Neutral Citation Number: [2019] EWHC 1951 (Ch)

Case No: HC-2016-001519

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2019

Before :

MISS JULIA DIAS QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

KEVIN TAYLOR	**Claimant**
- and -	
(1) VAN DUTCH MARINE HOLDING LTD	**Original**
(2) VAN DUTCH MARINE LTD	**Defendants**
(3) HENDRIK R ERENSTEIN	
(4) RUUD KOEKKOEK	
(5) MOHAMMED KHODABAKHSH	**Additional**
(6) NEW BEGINNINGS TECHNOLOGIES LLC	**Defendants**
(7) RHINO OVERSEAS INC (aka Rhino Overseas Ltd)	

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James Ramsden QC and Daniel Benedyk (instructed by Keystone Law) for the Claimant
Lance Ashworth QC and Dan McCourt Fritz (instructed by Messrs Archerfield Partners LLP) for the Additional Defendants
The Original Defendants did not appear and were not represented

Hearing dates: 4-5, 8-12 April, 21 June 2019

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JUDGMENT

Miss Julia Dias QC sitting as a Deputy Judge of the High Court:

A. INTRODUCTION

1. This judgment is divided into the following sections:

A. Introduction

B. The issues in outline

C. The evidence

D. *Kendall v Hamilton*

E. Agency

F. Contractual claims

G. Misrepresentation

H. Conspiracy

I. Unjust enrichment

J. Proprietary claims and constructive trust

K. Quantum and interest

2. The Claimant, Mr Kevin Taylor, is a businessman of some prominence. He is the chairman and founder of the McClaren group of construction companies. However, for all his undoubted business acumen, he now finds himself in the unfortunate position of having made a short-term loan on the strength of apparently credible assurances that it would be repaid in short order, only to be left grievously disappointed when the time for payment arrived.

3. When no payment was forthcoming, Mr Taylor obtained a default judgment against the four Original Defendants, who were the persons and entities with whom he had dealt. That judgment remains unsatisfied and the question for determination at this trial has been whether Mr Taylor is additionally entitled to seek relief (a) in respect of the same causes of action against the Fifth to Seventh Defendants (the "Additional Defendants"), one or more of whom he alleges to have acted as undisclosed principals of one or more of the Original Defendants, and/or (b) on the basis of an alleged conspiracy between the Additional and Original Defendants. This raises an interesting and difficult question concerning the extent to which a default judgment obtained against an agent bars a subsequent claim against an undisclosed principal – the so-called rule in *Kendall v Hamilton* (1879), 4 App. Cas. 504.

4. The procedural history of this action has been both tortuous and torturous, particularly in relation to disclosure, spawning no fewer than 25 witness statements and 16 affidavits on behalf of the Claimant, 11 affidavits on behalf of the Original Defendants, 9 witness statements on behalf of the Additional Defendants, and two separate sets of contempt proceedings against the Third and Fourth Defendants resulting in two separate sentences of imprisonment imposed on them.

5. Nonetheless, for present purposes the background can be stated relatively shortly as follows.

The Parties

6. The Claimant is a UK national with a passion for boats. Between about 2008 and 2016, he was resident in Monaco having moved there in part, but not

exclusively, for tax reasons. He still retains business interests there, although he has now moved back to the UK. His representative in Monaco is Mr Damian Crean.

7. The First Defendant ("VDMH") is a Maltese registered company which was incorporated at the end of April 2015. It is the 100% owner of the Second Defendant ("VDML"), a UK domiciled company. The Third Defendant, Mr Henk Erenstein, and the Fourth Defendant, Mr Ruud Koekkoek, are Dutch nationals, both resident in Monaco. They are the ultimate beneficial owners of the Van Dutch group, each owning 50% of the shares in VDMH.

8. The Fifth Defendant, Mr Mohammed Khodabakhsh, is a US citizen of Iranian extraction, residing in California. He is the legal and beneficial owner of the Sixth Defendant ("NBT"), a Limited Liability Corporation incorporated in Delaware on 19 June 2015. He is a physicist and engineer by profession and an inventor with several patents to his name. His particular expertise, and NBT's business, relates to the development of advanced green technologies. In 2009, he opened a private laboratory in California to research and develop these technologies. At the same time he recruited Mr Terry Vechik, a businessman with an MBA in marketing whom he had known for about 15 years, to handle his business affairs. In February 2018, Mr Khodabakhsh transferred his operations to an on-campus facility at Aachen University in Germany and the Californian laboratory was closed.

9. Mr Khodabakhsh has been the Chief Technology Officer of NBT since its incorporation. Mr Vechik was the Chief Operating Officer of NBT from its

incorporation until January 2017, when he became the Chief Operating Officer of the Seventh Defendant.

10. The Seventh Defendant ("Rhino") is a Panamanian company which was, at least until 30 May 2015, a 100% subsidiary of VDMH. It is the Additional Defendants' case that by a written agreement of that date, VDMH undertook to transfer 100% of the shares in Rhino to Mr Khodabakhsh as nominee for NBT as part of a joint venture between "Van Dutch" (putting it neutrally) and Mr Khodabakhsh/NBT to develop a green technology motor for marine use (referred to in these proceedings as the "E-Force Generator" or "E-Generator"). The entire shareholding in Rhino was formally registered in the name of NBT on 25 January 2017. However, the beneficial ownership of Rhino after 30 May 2015 was a matter of dispute before me.

11. At all material times, which for present purposes is 2014 onwards, Mr Erenstein and Mr Koekkoek carried on business designing, manufacturing and selling luxury leisure yachts under the "Van Dutch" brand. VDML was the active trading company, acting on behalf of Rhino, by whom all the relevant IP rights and valuable assets (principally moulds and tools) were owned. The actual manufacture of the yachts was outsourced partly to Marquis Yachts LLC ("Marquis") in the USA and partly to Couach CNC in France. By virtue of a licensing agreement dated 11 March 2015 between VDML, Rhino and an unrelated Panamanian company called Van Dutch Latam SA ("Latam"), Latam was granted exclusive rights to produce, distribute, promote, market and sell Van Dutch boats and products in a widely defined territory including the USA and Latin America. In return Latam undertook to pay VDML licence

fees and substantial revenues linked to the number of boats sold by Latam, based on a minimum of 20 boats per year.

12. In 2015, the business was restructured. VDMH was incorporated in April 2015 as the holding company of both VDML and Rhino as 100% subsidiaries.

The first approach to Mr Taylor

13. In August 2014, while Mr Taylor was still living in Monaco, he was contacted by a friend, Mr Mark Thomas. Mr Thomas also lived in Monaco and was very well-connected there, having close links to Prince Albert. Mr Thomas had become involved in the Van Dutch business and worked closely with Mr Erenstein and Mr Koekkoek. He explained to Mr Taylor that Mr Erenstein and Mr Koekkoek needed a bridging loan of US$1.2 million to tide them over a working capital crisis. In particular, money was needed to buy out a 10% shareholder. Mr Taylor was sufficiently interested to ask for some financial information and forecasts which he asked McLaren's Group Finance Director, Mr Craig Young, to assess. Mr Young advised that the return Mr Taylor could expect was reasonable but not such as to justify the trouble of entering into and documenting the transaction. In the event, the proposal was not taken further. In fact, although Mr Taylor was not aware of this until much later, a loan was made in November 2014 by TCA Global Credit Master Fund LP ("TCA").

The loan

14. In July 2015, Mr Thomas asked Mr Taylor again whether he would be prepared to make a bridging loan to the Van Dutch business. Negotiations

took place, principally between Mr Young and Mr Crean on behalf of Mr Taylor, and Mr Erenstein and Mr Hans Klaver on behalf of Van Dutch. Mr Klaver was the Van Dutch group's Dutch lawyer. I will have to deal in more detail below with the information provided to Mr Taylor and his advisers and the representations made to them during the course of those negotiations.

15. In general terms, however, they were given to understand that business was booming, that the group wished to expand and that it was currently in the process of preparing a bond issue in order to raise up to €20 million for this purpose. Meanwhile, however, a short-term cash injection of US$1,591,040 was urgently needed in order to settle outstanding payments due to Marquis. Mr Taylor was assured that yachts had been pre-ordered and that significant payments could be expected imminently from customers, and that in any event the licence fees from Latam alone would be sufficient to repay the loan within six months irrespective of the forthcoming bond issue. Further security was also offered to him in the form of options to acquire equity in the business and to purchase any two Van Dutch yachts at cost price, as well as pledges of 30% of the equity in VDMH and a charge over three stock boats owned by VDMH.

16. Heads of Terms between Mr Taylor and VDMH were drafted by Mr Crean to reflect these discussions and were signed by Mr Erenstein on behalf of VDMH on 24 July 2015. They included terms requiring full transparency in all the group's financial dealings and express authorisation by Mr Taylor for all payments by any group company. They also entitled Mr Taylor to direct that any receipts by a group company should be applied to repayment of the loan.

17. The Heads of Terms were expressly subject to the agreement and signature of a formal loan agreement. However, there was considerable urgency as Marquis was threatening to sue unless payment was made by 24 July 2015. Mr Taylor therefore arranged for funds to be advanced on the same day by way of direct remittance to Marquis.

18. Subsequently, a draft Loan Agreement was signed by or on behalf of the Original Defendants on about 30 November 2015. This broadly reflected the Heads of Terms, except that all four Original Defendants were shown as parties to the agreement and no mention was made of the options granted to Mr Taylor. It seems that these were intended to be the subject of a separate option agreement. Additionally, Mr Erenstein and Mr Koekkoek undertook to grant Mr Taylor a pledge over 51% of the shares in VDMH. As pointed out the following day by Mr Crean, however, the draft was incomplete in some respects and required amendment in others. The option agreement had also not been signed. Although Mr Crean asked for the Original Defendants to review the Loan Agreement urgently and revert, nothing further seems to have happened and no finalised text was ever agreed or signed.

Non-payment and breach of contract

19. The loan matured on 25 January 2016. It was not repaid, either then or subsequently. Nor was any of the security executed that had been promised to Mr Taylor. On 8 January 2016, Mr Taylor gave notice to exercise his options under the Heads of Terms to purchase two yachts and 33.33% of the shares in VDMH at a 10% discount but no response was received. No attempt was made at any time to comply with any of the provisions relating to financial

reporting and transparency. It subsequently transpired that the revenues under the Latam agreement had been assigned to TCA in July 2015, either before or soon after the loan was made.

20. In short, almost every obligation under the Heads of Terms and Loan Agreement was either ignored or breached.

The commencement of proceedings

21. On 17 May 2016, Mr Taylor commenced proceedings against the Original Defendants seeking damages for breach of contract and misrepresentation, alternatively rescission or damages in lieu of rescission. The Particulars of Claim also included a claim for an account and repayment of all sums paid to VDMH and VDML since signature of the Loan Agreement on the basis of an alleged constructive trust.

22. On 21 June 2016, Mr Simon Monty QC granted a limited worldwide freezing order against VDMH and VDML and wider disclosure orders against all four Original Defendants. The proceedings and the disclosure orders were ignored by the Original Defendants and on 7 July 2016, Norris J extended the freezing order and granted permission to commence contempt proceedings against Mr Erenstein and Mr Koekkoek. On 21 July 2016, Mr Robin Hollington QC granted permission to prosecute an application for committal against them.

23. On 2 August 2016, Mr Taylor obtained judgment in default against the Original Defendants for a liquidated sum of US$2,545,664 (representing the amount of the loan plus accrued contractual interest) with further damages to be assessed. By order dated 24 November 2016, Master Clark awarded Mr

Taylor further sums after assessment of US$1,384,000 and US$416,958.55, with assessment of certain other heads of damage being adjourned.

The contempt proceedings and the introduction of the Additional Defendants

24. Meanwhile, on 5 September 2016, Warren J committed Mr Erenstein and Mr Koekkoek to prison for six months, suspended until 4 October 2016 to allow them to purge their contempt. This finally prompted a response from the Original Defendants and on 4 October itself, Messrs Erenstein and Koekkoek purported to provide the disclosure required and also applied to vary or set aside Warren J's judgment. This has been referred to as the "remittal application".[1]

25. In affidavits served on 23 November 2016 in support of their remittal application, the Third and Fourth Defendants asserted for the first time that (i) VDML had acted as an agent on behalf of Rhino in its dealings with Mr Taylor; (ii) none of the Original Defendants owned Rhino; and (iii) certain valuable moulds and tools which Mr Taylor had understood to be owned by VDML were in fact owned exclusively by Rhino.

26. They relied in this respect on a document described as an affidavit (although it was not in fact in correct form) signed by Mr Khodabakhsh on 7 December 2016, in which he stated that he owned Rhino and confirmed that VDML had an agreement with Rhino whereby it acted as a nominee on its behalf. In response to an order of Barling J on 8 December 2016 requiring Mr

[1] For completeness, although it is not directly relevant to anything which I have to decide, Mr Taylor issued a second separate set of committal proceedings against Messrs Erenstein and Koekkoek on 9 November 2016, which led in due course to further consecutive three-month terms of imprisonment being imposed on each of them by Order of HHJ Pelling QC dated 15 March 2018.

Khodabakhsh's evidence to be adduced in proper form, a further document was produced purporting to be an affidavit of Mr Khodabakhsh signed on 14 December 2016 as *"attorney in fact on behalf of"* NBT. This affidavit broadly confirmed Mr Khodabakhsh's previous statement of 7 December 2016 but clarified that he had acquired Rhino *"on behalf of my company for my company"*. He also claimed to have been given a power of attorney over VDMH.

27. The remittal application was heard by Barling J on 12 January 2017 and in due course dismissed. None of the Original Defendants has played any part in the proceedings since then. During the hearing Mr Khodabakhsh appeared at court with certain documents but then left for reasons which were obscure. The Judge's order of 12 January 2017 (which records in some detail what was clearly a most unusual sequence of events) included an order requiring Mr Khodabakhsh to disclose to the Claimant by 19 January 2017 both the documents which he had brought to court as well as all other documents in his possession or control relating to the ownership of Rhino.

28. Over the ensuing months some limited disclosure was provided by Mr Khodabakhsh and NTB, and on 21 April 2017 NTB confirmed in writing to Mr Taylor's solicitors that at all material times (i) Mr Khodabakhsh had acted on behalf of NBT; (ii) NTB rather than Mr Khodabakhsh had been the ultimate beneficial owner of Rhino; and (iii) VDML had acted as agent for Rhino which owned *"all of the assets of the yacht business"* as principal.

The Amended Claim

29. On 14 September 2017, Mr Taylor applied to amend his Particulars of Claim to join Mr Khodabakhsh, NBT and Rhino as Additional Defendants. The application was consented to and further disclosure was ordered to be given by the Additional Defendants. The Additional Defendants served their Defence on 9 November 2017, to which the Claimant served a Reply on 23 November 2017.

30. On 6 November 2018, the Additional Defendants applied to amend their Defence to raise the *Kendall v Hamilton* point referred to above. Permission was given and the Amended Defence was served on 12 November 2018. The Claimant served an Amended Reply on 26 November 2018.

31. It is fair to say that the question of disclosure has been something of a running sore throughout these proceedings. Leaving aside the Original Defendants, whose attitude to their disclosure obligations has been variously castigated as *"flagrant", "blatant", "egregious", "audacious"* and *"shameless"*, the Claimant says that disclosure by the Additional Defendants has also been woefully inadequate. For their part, the Additional Defendants claim to have disclosed everything required of them. The alleged failings of the Additional Defendants in this respect were heavily relied upon by the Claimant not only as matters seriously undermining the credibility of Mr Khodabakhsh but also as part of an alleged conspiracy between the Original and Additional Defendants to deprive the Claimant of the benefit of the Heads of Terms and/or Loan Agreement.

B. THE ISSUES IN OUTLINE

32. As noted in paragraph 21 above, the original Particulars of Claim pleaded claims against the Original Defendants for breach of contract and misrepresentation. By his Amended Particulars of Claim, Mr Taylor:

i) joined the Additional Defendants to the existing pleaded causes of action on the basis that at all material times, the Original Defendants were acting as agents on behalf of one or more of the Additional Defendants as undisclosed principals;[2] and

ii) added two further causes of action against all the Defendants, namely a claim for unlawful means conspiracy and a claim in unjust enrichment.

33. The Amended Defence denies that there was any relationship of agency between any of the Original Defendants and the Additional Defendants beyond a limited agency between Rhino and VDML arising from a written agreement dated 1 April 2013. The Additional Defendants further deny being party or privy to any of the negotiations between the Original Defendants and Mr Taylor regarding the loan or to any agreement with him. They claim to have had no knowledge of these matters prior to their involvement in the present proceedings.

34. In the circumstances, they deny any liability to the Claimant for the original claims of breach of contract and misrepresentation on the facts. Their main defence in this regard, however, is that these claims are advanced against the Additional Defendants solely on the basis that they were undisclosed principals to the loan transaction and that the Claimant, having obtained

[2] The amended pleading is not specific or altogether consistent about which of the Original Defendants is alleged to have acted as agent on behalf of which of the Additional Defendants at any particular time.

judgment against the alleged agents, is now precluded by law – specifically the rule in *Kendall v Hamilton* – from suing the Additional Defendants as undisclosed principals. The Additional Defendants say that the same is true in relation to the further claim based on unjust enrichment, which they say can only arise on the basis of the alleged agency. They accept that the claim in conspiracy is not caught by the rule and can legitimately be pursued by the Claimant although they deny that the facts disclose any plausible case of conspiracy.

35. The *Kendall v Hamilton* point was the subject of a summary judgment application issued by the Additional Defendants on 19 December 2018. At the commencement of the trial, I was much pressed by Mr Ashworth QC on behalf of the Additional Defendants to rule on this application as a preliminary matter. This was on the basis that if I found in his favour, all issues would fall away save for the Claimant's case in conspiracy.

36. Persuasively as he argued the point, I declined his request essentially on case management grounds. It seemed to me then, and it seems to me now, that while this might have been a sensible course if the application could have been disposed of some months prior to trial, it had been ordered by Master Clark to be heard at trial with the result that any saving in costs would be far less than might otherwise have been the case. Moreover, time had been allocated for the trial of the entire action, the court would need to traverse much of the same ground in the context of the conspiracy claim in any event, both parties were fully prepared and their witnesses had made themselves available to give evidence. The prospects of an appeal by the Claimant in the event that I found

in Mr Ashworth's favour on the *Kendall v Hamilton* point seemed high, and in those circumstances, the benefits of dealing with the point in advance and potentially shortening the trial seemed to me to be outweighed by the potential risk of the matter having to come back for trial in the event of a successful appeal. I therefore ruled that I would deal with the point as part of my substantive judgment.

37. Against this background, the parties helpfully agreed the appended list of 32 issues for my determination, albeit each of issues 25-32 is objected to by one side or the other on the basis that it does not arise out of any pleaded case. For ease of exposition, the issues can be grouped into the following categories and I propose to address them in this fashion after a consideration of the evidence:

i) The *Kendall v Hamilton* point (Issue 18);

ii) Agency (Issue 1);

iii) Contractual claims (Issues 6-12, 25, 27-31);

iv) Misrepresentation (Issues 2-5, 16-17, 26);

v) Conspiracy (Issues 19-21, 32);

vi) Unjust enrichment (Issues 22-23);

vii) Constructive trust and proprietary claims (Issues 13-15);

viii) Quantum and interest (Issues 21and 24).

C. THE EVIDENCE

The Crean witness statement

38. Mr Crean was the person most closely involved in the final negotiations for the loan, raising queries and reporting back to Mr Taylor. His witness statement for the trial extended to a full 99 pages – this on top of seven affidavits and two statements that he had already served in the proceedings. At the outset of the trial, Mr Ashworth applied for the entire statement to be struck out on the grounds that it consisted of irrelevant recitation of evidence previously given and was in large part made up of inadmissible comment, speculation and submission, contrary to the letter and spirit of CPR Part 32 and paragraph 19 of the Chancery Guide.

39. These submissions had considerable force and I ordered that some 60 pages of the statement be struck out on the basis that it amounted to no more than a rehearsal of the procedural history by reference to, and adopting evidence previously given, not only by Mr Crean himself but also by other witnesses. This seemed to me to be wholly unnecessary and unhelpful, not least because all of the evidence in question was in any event before the court and available for reference if required. In my view, it was also inappropriate in principle to use Mr Crean as a vehicle for putting the evidence of other witnesses before the court without the possibility of cross-examination by the simple expedient of his "adopting" their evidence.

40. Even the remainder of the statement contained much which could be said to amount to inadmissible comment and submission, although I allowed it to stand on the understanding that the court would simply ignore such evidence and that Mr Ashworth would not be expected to cross-examine on it.

41. Nonetheless, it cannot be over-emphasised that parties to litigation are at all times required to co-operate in furthering the overriding objective of resolving disputes in a cost-efficient and proportionate manner. CPR Part 32 and the relevant passages in the Chancery Guide are designed to reinforce this duty by requiring that a witness statement is confined to those issues on which the witness in question can give admissible evidence and is as concise as the circumstances allow. It should therefore not contain lengthy quotations from documents, expressions of opinion or submissions about the evidence of other witnesses or argument on the issues. This should be obvious, but has in any event been confirmed by Sir Terence Etherton C (as he then was) in *JD Wetherspoon plc v Harris,* [2013] W.L.R. 3296.

42. As originally served, Mr Crean's statement contravened almost every one of these requirements. It did not assist the court and it wasted a considerable amount of time. I should emphasise that I make no criticism of Mr Crean personally in this respect. However, the Claimant's legal advisers should not have allowed his statement to be prepared in this form and it is to be hoped that they will not adopt a similar approach in the future.

Assessment of the witnesses

43. I heard a great deal of oral evidence and was referred to a quantity of documentation, as well as reading the witness statements, all of which I have considered carefully. On behalf of the Claimant I heard oral evidence from Mr Crean, from Mr Taylor himself and also from Mr Young and a Mr Guus Franke. On behalf of the Additional Defendants I heard from Mr Khodabakhsh and Mr Vechik. The originally planned sequence of witnesses

was considerably disrupted, as Mr Crean had to return to Monaco over the weekend to locate certain notes and documents which it became apparent during the course of his evidence should have been disclosed. As a result, his evidence was interposed at various points in the evidence of Mr Young and Mr Taylor. A number of travel arrangements needed to be changed at short notice and I am grateful to all the witnesses and to counsel for their patience and flexibility in this regard.

44. With regard to the factual analysis, the Claimant and the Additional Defendants were like ships passing in the night. Each invited me to interpret the evidence in a completely different way. Mr Taylor would have me believe that the Original and Additional Defendants were in league from the outset to defraud, if not specifically him, then at least any potential lenders to the Van Dutch group. Mr Khodabakhsh's case is that Mr Erenstein and Mr Koekkoek's dealings with him/NBT in relation to the joint development project for the E-Generator were entirely separate from their dealings with Mr Taylor in relation to the loan and that the two strands only came together in late 2016 as a result of the default judgment and freezing order. Which version I accept is the key to resolving this dispute.

45. Generally speaking, I was satisfied that all the witnesses who appeared before me were genuinely doing their best to give evidence truthfully to the best of their recollection. I nonetheless bear in mind the valuable discussion in cases such as *Blue v Ashley*, [2017] EWHC 1928 (Comm) at [65]-[70] about the inherent unreliability of memory and the various conscious and sub-conscious influences that may combine to undermine the reliability of a witness's

recollection. The people who could perhaps have assisted the court more than anyone else in determining the true course of events, namely Messrs Erenstein and Koekkoek, were, like Macavity, "not there". In the circumstances, I must arrive at my findings on the basis of the evidence before me and the inherent probabilities of the case.

46. Unlike Leggatt J in *Blue v Ashley*, I have had the benefit of a considerable quantity of documentation and I have in large part been able to test the witness evidence against those documents. In so doing, I bear in mind two further matters:

i) Not all the documents were drafted by native English speakers. In particular, Mr Erenstein, Mr Koekkoek and Mr Franke were all native Dutch speakers, and although they were clearly competent in English, they were not perfect. The same applied to Mr Franke's oral evidence. Moreover, many of the contractual documents concerning the joint development of the E-Generator, were drafted by an Italian lawyer in what appeared to be a somewhat haphazard fashion and without the attention to detail and consistency that would have been expected of, say, a firm of City solicitors.

ii) The fact that a witness has not told the truth or has been evasive in relation to one part of his or her evidence does not necessarily mean that the entirety of his or her testimony is to be disregarded. The baby must not be thrown out with the bathwater.

47. With all these points firmly in mind, I had no hesitation in accepting the evidence of Mr Young in its entirety. Mr Young is the Group Finance

Director for the McLaren Group. In general terms, he advised Mr Taylor in relation to corporate investments, while Mr Crean dealt with personal investments, albeit there was no fixed rule about this. I found him to be a patently honest and straightforward witness and his account of his involvement accorded entirely with the contemporaneous documentation.

48. I also found Mr Crean to be a generally honest witness. It was surprising, therefore, given his prior vehement and repeated denunciations of the Additional Defendants in relation to their disclosure, that he had himself failed to produce documentation which was clearly and obviously relevant to the issues in the case, including the two versions of the Heads of Terms signed by Mr Taylor and his email report to Mr Taylor timed at 1446 on 24 July 2015, none of which had previously been disclosed. While I acquit him of any nefarious intent in that regard, I nonetheless found his evidence to be coloured by an understandable desire to salvage something for his employer from the wreckage of what was clearly a disastrous investment that he had endorsed, contrary to the views of Mr Young. His obvious interest in justifying his position in my view subconsciously led him to recall events and, in particular, his own thought processes, in a way which supported Mr Taylor's pleaded case rather more unambiguously than was perhaps justified. It also predisposed him to see conspiracy and dishonesty lurking in everyone and everything associated with the Van Dutch business, including Mr Khodabakhsh who, if the Additional Defendants are right, was as much taken in by Mr Erenstein and Mr Koekkoek as Mr Taylor. He was also inclined at times to be argumentative.

49. As for Mr Taylor himself, it was clear that he had done virtually nothing to prepare for the hearing. He was wholly unfamiliar with the pleadings, notwithstanding that they were attested by a statement of truth given on his behalf. Nor was he familiar with many of the documents which he claimed in his written statement that he had specifically reviewed.

50. This is wholly unsatisfactory. Mr Taylor may well be a busy man, but this is a claim brought in his personal name and one which, moreover, alleges misrepresentation and conspiracy. In those circumstances, it was incumbent on him to engage with the proceedings in sufficient detail to be able to give proper instructions. As it was, he did not recognise any of the documents on which the alleged conspiracy is based and was unable to state with any clarity what the conspiracy consisted of. I was therefore left in little doubt that he had had no meaningful input into either the pleadings or his witness statement, other than at the highest of levels, leaving them all to his legal advisers. His answer to the question whether he had read his statement before signing it was telling: *"I read it carefully to make sure that I was in agreement with it."*

51. Whatever else one might say about such a *laissez-faire* attitude to the litigation, of one charge Mr Taylor can be completely exonerated and that is that his oral evidence was in any way embellished by recent reference to the documents. On the contrary, what he said in the witness box was his pure, unvarnished recollection. Whether it was more or less reliable as a result is a different question: see paragraph 45 above. In many instances, he simply could not remember what he had seen or done.

52. Mr Franke works in corporate finance. He is the founder of Nederroem Corporate Finance, which includes a Dutch financial consultancy, Nederroem BV ("Nederroem") and its predecessor, Nedfact ICF BV ("Nedfact"). He was involved in 2016 and 2017 in efforts to refinance the Van Dutch yacht business.

53. Mr Franke gave evidence in a foreign language and I made due allowance for that fact. Nonetheless, I treated his evidence with a degree of caution. He had made an unsolicited offer to give evidence on behalf of Mr Taylor in return for a share of any recovery. Albeit he explained that this was not for personal gain but in order to repay what he regarded as a moral obligation to certain investors who had advanced funds in anticipation of making an investment which never materialised, the fact remained that he had an undoubted pecuniary interest in the successful outcome of the action. Moreover, he clearly felt very aggrieved at having invested a considerable amount of time and effort in trying to secure investors for the Van Dutch business only to receive nothing for his pains. This manifested itself at times in a degree of personal animus against Mr Khodabakhsh.

54. Mr Franke was also inclined to base his evidence on his own assumptions, interpretations and opinions of matters about which he had no personal knowledge. Most, if not all, of his information derived from what he was told by Mr Erenstein, on whose word it is difficult to place any reliance. As a result, some of Mr Franke's evidence was inconsistent and confused – particularly in relation to what he had been told about the ownership of Rhino

and whether the documents transferring ownership of Rhino in April/May 2015 had been backdated (which was not in fact the Claimant's case).

55. As for Mr Khodabakhsh, it is true that some parts of his evidence relating to events from late 2016 onwards, especially with regard to the NBT minutes of 29 October 2016 and the rebuttal letters, were evasive and unconvincing. However, I bear in mind that if he was right about his dealings with Van Dutch, then NBT was in truth the rightful owner of Rhino and the discovery of Mr Taylor's claim and the freezing order must have come as a very unwelcome shock, since they clearly put Rhino and its assets in jeopardy. In such circumstances, he and Mr Vechik may well have thought that their immediate tactic should be to put it beyond doubt that Rhino was not part of the Van Dutch group by belatedly completing the transfer of shares in Rhino, and at the same time to try in conjunction with Mr Erenstein and Mr Koekkoek to find a positive solution going forward which actively involved Mr Taylor. When that failed and they were joined to the litigation, I can well understand why they may have decided to say and disclose as little as possible so as to avoid giving any ammunition to Mr Taylor and his lawyers. They accordingly took a very narrow view of the disclosure order made by Barling J.

56. This was undoubtedly unhelpful from the Claimant's point of view but, as non-parties to the litigation, they were under no moral or other obligation to co-operate with Mr Taylor whose interests were clearly adverse to their own to the extent that he was laying claim to Rhino and its assets. Moreover, the litigation post-dated by some years the critical events of 2015 on which this

case primarily turns. Accordingly, even if valid criticisms are to be made of the conduct of the Additional Defendants from 2017 onwards, I would require an independent basis for rejecting Mr Khodabakhsh's testimony in other respects. I also bear in mind that many questions put to him in cross-examination were not based on any evidence and some were put to him on an incorrect basis, for example relating to the validity of pre-incorporation contracts on behalf of NBT.

57. Mr Vechik, like Mr Khodabakhsh, had equally been concerned to give away as little as possible once the proceedings and, in particular, the freezing order came to light. However, I saw no reason to doubt his evidence generally and certainly not in relation to his involvement in 2015.

Factual Findings

58. I will not attempt to summarise the evidence given by each of the witnesses. Rather, I set out below my key findings on the factual sequence of events. If a particular piece of evidence is not referred to, that does not mean that I have failed to take it into account.

2014

59. The story begins in mid-2014 when Mr Taylor was first asked by Mark Thomas about the possibility of providing a US$1.2 million bridging loan to the Van Dutch business. Mr Thomas was a good friend of Mr Taylor's who was well-connected in Monaco and one of Prince Albert's best friends.

60. Notwithstanding that this was a personal, rather than a corporate, investment, Mr Taylor forwarded to Mr Young all the documentation that was provided to

him by Mr Thomas without reading it himself – at least in any detail. This was not unusual. Mr Taylor's habitual *modus operandi* was to rely on the professionals around him.

61. The documentation included various press releases, profit and loss figures for 2012, unsigned accounts for 2013, and sales forecasts for the next five years. Mr Young also obtained a Dun & Bradstreet report on VDML which showed that the company had been balance sheet insolvent every year from 2009 to 2012, and had a low credit rating and negative net worth of £22,000 in 2013 despite having around £247,000 cash in the bank. Mr Young inferred that the negative net worth was attributable to a shareholder or intercompany loan.

62. It is fair to say that Mr Young was sceptical about the proposal. Without sight of order books and historical sales figures to support the forecasts, he was concerned that these were simply "fluff". The available figures suggested that VDML was not the trading entity in the sense of being the company actually selling the boats, and its accounts certainly did not support the forecast level of turnover going forward. The offer of 10% of VDML's shares as collateral lacked substance given the company's negative net worth.

63. He voiced his concerns to Mr Taylor and offered to try to flush out the further information required, but Mr Taylor, having already queried whether the return was worth the effort, decided in the light of Mr Young's continuing lack of enthusiasm that it was not and the matter was dropped.

The Joint Venture

64. One of the main technologies being developed by Mr Khodabakhsh's laboratory at the material time was a green technology generator which uses centrifugal force to produce electricity. It has been referred to in these proceedings as the "E-Force Generator" or "E-Generator".

65. In about mid-2013, Mr Khodabakhsh was introduced to a Mr Robert Lavia, a businessman involved in a number of technology companies. Mr Lavia invited Mr Khodabakhsh to accompany him to Cologne to evaluate some centrifugal energy technology and then to travel on to Monaco. He did not explain the purpose of the trip to Monaco. Mr Khodabakhsh nonetheless agreed to go as he had never been to Monaco before and was interested to see it. He arrived in Cologne on 13 March 2014, where he visited the technology facility with Mr Lavia and suggested some possible improvements. Mr Lavia told him that Prince Albert of Monaco was also interested in the Cologne technology.

66. Mr Lavia and Mr Khodabakhsh then flew on to Monaco where he was introduced to a Mr Martin Raken who was a part-owner of the Cologne technology. On 16 March 2014 Mr Khodabakhsh was invited to the palace to meet Prince Albert who had apparently been interested in his comments about the Cologne technology. Mr Khodabakhsh thinks that it was immediately after this meeting that he met Mr Thomas for the first time, whom he understood from Mr Raken to be Prince Albert's "best friend". He returned to the USA on 18 March 2014.

67. After his return, Mr Khodabakhsh continued to exchange emails with Mr Raken. The name "Van Dutch" appeared in some of Mr Raken's emails, but

Mr Khodabakhsh said that the name meant nothing to him and that he would not have paid much attention in any event as Mr Raken was full of grand – and sometimes incoherent - ideas and he took everything he said with a pinch of salt. If he gave the matter any thought at all, he thinks that he would have assumed they were potential funders for one of Mr Raken's numerous ventures and probably associated with cars as Mr Raken had said that Van Dutch had an agreement with Red Bull for the Monaco Grand Prix.

68. On 19 May 2014, Mr Khodabakhsh returned to Monaco where he attended a party hosted by Mr Thomas just prior to the Grand Prix. At the party he spoke at length to Prince Albert who suggested that a centrifugal technology could perhaps be used in yachts and introduced him to Mr Koekkoek. Mr Koekkoek was interested in the idea and took Mr Khodabakhsh to the port the following day to look at a Van Dutch boat. Shortly before leaving Monaco on 28 May 2014, Mr Khodabakhsh met Mr Erenstein and was impressed by him. He spent a considerable amount of time with Mr Erenstein over the next couple of days and before he left it had been agreed between all three of them that they would try to develop a centrifugal technology for use in Van Dutch boats. From Mr Erenstein and Mr Koekkoek's point of view, it was an attractive proposition because it would give their business an ecological edge. From Mr Khodabakhsh's perspective, it provided a conduit by which his technology could be exploited commercially. Van Dutch appeared to be a very successful brand and Mr Khodabakhsh was impressed by Mr Erenstein and Mr Koekkoek's apparently high standing and reputation in Monaco.

69. Thereafter, Mr Khodabakhsh was in frequent correspondence with Mr Erenstein and Mr Koekkoek. His primary motivation in entering into a joint venture was to provide a vehicle for developing and marketing his new technology. For this purpose, he and Mr Vechik planned to incorporate a new company, NBT, which would own the rights to the E-Generator.

70. On about 16 April 2015, Mr Khodabakhsh returned to Monaco to finalise the arrangements. He and Mr Vechik had become frustrated at the length of time it was taking to finalise the joint venture agreement and Mr Vechik had insisted that unless a deal was concluded by 31 May 2015, they would pull out. This was nothing to do with any lack of trust in Mr Erenstein or Mr Koekkoek. Rather, they wanted to apply pressure to conclude a deal which they believed would be advantageous to them.

71. I am satisfied that the negotiations between Mr Erenstein and Mr Koekkoek and Mr Khodabakhsh leading eventually to the conclusion of a joint development agreement on 30 May 2015 took place substantially in the way described by Mr Khodabakhsh and Mr Vechik.

72. Thus I accept that Mr Vechik had carried out such corporate due diligence as he could in relation to Van Dutch. It seemed to him that the boats were good and that Van Dutch had a good market and good connections, including Red Bull. However, only limited information was available and he did not have any corporate structure, background or financial information. Accordingly his and Mr Khodabakhsh's paramount concern was to ensure that:

i) The technology was protected and that they would not be required to surrender it without getting equal value in return, even if he could not ascribe an exact figure to that value;

ii) The technology, being the only asset of value, would not go into an operating company which could be bought or seized, but would be kept in a separate company that leased the rights to use the IP.

73. I also accept that at all times during the negotiations, Mr Khodabakhsh was acting on behalf of NBT which was then in the process of incorporation as the vehicle by which Mr Khodabakhsh would develop the technology. I find it entirely plausible in these circumstances that Mr Khodabakhsh as a non-lawyer would not necessarily have seen the need to distinguish between himself and a company of which he was the sole legal and beneficial owner and which was incorporated to develop his particular pet project. In the same way, Mr Taylor as the ultimate beneficial owner of the McClaren group, clearly regarded McClaren as "his" business, regardless of whether he was a shareholder or director of any particular company.

74. During the course of this visit, two letters of intent were signed. The first was a draft Letter of Intent dated 22 April 2015 signed by Mr Erenstein on behalf of "Van Dutch Marine" and by Mr Khodabakhsh on behalf of NBT *"in forming"*. It was drafted by Mr Gianfranco Puopolo, an Italian lawyer in Monaco. The letter recorded the intention of the parties to enter into a joint development agreement for a new green technology device by 31 May 2015. NBT was to provide the technology and give Van Dutch Marine shares in a new joint venture company holding the technology, while Van Dutch Marine

was to provide shares or other assets to NBT in an equal or greater value. Mr Khodabakhsh did not obtain any legal advice on the letter, but this latter provision was included at the suggestion of Mr Vechik reflecting their concern not to relinquish the technology without getting something in return.

75. In so far as relevant, I find that this first Letter of Intent can only have been concluded with VDML as VDMH was not incorporated until the end of April.

76. The second Letter of Intent dated 24 April 2015 (also drafted by Mr Puopolo) effectively supplemented the first by further developing the intended content of the joint development agreement and the two must be read together. It was again signed by Mr Erenstein, this time specifically on behalf of VDML, and by Mr Khodabakhsh as attorney in fact on behalf of NBT.

77. After signing this document, Mr Khodabakhsh flew to London before returning to the USA. He was then invited back to Monaco by Mr Koekkoek for the Grand Prix where he arrived towards the end of May.

78. I find that Mr Khodabakhsh knew nothing about the restructuring of the Van Dutch group in April 2015 or the reasons for it. Nor did he know anything about Van Dutch's increasing financial difficulties. This is not implausible. Securing the joint venture with NBT would have been a valuable tool in Mr Erenstein and Mr Koekkoek's attempts to secure finance from other sources. I find it inherently improbable that they would have told Mr Khodabakhsh that the business was in dire straits and in urgent need of money since this would hardly have served to persuade him that Van Dutch was a reliable joint venture partner. I therefore do not accept that Mr Khodabakhsh saw or was told about the Kraaijeveld Coppus Legal tax restructuring report or the

prospective incorporation of VDMH as a holding company. Nor was he told about the attempts to raise money, whether via the bond issue or otherwise.

79. I also accept that at this stage Mr Khodabakhsh knew nothing about the existence of Rhino or the fact that Rhino owned the IP, moulds and tools. He had assumed from what he was told and what he observed that Mr Erenstein and Mr Koekkoek "were" Van Dutch and that they owned the entire Van Dutch business, including all the assets and IP and factories associated with it – *"the whole enchilada"*, as he put it. He saw that they were extremely well-connected and apparently very wealthy, with a good product to sell and an outwardly successful business. By all accounts Messrs Erenstein and Koekkoek were very charming and plausible people and Mr Khodabakhsh may well have been taken in by them and their high society connections. In that, of course, he was not alone. Mr Taylor and his advisers made similar assumptions that they owned and controlled the entire business, irrespective of its precise corporate structure.

80. In any event, so far as Mr Khodabakhsh and Mr Vechik were concerned, exactly how the business operated was a secondary consideration. If Van Dutch defaulted, their ultimate protection lay in the fact that they could simply refuse to hand over the technology.

81. On the morning of 24 May 2015 (the day of the Grand Prix itself), Mr Erenstein and Mr Khodabakhsh had a discussion in which Mr Erenstein offered to provide their contribution to the joint venture in the form of shares in Rhino. Mr Khodabakhsh said that this was first time that he became aware of the existence of Rhino, the fact that it was the owner of the IP, moulds,

tools and books and that it had granted an exclusive global licence to VDML to manufacture boats under the Van Dutch brand. By this time VDMH had been incorporated and it may well have been explained to Mr Khodabakhsh that Mr Erenstein and Mr Koekkoek were the beneficial owners of VDMH which in turn owned Rhino. For the reasons already explained, however, this would have been a matter of little interest to him. I find that Mr Khodabakhsh did not know the specific terms of any agency agreement between VDML and Rhino.

82. Mr Khodabakhsh immediately consulted Mr Vechik by telephone. All Mr Vechik was able to find out about Rhino was that it was a Panamanian company. Although they were being told that the shares had value, he could not be certain of this and he knew virtually nothing about Van Dutch beyond the fact that they made nice yachts. He therefore told Mr Khodabakhsh to take the Rhino shares, but to make sure that they would get their money, that Prince Albert was involved, that all the operational requirements were met and that they were protected from any outside interference.

83. Mr Khodabakhsh accordingly accepted the offer, and the Request for Transfer of Shares was prepared – probably by Mr Puopolo – and signed on the same day. This provided for Mr Erenstein and Mr Koekkoek to transfer 100% of the shares in Rhino to Mr Khodabakhsh on 30 May 2015 for a price of €10,000. This was the nominal value of the shares, the intention being that it would be offset against subsequent payments to NBT under the JDA. Accordingly, no money physically changed hands. Although Mr Khodabakhsh's signature is unqualified, for the reason given in paragraph 73

above, I find that he was signing and was understood to be signing on behalf of NBT and that the failure to mention NBT was simple oversight.

84. On 30 May 2015, three further documents were signed. First, the Joint Development Agreement (the "JDA") itself was signed between VDML and NBT. This provided for VDML to pay NBT a total fee of US$400,000 in monthly instalments. In the event that the E-Generator was successfully completed and tested, VDML was to provide NBT with a one-third equity interest in either VDMH or such other joint venture company as might be incorporated to hold the IP and know-how in the E-Generator. The aim of this provision was to give Mr Khodabakhsh control over the company that owned the E-Generator technology. At this stage it had not been finally decided what that corporate vehicle would be. The intention and hope was that it would be a Monegasque company called Volta in which Prince Albert had a stake, but if that did not happen, the technology would go to Van Dutch and Mr Khodabakhsh wanted to ensure that he still had control over it. Again he did not draw any distinctions between the constituent parts of the Van Dutch group and regarded the reference to a 33% equity interest in VDMH as a reference to the entire Van Dutch business.

85. The second document was an agreement between VDMH (represented by Mr Erenstein) and Mr Khodabakhsh in which VDMH undertook to transfer 100% of Rhino's shares to Mr Khodabakhsh the next business day. This agreement effectively crystallised the Letter of Intent dated 22 April 2015 and the subsequent Request for Transfer of Shares dated 24 May 2015 and represented the "assets of equal value" contemplated by the former. I find that this

agreement was concluded between VDMH, as the only party with the ability to transfer the shares, and NBT. Although the agreement referred only to Mr Khodabakhsh as a party, clause 7 made it clear that he was acting as an agent for his company, ie. NBT, and that is consistent with the Letters of Intent and the JDA.

86. Mr Khodabakhsh was cross-examined about the two-year time limit in the agreement. He said he had no idea why this was but hazarded a guess that it was to do with the non-disclosure and confidentiality provisions. This response was criticised but, whether correct or not in law, it is entirely consistent with the second rebuttal letter in which Mr Vechik on behalf of NBT stated his belief that a time limit was required in order for these provisions to be enforceable.

87. The third agreement was signed by both Mr Erenstein and Mr Koekkoek on behalf of VDMH and by Mr Khodabakhsh. Although not expressly so stated, Mr Khodabakhsh said that he also signed this agreement on behalf of NBT. This was the last of the agreements signed between the parties. It referred to the receipt of shares *"from VDMH into MK"* and provided that he should hold them *"in a protected state for use by VDMH in its normal business operations until such time that MK and VDMH agree that VDMH is once again solvent and free of liens and or any other holds."*

88. It is undoubtedly the case that this document is infelicitously expressed and capable of more than one interpretation. Mr Ramsden argued that it was a "shielding document", the subject of which was the Rhino shares, and that its purpose was to conceal the valuable shares in Rhino from Van Dutch's

creditors by transferring them to Mr Khodabakhsh to safeguard until VDMH was again solvent. Mr Khodabakhsh said that it was nothing of the sort and referred to the obligation under the JDA to transfer one-third of VDMH's shares to NBT. He said that it was drawn up at Mr Vechik's insistence as an umbrella or insurance policy against the possibility that the technology was successfully developed but Volta was never incorporated. In that eventuality, they would lose the cachet of an association with Prince Albert and Mr Vechik wanted to have some leverage in those circumstances to negotiate for more than the 33% equity share in Van Dutch to which NBT was entitled under the JDA.

89. In due course, Volta was incorporated with Mr Khodabakhsh taking a 40% share, and Prince Albert, Mr Erenstein and Mr Koekkoek 20% each. Save for Prince Albert, who held his shares in Volta through a nominee, the other shareholdings were held indirectly through corporate shareholders. Mr Khodabakhsh was unable to recall the date of Volta's incorporation, but said (confirmed by Mr Vechik) that after Volta had been incorporated and they were confident that the technology would go into a separate company, the third agreement of 30 May 2015 was viewed as redundant and was shredded. In the event, Volta never traded and Prince Albert decided to wind it up.

90. Had this agreement stood alone, there would have been much to say for the construction which Mr Ramsden sought to put on it. As it is, however, it has to be read as part of the entire package of documentation agreed between the Van Dutch interests and Mr Khodabakhsh in April/May 2015. The lack of express reference to Volta is explicable on the basis that no decision had yet

been made as to which company was to hold the technology. The evidence that it was shredded after Volta was incorporated was somewhat surprising but not so implausible that I find it simply cannot have happened as described. On balance, I accept Mr Khodabakhsh's explanation of this document. I am certainly unable to find that the Claimant has proved on a balance of probabilities that it was a "shielding document" in the sense argued for.

91. Quite apart from anything else, in circumstances where I have found that Mr Khodabakhsh was not told about Van Dutch's financial difficulties, I find it far more implausible, if not utterly incredible, that Mr Khodabakhsh would have been conspiring in May 2015 with Mr Erenstein and Mr Koekkoek, whom he hardly knew, to defraud unidentified future creditors of the Van Dutch business, let alone Mr Taylor specifically, when it was common ground that neither knew anything about the other's existence until 2016. As Mr Khodabakhsh said, *"I have established a lifestyle by myself. I'm well content. I have two boys, daughter in laws, wife of 30 years. I have a business running that I do research and development. He is suggesting that I came all the way to Monaco, put hand in hand with two Dutch guys that I don't know from Adam to put this together so they can raise money, take money away from an individual, send it to Marquis Yachts for their benefit. What is the benefit in it for me, my Lady? Why would I on earth do this?"* I find this testimony compelling.

92. Mr Khodabakhsh then returned to the United States to continue working on the E-Generator technology and there is no evidence that he had any further contact with Mr Erenstein or Mr Koekkoek or anyone acting on their behalf

until the end of December 2015 at the earliest. However, VDMH did not transfer the Rhino shares immediately as it had undertaken to do. I have little doubt that the reason why the Rhino shares were never transferred was because Mr Erenstein and Mr Koekkoek were simultaneously relying on Rhino being owned by VDMH as part of their attempts to raise money. Mr Khodabakhsh was not overly concerned by this as he had the ultimate protection of simply refusing to release the technology but VDML also failed to perform its obligations under the JDA and ceased making payments after 1 December 2015. On 4 August 2016, Mr Khodabakhsh on behalf of NBT served notice of default under clause 10.2 of the agreement. The default was not cured within 15 days and the JDA accordingly terminated on 19 August 2016.

93. I am therefore satisfied that as far as Mr Khodabakhsh was concerned there was a genuine agreement to transfer the Rhino shares to NBT in 2015 as part of the joint venture arrangements and that there was no ulterior motive or purpose on his part and certainly no question of any backdating or sham.

The loan

94. Meanwhile in July 2015, Mr Taylor had been approached a second time for a loan. Once again, he referred the proposal to Mr Young without looking at the underlying documentation himself in any detail. Despite his scepticism in 2014, Mr Young explained and I accept that he looked at the 2015 proposal afresh.

95. On 9 July 2015, Mr Young spoke to Mr Klaver who was the Van Dutch legal counsel. At that stage he did not know precisely what the group consisted of,

or how it was structured. It is clear from Mr Young's follow-up email sent the same day that Mr Klaver explained that cash was needed as working capital in order to make down payments to the yacht manufacturer of around 70% of the manufactured price, with Van Dutch eventually receiving between 10%-30% of the retail price charged to the purchasers. Mr Klaver also suggested that the loan would be refinanced from a bond placement which was currently in negotiation but that even if the bond was never issued, gross profits from sales would cover repayment of the loan. Mr Young asked to see a spreadsheet showing the quantum of the cash shortfall, full details of all orders received, a cashflow reflecting the time taken to fulfil the sales orders, the security package which was being offered and a group organisation chart which Mr Klaver had mentioned.

96. In an email dated 10 July 2015, Mr Klaver answered some of these queries. He explained that a short term bridging loan of €2 million was required because down payments had to be made to the factory for the pre-order of materials before the customers were required to make their own down payments. He also referred to the licence fees payable by Latam to VDML and stated that more than sufficient funds would be coming in over the next few months to repay the loan, irrespective of the bond issue.

97. On 13 July 2015, Mr Klaver sent a further email to Mr Young, giving further details of the bond issue then being proposed as security for Mr Taylor. He attached a corporate structure chart which he had signed himself in his capacity as "Advocaat" and which showed VDMH as the holding company and Rhino, VanDutch Marine Finance I BV (the proposed bond issuer) and

VDML as 100% subsidiaries. Mr Klaver stated that 51% of the shares in VDMH would be pledged to an independent bond trustee which would thus have recourse to the IP of the group which was held by Rhino. In the event of default, the Bond Trustee would execute the pledge on behalf of all the bond holders. He informed Mr Young that the placement was going rather slowly, but that €600,000 had been committed which should be paid within the next few days.

98. Mr Young subsequently received the Information Memorandum prepared for the purposes of the bond issue. This contained a virtually identical corporate chart and confirmed what Mr Klaver had said about the group structure, the IP held by Rhino and the way in which the bond issue would be structured.

99. Based on the Information Memorandum and what he had been told by Mr Klaver, Mr Young understood that the loan would be to a group company, that sales were made by the group and that all revenues and income would be retained by the group. Mr Young was not particularly worried about the IP rights, beyond believing that they were held within the group via Rhino. Of far greater importance in his mind was the question of how the loan would be repaid if the bond monies were not raised and, in particular, whether there was satisfactory evidence to support the sales forecasts and income projections he was being given. His main focus was therefore on the revenues into the group, primarily the Latam license fees and the income from sales. He was particularly sceptical about the sales forecasts which, so far as he could see, were only supported by assertion. He therefore put together a cashflow template which he asked Mr Erenstein and Mr Klaver to complete, and

pressed repeatedly for sight of actual orders to support the figures. Identifying precisely which company within the group was generating the revenues was not of primary concern to him.

100. On 22 July 2015, Mr Young received an email from Mr Thomas, forwarded by Mr Taylor, in which Mr Thomas stated that (i) not all the individual invoices and contracts were available since they came through the US dealer; (ii) the dealer's contract was to take 20 boats a year which would pay out a minimum of $2 million in fees; (iii) the bond monies were coming in slowly, but boat orders were flying in and Mr Erenstein and Mr Koekkoek were prepared to offer Mr Taylor security over their shares as well as over some boats. Mr Thomas stressed the urgency of making payment to the US manufacturer by Friday (24 July). This email confirmed to Mr Young that the Latam license fees would be received by the group. He was never told that they had in fact already been or were about to be assigned to a third party.

101. Mr Taylor's email was followed by an email from Mr Erenstein, offering a different security package, consisting of 10% of his own shares as well as security over 3 stock boats valued at €1.6 million. Mr Erenstein also referred to Mr Taylor's "deal" on two boats. (This related to a previous offer for Mr Taylor to acquire two Van Dutch boats at cost price.)

102. While deriving some comfort from the fact that further bond monies had been committed, from which he assumed that the potential purchasers had done their own due diligence, Mr Young continued to be troubled that no hard evidence had been produced to support the asserted sales forecasts and voiced his concerns to Mr Taylor on 23 July. He said he felt that they were being

pressurised into taking the borrowers on trust because of the supposed status and connections of the Van Dutch personnel. In a telephone conversation with Mr Thomas, he had been effectively told to *"stop asking these annoying questions"*.

103. After putting some further questions to Mr Erenstein at Mr Taylor's request on the morning of 23 July 2015, Mr Young effectively dropped out of the picture. He was based in England, whereas everyone else was in or near Monaco, and the matter was by then very urgent if the 24 July 2015 deadline to pay Marquis was to be met. It was therefore agreed that Mr Crean should take the matter over on behalf of Mr Taylor. Mr Crean had not been involved in the first approach to Mr Taylor in 2014 but was aware of it and had seen some of the email correspondence a few months later but not the Dun & Bradstreet report or the 2012 accounts. By 23 July 2015 he was only aware of the second proposal in general terms.

104. There was now considerable pressure to finalise the deal and Mr Crean held a meeting with Mr Erenstein and Mr Thomas on the afternoon of 23 July at which he was given the corporate structure chart signed by Mr Klaver. Mr Erenstein also provided some further documents on a USB stick, including the Information Memorandum and the Latam licensing agreement. After the meeting, Mr Erenstein forwarded a further email from Mr Klaver attaching draft documents relating to the bond issue and proposing that Mr Taylor participate in the bond placement so as to benefit from the security offered by the 51% pledge over the shares of VDMH.

105. Mr Crean reviewed all the documents. Like Mr Young, his main focus was on the big picture and, in particular, what revenues were available to repay the loan. Given the time constraints, he concentrated on the income stream from the sale of the boats and the licensing agreement. He was not concerned to check exactly where the revenues were going, so long as everything was kept within the group.

106. Following his review, Mr Crean emailed Mr Erenstein on the evening of 23 July 2015 with a number of queries including a request for a list of orders and a production schedule. The information provided in response, which was also forwarded to Mr Young, did not confirm what had previously been represented. When it turned out that the projected sales figures were not supported by firm orders, Mr Young did not mince his words. In an email to Mr Crean on 24 July 2015 he stated that *"It appears that they have lied and made material misrepresentations, very disappointing."* Mr Young lost all faith in the proposal at this point and did not think the deal should be done.

107. Mr Crean, however, was not willing to draw the same conclusion until he had tried to understand the discrepancies. He therefore had a second meeting on 24 July 2015. This meeting focused on the revenue coming into the group leaving what Mr Crean described as "minor administrative issues" to be rectified later.

108. During the course of the meeting, Mr Crean emailed Mr Klaver asking for an update on the bond placement. He received an almost instantaneous response to the effect that €500,000 had been received which had already been paid to Marquis, €600,000 was the subject of a firm commitment and was expected to

be received on 29 July, €1,000,000 had been committed in writing and should be received by 3 August, while two separate amounts of €1,000,000 were likely to be placed by a Dutch broker during the first week of August although they could not yet be regarded as firm commitments.

109. Mr Crean had also read the Latam licensing agreement and the manufacturing agreement with Couach, from which he understood that Rhino owned the IP, moulds and tools but that there was some agreement under which VDML had the right to use them. He did not ask to see this agreement and he did not at this stage know about any agency agreement between VDML and Rhino. In any event, however, he would not have worried about the payment obligations between the two companies as he was simply looking at the big picture. Provided the Latam revenues were all held within the group, he did not worry where they were going.

110. Ultimately, Mr Crean formed the view that the business was fundamentally successful and that there was a solid income stream with enough revenue coming into the group from the Latam license fees, the order book and the bond monies to support the loan. He was willing to rely on the assurances he had been given about future sales, notwithstanding that some of the sale contracts had not yet been signed. At 1446 he emailed Mr Taylor from the meeting summarising the results of his enquiries. His conclusion was that:

> *"Overall although the management needs improvements… there seems to be an opportunity to grow a brand and as such would suggest that this loan is done collaterised* [sic] *against 5% of the company, the stock boats and the bond monies with obligation from Van Dutch that any revenues from sale of the stock boats or income from bond should be repaid to you unless you agreed for it to be used for other purposes."*

111. There was a certain amount of confusion as to what happened next and in what order, but on a balance of probabilities I find that the sequence of events was as follows. Following this email there was a telephone conversation between Mr Crean and Mr Taylor during which Mr Taylor stated that he did not want to be involved in the bond as it would be too complicated to deal with in the time available. He therefore wanted a separate agreement with security (as previously offered) over three stock boats and shares in VDMH.

112. Mr Crean sent a further email at 1450 reiterating that the loan should be done on the basis that it could become convertible once Mr Taylor had had a chance to discuss valuations and also on the basis that he was given an option to purchase further equity at a preferential rate.

113. Mr Crean then drafted Heads of Terms and printed them out, putting a copy in front of Mr Erenstein and sending a Word version by email to Mr Taylor at 1634. Mr Erenstein signed the hard copy but Mr Taylor then pointed out that there was no reference to the security over the three stock boats. Mr Crean therefore made the necessary change and printed out an amended version, which Mr Erenstein also signed. By now, time had nearly run out if payment was to be made to Marquis that day. Mr Taylor had indicated that payment could be made as soon as Mr Erenstein had signed the Heads of Terms and at 1734 Mr Crean sent an email confirming that a payment instruction had been issued. He followed this up with an email to Mr Taylor at 1802 attaching a PDF of the amended Heads of Terms as signed by Mr Erenstein. Mr Taylor confirmed that funds were remitted from the bank account of McClaren Construction Ltd but charged to his loan account.

114. As is apparent, Mr Taylor did not engage in the detail of the loan proposal himself but relied on his advisers to do the necessary investigations and draw any salient points to his attention. I am nonetheless satisfied that he made his own decisions. While he took account of Mr Young's scepticism, he formed the view on the basis of everything he had been told by Mr Crean, Mr Young, Mr Thomas and Mr Erenstein that the business was fundamentally good, even if it was perhaps a victim of its own success and Mr Erenstein and Mr Koekkoek a bit out of their depth. Mr Crean's email of 1446 on 24 July 2015 gave him a *"flavour of the business"* and confirmed that sufficient money was coming in to the group to repay the loan. It is clear, nonetheless, that if Mr Crean had advised him not to do the deal for an apparently good reason, then he would not have gone ahead.

115. I find that neither Mr Taylor nor Mr Young nor Mr Crean was particularly concerned about which company was generating the revenues, or the precise relationship between the group companies. Time was limited and did not allow for a full due diligence exercise to be carried out. Their predominant concern was to ensure that sufficient revenue was coming into the group to allow the loan to be repaid within the six-month timescale envisaged, ie the "big picture". Like Mr Khodabakhsh, they viewed Van Dutch as a single business unit effectively owned by Mr Erenstein and Mr Koekkoek: *"Everybody in Monaco was under the impression it was Henk and Ruud's show and they owned the business."* If the revenues into the group were insufficient, Mr Taylor would not go ahead; if they were, it did not much matter which company received them as long as it was all held within the

group, particularly since Mr Taylor had negotiated a right to apply any group revenues towards repayment of the loan.

116. Consistently with that, I find that the ownership of Rhino and the IP, moulds and tools did not play nearly as large a part in Mr Crean and Mr Taylor's thinking at the time as they have subsequently come to believe. It was certainly not a matter which was specifically raised in the contemporaneous correspondence or in Mr Crean's email report to Mr Taylor at 1446 on 24 July 2015, and I was sceptical of Mr Crean's evidence that the revenues being received by VDML were dependent on the IP and other assets being held within the group.

117. Nonetheless, I am not satisfied that this was a matter of complete indifference to them. On the contrary, I find that it was a matter of some, albeit not paramount, importance to them that Rhino owned the IP, moulds and tools and that Rhino was a group company, since these were the only capital assets of any significance. I accept Mr Taylor's evidence that he would not want to lend to *"bits of a company. Why would I do that? I would lend money to a company that's all-encompassing, that owns everything it portrays that it owns, wouldn't I? I wouldn't lend money to bits of a company, such as this business."* In this context it is highly relevant that Mr Crean made a note in his notebook during the meeting on 24 July 2015 that *"moulds owned by Rhino".*

118. Although Mr Taylor regarded himself as effectively lending to Mr Erenstein and Mr Koekkoek for the purposes of the Van Dutch business, he was quite clear that the loan was to VDMH, which he described as "topco". Although

the Heads of Terms were expressed to be subject to the agreement and signature of a detailed legally binding agreement, Mr Taylor regarded them as legally binding and would not otherwise have paid.

119. Mr Taylor subsequently signed both the original and the amended versions of the Heads of Terms. Neither he nor Mr Crean could recall when or where this happened. Mr Crean was wholly unable to explain why Mr Taylor had been asked to sign the superseded version or why this had been retained at all. In my view, the likely explanation is that both documents had been filed away by Mr Crean immediately after the meeting on 24 July 2015 and that when he came to ask Mr Taylor to sign them, he had simply forgotten that there were two different versions.

120. A formal Loan Agreement should have been prepared by Van Dutch. When they failed to do so, Mr Taylor's lawyers prepared a draft in about November 2015. This was signed by Mr Erenstein in four different capacities: as a director of VDML, as attorney-in-fact for VDMH, and on behalf of himself and Mr Koekkoek. However, the draft which he signed was incomplete and required certain information to be supplied by Van Dutch, in particular, relating to the stock boats over which Mr Taylor was to have security. Although Mr Crean asked for a final version to be prepared it never was. Mr Taylor himself never signed any iteration of the Loan Agreement.

121. Mr Taylor, Mr Crean and Mr Young knew nothing of Mr Khodabakhsh, NBT or the joint venture agreement when the Heads of Terms were agreed, or indeed at any time until late 2016. They were not told by Mr Erenstein or anyone else that Rhino's shares had been sold to NBT on 30 May 2015. Nor

were they told that TCA had made a loan to the business on 4 November 2014, that repayment had been demanded on 26 June 2015 or that the Latam license revenues, on which so much emphasis had been placed during the loan negotiations, had already been or were about to be assigned to TCA.

Mr Khodabakhsh's knowledge

122. I find that Mr Khodabakhsh had no knowledge whatsoever of Van Dutch's approach to Mr Taylor for a loan in either 2014 or July 2015. He did not know about the Investment Memorandum or the Latam agreement or the specific terms of any agency agreement between VDML and Rhino. If he was unaware of the approach for a loan, it follows that he cannot have been aware of the negotiations for that loan or of what was or was not being said to Mr Taylor, of whom he had never heard. Indeed, there is no evidence that he was in communication with the Original Defendants at all between the time he left Monaco at the end of May and the very end of December 2015.

123. As previously indicated, I find the inherent probability of the situation is that Mr Erenstein and Mr Koekkoek were deliberately keeping their negotiations with Mr Khodabakhsh for the joint venture separate from their attempts to raise money via the bond issue and/or from individual lenders. Although they are not here to speak for themselves, the overwhelming likelihood is that Mr Erenstein and Mr Koekkoek were being duplicitous in this respect. It is impossible to believe that they could honestly have agreed to transfer ownership of Rhino to Mr Khodabakhsh in May while negotiating with Mr Taylor in July on the basis that Rhino was still part of the Van Dutch group. More likely, they were desperately teeming and lading, as Mr Ramsden

described it, in the hope that they would be able to relaunch the business and repay the loan from boat sales and/or the bond issue without having to disclose that they had in fact previously agreed to dispose of Rhino to NBT. I have found above that there was a good reason for them not to disclose their financial embarrassment to Mr Khodabakhsh and, if concrete evidence of their lack of probity were required, it can be found in the fact that at no stage did they disclose the TCA loan and the assignment of the Latam revenues to either Mr Taylor or Mr Khodabakhsh.

124. In short, I find that Mr Khodabakhsh had no idea about the loan to Mr Taylor until he found out about it towards the end of 2016 and that he was unaware that representations were being made to Mr Taylor that Rhino was part of the Van Dutch group.

Subsequent events; the attempts to raise finance

125. Meanwhile, Mr Erenstein had been attempting throughout 2016 to find investors in an attempt to relaunch the Van Dutch business. To that end he had been introduced to Mr Franke and Nedfact by a former partner at Deloittes, Mr Kees Jan van Uchelen. An Exclusive Negotiating Agreement valid for an initial period of 90 days was agreed between Nedfact and VDMH on 1 September 2016.

126. Mr Franke had no direct knowledge of events preceding his involvement and obtained information about the previous history of the business from Mr Erenstein. All of Mr Franke's dealings were with Mr Erenstein. He never met or spoke to Mr Koekkoek. In particular, Mr Erenstein was the exclusive source of the information contained in a *"Restructuring and Strategic Plan of*

Action 2017-2021" which Mr Franke asked him to prepare. This was a substantial document and contained a detailed history of significant events written by Mr Erenstein himself. Mr Franke was anxious that the full picture should be presented to potential investors, including any and all litigation in which Van Dutch was involved, so that there would be no surprises and the investors could be confident that the slate would be wiped clean. By September 2016, of course, Mr Taylor had obtained his default judgment against the Original Defendants.

127. The Executive Summary in the Strategic Plan referred to VDML having entered into an agreement with a green technology company, NBT, and that it had invested in this technology over the past several years in both time and money. The historical overview also referred expressly to an agreement between VDM and NBT for the transfer of Rhino's shares to NBT on 30 May 2015, as well as to the loan made by Mr Taylor and the subsequent litigation. Mr Franke confirmed that neither Mr Khodabakhsh nor NBT had any involvement or input into the Strategic Plan. Indeed, he had not heard of Mr Khodabakhsh at that stage and did not meet him until mid-2017. For his part Mr Khodabakhsh said, and I accept, that he had no knowledge of the Strategic Plan or its contents.

128. It is fair to say that Mr Franke's evidence as to the ownership of Rhino was confused and confusing. Initially, Mr Franke attempted to attract investment into VDMH and/or the Van Dutch group as a whole. However, investors were wary about the number of court cases in which the group was involved. For that reason and because Mr Erenstein believed that Rhino was not affected by

Mr Taylor's default judgment, it was subsequently decided to refocus efforts towards securing investment specifically into Rhino.

129. According to Mr Franke's statement, it was only at this point that (i) the group's assets were put into Rhino and (ii) that Mr Khodabakhsh was appointed as the "fake" owner of Rhino under a backdated transaction. When cross-examined on the point, however, he backtracked considerably. First he said that the investment strategy was changed because they discovered serendipitously that all the assets were already in Rhino, thus giving them a way of avoiding the consequences of the judgment. Then he said that only a few assets were already in Rhino and that the big items such as the IP, moulds and tools were transferred later.

130. As for the actual transfer of Rhino to Mr Khodabakhsh, having suggested in his statement that Rhino was only transferred to Mr Khodabakhsh in 2017 and that the transaction was backdated, Mr Franke said in cross-examination that Rhino had been nominally transferred 100% to Mr Khodabakhsh on 30 May 2015 but that Mr Erenstein and Mr Koekkoek in reality continued to hold a one-third share each. When pressed further he suggested that it was not so much a question of backdating documents as of manipulating the situation.

131. It is impossible for me to be certain what Mr Erenstein told Mr Franke about the ownership of Rhino and the IP, moulds and tools or when. The Strategic Plan clearly refers to the transfer of Rhino to NBT in May 2015. However, Mr Erenstein may well have told Mr Franke that the transaction was effectively a sham and that he and Mr Koekkoek continued to own a one-third share in Rhino each. There was, moreover, an obvious incentive for Mr

Erenstein to misrepresent the position in this way, since investors were inherently less likely to invest in a business which did not own the relevant IP and, given Mr Erenstein's track record of duplicity/economy with the truth, I cannot exclude the possibility that this is indeed what he did tell Mr Franke as a way of trying to explain the agreement with NBT in a way which did not scare off potential investors.

132. What was clear was that Mr Franke viewed Mr Khodabakhsh's involvement as simply part of an attempt to distance Rhino from Van Dutch. He therefore continued to regard Rhino as a corporate vehicle for Mr Erenstein and Mr Koekkoek and as part of the Van Dutch business, and believed that Mr Erenstein was the real decision maker for the entire business, including Rhino.

133. On 27 September 2016, Mr Khodabakhsh returned to Monaco with Mr Vechik. On 29 October 2016 they held a meeting with Mr Erenstein and Mr Koekkoek at which they learned for the first time about the English proceedings and Mr Taylor's action. No doubt they were also told about Mr Erenstein and Mr Koekkoek's attempts to raise finance to relaunch the business. Later that evening, an Emergency Board Meeting of NBT was held by telephone between Mr Khodabakhsh and Mr Vechik in Monaco and Rhino's CEO, Mike Zarei, in the United States. While Mr Khodabakhsh claimed not to have been specifically aware of the freezing order, I find that the Emergency Board Meeting minutes are likely to be the most accurate indication of what they were told, which was that *"action has been taken by KT towards the assets of VDMH which may have a negative bearing on the molds and other assets which would affect the value of the shares which are*

pledged to NBT." I find that this was in substance a reference to the freezing order even if Mr Khodabakhsh and Mr Vechik may not have recognised it as such. At all events, it was apparent to them that Rhino's assets were at risk one way or another from these proceedings.

134. In these circumstances, Mr Khodabakhsh and Mr Vechik would have seen it as an absolute priority to finalise the transfer of Rhino's shares to NBT as envisaged by the 2015 agreements. Although the JDA had been terminated some months previously in the light of VDML's failure to perform, NBT had an accrued right to have the shares in Rhino transferred and there is no obvious reason why it would have foregone that right when it had been working on the development of the E-Generator technology without receiving the payments to which it was entitled under the JDA.

135. The meeting therefore resolved to authorise Mr Khodabakhsh on behalf of NBT to notify the English court of NBT's position in relation to Rhino and to finalise the transfer of the Rhino shares to NBT.

136. At the same time Mr Khodabakhsh and Mr Vechik were aware of the attempts to relaunch the Van Dutch business and were keen to co-operate, understandably given its potential as an outlet for the E-Generator technology. It was also in Rhino's interests to seek to protect and exploit the Van Dutch brand as the business had virtually dried up and the physical assets were wasting away at the premises of the manufacturers. Mr Khodabakhsh and Mr Vechik were also attracted by the opportunity to involve Mr Taylor in any relaunch. This was for two reasons. First, it would ensure that Mr Taylor was repaid and thereby put an end to the litigation and any further threat to Rhino.

Secondly, it would provide a source of funding for the relaunch. However, Mr Erenstein and Mr Koekkoek had fallen out spectacularly to the extent that they had apparently come to blows in the street, and Mr Khodabakhsh concluded that it would be better to keep them out of any negotiations. For that reason, he asked for and on 2 November 2016 was given a power of attorney to negotiate and conclude contracts on behalf of VDMH.

137. Acting on behalf of VDMH pursuant to the power of attorney, he attended an exploratory meeting with Mr Crean on 3 November 2016. He had with him a draft Letter of Intent dated 3 November 2016 relating to a potential investment by Spanish interests sourced by Nedfact through one Francisco de Borbon. Mr de Borbon was connected to the Spanish royal family and seems to have acted as an intermediary for more than one group of investors. This particular group included a Mr Matias de Tezanos and his company, PeopleFund.

138. The proposal envisaged incorporation of a joint venture company called Holland Yachts BV to which VDMH would transfer 51% of its shares. The investors would make a €3 million loan to Holland Yachts secured by a pledge of Holland Yacht's 51% shareholding in VDMH. Holland Yachts would then make a back-to-back loan to VDMH. Clause 3.2 provided that, "*VDM Holding and its subsidiaries will secure the Term Loan VDM with: a pledge on all copyrights, names, moulds, building & engineering books and other relevant assets of VDM Holding and its subsidiaries; a pledge on the shares of VDM Holding by the shareholders in VDM Holding....*" There was no specific mention in this agreement of Rhino.

139. This draft letter of intent was signed by Mr Khodabakhsh as attorney in fact on behalf of VDMH pursuant to the power of attorney that he had been given. He could not recall whether he had also signed on behalf of Rhino, of which he was not – either then or at any time – a director. I do not regard the mere fact that security was being offered over the IP, moulds and tools as necessarily indicating that Rhino continued to be owned by VDMH. It is equally consistent with Mr Khodabakhsh wishing to co-operate in raising finance for the business. However, the document is clearly open to the former interpretation. It seems to have been drafted either by Mr Franke or by Mr van Uchelen with Nedfact as a prospective party, and it may therefore be that it simply reflected Mr Franke's understanding of what he had been told by Mr Erenstein about the ownership of Rhino. Mr Franke had not met Mr Khodabakhsh at this stage.

140. Mr Khodabakhsh was not asked whether he understood clause 3.2 in this way, only whether he had himself informed the potential investors that he owned Rhino. He readily accepted that he had not, and this is understandable. Mr Franke was the broker handling the negotiations and it was not for Mr Khodabakhsh to approach investors directly. I accept moreover that Mr Khodabakhsh had no reason to believe that Mr Franke was not aware of the true position regarding the ownership of Rhino.

141. At the meeting Mr Khodabakhsh explained to Mr Crean that he was going to use the power of attorney to try to resurrect the company and restart manufacturing in the United States, presumably utilising finance provided, in part, under the Letter of Intent. He asked whether Mr Taylor would be

interested in participating. Mr Crean was keen to explore any means by which Mr Taylor might be repaid and they agreed to meet again on 11 November 2016. At this second meeting they discussed the structure of the proposed future business. Mr Crean expressed potential interest and drew a diagram of the proposed structure (subsequently annotated by Mr Khodabakhsh) which it was thought might require a total investment of about US$10 million.

142. It is not disputed that the possibility of Rhino taking action to recover the moulds and tools from Marquis in the United States was raised but that Mr Crean said they could not be used because they were covered by the freezing order. The evidence as to what Mr Khodabakhsh said in response is conflicting. Mr Khodabakhsh claimed (consistently with his first "affidavit" of 7 December 2016) to have told Mr Crean that he was the sole owner of Rhino. His oral evidence was to similar effect: *"If I didn't share that with him, there was no way that he would sit down and negotiate with me, put numbers down, try to solve the issue, allow me to explain to him how I would do this in the US, how I would approach Marquis, how I would finally go after Latam for the price."* By contrast, Mr Crean's evidence was that Mr Khodabakhsh merely said that he owned the moulds pursuant to *"an arrangement with Henk and Ruud"*, and this was substantially confirmed by Mr Vechik. In the light of this evidence I cannot be certain that Mr Khodabakhsh actually stated in terms that he owned Rhino and I find it more likely that he said something along the lines recalled by Mr Crean and Mr Vechik. However, Mr Khodabakhsh may well have thought that this was sufficient to convey his ownership of Rhino given that all parties knew that

Rhino owned the moulds and tools. For the reasons already given, I do not find it surprising that he did not mention NBT.

143. Although such an answer was criticised by Mr Ramsden, it was not a wholly inaccurate description of the position. The agreement to transfer the shares in Rhino had indeed been negotiated by Mr Khodabakhsh with Mr Erenstein and Mr Koekkoek, who in the eyes of all parties "were" Van Dutch, and I am not persuaded that Mr Khodabakhsh was under any legal or moral duty to say more. As I have found, he was not to know about the express representations which had been made to Mr Taylor about the ownership of Rhino in July 2015. What would have been clear to him, however, was that Mr Taylor was staking a claim to Rhino and the moulds and tools and in those circumstances, he may well have felt it prudent to say as little as possible until it was known whether Mr Taylor was interested in pursuing the proposal further.

144. On 26 January 2017, Heads of Agreement were signed with B-International PVT Ltd/B-Yachts, a vehicle of the Qatar Investment Authority. This document expressly recorded in paragraph 1 that VDMH was the holding company of VDML which was in turn a representative/agent for Rhino which was a Panamanian company and holder of all relevant assets. It did not state that Rhino was a subsidiary of VDMH. However, it did say that Mr Erenstein and Mr Koekkoek were the ultimate beneficial owners of both VDMH and Rhino and defined the *"VDM Group"* as including all three companies. This is consistent with Mr Franke's understanding that Rhino continued to be beneficially owned by Mr Erenstein and Mr Koekkoek in one-third shares.

Again, however, the document appears to have been drafted by Mr Franke or Mr van Uchelen without any input from Mr Khodabakhsh.

145. The structure of the investment proposal under the Heads of Agreement with B-International PVT Ltd was similar to that proposed for the Holland Yachts investment. VDMH and Rhino were each to transfer 51% of their shares to a special purpose vehicle, B-Yachts, to be used as security for a loan to B-Yachts by the investor. B-Yachts would then make a loan to VDM Group secured by a pledge over Rhino's assets. The Heads of Agreement were signed on behalf of the putative investors in a version which provided for signatures to be added on behalf of "VDM Group". However, this was altered in manuscript to read "VDM Ltd" before signatures were added by Mr Erenstein over the rubric *"VDM Ltd Attorney in fact"* and by Mr Khodabakhsh as *"attorney in fact on behalf of Ruud Koekkoek"*. Mr Franke's evidence was not altogether clear as to who had made the amendment. In his statement he said it was Mr Erenstein; his oral evidence was that the amendment was made, or at least suggested, by Mr Khodabakhsh and that this *"smart idea"* was one of the reasons that the Qatar Investment Authority subsequently pulled out.

146. Mr Khodabakhsh says that he did not read the document before signing as he was simply signing on behalf of Mr Koekkoek. While this may seem surprising, it is not altogether implausible. The Heads of Agreement were stated to be between the Qatar Investment Authority and VDMH, not Rhino. Moreover, Mr Khodabakhsh had not met Mr Franke at this stage and there is therefore no basis on which he could or would have suspected that Mr Franke

believed Rhino still to be two-thirds beneficially owned by Mr Erenstein and Mr Koekkoek. What he did say is that Mr Vechik was subsequently in touch with the Qatari investors and that they were aware of the correct position as reflected in a later document, I assume the Heads of Agreement dated 2 May 2015 referred to below.

147. I find that, as stated in Mr Franke's written statement, the manuscript change from "VDM Group" to "VDM Ltd" was made by Mr Erenstein at the same time as he clarified in manuscript that he was signing as an attorney in fact on behalf of VDML. This makes perfect sense on the basis that neither Mr Erenstein nor Mr Koekkoek was a director or otherwise authorised to sign on behalf of VDMH (or Rhino). By contrast, Mr Khodabakhsh's signature was expressly stated in typescript to be as *"attorney in fact on behalf of Ruud Koekkoek".*

148. Mr Vechik was quite clear that if he had known at the time that Mr Khodabakhsh had signed this document he would have been very angry. On balance, therefore, I accept that Mr Khodabakhsh did not appreciate that this document presented Mr Erenstein and Mr Koekkoek as ultimate beneficial owners of Rhino. As appears below, I also accept his evidence that in his own dealings with potential investors he made it clear that he and not Van Dutch owned Rhino.

149. Thereafter, the focus seems to have changed from trying to secure investment in VDMH/VDML to attempting to secure investment directly into Rhino. On 15 March 2017, a draft Memorandum of Understanding was prepared by Mr van Uchelen in relation to a potential €5 million loan to Rhino by one

Frederico Parker, a Nicaraguan relative of Francisco de Borbon. This time Rhino was shown as a party to the MOU in its own name along with VDMH. The document recited that VDMH was the holding company of VDML which was a representative/agent of Rhino. It also defined the "VDM Group" as comprising all three companies. However, this does not take the matter much further for present purposes as the document was not put to Mr Khodabakhsh in cross-examination and it is unclear whether he ever saw it. It does not suggest in terms that Rhino was a subsidiary of VDMH. Indeed it says nothing whatsoever about the ownership of Rhino, beneficial or otherwise.

150. On 2 May 2017, a further Heads of Agreement relating to investment by B-International PVT Ltd was drawn up. The proposal this time was for Rhino to sell 51% of its shares to B-International for €3 million and for B-International thereafter to make a standby facility available to a company to be incorporated by Rhino, to be used to make down payments to the yacht manufacturers. The Heads of Agreement recorded that Rhino was the owner of the IP, moulds and tools and provided that Mr Khodabakhsh, Mr Franke, Mr van Uchelen and Mr de Borbon would be appointed as the initial board members of the new company. The proposed signatory on Rhino's behalf was Mr Vechik who by that time was the Chief Operating Officer of Rhino (see paragraphs 168ff. below). VDMH was not mentioned and there was nothing to suggest any link with Mr Erenstein or Mr Koekkoek. While the document does not directly address the ownership of Rhino, it is consistent with Mr Khodabakhsh's evidence that this had been explained by Mr Vechik to the Qatari investors. In the event, the deal was never signed but Mr Franke said that 500,000 (he did

not specify the currency) had been paid by the investors to clean up the court cases before proceeding further.

151. At around this time, Mr Franke was also in discussions with Turkish brokers, Ahmed Arisoy and Nursel Atar, whom he had introduced to Mr Erenstein. Mr Arisoy, Mr Atar and Mr Franke jointly controlled a company called Redo BV, which had identified two wealthy Turkish families as potential investors, Tekin and Şen. On 30 June 2017, Mr Franke emailed Mr Arisoy and Mr Atar regarding a possible loan of €3.5 million by Tekin. The email is noteworthy because it records Mr Franke's understanding at this stage that Mr Erenstein, Mr Koekkoek and Mr Khodabakhsh were all one-third shareholders (in which particular company was not specified).

152. On 1 July 2017, Mr Franke sent Mr Erenstein a final draft Agreement for Brokerage Services to be signed between Rhino and Redo BV granting Redo exclusive rights to raise investment in Turkey. Mr Erenstein responded saying that he had revised the agreement slightly on Mr Khodabakhsh's advice. He also referred to Mr Arisoy having approved *"the negotiations with Mo."* I take this to be a reference to the fact that Mr Khodabakhsh had also arranged to attend meetings in Turkey a few days later with representatives of the Tekin family,[3] either as a last-minute replacement for Mr Erenstein who had to withdraw because of an urgent hip operation, or because he insisted on attending to ensure that Rhino was not discussed behind his back.

153. Prior to the meeting with Tekin, Mr Franke, Mr Arisoy, Mr van Uchelen and Mr Khodabakhsh held a pre-meeting. This was the second occasion on which

[3] The evidence was unclear whether there were also to be meetings with the Şen family but it is unnecessary to resolve the matter for the purposes of this judgment.

Mr Franke had met Mr Khodabakhsh, they having previously met in Amsterdam on 19 June 2017 at a meeting with Mr Erenstein, Mr de Borbon and Mr de Tezanos. There is a stark conflict of evidence between Mr Franke and Mr Khodabakhsh as to what was said at this pre-meeting. Mr Franke claims that Mr Khodabakhsh told them there were three owners of Rhino, but that they were not to mention this to the investors and only to present him as the owner. Mr Khodabakhsh denied this. He said that when he talked to Mr Franke, it became apparent that Mr Franke was drawing no distinction between Van Dutch and Rhino. He was also horrified to discover that Rhino's assets had been offered as security in Turkey (which he clearly regarded as a dangerous jurisdiction) on behalf of Van Dutch without his knowledge or consent. Mr Franke said that this had been authorised by Mr Erenstein whereupon Mr Khodabakhsh told Mr Franke and Mr Arisoy that he was the sole owner of Rhino and that Mr Franke had no right to represent Rhino without his instructions and authorisation and that he did not agree that Rhino's assets could be offered as security to Tekin.

154. According to Mr Khodabakhsh, there was a telephone conversation with Mr Erenstein in which Mr Erenstein confirmed that Mr Khodabakhsh owned and controlled Rhino. Mr Franke denied having spoken to Mr Erenstein at this stage.

155. It was, however, common ground that following the first meeting with the investors, an acrimonious dispute arose regarding Redo's fee. As recorded in Mr Arisoy's email of 5 July 2017, Mr Khodabakhsh refused to accept the brokerage terms previously agreed with Mr Erenstein and insisted on

including certain amendments but then said that he did not have authority to sign on behalf of Rhino. (This was, of course, true as Mr Khodabakhsh was not then or ever a director of Rhino.) Mr Arisoy was incensed and forbade any further contact with either the Tekin or Şen investors.

156. Mr Franke was clearly furious at this turn of events, which he regarded as having killed a promising deal and caused potentially serious damage to his personal reputation. He made his feelings plain in an email to Mr Erenstein and Mr Khodabakhsh on 6 July 2017. Mr Erenstein responded by email to Mr Arisoy apologising and stating that *"my partners and I have decided to reorganise our positions in this and I decided to take over again and Mo is not involved in the discussion with you anymore."*

157. Whatever Mr Franke may or may not have been told previously by Mr Erenstein, I do not accept that Mr Khodabakhsh said anything at the pre-meeting or subsequently about Rhino being owned in one-third shares or as to Mr Erenstein and Mr Koekkoek having any continuing beneficial interest. On a balance of probabilities, I accept Mr Khodabakhsh's evidence that he was unhappy to discover that Rhino's assets had been offered as security in Turkey without his knowledge or consent and he accordingly told Mr Franke and Mr Arisoy that he was the sole owner of Rhino and that they could not act on behalf of Rhino without his approval.

158. This to my mind is consistent with the dispute regarding Redo's brokerage agreement. Specifically it is consistent with :

i) Mr Khodabakhsh's refusal to accept the brokerage agreement previously negotiated by Mr Erenstein;

ii) Mr Arisoy's email of 5 July 2017 which expressly refers to Mr Khodabakhsh having suddenly appeared and announced that he was the *"only owner"* of Rhino. Mr Franke's attempt to explain this as a reference to the "public position" that he and Mr Arisoy had been told to present is unconvincing. In the context of his complaint, Mr Arisoy would have been concerned with the true position which Mr Khodabakhsh had allegedly disclosed to them, not with the irrelevant public position;

iii) Mr Franke's evidence in re-examination that Mr Khodabakhsh presented himself as running Rhino in certain respects and that he assumed he was a director of Rhino.

159. Mr Erenstein's email of 6 July 2017 in which he refers to he and his partners having *"decided to reorganise our positions in this and I decided to take over again and Mo is not involved in the discussion with you anymore"* is equivocal in this respect. It could mean no more than that Mr Erenstein had reassumed the role of meeting the investors face-to-face since, according to Mr Franke, Mr Khodabakhsh knew nothing about yachts (unlike Mr Erenstein) and had not gone down well with the investors. More likely it simply meant that although Mr Khodabakhsh had acted on behalf of VDMH/VDML in the negotiations in place of Mr Erenstein he would now reassume that particular role himself. But even if Mr Erenstein was presenting himself as representing Rhino as well, there is no evidence that Mr Khodabakhsh acquiesced in any such representation. He said that he was

unaware of this email and there is no evidence that he ever saw it before it was disclosed in these proceedings.

160. In the event a brokerage agreement between Redo and Rhino was signed on behalf of Rhino by Mr Vechik with effect from 7 July 2017 appointing Redo as exclusive broker in Turkey to introduce potential investors to Rhino. So far as relevant, I find that this was entirely separate from the Exclusive Negotiating Agreement concluded between Nedfact and VDMH on 1 September 2016.

161. In short, I accept that Mr Erenstein may well have presented VDMH, VDML and Rhino as effectively synonymous, and that Mr Franke may well have believed from what he was told by Mr Erenstein that Rhino was still beneficially owned in part by Mr Erenstein and Mr Koekkoek, notwithstanding what was said in the Strategic Plan about the transfer of Rhino to NBT. It would undoubtedly have been in Mr Erenstein's interests to create this impression in order to improve his chances of securing investment. However, I find that Mr Khodabakhsh never said anything to this effect but, on the contrary, was insistent at all times that he was the sole beneficial owner of Rhino. Accordingly, if Mr Franke was labouring under any misapprehension as to the ownership and control of Rhino, this was induced by Mr Erenstein and not as a result of anything said by Mr Khodabakhsh himself.

162. On 19 July 2017, Mr de Borbon (whose Spanish investors were still in the frame) sent an email expressing irritation at the lack of progress in finalising a deal. He complained that they had paid $100,000 and flown in from Hong

Kong because they had been told the matter was urgent only to be kept waiting for 6 weeks without information. (I take this to be a reference to the meeting in Amsterdam in mid-June 2017.) Mr Erenstein responded apologising profusely for the delay. He also said, *"Can I ask you to help me regarding the 100k usd and explain to Mo and his part of the group that it was a private loan to me, which makes it possible to pay back family and special friends, otherwise I have an issue."* It seems that Mr Erenstein was in financial difficulties following the default judgment and freezing order and had taken the opportunity of the meeting in Amsterdam to obtain money on his own account which he had concealed from Rhino and Mr Khodabakhsh. This was apparently an advance goodwill payment by Mr de Tezanos personally which was to be deducted from any investment if eventually made, but otherwise did not need to be repaid. What this response clearly demonstrates, however, is a distinction between Mr Khodabakhsh and *"his part of the group"* (ie. Rhino) and Van Dutch.

163. On 11 August 2017, the Tekin family made its last offer to Mr Franke. One of the items of information they requested was details of the ownership of Rhino. On 17 August 2017, Rhino raised a number of matters which it required to be addressed and cleared before the deal could go forward. This email was sent from a Rhino email account and there is no evidence that Mr Erenstein had any input into it. Mr Franke responded directly to Rhino with a copy to Mr Erenstein. This is inconsistent with his professed belief that Mr Erenstein was calling all the shots on behalf of Rhino.

164. On 18 August 2017, Mr Franke vented his own frustration at the delay in pursuing either of the two possible leads. He also complained that he had not yet received his own brokerage contract, a complaint repeated in an exchange of emails with Mr Erenstein and Mr Arisoy on 20 August 2017 in relation to the Tekin proposal. In one of his emails in response, Mr Erenstein referred to an agreement between Mr Franke and Rhino which would be *"worked out"*. I do not regard this comment as necessarily indicating that Mr Erenstein was in control of Rhino.

165. In the event, a letter of confirmation signed on behalf of Rhino was sent to Mr Franke on 20 September 2017 confirming an agreement between Rhino and Nedfact to remunerate Nedfact in the event of a successful investment by Tekin.

166. However, none of the proposed investments came to fruition. Mr Franke was clearly unhappy at having put in a substantial amount of work for which he received no remuneration and at having his reputation tarnished by association with what he regarded as unprofessional behaviour by his clients. He was particularly aggrieved because he believed that Rhino had in fact subsequently entered into an arrangement with a group of investors based on his due diligence but without making the payment which he felt was due to him. This was a reference to the Heads of Agreement dated 2 May 2017 with B-International (paragraph 150 above). Although the deal did not proceed, the main investor, Mathias de Tezanos, had agreed to pay up to US$500,000 through his company, PeopleFund, specifically to fund Rhino's lawsuits in the United States against Marquis and the US distributor, Van Dutch Inc., to

recover the moulds and tools. If successful, Mr de Tezanos had expressed interest in investing in some sort of joint partnership. The amount actually paid was around US$365,000. This agreement was not documented and VDMH/VDML were not part of it. In the end, the claims were abandoned because Rhino had insufficient available manpower to devote to them.

167. While Mr Franke accepted that his only brokerage agreement with Rhino (the 20 September 2017 agreement) was limited to an investment by Tekin, he felt that he had been manipulated and this may go some way to explaining his evident hostility towards Mr Khodabakhsh.

The transfer of the Rhino shares and disclosure

168. As set out above (see paragraphs 133ff.), when Mr Khodabakhsh and Mr Vechik returned to Monaco at the end of September 2016 and discovered the threat to Rhino posed by Mr Taylor's action, they were anxious to finalise the transfer of the Rhino shares to NBT. On the basis that, as I have found, there was a genuine *bona fide* sale of the shares to NBT in May 2015, I can see nothing necessarily nefarious or collusive in this. True it is that the JDA had by then been terminated, but Mr Khodabakhsh had developed the technology, without NBT receiving the full payment to which it was entitled under the JDA, and NBT had an existing and accrued right to the shares. There was therefore an obvious commercial benefit to NBT in *"getting the most out of our agreement"* as recorded in the minutes of the Emergency Meeting on 29 October 2016.

169. As for Mr Erenstein and Mr Koekkoek, there may have been many reasons why they were content to complete the transfer. Not only did they have no

legal basis for refusing, but it is entirely plausible that they were hoping at that stage that something would still come of the green technology project and that they could relaunch the business. For that purpose they would obviously need Mr Khodabakhsh's co-operation. I have no doubt that, if this was their goal, it also suited them to make absolutely sure that Rhino was beyond the reach of any creditors.

170. Until then, Rhino had had corporate directors in the form of ICS in Monaco. Neither Mr Khodabakhsh nor Mr Vechik had hitherto played any part in the business of Rhino. While they knew that there was some agency relationship between VDML and Rhino, they were not aware of any specific agreement until their involvement in these proceedings.

171. When Mr Khodabakhsh and Mr Vechik contacted ICS, they were told that ICS had terminated their contract because they had not been paid. New directors were therefore appointed on 24 January 2017: Mr Christian Ekeberg, Ms Eugenie Lurvink, and Mr Bernard Didier. Mr Ekeberg had been approached to serve by Mr Vechik who was impressed with his knowledge and experience as a yacht broker. Ms Lurvink was well-connected to the palace, being Prince Albert's make-up artist, and also a successful businesswoman in her own right, speaking some 4 or 5 languages. Mr Vechik was appointed as interim Chief Operating Officer.

172. On 25 January 2017, the new directors of Rhino resolved to issue all shares in the company to NBT. A significant part of Mr Ramsden's cross-examination of Mr Khodabakhsh was directed towards the allotment of the shares to NBT, and the existence of two sets of board minutes, one resolving to issue a share

certificate no. 11 and the other referring to certificate no.6. It seems to me that there is a perfectly innocent explanation for this. In total there were 11 share certificates in existence prior to 25 January 2017. Certificates 1 and 2, dated 5 October 2007 were bearer shares each for 5000 shares. They appear to have been cancelled and replaced by Certificates 3-5 dated 8 July 2008, each for 3333 shares. These were in turn replaced by Certificates 6-10 dated 16 January 2009, each for 2000 shares. Finally, Certificate 11 dated 5 May 2015 purported to show VDMH as the sole owner of all 10000 shares. This is consistent with the restructuring of the Van Dutch business in April 2015 and the creation of VDMH as the holding company of VDML and Rhino.

173. The new directors of Rhino accordingly resolved to cancel certificate 11 and issue a new certificate 12 to NBT. However, when the documentation was sent to Panama for registration, it transpired that certificates 6-10 had never been previously registered. The correct certificate for NBT's shares should therefore have been no. 6. The Panamanian registry accordingly prepared a new share certificate and a fresh set of board minutes authorising the issue of new certificate 6. This package was posted to NBT in the United States on 24 February 2017 and received by Mr Khodabakhsh and Mr Vechik shortly thereafter.

174. A significant element of Mr Taylor's case related to the Additional Defendants' failure to disclose the true ownership of Rhino or the actual transfer of shares and their conduct generally in relation to disclosure in these proceedings. It was forcefully argued that this was part and parcel of the alleged conspiracy to conceal the true position from Mr Taylor. From Mr

Taylor's point of view, until 23 November 2016, Mr Erenstein and Mr Koekkoek had been saying consistently, on oath, that Rhino was owned by VDMH. He was then told that Rhino was in fact owned by a third party and subsequently the share transfer came to light. I can entirely understand why Mr Taylor and his advisers took the view that there were plausible grounds for suspecting subterfuge, if not fraud and dishonesty, not only on the part of Messrs Erenstein and Koekkoek, but also Mr Khodabakhsh.

175. Despite the fact that I have not heard from Mr Erenstein or Mr Koekkoek, there are enough instances of their duplicitous behaviour from which I can infer that they were quite prepared to be positively parsimonious with the truth (at best) or even to lie (at worst) when they thought it in their interests to do so. However, that does not necessarily mean that Mr Khodabakhsh is to be tarred with the same brush, much as it may have appeared at first blush that he should be. The critical question is whether the share transfer took place in pursuance of a genuine *bona fide* transaction. I have found above that it did, and this puts a wholly different complexion on the Additional Defendants' conduct.

176. My findings are as follows.

177. The first suggestion by Mr Erenstein and Mr Koekkoek that Rhino was not after all owned by VDMH was in their affidavits dated 23 November 2016. This is consistent with Mr Khodabakhsh and Mr Vechik having arrived in Monaco and insisted on finalising the share transfer. Until then, Mr Erenstein and Mr Koekkoek may well have considered that they could get away with

asserting that VDMH was the owner of Rhino, which in terms of legal ownership it still was.

178. Mr Khodabakhsh's two meetings with Mr Crean in November 2016 pre-dated this revelation. I have made my findings in relation to this meeting above. As there set out, I find that Mr Khodabakhsh did not say in terms that he owned Rhino, although he may have thought that he had sufficiently conveyed this information. At all events, there was no particular reason for him to go into detail as he was unaware at that stage that Mr Taylor and Mr Crean had been told that Rhino was owned by VDMH. I do not therefore find that there was any deliberate deception or obfuscation on the part of Mr Khodabakhsh, although he may well have been wary of going into too much detail until he saw how the land lay with Mr Taylor.

179. As regards Mr Khodabakhsh's first "affidavit" dated 7 December 2016, this was criticised by Barling J for its unsatisfactory nature. In so far as the document was not in correct form, I am not inclined to be too critical. Mr Khodabakhsh was not a party to the proceedings and did not have the benefit of legal representation. Had he done so, no doubt his evidence would have been put before the court in proper form and the substance of it would have been expressed more clearly and accurately.

180. As it is there are really only two criticisms which can be levelled at the document, apart from its brevity. The first is that Mr Khodabakhsh said that "he" owned Rhino. However, whilst legally inaccurate, in layman's terms this was consistent with him identifying himself with NBT. The second is whether or not he told Mr Crean in terms that he owned Rhino. I have found that he

did not, although he thought that he had sufficiently explained the position. None of this necessarily indicates any intention to mislead or obfuscate.

181. As to the second affidavit of 14 December 2016, the same criticism is made in relation to Mr Khodabakhsh's account of his meetings with Mr Crean. I have dealt with this. Otherwise, it is only the reference to Volta which could be said to have been apt to mislead. Mr Khodabakhsh accepted that this was a careless error, although he also said that he had not expected the affidavit to be served in the form in which it was and that he thought there may have been some misunderstanding between him and the Original Defendants' solicitor, Mr Woodfield, who drafted it. Even so, it is not as if Volta had nothing to do with the matters in question. The effect of the agreements in April/May 2015 was that shares in Rhino were to be transferred to NBT as the Van Dutch contribution to the joint venture. In return, Van Dutch were to receive a share of the E-Generator technology via whatever company was ultimately established to hold it. At the time, it was anticipated that Volta would be that company. In a very broad sense, then, Volta was the *quid pro quo* for the transfer of the Rhino shares. In any event, the second rebuttal letter dated 20 April 2017 accepted that this was inaccurate.

182. On 12 January 2017, Mr Khodabakhsh attended court at the request of the Claimant's solicitors. I note that he did so voluntarily as he was under no compulsion to do so. It is common ground that he had with him the Request for Transfer of Shares dated 24 May 2015 and the Agreement dated 30 May 2015 between VDMH and Mr Khodabakhsh undertaking to transfer the shares in Rhino, and that he showed these documents to the Original Defendants'

solicitors but did not hand them over and was not subsequently called to give evidence. The account at paragraph 31 of his first witness statement dated 9 July 2018 of the circumstances in which he waited at or near the court until 2.30 pm without being called upon was not challenged in cross-examination and I have no reason to doubt that it was true.

183. The order made by Barling J on that date required Mr Khodabakhsh personally to do two things:

i) To preserve and disclose to the Claimant by 13 January 2017 the documents he had brought to court on 12 January 2017;

ii) To preserve and disclose to the Claimant by 19 January 2017 all other documents in his possession and control pertaining to the ownership of Rhino.

184. It is not disputed that Mr Khodabakhsh complied with the first requirement but did not disclose any further documents. The Claimant asserts that this was a deliberate and flagrant breach of the second part of the order on the basis that, as he alleges:

i) On 21 March 2017 Mr Khodabakhsh admitted in a telephone conversation with Mr Crean that he had further documents but that he saw no reason to disclose them;

ii) Mr Khodabakhsh subsequently produced copies of the Letter of Intent dated 22 April 2015 and the JDA attached to his first rebuttal letter;

iii) The transfer of the shares on 25 January 2017 and the share certificate was not disclosed.

185. However, in my view and however suspicious the circumstances may have appeared to Mr Taylor and his advisers, there is in truth no real evidence to substantiate this accusation. On a strict construction, the Barling Order only required Mr Khodabakhsh to disclose documents which were in his possession or control as at 12 January 2017 or, at the very latest, 19 January 2017. Moreover, he was only obliged to disclose documents which pertained to the ownership of Rhino. The documents which were disclosed with the first rebuttal letter were specifically requested by Keystone Law on the basis that they were referred to in the Agreement of 30 May 2015 which had been disclosed. However, neither of them related to the Agreement dated 30 May 2015 between VDMH and Mr Khodabakhsh undertaking to transfer the shares in Rhino or to the ownership of Rhino and it is by no means evident to me that Mr Khodabakhsh must necessarily have appreciated (without the benefit of legal advice) that he was under any obligation to disclose documents merely because they were referred to in other, disclosed, documents.

186. As to the conversation with Mr Crean on 21 March 2017, Mr Khodabakhsh agreed that it had taken place but could not recall having said anything about having further documents. His evidence was that the conversation did not relate to Rhino at all, but to the position in the US and how his previous discussions with Mr Crean could be taken forward. I do not accept this and I felt that Mr Khodabakhsh was somewhat unconvincing in this respect. The substance of the conversation was set out in Keystone Law's letter of 28

March 2017 only a matter of days later and the likelihood is that an exchange of this nature took place.

187. It is difficult to understand why Mr Khodabakhsh would have denied this conversation. The most charitable explanation is that he and Mr Vechik thought that it would provide ammunition to the Claimant to argue that he was in breach of the Barling order. On any view, it does him no credit. However, the fact that he may have admitted to having further documents on 21 March 2017 which he was unwilling to reveal does not mean that he was in breach of the Order. By 21 March 2017, of course, Mr Khodabakhsh had come into possession of the share certificate issued to NBT. Since that only arrived on 24 February 2017, however, he could not have been under any obligation to disclose it under the Barling Order and the Claimant has not identified any other documents relating to the ownership of Rhino to which he could have been referring.

188. Mr Khodabakhsh was cross-examined at some length about the two "rebuttal" letters which had been written in response to letters from Keystone Law dated 28 March 2017 and 15 April 2017 complaining about the Additional Defendants' disclosure and threatening contempt proceedings against Mr Khodabakhsh. Mr Khodabakhsh said that both letters had been drafted and sent by Mr Vechik on his behalf and that he did not become aware of them until much later. He said that he had been busy on other things and had been happy to let Mr Vechik deal with them as Mr Vechik had sufficient knowledge of what had been going on. For his part, Mr Vechik said that it was a frequent bone of contention that Mr Khodabakhsh failed to deal with things because he

was too busy. As he did not want to keep receiving threatening letters, he just dealt with them himself on behalf of NBT.

189. On the basis of my findings as to the events of 2015, and if the sarcastic tone of some parts of the letters is put to one side, there is virtually nothing in the substance of either of them to attract opprobrium. It is clear from the first rebuttal letter that Mr Vechik was taking a narrow approach to the Barling Order, but in my view he was entitled to do so. Moreover, he did provide copies of the Letters of Intent dated 22 and 24 April 2015 and the JDA requested by Keystone Law, albeit under protest as to their relevance to the Order.

190. Keystone Law, however, were not satisfied with this letter or with the further disclosure. They asserted in a follow-up letter dated 15 April 2017 that it was *"highly suggestive of other discussions/negotiations having taken place. All of that would be disclosable and covered by the 12 January Disclosure Order."* They further stated that they had seen no evidence to support the claim that Mr Khodabakhsh owned Rhino and that his assertions to that effect were either dishonest or deliberately misleading.

191. The second "rebuttal" letter dated 20 April 2017 was a response to this letter. In it, Mr Vechik again on behalf of NBT clarified that Mr Khodabakhsh had acquired Rhino through NBT as collateral under the JDA. He also accepted that there were valid criticisms of the wording of Mr Khodabakhsh's second affidavit of 14 December 2016 in relation to Volta. A fairly full explanation was also given of the sequence of events which I have accepted above. While

this would undoubtedly have been very confusing and difficult to understand, I do not find that it was deliberately intended to mislead.

192. The major criticism of the second rebuttal letter is that it failed to refer to the share transfer when this would have been an obvious riposte to Keystone Law's assertion that they had seen no evidence to support Mr Khodabakhsh's ownership of Rhino. This criticism has some force and, to be fair to Mr Khodabakhsh, he said that if he had been drafting the rebuttal letters he would have referred to it. As he said in cross-examination, *"The only thing that would secure the claims that I had was the shares. Why wouldn't I share that with you or Keystone? Why would I hide the only thing that gives me the right to claim all the assets that were wrongfully seized by the order that was made for Van Dutch Marine Holding. Why would I do that?"* This had a ring of plausibility. However, Mr Vechik was of the view that they should disclose neither more nor less than was required under the Barling Order and that they had already disclosed everything which they were obliged to disclose. He said that they were facing continual demands from Mr Taylor's lawyers for ever more documents and that every piece of information they supplied spawned yet further demands and allegations. He thought that if they disclosed the actual transfer of shares in Rhino, it would look as if they were making something up after the fact and cause problems for themselves. For that reason he decided not to.

193. Whether or not this was a sensible or prudent course to adopt is a matter for debate. Given the history of these proceedings, it is difficult to say that Mr Vechik's assessment of the situation was inaccurate. However, if he hoped by

such a tactic to avoid the Additional Defendants being dragged into the litigation, it backfired spectacularly. Nonetheless, the question that I have to decide is whether these letters were part of a deliberate attempt to conceal or mislead Mr Taylor as to the true ownership of Rhino. I find that they were not.

194. At last, therefore, I come in sight of the issues.

D. KENDALL V HAMILTON (Issue 18)

195. I start with the defence based on the rule in *Kendall v Hamilton* which raises a discrete question of law.

196. This is an interesting point, not least because the parties were in fundamental disagreement as to what the rule in *Kendall v Hamilton* actually is. Mr Ramsden argued that the true principle was one of election and that a default judgment obtained at a time when a claimant is unaware of the existence of the undisclosed principal cannot amount to the fully informed choice which would be necessary to found an election. He relied on the well-known case of *Scarf v Jardine* (1882), 4 App. Cas. 504 in relation to the requirements for a valid election.

197. Mr Ashworth did not challenge the requirements for an election but said that election had nothing to do with the matter. He argued that *Kendall v Hamilton* stands for the proposition that a judgment against an agent is an automatic bar to a subsequent action against an undisclosed principal. It is irrelevant that the judgment in question is a default judgment; for as long as it subsists action

against the undisclosed principal is precluded as a matter of law. He pointed out that there has been no application to set the judgment aside in this case.

The* ratio *of Kendall v Hamilton

198. It is therefore necessary to examine the judgment in *Kendall v Hamilton* with some care. In that case, the plaintiff lent money to a partnership consisting of Wilson and McLay in order to finance certain shipments. Unbeknownst to the plaintiff, the shipments were in fact for the joint benefit of Wilson, McLay and one Hamilton, who had authorised Wilson and McLay to handle all financial arrangements. Unaware of the existence of Hamilton, the plaintiff obtained judgment against Wilson and McLay but they were insolvent and the judgment remained unsatisfied. The plaintiff then discovered the involvement of Hamilton and sought to sue him.

199. The Lord Chancellor, Lord Cairns, analysed the situation as one of agent and undisclosed principal on the basis that Wilson and McLay were in reality agents authorised to borrow on behalf of Wilson, McLay and Hamilton as undisclosed principals. In his view it was clear that:

> *"where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of* Priestley v Fernie *may be mentioned…*
>
> *In the present case I think that when the Appellants sued* Wilson & McLay, *and obtained judgment against them, they adopted a course which was clearly within their power, and to which* Wilson & McLay *could have made no opposition, and that, having taken this course, they exhausted their right of action, not necessarily by reason of any election between two courses open to them, which would imply that, in order to [*scil. *make] an election, the fact of both courses being open was known, but because the right of action which they pursued could not, after judgment obtained, coexist with a right of action*

on the same facts against another person. If Wilson & McLay *had been the agents, and* Hamilton *alone the undisclosed principal, the case could hardly have admitted of a doubt; and I think it makes no difference that* Wilson & McLay *were the agents and the undisclosed principals were* Wilson, McLay, *and* Hamilton.*"*

200. It appears from the speech of Lord O'Hagan that this analysis originated with Lord Cairns himself and had not been suggested or discussed in argument. Lord Cairns nonetheless went on to consider the claim on the alternative basis that Messrs Wilson, McLay and Hamilton were joint contractors. On this analysis also he held that the claim against Hamilton was barred, this time by the rule in *King v Hoare* (1844), 13 M & W 494 whereby a judgment obtained against one joint contractor releases the others, the reason being that in the case of co-contractors there is only a single cause of action which merges in the judgment. Accordingly, even on this approach the judgment against Wilson and McLay would have been fatal to the subsequent suit against Hamilton.

201. The other members of the House of Lords treated the case as one of joint contractors and decided it solely on the basis of *King v Hoare*. Mr Ashworth submitted that Lord Blackburn also analysed the case as one of undisclosed agency. This is true, but only to the extent that his Lordship recognised that in cases of undisclosed agency, a plaintiff was entitled but not bound to sue the undisclosed principal. His actual decision was that Wilson, McLay and Hamilton's liability as undisclosed principals was joint and that the rule in *King v Hoare* precluded any action against Hamilton after judgment had been obtained against Wilson and McLay. Lord O'Hagan likewise rested his decision on *King v Hoare,* feeling it inappropriate to decide the case on a basis

which had not been argued, albeit disposed to agree with Lord Cairns' agency analysis.

202. The clear *ratio* of the decision was accordingly that Hamilton was released from liability on the basis that he was a joint contractor with Wilson and McLay and that judgment against them exhausted the cause of action against him.[4] In the circumstances, to describe the principle that judgment against an agent releases an undisclosed principal as the "rule in *Kendall v Hamilton*" appears something of a misnomer although I shall continue to refer to it as such for the purposes of exposition.

Basis of the rule

203. Nonetheless, the rule does undoubtedly exist. Lord Cairns regarded it as beyond doubt and it clearly appears from the only authority to which he referred in support of the proposition, namely *Priestly v Fernie* (1863), 3 H & C 977. This was a case where the master of a ship had been sued on a bill of lading. The plaintiff recovered judgment against the master but attempts to enforce it proved unsuccessful as the master became bankrupt. The plaintiff then discovered that the master had signed the bill as agent on behalf of the shipowner and sought to implead the owner. The Court of Exchequer unanimously held that the action could not be maintained. Judgment was delivered by Bramwell B who stated that:

> *"If this were an ordinary case of principal and agent, where the agent, having made a contract in his own name, has been sued on it to judgment, there can be no doubt that no second action would be maintainable against the principal. The very expression that where a contract is so made the*

[4] This procedural bar has now been statutorily abrogated by s.3 of the Civil Liability (Contribution) Act 1978.

contractee has an election to sue agent or principal, supposes that he can only sue one of them, that is to say, sue to judgment. For it may-be that an action against one might be discontinued and fresh proceedings be well taken against the other. Further, there is abundance of authority to shew that where the situation of the principal is altered by dealings with the agent as principal, the former is no longer subject to an action. But this is the case here. The defendants may or may not be liable to indemnify the master in respect of his costs or his imprisonment. But they are clearly liable to him or his estate, in respect of the damages recovered against him, and proceedings might have been taken against them as soon as judgment was recovered against the master, and before any payment by or execution against him. They are now therefore under a liability to the master or his estate to the extent of the whole claim, and yet it is sought to bring them under a fresh liability for that to the plaintiffs."

204. Three points should be noted about this decision:

i) Although it is couched in terms of election, the court seems to have been of the view that suing to judgment was in itself a sufficient election;

ii) *Priestly v Fernie* was a case where the plaintiff was unaware of the existence of the principal prior to entering judgment but this was not held to have made any difference;

iii) The rationale given for the rule was that the entering of judgment in and of itself altered the undisclosed principal's position in that he thereupon became immediately liable to indemnify the agent.

205. Footnote 699 to paragraph 8-116 in *Bowstead & Reynolds on Agency* (21st ed.) regards *Priestly v Fernie* as *"not a convincing case, nor a case on a true undisclosed principal, since ships are known to have owners."* However, it seems to me that this criticism may be unfair, since in the nineteenth century master-owners were by no means uncommon. It would therefore not

necessarily have been apparent to the plaintiff that the master was not himself the owner of the ship in question.

206. The existence of the rule is also supported by Art. 82(1) of Bowstead where it is formulated in the following terms:

"Where an agent enters into a contract on which he is personally liable, and judgment is obtained against him on it, the judgment, though unsatisfied is, so long as it subsists, a bar to any proceedings against the principal, undisclosed or (perhaps) disclosed, on the contract."

207. However, the Claimant's argument in the present case requires me to identify the true principle underlying the rule and, as the commentary to this article suggests, this is far from clear. In their general preliminary comments at paragraph 8-114, the learned editors discuss three potential justifications and I make no apology for setting them out at length:

It is difficult to see in principle why, where principal and agent are both liable on a contract, any doctrine of merger or election should bar a person who has proceeded against one from proceeding against the other. Only satisfaction of the claim should normally be a bar.

The real basis of such notions of merger and election seems to be an assumption, common in older cases, that the contract was either with the principal or with the agent. In cases of disclosed principal these were in effect alternative interpretations of the facts: but it seems to have been applied also to undisclosed principals and their agents on the basis that there was alternative liability as a matter of substantive law. But it is now clear that there can be cases where the agent is liable together with the disclosed principal: and there seems no real reason why this should not be so in the case of the undisclosed principal also. To such analysis, the idea of merger or election in respect of alternative liabilities seems inappropriate.

Only three lines of reasoning appear available to justify the results stated in the Article as formulated. The first is that the principal and the agent are liable jointly. If there is only one obligation, it can be said that judgment against one can release the other. This would be solely a doctrine of merger: any notice of election would be irrelevant. This is certainly a possible interpretation of some cases where disclosed principal and agent are both liable on a contract. But it is by no means the only one: indeed, it is an unlikely one. Further, there seems no reason at all to apply it to undisclosed principals and their agents, and indeed it has not been applied to them. In any

case, the rule that judgment against one person jointly liable releases the other was abolished in England by statue in 1978, so that the reasoning now fails, at any rate in England.

The second possible justification is that the liability of principal and agent is, where they are both liable to the third party, as a matter of substance an alternative liability. The leading case of United Australia Ltd v Barclays Bank Ltd, *concerning waiver of tort, accepts a distinction as to choice between inconsistent rights and choice between alternative remedies. In the first election is required; but in the second the right to proceed is (probably) only lost by satisfaction of the claim… It is possible, and indeed is assumed in the* United Australia *case itself,*[5] *that the liabilities of agent and undisclosed principal are inconsistent in such a way as to require election between rights. This can only really be justified as a special analysis applicable in this context to situations of undisclosed principals...*

It does, however, seem that the liability of agent and undisclosed principal is on present authority to be regarded as an alternative one: and since the whole doctrine of the undisclosed principal can be said to be anomalous anyway, it cannot be said that such a view is demonstrably wrong, even if there is not much to commend it. If this is so, the governing principle could be regarded either as one of merger or as one of election. If it is one of merger, manifestation of choice to sue one or the other would have no relevance; but a judgment against one would discharge the other, and where it is against the agent, even where it was taken without knowledge of the principal. If the principle is the broader one of election, the third party has an election or choice as to with whom he wishes to regard the contract as having been. When he has manifested this choice he cannot thereafter change course. Until he realises the existence of the undisclosed principal, of course, he is not able to make valid election, for on general principles a choice cannot be exercised by one who does not know that he has it. Though the narrower, merger principle predominates, the election approach has been taken in some cases, including the United Australia *case itself. A compromise position is that judgment is the only true election.*

The third justification is this. There are many situations where a person does not allege that both agent and principal were liable to him, but cannot decide on the correct interpretation of the facts whether his contract was with one or the other; and therefore sues both in the alternative and leaves the court to decide the question… Here the court is asked to decide between two mutually inconsistent legal interpretations of the facts. Once a final judgment has been obtained on this issue of fact, the matter is res judicata. This is obviously not a matter of merger; but neither is it one of election between inconsistent rights. In this situation, at least in theory, one interpretation is right and the other simply wrong. The matter is rather one of finality of decision as to the proper legal analysis of facts; or sometimes as to restrictions on the advancing of mutually inconsistent allegations. Difficulties arise in particular when it is sought to reopen the issue in connection with judgment subject to

[5] *United Australia Ltd v Barclays Bank Ltd*, [1941] AC 1.

appeal, and as to default and summary judgments, and some of the leading cases concern procedural problems arising in such situations.

208. With specific reference to the rule quoted in paragraph 206 above, the following is stated:

> *"It is well established in England that if the third party obtains judgment against the agent of an undisclosed principal, he can no longer sue the principal, even though he obtained judgment in ignorance of the fact that the agent had been acting for another, and so of his full rights, and even though the judgment is unsatisfied. The rule seems to be based on two arguments. The first is that there is only one obligation which is merged in the judgment. The analogy is with the case of joint debtors; but the reasoning seems rather that the obligation is an alternative one. This is reinforced by a rather rough and ready argument, that the liability of the undisclosed principal involves an interpretation of the facts inconsistent with that involving the agent's liability, and the third party cannot have it both ways: the principal's liability is in a sense a windfall, and the third party cannot complain if the windfall turns out to be of limited value. But, as stated above, this rule relating to joint debtors has been changed by statute. And what may be called the "windfall" argument can be regarded as reneging on the doctrine of undisclosed principal itself. It seems that in the late nineteenth century the doctrine came to be thought of as inconsistent with basic contract theory, and limitations were consequently placed on it. Such inconsistency was not of itself a valid reason for the limitations imposed. It seems clear, however, that the present rule for undisclosed principals, that the obligation is alternative, can only be changed by the Supreme Court…"*

209. Mr Ashworth relied on these passages, particularly the last quoted sentence, as supporting his argument that the current position in English law is that the liability of agent and undisclosed principal is alternative and that judgment against the agent automatically bars a subsequent action against the principal, for whatever reason.

210. Mr Ramsden, by contrast, submitted that *Bowstead* was by no means conclusive, and indeed was internally inconsistent, on the question of whether the liability of agent and undisclosed principal was alternative. He submitted that an agent could be liable jointly together with an undisclosed principal,

referring me to paragraphs 9-006 and 9-012 where it is said that an agent can contract jointly or jointly and severally with his principal and that:

> *"Where the principal is undisclosed at the time of contracting, the contract is made with the agent, and he is personally liable and entitled on it. There is no need for the agent to join the principal as a party. However, the principal also may intervene to sue, and may be sued, but the latter only subject to the general rule that nothing must prejudice the right of the third party to sue the agent if he so wishes. This is therefore a case where both agent and principal are liable and entitled. The doctrine of election, referred to above, may raise problem when the agent is sued."*

211. His primary submission was accordingly that the liability in this case was a joint liability, whether as joint contractors or as joint tortfeasors (on the basis that the Additional Defendants had authorised the alleged misrepresentations), and that the 1978 Act had statutorily abrogated the rule against successive actions. Alternatively, he submitted that even if the liability was alternative, the true basis of the doctrine was one of election. In this context, he relied on the third line of reasoning referred to in paragraph 207 above and the cases of *Pendleton v Westwater*, [2001] EWCA Civ. 1841 and *Balgobin v South West Regional Health Authority,* [2013] 1 AC 582 as demonstrating that a default judgment obtained against X on one interpretation of the facts does not bar a further action against Y on an alternative interpretation, as a default judgment against X does not involve any determination of the facts which is inconsistent with the liability of Y. I return to these cases later.

212. Only three recent cases were cited to me as having any relevance to the question. The first is *Brave Bulk Transport Ltd v Spot On Shipping Ltd*, [2009] EWHC 612 (QB); [2009] 2 Lloyd's Rep.115 where the respondent obtained a default judgment against the defendant company, SOS, in respect of a contractual claim, which it subsequently sought to enforce in New York

against the assets of the applicant on the basis that the applicant was the *alter ego* of the defendant. The question before the court was whether the applicant could obtain anti-suit relief restraining the New York proceedings.

213. When the respondent commenced suit against SOS in March 2008, it was aware of the applicant and could, had it so chosen, have alleged that the applicant was party to the contract as an *alter ego*. In fact it took a different approach, accepting that SOS was the contracting party and that its contractual claim was exhausted by the default judgment. Its case in New York was rather that it was entitled to enforce that judgment against the assets of the applicant as an *alter ego*.

214. Having pre-read the papers, Burton J sent a note to counsel setting out his provisional analysis of the case which read, in part:

> *"If* [the Respondent] *is alleging in the New York proceedings that* [the Applicant] *is the contracting party liable to the Respondent under the FFA then: 1. They cannot, having sued and obtained judgment against SOS. Abuse is not necessary – election would suffice – see* ***Kendall v Hamilton*** *[1879] 4 AC 504 especially at 515...*" (a reference to the speech of Lord Cairns).

He subsequently referred at paragraph 25 to *Kendall v Hamilton* in the following terms:

> *"If, in fact, as a result of information which had now become available to it, the Respondent was, in March 2008, in a position to have alleged that SOS was agent, in entering into the FFA, for an undisclosed principal, namely the Respondent, then it is all the clearer that by issuing the proceedings only against SOS it elected to sue the agent on the contract, and could not now thus sue the undisclosed principal on the contract – see* ***Kendall v Hamilton*** *referred to above. This only emphasises what, in my judgment, would have been the case in any event, in the light of the House of Lords authority."*

215. Clearly, therefore, he regarded *Kendall v Hamilton* as a case on election. For the reasons given above, however, and with the profoundest respect, I disagree

with this analysis. None of their Lordships treated it as a case of election. On the contrary, apart from Lord Cairns they all dealt with it as a case of merger in the context of joint contractors (albeit Lord Penzance refused to follow *King v Hoare*). Lord Cairns himself at page 515 expressly eschewed the suggestion that any question of election was involved. However, it does not appear that *Kendall v Hamilton* was the subject of any argument before Burton J, let alone the detailed submissions that have been presented to me.

216. Two years later, Burton J gave judgment in *Antonio Gramsci Shipping Corp v Stepanovs*, [2011] EWHC 333 (Comm); [2011] 1 Lloyd's rep.647 where the claimant, having obtained summary judgment against certain corporate defendants, brought a further action seeking to pierce the corporate veil so to hold the beneficial owners of the corporate defendants jointly and severally liable for its losses. The immediate question before the court was whether jurisdiction could be established against the beneficial owners on the grounds that they were parties to the relevant contracts. Burton J held that there was a good arguable case that the veil could be pierced so as to permit enforcement of the contracts against them. However, counsel argued by analogy with the agency cases that by taking judgment against the corporate defendants, the claimant had made an election and could no longer sue the beneficial owners.

217. Burton J dismissed this argument on the basis that it could only succeed if (1) the claims against the corporate defendants (as puppets) and the beneficial owners (as puppeteers) were alternative; and (2) the decisions on election as between principal (including undisclosed principal) and agent were extended. As to the latter, he expressed the view that the nineteenth century cases of

election such as *Priestly v Fernie* and those cited in *Bowstead* constituted *"a wholly unfair historical anomaly, which I see no need or justification to extend."*

218. Given that he rejected the argument on the basis that the liability in question was in any event joint and several, not alternative, this comment was clearly *obiter*. Moreover:

i) It appears to have been very much a throwaway comment in circumstances where it is again not apparent that the point was the subject of any detailed forensic examination;

ii) As in *Brave Bulk*, the case was one where the claimant had sufficient knowledge prior to entering judgment to have made a fully informed election had election been a relevant consideration;

iii) It is slightly puzzling that Burton J made no reference to *Kendall v Hamilton* which had featured so prominently in his judgment in *Brave Bulk*.

219. Finally, there is *Adams v Atlas International Property Services Ltd,* [2016] EWHC 2680 (QB) where in a short judgment, Mr Justice Lavender regarded it as *"well settled"* that a claimant can obtain judgment against either the agent or the undisclosed principal but not both, referring to Art 82(1) of *Bowstead* and also para 9-057 where it is stated that:

> *"Any liability of an agent on any contract made by an agent on behalf of his principal is discharged by the obtaining of judgment against the principal, and may perhaps be discharged where the third party elects to pursue his rights against the principal, in accordance with the principles stated in Article 82."*

220. However, that was a case where the claimant was pursuing alternative claims against the agent and the undisclosed principal in the same proceedings and the argument seems to have centred on whether, if it was the case that the claimant had to make an election, it could do so after judgment had been given. Any such election would of course have been a fully informed election and the point that arose in *Priestly v Fernie* and *Kendall v Hamilton* and which arises here was not directly in issue.

Discussion

221. I have not found this an easy point. It is not made any easier by the fact that (1) the doctrine of undisclosed agency is undoubtedly anomalous and far from universally approved; and (2) the basis of the rule does not seem to have been the subject of any detailed judicial consideration.

222. In my view, the true principle underlying the rule as exemplified in *Priestly v Fernie* and in the judgment of Lord Cairns in *Kendall v Hamilton* is that the liability of agent and undisclosed principal is alternative but *not* in the sense that there is any factual inconsistency between the liability of the agent and that of the principal. On the contrary, the same factual analysis underlies the cause of action against both agent and principal, namely that the contract in question has been made with the agent. The cause of action is therefore one and the same; it is simply that, for better or for worse, the law entitles the claimant (but does not bind him) to treat the undisclosed principal as if he had been standing in the shoes of the agent all along. That being the case, there is only a single liability, and judgment against one bars judgment against the other. In other words, the shoes can be worn by either the agent or the

principal. Agent and principal cannot both wear the same shoes at the same time. Nor can they wear one each.

223. On that basis, it seems to me that Mr Ramsden's reliance on *Pendleton* and *Balgobin* was misplaced. Both cases were concerned with a completely different situation where the liabilities in question were alternative because they each involved a wholly different factual analysis. Thus, in *Pendleton* the question was whether a loan had, on its true construction, been made to the first defendant or to the second defendant. In *Balgobin*, it was whether the plaintiff had been employed by the first defendant or the second defendant. In neither case could the cause of action against the two possible defendants be supported by the same facts. Either one of them was the lender/employer, or the other was. That, to my mind, is very different from the type of alternative liability which arises where the claimant can sue either the agent or the principal on the same contract.

224. For substantially the same reasons, I also reject the argument that the situation is one of joint liability. While beguilingly similar, the joint contractor analysis is in fact conceptually different. It is true that in a joint contractor situation, there is likewise only one factual analysis and only one cause of action. The difference is, however, that joint contractors are all *simultaneously* liable such that, prior to the change effected by the 1978 Act, the entire cause of action merged in a judgment obtained against any one of them with the result that it was no longer possible to sue a joint contractor who had not previously been sued.

225. I do not think that a valid analogy can be drawn with the situation of disclosed principals. Where the principal is disclosed, all parties understand that the contract is that of the principal, and usually the only question is whether there is something in the surrounding circumstances which makes the agent additionally liable on the contract jointly with the principal. By contrast, where the principal is undisclosed, the contract is (and can only be) that of the agent and the question is the extent to which the principal can intervene to sue or be sued. The parties can never have contemplated any joint liability in this situation because, *ex hypothesi*, the principal is undisclosed and the third party does not know of his existence. It is therefore difficult to see how the liability can be anything other than alternative. Accordingly, if the principal intervenes, he does so to the exclusion of the agent while the third party can sue either the agent or the principal but not both.

226. If that is right, then it seems to me that the better analysis is that the rule preventing a claimant from suing an undisclosed principal after obtaining judgment against the agent is one of merger. Further possibilities derived from *Priestly v Fernie* are that it is a species of estoppel resulting from the fact that the judgment against the agent automatically alters the position of the principal by imposing on him an obligation of indemnity or is alternatively based on a perception of unfair prejudice. However, the former is difficult to reconcile with accepted principles of estoppel since, unless the third party knows of the principal's existence, it is difficult to spell out the necessary

unequivocal representation that he does not intend to sue the principal,[6] and the latter does not find support in any later authorities.

227. On any view, I cannot accept that the underlying principle is one of election in the sense contemplated by *Scarf v Jardine*. It is clear that the result follows automatically by virtue of judgment being entered and, in so far as *Priestly v Fernie* referred to election, the court must necessarily have treated judgment as sufficient election in itself for this purpose (*Bowstead'*s "compromise position"), since on the facts of the case the plaintiff did not know about the existence of the principal when judgment was entered.

228. I do not find myself swayed from this analysis by anything said in the other cases referred to above. First, all of them concerned factual situations where the claimant was in a position to know about his alternative claim prior to obtaining judgment. They could all therefore be analysed as cases of true election, irrespective of the rule in *Kendall v Hamilton*. Secondly, in none of them does the point seem to have been subjected to any sustained or detailed argument.

229. I do not overlook the passing comment of Lord Atkin in *United Australia Ltd v Barclays Bank Ltd,* [1941] AC 29 that the choice whether to sue agent or undisclosed principal invokes the doctrine of election. But that was not a case of agency and this was simply an example given by Lord Atkin of a situation involving election. Of course, in any given case it may well be that there has been a fully informed election short of judgment which is sufficient to bar the

[6] Although it is not an objection that the principal might in theory have a right of reimbursement against the agent to recover any payment already paid. This would not be an adequate remedy if the agent was impecunious and the likelihood is that the third party would only be looking to the principal in that situation.

alternative claim.[7] However, the fact that an election in this sense may be *sufficient* to bar the alternative claim does not mean that it is *necessary.*

230. I therefore accept the submission of Mr Ashworth that if and in so far as the relationship between the Original Defendants and the Additional Defendants was one of undisclosed agency, then in circumstances where there has been no application to set it aside, the default judgment against the Original Defendants is a bar to any subsequent proceedings against the Additional Defendants based on the alleged contract which raise the same causes of action as were settled by the judgment. I derive considerable reassurance in this view from the fact that the learned editors of *Bowstead* likewise conclude that this represents current English law at least short of the Supreme Court.

231. However, the same is not true in my judgment as regards any liability for misrepresentation on the part of the Additional Defendants as principals. For this purpose they and the Original Defendants would be joint tortfeasors and, as discussed further below, such liability depends on the scope of the agent's authority, irrespective of whether the agency is disclosed or undisclosed. The reasoning in *Kendall v Hamilton* is inapplicable to this situation and the rule cannot therefore apply. The old rule that judgment against one joint tortfeasor automatically released all other tortfeasors jointly liable has now been statutorily reversed by section 3 of the Civil Liability (Contribution) Act 1978. Accordingly, I hold that claims in misrepresentation against the Additional Defendants as principals are not barred by the judgment. I deal with unjust enrichment at Section I below.

[7] See, for example, *Clarkson Booker Ltd v Andjel*, [1964] 2 QB 775.

Election

232. Given my conclusions above, the question of election does not arise. However, it was fully argued and I will therefore express my opinion on it briefly.

233. The principles underlying the doctrine of election are well-known: see *Scarf v Jardine (supra)*; *The Kanchenjunga*, [1990 1 Lloyd's Rep. 391, 398 *per* Lord Goff. Where one party, having two alternative and inconsistent courses of action open to him, acts in a way consistent only with him having chosen one of those courses, he will be held to have elected to abandon the other. Generally it is a prerequisite that this is an informed choice in the sense that the electing party must be aware of the facts giving rise to the choice although, as Lord Goff pointed out in the latter case, this is not invariable since there may be some situations where the law deems an election to have been made. An example is where a buyer is deemed under the Sale of Goods Act 1979 to have accepted defective goods and thereby waived his right to reject them notwithstanding that he has not actually examined them.

234. A more vexed question is whether the electing party must be aware, not only of the facts giving rise to his rights, but also of the rights themselves. This was a point which was left open in the *Kanchenjunga* as it did not arise on the facts. This is a difficult question but there is much to be said for the proposition that a person cannot make an informed election unless he knows, or at least could reasonably be taken to know, that there is a choice to be made which will have consequences, in the sense that something will necessarily be surrendered as a result of him exercising his choice. This, it seems to me, was

the basis of the decision of the Court of Appeal in *Peyman v Lanjani*, [1985] 1 Ch.457. See also *Kendall v Hamilton* at 542 *per* Lord Blackburn and *Chestertons v Barone,* [1987] 1 EGLR 15 *per* May LJ. Indeed, to hold otherwise would run the risk of confusing election, which is a question of conscious choice, with estoppel which depends solely on outward appearances without any particular knowledge being required at all.

235. These are deep waters for a judge sitting at first instance, but I am prepared to assume in Mr Taylor's favour that in order to have made an election, he must at least have been in a position where he knew or reasonably should have known that he needed to choose between the liability of the Original Defendants and that of the Additional Defendants.

236. There was no dispute that the mere fact of entering the default judgment could not have constituted such an election. At that date, Mr Taylor was unaware of the existence of Mr Khodabakhsh and NBT, let alone of their involvement with Rhino. The question is whether he subsequently made an election after becoming aware of that involvement by taking certain steps in Monaco in relation to the default judgment.

237. In April 2017, Mr Taylor brought an application against the Original Defendants in Monaco for asset disclosure in order to *"proceed with potential precautionary or legal measures against them."* The order was granted and revealed the existence of a berth at Cap d'Ail owned by a company called Eko Invest SCI of which Mr Erenstein and Mr Koekkoek were shareholders.

238. On 20 October 2017, Mr Taylor made a further application for seizure of Mr Erenstein and Mr Koekkoek's shares in Eko Invest. The application stated

that Mr Taylor planned *"to initiate proceedings against [Messrs Erenstein and Koekkoek] to obtain enforcement* exequatur *in Monaco of the default judgment granted by the High Court of Justice in London on 2 August 2016, but wants first to exercise a precautionary measure with regard to the valuable assets belonging to [Messrs Erenstein and Koekkoek] that might be transferred easily to third parties."*

239. Critically, as it seems to me, the application recognised that under Monegasque case law, an applicant for seizure of assets was obliged to prove the existence of a certain debt from the respondent in his favour. The default judgment was therefore relied upon for this purpose as evidence establishing the existence of a debt certain provisionally estimated at US$2,510,000.

240. The application was granted on 24 October 2017. It was served on Eko Invest SCI, Mr Erenstein and Mr Koekkoek on 21 March 2018 and they were summoned to appear at court on 5 April 2018 failing which they were warned that a default judgment might be given. They did not so appear and a further subpoena was issued on 13 April 2018 for a hearing on 17 May 2018.

241. In these circumstances, I cannot accept the evidence of Mr Crean that the Claimant had not sought to enforce the default judgment but had merely *"made enquiries about enforcing it."* In my judgment the application for asset seizure went far beyond a mere enquiry or even a provisional step. On the contrary, it was a preliminary step towards actual enforcement which could not be taken without positively averring and proving the existence of a valid debt, in other words relying affirmatively on the default judgment.

242. By October 2017, Mr Taylor had already pleaded his case on undisclosed agency. There can therefore be no doubt that he knew the relevant facts giving rise to his right to elect between the liability of the Original Defendants and Additional Defendants. He had the benefit of legal advice from his English solicitors and in my judgment they could reasonably have been expected to have advised him of the consequences of continuing to pursue his remedies based on the default judgment. There is clear authority at Court of Appeal level that the mere commencement of proceedings with knowledge of the agency is strong *prima facie* evidence of an election[8] and the steps taken here went much further than that.

243. Had the point arisen, therefore, I would have held that Mr Taylor elected to hold the Original Defendants liable to the exclusion of the Additional Defendants by making and serving the application for asset seizure in Monaco. However, such an election would only have barred his contractual claims. Since Mr Taylor was fully entitled to pursue his claims in misrepresentation against both Original Defendants and Additional Defendants notwithstanding the default judgment, no question of choice arose and therefore no question of election either. It seems to me that the same is probably true of the claim for unjust enrichment although, for the reasons given at section I below the point is academic.

244. Mr Ramsden argued that no question of election could properly arise where the existence of the underlying agency was a matter of dispute. However, I agree with Mr Ashworth that this is a risk the Claimant took. This was not a

[8] *Clarkson Booker Ltd v Andjel (supra); Chestertons v Barone (supra).*

case like *Balgobin* or *Pendleton* where only one defendant or the other could be liable depending on the facts. In this case, the Original Defendants would always have been liable to Mr Taylor, whether or not the agency was ultimately established, and it was therefore always open to him to elect to look only to them. If he had wanted to preserve his options, the correct course would have been for him to apply to set aside the default judgment so that he could pursue all the Defendants in one set of proceedings.

E. AGENCY (Issue 1)

245. Having dealt with the question of law, I can now address the remaining issues in the light of the findings that I have made above.

246. The critical question here is whether there was any agency relationship between some or all of the Original Defendants and some or all of the Additional Defendants, which (subject to the *Kendall v Hamilton* point) renders the latter contractually liable under the Heads of Agreement or Loan Agreement or liable for any misrepresentations which may have been made in the course of the negotiations for those agreements.

247. In both his opening and written closing submissions, Mr Ashworth complained bitterly about the lack of clarity of the Claimant's case on this point, in particular, as to which of the Original Defendants was alleged to have acted as agent for which of the Additional Defendants and when. These submissions had considerable force. In the event, however, Mr Ramsden in his written closing submissions expressly abandoned any suggestion that either Mr Khodabakhsh or NBT was an undisclosed principal and confined the

Claimant's case to an allegation that the Original Defendants acted as agents on behalf of Rhino.

248. This allegation was itself limited to an agency arising under two agreements between VDML and Rhino dated 15 October 2007 and 1 April 2013 respectively. The Additional Defendants did not deny the existence of these agreements or that in principle they continued to operate following the transfer of ownership of Rhino. However, they disputed their scope and effect.

249. The agreement dated 15 October 2007 (to which I shall refer as the "Agency Agreement") was expressly governed by Panamanian law. Neither side called any evidence of Panamanian law or suggested that it differed in any material respect from English law. I accordingly proceed on that basis.

250. The preamble to the agreement recorded that Rhino, the principal, carried on or intended to carry on the business of *"trading in the buying of pleasure yachts from the Netherlands and selling worldwide"* and wished to appoint VDML, the agent, *"to carry out duties ("the Duties") in connection with the Business as its agent on behalf of the principal but in the name of the Agent."*

251. By clause 1 VDML was appointed as agent to carry out the Duties. However, the content of the Duties was nowhere expressly spelled out. Clause 3, headed *"Duties of Agent"*, which might have been expected to contain a definition of the Duties, merely stated as follows:

> *"As agent of the Principal, the Agent shall perform the Duties and carry out such transactions, dealings, acts and things as may be necessary or expedient for carrying out the duties to the best account, and without prejudice to the generality of the foregoing, the Agent shall in particular:-*

(a) Use its best endeavours and work diligently at all times to carry out the Duties to the best of its abilities; and

(b) Not without the prior written consent of the Principal engage or be concerned or interested either directly or indirectly in any activity likely to compete or interfere with the Business or the carrying out of the Duties; and

(c) Engage and employ such staff and personnel as may in its opinion be appropriate for the proper carrying out of the Duties;

(d) Place orders with, enter into commitments, obligations and liabilities of any description with and to third parties for or in the course of the carrying out of the Duties, purchase, sell and turn to account all assets materials and goods used therein… purchase, sell, construct, install or dispose of all plant and equipment and effects used in connection with the carrying out of the Duties or ancillary or incidental thereto and procure services for the purposes of carrying out the Duties.

(e) Open and maintain in its own name such banking account or accounts as the Principal shall agree and credit thereto all moneys received by it in connection with carrying out the Duties or which may be paid to it by the Principal for the purposes of carrying out the Duties and debit thereto all expenses incurred in connection with carrying out the Duties and any sums which the Principal may from time to time require to be paid to it out of such account or accounts by the Agent;

(f) Hold any assets of the Business or collect any commissions or other payment due to the Principal in the name of the Agent as agent and nominee for the principal."

252. Clause 5 provided expressly that the agency was to be undisclosed, while clause 11 provided that the parties were not partners or joint venturers and, further, that VDML had no authority to act on behalf of Rhino save as authorised under the agreement.

253. By virtue of clause 2, the agreement was to continue indefinitely unless terminated by no less than 30 days' notice in writing.

254. The agreement of 1 April 2013 (to which I shall refer as the "Nominee Agreement") seems to have originated in an agreement dated 8 March 2013 which itself was expressed to be the formalisation of a verbal agreement effective from 1 December 2010. There were two versions of the Nominee

agreement in substantially similar terms, one of which expressly nullified the 8 March 2013 agreement, but nothing turns on this. Criticisms of the Additional Defendants for not being able to explain the reasons for the different versions seemed to me to be misplaced as it is not immediately apparent how Mr Khodabakhsh could have been expected to know about events long pre-dating his involvement with the Original Defendants.

255. The Nominee Agreement expressly provided that it *"amends all previous agreements".* The parties were Rhino as principal and VDML as nominee. By clause 1, VDML was instructed – somewhat obscurely, it has to be said:

> *"to retain one time exclusive right to exercise in the name of the Nominee but in trust and on behalf of the Principal and at the latter's risk the following assets (hereafter referred to as the "Assets"):*
>
> *The Beneficial ownership of the Assets held by the Nominee or registered under its name in its capacity as nominee of the Principal shall at all times belong to the Principal."*

256. Other relevant provisions were:

i) Clause 4(b), which provided that VDML should, when entering into any agreement on behalf of Rhino, disclose the fact that all assets were the property of Rhino;

ii) Clause 5, which provided that the proceeds received by VDML from any transaction in relation to which Rhino had beneficial ownership should be credited to Rhino;

iii) Clause 6, which provided for a fee to be paid to VDML;

iv) Clause 7, which expressly prohibited VDML from putting Rhino's assets at risk or in any situation whereby Rhino might incur a liability;

v) Clause 10(b), which provided that Rhino accepted no liability for any transactions entered into by VMDL.

257. The first question I have to resolve is whether, as Mr Ashworth argued, the Agency Agreement was entirely superseded by the Nominee Agreement. There was no evidence before me to suggest that the Agency Agreement was ever consensually terminated. I also note that the Nominee Agreement only purports to "amend" previous agreements, not to supersede or replace them. This is in contrast to the earlier version which expressly provided for the 8 March 2013 agreement to be nullified. It is therefore conceptually possible that, unless the subject matter of the two agreements was entirely co-extensive, they continued to operate in parallel with the later agreement overriding the earlier agreement only to the extent of any genuine inconsistency or overlap.

258. The documents before me disclosed the following relevant considerations:

i) The original manufacturing agreement between Marquis and VDML was dated 18 November 2013. It provided for Marquis to build yachts which VDML would purchase. It expressly recorded that the IP, moulds and tools were owned by Rhino.

ii) A press release dated 13 December 2013 recorded that Marquis was now the sole builder worldwide of Van Dutch yachts and that all moulds and tools were being moved to Wisconsin.

iii) On 11 March 2015, the Latam Licensing Agreement was concluded between VDML, Rhino and Latam. Clause 1.1 of the Licensing

Agreement stated that the moulds and tools were owned by VDML/Rhino. Clause 1.3 expressly contemplated that new manufacturing agreements would be entered into with Marquis by both Latam and VDML.

iv) On 4 May 2015, the original manufacturing agreement between Marquis and VDML was indeed replaced with a second agreement between the same parties. For reasons which can probably only be explained by Mr Erenstein and Mr Koekkoek, this agreement recorded that VDML owned and had exclusive rights to the moulds and tools. Rhino was not mentioned, although there were references elsewhere in the document to VDML's licensors. The agreement also referred expressly to Latam.

v) On 15 July 2015, a further manufacturing agreement was concluded between VDML and Couach. As with the first Marquis manufacturing agreement, this explicitly recorded that the moulds and tools were the property of Rhino.

259. It appears therefore that the whole basis of the business was changed in 2013. Production in the Netherlands ceased and all manufacturing operations were moved to the United States. This is consistent with the timeline set out subsequently by Mr Erenstein in the Strategic Plan. In March 2015, Latam was granted an exclusive licence to manufacture and distribute yachts within a territory broadly comprising the Americas, although VDML and Rhino reserved to themselves the right to manufacture yachts within the territory

provided only that they were distributed and sold elsewhere. A French manufacturer was added in 2015.

260. This suggests that there were two separate spheres of operation. One was in the Americas where boats were manufactured, distributed and sold by Latam. No question of agency arises here. Rhino was party to the Licensing Agreement in its own right and the actual purchase and sale of the boats was handled by Latam. The other involved the manufacture of boats worldwide by VDML/Rhino and their distribution and sale outside the Americas. The evidence, such as it was, suggested very strongly that these operations were conducted by VDML on behalf of Rhino, see, for example, the Tax Restructuring document. What was not at all clear was the basis on which it did so after 2013.

261. One possibility is that the 2007 Agency Agreement, which referred explicitly to the purchase of yachts from the Netherlands, came to an end when manufacturing operations were moved to the United States and was replaced altogether by the 2013 Nominee Agreement. This is Mr Ashworth's argument. However, it is not what the Nominee Agreement says. Another possibility is that the Agency Agreement was amended by conduct so as to continue to apply to the business as it was carried out from and after 2013 save in so far as any particular transactions fell under the Nominee Agreement.

262. The agreements are not easy to interpret but it seems to me as a matter of construction that the Nominee Agreement is directed specifically at the *assets owned by Rhino*, namely the IP, moulds and tools, and sets out the conditions on which those assets are to be exploited by VDML, including a requirement

that Rhino's ownership should always be made clear. Manufacturing and licensing obviously involved the exploitation of Rhino's IP, moulds and tools and thus fell under the scope of the Nominee Agreement. Consistently with that agreement, Rhino's ownership was disclosed in the first Marquis and Couach manufacturing agreements and in the Latam Licensing Agreement. (As noted above, the second Marquis agreement is something of an oddity in this respect.)

263. However, I do not read the Nominee Agreement as conferring any wider authority on VDML to act as an agent generally, for example in relation to the sale and distribution of boats outside the Americas. In other words, the Nominee Agreement was dealing only with the exploitation of Rhino's assets and not with any subsequent distribution and sale arrangements. There is therefore no obvious reason why the Nominee Agreement should have entirely displaced the Agency Agreement rather than simply amending it.

264. In my view, the two agreements fall to be read together, the effect being that the Nominee Agreement regulated the rights and obligations of the parties regarding the specific use of Rhino's IP, moulds and tools, while the Agency Agreement (amended by conduct) continued to apply generally to the distribution and sale of boats by VDML after 2013. This is consistent with the Strategic Plan which mentions only the 2007 agreement.

265. The next question is whether either agreement conferred authority on VDML to enter into loan transactions on behalf of Rhino, either generally or specifically with Mr Taylor. The Nominee Agreement says nothing of relevance in this respect and, on my construction, is in any event concerned

with a different subject-matter. Any such authority must therefore be found in the Agency Agreement.

266. At my request, the parties addressed me on the scope of the implied or usual authority of an agent to pledge his principal's credit. I do not propose to discuss the authorities. As they make clear, this is a fact-specific enquiry in each case. The position is sufficiently summarised in *Bowstead (op.cit.)* Art. 29 which states that an agent authorised to conduct a particular business has implied authority to do what is incidental to the ordinary conduct of such business. The commentary goes on to make the obvious point that an agent with authority to conduct business generally on behalf of a principal is likely to have implied authority to carry out a wider range of incidental acts than one who is only authorised to carry out a particular transaction.

267. As noted above, the definition of "Duties" under the Agency Agreement was entirely self-referential. Nonetheless, since Rhino's business was defined as being that of trading in the buying and selling of yachts, and since Recital (B) limited VDML's "Duties" to those specifically connected with the Business, the only sensible reading I can give the agreement is that it authorised VDML to transact the business as so defined on behalf of Rhino. In other words, VDML's "Duties" under the agreement were to buy and sell yachts on Rhino's behalf.

268. For this purpose, clause 3 authorised VDML to carry out *"such transactions, dealings, acts and things as may be necessary or expedient for carrying out the duties"* and to *"enter into commitments, obligations and liabilities of any*

description with and to third parties for or in the course of the carrying out of the Duties".

269. This wording is very broad and is certainly wide enough on its face to cover the taking out of a loan, which would undoubtedly constitute a commitment, obligation or liability to a third party. Provided, therefore, that the loan in question was sufficiently closely connected with the buying or selling of yachts, I consider that VDML would have had authority under the Agency Agreement to enter into it. In my judgment if money needs to be borrowed in order to facilitate the purchase of a yacht it is sufficiently connected with the business to fall within the express authority conferred by clause 3(d) without recourse to any doctrine of implied or usual authority. It is therefore unnecessary to consider the difficult case of *Watteau v Fenwick,* [1893] 1 QB346.

270. That said, the Agency Agreement does not in terms authorise loans and the wording of clause 3 quoted above does no more than write out the authority which would anyway be implied in the case of an agent employed to manage the principal's business. As such, I am clearly of the view that, as with implied authority, any such authority was limited to whatever was incidental in the ordinary conduct of such business: see *Bowstead (op. cit.)* Art 29.

271. However, this was not a loan in the ordinary course of business:

i) It was a short-term bridging loan required urgently on onerous terms, including an interest rate equivalent to 48% per annum, rising to 60% per annum if not repaid in full within 6 months;

ii) It purported to provide security which, as Mr Ashworth pointed out, Rhino was simply not in a position to offer, namely a pledge of shares belonging to VDMH and Mr Erenstein, security over stock boats owned by VDMH, an option to purchase further boats and an option to purchase a stake in the entire Van Dutch business.

272. It may be that Mr Erenstein was happy to enter into these commitments but Mr Erenstein was not even a director or shareholder of VDML. He was certainly not a director or shareholder of Rhino. Nothing he said or did can therefore have bound Rhino absent some holding out by Rhino, which was not alleged and of which there was no evidence.

273. In these circumstances, I have concluded that VDML did not have authority under either the Agency Agreement or the Nominee Agreement to enter into the loan transaction with Mr Taylor on the terms which were in fact negotiated.

274. The Agency and Nominee Agreements are the only source of authority relied on by the Claimant. The only parties to these agreements are Rhino and VDML. VDMH did not exist at the date they were concluded and so cannot have been party to any agency relationship created thereunder. The fact that VDMH subsequently became the holding company of VDML does not alter this position.

275. There is no evidence of any other agency relationship between Rhino and any of the Original Defendants and Mr Ramsden did not ultimately argue that there was.

F. CONTRACTUAL CLAIMS (Issues 6-12, 25, 27-31)

276. It is not now alleged that either Mr Khodabakhsh or NBT was party to either the Heads of Terms or the Loan Agreement.

277. As far as concerns Rhino, it follows from my findings on agency above that VDML had no authority to enter into the loan transaction with Mr Taylor on its behalf. While that is sufficient to dispose of the contractual claims in their entirety, I would in any event have held that they failed for the following additional reasons:

i) VDMH was the sole counterparty to the Heads of Terms. Not only did Mr Taylor expressly state in evidence that he regarded himself as lending to the "topco", but the Heads of Terms themselves provided in clause 1.3, which was expressly stated to be legally binding, that they were for the benefit of the parties alone and were not intended to be enforceable by or against anyone else.

ii) Accordingly, VDML was not a party to the Heads of Terms and since only VDML is alleged to have had any agency relationship with Rhino, there is no conceivable basis on which it can be said that Rhino was party.

iii) Even if VDML had been a party to the Heads of Terms, both parties agreed that an intention to contract on behalf of Rhino was an essential pre-requisite of the undisclosed principal doctrine. However, any such intention was clearly negatived by clause 1.3 which would have been

sufficient to exclude the intervention of Rhino, whether to sue or to be sued: see *Bowstead (op.cit.)* Art. 76(4) and paragraph 8-081.[9]

iv) It must in any event be doubtful whether VDML intended to contract on behalf of Rhino in July 2015 when Rhino had by then been sold to Mr Khodabakhsh as part of the joint venture. There was certainly no evidence to that effect.

v) No binding contract was ever concluded on the terms of the Loan Agreement. The Loan Agreement was intended to supersede the Heads of Terms. On the basis of my factual findings set out above, I am satisfied that Mr Taylor and his advisers, specifically Mr Crean, did not intend to enter into a binding loan agreement until all the replacement terms had been finally agreed, in particular those relating to Mr Taylor's security. Otherwise I can see no reason why Mr Crean would have returned the Loan Agreement text signed by Mr Erenstein for amendment. Had it been concluded, then VDML would have been a party and the issue of undisclosed agency would have been live. As it is, I hold that the only binding contract was that contained in the Heads of Terms to which neither VDML nor Rhino was a party.

vi) Even if the Loan Agreement had been valid and binding and VDML had been authorised to contract on behalf of Rhino notwithstanding

[9]See also the recent Court of Appeal decision in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico Sade CV*, [2019] 1 WLR 3398 which, although not cited by either party, confirms that an entire agreement clause *prima facie* negatives any suggestion of undisclosed agency. It is a clear implication of the decision that an express provision in the terms of clause 1.3 is conclusive of the point: see, especially, at [114].

what is said in paragraph 273 above, the considerations in i)-iv) above would have applied equally by virtue of clause 10.9.

278. Mr Ashworth submits that Issues 25 and 27-30 do not in fact arise for decision on the pleadings. Mr Ramsden makes a like submission in relation to Issue 31. Given my decisions so far, it is plain that Issues 25 and 27-30 must all be answered adversely to the Claimant with the result that Issue 31 does not arise. It is therefore unnecessary for me to dwell on them further.

G. MISREPRESENTATION (Issues 2-5, 16-17, 26)

279. In the light of my factual findings, I am satisfied that at least the following representations were made by Mr Erenstein or, in so far as they were contained in communications sent by Mr Thomas and Mr Klaver, were adopted by Mr Erenstein. I assume, without making any finding to this effect, that Mr Erenstein was authorised to make these representations on behalf of VDMH and VDML:

i) The Van Dutch business was structured with VDMH as holding company and VDML, Rhino and the proposed bond trustee as 100% subsidiaries;

ii) The IP, moulds and tools were owned by Rhino;

iii) The business was solvent and successful with a buoyant order book but had cashflow difficulties and required a bridging loan in order to make certain down payments to the yacht manufacturer;

iv) Only a short-term facility was required pending realisation of funds from a forthcoming bond issue; any loan could and would be repaid in full and with interest within 6 months;

v) The business had yachts in stock worth in the region of €1.6m which would be available as security for the proposed loan;

vi) License fees from the Latam Agreement alone would provide sufficient income to repay the loan within 6 months regardless of any bond monies.

280. Nonetheless, Mr Ashworth launched a full-frontal attack on the Claimant's case in misrepresentation. He submitted that Mr Taylor had failed to prove that:

i) the alleged representations were made to him personally as opposed to his advisers;

ii) he personally relied on any of the alleged representations. In this context, Mr Ashworth argued that:

a) the Investment Memorandum and Licensing Agreement should be ignored as Mr Taylor did not read them;

b) Mr Taylor relied on Mr Crean's advice not on any representations;

c) in any event the only act of reliance pleaded was signature of the Heads of Terms and Mr Taylor did not actually sign the Heads of Terms until after the loan had been made;

iii) any reliance was reasonable.

281. There is some force in all these points. As I have found, Mr Taylor was clearly not a "details man" and relied heavily on the recommendations of his advisers. At best he only skim-read the material that was sent to him. However, I have also found that he made his own decisions and I accept that he read sufficient of the Investment Memorandum and the emails from Mr Erenstein and Mr Taylor which were either sent or forwarded to him, to constitute him a legitimate recipient of the representations set out above. In any event, the situation was clearly one where Mr Erenstein would have expected the representations to be passed to Mr Taylor and that is sufficient to make Mr Taylor a representee in circumstances where Mr Crean relied on them, even if they were not in fact passed on: *Chitty on Contracts (32nd ed.) §7-032*. Moreover, in so far as Mr Taylor relied on the recommendations of his advisers, he thereby implicitly relied on the representations that had been made to them and on which they had relied in making their recommendations.

282. I also proceed on the basis that although Mr Taylor only added his signature to the Heads of Terms after the loan had already been made, his agreement to the Heads of Terms was itself a sufficient act of reliance, albeit unpleaded. Had the Loan Agreement been concluded, I would further have been inclined to accept that in entering into the Loan Agreement, which was effectively a working out of the Heads of Terms, Mr Taylor continued to rely on the representations which had induced the latter.

283. However, even assuming all this in Mr Taylor's favour and even assuming further that his reliance was reasonable (as to which some of Mr Ashworth's

arguments were formidable), it is clear that his case on misrepresentation faces serious difficulties. Claims under the Misrepresentation Act 1967 lie only against the other contracting party and I have held that none of the Additional Defendants was a party to either the Heads of Terms or the Loan Agreement. No duty of care or special relationship is pleaded sufficient to found a tortious claim for negligent misstatement and Mr Ramsden expressly eschewed any case in deceit.

284. Instead he put his client's case on the basis of vicarious liability. But it seems to me that this is a misuse of terminology. Vicarious liability properly so-called derives from, and only from, a master/servant relationship, ie it arises in the context of employment. No employment relationship is alleged to have existed here. It is true that an analogous liability for misstatements can arise in an agency context, but only where the statement in question is made by the agent within the scope of his actual or apparent authority: see *Bowstead (op. cit.)* Art. 90(2) and the commentary at paragraph 8-182. I put this to Mr Ramsden in closing submissions and he accepted that the question was in truth one of the nature and scope of the agent's authority.

285. Apparent authority can be discounted immediately, since it is common ground that Mr Taylor and his advisers had no dealings with any of the Additional Defendants which could have amounted to a "holding out" by the latter of any of the Original Defendants (or Mr Thomas or Mr Klaver) as having authority to speak on their behalf. It is trite in this context that reliance cannot be placed on anything said or done by the putative agent himself: see *The Ocean Frost,* [1986] 1 AC 717.

286. Moreover, my findings in relation to agency mean that there was no agency relationship which authorised any of the Original Defendants to negotiate and conclude a loan transaction with Mr Taylor. Accordingly, none of the representations in question can have been made with the express or implied authority of the Additional Defendants (or any of them) unless they were actually aware of, and specifically authorised or adopted, them. Since I have found that Mr Khodabakhsh was wholly unaware of the loan transaction, let alone the negotiations for the loan, there is no basis on which it can be said that the representations were made with either his or NBT's authority or consent. As far as Rhino is concerned, authority to make the representations could only have come from its officers and there is no evidence to suggest that the corporate directors knew anything about the loan.

287. The claim in misrepresentation therefore fails *in limine*. Specifically, while Issue 3(a) is to be answered in the affirmative to the extent set out at paragraph 279 above, Issues 2, 3(b), 16 and 17 must be answered in the negative while Issues 4, 5 and 26 do not arise.

H. **CONSPIRACY** (Issues 19-21, 32)

288. The reasoning and analysis thus far would seem to suggest that the Claimant's case in unlawful means conspiracy is unpromising at best. However, it was common ground that it was not caught by the rule in *Kendall v Hamilton*. Conspiracy accordingly formed a key part of Mr Ramsden's submissions and he concentrated a significant proportion of his firepower on it. In deference to his valiant argument, I therefore deal with the point.

289. The constituent elements of unlawful means conspiracy were not substantially in dispute, although their application to the facts of this case was. They are:

i) an agreement, combination or understanding involving two or more persons;

ii) to take action which is unlawful;

iii) with the intention (but not necessarily the predominant purpose) of injuring the claimant;

iv) damage caused to the claimant by the unlawful means.

The burden of proof is on the Claimant to establish all elements of his case: *Kuwait Oil Tanker Co. SAK v Al Bader*, [2000] 2 All ER (Comm.) 271 at [132].

290. Mr Ashworth professed a degree of forensic bemusement at Mr Taylor's case on conspiracy which he described as "incoherent". I leave to one side Mr Taylor's evident lack of familiarity with the finer details of his pleaded case on this point but I have to say that I too struggled to understand precisely what was being alleged, particularly with regard to the actual ownership of Rhino. Nonetheless, the mast to which Mr Ramsden firmly pinned his colours was that there was a combination between the Original Defendants and the Additional Defendants to use unlawful means, namely (i) entering into the agreements of April/May 2015 and/or (ii) making misrepresentations as to the ownership and status of Rhino[10] *"for the purpose and with the intention of*

[10] Other conduct pursuant to the alleged conspiracy was also pleaded, such as a failure to disclose the alleged relationship of undisclosed agency, but Mr Ramsden did not ultimately suggest that such

obscuring the true ownership of Rhino or the underlying assets of Van Dutch" thereby causing loss to Mr Taylor.

291. There are a number of factual and legal difficulties with the case as thus articulated.

292. Given the chronology of events, the factual case must be that there was a conspiracy between Mr Khodabakhsh and the Original Defendants in April/May 2015 to obscure the ownership of Rhino so that *if* a loan was sought and granted in the future by some as-yet-unidentified person, and *if* the terms of the loan were such that the creditor had rights against the assets of Rhino, and *if*, further, the loan was not repaid and the lender sought to enforce its rights, then it would run up against a brick wall.

293. This seems to me to be a most unlikely conspiracy from Mr Khodabakhsh's point of view and I have been unable to identify any convincing motive he might have had for allegedly so conspiring. Although I have heard no evidence from Mr Erenstein or Mr Koekkoek, I have very little doubt, as I have said in paragraph 123 above, that they were spinning a double line. On the one hand, they had disposed of Rhino to Mr Khodabakhsh and NBT because Mr Khodabakhsh had made it clear that he was not interested in a joint venture unless they provided him with something of equal value to the technology, and Rhino was the only thing of value they were in a position to provide. On the other, they continued to represent to the rest of the world, in particular, to Mr Taylor, Mr Franke and other potential investors, that Rhino

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conduct amounted to independently unlawful means. In particular, he did not suggest that there had been any conspiracy that Mr Erenstein and Mr Koekkoek should commit contempts of court, or that the alleged breaches of court orders by the Additional Defendants were anything more than a continuing manifestation of the conspiracy.

and its assets were still held within the Van Dutch group as to do otherwise would have made the task of raising finance much more difficult, if not impossible.

294. But the duplicity of Mr Erenstein and Mr Koekkoek does not of itself establish a conspiracy with the Additional Defendants. In order to conspire there must be an element of deliberate combination, even if there is no express agreement: *Kuwait Oil Tanker Co. SAK v Al Bader (supra)* at [111]. However, as I have found:

i) So far as Mr Khodabakhsh was concerned, the transfer of Rhino in May 2015 was a genuine arms-length transaction forming part and parcel of the joint venture arrangements with the Original Defendants.

ii) He was unaware of the Original Defendants' financial embarrassment in mid-2015, or of their attempts to raise funds whether by means of a bond issue or otherwise.

iii) He was likewise unaware that they were intending to approach Mr Taylor or anyone else for a loan and had no knowledge of the actual loan negotiations. He is therefore hardly likely to have agreed that the Original Defendants should make misrepresentations during any such negotiations and indeed he did not authorise the actual representations that were made to Mr Taylor.

295. As for the conduct of the Additional Defendants after their involvement in this litigation, for the reasons set out in paragraphs 55-56 above, this is explicable on the basis that Mr Khodabakhsh's interests were wholly adverse to those of

Mr Taylor for reasons unconnected with any pre-existing conspiracy. No doubt he had an interest in making common cause with the Original Defendants in order to defeat any claim by Mr Taylor to Rhino's assets, but he had no reason to be particularly well-disposed to the Original Defendants once the joint venture had irretrievably broken down.

296. In these circumstances, the alleged combination is not made out against either Mr Khodabakhsh or NBT even if Mr Khodabakhsh can be treated as acting on its behalf prior to its incorporation. There is no evidence at all to show that Rhino itself was one of the conspirators and none of the Additional Defendants authorised the alleged misrepresentations.[11] The case against all the Additional Defendants therefore fails on the facts.

297. It also faces a number of formidable legal difficulties.

298. First: To my mind, the Claimant cannot plausibly allege that the Defendants conspired to obscure the ownership of Rhino without pleading what the ownership actually was as a result of the impugned transactions. When this was put to Mr Ramsden, he submitted somewhat plaintively that his client did not know what the effect of the transactions was because the ownership of Rhino had been all-too-effectively obscured, and that it was unnecessary – indeed he would probably say unfair – to expect him to put a positive case in this respect.

299. While I see the forensic force of the argument, it does nonetheless seem to me that the falsity of any representations made to Mr Taylor about the ownership

[11] Mr Ashworth also submitted that the "cease and desist" letter sent by NBT to VDML on 4 August 2016 was an odd letter for one co-conspirator to send another. I agree, but as it was not sent until significantly after the relevant events, I place no weight on it.

of Rhino depends critically on whether there was or was not a genuine transfer.

i) If there was no genuine transfer and beneficial ownership of Rhino at all times remained with the Original Defendants, then there were no misrepresentations and therefore no unlawful means. This would in any event be an extremely odd conspiracy for Mr Khodabakhsh to have entered as it would have involved him in surrendering his green technology for no benefit whatsoever.

ii) If, on the other hand, the transfers were genuinely concluded by Mr Khodabakhsh as part and parcel of the arrangements for the Joint Development Agreement as he asserted, then the case falls apart because there would then have been no relevant agreement or combination by Mr Khodabakhsh to use unlawful means. Belief in a lawful right to do what you are doing is a defence to a claim in unlawful means conspiracy: *Meretz Investments NV v ACP Ltd*, [2007] EWCA (Civ.) 1303; [2008] Ch. 244 at [127], [174]. In this respect it would not matter that Mr Erenstein and Mr Koekkoek had nefarious intent; the all-important element of combination would be lacking.

iii) A third possibility is that the agreements effected a genuine transfer but with a view to "shielding" Rhino's assets by abstracting them from the group. However:

a) It was accepted by Mr Ramsden that the transfer of shares in Rhino to a third party was not in itself intrinsically unlawful. The Claimant's case therefore seemed to be that the purpose of

the agreement (ie shielding Rhino's assets) rendered unlawful something which was otherwise perfectly lawful. However, that is the stuff of *lawful means* conspiracy which requires a predominant purpose to injure, and the case was neither pleaded nor pursued on this basis.

b) Furthermore, it is difficult to see how anything was obscured. Putting to one side the fact that the alleged "shielding document" was not pleaded as having been entered into pursuant to the conspiracy, it did not on its face say anything about Rhino, while the other documents which did effect the transfer of Rhino's shares were entirely clear as to their meaning and purport.

c) Simply saying that the agreements were obscure and that it is impossible to know what their effect was does not alter the position. There is nothing unlawful about entering into an obscure agreement. The Law Reports are replete with obscure agreements. Such an argument would therefore again require the Claimant to plead and prove a case in lawful means conspiracy.

300. Secondly: Unlawful means conspiracy requires an agreement to act unlawfully, ie. to do something which is unlawful. Where misrepresentation is relied on as the unlawful means, this must necessarily require an agreement that a misrepresentation will be made. However, the Amended Points of Claim allege only that *Mr Erenstein* knew or should have known the falsity of

the representations made. It is therefore difficult to see how Mr Khodabakhsh can have agreed that Mr Erenstein should make false representations unless he also knew that the putative representations were false.

301. Nonetheless, deceit as such was not pleaded. It is well-established that a mere allegation that a defendant "knew or ought to have known" a particular fact does not raise a case of deceit. Nor, arguably, does the isolated reference in the pleadings to recklessness on the part of Mr Erenstein and Mr Koekkoek: *Armitage v Nurse*, [1998] Ch. 241 at 256G-257C. In any event, Mr Ramsden repeatedly eschewed any case in deceit, arguing that it was not necessary for him to go that far. This therefore raises starkly the question of whether purely negligent misrepresentations can constitute the requisite unlawful means for an unlawful means conspiracy. As there is an obvious conceptual difficulty in envisaging a conspiracy to injure someone negligently, I invited submissions specifically on the point.

302. While there is ample authority that conduct must be tortious (or, in some cases, criminal) in order to amount to unlawful means, I do not read the authorities as saying that the converse is necessarily true. In other words, not all torts will *necessarily* be unlawful for this purpose. Indeed, the examples given in most of the cases involve deliberate and intentional conduct.[12] The correct position is in my view that suggested by Lord Walker in *Revenue & Customs Commissioners v Total Network SL*, [2008] UKHL 19; [2008] 1 AC

[12] Mr Ramsden placed considerable reliance in this regard on *Sorrell v Smith*, [1925] AC 700 at 730. However, I do not read this passage as saying that negligence can constitute unlawful means. This was a *lawful means* conspiracy case where it was necessary to show a predominant purpose to injure. Lord Dunedin in the passage relied on was merely saying that the question whether conduct in a particular case was motivated by an intention to injure or merely by business interests was essentially a jury question on which opinions might well differ. Negligence was given as another example of just such a jury question.

1174 at [89]-[93], namely that any criminal and tortious behaviour can in principle constitute unlawful means provided it is the mechanism by which harm is *intentionally* inflicted on the claimant.

303. However, the essence of negligence is careless conduct where *ex hypothesi*, the precise form it will take cannot be known. But since it is not possible to agree to make a representation without knowing what the representation will be, in practice there can only be an intention to harm the claimant if there is an agreement to make deliberately untrue statements. That, it seems to me, is tantamount to a case of fraud which should have been properly pleaded and put.

304. Thirdly: It is uncontroversial that the conspirators must know the facts on the basis of which the conduct is unlawful. The balance of recent authority suggests that they must also know, or at least have blind-eye knowledge, that the conduct is in fact unlawful. Suspicion is insufficient in this respect; a high degree of blameworthiness is required: *OBG v Allan,* [2007] UKHL 21; [2008] 1 AC 1 at [164]-[166]; *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS,* [2009] EWHC 1696 (Ch.); [2010] Bus LR Digest at [838]-[841]; *The Racing Partnership Ltd v Done Brothers (Cash Betting) Ltd,* [2019] EWHC 1156 (Ch.) at [277].

305. Knowledge of unlawfulness is also inextricably linked to whether the defendant intended to harm the claimant: *Meretz Investments NV v ACP Ltd (supra)* at [127], [146], [174]. It is not enough to do an act which in fact causes loss. Nor is mere foreseeability sufficient: *OBG v Allan (supra)* at [62]. The act must be done with the *intention* that it will cause loss, even if

such loss is merely the means to an end rather than the end in itself. This requirement of intention, albeit not predominant intention, strongly suggests that the unlawful means must consist of deliberate and not merely negligent conduct.

306. Suppose, for example, that two friends decided to go out to celebrate a glorious sporting triumph and agreed to drive home together knowing that neither was in a fit state to do so. Ignoring any criminal offence which might thereby be committed, can it really be said that they conspired to injure anyone they happened negligently to run down? I think not, and this seems also to have been the view of the Court of Appeal in *British Airways plc v Emerald Supplies Limited*, [2015] EWCA Civ. 1024 at [148]-[152] when approving the judgment of Arden LJ in the earlier case of *Newson Holding Ltd v IMI plc*, [2016] EWCA Civ.773; [2017] Ch.27. At paragraphs [40]-[41] of *Newson*, Arden LJ held that where the gain to the defendant and the loss to the claimant are not inextricably linked, it is not sufficient that the conspirators must have intended to injure anyone who might suffer loss from their agreement. This in turn leads on to the next problem.

307. Fourthly: Mr Taylor's identity as the eventual lender was not known when the transfer of Rhino took place. Moreover, there was no evidence before me to suggest any communication between Mr Khodabakhsh and the Original Defendants from the end of May to the end of December 2015. Any combination must therefore have taken place at a time when it was not known whether there ever would be a lender or, if so, what matters such lender would consider important or on what terms they would be prepared to lend. It is

unrealistic in this context to have regard to the abortive loan proposal in 2014. Mr Taylor's own witnesses regarded the two proposals as entirely separate and, when evaluating the latter, treated the earlier approach as water under the bridge. In any event, even if the Original Defendants might always have had Mr Taylor in mind as a potential lender, there is no evidence that this was known to Mr Khodabakhsh, let alone agreed with him.

308. The alleged conspiracy to obscure the ownership of Rhino cannot therefore have had Mr Taylor as its specific target. Can the Claimant nonetheless argue that there was a sufficient intention to injure him as one of a class of potential creditors?

309. In *British Airways plc v Emerald Supplies Limited (supra)* at [168]-[169] it was accepted by the Court of Appeal that if the conspirators intended to injure members of a particular class, it did not matter that only some of them in fact suffered harm. However, the court recognised that where it was unknown whether anyone from the alleged class would in fact suffer any loss at all, then it was contrary to the decision in *Newson* to say that there was an intention to injure the particular claimant. Given the complete uncertainty at the date of the alleged combination as to the identity of the lender (if any), the course of the negotiations or the terms of any eventual agreement, it seems to me that this is just such a case.

310. Fifthly: The unlawful means must be the means by which harm is inflicted on the claimant: *OBG v Allan (supra)* at [159]-[160]; *Revenue & Customs Commissioners v Total Network SL, (supra)* at [95]-[96]; *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS (supra)* at 835.

Accordingly, Mr Taylor would need to show that the misrepresentations were made pursuant to the alleged conspiracy, a difficult task for the reasons already given. But even if there was a conspiracy to use unlawful means as alleged by the Claimant, it is difficult to see how he has thereby been caused any loss. If the beneficial ownership of Rhino remains with the Original Defendants, he can still enforce against its assets and has not suffered any loss. If the transfer was genuine, he has still suffered no loss because he could never have enforced against its assets anyway, whatever the motivation for the transfer.

311. Ultimately, the Claimant faces two insuperable problems. First, entering into an obscure agreement can only be relied upon as part of a lawful means conspiracy and this was not Mr Taylor's case. Secondly, there cannot to my mind be a conspiracy to injure by means of *negligent* misrepresentation. Representations as to the status and ownership of Rhino were only *mis*representations if untrue, in other words, if ownership of Rhino had indeed been transferred (for whatever reason). To say otherwise could only have been a deliberate and conscious falsehood; there is no room in practice for recklessness or Nelsonian blindness. Accordingly, any conspiratorial agreement must have been to make a representation which was known to be untrue. This, as stated, is a case of deceit which should have been explicitly pleaded and proved as such.

312. The difficulty of articulating the Claimant's case within the confines of established principle gives some indication that it may not be well-founded. If it existed, it would have been one of the most bizarre conspiracies it is

possible to imagine. As Mr Ashworth put it in closing, *"what was Mr Khodabakhsh doing conspiring with business acquaintances who he had only just met against somebody he had never met and about whom he knew nothing, in order that money could come in for another purpose, not his purpose?"* As it is, I cannot be satisfied that there was any combination or agreement involving the Additional Defendants, or that any unlawful means were used with the intention of injuring Mr Taylor, or, indeed, that he suffered any loss as a result.

I. UNJUST ENRICHMENT (Issues 22-23)

313. I can deal with the remaining claims briefly. The claim in unjust enrichment was predicated on the alleged conspiracy. No other basis was suggested.

314. Mr Ashworth had a number of objections to the claim, namely that:

i) None of the Additional Defendants was enriched at all, given that the payment in question was made directly to Marquis in satisfaction of VDML's liability under the Manufacturing Agreement;

ii) If he was wrong about that, any enrichment of Rhino can only have been in its capacity as undisclosed principal of VDML and the cause of action is accordingly barred by the rule in *Kendall v Hamilton*;

iii) The enrichment was not in any event unjust, given that on the Claimant's case Mr Taylor acquired correlative rights under the contract pursuant to which the benefit was transferred and a claim in unjust enrichment should not be permitted to subvert a contractual allocation of risk;

iv) It had not been sufficiently proved that any enrichment was at the expense of Mr Taylor in circumstances where the payment was actually made by McLaren Construction Ltd.

315. These are all interesting points, but given that the claim must stand or fall with conspiracy in any event, it is unnecessary to consider them further.

J. PROPRIETARY CLAIMS AND CONSTRUCTIVE TRUST (Issues 13-15)

316. These claims did not feature prominently in argument. By the end of his closing submissions, it appeared that Mr Ramsden was advancing two separate proprietary claims. The first was on the basis that the loan monies were misappropriated pursuant to the alleged conspiracy. Plainly this cannot now succeed.

317. The second was a separate claim to recover monies paid into the Van Dutch group pursuant to clause 9.3 of the Loan Agreement. Irrespective of Mr Ashworth's argument that clause 9.3 did not support such a claim, it must likewise fail given my finding that the Loan Agreement was never concluded.

318. The alleged Quistclose trust was also based on clause 9.3 of the Loan Agreement and fails for the same reason.

K. QUANTUM AND INTEREST (Issues 21, 24)

319. Since I have found that none of the Claimant's claims against the Additional Defendants can succeed, questions of quantum and interest do not arise.

L. CONCLUSION

320. In all the circumstances, the Claimant's claims against the Additional Defendants must be dismissed.

321. I cannot, however, conclude without expressing sympathy for Mr Taylor's plight. He lent money in good faith to people who turned out to be utterly untrustworthy. It may well have been a speculative loan which he had much better not have made but it should nonetheless have been repaid and the Original Defendants clearly have much to answer for. I can also well understand his suspicions about the role played by the Additional Defendants when their involvement eventually came to light. Their reticence in relation to disclosure would certainly not have allayed his suspicions and it is by no means surprising that his initial reaction was to assume that they were all in league together. Nonetheless, for the reasons I have endeavoured to explain, I find this wholly implausible and there was no real evidence to support it. Rather it seems to me that Mr Khodabakhsh was as much taken in by the glitz and glamour of the Van Dutch operation as Mr Taylor – and with far more excuse, not being a businessman by profession and not having the array of advisers available to Mr Taylor.

322. I put to Mr Ramsden in closing the possibility that Mr Erenstein and Mr Koekkoek were every bit as duplicitous and deceitful as he alleged but that, far from being in league with Mr Khodabakhsh, they were effectively playing both sides against the middle. He very fairly accepted that this was a possibility but invited me to find it less plausible than the Claimant's version of events. However, having heard the evidence from both sides, albeit without

the assistance of Messrs Erenstein and Koekkoek, I am satisfied that this is indeed what occurred.

323. I am grateful to counsel for their very helpful written and oral submissions.

APPENDIX

Agreed issues

1. Was there an agency relationship between any of the Original Defendants (as agent(s)) and any of the Additional Defendants (as principal(s))? If so, between which parties, on what terms and during what period(s) did such relationship(s) exist?

   Yes. There was an agency relationship between the Second Defendant and the Seventh Defendant on the terms of an Agency Agreement dated 15 October 2007 and a Nominee Agreement dated 1 April 2013, effective from their respective dates and continuing.

2. *W*ere the Additional Defendants (or any of them) party to or privy to the communications pleaded at paragraphs 5 to 8 and 9 of the Amended Particulars of Claim?

   No.

3. Were any of the representations pleaded at paragraphs 10 to 23 of the Amended Particulars of Claim:

   (a) made; and if so

   (b) made on behalf of the Additional Defendants (or any of them)?

   (a) Yes. Representations were made as set out in paragraph 279 of the judgment.

   (b) No.

4. If so, were any of the relevant representations misrepresentations as alleged in

paragraph 44 of the Amended Particulars of Claim?

Does not arise.

5. If so:

   (a) did the Claimant rely on the relevant misrepresentation(s) in signing the Heads of Terms on 24 July 2015; or

   (b) was the Claimant induced by the relevant misrepresentation(s) to sign the Heads of Terms and/or the Loan Agreement?

   Do not arise.

6. Were any of the Additional Defendants a party to the Loan Agreement and if so, which of them?

   No.

7. Are any of the Additional Defendants liable for repayment of the Loan and if so, which of them?

   No because not parties to either the Heads of Terms or the Loan Agreement.

8. Are any of the Additional Defendants liable to pay the Claimant damages for breach of the Loan Agreement? If so, which Additional Defendant(s) and in what amount?

   No because not parties to either the Heads of Terms or the Loan Agreement.

9. Are any of the Additional Defendants liable for the failure to execute security in respect of the vessels listed in Clause 7.1 of the Loan Agreement and if so, which of the Additional Defendants?

   No because not parties to either the Heads of Terms or the Loan Agreement.

10. Are any of the Additional Defendants liable for the failure to report and/or seek authorisation in breach of clause 9.2 of the Loan Agreement and if so, which of them?

No because not parties to either the Heads of Terms or the Loan Agreement.

11. Was there an obligation on any of the Defendants, and if so which, to account to and pay to the Claimant any or all sums received by any company in the VDMH group since execution of the Loan Agreement?

    No because not parties to either the Heads of Terms or the Loan Agreement.

12. If so, are any of the Additional Defendants liable for the failure to account in breach of clause 9.3 of the Loan Agreement and if so, which of them?

    No because not parties to either the Heads of Terms or the Loan Agreement.

13. Are the claims as to the existence of a constructive trust, a Quistclose Trust and the proprietary claims in paragraph 43 of the Amended Particulars of Claim sustainable?

    No.

14. Does clause 9.3 of the Loan Agreement create a constructive trust and/or give rise to a proprietary right to trace as alleged in paragraph 43 of the Amended Particulars of Claim, and if so, against which, if any, of the Additional Defendants?

    No, because no concluded Loan Agreement.

15. Does clause 9.3 of the Loan Agreement prohibit use of any receipts into the VDMH group for any purpose other than as prescribed by Clause 9.3, and if so, is any constructive trust in the nature of a Quistclose Trust?

    No, because no concluded Loan Agreement.

16. Is the Claimant entitled to rescission of the Heads of Terms and Loan Agreement or damages in lieu of rescission?

    No. There was no misrepresentation for which any of the Additional Defendants is liable.

17. Are any of the Additional Defendants liable to pay the Claimant damages for

misrepresentation and/or in lieu of rescission? If so, which Additional Defendant(s) and in what amount?

No. There was no misrepresentation for which any of the Additional Defendants is liable.

18. Do the judgments against the First to Fourth Defendants (the "**Original Defendants**") embodied by the orders of Master Clark dated 2 August 2016 and 24 November 2016 constitute a bar to any or all of the Claimant's claims arising from any such agency relationship (other than the claims in conspiracy) against the Fifth to Seventh Defendants (the "**Additional Defendants**") in accordance with the principle under *Kendall v. Hamilton* (1879) 4 App. Cas. 504?

The claims in contract which raise the same causes of action as were settled by the judgment are barred. The claims based on misrepresentation are not barred. The claim in unjust enrichment fails in any event.

19. Did any of the Additional Defendants conspire:

(a) with each other and if so, who conspired with whom; and/or

(b) with any of the Original Defendants and if so, who conspired with whom;

in the manner alleged in paragraph 46A of the Amended Particulars of Claim?

No.

20. If so, was the intention of the relevant Additional Defendants as alleged in paragraphs C and/or 46A to 46C and 47 of the Amended Particulars of Claim?

Does not arise.

21. If so, what (if any) loss or damage was caused as a result of the conspiracy and to what relief (if any) is the Claimant entitled as against the relevant Additional Defendants by reason of the alleged conspiracy?

Does not arise.

22. Is a sustainable claim in unjust enrichment pleaded against the Additional Defendants in paragraph 46D of the Amended Particulars of Claim?

No.

23. If so, were the Additional Defendants unjustly enriched by monies paid by the Claimant (or any part thereof)? If so, to what relief (if any) is the Claimant entitled?

Does not arise.

24. To what interest (if any) is the Claimant entitled on any sums that are found to be due to him from the Additional Defendants?

Does not arise.

Unagreed issues

25. Were any of the Additional Defendants a party to the Heads of Terms and if so, which of them?

Does not arise.

26. Did the Claimant rely on the relevant misrepresentation(s) in signing the Loan Agreement?

Does not arise.

27. Are any of the Additional Defendants liable for the failure to report and/or seek authorisation in breach of clauses 9.1.1, 9.1.2 and/or 9.1.3 of the Loan Agreement and if so, which of them?

No because not parties to the Loan Agreement.

28. Are any of the Additional Defendants liable for the failure to honour purchase and/or share options in breach of the Heads of Terms and if so, which of them?

No, because not parties to the Heads of Terms.

29. Are any of the Additional Defendants liable for the failure to execute a

pledge or other form of security over 30% of the shares in VDMH in favour of the Claimant?

No, because not parties to either the Heads of Terms or the Loan Agreement.

30. Is the Claimant entitled to a declaration in relation to, and to an account and payment from, any of the Additional Defendants in respect of 75% of the gross profit on sale of any of the yachts identified in the Heads of Terms? If so, which Additional Defendant(s) and in what amount?

No, because not parties to the Heads of Terms.

31. What are the vessels (if any) in respect of which security should have been given by the parties to the Loan Agreement in pursuant to clause 7.1 of the Loan Agreement?

Does not arise.

32. Is a sustainable claim in conspiracy pleaded against the Additional Defendants in the Amended Particulars of Claim?

No.