Neutral Citation Number: [2022] EWHC 3056 (Ch)

Case No: BL-2021-000049

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 5 December 2022

Before:

HIS HONOUR JUDGE KEYSER KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

EAST-WEST UNITED BANK SA	**Claimant**
- and -	
(1) VLADIMIR GUSINSKI	
(2) GSC SOLICITORS LLP	
(3) BARRY SAMUELS	**Defendants**

- -
- -

Clare Stanley KC and **Sophie Holcombe** (instructed by **Distinction Law**) for the **Claimant**
Graeme McPherson KC and **Charles Phipps** (instructed by **Clyde & Co**) for the **Second and Third Defendants**

Hearing dates: 21, 22 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser K.C. :

Introduction

1. This is my judgment upon two applications, one by the first defendant and one by the second and third defendants, for orders striking out parts of the particulars of claim under CPR r. 3.4 or giving summary judgment against the claimant on the issues raised by those parts of the particulars of claim pursuant to CPR Part 24.

2. The case arises out of an arbitration award made in the claimant's favour against a company owned and controlled by the first defendant. The second and third defendants were, respectively, the firm of solicitors acting for the debtor company in the arbitration and the individual within the firm with conduct of the proceedings. The debtor company submitted to the award but sought and obtained terms giving it time to pay by two instalments. The first instalment, amounting to roughly half of the award, was to be in the same amount as moneys held against the name of the debtor company in the second defendant's client account. But in fact no payment was made to the claimant. The first defendant caused the debtor company to be put into voluntary winding up and the moneys held by the second defendant were paid to the liquidators. In these proceedings, the claimant contends that, by reason of certain representations made by or with the approval of the defendants when seeking time for the debtor company to pay any arbitration award, it had a proprietary interest in the moneys that the second defendant was holding in its client account. Against the second and third defendants it claims relief on various grounds concerned with the disposal of moneys in which it had a proprietary interest. The claimant also alleges that the three defendants combined in an unlawful means conspiracy.

3. The application of the second and third defendants seeks summary disposal of all parts of the claim against them that depend on the assertion that the claimant had a proprietary interest of the moneys in the second defendant's client account, on the grounds that there is no real prospect that the claimant will establish the existence of such an interest. The application does not seek summary disposal of the entire claim in unlawful means conspiracy, but it does seek dismissal of the particulars of that claim that are said to rest on the existence of a proprietary interest and of certain other particulars on the grounds that the pleading is inadequate.

4. A short while before the hearing of the applications, the first defendant parted company with his legal representatives. He did not attend the hearing to pursue his application.

5. The following evidence has been filed and considered in respect of the applications:

    - For the second and third defendants, a witness statement by Ciaran Peter Moore, a solicitor of Clyde & Co who have conduct of the case, and a witness statement by the third defendant;

    - For the first defendant, two witness statements by Sophia Rowena Purkis, a partner in the firm of Fladgate LLP, the solicitors who until recently acted for the first defendant;

- For the claimant, a witness statement by Aleksey Stoliarov, the claimant's Chief Legal Officer.

6. The remainder of this judgment will be structured as follows. First, I shall summarise the relevant procedural law. Second, I shall set out an account of the relevant facts. Third, I shall give a survey of the particulars of claim. Fourth, I shall dispose briefly of the first defendant's application. Fifth, I shall deal at rather greater length with the application of the second and third defendants.

7. I am grateful to Mr McPherson KC and Mr Phipps, counsel for the second and third defendants, and to Ms Stanley KC and Ms Holcombe, counsel for the claimant, for their helpful written and oral submissions.

Summary Judgment and Strike-out

8. CPR rule 24.2 provides, so far as relevant to this application:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that … that claimant has no real prospect of succeeding on the claim or issue … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

9. I shall not set out verbatim Lewison J's classic summary of the relevant principles in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], though of course I have regard to it. For present purposes, the main points appearing from that summary and from the many other cases that have discussed the matter are these. Summary judgment will be given against the claimant on a claim or an issue only if the court is satisfied that the claimant has no real, as opposed to fanciful, prospect of success on the claim or issue. A case that is merely arguable but carries no conviction will not have a real prospect of success. The court will not conduct a mini trial and, accordingly, where disputed questions of fact arise it will not generally attempt to determine where the probabilities lie. However, the court is not prohibited from carrying out a critical examination of the material, and where it is clear that the factual case is self-contradictory, or inherently incredible, or inconsistent with reliable objective evidence, the court can reject that case. The court will have regard both to the evidence that is currently available and to any further evidence that can reasonably be expected to be available at trial. However, it will not be dissuaded from giving judgment by mere Micawberism, the chance that something might turn up. Of particular relevance to this case is the seventh proposition of Lewison J in the *EasyAir* case:

> "[I]t is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the

> respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction..."

10. In that connection I bear in mind three dicta (among many others) that sound a cautionary note. In *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical 100 Ltd* [2006] EWCA Civ 661, [2007] FSR 63, Mummery LJ, with whom Longmore LJ and Lewison J agreed, said at [18]:

> "In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."

11. The second and third dicta concern the position when what is sought is summary disposal of part of a case, in circumstances where other parts of the case appear likely to go to trial. In *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1, albeit in a specific factual context, Lord Hope of Craighead said at 264:

> "Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out other parts of it. A great deal of time and money has now been expended in the examination of the preliminary issues, and I think that this exercise must now be brought to an end. I would reject the Bank's application for summary judgment."

In *TFL Management Services Ltd v Lloyds TSB Bank plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006, Floyd LJ set out the principles in the *EasyAir* case and said at [27]:

> "I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in *Partco v Wragg* [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to

> compromise is of course one consideration, but no more than that. Moreover, it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications; see *Partco* at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example *Hudson and others and HM Treasury and another* [2003] EWCA Civ 1612."

12. These dicta do not indicate that it is wrong to deal summarily with a claim or issue when the court can be confident that all relevant facts are before it and that it is in a position to apply the law to those facts. There are certainly cases where it will be both possible and helpful to dispose summarily of some issues, even though there will have to be a trial on other issues. However, I take three points from the dicta. First, a court should guard against too readily concluding that the full litigation process will not cast further relevant light on the case. Second, the fact that a court is seised of an application for summary determination of an issue and is capable of determining that issue does not mean that it is obliged to accede to the request that it do so. It might be better to refuse summary determination of the issue and instead let the entire case proceed to trial. Third, one factor that might, in a particular case, militate against summary determination of a single issue is the risk that the case will become mired in appeal proceedings rather than proceed efficiently to trial.

13. I remind myself that r. 24.2(b) always falls to be considered in principle. The observations in paragraph 15 below are relevant in that regard.

14. As for strike-out, CPR rule 3.4 provides in part:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court—
>
> > (a) that the statement of case discloses no reasonable grounds for bringing … the claim;
> >
> > (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; ..."

The test under r. 3.4(2)(a) is not unlike that in r. 24.2 (what in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7 Marcus Smith J compendiously referred to as "reasonable arguability"), though under the former rule the focus is on whether the claim could succeed on the pleaded facts, assuming those facts to be correct. Rule 3.4(2)(b) raises different issues, relevant only to the first defendant's application.

15. Finally, it ought to be remembered that r. 3.4 and r. 24.2 each confer a power and thereby create a discretion: the court "may" strike out a statement of case or give

judgment on a claim or issue. In exercising these powers, the court must seek to give rise to the overriding objective: see r. 1.2(a).

The Facts

The parties and the background

16. The claimant ("the Bank") is incorporated in Luxembourg and has its registered office there.

17. The first defendant ("Mr Gusinski") is a Russian national and a businessman with business interests in Russia and Ukraine and elsewhere. Among those business interests is the New Media Group of companies ("the Group"), of which he has at all material times been the Chairman, controller and ultimate beneficial owner. A major asset of the Group was an extensive Russian language television programme library of media content ("the Library").

18. The second defendant ("GSC") is a firm of solicitors in London. It has for many years acted for Mr Gusinski and his companies in litigation and arbitrations in England and Wales. The third defendant ("Mr Samuels") is a solicitor and consultant in GSC and, so far as concerns this case, has had conduct of the firm's representation of Mr Gusinski and the Group.

19. The origins of the current dispute lie with a loan facility that the Bank made available in 2013 to one of the companies in the Group ("the Borrower"). In 2017 the loan facility was supplemented and amended and its term was extended until the end of 2018. As one of the conditions of this extension of the facility several other Group companies ("the Guarantors") guaranteed the performance of the Borrower's obligations. The guarantees contained an arbitration agreement, requiring that any dispute would be referred to and resolved by arbitration under the LCIA Rules.

20. The Borrower defaulted on its obligations under the loan facility, and in January 2018 the Bank served on it an acceleration notice that had the purported effect of making a total of US $9,596,920.60 immediately due and owing to the Bank. When the Borrower did not pay, the Bank served demands under the guarantees, but the Guarantors did not pay either. The Borrower obtained from the Swiss courts a temporary insolvency moratorium on payments to the Bank with the ostensible purpose of restructuring its indebtedness and paying its creditors in full during the duration of the moratorium.

21. The Bank commenced arbitration proceedings against the Guarantors for payment under the guarantees. GSC acted for the Guarantors in those proceedings, with Mr Samuels having day to day conduct of the matter, and they took their instructions from Mr Gusinski. GSC instructed leading and junior counsel to act in the proceedings, namely Ms Barbara Dohmann QC and Mr Daniel Burgess. The Guarantors defended the Bank's claim on the basis of allegations that the Bank was in breach of implied terms of the guarantees and of non-contractual common law duties owed to the Guarantors and sounding in tort. The arbitration was set down for final hearing on 27 and 28 November 2018. The critical facts, so far as concerns the

application before me, have to do with what was said and done at in the closing stages of the arbitration proceedings, and it is therefore necessary to descend into a little more detail.

22. Before that, however, I need to mention one other important piece of background information. On 30 October 2018 Marcus Smith J handed down judgment in proceedings between one of the Group companies and Guarantors (and third respondent in the arbitration proceedings) namely New Media Distribution Company SEZC Ltd, ("NMDC"), which was incorporated in the Cayman Islands, and one Mr Kagalovsky, a former business associate of Mr Gusinski ("the Kagalovsky Proceedings"). He gave judgment for NMDC for a sum of about US $5.2 million inclusive of interest ("the Judgment Sum"). On 12 November 2018 Marcus Smith J refused Mr Kagalovsky's application for permission to appeal and ordered him to pay the Judgment Sum to GSC to hold until further order of the High Court or the Court of Appeal, subject to the proviso that, if no such further order had been notified to GSC by 10 December 2018, GSC would be at liberty to pay the Judgment Sum to NMDC. The Judgment Sum was duly paid to GSC, who placed it in their client account against the name of NMDC. These matters were not known to the Bank until the communications that I describe in the following paragraphs.

The final stages of the arbitration proceedings

23. By a letter dated 16 November 2018 GSC on behalf of the Guarantors wrote to the arbitration Tribunal ("the Tribunal"), intimating an intention to withdraw their defence and associated cross-claim and to submit to judgment; the letter said that the Guarantors "will agree to do so subject to terms as to time for payment" and that they intended to make an application for terms as to time for payment. The letter set out the terms proposed by the Guarantors ("the Initial Proposal"):

> "The terms of the proposed Award are as follows:
>
> (1) The Respondents shall pay the outstanding principal on the Facility Agreement of USD 9,150,024.89, accrued interest (including default interest) and the costs of the Arbitration (including legal fees and expenses) to be assessed by two equal instalments on 31 May 2019 and 31 October 2019 respectively ('the Payment Dates').
>
> (2) In the event that the Respondents do not make the payments by either of the Payment Dates:
>
> a) there shall be a public auction of the Library with the cooperation of NMDC's management and the creative team …;
>
> b) the Library will be sold to the highest bidder; and
>
> c) the proceeds of the sale will be used to discharge the sums then remaining due under the Award."

The letter explained the rationale of the Initial Proposal, stating that the Guarantors "do not currently have sufficient realisable assets available to make an immediate payment of the sums outstanding under the Facility Agreement", but that the Group would be able to do so if allowed more time. The letter made no mention of the Judgment Sum in the Kagalovsky Proceedings, which of course was then held subject to the terms of Marcus Smith J's order of 12 November 2018.

24. On 20 November 2018 the Guarantors applied to the Tribunal for an order for staged payments of the debt to the Bank. The application was supported by a witness statement of the same date by Mr Gusinski. He stated that the Guarantors currently had no liquid assets available to make an immediate payment of the sums due to the Bank "or any part of them"; the main reason for this, he said, was that the dispute with the Bank had had a substantial negative impact on the Group's business with its customers, who had lost confidence in it. Mr Gusinski referred to the Judgment Sum but observed that, because of the order made by Marcus Smith J, it was "not yet available to NMDC." He continued: "However, when these funds become available to NMDC this will of course improve the Group's position, including the financing of its business operations and its ability to repay the Claimant." He did not make any offer to apply all or any part of it in settlement of the debt owed to the Bank. The proposal made in the statement was precisely in the terms of the Initial Proposal in the letter of 16 November 2018.

25. By a letter of 20 November 2018, Morgan, Lewis & Bockius UK LLP ("Morgan Lewis"), the solicitors acting for the Bank, made clear that the Bank would oppose the application and seek an award providing for immediate payment in full.

26. On 26 November 2018 the Guarantors filed and served written submissions from Ms Dohmann and Mr Burgess, which were written on the instructions of or at least approved by Mr Gusinski, GSC and Mr Samuels. The submissions contain the first of three statements or representations on which the Bank relies in support of its claim to have had a proprietary interest in the Judgment Sum (or at least part of the Judgment Sum). Paragraph 3 set out the Guarantors' "Proposed Award", which was identical to the "Initial Proposal". This was immediately modified, or improved, by paragraph 4, which contained in sub-paragraph (d) what the claimant relies on as "the Written Submissions Representation":

> "4. Since the letter of 16 November 2018, there has been an important development:
>
> a. As set out in the witness statement of Mr Gusinski in support of the Application…, the Third Respondent [NMDC] has recently obtained a judgment in the sum of US$5.2 million in High Court proceedings in respect of unpaid licence fees ('the Kagalovsky Proceedings'). Whilst [Mr Kagalovsky] has been ordered to pay that sum into the account of the Third Respondent's solicitors [GSC] (the same solicitors which represent the Third Respondent in the Arbitration) and has done so, release of that payment to the Third Respondent has been stayed pending an application by the Defendant in that case to the Court of Appeal for a further stay and for permission to appeal.

> b. By letter dated 23 November 2018, the Court of Appeal has indicated that 'In view of the urgency of the stay application we will be referring the papers to a judge from next Wednesday 28th November 2018 at 4pm'.
>
> c. If the Claimant's application for an interim stay fails, the Third Respondent will immediately have available to it the sum of US$5.2 million.
>
> d. The Respondents are therefore willing to add a further provision to the Proposed Award, in the following terms: In the event that the stay application by the Defendant in the Kagalovsky Proceedings is dismissed, the Third Respondent shall make a payment to the Claimant in the sum of US$4.75 million within 7 days of being notified of that dismissal and such sum will be taken into account in respect of the liability to pay the first instalment (depending on the date of such payment)."

Also relevant is paragraph 5:

> "For the reasons set out below, it is submitted that the Proposed Award (particularly as now fortified by the addition in the preceding paragraph) is both eminently reasonable and of substantial benefit to both parties. It will prevent the unnecessary destruction of the Group which would follow from the immediate enforcement of an Award of the sums sought. It will also provide the Claimant with a greater prospect of full recovery of those sums."

27. This improved proposal did not find favour with the Bank, which remained insistent on immediate payment in full. Accordingly the arbitration proceedings went to a hearing on 27 November 2018. The arbitral tribunal ("the Tribunal") comprised Mr David Sutton in the chair, Mr Michael Brindle QC and Mr Christopher Symons QC.

28. At the hearing, Ms Dohmann made oral submissions on the instructions of GSC and Mr Samuels and with the approval of the Guarantors. Those oral submissions, which have been transcribed, contained the following passage, which the Bank relies on as "the Oral Submissions Representation":

> "Now, the second main source, more substantial source actually, is the judgment proceeds of the Kagalovsky judgment, if I may call it that for short. Sir, it is quite an astonishing submission to say that there would be deprivation of the [Bank] to enforce against a judgment sum in circumstances where it's one of the main anchors of our proposal to this Tribunal that that sum, minus what we need to defend and to deal with cost assessment, should be specifically earmarked for repayment. I stress specifically earmarked. Why? Because it's not just something that goes into the general estate of the guarantor company [NMDC]. It is a sum that is in the jurisdiction and we

> have offered it. And it is, as you know of course large enough to be almost half of what is outstanding …"

29. Later in the hearing there was a lengthy exchange between Mr Brindle and Ms Dohmann concerning the terms of the Guarantors' proposal. Mr Brindle expressed doubt as to the Tribunal's jurisdiction to direct enforcement against the Library or the proceeds of sale of the Library as envisaged by the Initial Proposal, and Ms Dohmann accepted that this was something that would have to be dealt with by recital or undertaking but could not be ordered by the Tribunal. Then Mr Brindle distinguished between two parts of the Guarantors' proposals: the first part related to the Judgment Sum, which represented approximately half of the amount owed to the Bank; the second part related to the remainder of the debt, which Ms Dohmann agreed depended on the evidence and submissions regarding the Group's income stream and the Library. The exchange continued:

> "MR BRINDLE: Yes. One possible answer is that we might accept your submissions in relation to the first point but be unpersuaded to the second. That is open to us, is it not? … In other words, we may accede to part of your submission, namely an extension until you say May but it may be April, it doesn't matter, but not be persuaded to give the further extension. It obviously isn't your position, I'm just saying that's open to us?
>
> MS DOHMANN: It is obviously open to you, yes."

A little later there were further exchanges concerning the possibility of providing some comfort to the Bank if staged payments were to be directed. There was discussion of the possibility of a charge over the Library; the Bank gave reasons why it did not regard that course as satisfactory. Then there was discussion concerning the Judgment Sum:

> "THE CHAIRMAN: We do have one other point, just talking about it, and that relates to the money that will come—assume for the moment that the Court of Appeal doesn't give permission and that then the money is available and so on. We heard Mr Gusinski tell us that that money would be paid over to the bank.
>
> MS DOHMANN: Subject to the costs of enforcing, the costs assessment and so on.
>
> THE CHAIRMAN: Subject to certain deductions to be made and costs of the litigation and so on. Just tell us, really thinking it through as to how that money would pass, would it go straight into Mr Samuels' firm's account?
>
> MS DOHMANN: It is already there. That's where it is.
>
> THE CHAIRMAN: Would his firm be in a position where he could give an undertaking that that money would be paid

> over, so a solicitor's undertaking that that money would be paid straight to the bank?
>
> MS DOHMANN: Well, always subject to the deductions which are necessary. Again, I haven't got instructions on that, but that is certainly not complicated.
>
> THE CHAIRMAN: No, it doesn't seem to us either complicated and Mr Samuels is sitting there, so you could take instructions.
>
> MS DOHMANN: Subject to the partners and the compliance department of the firm, one doesn't see a problem with that.
>
> THE CHAIRMAN: I think if we were minded at all to consider your application for stage payments, I think at the moment we would want to see such an undertaking, so he would need to talk to his compliance department and get clearance.
>
> MS DOHMANN: Yes. We do have time as you are aware, because of the timetable for costs and interest. That being the case, that is something that can be resolved.
>
> THE CHAIRMAN: Very good.
>
> MR BRINDLE: As you can understand, we just want to be absolutely sure that there's no possibility of that money going anywhere else.
>
> MS DOHMANN: At the moment that seems to me very clear. Right now it certainly can't go anywhere else, it's under a stay order. But if and when that's gone, if there is something else put in place, the Tribunal will be told."

30. At the conclusion of the arbitration hearing, the Tribunal reserved its award. There then followed a lot of correspondence between GSC and Morgan Lewis, much of it copied to the Tribunal. I shall refer to such parts as have some bearing on the present applications.

31. By a letter dated 28 November 2018 to GSC, Morgan Lewis followed up the discussion at the hearing concerning a solicitors' undertaking and asked whether such an undertaking would be forthcoming. The letter concluded: "For the avoidance of doubt, our client's position remains that the Tribunal should reject your clients' application for stage payments, but this suggestion of an undertaking is clearly an important point, currently left open from yesterday's hearing." Having received no response to that request, on 30 November 2018 Morgan Lewis sent a chasing email to GSC, which was copied to the Tribunal.

32. GSC gave a substantive response on 30 November 2018, declining to give an undertaking. The letter included the following points:

> "1. The proposal made in respect of payment of part of the Judgment monies was made in the context of a staged payment Award. That proposal was made to enable the New Media Group to be able to continue to fund its ongoing operations and hopefully to ensure that your client Bank received payment. That context is of crucial significance.
>
> 2. You have consistently opposed a staged payment Award …
>
> 3. Mr Gusinski has made clear both orally at the hearing and in his witness statements that an immediate payment Award ... would threaten the continued existence of the New Media Group and its solvency. You are therefore well aware of this risk.
>
> 4. That being so, any payment of all or any part of the Judgment monies in favour of your client could be challenged in the context of future insolvency proceedings in relation to NMDC as a voidable preference under s.145 of the Cayman Islands Companies Law. We should further mention that your client's exposure to a preference challenge may be increased by reason of s.145 (2) and (3) of the Companies Law. In such circumstances our firm is understandably not willing to be put at risk of being called upon the comply with its undertaking if preference claims are raised. We consider it unreasonable for this firm to be exposed to such a risk.
>
> 5. The risk of any such liquidation will be considerably reduced by a stage payment Award as per our proposal."

33. In its response to that letter on the same day, Morgan Lewis stated that the Bank "would be willing to accept an undertaking from [GSC] that no part of the USD5.2 million held in [GSC's] bank account as a result of the English High Court litigation involving [NMDC] be paid out of that account without providing [Morgan Lewis] with 14 days' written notice that such payment [was] to be made." The letter said that the Bank reserved its rights to apply, among other things, for an urgent injunction unless a satisfactory undertaking were given. The possibility of applying for an injunction was explained by Morgan Lewis in a letter on 3 December 2018:

> "[I]f the application for permission to appeal is determined in favour of the Third Respondent before an award has been issued by the Tribunal, there is a possibility that the funds held by GSC may cease to be available to satisfy the Tribunal's award, and further our client may be put to the effort and expense of applying for a freezing order to preserve those funds. As/when and award is subsequently made in favour of our client, enforcement steps would then need to then take place if that award is not complied with voluntarily."

34. On 3 December 2018, by a letter sent both to Morgan Lewis and to the Tribunal, GSC refused to give an undertaking in the terms sought by the Bank but offered instead an undertaking in the following terms: "if the stay on the Judgment monies is lifted before the Tribunal has issued its Award in this arbitration, we will notify both you and the Tribunal by email of that fact and provide you with 5 days' notice before any withdrawal of the Judgment Sum from our client account is made which would reduce that sum to less than US$4.75 million. This will enable your clients an opportunity to decide whether to make any further application." The reference to the lesser figure of $4.75 million was explained by other parts of the letter, in particular the following passage:

> "2. Your letter seems to assume that the entirety of the Judgment Sum is to be made available to East West. That is not the case. As Mr Gusinski explained, there are various key employees and members of the creative and management teams who agreed to delay the payment of monies due to them whilst NMDC continues to operate, and they did so to enable NMDC and the New Media Group to continue to trade. They too have an interest in the Judgment sum and, if the Group becomes insolvent, there is a real risk that they will not stand by and allow East West to try to obtain an unlawful preference. They have, to date, supported the offer of a substantial part payment from the Judgment sum to East West but only as part of the overall proposal that has been made. you cannot and should not concentrate on just one aspect of the terms of that proposal; to do so runs the risk of misleading the Tribunal.
>
> 3. Further and in the meantime, further legal costs have to be incurred in the NMDC litigation including but not limited to the preparation of a bill for detailed assessment of the costs which have been awarded to NMDC. The proposal of a payment of US$4.75 million was offered as part of a staged payment Award inter alia expressly to enable such steps to be taken. There are also costs that have been incurred on behalf of NMDC in dealing with the arbitration itself."

35. On 4 December 2018 GSC wrote to the Tribunal in response to certain matters raised by Morgan Lewis in a letter on the previous day. One part of GSC's letter is relevant:

> "In the first paragraph of page 2 of their letter it is astonishing that Morgan Lewis state: 'We note that the possibility of the funds held by GSC being proffered in support of the Respondents' application for payment by instalments has not materialised.' That is simply incorrect and indeed misleading, as is shown by:

a. the Submission served on Monday 26 November 2018; we refer to the terms stated for 'the Proposed Award' in paragraphs 3 and 4(d);

b. the Transcript of the hearing on 27 November 2018 starting on page 8 line 21 which for your convenience we set out in full (emphasis added):

> 'Now, the second main source, more substantial source actually, is the judgment proceeds of the Kagalovsky judgment, if I may call it that for short. Sir, it is quite an astonishing submission to say that there would be deprivation of the [Bank] to enforce against a judgment sum in circumstances where it is one of the main anchors of our proposal to this Tribunal that that sum, minus what we need to defend and to deal with cost assessment, should be specifically earmarked for repayment.
>
> That submission/proposal has been made on instructions and remains in place."

36. On 5 December 2018 GSC gave a solicitors' undertaking to the Tribunal to notify the Tribunal and Morgan Lewis promptly if the stay were lifted before the Tribunal issued its award and to give five business days' notice before making any withdrawal from the Judgment Sum that would reduce the amount held below $4.75 million. (The Bank's particulars of claim assert that the undertaking was given both to the Tribunal and to the Bank, but before me it was rightly accepted that the undertaking was given only to the Tribunal.)

37. On 7 December 2018 the Court of Appeal refused Mr Kagalovsky permission to appeal and removed the stay on disposition of the Judgment Sum. On the same day GSC informed the Bank and the Tribunal that the stay had been removed.

38. On 10 December 2018 Morgan Lewis wrote to the Tribunal and GSC in light of the removal of the stay. The letter concerned what was said to be the need for or at least merit in a freezing order, and it contained the following passages:

> "As you will recall, the Respondents have repeatedly suggested that the vast majority of the money (specifically US$4.75 million of the US$5.2 million judgment in favour of the Third Respondent) that was previously subject to the stay ('the GSC Money') could (subject to other claims) be used to partially satisfy the award which will, inevitably (given there is no defence or cross-claim), be made in favour of [the Bank] in this arbitration ('the Upcoming Award'). Indeed, this is one of the cornerstones of the Respondents' application for staged payments.
>
> …

> The Claimant is concerned that, if the Notice is given [viz. that money is to be withdrawn from the GSC Money so as to reduce the balance below $4.75 million] and the GSC Money is paid out of GSC's client account, then that money will be dissipated and put beyond the Claimant's reach. Given this concern …, it seems increasingly likely that the Claimant will have to apply for a freezing injunction as against the GSC Money as/when the Notice is given. Indeed, the only foreseeable circumstance in which that would not be necessary is if the Claimant is able to enforce the Upcoming Award against the GSC Money before the Notice is given."

39. On 10 December 2018, after receipt of that letter, GSC wrote to the Tribunal and Morgan Lewis. I set out below the greater part of the text. The Bank relies on the text down to the ellipsis in point 3 as constituting what it calls "the GSC Representations"; I shall however extend the quotation by a little for added context.

> "We refer to Morgan Lewis' letter of today's date regarding the GSC Monies in the sum of US$4.75 million currently held in our client account and subject to our undertaking to the Tribunal.
>
> We have now taken urgent instructions and can indicate as follows:
>
> 1. We believe that it has at all times been made clear that the payment of the sum of US$4.75 million currently held by this firm in its client account is an integral part of the Respondents' proposal which was a cornerstone of their Application for a staged payments Award, namely if their proposal became a part of the Award that sum would be paid to the Bank within 7 days of any then still current Court stay on the monies being lifted. That Court stay has of course now been removed.
>
> 2. In order to be in a position to comply with their proposal and with any such staged payment Award the Respondents would have to and will retain that sum in our client account.
>
> 3. To address the Claimant's alleged concerns, a Solicitors' undertaking was provided to the Tribunal to the effect that we would not take steps to reduce the monies currently held below US$4.75 million without giving the Tribunal and Morgan Lewis five business days' prior notice. We indicated earlier today that we have had no instructions to serve such a notice and that remains the position. Indeed we are authorised to confirm that no such instructions will be forthcoming and no such notice will be given before the issue of the Award …
>
> 4. Whilst we accept that the Tribunal does have power under the LCIA Arbitration Rules to make a conservatory Order prior

> to issuing its Award, such an order is obviously unnecessary in the circumstances of this arbitration.
>
> 5. If following the issue of the Award, the Claimant wishes to seek a post Award freezing Order they must [do] so by application to the Commercial Court, but we hereby put them no notice that we do not for one moment accept that they have any entitlement to such an Order either now or at all, and we shall make submissions accordingly to the Commercial Court if this becomes necessary."

40. That letter elicited a response by Morgan Lewis on 11 December 2018, which is the final piece of correspondence I need refer to before the Tribunal made its initial award. Two passages in that letter may be noted:

> "To be absolutely clear, any reference to the 'GSC Monies' or 'GSC Funds' is to the entirety of the amount held by GSC on behalf of the Third Respondent as a result of the High Court litigation in which the Third Respondent received a judgment sum of USD5.2 million."
>
> "To repeat the position—the Claimant is concerned that as/when the Tribunal becomes *functus officio* the undertaking [namely, the undertaking given in the letter of 5 December 2018] may arguably fall away in its entirety and there will be no obligation on GSC, owed by them to our firm or to the Claimant, to provide five business days' notice as/when/if the Third Respondent seeks to withdraw an amount from the GSC Monies which would reduce the amount to be held in that account to below US$4.75 million. We trust that you will agree that is not a satisfactory position for the Claimant to be in (indeed, we cannot see how you could think otherwise)."

41. At this point I note that on 10 December 2018, without forewarning or subsequent notification to the Bank or the Tribunal, GSC paid $415,000 out of its client account to the Borrower's UBP Account in Switzerland. Mr Stoliarov states that this reduced what he calls the "Earmarked Funds" to a figure below that which Ms Dohmann had told the Tribunal would be preserved, but the defendants aver that "the Lesser Sum"—that is, the figure of $4.75 million mentioned previously—remained in GSC's client account, and this appears to be correct (see the transactions referred to at paragraph 59 below). Nevertheless, the Borrower did not use any part of the funds to repay its debt under the facility with the Bank; rather, according to Mr Stoliarov, they were paid to friends and associates of Mr Gusinski. Further, the payment from the client account was made after counsel's oral submissions to the Tribunal and the express repetition and confirmation of those submissions in the letter of 4 December 2018: "[I]t is quite an astonishing submission to say that there would be deprivation of the [Bank] to enforce against a judgment sum in circumstances where it is one of the main anchors of our proposal to this Tribunal that that sum, minus what we need to defend and to deal with cost assessment, should be specifically earmarked for repayment." It is perhaps not altogether surprising that, in those circumstances, the

Bank takes a dim view of the payment of $415,000 from the Judgment Sum to the Borrower on 10 December 2018.

42. On 11 December 2018 the Tribunal issued a partial final award ("the First Award"), by which it ordered the Guarantors to pay to the Bank $9,150,024.89 in two instalments, namely (i) $4.75 million forthwith and (ii) the balance by 31 March 2019. The Bank lays store by paragraph 73 of the First Award, but I shall refer to some other passages as well.

43. In paragraph 11 of the First Award the Tribunal recorded that the dispute had eventually come down to "whether the amounts claimed by the Claimant should be paid immediately or by staged instalments." Paragraphs 22 and 39 recorded that the Guarantors had withdrawn their defences and cross-claim but had not consented to the making of an award and "would only agree to an award on specific terms, which the Claimant opposed". Paragraph 44 referred to GSC's letter of 16 November 2018 (see paragraph 23 above) and to Mr Gusinski's witness statement dated 20 November 2018 (see paragraph 24 above). Paragraph 45 quoted the proposal set out in counsel's written submissions for NMDC, reiterating the terms of the Initial Proposal (see paragraph 26 above).

44. Paragraph 46 referred to Ms Dohmann's oral submissions on behalf of NMDC and summarised the case advanced:

- NMDC currently had no liquid assets available to make immediate payment of the amount due to the Bank.

- If the Judgment Sum were released from the stay, NMDC "would make a payment to the Claimant of US$4.75 million within seven days [thereafter], such sum to be taken into account in respect of the liability to pay the First Instalment of the award proposed by the Respondents provided that an award is made in the terms proposed (RS, 4(d))". (Paragraph 52 recorded that the stay had subsequently been removed on 7 December 2018.)

- If staged payments were permitted, the Group would be able to make payment in full from its ongoing commercial activities. Further, the value of the Library was more than sufficient to cover all sums outstanding.

45. After a summary of the submissions for the Bank and a discussion of the Tribunal's powers, the First Award identified at paragraph 66 certain matters that "the Tribunal ha[d] particularly borne in mind", which included: "[t]he possibility that a staged payment award may prejudice the Claimant from a timely and effective enforcement as against other creditors and/or in the event of bankruptcy of some or all of the Respondents." The Tribunal then explained the reasons for its decision, which included the following:

> "68. Having considered the evidence, and heard Mr Gusinski's testimony and the Parties' submissions, the Tribunal has, in addition, received the information provided to it by the Respondents that the sum of US$4.75m is no longer the subject of a stay from the Courts in that case and is now

> 'available'. The Tribunal notes the submission made by the Respondents above namely:
>
> > 'In the event that the stay application by the Defendant in the Kagalovsky proceedings is dismissed, the Third Respondent would make a payment to the Claimant of US$ 4.75 million within seven days of being notified of that dismissal, such sum to be taken into account in respect of the liability to pay the First Instalment of the award proposed by the Respondents provided that an award is made in the terms proposed (RS, 4(d)).'
>
> 69. The Tribunal can see no reason not to order the Respondents to make immediate payment of that sum to the Claimant and will so order. As for the balance the Tribunal has decided to specify in the Award that payment in full of the remainder of the claim should be made on or before 31 March 2019.
>
> …
>
> 73. In making this Award, the Tribunal has sought to avoid the bankruptcy of the Respondents for the sake of a short period of delay. In particular, the Tribunal took account of the statement of the Respondents' Leading Counsel that the majority of the Kagalovsky Judgment sum has been 'specifically earmarked for repayment' of the Claimant's loan and that the sum was in the jurisdiction."

46. The email from the Chairman, by which the First Award was sent, granted permission to the Bank to apply to the Court, if so advised, for a freezing order and said: "In the absence of payment to the Claimant or the Respondents agreeing to pay the Claimant the sum of US$ 4.75 million forthwith, the Tribunal can see no reason why such an order or injunction should not be granted."

Subsequent events

47. On 13 December 2018 (which is the date on which a corrected version of the First Award was delivered), Morgan Lewis provided to GSC details of the bank account into which the first instalment should be paid and asked for confirmation that $4.75 million would be paid immediately.

48. On 14 December 2018 GSC replied:

> "As you are aware the Arbitral Tribunal are still functional and our undertaking therefore remains in place and that the sum of US$4.75 million is held by us.
>
> That stated, you are also aware that the stage payment proposal which we put forward on behalf of our clients had been carefully formulated taking into account the views of the

> various creditors of NMDC. Our clients therefore are proposing to consult with these creditors over the weekend to see what their position is in the light of the Tribunal's Partial Award.
>
> We therefore hope to respond to you substantively during the course of Monday."

49. No payment was made in respect of the first instalment.

50. On 17 December 2018 the Bank filed a claim form in the Commercial Court, seeking the entry of judgment in the terms of the First Award.

51. On the same day GSC wrote to Morgan Lewis in the following terms:

> "Having heard further from the Third Respondent, we write in relation with the amount of US$4.75 million currently held by this firm in its client account and having the following points to make:
>
> 1. We confirm again that our firm holds the sum of $4.75 million in our client account and our client has not given any instructions to this firm to transfer that amount at the present time.
>
> 2. As your client is aware that amount is the only liquid asset currently available for the Third Respondent to pay its creditors which include your client as well as its other creditors being mainly employees and consultants who have so far deferred a significant part of their compensation for a long time.
>
> 3. The Third Respondent's management has discussed with most of these other creditors the current situation following the issuing of the Partial Final Partial Award to try to ascertain whether, if the monies held by this firm were released to your client, the Group would be able to continue its operation as a going concern and whether such payment would be challenged.
>
> 4. The parties are currently waiting for the Tribunal's Award in relation to costs and interest and that would be a further liability in an amount of circa $ 1 .5 million. If that were ordered to be paid immediately or by the end of March 2019, the Group would make it very difficult to meet such a liability.
>
> 5. The other creditors have indicated concern as to the viability of ongoing operational activity if an immediate liability pay this further amount arises and thus both our client and your client are likely to be faced by arguments from these other

> creditors if the payment of the US$4.75 million is made without regard to their interests.
>
> 6. Accordingly we have been asked to invite your client to agree to the following, namely if payment of the US$4.75 million is made now, the payment of the additional amount can be made by no later than 1 October 2019 and you will notify the Tribunal of your agreement to this date for payment."

52. On 20 December 2018 Morgan Lewis responded:

> "So that our client can properly consider the proposal, please confirm (with certainty) the position of the 'other creditors'.
>
> In short, our client needs express confirmation that if it was inclined to agree to your clients' proposal then no farther approval of any third party/ies is needed such that the USD 4.75 million is paid to this firm's bank account immediately."

53. GSC's response later on the same day did not provide the confirmation sought but instead said:

> "We have just finished a meeting with our client and write to confirm that we are instructed to undertake to your firm to provide you 5 business days' notice by email before any withdrawal of the sum of US$4.75 million which we currently hold in our client account on behalf of the Third Respondent to this Arbitration."

54. On 19 January 2019 Andrew Baker J made an order permitting the Bank to enforce the First Award in the same manner as a judgment of the court and entering judgment against NMDC and others in the terms of the First Award.

55. Mr Stoliarov states (paragraph 64) that he believed that the court order meant that the "Earmarked Funds", namely those referred to by Ms Dohmann as "earmarked", would ultimately be paid to the Bank and that therefore the Bank neither needed to nor could take any further steps to protect itself.

56. On 25 January 2019 GSC wrote to the Tribunal and to Morgan Lewis. They did so as solicitors both for NMDC and for the provisional liquidators of NMDC who had been appointed by the Grand Court of the Cayman Islands on 21 January 2019. The letter enclosed the order appointing the provisional liquidators. It also enclosed "by way of service and information" an order made that day in the High Court of England and Wales recognising the Cayman Islands Order under the Cross Border Insolvency Regulations 2006. The letter continued:

> "We refer you to Article 20 of these Regulations which in effect stays any enforcement of the partial Award made in the Arbitration.

> We also wish to inform you that the provisional liquidators have already made demand that we release to them the monies held in our client account pursuant to the undertakings. Accordingly we hereby given you formal notice under the undertakings that we intend to withdraw the sum from our client account at the expiration of five working days from today's date namely: Monday 4 February 2019."

The demand of the joint provisional liquidators ("JPLs") had in fact been made by email to Mr Samuels on 22 January 2019.

57. The particulars of claim make the following averments of fact in connection with the appointment of the JPLs:

1) NMDC presented the petition for its own winding up on 18 January 2019. (All the defendants admit this.)

2) The affidavit in support of the petition had been sworn by Mr Gusinski on 8 January 2019. (All the defendants admit this.)

3) The JPLs had sworn evidence in support of their appointment on 9 January 2019. (Mr Gusinski admits this, but GSC and Mr Samuels do not admit it.)

4) (As a matter of inference) GSC and Mr Samuels at all material times knew that Mr Gusinski intended to wind up NMDC if payment to the Bank could not be avoided or satisfactorily deferred. (GSC and Mr Samuels do not plead fully to this, for reasons of alleged legal professional privilege among others, but they deny that the inferences drawn by the Bank are valid.)

58. On receipt of GSC's letter of 25 January 2019, Morgan Lewis stated that they reserved the Bank's rights, but they took no further action. Mr Stoliarov states (paragraph 65): "No formal objection [to GSC's notice] was taken because I believed that the JPLs were independent and reputable, acting under the supervision of the Cayman Islands Grand Court, and I had even less reason to suppose that they would not pay the Bank than GSC. Accordingly, I did not believe that there was any immediate or pressing need for the Bank to object, let alone seek an injunction preventing any payment out to them particularly when … Morgan Lewis had already expressly reserved our rights."

59. On 5 February 2019 GSC paid $4,647,000 to the JPLs, having first deducted from the moneys it was holding a sum of $103,000 in respect of its own fees in respect of (a) the arbitral proceedings and (b) the JPLs' recognition application in England.

60. Also on 5 February 2019 the Tribunal issued its Second and Final Award in respect of interest and costs, requiring the Guarantors to pay approximately $1.8 million to the Bank. Those moneys have not been paid.

61. In May 2019 the JPLs became joint official liquidators ("JOLs") of NMDC by order of the Grand Court of the Cayman Islands. In the same month the Borrower's moratorium was converted into a full liquidation by the Cantonal Court of Zug.

62. On 22 May 2019 the Bank submitted a proof of debt, signed by Mr Stoliarov, in NMDC's liquidation for $10,775,769.98. The proof did not refer to any security for the debt.

63. In July 2019 the Bank joined the liquidation committees of both NMDC and the Borrower.

64. By a letter dated August 2020, solicitors newly consulted by the Bank (and who act for the Bank in these proceedings) asserted to the JOLs that the moneys transferred to them by GSC on 5 February 2019 "were in fact held on trust for the Bank and were transferred to you in breach of that trust." By another letter of the same date to GSC the Bank's solicitors asserted the existence of the trust, relying on the Oral Submissions Representation, and made allegations of breach of trust against GSC.

65. I shall not set out the detail of the ensuing dispute between the Bank and the JOLs. In summary, the JOLs denied that the Bank had any proprietary interest in the moneys that had been transferred to them as JPLs on 5 February 2019 and issued a summons in the Cayman Islands to resolve the issue. In August 2021 the Bank and the JOLs compromised the dispute on terms that included acceptance by the Bank that it had no proprietary interest in the moneys then held by the JOLs. Mr Stoliarov provides an explanation both of the terms of the compromise and of the Bank's reasons for agreeing to them. I proceed on the basis of the assumption that the Bank's decision to reach terms was motivated at least in part by pragmatism.

66. These proceedings were issued in January 2021 and served in February 2021. Defences were filed and served in October 2021. A case management conference was listed for 31 January 2022, but it was vacated when the defendants issued their present applications very shortly before the hearing.

67. Although Initial Disclosure has taken place, Extended Disclosure has not taken place. The defendants have invoked the possible existence of legal professional privilege, and the Bank has maintained that the "iniquity exception" to such privilege would apply. Neither party has sought to have the issue determined; each blames the other for failing to do so.

Summary of the Particulars of Claim

68. The essence of the Bank's case is put in the following terms by Mr Stoliarov in paragraph 6 of his witness statement:

> "The Bank alleges that it has not been paid because Mr Gusinski has taken the deliberate decision not to do so and has managed the Group's affairs to avoid payment. He has done so by causing or procuring Group companies to breach their contracts, and (with the intention of delaying or avoiding repayment to the Bank causing it injury) by using both lawful and unlawful means to insulate the Group from their obligations. That latter strategy is alleged to have been masterminded and given effect to by Mr Gusinski and his long-standing English lawyers, GSC Solicitors, acting in combination together."

The particulars of claim work out that case over 58 pages. I shall summarise what is said, but at this stage I note that three categories of allegation can be identified:

i. There is a contention that the Bank had a proprietary interest in some or all of the moneys held by GSC in respect of the Judgment Sum, on the grounds of either (a) an equitable assignment or (b) a constructive trust. I shall refer to this as "the Proprietary Interest Claim".

ii. There are claims that depend analytically on the Proprietary Interest Claim. These are primarily claims for compensation for breach of trust and breach of statutory duty.

iii. There are claims in tort, for conspiracy. There is an issue as to how many of the allegations of conspiracy are dependent on the Proprietary Interest Claim.

69. Paragraphs 1 to 46 set out the background, including the Initial Proposal in the letter of 16 November 2018 and the repetition of the Initial Proposal in Mr Gusinski's witness statement dated 20 November 2018.

70. Paragraphs 47 to 49 concern the Written Submissions Representation (see paragraph 26 above). The whole of paragraph 4 of the written submissions is relied on for context, but the representation relied on is specifically the proposal in paragraph 4(d). Paragraphs 50 to 52 allege the Oral Submissions Representation (see paragraph 28 above). Paragraph 53 states:

> "53. Each of the Written Submissions Representation and the Oral Submissions Representation was made with the intention of Mr Gusinski and GSC that the Tribunal (and the Bank) would rely on it and understand it to be a declaration and promise by NMDC, acting by its duly authorised agent, that the Judgment Sum alternatively the sum of USD4.75 million had been earmarked ('the Earmarked Funds') for payment to the Bank."

GSC and Mr Samuels seek summary disposal of paragraph 53, on the grounds that it falls with the Proprietary Interest Claim. They also seek summary disposal of paragraph 55(1), which avers that by its letter dated 3 December 2018 (see paragraph 34 above) GSC "acknowledged that the Bank had an interest in at least part of the Judgment Sum".

71. Paragraph 57 refers to GSC's letter of 10 December 2018 and in particular to the GSC Representations in points 1, 2 and 3 of that letter (see paragraph 39 above). Paragraph 58 states:

> "58. Those representations ('the GSC Representations') were made by NMDC and GSC in order to induce the Bank not to apply for a conservatory order in respect of the Earmarked Funds. The Bank relied on those representations and did not seek a conservatory order and was content for the Earmarked Funds to remain in GSC's account."

GSC and Mr Samuels seek summary disposal of paragraphs 57 and 58, on the grounds that it falls with the Proprietary Interest Claim.

72. Paragraphs 59 to 62 refer to the First Award in the arbitral proceedings. Paragraph 62 states:

> "62. The Tribunal would not have made a staged payment award but for the Written Submissions Representation, the Oral Submissions Representation and the GSC Representations (together 'the Representations')."

73. Paragraphs 63 to 81 complete the narrative of facts up to the Second and Final Award and the Guarantors' failure to pay.

74. For the purposes of these applications, the most important part of the particulars of claim is paragraphs 82 to 89, which are headed "Bank's Interest in the Earmarked Funds" and set out the Proprietary Interest Claim. The case on equitable assignment[1] is principally set out in paragraphs 84 and 85:

> "84. By the Written Submissions Representation, the Oral Submissions Representation and/or the GSC Representations (together 'the Representations'), NMDC represented that it had segregated, alternatively undertook that it would segregate, the Judgment Sum, and promised that it would pay the Bank the Earmarked Funds out of that fund. In the premises there was an equitable assignment by NMDC to the Bank of the Earmarked Funds, and the Bank acquired an equitable charge over the Judgment Sum.
>
> 85. Further or alternatively, the Representations (or any of them), were orders and directions (alternatively, were evidence that such orders and directions had been given) by NMDC to GSC (its debtor) to pay the USD4.75 million to the Bank out of the Judgment Sum. Accordingly, there was an equitable assignment by NMDC to the Bank of the Earmarked Funds, and the Bank acquired an equitable charge over the Judgment Sum."

Paragraph 86 presents various alternative possibilities concerning the time when the assignment took place. Paragraph 87 avers that, insofar as may have been necessary, the Bank gave value for the assignment. No issue on either of those matters arises for the purposes of the present applications.

75. The case on constructive trust is set out in paragraphs 88 and 89:

> "88. Further, by reason of the matters aforesaid, it was unconscionable:

[1] The particulars of claim also refer to a charge over the Earmarked Funds, but before me it was not suggested that this was materially different from, or added anything material to, an equitable assignment. I shall therefore refer only to the latter analysis. Similarly, the particulars of claim refer to a lien as an alternative to a constructive trust, but the argument before me mentioned only the constructive trust. GSC and Mr Samuels have not raised any point concerning the effect of purported assignment of part only of a larger fund.

> (1) For GSC and NMDC to deny the Bank's interest in the Earmarked Funds … and to deal with the Earmarked Funds in the knowledge of the Representations and/or in the knowledge that the Bank forewent the opportunity to apply for a conservatory order.
>
> (2) For NMDC, acting by the JPLs, to assert an interest in the Earmarked Funds, and for GSC to prefer the interests of NMDC to the interests of the Bank.
>
> 89. In the premises, a constructive trust ('the Trust') arose in respect of the Earmarked Funds, such that the Bank became a beneficial owner of the same or had a lien ('the Lien') over the Judgment Sum in an amount equal to the Earmarked Funds. That Trust or Lien arose, at the latest, at the time that NMDC denied the Bank's interest in the Earmarked Funds by GSC's letter of 17 December 2018 ..."

76. Paragraphs 90 to 94 make allegations of debt and of breach of trust and fiduciary duty.

77. GSC and Mr Samuels seek summary disposal of paragraphs 84 to 94, on the grounds that they advance or depend on the Proprietary Interest Claim.

78. Paragraphs 95 to 99 contain allegations of conspiracy against all three defendants, involving them and various companies in the Group. The allegations against Mr Gusinski, who is said to have joined the conspiracy in 2017, are of both lawful means conspiracy and unlawful means conspiracy. The allegations against him are lengthy; I shall not set them out, but I have regard to them because they are relevant to a consideration of the issues that are likely to go to trial in any event. Paragraph 98 contains the allegations against GSC and Mr Samuels ("the Conspiracy Claim"), which are only of unlawful means conspiracy. GSC and Mr Samuels seek the summary disposal of only some of the allegations in that paragraph. Although the paragraph is very long, it is convenient to set it out in full, for two reasons: first, the challenge to some of the allegations is put on the basis that they depend on the Proprietary Interest Claim, and this requires examination of the text; second, the parts that are not subject to present challenge indicate the scope of the dispute that (failing discontinuance, settlement or further order) will go to trial in any event. The particulars that fall for consideration on the present application are those numbered (4) to (9) and (11).

> "98. Mr Samuels and GSC joined the Conspiracy on a date unknown (but by June 2018 at the latest).
>
> Particulars
>
> (1) Under the SRA Code of Conduct ('the Code') in force at the material time, the regulatory duties of Mr Samuels included:

> '1.4 You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).'
>
> '2.4 You only make assertions or put forward statements, representations or submissions to the court or others which are properly arguable.'
>
> '2.6 You do not waste the court's time.'

(2) Further, GSC and Mr Samuels were the Guarantors' legal representatives in the Arbitration within the meaning under Art. 18 of the LCIA Rules. Accordingly, it is to be inferred that GSC and Mr Samuels had, in accordance with Art. 18.5, agreed to comply with the Annex to the LCIA Rules, which required at all material times, inter alia, that 'A legal representative should not knowingly make any false statement to the Arbitral Tribunal…'

(3) In breach of the said paragraph 2.4 and 2.6 of the Code, in June and August 2018, Mr Samuels gave instructions to Miss Dohmann Q.C. and Mr Burgess to put forward, on behalf of the Guarantors, a Cross-Claim, which had the effect of delaying the issue of the First Award by creating the semblance of a genuine dispute about whether amounts were due and owing to the Bank, when there was none. The Cross-Claim was, as Mr Gusinski knew and intended, and in breach of Art. 14.5 of the LCIA Rules, and therefore in breach of the Arbitration Agreement incorporated by reference into the Facility, not made in good faith by the Guarantors, but to delay determination of the Bank's legitimate claims, and it is to be inferred that Mr Samuels knew and/or intended this also. Mr Samuel's knowledge is reasonably inferred inter alia from the facts that:

(i) As GSC admitted in its letter to the Tribunal dated 16 November 2018 (which it is to be inferred that Mr Samuels drafted), the Guarantors did not then have (and by implication had never had) the evidence needed to establish their Cross-Claim;

(ii) In the absence of evidence, there was no proper basis to plead (i.e. it was not reasonably arguable) that:

(a) criminal offences had been committed by the Bank under Luxembourg law; or

(b) a breach of confidence had occurred prior to the Borrower's default under the Facility, when the

information alleged to have been shared was not provided until 31 December 2017, two days after the default had occurred;

(iii) Mr Samuels, as an experienced commercial litigator qualified in 1971, conducting high value litigation and arbitration:

(a) Would have known and understood that allegations that the Bank had committed crimes could not be pleaded without first being satisfied that there was a sufficient evidential basis for the same, including, for example, evidence of foreign law; (b) Would have undertaken a careful review of the available documentary evidence before pleading a breach of confidence.

(iv) The reasons given by Mr Samuels and GSC for the withdrawal of the Cross-Claim were not genuine:

(a) As an experienced commercial litigator qualified in 1971, conducting high value litigation and arbitration, it is to be inferred that Mr Samuels knew from the outset that because the Bank's parent company was not a party to the Arbitration, no documents could ever be compelled to be disclosed by it in that arbitration. In the premises, the suggestion that this was a conclusion only reached on or about 16 November 2018 was known by Mr Samuels to be untrue, or was a statement made by him and thus GSC recklessly, not caring whether or not it was true.

(b) If it had been true that the Cross-Claim was withdrawn because of a lack of disclosure, it is to be inferred that such a decision was made within a reasonable time after disclosure closed on 20 September 2018, and certainly before Mr Gusinski's Witness Statement dated 10 October 2018 was served; yet the decision was not communicated to the Tribunal until 2 months later, and only 10 days before the substantive hearing.

(4) On or around 26 and 27 November 2018, Mr Samuels and GSC caused counsel (by giving instructions) or allowed counsel (by failing to then correct what they said) to make the Written Submissions Representation and the Oral Submissions Representation to the effect that the Earmarked Funds would be paid to the Bank within 7

days of the Court of Appeal setting aside the Stay. In the light of the matters set out below in sub-paragraph (6), Mr Samuels and/or GSC knew that the Earmarked Funds would not be paid to the Bank, alternatively reasonably doubted that the Earmarked Funds would in fact be paid to the Bank. This misled the Tribunal and the Bank. It was accordingly a breach by Mr Samuels of paragraph 1.4 of the Code. To the extent that Mr Samuels knew that the Written Submissions Representation and the Oral Submissions Representation (or either of them) were false, his procuring or approving them being made and/or not correcting them was a breach by him of the Annex to the LCIA Rules.

(5) On 10 December 2018, Mr Samuels and GSC made the GSC Representations to the Tribunal on behalf of the Guarantors to the effect that if a staged payment award was made, the Earmarked Funds would be paid to the Bank within 7 days of the Court of Appeal lifting the Stay. In the light of the matters set out below in sub-paragraph (6), Mr Samuels and/or GSC knew, alternatively reasonably doubted, that the Earmarked Funds would in fact be paid to the Bank. This misled the Tribunal and the Bank. In the premises, it was a breach by Mr Samuels of paragraph 1.4 of the Code. To the extent that Mr Samuels knew that the GSC Representations were false, this was a breach by Mr Samuels and GSC of the Annex to the LCIA Rules.

(6) The matters at sub-paragraphs (4) and (5) above are to be reasonably inferred from the fact that GSC later (in correspondence drafted by Mr Samuels and within a matter of mere days of the First Award) resiled from the Written Submissions Representation, the Oral Submissions Representation and the GSC Representations, but without any or any material change in circumstances from when the submissions had been first made:

(i) By letter to Morgan Lewis dated 14 December 2018, GSC now alleged falsely that payment of the Earmarked Funds depended upon the consent of other (unspecified) creditors whereas, so far as Bank can ascertain, to the extent that these unspecified creditors and/or their claims were genuine, they had existed prior to and at the time when the Representations had been made, and were not new. In the premises, if the Representations could be made without reserving any right of approval to them, no such consent was required subsequently.

(ii) By letter to Morgan Lewis dated 17 December 2018, despite having already acknowledged the Bank's interest in at least part of the Judgment Sum in its letter dated 3 December 2018 and submitted itself that payment would be made within 7 days of the lifting of the Stay, GSC refused to make any payment of the Earmarked Funds unless the Bank agreed to balancing payments being delayed to 1 October 2019.

(7) As pleaded in paragraph 92 herein (which particulars are repeated), GSC (procured by Mr Samuels) dissipated the Earmarked Funds, in breach of trust and/or fiduciary duty owed to the Bank.

(8) On or about 10 December 2018, GSC made a payment out of the Judgment Sum to the Borrower's account with UBP for the purpose of making payments to third parties on behalf of other companies in the Group when GSC knew that NMDC had agreed (by clause 21.25(a) of the Facility) to procure that the payments aforesaid only be made from an account with the Bank (which the UBP account was not);

(9) The GSC Representations (which it is to be inferred were drafted by Mr Samuels) were made in order to persuade and prevent the Bank from applying for a conservatory order, and in an attempt by GSC to give the Bank the false impression that the Earmarked Funds would be retained on GSC's client account to be paid over to the Bank if a staged payment order was made, when (as set out above) Mr Samuels knew that they would not be, alternatively he reasonably doubted that they would be. That was dishonest;

(10) GSC and Mr Samuels were aware at all material times that Mr Gusinski intended to wind-up NMDC and NMP (with the agreement of those companies) if payments to the Bank could not be avoided alternatively not delayed until October 2019 or some other date or dates of his choosing. This is to be reasonably inferred from:

(i) GSC's reference to the possibility of an 'unlawful preference' in its letter to Morgan Lewis dated 3 December 2018 (drafted by Mr Samuels);

(ii) The very close chronology between issue of the First Award, the extraordinary general meetings of NMDC and NMP convened on 8 January 2019 to resolve to present winding up petitions, the fact that affidavits of Mr Gusinski were prepared and then sworn on 8 January 2019, the agreement of the JPLs to act on 9

January 2019 and the presentation of winding-up petitions on 18 January 2019, particularly given the intervention of Christmas and New Year in the meantime;

(iii) The fact that GSC (by Mr Samuels) acted for the JPLs and had liaised with their Cayman Islands lawyers (Collas Crill) in relation to the First Award.

(iv) GSC (by Mr Samuels) had previously acted (on the instructions, it is to be inferred, of Mr Gusinski) in connection with the CBIR application for recognition of the moratorium in respect of the Borrower. Accordingly, GSC knew that Mr Gusinski had previously sought, by means of an insolvency procedure, to prevent the Bank from recovering the debts due from the Borrower.

GSC and Mr Samuels agreed alternatively combined with Mr Gusinski and its various clients not to alert the Tribunal or the Bank to this plan. Paragraph 97(9) above is repeated.

(11) As pleaded in paragraph 74 herein, GSC (by Mr Samuels) appears to have acted for the JPLs at all material times from the date of their appointment, in particular when applying for recognition of the JPLs' appointment under the CBIR. Accordingly, GSC owed to the JPLs a fiduciary duty of undivided loyalty, in particular not to allow a conflict of interest to arise without the JPLs' fully informed consent. So far as the Bank can ascertain, GSC (by Mr Samuels) failed to alert the JPLs to the Assignment, the Charge, the Trust, the Lien and/or the Bank's claim to the Earmarked Funds, despite having acknowledged the interest of the Bank in at least part of the Judgment Sum by its letter to Morgan Lewis dated 3 December 2018 (drafted by Mr Samuels) and in circumstances where it knew or ought to have known that neither Mr Gusinski nor NMDC nor NMP had done so either because GSC and Mr Samuels had or ought to have had copies of evidence filed in the Cayman Islands insolvency proceedings (inter alia Mr Gusinski's affidavits sworn on 8 January 2019) which not only failed to mention them but, to the contrary, stated that the Judgment Sum was a direct asset of NMDC and held by GSC 'on its behalf' (paragraph 43.3 Gusinski Second Affidavit). This was a breach of fiduciary duty."

79. Paragraphs 100 to 104 allege that Mr Gusinski procured breaches of contract by the Borrower and the Guarantors. Paragraphs 107 to 111 allege that Mr Gusinski

dishonestly assisted NMDC and GSC to commit breaches of trust and of fiduciary duty.

80. Paragraphs 112 to 115 make allegations of dishonest assistance and knowing receipt against GSC and Mr Samuels if, contrary to the Bank's primary case, GSC was not a trustee for the Bank. GSC and Mr Samuels seek summary disposal of these allegations, on the grounds that they rest on the Proprietary Interest Claim.

Mr Gusinski's Application

81. Mr Gusinski made his application under r. 24.2(a) and r. 3.4(a) and (b) on 25 January 2022. The greater part of the application rests on broadly similar grounds to that of GSC and Mr Samuels and, as Mr Gusinski did not attend at court to pursue it, I shall not discuss it separately.

82. Mr Gusinski also raised a discrete point, to which Mr McPherson drew my attention though he did not adopt it on behalf of his clients. This was the contention that the Proprietary Interest Claim and all claims dependent on it ought to be struck out under r. 3.4(2)(b) as being an abuse of process, on the grounds that they are improperly constituted because NMDC, as "the owner of the funds in respect of which the claimant claims a proprietary interest", has not been joined as a party to the claims. A related, though strictly distinct, point is the suggestion that the Proprietary Interest Claim is an abuse of process because it ought to have been litigated against the JOLs in the Cayman Islands.

83. There is nothing in these points. Even if it might be argued that, as the Proprietary Interest Claim raises an issue that might affect NMDC, namely the ownership and disposition of the moneys formerly held by GSC in respect of the Judgment Sum, "no action is now dismissed for want of parties": *per* Lord McNaghten in *William Brandt's Sons & Co v Dunlop Rubber Company Limited* [1905] A.C. 454 at 462. I have mentioned that the Bank settled with the JOLs on terms that foreswore any existing right in the moneys held by the JOLs. It was entirely proper for the Bank to take the view that there was no practical value in joining NMDC, which was in liquidation, as a party to these proceedings. Further, NMDC has now been dissolved.

84. In the circumstances, I dismiss Mr Gusinski's application.

The Application of GSC and Mr Samuels

85. The application of GSC and Mr Samuels has been advanced primarily on the basis that the Bank's Proprietary Interest Claim is not reasonably arguable and should be dismissed, and that consequently all other heads of claim that depend on the Proprietary Interest Claim should also be dismissed. Those other heads of claim include, most obviously, claims for breach of trust and breach of fiduciary duty, but Mr McPherson submits that they also include much of the claim for unlawful means conspiracy. For reasons that will, I hope, become apparent, I shall reverse the order of analysis and begin with the conspiracy claim.

The Conspiracy Claim

86. Paragraph 98 of the particulars of claim sets out the Conspiracy Claim (for the text, see paragraph 78 above). There is no present application to strike out the allegations in sub-paragraphs (1), (2), (3) and (10); therefore, unless the claim is discontinued or settled or a further order is made hereafter, those allegations will proceed to trial. Mr McPherson submitted that it was reasonably likely that, if the Proprietary Interest Claim and the remainder of the Conspiracy Claim were struck out, the Bank would not pursue these particular allegations. I bear in mind the possibility that the Bank would take such a course, but I do not assume that it would do so. Although the focus of this judgment is on matters arising in and shortly after the late stages of the arbitration proceedings, the Bank's professed grievance against Mr Gusinski extends much more widely (see the summary given by Mr Stoliarov: paragraph 68 above) and implicates GSC and Mr Samuel beyond their behaviour regarding the Judgment Sum.

87. Mr McPherson objects to sub-paragraphs (4), (5), (6), (7), (9) and (11) on the grounds that they are "entirely parasitic" on the Proprietary Interest Claim and so must fall if that fundamental claim falls. In my view this is correct as regards sub-paragraphs (7) and (11) but is incorrect as regards sub-paragraphs (4), (5), (6) and (9). The allegations in those latter paragraphs do not depend on the prior conclusion that the Representations were constitutive of or evidenced an equitable assignment or gave rise to a constructive trust. They are basically allegations that the defendants deliberately misled the Bank and the Tribunal into believing that roughly half of the debt to the Bank would be paid out of the moneys held in GSC's client account when they knew that they would not be so paid or at least reasonably doubted that they would be. Whatever the merits of the case so advanced, it does not depend on the existence of a proprietary interest of the Bank in the moneys. (Indeed, in his oral submissions in reply to Ms Stanley, Mr McPherson submitted that the particulars of conspiracy were parasitic on *the very same matters that underpin* the proprietary case. That is different from saying that the particulars stand or fall with the Proprietary Interest Claim.)

88. The allegation in sub-paragraph (8) is rather different. It relates to the payment of $415,000 on 10 December 2018 and amounts to an allegation of procuring a breach of the contract between NMDC and the Bank. Mr McPherson's overarching point is that the matters set out in the sub-paragraph do not constitute unlawful behaviour: in oral submissions he said that, even if the sub-paragraph was factually correct, it was a "paradigm example of permissible behaviour by a solicitor". He makes a number of specific points in support of that contention.

    1) Mr McPherson submits that, although the Bank alleges that the purpose of the payment to the Borrower was to make payments to third parties on behalf of other companies in the Group, it does not allege that GSC and Mr Samuels knew that this was the purpose of the payment. I do not accept this submission. At most there is an ambiguity in the text, which could have been cleared up by a short request for further information. The natural, strictly grammatical reading of the averment that "GSC made a payment out of the Judgment Sum to the Borrower's account with UBP for the purpose of making payments …" is that "the purpose" was that of GSC in making the payment out of the Judgment Sum. Of course, it might be objected that "the purpose" more probably relates to the subsequent making of payments to others and so

should be taken to be that of the Borrower. That, however, is the ambiguity. It does not justify an order to strike out the allegation.

2) It is further objected that sub-paragraph (8) does not allege that GSC and Mr Samuels intended to procure a breach of contract. Liability for the tort requires both the requisite knowledge of the existence of the contract and an intention to procure a breach of the contract: see *OBG Ltd v Allan* [2008] 1 AC 1, especially *per* Lord Hoffmann at [39]-[43]. Here, again, we are faced with the ambiguity in the text, concerning GSC's purpose in making the payment out of the Judgment Sum. Also relevant are the close connection between knowledge and intention and the (sometimes fine) distinctions between the two, as discussed by Lord Hoffmann in *OBG Ltd v Allan* at [42] and [43]. In my view, the formal adequacy of the Bank's case in respect of this particular ought to be addressed by the provision of suitable further information, not by immediate resort to the power to strike out parts of a statement of case.

3) Mr McPherson submitted that sub-paragraph (8) failed to allege that the Borrower's alleged payments to third parties fell within the prohibition in clause 21.25(a) of the Facility, namely "monthly payments greater than $10,000 … to any third party" from an account other than one held with the Bank. Although I accept that the sub-paragraph, in contrast to the rest of the particulars of claim, is somewhat condensed, I do not think that the objection is correct. Sub-paragraph (8) avers that the payment from the Judgment Sum was made for the purpose of making "payments to third parties …" when GSC knew that clause 21.25(a) required "the payments aforesaid" to be made only from the account with the Bank. Logically, therefore, the averment is that the payments in question were payments falling within the requirements of clause 21.25(a). Whether or not the averment is factually correct, it is formally adequate.

4) Mr McPherson referred to the special requirements governing the pleading of allegations of fraud and dishonesty, as summarised by Arnold LJ in *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699 at [23]. The principles are uncontroversial, but paragraph 98(8) alleges procurement of a breach of contract and, subject to the slight qualifications mentioned above, the pleading is adequate.

89. The result of this analysis is that, if the Proprietary Interest Claim were to be dismissed summarily, the Conspiracy Claim would remain, with the loss of only the allegations in paragraph 98 (7) and (11). The remaining allegations would include the allegations that GSC and Mr Samuels deliberately misled the Tribunal and the Bank or caused them to be misled.

The Proprietary Interest Claim: Equitable Assignment

90. The Proprietary Interest Claim asserts that the Bank became the beneficial owner of the chose represented by the credit balance in GSC's client account referable to the Judgment Sum. For present purposes it does not matter whether that credit balance is properly the full Judgment Sum, or the "Lesser Sum" of $4.75 million, or what was left of the Lesser Sum after the deduction of certain costs and expenses (which I shall call, neutrally, the Retained Sum). The Bank's claim to an interest in the Retained

Sum rests primarily on equitable assignment. Because of the way the argument was developed before me, it suffices to consider the requirements for an equitable assignment of a legal chose.

91. For the Bank, Ms Stanley relied on the summary of the law in Liew, *Guest on the Law of Assignment* (4th edition), at paragraphs 3-13 to 3-15 (references omitted):

> "3-13 An equitable assignment of a legal chose may be effected in either of two main ways. First, it may consist of a communication from the assignor to the assignee which manifests a final and settled intention to transfer the chose immediately to the assignee. An equitable assignment may, for example, be constituted … by an authority given by the assignor to the assignee to direct the obligor to perform his obligation to the assignee, or by an undertaking on the part of the assignor to pay a debt owed to the assignee out of a specific fund coming to the assignor from a third party. As between assignor and assignee, it is unnecessary for the effectiveness of the assignment that notice of the assignment should be given to the debtor or obligor. … The right of the assignee to the chose in equity does not depend on notice being given to the obligor. … The consent of the debtor or obligor to the assignment is not required.
>
> 3-14 The second main way in which an equitable assignment may be effected is for the assignor to direct the debtor or obligor to pay his debt or perform his obligation to the assignee instead of to the assignor. For example, where a debtor or obligor owes money to or holds funds belonging to the assignor, the assignor may assign the money or funds by directing the debtor or obligor to pay them (or part of them) to the assignee. The direction need be in no particular form. The clearest support for the absence of any formal requirement is the oft-quoted statement of Lord Macnaghten in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] A.C. 454. In response to a comment made by Lord Alverston CJ in the Court of Appeal that the document in question did not, on the face of it, purport to be an assignment or use the language of assignment, Lord Macnaghten said:
>
> > 'An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.'
>
> 3-15 The difficulty is, however, that the direction to the obligor may be merely a revocable mandate and not an

> assignment, that is to say, it may merely be an authority given to the obligor to act on behalf of the alleged assignor, which authority may be revoked up to the time the obligor acts on it. For an assignment, there must be a clear expression of an intention to make an immediate and irrevocable transfer of the chose to the assignee. Moreover, even though a 'courteous request' may suffice, in *Smith v Perpetual Trustee Co Ltd* (1910) 11 C.L.R. 148, 158, Griffith CJ warned that if 'a mere request to a debtor to pay the debt to a creditor of the person making the request were necessarily an equitable assignment, extraordinary consequences would follow'. It must be plain that the assignor intends by the request to divest himself of the chose and vest it in the assignee. The intention must be determined objectively: the subjective intention of the assignor is irrelevant. The test is how the direction would be understood by a reasonable obligor, having regard to the words used, the nature and purpose of the transaction and the relevant surrounding circumstances. In practice, though not a requirement, it would seem that some form of prior communication, arrangement or understanding between the assignor and the assignee would be likely to be found before a direction was construed as an assignment."

92. Mr McPherson did not dissent from that statement of the law, though he emphasised the words "a final and settled intention" in paragraph 3-13 and the points made in paragraph 3-15. He referred to the statement of Lord Macnaghten in *Tailby v Official Receiver* (1888) 13 App. Cas. 523, at 543, that "the mode or form of assignment is absolutely immaterial provided the intention of the parties is clear." The objective approach to the identification of the parties' intentions was confirmed by the Privy Council in *National Stadium Project (Grenada) Corporation v NH International (Caribbean) Ltd* [2020] UKPC 25, at [37]-[38].

93. As Ms Stanley made clear, the Bank relies, in the alternative, on both of the ways of making an equitable assignment mentioned in *Guest*. First, the Representations (that is, the Written Submissions Representation, the Oral Submissions Representation and the GSC Representations, taken severally or together) constituted communications from the assignor (NMDC) to the assignee (the Bank) which manifested a final and settled intention to transfer the chose immediately to the assignee. Second, the Representations evidenced a direction by the assignor (NMDC) to the debtor or obligor (GSC) to pay its debt or perform its obligation (viz. to pay over the Retained Sum) to the assignee (the Bank) instead of the assignor. Ms Stanley made clear that the Bank does not allege that the equitable assignment was pursuant to any agreement between itself and NMDC.

94. I need say very little about the second way of putting the case, namely a direction by NMDC to GSC. There is no direct evidence of such a direction. Its existence can only be an inference from the communications relied on in the first way of putting the case. If they do not amount to an assignment by communication to the assignee, I cannot see how they can be taken to evidence a prior assignment by direction to the obligor. In those circumstances, to allow the matter to proceed on the basis that

something might turn up on disclosure would be an unjustified fishing expedition. So the matter really turns on the first way of putting the case in equitable assignment.

95. Ms Stanley submitted that the Representations, properly construed, were communications that manifested a final and settled intention to transfer the Retained Sum, held by GSC, to the Bank. With reference to the text of paragraph 3-13 of *Guest,* this is put primarily on the basis of "an undertaking on the part of the assignor to pay a debt owed to the assignee out of a specific fund", namely the Retained Sum held by GSC. Ms Stanley also submitted that it could be analysed as "an authority given by the assignor to the assignee to direct the obligor to perform his obligation to the assignee". For present purposes, these seem to me to come to much the same thing on the facts of the case.

96. The terms of the Representations are uncontroversial: the Written Submissions Representation and the GSC Representations are contained in documents, and the Oral Submissions Representation was transcribed and there is no argument as to what was said. It is also fanciful to suppose that any further evidence relevant to the objective construction of the Representations could be forthcoming. Anything that might turn up on disclosure would be limited to unilateral motivations but would not be relevant to the objective construction exercise. Therefore, it could be said that the court is now in as good a position to construe the Representations as it would be at trial.

97. The particular matters relied on by the Bank in support of the contention that the Representations manifest a final and settled intention to transfer the Retained Sum include the following.

a) In the Written Submissions Representation, paragraph 4 identified a specific fund that was being held (that is, the Judgment Sum), said that this would be "immediately … available", and proposed a payment of $4.75 million, which can only have been intended to come from the funds identified as being available, namely the Judgment Sum. Further, paragraph 5 referred to this amended proposal as having "fortified" the Initial Proposal, a choice of words that was clearly intended to have more than rhetorical purpose.

b) The Oral Submissions Representation made four significant points. First, it called "astonishing" any suggestion that the Bank's ability "to enforce against a judgment sum" (which in context must mean the Judgment Sum) would be harmed. Second, it said—and stressed—that the Judgment Sum "minus what we need to defend and to deal with cost assessment" "should be specifically earmarked for repayment". Third, it said that "it" was "not just something that goes into the general estate of [NMDC]". Fourth, "it" was "a sum that is in the jurisdiction and we have offered it"; and, again, this must refer to a particular asset, namely NMDC's credit balance on GSC's client account. The passage as a whole was, it is submitted, an unequivocal statement of a settled intention that the Bank should have proprietary security for the part of its debt represented by the money in GSC's client account.

c) This is confirmed by the further exchanges in the course of the oral submissions. In particular, Mr Brindle expressed concern that there should be an assurance that the moneys held by GSC would pass to the Bank and Ms

Dohmann neither indicated any objection to that nor saw any difficulty of principle in there being a solicitors' undertaking.

d) The letter of 4 December 2018 expressly confirmed that counsel's submissions and the proposal they contained were made on instructions.

e) The GSC Representations in the letter of 10 December 2018 clearly indicate that the payment of the $4.75 million will come from the specific fund when it is available (point 1 in the letter) and that, for that reason, the money will be preserved in the client account (point 2), and in context it is for that reason that a conservatory order is unnecessary (point 4).

f) Although the subjective understanding of the parties or third parties is not strictly relevant to objective construction, it is significant that (so it is said) the Tribunal believed that the Bank had a proprietary interest in the Retained Sum: see paragraph 73 of the First Award. Although the Bank does not seek to place significant weight on the fact, it also points to Mr Stoliarov's understanding as set out in his witness statement. He states (paragraph 44) that he understood the Guarantors' written submissions to mean "that NMDC was now not only ringfencing these monies but also—once they were free of any stay—doing so for the sole purpose of using them to then pay the Bank." He acknowledges (paragraph 48) that he did not appreciate immediately what the oral submissions meant, but he continues: "After the hearing, and because of what had been written and said, I had the very strong impression that at least USD 4.75 million would be the Bank's once an award was issued and that the purpose of Ms Dohmann's speech was to confirm that the Tribunal should not doubt that those funds belonged to the Bank in one way or another. That much was clear to me at the time." He continues at paragraph 50:

> "As a result of what had been submitted and in reliance upon it, we did not ask the Tribunal for an order recording the provision of security or that any first tranche must be paid out of the Earmarked Funds, because we hoped (even if we did not completely trust) that the submissions were truthful and made properly and in good faith."

98. There are numerous arguments that might be raised against the Bank's case on equitable assignment. I mention the following points made by Mr McPherson in his powerful submissions.

a) There was (as is common ground) never an agreement between the parties for an assignment.

b) The Judgment Sum, or the Lesser Sum, was never segregated.

c) Although it was later amended materially, the Initial Proposal provides the context for what followed. It was simply a proposal for the terms of staged payments, and it did not even mention the Judgment Sum.

d) The Written Submissions Representation did no more than modify the Initial Proposal by proposing that that amount be paid within 7 days of the removal

of the stay. It did not propose that the Bank have security for any part of its award, far less communicate an immediate and unconditional intention to assign the moneys held. It was simply making proposals that might make the Guarantors' request for staged payments more attractive to the Tribunal. (In a passage in the transcript that I have not set out but have alluded to in paragraph 29 above, Ms Dohmann agreed with Mr Brindle that the Tribunal had "no power to direct how enforcement should proceed". It was well understood that the Tribunal could not, by the terms of its award, create or require the creation of a security interest, and the very exchange makes sense only on the supposition that the Bank had no proprietary interest.)

e) The Oral Submissions Representation was, similarly, no more than an offer or proposal for payment of part of a debt. It was not a statement that the moneys were, or after the removal of the stay would be, the beneficial property of the Bank.

f) The lack of any declaration of assignment by NMDC and the fact that the Tribunal did not imagine that there was any such declaration are shown by the exchange between Ms Dohmann and the Chairman concerning the possibility of a solicitors' undertaking. If the Bank's current contention were right, this exchange and the subsequent communications regarding an undertaking would have been unnecessary and inappropriate, because GSC would have held the Retained Sum on trust for the Bank and would have been obligated to pay them over. Indeed, this reflects the fact that the very nature of the proposals being made by the Guarantors was contrary to the existence of an assignment. Although the Bank's entitlement to an award of $9,150,024.89 was no longer in dispute and the only live issue was the Guarantors' request for staged payments, the Guarantors only ever proposed payment of $4.75 million within 7 days of the removal of the stay. They did not purport to make a fund in that amount the immediate property of the Bank, or its property immediately and automatically upon the removal of the stay.

g) If there was no assignment by 5 December 2018, nothing that happened thereafter was capable of effecting one. The undertaking given in the letter of 5 December 2018 was inconsistent with the existence of an equitable assignment, because it showed that NMDC purported to have the right to dispose of the Retained Funds below the level of $4.75 million; it was that right alone that made the terms of the undertaking meaningful. The undertaking remained in place at all times up to the making of the First Award and was affirmed in the letter of 10 December 2018. That letter's confirmation that no notice of intention to withdraw funds below $4.75 million would be given before the issue of the Award confirms NMDC's beneficial ownership of the Retained Funds. By this time, the stay on the Judgment Sum had been removed, and therefore any prior assignment would have become unconditional, so the affirmation of the undertaking cannot be understood as required by the inchoate nature of any prior assignment. What this means is that the text that the Bank relies on as the GSC Representations cannot itself be a communication capable of effecting an equitable assignment. (The Bank's contention that the objection in point 5 to a freezing order is premised on a proprietary interest that makes it unnecessary is wrong. The objection

was simply that the conditions for the grant of a freezing order, in particular the risk of imminent dissipation, were not satisfied.)

h) The remainder of the correspondence after the hearing in the arbitration does not support but contradicts the Bank's case. In particular, the letter of 30 November 2018, making clear the wish to avoid anything that might be viewed as a preference, is inconsistent with the intention to give a security interest to one particular creditor. The letter of 3 December 2018 does not support the Bank's case as it claims: the reference to "hav[ing] an interest in the Judgment Sum" cannot be to a proprietary interest but can only be to the (non-proprietary) interest that creditors have in the available assets of their debtors.

i) The Tribunal did not believe that the Bank had any proprietary interest in the Retained Funds; it invited a solicitors' undertaking because of concern about the possible disposal of the funds. The Bank did not believe it had any such interest either, as is shown by the facts that it envisaged an application for a freezing order (not a proprietary injunction), that it did not oppose the release of the Retained Sum to the JPLs, and that its proof of debt did not refer to any security. (No great weight is placed on these points, as it is accepted that what matters is the objective construction of the communications, not the subjective interpretations of the parties or others.)

99. I have come to the conclusion, despite the observations made in paragraph 96 above, that the better course is for me to decline to deal with this issue summarily. First, the high quality of the arguments from counsel leads me to the view that there are respectable arguments to be put on both sides of the issue and that it is therefore (in Marcus Smith J's happy phrase) reasonably arguable. Disputes over the construction of things spoken or written have a well-known capacity to elicit conflicting judicial decisions. I have my own view on this issue, but that does not mean that I am bound to express it and, in the exercise of my judicial discretion, I think it prudent not to do so. Second, summary determination of this issue would not dispose of the entirety of the case but only of one aspect of it. Third, this issue will not, in my view, materially affect the evidential development of the rest of the case. No further witness evidence of any substance, and probably none at all, will be directed to this issue, though much will be directed to the issues concerning conspiracy. Similarly, the only possible part of the assignment issue that might involve disclosure concerns any direction given by NMDC to GSC (as to which, I now express a high degree of scepticism), and disclosure in that regard would be subsumed under the much more significant disclosure relating to conspiracy. Fourth, for much the same reason, leaving this issue for determination at trial will not add very much to the length of the trial. Fifth, this case badly needs to make substantive progress procedurally. A prompt case management conference is required and disclosure issues ought to be addressed with as little delay as possible. There is, I think, a real risk that a substantive decision at this stage on what is really a construction issue will cause the case to be bogged down in preliminary stages, including appeal proceedings, and deflect attention from the areas where it would best be directed.

The Proprietary Claim: Constructive Trust

100. *Lewin on Trusts* (20th edition) says at paragraph 8-010 (citations omitted):

> "[A]t present, there are established categories of case where the imposition of a constructive trust by operation of law is recognised. Equity's intervention is based on principle and there must be a relationship between the relief granted and the circumstances giving rise to it. It is related to the existence of a fiduciary relationship, the categories of which are not closed. Lord Browne-Wilkinson has said that the constructive trust is imposed by law by reason of the unconscionable conduct of the legal owner of property. For this to be an adequate categorisation, it must include those instances where it is the legal owner's denial of the beneficial interest of another which is unconscionable, rather than his conduct. The possibility of a constructive trust imposed in the absence of any existing cause of action in order to prevent unjust enrichment, the so-called purely remedial constructive trust, has often been discussed in the authorities but it is not recognised as an existing category of constructive trust in English law."

101. The Bank's case on a constructive trust is pleaded at paragraphs 88 and 89 of the particulars of claim (see paragraph 75 above). It rests on the allegation that GSC's conduct was unconscionable. For GSC, Mr McPherson submits that it also rests on the alleged prior existence of a proprietary interest of the Bank in the Retained Sum; as such it would not advance the Bank's case. For the Bank, Ms Stanley denied that this was the case: she submitted that the trust could arise in the absence of a prior proprietary interest and on the basis that unconscionable behaviour by GSC misled the Bank (and was designed to mislead it) into thinking that an application for a conservatory or freezing order was unnecessary. Ms Stanley conceded that such a trust did not fall into any category of constructive trust that she had seen, but she referred to the observation of Edmund-Davies LJ in *Carl Zeiss Stiftung v Herbert Smith & Co. (No.2)* [1969] 2 Ch. 276 at 300:

> "English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court in technicalities in deciding what the justice of a particular case might demand."

102. I confess to having some difficulty in understanding the Bank's case on a constructive trust. If the funds held by GSC (the Retained Sum) had been assigned in equity to the Bank or were subject to a security interest in the Bank's favour, it is hard to see what room there would be for a constructive trust to be overlaid or, indeed, what the analysis in terms of constructive trust might add to the Bank's case. On the other hand, if the Bank had no proprietary interest in the Retained Sum but simply failed, by reason of being misled by bad behaviour of GSC, to take steps that might have improved its prospects of execution against that asset, I cannot see any basis on which there might have been a pre-existing fiduciary relationship between the parties or any other ground on which the remedy for bad behaviour should be the creation of a constructive trust.

103. However, I shall not dispose of this issue summarily, for much the same reasons as those set out in respect of the equitable assignment point. I add the following observations. First, Mr McPherson advanced two grounds of attack against the

constructive trust analysis. His first ground of attack was the contention that the constructive trust claim depended on the assignment claim. If that is right, that ground falls away in view of my decision not to dispose of the assignment claim summarily. Second, Mr McPherson's second ground of attack was that the constructive trust claim additionally depended on establishing that the solicitors' conduct was unconscionable, and that the pleading did not disclose an arguable case for such a finding. However, the pleaded case for a constructive trust rests on the narrative set out in the paragraphs preceding paragraph 88 of the particulars of claim. Further, as the question is whether it was unconscionable for the solicitors to deny the Bank's interest in the Retained Sum, it is artificial to ignore the allegations in paragraph 98 of the particulars of claim, which provide both a wider context and more details concerning the circumstances in which the Retained Sum came to be paid to the JPLs. Unconscionability is a matter best considered in the context of a consideration of the facts as a whole. The constructive trust point is essentially a single legal argument based on facts that will be considered by the trial judge in any event. In my judgment it is better left for such consideration rather than picked off now as a discrete point.

Conclusion

104. The application of the first defendant is refused.

105. The application of the second and third defendants is refused.

106. I shall be grateful if counsel will seek to agree the terms of the order and, if any consequential matters cannot be agreed, give me a proposal for the best way in which to deal with them.