Orb A.R.L., Roger James Taylor, Nicholas Thomas v Andrew Joseph Ruhan, Anthony Edward Stevens, Grenda Investments Limited, Phoenix Group Foundation, Bluestone Securities Limited v Simon John McNally, Simon Nicholas Hope Cooper, Gail Alison Cochrane, Gerald Martin Smith, SMA Investment Holdings Limited (a Marshall Islands company)

Case No: 2012 Folio 1414

High Court of Justice Queen's Bench Division Commercial Court

11 February 2015

[2015] EWHC 262 (Comm)

2015 WL 537843

Before: Mr Justice Cooke

Date: 11/02/2015

Hearing dates: 2nd, 3rd, 4th and 5th February 2015

Representation

Antony White QC and Nicholas Gibson (instructed by Stewarts Law) for the Claimant and proposed 5th and 7th Parties.

Richard Waller QC , Tim Jenns and Andrew Pearson (instructed by Memery Crystal) for the first Defendant.

Jonathan Adkin QC and Ruth den Besten (instructed by Peters and Peters) for the proposed 6th Party.

Ian Mill QC and Mark Vinall (instructed by Jones Day) for Mr McNally and Mr Cooper.

Philip Marshall QC and Justin Higgo (instructed by Akin Gump LLP) for the Second to Fifth Defendants.

Approved Judgment

Mr Justice Cooke:

The claimants' applications

1 The claimants seek permission to amend the Claim Form and Particulars of Claim and to add four further defendants in addition to the original defendant Mr Ruhan. They further seek permission to serve the prospective second-fifth defendants out of the jurisdiction and a proprietary injunction against those defendants with ancillary relief, including permission to enforce the orders obtained abroad. I am not going to set out the complex background to these applications which is fully canvassed in the extensive evidence put before the court and the parties' skeleton arguments but will, in as short a form as I can, set out my reasons for coming to the conclusions that I have in relation to the claimants' applications.

2 In summary, I give permission to amend the Amended Claim Form and the Particulars of Claim

to plead the additional facts relied on against Mr Ruhan but refuse permission for service out of the jurisdiction upon the second-fifth prospective defendants and refuse to grant the injunctions sought against any of them. Mr Ruhan has given undertakings in respect of his assets which are satisfactory to the claimants.

The relevant tests

3 There is no dispute between the parties as to the relevant principles to be applied in the context of the different applications. Permission for amendment is required under CPR 17.1(3) and 19.4(1) and as a general rule amendments should be allowed as long as any prejudice to the other party can be compensated for in costs (CPR 17.3.5). Permission will be refused where the amendment has no realistic prospect of success, applying much the same test as under CPR Part 24 in respect of summary judgment applications.

4 In relation to service out, I have to determine whether there are serious issues to be tried on the merits between the claimants and the prospective second-fifth defendants and whether there is a good arguable case that the claims fall within the jurisdictional gateways. There is also an issue which is raised in relation to the need for the claimants to make full and frank disclosure in circumstances where the application for service out of the jurisdiction is made with the second, third and fourth defendants present on the *Sphere Drake* basis (namely that of accepting service in order to avoid the inconvenience of serving out of the jurisdiction, whilst preserving the right of the defendants to contest the court's jurisdiction). The fifth defendant has not accepted service but solicitors and counsel representing the second-fourth defendants were in a position to argue the fifth defendant's position and did so.

5 So far as concerns the proprietary injunction, the claimants must show that there is a serious issue to be tried on the merits, that the balance of convenience is in favour of granting an injunction and that it is just and convenient to do so. An additional issue arises inasmuch as the proposed defendants submit that a claimant who seeks an equitable remedy in the form of a proprietary injunction must come to the court with clean hands.

The alleged oral agreement of 6th May 2003

6 There is in my judgment a serious issue to be tried in relation the alleged oral agreement made, as alleged by the claimants, between Dr Smith (a convicted fraudster) acting on behalf of the first and third claimants, the second claimant, Mr Taylor, acting on his own behalf and Mr Ruhan acting on his own behalf. Though the defendants have powerful points to make against the existence of any such agreement, I cannot see how a court could properly resolve the dispute without hearing the evidence of the protagonists. The formal contracts executed in the form of the Sale and Purchase Agreement (the SPA) and the Headstay Agreement militate against the existence of such oral agreement by reason of their general contents, leaving aside the entire agreement clause which is said by the claimants not to apply to an agreement with Mr Ruhan personally. Dr Smith has given inconsistent evidence about the oral agreement in criminal proceedings and gives no evidence about it in the context of these proceedings. No evidence appears from Mr Taylor and the evidence of Mr Campbell and Dr Cochrane is both limited and open to question. In particular Mr Campbell's evidence is open to the interpretation that the Headstay Agreement did document the oral agreement allegedly made. There is however no direct evidence from Mr Ruhan either. The claimants also rely on Mr Thomas' first affidavit and a letter of 23rd July 2004 from Mr Chan as secondary evidence. As already indicated, I cannot see how the court can resolve a dispute of this kind about an oral agreement without hearing the evidence of the individuals concerned, tested by cross-examination.

Illegality

7 It is contended by the proposed defendants that the object of the alleged oral agreement was to deceive Morgan Stanley and that, in the light of the decision of the *Supreme Court in Les Laboratoires Servier v Apotex Inc [2014] UKSC 55* , that contract would be unenforceable for illegality *ex turpi causa* . The claimants do not however plead that as the object of the agreement, instead alleging that the primary object was profit sharing between Orb and Mr Ruhan on a

personal basis. There are passages in the evidence of Mr Thomas which might be taken to support the unlawful objective however. Lord Sumption at paragraphs 23-30 and especially paragraph 28 defined what was meant by “turpitude”, referring to criminal acts or quasi-criminal acts which engaged the public interest. This he said encompassed cases of dishonesty or corruption (paragraph 25). Lord Toulson also *referred to the dictum of Pearce LJ in Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 QB 621* in stating that a contract which had as its object the direct commission of the tort of deceit was unenforceable.

8 It is clear however from the decision of the Supreme Court and many other decisions on illegality that, therefore, the application of what is now considered a rule of law is fact-sensitive. The exact terms of what, if anything, was agreed as part of the alleged oral agreement will assume considerable importance in this regard. For the same reasons as I have given in relation to the existence of the oral agreement, I cannot see how this matter can properly be resolved without a trial.

9 A further allegation that the agreement involved a payment to Mr Taylor, a director, of a secret profit, when the company was verging on insolvency, was also made but whether this would constitute “turpitude” for Lord Sumption's test is open to question and whether the company could rightfully be considered insolvent is a question of fact. Trial issues arise here too.

The entire agreement clauses in the SPA and Headstay Agreement

10 These arguably do not touch any agreement between Orb and a different entity than Atlantic, namely Mr Ruhan. Equally the warranty given by Orb that there was no joint venture consortium or partnership arrangement with respect to any group company was one given to Atlantic, not Mr Ruhan. The terms of the oral agreement remain to be determined at trial.

Fiduciary duties

11 As pleaded, the oral agreement was that Mr Ruhan would redevelop, restructure, manage and/or dispose of assets within the Hotel Portfolio and the Orb Securities Portfolio in order to maximise the financial benefit realised from such assets and that he would pay a share of the net financial benefit to him realised from such activity (paragraph 40(3) and (4) of the Amended Particulars of Claim) to the claimants. It was also agreed, as alleged in paragraph 41 of the Amended Particulars of Claim, that Mr Ruhan would pursue the joint venture with Orb, Mr Taylor and Mr Thomas in the best interests of all the parties, would deal with the Orb Assets on an “open-book basis” and would account to the claimants fully and honestly for any financial benefits realised (sub-paragraphs 4 and 5). In consequence it is alleged that Mr Ruhan owed fiduciary duties to the claimants as set out in paragraph 42 of the Amended Particulars of Claim. At paragraphs 66 and 91 of the Amended Particulars it is alleged that Mr Ruhan carried out various schemes “in order to acquire through corporate vehicles and sell onto third parties the Orb Assets for his personal profit and to conceal such sales and profits and to deprive the claimants of their agreed share of those profits”. It is alleged that in relation to all of the corporate entities referred to in paragraphs 70-109 which were owned and/or controlled by Mr Ruhan, they were mere facades or alter egos for Mr Ruhan or devices to conceal the true facts and, because they were used as they were, any profits made through them are profits for which Mr Ruhan as fiduciary is liable to account, as well as being liable personally for breach of the oral agreement.

12 I should say at this stage that, as a result of orders for disclosure made by the Isle of Man courts in September and October 2013 and the Isle of Man Settlement which took place in March 2014, the claimants have, for more than 9 months, been in possession of documents which relate to the Arena Settlement in the Isle of Man and have had the run of Mr Ruhan's offices in Baker Street with all the documents he had there. They have additionally had the benefit of assistance from Mr Cooper and Mr McNally who were involved in the Arena Settlement in circumstances which are in dispute but where Mr Ruhan has a strong case that they acted on his behalf and as his advisers and nominees in relation to assets in the Arena Settlement. The cumulative effect of these matters is that the claimants have had, over an extended period of time, every opportunity to examine the documents relating to companies held in the Arena Settlement, the assets belonging to them, the transactions undertaken by them and the loans and distributions effected by them. The claimants are therefore in a strong position to see, from the documents, what has been going on and to make good any allegations that they wish to make in relation to

transactions undertaken, loans made and profits obtained by companies which are alleged to be Mr Ruhan's vehicles under that umbrella, and, as appears from the Isle of Man Settlement documents which were disclosed during the course of the hearing, other companies which are also alleged by the claimants to be Mr Ruhan's creature companies held by Messrs Cooper and McNally as nominees, though falling outside the Arena Settlement.

13 In this context, the only profits identified as falling within the oral agreement arose from the sale of the three Hyde Park Hotels, namely the sale of the Lancaster Gate Thistle Hotel and the sale of the two Kensington Park Thistle Hotels. No other profits of any kind have been identified in relation to any other sale of items forming part of the Orb Assets.

Tracing, following, constructive trust, dishonest assistance in Mr Ruhan's breach of fiduciary duty and knowing receipt on the part of the 2nd-5th proposed defendants

14 The issues centre on a payment of just under £92 million derived from the sale of Sentrum Holdings Ltd which was ultimately payable to Euro Estates Holdings Ltd as set out below, a company said by the claimants to be owned by the second proposed defendant (Mr Stevens) as nominee for Mr Ruhan. The difference between following and tracing has been explained by Millett LJ (as he then was) and what is alleged here is that the £92 million paid by Sentrum properly represents the profits made on the Hyde Park Hotels because there is a sufficient causal and transactional link to render it a substitute for tracing purposes. The essential principles relied on were those set out by the *Court of Appeal in Relfo v Varsani [2014] EWCA Civ 360* at paragraphs 22-23, 29–33, 44 and 56- 59.

15 The proposed defendants maintain that there is a complete lack of focus on the part of the claimants in identifying the property to which a constructive trust attaches and the appropriate substitute for it. It is said that the various transactions relied on include sales of hotels (where real property is transferred), sales of companies (where shares are transferred) and loans to companies (which do not give rise to any interest in the real property or shares of the company in question). Thus, it is said, it is impermissible to trace monies obtained on the sale of the Hyde Park Hotels by the Cambulo Group to third parties (where the Cambulo companies are said to be owned by Mr Stevens as nominee for Mr Ruhan) into loans made to Sentrum or Bridge Tower Holdings 1 or 2, into the assets of those companies and into a compromise agreement under which Sentrum in effect paid money to Euro Estates. As already pointed out however, the claimants' pleaded case involves a scheme or schemes set out in paragraphs 66 of the Amended Particulars of Claim onwards (particularly paragraphs 70-109) whereby companies, nominees, loans and distributions were made, all at Mr Ruhan's behest, in order to conceal profits and to deprive the claimants of their agreed share. The alleged use of the various companies, shareholdings, loans and other transactions as vehicles for this alleged purpose raises considerable issues of fact. The question is whether or not, given the serious nature of the allegations made and the inferences which are sought to be drawn, the claimants can establish that there is a serious issue to be tried in relation to them.

16 Mr Stevens was originally the named 100% beneficial owner of Euro Estates which in turn owned Cambulo Madeira which entered into a Business Sale Agreement (BSA) of 1st March 2005 under which the three hotels, the Thistle Lancaster Gate, the Thistle Kensington Park and the Thistle Kensington Palace were to be purchased by it from HPII (at prices which resulted in no profit to Atlantic in which Mr Ruhan had, at the time a one third interest, the proceeds being used to pay off the Morgan Stanley loans inherited under the SPA). At a later stage, 20% of the shares in Cambulo Madeira were transferred to Wellard, a company owned by Mr Stevens' brother. It is the claimants' case that these shareholdings in Cambulo Madeira are held as nominees for Mr Ruhan so that profits received by that company are subject to the alleged profit-sharing oral agreement.

17 Cambulo Madeira's rights under the BSA with regard to the Thistle Lancaster Gate Hotel were novated to its subsidiary Cambulo Lancaster Gate which borrowed about £58.5 million from Investec and completed the purchase of the hotel in March 2006. Cambulo Madeira agreed to sell its shareholding in Cambulo Lancaster Gate to independent third parties for £67.5 million (as compared with the £56 million it had agreed to pay under the BSA). Completion did not take place until August 2006 at a gross profit of £11.5 million to Cambulo Madeira, as pleaded by the claimants, but £7.76 million on a net basis, according to Mr Stevens.

18 Cambulo Madeira's rights under the BSA with regard to the other two hotels were novated to two further subsidiaries, Cambulo Kensington Palace and Cambulo Kensington Park and in April 2006 completion of the purchase of the long leasehold interest in the Thistle Kensington Palace and of the freehold interest in the Thistle Kensington Park took place for a total consideration of £69 million.

19 The Candy brothers entered into a joint venture with the Cambulo companies through the incorporation of Cambulo Property Holdings Ltd (CPHL), a company in which the Candy brothers had directly or indirectly a 50% interest and Cambulo Madeira the other 50%. CPHL, through the Candy brothers' contacts, obtained funding from the Bank of Scotland for £75 million to fund the purchase. It was a term of the Debenture over the assets that they should not be used as security for any other transaction without the Bank's consent. The freehold of the Thistle Kensington Palace was purchased as was the freehold of 8 De Vere Gardens, which adjoined it, as part of a scheme of development, so that the hotels could be refurbished and sold as residential accommodation.

20 In March 2008, the Thistle Kensington Palace and the Thistle Kensington Park were sold by CPHL for a total of £320 million to third parties following the obtaining of planning permission and development by CPHL. The claimants allege that profit of approximately £250 million was thereby made on that sale but have failed to take into account the Candy brothers' interest of 50%, about which there is in reality no dispute.

21 On the evidence which has emerged from Mr Stevens, there is in fact little real doubt about the figures, a matter to which I will revert later. The profit to Cambulo on the Lancaster Gate Hotel amounted to £7.76 million net after deduction of expenses from the sale price of £67.5 million, as compared with the purchase price of £56 million. So far as the Kensington Park and Kensington Palace Hotels were concerned, additional expenditure was involved in relation to the purchase of other land and the development of social housing in order to fulfil the terms of a section 106 agreement with the local authority which was necessary in order to obtain planning permission. There is no reason to doubt Mr Stevens' evidence that the total profit on the Kensington Hotels for Cambulo Madeira amounted to £114.6 million, as its half share of the net profit.

22 There is a serious issue to be tried about Mr Stevens' beneficial ownership of Cambulo Madeira and whether he was in truth a nominee for Mr Ruhan. Reliance is placed by the claimants on a MacDonald Partnership Attendance Note of 6th May 2006, on the first and second affidavits of Mr Thomas and the letter from Mr Hunter exhibited to it, on the evidence of Mr Trachtenberg and on a letter from Mr Ruhan to Sheikh Tamin Al Thani of 30th September 2012. Mr McNally's first affidavit also supports the proposition. This is a matter which would require investigation at trial. If, as appears on the evidence before the court, a figure of £122.36 million represents the profits obtained on the sale of the three hotels and Mr Ruhan is the true owner of 80% of Euro Estates through the nominee holding of Mr Stevens, or 100% if Mr Stevens' brother's interest is to be ignored, the issue arises as to whether or not the figure of just under £92 million paid by Sentrum Holdings Ltd to Euro Estates Ltd and as thereafter disbursed by Mr Stevens can be properly seen as a substitute asset, representing the profit from the proceeds of sale of the hotels.

23 On the evidence before the court, there is no causal link between the profits made on the Hyde Park Hotels and monies in the hand of Sentrum Holdings Ltd which were used to pay the £92 million. It is asserted in the claimants' evidence that Orb Assets were used to set up the Sentrum data centres, that Mr Ruhan funded Sentrum from the Orb Assets and used them to secure Sentrum's borrowings. Ultimately, the claimants mainly rely on an inference that profit on the Thistle Lancaster Gate Hotel of £7.76 million was available for use at the relevant time in establishing Sentrum but there was no evidence at all that these funds were used in the way suggested. There was no evidence that they ever went into the Arena Settlement. The allegation was based solely upon speculation by Ms Stickler and supposed verification by Mr McNally in his first affidavit at paragraphs 4 and 5 and 14 to 17, without any supporting evidence in the shape of documents, despite the fact that the claimants have had access to the Arena Settlement documents in the circumstances I have already outlined (since October 2013 and March 2014).

24 In the light of the evidence from the defendants, in my judgment the point is unsustainable. Sentrum 1 owned by Sentrum Holdings (owned by Mr Ruhan) purchased a building in Camberley in 2005 with the aid of external funding. Sentrum 1 was never a company held within the Arena

Settlement and was sold to Merill Lynch in January or February 2006, the profits of which were then used by Mr Ruhan to acquire buildings for further Sentrum companies and new data centres at Croydon, Watford, Woking and Hayes and Rugby. External funding was arranged for Sentrum 2, Sentrum 3 and Sentrum 4, secured on the assets of those companies including the buildings in question. Sentrum 2 began to trade on 1st March 2006 before any profit could be made on the three hotels. Ms Stickler, for the claimants, states that in its early stages through to at least the end of 2007, Sentrum 2 was heavily dependent upon borrowing from its owners as well as from external lenders and that it was loss making until the end of December 2008. What can be seen however is that there was £3 million funding from Unicorn, within the Arena Settlement, and £59.75 million funding from Investec, with the facility increased to £64.45 million before refinancing with a £72 million loan from Anglo-Irish. The nominee shareholdings in Sentrum 2 which existed at incorporation were transferred to Sentrum Holdings, within the Arena Settlement, on 18th August 2006 and Mr Ruhan, the alleged ultimate beneficial owner, provided financial support, according to its accounts. All that Ms Stickler can say is that the Arena Settlement was, via its trustees, the vehicle in which a large number of the Orb Assets were placed and that Unicorn, a company within the Arena Settlement provided a loan which the accounts show as amounting to £1,714,300 at the end of December 2007 and as fully repaid at the end of 2008. Unicorn was the treasury company within the Arena Settlement but there is nothing to identify the monies loaned from Unicorn to Sentrum 2 with the proceeds of sale from the Hyde Park hotels nor any suggestion that the external loans were secured by such proceeds as opposed to being secured on the assets of the Sentrum companies themselves, of which evidence has been provided in the shape of loan documents with security.

25 Since the sale of the two Kensington Hotels did not take place until March 2008, their proceeds can be ruled out altogether. On the evidence, £7.76 million was available to Euro Estates in August 2006 but no evidence has been adduced of the use of these funds in relation to Sentrum. In her affidavit, Ms Stickler says that she believes that the external borrowings with Investec and Anglo-Irish were secured by charges over the Orb Assets and were likely repaid in part using the proceeds of sale from the hotels which were also used directly in investment in the Sentrum business. The only basis for this belief appears to be the availability of the Lancaster Gate Hotel profits in August 2006 to Euro Estates. That is wholly insufficient for any inference to be drawn as to a connection with Sentrum.

26 Mr McNally's supporting evidence adds nothing because he makes assertions which are wholly unsupported. To say that the Sentrum Group would not have got off the ground without the use of the Orb Assets, that without the loan from Unicorn it would not have been able to trade as a going concern and that its borrowings from Investec were cross-securitised with other borrowings secured on Orb Assets is worthless without any particularity or evidence.

27 On 26th June 2012 Digital Stout Holdings LLC purchased the shares in Sentrum Holdings which gave rise to a figure, after repayment of the external lenders of a balance of £220 million, which was paid to Glen Moar, a company within the Arena Settlement. A dividend of £160 million was then paid by Glen Moar to its shareholders, namely the trustees of the Arena Settlement.

28 On the evidence produced to the Court, which is in reality undisputed, the profit from the sales of the two Kensington hotels did not become available to Euro Estates until March 2008. By this time, Mr Ruhan, using companies outside the Arena Settlement, namely Bridge Towers Holdings 1 Ltd, Bridge Towers Holdings 2 Ltd and six subsidiary Bridge Towers companies, was involved in property development in Qatar in two separate projects. In pursuing this, Bridge Tower Holdings 1 obtained a loan of $143 million from Investec, secured on the Qatar assets themselves, and on the Sentrum assets also (rather than vice-versa). Investec was however looking for additional security and Mr Stevens' evidence is that, for a fee and a small profit participation, he was prepared to assist Mr Ruhan in this respect. On 21 December 2007, although the Kensington Hotels had not yet been sold, profits were expected when they did sell and Mr Stevens allowed Euro Estates 80% shareholding in Cambulo Madeira to be used as collateral in respect of the Investec loan to Bridge Tower Holdings 1, it being a term required by Investec that, if there was a relevant sale of the Kensington Hotels which preceded the realisation of the proceeds of the Qatar development or other refinancing, the proceeds from such disposal would be used to repay the outstanding Investec loan facility.

29 When the Kensington Hotels were sold in March 2008, the proceeds were then used to discharge the Investec loan with Euro Estates concluding a direct facility agreement with Bridge Tower Holdings 1 on virtually identical terms as the facility agreement previously in place with

Investec. There was no room therefore for Euro Estates to make the Kensington Hotel profits or its shareholding in Cambulo Madeira available for Sentrum's business.

30 A further £19.9 million was then made available by Euro Estates which could be taken up either by Bridge Towers Holdings 1 or Bridge Towers Holdings 2 in respect of the two distinct Qatar development projects. No evidence is before the court as to where that sum went, as to which company took up the money and in which development it was utilised.

31 Following the financial crisis in late 2008, the Qatar development “turned into something of a disaster” on Mr Stevens' evidence. The Euro Estates loans fell into default in 2009 and 2011 respectively and the Bridge Tower companies were engaged in litigation in Qatar without cash or immediately realisable assets which could give rise to recovery by Euro Estates on the loans.

32 It was in November 2012 that Euro Estates entered into a Termination and Settlement Agreement under which just short of £92 million, representing the loan capital advanced by Euro Estates was to be paid to it on behalf of the borrowers, together with 10% of the recoveries to be made by those companies from the investments in Qatar. The £92 million approximately was paid to Legion Management Corporation, a company outside the Arena Settlement but administered by Messrs Cooper and McNally in the same way as the Bridge Tower companies (as nominees for Mr Ruhan, on the claimants' case). The shares of Legion Management Corporation were then transferred to Mr Stevens.

33 The sum of £92 million approximately, which was paid to Euro Estates as a compromise sum in respect of the debt owed to it by Bridge Tower Holdings 1, derived from the £160 million which was part of the profits on the sale of Sentrum to Digital.

34 The claimants submit that there is a sufficient causal and transactional connection between Euro Estates' use of the profits on the sale of the Hyde Park Hotels to fund the loans made to Bridge Tower Holdings 1 and 2 (for it to pay off the Investec loan and as working capital for the Qatar development) and the payment of £92 million as a part recovery under those loans. The question that arises is whether or not, on those facts, as they appear from the evidence, the £92 million payment can be said to represent the profit share so as to amount to a substitute asset for the purpose of tracing. It is of course true that the loans made to Bridge Tower Holdings 1 and 2 were not repaid by those companies at all and that the £92 million approximately was paid by another company allegedly owned by Mr Ruhan (Sentrum) but in the overall context of Mr Ruhan's empire and the allegations made as to his use of corporate entities within it, I consider that tracing the profits into this payment by Sentrum cannot be said to have no realistic prospect of success. There are plainly fact sensitive issues involved here.

35 A further tracing claim arises in respect of the sum of $40 million paid to Minardi Investments Ltd. This is said to derive from profits from the Al Jufairi project in Qatar but as there is no evidence that any of the Hyde Park Hotel proceeds went to Bridge Tower Holdings 2, it appears to me that this tracing claim falls at the first hurdle.

36 Moreover, on the evidence, Minardi lent $27 million to the proposed fifth defendants (Bluestone) on 10th February 2014. It then lent that sum on to the proposed third defendants (Grenda) which used the sum to repay a loan from Global Marine Systems Ltd, a company within the Arena Settlement. Since the claimants have acquired the assets within the Arena Settlement, they thus have the benefit of this $27 million. As matters stand however, Grenda owes Bluestone $27 million and the claimants appear to contend that they can trace the Hyde Park Hotel proceeds into the chose in action which exists in respect of that claim. I am unable to see how this can be the case.

37 After receipt of the £92 million approximately, at Mr Stevens' direction, LMC paid out £35 million for an investment in Gravity Motorsports s.r.l, €5.5 million for an investment in Nord Finanz Bank AG, £32 million for a Ruhan deal with BAE which came to nothing and resulted in the return of £36 million in repayment of the loan made by Grenda to Mr Ruhan, and the payment of £15 million to Gravity as a loan. £16 million was transferred to Phoenix's Swiss Bank Account.

38 The claimants submit that each of the payments to which I have just referred in paragraph 37 illustrate that the sums in question were in reality disbursed at Mr Ruhan's behest and for his benefit, notwithstanding the contention of Mr Stevens that some of the investments were his and others took effect as loans to Mr Ruhan for his purposes. Payments of £100,000 and £200,000 were made to Mr Stevens' personal account in late November and early December 2012 and a

further payment of £1 million was made which was used to repay a loan from Unicorn to Mr Stevens. These are alleged to be Mr Stevens' "pay-off." In my judgment the claimants cannot be said to have no realistic prospect of success in pursuing tracing claims in respect of all these items insofar as there are assets within the hands of the prospective defendants other than Bluestone.

39 Whilst challenge was raised to the particulars given in support of the allegations of knowledge and dishonesty on the part of Mr Stevens by reference to paragraphs 162 and 163 of the Amended Particulars of Claim, I consider that sufficient factors are raised there to give rise to a potential inference as to his knowledge and dishonesty in relation to the alleged breach of Mr Ruhan's fiduciary duty. It is, above all, Mr Stevens' involvement in the Cambulo corporate structure, the use of the Kensington Park Hotel profits in Mr Ruhan's Qatar development enterprise and the receipt and disbursement of the £92 million which give rise to such a potential inference in the light of my finding that there is a serious issue to be tried as to whether Mr Stevens was Mr Ruhan's nominee in relation to the Cambulo companies. If Mr Stevens is Mr Ruhan's nominee, the question arises as to why he would contend otherwise and although there are a number of potential answers to this which do not involve his knowledge of the alleged oral agreement, or knowledge of a breach of fiduciary duty on his part, I do not see how such matters could be determined short of a trial. It is almost invariably the case that an individual's state of mind can only be a matter of inference for the purpose of a statement of case and, here, enough has been done to give rise to the possible inference in the case of Mr Stevens, whose state of mind is also to be attributed to Grenda and Phoenix.

Limitation

40 There is plainly a limitation issue in relation to events which took place in 2006 and 2008. The six year time limit applies for constructive trusts claims as appears from the decision in the *Supreme Court in Williams v Central Bank of Nigeria [2014] AC 1189* and in particular from Lord Sumption's judgment at paragraphs 28 and 30-31. On the claimants' case, the claim against Mr Stevens in respect of his initial involvement in Cambulo Madeira and Euro Estates in 2006–8 is prima facie time barred. I do not see how this can apply to his dealings with the £92 million approximately in 2012 and the claims against Grenda and Phoenix which arise therefrom. Self evidently, although a cause of action in respect of events in 2006–2008 may be time barred, the facts which occurred then and the knowledge that Mr Stevens may have acquired then are highly relevant to the claims now made against him and his companies in respect of the £92 million.

41 The claimants submit that they have available to them an argument under section 32 of the Limitation Act 1980 which I cannot determine and am not asked to determine. The period of limitation does not run, where section 32 applies until a claimant has discovered the fraud, concealment or mistake, as the case may be, or could with reasonable diligence have discovered it. The statement made by Dr Smith in the context of the criminal proceedings brought against him in 2007 and the Enforcement Receivers' letter of 2008, on their face however, show quite enough knowledge of the involvement of the Cambulo companies and the proceeds realised by Cambulo Madeira, at least in broad terms. Mr Stevens' participation was known by reason of his involvement in Euro Estates and the Cambulo companies and it is hard to see therefore how any section 32 argument could assist in relation to the earlier events in 2006–8. The claim in respect of the £92 million however only arises in 2012.

42 If the claimants wished to pursue the prospective defendants in respect of anything other than the £92 million payment, they would therefore have to bring fresh proceedings in order to do so, so that no issue of "relation back" arises and any limitation point can be determined in that action.

The quantum of the claim

43 At paragraph 156 of the Amended Particulars of Claim, the claimants seek to recover £100 million (at least). This figure was put forward on the basis of a 40% profit share of £250 million which is said to have been the profit on the three Hyde Park Hotels. As I have already mentioned, what this fails to take into account is the Candy brothers' interest in CPHL. There is no reason to doubt the figures as put forward by Mr Stevens in relation to the sale of the three hotels and it is clear that Dr Smith and the property market at large had a good idea of the figures

involved at the time the sales took place. I need not go into any detail other than to point out that, even allowing for a total profit achieved by Cambulo Madeira of £125 million, a 40% share would amount to no more than £50 million.

44 To this, the claimants submit, a claim could be added for compound interest for 6 or 7 years as against Mr Ruhan but no evidence has been produced as to the rates of interest recoverable. In argument, counsel for the claimants recognised that a figure of £75 million-£100 million was a realistic maximum, if compound interest was added to the claim for £50 million.

45 On the evidence however, the claimants have, whether rightly or wrongly, obtained transfers of assets as a result of the Isle of Man Settlement, to which I shall refer in more detail later. This includes assets within the Arena Settlement and assets held outside it in the names of Mr Cooper and Mr McNally which, on the claimants' case, they held for Mr Ruhan's benefit, (which he now agrees was the case). In Mr Ruhan's affidavit, these assets are valued at something between £150 million and £205 million.

46 It appears that the claimants have sold Global Marine Systems for a price of £75 million in September 2014 and that Unicorn has recovered some $150 million between 2009 and 2011 in respect of the Qatar project. There are traceable proceeds of the Qatar assets which are now in the claimants' control as a result of the transfers which took place under the Isle of Man Settlement.

47 There are no circumstances in which Mr Stevens, Grenda and Phoenix could be liable to the claimants if Mr Ruhan was not and the claimants have already by “self help” recovered more than their best prospective entitlement. It is, I think, accepted by all that, as between the claimants and Mr Ruhan, whatever the result of this litigation, there will be a setting off of sums due in each direction. In such circumstances it may well be asked what the purpose is in pursuing Mr Stevens, Grenda and Phoenix, even if a proprietary claim can be made out. Proprietary claims may be established but if recovery has already been made, not only will double recovery not be allowed but any surplus recovered will have to be repaid. The need for a tracing claim disappears if there is security from the primary wrongdoer for all that the claimant can recover and a fortiori if recovery has actually been made. Whether or not any questions of election arise from taking over assets under the Isle of Man Settlement which are said to represent the Orb assets (and there is a good argument that such an election has been made) the pursuit of the additional prospective defendants in respect of the £92 million, whether in the context of proprietary tracing claims, dishonest assistance or knowing receipt is unnecessary. It appears to me therefore that although the claimants may have realistic prospects of success on such causes of action, the court should not countenance permitting service out of the jurisdiction when full recovery has already been made in respect of the claim for the profit shares alleged.

The jurisdictional gateways

48 It was not contended by any prospective defendant that, if there was a real prospect of success on any of the claims that there was not also a good arguable case that they fell within the relevant gateways and I so hold.

Clean hands, non-disclosure and the other requirements for service out and/or an injunction

49 The failure by the claimants, despite holding these assets for 9 months and disposing of some of them for considerable sums, to inform the court of the value received as against the claim made is, in my judgment, extraordinary. Whilst the claimants have said that they are prepared to bring such recoveries into account, the reality of the matter is, on the evidence available, that they have recovered far more than any claim which they could properly justify, even if they were right on all other points.

50 Moreover, until the third day of this interlocutory hearing, the claimants, and the proposed third-seventh parties (Messrs Cooper, McNally and Smith and Dr Cochrane and the creature company SMA) had steadfastly refused to give disclosure of the Isle of Man Settlement documents to Mr Ruhan. The stance adopted was that there was no obligation to provide disclosure until the appropriate stage was reached in the litigation when disclosure ordinarily took

place. It was only when the court expressed its interest in seeing the document that the claimants volunteered to provide it and later did so. The terms of the three documents which were disclosed are in themselves extraordinary, as appears later in these reasons but put shortly the Master Settlement Deed (MSD) of 17 December 2013 proceeds on a basis which is at odds with the case put forward as to the nominee status of Messrs Cooper and McNally in holding assets for Mr Ruhan both inside and outside the Arena Settlement. As recorded in Recitals A and C, the MSD operates on the basis that such assets inside and outside the Arena Settlement were owned beneficially by Messrs Cooper and McNally in which Orb assets had been intermingled and to which Orb was therefore entitled to lay claim. Schedule 5 refers to the Arena Trust as created for the benefit of Messrs Cooper and McNally, directly contrary to the case being pursued by the claimants against Mr Ruhan.

51 The claimants' case has always been that Mr Cooper and Mr McNally held the Relevant Assets in the Arena Settlement as nominees for Mr Ruhan. By being party to transactions which formed part of the Isle of Man Settlement, they participated in the transfer of assets which they therefore considered to be those of Mr Ruhan to parties other than him on the basis of his alleged wrongdoings as pleaded in their Statement of Case, and their arguments that they were entitled to lay claim to them. The failure however to be open about the terms upon which this occurred at any time prior to the third day of the hearing before me is remarkable, particularly given the inconsistency with their case as recorded in the Settlement documents. This does not evidence a “clean hands” approach on the part of the claimants and reflects badly upon Orb, Dr Cochrane, the creature company SMA holdings, Mr Cooper, Mr McNally and Dr Smith who was doubtless the architect of it all. His threats of proceeding against Mr McNally and Mr Cooper are said to have led to the “compromise”. The very least a party should do when coming before the court seeking a proprietary remedy against third parties is to reveal the extent of recoveries made already in respect of the claims made against the original defendant (Mr Ruhan) and the basis upon which those recoveries were made, by reference to all relevant documents.

52 In circumstances where Mr McNally and Mr Cooper have since put forward evidence to this court that they were entitled to the assets concerned, without any nominee arrangement, but where no consideration appears to have passed to them in respect of the supposed loss to them of millions of pounds worth of assets which they collectively owned, other than the compromise of a claim against them, a full explanation, with supporting evidence, of the background to, the nature of, and the exact terms of the Isle of Man Settlement was required from the claimants. An explanation of how the claimants could lay claim to assets inside and outside the Arena Trust to the tune of many millions in excess of their best claim was needed. That was not forthcoming, save to the extent that the existence of the Isle of Man Settlement and the transfers of the assets (without any valuation) was said to have taken place by such a settlement.

53 To come to the court without disclosing the terms of these documents or showing what value was ascribed to the assets thus acquired does not demonstrate a clean hands approach. Nor does it fulfil the obligation of full and frank disclosure which the claimants accepted as a condition of the proposed additional defendants' agreement in solicitors' correspondence to accept service on the *Sphere Drake basis* .

54 In my judgment, in the ordinary way, non disclosure is unlikely to arise on applications which are argued on the *Sphere Drake* basis. Proposed defendants such as Mr Stevens, Grenda and Phoenix are given the opportunity to address the court on the question of service out as well as the injunctions sought. In such circumstances, it might seem wholly unreal to require the claimants to make the prospective defendants' points for them, unless there are matters of which the defendants cannot know and where they are being kept in the dark, as was the case here. To disclose the fact of the Isle of Man Settlement did not go far enough because there were other matters which were material to the court's decision of which the defendants were unaware, on which they sought information and documents because they considered the terms of the documents were likely to be important, but were refused.

55 The two failures to which I have drawn attention stand out in the conduct of these proceedings by the claimants. On an ex parte basis both of those failures would have been enough, when they subsequently came to light, to vitiate any permission given for service out. They go also to the questions of whether it is just and convenient to grant the injunction and to the issue of “clean hands” on the part of the party seeking the injunction.

56 It is clear also that the balance of convenience is wholly against the grant of the injunctions

which are being sought in circumstances where the claimants appear to have made a substantial over recovery in respect of any wrong doing upon which they have arguable prospects of success.

57 This is hard fought litigation with no holds barred between parties who are at enmity with one another and where a war of attrition is being waged in the shape of this action and other litigation being waged by the claimants against Mr Ruhan. The history of proceedings in the Isle of Man and of bankruptcy applications launched at the claimants' instigation and dismissed, with indemnity costs, because they were being used as a tool of oppression speaks for itself. The court will not give aid to a party who seeks to harass another in this way. It is not just and convenient to do so.

Conclusions on the claimants' applications

58 I am clear therefore that service out should be refused and that no injunction should be granted. Permission to amend the Particulars of Claim to plead relevant facts against Mr Ruhan is granted on the usual terms as to costs, whilst the costs of the applications for service out and for the injunction must be paid by the claimants to the proposed additional defendants on the indemnity basis.

Mr Ruhan's applications

59 Mr Ruhan seeks permission to amend his Defence and to bring Counterclaims against Orb and claims against the third to seventh parties, namely Messrs Cooper and McNally, Dr Cochrane, Dr Smith and SMA Holdings in respect of the transfer of the assets of the Arena Settlement and other assets held by Mr McNally and Mr Cooper outside the Settlement (including the Bridge Towers companies, the Legion Companies, Sulby, and Unicorn, the company said to be utilised as the treasury company). Mr Ruhan's evidence which is unchallenged is that the value of these assets was in the range of £150 million- £205 million. As already noted, the claimants' case has always been that such assets were held by Mr McNally and Mr Cooper as nominees for Mr Ruhan. They therefore participated in transactions forming part of the Isle of Man Settlement which resulted in the recovery of assets which they considered were those of Mr Ruhan, not Mr McNally and Mr Cooper, subject to the alleged constructive trusts in their favour which arose on the basis of their case as to his alleged wrongdoing as set forward in their Particulars of Claim.

The application to amend and join the Additional Parties

60 Mr Ruhan seeks permission to amend so as to make claims against the additional parties in respect of the misappropriation of his assets in March- April 2014 pursuant to the Isle of Man Settlement on the basis that, as the claimants maintain, the assets were all held for him beneficially by Mr Cooper and Mr McNally. Contrary however to their contentions, he says that those assets were not impressed with any constructive trust in favour of the claimants, denying as he does the oral agreement alleged by the claimants of 6th May 2003 and any of the constructive trust/fiduciary relationships which are said to arise from it, as well as the tracing mechanisms alleged in respect of substitute assets which represent the profits on the sale of the Hyde Park hotels.

61 In addition to seeking permission to amend his defence and bring these counterclaims and additional claims against other parties, Mr Ruhan sought permission to serve Dr Cochrane out of the jurisdiction in Jersey and SMA in the Marshall Islands, an application now rendered unnecessary because of the agreement of the claimants' solicitors to accept service in the jurisdiction on their behalf. A proprietary injunction and worldwide freezing injunction were sought against Orb and the third to seventh parties which has resulted in the giving of undertakings to the court, in the same way as Mr Ruhan has given undertakings in respect of injunctions sought against him. A further application was made by Mr Ruhan for disclosure of documents evidencing the Isle of Man Settlement which was robustly resisted by the claimants and by Mr Cooper and Mr McNally until, as I have already said, on the third day the claimants volunteered disclosure of it. Further disclosure is now sought in relation to the Isle of Man Settlement as a result of the

three documents supplied.

62 It was accepted by the proposed additional parties that Mr Ruhan has realistic prospects of success in the claim he raises against them after comments I made about the implausibility of the evidence of Mr Cooper and Mr McNally in the light of the other evidence available to the court. The idea that they were the beneficial owners of all the assets acquired through Mr Ruhan's entrepreneurial skills, whether they were in the Arena Settlement or outside it and that there was no nominee arrangement of any kind (or other similar understanding) was a notion upon which Mr Ruhan's counsel poured scorn. Successful entrepreneurs, and monied individuals, as is common knowledge, shield their wealth from UK tax by using trust arrangements, lawyers, accountants and fiduciaries in tax havens such as the Isle of Man and, in particular, by the use of discretionary trusts, nominee directors and nominee shareholders. The legitimacy of such arrangements from a tax perspective no doubt depends upon the exact structures used but transparency is not usually high in the objectives of the wealthy individuals concerned. In short, lawyers and accountants, together with trust companies and trust managers create a structure of documentation from which it is often difficult to ascertain the identity of the individual whose wealth is intended thereby to be shielded from tax.

63 The basis upon which the proposed amendments and joinder of the additional parties are resisted can be expressed shortly. In his original defence, at a time when he was seeking to avoid interference by Dr Smith and the Claimants in his business affairs and assets, he said that he had no beneficial interest in the Arena Settlement. After the claimants have acquired the assets of it, together with other assets, he now wishes to assert that those assets are in reality his, and that, regardless of the fact that he was as from 21 March 2012 onwards, not a named discretionary beneficiary, Mr Cooper and Mr McNally who were at various times so named were always his nominees. The additional parties say that, if Mr Ruhan is to be believed now on the case he wishes to put forward, then he deliberately lied in his defence in April 2013 and in the further information supplied pursuant to a request in November of that year. Such a volte face is said to be an abuse of the process of the court and the court should not countenance an amendment of this kind. The effect of this contention is that a party who has lied to the court is not to be allowed to advance a case based on what he now says is the true position. Here is it said that Mr Ruhan has not only, on his amended case, lied in the earlier statements of his case but has since lied about those lies, in seeking to explain away how he came to make those false statements in the unamended defence and further information, based on Mr Cooper's and Mr McNally's contributions to the drafting of the documents in question.

64 It is not accepted by Mr Ruhan that he lied in his statements of case, although it is admitted that he did not reveal the full story, namely the nominee arrangements which are central to the Arena Trust and the other Isle of Man assets which Mr Ruhan says are his. Furthermore Mr Ruhan submits that his explanation as to the way in which the relevant paragraphs of the defence and the further information came to be in the form they were, is correct and that Messrs Cooper and McNally, upon whom he relied to explain the details of the trust arrangements not only approved but were essentially responsible for any false or misleading statements concerning them.

65 It is said by the additional parties that Mr Ruhan lied in 3 major material respects in his statements of case, if his new case is true. First, he said that he had no interest in the Arena Settlement: second, he said that he had received no benefits from the Trust: and third, he said that he, Mr McNally and Mr Cooper owned a one third interest in HPII UK, when he now says that they held their shares as nominees for him. These points he wishes to correct in various paragraphs of the defence and further information.

The Defence and further information – the first alleged lie

66 The key paragraphs of the defence upon which the further information was sought related to Mr Ruhan's beneficial interest in the Arena Settlement and its assets, as pleaded in paragraph 39, paragraph 44(4), paragraph 108(4) and paragraph 112(4). These read as follows:

> “39. In or about December 2004 Bridgehouse Hotels (in which Mr Cooper and Mr McNally have and Mr Ruhan had beneficial interests) acquired the Country House Hotels from Sceptre for £42 million …

…

(4) On or about 30 May 2003 the issued share capital of Orb Securities was transferred for a nominal sum to Conway Assets No 2 Limited (now Bridgehouse Properties in which Mr Ruhan had a beneficial interest) …

…

(4) It is averred that Mr Ruhan was a discretionary beneficiary, but is no longer a beneficiary, of the Arena Settlement together with Mr Cooper and Mr McNally, and he was not the settlor. Mr Ruhan has not received a distribution or any benefit from the Arena Settlement …

…

(4) Bridgehouse Hotels Ltd was incorporated on 24th August 2004 on behalf of and is beneficially owned by the Arena Settlement. Mr Ruhan repeats paragraph 108(4) above …"

67 The claimants sought further information in relation to paragraph 39 in relation to Mr Ruhan's beneficial interest in Bridgehouse Hotels, asking when he acquired the interest, whether it was a joint interest and details of any such joint interest, when his interest ceased and why and in what circumstances that interest ceased. Materially identical requests were made in relation to paragraphs 44(4), 108(4) and 112(4) in relation to Bridgehouse Properties and the Arena Settlement. At paragraphs 2-5 of his response, Mr Ruhan stated the following in answer to the request under paragraph 39 (repeated or the subject of cross reference in answers to the other requests, as necessary):

"2. On 3rd November 2004, Mr Ruhan was added to the class of beneficiaries of the Arena Settlement at the request of Morgan Stanley in contemplation of the reorganisation of interests in December 2004 as further outlined below. Mr Cooper and Mr McNally were then also within the class of beneficiaries of the Arena Settlement.

3. On 22nd November 2005, Mr Cooper ceased to be discretionary beneficiary of the Arena Settlement.

4. On 19th July 2010 Mr Cooper was reappointed a discretionary beneficiary of the Arena Settlement.

5. On 21st March 2012, Mr Ruhan was excluded as a discretionary beneficiary of the Arena Settlement … having received no distribution or appointment of benefit from the Arena Settlement."

68 It is clear that at no point did Mr Ruhan state that Mr McNally and Mr Cooper were nominee beneficiaries of the discretionary trust constituted by the Arena Settlement. To an objective reader without any knowledge of the situation, it appeared that he was saying that between 3rd November 2004 and 21st March 2012 he was part of the class of discretionary beneficiaries of the Arena Settlement but that since March 2012 he had no interest in it. Furthermore, he had received no distribution or appointment of benefit from it during the time he was a discretionary beneficiary. His case now is that at all times Mr Cooper and Mr McNally were named as discretionary beneficiaries but only as his nominees. The reason for his inclusion by name was because Morgan Stanley required it in the context of the re-organisation which took place in December 2004 whereby a Morgan Stanley company and Thistle Hotels Ltd took a one third interest in the share capital of HPII UK whilst the Arena Settlement held Mr Ruhan's one third interest.

Mr Ruhan's Explanation

69 In his witness statement of 22nd September 2014 in support of his application for permission to amend the defence and further information as well as to bring a counterclaim against the additional parties arising out of the misappropriation of the Arena Settlement assets, Mr Ruhan explained the position in the following way:

> "4. The nature and basis of the proposed Counterclaim is evident from the draft pleading itself. In early 2004, on advice from my long-standing and trusted lawyers and financial advisers, Messrs Cooper and McNally, my businesses and their assets were transferred into an off-shore trust ("the Arena Settlement"). Messrs Cooper and McNally were named as discretionary beneficiaries of the Arena Settlement albeit on the basis that they were my nominees ("the Arrangement").
>
> 5. On 9 April 2014, I became aware for the first time that Messrs Cooper and McNally had (in or around March 2014) purported to transfer or procure the purported transfer of the Arena Assets into the First Claimant's control (or those who stand behind the First Claimant, namely Dr Cochrane and Dr Smith), through the transfer to an offshore company, namely SMA. I was shocked by this. On a personal level I feel utterly betrayed. The purpose and basis of the proposed Counterclaim is to recover the Arena Settlement Assets and other assets (namely shares in Bridge Tower companies held by Mr Cooper as my nominee but wrongly transferred by him to the First Claimant, Dr Cochrane, Dr Smith or their nominee) and/or seek damages from those involved in this gross breach of fiduciary duty.
>
> 6. The Claimants have refused to consent to the proposed amendments, including the bringing of the proposed Counterclaim, on the basis that the amendments constitute an "extraordinary change of position". They say that, if I wish to pursue the amendments, I must explain to the Court why I have changed my position as to my interest in the Arena Assets. I fully accept that the proposed amendments involve a change in position and that a full explanation is warranted.
>
> 7. In my original pleadings, both in the Defence and Response to RFI, my pleaded position was that I did not have a 'beneficial interest' in the Arena Assets with effect from March 2012 (when I was formally excluded as a named discretionary beneficiary to the Arena Settlement). The particular statements to which I refer are those made at paragraphs 39, 44(4), 108 and 112 of the Defence and Responses 5, 13, 26 and 36 of the Response to RFI ("the Statements"). I now understand, but did not at the relevant time, that the Statements are inaccurate as the nominee arrangements I had in place with Messrs Cooper and McNally, meant that I did in fact retain what the law would regard as a 'beneficial interest'.
>
> 8. The Statements were verified by statements of truth either signed by me personally (in the case of the Defence) or on my instructions (in the case of the Response to the RFI). In the latter instance, I authorised David Harvey Rands, a partner at Memery Crystal LLP ("Memery Crystal"), to sign on my behalf, as I was overseas at the time.
>
> 9. The background and circumstances relating to the making of the Statements are dealt with fully below. However, I should state at the outset that I believed that the Statements were accurate when I verified them as true. In particular, I thought that because I had been excluded as a named discretionary beneficiary of the Arena Settlement in March 2012, I could truthfully say that I no longer had a 'beneficial interest' in the Arena Settlement notwithstanding the nominee arrangements with Messrs Cooper and McNally. Whilst I always appreciated that this was a technical distinction and that my denial of a 'beneficial interest' without disclosing the nominee structure was potentially misleading, I did believe that the Statements were technically accurate as a matter of law and therefore could be truthfully made.
>
> 10. In this regard, I relied heavily on the legal expertise and advice of my Isle of Man lawyers, Bridgehouse Partners and, in particular, Mr McNally who (in conjunction with Mr Cooper) had put these structures in place. The Statements were approved as accurate by Mr McNally who I believed at the time was best placed to advise as to what I could and could not properly say both in my Defence and the Response to RFI given the trusts and arrangements in place. I understood from his input into and approval of

the drafts that given my exclusion as a discretionary beneficiary I could properly deny any 'beneficial interest' and it was not incumbent on me to volunteer the nominee arrangements.

11. I should also say at the outset that I fully appreciate the importance and solemnity of a statement of truth and the consequences of knowingly submitting and relying on a false allegation and I appreciated this at the time.

12. I also fully accept, on reflection, that this was a gross misjudgement on my part not to explain the factual situation fully to Memery Crystal and Counsel so that they could have reached an informed view as to what could and could not properly be said about the nature of my ongoing interest in the Arena Assets. Instead, as I have already mentioned, in this particular regard I relied exclusively on the advice of Bridgehouse Partners and, in particular, Mr McNally and (to a lesser extent) Mr Cooper who had set up these structures for me. In hindsight I recognise that Messrs McNally and Cooper were too closely involved to give proper independent advice.

13. I am also now concerned that Mr McNally allowed his self-interest to cloud his judgment. It is now clear that Mr McNally and Bridgehouse Partners at the time they were assisting me in answering the Response to the RFI in November 2013 were being pursued in legal proceedings issued by the Claimants in the Isle of Man ("the Isle of Man Proceedings"). These were shortly thereafter settled on terms which resulted in Messrs McNally and Cooper purporting to transfer all the Arena Assets to SMA (which is said to the First Claimant's off-shore nominee) ("the IOM Settlement"). It is therefore now clear that Mr McNally had a substantial conflict of interest at the time he was providing assistance to the content of the Response to RFI. This may well explain why he did not want the Arrangement mentioned in the Response to RFI as it helped him a short time later to "buy-off" the Claimants using my assets.

14. Although I do not believe I was acting dishonestly when I verified the truth and accuracy of the original pleadings, I do accept that I knowingly concealed the existence of the Arrangement. I also accept that this meant that my original pleadings were incomplete and to that extent misleading. The fact that Bridgehouse Partners and, in particular, Mr McNally approved this approach knowing the full facts, led me to believe that I was not acting inappropriately. However, given what I now know the Statements were not only incomplete but they were also wrong in law. I therefore sincerely and unreservedly apologise for making these Statements and indeed verifying them as true.

…

32. My Defence was concluded and served on 17 April 2013. It was approved and concluded in a meeting held in the morning on 17 April 2013 attended by me, Messrs. Cooper and McNally and their solicitors, Jones Day and Memery Crystal, in respect of which I assert and do to waive privilege. The pleaded statements made about my lack of a 'beneficial interest' in paragraphs 39, 44(4), 108(4) and 112(4) were introduced at this meeting. The re-drafting of these paragraphs was done by Memery Crystal following advice given by Messrs. Cooper and McNally in their capacity as my corporate lawyers. I do not waive privilege in that advice. I was content to leave this aspect of the pleading to Messrs. Cooper and McNally given their legal expertise and their intimate knowledge of the Arena Settlement.

33. As the relevant changes to these paragraphs were made following advice received from Messrs. Cooper and McNally, I believed at the time that the Statements were accurate as a matter of law. I believed that my exclusion as a named discretionary beneficiary in March 2012 meant that I ceased to have a 'beneficial interest' in the Arena Settlement Assets in a strict legal sense. I assumed that whatever my interest was, it was not what lawyers would call a 'beneficial interest'. However I now understand that given that Messrs. Cooper and McNally were acting as my nominees, I did retain a beneficial interest as a matter of law. Hence the need to correct my original pleadings."

70 Reference should also be made to paragraphs 22 to 29 in which Mr Ruhan explained how Mr Cooper and Mr McNally, founding members of the firm of solicitors Bridgehouse Partners which acted for him since 1999 advised him in 2004 to settle his business into a trust structure and set

up the Arena Settlement for him. From the outset Mr Cooper and Mr McNally, as Mr Ruhan explains in paragraph 25, were the only named discretionary beneficiaries who were to hold their interests as his nominees. There was no document in place to evidence this but since all the assets which went into the trust came from his businesses, this was the clear arrangement. In fact, under the terms of the trust, although named as a discretionary beneficiary, a person resident in the Isle of Man was ineligible to receive any appointment under the trust.

71 At paragraph 26 Mr Ruhan explains how he was included as a named beneficiary on 3rd November 2004 because of Morgan Stanley's request in the context of the restructuring of HPII UK to which I have just referred. In paragraph 27, he states that in early 2012 because Dr Smith was looking to damage his businesses and the Sentrum sale was pending, he was advised by Mr Cooper and Mr McNally that it would be better if he ceased to be named as discretionary beneficiary. That had no bearing on the nominee arrangements in place but was “just a way to try and make it harder for Dr Smith to interfere with and potentially damage my business interests including the imminent sale of the Sentrum business.” In consequence he was excluded as a named beneficiary on 21st March 2012.

72 At paragraphs 30 and 45 Mr Ruhan explained the circumstances in which he prepared his defence and response to the request for further information and I was taken by counsel through a series of documents passing between Mr Ruhan, his solicitors (Memery Crystal), Mr McNally and Jones Day who were by then acting for Mr Cooper and Mr McNally against whom claims had been threatened by the claimants. Attendance notes of meetings and telephone conversations were put before me.

73 It is common ground that Bridgehouse Partners acted as Mr Ruhan's solicitors in the very action with which I am concerned until 11th December 2012 when Memery Crystal served a notice of change. The first draft of the Defence was settled by counsel instructed by Bridgehouse Partners (Mr McNally) before Memery Crystal took over conduct of the proceedings.

74 At paragraph 32 of his witness statement, Mr Ruhan states that his defence was approved and its form concluded in a meeting held on the morning of 17th April which he attended with Mr Cooper and Mr McNally and their solicitors Jones Day and Memery Crystal. He states that “the redrafting of [the relevant] paragraphs was done by Memery Crystal following advice given by Messrs Cooper and McNally in their capacity as my corporate lawyers … I was content to leave this aspect of the pleading to Messrs Cooper and McNally given their legal expertise and their intimate knowledge of the Arena Settlement.” He went on in paragraph 33 to say that as the relevant changes to those paragraphs were made following advice received from Messrs Cooper and McNally, he believed at that time that the statements were accurate as a matter of law and that his exclusion as a named discretionary beneficiary in March 2012 meant that he ceased to have “a beneficial interest” in the Arena Settlement in a legal sense. Whatever his interest was, he understood it was not what lawyers would call a “beneficial interest”. By the time of his witness statement however, his understanding was that, since Messrs Cooper and McNally acted as his nominees, he did retain a beneficial interest as a matter of law.

75 I have examined the emails and attendance notes which reveal the exchanges between Mr Ruhan, Mr Cooper, Mr McNally and the representatives of Memery Crystal and Jones Day. From these exchanges it is clear that Memery Crystal were in touch with Jones Day to seek information from Mr Cooper and Mr McNally about the identity of the settlor and the beneficiaries of the Arena Settlement “as Mr Ruhan was unable to recall the position”. A draft defence was circulated and returned with Mr Ruhan's comments on 16th April 2013. In relation to paragraph 39 as drafted, Mr Ruhan referred to his beneficial interest in Bridgehouse Hotels whilst expressing uncertainty as to whether Mr Cooper and Mr McNally had any such interest. At paragraph 44(4) his amendment was to the effect that he had a beneficial interest in Bridgehouse Properties Ltd. At paragraph 108(4) Mr Ruhan suggested an amendment to the effect that he was a discretionary beneficiary of the Arena Settlement together with Mr Cooper and Mr McNally whilst at paragraph 112 there was an admission that he was beneficial owner of Bridgehouse Properties Ltd. The Jones Day amendment to the draft, sent to Memery Crystal on the same day but not reflected in the draft containing Mr Ruhan's comments which was sent to Jones Day contained footnotes in relation to the relevant paragraphs. These comments were sent in response to Memery Crystal's request for confirmation from Mr Cooper and Mr McNally of the settlor/beneficiary position, because Mr Ruhan could not recall it. Jones Day, in relation to paragraph 39, stated that it was not correct to say that in December 2004 Bridgehouse Hotels was owned and controlled by Mr Ruhan and in relation to paragraph 44(4) deleted the wording

that said that he did own or control Bridgehouse Properties Ltd. At paragraph 108(4) a footnote is added suggesting that there should be a non-admission that Mr Ruhan was the settlor of the Arena Settlement and, instead of the averment that he was a current beneficiary, to say that "Mr Ruhan was a beneficiary of the Settlement at the behest of Morgan Stanley between 3rd November 2004 and 21st March 2012 but no distribution was ever made to him". With regard to paragraph 112(4) there was a footnote stating that the admission that Mr Ruhan was the sole beneficial owner of Bridgehouse Hotels and exercised de facto control over its affairs was wrong.

76 On 17th April there was a meeting at which Mr Ruhan, Mr Cooper and Mr McNally were present, along with representatives of Memery Crystal and Jones Day. There are meeting notes emanating from representatives of both firms of solicitors. Both the two Jones Day notes of the discussion and that of the Memery Crystal representative are consistent, although they do not contain the same information verbatim. Mr Cooper stated that neither he nor Mr McNally had any economic or intellectual involvement in the hotel portfolio. Mr Cooper said that Mr Ruhan had become a named discretionary beneficiary in 2004 because Morgan Stanley required it in the context of the hotel portfolio and that he ceased to be a beneficiary in March 2012, because Mr Cooper, who decided on beneficiaries, had personal reasons for doing so. Whilst there is discussion of nominees in the context of Mr Campbell, there is no mention from Mr Ruhan, Mr Cooper or Mr McNally of the latter being nominees for Mr Ruhan. In discussion about paragraph 39 Mr Cooper is reported as saying that he is not sure that it is right to say that he, Mr McNally and Mr Ruhan held beneficial interests in Bridgehouse Hotels. In the light of what had been said about Mr Ruhan ceasing to be a beneficiary of the Arena Settlement on 21st March 2012, a Jones Day representative suggested that paragraph 39 should use the words "Bridgehouse Hotels (in which Mr Cooper and Mr McNally have and Mr Ruhan had a beneficial interest". Similarly in paragraph 44(4) it should state that Mr Ruhan had a past beneficial interest in Bridgehouse Properties. Thus, in the presence of Mr Cooper and Mr McNally these forms of words suggested by their solicitors on the basis of what Mr Cooper had said, came to be adopted. In discussion on paragraph 108(4) Mr Cooper was reported as saying that Mr Ruhan was not the settlor and had been a discretionary beneficiary and the form of words which appeared in the defence, following on from Jones Day's amendments to the previous day was then apparently agreed, including the wording that he had never received a distribution or benefit. In discussion on paragraph 112(4), Mr Cooper asked whether beneficial ownership helped and Mr McNally commented that Mr Ruhan was not a beneficiary at the relevant time. Mr Cooper then said it was not right to say that Mr Ruhan was beneficial owner because, as he understood the meaning of beneficial ownership, it connoted control which was not the case. Mr Ruhan appeared to ask whether he was in sole control of a sale that sat within [the Arena Settlement – i.e. a company within the Arena Settlement] and the form of words in the sub-paragraph ultimately merely repeated the terms of paragraph 108(4) which had emerged from the earlier discussion.

77 Paragraphs 7-10 of Mr Ruhan's witness statement must therefore be seen in the light of these exchanges. Mr Cooper and Mr McNally and their solicitors were, between them, essentially responsible for suggesting the form of words which the additional parties (including Mr Cooper and Mr McNally) now criticise. Memery Crystal were not being told of the nominee arrangements and the discussion related to what was being said about a "beneficial interest" in the Arena Settlement, where Mr Cooper expressly set out his understanding of the meaning of that term.

78 On the evidence, I regard the suggestion that Messrs Cooper and McNally were not providing input as Mr Ruhan's corporate lawyers but only as potential co-defendants, risible. They were indeed potential co-defendants and the discussions were covered by common interest privilege but Mr Ruhan and Memery Crystal were expressly looking to Mr Cooper and Mr McNally and their solicitors for assistance about the Arena Settlement for the administration of which Mr Cooper and Mr McNally were responsible.

79 Paragraphs 32 and 33 of Mr Ruhan's witness statement therefore reflect the position as Mr Ruhan saw it.

80 Mr Richard Waller QC for Mr Ruhan contended that Mr Ruhan was not dishonest and did not tell lies in the pleading whilst accepting that he was not full and frank because of the failure to disclose the nominee arrangement. In my judgment what was said was misleading and deliberately so. Mr Ruhan, Mr McNally and Mr Cooper, on Mr Ruhan's case, deliberately refrained from mentioning the nominee arrangements in order to give the misleading impression that Mr Ruhan had no interest of any kind in the Arena Settlement after 21st March 2012. It is not

enough to say that the question of “beneficial interest” is a difficult matter of law, where its meaning depends upon the context in which it is used, whether for tax purposes or otherwise.

81 Mr Ruhan's explanation for how the defence came into existence is, in these circumstances essentially correct. At the meeting of 17th April 2013 it was Mr Cooper who suggested a change to paragraph 39 and 108(4) to the effect that Mr Ruhan was not a beneficiary. Mr McNally suggested in addition to paragraph 112(4) to the same effect and Mr Rands of Memery Crystal suggested the change to paragraph 44(4) in the light of what Mr Cooper had said. On the face of it, it was therefore as a result of Messrs Cooper and McNally that the Defence came to deny that Mr Ruhan had a beneficial interest in the Arena Settlement.

82 As I see it, on the basis that Mr Ruhan's new case is true, both he, Messrs Cooper and McNally deliberately chose not to tell Memery Crystal of the nominee arrangement. At paragraph 12 of his witness statement Mr Ruhan accepts that it was “a gross misjudgement” on his part not to explain “the financial situation” fully to his lawyers so that they could reach an informed view as to what could and could not properly be said about the nature of his interest in the Arena assets. When at paragraph 43 of his witness statement, Mr Ruhan deals with the further information, he states that the omission of any reference to the nominee arrangements was deliberate and not an oversight on his part. The same must apply to the defence itself.

83 Turning then to the further information which was supplied on 2nd December 2013, it is clear that the reliance was once again placed upon Mr McNally to provide information to Memery Crystal. On 9th October Memery Crystal emailed Jones Day asking for assistance in relation to issues raised in the Request for Further information (RFI). The lawyer at Memery Crystal referred to a meeting that she was due to have with Mr Ruhan the next morning. A draft of the relevant responses shows that, in answer to the question under paragraph 39 as to Mr Cooper and Mr McNally's current interest in Bridgehouse Hotels and Mr Ruhan's past interest, Memery Crystal asked Mr Ruhan for help but he referred them to Mr Cooper and Mr McNally for information. On 22nd October Memery Crystal emailed Jones Day enclosing a copy of the RFI and asking for Mr Cooper and Mr McNally's input with regard to requests of paragraphs 39, 44(4), 108(4) and 112(4) of the Defence. On 28th October an email from Memery Crystal to Bridgehouse Partners, Mr McNally's firm (to which Mr Cooper was by then a consultant) set out almost verbatim the RFI under those paragraphs stating that Mr Ruhan had told them that Bridgehouse Partners had the information and that the request required “the input of Messrs Cooper and McNally”.

84 On 1st November 2013 Mr Clegg of Bridgehouse Partners sent copies of emails that had previously been sent by Mr McNally to Mr Ruhan on 4th December 2012 which both stated Ruhan was not a beneficiary in the Arena Settlement (“as you will recall” – “of course”).

85 On 27th and 28th November telephone calls took place between representatives of Memery Crystal and Mr McNally directly in which Mr McNally said that Mr Ruhan's beneficial interest in the Arena Settlement began on 3rd November 2004 and ceased in March 2012. This was then confirmed in an email the following day from Mr McNally where he set out the relevant dates for those named as discretionary beneficiaries as follows:

> “From 29th March 2004 to 03 November 2004: Simon Cooper & Simon McNally
>
> From 03 November 2004 to 22nd November 2005: Andrew Ruhan, Simon McNally and Simon Cooper
>
> From 22nd November 2005 to 19th July 2010: Andrew Ruhan and Simon McNally
>
> From 19th July 2010 to 21st March 2012: Andrew Ruhan, Simon McNally and Simon Cooper
>
> From 21st March 2012 to date: Simon Cooper and Simon McNally”

(Under the terms of the trust an appointment could not be made to any person resident in the Isle of Man. Mr Cooper ceased to be a resident in the Isle of Man some time in 2004 but Mr McNally has remained resident throughout. In the middle period therefore between 22nd November 2005 and 19th July 2010, the only eligible appointee for a distribution was Mr Ruhan.)

86 On 28th November Memery Crystal asked Mr McNally by email if he could help in giving them understanding about the reasons for each of the changes of beneficiary referred to. He was

asked “why and in what circumstances Andy's interest ceased.” There followed a telephone conversation on 28th November between three representatives of Memery Crystal and Mr McNally. In this call, Mr McNally stated that Mr Ruhan was named as a beneficiary because Morgan Stanley wanted it and that he was removed when Mr Cooper asked for this to be done in 2012. He stated that he was pretty sure that Mr Ruhan did not know he had been removed. Mr Rands of Memery Crystal pressed Mr McNally because, as appears from the note of the conversation he anticipated cross-examination of Mr Ruhan on the point. Mr McNally said that Mr Ruhan had “no legitimate interest in these assets [the assets of the Arena Settlement] absent appointment as a beneficiary”. Mr Rands put to Mr McNally the suggestion that he anticipated would be made in cross-examination that this was all a sham and that Mr Ruhan did have an ownership interest given the fact that he bought assets in 2003, they went into the trust, he was a potential beneficiary of the trust but had now apparently ceased to be a beneficiary. Mr McNally's response was to say that the property assets transferred into the trust (the Country House Hotels) were not valuable and that the trust only just “came out in the black”.

87 On 29th November Memery Crystal sent Mr McNally and Bridgehouse Partners the updated draft response to the RFI “for your final review”. The answers given under paragraph 39 set out the information given by Mr McNally as to the dates when Messrs Cooper, McNally and Ruhan were named as discretionary beneficiaries in the Arena Settlement at paragraphs 2-5. It will be noted that Mr Ruhan was not party to these telephone conversations but was sent a copy of the final version for his approval and he authorised its signature by Mr Rands on his behalf for service. He states in paragraphs 34-42 of his witness statement that he had authorised Memery Crystal to deal directly with Mr McNally and Bridgehouse Partners to obtain the information. This was done without using the intermediary of Jones Day on 27th and 28th November. At paragraph 42 he states that, when considering the response to the RFI which he authorised, he believed that the references to “beneficial interest” (which was the term used in the defence to which the requests were directed) was a term of legal art and referred to his interest as a named beneficiary under a trust, namely as a named beneficiary under the Arena Settlement. “I therefore believed that the responses truthfully and accurately answered the specific requests.” As there was no reference to the nominee arrangements in the response to the RFI, he took it that Mr McNally, who had approved it with full knowledge of the facts, had taken the view that it was not necessary to volunteer details about the nominee arrangements. He did not think it necessary to raise the existence of those arrangements with Memery Crystal. In paragraph 43, a paragraph to which I have already referred, he accepted that this omission was deliberate and not an oversight on his part and though at the time he believed he could legitimately refrain from mentioning it, he realised at the time of his witness statement that this was not a justifiable approach and apologised for it.

88 This was in reality little more than a perpetuation of the course already adopted by Mr Ruhan, Mr Cooper and Mr McNally at the time of the Defence, if Mr Ruhan's new case is correct. It could be said that Mr Ruhan looked to Mr McNally and Mr Cooper to see “what he could get away with” in answering the request, the desire being, as he put it in paragraph 27 of his witness statement, to make it hard for Dr Smith to get at assets in the Arena Settlement. In that respect the ploy entirely failed and the claimants, Dr Smith, Mr McNally and Mr Cooper have since sought to justify the transfer of the Arena Settlement assets by reference to statements in the Defence and further information which came into being essentially at Mr Cooper and Mr McNally's own suggestion. It is ironic that Mr Cooper and Mr McNally should seek to shut out Mr Ruhan's new case on the basis that he told lies in his original case for which they were, on his case, at least, jointly responsible with him. Insofar as Dr Cochrane, the allegedly ultimate beneficial owner of Orb and her ex-husband, Dr Smith, are concerned, and the creature company SMA, as it has always been the claimants' case that profits made by Mr Ruhan went into the Arena Settlement they could not, on the face of it, have believed what Mr Ruhan was saying or relied upon it.

89 As counsel for Mr Ruhan submits, the misleading nature of what Mr Ruhan said cannot be seen in isolation from the position of the parties objecting to the amendment and joinder against whom there is a strongly arguable case of misappropriation of Mr Ruhan's assets, both inside and outside the Arena Settlement.

90 In particular, at the very time when Mr McNally was furnishing the answers for the purpose of responding to the RFI, he was, with Mr Cooper, in negotiation with the claimants with a view to settling the supposed claims against them. The evidence shows that without prejudice discussions commenced on 6th November 2013 and that on 15th November 2013 Messrs

Cooper and McNally paid the sum of £10 million to Dr Cochrane which, it appears likely, came out of the Arena Settlement. On 17th December 2013, some two weeks after the further information was served, the MSD was concluded. Mr McNally had a clear motive to encourage Mr Ruhan to deny his interest in the Arena Settlement in order for those assets to be used by Mr Cooper and himself to buy off the claim against them, as if they were their own assets, which was the basis upon which the MSD proceeded.

The Defence and further information – the other alleged lies.

91 The other alleged false statements pale into insignificance alongside this main area of contention.

i) Using the wording put forward by Jones Day in paragraph 108(4) of the Defence, it was averred that Mr Ruhan had not received a distribution or any benefit from the Arena Settlement. It was of course true to say that he had not received any appointment of funds from the trustees of the Arena Settlement or any benefit directly from the trustees or trust itself. Mr McNally says as much in his witness statement. What he had received as paragraph 45 of his witness statement and the draft amendment to the further information state was fees for consultancy services from businesses within the Arena Settlement. In this fourth witness statement at paragraph 71 he referred to the consultancy agreement that he had with various companies administered by Mr Cooper and Mr McNally as a "means of deriving income" whilst the capital value of his assets remained in the Arena Settlement and unappointed to him or to his order. He stated that the advice of Mr Cooper and Mr McNally was that, because he was no longer a UK resident for tax, the Legion Consultancy arrangement was the most tax efficient way of deriving income. It also appears that loans were made to him by companies within the Arena Settlement for which the mechanism of repayment is unclear. Whether it is strictly true to say that Mr Ruhan did not receive "any benefit from the Arena Settlement" is perhaps beside the point since the impression given from this, supporting the misleading nature of what was said elsewhere, was that he had no interest in the Arena Settlement at all and had never benefited from any assets within it.

ii) As originally set out in the further information under paragraph 53(2), in September 2004 HPII UK was owned as to 66% by Mr Ruhan and the balance by Messrs Cooper and McNally, following transfer from Mr Campbell of Chester Hotels Ltd. Whilst HPII UK played a significant part in the overall history of the transaction, the point is of insignificance in the overall context where claims are made in respect of the profits gained by the Cambulo companies at a later stage in the history.

92 Counsel for Mr McNally and Mr Cooper raised an additional point, contending that Mr Ruhan had lied in his explanations when he said in his affidavit that he was advised by Messrs McNally and Cooper that he should cease to be a discretionary beneficiary in March 2012 in order to make it harder for Dr Smith to interfere with the Sentrum assets. This assertion appears elsewhere in Mr Ruhan's other evidence. Mr McNally and Mr Cooper deny that any such advice was given by them and draw attention to Mr McNally's statement in the telephone conversation that he was pretty sure that Mr Ruhan did not know it had happened at the time and to the general ignorance which Mr Ruhan revealed when he was asked for the information required to answer the RFI. Reliance is also placed on paragraph 102 of Mr Ruhan's fourth witness statement in which he sets out the answers he gave in Form E in his matrimonial proceedings in April 2014 where he said he had been a discretionary beneficiary of the Arena Settlement and that, unbeknownst to him he had been removed on a date yet to be given to him. (He accepted that the date was available to him but he had forgotten it at that point). In the Form E he had stated that as a result of the Isle of Man Settlement all of the assets of the Arena Settlement had been transferred and that he was trying to find out exactly what had happened through court action. It is true that there are inconsistencies in what Mr Ruhan has said in relation to the exact circumstances in which he ceased to be a named discretionary beneficiary but these are not such as to call into doubt his overall explanation for the way in which the pleas came to be made.

93 Attention is drawn to other inconsistent statements allegedly made by Mr Ruhan in addition to

the Form E where it is said that he should have revealed the nominee arrangements as such including references in the deposition he gave in West Virginia. Points are made also about the absence of entries in his UK tax returns. These are beside the point in the context of amendment of his case here since it is accepted that the new case he wishes to pursue has realistic prospects of success. In my judgment it is a strongly arguable case. Entries do appear in his tax returns for consultancy payments and Mr McNally's firm Odyssey supplied the figures to Mr Ruhan for completion of the return, on his evidence. The Form E does reveal the existence of the trust and the loss of assets within it and what was said in West Virginia is by no means capable of only one interpretation. Mr Ruhan has stated that at the time of the transfer of the Isle of Man assets Mr McNally was advising him on asset disclosure in his divorce proceedings. No doubt Mr Ruhan can be cross-examined at trial about these matters and the inadequacy or inconsistency of the answers given in the light of the case he now wishes to make. But this is nothing to the point on the joinder application.

94 There are a number of further consequential amendments, beyond those to the paragraphs to which I have referred, which Mr Ruhan seeks to make in relation to the nominee arrangements that he claims he had. These follow from the major amendments that he wishes to make and do not require separate consideration.

The Basis of the Objections

95 The claimants can have no objection to the amendments sought because they essentially amount to an admission of the claim as put by them.

96 Although the additional parties can complain about the volte face of Mr Ruhan, once it is accepted, as it is, that there is an arguable case on the basis of those amendments, it is hard to see why Mr Ruhan should forfeit the right to pursue such claims. It would require extreme facts for a court to deny a claimant the opportunity to pursue legitimate claims and to deny him justice in respect of them.

97 Initially, unreal points were taken about the analogy of the proposed alteration of case to a withdrawal of admissions where an application to do so must be made in good faith, with a full explanation. Whilst the need for good faith and an explanation was accepted the analogy is not apt and the point was not seriously pursued. In my judgment it was unarguable since Mr Ruhan was, by his amendments, accepting the claimants' case, albeit on the basis of an entitlement to raise a counterclaim against them and a claim against the additional parties. With a good arguable case on the new claims and the explanation given by Mr Ruhan, I cannot see how bad faith can be made out in relation to them, without a full determination at trial.

98 The essential submission of the additional parties was that Mr Ruhan had abused the process of the court when putting forward the original case that he did, and which he now accepts was false and misleading. It was submitted that the court has broad powers to deal with the misuse of process both under the CPR and the inherent jurisdiction of the court and reliance was placed upon the decision of the *Supreme Court in Summers v Fairclough Homes Ltd [2012] 1 WLR 2004* . In that case, a personal injury claimant obtained judgment on liability and directions were given for a trial on the issue of quantum. The defendant obtained surveillance evidence which demonstrated that the claimant had submitted a schedule of loss claiming total damage of over £800,000 on the basis that he was grossly disabled, unable to work and likely to remain so, which was not the case. The defendant sought to strike out the claim on the basis that it was an abuse of the court's process deliberately, grossly and dishonestly so to exaggerate his claim. The Supreme Court concluded at paragraph 33 that the court had jurisdiction to strike out a statement of case under CPR 3.4(2) for abuse of process even after the trial of the action and under its inherent jurisdiction. The express words of CPR 3.4(2)(b) gave the court power to strike out a statement of case on the ground that it was an abuse of the court's process (paragraph 41) and it was common ground that deliberately to make a false claim and to adduce false evidence was an abuse of process. In that case the court did not do so, holding that justice required that the claimant should be entitled to recover in respect of his true loss for his injury, notwithstanding that the damages claimed were over eight times the amount the trial judge had awarded. It would not be proportionate or just and would be wrong in principle to strike out the action instead of giving judgment for the claimant for the losses which he had actually established (paragraphs 62 and 64).

99 Reliance was nonetheless placed on paragraph 62 of the court's judgment where it was said that nothing in the judgment affected the correct approach to a case where an application was made to strike out a statement of case at an early stage. “One of the objects to be achieved by striking out a claim is to stop proceedings and prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined”. Furthermore, nothing in the judgment was to affect the case where fraud or dishonesty tainted the whole claim.

100 Subject to the point of law which arises in respect of one of the claims made by Mr Ruhan, as currently formulated, which could vitiate it, it is to my mind clear that justice requires that Mr Ruhan should be allowed to pursue his claim. It cannot be said that the new case put forward is an abuse of process. The alleged abuse relates to the old case which was advanced. Mr Ruhan has given an explanation and an apology in respect of the defence submitted and the further information served. He has, unsurprisingly, sought to put the best light on it, but has accepted that he deliberately failed to set out the nominee arrangements and his true connection with the Arena Settlement in order to protect assets in it from the claimants and Dr Smith. This is not a case, despite the additional parties' submissions, where the party has failed to make a sufficiently clean breast of what he has done to disentitle him from permission to amend. Justice requires that Mr Ruhan be permitted to pursue the case which he now wishes to make. Unlike the position in Summers , the dishonesty upon which all parties are proceeding relates to the defence which is now abandoned and not to the defence and claims which Mr Ruhan wishes to advance.

101 It was faintly suggested that a fair trial would not be possible in respect of these new claims because of the lies that Mr Ruhan had already told. I do not accept this argument. This is an action where, self-evidently, if the parties persist in their respective cases, lies are being told by one or more of the individuals concerned. I have already had cause to comment upon Dr Smith's credibility and the implausibility of Mr Cooper and Mr McNally's evidence. At a trial Mr Ruhan and these individuals, should they give evidence, will all be the subject of cross-examination in the light of any inconsistent statements and inconsistent documents. This is not a situation which is unknown to the court where judges frequently have to determine issues where one or a number of persons are shown to be dishonest. This case is no different from many others in this respect.

Joinder as a Case Management Issue

102 It is clear that, if Mr Ruhan is to be permitted to pursue these claims, they should be pursued in the same proceedings as the claim made against him. The alleged misappropriation of the Arena Settlement assets and other assets claimed by him to belong to him outside the Arena Settlement is interconnected with the claimants' constructive trust claims in respect of those self-same assets. The claimants' justification for taking such assets can be, as appears from the terms of the MSD, their proprietary entitlement to them. The claimants seek an account and say that they will bring in to that account the recoveries made. Mr Ruhan would also wish to set off his claims against any liability the court might find in respect of his alleged breach of an oral contract or breach of fiduciary duty. In short, it is self-evident that the matters raised by the cross-claim against the claimant and the claim against the additional parties should be heard at one and the same time as the claims made against Mr Ruhan.

103 It is to my mind self-evident that the claim against Mr Cooper and Mr McNally must proceed alongside those made against the other additional parties and that claims against the additional parties must proceed at one and the same time as the claims advanced by the claimants and the counterclaim advanced by Mr Ruhan. The facts are all so closely intertwined that any other outcome would be unthinkable.

Mr Ruhan's proprietary claim against Dr Smith – is it bad in law?

104 Mr Adkin QC for Dr Smith submitted that all of Mr Ruhan's proprietary claims to the Arena Settlement assets which were transferred by Messrs Cooper and McNally pursuant to the MSD and other Isle of Man Settlement documents could not succeed as a matter of law. His claim in respect of assets outside the Arena Settlement which were so transferred was unaffected as were the claims for dishonest assistance and conspiracy.

105 The point arises in this way. From paragraph 168 onwards of the Amended Defence and Counterclaim, Mr Ruhan alleges a breach of trust and/or fiduciary duty on the part of Mr Cooper

and Mr McNally entering into the Isle of Man Settlement with Orb, Dr Cochrane and AS Managers Ltd (ASM), the then trustees of the Arena Settlement. At the time of drafting Mr Ruhan's new Statement of Case, Mr Ruhan's advisers had not seen the terms of the MSD and the other two documents which were only disclosed during the course of the hearing. By a letter of 9th April 2014, the claimants' solicitors had however told them of the transfer of various assets within the Arena Settlement and outside it, including the Bridge Towers companies. In that letter it was said that Dr Cochrane had, by means of the Isle of Man Settlement, on behalf of the claimants, via her company SMA, taken ownership of the holding companies of the subsidiaries and assets comprising the Arena Settlement and had also taken ownership of the Bridge Towers companies.

106 As on Mr Ruhan's case, Mr McNally and Mr Cooper had acted in breach of trust or in breach of fiduciary duty in entering into these arrangements, at paragraph 173 it was alleged that Mr Ruhan had an equitable proprietary interest in the assets transferred which he was entitled to assert against Dr Cochrane and/or Dr Smith and/or Orb and/or SMA or other nominees used, because they could not raise the defence of bona fide purchaser for value without notice. At paragraph 175 it is alleged that the recipients are liable to revest the legal title in the assets in Mr Ruhan or alternatively, in the case of the Arena Settlement assets, in the trustees of the Arena Settlement or in a new trustee as the court might direct. It was further alleged that all the assets transferred were subject to a constructive trust in Mr Ruhan's favour and that he was entitled to trace them into the hands of the recipients and to a declaration of his beneficial ownership and/or an equitable charge or lien to secure payment of his claim for damages and/or equitable compensation. Further claims followed for unjust enrichment, knowing retention and knowing receipt.

107 Mr Adkin QC submits that Mr Ruhan never had any proprietary interest in the Arena Settlement at all because he could have no better title than his claimed nominees Mr McNally and Mr Cooper, who were discretionary beneficiaries only with no vested interest in the trust funds and only a right to be considered by the trustees for appointments to them.

> "An object of a discretionary trust has no proprietary interest in the trust assets or capital and no right to a definable part of the trust income. In general, a discretionary trust has no-one in whom the beneficial interest in the trust property can be said to be vested because vesting is contingent upon the selection of an object from a nominated class." – *Lewin on Trusts* 19th edition paragraph 1-061.

108 It was submitted that the most that Mr McNally or Mr Cooper could be entitled to was an order requiring any defaulting trustee of the Arena Settlement to have the trust fund reconstituted or (possibly) an order requiring a third party receiving such property to restore it to the trustees of the Arena Settlement if it had been misapplied by the trustees. It was submitted that no allegation was being made by Mr Ruhan that the Arena trustee had acted in breach of trust or that such trustee was aware of the nominee arrangements between Messrs McNally, Cooper and Ruhan.

109 Mr Waller QC for Mr Ruhan submits that Mr Cooper and Mr McNally, in their capacity as discretionary beneficiaries of the Arena Settlement, were acting as Mr Ruhan's nominees and so held their "beneficial interest" on sub-trust for Mr Ruhan. They also owed fiduciary obligations to Mr Ruhan not to use their "beneficial interest" in the Arena assets for their own personal use and benefit, but were bound to hold and use those interests for the benefit and use of Mr Ruhan. It is also pointed out that the points of law raised in the context of this argument demonstrate the ambiguity in the use of the term "beneficial interest" and can be prayed in aid in Mr Ruhan's favour in relation to his answers to the RFI but, more importantly, it is pointed out that there is a difference between a vested interest which a discretionary beneficiary does not have in the trust fund prior to any appointment in his favour and the collective interest of the discretionary beneficiaries when taken as a whole.

110 It is common ground that an individual discretionary beneficiary's only positive right is to be considered for a distribution pursuant to the exercise of the trustees' discretion, but a discretionary beneficiary does have the negative equitable right to compel the due administration of the trustee's duty according to the terms of the trust and the general law. If a discretionary trustee makes an unauthorised disposition of trust property, the transferee holds on constructive trust for the beneficiary and is open to a tracing claim. This however depends upon the trustee

making an unauthorised disposition, of which, Mr Adkin QC submits, there is no evidence.

111 Additionally, however, Mr Waller submits that the Arena Settlement had a small closed class of beneficiaries. At the time of the alleged misappropriation in March/April 2014 the only discretionary beneficiaries were Messrs Cooper and McNally. As members constituting the entire class of eligible beneficiaries, they were collectively entitled to the entire property and could call in the trust pursuant to the principles of *Saunders v Vautier (1841) Cr. & Ph. 240* . Before seeing the Isle of Man Settlement documents it was submitted that this is what must have happened when Messrs Cooper and McNally directed the trustee ASM to transfer the assets to the recipients, since without that, the trustees could not properly have acted as they did. Alternatively, the trustees must have acted in breach of trust and the disposition was therefore unauthorised.

112 One way or the other therefore, since Messrs Cooper and McNally held their interests as discretionary beneficiaries for the benefit and use of Mr Ruhan, because they were his nominees, Mr Ruhan acquired a proprietary and/or equitable interest in the trust assets since he could direct Mr Cooper and Mr McNally to exercise their Saunders v Vautier rights or, through them he could exercise his negative right to prevent breach of the trust and to follow any trust property appointed either to Mr Cooper or Mr McNally or to their order in breach of trust.

113 Mr Adkin QC submitted that there was no arguable breach on the part of ASM as the trustee because it entered into an agreement with Dr Cochrane and the other additional parties under its power to settle claims against it. He further submitted that the trust was not a closed trust which enabled the currently nominated two discretionary beneficiaries to call in the trust under the Saunders v Vautier principle.

114 The Trust Deed concluded between Mr Cooper as settlor and Atticus as trustee defined the Beneficiaries as Mr Cooper, Mr McNally and “any person or class of persons or charity or charities who have been added to the class of Beneficiaries pursuant to clause 5”. Clause 5 provided that the trustee could, with the written consent of the Protector identified in schedule 3 (or his successor), direct that any person or charity should be added to the class of beneficiaries from that date onwards, at any time during the Trust Period. The Trust Period was the shorter of 80 years or the day when the trustee, at its discretion, declared the expiration of the Trust Period. The trust deed contained the usual power of appointment to the discretionary beneficiaries and, under clause 31, the power to institute, prosecute and defend suits or actions and compromise any claims against it as trustee.

115 In Re Smith [1928] 1 Ch 915 , the named discretionary beneficiaries were a Mrs Aspinall and her three adult children, of whom one had died. It was held that she was of an age when it was impossible that she could have further issue and in consequence, she, the two surviving children and the personal representatives of the deceased child were held to be entitled to the whole fund. Romer J held that the four of them could come to the court and demand that the trustees hand over the fund to them.

116 In *Lewin* (*ibid* .) at paragraph 24-016, the authors state that, as long as the class of objects has closed, the beneficiaries can terminate a discretionary trust under the principle of Saunders v Vautier even though each of the discretionary objects, as an individual, has no more than the right to the due administration of the trust, including the right to proper consideration. In those circumstances the trust can be terminated by all of them acting together. The fact that the objects do not have absolute indefeasible interests, indeed do not have interests in the strict sense at all, makes no difference: it is sufficient if they are the only persons entitled to the due administration of the trust.

117 The question therefore arises as to whether or not, in circumstances where there are two named beneficiaries, but the trustees have power to appoint additional beneficiaries, there can be said to be a closed class at any point in time before the trust comes to an end. Reliance is placed upon In Re Trafford's Settlement [1985] 1 Ch 33 , a decision of Peter Gibson J that a settlor of discretionary trust funds for a class which included himself, any wife whom he might marry and any children, did not, immediately before his death, unmarried and childless, have a beneficial entitlement to an interest in possession in the funds. He did not have a “present right of present enjoyment” although he was the sole beneficiary in existence under the discretionary trust at that time. Until his death there was always the possibility that the class of beneficiaries might increase, were he to marry even though, in the event that happened, he alone was entitled

to the income and would have been able to prevent the trustees applying the income to anyone other than himself. The trustees were not bound to distribute the income to the settlor at any point immediately prior to his death however. He could not therefore be said to have an immediate absolute entitlement to the income and a distinction was drawn between his situation and that of a sole object of a closed class.

118 It is true that the possibility exists of the trustee directing that a person or charity should be added to the class of beneficiaries at any point prior to the expiry of the trust but it is not clear, on the current state of the law, whether the class is in fact a closed class at any point in time where the trustees have not made such a direction. The settlor's intentions are irrelevant in a Saunders v Vautier situation as the closure of a present right of enjoyment of the income is to the same as an inability to call in the trust. Whilst In Re Trafford's Settlement supports Mr Adkin's arguments, in my judgment it cannot be said that Mr Waller has no realistic prospect of success in arguing that the class is closed since the addition of beneficiaries to the class depends not upon external events but upon decisions made by the trustee himself. It must be arguable that the existing class of discretionary beneficiaries, named as such, represent a closed class so that they can call in the trusts.

119 Moreover there are clearly issues of fact which arise in relation to the exact circumstances in which the assets inside and outside the Arena Settlement came to be transferred under the terms of the MSD and the other two disclosed documents. At the very time that assets were being transferred to SMA, Dr Cochrane and Orb were seeking orders in the Isle of Man which were predicated on the assets belonging to Mr Ruhan, rather than Mr McNally and Mr Cooper. How it was that the trustee was persuaded to hand over £150 million-£205 million worth of assets under the Isle of Man Settlement documents is a matter which requires investigation. It certainly appears that there were threats made against Mr Cooper and Mr McNally but on their case, as currently put forward, however plausible or implausible it may seem, they were beneficial owners of the assets and Mr Ruhan was not so that any tracing claim against them ought not to have been a cause for settlement.

120 It is not disputed that Mr Ruhan would have a negative proprietary interest on his case, to prevent the trustee from wrongfully disposing of the trust assets. Though no claim is made against ASM, as matters stand, it is to be borne in mind that the Isle of Man Settlement documents have only just become available and there are good arguable grounds for thinking that the trustee could not be said to be bona fide exercising the power of compromise granted to it under article 31 of the trust deed. It is in this connection that the terms of the MSD assume importance.

121 I have already referred to recitals A and C of the MSD which is made between Dr Cochrane, Mr Cooper and Mr McNally. ASM is not a party. Under clause 2, Messrs Cooper and McNally were to pay £10 million to Dr Cochrane, the provenance of which is not stated but, Mr Waller submits, as a matter of inference, must have come from the Arena Settlement. Mr Cooper and Mr McNally undertook obligations in clause 2.3 to provide Dr Cochrane with security over 98.08% of the share capital of Unicorn and subsequently a charge over assets within the Arena Settlement as determined by an audit under clause 3. The audit was to identify assets held by Mr Cooper and Mr McNally over which the claimants might have a claim by operation of law and to distinguish assets held by them over which there was no such possible claim. In the event of agreement as to the assets which fell into each class, the charge would operate on those over which it was agreed that the claimants might have a claim. In the absence of any such agreement, the charge would operate in respect of all assets held by Mr Cooper and Mr McNally in the Arena Settlement.

122 Mr Cooper and Mr McNally also agreed to procure, as soon as reasonably possible and in any event by 13th December 2014 that the trustee of the Arena Settlement, Atticus, or its successor, would make an unconditional and irrevocable transfer to Dr Cochrane of assets in settlement of the claimants' claims in this very action. The trustee was changed soon after. It is clear therefore that Mr Cooper and Mr McNally undertook an obligation to procure that the trustee of the Arena Settlement make the transfers which subsequently took place, which they fulfilled with a newly appointed trustee.

123 The consideration for the payment of £10 million and the transfer of these assets was the release of Mr Cooper, Mr McNally and related parties from all claims.

124 Additionally Mr Cooper and Mr McNally agreed to provide all assistance reasonably required by the claimants in the conduct of the current action, including the provision of documents relating to the action and replying to reasonable requests for information, whether with regard to tracing assets or otherwise. Beyond that however, in clear breach of duties of confidentiality, if Mr Ruhan's case as to their nominee and advisory status is right, Mr Cooper and Mr McNally agreed to provide full and frank disclosure about all of Mr Ruhan's assets and financial affairs since 6th May 2003. That material was to be supplied on a confidential basis save that Dr Cochrane and the claimants were entitled to use the disclosure in this very action. Furthermore, should Mr Cooper and Mr McNally fulfil the obligations of assistance and disclosure undertaken, they would not be required to voluntarily provide a witness statement or give evidence in the action or make any appearance in it. If however they breached any of the terms of the agreement the claimants reserved the right to issue witness summonses or procure the giving of evidence by them by letters rogatory or other compulsory court process.

125 By clause 9 Mr Cooper and Mr McNally warranted that they were not aware of any claims which Mr Ruhan could bring against any of the claimants as a consequence of entering into the MSD, save for any claim for costs in the current action.

126 The audit obviously took place though no details have been provided. On 26th February 2014 however, Mr Cooper and Mr McNally charged the share capital of the holding companies in the Arena Settlement, as set out in schedule 1 to a deed of that date. Additionally, they charged the shares in the Bridge Towers companies and other companies outside the Arena Settlement as set out in schedule 2 . The legal title to the schedule 1 shares was said to be held by new trustees ASM which had replaced Atticus, whilst the schedule 2 shares were said to be held by Mr Cooper and Mr McNally jointly. The claimants claimed that both categories belonged to them beneficially whilst the Arena Settlement was said to be a discretionary trust whose current discretionary beneficiaries were Mr Cooper and Mr McNally. The parties to this deed were Mr Cooper, Mr McNally, Dr Cochrane, Orb and ASM. The circumstances in which ASM came to replace Atticus are unknown.

127 On 24th March 2014 in a confidential deed between the same parties, Mr McNally and Mr Cooper agreed to transfer the schedule 2 shares to Orb and Dr Cochrane, whilst ASM covenanted to take the necessary steps to declare that it held the Arena Settlement assets on trust and as nominee for Dr Cochrane. Recital K stated that Mr Cooper and Mr McNally considered that it would be in their best interests as the only persons currently named as beneficiaries of the settlement for the trustee to enter into the deed and recital L said that the trustee had resolved to enter into and perform the obligations undertaken in it. Dr Cochrane and Orb indemnified the trustee against all claims resulting from entry into or performance of the deed. At clause 7.2 Mr Cooper and Mr McNally warranted and represented that they had irrevocably requested the trustee to act as it had undertaken to do in the deed itself and that such action was in their individual and collective best interests.

128 On the basis of these documents it cannot be said that Mr Ruhan has no realistic prospects of success in showing that Mr Cooper and Mr McNally directed ASM to do what it did in transferring the assets to Dr Cochrane and Orb. Whilst the deed appears to compromise claims against the trustee there is room for thinking that there is more to this than the trustee simply exercising the powers given to it to compromise claims, because of the terms of the three documents and the circumstances in which these events took place, including in particular the terms of the MSD.

129 It is arguable therefore that Messrs Cooper and McNally effectively did call in the Arena Settlement under the Saunders v Vautier principle in directing that assets to which they were collectively entitled should be subject of charge and transfer to Orb and Dr Cochrane. The claim may be put in other ways too as against them in procuring the breach by ASM of its obligation and the claim against ASM may run too, although neither of these are currently pleaded because of the late production of these documents.

130 Where there has been unauthorised disposition by a defaulting trustee, a beneficiary may claim the trust property from a stranger if Saunders v Vautier rights have been exercised, without the need to reconstitute the trust itself – see *Lewin* (*ibid.*) paragraph 2-003 and 004.

131 In my judgment, as counsel for Mr Ruhan submits, there are complex factual issues to be resolved here and the proprietary claim cannot be said to have no realistic prospects of success.

In order to ascertain exactly what has taken place and the basis upon which the transfers were made including the suspicious circumstances which surround it all, this matter must go to trial.

Further disclosure

132 Counsel for Mr Ruhan seeks further disclosure in relation to the Isle of Man Settlement. In particular, documents are sought which evidence the source of the first payment of £10 million. Second, documents are sought relating to the content and outcome of the audit exercise which took place to identify those assets to which it was said that Dr Cochrane and Orb could lay claim, distinguishing them from those to which they could not. Thirdly, documents were sought in relation to any consent given by the trustees to transfers. Disclosure of these documents would clarify what actually took place between November 2013 and April 2014 and how Messrs Cooper and McNally, the trustees of the Arena Settlement and the Protector came to act as they did and possibly the value ascribed to the assets. It would throw light upon the issues relating to Mr Ruhan's claims to follow assets.

133 Having decided the applications in the manner that I have, I cannot see the necessity for early disclosure of documents, particularly when some of these points are capable of being met by requests for further information. The appropriate procedure, once the interlocutory dust relating to injunctions, amendment and joinder has settled, is for the statements of case to be finalised with any requests for further information answered in order to clarify the parties' respective cases. Disclosure would follow in the ordinary course. I see no particular reason why it should be advanced. The documentary material surrounding the Isle of Man Settlement is, I am told, extensive. As I have found that Mr Ruhan has an arguable case, whilst I understand that the way in which the case is put may depend upon what the documents show I do not think it necessary for the fair disposal of the action that early disclosure be given and costs may or may not be saved by disclosure at this stage.

Privilege

134 Issues arise in relation to the manner in which documents subject to common interest privilege, as between Mr Ruhan on the one hand and Messrs McNally and Cooper on the other, fall to be dealt with. There is no issue with regard to documents held by Messrs McNally and Cooper and Bridgehouse Partners which are held by them in their capacity as Mr Ruhan's litigation lawyers in this action. Such documents are prima facie privileged and can only be the subject of disclosure in the event of waiver or some issue arising between Mr Ruhan and Bridgehouse Partners which turned on exchanges between them. In such circumstances, if Mr Ruhan wished to use such documents as against Mr Cooper and Mr McNally, in the context of this action, it is inevitable, as Mr Waller recognises, that all parties would have to see the documents in question.

135 The position must be much the same in relation to documents which are the subject of common interest privilege. Subject to waiver, parties to common interest privilege are entitled and bound to withhold disclosure from other parties. If there is waiver and documents fall to be disclosed in relation to an issue between Mr Cooper, Mr McNally and Mr Ruhan, once again all those documents must be open for all parties in the action to see.

136 It is contended on behalf of Mr Cooper and Mr McNally that problems may arise if there are documents in the latter's possession that bear on the claims advanced by the claimants and, but for the question of common interest privilege, would fall to be disclosed under the ordinary provisions of CPR 31.6 . Such documents may exist above and beyond those which have already been disclosed in relation to the particular “transaction” in respect of which privilege was waived, namely the exchanges leading to the drafting of the Defence and further information covering Mr Ruhan's beneficial interest in the Arena Settlement and its assets.

137 I am not going to anticipate any such issues nor determine them on an abstract basis. Any problems will have to be resolved as and when they arise. It may well be that there are significant difficulties and issues may arise between Mr Ruhan on the one hand and Messrs Cooper and McNally on the other which the court has to resolve in the absence of other parties in order to determine whether some form of privilege has been waived or some other exception applies which requires disclosure to other parties. That must wait another day.

The terms upon which Mr Ruhan has permission to amend and join the additional parties and the issue of costs

138 Mr Adkin QC, in submissions adopted by Mr Mill QC for Messrs McNally and Cooper and Mr White QC for the other additional parties, contended that if Mr Ruhan were to be given permission to amend and join the additional parties, it should be on stringent terms. A number of possible conditions were put forward. The first was that security for costs should be provided in respect of the new defence and additional claims. The second was that Mr Ruhan should give a full explanation of all the changes in his case and why he said what he did. Further, a full explanation should be given in respect of what he said in his West Virginia deposition and what he said in Form E. He should in particular state why his “nominee arrangements” with Messrs Cooper and McNally were not documented. Further, he should state exactly what sums he has received from companies in the Arena Settlement over the period in which it has existed.

139 In my judgment none of these conditions are appropriate. It is clear from Dr Smith's approach, as mentioned earlier, that he uses the process of litigation, and abuses it, for the purpose of obtaining leverage and harassing others. Mr Ruhan has given a sufficient explanation for this court to be satisfied that he should be given permission to amend and join the additional parties. If proper requests for information can be formulated in relation to the new case advanced, no doubt such requests can be made and answered with, if necessary, the court determining any issues which arise as to the propriety of such requests.

140 On my finding, the claimants have already recovered more than their claimed entitlement and quite sufficient to cover any costs for which Mr Ruhan may be liable. If security for costs of the additional parties, other than the original claimants, is appropriate on ordinary principles, then an application can be advanced on that basis and the court will deal with it then. Furthermore, it should be borne in mind that as a result of the Isle of Man disclosure proceedings and the Isle of Man Settlement, it is the claimants and the additional parties who hold all the documents relating to the Arena Settlement and much else of Mr Ruhan's alleged assets. This indisputably impacts on his ability to give explanations of his financial affairs, particularly as Odyssey, part of the Cooper/McNally owned structures, have in the past provided him with information as to the financial affairs which he says were handled by Messrs Cooper and McNally, and were the subject of advice from them, particularly Mr McNally in more recent years.

141 Looking at the matter in the round, it appears to me that there is much to be said against the position of all the relevant parties in these proceedings. In hard-fought litigation of this kind, it is appropriate that orders for costs should be made which reflect success or failure on the part of the various parties and to some extent at least mark the court's disapproval of discreditable conduct.

142 The usual order in relation to amendment of an existing pleading is that the amending party should pay the costs of and occasioned by the amendment. I order that in relation to the Defence and further information. Given the nature of the amendments, I order that these be paid on the indemnity basis since this is a case so far outside the norm that it justifies the court showing its disapproval of Mr Ruhan's deliberate attempt to mislead, however unsuccessful that may have been.

143 I am however wholly unimpressed with the position of the claimants who have already over-recovered and did not see fit to inform the court and who entered into the Isle of Man Settlement on a basis which, on its face, is directly contrary to the case which they are pursuing against Mr Ruhan. That point holds good for Dr Cochrane, Dr Smith and SMA Investment Holdings Ltd as a creature company. So far as Mr Cooper and Mr McNally are concerned, there are serious issues of fact to be determined but the implausibility of their account, in circumstances where Mr Cooper is recorded at meetings with solicitors as saying that he had no interest in the Hotel Portfolio and in the overall context of the provenance of assets in the Arena Settlement from Mr Ruhan's businesses, is manifest. Their criticism of the amendments for which they were jointly responsible was unjustified.

144 Mr Ruhan has succeeded in his application for amendment and joinder and in the ordinary way would be entitled to his costs of those applications as against the parties resisting. In order, however, to mark the court's disapproval of Mr Ruhan's attempts to mislead the court, I consider that the right order in respect of all the applications other than the orders I have already made,

should be no order as to costs and that those costs should lie where they fall.