Neutral Citation Number: [2025] EWHC 2369 (KB)

Case No: KB-2025-001160

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2025

Before :

MR JUSTICE LINDEN

- -

Between :

BARINGS INVESTMENT SERVICES LIMITED

Claimant/Respondent

- and –

MR ADAM HUGH WHEELER

Defendant/Applicant

- -
- -

Jane McCafferty KC and Zac Sammour (instructed by **Dechert LLP**) for the **Claimant/Respondent**
Daniel Oudkerk KC and Edward Mordaunt (instructed by **Pallas Partners LLP**) for the **Defendant/Applicant**

Hearing dates: 9 and 10 September 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE LINDEN

Mr Justice Linden :

Introduction

1. This is an application by the Defendant, Mr Adam Wheeler, to strike out the Claim in whole or alternatively in part pursuant to CPR Rule 3.4(2)(a) and/or (b), or alternatively for "reverse summary judgment" pursuant to CPR Rule 24.2(a) ("the Application"). The Application was made on 17 June 2025 and the hearing of it was expedited pursuant to a decision of listings on 16 July 2025. By the end of the hearing before me, Mr Oudkerk KC said that the matter was no longer urgent as the issues between the parties had narrowed.

2. The Claim arises out of a "team move" from Barings to Corinthia Global Management Limited ("Corinthia") which is alleged to have been orchestrated by Mr Wheeler and others in 2023/2024. The Claimant ("BISL") contends that in so doing he acted in breach of contract and fiduciary duty, and it claims various financial remedies on these bases.

3. The Application does not challenge any of the causes of action pleaded by BISL. Rather, its focus is on the remedies which are claimed. In broad terms, Mr Oudkerk's case was that BISL's claim is abusive because it has adopted fundamentally inconsistent positions both in the context of the present proceedings ("the English proceedings") and as between these proceedings and proceedings in the United States of America which have been brought by Barings LLC against Corinthia and two US based organisers of the same team move ("the US proceedings"). He also argues that BISL has not suffered the loss which it claims in damages, and that the other remedies claimed are bound to fail.

The pleaded claim

4. The pleaded case against Mr Wheeler can be summarised as follows.

5. Barings is a large asset management business comprising a number of companies which operate globally ("the Barings Group"). The headquarters of the Barings Group is in Charlotte, North Carolina, USA. Barings LLC ("LLC"), a company incorporated in Delaware which has its principal place of business in North Carolina, is the company at the head of the Barings Group.

6. BISL was incorporated and is registered in England. It acts as a service company which provides services to certain other companies in the Barings Group in relation to operations in the United Kingdom. A key service which it provides is that it employs and supplies the Barings workforce working here.

7. Mr Wheeler is the former Co-Head of Barings' Global Private Finance Group ("the GPF Group"). At all material times he was based in London. With Mr Ian Fowler who was based in the USA, he led a team of over 100 employees which included employees who were employed in the USA, and a team of employees based in Europe and Asia ("the EMEA GPF employees") for which he had direct management responsibilities.

8. Mr Wheeler was employed pursuant to a contract of employment with BISL dated 5 July 2016 ("the Contract"). His basic salary was in the order of £325,000 but he was also eligible to receive discretionary bonus awards under three schemes: a long term incentive plan ("the LTIP"), a short term incentive scheme ("the STIS") and a carried interest cash scheme (the "CICS"). Pursuant to these arrangements, Mr Wheeler's remuneration was more than £4 million for performance year 2023, and more than £20 million over the course of his employment.

9. Clause 6.5 of the Contract provided, however, that Mr Wheeler would not be entitled to discretionary bonus awards under the STIS and the CICS if his employment had terminated or he was under notice of termination, whether given by him or by BISL, at or before the date when the award might otherwise have been delivered.

10. Mr Wheeler's employment was terminable on 3 months' notice on either side. The Contract included express terms which permitted BISL to place Mr Wheeler on garden leave during any notice period, and he was subject to various post termination restrictive covenants.

11. The Contract expressly set out various duties owed by Mr Wheeler which are pleaded but which I need not repeat here. In summary, the express terms were incidents of the duties of good faith, loyalty and fidelity and the duty of mutual trust and confidence which are implicit in all contracts of employment. Under clause 4.2, there was also an express duty not, directly or indirectly, to have interest in any business or undertaking or be involved in any activity which would interfere with the performance of his duties or give rise to a conflict of interest.

12. Although not spelt out in the Contract, the following duties are also pleaded at [20] of the Particulars of Claim ("POC") as incidents of the implied terms to which I have referred:

> "…
>
> (b) to inform the Claimant of all information of which he was aware which was relevant and material to the successful conduct of the GPF business, of which he was employed as Co-Head, including as to nascent and/or actual commercial threats; and
>
> (c) to inform the Claimant of all matters relevant and material to the tasks entrusted to him and/or the tasks for which he was responsible and/or involved in the course of his employment, including his own misconduct or breaches of duty or obligation and/or those of which he was aware committed by any other employee of the Claimant or any associated company."

13. The POC also pleads, at [22], that Mr Wheeler owed fiduciary duties given: his seniority within the GPF Group; the nature of his duties as a leader including his role in proposing and advising on bonus payments for members of the GPF Group; the degree of autonomy which he enjoyed and the level of trust reposed

in him; the degree of influence which he had over others within the GPF Group; and his access to Barings' confidential information. Those duties are pleaded at [23] POC as follows:

> "(a) A duty of undivided loyalty to the Claimant.
>
> (b) A duty to act in the way he considered, in good faith, most likely to promote the success of the Claimant and/or the business of the GPF Group of which he was employed as Co-Head.
>
> (c) A duty not to place himself in a position where his own personal interests conflicted with those of the Claimant and/or those of the business of the GPF Group of which he was employed as Co-Head.
>
> (d) A duty not to make a secret and/or undisclosed and/or unauthorised profit out of the exploitation of his position as Co-Head of the GPF Group.
>
> (e) A duty to report to the Claimant any competitive threat to the Claimant and/or the business of the GPF Group of which he was employed as Co-Head, of which he was aware, including wrongdoing by himself or others.
>
> (f) A duty to report any matter which he considered, in good faith, to be of interest to or material to the success of the Claimant and/or the business of the GPF Group of which he was employed as Co-Head, including wrongdoing by himself or others.
>
> (g) A duty to comply with the obligations particularised in subparagraphs (e)-(f) above in a prompt and timely manner and/or in such a way as to provide the Claimant with a proper opportunity to consider the information and take whatever action it deemed appropriate in light of it to protect its business and/or the business of the GPF Group of which he was employed as Co-Head."

14. BISL alleges that in the last year of his employment Mr Wheeler surreptitiously assisted in the establishment of a competitor to the GPF Group: Corinthia. Mr Wheeler's recruitment activities on behalf of Corinthia began as early as 13 May 2023, when he introduced Ms Kelsey Tucker, former Global Head of Operations at Barings, to Mr Paul Weightman, Executive Chairman at Corinthia. His efforts intensified over the months which followed and they culminated in the co-ordinated giving of notice of resignation, on 8 March 2024, by Mr Wheeler and 12 other EMEA GPF employees. These employees timed their resignations for on or shortly after 8 March 2024 because that was the day after they each received the second of two substantial discretionary bonus payments from the Claimant, the first having been paid on 22 February 2024 pursuant to the STIS, and the second pursuant to the CICS.

15. BISL's case is that Mr Wheeler had accepted an offer of employment with Corinthia in November or December 2023 at the latest. He is now employed in a very senior position by a Corinthia company (I was told that he is a joint owner and Chief Executive of Corinthia), where he works alongside Mr Fowler and 20

other employees who previously worked in, or in support of, the Barings GPF Group.

16. A key aspect of the claim by BISL is Mr Wheeler's conduct in relation to the bonus payments made to EMEA GPF employees who had been recruited to join Corinthia. As Co-Head of the GPF Group his responsibilities included proposing annual bonus payments for employees within the GPF Group, including the EMEA GPF employees, and advising BISL in relation to such payments and awards. BISL relied on him to make proposals which reflected an honest and genuinely held belief that they were in the best interests of BISL and in furtherance of the aim of the Barings Remuneration Policy which was to retain existing employees, rather than any collateral purpose or purpose adverse to the interests of BISL.

17. On 15 November 2023, Mr Wheeler was asked to propose bonus payments for the EMEA GPF employees in respect of the 2023 performance year. He did so on 1 December 2023 and he provided further input and proposals between 9 December 2023 and 3 January 2024.

18. BISL's case is that at all material times Mr Wheeler had accepted a senior role with Corinthia with, it is inferred, shares or equity options in that company. He knew that he and Mr Weightman were in the process of establishing a competing business and that Corinthia was recruiting GPF Group employees for this purpose. He also knew about the planned and co-ordinated resignations, including his own intended resignation. These were matters which he deliberately concealed from BISL. Instead of disclosing what was happening, Mr Wheeler acted in his own interests and for the benefit of Corinthia in proposing that a total of £6,306,198 should be paid to him and the departing EMEA GPF employees. He also helped to organise the timing of the resignations so that these sums could be pocketed before BISL was made aware of the team move. A particularly egregious aspect of Mr Wheeler's conduct in this regard is that on 5 January 2024 he emailed Ms Suddreth (HR Business Partner) to ask whether bonus payments under two of the bonus schemes would be paid on the same date. When he was told that they would not be, he asked when each bonus would be paid. When she told him, Mr Wheeler forwarded his emails with Ms Suddreth to Mr Fowler so that the dates could be incorporated into the plan.

19. Under the heading "Loss and Damage" BISL pleads, in summary, that had Mr Wheeler complied with his contractual and fiduciary duties BISL would not have paid the sums which it paid to him and the departing EMEA GPF employees on 22 February and 7 March 2024. Instead, BISL would have given all of them notice of termination, depriving them of any entitlement to discretionary bonus under the STIS or the CICS, and placed them on garden leave.

20. Under the heading "Relief" BISL pleads as the following claims at [53]-[57] POC, which are said by Mr Oudkerk to be abusive and/or bound to fail:

> "53. The Claimant is entitled to damages and/or equitable compensation for the loss and damage caused to it by Mr Wheeler as particularised above. The Claimant accordingly seeks damages in the sum of £6,306,198.
>
> 54. Further or in the alternative, and at the Claimant's election, Mr Wheeler is liable to account to the Claimant for profits made to and by him consequent upon his breaches of his Fiduciary Duties.
>
> 55. Further or in the further alternative, Mr Wheeler's bonus payments ….were or included remuneration for his discharge of Fiduciary Duties. Mr Wheeler, having breached those duties, has forfeited any right to that remuneration. The Claimant is entitled to repayment of those sums from Mr Wheeler.
>
> 56. Further or in the further alternative, Mr Wheeler gained an advantage in breach of his Fiduciary Duties to the Claimant as a result of his obtaining shares or equity options in Corinthia. Mr Wheeler obtained those shares or equity options because of his agreement to facilitate Corinthia's recruitment of a large team of employees from the GPF Group. Mr Wheeler facilitated that recruitment through the breaches of Fiduciary Duty pleaded above. The Claimant accordingly seeks a declaration that all shares or equity options acquired by Mr Wheeler in Corinthia are held on constructive trust for the Claimant.
>
> 57. Further, subject to consideration by Barings' Remuneration Panel and the Board of Barings Europe Limited (the "Board"), Mr Wheeler's conduct as particularised herein is eligible for consideration under clawback provisions to which he has agreed to be bound in respect of the variable compensation paid to him between 8 March 2021 and 8 March 2024 in the sum of £12,080,818, being the variable compensation paid to him in the three years prior to his resignation. The Claimant reserves the right to amend these Particulars of Claim to include such a claim following consideration by the Remuneration Panel and Board."

BISL's reaction to the resignations of Mr Wheeler and the EMEA GPF employees

21. Mr Wheeler's notice of resignation on 8 March 2024 was responded to by solicitors for BISL on 11 March 2024. Their letter reminded him of his contractual obligations and said that the inference to be drawn from the timing of the 22 resignations and other evidence was that this was a planned and coordinated action by Mr Wheeler, Mr Fowler and others. The letter also reminded him of the post termination restrictive covenants to which he was subject. It said that the team move was causing substantial loss and damage and that if, as Barings inferred, he had participated in coordinating the move he was in breach of his fiduciary and contractual duties in respect of which Barings' rights were reserved.

22. The letter went on to say that Barings was entitled to immediate injunctive relief to restrain further breaches by him. If immediate litigation was to be avoided Barings required, by 18 March 2024, an undertaking that Mr Wheeler would

comply with his duties as an employee throughout the notice period and with his post termination obligations.

23. BISL then wrote to Mr Wheeler on 12 March 2024, confirming that his employment with the company would end on 7 June 2024 and that he would remain on garden leave during the notice period. His contractual obligations during that period were set out and he was reminded of his post termination restrictive covenants.

24. On 18 March 2024, solicitors for Mr Wheeler gave a written undertaking on his behalf that he would comply with his duties as an employee during the notice period and with his post termination restrictions. However, he did so without prejudice to his right to challenge the enforceability of the post termination restrictions in due course, a question on which he was taking advice.

25. There was further correspondence between the parties in which Mr Wheeler declined to attend an investigatory meeting. BISL asserted that as an employee of the company he was obliged to attend but it appears that he did not do so.

26. On 18 April 2024, the solicitors for BISL then chased for an answer as to whether, having taken advice, Mr Wheeler now unequivocally undertook to comply with the relevant post termination restrictions. They said that if there was a dispute BISL would take action to protect its legitimate business interests. On 30 April 2024, Mr Wheeler's solicitors confirmed that he intended to continue to honour his agreement to comply with the terms of his contract.

27. The same approach, i.e. affirmation of their contracts and requiring them to undertake that they would comply with their obligations, was apparently taken with the other departing EMEA GPF employees.

The US proceedings

28. In the meantime, on 18 March 2024, LLC issued proceedings in the North Carolina General Court of Justice, Superior State Court Division, against Corinthia, Mr Fowler and Ms Tucker ("the US Defendants"). In summary, LLC alleges that the US Defendants undertook an unlawful "corporate raid" which involved conspiring for more than seven months, setting up a competitor – Corinthia - while still employed by LLC, arranging for the coordinated departure of 22 members of Barings' GPF Group including the 12 EMEA GPF employees, and concealing these matters from Barings LLC in breach of duty. Although he is mentioned several times in the pleaded case as one of the three key organisers of the corporate raid, proceedings against Mr Wheeler were prevented by section 15C of the Civil Jurisdiction and Judgments Act 1982.

29. Between 13 and 17 May 2024, each of the US Defendants filed motions to dismiss and, on 12 June 2024, LLC filed an Amended Complaint. On 12 July 2024, Corinthia (which was incorporated in England) then filed a motion to stay the proceedings on the basis of forum non conveniens, arguing that the case should be dealt with in England.

30. On 13 February 2025, the motions to dismiss and to stay were determined by the North Carolina Court. The motion to dismiss was successful in part but the motion to stay was dismissed. The upshot is that the proceedings in North Carolina brought by LLC are ongoing. In those proceedings, LLC makes the following claims:

    - a claim against Corinthia, Mr Fowler, and Ms Tucker for civil conspiracy;
    - claims against Mr Fowler for constructive fraud and breach of fiduciary duty; and
    - claims against Corinthia for misappropriation of trade secrets, tortious interference with contractual relations, unfair or deceptive trade practices, and breach of a stipulated injunction order dated 21 March 2024 which had been agreed.

31. Mr Fowler and Ms Tucker have since filed answers and counterclaims to the Amended Complaint, and LLC has filed responses to these pleadings. The US proceedings are now near the end of the "fact discovery" phase, as part of which witnesses may provide depositions. That process has been ongoing since April 2025 and Mr Wheeler has agreed to be deposed on 19 September 2025 in New York.

The legal framework

CPR Rule 3.4

32. CPR Rules 3.4(2)(a) and (b) provide as follows:

> "(2) The court may strike out a statement of case if it appears to the court-
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; or
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …"

33. The Rule therefore identifies two issues for the court (see *Asturion Fondation v Alibrahim* [2020] 1 WLR 1627 at [64] and *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110):

    - first, is one of the specified bases for strike out established?
    - if it is, second, should the court in the exercise of its discretion strike the statement of case out?

The "no reasonable grounds" basis for striking out

34. As to the test under Rule 3.4(2)(a), it is well established that, in contrast to an application for summary judgment under Rule 24.2, the court should focus on the pleaded case: *The Royal Brompton Hospital NHS Trust v Hammond* [2001]

1 Lloyds Rep PN 526 at [106]) and should ask whether that case is hopeless or bound to fail. Applications to strike out on the "no reasonable grounds" basis do not require evidence and the court should normally assume the pleaded facts to be true unless they are contradictory or obviously wrong: see e.g. *MF Tel Sarl v Visa Europe Limited* [2023] EWHC 1336 (Ch) at [34(1)]. Nor, generally, should the court seek to determine points of law which are not settled, particularly where the facts are in dispute or evidence would potentially shed light on the issue of law, or the issue of law may not arise when the facts are found: see e.g. *Barrett v Enfield LBC* [2002] AC 550 at 557.

35. Examples of the type of case which may be struck out under Rule 3.4(2)(a) are given at [1.2] of Practice Direction 3A on Striking Out a Statement of Case. These are:

> "(1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

The need for a proportionate approach

36. The sanction of striking out is often described in the authorities as "a draconian step" and a "last resort". Even if a statement of case or parts of a statement of case do satisfy the Rule 3.4(2)(a) test, it does not follow that the defective pleading will necessarily be struck out. In these circumstances the court should determine whether it is proportionate and in accordance with the overriding objective to take this potentially draconian step: see e.g. *Fairclough Homes v Summers* [2012] 1 WLR 2404 at [48]. In determining this question it will be relevant to consider whether the defects are capable of being corrected by appropriate amendments (see e.g. *In Soo Kim Park & Others* [2011] EWHC 1781 (QB) at [40]) or whether other measures such as the provision of further particulars are appropriate (see e.g. *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 at 1932B).

37. The requirement for proportionate measures, using strike out as a last resort, also applies in relation to the abuse of process ground under Rule 3.4(2)(b). In the *Summers* case (supra) Lord Hope said at [48]:

> "48. It is in the public interest that there should be a power to strike out a statement of case for abuse of process, both under the inherent jurisdiction of the court and under the CPR, but the court accepts the submission that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly."

38. He went on to say, at [49], that the draconian step of striking a claim out is always a last resort.

The abuse of process ground for striking out

39. In a passage which is often cited, Lord Diplock provided the following summary of the concept of abuse of process in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536B:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice 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 otherwise bring the administration of justice into disrepute amongst right-thinking people. The circumstances in which abuse of process can arise are very varied … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power". (emphasis added)

40. Although the categories of abuse of process are not closed, Mr Oudkerk relied on a particular species of abuse in the present case. This is referred to in various ways in the authorities but he particularly relied on *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2022] 1 WLR 336 where the Court of Appeal considered estoppel by conduct. At [19] Sir Christopher Floyd noted that in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1018 Viscount Radcliffe said in relation to this type of estoppel that:

> "a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned."

41. Sir Christopher then considered *Gandy v Gandy* (1885) 30 Ch D 57 and said at [22]:

> "22. The phrases used in these cases suggest that it is not every change of position by a party or a witness which will create this form of estoppel. In *Kok Hoong*...., Viscount Radcliffe's formulation requires (a) that the party's stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance. In *Gandy*, Cotton LJ says that the earlier decision was in favour of the husband "on the ground that" the deed provided a continuing obligation. Bowen LJ said that the husband had succeeded "on the footing" of that construction of the deed. These phrases suggest that it must be apparent from the earlier judgment that the stance taken by the party was a reason for the judgment which he obtained, and that it would in all the circumstances be unjust to allow the party to resile from the stance taken earlier."

42. Sir Chrisopher then considered the decision of Ginsberg J in *New Hampshire v Maine* (2001) 532 US 742 where a similar doctrine was recognised by the law of the United States and said:

> "24. The purpose of the rule was said to be to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties "from playing fast and loose with the court". Whilst observing that the equitable doctrine was not "reducible to any general formulation of principle", Ginsburg J identified a number of factors which typically inform a court's decision as to whether to apply the doctrine in any individual case. First, a party's later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

43. At [25] Sir Christopher agreed that there was no reason to think that the position was different under the law of England and, at [26], said:

> "26. It is clear, therefore, that this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Ginsburg J in the *New Hampshire* case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute." (emphasis added)

44. In *Iftikar Malik v Vaqar Malik* [2024] EWCA Civ 1323 at [34] Zacaroli LJ applied the test in *LA Micro*. He noted that a very similar principle had been described in the authorities as preventing a person from approbating and reprobating, or as a species of abuse of process, or as a form of estoppel. His view was that it was not necessary to consider these cases in detail given that the variations in how the principle was described reflected the circumstances in which the point had arisen, and it was unlikely that the results in those cases would have been different if approached "on the broad-based approach adopted in *LA Micro*":

> "36. Ultimately, the label is unimportant. Although Sir Christopher Floyd did not use the phrase, the form of estoppel by conduct in issue can readily be seen as a species of abuse of process."

45. My attention was also drawn to *State Bank of India & Others v Mallya* [2025] EWHC 858 (Ch) where Sir Anthony Mann applied the approach in *LA Micro* as further explained in *Malik*. At [79] he said:

> "Three particular points deserve emphasis. First, the formulation in *Malik* is that a party cannot adopt "two inconsistent attitudes towards another " (my emphasis)…. Second, Mr Beswetherick pointed out that the inconsistency, and abuse of process, alleged in the present case arises out of cases in different jurisdictions, which he says goes beyond any of the authorities. He would say that that is because something in this jurisdiction cannot be an abuse of the process of another. Third, it is not sufficient that inconsistent positions be adopted. The *New Hampshire* case demonstrates that it is a relevant factor to consider whether the party adopting an inconsistent position would derive an unfair advantage or impose an unfair detriment on the other party if not prevented from doing so.
>
> 80. All those three factors are capable of being relevant, but they all have to be viewed through the prism of abuse of process which can be said to underpin the doctrine. It seems to me that if there is sufficient evidence of an abuse (bringing the justice system into disrepute) then that might, in an appropriate case, trump each of the three requirements…"

46. Both sides also referred to the decision of the Singapore Court of Appeal in *BWG v BWF* [2020] SGCA 36 although, with respect, I am not sure that it added a great deal to the authorities to which I have already referred:

- Mr Oudkerk emphasised [113] and [118] where the Court held that "it is clear that the operation of the doctrine of approbation and reprobation does extend to inconsistent positions asserted against different parties in different proceedings, as long as the party has received an actual benefit as a result of an earlier inconsistent position". This was apparently to meet the point that in the present case the parties in the US proceedings and the present proceedings are different both as to claimants and defendants. The passages on which Mr Oudkerk relied made the point that a party may be abusing the process by taking inconsistent positions as against different parties. They did not in fact address the point that in the present case the alleged inconsistent positions have been taken by different parties – LLC on the one hand, and BISL on the other – but Ms McCafferty KC accepted that this point was not decisive, presumably given the relationship between the two companies and the fact that both sets of proceedings were apparently signed off by Jill Dinerman, the Chief Legal Officer of LLC, who also provided statements of truth in both.

- Ms McCafferty relied on [58] where the Court said that abuse of process "is a discretionary jurisdiction, and may involve considerations of policy. Hence, by reason of policy considerations and in exceptional circumstances, the court may decline to hold that a party is in abuse of process despite the party's inconsistent conduct if there is a risk of even greater injustice in barring a party from taking an inconsistent position.". Leaving aside whether I would have put it this way, the effect of what

> the Court said is essentially the same as the principles which I have summarised above: whether or not there is an abuse of process requires a broad merits based assessment and, even if there is an abuse of process, it does not follow that the consequence will be a striking out of the claim.

Waiver by election

47. Mr Oudkerk also placed considerable reliance on *Twinsectra Limited v Lloyds Bank Plc* [2018] EWHC 672 (Ch) where Mr Jeremy Cousins QC, sitting as a Deputy High Court Judge, considered the principles of election, approbation and reprobation, and abuse of process. The context was a case in which the claimant company had obtained judgment in earlier proceedings against one of its directors on the basis that he had acted in breach of fiduciary duty in causing the company to enter into certain charges to secure a loan from the Bank. Damages had been awarded on the basis that the company was liable to the Bank. The company later brought proceedings against the Bank in which it contended that the charges were not valid because the director lacked authority to enter into them on behalf of the company. The Bank successfully applied for summary judgment on the basis that obtaining judgment against the director in the earlier proceedings meant that the claimant was precluded from contending, in subsequent proceedings, that the charges were not valid.

48. Mr Oudkerk drew particular attention to a passage from the judgment of Walker LJ (as he then was) in *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, which Mr Cousins cited at [45]. That passage included the following in relation to the distinction between election between inconsistent rights and election between inconsistent remedies:

> "The distinction can of course be obscured by terminology: every remedy is in one sense a right, even if its grant is discretionary, but not every right is a remedy. The distinction is clear if "right" is used to indicate a substantive right such as entitlement to a leasehold interest or to the benefit of a contract. If a would-be purchaser is induced by a misrepresentation to enter into a contract, he has a choice (exercisable subject to familiar constraints) whether to treat himself as no longer bound by the contract, or to affirm it. In either case he will usually also be entitled to claim damages for any loss caused by the misrepresentation. That is an election between rights. If he chooses to affirm the contract and the other party defaults, the purchaser may sue for specific performance or for damages. That is an election between remedies. Normally election between remedies need not be made until judgment, and even then the election need not be final if specific performance is not in the event feasible. Sometimes, however, election between substantive rights and between procedural remedies will necessarily coincide. The most obvious example is in the law of landlord and tenant when a landlord decides not to claim that a lease has been determined by forfeiture; by that decision he necessarily also elects not to seek an order for possession of the demised premises." (emphasis added)

49. Affirming the Contract in the present case, submitted Mr Oudkerk, was analogous to failing to claim that a lease has been determined by forfeiture.

Having done so, BISL could not then claim damages on the basis that the Contract would have been terminated prior to 22 February 2024.

50. Mr Oudkerk also relied on the following principle which Mr Cousins derived from the authorities at [72(i)] of his judgment, and I note [72(iii)] for completeness:

> "(i) Where an election has been made between rights, it cannot be retracted. Thus, where a contract has been affirmed by the innocent party, following repudiatory breach by the other party, the innocent party cannot later go back upon his affirmation. His decision stands, and so does the contract. For this purpose, election, whether intended or not, by an unequivocal act communicated to the other party, is conclusive; ..It is, therefore, possible for the making of a claim against one party, even though it does not proceed to judgment, to represent an unequivocal manifestation of an election between inconsistent rights which might affect a claim against another party;..." (emphasis added)…
>
> (iii) A claimant cannot have both alternative and inconsistent remedies. He must elect between them, when judgment is given, but need not do so before;…"

51. In *Twinsectra*, Mr Cousins held that there had been an election between inconsistent remedies when the company had entered judgment in the earlier proceedings against its director. There was also, at least at that point, an election between rights i.e. between the right to enter a judgment for the money sum against the director and the right to press on and challenge the validity of the charges. In addition to finding that there had been an irrevocable election by the company, he held that it had offended against the principle of approbation and reprobation, and had acted in abuse of process in the subsequent proceedings against the Bank as well.

52. I note that in *Glencore Grain Ltd v Flacker Shipping Ltd (the Happy Day)* [2002] 2 All ER (Comm) 896 Potter LJ provided a lucid explanation of the difference between unilateral waiver and waiver by election, and their relationship with estoppel. The former entails a unilateral decision by a party to waive an obligation under a contract. As for the latter:

> "65. So far as waiver by election is concerned, the basic proposition is that where two possible remedies or courses of action are to his knowledge open to X and he has communicated his intention to follow one course or remedy in such a manner as to lead Y to believe that his choice has been made, he will not later be permitted to resile from that position…" (emphasis added)

53. Potter LJ went on to say:

> "68. In relation to waiver, it is important to note certain features of the doctrine around which the submissions of the parties have revolved:

> (1) In order to demonstrate awareness of the right waived, it must generally be shown that X had knowledge of the underlying facts relevant to his choice or indication of intention...
>
> (2)The court will examine any act or conduct alleged to be unequivocal in its context, in order to ascertain whether or not it is sufficiently clear and unequivocal to give rise to a waiver....."

Part 24

54. CPR Rule 24.3 provides as follows:

> "24.3 The court may give summary judgment against a claimant or defendant on the whole of a claim or on an issue if—
>
> (a) it considers that the party has no real prospect of succeeding on the claim, defence or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

55. I was referred to the helpful summary of the applicable principles which was provided by Nicklin J in *Amersi v Leslie* [2023] EWHC 1368 (KB) at [142]. For present purposes it is sufficient to note the following points which he made:

> "(1) The court must consider whether the claimant has a " *realistic* " as opposed to a " *fanciful* " prospect of success….The criterion is not one of probability; it is absence of reality...
>
> (2) A " *realistic* " claim is one that carries some degree of conviction. This means a claim that is more than merely arguable..
>
> (3) In reaching its conclusion the court must not conduct a " *mini-trial* "..This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents...
>
> (4) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial..."

56. As is well known, the court will take evidence into account when considering an application under Part 24. It is not confined to considering what has been pleaded.

The grounds on which Mr Wheeler seeks summary disposal

57. Mr Oudkerk advanced six grounds on which he submitted that the Claim, or alternatively parts of it, should be struck out or dismissed. The first four, which

were the principal focus of his oral submissions, all challenge BISL's claim for damages in the sum of £6.3 million ([53] POC). The fifth challenges each of the equitable remedies sought by BISL, and the sixth its reservation of the right to apply to amend pleaded at [57] POC. A good deal less time was spent on Grounds 5 and 6 in oral submissions. Mr Wheeler therefore needed to succeed on at least one of the first four grounds and the whole of the fifth ground if he was to strike out the Claim.

58. With respect to Mr Oudkerk and Mr Mordaunt, Grounds 1-4 were presented in a way which overlapped and was therefore somewhat repetitive. Under each heading there was, in truth, one point albeit I accept that they were entitled to rely on all four Grounds cumulatively as well as individually. I will therefore deal with each of these points in turn and consider their cumulative effect as well.

Ground 1: internal inconsistency in the context of the BISL claim

Mr Wheeler's case

59. Mr Oudkerk's argument was essentially that BISL is claiming damages and/or equitable compensation on a basis which is inconsistent with its affirmation of the Contract by its letters of 11 and 12 March 2024. In these letters and the subsequent correspondence, BISL took the position that Mr Wheeler's employment continued until 7 June 2024 and that he remained bound by his then current and his post termination obligations. On 18 April 2024, BISL had reiterated its position that he remained bound by his post termination restrictions on the implied basis that they would operate from the end of his employment on 7 June. Having maintained that Mr Wheeler's employment continued until 7 June, and taken the benefit of the garden leave period and the fact that the post termination restrictions applied from that date, BISL could not subsequently claim damages on an inconsistent basis, namely that if Mr Wheeler had complied with his obligations to inform BISL of the team move his employment would have been terminated before 22 February 2024 when the first instalment of the bonuses was paid to him and the EMEA GPF employees.

60. As far as the knowledge of BISL when it affirmed the Contract is concerned, Mr Oudkerk argued that BISL must have been aware of what it believed Mr Wheeler had done. By the time BISL sent Mr Wheeler the letter of 18 April 2024, LLC had, a month earlier, launched proceedings in North Carolina based on allegations which included very similar allegations to those which are made against Mr Wheeler in the English proceedings.

61. Mr Oudkerk also complained that it was unfair and impermissible for BISL to gain longer protection from the garden leave period and post termination restrictions, by affirming the Contract, than it would have if it had terminated prior to 22 February 2024.

Discussion

62. Although Mr Oudkerk put Ground 1 on the basis of waiver by election, and approbation and reprobation, and estoppel by conduct, and although it does not

make any difference to the result, the true nature of his argument seemed to me to be that there had been waiver by election when BISL affirmed the Contract and decided to hold Mr Wheeler to the notice which he had given. Waiver by election does not require a party to have made a legal claim or obtained a judgment on an inconsistent basis. It merely requires a party knowingly to have made an unequivocal choice between conflicting rights or remedies which are available to it.

63. On analysis, Mr Oudkerk's complaint was not that BISL had adopted the position, in one court or set of proceedings, that Mr Wheeler's contract continued in force until 7 June 2024 and then argued in another that it had come to an end before 22 February 2024 (the sort of situation which is addressed in the cases considered in *LA Micro* and *Malik* (see [40]-[44], above). Nor was it that BISL had waived its right to claim damages on the basis of a February 2024 termination date by making a previous claim for damages on the basis of a 7 June termination date (the sort of situation with which the passage at [72(i)] of *Twinsectra* (at [50] above) was concerned). His complaint was that, having chosen to continue the Contract until 7 June, BISL had made an election of rights and had therefore waived its right to claim damages on the basis that the Contract had been terminated at some earlier date.

64. It followed from this, in my view, that Mr Oudkerk's case under Ground 1 was that the pleaded claim for damages and/or equitable compensation was bound to fail because such a claim had been waived by election. As his argument depended on the evidence of affirmation by BISL, it could only succeed under Part 24, if at all i.e. on the basis that BISL has no real prospect of success on this point.

65. In my view, Mr Oudkerk's argument did not come close to meeting the standard required for summary disposal of this head of relief claimed by BISL. At a fundamental level it fails to do so because it does not recognise that damages are assessed on the basis of the hypothetical question of what would have happened if there had been compliance with the duties which have been breached. The counterfactual is necessarily not the same as the actual facts. In this case, the facts are that the Contract was affirmed and continued until 7 June 2024; the counterfactual is that, prior to 22 February, Mr Wheeler disclosed the information which he was duty bound to disclose whereupon his contract and the contracts of the departing EMEA GPF employees would have been terminated at a point which deprived them of their bonuses. Given that the counterfactual is based on hypothetical facts, including BISL having knowledge of the team move and Mr Wheeler's involvement in it at a significantly earlier date, nor do I accept that Mr Oudkerk's characterisation of it as "inconsistent" with what actually happened has any real significance.

66. If one looks at the matter through the lens of waiver by election, I agree that by affirming the Contract BISL waived any right to contend that in fact it had terminated before 22 February 2024 and to assert any rights on that basis e.g. to defend a claim for unpaid wages on the basis that Mr Wheeler was not employed after that date. However, Mr Oudkerk rightly accepted that BISL did not waive the remedy of damages for Mr Wheeler's breaches of duty. His only objection was to the basis on which damages are now claimed by BISL. As to that

objection I do not accept that by affirming the Contract, accepting that the termination date pursuant to Mr Wheeler's notice would be 7 June, requiring undertakings that he would comply with his obligations if he was to avoid proceedings etc, BISL unequivocally waived a claim for a remedy on the hypothetical basis which it has pleaded in the POC so that such a claim can be summarily dismissed. The question of the basis on which damages might be claimed was left open.

67. I also agree with Ms McCafferty's analysis or, at least, her analysis was far from bound to fail. This was that BISL never did have the choice to elect between the right to terminate on notice before 22 February 2024 and the right to affirm the Contract after Mr Wheeler gave 3 months' notice of termination on 8 March (see [65] of the *Glencore* case, cited at [53] above). As at the dates of its March/April 2024 letters, the option of earlier termination was not available and there is no sense in which BISL could or did elect between these two rights. What it had was an accrued claim for damages based on Mr Wheeler's earlier breaches of duty and a right to affirm the Contract. Its exercise of this right did not waive its accrued claim for damages or restrict the scope of that claim in any way, whether unequivocally or at all. The contractual undertakings which BISL sought – confirmation that Mr Wheeler would comply with his obligations – were at most a *quia timet* remedy for threatened future breaches of duty, and had no bearing on the remedies available to BISL for the earlier actual breaches of duty which had already been committed by Mr Wheeler. BISL was therefore exercising a different right. In addition to this, I accept Ms McCafferty's submission that the extent to which BISL had sufficient knowledge of the underlying facts relevant to its options as at 12 March or even 18 April 2024 is an issue for trial: see [68] of *Glencore*, cited at [54] above.

68. As for Mr Oudkerk's complaint that this analysis leads to BISL deriving an unfair benefit, if the facts of Mr Wheeler's conduct are as pleaded in the POC this may not be accepted at trial. But if this is a concern, the court will no doubt be able to give credit for such benefit as BISL received as a result of affirming the Contract, as it might on a cross undertaking as to damages. As Ms McCafferty submitted, the court would not necessarily be obliged to proceed on the basis that BISL was required to terminate at the earliest available point, or would have done so, and she would be entitled to argue that BISL would in fact have left the termination as late as was consistent with its own interests. This might well have been very shortly before the first bonus was due to be paid and therefore only a matter of a fortnight or so before 8 March 2024. The additional benefit gained by BISL through affirming the Contract is therefore potentially minor.

69. As Ms McCafferty also pointed out, Mr Oudkerk's submission is highly unattractive given that it rewards the approach which Mr Wheeler is alleged to have taken to the timing of the resignations of the EMEA GPF employees. The logic of his position is that the options open to BISL on 8 March were to treat Mr Wheeler as discharged from the Contract and lose some or all of the contractual protections against the competitive threat of Corinthia which it would otherwise enjoy, or affirm the Contract and allow the departing employees to achieve their objective of keeping their bonuses. Indeed, it is not

clear why the logic of Mr Oudkerk's argument would not lead to the conclusion that, even if BISL had elected to treat the Contact as discharged as at 8 March 2024, it still would still have been prevented from asserting that, if it had known about the team move earlier, it would have terminated earlier. In this scenario BISL would have chosen a termination date of 8 March which, on Mr Oudkerk's argument, was inconsistent with claiming damages on the basis of a hypothetical earlier termination date. If the answer to this point is that BISL did not have a choice to terminate earlier than 8 March, this is also true in relation to the course which BISL actually took.

70. In case the analysis set out above is wrong, I have also considered the matter under the abuse of process heading and made the broad, merits-based assessment, which is required, having particular regard to the factors which were said in *LA Micro* and *Malik* to be relevant. Essentially for the reasons which I have given I do not accept that BISL's pleaded basis for its claim for damages is inconsistent with its affirmation of the Contract or that it misuses the court's procedure in a way which is manifestly unfair to Mr Wheeler or would otherwise bring the administration of justice into disrepute amongst right-thinking people. The greater risk is that accepting Mr Oudkerk's argument would have this effect. In my view, the pleaded basis for BISL's claim for damages has a real prospect of success and is not an abuse of process.

Ground 2: inconsistency between the US Proceedings and the Claim

Mr Wheeler's case

71. Mr Oudkerk's argument was that, in the US proceedings, LLC has taken the position that it had suffered the loss now claimed by BISL in the English proceedings and is claiming in respect of that loss. There is therefore a clear inconsistency between Barings' position in the US proceedings and its position in the English proceedings. Insofar as he needed to establish that an advantage had been gained as a result, it was that the North Carolina Court had relied on LLC's position when rejecting Corinthia's application for a stay on the grounds of forum non conveniens. The Claim is therefore abusive.

72. Mr Oudkerk principally relied on the following points:

- The pleadings in the US Proceedings begin by defining Barings LLC as ("Barings" or "the Company").
- In a footnote to the Amended Complaint, references to "Barings Employees" are said to mean the "Barings US Employees" and the "Barings Non-US Employees" who left as part of the team move. It is also stated that Barings Non-US Employees were employed by different affiliates of LLC according to whether they worked in the United Kingdom, Germany or Singapore.
- [44] of the Amended Complaint pleads, in the "Factual Background" section, that:

> "44. In fact, between the time Fowler and the Barings Employees decided and agreed to leave together for Corinthia and their actual resignation on March 8, 2024, Barings paid the first installments of 2023 cash bonuses. Had Fowler and the Barings Employees submitted their resignations earlier, Barings would not have owed or paid those amounts. Further, under the terms of the offers made by Corinthia, had the employees resigned prior to collecting their bonus and incentive payments, Corinthia would have paid those amounts."

- [81] of the Amended Complaint pleads, specifically in relation to LLC's claim for tortious interference with contractual relations:

> "81. Barings incorporates herein by reference the allegations contained in the foregoing paragraphs. Additionally, the Barings Non-US Employees agreed in binding Confidentiality and Non-Interference Restrictions agreements to immediately inform Barings of any offers of employment or engagement received during their employment with Barings. Rather than complying with this duty, the Barings Non-US Employees waited to inform Barings of their long-planned departures months after not only receiving employment offers but actually making their decisions to leave. Throughout that time, the employees continued to access Barings' Confidential Information, meet with Barings' investors and borrowers, and collect tens of millions of dollars in salary, bonuses and incentive payments, causing Barings to incur substantial damages."

73. Thus, Mr Oudkerk argued, the Amended Complaint indicates that LLC claims for loss of the remuneration paid to the departing EMEA GPF employees. He also points out that, in Corinthia's memorandum of law in support of a stay on the grounds of forum non conveniens, dated 12 July 2024, one of the submissions was as follows:

> "**The Bulk of Barings' Alleged Damages Would Have Been Suffered in England.**
>
> Although Barings—the nominal plaintiff here—may be headquartered in Charlotte, the bulk of the damages allegedly suffered by Barings would presumably be suffered not by Barings but by BISL UK or other Barings affiliates in Europe where the majority of the employees recruited by Corinthia were located. Any loss of confidential information or clients would presumably be suffered by BISL UK or other English affiliates, not Barings. See *La Mack*…(granting stay where "much of the offending conduct alleged in [the] action … was directed against" a non-North Carolina company)."

74. In its written submissions in response LLC said:

> "Corinthia relies on *La Mack* to assert that a stay is appropriate where the conduct occurred outside of North Carolina and against a "non-North Carolina company." In that case, the plaintiffs alleged injuries suffered by a New York company that had a satellite office in North Carolina... Here,

> by contrast, Barings is headquartered in North Carolina and the Amended Complaint alleges that Barings—not Barings' U.K. affiliate—suffered the injuries. Indeed, while the Barings Non-US Employees were employed by subsidiaries in the local jurisdiction directly or indirectly wholly-owned by Barings… those former employees' agreements make clear that the Confidential Information and trade secrets belong to Barings. In the Confidentiality and Non-Interference Restrictions for those Barings Non-US Employees based in the U.K., "Confidential Information" is defined as "[a]ny trade secrets or other confidential information belonging or relating to Barings, its clients, officers, employees, suppliers of products or services." "Barings," in turn, is defined as "Barings LLC or any of its Affiliates."

75. Thus, argued Mr Oudkerk, LLC was expressly making clear that it, and not BISL, suffered the losses which resulted from the corporate raid. It was claiming those losses and they included damages for the payment of remuneration, including bonuses, to the departing EMEA GPF employees.

76. Mr Oudkerk also pointed out that, at [35] of his witness statement, Mr Bedford, a solicitor instructed on behalf of BISL, referring to [44] and [81] of the Amended Complaint, says that:

> "While the details necessarily differ (as the parties and contracts involved were not the same), the basic structure of the Paragraph 44/81 Counterfactual is the same as that advanced in the English Proceedings: if the individual defendant(s) had not kept the conspiracy hidden, in breach of their duties, then the departing employees would have left sooner (whether as a result of resignation or dismissal) and the bonuses would never have been paid."

77. This, Mr Oudkerk said, confirms his analysis. He went on to argue that the claim that the "injuries" alleged in the US proceedings were suffered by LLC and not BISL was bound to have influenced the North Carolina Court in finding that North Carolina was the appropriate forum for the dispute about the team move. BISL's current position in the English proceedings therefore amounts to "playing fast and loose with the court" and is an abuse of process.

Discussion

78. Mr Oudkerk's arguments do not score well against the three key factors in relation to this species of abuse of process identified by Ginsberg J in the *New Hampshire* case and approved by the Court of Appeal in *LA Micro* and *Malik*. First, leaving aside the point that BISL is a different party and assuming that this does not matter for the reasons given at [46(b)], above, I do not accept that BISL's position is *"clearly inconsistent"* with LLC's earlier and, indeed, current position in the US proceedings.

79. The context in which the pleadings in the US proceedings should be read is important. The Amended Complaint is not, and is not intended or required to be, a fully particularised statement of the losses claimed by LLC and the basis on which they are claimed. Nor would it have been read as such by the North

Carolina Court. Mr Bedford explains that, as matters stand, LLC's broad position in the US proceedings is that, as a result of Corinthia's interference, it has suffered multiple heads of loss in addition to loss of profits arising from the US Defendants' conduct, a position which will be refined and particularised as appropriate in due course. The Amended Complaint does not make, and is not required at this stage to make, a specific counterfactual case as to what would have happened, but for Corinthia's interference. After the taking of depositions in the US proceedings has been completed the next step will be for LLC to seek to adduce expert evidence as to the scope and quantum of damages. Mr Bedford also states that in North Carolina, as here, there is a rule against double recovery: LLC would not be able to claim sums which BISL recovered and vice versa.

80. Mr Bedford's evidence about the context for, and nature of, the Amended Complaint is borne out by the text of the document itself. [44] of that document, relied on by Mr Oudkerk (see [72(c)], above) merely forms part of an account of the factual background. It does not get him anywhere near where he needs to be if the Application is to succeed.

81. [81] of the Amended Complaint does at least form part of one of the pleaded causes of action. But, as Ms McCafferty points out, the use of the word "Barings" throughout the Amended Complaint is often inconsistent as to which entity is referred to and/or inconsistent with the strict legal position. For example, despite the initial definition of "Barings" and "the Company", and despite making clear in a footnote that "Barings Employees" includes the "Non-US Employees" including Mr Wheeler who were employed by BISL, there is reference to Mr Wheeler being employed by "Barings". [81] itself uses "Barings" to refer to the Barings Group rather than LLC when it deals with confidentiality, and to refer to BISL and other affiliates of LLC when it refers to the Non US Employees informing "Barings of their long planned departures" (i.e. informing their employing entities by resigning). "Barings investors and borrowers" also apparently refers to investors and borrowers of Barings Group companies. It is therefore difficult to sustain the submission that [81] of the Amended Complaint was clearly referring to LLC when it referred to "causing Barings to incur substantial damages". "Barings" was being used as a general reference to "the business" or "the firm".

82. Moreover, the Amended Complaint goes on to plead, at [82]-[90], that the US Defendants were aware of "the Barings Employees'" contractual agreements with "the Company" (i.e. LLC although in fact these agreements were entered into with various Barings companies, as the footnote to the Amended Complaint referred to at [72(b)] above points out), and that these agreements prohibited various actions of "the Barings Employees". Although clearly referring to all employees, including employees of BISL and other affiliates of LLC, and to customers of the Group as a whole, the following is pleaded:

> "89. Despite this knowledge, Defendants induced and attempted to induce Company employees to breach their employee agreements and to use and disclose Confidential Information and divert Company customers and goodwill to Corinthia.

> 90. As a result of the acts alleged herein, Plaintiff has been injured in an amount exceeding $25,000."

83. I therefore accept Ms McCafferty's submission that it would be inconsistent with the drafting approach of the pleader of the Amended Complaint to read all references to "Barings" or "the Company" as "clearly" referring to LLC and therefore "clearly" representing that this particular corporate entity paid remuneration to all "Barings Employees". Given that there were various causes of action alleged, and LLC plainly has not particularised its damages claims, it is also difficult to read the Amended Complaint as clearly or necessarily claiming the damages now claimed by BISL in the English proceedings.

84. Moreover, [35] of Mr Bedford's witness statement has been taken out of context by Mr Oudkerk. This paragraph was addressing an argument which was ultimately abandoned by Mr Oudkerk, namely that the counterfactuals in the US proceedings are inconsistent with the counterfactual in the English proceedings. Mr Bedford was making the point that they were not: "*the basic structure"* of one of the counterfactuals is the same, i.e. it is contended in both sets of proceedings that the bonus awards would not have been paid had the team move been known earlier. But that counterfactual does not mean that LLC was necessarily claiming in respect of the payments made by BISL to its employees; on the basis of the same counterfactual, LLC could perfectly well claim in due course only in respect of the payments which it made to its employees, and leave BISL to sue for its own losses in this regard. There is therefore an element of prematurity about Mr Oudkerk's complaint.

85. Turning to the exchanges between the parties in relation to Corinthia's motion to stay, these were perhaps the high point of Mr Oudkerk's argument. However, his reliance on the statement that "*the Amended Complaint alleges that Barings – not Barings UK affiliate – suffered the injuries"* begs the question whether the Amended Complaint claims the damages claimed by BISL in the present proceedings whereas, for the reasons I have given, I do not think that it clearly does. The position as to what claims for damages LLC is making and on what basis has not been crystallised or been particularised in the US proceedings. The passage from LLC's submissions relied on by Mr Oudkerk (see [74] above) is capable of being read as saying that in fact LLC is only claiming for injuries which it alleges it suffered i.e. <u>not</u> for losses suffered by affiliated companies. I also note that the passage goes on to focus on the point that the confidential information which the employees wrongfully used or disclosed belongs to LLC, rather than on any claim in respect of remuneration.

86. So, for all of these reasons, I see Mr Oudkerk's argument as to inconsistency but I do not accept that the inconsistency is "clear". But, <u>secondly</u>, nor do I accept that BISL or, on Mr Oudkerk's argument, LLC, has succeeded in persuading a court (the North Carolina Court) to accept BISL/LLC's earlier position, so that judicial acceptance of BISL's position in the English proceedings would create the perception that either court had been misled.

87. Mr Oudkerk was required to use a degree of ingenuity to assemble an argument that the North Carolina Court had relied on an understanding that LLC paid the relevant remuneration to the Non-US Employees and/or that LLC was claiming

damages in respect of these sums in coming to its decision on the motion. However, with respect to him, the result was unconvincing. It is clear from the reasons given by the North Carolina Court that this was not a material factor in the decision on the motion to stay. The Judge said that he was required to determine whether "it plainly appears that" North Carolina "is an inconvenient forum and that another is available which would better serve the ends of justice and the convenience of [the] parties". The law was that the following factors were potentially relevant, but it was not necessary to consider each factor:

> "(1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations."

88. The judge went on to base his decision on Barings' choice of forum which, he said, "deserves great deference" given that North Carolina was LLC's home forum and that the plaintiff's choice is ordinarily given great deference in these circumstances. He said that this factor weighed heavily against a stay. He also relied on his view that the applicable law would include North Carolina law, albeit the laws of other jurisdictions including England might be relevant. He made no reference to the question of where the losses were suffered, still less to any impression that LLC had paid remuneration to the Non US Employees and was claiming damages to reflect this.

89. Mr Oudkerk argued that when, in the course of his judgment, the Judge said that the convenience of the witnesses and the ease of access to evidence was a neutral consideration because there were witnesses based in the USA and the United Kingdom, he clearly did not contemplate that there would be a second set of proceedings in England. In my view the Judge may or may not have contemplated this possibility. It is not apparent on the face of his decision. But to move from the proposition that he did not, to the argument that therefore he understood that the damages now claimed by BISL would be claimed by LLC in the US proceedings, and that he then materially relied on this understanding in coming to his decision on forum, seems to me to involve at least two leaps too many. I therefore do not accept that there is any evidence that the North Carolina Court was misled into rejecting the motion for a stay in the way that Mr Oudkerk argues it was, or at all.

90. Thirdly, I do not accept that BISL would "derive an unfair advantage or impose an unfair detriment [on Mr Wheeler] if not estopped.". Even assuming that the detriment is said to be the fact that the US proceedings were not stayed he is not a defendant in those proceedings, he is a witness. Even if he were a party, there is also no question of double recovery as against Mr Wheeler or anyone else. Even assuming that the rejection of the motion for a stay is a relevant advantage/disadvantage for present purposes the greater potential unfairness, it seems to me, lies in the risk that Mr Wheeler may escape personal accountability or liability for his actions if BISL's claim for damages is struck out. As noted above, LLC did not in fact pay the remuneration of BISL employees. If there

were an attempt by LLC to claim these sums in the US proceedings, there is a real risk that the point would be taken that these sums were not lost by LLC and therefore cannot be recovered by this entity.

91. Having considered the individual factors identified by Ginsberg J in the *New Hampshire* case, it is necessary to stand back and make a broad, merits based, assessment of Mr Oudkerk's complaint. Having done so I do not consider that the approach of BISL amounts to "playing fast and loose with the court". What one has, on the one hand, is a somewhat broad brush pleading in the US proceedings which has not yet particularised the losses claimed by LLC on the basis of a range of causes of action against different defendants; and, on the other, a specific claim brought by BISL against Mr Wheeler. The damages claimed in the US proceedings do not clearly include those which are claimed in the English proceedings and so there is no clear inconsistency. Even if they are ultimately claimed by LLC, the rule against double recovery will apply. Assuming that they are not claimed in the US proceedings, Mr Wheeler will not have suffered an unfair detriment: he will simply be held personally accountable for his own part in the team move. Moreover, the alleged inconsistency has not been the basis for any decision adverse to Mr Wheeler or, indeed, anyone else given that the North Carolina Court did not rely on an understanding that LLC was claiming the damages now claimed in the English proceedings.

92. Even taking into account, also, Mr Oudkerk's complaint that there was no pre action protocol correspondence in this case, I do not consider that it is manifestly unfair to Mr Wheeler for the claim against him to be made and nor do I consider that it brings the administration of justice into disrepute amongst right-thinking people. I therefore do not accept that Ground 2 establishes an abuse of process. In any event, as I explain further below, a stay would be the proportionate course were Mr Oudkerk right and/or in the event that the same damages were in due course claimed in both sets of proceedings.

Ground 3: BISL did not incur the loss in any event

Mr Wheeler's case

93. Mr Oudkerk's contention under this heading was that BISL did not pay the salary and bonuses which are the subject of the Claim or, if it did, it recharged these costs given that it is a service company. It therefore did not suffer any loss.

94. Given that this was effectively an argument that the claim for damages/equitable compensation was bound to fail, and given that the point turns on evidence, it seems to me that this was effectively a "no real prospect of success" argument under Part 24. But I considered the point under the abuse of process limb of Rule 3.4(2) as well on the basis that Mr Oudkerk was contending that the fact that BISL did not suffer any loss is further evidence of the abusive nature of the Claim.

Discussion

95. It was and is, for present purposes at least, clear that BISL pays its employees and that it paid Mr Wheeler and the departing EMEA GPF employees the relevant sums. In any event, a witness statement from Mr Sutherland (Chief Finance Officer – Europe for Barings Group), dated 9 September 2025, explains that BISL supplies its employees to other companies in the Baring Group which generate revenue by managing investments, namely Barings Asset Management Limited ("BAM") and Barings (UK) Limited ("BUK"). BISL pays the salary and bonuses of its employees out of its own funds i.e. from its own bank accounts. This is true of the bonus payments on 22 February and 7 March 2024 which are the subject of the Claim.

96. BISL recharges 100% of its costs to BAM and BUK including salary, bonuses, occupancy costs and professional fees. It does not recharge any of these as a separate item. The costs as a whole are settled on a quarterly basis. The settlement of the recharges which included the costs of the February and March 2024 bonus payments took place in the second quarter of 2024.

97. In my view, the answer to Mr Oudkerk's "no loss" point is that BISL has a real prospect of success on an argument that its recharging arrangements with BAM and BUK provided it with collateral benefits which arose independently of the circumstances giving rise to the loss which it claims. The evidence is that these arrangements, for which BISL provides consideration, exist as part of the Barings business model and have no connection with the circumstances of the present case. It is not the case that BAM and BUK, knowing of the loss which BISL had suffered, reimbursed BISL in respect of those losses. Rather, the costs of the bonuses formed part of their overall quarterly settlement of BISL's costs as a whole, which they paid regardless of Mr Wheeler's actions. As Lord Sumption JSC said in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 at [11]:

> "11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (res inter alios acta), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose…In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work…" (emphasis added)

98. Even if I had accepted that Mr Wheeler's argument was bound to succeed on the basis that the only parties which suffered loss were BAM and BUK,

provided there was a cause of action available I would have been likely to give permission to join these companies as claimants rather than to strike out the Claim. Alternatively, if it is the case that only BISL is able to bring a claim for the loss of the remuneration in question because BAM and BUK did not have a contractual relationship with Mr Wheeler and/or he did not owe fiduciary duties to these companies, BISL has tenable arguments under the principle of transferred loss. As Lord Sumption said in the *Swynson* case:

> "14. The principle of transferred loss is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered. It applies where the known object of a transaction is to benefit a third party or a class of persons to which a third party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party."

99. He went on to say:

> "16. It is, however, important to remember that the principle of transferred loss..is an exception to a fundamental principle of the law of obligations and not an alternative to that principle. All of the modern case law on the subject emphasises that it is driven by legal necessity. It is therefore an essential feature of the principle that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a "legal black hole", in which in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss…That is why, as the House of Lords held in this last case, it is not available if the third party has a direct right of action for the same loss, on whatever basis."

100. Given that BISL's arguments on the issue of loss have real prospects of success, and for the reasons given above, I do not accept that Ground 3 establishes any abuse of process on the part of BISL.

Ground 4 – quantum claim misconceived?

Mr Wheeler's case

101. Mr Oudkerk spent less time on this Ground in his oral submissions, perhaps recognising that the appropriate course was for his arguments to be pleaded and then considered at trial. He argued that BISL's claim for damages is misconceived because:

- BISL was better off as a result of not having terminated the contracts of what were high performing employees who made profits for the Barings business, earlier than it did. BISL's counterfactual ignores the profit which was made as a result of the departing EMEA GPF employees continuing in its employment and, indeed, illustrates the artificiality of BISL's case since any profits made by the employees does not accrue to BISL and there will therefore be difficulties in bringing these profits into account when assessing quantum.

- Mr Wheeler merely advised as to the division of a bonus pool which had been allocated, and there is no pleaded case that his advice misled BISL or led to higher bonuses being paid than would have been the case on the merits of the relevant employees' performances in performance year 2023. Those employees had earned the sums which they were awarded by their performance in that performance year.

- BISL also saved money in that, when notice of resignation was given on 8 March, it purported to exercise its right to forfeit Mr Wheeler's awards under the LTIP – the July 2021 Barings (UK) Deferred Cash Plan - for 2023 and all earlier years. It is to be assumed that it did the same for all departing EMEA GPF employees. On BISL's counterfactual and on the true construction of the terms of the LTIP which are applicable to dismissals, as opposed to resignations, such employees would have been dismissed "without cause" and their unvested awards would have vested upon dismissal provided they signed a release of claims.

Discussion

102. In my view, BISL has a real prospect of defeating these arguments. They should be pleaded by Mr Wheeler and can then be considered at trial on the basis of the whole of the evidence. Very briefly:

- The question whether BISL, or Barings Group companies more generally, made more profit as a result of affirming the contracts of the departing EMEA GPF employees than they would have made if they had terminated their employment on or before 22 February 2024 will be a matter for evidence and argument at trial. The evidence which is before me for the purposes of the Application does not enable me to make a finding on this issue on a summary basis.

- As I have noted, Ms McCafferty argues that at trial the court should approach this issue on the basis that on BISL's counterfactual the employment of the departing employees would have been terminated on notice around 2 weeks earlier than it was i.e. on or about 21 February 2024. This argument has a real prospect of success and it means that the alleged additional profits would have been generated over a short period. There is also a real dispute as to any additional profits would have been made during this period given BISL's argument that a large part, if not all, of the profits of the GPF Group resulted from the payment of fees which would have been payable in any event.

- The interpretation and application of the terms of the LTIP to the facts as the court finds them, including the hypothetical question of what BISL would have done and why had it known more than it did before bonuses were paid, will also be a matter for consideration at trial in the light of all of the evidence. There seems to me to be a perfectly respectable argument that the definitions of "Cause", "Termination for Cause" and "Termination without Cause" under

the LTIP permit notice of dismissal of an employee "for Cause" for the purposes of the provisions governing the forfeiture of unvested awards pursuant to clause 6.3.

- As to the arguments about the bonus pool and the fact that Mr Wheeler was merely advising as to how it should be divided up, BISL's case is simply that the sums in question would not have been paid to the departing EMEA GPF employees and, as a result, it has suffered loss. Mr Oudkerk's arguments do not engage with that claim unless it is said that the bonus pool would still have been spent on whichever employees were left, but that is an argument which BISL would need to plead for consideration at trial.

103. For the reasons which I have given, I cannot see that Mr Oudkerk's arguments under Ground 4 show that BISL's claim for damages is an abuse of process. Nor do they add any material weight to his other abuse of process arguments under Grounds 1-3.

Ground 5: equitable claims

Overview

104. Very little time was spent by Mr Oudkerk on Ground 5. Again, this may be because he recognised that his arguments did not lead to the conclusion that any of BISL's claims for relief, which were pleaded as alternatives, could or should be disposed of summarily or were abusive.

Equitable compensation relief

105. Mr Oudkerk argued that it was abusive to bring a claim for equitable compensation in circumstances where the common law claim for the same sum is abusive. As I have found that the common law claim is not abusive, this argument fails.

The claim for an account of profits

106. Mr Oudkerk complained that no attempt has been made in the POC to identify any profits made by Mr Wheeler. Secondly, the required causal connection between any breach of fiduciary duty and any unauthorised profits – "sufficient connection" with the fiduciary relationship (see *Recovery Partners GP Ltd v Rukhadze* [2025] 2 WLR 529) - "is not satisfied".

107. There is nothing in these points, at least for the purposes of summary disposal. The purpose of an account of profits is that the defendant gives an account of the profits made as a result of the breach of fiduciary duty. If Mr Wheeler requires particulars, these can be requested by him. So it would not be proportionate to strike out the claim for this remedy on the basis that it was insufficiently particularised. The issue of "sufficient connection" is one for trial, to be determined on the basis of the whole of the evidence.

No constructive trust

108. Mr Oudkerk argued that there is no proper basis for asserting a constructive trust. He relied, inter alia, on *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 and submitted that a constructive trust typically arises in the most serious forms of equitable wrongdoing: against the knowing recipient of trust property, or where an individual has dishonestly assisted in a breach of trust. It has to be "unconscionable" for the owner of the property to assert his own beneficial interest and deny the beneficial interest of another. There is also a causal requirement and the court does not simply impose a constructive trust as an ex post facto form of relief: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714-716.

109. It seems to me that this is an issue which Mr Wheeler should raise in his pleaded Defence, if he wishes. The point can then be determined on the evidence, including the evidence as to what the arrangements were between him, Corinthia and the other organisers of the team move, and what benefits he derived from any breaches of fiduciary duty on his part. I do not accept that I can and should dispose of this claim summarily or that it is abusive.

No forfeiture of bonuses

110. Mr Oudkerk argued that BISL has no real prospect of establishing an entitlement, pursuant to [55] POC, to repayment of the bonus awards which he received for performance year 2023. Barings' Remuneration Policy expressly provided bonuses were paid for "individual performance in the applicable performance year, as well as their contribution to the profitability and profile of the firm". There is no allegation that Mr Wheeler or any other employee received a bonus which their performance did not warrant. Absent an express term of forfeiture, equity cannot override the parties' respective obligations at common law: see Leggatt LJ (as he then was) in *Al Neyahan v Kent* [2018] 1 CLC 216, [141].

111. Again, this is an issue for trial. BISL's pleaded case is that Mr Wheeler's bonus payments were, in part, remuneration for the discharge of his fiduciary duties as particularised at [22]-[23] POC. Whether that is correct is a question of fact for trial. BISL has a realistic prospect of showing that his conduct in advising the Claimant as to bonuses to be paid to his team in respect of the 2023 performance year was work done by him in relation to that same performance year.

Ground 6: "inchoate 'claw back' claim"

112. Mr Oudkerk complained that [57] POC does not disclose any cause of action. It follows that it should be struck out.

113. I reject this argument. [57] POC simply reserves the right to (apply to) amend. It does not add anything to the issues in the Claim at this stage but nor is any useful purpose served by striking it out.

In any event…

114. Even if I had considered that any of the Grounds relied on by Mr Wheeler satisfied the tests in Rules 3.4(2)(a) or (b) or 24.3(a) I would not have struck out the claims which he challenged or any of them. As I have said, some of his complaints were capable of being addressed by an appropriate order for further particulars or permission to take other procedural steps. Even if any of his grounds established an abuse of process or that there was an abuse of process when one considered their cumulative effect, striking out all or any of them would not have been a proportionate step or in accordance with the overriding objective given the relatively undeveloped state of the claim in the US proceedings and given the risk that this would have left BISL without the ability to claim against Mr Wheeler the sums which it claims in the English proceedings.

115. Rather, I would have stayed the English proceedings until the conclusion of the US proceedings with liberty to apply if or when it became clear whether the damages claims in both sets of proceedings did or did not overlap. BISL offered this on 1 July 2025 but it was refused by Mr Wheeler, allegedly on the basis that the existence of the English proceedings was impairing his professional life because he was obliged to disclose the existence of these proceedings to investors. On exploring this at the hearing it transpired that it was a somewhat disingenuous point. The reality is that the US proceedings, in which Corinthia is a defendant, will inevitably be known to investors in any event. Striking out the Claim against Mr Wheeler or parts of it would make no real difference to their willingness to invest.

Conclusion

116. I therefore dismiss the Application for the reasons given above.

117. As I have noted, BISL offered to agree to a stay of the Claim as a way of resolving the Application although, when this was rejected by Mr Wheeler, their position was that they were not positively advocating it. They were advocating the dismissal of the Application. For his part, Mr Wheeler suggested a stay as an alternative in the event that I was not prepared to strike out or dismiss the Claim.

118. My provisional view is that it is likely to be useful for Mr Wheeler to plead his case and for the Claim to proceed to the close of pleadings. This will enable the issues in relation to the claims against him to be identified and may ultimately assist settlement. However, I am willing to give the parties an opportunity to agree a position or, absent agreement, to make submissions as to whether there should be a stay and, if so, the terms of any stay.