful means conspiracy among Mr Mirza, Tydwell, Redwire, Boomzone (to the extent it was involved in the invoicing arrangements) and Mr John, but not in relation to any other of the Defendants.

B. The Claims relating to the Boomzone Leases

i. Claims in Deceit relating to the Boomzone Leases

1549. I have found that the Claimants have not established a claim in deceit against any of the Defendants as regards the entry into of the Boomzone Leases.

ii. Claims for breach of duty

1550. I have found that Mr Mirza was in breach of both his contractual duty of good faith under the JVA and his fiduciary duty to Viper by bringing about the Boomzone Leases by means of his position of trust in relation to the JV Entities when these leases were not in the best interests of Viper and without obtaining the fully informed consent of Viper.

1551. I have not found a breach of the self-dealing rule, but I consider that this breach of fiduciary duty is within the fair-dealing rule (assuming that it extends to circumstances beyond the purchase of a beneficiary's interest under a trust) or otherwise that such a breach of fiduciary duty should in this analogous case give rise to similar remedies, which may include rescission.

1552. However, the question of rescission as a remedy will need to be considered in more detail as part of the more general consideration to be given to appropriate remedies.

iii. Claims relating to Unjust Enrichment

1553. I have found that Boomzone was unjustly enriched at the expense of Viper through the creation of each of the Boomzone Leases.

iv. Claims relating to Dishonest Assistance

1554. I have found that Boomzone is to be considered liable for dishonestly assisting Mr Mirza in his breach of fiduciary duties, but no such finding may be made against Mrs Mirza, Ameer or Mr John.

v. Claims relating to Knowing Receipt and constructive trust

1555. I have found that the elements of a claim for knowing receipt are made out as regards both Boomzone and LMH and accordingly that Boomzone should on these grounds be regarded as holding, and having held, the Boomzone Leases on constructive trust for Viper and similarly LMH should be regarded as holding the LMH Lease on constructive trust for Viper.

1556. ***Claims relating to an unlawful means conspiracy***

1557. I have found that an unlawful means conspiracy existed in relation to the Boomzone Leases (and the LMH Lease) among Mr Mirza, Tydwell, Boomzone and LMH.

C. The Claims relating to the Wolverine Transaction

i. The argument that there was no power of sale

1558. I have rejected the arguments proposed by the Claimants that Mr Mirza had no claim to exercise a power of sale. I have found that he was not acting as an assignee; he was exercising a power of sale pursuant to his right of subrogation. However his failure to demonstrate that he obtained the best price and my conclusion that Mr Mirza is not coming to equity in relation to his rights of subrogation with clean hands may (subject to other considerations) militate in favour of denying Mr Mirza his subrogation remedy in relation to the BOS Charge and towards ordering rescission of the Wolverine Transaction, but more argument will be needed on this point.

ii. The argument based on self-dealing

1559. I have dismissed the Claimants' argument that the Wolverine Transaction fell foul of the rule against self-dealing.

iii. The argument based on breach of fiduciary duty

1560. Whilst I have found a breach of fiduciary duty in relation to the creation of the Boomzone Leases, I have dismissed the argument based on breach of fiduciary duty specifically in relation to the Wolverine Transaction.

iv. The claim for an unlawful means conspiracy

1561. Similarly, whilst I have found an unlawful means conspiracy between Mr Mirza, and Boomzone (but not involving any other Defendant) in relation to the creation of the

Boomzone Leases and among Mr Mirza, Boomzone, and LMH in relation to the LMH Lease, I have not found an unlawful means conspiracy in relation to the Wolverine Transaction.

v. The claim based on "the principle in Tse Kwong Lam"

1562. However, I have found that that neither Mr Mirza nor Wolverine has demonstrated compliance with the duty to take reasonable precautions to obtain the best price reasonably obtainable at the time of sale and therefore a breach of what the Claimants have described as the "principle in *Tse Kwong Lam*": where a person exercising a power of sale is a mortgagee or chargee has a conflict of interest, it is for that person (and the transferee) to demonstrate that the mortgagee or chargee has complied with his or her duties in exercising the power of sale.

vi. The claim of unclean hands

1563. I have also found, however, that Mr Mirza's right to enforce the charge pursuant to subrogation rights is an equitable remedy and is subject to equitable principles, including the principle that "he who seeks equity must come with clean hands" and that the fact that it was his wrongdoing that depressed the value of the Viper Lease opens the possible remedy of rescission of the Wolverine Transaction, but more argument will be needed on this point having regard to (amongst no doubt many other points that will be raised):

i) the interests of third parties, including in particular Al Rayan Bank; and

ii) the requirement to balance interests: it remains the point that Mr Mirza has discharged the amounts due under the BOS Facility, and the court will need to consider the desirability of avoiding unjust enrichment of Viper.

D. The Claims relating to the VAT advances

1564. In relation to the VAT advances, I have found that:

i) The holders of the "B" shares were to have the cashflow benefit of the VAT refunds received by the JV Entities as they arose, but had no absolute right for these payments to take the form of dividends from Otaki;

ii) in fact, the payments were made as advances and not as dividends;

iii) the VAT advances are to be regarded as advances by Otaki, as that was the entity liable to make those advances under the JVA. If any of the money in fact proceeded straight from one of the other JV Entities, this should be regarded as that JV Entity making a payment on behalf of Otaki, giving rise to an inter-company account;

iv) if Otaki has assets after paying other creditors in a winding-up, these will be used to set off the amount repayable in respect of VAT advances before any other distribution to shareholders;

v) if there are no such profits available to shareholders, or to the extent that there is a shortfall, the VAT advances cannot be set off and will be an asset that the liquidator can use to satisfy the claims of other creditors.

E. The Counterclaims and Part 20 Claim

i. The KYC Counterclaim

1565. I have concluded that neither clause 2.1 nor clause 2.2 imposed any duty on Mr Morjaria that would be breached by his failing to use reasonable endeavours to answer the KYC requirements of BOS.

1566. I have further concluded that even if Mr Morjaria did have such a duty, in the circumstances in which he found himself, he did not breach such a duty.

ii. The Viper SPA Claim

1567. I have dismissed Mr Mirza's claim that Mr Morjaria and/or Otaki were in breach of clause 12.2 of the JVA in entering into the May 2022 Agreements (including in particular the Viper SPA) without first discussing this with Mr Mirza and the counterclaim relating to this matter therefore fails.

iii. The Part 20 Claim

1568. As I have found that there was no breach of the JVA arising out of the May 2022 Agreements, the Directors can have no liability for procuring such a breach, and the claim against them fails accordingly.

1569. Further, even if this were not so, the Directors were acting according to their best light in the interests of Otaki and Krugar, and fall within the protection provided by *Said v Butt*; they were not aiming at a breach and were doing their best to perform their duties to Otaki. Accordingly, the Part 20 Claim against the Directors fails on multiple points.

iv. The Counterclaims relating to the Private Prosecution

1570. Whilst the Private Prosecution was brought maliciously, the Claimants are not liable in the tort of malicious prosecution because they had reasonable and probable cause that the offences alleged to have been committed had been committed.

1571. The Claimants are not liable in the tort of abuse of process because a tort of abuse of process in relation to a criminal claim is not currently known to the law.

F. The Default Judgment Application against Mr John

1572. As I mentioned at the start of this judgment, the Claimants have made an application for default judgment to be entered against Mr John pursuant to CPR Part 12. If granted, this would have the effect in accordance with the principle in CPR rule 12.12(1) that the court would give such judgment as the claimant is entitled to on the statement of case.

1573. In the absence of the application for default judgment, having decided that I should go ahead in the absence of Mr John, having regard to the provisions of CPR rule 39.3, I

would find Mr John's liability to be that which I have summarised above. I will need to consider whether this position is changed by the application for default judgment.

1574. I have concerns about the suitability of the Part 12 procedure when Mr John is only one of several defendants and I have been able to consider a great deal of evidence allowing me to reach detailed conclusions on various matters that affect the accusations against Mr John, some of which are inconsistent with the principle in CPR rule 12.12(1). Default judgment is defined in CPR rule 12.1 as "judgment without trial", and it appears odd and unsatisfactory for an application for it to be made during the very course of a trial, as is the case here.

1575. To take an example of the difficulties that arise, it is alleged at paragraph 116 of the PoC that Mr John (as well as Mrs Mirza and Ameer) procured, induced or assisted a breach of fiduciary duty by Mr Mirza in relation to the Boomzone Leases and the Wolverine Transaction and I have found that the way that Mr John is said to have assisted in these matters is inadequately pleaded and has not been made out. It seems unjust that the court could reach these conclusions but nevertheless be obliged by the principle in CPR rule 12.12(1) to give against Mr John the judgment that the Claimants would be entitled to on their statement of case. This is so even though the injustice is mitigated as where the Claimants have failed because of an inadequacy in their pleadings, they fail also under the principle in CPR rule 12.12(1) (since they would not be entitled to relief on the basis that their statement of case has not adequately pleaded).

1576. CPR rule 12.9 deals with the position where there is a claim against more than one defendant. CPR rule 12.9(1) deals only with money claims or claims for the delivery of goods, but CPR rule 12.9(2) appears to apply to all claims against more than one defendant and suggests that if the claim cannot be dealt with separately from the claim against the other defendants, the court will not enter default judgment against that defendant and "must deal with the application at the same time".

1577. I take the view that in the current case the complexity and interrelatedness of the claims is such that the claim against Mr John cannot be dealt with separately from the claim against the other Defendants.

1578. In finding this it might be said that I am going counter to the judgment in *Otkritie International Investment Management Ltd v Urumov & Ors* [2012] EWHC 890 (Comm), [2012] 3 WLUK 13. In that case, Flaux J (as he then was) considered that CPR rule 12.8(b) (now 12.9(2)(b)) was aimed at a case where the claimant has a claim against a number of defendants in the alternative, rather than on a several basis, and in the light of this and of the comparison between the claimant's total claim in that case of around US$160 million plus interest, and the comparatively small size of the proposed default judgment (around US$30 million), he determined that he would allow the application for default judgment.

1579. Despite the decision in that case, I do not think that it is correct that all cases where several liability is alleged are suitable for separate judgement to be given. For example, in the case before me there are allegations of conspiracies involving Mr John. If one person is found to be a conspirator by means of a default judgment, that could have an effect on whether other alleged conspirators are involved in the conspiracy.

1580. In the circumstances that I find that CPR rule 12.9 (2)(b) applies, the question arises whether CPR rule 12.9 alters the general position where an application is made under CPR rule 12. In general, where the conditions apply for a default judgment to be given under CPR rule 12, whilst the applicant would not have an absolute right to obtain such a judgment in all circumstances, the judge would exercise any discretion to refuse this relief only in very rare circumstances. However, I think that in cases that are within CPR rule 12.9(2)(b), because the court determines that a particular defendant cannot be dealt with separately from the other defendants, we are in one of those rare circumstances.

1581. It appears to me that CPR rule 12.9 is not merely a rule about the timing of when a default judgment should be given, but rather that it does also affect the general position that a default judgment will be granted where the conditions for a default judgment are satisfied and that it is intended to allow the judge to look at that matter in the round having regard to the facts that are before the judge and to use his or her discretion as to whether to provide the remedy of a default judgment or to decide the matter on the facts presented at trial.

1582. This conclusion is supported by consideration of the definition of default judgment (that it is one made without trial) and also from the decision in *AS Latvijas Naftas Tranzits v King & Wood Mallesons LLP* [2014] EWHC 2593 (Comm); 2014 WL 3671667. Whilst in that case, Walker J considered, on the facts, that it was appropriate in the circumstances to enter default judgment under CPR rule 12.8(2) against only certain defendants in a fraud case on a without notice application, it was clear that he thought it possible to deal with the matter instead at trial.

1583. I offer this view, tentatively, however, as the drafting of CPR rule 12 .9(2)(b) is by no means clear. On the one hand at (i) it states that:

> "the court will not enter default judgment against that defendant";

but on the other hand, at (ii) it goes on to say:

> "the court must deal with the application at the same time as it deals with the claim against the other defendants".

As the application is one for default judgment and the court is enjoined by subparagraph (i) not to enter default judgment, if these provisions are taken literally, there is nothing more to be considered at subparagraph (ii).

1584. Whilst the drafting could be clearer, I consider that the only viable interpretation is that where CPR rule 12.9(2)(b) applies, the judge is required not to enter a default judgment before trial and, having heard the evidence at trial, the judge has the discretion either to grant a default judgment at that point, or to deal with the matter according to the evidence.

1585. However, against the background that:

i) the application specifically asked for the application to be considered at a hearing, and no material consideration was given to the application at trial;

ii) I have received no submissions from counsel as to the matters concerning the application of CPR rule 12 that I have discussed above (and counsel has not been referred to the cases that I have mentioned); and

iii) we are anyway going to have a further hearing to deal with quantum,

I consider that it is appropriate that I delay making a determination in respect of this application until I have heard further from counsel at the further hearing.

1586. I also note that it is possible that the Claimants, having seen what I have found on the facts, may anyway prefer to withdraw this application. They may be content with those findings and also that they may consider that Mr John's ability to overturn a finding made on the facts in his absence under CPR rule 39.3(5) may be more narrow than his ability to have a default judgment set aside under CPR rule 13.

19. DETERMINING REMEDIES AND QUANTUM

A. The need for a hearing on quantum

1587. In view of the complexity of the different causes of action and remedies available to the Claimants, I am gratefully accepting the Claimants' proposal that remedies and quantum be dealt with at a separate hearing (if no settlement is reached that would avoid such a hearing).

1588. In advance of a hearing on quantum, I consider that it is useful to record some of my observations on some of the expert evidence received to date as this may focus that hearing.

B. The Expert Evidence on the valuation of services

1589. The court has heard a great deal of evidence concerning the valuation of the services provided by Tydwell and Redwire, but on the basis of my findings, there is little scope for this evidence to be deployed. I have not found that Tydwell overcharged for its services: I have found for the Claimants essentially on the basis that Tydwell misrepresented the bases on which it was making claims for payment from the JV Entities. This was first in relation to the Invoice Claims by presenting invoices that would be understood as claims for reimbursement of, or to be put in funds in respect of, third-party costs. Secondly, in relation to the Cladding Claim, this was through representing that there had been an increase in the costs and expenses necessary to complete the cladding project over and above those assumed in the initial payment of £750,000.

1590. On the basis that there is no real need to value the services provided by Tydwell (or Redwire), I will not comment in detail on the expert evidence relating to the valuation of services, except to note one point.

1591. This is that much of this evidence appeared to value the services that Tydwell (or Redwire) was said to be providing, categorising this as including the role of a development manager, construction manager / main contractor, asset manager and property manager without any great reference to the services that the JV Entities had actually agreed to pay Tydwell to provide (and ignoring the processes which Tydwell

had agreed to abide by in order to obtain payment). Much of the evidence proceeded on the basis that if Tydwell or Mr Mirza could be seen to be performing a task, then the JV Entities must have agreed to pay for this on a *quantum meruit* basis.

1592. I do not think that this is a fair assumption in the context that Mr Mirza owned 50% of the JV (and had an interest of 55% in its income, as well as receiving funding and potentially extra profit arising from the VAT advances) and under the JVA had already agreed to manage the day-to-day business of the JV through his company with the JVA making no provision for any extra payment for this. Against this background, the fact that Mr Mirza or Tydwell may have been performing tasks that benefitted the JV cannot be assumed to be evidence that any of the JV Entities had agreed to pay for those efforts on a *quantum meruit* basis. If for any reason it does become important to value the services provided by Tydwell (or Redwire), then any such valuation should be by reference to tasks that the JV Entities had agreed that they could be charged for.

C. The Expert Evidence relating to forensic accounting

1593. The expert evidence relating to forensic accounting, however, will be useful in establishing the extent of any loss arising out of the misrepresentation claims, although it will need to be used in a slightly different way. As the Claimants put this in their written closing argument, the central factual enquiry is the amount of the Misappropriated Sum and what has been referred to as the "Surplus". Based on what I have found to be the wrongdoing involved, these (added together) fall to be calculated in two parts as:

i) The total amount actually received by Tydwell and Redwire from the JV Entities (or out of rents or other income that should have accrued to the JV Entities) in respect of any Non-Cladding Services, less:

   a) the total value of third-party invoices rendered to Tydwell or Redwire (but avoiding any double-counting) referable to Non-Cladding Services; and less

   b) the total value of Tydwell and Redwire third-party invoices referable to Non-Cladding Services insofar as what is invoiced expressly refers to project management or project management and overheads;

plus:

ii) the total amount received by Tydwell from the JV Entities (or out of rents or other income that should have accrued to the JV Entities) in respect of any Cladding Services, less:

   a) the total value of third-party invoices rendered to Tydwell referable to Cladding Services; and less

   b) the gross profit margin for Tydwell anticipated by Tydwell when the Advance Payment of £750,000 was agreed plus a further gross profit margin on any increased expenses arising beyond those anticipated when the Advance Payment of £750,000 was agreed, calculated in the manner discussed at [1542].

1594. I understand that the parties' respective experts have already agreed that Tydwell and Redwire raised invoices totalling £31,032,577.04 including VAT (or £25,952,650.54 on a net basis with VAT of £5,079,926.50 being charged). I believe this has not been broken down yet between invoices relating to Cladding and Non-Cladding services.

1595. As regards the value of third-party invoices, again these have not yet been broken down in the same way.

1596. I also understand that the experts are not in agreement as to the value of these third-party invoices, although the gap between them has been narrowing. It may be helpful to allow a further narrowing of the difference between them for me to state my conclusions in relation to various matters not agreed between the experts. These are as follows:

i) I prefer Mr Pearson's methodology in sampling invoices below £1,500 that have not been individually considered to that of Mr Dumville, which I consider to be distorted by the inclusion of the very large Mace invoices.

ii) As regards Mrs Mirza's evidence as to which invoices related to work at No. 22 (summarised at Appendix 14 to Mr Pearson's Supplemental Report), I note that Mr Pearson, in his Supplemental Report (in the court bundle at reference I2/5/13) at paragraph 3, lists some invoices where he accepts Mrs Mirza's evidence and that the Claimants have conceded that there may be added invoices issued by Scalable Communications, Stuart Baker, Cloud Experience and Amco. I see no reason not to accept the remainder of Mrs Mirza's evidence on this point.

iii) As regards the disputed category of Data Centre running costs (being those listed in Appendix 14 to Mr Pearson's Supplemental Report), I agree that the Boomzone Leases make Boomzone, rather than the JV, responsible for certain types of cost including electricity, gas, water, sewage, telecoms and other services and utilities. Many of the items listed in Appendix 14 fall within these categories; others may need to be considered further. This may become a moot point, however, if the Claimants obtain rescission of the Boomzone Leases and/or the relevant Defendants account for the income from No. 22: if the Claimants are to be allowed the income from No. 22, they should bear the relevant expenses.

iv) As regards the disputed category of invoices from related companies (being those listed in Appendix 15 to Mr Pearson's Supplemental Report):

a) the invoices from Kingmead should be excluded unless the Defendants can show cogent evidence that these are passing on third-party costs genuinely incurred for the benefit of No. 22 (and are not another disguised management fee);

b) the invoices from Redwire and Tydwell should be excluded.

v) As regards the disputed category of marketing and recruiting costs for the Data Centre (being those listed in Appendix 16 to Mr Pearson's Supplemental Report), I see no reason to exclude these items, except for the item for logo

design (£500 from XVAVI), which should be regarded as an internal cost. However, this is on the assumption that any revenue from the Data Centre has been applied for the benefit of the JV Entities (which in this context would include Viper even after it was taken outside the JV).

vi) As regards the disputed category of suppliers working on other Tydwell contracts (being those listed in Appendix 17.1 to Mr Pearson's Supplemental Report), I am not satisfied that all of these were incurred for the benefit of the JV, but it seems more likely than not that some were. Unless the Defendants can produce more evidence of this, these should be reduced to 50% of the total.

vii) As regards the disputed category of costs associated with the office at 58 Uxbridge Road (being those listed in Appendix 18 to Mr Pearson's Supplemental Report), these I consider relate to Tydwell's own overheads and should be excluded.

viii) As regards the disputed category of Accreditations (being those listed in Appendix 19 to Mr Pearson's Supplemental Report), the Claimants have accepted, and I agree, that these invoices more likely than not were for the benefit of the Data Centre and should be chargeable to the JV on the assumption that any revenue from the Data Centre has been applied for the benefit of the JV Entities.

ix) As regards the disputed category of accountancy and legal fees (being those listed in Appendix 20 to Mr Pearson's Supplemental Report), these I consider relate to Tydwell's own overheads and should be excluded, except to the extent noted in the "My comments" section, as being attributable to the JV Entities according to Mrs Mirza's witness statement.

x) As regards the disputed categories of invoices not addressed in Mrs Mirza's witness statement and of invoices not addressed to Tydwell (being those listed in Appendix 21 to Mr Pearson's Supplemental Report), these must be excluded unless more evidence is provided as to their relevance to the JV.

xi) I consider the email to Mr John from Natalia Talaska dated 23 February 2022 (in the court bundle at reference K1/4528/1) to represent the best evidence of what Teampol invoiced: there may however need to be further evidence of whether the retention figure mentioned there was paid;

xii) given the passage of time, I agree that the Defendants should be given some allowance for missing third-party invoices referable to the Non-Cladding Services; I would set this at 2% of the value of the invoices referable to Non-Cladding Services, excluding the Mace invoices;

xiii) as regards the Cladding Services, however, I see no reason for such an allowance as there was comparatively little time between the third-party invoices being received and Tydwell becoming aware that there may be a dispute about them;

1597. It will be necessary to understand the payments received by Boomzone or LMH from third parties and Redwire, including rent in connection with the JV. Again, I understand the experts to be largely agreed on this point. It may assist for me to say that I agree

with Mr Pearson that this should include the £45,972.67 from parties not listed in the Boomzone tenants document.

1598. It will be necessary, however, to consider carefully payments received by Boomzone, Tydwell or Redwire from LMH to be sure of separating out monies that have come from tenants and monies that LMH may have paid Tydwell out of its own resources (as opposed to out of rental income or contributions to refurbishment costs) received from tenants at No. 22 as a contribution to fit-out costs.

D. The Expert Evidence relating to property valuation

1599. I have already commented on some of the property valuation evidence received. I should add to these comments a note of the valuations of the market value of the Viper Lease at May 2024, as these may prove relevant depending on what remedies the Claimants seek.

1600. Mr Manley in his Re-Amended Supplementary Report considered the market value of the Viper Lease (on the assumption that one could look through the Boomzone and LMH Leases) to be:

i) £32,325,000 if there was no requirement on Viper as landlord to meet a contribution to rates; or

ii) £30,150,000 if Viper had an obligation to meet a £250,000 contribution towards the rates,

1601. Ms Seal in her Further Supplemental Report considered the market value of the Viper Lease (on the assumption that one could look through the Boomzone and LMH Leases) to be:

i) £24,925,000 (on certain special assumptions including that this lease is for 20 years from May 2023 with a 15-year break and a 3% and 6% cap-and-collar RPI uplift, at the rent that was passing at the date); or

ii) £26,400,000 (on different assumptions including that this lease is for 20 years from May 2023 with a 15-year break and a 3% and 6% cap-and-collar RPI uplift, at the rent that was passing at the date and on the assumption that Timeline takes on the rates liability).

1602. If the market value of the Viper Lease at this time becomes important, these differences, and the best assumptions for the court to adopt, will need to be explored further.

E. The relevance of limitations

1603. The Defendants argue that a significant portion of the Invoicing Claims is statute-barred, being, the Claimants' claims in relation to any invoice paid prior to 9 May 2016 (six years before the claim form was issued on 9 May 2022). They argue that claims relating to any earlier invoice are statute-barred by reason of the primary limitation periods under the Limitation Act 1980 ("**LA 1980**").

1604. In order to apply LA 1980, it is necessary to consider what claims the Claimants have made that have been found to succeed. These include claims: in deceit; for breach of

contract; for breach of fiduciary duty; for unjust enrichment; relating to dishonest assistance; relating to knowing receipt; and an unlawful means conspiracy.

i. The Defendants' argument concerning limitation

1605. The Defendants argue that limitation applies as follows:

i) as regards the claims in tort (including deceit and conspiracy), s.2 LA 1980 applies, so that, the action could not be brought after the expiration of six years from the date on which the cause of action accrued, which for a claim in tort is when the damage is sustained;

ii) as regards the claims in contract, s.5 LA 1980 applies, so that, again, the action could not be brought after the expiration of six years from the date on which the cause of action accrued, which, in this case, is when the breach is alleged to have occurred;

iii) as regards the claim relating to unjust enrichment, such claims are to be regarded as "founded on simple contract" within s.5 LA 1980, so that again the action could not be brought after the expiration of six years from the date on which the cause of action accrued, which, in this case, is when there is some measurable benefit to the defendant (i.e. when the payments were received);

iv) as regards the claim relating to breach of fiduciary duty, the claims fall within s.21(3) LA 1980, by virtue of which the action could not be brought after the expiration of six years from the date on which the cause of action accrued, which in this case would be when the alleged breaches of fiduciary duty occurred;

v) as regards the claims relating to dishonest assistance and knowing receipt, s.21(3) also applies to claims in dishonest assistance and knowing receipt such that the action could not be brought after the expiration of six years from the date on which the cause of action accrued, which in this case would be when the Defendant allegedly dishonestly assisted a breach of trust, or when the recipient received trust property with the requisite knowledge.

ii. The Claimants' argument concerning limitation

1606. The Claimants argue that identifying the precise dates when causes of action accrued is impossible since even the Defendants cannot identify which particular invoices included undisclosed fees.

1607. I do not regard this as a conclusive argument. If LA 1980 otherwise applies, this is a matter that would need to be dealt with as a matter of evidence.

1608. More pertinently, they argue that the Defendants have no limitation defence for the following reasons:

i) The claims for breach of fiduciary duty against Mr Mirza and Tydwell are claims for fraudulent breach of trust. Mr Mirza and Tydwell were fiduciaries who misapplied pre-existing trust property, i.e. funds of the joint venture which Mr Mirza and Tydwell were entrusted with managing. Therefore, again no limitation period applies by virtue of s.21(1)(a) LA 1980.

ii) The claims for knowing receipt against Mr Mirza and Tydwell are actions to recover trust property or its proceeds previously received by the trustee and converted to his use, within the meaning of s.21(1)(b).

iii) The claims in deceit, conspiracy and dishonest assistance are "based upon the fraud of the defendant" within the meaning of s.32(1)(a) LA 1980;

iv) The invoicing claim inherently involves the deliberate concealment of facts relevant to the Claimants' cause of action so that s.32(1)(b) applies.

v) The claims of Viper in unjust enrichment are claims for relief from the consequences of a mistake for the purposes of s.32(1)(c) LA 1980;

iii. Does s.21 LA 1980 apply?

1609. The Defendants argue that the Claimants are mistaken in their reliance on s.21(1) LA 1980 to avoid limitations.

1610. The pertinent parts of s.21 LA 1980 are as follows:

> "**21.— Time limit for actions in respect of trust property.**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use."

1611. The Defendants refer the court to *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 ("***Williams***").

1612. In that case, Dr Williams sued the Central Bank of Nigeria for dishonest assistance and knowing receipt, and sought to rely on section 21(1)(a) LA 1980 to avoid limitation. The majority of the Supreme Court held that the claims were time barred as against the bank, holding that the exceptions in s.21(1) did not apply to strangers to the trust who were subject only to an ancillary liability; the exceptions only applied to claims brought against trustees themselves, and not anyone else who was involved in the fraud or fraudulent breach of trust. A party guilty of knowing receipt was not a trustee for the purposes of LA 1980. Accountability for any profits or losses did not make the party a trustee or bring it within the provisions of the Limitation Act relating to trustees. As Lord Sumption put it at [32]:

> "In my opinion, it is clear that s 21(1)(a) of the Act of 1980 is concerned only with actions against trustees on account of their own fraud or fraudulent breach of trust."

1613. This analysis however ignores the extended concept of "trust" and "trustee" that the courts have adopted in decisions such as *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 ("***Paragon Finance"***) and indeed in *Williams* itself, as explained in detail in *First Subsea Ltd v Balltec Ltd* [2017] EWCA Civ 186; [2018] Ch. 25 ("***First Subsea***"). Whilst the courts have refused to extend the concept of trust in this context to include a constructive trust that arises from a "stranger" wrongfully holding another's property, the courts have extended the concept to include the category of persons who, in the words of Millett LJ (in *Paragon Finance* at page 408 J)

> ... "though not strictly trustees, were in an analogous position and who abused the trust and confidence reposed in them to obtain their principal's property for themselves."

1614. Millett LJ refers to this as including "directors and other fiduciaries", and the class affected is referred to in *First Subsea* as a "class 1 fiduciary" – as opposed to a "class 2 trustee", being someone who was not originally a fiduciary but who becomes the trustee of a constructive trust. As Patten LJ puts this in *First Subsea* at [63]:

> "The *Paragon* case and *Williams v Central Bank of Nigeria* (and the authorities on which they are based) are concerned with identifying the class of fiduciaries who fall within the definition of "trustee" in section 38(1). This, as I mentioned earlier, is a question of status which is determined by the nature of the office which they lawfully hold and the power over the trust property which that gives them."

1615. I have found that the power that Mr Mirza and Tydwell held over the property of the JV Entities, in the circumstances, was sufficient to cause them to be fiduciaries and I consider that it is accordingly appropriate to regard them as a class 1 fiduciary so that s.21 LA 1980 will apply to their breaches of fiduciary duty.

1616. I find therefore that s.21 LA 1980 does apply to disapply limitation in relation to the claims that I have found relating to breach of fiduciary duty but not any of the other heads of claim.

iv. Does s.32 LA 1980 apply?

1617. The pertinent parts of s.32 LA 1980 are as follows:

> "**32.— Postponement of limitation period in case of fraud, concealment or mistake.**
>
> (1) … where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

Does s.32(1)(a) apply?

1618. The Claimants argue that the claims in deceit, conspiracy and dishonest assistance are "based upon the fraud of the defendant" within the meaning of s.32(1)(a) LA 1980. In oral argument I think they extended this application to cover also what they described as a "fraudulent breach of fiduciary duty".

1619. The Defendants argue that the Claimants are mistaken in their reliance on s.32(1) LA 1980 to avoid limitation. They argue that in order to rely on section 32(1), the Claimants must satisfy two elements:

i) first, they must show that section 32 is engaged in relation to the claims for which they seek to rely on it: the section only applies to actions based on the fraud of the defendant, cases of deliberate concealment of facts relevant to the claimant's right of action, or actions for relief from the consequences of a mistake; and

ii) secondly, if section 32 is engaged, the Claimants must show that they did not discover the fraud, concealment or mistake (as the case may be) until after 9 May 2016, or that they could not with reasonable diligence have discovered it until after that date.

1620. As to the first point, the Defendants accept that a claim in deceit is an action based on fraud for the purposes of s.32(1)(a).

1621. However, the Defendants argue that the Claimants cannot rely on s.32(1)(a) for the claims in conspiracy, breach of fiduciary duty, dishonest assistance or knowing receipt.

1622. They argue that:

i) the test laid down by the Court of Appeal in *Beaman v ARTS Ltd* [1949] 1 All E.R. 465, CA, per Lord Greene MR at page 467 is that an action is only "based on fraud" if, and only if, fraud is an essential element of the cause of action.

ii) This test was applied by Pearson J in *Phillips-Higgins v Harper* [1954] 1 QB 411. I consider this to be questionable, as that case was more focussed on the application of the Limitation Act 1939 to mistake, rather than fraud.

iii) The same test was applied more recently in *Cunningham v Ellis* [2018] EWHC 3188 (Comm) at [87] and *Sixteenth Ocean GmbH & Co KG v Societé Generale* [2018] EWHC 1731 (Comm) ("***Sixteenth Ocean***") at [137].

1623. Teare J in *Cunningham v Ellis* at [87] said the following*:*

> "For the purposes of section 32(1)(a), an action is only 'based upon a fraud' if fraud is an essential element of the cause of action (see McGee, *Limitation Periods* (8th ed.) at [20-009]; *Phillips-Higgins v Harper* [1954] 1 KB 550). This includes a claim for fraudulent misrepresentation (*Regent Leisuretime v Natwest Bank* [2003] EWCA Civ 391), but not 'moral turpitude' falling short of fraud (*Chagos Islanders v AG* [2004] EWCA Civ 997). For these purposes, that which must have been discovered or discoverable by the claimant before the limitation period will begin to run is knowledge of the essential facts constituting the alleged fraud."

1624. It is clear, however, that his focus was not on whether the claim was one within a class that was capable of being pleaded without a pleading of fraud (so that, for example, there could be breach of fiduciary duty without involving any fraud), but rather was whether the particular claim was reliant on fraud (e.g. where the case put by the claimant as to breach of fiduciary relied on fraud and would fail if fraud was not found). He went on at [88] to say:

> "For the purposes of section 32(1)(b), 'any fact relevant to the plaintiff's right of action' is one which is an essential element of the claimant's cause of action".

1625. If this is the meaning of "essential element" in s.32(1)(b) I do not see why it would be different in s.32(1)(a). In my view, the question is not whether the claim is the *type* of claim where an essential element of that type of claim is fraud – it is whether fraud is an essential element in the claim being considered by the court.

1626. This interpretation is also consonant with the decision in *Attorney General of Zambia v Meer Care & Desai* [2007] EWHC 952 (Ch) ("***Desai***"), in which Peter Smith J held that s.32(1)(a) applied not only to claims in deceit, but to any claim of which dishonesty was an integral element (for which one looks at what is alleged against the defendant), a conclusion which the judge justified on policy grounds and based on his interpretation of dicta of Mummery LJ in *Gwembe Valley Development Co Ltd v Koshy* [2004] 1 BCLC 131.

1627. The Defendants submit that such an approach should not be followed on the grounds that:

i) It is in direct conflict with *Beaman* (which is binding Court of Appeal authority) and with the more recent decisions in *Cunningham* and *Sixteenth Ocean*.

ii) The correctness of Peter Smith J's conclusion in *Desai* was brought into question in *Sixteenth Ocean* at [137] (where it was stated that "section 32(1)(a) makes no reference to any ground of claim other than fraud"), and the

Defendants submit that the reasoning in *Sixteenth Ocean* is to be preferred to that of *Desai*, because it accurately reflects the wording of section 32(1)(a) and does not seek to invoke policy considerations to widen the meaning of the words of the provision.

iii) It conflicts with the rejection by Ouseley J in *Chagos Islanders v AG* [2003] EWHC 2222 (QB) ("***Chagos Islanders***") of an argument that unconscionability (i.e. that it would be unconscionable for the defendant to rely on the lapse of time as a bar to the claim) was sufficient for section 32 to be engaged. They point out that as noted in *Sixteenth Ocean* at [134], the Court of Appeal refused permission to appeal ([2004] EWCA Civ 99), holding at [45] that:

> "… the Limitation Act 1980 is intended to provide a complete code, including the circumstances in which it is unconscionable for a defendant to seek to invoke limitation…it is simply not open to the courts to seek to circumvent the effect of the 1980 Act by adding fresh grounds".

1628. As to their first argument, that *Desai* is in direct conflict with *Beaman*, this point is partly answered within *Desai* where it was pointed out that the Court of Appeal's interpretation was influenced by the use of the word "fraud" in connection with the separate provision for concealment in the 1939 Act, a word now replaced by "deliberate" in section 32(1)(b) of the 1980 Act.

1629. Secondly it is important to note that that case was based on conversion, said to be a "fraudulent" conversion, and Lord Greene MR in *Beaman* had considered that in the context of the "civil action of conversion" the word fraudulent "was nothing more than abusive epithet" (see page 467 at D). This then was a case where fraud could never be an essential element of the cause of action. The case therefore says nothing about cases where fraud might or might not be an essential element of the case pleaded.

1630. As to the second and third arguments based on *Chagos Islanders* and *Sixteenth Ocean*, in my view, these arguments confuse two propositions:

i) **The proposition that "fraud" means fraud**. This is the argument that "fraud" in s.32 means fraud and not some more general degree of moral turpitude; and

ii) **The proposition that only actions that must always be based on fraud count.** This is the argument that an action based on "fraud" must for the purposes of s.32(1)(a) refer only to a class of action where fraud is always an integral part (such as an action for deceit) and does not apply to a class of action which could be maintained without fraud being established (even if in the case before the court, fraud is an essential element of the case being pleaded).

1631. *Chagos Islanders* (at [615] to [620]) was dealing with the argument that "fraud" means fraud and it was the resolution in that case of that argument that was commended by Peter MacDonald Eggers QC (now KC) sitting as a Deputy High Court Judge in *Sixteenth Ocean*. These cases do not establish the proposition that only actions that must always be based on fraud count. This is an answer to the Defendants' second and third arguments.

1632. Accordingly, I consider that s.32(1)(a) applies to any of the causes of action where fraud is an essential element of the case pleaded and established.

1633. This clearly includes the misrepresentation claim.

1634. It is arguable whether it includes the claim for breach of fiduciary duty, but as I have already found that cause of action to be covered by s.21 LA 1980, I need not determine that point.

1635. I find that it does apply to the claims for unjust enrichment, as I have found that it has been the fraud that has given rise to the essential element of this claim that there be wrongdoing.

1636. Similarly, I find that it does apply to the claims that I have found for dishonest assistance as it has been an essential element of those claims that they were based on participation in the misrepresentation.

1637. Again, I find that it does apply to the claims that I have found for an unlawful means conspiracy as it has been an essential element of those claims that they were based on the use of false and dishonest invoicing.

1638. It does not, however, apply to the claims for knowing receipt or for breach of contract as fraud has not been an essential element of those claims.

Does s.32(1)(c) apply?

1639. The Claimants argue that the claims of Viper in unjust enrichment are claims for relief from the consequences of a mistake for the purposes of s.32(1)(c) of the Limitation Act 1980.

1640. The Defendants accept that an unjust enrichment claim is an action for relief from the consequences of a mistake - but only insofar as the claim in unjust enrichment is limited to a claim based on mistake.

1641. However, insofar as the Claimants rely on failure of basis and "wrongdoing" as unjust grounds, they argue that the Claimants cannot rely on s.32(1)(c), which applies only where mistake is an essential ingredient of the cause of action.

1642. In support of this proposition they cite *Phillips-Higgins v Harper* [1954] 1 QB 411, accepted as correct by Lord Walker in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners and the Attorney General* [2006] UKHL 49, [2007] 1 AC 558 at [146]-[147], albeit that he considered the proposition to rest on "a surprisingly uncertain basis" and that there might be arguments for review of this point. Despite these reservations, I consider that I am bound by Lord Walker's finding on this point.

1643. As I have concluded that the Claimants have succeeded in relation to unjust enrichment as a result of wrongdoing, rather than as a result of mistake, I must agree with the Defendants that the unjust enrichment that I have found in relation to the invoicing claims does not come within the purview of s.32(1)(c).

Does s.32(1)(b) apply?

1644. Finally, the Claimants argue that the invoicing claim (in all the various ways in which it has been pleaded) inherently involves the deliberate concealment of facts relevant to the Claimants' cause of action so that s.32(1)(b) applies. They argue that "concealed" means to keep something secret, either by taking active steps to hide it, or by failing to disclose it, and "deliberately" requires that the defendant must have considered whether to inform the claimant of the relevant fact and decided not to.

1645. As to this, the Claimants point out that they had identified in their pleadings the acts of concealment relied on as including (a) the fraudulent Invoice Representations; (b) the terms of the Invoices and Requests (which concealed the fact that Tydwell was demanding sums in excess of those required to defray third-party costs and/or purporting to charge fees); and (c) the failure of Mr Mirza to comply with his fiduciary duties and/or duties under the JVA to inform the Morjarias of his wrongdoing and/or of those matters that which would have uncovered that wrongdoing.

1646. In support of these contentions, the Claimants cite *Canada Square Operations Ltd v Potter* [2023] UKSC 41; [2024] A.C. 679 ("***Canada Square***"), where, as summarised in the headnote, it was held that:

i) on a true construction, the concept of "concealment" in section 32(1)(b) LA 1980 connoted keeping a fact secret, whether by taking active steps to hide it or by failing to disclose it;

ii) section 32(1)(b) did not contain a requirement that the concealment (whether active or by way of non-disclosure) was in breach of either a legal duty or a duty arising from a combination of utility and morality;

iii) the fact that was concealed had to be relevant to the right of action asserted by the claimant in the proceedings before the court, in that it was a fact without which the claimant's cause of action was incomplete, but it was not necessary that the defendant knew that the fact was relevant to the right of action or was reckless as to that possibility;

iv) that a fact was concealed "deliberately" within section 32(1)(b) if the defendant intended the result of the concealment, it being insufficient that the defendant was reckless as to the possibility of the fact being concealed; that, thus, section 32(1)(b) required:

a) a fact relevant to the claimant's right of action,

b) the concealment of that fact from the claimant by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and

c) an intention on the part of the defendant to conceal the fact or facts in question;

v) that, likewise, there was a "deliberate" commission of a breach of duty within section 32(2) if the defendant intended to commit, or knew that he was

committing, a breach of duty, it being insufficient that the defendant was reckless as to the possibility that what he was doing was a breach of duty.

1647. In summary, they argue that each time the Defendants decided to mark up a third-party invoice, they must have decided not to disclose the fact or amount of the mark-up to the Claimants. Equally, each time Mr Mirza refused a request for the provision of third-party quotations or invoices, he was deliberately concealing their contents.

1648. I agree that the relevant Defendants were concealing the fact that Tydwell was profiting (to a much larger extent than the management fees disclosed) from marking up invoices by presenting invoices and requests for payment that appeared to be based on third-party costs but having inflated those costs. This was a deliberate attempt to disguise a secret profit and must amount to deliberate concealment within s.32(1)(b). I agree therefore that s.32(1)(b) applies to all the invoicing claims.

1649. Where s.32 applies, time does not start to run until the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

1650. The law on this point was recently summarised in *Duke of Sussex v MGN Ltd* [2023] EWHC 3217 (Ch); [2024] E.M.L.R. 5 at [1384]. In short, time runs from the point when a claimant knew, or could with reasonable diligence have known, that they had a "worthwhile claim". A claimant who has no actual knowledge is fixed with knowledge of:

i) what a reasonably attentive person would learn; and

ii) once there is something (a "trigger") to put him on notice of the need to investigate, what a reasonably diligent investigation would reveal.

The actual circumstances of the claimant are to be taken into account, but his personal characteristics, such as naivety, lack of curiosity or being ill-informed, are disregarded.

1651. Another summary is given in the judgment of Trower J in *Boyse (International) Ltd v NatWest Markets plc* [2021] EWHC 1387 (Ch) (at [27]-[40]. In summary:

i) The claimant will have "discovered the fraud" when he has discovered the essential facts constituting the alleged fraud. Generally, this is determined by the application of the "statement of claim" test - i.e. does the claimant have sufficient knowledge to enable it to plead a claim?

ii) In some cases, discovery of the relevant facts involves a process over a period of time as pieces of information become available, so that it may be difficult to identify a precise point of time at which the claimant has (or is deemed to have) sufficient knowledge.

iii) The court must look for the gist of the cause of action to see if that was available to the claimant without knowledge of the concealed material. At the point at which the claimant can plead the complete cause of action, however weak or strong, time starts to run. Not every detail needs to be known and a realistic view must be taken by the court.

1652. Time starts to run before the claimant has the requisite knowledge if, by exercising reasonable diligence, the claimant could have discovered the fraud or concealment. This is a question of fact in each case. As Neuberger LJ stated in *Law Society v Sephton* [2004] EWCA Civ 1627, reasonable diligence "means not the doing of everything possible, not necessarily the doing of anything at all, but the doing of that which an ordinarily prudent buyer and possessor of a valuable work of art would do having regard to all the circumstances, including the circumstances of the purchase". For the purposes of this case, the standard is thus what an ordinarily prudent joint venture partner would do, or what an ordinarily prudent claimant would do, having regard to all the circumstances.

1653. The key date for this purpose is 9 May 2016, six years before the issue of the claim form.

1654. The Claimants in the PoC say that they discovered the fraud and its concealment "only during 2021 when the matter was investigated with the assistance of lawyers" and in the Response say that neither they nor a competent individual in their position could with reasonable diligence have discovered the fraud, concealment or mistake prior to 9 May 2016, relying on:

> "(a) the control of the information regarding invoicing by Mr Mirza and/or Tydwell; (b) the acts of concealment as to that information pleaded above; and (c) the trust legitimately placed in Mr Mirza by the Morjarias".

1655. The Claimants argue in their closing submissions that they did not have, and could not have had, the relevant knowledge at that time. The fact that the Claimants knew in 2010 that Mr Mirza had failed to comply with a request from IQEQ to provide back-up invoices was not sufficient to start time running. Although s.32 refers to discovery of "the concealment", that means the concealment of a worthwhile claim. If a builder fills in above defective foundations, or papers over some cracks, the fact that the employer knows that the foundations have been filled in, or the wall has been papered, is not in itself enough to start time running – they must discover that something untoward lies beneath.

1656. I agree. The Defendants have presented various arguments to the effect that the Morjarias and the JV Entities must have known that Tydwell was charging management fees, but that is irrelevant to the case I have found against the relevant Defendants. There was nothing prior to 9 May 2016 to put the Morjarias and the JV Entities on notice that what were being presented as third-party fees were being inflated.

1657. Accordingly, for various reasons I find that the Defendants' defence based on limitations fails.

20. CONCLUSION

A. Matters left to determine

1658. Despite the huge amount of time and expense that the parties have already put into this litigation, there is still much for the court to decide.

1659. The Claimants will need to elect between the various remedies available to them. Where these remedies are discretionary, the court will need to consider how to use its discretion, particularly if rescission is sought and third parties are affected by this.

1660. A further complication is that the court must not lose sight of the fact that Mr Mirza has repaid the BOS loan on behalf of Viper and whatever solution is reached should avoid the undue enrichment of Viper. Furthermore, if Boomzone or LMH have funded the fitting out of No. 22 from their own resources (rather than out of rents or fitting-out contributions received from Timeline or other tenants), then it may over-reward the Claimants not to recognise this.

1661. I note also that there may be a potential unfairness (but one might say it is one of Mr Mirza's making) in that Trafalgar has been able to purchase the Viper Lease at a price that was depressed by the existence of the Boomzone Leases, but may find that it comes out of these proceedings with a Viper Lease that is free of the Boomzone Leases and the LMH lease. Whether this point should have any bearing on what the court does next may be a matter for further argument.

1662. More expert forensic accountancy advice is likely to be needed to apply the findings already made to the facts. There may also need to be some further property valuation advice.

1663. There must be a concern that the way that this litigation has evolved is generating a level of costs that is not commensurate with the amounts at issue. I will express my hope that this judgment has reduced the matters at issue sufficiently that it is now realistic that the parties, despite their differences, could reach some accommodation that would avoid further litigation, if only to avoid the ultimate result in that most important of authorities, *Jarndyce v Jarndyce.* I strongly recommend that the parties consider some form of mediation.

B. Further directions

1664. A short consequentials hearing has been ordered for later this week.

1665. I suggest, but am open to persuasion to the contrary, that this hearing should deal only with the principle of costs to date as regards the Part 20 proceedings (unless there is a good reason why this cannot be dealt with then) and if there is any application for permission to appeal, that application and that other matters, including directions for a trial on quantum liability should be left to a further date, perhaps after a period during which mediation may be explored.