Neutral Citation Number: [2023] EWHC 2420 (Ch)

Case No: BL-2022-000913

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: 03/10/2023

Before :

MR JUSTICE MILES
(sitting with MASTER KAYE)

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Between :

(1) HARRINGTON & CHARLES TRADING COMPANY LIMITED and ors. **Claimants**

- and -

(1) JATIN RAJNIKANT MEHTA and ors. **Defendants**

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Ian Wilson KC, Philip Hinks, James McWilliams and William Day (instructed by **Hogan Lovells International LLP**) for the **Claimants**
Thomas Grant KC, Emily McKechnie and Paul Adams (instructed by **Withers LLP**) for the **First to Fourth Defendants**

Hearing dates: 19, 20, 21 July 2023

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Approved Judgment

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This judgment was handed down remotely at 10.30am on 3 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Miles :

Introduction

1. This judgment concerns applications by the first to fourth defendants (**the Defendants** for short, though there are other defendants not party to the present applications) to strike out the claims or for reverse summary judgment (**the strike out applications**). There was no suggestion that, for the purposes of the present applications, the tests for striking out under CPR 3.4(2)(a) and for summary dismissal under CPR 24 differ materially.

2. There are two main pillars of the strike out applications: that the claims fail to disclose reasonable grounds (**the reasonable grounds challenge**), and that the way the claims have been brought amounts to an abuse of the process of the court (**the abuse challenge**).

3. At a three day hearing in October 2022 Edwin Johnson J heard an application by the Defendants to discharge worldwide freezing orders that had been granted ex parte in May 2022 (**the WFOs**) and an application by the Claimants to continue the WFOs. At the hearing the Defendants advanced sustained and detailed arguments that the Claimants' pleaded case failed to overcome the good arguable case (**GAC**) threshold (as well as challenging the WFOs on other grounds). In a judgment of 22 November 2022 (**the November judgment**), which led to an order of 8 March 2023 (**the March 2023 order**), the judge examined each of the claims advanced in the Claimants' pleadings and decided that (apart from a Contribution Act claim, which he did not need to decide) the Claimants had established a GAC. He refused to discharge the WFOs.

4. The strike out applications had been issued on 6 July 2022 but they were not formally before the judge at the October hearing.

5. The Defendants also made a forum non conveniens challenge. That was addressed at a separate two-day hearing in December 2022. Edwin Johnson J dismissed the challenge in a judgment of 14 February 2023.

6. There were three days of further hearings before Edwin Johnson J in March 2023 dealing with the consequences of the November 2022 and February 2023 judgments. This led to the order of 8 March 2023. The Defendants have sought permission to appeal the order concerning the WFOs, but not so far as it concerns jurisdiction. Asplin LJ dismissed the application for permission to appeal on 29 August 2023.

7. As already noted, although the strike out applications had been issued before the October hearing, they were not formally before the judge. At the March 2023 consequentials hearing, the Claimants argued that the Defendants might be seeking, by pursuing the reasonable grounds challenge in the strike out applications, to relitigate points which had already been decided in the November judgment. The judge required the Defendants to serve a document identifying the points they sought to advance at the hearing of the strike out applications. The Defendants served such documents (**the Strike Out Points**) later in March 2023.

8. The present application was listed for a six day hearing (including two-days pre-reading). The Claimants took the threshold point that the attempt to advance Strike Out

Points (1) to (8) would amount to an abuse of the process of the court and/or a collateral attack on the November judgment. They argued that the orders now sought were inconsistent with, and would serve to undermine, the court's existing decisions about the claims meeting the GAC arguability test. They did not argue, ultimately, that the Defendants were precluded from advancing most of Point (10) (the abuse challenge), Point (9) (concerning a claim under the civil contribution legislation and which the judge did not need to decide in the November judgment), or Point (11) (which concerned only Docklands and which was not addressed by the judge).

9. The Defendants contended that there was nothing abusive about moving the strike out applications and that they should be allowed to proceed with them fully.

10. At the hearing I invited submissions at the outset as to whether Points (1) to (8) of the strike out applications were an abuse of the process of the court; and also whether the court should in any case refuse to entertain them under the guidance in *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368. At the conclusion of argument on that point I informed the parties of my decision that the Defendants could not proceed with Points (1) to (8) on the basis that this was an abuse of process. I said that I would give reasons later – and do so here. I also said that I would consider the *Williams & Humbert* point – see this too below.

11. The court then proceeded to hear the remaining Strike Out Points. The Defendants argued Points (9) and (10), but did not in the event pursue Point (11).

12. I heard the application with Master Kaye, with whom I am jointly case managing the case. I am responsible for this judgment but it contains our joint views.

The pleaded case

13. The parties agreed that the Court should consider the case set out in the Claimants' latest consolidated amended particulars of claim (**the CAPOC**).

14. This section of the judgment contains a summary of the case advanced by the CAPOC.

15. There have been no defences, but the Defendants have stated that they strongly deny these allegations. I therefore emphasise that what follows is a summary of the Claimants' allegations and nothing said here should be read as a finding of fact.

16. The First to Sixth and Ninth Claimants comprise six English companies and one English LLP in liquidation (the **Claimant Companies**). They were all entities forming part of the 'Transactional Services Unit' (the **TSU**) of the Amicorp corporate group (the **Amicorp Group**), a group that provided company administration and other services. The Seventh and Eighth Claimants are the Joint Liquidators of each of the Claimant Companies.

17. Of the Claimant Companies: (a) in certain instances following restoration, the First to Sixth Claimants (the **Layer 2 Claimant Companies**) were placed into liquidation on 11 August 2021 (in the case of the First, Second, Fourth and Sixth Claimants) or 10 February 2021 (in the case of the Third and Fifth Claimants); and (b) following restoration, the Ninth Claimant (**the Layer 3 Claimant Company** or **Docklands**) was placed into liquidation on 31 May 2022.

18. The First Defendant (**Jatin Mehta**) was a director and (so the Claimants contend) controller of two Indian jewellery companies (respectively **Winsome** and **Forever Precious**). The Second, Third and Fourth Defendants are, respectively, Jatin Mehta's wife (**Sonia Mehta**), and two sons (**Vishal Mehta** and **Suraj Mehta**).

19. The Fifth Defendant (**Mr Obidah**) was and is a close business associate of Jatin Mehta. The First to Fifth Defendants are referred to collectively in the CAPOC as the **Alleged Principal Conspirators**.

20. The Sixth and Seventh Defendants (**IIA** and **Polishing** respectively) are Singaporean companies which (the Claimants contend) were at all material times owned and controlled by all or some of the Alleged Principal Conspirators.

21. The Eighth Defendant (**Mr Kothari**) is an individual who the Claimants contend introduced some or all of the Alleged Principal Conspirators to the Amicorp Group and thereafter provided instructions to the Amicorp Group on their behalf.

22. Winsome and Forever Precious were parties to precious metals facility agreements pursuant to which loans of gold bullion were advanced to them by various banks (the **Precious Metals Facilities** and the **Bullion Banks**). The repayment obligations of Winsome and Forever Precious under the Precious Metals Facilities were supported by the issue by a consortium of banks (the **Consortium Banks**) of irrevocable standby letters of credit (the **SBLCs**) pursuant to working capital facilities (the **Working Capital Facilities**) between the Consortium Banks and Winsome and Forever Precious.

23. Winsome and Forever Precious defaulted under the Precious Metals Facilities in April 2013 (the **Default**). The Bullion Banks made demands of the Consortium Banks under the SBLCs, which were met.

24. The explanation given at the time by Jatin Mehta and Mr Obidah for the Default was that Winsome and Forever Precious had exported gold and jewellery to distributor companies in the UAE controlled by Mr Obidah on credit terms (such entities being referred to in the CAPOC as the **Layer 1 Companies**); the UAE companies had sold the gold and jewellery but had suffered heavy losses on foreign exchange and commodities transactions; and, as a result, the UAE companies had failed to pay Winsome and Forever Precious, leaving Winsome and Forever Precious unable to meet their obligations to the Bullion Banks or the Consortium Banks.

25. The Claimants' case is that the Default was in fact part of a fraud orchestrated by the Alleged Principal Conspirators and participated in by the Sixth to Eighth Defendants pursuant to which the proceeds were misappropriated, dissipated and concealed for their benefit, leaving Winsome and Forever Precious unable to meet their obligations to their creditors including the Bullion Banks and the Consortium Banks (the **Alleged Fraud**).

26. The Claimants allege that (contrary to the explanation given by Jatin Mehta and Mr Obidah) what actually happened to the proceeds of the Precious Metals Facilities was as follows:

    i) By means the details of which the Claimants are currently unaware, gold drawn down under the Precious Metals Facilities was dealt with such as to result in Al

Mufied, one of the Layer 1 Companies, receiving a series of payments totalling c. US$ 1.2 billion from a UAE-based refinery called Emirates Gold DMCC (the **Proceeds**).

ii) Between April 2012 and April 2013, c. US$ 875m of the Proceeds was transferred away from Al Mufied via a complex layering process through various bank accounts. The Joint Liquidators' investigations to date show that a material part of the Proceeds as paid to Al Mufied were paid on to entities connected with the Alleged Principal Conspirators (the **Non-Amicorp Proceeds**).

iii) Between July 2012 and March 2014, c. US$ 440m of the Proceeds were transferred from the Layer 1 Companies and laundered through the use of a corporate structure, transaction documentation and corporate services provided by the Amicorp Group (the **Amicorp Proceeds**).

27. According to the Claimants, material features of this laundering process and how it came about include the following:

i) In 2012, Mr Obidah was introduced to the Amicorp Group as a client by Mr Kothari. Following that introduction, at some point in 2012 a meeting took place at a hotel in Dubai with representatives of the Amicorp Group attended by Mr Obidah and Mr Amit Shah (**Mr Shah**), someone who was then or had been a Winsome employee.

ii) During the meeting, Mr Obidah and Mr Shah told representatives of the Amicorp Group that Mr Obidah wished to restructure the balance sheet of his business in the Middle East so that certain assets were taken 'off the books'. Mr Obidah wished to transfer significant funds through companies under the Amicorp Group's control before routing the same to entities beneficially owned by him or third parties. The flow of these funds through the structure was to be entirely pre-ordained but documented as a series of over the counter (**OTC**) derivative transactions, but in circumstances where no genuine OTC derivatives transactions were to take place.

iii) The Amicorp Group was told that instructions would be given to them from time to time by Mr Shah and Mr Kothari on behalf of Mr Obidah using an email address 'comic052013@gmail.com', under the pseudonym 'Stan Laurel'. Instructions were duly given by this means but also by Mr Kothari by telephone or from his personal Gmail address.

iv) The pre-ordained movement of monies through the Amicorp-provided structure (the **Funds Flow Structure**) as ostensibly documented and justified by the (sham) OTC derivative transactions was initiated by two Amicorp Group 'transaction activation forms' for US$ 200m and US$ 1bn with activation dates of 3 July and 30 August 2012 respectively (the **July TAF** and the **August TAF**). The justification stated on these forms for the payments they caused to be made was false.

v) The July TAF and the August TAF named Mr Obidah and certain members of his family as the sole or joint ultimate beneficial owner of the monies which

would be transferring funds into the Funds Flow Structure. As at least one employee of the Amicorp Group in Singapore was aware, however, the "Actual UBO" was Jatin Mehta, a copy of whose passport was on file for KYC purposes.

vi) Although the July TAF and August TAF together suggested that c. US$ 1 billion was to pass through the Funds Flow Structure, only US$ 440m of unique funds – i.e., the Amicorp Proceeds – in fact did so. Those monies were recycled through the Funds Flow Structure so as to make it appear as if this amount of unique funds – i.e., the entirety of the Proceeds – had passed through the Funds Flow Structure, and to purportedly justify such transfers by way of the sham OTC derivative transactions.

vii) The Claimant Companies formed part of the Funds Flow Structure, the Layer 2 Claimant Companies sitting at layer 2 (and thus receiving the Amicorp Proceeds from the Layer 1 Companies) and Docklands sitting at layer 3 (and thus being the entity that received the Amicorp Proceeds from the layer 2 companies and which paid the same on to companies at layer 4).

viii) A total of US$ 932,466,942.36 was transferred by the Layer 2 Claimant Companies to Docklands. A total of US$1.05552 billion was then transferred by Docklands (having received sums from an additional layer 2 company that has been dissolved and cannot now be restored) onwards to companies sitting at layer 4 in the Funds Flow Structure. Those entities included, amongst others, Marengo Investments Limited, a company under the ownership and control of at least some of the Mehta Defendants, and in particular Vishal Mehta.

28. The Joint Liquidators say they do not know the identity of all the recipients of the Proceeds but infer that a substantial majority has been received by or for the benefit of some or all of the Defendants by reason of (i) the Defendants' involvement in the Alleged Fraud; (ii) the fact that the known recipients of the proceeds of the Alleged Fraud include Jatin Mehta, Sonia Mehta, IIA and Polishing; (iii) the connections between other known recipients of the proceeds of the Alleged Fraud and the Defendants; and (iv) the number of intermediaries and the connections between those intermediaries and the Defendants.

29. The Claimants' case is that by participating in the laundering and concealment of the Proceeds pursuant to the Alleged Fraud, the Claimant Companies have become liable to the Consortium Banks, which now have claims against them in respect of their losses. This liability to the Consortium Banks (**the Inbound Claims**) in turn founds the Claimants' claims against the Defendants in these proceedings.

30. The Claimants bring the following claims against the Defendants.

31. As against the Alleged Principal Conspirators only, a claim for breach of fiduciary of duty at CAPOC [124]-[131] on the basis that:

i) the Alleged Principal Conspirators were shadow directors of the Claimant Companies in circumstances where the Amicorp employees and de jure directors of the Claimant Companies were operating, and were accustomed to operate, the same pursuant to instructions given by or for Mr Obidah and/or Jatin Mehta on behalf of all of the Alleged Principal Conspirators; and

ii) the Alleged Principal Conspirators accordingly owed fiduciary duties to the Claimant Companies, which duties they breached in causing or permitting them to make or receive the transfers of the Amicorp Proceeds, which transfers had no proper purpose and which exposed the Claimant Companies to claims from creditors.

32. A claim for a declaration of constructive trust and associated relief at CAPOC [132]-[136] on the basis that:

i) the transfers from the Layer 2 Claimant Companies to Docklands and onwards by Docklands to the Layer 4 companies were made in breach of fiduciary duty; and

ii) it is to be inferred that the funds paid away from the Claimant Companies in breach of duty were ultimately paid out to the Defendants and/or entities connected to them, all of which received the same in knowledge of their origins, as volunteers and for no consideration.

33. A claim in knowing/unconscionable receipt at CAPOC [139]-[140A] on the basis that:

i) it is to be inferred that each of the Defendants and/or entities connected to them received sums belonging in equity to the Claimant Companies but paid away from those companies in breach of fiduciary duty and/or breach of trust, of which origins the recipients were aware; and

ii) in the case of IIA and Polishing specifically, those entities in fact received at least US$ 8.44m and US$ 13.8m respectively.

34. A claim in dishonest assistance at CAPOC [141]-[144] on the basis that:

i) the Defendants assisted in the breaches of fiduciary duty owed to the Claimant Companies by the Alleged Principal Conspirators and their de jure directors by (i) devising and carrying out the Alleged Fraud; (ii) the instructions given by the Alleged Principal Conspirators pursuant to which the transfers were made; and/or (iii) helping to conceal the Amicorp Proceeds; and

ii) the assistance provided was dishonest, the Defendants together being responsible for perpetrating the Alleged Fraud and having knowledge that the monies transferred through the Claimant Companies represented the proceeds of a fraud and that the transfer was a breach of fiduciary duty and a breach of trust.

35. A claim in unlawful means conspiracy at CAPOC [145]-[148] on the basis that:

i) it is to be inferred that the Defendants combined together and/or acted in concert pursuant to an agreement or common understanding with an intention to cause financial loss to the Claimant Companies by the use of unlawful means in circumstances where: (i) Jatin Mehta directed that the Layer 1 Companies be 'on-boarded' by Winsome without any credit assessment or due diligence; (ii) Jatin Mehta and Mr Obidah both gave the same false explanation for the Default; (iii) the Alleged Principal Conspirators engaged the Amicorp Group; (iv) the

instructions were given to the Amicorp Group by the Defendants; and (v) the Defendants received the proceeds of the Alleged Fraud;

ii) pursuant to the conspiracy, the Defendants carried out the Alleged Fraud and directed, procured and/or caused its proceeds to be transferred to and laundered through a web of companies for their ultimate benefit;

iii) the unlawful means used included breach of fiduciary duty, breach of trust, knowing/unconscionable receipt, dishonest assistance, the claims under the Insolvency Act 1986 and/or various criminal offences; and

iv) the conspiracy has caused loss to the Claimant Companies in that they have been exposed to claims from their creditors arising from their participation in the Alleged Fraud and the concealment of its proceeds.

36. As against the Alleged Principal Conspirators only, an application for relief under section 212 of the Insolvency Act 1986 at CAPOC [149]-[150] on the basis that:

i) the Alleged Principal Conspirators were shadow directors of the Claimant Companies and/or persons on whose instructions the de jure and de facto directors were accustomed to act; and

ii) the Alleged Principal Conspirators breached their fiduciary duties as shadow directors, are liable as constructive trustees and knowing recipients, dishonestly assisted in breaches of fiduciary duty owed to the Claimant Companies and/or participated in an unlawful means conspiracy intended to injure the Claimant Companies.

37. As against the Alleged Principal Conspirators only, a claim for relief under section 213 of the Insolvency Act 1986 (fraudulent trading) at CAPOC [151]-[154] on the basis that:

i) the business of the Claimant Companies was carried on with the intent to defraud the creditors of those companies and those of Winsome and Forever Precious and for the fraudulent purpose of laundering and concealing the proceeds of the Alleged Fraud;

ii) the Alleged Principal Conspirators were knowingly party to the fraudulent carrying on of the business of the Claimant Companies; and

iii) the Claimant Companies have suffered loss as a result of such fraudulent trading comprising the liabilities to which they have now been exposed, alternatively the sums which were transferred out of those companies or the unique funds that passed through them.

38. A claim under section 423 of the Insolvency Act 1986 at CAPOC [155]-[157] on the basis that:

i) the transfers of funds made by the Layer 2 Claimant Companies to Docklands, the Layer 3 Claimant Company, and the onwards transfers made by Docklands were made pursuant to sham OTC derivatives documentation and in fact were made for no consideration; and

ii) the intended purpose and effect of the transfers was to put the funds out of reach of the creditors of the Claimant Companies and/or Winsome and Forever Precious and to prejudice the same.

39. A claim for a declaration as to the Claimants' entitlement to a contribution from the Defendants pursuant to section 1(1) of the Civil Liability (Contribution) Act 1978 at CAPOC [158]-[161] on the basis that:

i) the Claimant Companies have incurred liabilities to creditors, have received proofs of debts from creditors, anticipate they will receive further proofs and, in the case of the Third and Fifth Claimants, are subject to a judgment on liability with quantum to be assessed; and

ii) such liabilities and/or such proofs, if determined or adjudicated to be valid, and the judgment relate to the same damage in respect of which the Defendants are also liable to those creditors, such that the Claimant Companies are entitled to a contribution.

40. By CAPOC [163], the Claimants claim damages/equitable compensation from each of the Defendants as follows (in all cases plus interest):

i) a sum to be assessed by reference to the losses sustained by creditors of the Claimant Companies as a result of the Alleged Fraud and to whose claims in respect of which losses the Claimant Companies have been exposed by reason of the Defendants' conduct in causing them to participate in the Alleged Fraud (which claims include but are not limited to the sums passing through the Claimant Companies);

ii) alternatively, the sum of US$ 1.05552 billion (being the sum transferred by Docklands to the Layer 4 companies or otherwise paid away by Docklands and/or representing the liabilities incurred by Docklands to the Consortium Banks and other creditors);

iii) alternatively, US$ 932,366,942.36 (being the sum transferred by the Layer 2 Claimant Companies to Docklands and/or representing the liabilities incurred by the Layer 2 Claimant Companies to the Consortium Banks and other creditors); or

iv) in an amount to be assessed.

41. Further or alternatively, by CAPOC [150], [154] and [164], the Claimants also seek (i) orders for the Defendants to account for all proceeds of the fraud and for their profits; (ii) declarations as to the existence of a constructive trust and orders consequent thereto; (iii) orders pursuant to section 212, 213 and/or 423 of the Insolvency Act 1986; and (iv) a declaration as to the Defendants' contribution liability.

History of the proceedings

42. The ex parte WFOs were granted on 27 May 2022.

43. The Defendants applied on 6 July 2022, challenging the jurisdiction, to discharge the WFOs, and to strike out the claims. At the time the first, second and fourth Defendants

were represented by one firm of solicitors and the third Defendant by another. Nothing turns on this as at the October 2022 hearing each set of Defendants adopted the submissions of the other.

44. The evidence in support of the applications set out (inter alia) brief details of the grounds on which the relevant Defendants said that there was either no GAC and that the case failed to disclose reasonable grounds or should otherwise be dismissed. The grounds advanced for saying there was no GAC and no reasonable case were the same.

45. The time estimate given by the Defendants for the determination of all the applications was just two days, and they were initially listed to be heard on 5-6 October 2022. That time estimate was always going to be far too short.

46. On 18 July 2022 the Claimants applied to relist the Defendants' applications with a time estimate of 5 days. The Defendants opposed this.

47. At a hearing listed for 30 minutes before HHJ Hodge QC (sitting as a Judge of the High Court) on 22 July 2022, the judge directed that the October listing be increased to three days (plus one day of pre-reading) and that, "subject to the final delineation to be made by the Judge hearing the October Hearing", the hearing would not include the jurisdiction challenges or related challenges to the WFO on grounds of non-disclosure or lack of fair presentation regarding jurisdiction. He also directed that the hearing would not include the strike out applications. This was again subject to further decision of the judge at the October hearing.

48. Judge Hodge directed that there be a further two-day hearing (plus one day of pre-reading) in November/December 2022 to deal with all remaining aspects of the Defendants' applications.

49. On 14 September 2022 the Defendants lodged their skeleton arguments for the October Hearing. On 20 September 2022 the Claimants' counsel wrote to the court saying that it was "highly unlikely" that the Court would be able to hear full argument on all the points raised in the Defendants' skeletons in the three days that had been allocated for the hearing. They proposed that the October Hearing be confined to alleged non-disclosures of matters of fact, with the balance of the arguments (including those as to the arguable merits of the claims) being determined at a later date. The Defendants opposed that proposal. On 22 September 2022 their counsel wrote to the Court stating their position that the three-day hearing was sufficient. Edwin Johnson J responded by directing that there should be an extra day of pre-reading and that otherwise the time estimate would be addressed at the hearing.

50. The October Hearing took place before Edwin Johnson J on 6, 7 and 10 October 2022. It addressed the challenges to the WFOs, but not the jurisdiction or strike out applications. For the October 2022 hearing the Defendants served skeleton arguments of (together) 170 pages. The Claimants' skeleton was 157 pages. There was a joint authorities bundle of over 160 cases and more than 4,600 pages.

51. There was some discussion during the hearing about the potential overlap between the merits challenges to the WFOs and the strike out applications (which had been issued but were not formally in play at the hearing). At one point Counsel for the Claimants pressed the Defendants to pursue their strike out applications at the hearing given the

similarity between the strike out test and the good arguable case test. That was resisted by the Defendants who raised concerns about being taken to have submitted to the jurisdiction. Edwin Johnson J observed that it was a matter for the Mehtas whether they moved their strike out applications, and they chose not to do so.

52. At one point Counsel then acting for the Third Defendant accepted that the good arguable case test that applied to the application to discharge the WFOs was "a higher case than the strikeout".

53. In another part of the oral argument Counsel for the Claimants argued that the judge needed only to be satisfied that there was at least one cause of action which met the GAC test and that he did not need to address each and all of the causes of action; and, in the same passage, said that it would be possible for the Defendants to pursue their strike out applications thereafter. These were linked submissions. The judge was not attracted by the submission that the Claimants needed only to establish one cause of action to the necessary standard and said that he would address each claim separately.

54. In the November judgment, which ran to 113 pages, Edwin Johnson J analysed each of the pleaded claims separately and in fine-grained detail. He recited the Defendants' arguments against the claims and concluded that each way the case was advanced (other than the contribution claim where he reached no conclusion) met the GAC standard. He also concluded that there was strong evidence that a major international fraud had taken place (at [265]), and there was a GAC that each of the Mehtas was implicated or involved in the Alleged Fraud (at [302]). The judge said that no evidence from the Mehtas provided a satisfactory or plausible explanation of how the movement of the proceeds of the fraud (i.e., the Funds) was legitimate and he found this unsatisfactory (at [272]-[273]).

55. The judge made some comments in his November judgment about the potential overlap or interplay between the matters he had addressed and those he had not. At [45] he said that it was "sensible" to hive off the strike out applications given time pressure at the October Hearing. He also noted at [49] that there was an "unavoidable overlap" between the discharge applications and the strike out applications. At [54] he said that he was not determining the strike out application, but stated that his decision on GAC "may have a bearing on the issues in the strike out applications and may be said to inform the answers to some of the issues raised by the strike out applications".

56. At [401] he said,

> "I should also make it clear that my reference to the WFO continuing until trial is not intended to pre-judge the outcome of the December Hearing, or the strike out applications, if the latter applications are pursued. If the strike out applications are pursued, it seems to me that it will be a matter for argument, at the hearing of those applications, as to whether and, if so, to what extent my decisions in this judgment impact upon the issues raised by the strike out applications."

57. By para 1 of the March 2023 order the Judge dismissed the Defendants' applications to discharge the WFOs and continued the WFOs until trial.

58. As already noted, before the 8 March hearing the claimants had raised a concern in correspondence that the prosecution of the strike out application might constitute an abuse of process. They sought clarification of which points the Defendants continued to run. The judge acceded to this and by para 4 of the 8 March order he directed the Defendants to identify the points upon which they intend to rely in support of their strike out application.

59. At the hearing on 8 March 2023 the judge said,

> "Someone hears the strike out applications and let us suppose the defendants seek to argue that the proprietary claim should be struck out because there is no hope of them succeeding, or perhaps it might be the subject of a summary judgment and it's said they have no real prospect of success. Any such argument would have to be arranged, would it, in such a way as not to conflict with my decision that there's a good arguable case in relation to the proprietary claims?" and,
>
> "…it does seem to me that if I've decided that there's a good arguable case in a certain respect, then subject to some clever argument I haven't thought of, that ought to be the end of it."

60. The Defendants produced the Strike Out Points documents on 22 March 2023.

61. The Claimants contended that the only points on which the Defendants should be entitled to rely in support of their strike out application are (i) a new limitation point raised in respect of Docklands (who was not party to the October Hearing) and (ii) those relating to their argument that the Claimants' claims are an abuse of process given, at [205] of the November Judgment, Edwin Johnson J directed that "this particular argument will be for the hearing of the Third Defendant's strike out applications and/or, if the argument is said to go to jurisdiction, for the December Hearing".

62. At a hearing of a consolidation application on 21 April 2023 I expressed concerns that the Defendants' attempt to re-litigate the same points as had been unsuccessfully relied upon at the October Hearing (and indeed were subject to an application for permission to appeal) might be abusive. The parties and the court exchanged correspondence with a view to determining whether there was utility in the listing of a preliminary hearing at which directions would be given as to whether the Defendants were entitled to re-litigate points in this way. Ultimately, however, the court concluded that it would not be an efficient or reasonable use of Court resources to seek to accommodate such a hearing in advance of this one.

Abuse of process: principles

63. Lord Diplock gave a high level description of the doctrine of abuse of process in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at p. 536C as,

> "the inherent power which any court must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before

> it, or would bring the administration of justice into disrepute among right-thinking people".

64. *Hunter* was concerned with a collateral attack on a previous decision of the court. The Claimants in civil proceedings alleged that they had been assaulted by the police. The allegations contradicted detailed findings in earlier criminal proceedings. The civil claim was struck out as an abuse of process. Lord Diplock said at 541B-C,

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

65. Lord Bingham described the jurisdiction to control abuse of process in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at p30H-31F:

> "It may very well be, as has been convincingly argued … that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have

> been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not……..While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

66. Abuse of process is obviously not limited to cases of re-litigation. It is a broader principle. But finality in litigation is a significant element of the doctrine for the present case. In *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] 3 WLR 299, Lord Sumption explained at [17] that *res judicata* is a portmanteau term which is used to describe a number of different but related legal principles concerned with finality of litigation. These include cause of action and issue estoppel, the rule in *Henderson v Henderson* and abuse of process.

67. The Court of Appeal has recently discussed the application of the principles of finality in relation to interlocutory hearings in *Koza Limited v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1018. Popplewell LJ (with whom Asplin LJ agreed) said:

> "41. The *Henderson* and *Hunter* principles also apply to interlocutory decisions and applications. In the current case, the Judge said that there was a tension between some of the authorities concerned with interlocutory decisions. He referred to the judgment of Nugee J in *Holyoake v Candy* [2016] EWHC 3065 Ch which is a helpful summary of those cases and what is said to be a difference of approach between them:
>
> > "13. In *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485 ("Chanel"), the plaintiffs, in an action for trade mark infringement and passing-off, obtained ex parte interlocutory injunctions; on the inter partes hearing the defendants felt constrained to give undertakings and by consent the motion was stood over to trial (without being opened or the evidence read) on the defendants giving undertakings "until judgment or further order". The defendants then carried out some research which led them to think they had an argument after all and applied to discharge the undertakings. Foster J refused the application, and the Court of Appeal refused leave to appeal. Buckley LJ held (at 492D) that an order (or undertaking) expressed to be until further order gave a right to the party bound to apply to have the order (or undertaking) discharged if good grounds for doing so are shown. He then said he would assume (without deciding) that the evidence the defendants had uncovered would have enabled them to resist the motion, and continued (at 492H):

"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position."

14. In *Woodhouse v Consignia plc* [2002] EWCA Civ 275, a claimant who had unsuccessfully sought to lift a stay applied to do so a second time, and both the district judge and judge held that he could not have a second bite at the cherry. The Court of Appeal allowed an appeal. Brooke LJ, giving the judgment of the Court, said that there was a public interest in discouraging a party from making a subsequent application for the same relief based on material which was not, but could have been, deployed in the first application; that one of the reasons was the need to protect respondents to successive applications from oppression [55]; but that although the policy that underpins the rule in *Henderson v Henderson* had relevance as regards successive pre-trial applications for the same relief:

"it should be applied less strictly than in relation to a final decision of the court, at any rate where the earlier pre-trial application has been dismissed." [56]

He then gave an example where an application for summary judgment under CPR Pt 24 had been dismissed, but a second application was made based on evidence that, although available at the time of the first application, was not then deployed through incompetence, but which was conclusive; the second application ought to be allowed to proceed [57]. The district judge and judge had therefore been wrong to regard the fact that the second application was a second bite at the cherry as decisive [58], and the Court of Appeal proceeded to consider the second application on its merits, regarding the fact that it was a second bite at the cherry as an important factor [61], but in the event decided that it would be a disproportionate penalty for the claimant to lose his right to damages due to a pardonable mistake by his solicitor, and lifted the stay [63].

15. In *Orb a.r.l. v Ruhan* [2016] EWHC 850 (Comm) Popplewell J had to deal with a number of applications arising out of a freezing order made by Cooke J which had

been obtained by the defendant (Mr Ruhan) against the Claimants (the Orb Parties) [1]-[2]. The order required Mr Ruhan to fortify his cross undertaking in damages by charging certain shares [48]. Mr Ruhan had done so but the Orb Parties sought further fortification on the ground that the shares were inadequate security. Popplewell J dismissed the application for a number of reasons, the first of which was that it was open to the Orb Parties to take the point before Cooke J but they had failed to do so. None of the material relied on had come to their attention subsequently; Cooke J had given them an opportunity to raise any objections to the shares as fortification, but they had not raised the points now sought to be raised, although they were well known to them; there had been no significant or material change of circumstances [81]. Popplewell J continued [82]:

"That is fatal to this ground for discharge: see *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

16. Mr Stewart also referred to a judgment of Etherton C in this action, *Holyoake v Candy* [2016] EWHC 1718 (Ch). The Claimants had initially applied for a notification injunction, making the decision not to apply for a freezing injunction. I granted that application in a modified form. The Claimants then applied for a freezing order after all. It was that application which came before the Chancellor. He dismissed it. The Claimants' counsel, Mr Trace QC, had submitted that all that he needed to show was the usual prerequisites for a freezing order, namely a good arguable case on the merits, a real risk of dissipation and that the balance of convenience favoured the grant of the order [18]. The Chancellor disagreed, saying [21]:

> "I do not agree with Mr Trace's statement of principle. The starting point in such a case as the present is that the Claimants must point to something that has happened since the grant of the original order. They must show something material has changed to make it appropriate to investigate the same issues over again at yet another extensive hearing with even more voluminous evidential material. Absent any such change, the application for a freezing order is not only a disproportionate call on the court's resources, but an abuse of the court's process, in effect making successive applications for the same objective but testing the court's willingness each time to see how far the court will go, each such application involving, to a greater or lesser extent, duplication of issues, evidence and arguments."
>
> He then examined, and rejected, various matters which were said to amount to a sufficiently material change of circumstances.
>
> 17. These authorities are not entirely easy to reconcile with each other. The decisions in *Orb v Ruhan* and *Holyoake v Candy* proceed on the basis that a party who has sought and obtained relief on an interlocutory application cannot return to court and ask to extend (or "upgrade", in the words of the Chancellor) the relief without showing a material change of circumstances. It is easy to see the policy reasons behind such a principle which are well articulated by both judges. *Chanel* indicates that similar considerations apply where a party has submitted to an order, and that the question does not turn on whether the applicant did in fact have the evidence at the earlier hearing but on whether it was reasonably available to him. Yet in *Woodhouse v Consignia* the Court of Appeal held that the rule in *Henderson v Henderson* was not applied so strictly in interlocutory matters, that the judges below had been wrong to dismiss the second application as a second bite at the cherry, and that it did not matter that the evidence deployed had in fact been available to the applicant at the time of the first application, at any rate if the evidence was conclusive."

42. In my judgement the tension is more apparent than real. The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief,

> absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in *Johnson v Gore Wood* that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in *Woodhouse v Consignia* that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paragraphs [30] to [40] above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

68. The categories of abuse are not closed. There may for instance be an abuse of process where the process of the court is being used for an improper purpose or to achieve something not properly available to the claimant in the course of properly conducted proceedings (*JSC VTB Bank v Skurikhin* [2021] 1 WLR 434 (CA) at [54]; *Brandt v Commissioner of Police* [2021] 1 WLR 3125 (PC), at [36]. Ultimately, the crucial question is whether, taking a broad merits-based approach, a party is misusing or abusing the process of the court (*Skurikhin* at [47], [51]).

69. Where a statute requires proceedings to be brought in a particular way (e.g. judicial review) it may be an abuse to bring another type of proceedings (e.g. under CPR 8) to avoid a time-bar: *Carter Commercial Developments v Bedford BC* [2001] EWHC Admin 669, at [26]-[34]).

Strike Out Points (1) to (8): an abuse of process?

70. The Claimants contended that the Defendants should be precluded from pursuing the strike out application in respect of Strike Out Points (1) to (8) because the court has already ruled on the arguability of the claims and this is a second bite of the cherry. The GAC test considered in the November judgment was at least as high as the strike out or summary judgment tests.

71. The Claimants submitted that this was a re-litigation of the same question or point. Indeed the challenge was a collateral attack on the November judgment. The Defendants had not shown a relevant change of circumstances.

72. The Claimants submitted that it matters little whether the case is regarded as one of cause of action estoppel, issue estoppel or a broader principle of abuse, what is clear is that there is an attempt to relitigate issues, points or questions that the court has already decided.

73. The Defendants submitted in summary as follows:

    i) The arguments supporting the striking out or dismissal of the claims are realistic and substantial. If successful they would dispose of the whole action. The burden is on the Claimants to show that the application was an abuse and the court must be satisfied that there is an abuse before depriving the Defendants of the chance to advance their application at the threshold.

    ii) The current application involves a different juridical process from that undertaken in the November judgment. The latter involved the court reaching no more than a provisional view on the arguability of the claims for the purposes of deciding whether to dismiss or continue the WFOs, expressly pending further consideration of the legal merits in the future. The ultimate question at that hearing was whether it was just to maintain the WFOs. The present application requires the court to undertake a different task: i.e. to determine or state the relevant principles of law and decide whether, in the light of that determination or statement, the pleaded case advances a viable claim.

    iii) In the November judgment, Edwin Johnson J did not decide the various legal issues now raised by the current applications. To take some examples: he held that it was not appropriate to enter into a detailed discussion of the legal issues arising in connection with whether the Claimants could establish a proprietary claim to the Funds (November judgment [324]-[326]). Similarly, he made no determination as to whether the Claimant Companies held the Funds on trust for Winsome and Forever Precious ([325]). He also considered that it was not appropriate to go into the detail of the argument as to whether the Defendants were shadow directors ([346]).

    iv) The principles concerning successive interlocutory applications stated by the Court of Appeal are more restricted than the Claimants suggest. The principles exemplified by *Koza* apply only where a party has itself brought successive applications seeking the same relief. This is not such a case. The court has not previously entertained or determined the Defendants' application to strike out or dismiss the claims.

v) Nor is this a case of collateral attack. That principle applies only to final decisions on an issue, not to interlocutory decisions: see Lord Diplock's formulation in *Hunter* cited at [64] above. Moreover it only applies to cases where a party seeks to undermine an earlier final judgment in later proceedings involving different parties: see *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7 at [27].

vi) The relevant procedural history entirely undermines the suggestion that the conduct of the Defendants is abusive. The strike out applications (though issued) were not before the court in October 2022 and the judge made clear in his November judgment that nothing in it was intended to preclude the Defendants from bringing the strike out application later. Moreover Counsel for the Claimants expressly said at the October hearing that the Defendants would be able to bring their strike out applications in the future. In light of that history no fair-minded observer would think that the conduct of the Defendants in pursuing the application would bring the administration of justice into disrepute. The Claimants cannot complain as it was always anticipated that the strike out application could and would be brought on later. That is just what the Defendants have done.

vii) The Defendants did not have sufficient time in October 2022 to advance orally all of their legal arguments and had therefore not had as full a chance to do so as they would now have.

74. The Defendants did not however suggest that there had been any relevant change of circumstances since the November judgment. Nor did they suggest that the arguments now being deployed were substantially different from those advanced (or that they would not have been available to them) in October 2022. Indeed Counsel for the Defendants submitted that nothing had been held back at that hearing to be deployed later.

Discussion and conclusions

75. I have already set out the relevant authorities. These speak for themselves. There were however three issues of principle.

76. The first is that the Claimants argued that it matters little whether the case is regarded as one of cause of action estoppel, issue estoppel or a broader principle of abuse.

77. I do not accept this. While the underlying principles of finality and the proper management of the court's resources are the same there are differences between the various doctrines which together fall under the broad res judicata rubric. It is important to keep these apart analytically even though the same twin private and public interests are in play in each.

78. I do not think that there can be any cause of action or issue estoppel as there has been no final determination of any cause of action or issue. It appears to me instead that the relevant principles are those summarised by Popplewell LJ in *Koza*, derived from *Chanel*, concerning successive interlocutory battles over the same point or question. As *Koza* shows, the principles share the same foundations as other aspects of res judicata: the private interest of the parties in avoiding being repeatedly vexed and the public

interest of the courts in ensuring that their scare resources are used fairly and efficiently in the interests of all litigants, including those not before the court. The court must focus attention on those twin policies and ask itself the crucial question whether, in all the circumstances, the Defendants are misusing or abusing the process of the court by seeking the striking out or dismissal of claims which have already been assessed and judged to be arguable.

79. Second, the Defendants argued that in order for there to be an abuse of process in interlocutory proceedings there must be successive applications by the same party for the same relief. I am unable to accept this:

i) The authorities do not speak that narrowly. As to the nature of the relief being sought in the application, the authorities talk of points, issues, or questions, and not of the precise relief being sought. Nor is there any suggestion in the authorities that the principle applies only where the same application is made more than once. *Henderson* applies in interlocutory proceedings. It speaks of parties seeking to take the same "point" serially. *Chanel* speaks of a party seeking to fight the same "battle" twice.

ii) The answer cannot to my mind depend on which party happens to be the applicant and nor can it depend on the precise relief being sought. The principle arises where in substance the same battle is sought to be fought over again and it does not matter who started the first or second fight.

iii) Indeed in *Chanel* the court held that the defendant, which was applying to discharge an injunction, had had the opportunity to run the same arguments at the inter partes return date and was therefore prevented later applying to discharge the order. At the return date hearing the defendant would have been the respondent to the application. It is indeed commonplace that respondents to injunctions who do not contest the return date are required to show a change of circumstances before being allowed to apply to discharge. There is no requirement that the applicant be the same.

iv) The passage from *Johnson v Gore Wood* set out at [65] above shows that the bringing of the same *defence* in successive proceedings may be an abuse. In other words the abusive party may be the one in the defensive position, and it may not itself be seeking any relief other than the dismissal of the claims against it. I see no reason why the same principle should not apply to respondents in successive interlocutory applications.

v) To my mind the question is whether in substance a party in an interlocutory application is seeking to relitigate the same questions or issues or points as have been decided against it earlier. It is not necessary that the party has brought successive applications seeking the same relief.

vi) On the present facts, the Defendants applied for the dismissal of the WFOs and argued that the Claimants could not show a GAC. They advanced the same arguments as they now seek to advance in making that case. Hence the Defendants were applicants then and applicants now. While the precise relief being sought is (necessarily) different, I do not think that can matter: the same issue or point (the arguability of the claims) is sought to be fought over.

80. Third, the Defendants also submitted that this could not be a case of collateral attack as that applies only where there had been a final decision in separate proceedings. I accept that the issue of whether there has been a collateral attack will often, indeed normally, arise in separate proceedings between different parties. But I do not accept that the principle is so limited. When Popplewell LJ said in *Koza* that the principles in *Hunter* apply to interlocutory proceedings he was, as I read him, referring to collateral attacks (he had just referred to *Hunter* as such a case). The argument in *Koza* was that the same principle could apply where there was a collateral attack on the practical consequences of an order as well as where what was sought was inconsistent with an earlier order. Popplewell LJ did not simply say that the principles of collateral attack had no possible relevance because they did not apply to interlocutory orders between the same parties; he addressed the argument on its merits. Hence in my view the *Hunter* principle can apply where there is a collateral attack on an earlier interlocutory decision in the same proceedings; the test is whether the decision being sought is inconsistent with an earlier one.

81. As to the passage in *Allsop* at [27] I do not read Marcus Smith J (sitting in the Court of Appeal) as saying that a collateral attack can only arise in proceedings between different parties – rather, that was simply the way he stipulated his use of the term in his judgment.

82. In any case for reasons set out below I doubt that labelling of this kind really matters.

83. With these principles in mind, for the reasons which follow, I have concluded that to allow the Defendants to advance Strike Out Points (1) to (8) would be an abuse or misuse of the process of the court.

84. First, the test applied by the court to the arguability of the claims in the November judgment was at least as high as the strike out or summary judgment arguability tests. In *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm), Flaux J held at [145] that there was an "imperceptible" difference between the test applied on the grant of a freezing order (i.e., good arguable case) and that applied on a strike out (i.e., real prospect of success). It appears that Edwin Johnson J applied a rather higher test (see [255] and [256]). But what matters is that he did not apply a lower one.

85. The Defendants did not contend that the test for a strike out was higher than that applied by the judge to determine whether there was a GAC. What they said was that the current application involves a different juridical process from that undertaken in the November judgment. The latter involved the court reaching no more than a provisional view on the arguability of the claims for the purposes of deciding whether to dismiss or continue the WFOs. The present application requires the court to undertake a different task: i.e. to determine or state the relevant principles of law and then decide whether, in the light of that determination or statement, the pleaded case advances a viable claim.

86. I am unable to accept this point. A claimant for a freezing order must establish a GAC. That entails (at least) showing that the pleaded case has reasonable grounds and reasonable prospects of success, in accordance with the facts and relevant principles of law. If the case does not pass that merits threshold no order will be made. The claimant for a freezing order has to establish other things, including a risk of dissipation and ultimately that it is just and reasonable to make the order. But the existence of those additional requirements does not mean that, in relation to the merits threshold, a

materially different process is being conducted from that conducted on a strike out or summary dismissal application.

87. The Defendants submitted that in the case of a strike out application the court has first to come to a clear statement of the relevant legal principles and then assess whether the pleaded case matches up to them. That may be one course. But there are many cases where the court concludes that there are legal issues which are difficult or uncertain, or would be better determined in the light of the full context of the found facts rather than on the basis of the (necessarily skeletal, abstracted) version of the facts in the pleading. More generally the court does not generally declare the current state of the law and then measure the pleading against it. It carries out a unitary exercise of deciding whether there is a realistically sustainable case which should be allowed to proceed to trial.

88. At any rate, even if one could imagine cases where it might be possible to discern a materially different approach I do not think that there is a discernible difference between the process carried out by Edwin Johnson J in the November judgment and that proposed by the Defendants in the current application. Edwin Johnson J was invited to and did carry out a granular analysis of each of the relevant pleaded causes of action, by reference to extensive argument about the relevant law. I am unable to discern any difference between the "juridical process" in fact carried out by Edwin Johnson J and the one the Defendants ask the court to undertake in their Strike Out Points.

89. Indeed if there is a discernible difference between that process and the one the court goes through to decide whether there is a GAC, it seems to me that the latter test is more exacting because of the adverse consequences on a defendant who is being enjoined from dealing with its assets before trial.

90. I do not accept that in the November judgment the judge declined to decide various legal issues of a kind that would fall to be decided under the current applications. This again seems to me to involve a mischaracterisation of strike out applications. The court may decide short points of law, at least where there is no real uncertainty about them and they can safely be determined without a full appreciation of the facts. But the court is not bound to decide legal issues on summary applications in complex cases, particularly where the points are difficult or the law is uncertain.

91. It seems to me that the approach of the court to points of law in strike out applications runs hand in hand with the approach it takes in freezing orders: if there is a short, dispositive point of law it will strike out the claim or refuse the injunction. But otherwise the court may (under either juridical exercise) decline to decide the point on the basis that it is too involved and is unsuitable for summary determination.

92. Edwin Johnson J did not duck the question whether the claims met the GAC test; he decided in each case that they did. Having reached that conclusion he wisely declined going into further detail about the merits of the claims – as to do so could embarrass the trial judge. A similar approach is often taken by judges on strike out applications once they have concluded that the claim is not obviously unsustainable.

93. As to the examples specifically relied on by the Defendants, Edwin Johnson J carefully examined the legal and factual submissions arising in connection with whether the Claimants could establish a proprietary claim to the Funds ([324]-[326]). He concluded that the arguments raised difficult questions of law unsuitable for summary

determination. It appears to me that the court on a strike out could properly reach just the same conclusion without "deciding the legal issues" (which are indeed complex and involved).

94. Another example is the question whether these Defendants were shadow directors (at [346]). The reasoning of the judge on this issue is just the kind of approach that a judge deciding a strike out application would take. He asked whether there was a properly sustainable case on the pleadings and the evidence and concluded that there was.

95. I am unable to accept the Defendants' contention that in strike out or summary applications the court is compelled to decide the legal issues chosen by the applicant; what the court is actually deciding is whether to prevent the claimant from taking its case to trial and it will do so if the case is not reasonably viable.

96. Second, the Defendants had a full opportunity to advance their arguments at the October 2022 hearing, and in fact did so. The October hearing took five days, including two days of judicial pre-reading. The parties' skeleton arguments were very long and detailed and there were over 160 authorities. The judge considered every point separately and gave a careful and comprehensive ruling addressing each of the points. If the Defendants ran out of time to make all of their arguments orally that was the result of their opposition to the Claimants' contention that more time was needed for the hearing. In any case they made their principal arguments orally and invited the court to consider and determine all of the remaining points in their skeleton argument.

97. What is now suggested is a further six day hearing (including two pre-reading days) covering the same arguments. The skeleton argument covering the relevant Strike Out Points covers many pages and refers to a plethora of authorities. Though there may be some differences of nuance, the challenges to the claim are substantially the same.

98. In the event this hearing occupied three full days dealing with just the Claimants' abuse argument and Strike Out Points 10 (abuse) and (9) (contribution). That experience left me in no doubt that there would not have been enough time to hear the substantive arguments about Strike Out Points (1) to (8) in a four day hearing. I would be surprised if all the issues could have been dealt with in less than six or seven days plus two days pre-reading.

99. Third, the arguments now sought to be advanced are substantially the same as those that were run in October 2022 in relation to GAC. The point is well illustrated by comparing the arguments in the Defendants' skeleton argument for this hearing and the Defendants' application for permission to appeal to the Court of Appeal. The Claimants have tabulated the arguments and demonstrated that they substantially overlap. The Defendants did not suggest otherwise: counsel accepted, in his words, that there was no treasure that had been held back. This was consistent with the evidence of Ms Hinds in support of the application – each relevant paragraph said that there was no reasonable ground for alleging (let alone a good arguable case) in the relevant respect.

Looked at in terms of the private interests of the parties, it seems to me that the Defendants are seeking to require the Claimants to re-litigate points already determined. That involves duplication of costs and work. The existence of the strike out application (and the need to fix a long hearing) has also held up the progress of the action. Looked at in terms of the public interests of the court in the deployment of its scarce resources,

the Defendants are asking the court to deploy very significant time to rehear points the court has already considered and adjudicated (and which the Defendants are seeking to appeal to the Court of Appeal). The Defendants have not however relied on or shown any relevant change of circumstances.

100. Fourth, I do not accept that the procedural history amounts to the court giving the Defendants the suggested permission to re-fight the same battles as were had and determined by the court in the November judgment.

101. The arguments falls into three parts. The Defendants are correct to say that the strike out applications were not formally moved at the October hearing. But that is irrelevant. The earlier case management orders determined the agenda for the October hearing but they did not say that it would be open to the Defendants to seek to relitigate points determined at that hearing if that would otherwise be abusive. I have no doubt that had the Defendants sought to contend that it would be open to them to have two bites of the same cherry the court would have demurred.

102. The second part of the argument arises from what was said at the October 2022 hearing. The Defendants particularly relied on a passage where Counsel for the Claimants said that the Defendants would be able to run their strike out arguments in the future. But that was said in the context of a submission, which the judge rejected, that the court need only consider whether at least one of the claims amounted to a GAC. The judge indicated that he would not take that course and that it would be necessary to consider each of the causes of action separately. In any case Counsel for the Claimants never accepted that it would be open to the Defendants to re-litigate arguments which had been or could have been advanced by them in relation to the merits hurdle. Moreover there were other passages in the transcripts which tend the other way, including the acceptance by one of the Counsel for the Defendants that the test for a GAC was higher than that for striking out. Overall I do not think that anything said in the course of the hearing could have created an understanding on the part of the Claimants or the Court that the Defendants would be at liberty to return to the fray over points they had argued but lost at the October hearing.

103. The third part of the argument arises from the terms of the November judgment. The Defendants contended that the judge expressly permitted them to pursue the strike out applications. I am unable to accept this argument. On a fair reading of the whole judgment, it seems to me clear that the judge was making two points. First, that the strike out applications were not strictly before the court and that he was not adjudicating on them as such. It followed that the judgment did not, as such, automatically preclude the Defendants moving those applications at a later date. However, secondly, any court considering the strike out applications would have to consider the impact of the particular rulings contained in the judgment in relation to the issues raised by the applications. That is entirely understandable: the judge had a mass of issues to determine and the strike out applications, though issued, were not strictly before him.

104. Counsel for the Defendants did not suggest in the course of the October 2022 hearing that it would be open to them, if their arguments failed at that stage, to re-run substantially the same arguments through the strike out application without showing a relevant change of circumstances or other justification. Had it been suggested that they would have carte blanche to have another go I have no doubt that the Claimants would

have objected and that the judge would have cavilled at the suggestion. I think it inconceivable that he would have given his blessing to a complete second performance.

105. This reading of the judgment is supported by the events of the 8 March 2023 consequentials hearing. The Claimants raised their concern that the Defendants were seeking to relitigate the same issues and invited the court to order the Defendants to serve a list of Strike Out Points, which would assist to identify the extent of any overlap. The judge made that order. There would have been no basis for that if the court and the parties had understood that the Defendants were at liberty to have another go at running the same points. In the passages I have set out in [59] above the judge was surprised at the idea that the Defendants would have an entirely free run at the strike out applications irrespective of the conclusions he had reached on the GAC. The Defendants did not suggest at that stage that it had already been decided that they would be able to re-argue the arguability of each of the claims despite having lost the battle at the October hearing. It seems to me clear that the judge understood his comments in the judgment in the sense I have set out above.

106. For these reasons I reject the Defendants' argument that, in light of the procedural history, they were at liberty to move the application without showing a change of circumstances or other similar justification.

107. Fifth, standing back the submission of the Defendants on this point amounts to saying that the court should now entertain the strike out application while ignoring the November judgment altogether. The skeleton argument of the Defendants does not grapple with the November judgment or explain why the judge was wrong in reaching the conclusions he did about the GAC. On the Defendants' case is it essentially to be consigned to a historical moment in the case. Its only relevance, on this view, is that as a matter of fact the court continued the WFOs. That cannot be a proper approach to the court's rulings, or to the administration of justice.

108. Sixth, it appears to me that, considered realistically, the relevant parts of the strike out application do indeed amount to a collateral attack on the decisions contained in the November judgment. A judge has carefully considered and determined the arguability of the case – and decided it against the Defendants. It seems to me that the application to strike out is a collateral attack on the November judgment. In that judgment Edwin Johnson J held that the claims were arguable to the GAC standard. That decision entailed the proposition that there were reasonable grounds for the claims. What is now sought is a determination that there are no reasonable grounds for the claims. That is asking for an inconsistent outcome and is therefore a collateral attack.

109. Indeed it may be that the metaphor of collateral attack – which suggests some kind of a flanking manoeuvre – is inapt to describe what is actually a face-on, frontal, challenge. It appears to me impermissible for a party to ask one judge (me) to decide that what another judge (Edwin Johnson J) has decided about arguability of the claims is wrong, absent some material change in the circumstances. Hence the label probably does not matter anyway.

110. For these reasons I have concluded that the Defendants are precluded by the abuse of process doctrine from moving the strike out application in respect Strike Out Points (1) to (8).

Are these issues suitable for summary determination in any case?

111. The court also invited submissions from the parties about whether these issues were suitable for summary determination in any event. The Claimants relied on the case of *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368, 435 (Lord Templeman) and 441 (Lord Mackay), which shows that it can be inappropriate to embark upon prolonged argument on strike out unless the Court not only harbours doubt about the soundness of the pleading but also is satisfied that strike out would obviate the need for a trial or would substantially cut down or simplify trial to make proceeding with that prolonged argument worthwhile.

112. It seems to me that the idea of the judge harbouring doubts about the pleading can also be expressed as the judge at an early stage in the hearing of the application having real doubts as to whether the proceedings are obviously unsustainable.

113. It is often hard for a court to reach a view on this question without hearing full argument, by which stage it is often too late. In the present case I had two advantages. The first was that I had two days of pre-reading. The skeletons were each about 50 pages. The parties referred to a great many authorities running to thousands of pages. The second was that I had the benefit of reading in detail the long and fine-grained November judgment of Edwin Johnson J which contains a full recital of the issues and arguments.

114. There is no question that a full hearing of Strike Out Points (1) to (8) would have been prolonged. As already explained I have no doubt that if the full hearing had proceeded it would have taken significantly longer than the six days (including reading time) for which it was listed.

115. As to the general approach to strike out applications, the parties agreed that the court may strike out a statement of case, or part of a statement of case, pursuant to CPR r.3.4(2)(a) on the grounds that it "discloses no reasonable grounds for bringing the...claim". An application under CPR r.3.4(2)(a) calls for analysis of the statement of case, without reference to evidence. The primary facts alleged are assumed to be true. The test was summarised in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 at [22]-[23].

116. The parties also agreed that if the court has all the necessary materials to decide a point of law it may decide to grasp the nettle and do so. However there was a dispute about whether this is the right case to do so (see more about this below).

117. The parties also agreed that the principles concerning summary determination under Pt. 24 were summarised in *Easyair Ltd v Opal Telecom* [2009] EWHC 339 (Ch) at [15]. There was no suggestion that similar principles may not be equally applicable to strike out applications at least where the contention of the applicant for reverse summary judgment is that the case as pleaded discloses no reasonable grounds. In sub-paragraphs (vi) and (vii) Lewison J said:

> "vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where

> there is no obvious conflict of fact at the time of the application, where 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: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it 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: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

118. Lewison J said at (vii) that it may be appropriate for the court to decide a "short" point of law or construction. The court is unlikely to take the view that it is appropriate to decide difficult points of law where the law is uncertain or developing and where the issue would be better decided on the actual facts (see the earlier discussion in [8787] above).

119. There is another consideration expressed in the judgment of Mummery LJ in the *Doncaster* case referred to by Lewison J in sub-paragraph (vi). At [6] and [7] he said that,

> "there can be more difficulties in applying the "no real prospect of success" test on an application for summary judgment (or on an application for permission to appeal, where a similar test is applicable) than in trying the case in its entirety (or, in the case of an appeal, hearing the substantive appeal). The decision-maker at trial will usually have a better grasp of the case as a whole, because of the added benefits of hearing the evidence tested, of receiving more developed submissions and of having more time in which to digest and reflect on the materials."

120. It appears to me that this wise guidance may apply to legal questions as well as factual ones. In large and difficult cases the court is more likely to be able to get to the right

answer in the light of the facts as found and after prolonged immersion in the case in the way that can only be achieved at a trial.

121. To these issues I add the consideration that it may well not be appropriate to entertain a strike out or summary judgment application on a particular issue where the case will anyway have to go to trial.

122. Had I not decided that the relevant parts of the strike out application constituted an abuse of process, I would have decided that it should have been stopped in its tracks under the guidance of *Williams & Humbert*, for these reasons.

123. First, it is clear that the application would have involved prolonged argument. While the Defendants were right to observe that if the case were struck out it would save a trial of some months, it remains the case that the present application would have occupied the court for many hearing days and a multiple of that in judgment writing.

124. Second, the issues raised by the strike out applications are difficult and involved. Contrary to the Defendants' submissions their arguments do not raise self-contained issues which can easily be isolated and decided. As already stated, in some cases it is very hard to address a *Williams & Humbert* argument without hearing the whole application, by when it is too late. Here the court has the great advantage of having access to the very long November judgment, which meticulously summarises the principal issues and submissions, as well as the parties' skeleton arguments. This is therefore one of those perhaps unusual cases where the court is in an excellent position fairly to reach a conclusion on the *Williams & Humbert* point without hearing the full argument first.

125. Third, it appears to me that this is an archetypal case where the court should exercise restraint before launching into deciding the difficult issues of law. It appears to me (based on the November judgment and the skeleton arguments for this hearing) that the issues raised are either fact sensitive (were the Defendants shadow directors? did the Claimant Companies have the necessary intention to defraud under s.213? was there the necessary purpose to satisfy the requirements of s.423?); or uncertain and in an area of development (can a party who has received monies subject to a constructive trust claim itself bring claims against a third party transferee of the monies; and are those claims proprietary in nature?). A careful reading of the November judgment shows that these are difficult points which are simply unsuitable for summary determination.

126. Fourth, the court may well decline to entertain a strike out application where the case will go to trial anyway; where it will not be dispositive. It follows that the Defendants would have to succeed on all on their strike out points. Given what I have said above about the unsuitability of at least some if not all of the points for summary determination, the order that the Defendants have set for themselves is an extremely tall one.

127. The court is (perhaps unusually) in a secure position to reach a reliable view on the prospects of the case being struck out; or to paraphrase the words of *Williams & Humbert* to decide whether it harbours doubts about the prospects of the pleaded case surviving the application. Having carefully considered the November judgment and the skeleton arguments I do not harbour realistic doubts about the prospects of the case being allowed to go to trial on at least some of the claims.

128. In short, for these reasons too, I would have dismissed the application in respect of Strike Out Points (1) to (8) at the threshold.

Strike out point (9): Contribution

129. Edwin Johnson J decided in the November judgment that he did not have to determine the viability of the Contribution Act claims. The claim is made under the Civil Liability (Contribution Act) 1978. The Claimants seek a declaration that they are entitled to contribution.

130. The Defendants argued in their skeleton argument that the claim should be struck out for two reasons. First, the liquidators only expect to receive claims from the Consortium Banks after they have recovered from the Defendants, so that on their own case they have no existing liabilities to the Consortium Banks. A declaration would therefore serve no useful purpose and would necessarily be refused. Second, the Claimants would have to establish (i) that the Claimant Companies were liable to the Consortium Banks and (ii) that each of Defendants was liable to the Consortium Banks. The Defendants submitted that the Claimants cannot overcome (i) for the reasons set out in connection with Strike Out Point (4) (namely that there were no incoming claims). There is a bare assertion in CAPOC paragraph 159 that the Defendants are liable to the Consortium Banks, but no basis for that liability is pleaded and no particulars in support of the assertion are given. Such a bare assertion is not sufficient.

131. At the hearing the Defendants accepted that the two arguments of substance were not available to them in the light of the court's ruling about the effect of the November judgment on the other strike out points. However the Defendants maintained that the pleading was inadequate in that it consists of a bare assertion with no particulars. In particular no particulars are given of the liability of the Defendants to the Consortium Banks. The Defendants relied on *AXA France v Santander* [2022] EWHC 1776 (Comm) at [78] for a statement of the elements that have to be pleaded.

132. I consider that, once the other arguments fall away, this is ultimately a complaint about particularisation. It is correct that the Claimants have not specifically identified the basis of the alleged liability of the Defendants to the Consortium Banks or its extent. However I do not consider that this is a case of a bare assertion. The CAPOC must be read as a whole. It appears to me that the CAPOC contains an intelligible basis for asserting that the Defendants are liable to the Consortium Banks. The pleaded case is that the purpose and effect of the Alleged Fraud was to remove assets that would otherwise be available to meet the claims of the Consortium Banks and that this was done to enrich the Defendants. Equally, as has been found by Edwin Johnson J there is a viable case that the Claimants are liable to the Consortium Banks. It is correct that the pleading does not provide particulars. However the case is at a very early stage – the Defendants have not yet served defences – and I do not consider that there is any difficulty in understanding this part of the case. It was not suggested that they were unable to plead. The Defendants can seek further particulars and the court will consider any such request at the appropriate time.

133. I also take account of the fact that this claim is only one of a large number and that, on the basis of the rulings set out above, the case is going to proceed anyway.

The Defendants' case that the Claimants' proceedings are an abuse of process

134. This was articulated in the Strike Out Points served by the First, Second and Fourth Defendants as follows:

> "(10) The steps taken to enable the HCTC Proceedings and the Docklands Proceedings to be brought (including the restoration of those of the Claimant Companies that had been dissolved, the use of proofs of debt submitted by SCB/SCB India to justify putting the Claimant Companies into CVL, and the appointment of the Seventh and Eighth Claimants as liquidators) amount to an abuse of the corporate insolvency regime, and the HCTC Proceedings and the Docklands Proceedings amount to an abuse of the process of the court, such that they should be struck out.
>
> In this regard, the Three Defendants will rely in particular on:
>
> (a) a contention that the steps taken are a device to enable the bringing of claims for the benefit of SCB/SCB India which for reasons of affirmation/election and limitation SCB/SCB India would not be able to bring themselves;
>
> (b) point (2) above, concerning the Claimant Companies having been, on their own factual case, trustees of the Relevant Monies for Winsome and Forever Precious;
>
> (c) a contention that the steps taken by the Claimants wrongly seek to ignore and bypass the Indian liquidations of Winsome and Forever Precious and the rights and interests of the creditors of those companies;
>
> (d) a contention that on the Claimants' own factual case their funding arrangements are in breach of trust;
>
> (e) point (4) above, concerning the Claimant Companies having suffered no loss and consequently not being insolvent;
>
> (f) a contention that the Seventh and Eighth Claimants are, as liquidators, severely conflicted and that the Claimants' procedural scheme relies upon those conflicted liquidators making decisions which independent liquidators would not make;
>
> (g) a contention that the Seventh and Eighth Claimants have already in fact made such decisions;
>
> (h) a contention that the procedural scheme which has been adopted is unjust and unfair to the Defendants in that it affords them no or no adequate opportunity to challenge the key propositions on the basis of which they are being subjected to these proceedings, including the propositions that it was appropriate to restore those of the Claimant Companies which had been dissolved to the register, and that it was appropriate to

> put the Claimant Companies into CVL with the Seventh and Eighth Claimants as liquidators, and that it is appropriate for the said liquidators to proceed on the basis that the putative claims against the Claimant Companies are good claims generating a recoverable loss; and
>
> (i) a contention that the procedural scheme which has been adopted artificially inflates the quantum of the claims against the Defendants so that, even though the only active underlying claimant (SCB/SCB India) ostensibly has a claim for some £50 million, the Defendants are facing claims for more than ten times as much."

135. The Defendants accepted, in light of the court's ruling that Strike Out Points (1) to (8) could not properly be advanced at this hearing, that sub-points (10) (a), (b) and (e) cannot be relied on as part of their abuse of process argument. I shall disregard them.

136. As well as relying on the principles about abuse of process referred to earlier in this judgment the Defendants relied on certain principles of English insolvency law. These were not contested by the Claimants (though their relevance was):

i) The principal purpose of English liquidation is to deal with the company's assets and liabilities by collecting the company's assets, establishing the company's liabilities and making a rateable distribution to the creditors (in the case of an insolvent liquidation) or to the members (in the case of a solvent liquidation). The functions of a liquidator are to ensure that the assets of the company are got in, realised and distributed to the company's creditors (and, if there is a surplus, to the persons entitled to it) (s. 143(1) of the Insolvency Act 1986).

ii) Winding up is a collective process. Creditors' individual rights are surrendered in exchange for a right to share in the assets of the company. This is done so that there is an orderly winding-up process and the creditors will be paid *pari passu* (McPherson's Law of Company Liquidation, 5th edition, at 7-001).

iii) While the property of a company is broadly defined, and includes rights of action for compensation or damages, it only extends to assets in which the company has a beneficial interest. A liquidator has no right to assets held by the company in trust for others and trust assets do not form part of the insolvency estate (McPherson at 9-069). Similarly, a liquidator cannot take remuneration from assets held by the company on trust (unless the court, on the liquidator's application, authorises an equitable allowance) (McPherson at 8-072).

iv) A voluntary liquidation is to be conducted as a members' voluntary liquidation unless the company is unable to pay its debts (ss. 90 and 95(1) of the 1986 Act). A key practical difference between MVL and CVL is that in CVL the persons recognised as creditors may nominate a person to be liquidator (ss. 95(4B) and 96(3) of the 1986 Act).

v) The following instances of abuse of process or improper procedural conduct have been recognised specifically in the context of insolvency and winding up:

a) It is an abuse of process for a creditor of a company to invoke a collective insolvency process, not for the benefit of the class of creditors, but in order to obtain some private advantage not shared by the creditor group as a whole.

b) It is an abuse of process for a person who claims to be a creditor of a company but who has no real debt or whose alleged debt is disputed on substantial grounds to petition for the winding up of the company.

c) It is abusive or otherwise impermissible for a person who is a claimant in substantive litigation to seek to wind up another party to the dispute for the purpose of installing a conflicted liquidator who would be under a duty to the claimant to, or would otherwise be likely to, conduct the substantive litigation in a manner favourable to the claimant (*Re Wallace Smith & Co Ltd* [1992] BCLC 970 at 986 to 988).

d) Where a person claiming to be a creditor of a company has participated in an insolvency proceeding in respect of that company in one country (including by lodging a proof of debt), it is inimical to the proper winding up process for that person to seek or to enforce an attachment order in its own favour from a foreign court which would result in his enjoying prior access to any part of the company's estate (*Stichting Shell Pensioenfonds v Krys* [2015] AC 616 (PC) at [28]-[32] and [39]-[40]). In that case the liquidators successfully applied in the courts of the liquidation of a company for an injunction restraining a foreign creditor who had participated in the liquidation from enforcing a garnishment order made by a foreign court over assets of the company.

137. The Defendants based their abuse arguments on the sequence of events recited below. They described these as facts, but some of them are contested. At any rate they formed the substratum of the arguments and I shall take them as sufficiently well-grounded for the purposes of addressing the merits of the abuse case (ignoring the more tendentious phrasing).

138. After the occurrence of the Defaults under the facilities in March 2013, there are some indications that SCB/SCB India considered that there may have been fraud and by September 2013 they informed the other Consortium Banks of their concerns.

139. SCB India and the other Consortium Banks then took civil proceedings against Winsome and Forever Previous relying on the relevant contracts and against the First Defendant as guarantor. They obtained judgments, made some recoveries from Winsome and Forever Precious and also brought garnishee proceedings.

140. Specifically, since 2015 the Consortium Banks have pursued civil claims and criminal complaints in India in respect of the Winsome Default, including these:

i) On 2 June 2014 the Consortium Banks issued contractual claims in debt in the Debts Recovery Tribunal (the **DRT**) in respect of Winsome's liabilities under the Working Capital Facilities. The defendants were the First Defendant as guarantor, Winsome as principal borrower and a number of other group companies as guarantors. The claims were granted pursuant to a judgment of the

DRT handed down on 9 December 2016. Pursuant to that order, interim certificates (called Recovery Certificates) were issued permitting recovery of the contractual debt owed by Winsome together with interest, costs and charges.

ii) As part of the same proceedings, in late 2014 SCB India filed an application for garnishee orders and the attachment of debts, including in respect of debts payable by UAE companies (being the Layer One Companies in an alleged money laundering scheme relied upon by Claimants) to Winsome. All 13 UAE companies were joined as respondents to the application in their capacity as debtors of, and/or buyers of jewellery from, Winsome.

iii) On 8 May 2014 the relevant Consortium Banks filed contractual claims in the DRT in relation to liabilities owed by Forever Precious under the Working Capital Facilities. The defendants to that application were Forever Precious as principal borrower, the First Defendant in his capacity as guarantor, Winsome, and the UAE companies which had had dealings with Forever Precious. By a judgment dated 9 December 2016 the DRT granted the application made by the Consortium Banks to enforce their contractual loans.

141. In November 2017 an operational creditor of Winsome issued an application in India which led to the commencement of a Corporate Insolvency Resolution Process (which appears to be an insolvency process under Indian law short of liquidation). SCB and the other Consortium Banks formed a Committee of Creditors of Winsome. In August 2018, the Committee of Creditors directed the resolution professional to apply to court for the liquidation of Winsome. SCB proposed that the person nominated to act as liquidator should be Amit Gupta, and the other Consortium Banks agreed. This appears to have been opposed by an association of shareholders, the Winsome Investor Welfare Association (**WIWA**). That association objected to the resolution professional's application for liquidation but that happened ultimately, on 1 September 2020.

142. After Winsome went into liquidation, SCB India submitted a proof of debt. It appears that the other Consortium Banks did likewise. SCB India's proof was admitted by the liquidator of Winsome. By March 2022 SCB India had received a dividend in the liquidation in an amount of US$ 850,000.

143. From about 2019 onwards SCB entered into discussions with Grant Thornton about the possibility of also taking other steps in respect of its losses.

144. Those discussions led to what has been called **the Grant Thornton Scheme**. This was addressed in the November judgment at [77]ff. At [78] Edwin Johnson J described the Defendants' contentions as follows:

> "The Respondents say that from around 2019, or possibly earlier, SCB instructed Grant Thornton to explore claims on SCB's behalf outside India, with a view to recovering what had been lost as a result of the Defaults and the calls on the SBLCs. What is said to have happened is that SCB and Grant Thornton entered into a collaboration agreement and a litigation funding agreement, pursuant to which, by a series of pre-planned steps, the Claims could be made. The pre-planned steps are said to have involved SCB restoring the Claimant Companies to the register,

> so far as the same had been dissolved, appointing Grant Thornton (in the person of the Liquidators), and making claims and presenting proofs in the liquidations of the Claimant Companies. For its part Grant Thornton would procure litigation funding through an associated company, in return for a share of the recoveries from the Claims, and would pursue the Claims by litigation."

145. The details are set out in [79]-[82]. It is not necessary to set it out again. (I am not sure that I would have adopted the term "Grant Thornton Scheme" as it is possibly tendentious, but since it has been used by the parties and the judge in the November judgment I will carry on using it.)

146. The Defendants submitted that Grant Thornton's motivation under the Grant Thornton Scheme was to secure commercial and financial benefit for Grant Thornton, including through their litigation funding vehicle.

147. The Defendants contend that Grant Thornton originally advised SCB that steps could be taken directly by the Consortium Banks for which purpose Grant Thornton then sought the approval of all the banks. This was described as Plan A. Bank approval was not forthcoming.

148. Grant Thornton then moved on to Plan B. This involved bringing some of the Claimant Companies out of dissolution and placing them back into liquidation; and putting the other Claimant Companies into liquidation. More details are given below.

149. It also involved the provision of funding by a Grant Thornton-owned asset recovery fund. It appears from Companies House filings that, having been appointed as joint liquidators for the Claimant Companies, C7 and C8 caused them to (purportedly) charge their assets, including causes of action, in favour of ARF SV 1 SARL, the Grant Thornton litigation funding vehicle.

150. Grant Thornton have refused to disclose the percentage interest of the funders in any proceeds of the litigation. Mr Travers of Jones Day, then acting for some of the Defendants, speculated that the percentage could be 50%. This has not been contradicted or responded to by the Claimants (November judgment [84]).

151. I comment here that the Defendants have not established any entitlement to disclosure of the percentage and Mr Travers' speculation (even if uncontradicted) carries little weight. However I shall proceed on the basis that under the funding arrangements the funding vehicle would be entitled to a share of the proceeds of the litigation.

152. The Defendants say that the Grant Thornton Scheme was implemented in four steps, namely (i) the restoration of those of the Claimant Companies which had been dissolved (i.e. all of them except C3 and C5), (ii) the conversion of the MVLs in respect of the Claimant Companies to CVLs, with C7 and C8 being appointed liquidators, (iii) C7 and C8 considering the merits and quantum of putative claims by the Consortium Banks against the Claimant Companies (i.e. the Inbound Claims), and (iv) C7 and C8 causing the present proceedings to be brought.

153. The Inbound Claims are significant because a number of the claims brought in these proceedings depend on the Claimants establishing that they have suffered a loss by reason of the acts of the Defendants. The Claimants say (in broad terms) that the Defendants caused the Claimant Companies to be part of a money laundering fraud, which had the effect (and intent and purpose) of removing assets from the grasp of the Consortium Banks. Those banks have therefore suffered losses, for which the Claimants are liable. The Claimants claim (among other things) an indemnity against the Defendants for those liabilities. The amounts of the Inbound Claims are therefore crucial to such claims.

154. As to the steps set out in [152] above, (i) and (ii) depended on decisions being made respectively by the court and by MVL liquidators of the Claimant Companies. The restorations in step (i) were ordered by HHJ Hodge QC and HHJ Pearce (as regards the ninth Claimant). The applicant, SCB, accepted that it had duties of full and frank disclosure.

155. As to step (ii), some of the companies had been in MVL before their dissolution. They were therefore restored to MVL. The liquidators who were appointed (Peter Hart and James Sleight) formed the opinion that the companies of which they were liquidators were unable to pay their debts. Under ss. 95 and 96 of the 1986 Act, this resulted in the MVLs being converted to CVLs. The creditors, which may simply have been SCB as the active one, then appointed the seventh and eighth Claimants as liquidators.

156. The Defendants complain that the Claimants have disclosed none of the materials on which the MVL liquidators determined whether the companies were unable to pay their debts. The Defendants submitted that "it appears clear, however, that the process of converting the MVLs to CVLs was devoid of substance and a fait accompli."

157. I make two comments at this stage. The Defendants have advanced no basis for any entitlement to disclosure of this information; and no evidential basis has been given for the suggestion that Mr Hart and Mr Sleight did not properly carry out their duties under the 1986 Act.

158. Some of the Claimants, namely the third and fifth Claimants, were not dissolved. On 5 August 2020, SCB issued proceedings against them in the English High Court. On 26 October 2020, the shareholders of the third and fifth Claimants resolved that those companies be wound up voluntarily and MVL liquidators were appointed (Shane Biddlecombe and Gordon Johnston). The director of those companies made statutory declarations that C3 and C5 were solvent with asset surpluses of £21,792 and £15,378 respectively. However, these assets were plainly not enough to enable the proceedings brought by SCB to be defended and on 16 January 2021 SCB obtained default judgment by request for an amount to be decided. This led to the two companies going into CVL.

159. The Defendants again complain that the Claimants have provided no information about what materials were provided to the MVL liquidators to enable them to determine whether the companies were unable to pay their debts. They have advanced no basis for saying that the Claimants were required to disclose this information.

160. The Defendants complain that the seventh and eighth Claimants (i.e. the liquidators) have simply taken a position concerning the Inbound Claims which has been influenced by their interest in inflating the claims. In particular they have signed statements of truth

valuing the claims at circa US$1 billion, and have obtained a WFO, on the basis that the Claimant Companies are liable to the Consortium Banks for this amount.

161. The Defendants say that this is not justified as the "only genuine proofs of debt received in respect of the Claimant Companies are those of SCB, and there are good reasons to suppose that no more such proofs will be received." The claims of SCB are around £50m. The Defendants also argued that the evidence suggested that the liquidators had accepted that they are in no position to adjudicate the merits of the Inbound Claims by reason of conflict of interest and have stated that non-conflicted liquidators will be appointed in due course. They also contended that the evidence showed that the liquidators had done no work to ascertain whether the Inbound Claims are valid. This is tendentious. It seems to me that the passages in the liquidation reports relied on by the Defendants have been plucked out of context. It is evident that much work has been undertaken in assessing the Incoming Claims – for the purposes of the restoration applications and for these proceedings. What has not happened is a formal adjudication of proofs within the liquidations.

162. Edwin Johnson J addressed these issues in his November judgment. He did not accept the Defendants' argument that the Inbound Claims were limited to the amount of the formal SCB proof. At [398] he said this:

> "I do not accept that there should be this reduction in the value of the assets secured by the WFO, as continued, essentially for the reasons which I have already set out in the relevant part of my discussion of good arguable case. The case for the reduction seems to me to proceed on the basis, which I regard as misconceived, that the Claims can only be worth the amount of SCB India's Inbound Claim because only SCB India has submitted proofs of debt in the liquidations of the Claimant Companies. As it happens, the factual position now is that four other Consortium Banks have submitted their own proofs of debt, but this seems to me to be beside the point. As I have already explained, it does not seem to me that the quantum of the Claims is dependent upon whether proofs of debt have or have not been submitted by Consortium Banks. If the Claims are established, their value is not restricted to the value of any particular Inbound Claim. Their maximum value seems to me to be the total of the Funds which passed through the bank accounts of the Claimant Companies as part of the Alleged Fraud. I therefore conclude that the value of the assets secured by the WFO, as continued, should be the same as the value of the assets secured by the WFO in its existing form."

163. I agree with that analysis. It appears to me, on the current evidence, that the amount of the Inbound Claims is as yet uncertain and will have to be the subject of further examination, both in the liquidations and in these proceedings (see more about this subject below).

164. The Defendants also complain that the liquidators appear to be proceeding on the footing that they will be able to avoid any examination or analysis of the Inbound Claims until after recoveries have been made in these proceedings. They rely in this

regard on a witness statement made by one of the liquidators to the effect that it is common for creditors not to submit proofs before recoveries have been made. That evidence was given to explain the absence of claims from some of the Consortium Banks. As to this:

i) Self-evidently if the Claimants wish to run a case for the Defendants to pay damages to indemnify the liabilities of the Claimants, the Claimants will have to establish the Inbound Claims. Indeed much of the argument at the October 2022 hearing – and the basis of much of the strike out application – turned on the Defendants' contention that there were no sustainable Inbound Claims. If the Claimants wish to bring their claims for damages or compensation they will have to establish the existence and amount of the Inbound Claims in the proceedings.

ii) That is however a different process from proving within the liquidations and I agree with Edwin Johnson J that what has happened so far in the liquidations cannot be conclusive or determinative of the issue for the purposes of these proceedings.

iii) As the Claimants submitted, there may also be recoveries in respect of the Alleged Fraud from third parties who are not being sued in the present proceedings.

The parties' submissions

165. The Defendants made wide-ranging submissions. I shall not repeat them in full but summarise the principal points as follows. As Counsel acknowledged these overlap to an extent.

166. First, the Consortium Banks caused Winsome and Forever Precious to be placed into liquidation and participated in those liquidations. They thereby sought to enforce their contractual rights. The present proceedings brought by the Layer 2 and 3 companies, are in respect of the Alleged Fraud, which (if it happened) was practised on Winsome and Forever Precious. It is part of the Claimants' own case that those two companies were victims of the fraud. The Grant Thornton Scheme is designed to make recoveries for the Consortium Banks. But it enables the Consortium Banks to by-pass the liquidations. That is contrary to the principles illustrated by the *Krys* case. It is indeed an attempt to steal a march on the other creditors of Winsome and Forever Precious and an abuse of the insolvency legislation.

167. The Defendants also relied on the fact that WIWA has recently brought proceedings in the liquidation of Winsome against (among others) the Claimants and the First Defendant in this case, and the Consortium Banks, seeking (among other things) an anti-suit injunction against these Claimants preventing them from pursuing this case. The Defendants submitted that the WIWA claim bolstered the conclusion that the Claimants were seeking to steal a march on the stakeholders in the Winsome Liquidation.

168. Second, SCB, which has claimed losses of some £50m, has formed a joint venture arrangement with Grant Thornton. The other Consortium Banks were unwilling to enter a collaboration agreement to enable them all to proceed directly against the Defendants.

Though there is only one active underlying claimant (SCB) with a claim for only £50m, it has managed artificially to construct, acting with Grant Thornton, a commercial scheme which allows the Claimants to bring a claim for $1 billion with the possible outcome that there are no other creditors. Grant Thornton itself will share in recoveries through the funding arrangements. It may even be the case that there are no Inbound Claims other than that £50m so that the net proceeds of the litigation will end up with the shareholders of the Claimant Companies. That is manifestly unfair.

169. Third, under Plan B in the Grant Thornton Scheme the claims have been presented as being for $1bn but the liquidators are not expecting even to receive claims, still less adjudicate them, until after the proceedings when recoveries and realisations are made. Yet many of the claims against the Defendants depend on there being valid Inbound Claims against the Claimants in respect of the Alleged Fraud. This is an irreconcilable and fundamental flaw in these proceedings: the Claimants assert that they have suffered losses but the liquidators are saying that they do not expect to adjudicate the claims before the proceedings are over. Moreover, because the Consortium Banks are not parties to the proceedings (as they would have been under Plan A) the Defendants will not be able to obtain disclosure from them. The fair and proper way for the proceedings to have been brought is by the Consortium Banks; it is unfair for the proceedings to be brought through the filter of the Claimant Companies.

170. Fourth, the liquidators of the Claimant Companies are subject to irresolvable conflicts of interest and duty. Liquidators are fiduciaries, who owe duties to the creditors as a whole. The liquidators, as partners in Grant Thornton are personally interested in the outcome of the litigation. Grant Thornton are "effectively commercial co-adventurers" with SCB. They have an interest in inflating the claims against the Defendants. This conflict, which inevitably affects their decisions in conducting the litigation, renders the proceedings manifestly unfair to the Defendants.

171. Fifth, there is a risk to the Defendants of double jeopardy. They face claims by the Claimants. They may also face claims by the liquidators of Winsome and Forever Precious. Indeed the First Defendant is already subject to a judgment debt to the Consortium Banks as a guarantor. He is also a party to the proceedings brought by WIWA for $1 bn.

172. Sixth, the proceedings have been deliberately structured under Plan B so as to avoid possible limitation defences that might have been available to the Defendants to direct claims by the Consortium Banks. This is contrary to the principle illustrated by the *Carter Commercial* case.

173. The Claimants' principal submissions were in outline as follows (and again this is my summary).

174. First, that the abuse of process case, as originally formulated, was closely tied to some of the strike-out challenges to the merits of the claims. Two fundamental points have been removed: that there are no real Inbound Claims and therefore no real creditors in the liquidations; and, secondly, that any outbound claims were held on trust by the Claimants for Winsome and Forever Precious. In light of the court's decision about Strike Out Points (1) to (8), these two points are no longer available. The court must therefore proceed on the basis that there are viable Inbound Claims of US$ 1bn and that (at least some of) the outbound claims (for compensation, and those under the 1986

Act) are claims of the Claimants themselves and not subject to any trust obligations to others. It follows that the real substratum of the abuse arguments – that the claims were being brought for others and are without proper foundation – has gone.

175. Second, and following the first point, these proceedings are being brought for a proper purpose, namely to make recoveries for the ultimate benefit of the Claimant Companies' creditors. That is not an improper or collateral aim: it is what happens where companies go into liquidation.

176. Third, many of the Defendants' complaints or objections are not ones they have standing to make. Many of them concern the liquidations of various companies. They are strangers to those liquidations. The classes of persons who may object to the acts and decisions of liquidators are set out in ss. 112 (voluntary liquidation) and 168(5) (compulsory liquidation) of the 1986 Act. These do not (unsurprisingly) include debtors of the company in liquidation or defendants to claims brought by the company or its liquidators.

177. The matter can be tested this way. The Defendants are seeking to strike out these proceedings as an abuse. Suppose that the factual case is established at trial, so that the Defendants were shown to have engaged in a money laundering fraud for the purpose of removing assets from the Banks and obtaining at least some of them for their own benefit; it is being said that they should be able to avoid such proceedings because of circumstances internal to the liquidations. That would be remarkable and cannot be right.

178. Fourth, the complaints about by-passing the liquidations of Winsome and Forever Precious are misplaced. The claims being pursued here are the claims of the Claimants. These are not an asset of Winsome or Forever Precious. This is not a case of a particular creditor seeking to attach or enforce against the assets of those companies (see the first submission above). In any case if there was any real complaint of by-passing the Indian liquidations it would be for the liquidators or other stakeholders in those liquidations, not for the Defendants in these proceedings.

179. Fifth, the WIWA proceedings do not assist the Defendants. Those proceedings have not been addressed in the evidence for this application and the Claimants have concerns about their *bona fides*. In any case they have no impact on the abuse of process arguments.

180. Sixth, the possibility of double jeopardy for the Defendants does not render these proceedings abusive (assuming that there are sustainable causes of action). It is commonplace for different parties to have different claims arising from the same underlying transactions. Questions of overlapping liability may (in the right circumstances) afford a defence (such as circuity of action) or affect the way relief is framed (e.g. by giving credit against damages where recoveries have been made elsewhere) but in general the possibility of double jeopardy does not render a particular claim abusive. Moreover the kinds of claims relied on by the Defendants in argument (e.g. by the liquidators of Winsome or Forever Precious) may never be brought.

181. Seventh, the arguments about limitation have no merit. If the present claims are not limitation barred it cannot be abusive for the Claimants to bring them.

Discussion and conclusions: are the claims an abuse of process?

182. I have reached the clear conclusion that the Defendants' case that the claims are an abuse of process fails. My reasons follow.

183. First, I accept the Claimants' submissions that much of the abuse argument as originally framed depended on showing two things: that there are no viable Inbound Claims and that the outbound causes of action were held by the Claimants on trust for others. Once these two pillars are removed little of the edifice remains. Once it is accepted that the Claimant Companies and the liquidators have viable causes of action in their own right; and that there is a sustainable case that there are substantial Inbound Claims (and therefore liabilities on the part of the Companies) it is very hard to see (subject to the further points discussed below) that commencing or pursuing the claims can be said to be for an improper or collateral purpose or is otherwise manifestly unfair.

184. The fact that the claims have been brought for the ultimate benefit of the creditors of the Claimant Companies does not mean of course that they have been brought for collateral purposes or to achieve the aims of others. It is commonplace where large scale fraud is alleged that claims are brought by companies in liquidation – or liquidators – for the ultimate benefit of the creditors who have lost out.

185. Second, I do not consider that the contention that the Consortium Banks are by-passing the Indian liquidations is capable of rendering the present proceedings abusive. There are four reasons for this conclusion.

186. The first is that this is not a case like *Krys*, where a creditor who has participated in the liquidation of a company seeks to enforce against the assets of the company itself. The Claimants have (to the GAC standard) their own independent causes of action which they do not hold on trust for Winsome or Forever Precious. This is not therefore a case of a creditor going behind the backs of the liquidators or other creditors of the liquidation estate.

187. The second reason is that if there is a proper ground of complaint, it is a matter internal to the liquidations and does not affect the fairness of these proceedings. The doctrine of abuse of process is about the misuse of the processes of this court in the commencement or prosecution of the proceedings. I am unable to see how an alleged "abuse of the insolvency legislation" is supposed to constitute an abuse of this court's processes. Still less do I see how an alleged abuse of the insolvency legislation of India can constitute an abuse of this court's processes.

188. The third reason is that if anyone has a complaint it is the liquidators or other stakeholders in the two Indian companies. That is what happened in *Krys* where the liquidators applied for an injunction.

189. The fourth reason is that even if the liquidations were English ones the Defendants would not be within the classes of persons entitled to apply to the court (in its capacity as supervisor of the insolvencies).

190. I agree with the Claimants that the WIWA proceedings do not assist the Defendants. Those proceedings have not been addressed in the evidence for this application and the Claimants have concerns about their *bona fides*. But in any case, if anything, the

existence of these proceedings in the courts of India supports the conclusion that if anyone is to complain about by-passing the liquidations, it is the stakeholders in those liquidations, by application to the courts of India.

191. In short if there is any complaint about the relationship of these proceedings and the liquidations of Winsome and Forever Precious, it affects other parties and is not one that bears on the fairness of these proceedings.

192. Third, many of the Defendants' submissions about the "unfairness" of the Grant Thornton Scheme have nothing to do with these proceedings. I repeat that the principle of abuse of process concerns misuse of the process of this court, not other actions of SCB or the liquidators. Any complaints about the conduct of the liquidators acting as such would have to be brought within the liquidations by the persons and parties having standing within the classes set out in the 1986 Act. These persons and parties do not include defendants to proceedings brought by companies in liquidation.

193. A stakeholder who wished to complain about the funding arrangements entered into by Grant Thornton, or the liquidators' acts or omissions, or their remuneration, could do so as appropriate in the liquidations. But those issues have nothing do with the current proceedings. And they cannot be alchemised into a misuse of the court's process by saying that the categories of abuse are not closed – there still has to be an abuse of the process of this court.

194. The Defendants sought to build a nexus between the conflict they say affects the liquidators (arising from the relationship of Grant Thornton and SCB and/or the funding arrangements) and their decisions in conducting the litigation. I have no hesitation in rejecting this submission. If they choose to take steps in the current litigation that are otherwise manifestly unfair the court, in managing the case, will no doubt intervene. Equally if there are conflicts which the liquidators fail properly to manage, the stakeholders in the liquidations will be able to apply to the Insolvency and Companies Court to control them. But the attempt to add the one thing to the other and say that the product of the sum is an abuse of process is fallacious. The Court has already determined that the claims made by the liquidators and the Claimant Companies in these proceedings are properly sustainable on the merits. I fail to see how the decision of the liquidators to pursue them can amount to an abuse of process, even if the liquidators have an interest in the outcome of the proceedings via the funding arrangements. Nor do I see how it can be said that the relationship between Grant Thornton and SCB (which claims to be a creditor) can render the pursuit of the proceedings abusive.

195. Fourth, I am unable to accept the Defendants' submission - or at least suggestion - that the various steps in Plan B of the Grant Thornton Scheme were somehow unfair, or can properly amount to an abuse of this court's processes. This argument or suggestion appeared to have various strands: that these steps (e.g. the restoration of the companies, the conversion from MVL to CVL, the funding arrangements, the decision to bring the claims) involved Grant Thornton and/or SCB but not the Defendants; that the steps were part of a preconceived plan; and that the Claimants had then refused to reveal information about them to the Defendants. It appears to me that this argument fails at various points.

196. The first is that the Defendants had no entitlement to be involved in these various steps. The second is that, for similar reasons, the Defendants were not entitled to information

about them. They sought to deploy the well-trodden forensic path of seeking information to which they were not entitled and then asserting that things were wrongly being kept secret when the Claimants did not respond. That is not a legitimate argument. The third is that there is nothing objectionable as such about a litigation strategy being pre-planned and consisting of several steps. If the plan results in viable causes of action being pursued for a proper purpose it cannot as such be criticised as an abuse of process.

197. Fifth, I am not able to accept the Defendants' submission that the proceedings are manifestly unfair because of the treatment of the Inbound Claims. The Defendants said that the liquidators were acting in two inconsistent ways – they wanted to assert these claims (and indeed inflate them) in the litigation, but were taking no steps even to investigate them, still less adjudicate them, in the liquidations. The submission proceeded on the premise that the Claimants would be able to avoid any scrutiny of the nature and scale of the Inbound Claims in these proceedings. I am unable to accept that premise. I have already addressed this point at [164] above. In short, the Claimants have pleaded the existence and amount of the Inbound Claims – they do so as an element of their claims for compensation and as an element of the 1986 Act claims. Supposing (as seems highly likely) that the Defendants put these allegations in issue in their defences, the Claimants will have to prove them at trial. They will therefore be subject to adjudication in the proceedings. Hence there is nothing unfair in the way these proceedings have been framed (whatever approach the liquidators may or may not have taken to date in the liquidations).

198. For similar reasons I also reject the Defendants' related submission that the liquidators have an incentive to inflate the Inbound Claims and that this is unfair. The amount of the Inbound Claims will be an issue in this litigation and will be subject to the objective determination of the Court. Moreover the liquidators have decided to appoint an independent liquidator to scrutinise the Inbound Claims.

199. If it is assumed that there is a viable, sustainable, case that the Inbound Claims against the Companies amount to US$ 1bn (as Edwin Johnson J has decided) I am unable to see how it can amount to an abuse of process for the Claimants to assert the claims in these proceedings.

200. Sixth, I do not think there is any force in the arguments based on potential double jeopardy. I accept the Claimants' submission that it is commonplace for different parties to have different claims arising from the same underlying transactions and that there may be defences available to the Defendants arising from this risk. But in general the possibility of double jeopardy does not render a particular claim abusive. I also agree that the claims principally relied on by the Defendants in argument (possible claims by the liquidators of Winsome or Forever Precious) may never be brought.

201. Seventh, I am unable to accept the Defendants' submission that the proceedings are an abusive attempt to avoid properly applicable limitation periods. This submission was based on *Cooper Commercials*. In that case, under the relevant statute a challenge to the decision had to be brought by judicial review. The claimant instead brought the claim under Part 8 with a view to avoiding the much more stringent time limits for judicial review claims. That was abusive. This case is entirely different. The Claimants are bringing their own claims, not those of other parties. The fact that, if they sought to bring their own claims, those other parties might be subject to limitation defences is immaterial.

202. Overall it appears to me that there is no support for the contention that the proceedings have been brought for an improper or collateral purpose. There is nothing manifestly unfair about them.

Conclusions

203. The strike out applications are dismissed.